ARKANSAS REPORTS

VOL. 56.

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

APRIL—NOVEMBER, 1892.

T. D. CRAWFORD, REPORTER.

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LITTLE ROCK, ARKANSAS.

JUDGES AND OFFICERS

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME.

STERLING R. COCKRILL, - - CHIEF JUSTICE.

BURRILL B. BATTLE,
WILSON E. HEMINGWAY,
SIMON P. HUGHES,
WILLIAM W. MANSFIELD, } ASSOCIATE JUSTICES.

WILLIAM E. ATKINSON, - - *Attorney General.*

W. P. CAMPBELL, - - - - - - - *Clerk.*

T. D. CRAWFORD, - - - - - - - *Reporter.*

CHANCELLOR FIRST CHANCERY DISTRICT,

DAVID W. CARROLL.

CHANCELLOR SECOND CHANCERY DISTRICT,

JAMES F. ROBINSON.

JUDGES OF THE CIRCUIT COURTS

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1st Circuit.....Grant Green, Jr
2d Circuit.....J. E. Reddick
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..... W. H. Martin
8th Circuit.....James H. McCollum
9th Circuit.....James 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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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS.

WALKER *v.* GEORGE TAYLOR COMMISSION CO.

Opinion delivered April 2, 1892.

Conflict of jurisdiction—No interference with receiver's possession. | 56 1 | 56 417 |

Where, on the failure of an assignee to qualify, the property assigned is placed in the hands of a receiver, his possession pending the suit cannot be interfered with under process from a court of concurrent jurisdiction.

Appeal from Clark Circuit Court.
RUFUS D. HEARN, Judge.

Atkinson, Tompkins & Greeson for appellant.
Murry & Kinsworthy for appellee.

HUGHES, J. On the 14th day of February, 1890, the appellant, Walker, a merchant, executed a general assignment for the benefit of his creditors, preferring A. A. Key and nine others, and appointing B. F. McGill assignee. On the same day the said A. A. Key filed a complaint in the circuit court in chancery, praying the appointment of a receiver to take charge of the effects conveyed by the assignment, alleging that the assignee, McGill, had refused to qualify. The court appointed J. C. Barnard receiver, who refused to qualify; and the court then appointed W. W. Hall receiver on the 17th of February, 1890, on which day Hall's bond was filed

and approved; and he qualified as such receiver, and took possession of the property.

On the 21st day of April, 1891, the appellee sued out an attachment, and had it levied upon the funds in the hands of the receiver. The justice of the peace sustained the attachment. Upon appeal to the circuit court, it declared the assignment void, and sustained the attachment.

The chancery court had jurisdiction to appoint a receiver, and when it had done so, and the receiver had taken possession of the property, his possession was the possession of the court, which could not be interfered with by any other court of concurrent jurisdiction, even pending the litigation. *Buck* v. *Colbath*, 3 Wallace, 334. The justice of the peace had no jurisdiction to determine the rights of the assignee under the assignment, and, on appeal from his judgment, the circuit court acquired no such jurisdiction. "It is well settled that after a receiver has been appointed, and has taken the rightful possession of the property, it is a contempt of court for a third person to attempt to deprive him of that possession by force or even by a suit or other proceeding, without the permission of the court by whom the receiver was appointed." *Angel* v. *Smith*, 9 Vesey, 335; *Thompson* v. *Scott*, 4 Dill. 508; *Parker* v. *Browning*, 8 Paige, Ch. 388; *Ford* v. *Judsonia Mercantile Co.*, 52 Ark. 426.

The personal judgment is affirmed. The judgment sustaining the attachment is reversed, and the cause remanded with directions to discharge the attachment as to the property in the hands of the receiver.

Opinion on rehearing filed May 16th, 1892.

HUGHES, J. A motion for rehearing or modification of the judgment of the court in this cause has been made.

After an assignment had been made by the appellant for the benefit of his creditors, and a receiver had been appointed, and had taken possession of the property included in the assignment, the appellee sued out an attachment against the appellant before a justice of the peace, and had it levied upon funds in the hands of the receiver. The justice of the peace declared the assignment void, and sustained the attachment; and, upon appeal to the circuit court, it did the same. We said in the opinion that the justice of the peace had no jurisdiction to determine the rights of the assignee under the assignment, and that upon appeal the circuit court acquired none. We reversed the judgment, and discharged the attachment as to the property in the hands of the receiver.

The effect of the judgment of the circuit court would have been that the officer charged with the execution of the process of the court could seize and sell property lawfully in the possession of the chancery court. This could not be the case, as it would produce an unseemly conflict of jurisdiction between the law court and the chancery court. The opinion does not mean that the attachment should be dismissed. The plaintiff in the attachment suit, it may be, will have the right to subject the property to the payment of his demand, if the assignment should be adjudged to be void. But the rights of the assignee under the assignment must be settled in the chancery court.

The motion is denied.

LEE v. STATE.

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Opinion delivered April 2, 1892.

1. *Criminal procedure—Steps taken in absence of defendant.*

If it is error to administer the statutory oath to the officer in charge of the jury, and to admonish the jury as to their duty, in the absence of defendant, it is not cause for reversal where such absence was voluntary, and the opportunity was afforded to defendant to rectify the mischief before the jury left the box.

2. *Right of prosecuting attorney to comment on defendant's testimony.*

Where defendant testifies in his own behalf, he is upon the same footing as any other witness; his failure to deny incriminating testimony relating to facts within his knowledge is a proper subject of comment by the prosecuting attorney.

3. *Court house destroyed by fire—Temporary site.*

Where a county court house is destroyed by fire, the county court may provide a temporary court house near the former site. *Hudspeth* v. *State*, 55 Ark. 323, followed.

Appeal from Faulkner Circuit Court.

ROBERT J. LEA, Judge.

Marshall & Coffman and *G. W. Bruce*, for appellant.

1. It was error to give instruction No. 4, and refuse No. 5. One murderously assaulted is not obliged to retreat, but may pursue his adversary and slay him, if it appears reasonably necessary to secure himself from danger. Hawk. P. C., ch. 10, sec. 24; 1 Bish. Cr. L., (7th ed.), secs. 850, 870; 17 S. W. Rep., 450; 1 East, P. C. 271; 1 Lawson's Cr. Def., p. 30 and note; *ib.*, p. 231; 32 Ia. 36; Stofer's case, 15 Oh. St.; 15 Ga. 117; 52 Ark. 47.

2. The jury were admonished, and the bailiff sworn and admonished, in the absence of defendant. These were material steps taken in his absence. Cooley, Const. Lim. (6th ed.), p. 388; 90 Mo. 37; 110 U. S. 574; 24 Ark. 620; *ib.* 629; 44 *id.* 331; 45 *id.* 165.

3. The attorney for the State commented upon the failure of the defendant to testify as to certain facts, and to deny the statements of certain witnesses. This was prejudicial error. 17 N. W. Rep. 192; 56 Ind. 182; 84 *id.* 562; 77 Va. 393; Thompson on Trials, sec. 1001; 123 Mass. 239; 74 Ia. 154; 110 Mass. 411; 18 Me. 490; 12 S. W. Rep. 737; 96 Ill. 261; 2 Pac. Rep. 609; 8 Tex. App. 416; 36 Cal. 522; 105 Ill. 452.

4. The court was held at a place other than the seat of justice. Art. 7, sec. 7, const.; Mansf. Dig., secs. 1089, 1094, 1154.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

1. The law of self-defense was fully covered by the court's charge.

2. Whether the swearing and admonishing the bailiff was a substantial step or not it is not necessary to decide; defendant was on bond and voluntarily absent; it was his duty to be present. Moreover, he was brought before the court and informed of what had transpired, and an opportunity was given him to protect his every right. The contention is frivolous. Mansf. Dig. sec. 2213; 52 Ark. 285; 50 *id.* 490; 45 *id.* 168.

3. The remarks of the State's attorney are not a ground of reversal. By taking the stand defendant waived the protection afforded him by the statute. 14 S. W. Rep. 128; 52 N. H. 459; 97 Mass. 546; 56 N. Y. 315; 59 Iowa, 472; 12 Pac. Rep. 406.

4. The contention that the court was held at a place not authorized by law is settled by 18 S. W. Rep. 183.

COCKRILL, C. J. The appellant was indicted for murder. He undertook to justify the homicide upon the ground of self defense. He was convicted of manslaughter, upon evidence which clearly justified the ver-

dict, and sentenced to seven years in the penitentiary. He seeks to reverse the judgment of conviction:

1. Because of the court's refusal to give in charge to the jury a request preferred by him upon the doctrine of self defense. But, upon reference to the court's charge, we find that subject sufficiently covered.

1. When steps taken in defendant's absence not prejudicial.

2. Because, it is said, a material step in the progress of the trial was taken in the prisoner's absence. The record shows that the defendant was not under arrest, but was on bond; that, at the close of the first day of the trial, the court announced that, the hour of adjournment having arrived, the taking of testimony would be suspended until the morrow; that, without the knowledge of the court, the defendant walked out of the court room, and was standing with a crowd of men on the sidewalk in front of the court house when the presiding judge administered the statutory oath to a deputy sheriff and placed the jury under his charge, after admonishing them; that the judge's attention was not called to the fact that the defendant was absent at the time these steps were taken, but that immediately thereafter he directed him to be brought into court, and stated to him that the bailiff had been sworn, and the jury, who were still in the box, had been admonished as to their duty in the case, and gave him full opportunity to assert any right he might have in the premises as if nothing had been done in his absence.

If it should be held that a probability of prejudice to a prisoner could be conceived because in his absence the court administered a statutory oath to a deputy sheriff, and admonished the jury as the law requires, it would not be reversible error where the absence is shown to have been through the wilful conduct of the prisoner, and he has had an opportunity to rectify the mischief and regain the lost advantage before the jury has left

the box. *Mabry* v. *State*, 50 Ark. 498–9; *Gore* v. *State*, 52 *id.* 285.

2. Defendant as witness.

3. The defendant testified in his own behalf, but confined his testimony to a single fact tending to sustain his theory of self defense. One of the attorneys for the prosecution, in his argument to the jury, commented upon the defendant's failure to deny the testimony of two witnesses for the State to the effect that he had made a statement the day of the homicide indicating a desire for an opportunity to kill the person for whose death he was upon trial. It is argued that this is prejudicial error for which the judgment should be reversed. Acts of 1885, p. 126.*

But the exemption from unfavorable comment upon the silence of a defendant in a criminal cause extends only to one who does not avail himself of the statutory privilege of testifying in his own behalf. If he takes the stand, he is on the same footing as any other witness. *McCoy* v. *State*, 46 Ark. 141. When he has exercised his option to become a witness, he is made competent for all purposes in the case; and, as was said by the Supreme Court of Maryland in a case like this, "his conduct on the witness stand, and his silence, when testifying, as to matters involved in the pending inquiry, which were certainly within his knowledge, were circumstances which the jury had a right to consider in deciding upon the credit due to the witness, in connection with the other facts proved in the case, and they were, therefore, circumstances upon which the State's attorney had a right to comment in addressing the jury." *Brashears* v. *State*, 58 Md. 568; *McFadden* v. *State*, 28 Tex. App. 241; *Heldt* v. *State*, 20 Neb. 492; *Stover* v.

*The act of March 24, 1885, sec. 1, (Acts 1885, p. 126), provides "that on the trial of all indictments," etc., "the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him."

People, 56 N. Y. 315; *State* v. *Tatman*, 59 Iowa, 471; *Com.* v. *Mullen*, 97 Mass. 546.

The attorney's reference to the defendant's failure to contradict the witnesses does not warrant a reversal.

3. Provision for temporary court house.

4. The last contention worthy of consideration is that the court was not held at the place authorized by law. The court house had been destroyed by fire, and the authorities whose duty it was to act in the premises provided a building just across the street from the former site as a temporary court house. The court was lawfully held therein. *Hudspeth* v. *State*, 55 Ark. 323.

Affirm.

SIMPSON *v.* STATE.

Opinion delivered April 2, 1892.

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1. *Escaped felon—Right of officer to arrest.*

A peace officer may lawfully arrest without warrant a convicted felon found outside the walls of the state penitentiary without a guard, although he left the prison with the warden's consent and intending to return.

2. *Unlawful killing not presumed murder in first degree.*

On a trial for murder it was proved that deceased's death was caused by a blow upon the back of the head inflicted by defendant, apparently with a round stick. The skull was not fractured, but a blood vessel was ruptured. Defendant testified that, in an effort to escape lawful arrest by deceased, a policeman, he struck at deceased with his pocket knife, and a small knife wound was found on one of deceased's arms. There was no eye witness to the killing. The blow which caused the death would not ordinarily produce that result. *Held*, that while the law presumes that an unlawful killing is malicious, it does not presume that it is premeditated; that the evidence did not sustain a verdict of murder in the first degree.

3. *Sentence of murder in first degree—Modification on appeal.*

Where, on appeal from a conviction of murder in the first degree, the evidence is insufficient to establish the premeditated inten-

tion to take life, which is an essential ingredient in the crime of murder in the first degree, but does establish the crime of murder in the second degree, and where no other error appears, the sentence of murder in the first degree will, with the approval of the Attorney General, be set aside, and the cause be remanded to the circuit court with directions to sentence the prisoner for murder in the second degree.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

This is an appeal from a judgment of death pronounced against the appellant by the Pulaski circuit court at its October term, 1891. He was charged with the murder of W. L. Copeland, a policeman of the city of Little Rock, who was in the act of arresting him when he was killed. Appellant was at the time a convict in the state penitentiary, but was allowed to go outside of the prison walls at certain times as a special privilege in recognition of his good behavior. The witnesses in the case testified substantially as follows:

Dr. Scott testified: "I am a practising physician. I was called to see Copeland on the night of the killing, about 8 o'clock. He was unconscious, and never gained consciousness while I was attending him. There was a wound in the temple (I think the left temple), but it did not penetrate the skull; also a blow on the head, which I think caused a rupture of a blood vessel. I think the blow on the head caused Copeland's death. It might have been made with a round stick or chair round. There was also a cut on the arm."

Mrs. Copeland testified: "On the evening of the killing my husband left home about 7 o'clock to go on night watch. Soon after he left I heard a pistol shot, but paid no attention to it, because before he left home he said he intended to kill a dog. When he was brought home he was cut on the arm and had a wound in the temple and back of the head. He died the same night about 12 o'clock."

A. L. Donnelly testified: "I remember the night Copeland was killed. I had lit the lights in my saloon. I saw a man standing with a bundle under his arm; I noticed his hair was full of dirt and matted, and he was bloody; saw it was Copeland. I washed him off; he tried to speak, but could not. I tried to get him to go with me, but he would not. I finally got some of the boys to take him by the arm, and I went ahead and he followed me. While we were on our way to the drug store, he went along very well, until he looked around and saw a man hold of him. He pulled back and tried to strike this man; he did not want this man to touch him at all. We finally got him to the drug store, and we went to where the difficulty occurred. We found a pistol with one chamber empty, at the corner of Fifth street and Rector avenue, or near there. I saw where Copeland fell in the street. There was a pool of blood in the street. There was evidence of a scuffle from where we first saw blood to where Copeland fell. Copeland was a much larger man than the defendant. The killing occurred in Pulaski county, December 30, 1885. The man that Copeland objected to taking hold of him was a dark brown-skinned man, and resembled defendant very closely. We found the pistol near the steps, some little distance from where Copeland fell. The bruises on the head seemed to have been made with a blunt instrument. A chair round or a policeman's club would have made the same kind of wound."

E. H. Sanders testified: "I am chief of police of the city of Little Rock. The defendant was turned over to me by the sheriff of Ouachita county. He sent for me and made the following voluntary statement:

"'I and one John McMillen were out with a pass permitting us to be out until 10 o'clock. We were going out Fifth street toward Rector avenue, when we were hailed by deceased, who was on the opposite side of

Rector avenue. We stopped, and while deceased was looking at my pass John McMillen struck him; deceased fired one shot, and we both ran. John McMillen was as much implicated as I was.'"

Sam Speight testified: "I am city detective of Little Rock, and was acting in that capacity when deceased was killed. Defendant stated to me that McMillen knocked deceased down while he was looking at the pass."

Frank Botsford testified: "I was chief of police of Little Rock at the time the deceased was killed. He was assigned at the time, and had orders, to arrest all convicts at large, whether they had a pass or not. I do not know of any understanding with the penitentiary authorities that convicts having a pass would be exempt from arrest. The police force had orders to arrest convicts at large. The next day a piece of paper was handed to me, said to have been found near the place of difficulty. It had small spots of blood on it, and was a pass for Louis Simpson to be outside the walls until 10 o'clock. The pass is here produced and identified, and is as follows: 'Louis Simpson has permission to be out of the walls till 10 o'clock to-night. G. A. Leiper, Warden. Dec. 30, 1885.'" On cross-examination by the defendant, witness stated that there was at the time of the killing a city ordinance "prohibiting convicts from roaming at large in the city without a good and sufficient guard, and making it a misdemeanor."

Dave Adams testified: "I was city detective at the time policeman Copeland was killed. I went down to Fifth street and Rector avenue the next morning; saw evidence of quite a scuffle, a large pool of blood in the street, and some blood near the sidewalk."

Geo. A. Leiper testified: "I was warden of the penitentiary when Copeland was killed. Simpson was a convict at that time; was what is known as a 'trusty,'

and was allowed to go out of the walls as a privilege for good conduct. He always conducted himself well, and gave us no trouble. He had a pass the night of the killing, and did not return to the penitentiary."

Defendant testified: "My name is Louis Simpson. My former home was at Camden, Ouachita county. I was sent from there to the penitentiary. On the night of the difficulty between the policeman and myself, I was outside the walls by permission of Mr. Leiper, the warden at the time. He gave me a pass to be out until 10 o'clock, and told me not to get into trouble and let the officers grab me up. I left the walls about 7 o'clock, taking with me some clothing I intended to have washed. I was going east on Fifth street when deceased hailed me and told me to throw up my hands, which I did. I had on my stripes. He came up to me and told me he would have to arrest me because I was a convict. I presented the pass given me by Mr. Leiper, and he remarked, 'This ain't worth a damn,' and took hold of me. I resisted; we had a scuffle. I broke loose from him and started to run, when he fired and I fell. I lay still; he came up to me and walked around and up to me, and as he leaned over me and started to put on the nippers, I struck him with a knife. I jumped up and he fired again, and I ran down another street and went out to St. John's College. I then went to the southeast corner of the prison walls, and intended to go in, but I did not know how bad I had injured Copeland, and I made up my mind to leave, which I did. I was acquainted with Copeland. I had never had any trouble with him or with any of the officers. I had been in the habit of passing and re-passing, just as I did that night. I don't recollect of ever speaking to the deceased in my life. I knew that, if I failed to get back to the pen on time, I would be flogged and put back in the ranks, and I tried to get loose from deceased.

"There was no one with me. I did not strike him with anything. Deceased fired two shots when I ran from him. He fired and I fell, when he fired again and came toward me and walked around me, and as he came up near me and leaned over me, and I was lying on my side, I struck at him with my knife. Don't know when I opened the knife; don't think I had it open when I ran from the deceased. I was so scared that I hardly knew what I was doing. I was trying to get away. I had my pass, and I thought I had a right to be out. I had never been molested before. I didn't strike at Copeland but once. Don't know when I got out my knife; don't know whether I hit him; didn't hit him with a stick—not anything but my knife. No one was with me. McMillen was not with me that evening. I have told everything just as it occurred, to the best of my recollection. I made up my mind that it was no use to put anything on innocent people. When I escaped, I went around from one place to another. A man gave me a change of clothes, and I finally got to New Orleans, when I was arrested and brought back by the sheriff a few months ago."

T. P. Johnson for appellant.

1. The arrest was illegal. The deceased had no reason to believe that defendant had committed a felony, nor was any offense committed in his presence. 55 Am. Dec. 97. Deceased knew him to be a "trusty" out on pass. 53 Ark. 518.

2. It was error to admit parol testimony to prove a city ordinance. 35 Ark. 75; 1 Gr. Ev. p. 372; Wharton, Cr. Law, vol. 2, 659–661; 1 Phill. Ev. p. 19–20.

3. Defendant's confession must be taken as a whole. 12 Ark. 70; 14 *id.* 442.

4. The evidence does not make out a case of murder in the first degree. 15 Oh. St. 47; 1 Cr. Def. 220; Bish. Cr. Law (2nd ed.), sec. 656.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

1. Right of officer to arrest escaped felon.

COCKRILL, C. J. The appellant had been legally sentenced to the penitentiary for a felony, and before his term had expired the warden of the penitentiary permitted him to leave the prison without a guard and go into the city of Little Rock, where he was recognized as a convict by a policeman named Copeland, who attempted to arrest him for the purpose of returning him to the prison authorities. The officer had no warrant for the convict's arrest, the latter resisted, and in the rencounter the officer was killed.

The appellant was indicted for murder in the first degree, and was convicted of that grade of offense. He complains of the following part of the court's charge to the jury, viz: "The court instructs the jury that if they find that defendant was a convict at the time of the killing of Copeland, and was out of the walls of the penitentiary without a guard, and going at liberty within the corporate limits of the city of Little Rock, and that Copeland was a police officer of said city, that Copeland had the right and it was his duty to arrest the defendant."

He also complains because the court refused to charge the jury that if they found that he was at liberty by the consent of the prison warden, the officer had no authority to arrest him without a warrant, and that if he killed the officer in resisting arrest under such circumstances, his offense would be no more than manslaughter. The only question of law arising upon the charge is thus presented.

A difference of opinion has been expressed upon the question whether an officer can re-arrest one whom he has held by virtue of a warrant of arrest and voluntarily liberated.

It may be that the divergence occurs only where the charge is a misdemeanor ; but, however that may be, we find no principle sustaining the position that an officer may not, without a warrant, legally arrest an escaped felon to restore him to prison, that the sentence of the law may be executed, whether the felon has escaped with or without the consent of his jailer. He may arrest without warrant one whom he has reason to believe has committed a felony, in order that he may be convicted if guilty ; and it would be anamolous if the authority is not equally as broad to bring a convicted felon to punishment.

A voluntary release of a convict from imprisonment by a warden or other person having legal custody of him is illegal, and the convict is an escaped felon so long as he is at liberty. The warden's guilty consent to his escape cannot abrogate the judgment of conviction and legalize his liberty for an hour or any other length of time. *Griffin* v. *State*, 37 Ark. 437 ; *Martin* v. *State*, 32 *id.* 124. To hold that it could would be to recognize in him a limited power of pardon which the law has vested in the Governor exclusively.

The controlling question is not whether the convict is guilty of a felony (which of itself might subject him to re-arrest) in leaving the prison with the warden's consent, intending to return ; but it is whether he is legally at liberty. If he is not, any peace officer may arrest him, without a warrant, to restore him to the imprisonment to which the court has sentenced him. 1 Bish. Cr. Pr. sec. 163 and n. 2 ; *id.* secs. 1382–3 ; Crocker on Sheriffs, secs. 74 and 597 ; *Schwamble* v. *Sheriff*, 22 Pa. St. 18 ; *Clark* v. *Cleveland*, 6 Hill, 344 ; *Gano* v. *Hall*, 42 N. Y. 67 ; *Haggerty* v. *People*, 53 *id.* 476 ; *State* v. *Holmes*, 48 N. H. 377 ; *Com.* v. *Carey*, 12 Cush. 246.

The complaint against the charge of the court is without foundation.

The other assignments of error made by the appellant are not sustained by the record, and need not therefore be noticed. The motion for a new trial, however, challenges the evidence as insufficient to sustain a sentence of murder in the first degree, and that question has given us much concern.

2. No presumption that killing was premeditated.

As death ensued in an unlawful attempt to escape or to resist lawful arrest, and there was no evidence of mitigating circumstances, the jury could not consistently have reached any conclusion other than that the killing was murder. But there are two grades of murder, and a premeditated intention or a specific intent to take life is an indispensable ingredient of murder in the first degree. *Bivens* v. *State*, 11 Ark. 455. "An unlawful killing may be presumed murder, but it will not be presumed murder in the first degree. The burden of proving it so lies on the Commonwealth." *Johnson* v. *Commonwealth*, 24 Pa. St. 386. As was said by Judge Agnew in administering the Pennsylvania law, which is similar to ours: "If, from all the facts attending the killing, the jury can fully, reasonably and satisfactorily infer the existence of the intention to kill, and the malice of heart with which it was done, they will be warranted in so doing. He who uses upon the body of another, at some vital part, with a manifest intention to use it upon him, a deadly weapon, as an axe, a gun, a knife or pistol, must, in the absence of qualifying facts, be presumed to know that his blow is likely to kill; and, knowing this, must be presumed to intend the death which is the probable and ordinary consequence of such an act." *Commonwealth* v. *Drum*, 58 Pa. St. 9.

But, in the absence of other proof, one is presumed to intend only the probable or ordinary consequence of his act; and if death is the consequence of an act that would not probably or reasonably produce that result, malice, it may be, is presumed from the fact of killing,

but there is no presumption of a deliberate purpose to kill. The presumption can be raised only as a legitimate inference from facts or circumstances in proof. Presumptions of fact must rest upon fact, and not upon surmises or guesses at what is not proved. In this case there was no eye witness to the homicide. The defendant testified in his own behalf, and admitted that he had resisted the officer and made his escape, but denied striking the fatal blow or any blow with a stick or like weapon. The jury were warranted, however, in finding that he struck the fatal blow.

But what was the evidence that the killing was premeditated? A brief outline of the case has been given already. The statement of the details will be left to the reporter.

The character of the wounds, the conduct of the prisoner in using the knife, his contradictory statements, his motive for resisting the officer and his subsequent flight constitute the leading features of the evidence against him. There is nothing in either the third, fourth or fifth heads which can of itself be said to prove the specific intent. They can only be used to throw light upon other facts in proof and aid in extracting the truth from them. If no inference of a specific intent can be drawn from the other facts, the prisoner's motive and the fact of flight will not warrant the inference; and his contradictory statements only tend to prove that he struck the fatal blow. What evidence did the wounds themselves disclose?

A blow upon the back of the head caused the death. It was inflicted apparently with a round stick. The skull was not fractured, but a blood vessel was ruptured, and that caused death. We know nothing else in reference to the blow. It is not even shown that it broke the skin. A light blow at the base of the brain may, without a break of the skin, rupture a blood vessel, which in

due course of time may produce paralysis of speech, and afterwards stupor, and finally death—just the effects the proof shows upon the deceased in this case. But death is not the probable or ordinary consequence of striking a light blow, and proof of inflicting it does not therefore raise a presumption of the deliberate purpose to kill unless it is made to appear that it was probably given with that intent. But there is no proof in the case that it was, outside of the fact of death which, as we have seen, is not in itself sufficient. A blow similar to the one already described was inflicted upon the temple of the deceased, but it was not delivered with force enough to fracture the skull, and the evidence shows that it did not conduce to the death. There is nothing from which we can draw the inference that it was not as severe as the blow on the back of the head. It furnishes as much, but no greater, evidence of the intent to kill than the other wound.

The defendant testified that he struck at the deceased with his pocket knife in his effort to escape, and a knife wound was found on one of the deceased's arms. That is the circumstance in the case which has given me trouble. The stealthy and deliberate use of a knife, which the prisoner detailed when on the stand, may have afforded the jury the right to infer that he entertained the specific intent to kill, and, having the existence of the specific intent established in the rencounter in which life was taken, why should it not be presumed to continue to the striking of the fatal blow? But the knife used was a pocket knife, the size of which was not proved; the wound inflicted with it was not shown to be of a severe or vicious character; it is not known that its use preceded the striking of the fatal blow; and the blow which caused the death would not ordinarily produce that result. For these reasons and from a general view of the testimony, my brother judges express the abiding

conviction that the prisoner's design was escape from arrest only and not the taking of life, and that sentence for the first degree of murder cannot be sustained upon the proof which the record affords. What, then, should be the judgment in the cause?

3. Sentence of murder in first degree modified on appeal.

The only error committed is in the excess of the punishment. In other States where statutes authorize the appellate courts to modify the judgments of the circuit courts in criminal cases, the remedy in cases like this is found, not in a new trial, but by reducing the punishment to make it appropriate to murder in the second degree. The courts find no constitutional obstacle to such a practice. *State* v. *Fields*, 70 Iowa, 196; *State* v. *McCormick*, 27 *id.* 402; *Hogan* v. *State*, 30 Wis. 438–9; *Johnson* v. *Com.* 24 Pa. St. 386.

In this case the jury have found the prisoner guilty of murder; but having found a degree of murder which the proof does not warrant, the verdict stands for the offense of murder, and fails as to the degree. It is then as though the jury had found him guilty of murder but failed to assess the punishment. The two degrees of murder are not distinct offenses—they are only statutory regulations of the punishment of the one offense of murder, to be inflicted according to the mental state in which the crime is committed. *Thompson* v. *State*, 26 Ark. 323; 2 Bish. Cr. Pr. sec. 565.

It is true the statute requires the jury to find the degree of murder; but that is done for the purpose of having them take into consideration the distinguishing features of the two degrees, in order that the prisoner may not be sentenced to capital punishment without a special finding for the first degree. If their verdict does not show the intention to find the first degree, no sentence for that degree can follow. And if the verdict is "guilty as charged," no sentence for murder can be pronounced, because, other grades of homicide being charged

in the indictment, it is not known that a verdict of murder was intended. *Thompson* v. *State*, 26 Ark. *sup.*; *Curtis* v. *State*, *ib.* 439; *Trammell* v. *State*, *ib.* 534.

But all murder which is not of the first degree is of the second; and when there is a verdict for murder and no punishment is assessed by the jury, the prisoner is not prejudiced if the verdict is referred to the lower degree of the offense. It is the established practice under our statute that a new trial shall not be awarded for an error not prejudicial to the prisoner. *Hayden* v. *State*, 55 Ark. 342; *Cline* v. *State*, 51 Ark. 145.

The appellant may therefore be sentenced for murder in the second degree. The case of *Brown* v. *State*, 34 Ark. 232, is authority, if further authority were needed, for such a modification of the punishment. In that case the verdict was for manslaughter, without indicating whether it was for voluntary or involuntary manslaughter. The term of imprisonment fixed by the verdict was greater than the highest punishment authorized for involuntary manslaughter. The court modified the judgment of conviction by reducing the punishment to the highest term authorized for involuntary manslaughter.

The Attorney General, on behalf of the State, prefers a conviction for murder in the second degree to a reversal for a new trial.

The sentence for the first degree of murder will be set aside, and the cause remanded to the circuit court with directions to sentence the prisoner for murder in the second degree.

It is so ordered.

BATTLE, J., dissenting. I do not concur in the judgment of this court; but think that a new trial should be awarded to the appellant.

The appellant was indicted for murder in the first degree, and the jury found him guilty of that degree of

homicide. This court finds that the verdict was not sustained by the evidence, but that he was guilty of murder in the second degree, and that it can remand the cause to the lower court with instructions to enter judgment accordingly. I do not think that it has the right to render, or to authorize the circuit court to enter, such a judgment.

At common law a court of error had no power, when it reversed a judgment against a prisoner in a case of treason or felony, to remand the record to the court below for the proper judgment, or itself to pronounce such judgment as the law authorized; and all it could do was to discharge the defendant. *Stewart* v. *State*, 13 Ark. 745; *McDonald* v. *State*, 45 Md. 91; *Rex* v. *Ellis*, 5 Barn. & Cress. 395; *Rex* v. *Bourne*, 7 Ad. & Ellis, 58; *Silversides* v. *Queen*, 2 G. & D. 617; *Holt* v. *Queen*, 2 D. & L. 774; *Christian* v. *Com.* 5 Met. 530; *Howell* v. *State*, 1 Oregon, 241; *Ratzky* v. *People*, 29 N. Y. 124; *Elliott* v. *People*, 13 Mich. 365; *Wilson* v. *People*, 24 Mich. 410. And thus the law stood in this State until the enactment of the Revised Statutes of 1838. *Stewart* v. *State*, 13 Ark. 745–8. Among the provisions regulating the proceedings on appeals and writs of error in criminal cases are sections 224 and 225 of chapter 45 of those statutes, which are as follows: "If the Supreme Court shall affirm the judgment of the circuit court, the sentence pronounced by such court shall be directed to be carried into execution, and the same shall be executed accordingly. If the judgment of the circuit court be reversed, the Supreme Court shall direct a new trial, or that the defendant be absolutely discharged, according to the circumstances of the case."

After a long and diligent search, I have failed to find any statute inconsistent with or repealing either of these two sections. Section one of the Code of Practice in Criminal Cases provides: "That the provisions of

this Code shall regulate proceedings in all prosecutions, and penal actions in all the courts of this State, and be known as the Code of Practice in Criminal Cases." But its repealing section only repeals all laws inconsistent with its provisions (sec. 412). In this respect it is unlike the Code of Practice in Civil Cases. The repealing section of the latter provides: "All statutes and laws heretofore in full force in this State *in any case provided for by this code*, or inconsistent with its provisions, are hereby repealed and abrogated" (sec. 857). I have not been able to find any provision in the criminal code inconsistent with sections 224 and 225; nor is there anything in the code which expressly directs what the Supreme Court shall do when a judgment against a prisoner is reversed. There are sections which impliedly say that a new trial may be granted, but further than this there is nothing. There is certainly no provision in it giving additional power to the Supreme Court in that respect.

Section 1313 of Mansfield's Digest, which is section 1103 of Gantt's Digest, provides: "The Supreme Court may reverse, affirm or modify the judgment or order appealed from in whole or in part, and as to any or all of the parties." That section is a part of section 16 of the civil code of practice as amended in 1871, which, in part, is as follows: "The Supreme Court may reverse, affirm or modify the judgment or order appealed from, in whole or in part, and as to any or all of the parties; and its judgment shall be remitted to the court below, to be enforced according to law. * * * The provisions of this section shall extend to all appeals from decrees and decisions in chancery cases, in all respects, the same as from judgments and decisions in suits at law." Acts of 1871, p. 226. It is obvious that the judgments and orders referred to in this section are judgments and orders in chancery cases and suits at law. As a crimi-

nal prosecution is neither a chancery case nor a suit at law, it can have no application to appeals in criminal cases, and does not repeal sections 224 and 225 of the Revised Statutes of 1838.

Can it be truly said that this court can do what the circuit court was authorized to do when the verdict of the jury was returned in this case and the appellant filed his motion for a new trial, and that the circuit court had a right to render a judgment of confinement in the penitentiary for murder in the second degree upon a verdict for murder in the first degree, by authority of sections 2308–11 of Mansfield's Digest, and that therefore this court can do so? If this be true, it must derive its authority, through the circuit court, from the same source. How this can be is difficult to conceive; for sections 2308–2311 of Mansfield's digest are sections 176–179 of chapter 45 of the Revised Statutes, and are a part of the same chapter of which sections 224 and 225 cited above form a part. It is clear that if this chapter conferred on the circuit court the power to render the judgment of confinement, it withheld such authority from the Supreme Court.

But these sections of Mansfield's Digest do not confer such power on circuit courts in cases like this. Section 2283 of Mansfield's Digest limits the right of the jury to assess the punishment, when they find a verdict of conviction, to cases wherein there is an alternative or discretion in regard to the kind or extent of the punishment to be inflicted. In no case where the kind and extent are fixed by law are they authorized to assess the punishment. In cases wherein they have the right to declare the punishment, it is the duty of the court to render judgment according to the verdict, except as provided in sections 2308–11 of Mansfield's Digest. The first of these sections provides: "When a jury find a verdict of guilty and fail to agree on the punishment to be in-

flicted, or do not declare such punishment in their verdict, or if they assess a punishment not authorized by law, and in all cases of judgment on confession, the court shall assess and declare the punishment and render judgment accordingly." Obviously this section has no reference to cases in which the jury have no right to declare the punishment, as in this case. The other sections (2309–11) only apply to cases in which the jury assess a punishment greater than the highest or below the lowest limit prescribed by law for the offense of which the defendant is convicted by the verdict of the jury, or, if in the opinion of the court the conviction is proper, the extent or duration of the punishment assessed by the jury is excessive. In all these cases the power of the circuit court to reduce or increase the punishment is confined to the limits prescribed by law for the punishment of the offense of which the jury has found the defendant guilty. So it is clear that the circuit court had no authority by virtue of these sections to say that the punishment of a defendant found guilty by a jury of murder in the first degree shall be any other or less than death, the only penalty prescribed by law for that offense.

According to the statutes of this State, the circuit court has no power to find the degree of crime of which a defendant convicted for murder is guilty. If the accused in such cases confess his guilt, the statutes provide that the court shall impanel a jury and examine testimony, and the degree of crime shall be found by such jury (Mansfield's Digest, sec. 2284). So it is manifest that the statute intends that no one accused of murder shall be punished except for the degree of crime of which he shall be found guilty by a jury, unless it be in cases in which the degree is specified in the confession. How does he lose that right, or the verdict of a jury become less potent, by an appeal to this court?

Section 2284 of Mansfield's Digest provides: "The jury shall, in all cases of murder, on conviction of the accused, find by their verdict whether he be guilty of murder in the first or second degree; but if the accused confess his guilt, the court shall impanel a jury and examine the testimony, and the *degree of crime* shall be found by such jury." In *Thompson* v. *State*, 26 Ark. 323; *Allen* v. *State*, *ib.* 333; *Trammell* v. *State*, *ib.* 534, and *Neville* v. *State*, *ib.* 614, the defendants were indicted for murder, and found by a jury guilty as charged in the indictment. This court, following the statute, held that the verdicts were so fatally defective that no judgment could be entered upon them, because the degree of murder of which they found the defendants guilty was not stated in the verdicts; and remanded the causes for a new trial. If the judgment of this court in this case be correct, the court in the cases cited could have reversed the judgment, and remanded the records to the court below with instructions to impose on the defendants the penalty of murder in the second degree, because the juries, if they found the defendants guilty of either degree of murder, necessarily found them guilty of murder in the second degree. But this court did not think so, but properly remanded the causes for a new trial.

In the cases of *McPherson* v. *State*, 29 Ark. 225, *Winkler* v. *State*, 32 Ark. 552, *Brown* v. *State*, 34 Ark. 232, and *Fagg* v. *State*, 50 Ark. 506, verdicts of manslaughter were returned without the degree of the offense, of which the defendants were found guilty, being specified. In the first two cases the verdict fixed the punishment above the maximum for involuntary manslaughter and within the limits prescribed for voluntary manslaughter; and this court held that the penalty fixed clearly indicated the purpose to convict of voluntary manslaughter, and approved and sustained a sentence for voluntary manslaughter, following the statute which

says that "where the punishment is the same in kind, the amount that may be inflicted fixes the degree." Mansfield's Digest, sec. 2289.

In Brown's case, which is cited in the opinion of the court to sustain its judgment, the circuit court instructed the jury that if they found the defendant guilty of manslaughter, they should "assess his punishment in the penitentiary for a period of not less than two nor more than seven years," the penalty prescribed for voluntary manslaughter. It did not appear in the bill of exceptions in the case that the court informed the jury what punishment the statute prescribed for involuntary manslaughter. The jury returned a verdict for manslaughter, but did not indicate the degree, otherwise than by fixing the imprisonment for a longer period than is allowed by the statute for involuntary manslaughter. After reviewing the McPherson and Winkler cases, the court said: "Possibly, however, the jury may not have known, or been informed, that they might find the prisoner guilty of manslaughter, and fix his punishment at imprisonment in the penitentiary for one year or less, and whilst we are not willing to reverse the judgment and remand the case for a new trial, we will give him the benefit of a doubt, and modify the judgment of the court below so as to reduce his imprisonment to one year from the date of his conviction, under section 1103 of Gantt's Digest." The court was unwilling to reverse the judgment and remand the case for a new trial, but gave the defendant the benefit of a doubt. What doubt? Evidently a doubt as to whether the jury found the defendant guilty of voluntary or involuntary manslaughter. They gave him the benefit of the doubt, and fixed his punishment at one year in the penitentiary, the highest penalty for involuntary manslaughter, basing its judgment on the verdict as it found it to be by giving the defendant the benefit of a doubt.

In Fagg's case the jury found the defendant guilty of manslaughter, but did not designate the degree or assess the punishment. But the circuit court fixed the punishment at three years and six months imprisonment in the penitentiary, and rendered judgment accordingly. This court found that the jury intended a conviction of voluntary manslaughter, and affirmed the judgment.

In all these cases, in which the defendants were found guilty of manslaughter and the degree was not specified in the verdict, this court ascertained what the verdict of the jury was intended to be, and, when they refused to reverse and remand for a new trial, rendered judgment accordingly; and in the cases in which the verdicts were for murder, without specifying the degree, reversed and remanded for reasons already stated. But in this case this court has set aside the verdict of the jury and reversed the judgment of the circuit court; and, in effect, has tried the case *de novo* and found the defendant guilty of murder in the second degree, and remanded the cause to the court below to register its verdict and render judgment accordingly. Can it be said that such a judgment is based upon the verdict of the jury? The verdict was that the defendant was guilty of murder in the first degree. When it was set aside, there was no verdict, and the findings of fact by this court were substituted for it. When it was set aside, the inquiry necessarily was, not what had the jury found, but of what degree of unlawful homicide was the defendant guilty, if any; and we found that it was murder in the second degree; and that is said to have been included in the verdict, and so was an assault and battery, but the verdict was not for that offense.

My conclusion is that sections 224 and 225 of chapter 45 of the Revised Statutes of 1838 are still in force; and that the judgment of the circuit court should be reversed, and the cause remanded for a new trial.

NOTE.—In *State* v. *Freidrich*, 4 Wash. 204, decided April 30, 1892, on a trial for murder where the prosecution merely proved that defendant did the shooting and fled with the design of escaping, but failed to show any motive, plan or deliberation, and defendant showed that he and deceased were fast friends, and on the best of terms during the day of shooting, it was held that the Supreme Court was justified in modifying a judgment of death for murder in the first degree and ordering an entry of judgment for murder in the second degree, under Code Proc., sec. 1429, authorizing that court to affirm, reverse or modify any judgment appealed from, and to direct the proper judgment to be entered. See, however, In re *Freidrich*, 51 Fed. Rep. 747. (Rep).

LITTLE ROCK *v.* CITIZENS' STREET RAILWAY CO.

Opinion delivered April 2, 1892.

Street railway—Duty to conform track to grade of street.

A city ordinance authorized the construction of a street railroad, but provided that the tracks of the railroad "shall be laid in accordance with the grades of the streets as now or as hereafter may be established," that whenever a change of grade is made, the railroad company, after due notice, "shall, at their own expense, conform and adjust the tracks of the railroad to such changed grades," and that the company "shall keep in good repair and order the space between the tracks or rails." *Held*, that the railroad company, after it has constructed its road in a street, is bound to raise its road-bed to a grade established by the city.

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

The Citizens' Street Railway Company, a corporation running several lines of street cars upon the streets of the city of Little Rock, and especially upon Main street in said city, on April 26, 1890, filed its bill in equity against the city of Little Rock and others, and averred, among other things, that the city was a municipal corporation under the laws of Arkansas; that the defendants, Leigh, Koers and Keith, were the board of commissioners of Improvement District No. 17, organized

for the purpose of grading and graveling Main street, in said city, from Twelfth street to Seventeenth street, over and upon which street, and within which district, the plaintiff had laid its track and constructed its road, and was constantly running its cars for the transportation of passengers; that defendant Woodsmall was the contractor of the commissioners to do the work of improvement contemplated in the formation of the district; that, in order to make said improvement, it would become necessary for the commissioners to fill up Main street, commencing at or near Twelfth street, with a fill of but a few inches, and extending thence south until between Thirteenth and Seventeenth street, where the fill would have to be about six feet; that unless the rails of said road should be taken up and the fill made between them, in conformity with each side of the street, the road and rails would be left in a long hollow, some five feet wide, which at all times of rainfall will be submerged by water from the hill south and on said Seventeenth street, whereby its said road would be rendered unfit for use and be ruined; that the commissioners had contracted with Woodsmall to fill only that part of the street within the district which was outside the track of plaintiff; and that neither the commissioners nor the city intended to make the fill required between the tracks of the plaintiff, but that, on the contrary, the city had ordered plaintiff to take up its track in that district, and, at its own expense, make the fill between its tracks to conform with the grade established for the rest of the street, and had threatened the plaintiff that if it did not forthwith do so, it would declare its contract forfeited and would stop the running of its cars over its lines, to its irreparable injury; that it was willing, and had always been willing, to take up its tracks in said district, so as to enable the said commissioners and their contractor to make the said fill, grade and improvement, and when made to relay it in con-

formity to said new grade, but said city and said commissioners refused to permit it so to do for said purpose, but threatened and were about to pull up and destroy said track, and to stop the running of cars over said road.

Plaintiff prayed the court to restrain the defendants from tearing up or removing its tracks in said improvement district, and that they be required to make the said fill on said street, in said district, between the tracks of the plaintiff, so as to conform to the grade of the rest of the street outside of said tracks.

A general demurrer was filed to this complaint, setting up the two grounds, (*a*) that the complaint did not set forth facts sufficient to entitle plaintiff to any relief in the chancery court, and (*b*) that said court had no jurisdiction of the cause. The demurrer was overruled. The defendants electing to stand on their demurrer, the court entered a decree, in substance holding that the defendants were obliged to make the fill or cut required to bring that portion of the street occupied as a right of way by the railway company to the required grade; the railway company being required only to take up and replace the rails for this purpose, at its own expense. And the court granted an injunction as prayed in the complaint.

From this decree the defendants appealed.

Morris M. Cohn for appellants.

Under the ordinance and contract, it is the duty of the Street Railway company to conform and adjust its tracks at its own expense to the changed grades, including all necessary cuts, fills, etc. 4 Am. & Eng. R. R. Cases, 161; 26 *id.* 546; 32 *id.* 292; 138 U. S. 98.

Eben W. Kimball for appellee.

HEMINGWAY, J. The single question in this case is, whether the appellee, after it had constructed its road in a street, was bound to raise its road-bed, so as to conform to a change established by the city in the grade of

the street; or whether it was bound only to adjust its rails after the city had raised the bed to conform to the changed grade.

The question arises upon a difference, not as to the extent of municipal authority, but as to the contract obligations of the railway. The city contends that the railway was bound to raise that part of the street occupied by its track, while the railway contends that the city was bound to do that, and it was bound only to remove its track and to relay it upon the level of the street when raised.

The solution of the controversy depends upon the construction of the ordinance authorizing the railway to build its road in the streets, which, in so far as it affects or sheds light upon this cause, is as follows:

"Second. That the tracks of the said railway shall be laid in accordance with the grades of the streets as now or as hereafter may be established. And the party of the first part (the city) reserves the right to change or alter the grades of said streets, or any or either of them, or any part of either, whensoever it sees fit to do so, and shall not be liable to the parties of the second part for damages or losses that may be occasioned by such changes. And whenever a change of grade is made, and after due notice by the party of the first part, the said party of the second part shall at their own expense conform and adjust the tracks of the railroad to such changed grades, said adjustment to commence immediately after such notice as aforesaid.

* * * * * *

"Fourth. The said parties of the second part shall keep in good repair and order the space between the tracks or rails, and two feet on either side of tracks on all streets hereafter paved, so as not to obstruct the passing, crossing or traveling of said streets by other vehicles.

* * * * * *

"Sixth. Said railway, with its appurtenances, shall be maintained in good order and repair by the parties of the second part (the railway company), etc.

* * * * * *

"Ninth. The party of the first part also reserves the right to take up and remove the rails of said railway whenever it shall be necessary for the repair and improvement of the said street or for the laying of water or gas pipes or sewer, or for other public purposes thereon, and such repair or improvements shall be made by the party of the first part without unnecessary delay, and the track shall be taken up and relaid by the parties of the second part at their own expense."

The second section has direct application to the question, and is appealed to for its determination. It contains three stipulations with reference to the rights and duties of the railway. It was bound to lay its tracks to conform to the grades established at the time they should be laid; the city could change established grades without incurring liability to it; and whenever a grade should he changed, it was bound, upon notice by the city, to conform and adjust its tracks to the changed grade, at its own expense. Its duties relate, and are defined by reference, to grades "established" or "changed." The inquiry suggested is, what is meant by "grades?" Used in reference to streets it has two distinct meanings; by the first, it signifies the line of the street's inclination from the horizontal; by the second, a part of the street inclined from the horizontal; Century Dictionary. That is, it sometimes signifies the line established to guide future construction, and at other times the street wrought to the line. In the first stipulation, the language used leaves little room for doubt as to its meaning. The track is to be laid in accordance with grades established—that is, in accordance with the line fixed by the city—and not in accordance with the street

wrought. *Karst* v. *St. Paul, etc., R. Co.* 22 Minn. 118.

In the second stipulation the right to change the grades is reserved, and extends to all that are established, whether the streets have been wrought to conform to them or not.

There is nothing in the language of the third stipulation, or in the context, to indicate that the word was there used in a different sense; it is reasonable therefore to conclude that it was used in the same sense.

If this be true, it follows that when the railway undertook to conform and adjust its tracks to changed grades, it was intended that it should conform to such lines as should be established for grades, and not that it should conform to grades actually wrought in the structure of the street, and that the adjustment should begin immediately after notice. If it meant merely that the railway should adjust its tracks to the physical changes made in the street, it would seem strange that notice by the city to lay the track should have been provided for, and not notice to take up the track in order that the grade might be raised. For when the change was completed, the fact would be manifest, and no further notice to lay the track would be necessary; but as the city had to raise the grade occupied by the road, notice to the railway to take up its track would be necessary to its own protection as well as to prepare the street for the city's work. On the other hand, if it meant that, before the change was wrought in the street, the railway might be required to conform and adjust its track to the line established, it would seem reasonable and proper to provide for notice. For although established grades were changed, the city might not contemplate an immediate change in the structure of the entire streets, and public convenience might demand that the change of the part occupied by the railroad await the change of the residue, and, besides, it would be but fair that the railway should

have notice that the work was required. Therefore it would seem quite proper that the change in the roadbed should be made only on notice by the city. Furthermore, the provision that the work of adjustment should begin immediately after notice, and not when the grade was raised, indicates that the adjustment was to include raising the grade.

But, it is said, the railway is expressly required to conform and adjust its track to the changed grade, and is not thus required to raise or lower the bed on which it rests; from this it is argued that there was no intention to impose on it the latter duty. But the assumption of the higher includes all lower duties, and if the obligation to adjust its track can be met only by raising or lowering the roadbed, then the railway is bound by its agreement to do this. Moreover, the railway is as much bound to change its road to conform to changed grades as to lay it in the first place according to the grade then established. There is no express undertaking that it shall make fills or cuts in order to lay its track originally; but the undertaking is express that it will lay its track according to existing grades, and this, in the absence of other provisions, implies an undertaking to employ whatever means are necessary to that end. There was no other provision in the ordinance for raising the roadbed to the level of the grade in order that the railway could lay its track; the city did not undertake to do it, and as the railway agreed to lay its track with the established grade, and this could be done only by raising the street where it was below such grade, the railroad was bound in such cases to do it. So, likewise, when it agreed to conform its track to changed grades, it impliedly undertook to do whatever was necessary to effect such conformity; and there is no more reason for saying that the city should construct the bed to enable it to make the change, than that it should do so to enable

it to lay the track originally—a position for which the railway would hardly contend.

It may be said that when the railway undertook to lay its track according to established grades, it was contemplated that such grades corresponded with the actual level of the streets. But this, we think, is not true. It is a matter of common knowledge that establishing grades by ordinance has generally much outrun actual street construction, and that improvements have been made with reference to anticipated, rather than to existing, street conditions. So that when the agreement was made, it must have been understood that it would be necessary to make some fills and cuts at the outset. The establishment of grades is largely tentative, and, as appears from adjudged cases, subject to frequent modification. The ordinance shows that the parties contracted with this fact in view, and in as much as such changes might, and probably would, precede, by a considerable time, changes in construction, they must have contemplated that fills and cuts would be required to maintain the tracks according to the grades established from time to time. There is no express provision for making them; but the railway assumes duties which it can discharge only by making them, and thereby impliedly undertakes to make them.

While the authorities do not shed much light upon the question, some aid is derived from them.

In the case of the *District of Columbia* v. *Washington & Georgetown R. Co.*, 4 Am. & Eng. R. Cas. 161, the railway was bound by its charter to keep the space between its tracks "at all times well paved and in good order," and to change its railroad so as to conform to changes in grades; and it was held that the railway was bound to do the grading on that part of the street occupied by its road, so as to conform to the change. So in the case of *Ashland St. Ry. Co.* v. *City of Ashland*, 47

N. W. 619, the ordinance provided that the roadbed should at all times correspond with the actual grade of the streets, and in case the grade should be changed the company should relay its track to correspond to the grade; and it was held that the company was bound to raise the grade of its roadbed. In neither of the cases cited was there any express stipulation that the company should raise the grade of its roadbed, but the obligation was implied—in the one case from the undertaking to change the railroad so as to conform to the changed grade, and and in the other from that to relay the track to correspond to such grade.

Though their verbiage is different, their undertakings are substantially the same as that in this ordinance —that the railway, at its own expense, would conform and adjust its tracks to such changed grades, and would keep the space between its tracks in good order and repair so as not to obstruct travel by other vehicles.

It is said that, by section four of the ordinance, the duty of the railway to keep the space between its rails in good order and repair applies only upon paved streets; and from this it is argued that there was no intention to bind it to raise the grade of its roadbed upon unpaved streets. The argument proceeds upon a misconstruction of the section. By its provisions, the railway is bound to keep the space between its rails on all streets in good order and repair, so as not to obstruct travel in other vehicles; and upon streets thereafter paved, it is further bound to keep in like condition the space of two feet on either side of its track.

It is further insisted that the ninth section of the ordinance, which provides that in certain cases the city shall make repairs and improvements, shows that it was not intended that the railway should raise the grade of its roadbed. If this section bound the city to make all repairs and improvements, the contention would be sound;

but that it has no such meaning is obvious from the provisions of section four, which binds the railway to keep the space between its tracks in good order and repair so as not to obstruct travel in other vehicles.

These sections, with the second, should be construed together and in harmony, if it can be done; looking to them with that view, we conclude that the fourth obligates the railway to make such repairs and improvements as are necessary to keep the roadbed so as not to obstruct travel in other vehicles; the ninth obligates the city to make such improvements and repairs as it deems proper, and the railway is not bound by other provisions to make; while the second binds the railway to lay its track to conform to grades then established, and to change its track to conform to changes in grade, which implies that it will raise the grade of its roadbed whenever that is necessary to adjust the track to the changed grade. The chancellor having ruled contrary to this view, the judgment must be reversed, and the cause remanded with directions to sustain the demurrer to the complaint and for further proceedings.

GREER v. LAWS.

Opinion delivered April 2, 1892.

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1. *Contract—Evidence as to agreed price.*

   In a conflict of evidence as to whether a certain sum was agreed to be paid for services to be rendered, evidence of its reasonableness or unreasonableness is competent, as bearing upon the probable truth of what was alleged on either side as having been the agreement.

2. *Verdict—Not disturbed for irrelevant evidence, when.*

   A verdict sufficiently supported by competent evidence will not be disturbed on appeal because of the admission of irrelevant evidence, which was merely cumulative, if the opposite party was not surprised by its introduction.

3. *Evidentiary letters need not be filed with pleading.*

Under section 5064 of Mansf. Dig., which provides that "if either party shall rely upon any deed or other writing, he shall file with his pleading the original deed or writing, if in his power, or a copy thereof," a party is not required to file letters, not relied upon or referred to in the pleading, which he may desire to offer in evidence.

4. *Acceptance of check not an estoppel.*

Acceptance by a creditor of a check from his debtor which imports a full payment of the amount due him is not conclusive evidence of that fact and does not estop him from recovering a balance due unless there was an agreement that it should be in full satisfaction.

Appeal from White Circuit Court.

MATTHEW T. SANDERS, Judge.

F. P. Laws, a real estate broker, sued G. B. Greer, alleging that the latter employed him to negotiate a sale of 10,422 acres of land, and that the contract of employment was that if plaintiff should sell the land at $2.50 per acre, defendant would allow him 25 cents per acre and a commission of 5 per cent. on the remainder; that plaintiff negotiated the sale for the agreed price, and that defendant had refused to pay more than $1,250.

Defendant denied the agreement to pay 25 cents per acre, and averred that he agreed to pay 5 per cent. commission on the price received, and no more. He further alleged that the sale was effected at only $2.40 per acre, and that plaintiff accepted of defendant a check for $1,250, this being 5 per cent. of this price, in full settlement of the amount due him.

On this issue the cause was tried. The plaintiff testified that the contract was made as set out in the complaint, and that he effected a sale at $2.50 per acre, which defendant cut down to $2.40 per acre. Over defendant's objections, plaintiff was permitted to read in evidence certain letters which defendant had written him. Leaming, a real estate agent, was permitted to

testify that he would not take a large body of land to sell for less than 25 cents per acre, and that this was the customary charge of real estate men. Dowdy testified that Greer, some time before, had authorized him to sell this body of land at $20,000, and had promised to give him 5 per cent. and all he could get over and above the sum of $20,000. Sallee, also a real estate agent, was allowed to testify that Greer had authorized him to sell these lands at $20,000, offering to allow him all he could make over and above that sum.

The defendant, sworn in his own behalf, testified that the contract was that he was to pay 5 per cent. commissions on the proceeds of the sale and no more, and that there was no agreement for 25 cents per acre; that, a few days after the sale, he sent plaintiff a check, which check plaintiff received and collected. The check was exhibited, and reads thus:

"SEARCY, ARK., JUNE 25, 1890.

"Pay to the order of F. P. Laws, Esq., twelve hundred and fifty dollars, being his commissions, 5 per cent., on sale $25,000 on land.

"G. B. GREER.

"*To Boatmen's Savings Bank, St. Louis, Mo.*

"Endorsed: F. P. LAWS."

Plaintiff testified that he advised defendant that he "would contend for the 25 cents an acre and 5 per cent. commissions," and, further, "I wrote him the day that I received the check for $1250, demanding that he should settle in accordance with our agreement."

The testimony being closed, the defendant asked the court to give two instructions to the jury. The second instruction thus asked was as follows:

"If Greer sent to Laws the check read in evidence, and it was then in the same language which it now contains, and Laws accepted the check and got the money on it, he is bound by the language of the check; and if

the language of the check imports a receipt in full for his services in selling the land, Laws cannot now claim an additional amount."

The court refused to give this second instruction as asked, to which refusal defendant at the time excepted. The jury returned a verdict for the full amount claimed by plaintiff. Defendant has appealed.

W. S. McCain and *U. M. & G. B. Rose* for appellant.

1. The testimony of Dowdy and Sallee was entirely incompetent. 1 Gr. on Ev., sec. 52; 52 Ark. 117; 7 Ark. 327; 39 *id.* 278.

2. The letters of Greer were irrelevant and incompetent. 10 Ark. 309. They never had been filed with the pleadings. Mansf. Dig. secs 5063–4; 33 Ark. 543; *ib.* 593; 38 *ib.* 134.

8. Defendant's second instruction should have been given. 46 Ark. 217; 14 S. W. Rep. 769; 44 Ark. 349; 35 *id.* 75; 1 Gr. Ev., sec. 305.

House & Cantrell for appellee.

1. The evidence of Dowdy, Sallee and Leaming was relevant. It is not necessary that the evidence bear directly on the point in issue; if it tends to throw light upon or to prove the issue, it is sufficient. 30 Ala. 432; 27 Ga. 283; 5 Iowa, 535; 2 Watts & S. (Pa.); 35 Pa. St. 398; 14 Minn. 174; 17 Conn. 441; 1 Gr. Ev. sec. 51 *a*; Starkie on Ev. p. 67; 1 Wall. 359; 42 Ark. 554; 1 Cold. (Tenn.) 123. Nor is it essential that the relevancy appear when the evidence is offered. If it will afterwards be rendered material by other evidence, it may be admitted. 1 Sprague's Dec., U. S. 109; 30 Vt. 352; 6 Ala. 390; 10 *id.* 355; 11 Shefley (Me.) 139; 48 N. W. Rep. 998; 79 Ala. 9; 107 Mass. 210. When a similar transaction in reference to the same subject matter in issue tends to prove such issue, it is admissible. 3 Ore. 45; 68 Ill. 541; 9 Conn. 83; 32 Pa. St. 111; 5 Monroe

(Ky.) 502; 49 N. W. Rep. 55; 74 Iowa, 442; 145 Mass. 23; 67 Wis. 529; 142 Mass. 558; 104 N. Y. 459; 61 N. H. 416.

2. Taking them in connection with the other testimony, the letters were relevant and competent. 47 Barb. (N. Y.) 243; 16 S. W. Rep. 228; 1 G. (Md.) 140. Secs. 5063–6, Mansf. Dig., apply only to pleadings, and not to the introduction of evidence.

3. But the contention of Laws is sustained without the evidence of Dowdy, Sallee and Leaming and the letters, and this court will not disturb the verdict. 22 Ark. 79; 8 Ohio St. 415; 2 Nev. 345; 7 *id.* 341; 8 *id.* 44; 20 Ohio St. 10. When justice has been done, and there is little reason to believe that a different result would be had on a new trial, the cause should not be reversed. 8 S. & M. (Miss.) 298; 8 G. (Miss.) 671; 12 S. & M. (Miss.) 161.

4. The second instruction properly refused as asked, and as modified was as favorable as Greer could ask. Parol evidence can be given to explain a receipt or contradict it. 1 Johns. Cases, 145; 5 *id.* 68; 7 Cow. 334; 37 N. Y. 312; 57 N. Y. 312. A check is nothing more than a receipt, and is only *prima facie* evidence of what it recites. 5 Ark. 312; *ib.* 569; 21 *id.* 36; 42 *id.* 61; 46 *id.* 119.

1. Evidence of contract.

MANSFIELD, J. The only matter in issue between these parties in the court below was whether the defendant agreed to pay for the plaintiff's services in selling the defendant's lands the sum of twenty-five cents per acre and also the commission mentioned in the complaint, or whether the entire compensation stipulated for was the commission paid before the commencement of this suit. On this question the direct evidence was conflicting; and it was competent to prove any fact which bore upon the probable truth of what was alleged on either side as having been the agreement. The testimony of

Leaming tended to support that of the plaintiff by showing that the compensation claimed by the latter was reasonable and not unusual. And the action of the court in refusing to exclude it is sustained by the authorities cited below. Abbott's Trial Evidence, 305, 367; Starkie, Ev. p. 67, 617; *Norris* v. *Spofford*, 127 Mass. 85; *Knallakan* v. *Beck*, 47 Hun, 117; *Swain* v. *Cheney*, 41 N. H. 232; *Cornish* v. *Graff*, 36 Hun, 160; *Valley Lumber Co.* v. *Smith*, 71 Wis. 304; *Moore* v. *Davis*, 49 N. H. 45; *Kidder* v. *Smith*, 34 Vt. 294.

2. When verdict not disturbed for irrelevant evidence.

The testimony of Dowdy and Sallee had no such relevancy to the fact in controversy as entitled it to admission. But it was merely cumulative, and the evidence adduced by the defendant shows that he was not surprised by its introduction. The error of the court in admitting it is therefore no cause for disturbing a verdict, sufficiently supported as this is by competent testimony. *Barringer* v. *Nesbit*, 1 S. & M. 22; *Owen* v. *Jones*, 14 Ark. 503; *Sharp* v. *Johnson*, 22 Ark. 79; *Peterson* v. *Gresham*, 35 Ark. 381.

3. Letters need not be filed with pleading.

Objection was made to the reading of Greer's letters in evidence on the ground that they had not been filed with the complaint. But section 5064 of Mansfield's Digest, on which this objection is based, applies only to such deeds or other writings as are relied upon or referred to in the pleadings. It does not require the filing of other writings which the parties may desire to offer in evidence. Newman, Pl. & Pr. 251, 619; *Chamblee* v. *Stokes*, 33 Ark. 543.

The letters, dated respectively March 13th and March 28th, 1890, were objected to on the additional ground that they were not relevant. But they contain nothing prejudicial to the defendant that is not also found in other letters read to the jury and to the reading of which no objection was made except that they had not been filed.

4. Acceptance of check not conclusive of payment in full.

The case of the *Springfield R. Co.* v. *Allen*, 46 Ark. 217, and the case of *Bevens* v. *Dunlop*, 14 S. W. Rep. 769,* are cited in support of the appellant's position that the court erred in refusing his second instruction. But in each of those cases a smaller sum than the creditor demanded was offered by the debtor on condition that it should be accepted in satisfaction of the whole claim. And the creditor was estopped, not by his written receipt, but by his agreement to abide the adjustment of a controversy as to the amount due. No such case is presented here. At the time Laws received the check read in evidence, no dispute had arisen as to the compensation he was entitled to receive for his services. The check was not pleaded as a release; and there was no evidence to show that it was remitted under an agreement that it should be accepted in satisfaction of a demand for a larger sum. The contention is that it represented all that was ever due to Laws under the contract. But conceding that the language of the instrument imports a full payment, it was only *prima facie* evidence of that fact, and the court did not err in refusing to charge that it was conclusive. 1 Greenl. Ev., secs. 211, 305; *Springfield R. Co.* v. *Allen*, 46 Ark., *supra; Burke* v. *Snell*, 42 Ark. 61.

Affirmed.

BATTLE, J., dissents.

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* An unreported case. (Rep).

WATSON v. CRUTCHER.

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Opinion delivered April 9, 1892.

Conveyance—Description of land.

An agreement to convey the north half of a certain quarter section of land, "less twenty-five acres off the south side," manifests, *prima facie* at least, the intention that the land reserved should be laid off in a parallelogram with the whole of the south line of the north half of the quarter section in question as its base.

Appeal from Woodruff Circuit Court in Chancery.

Crutcher brought suit against Watson to compel specific performance of a written contract to convey, among other lands, the north half of the southeast quarter of section three in township six north, range three west, less twenty-five acres off the south side thereof. The decree of the court was in plaintiff's favor, adjudging that the title to the lands described in the complaint be vested in plaintiff, and that the line cutting off the said twenty-five acres be run parallel with the south boundary line of the north half of the northeast quarter of section three, township six north and range three west. The defendant has appealed.

J. N. Cypert for appellant.

J. W. House for appellee.

COCKRILL, C. J. The appellant concedes the appellee's right to a specific performance. There is no controversy as to the quantity of land he should convey—the location of twenty-five acres of it in the north half of the southeast quarter gives rise to the only controversy. The appellant maintains and undertook to prove that it should be laid off in an irregular form. The description, as given in the written obligation to convey,

after the call for other tracts by legal subdivisions, is as follows: North half of southeast quarter of section three, in a given township and range, "less twenty-five acres off the south side."

As to whether parol proof was admissible to explain or vary this description, in the absence of proof of a mistake, we need not determine. *Prima facie*, at least, it manifests the intention to lay the twenty-five acres off in a parallelogram with the whole of the south line of the north half of the quarter section in question as its base. That is the effect of the decision of *Beidler* v. *Railway*, 45 Ark. 17. If the appellant could raise an ambiguity out of the description so as to let in parol proof of a different intention, or if there was a mistake which he desired to correct, the burden was upon him to prove his contention by a clear preponderance of the testimony. *Mooney* v. *Cooledge*, 30 Ark. 640. In that he has failed, and the judgment should be affirmed.

HAWKINS *v.* TAYLOR.

Opinion delivered April 9, 1892.

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1. *Sheriff—Failure to return execution—Penalty.*

   Where a sheriff fails to return an execution on or before the return day, but makes return subsequently and before proceedings are instituted against him, he incurs, not the penalty imposed by sec. 3964 of Mansf. Dig. for failure to return an execution, but that fixed by sec. 3061, *ib.* for failure to return an execution on or before the return day therein specified.

2. *Execution—Return day—Sunday.*

   Where the return day of an execution falls on Sunday, the return should be made on or before the preceding Saturday.

3. *Process—Irregularity—Waiver.*

   Where a proceeding against a sheriff for failure to return an execution within sixty days is erroneously instituted by motion for

summary judgment, under secs. 3963-4, Mansf. Dig., instead of upon issuance and service of summons, as required under sec. 3061, *ib.*, the irregularity may be waived by entry of appearance and going to trial without objection.

4. *Execution against "A. & Co."—Valid against A.*
Where a judgment is against A. & Co., and the execution follows it, the execution is good as against A., and the words "& Co." after his name afford no excuse to the officer for refusing or neglecting to return it.

Appeal from Crawford Circuit Court.
HUGH F. THOMASON, Judge.

Taylor was plaintiff in a judgment in the circuit court of Franklin county against P. R. Cravens & Co., upon which execution was issued on February 26, 1890, and on same day placed in the hands of J. D. Hawkins, sheriff of Crawford county. On the 26th day of April, 1890, he, as such sheriff, endorsed the execution, "no property found," and, on April 28, 1890, mailed the execution with his return endorsed thereon to the circuit clerk of Franklin county, by whom it was received on the same day. On May 12, 1890, notice was served on Hawkins of a motion for summary judgment for failure to return the execution within sixty days, which motion was filed on June 13, 1890. Defendant moved to strike the motion from the files; this motion was overruled. Defendant answered, stating (1) that the execution was returned as required by law; (2) that the judgment upon which the execution was issued was void, and the execution a nullity. Upon the evidence the court rendered judgment against defendant for the amount of the execution and interest, with ten per cent. damages thereon. Defendant has appealed.

Sandels & Hill for appellant.

1. The court had no jurisdiction to hear and determine the motion. The statute is highly penal, and must be strictly construed. 25 Ark. 353. Plaintiff's remedy, if any, was by suit at law under sec. 3061, Mansf. Digest,

and not by motion for summary judgment. 22 Ark. 524 and 40 Ark. 377 were cases where there was no return.

2. The judgment was void, and the execution a nullity. 1 Black on Judg. 211.

3. The execution was returned within the time required by law. The sixtieth day was Sunday, on which no return could be had. 16 Mich. 9. When the time expires on Sunday, a party has all the next day to do what is required. 6 Johns. 326; 3 Pa. 200; 33 Ga. 146; 46 Mo. 17; 9 Mo. App. 24; 30 La. Ann. Part. 1, 677; 61 Cal. 498; 65 How. Pr. 273; 104 Pa. St. 500; 14 Ill. App. 643; 34 Kas. 212; 18 Neb. 682.

1. Liability of sheriff for failure to return execution

COCKRILL, C. J. 1. "For failure to return an execution" the statute imposes upon a sheriff a penalty equal to the amount of the judgment and costs and ten per cent. thereon. Mansf. Dig. sec. 3964.

For failure to "return any such execution on or before the return day therein specified" a statute, which was in force when the first was enacted, imposed a penalty of the "whole amount of money in such execution specified," and no more. *Ib.* sec. 3061. There is no such plain repugnance between the two provisions that the latter must yield and give place exclusively to the former. *Zerger* v. *Quilling*, 48 Ark. 157.

The two may stand together by applying the latter, according to its terms, in cases where there is a failure to return the execution "on or before the return day therein specified;" and by confining the other to cases wherein no return has been made at all.

The statute is highly penal, and its terms should not be extended by construction to cases not within its plain meaning. The ten per cent. penalty has never been enforced in any case where the execution had been returned. In this case the return was made before suit was instituted. As the return was legal, although after

the return day, there could be no recovery of the ten per cent. penalty inflicted by the first section above.

2. Rule where return day falls on Sunday.

2. The execution was returnable, by its terms and by the law, "within 60 days" from its date. The sixtieth day after its date was Sunday, and the execution was returned the next day thereafter. It is argued that, as no return could be made on Sunday, the officer might legally postpone the act until Monday. But the statute will not admit of that construction. It does not require the return to be made upon the sixtieth day only. If it did, and that day were Sunday, then the argument would be forcible. But executions are returnable "in sixty days from their date" (Mansf. Dig. sec. 2971), and a legal return may be made by the sheriff at any time after the writ comes to his hands—even a return of *nulla bona*, if he knows that the defendant is insolvent, and is willing to take the hazard of his remaining so. *Reeves* v. *Sherwood*, 45 Ark. 520.

The penal statute moreover prescribes that he shall be liable for a failure to make his return "on or before the return day." "On or before the return day" does not mean after the return day. *Alston* v. *Falconer*, 42 Ark. 117. And as the last day fell upon Sunday, it was the officer's duty to make the return on the preceding Saturday. Crocker on Sheriffs, sec. 40; Sedgwick, Stat. & Const. Law, p. 358; Sutherland, Stat. Const. sec. 115; *Haley* v. *Young*, 134 Mass. 364; ex parte *Simpkin*, 105 Eng. C. L. 392; see Endlich, Int. of Stat. sec. 393.

The return was not made on or before the sixtieth day, and the penalty was incurred under section 3061.

3. Irregularity in process waived by failure to object.

3. The proceeding was instituted by motion for summary judgment under sections 3963–4, and it is argued that the plaintiff's cause should fall because those sections, as held above, do not apply. But the complaint contains all the allegations necessary to a

recovery under section 3061. The defendant demurred to it, and, after the demurrer had been overruled and the cause continued to another term, consented to an order setting aside the continuance, filed his answer and went to trial. Either of these acts was sufficient to enter his appearance and waive the formal issue and service of summons. The defendant was therefore in court, and cannot now be heard to object that he was brought in by notice instead of summons.

4. Validity of execution against "A & Co."

4. The judgment was against P. R. Cravens & Co., and the execution followed it. It was good as to P. R. Cravens. Adding the words "and company" after his name was at most an irregularity, and it afforded no excuse to the officer for refusing or neglecting to return it. *Jett* v. *Shinn*, 47 Ark. 373.

The judgment will be reversed, and judgment entered here for the amount of the execution and interest without damages.

It is so ordered.

DENTLER v. O'BRIEN.

Opinion delivered April 9, 1892.

Sale—No rescission for vendor's infancy.

It is no ground for rescinding a contract of sale of land that the vendor is a minor who may avoid his deed upon coming of age.

Appeal from Prairie Circuit Court in Chancery, Southern District.

MATTHEW T. SANDERS, Judge.

John O'Brien brought suit against Mrs. Dentler to enforce a mortgage to secure payment of purchase money of land, and to enforce a vendor's lien on personal property. She answered and filed a cross complaint, alleg-

ing that while plaintiff sold her the land, the title came to her from one John F. O'Brien, a minor, who might avoid the deed upon arriving at majority; and therefore she prayed that the sale be rescinded and the mortgage cancelled. From a judgment of foreclosure of the mortgage Mrs. Dentler has appealed.

George Sibley for appellant.

Thos. C. Trimble for appellee.

COCKRILL, C. J. The appellant made no case for a rescission of her contract. The only cause alleged in her answer or cross-bill for rescission is that the title to the land in question was in a minor before her purchase; that she concluded negotiations for its purchase with the appellant, who was not the owner, and that he, in pursuance of his contract to convey, delivered her a conveyance from the minor, who owned the land. She does not claim to have been misled or deceived, or that she was ignorant of the true state of the title at the time of the purchase; but alleges only that she fears that the minor will disaffirm the contract on coming of age. No proof to sustain the allegations was made; and if we regard them as unanswered and therefore true, the appellant would take nothing. The minority of the vendor is no ground for a rescission by the vendee.

As to the personal property, there has been no decree against the appellant or her interest in regard to it, and nothing therefore from which she can prosecute an appeal.

Affirm.

RAILWAY COMPANY *v.* DAVIS.

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Opinion delivered April 9, 1892.

1. *Liability of railway for ejecting passenger.*

Where a railway conductor takes a ticket from a passenger which entitles him to passage from one station to another, and between those points demands of him another fare for part of the trip, and ejects him from the car for failure to pay it, such acts constitute a legal wrong for which the passenger is entitled to recover damages.

2. *When punitive damages recoverable.*

In an action against a railway company for unlawfully ejecting a passenger from its train, punitive damages may be recovered, in addition to actual damages, where the ejection was accompanied with such violent and insulting conduct on the part of the defendant's train men as indicated a wanton disregard of the passenger's safety.

Appeal from Nevada Circuit Court.

CHARLES E. MITCHEL, Judge.

Davis recovered judgment against the St. Louis, Iron Mountain & Southern Railway Company for $1000 damages for an unlawful ejection from its train. Defendant company has appealed. The facts sufficiently appear in the opinion.

Dodge & Johnson for appellant.

1. The verdict is not sustained by the evidence and is contrary to law.

2. The third instruction for plaintiff should not have been given. The facts in the case do not entitle plaintiff to exemplary damages. 53 Ark. 10; Field on Damages, sec. 34; 33 A. & E. R. Cases, 407; 1 Otto, 489; 21 How. 213; 2 Wall. Jr. 164; Suth. on Dam., p. 724; 34 A. & E. R. Cases, 432; 4 So. Rep. 359; 52 Ill.

451; 35 Ia. 306; 46 Tex. 272; 76 Ala. 176; 62 Md. 301; 40 Cal. 657; 39 Ark. 387; *ib.* 448; 41 *id.* 299; 56 N. Y. 44.

Atkinson, Tompkins & Greeson for appellee.

1. There was ample evidence to sustain the verdict.

2. There was evidence to show that the injury was unnecessary, and the result of conduct wanton and reckless, and the instruction was properly given allowing exemplary damages. 42 Ark. 326; 53 Ark. 10; 9 So. Rep. 375; 6 Atl. Rep. 553; 9 S. E. Rep. 9; 90 Am. Dec. 342; 7 S. E. Rep. 617.

HEMINGWAY, J. The contention of the appellant is that there was no evidence to warrant either a verdict for the plaintiff or the giving of an instruction with reference to punitive damages. To test it, we ascertain the state of case most favorable for the plaintiff that the jury could have found from the evidence, and determine whether it was a case for damages, and if so, whether it disclosed a wilful or wanton wrong.

1. *Liability* of railway for ejecting passenger.

The evidence warranted a finding that the conductor took a ticket from the plaintiff which entitled him to passage from Prescott to Malvern; that between those points the conductor demanded of him another fare for a part of the trip and ejected him from the cars for failure to pay it. This was a legal wrong to be compensated in damages.

2. When punitive damages recoverable.

As to the manner and effects of the ejection, the finding might have been that the conductor, in a violent manner and with profane and insulting language, demanded of plaintiff the payment of a fare; that, upon his refusal to make it, the conductor, without requesting him to leave the car, laid hold upon him to put him off, forcibly "jerked him" from his seat into the aisle, and with another person, each holding him by the arm, led or dragged him from his seat through the car and to the

platform, while a brakeman aided them by pushing him in the back; that he was forcibly thrown from the car by said parties with such violence as to dislocate his hip, and for a time cripple him and cause him a serious hurt. The insulting and profane language of the conductor, the manner of the employees and the force used in ejecting him, as indicated by the extent of the injury inflicted, warranted a conclusion that the hurt was occasioned by a conscious and wanton disregard of his safety.

As the jury would have been warranted in finding the facts, and deducing from them the conclusion stated, it was proper for the court to declare the law applicable to punitive damages. *Railway* v. *Hall*, 53 Ark. 10. It is not contended that the instruction given was wrong, if it was proper to give any on that subject, and it appears to state the law as favorably as appellant could ask.

We find no error in the record, and the judgment will be affirmed without penalty.

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PENNINGTON v. UNDERWOOD.

Opinion delivered April 9, 1892.

1. *Attorney—When not entitled to fee for collection.*

Where an attorney agrees to collect a claim, pay the costs and accept for his compensation one-half of the amount collected, he is not entitled to half of an amount collected by the client if the latter notified him of the opportunity to make the collection and he declined to resort to it because of the expense involved.

2. *Practice on appeal—Dismissal.*

Under the act of April 14, 1891 (p. 280), which authorizes the Supreme Court, on reversing a cause, to remand or dismiss the cause and enter such judgment as it may deem just, where

plaintiff's evidence affirmatively establishes that there is no right of recovery in his behalf, the court will reverse a judgment at law in his favor and enter judgment for defendant.

Appeal from Johnson Circuit Court.

J. G. WALLACE, Judge.

J. E. Cravens for appellant.

A. S. McKennon for appellee.

1. When attorney not entitled to fees for collection.

HEMINGWAY, J. A party seeking to recover upon a contract must show that he has complied with the conditions on which the right of recovery depends. When an attorney undertakes the collection of a claim under a contract that he will pay the costs incident thereto and accept for his compensation one-half of the amount collected, he is not entitled to half of an amount realized through the efforts of the client; and if the client notified him of the opportunity to make the collection, and he declined to resort to it because of the expense involved, he is entitled to nothing on account of such collection. For, as his failure to comply with his undertakings made it necessary for the client to assume them, he cannot ask compensation to which he would have been entitled only in the contingency that he did what his client was driven to do himself.

2. Practice in the Supreme Court as to dismissals.

The material facts in the case are not controverted, and, under the principles above announced, they do not support the verdict. There is, not simply a failure of proof, but an affirmative showing that there is no right of recovery—and this is made by plaintiff's own testimony. The judgment must therefore be reversed, and the question is, what shall we do with the cause? By the act of 1891, we are authorized to remand or dismiss it, or to enter such other judgment as in our discretion we deem just. Acts of 1891, p. 280. If the record disclosed a simple failure of proof, justice would demand that we remand the cause and allow plaintiff an opportunity to supply the defect; but as there is an affirma-

tive showing by him that he has no right to recover, a new trial would only protract the litigation, increase the the costs and needlessly occupy the time of the courts. In this state of case injustice would be done by remanding the cause, while justice would be done by determining it now as it must inevitably be determined at some time. The power conferred by the statute should be exercised with great caution, but in a case where justice plainly demands it we should not decline to end fruitless litigation by administering it. Such is our opinion in this case, and a judgment will therefore be entered here for the defendant.

CHOATE *v.* KIMBALL.

Opinion delivered April 9, 1892.

1. *Sale—Failure of vendor to execute deed.*

   Where one of the considerations of a note is the price of certain land which the vendor agreed to convey to the vendee, who was placed in possession, the failure of the vendor to execute a deed to the vendee will not warrant a reduction of the note *pro tanto* if such failure is attributable solely to a default on part of the vendee, as where the latter permits the land to forfeit for taxes.

2. *Fixtures—Right of mortgagor to remove—Custom of the country.*

   Where a mortgagor places on the premises saw mill machinery which could be removed without injury to the freehold and which he intends to remove, though such intention is not at the time disclosed to the mortgagee, such articles do not become fixtures if there is shown a general custom in the country to put them upon land for temporary use and to remove them at will.

Appeal from Yell Circuit Court in Chancery. Danville District.

JORDAN E. CRAVENS, Judge.

George L. Kimball brought suit in 1890 to foreclose a mortgage executed in 1880 by T. J. Choate and W. D.

Scott, on the south half of section 2 in township 6 north, range 22 west; also one engine and boiler, one Straub mill, one saw mill complete, and all pipes, belts, pulleys and all other attachments to make the above machinery in complete running order. The mortgage was executed to secure payment of two notes aggregating $3,594.00, given for the purchase of the above mentioned property. The complaint further alleged that Choate had purchased Scott's interest in the above property, and had subsequently located and erected on said land a new boiler, a new saw rig, a Curtis & Co. saw, a planing machine, shingle mill and outfit, all of which plaintiff claimed as fixtures and subject to said mortgage; that Choate had sold part of the new machinery and mortgaged the remainder. All persons interested in the property were made parties. Plaintiff's prayer was that defendants be enjoined from selling or removing the machinery or any part of it from the premises, for judgment for the balance due on the notes, and that the land and machinery be sold for the satisfaction thereof.

Choate answered that, when he bought the land and machinery described in the complaint, he also bought from plaintiff and one Perry certain lands, described in his answer and known as the "Dyer homestead," which were valued at $1400, which amount was part of the consideration of the two notes described in the complaint; that he had, at divers times and places, demanded a deed for said land, but plaintiff has failed, neglected and refused to execute him a deed therefor. He further alleged that the new machinery mentioned in the complaint was purchased by him, at different times from different parties, seven, eight and nine years after plaintiff's mortgage was executed; that it was in no wise permanently attached to the freehold or to any permanent buildings thereon, and that his intention, at the time the machin-

ery was placed on the land, was to remove it as soon as he could secure a suitable pinery. The answers of the other defendants, in so far as this suit affects or relates to them respectively, are the same as Choate's.

It was shown in evidence that, after the mortgage to the plaintiff was executed, the "Dyer homestead" was permitted by defendants to forfeit for taxes. The new boiler attached to the mortgaged premises weighed 6,000 pounds, and was held in position by its own weight. It was the custom of the country to move boilers of this kind from one pinery to another. None of the machinery was so attached to the freehold that its removal would result in injury thereto.

Upon the hearing, the court rendered judgment for plaintiff against defendants T. J. Choate and W. D. Scott for $2,540, principal and interest, and decreed sale of south half of section 2, township 6 north, range 22 west, and all the machinery mentioned and described in the mortgage sued on, and of the new boiler, saw rig and carriage, Curtis & Co. saw and attachments, to satisfy the mortgage; from which decree the defendants have appealed.

W. D. Jacoway and *U. M. & G. B. Rose* for appellants.

1. There was a partial failure of consideration of the notes and mortgage. The "Dyer homestead" was a part of the consideration, and Kimball & Perry agreed to execute a deed for said land; this they have failed to do, and the consideration has failed to the extent of the purchase money for said lands, $1400. 1 Daniel, Neg. Inst. (3d ed.), sec. 201 *et seq.*; 13 Ark. 9; *id.* 522; 12 *id.* 699; 14 *id.* 356; 17 *id.* 229; *id.* 254; 53 *id.* 159.

2. The new machinery not mentioned in the mortgage cannot be treated as fixtures and be held subject to the mortgage. As between mortgagor and mortgagee the following requisites must exist:

FIRST: Actual annexation to the realty, or something appurtenant thereto.

SECOND: Appropriation to the use or purpose of that part of the realty with which it is connected.

THIRD: The intention of the party making the annexation to make it a permanent accession to the freehold. Devlin on Deeds, vol. 2, sec. 1211; 59 Am. Dec. 634; Ewell on Fixtures, 21, 22; Boone on Mortgages, 241, 104–5, and note 5; 14 Am. Dec. 300 and note; Jones on Mortg., vol. 1 (3d ed.) 429 *et seq.* Of these three tests, the clear tendency of modern authority seems to give pre-eminence to the intention to make the article a permanent accession to the freehold. 14 S. W. Rep. 899; Ewell on Fixtures, p. 22. See also 7 Nev. 37; 48 Miss. 1; 25 N. J. Ex. 496; Ewell on Fixtures, 39 *et seq.* All the facts, the custom of the country, the mortgage of them as chattels, the temporary character of the structure, etc., show that the new machinery was never intended as a fixture. Ewell on Fixtures, pp. 109, 224, 283–6; Devlin on Deeds, secs. 1209–12; 31 Mich. 440; 1 Oh. St. 511–529; 53 N. J. 380; 1 Mo. 508; 25 Ga. 331; 28 Vt. 428; 30 *id.* 452; 7 Am. Dec. 223; 21 *id.* 720; 2 Peters, 137.

3. A chattel mortgage executed in view that chattels are about to be annexed to realty is regarded as sufficient evidence of the intention that they are to retain their character as chattels. Jones, Ch. Mortg. 125, 659; Jones, Mortg. (3d ed.), vol. 1, 814, *et seq.; ib.* 431, 1080.

R. C. Bullock for appellees.

1. The proof fails to show that the "Dyer homestead" was any part of the consideration of the notes. Besides, parol testimony was not admissible to vary or contradict the recitals of the note and mortgage. Pars. Cont. (5th ed.), pp. 429, 430; 2 Story, Eq. (12 ed.), sec. 1531; 1 Dan. Neg. Inst., secs. 204–5.

2. The saw mill and machinery were fixtures and subject to appellee's mortgage. The mere intention of Choate is not sufficient to change the rule. Boone on Real Property, sec. 9; *ib.* sec. 9, note 23; 19 Barb. 317; 12 N. Y. 170; 60 Mo. 339; Jones on Chat. Mort. (3d ed.), sec. 129, 130; 48 N. Y. 278; Ewell on Fixtures, 281, 282, 283-6; 97 Mass. 279; 53 Ark. 526.

HEMINGWAY, J. The parties agree in stating two questions for our consideration, which we find to be decisive of this cause. They are as follows:

First. Is there a partial failure of consideration of the notes and mortgage sued on?

Second. Is the new machinery which is involved in this suit, which is not mentioned in the mortgage, and which was purchased more than seven years after the execution of said mortgage, to be treated as fixtures, and be held subject to said mortgage?

1. When vendor not responsible for failure to execute deed.

Upon the first question we have found no difficulty. For if it be conceded that Kimball and Perry sold the Dyer homestead to Choate and Scott under an agreement to make a deed when they received a patent, and that the price of the land constituted a part of the consideration for the note and mortgage sued on, still the failure to make a deed will not warrant a reduction of the note, where such failure is attributable alone to a default on part of the purchaser.

If the sale included that land, the purchasers were placed in the immediate possession of it and permitted to enjoy it so long as they desired. Their possession was never disturbed by their vendors, and they got every thing for which they contracted except the legal title, for which it is not shown they made any demand. Several years after they had been let into possession, and while they were in its undisturbed enjoyment, it was forfeited to the State for the non-payment of taxes.

The forfeiture, which divested the vendors of their legal title, was the only cause of their failure to make a deed, and it arose without any fault on their part; for although no legal title had been made, the purchasers, having been let into the possession and permitted to hold it, were bound to pay the taxes; and when they failed to do so and the lands were forfeited to the State, the obligation to make a deed could not be performed; as such result was attributable to them, the obligation was released, and no right arose to a reduction upon the price agreed upon.

2. Right of mortgagor to remove saw mill.

Upon the second question we have encountered more difficulty. If the boiler, saw-rig, shingle mill and planer were fixtures, they became subject to the prior mortgage. Whether they were or were not fixtures, is the question that has perplexed us. The rule for the determination of the question varies according to the relation of the parties between whom it arises; and it is less liberal in permitting a removal as between mortgagor and mortgagee than as between landlord and tenant.

The term "fixtures" has reference to articles which, in and of themselves and irrespective of annexation to land, are of a chattel nature, but by reason of such annexation have become a part of the land. The point of difficulty arises in determining when there has been such annexation of chattels as to make them a part of the land, or irremovable fixtures.

It is said that the true criterion, established by the authorities, consists in a united application of several tests, as follows:

"1. Real or constructive annexation of the article in question to the realty.

"2. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected.

"3. The intention of the party making the annexation to make the article a permanent accession to the

freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation and the purpose or use for which the annexation has been made."

Mr. Ewell says that "of these three tests, the clear tendency of modern authority seems to be to give preeminence to the question of intention to make the articles a permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention." Ewell on Fix. p. 22.

Without making a detailed recital of the facts in this case, it may be stated that the annexation was sufficient to meet the requirements of the first test; but that the articles could be removed without any injury to the freehold or any material injury to themselves, and that the articles were appropriate and adapted to the use of the realty with which they were connected, but that they were equally appropriate and adapted to the use of other saw mills. The articles may or may not have been fixtures within the first and second tests, and whether they were or were not, must be determined by an application of the third. The actual intention of the mortgagor in making the annexation was that the articles should not become a permanent accession to the freehold, but such intention was not disclosed to the mortgagee; and whether the mortgagor's undisclosed intention can continue their chattel nature after actual annexation is a question upon which the authorities do not agree. The affirmative has been held by the courts of New York and Kentucky, in cases where the articles could be removed, without injury to the mortgaged property and were not within the contemplation of the mortgagee in taking his mortgage. *Tifft* v. *Horton*, 53 N. Y. 377; *Clore* v. *Lambert*, 78 Ky. 224.

But we have not deemed it necessary to determine that question.

The authorities hold that where the parties so agree such articles will retain their chattel nature, and to this end an agreement implied is as effective as one expressed. It is shown that a custom obtained, in the country where the land lies and the mortgage was made, to put such articles upon land for temporary use and to remove them when removal became desirable—in the light of which they would not, in ordinary understanding, be a part of the land, but removable chattels. When so attached as to be thus regarded, they do not become fixtures under the third test. *Wolford* v. *Baxter*, 33 Minn. 12.

It might be inferred from the mortgage itself that it was made with reference to this custom ; for, in describing the mortgaged property, it enumerated "lands" and "also" other property, embracing machinery upon the land of the same character as that in dispute. If land included the machinery upon it, no specific description of the machinery was necessary ; and the fact that it is found indicates that the parties did not treat it as a part of the land. And as they treated such articles as chattels, and did not stipulate that the mortgage should embrace such of a like kind as should be thereafter put upon the land, it would be implied that the mortgage was not intended to cover them. But however that might be, as the custom is shown to have been general, the inference is that the parties contracted with reference to it. *Varner* v. *Nobleborough*, 2 Greenl. 121, and cases cited ; Ewell on Fix. p. 224.

We conclude that the intention of the mortgagors, with the implied assent of the mortgagee, preserved the chattel nature of the articles, and that they passed by sales as chattels.

The judgment, in so far as it effects the mortgagors and the property described in the mortgage, is affirmed ;

but in so far as it affects the defendants, who claim the machinery not described in the mortgage, under sales from the mortgagors, it is reversed, and the bill must be dismissed.

McDONALD v. HUMPHRIES.

Opinion delivered April 9, 1892.

Life insurance—Beneficial interest—Trust.

Where a person advances money to pay the assessments on another's life insurance policy, under an agreement that he shall hold the policy as security for their repayment, and the name of the wife of such person is inserted as one of the payees, merely for the purpose of making his security more effectual, the wife has no beneficial interest in the policy except as trustee for the amount advanced.

Appeal from Ouachita Circuit Court.
CHARLES W. SMITH, Judge.

Mrs. Caroline McDonald brought suit against C. B. Humphries and wife, Lucy A. Humphries, and the American Legion of Honor, a mutual life insurance society, upon a benefit certificate for $2000, issued on the life of Joseph McDonald, one-half for the benefit of plaintiff, his wife, and one-half for the benefit of defendant, Lucy A. Humphries, sister of plaintiff. The complaint alleged that deceased held originally a benefit certificate for the sum of $2000 payable to herself. Becoming embarrassed, he applied to defendant, C. B. Humphries, to pay the dues and assessments. The latter agreed to pay them for the sole benefit of plaintiff, but reserved to himself a lien on the benefit certificate, or sum secured by it, for such sums of money as he might advance to pay dues and assessments; that subsequently the original benefit certificate was cancelled, and the certificate in question was

issued, but with the express agreement that neither C. B. Humphries nor his wife would ever claim any other interest than a lien for such sums as might be expended by him in payment of dues and assessments. Wherefore, plaintiff prayed that she recover the $1000 payable to her by the terms of the benefit certificate, and also the $1000 payable to defendant, Lucy A. Humphries, less the sum due C. B. Humphries for dues and assessments paid by him.

Defendants' answer alleged in substance that C. B. Humphries agreed, as a matter of charity, to pay deceased's assessments and dues; it denied that there was any agreement that neither C. B. Humphries nor his wife would ever claim any other interest than a lien for such sums as might be expended in paying dues and assessments; the truth was, the payment of the dues was made upon the expectation that if Mrs. Humphries should outlive McDonald she might have the half interest in the policy in her own right.

Under the order of the court, the defendant, the American Legion of Honor, paid to plaintiff $1000, and paid into court, subject to further orders, the $1000 in dispute, and was discharged from further liability in the case.

Plaintiff filed an amendment to her complaint, and alleged that defendant, C. B. Humphries, paid all the before mentioned assessments and dues as a gratuity and without charge; that defendant, Lucy A. Humphries, was never dependent in any way whatever on Joseph McDonald for support and maintenance, and had no legal or equitable interest whatever in the benefit certificate now in controversy.

The by-laws of the American Legion of Honor were read in evidence, showing that, under the rules of the order, certificates could be issued only for "the benefit of the member's family or those dependent upon him for

support." It was admitted that Mrs. Humphries was not a member of McDonald's family nor dependent upon him for support. It was proved that the dues and assessments paid by defendant, Humphries, including interest, amounted to $373.67. The abstracts do not state whether any other evidence was introduced in the case.

The court adjudged that defendant, C. B. Humphries, recover $373.67, the amount of dues and assessments paid by him, and that plaintiff recover the remainder of the sum in controversy. Both parties have appealed.

John Hallum for appellant.

Appellee has no right to recover what he admits in his pleadings was a gratuity. He is estopped by his pleadings. Herman on Est. & Res Jud., vol. 2, secs. 817, 818; Gr. Ev. (9th ed.) vol. 1, secs. 22, 27, 172, 205, 186 and 527 *a*; 16 Ark. 440; 24 *id.* 410; 21 *id.* 101, 121.

2. The judgment excluding Mrs. Humphries from participation in the fund is right. She is excluded by the charter, being neither a member of the family nor dependent on the deceased for support, nor of kin or blood relation to him. 140 Mass. 580 to 594; 142 *id.* 224. 145 *id.* 134.

Bunn & Gaughan and *B. W. Johnson* for appellees.

No one except the company had the right to object that Mrs. Humphries had no insurable interest in the life of the assured. The company making no objection, the policy should be paid to its beneficiaries according to its terms. 53 Ark. 255; 17 S. W. Rep. 874; 75 Wis. 465; 29 Mo. 509.

MANSFIELD, J. The judgment appealed from awards to the defendant, C. B. Humphries, no greater part of the fund deposited in court than the original complaint admitted his right to. The remainder of the fund was given to the plaintiff, and she thus obtained all her suit was brought to recover. But, after the defendants had

answered, she amended her complaint so as to demand the whole amount of the policy remaining unpaid. And her contention here is that the defendant, C. B. Humphries, is estopped to claim any part of it by facts admitted in the original answer. But if that pleading may be properly construed as making the alleged admission, it can have no force as an estoppel that must not also be given to the admission made in the original complaint. The latter was to the effect that C. B. Humphries was, by agreement with Joseph McDonald on whose life the policy issued, entitled to the sum which the court allowed him as a reimbursement of money advanced upon the policy. The evidence shows that the allowance was just, and the court did not err in adjudging it.

The defendants on their part complain of the judgment below because it gave to Mrs. Humphries no part of the sum in controversy. The argument of her counsel is that, as it was payable to her by the terms of the policy and her right to it was not contested by the insurance company, she was entitled to the whole sum, according to a ruling made by this court in *Johnson* v. *Knights of Honor*, 53 Ark. 255. The decision in that case was that a provision in the constitution of a mutual aid society limiting the beneficiaries of an insurance certificate to the holder's family, or those dependent upon him, may be waived by the society, and is of no avail to a third person. But here the objection to the claim of Mrs. Humphries, which presumably prevailed in the circuit court, was that she had no right to the fund in dispute except in the capacity of a trustee; and that the beneficial interest in the policy belonged to the plaintiff, subject to the right of C. B. Humphries to be repaid out of its proceeds, when collected, the sums advanced by him for McDonald as premiums and assessments. The complaint alleges that these sums were advanced under an agreement that the defendant, C. B. Humphries, should hold the policy as a

security for their repayment; and that McDonald acquiesced in the insertion of Mrs. Humphries' name in the policy as one of the payees, upon the assurance of her husband that her name was inserted merely for the purpose of making his security more effectual. If such was the agreement, the effect was to make the plaintiff the real beneficiary of the whole policy, subject to an equitable lien in favor of C. B. Humphries for the amount of his advances. Cooke, Life Ins., sec. 127. The company, having paid the money into court, was released from all liability to either of the parties, and had no further interest in the litigation. The question which remained for the decision of the court involved only a proper disposition of the fund as between the plaintiff and the other defendants. And Mrs. Humphries was denied any part of the money, not because she was disqualified to become a beneficiary, but for the reason that she had not in fact been made such except in a merely nominal sense. The agreement stated in the complaint places her in such relation to the policy that she was entitled to take nothing upon it except for the benefit of her husband. He has recovered all that was due to him under the agreement; and if the court erred in finding that the agreement was made or in the judgment enforcing it, the error is not disclosed by the defendants' abstract of the record.

Affirmed.

SCHOOL DISTRICT *v.* REEVE.

Opinion delivered April 9, 1892.

1. *School warrants—Time of presentment.*

   The provision contained in section 6255, Mansf. Dig., that school warrants shall be void unless presented to the treasurer within sixty days, has been repealed by Acts 1885, p. 107.

2. *Liability of school district.*

   Where a county treasurer refuses on presentment to pay a school warrant drawn on him, the school district issuing it becomes liable to an action to enforce its collection.

3. *Possession of draft as evidence of title.*

   Possession of a warrant payable to the order of another than the plaintiff is not sufficient evidence of title in the latter.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

D. Reeve sued School District No. 7 of Pulaski county, before a justice of the peace, upon several school warrants. Judgment was for plaintiff, and an appeal was taken to the circuit court.

The warrants were similar to the following:

No. 10, $40.00.

DISTRICT SCHOOL FUND, DISTRICT No. 7.

WAMPOO, ARK., Sept. 22, 1888.

Treasurer of Pulaski County, Arkansas:

Pay to James J. Manuel, or order, the sum of Forty Dollars, for teaching in August and September, 1888, out of the general fund.

D. F. ROSE, Secretary,
S. S. DESHA, President,
Directors.

It does not appear that the warrants were endorsed or assigned to plaintiff.

The cause was tried before the court sitting as a jury, upon the following agreed statement of facts:

"It is hereby agreed between plaintiff and defendant in this case that the warrants sued on herein were duly presented to the treasurer for payment, but that such presentation was not made within sixty days after the date of their issue. That this case be submitted to the court sitting as a jury for a trial thereof on the face of said warrants and this agreement of facts, this December 30, 1890."

Judgment was rendered for plaintiff. Defendant has appealed.

Blackwood & Williams for appellant.

1. The warrants were void, not having been presented to the county treasurer within sixty days after their issue. Mansf. Dig., secs. 6221, 6222, 6255, 6256.

2. But if valid under Acts 1885, p. 107, plaintiff's remedy was against the county treasurer. The directors had done all in their power and their whole duty. Mandamus against the treasurer was the remedy. 33 Ark. 81; 25 *id.* 263; 39 Cal. 270; 51 Mich. 184; Mansf. Dig. sec. 4569; 33 Ark. 451.

3. The warrants were payable to *order*, and the record shows no transfer nor assignment, or right in plaintiff to sue.

HEMINGWAY, J. The court's refusal to make three several declarations of law, at the request of the defendant, presents the different questions in this case. The declarations refused were as follows:

"1. That, said warrants not having been presented to the treasurer within sixty days from their issue, they are null and void, and judgment should be for defendant.

"2. That the directors, having issued the warrants, had complied with the full requirements of the law, and if the same are valid now or were at the time of the institution of this suit, the county treasurer should have

paid them, and, not having done so, plaintiff should have pursued his appropriate remedy against the county treasurer to compel that officer to pay said warrants, and judgment in this action should be for defendants.

"3. That plaintiff is not entitled to judgment on said warrants in this action against the school district, and judgment should be for defendants."

1. School warrants need not be presented within sixty days.

1. In section 6255 of Mansfield's Digest was a provision, among others, that school warrants should be void unless presented for payment to the treasurer within sixty days; but this section was amended in 1885 by re-enacting its other provisions and omitting the one referred to. Acts 1885, p. 107. The manifest design of the amendment was to abrogate the rule avoiding warrants not thus presented, and we think the court properly refused to make the first declaration.

2. Liability of school district to suits.

2. School districts are bodies corporate, and the statute provides that they may make contracts and sue and be sued. It imposes no restrictions upon their liability to be sued, and we conclude that it was intended that they, like other persons, might be sued whenever they made default in discharging their obligations. In other States it has been held that similar bodies were liable to suit upon similar warrants, at least after demand. *Varner* v. *Nobleborough*, 2 Greenl. 126; Tied. Com. Pap., sec. 140 and cases. If a different rule is maintained by any court, the fact has not been called to our attention. If the treasurer refuses to pay such warrants when he has in his hands money that ought to be paid on them, mandamus against him may be invoked, but that does not prove that the holder may not resort to other remedies. We have ruled that the statute of limitations ran against school warrants as well as county warrants. *School District* v. *Cromer*, 52 Ark. 454; *Crudup* v. *Ramsey*, 54 Ark. 168. As this statute operates only where there is a right to sue, it follows from the decisions that a suit

may be maintained on unpaid school or county warrants. The fact that the suit imposes a burden of costs upon the school district and does not advance the collection of plaintiff's claim is an argument for the change of the statute; but as it plainly provides that school districts may contract and be sued upon their contracts, without restricting the liability to suit, relief against burdensome and fruitless suits must come from a change in the law. We are of opinion that the second declaration was not the law.

3. When possession of draft no evidence of title.

3. It is contended that the third declaration is proper, for the reason that when a plaintiff, who is not the original payee, sues to recover upon unendorsed paper payable to order, he can succeed only upon proof that he acquired it from the payee by a *bona fide* transfer and delivery. At the common law a recovery could be had only upon a legal title derived by endorsement; but a more liberal practice now prevails, under which the real owner may recover, although his right is not evidenced by endorsement. *Heartman* v. *Franks*, 36 Ark. 501. But neither at the common law nor under the reformed practice can a party recover without establishing his title to the paper. Where endorsements show title in the plaintiffs, they are sufficient proof of that fact; but where there is no endorsement, or, there being one, it passes title to another than the plaintiff, it becomes necessary to establish ownership by proof *dehors* the paper. The record in this case contains no evidence of title in the plaintiff, except such as may be implied from his possession of warrants that upon their face show title in another. Is the fact of possession sufficient proof of plaintiff's title to overcome the proof contained upon the face of the warrants? Where paper is payable to bearer or has been endorsed in blank by the payee, possession is held to be proof of title; but where it is payable to order, and is not endorsed by the payee, or the endorse-

ment passes title to another person than the plaintiff, it is held that possession is not sufficient proof of title. 2 Randolph, Com. Paper, sec. 792; Edw. on Bills, p. 684; *Crisman* v. *Swisher*, 28 N. J. L. 149; *Van Eman* v. *Stanchfield*, 10 Minn. 225; *Redmond* v. *Stansbury*, 24 Mich. 445; *Hull* v. *Conover's Executors*, 35 Ind. 372; *Ross* v. *Smith*, 19 Tex. 171.

The law as stated is not changed by section 477 of Mansfield's Digest, which provides that the assignee of any instrument made assignable by law shall not be required to prove the assignment unless the defendant shall annex to his answer an affidavit denying such assignment and alleging that he verily believes that one or more of assignments on the instrument was forged. The language of this section clearly indicates that it was intended to apply only to assignments in writing.

It may be conceded that the filing of the warrants and causing summons to issue was a sufficient allegation of ownership to admit the proof of it; but proof would be required unless the fact was admitted. There was no written pleading on part of the defendant, either in the justice's court or in the circuit court, and no record entry disclosing the defense interposed. It is shown that the defendants appeared, and that a trial was had, and this implies that issues were tendered; whether they went to plaintiff's title to the warrants or were directed to other matters, we have no means of knowing. The third declaration asked by defendant is broad enough to cover this issue, and may have been designed to do it. We can not say therefore that the issue was not made, or that the fact was admitted.

As the defense was oral, the justice should have entered its substance upon his docket. Mansf. Dig., sec. 4050. But the defendant should not be prejudiced by his failure to do it. As it appears that an issue was joined, and we have no means of ascertaining what it was,

we can not hold that any fact necessary to make out plaintiff's case was admitted; and as there was no proof of plaintiff's title to the warrants, the third declaration should have been given. The error of refusing it was repeated in overruling the motion for a new trial, and rendering judgment upon a finding not supported by the evidence.

Reversed and remanded.

RUDY *v.* AUSTIN.

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Opinion delivered April 9, 1892.

1. *Decree* pro confesso *on cross-complaint.*

   Allegations of a cross-complaint not controverted by answer are taken as confessed. Mansf. Dig., sec. 5072.

2. *When gift void as to subsequent creditors.*

   A voluntary conveyance of property by an insolvent debtor is fraudulent as to subsequent as well as existing creditors if the debtor reasonably had in contemplation the contracting of such future debt at the time the conveyance was made.

3. *Subsequent creditors—Subrogation to rights of prior creditors.*

   Where a voluntary conveyance was made in fraud of prior creditors, subsequent creditors whose means were used to pay off the prior debts will be subrogated to the rights of the prior creditors.

4. *Fraudulent conveyance—Practice in action to set aside.*

   Under the act of 1887, p. 193, which provides that only one suit shall be necessary to set aside a fraudulent conveyance, a bill was filed to cancel a deed of land to defendant from Rudy as guardian of plaintiff, the consideration of which was a debt from Rudy to defendant. *Held*, that defendant might show that plaintiff derived title from Rudy by deed in fraud of defendant's rights as a creditor; and the latter's title will be confirmed, though Rudy dies before decree, if it does not appear that Rudy had any other creditors.

Appeal from Crawford Circuit Court in Chancery. HUGH F. THOMASON, Judge.

STATEMENT BY THE COURT.

This was an action instituted by John M. Rudy against James L. Austin and Mamie B. Austin, to quiet his title to two certain town lots in Van Buren, and for other purposes. Plaintiff alleged in his complaint that Daniel H. and Mary Divilbliss conveyed the lots to him on the 15th day of June, 1870; that afterwards, sometime in the month of April, 1879, his father, George H. Rudy, being indebted to M. Lynch, J. Neal and James L. Austin in about the sum of five thousand dollars, entered into an agreement with them, by which he, George H. Rudy, promised that he, as natural guardian of plaintiff, who was then a minor, would apply to the probate court for an order authorizing him, as such guardian, to sell the lots, and Lynch, Neal and Austin agreed to purchase the same at such sale and take them in full satisfaction of George H. Rudy's indebtedness to them; that subsequently George H. Rudy, as such guardian, made application to the probate court for, and procured, an order to sell the lots for the ostensible purpose of getting money to rear and educate plaintiff, and for reinvestment; and, on the 17th of May, 1879, sold the same at public auction to the said Lynch at and for the sum of $2000, he being the highest bidder therefor; that Lynch purchased and held the lots in trust for himself, Neal and Austin, until afterwards when, Austin having purchased his and Neal's interest, he conveyed the same to Austin; and that Austin thereafter conveyed the same, without consideration, to his wife and co-defendant, Mamie B. Austin; and asked that an account be taken of the rents received for the lots; that the order of the probate court be set aside; and that his title be quieted, and for other relief.

The defendant answered and admitted that the allegations in the complaint were substantially true, and alleged that the sale to Lynch was confirmed by the probate court, and that Austin purchased the interest of Lynch and Neal in the lots after the sale under the order of the probate court was made, and paid for the same and their interest in a small tract of land $1000; and answered further by way of cross-complaint, and alleged new matter, and made the plaintiff and George H. Rudy defendants therein.

Afterwards James L. Austin, and Miriam E. and Hamilton L. Austin, by their guardian and next friend, Jesse Turner, Jr., and Jesse Turner, Jr., as the executor of the last will and testament of Mamie B. Austin, deceased, filed an amended cross-complaint, in which they alleged that the defendant, Mamie B. Austin, had died since the commencement of the action and left a last will and testament, in and by which she had devised the lots in controversy to her children, the said Miriam E. and Hamilton L. Austin, and appointed Jesse Turner, Jr., executor of her will and guardian of her children, they being infants of tender years, and that he had duly qualified as such executor and guardian. That George H. Rudy had died since the filing of the original cross-complaint, intestate, leaving Alice Rudy, his widow, and John M. Rudy and his other children, naming them, his heirs, him surviving. That Alice Rudy was the duly appointed and qualified administratrix of his estate. And the plaintiffs in the amended cross-complaint made the plaintiff in the original complaint, John M. Rudy, and the administratrix and the heirs of George H. Rudy, deceased, parties defendants to their amended cross-complaint, and caused all of them to be duly served with process.

They further alleged in their amended cross-complaint substantially as follows: That George H. Rudy

purchased the lots of Divilbliss and paid for the same and caused Divilbliss and wife to convey the same to his son, John M. Rudy, a minor, being then five or six years old. That at the time of this purchase George H. Rudy was totally insolvent, without money or property, subject to execution, to pay his debts, and thereafter remained insolvent until the sale of the lots under the order of the probate court. They alleged specifically the debts which he owed at the time of the purchase, and that he had never paid them. That John M. Rudy paid nothing for the lots. That George H. Rudy caused Divilbliss and wife to convey them to him for the purpose of defrauding those who were his creditors at the time of the purchase and conveyance "and in anticipation of and reference to his subsequent indebtedness and insolvency," that is to say, to defraud subsequent creditors.

That George H. Rudy married an adopted daughter of Mrs. Olive Maxey. That Mrs. Maxey owned a valuable farm. That she permitted George H. Rudy to occupy and cultivate the same for a period of fifteen years, commencing soon after the late war between the States. That during this time he dealt largely with the merchants of Van Buren, and, although he paid them considerable sums of money out of the proceeds of the crops raised on the Maxey farm, "he was largely indebted to them all the time for goods, wares and merchandise, and for supplies furnished and money loaned." That he "dealt largely and extensively" with Lynch, Neal and Austin, merchants of Van Buren, his aggregate indebtedness to them at the time of the sale under the order of the probate court being nearly or quite $6000. That to pay this indebtedness the agreement was entered into, the order of sale was procured, the sale was made, and the lots were conveyed to Lynch, as stated in the original complaint. That the lots and improvements thereon

were only worth $2000. In consideration of these facts they asked that all the right, title, interest, estate, and claim of George H. and John M. Rudy, or either of them, in and to the lots be vested in the devisees of Mamie B. Austin, deceased, and other relief.

None of the defendants in the cross-complaint, except the minors, answered. The cross-complaint was taken for confessed as to John M. Rudy and all the adult defendants, by a decree *pro confesso* entered for that purpose.

The cause was heard and submitted upon the pleadings and exhibits and the decree *pro confesso* and the depositions of witnesses.

In the depositions the following facts appear: The business or occupation of George H. Rudy was farming. He raised large crops; his credit was good; and he contracted large debts. He commenced dealing with Lynch, who was a merchant, prior to 1870, and was indebted to him when the lots in controversy were conveyed to John M. Rudy, and continued to deal with him until he entered into partnership with Neal. He commenced trading with Neal, another merchant, in 1871, and dealt with him until 1874, when he and Lynch became partners, and then dealt with them until 1881. He commenced trading with Austin, also a merchant, in June, 1876, and dealt with him until the close of the year 1877. He contracted large debts with these merchants; made large crops, and delivered the same to them on account; and so continued to do business up to the time he compromised, as before stated. The agreement of George H. Rudy and Lynch, Neal and Austin, and the performance of it, appear in the depositions as stated in the pleadings.

A decree was rendered in accordance with the prayer of the amended cross-complaint, and John M. Rudy appealed.

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

1. Conceding the truth of the charges of the cross-complaint, appellee can not acquire title to lands by the proceedings they have resorted to. Austin's remedy was to bring suit against George H. Rudy, recover judgment and file a creditor's bill.

2. There is no evidence in the record to justify the court in finding that the property should have been subjected to George H. Rudy's debts. There is no testimony that the money was advanced by Rudy, or that he was insolvent in 1870.

3. Rudy owed Neal, Lynch or Austin nothing at the time the deed was executed by Divilbliss to plaintiff. They extended him no credit upon the faith of its ownership. These debts were contracted long afterwards. If it was a gift, they were not injured. The doctrine of tacking a new debt to an old one has been repudiated by this court. 42 Ark. 173; 38 Ark. 427. The American rule is that while voluntary conveyances are fraudulent as to existing creditors, they are not *per se* fraudulent as to subsequent creditors. There must be proof of actual or intentional fraud. 92 U. S. 183; 102 *id.* 154; 106 *id.* 264; 59 Mo. 158; 112 U. S. 144; 134 *id.* 405; 109 N. Y. 327. The American doctrine as outlined in 42 Ark. 173 is supported by 31 Conn. 372; 65 Me. 411; 67 Me. 258; 37 Pa. St. 508; 39 *id.* 499; 79 *id.* 459; 90 *id.* 293; 95 *id.* 69; 51 Ala. 318; 60 *id.* 192; 13 Cal. 62; 60 Miss. 886; 89 Ind. 556; 11 Mo. 540; 59 Mo. 158; 79 Mo. 555; 24 Kas. 780; 8 Gray, 517.

4. Even under the English law there is a difference between existing and subsequent creditors. Wait, Fr. Conv. 96; Bump, Fr. Conv. (3d ed.) 324.

Turner & Turner for appellee.

1. On a review of the whole testimony it seems clear that Rudy was insolvent at the time the lots were purchased. 125 U. S. 77; 16 Wall. 308.

2. Our statute makes conveyances in fraud of subsequent creditors void. Mansf. Dig. sec. 3374. An intent actually to defraud creditors is to be legally inferred from the grantor's being insolvent at the time, or greatly embarrassed, or so largely indebted that his conveyance necessarily has the effect to hinder and defraud creditors; and a voluntary conveyance made under such circumstances may be set aside by a subsequent creditor. Pom. Eq. Jur., sec. 973; Kerr on Fraud and Mistake, p. 207–8; 1 Peters, C. C. 460; 4 Wash. 129; 3 Johns. Chy. 481; 12 S. and R. 448; 4 Greenl. 195; 1 McCord, Ch. 518; 4 Des. 227; 3 Humph. 118; 3 Dev. 82; 1 Dana, 433. Subsequent creditors may avoid a voluntary transfer by a debtor by showing that it was made with a design to defraud the grantor's pre-existing creditors, and evidence of fraud against existing creditors is sufficient evidence of fraud against subsequent creditors. 52 Conn. 437; 50 Mo. 139; 2 Bush, 70; 29 Beav. 417; 1 Rob. (Va.) 123; 14 Sm. and M. 130; 10 N. Y. 227; 13 How. 92; 39 Minn. 527; 100 Mass. 524; 118 Mass. 524; 125 *id.* 398; 72 N. Y. 70; 54 Me. 476; 30 W. Va. 619; 92 U. S. 183; 13 Cal. 62; 12 Blatch. 256; 49 N. H. 100; 10 Ala. 348; 43 Vt. 48; 102 Mass. 272; 11 Gray, 217; 17 N. J. Eq. 367; 44 Pa. St. 413; 19 Md. 172; 2 Mackey, 43. See also 38 Ark. 425; 42 *id.* 173; 50 *id.* 43.

3. Appellees are not debarred from impeaching the conveyance by reason of the fact that they are in possession under certain illegal proceedings of the probate court. Broom's Leg. Max., secs. 685, 701; 45 Ark. 523; 30 *id.* 417; 22 *id.* 143; 33 *id.* 328; 14 *id.* 69.

BATTLE, J., after stating the facts as above reported.

1. Decree *pro confesso* on cross-complaint.

The defendants in the cross-complaint having failed to controvert the allegations therein, the same should have been taken as true. The circuit court properly treated them as confessed. Mansf. Dig., sec. 5072.

2. When gift void as to subsequent creditors.

The conveyance of the lots in controversy by Divilbliss and wife to the appellant was virtually a conveyance by George H. Rudy to his son, John M. Rudy, the same having been purchased and paid for by the father. It was a voluntary conveyance. Was it void as to the creditors of Rudy?

A debtor has the right to make reasonable provisions in property for his wife or children, according to his state and condition in life. But in doing so he must retain in his possession property amply sufficient to pay all his debts. If he does so fairly and honestly, the child or wife for whom the provision was made is not bound to refund the advancement, for the benefit of creditors, in the event the parent or husband should subsequently fail or become unable to pay the debts he owed when the provision was made. *Bertrand* v. *Elder*, 23 Ark., 494.

The law requires every man to be just before he is generous. If he makes a voluntary conveyance while he is in debt, it presumes that it is fraudulent as to existing creditors, and the burden is on those claiming under the conveyance to repel the presumption. If he be insolvent, unable to pay his debts, the presumption that it is fraudulent as to antecedent creditors is conclusive. The rule is correctly stated in *Driggs* v. *Norwood*, 50 Ark. 46, as follows: "Every voluntary alienation of his property by an embarrassed debtor is presumptively fraudulent against existing creditors. Indebtedness raises a presumption of fraud, which becomes conclusive upon insolvency. But as to subsequent creditors, a voluntary conveyance by a person in debt is not *per se* fraudulent. To make it so, proof of actual or intentional fraud is required."

According to the uncontroverted allegations of the cross-complaint George H. Rudy was unquestionably insolvent; and the conveyance to his son was void as to existing creditors. Was it void as to subsequent creditors?

Against subsequent creditors a voluntary conveyance executed by a grantor in debt at the time is not void, unless actually fraudulent. To make it fraudulent proof of actual or intentional fraud is required. As to what will be sufficient proof of such fraud the authorities are obscure and conflicting.

In order for a subsequent creditor to avoid a voluntary conveyance it is not sufficient to show that there are "debts still outstanding, which the grantor owed at the time he made it," as held in *Toney* v. *McGehee*, 38 Ark. 427. Mere indebtedness is no evidence of fraud as to such creditors. But the insolvency of the grantor at the time of the conveyance is at least *prima facie* evidence of a fraudulent intent as to them, "because a transfer of property under such circumstances affords a reasonable ground of presumption that the intention with which it was made was to put beyond the reach of creditors, future as well as present, the property to which they had a right to resort for the payment of their debts." This presumption would necessarily arise if the grantor contracted debts immediately or so soon thereafter as to show that he reasonably had in contemplation the contracting of such debts at the time the transfer was made. From his inability to pay and the voluntary alienation the conclusion would naturally follow that he did not intend to pay such debts when they were contracted, and that the conveyance of the property was intended to delay or prevent the collection thereof by the sale of the property under due process of law. *Winchester* v. *Charter*, 12 Allen, 606; *Winchester* v. *Charter*, 97 Mass. 140; *Morrill* v. *Kilner*, 113 Ill. 318, 322; *Moritz* v. *Hoffman*, 35 Ill. 553; *Taylor* v. *Coenen*, 1 Ch. Div. (L. R.) 636, 641; *Reade* v. *Livingston*, 3 Johns. Ch. 501, 502; *Redfield* v. *Buck*, 35 Conn. 328, 337; *Ridgeway* v. *Underwood*, 4 Wash. C. C. 137; *Howe* v. *Ward*, 4 Greenl. (Me.) 195, 206; *Sexton* v. *Wheaton*, 8

Wheat. 229, 252; *Horn* v. *Volcano Water Company*, 13 Cal. 71–2; Bump on Fraudulent Conveyances (3d ed.), p. 322; 2 Bigelow on Frauds, pp. 99, 181, 200; May on Fraudulent Conveyances, p. 75; 1 American Leading Cases (5th ed.), 42; 2 Pomeroy's Equity Jurisprudence, sec. 973.

This case is a fair illustration of the rule. At the time of the execution of the conveyance in question George H. Rudy was insolvent; his liabilities far exceeded his ability to pay. His vocation was farming. He had been engaged in that business for many years previous to the execution of the deed by Divilbliss and wife, and continued to farm many years thereafter. He had no other occupation, so far as is shown by the evidence. In following his vocation he purchased, extensively, goods, wares, merchandise and supplies needed to support his family and in his farming operations, on a credit, from merchants in Van Buren. He made large crops, and, when gathered, delivered them to the merchants to whom he was indebted to be appropriated to the payment of his accounts. His crops would fall far short of paying his debts, and the result was he continued to farm and contract debts and pay them in this manner every year, so far as the proof shows, using the crops of one year to pay the debts contracted in the preceding year and the current year, so far as they would extend, and was always in debt with his merchants. In this way he did business with Lynch prior to and at the time of the execution of the deed to appellant; and was in debt to him when the lots in controversy were conveyed to his son. In this way he continued to do business with him until he became a partner of Neal. In 1871, a short time after the execution of the deed in question, he commenced buying of Neal, and in this way purchased from him and delivered crops on account until 1874, when he and Lynch became partners, and in this

way did business with them until 1881. And in this way commenced business with Austin in 1876, and did business with him in the years 1876 and 1877. His habits and necessities of business were such as to plainly show that he, at the time he caused the lots to be conveyed to his son, necessarily had in view and knew that he would contract debts in the manner he did, and that his intention, in procuring the execution of the deed to his son, was to put beyond the reach of his creditors, antecedent and subsequent, the lots in controversy and to deprive them of the right to appropriate them by due process of law to the payment of his indebtedness. He could not reasonably have had any other motive. His son was about six years old, and there was no occasion for making any such provision at that time. All these facts go to prove the uncontroverted allegation of the cross-complaint that he caused the deed to be made to the appellant in order to defraud his existing creditors "and in anticipation of and reference to his subsequent indebtedness and insolvency"—to defraud his subsequent creditors.

3. When subsequent creditor subrogated to right of prior creditor.

In paying the debt which he owed to Lynch, at the time of the execution of the deed to his son, he did so by contracting another with Lynch and Neal in lieu of it, and thus continued to pay one by contracting another until he contracted the indebtedness of $6000, in the payment of which he attempted to convey the lots in controversy, by authority of the probate court. In this way Lynch and Neal, if not Austin, became subrogated to the right Lynch had to treat the conveyance in question as fraudulent (he being a creditor at the time it was executed), and to have the same set aside; became entitled to the same rights as those of the creditors whose debts their means have been used to pay. *Barhydt* v. *Perry*, 57 Iowa, 416, 419; *Madden* v. *Day*, 1 Bailey, 337, 587; *Mills* v. *Morris*, Hoffman, 419; *Brown* v. *McDonald*, 1

Hill, Ch. 297, 304; *Savage* v. *Murphy*, 34 N. Y. 508; *Churchill* v. *Wells*, 7 Cold. 364; *Wilson* v. *Buchanan*, 7 Gratt. 334; *Paulk* v. *Cooke*, 39 Conn. 566, 572; *Anon*, 1 Wall. Jr. 107; *Creed* v. *Lancaster Bank*, 1 Ohio St. 1; Bump on Fraudulent Conveyances (3rd ed.), p. 322; Wait on Fraudulent Conveyances (2d ed.) 103; American Leading Cases (5th ed.) 44.

Our conclusion is, that the conveyance to the appellant was fraudulent, and can be so treated by the creditors in this action. Acts of 1887, p. 193.

4. Practice as to setting aside fraudulent conveyances.

As it does not appear that George H. Rudy had any creditors at the time of his death, except Lynch, Neal and Austin, and the lots in controversy are not worth exceeding $2000, and as the indebtedness, in satisfaction of which the same were sold, amounted to $6000, exclusive of interest, and as it is to the interest of Rudy's estate and heirs that the contract of Rudy and his creditors, and the sale made in conformity therewith, should be permitted to stand, and as the conveyance to John M. Rudy is fraudulent and void, and he concedes that, this being true, he has no further interest in this cause, and has no objection to any course that this court may take in appropriating the lots in controversy to the payment of his father's debts, we decline entering into the consideration of what the proper practice as to the disposal of the lots is, and, no one concerned, under the circumstances, objecting, affirm the decree of the circuit court.

Affirmed.

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

SUMEROW v. JOHNSON.

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Opinion delivered April 9, 1892.

Certiorari to quash order of county court—Practice.

A judgment of the circuit court refusing on certiorari to quash an order of the county court directing an election for a change of county site will not be reversed on appeal where petitioners show no excuse for not becoming parties and prosecuting an appeal from the proceedings in the county court, where evidence introduced in the circuit court was not brought up by bill of exceptions, and where the judgment of the county court discloses no jurisdictional defect.

Appeal from Cleveland Circuit Court.
CARROLL D. WOOD, Judge.

Bunn & Gaughan for appellants.
Met L. Jones for appellee.

Certiorari cannot be used as a substitute for appeal. It is not a writ of right, but one of discretion. 44 Ark. 509; 28 *id.* 87; 43 *id.* 33; 39 *id.* 399. Errors or irregularities can be cured only by appeal. 30 Ark. 148; 35 *id.* 99.

COCKRILL, C. J. This is a petition to the circuit court of Cleveland county for a certiorari to quash the order of the county court directing an election for a change of the county site of that county from Toledo. The court denied the use of the writ. Several irregularities in the proceeding of the county court are sought to be enquired into.

I. The court was justified in refusing to consider the questions, for several reasons:

(1.) The petitioners are not shown to have been parties to the proceedings they sought to quash. *Black*

v. *Brinkley*, 54 Ark. 372; *Burgett* v. *Apperson*, 52 *id.* 213.

(2.) If their interest in the proceeding was properly established, they show no excuse for not prosecuting an appeal. *Burgett* v. *Apperson*, 52 Ark. *sup.*

(3.) If both of these objections were out of the way, the court's action would still be right, because the writ of certiorari is not granted as of course, even at the suit of one whose right of appeal has been lost without laches. If public inconvenience would result from quashing the judgment complained of, the court may deny the writ. *Black* v. *Brinkley*, 54 Ark. 372; *Moore* v. *Turner*, 43 *id.* 243.

A party may be estopped by acquiescence from questioning a judgment void for want of jurisdiction. *Black* v. *Brinkley*, 54 Ark. 372; *Moore* v. *Turner*, 43 *id.* 243; *State* v. *Leatherman*, 38 *id.* 81.

The court to which the application for the writ is made may hear testimony *dehors* the record to determine whether it is unwise to grant the use of the writ. *Burgett* v. *Apperson*, 52 Ark. *sup.*

In this case testimony was heard by the circuit court for that purpose, but it was not preserved by bill of exceptions, and it is not therefore presented for our consideration. Affidavits, copies of records used as evidence and depositions do not become part of the record in a law case, except through the medium of a bill of exceptions.

About two years after the order for the election was made, this petition for certiorari was presented. An election upon the question of change of the county site had been held by virtue of the order; a second election to settle which of two places should be the county site was subsequently held; a contest was had in the county court as to which of the two had received the highest number of votes at the second election; and, on appeal, a trial *de novo* of the same issue had been determined in

the circuit court before Toledo assumed its present attitude. That much we can ascertain from the record. We need not stop to speculate as to what additional state of facts in the way of expenditures made by the county in providing a new court house and jail, the change of the county officers from the old site to the new, and other changes the county court was authorized to make, may have been proved to the satisfaction of the court by the evidence considered by it at the trial and not preserved by bill of exceptions. If anything were needed beyond the facts furnished by the record proper to justify the action of the court, the presumption is it was furnished by the evidence considered at the trial and not preserved as part of the record.

II. The judgment of the county court ordering the election discloses no jurisdictional defect. It shows that petitions, such as the statute requires, were presented to the court to put in motion the machinery for a change of the county site, and that the court found, upon evidence adduced at the hearing, that each petition contained the requisite number of votes. The court's jurisdiction to make the order of election therefore attached; and if it be conceded that it erred in the exercise of its jurisdiction, the errors would not render the order void. But as the discovery of errors can now be of no benefit to the appellants, we decline to follow the argument of counsel for the purpose of detecting them.

Affirm.

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CHALLIS v. GERMAN NATIONAL BANK.

Opinion delivered April 16, 1892.

1. *Unacknowledged mortgage not a lien.*

A purchaser of property subject to all valid liens acquires title superior to the lien of a prior recorded but unacknowledged mortgage.

2. *Second mortgage not a discharge of first.*

Taking a second and unacknowledged mortgage is not a satisfaction of a prior mortgage duly acknowledged and recorded unless such was shown to have been the intention of the parties.

Appeal from Crittenden Circuit Court.

J. E. RIDDICK, Judge.

W. L. Bailey (of Kansas) and *W. S. McCain* for appellant.

1. The taking of a new note and mortgage is payment of the old note and releases the old mortgage, when such is the understanding of the parties. Jones, Ch. Mortg., sec. 645; Herman, Ch. Mortg., sec. 168; 11 Ala. 775. When evidences of debt are surrendered and new security taken, this is *prima facie* evidence of the satisfaction of the old securities. 46 Mich. 29; 11 Gray (Mass.), 190; 20 Minn. 411; 145 Mass. 357; 73 Ind. 429.

2. The second mortgage was not acknowledged, and was void against creditors and purchasers, even though they had actual notice. 9 Ark. 117; 18 *id.* 105; 22 *id.* 141; 32 *id.* 453; 35 *id*, 68; 40 *id.* 540; 33 *id.* 206; 20 *id.* 193; 41 *id.* 192. An unacknowledged mortgage, or one defectively acknowledged, has no right to record. 9 Ark. 117; 35 *id.* 57; 40 *id.* 540; 25 *id.* 158.

3. Appellee has not brought itself within the rule that "one who purchases subject to an outstanding

mortgage is precluded from setting up its invalidity." Boone on Mortg., ch. 11; 1 Jones on Mortg., ch. 17. No such agreement, contract or understanding was shown, but the contrary appears. See upon this point 31 Ark. 601; 7 *id.* 253; 72 Mass. 572; 12 N. Y. (2 Kernan) 79; 9 Paige, 432; Brandt on Suretyship, sec. 284; 2 Sand. Chy. 480; 99 U. S. 119; 27 N. J. Eq. 152; 56 Iowa, 349; 94 N. Y. 370; 67 Wis. 154; Wiltsie on Mortg., sec. 396. The deed from Lamberson to Challis contains a general covenant against all persons claiming under him, and no exceptions are made in favor of this mortgage.

4. One who purchases from a mortgagor can set up any valid defense against the mortgage unless he is estopped from doing so by express agreement with his vendor. 39 Ark. 182; 49 *id.* 83; 8 Paige, 440; 57 Wis. 594; 21 *id.* 241; 86 Ill. 513; 44 N. Y. 626; 4 Pet. 228.

Ratcliffe & Fletcher for appellee.

1. One who purchases subject to an outstanding mortgage is precluded from setting up its invalidity in the hands of its owners on any ground then existing. 13 Barb. 561; 2 Seld. 348; 9 Paige, 137; 5 Barb. 130; 3 Metc. (Mass.) 147; 40 Barb. 362; 45 Ill. 468; 129 Mass. 398; 104 Mass. 249; 121 Ill. 130; 13 N. E. Rep. 547. The mortgage was good as against Lamberson. He could not question its validity, and Challis is estopped from asserting any greater right than he. 1 Jones on Mortg., secs. 736, 738, 744; 34 Ill. App. 460; 36 *id.* 161; 104 Mass. 249.

2. Appellee does not claim the land under its mortgage; but if it did, it would not be precluded from showing the facts by the warranty in the deed to Challis. 23 N. J. L. (2 Zab.) 680; 90 Pa. St. 78; 92 *id.* 495. The agreement to pay off the incumbrance or take subject to same need not be in writing. Boone on Mortg., sec. 125; 29 N. J. Eq. 520; 37 Iowa, 239.

3. The taking of the second mortgage did not have the effect to satisfy the first, unless it is clear it was so intended. 2 Jones, Mortg., sec. 925–927; Jones, Ch. Mortg. secs. 643–4; 28 Ark. 195. The proof does not show such intent. But courts of equity, where the second security fails, will keep alive the first mortgage, to protect the parties. 38 Ark. 171.

4. The bank was not a party to the writing, and hence is not precluded from contradicting it by parol evidence. 16 Ark. 512; 31 *id.* 411; 45 *id.* 449; 48 *id.* 543; 4 Pet. (U. S.) 82; 56 Ala. 222; 2 Whart. Ev. secs. 1042–3 *et seq.*; 3 Fors. (N. H.) 555; 1 Greenl. Ev., sec. 279. The bill of sale contained no warranty, and all the circumstances show none was intended. 31 Ark. 423. See also 86 Ill. 573; 55 Vt. 205; 43 Ind. 213.

BATTLE, J. George Lamberson, being indebted to the German National Bank in the sum of $2500 for money loaned, executed a deed to a trustee on the first day of February, 1889, whereby he mortgaged seventeen yoke of oxen and other personal property to secure the payment of the debt for $2500, and all other indebtedness which should be contracted by him with the bank on or before the first of January, 1890. This mortgage was duly acknowledged and recorded within sixteen days after its execution. His indebtedness to the bank having increased to the sum of $9554.48, he executed a second deed, on the 6th of December, 1889, and thereby mortgaged the property mentioned in the first deed and a saw mill plant, known as "Lamberson's mill," and all tram cars, tram tracks and personal property used in connection with the mill, to secure the payment of this indebtedness, which included the indebtedness mentioned in the first mortgage. The second deed was filed for record on the day following its execution, and was recorded, but was never acknowledged, or proved by witnesses. To foreclose these mortgages this action

was brought by the bank against Lamberson, W. L. Challis and others.

Plaintiff alleged that Lamberson, on the first day of February, 1890, sold and transferred to Challis the property which was mortgaged to secure the bank, subject to the mortgages, and with the understanding that they were valid liens on the property described therein, and that the indebtedness secured thereby should be paid before Challis could acquire a good title to the property. But Challis, in his answer, denied this, and alleged that Lamberson sold the property to him unconditionally, on the 27th of December, 1890, for the consideration of $6000; and that the first mortgage was satisfied and cancelled by the execution of the second in lieu thereof.

Upon the hearing evidence was adduced in behalf of both parties, in consideration of which the court sustained the allegations of plaintiff's complaint, rendered judgment in its favor against Lamberson for the amount of his indebtedness to the bank, and decreed that the mortgages be foreclosed; and defendants appealed.

1. Unacknowledged mortgage no lien.

Under the laws of this State a mortgage is no lien on the property described in it as against any one, except the parties to it, unless it be acknowledged or proved and filed with the recorder. The second mortgage was neither acknowledged nor proved. To avoid the effect of such failure it is alleged and insisted that Challis purchased subject to it. The burden of proving this allegation rested upon the bank. To do this it adduced the testimony of Lamberson, who testified that, in selling to Challis, he took into consideration the fact that the bank held the second mortgage; that it was not his intention in selling to defeat it or in any way to affect its collection; and that, in selling to Challis, he only transferred all the right and title he had in the property. But he explained this by saying that he believed that the second mortgage was a valid lien on the property therein

described, and that Challis would pay it in order to protect his interest in the property, and that Challis took the property subject only to such claims as he should find were valid liens upon it as against him when it came into his hands as a purchaser. It does not appear that there was any understanding that he only purchased the equity of redemption, or that he would take any less interest than the law permitted him to acquire. If the mortgage was considered of any importance in the sale, it was because it was already a valid lien upon the property as against every one, and not because the parties to the sale intended to make it a lien as to Challis. The most reasonable conclusion is, Challis intended to acquire all the interest in the property purchased that the law permitted, and to recognize no lien which was not, independently of his own contract, a legal and valid lien against him. This conclusion is strengthened by the fact that, in taking a deed to the lands on which the mill and tramway were located, a covenant to warrant the title to Challis against all persons claiming under Lamberson was incorporated therein. We think that the parties imposed no limitations upon the interest in the property acquired by the purchase of Challis, except those imposed by law; and the law imposed none by virtue of the second mortgage.

2. When second no discharge of prior mortgage.

The first mortgage still remains in force, unless it has been satisfied or cancelled. The execution of the second mortgage did not operate as a satisfaction or discharge of the first, unless it was so intended or agreed by the parties. The burden of proving that it was rested on Challis. The evidence upon this point is not satisfactory. No witness testified positively that there was such an agreement. Suttler, who took the mortgage for the bank, testified: "It was not my intention to release or satisfy any claim which the bank might have against Mr. Lamberson. I was simply trying to put the secur-

ity in a little better shape." And Lamberson, who executed it, testified: "I don't know that there was much said about it. I supposed, of course, that when the new mortgage was *put on record it would satisfy the old one*, the same as the new notes satisfied the old ones." The fact is, it was an incomplete mortgage. Lamberson agreed to acknowledge it and never did. So if there was any agreement in regard to it, it never was carried into execution; and the fairest and most reasonable inference is, the first mortgage was never satisfied or discharged. *Akin* v. *Peters*, 45 Ark. 313; *Caldwell* v. *Hall*, 49 Ark. 512.

The decree of the circuit court is, therefore, affirmed as to the judgment in favor of the bank against Lamberson and the first mortgage, and is reversed as to the second mortgage, and the cause is remanded for proceedings consistent with this opinion.

GOODRUM *v.* AYERS.

Opinion delivered April 16, 1892.

1. *Equity—Jurisdiction to quiet title.*

   It is no objection to the jurisdiction of a court of equity to quiet title that plaintiff is not in possession if defendant filed a cross complaint to quiet his own title and thereby gave the court jurisdiction of the entire controversy.

2. *Tax sale—Excessive charge.*

   A sale of delinquent land, under the revenue act of 1874–5, is void where the amount for which the land sold included the fee of twenty-five cents for the certificate of purchase, such fee being payable by the purchaser for the certificate, and not as a part of the amount for which the land was sold.

Appeal from Lonoke Chancery Court.

DAVID W. CARROLL, Chancellor.

Ayers brought suit against Goodrum and another to quiet his title to certain land claimed by him under deed

from the heirs of James Timms. Defendants' answer set up title by tax sales; denied that the heirs of Timms had title when plaintiff purchased; and pleaded the statute of limitation of seven years adverse possession and that neither plaintiff nor his grantor has been possessed of the land within two years before commencement of suit. They asked that the answer be taken as a cross-complaint, and their title quieted. Plaintiff filed an amendment to his complaint, stating that the heirs of Timms had conveyed the land in question to the Little Rock & Fort Smith Railroad Company as a donation, upon condition that the road should be completed within five years, and that the road had not been completed. Wherefore they prayed that the railroad company be made a party defendant, and the deed from the Timms heirs cancelled. The railroad company appeared and consented that decree be entered against it. The evidence as to who was in possession of the land at the time suit was brought was conflicting.

Upon the hearing the court adjudged that the deed to the railroad company be cancelled, that defendant's tax title be declared null and void, and that plaintiff's title be quieted. Defendants have appealed.

Atkinson & England for appellants.

1. Plaintiff was not in possession, and hence has no standing in a court of equity; his remedy was at law.

2. The costs were charged up against the land after the delinquent list had been published, and constituted no part of the amount for which the lands were advertised. Gantt's Dig., sec. 5186; Acts 1875, p. 112, sec. 6; Acts 1874–5, page 181, sec. 24.

P. C. Dooley for appellee.

1. Plaintiff was in possession when this suit was commenced.

2. The tax deeds are void because the land was sold for too much costs. The twenty-five cents for cer-

tificate of purchase must be paid by the purchaser. Acts 1874, p. 112 and p. 227, sec. 17; 43 Ark. 375; 29 Ark. 489.

HEMINGWAY, J. Conceding that the plaintiff was not in possession of the land, and for that reason could not maintain a suit to quiet title, it cannot avail the appellant; for he filed a cross bill seeking to quiet his own title, and it gave the court jurisdiction of the entire controversy. *Radcliffe* v. *Scruggs*, 46 Ark. 96.

1. Jurisdiction of equity to quiet title.

Although the plaintiff's grantors conveyed the land to the railway company before making the deed to plaintiff, he alleged, and the railway admitted, that the conveyance contained a limitation by the terms of which the title had reverted before the execution of his deed; and this is conclusive of that fact, and presents the plaintiff's claim just as though the deed to the railway had never been executed.

If the defendant ever held such possession under his tax deed as put the statute of limitation in operation, it was taken less than two years before the bringing of this suit, and would not bar the right of a disseized owner. Mans. Dig. sec. 4475.

The tax titles are assailed upon several grounds, of which one is that the sales were made to satisfy costs not chargeable upon the land; as it is decisive of the case, we have not considered the others relied upon.

2. Tax sale void for excessive charge.

The sales were made in 1877 and 1878, and their validity is to be determined by the law then in force. By an act approved March 5, 1875, it was made the duty of the county clerk to attend all tax sales and make a record thereof, describing the several tracts sold and stating, among other things, the amount of the tax, penalty and costs due thereon.

It appears, from the clerk's record of the sales relied upon, that each tract of the land in suit was sold for an amount including eighty-five cents for costs. The

plaintiff contends that the several tracts were legally chargeable with thirty-five cents, and the excess of fifty cents was an illegal charge; while the defendant contends that eighty-five cents was legally chargeable, and furnishes an itemized statement aggregating that sum and, as he claims, made up of items properly charged upon the land.

The items are as follows:

Making certificate of purchase	25	cents.
Making copies for the printer	5	"
Attending sales and making records	10	"
Transferring land to the name of the purchaser	10	"
Advertising each tract	25	"
Collector for each tract sold	10	"
Total	85	cents.

Counsel upon each side treat the charge as made up of those items, and we accept their view of it. If it is correct, was the charge legal?

The first item is a charge for making a certificate of purchase, and is for the amount allowed by law for a certificate embracing one tract. The question is, was the fee allowed for making a certificate of purchase a charge to be included in the amount for which the land was offered? If we examine the statute regulating the sale, in connection with that providing for the redemption, it will be seen that under Gantt's Digest, as well as under the Act of March 5, 1875, amendatory thereof, the fee for a certificate of purchase was to be paid by the purchaser, and formed no part of the amount for which the land sold. Gantt's Dig. secs. 5188 and 5200; Acts 1874–5, secs. 15 and 17, pp. 226–7.

By the terms of the latter act, each tract must be offered to the person who will take the least of it and "pay the amount of the tax, penalty and costs due thereon;" and if no person bids the "amount of the tax,

penalty and costs," the collector is required to bid that amount for the State. It contemplates that the land shall be offered for an ascertained and definite amount, including tax, penalty and costs, and that the tract, or a part of it, shall be sold for exactly that sum, either to an individual or to the State. As it is offered and sold for a stated amount, no more and no less, the amount must be ascertained before the offering, and this could not be done if the fee for certificate entered into it; for if the sale is to the State, no certificate is made and no fee allowed; and if the sale is to an individual, the amount of the fee depends upon the number of tracts included in the certificate. If the certificate includes four tracts or less, the fee is twenty-five cents for all; while if it includes more than four, the fee is twenty-five cents and ten cents for each additional tract. Acts 1874–5, pp. 179–80. If the fee becomes a charge upon the land in any case, it is only after it has been sold to an individual, and even then the amount of the charge cannot be known until it is known how many tracts are included in the certificate. It is therefore plain that the fee, a contingent and variable charge, was not intended to be included in the definite amount for which the law directed the land to be sold.

As such fee was unlawfully embraced in the amount for which the several tracts were sold, it follows that the sale was unauthorized and void. The amount of the illegal excess is small, but, according to the decisions of this court, and the general current of authorities elsewhere, it is sufficient to invalidate the sale. Black, Tax Titles, secs. 98–9.

In this view it is unnecessary to consider whether other items were or were not costs upon the lands for which they could be sold.

Finding no error in the matters relied upon by the appellant, the judgment is affirmed.

HIGHT v. HARRIS.

Opinion delivered April 16, 1892.

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Sale of chattel without delivery—Innocent purchaser takes title.

The owner of a mule offered to sell it to plaintiff, who thereupon paid for it, under an agreement that the vendor should retain possession until a subsequent day. In the meantime defendant purchased the mule from the owner in good faith and took immediate possession. In a suit by plaintiff to recover the mule, *held*, there was evidence to support a finding of fact that there was no such legal delivery to plaintiff as would complete the contract of sale and protect plaintiff's title from an innocent purchaser.

Appeal from Washington Circuit Court.
E. S. McDANIEL, Judge.

J. D. Walker for appellant.

The sale and delivery to appellant were sufficient to vest the title in him as against a subsequent purchaser. 8 Ark. 213; 19 *id.* 567; 1 Benj. Sales, p. 12, sec. 6. Retention of possession by vendor is not conclusive proof of fraud. 54 Ark. 307.

B. R. Davidson for appellee.

Where there is a contract for future delivery or at a given place, the title does not pass until such delivery. Benj. on Sales, sec. 325; 113 Mass. 391–4; 101 Ill. 138. In this case there was no delivery, and hence no title passed as against subsequent purchasers without notice. 25 Ark. 553; 31 *id.* 136; 47 *id.* 214; 54 *id.* 308; 95 U. S. 683; Chitty, Cont. (10th ed.) 406; 14 Metc. 303; 19 Pick. 9; 6 Allen, 413; 3 Cr. 354; 5 Whart. 445; 44 Penn. St. 407; 8 B. Mon. 11.

HUGHES, J. On the 29th day of September, 1890, one Largent went to the residence of the appellee, and proposed to sell him a mule colt. They agreed upon the price, and that the mule should be paid for on delivery. On the next day, Largent went to the town of Fayetteville, riding a mare which the mule followed. He offered the mule for sale to the appellant, who paid him the price they agreed upon, and it was agreed that Largent should deliver the mule to appellant on the 15th of the following month at Fayetteville. Largent left appellant's house, riding the mare, the mule colt following. Late in the afternoon of the same day, which was the 30th of September, Largent rode up to the house of appellee, sold him the mule for forty-five dollars, received the money, and went on.

Appellant sued to recover possession of the mule. The court sitting as a jury found the facts and declared the law for the appellee, and gave judgment accordingly, from which this appeal was taken.

If it was a part of the original agreement and understanding between Hight and Largent that the mule was not to be delivered till the 15th of October, the title to it did not pass so as to protect the vendee against a subsequent innocent purchaser from Largent. But if, at the time of contract between Largent and the appellant, it was understood between them that the mule was then delivered and by the appellant permitted to remain in the possession of Largent as his bailee, to be returned to him on the 15th of October, this was a legal delivery, though there was no actual change of possession, and the title to the mule vested in the appellant. Legal delivery, and not a visible change of possession, is all that is demanded to protect the vendee's title. *Shaul* v. *Harrington*, 54 Ark. 307. There was no proof of any fraud in the case.

Under our decisions, the retention of possession by the vendor of personal property after sale is not a conclusive presumption of fraud. Whether there was a delivery, within *Shaul* v. *Harrington*, was a question of fact. We cannot say there was not evidence to warrant the finding of the court.

The judgment is affirmed.

GAINES *v.* BELDING.

Opinion delivered April 16, 1892.

1. *Slander—Words actionable* per se.

   To charge a person with being a "God damned thief," without words of qualification, is actionable *per se*.

2. *Verdict—When damages not excessive.*

   The verdict of a jury in an action of slander will not be set aside for excessive damages unless there be some suspicion of unfair dealing or the case be such as to furnish evidence of prejudice, partiality or corruption on the part of the jury. In this case a verdict of $2500 damages for slanderously calling plaintiff a "God damned thief" is not excessive.

Appeal from Garland Circuit Court.

JAMES B. WOOD, Judge.

U. M. & G. B. Rose and *Geo. G. Latta* for appellant.

1. The words were not actionable *per se*, and there is no allegation or proof of special damages. Odgers on Libel and Slander, 60; Towns. on Sl. and Lib. sec. 165. In the connection in which the words were used they amounted to nothing more than an abusive epithet. As illustrating the doctrine, see 1 Viner's Abr. 417; *ib.* 426; *ib.* 443-447, 491, 502, 503, 506; 7 Taunt. 205; 1 Cr. Jac. 65; 4 Eng. L. and Eq. Rep. 451; 2 E. D. Smith, 388; 8 Jones (N. C.) 66; 2 Green (N. J.) Law, 186; 1 Humph. 9; 1 Bailey, 595; 2 N. H. 398; 12 Pick. 100; 16 Pick. 1; 5

How. Pr. 171; S. C. *id.* 99; 7 Black. 117; 1 Johns. Cases, 279; 2 T. B. Mon. 66; 3 H. and J. 38; 60 Iowa, 251; 35 Iowa, 9; 12 Minn. 497; 5 Ill. 30; 15 *id.* 37; 12 Johns. 239; 40 Ind. 506; 48 Md. 494; 88 Ind. 248; 27 Pa. St. 112; 82 N. C. 296; 8 Mo. App. 43.

2. The verdict was grossly excessive.

G. W. Murphy for appellee.

1. The words were actionable *per se.* 42 Ind. 387; Cro. Eliz. p. 224; Towns. Sl. and Lib. secs. 165, 169. When one says of another "he is a thief," the law presumes that he intends to impute crime, unless a contrary intent be shown. 5 Ill. 30; 1 Bailey, 595; 2 E. D. Smith, 388; 2 Green (N. J.), Law, 186; 16 Pick.; 21 Pick. 51. In the absence of an accompanying explanation, the words will be presumed to have been used in their natural sense. 48 Barb. 581; 4 E. D. Smith, 218; 3 Dana (Ky.), 138. It was not competent to inquire how or in what sense the hearers understood the language; such an inquiry is admissible only when the meaning of the language is ambiguous or doubtful. 36 Barb. 438; 13 Ired. (N. C.) Eq. 142; Towns. Sl. and Lib. pp. 148, 650, secs. 97, 384. Words are presumed to have been understood by hearers in their natural sense; and when it is competent to show that they were understood in a different sense, the burden of so showing is on defendant. Towns. Sl. and Lib. pp. 183, 210; 5 Ill. 30. Under our statute the words are actionable. Mansf. Dig. sec. 1815; 36 Ark. 210; 12 Ark. 626.

2. The damages are not excessive. 4 Vt. 304; 15 Pick. 506; Towns. on Sl. and Lib. pp. 534, 541, secs. 289–293; 1 Suth on Dam. 810–11; 6 Am. Dec. 253; 2 *id.* 244; 1 Burr. 609; 2 Wils. 405; 3 *id.* 60; 2 *id.* 205; 2 W. Bl. 1327; Cowp. 230; 4 T. R. 651; 4 Mass. 1; 2 Johns. 63; 2 Wend. 352; 20 Am. Dec. 616; 36 *id.* 584. When one from ill-will or actual malice slanders another, the jury may assess such damages as they deem just

under all the circumstances. 22 Am. Rep. 306; 39 Fed. Rep. 672; 6 Am. Rep. 314; 34 Md. 128; Towns. Sl. and Lib. 131, 138, 538.

HUGHES, J. The appellee sued appellant for slander, and recovered a judgment for $2500, from which this appeal was taken.

The appellant rode up near where the appellee had a place of business, in the city of Hot Springs, and inquired for a harness shop. He was told that George Belding had a harness shop there. He asked, "what Belding?" and was answered, "George Belding." The person who answered him started to go to call Belding, when the appellant said, "Never mind. George Belding is too God damned a thief for me"; and rode off. The complaint charges that the words were false, and that they were spoken maliciously. No special damages are alleged, insisted upon or proven. The answer denied malice, any desire to injure the plaintiff, and the fact of injury, and also denied the use of the language.

The appellant contends that the words were not actionable *per se*, but admits that "if you say of a man, without explanatory words, 'he is a thief,' an action will lie, not because you have accused him of wickedness, but because the word 'thief' unexplained implies the previous commission of the crime of theft." This is exactly the case we have. The words used by the appellant, unexplained, amount to a charge that the appellee had been guilty of larceny, which is an infamous crime. There was no explanation.

1. What words actionable *per se*.

The appellant's counsel contends that the words used ought not to be understood as a charge that the plaintiff was a thief, but as indicating that the defendant simply had been guilty of a degree of moral turpitude. There was no qualification of the language used, and the meaning of it, if there was any doubt, was a question for the jury. "Where words are capable of two constructions,

in what sense they were meant is a question of fact to be decided by the jury." Townshend on Slanderd an Libel, sec. 281, pp. 503–504. The words were actionable if published with the intent to charge crime. *Id.* p. 504. "When a party has made a charge that clearly imputes a crime, he cannot afterwards be permitted to say, I did not intend what my words legally imply." *Id.* sec. 139, 84, 90, 91, 92. Shakespeare says: "A jest's prosperity lies in the ear of him who hears it." A general charge of being a thief is actionable, as to call one "a hog thief," "a bloody thief." *Id.* 169. It is also actionable to call one a "damned thief." "If merely fraud, dishonesty, immorality, or vice, be imputed, no action lies without proof of special damage. And even where words of specific import are employed (such as 'thief' or 'traitor), still, if the defendant can satisfy the jury that they were not intended to impute any specific crime, but merely as general terms of abuse, and meant no more than 'rogue' or 'scoundrel,' and were so understood by all who heard the conversation, no action lies." Odgers on Libel and Slander, 60.

2. When verdict for damages not excessive.

Are the damages assessed by the jury excessive? Where the words spoken are actionable *per se*, *prima facie* the law implies malice, and the jury can award compensatory damages only, but cannot award exemplary or punitive damages, without proof of express malice. Whether there was express malice, was a question of fact for the jury. Malice may be shown by the defamatory words themselves and the manner of their publication, and need not be proven by extrinsic evidence. The absence of legal excuse for publishing the slander is evidence of malice. Express malice may be inferred from all the circumstances of the case, but it is not to be inferred from the facts alone that the words are false and injurious to the plaintiff, although an implication of malice arises from these facts that will

warrant compensatory damages. Townshend on Slander and Libel, pp. 647, 649, n. 2; *Sexton* v. *Brock*, 15 Ark. 355; *Templeton* v. *Graves*, 59 Wis. 95 (17 N. W. Rep. 672); *Rwy Co.* v. *Bridges*, 86 Ala. 448 (5 So. Rep. 864); *Newman* v. *Stein*, 75 Mich. 402 (42 N. W. Rep. 956); Newell on Defamation, p. 845, n. 9.; Lawson's Rights and Rem. sec. 1302. Where actual ill will or express malice is shown, the jury may give exemplary or vindictive damages, the amount of which it is their province to determine, under proper instructions from the court. Townshend on Slander and Libel, pp. 516, 520 and 521. The verdict of the jury in an action for slander will not be set aside for excessive damages unless there is some suspicion of unfair dealing, or unless the case be such as to furnish evidence of prejudice, partiality or corruption upon the part of the jury. "The case must be very gross and the damages enormous to justify ordering a new trial on a question of damages." *Id.* 554 and n. 5.

No exceptions were saved to any of the instructions given by the circuit court in this case. Finding no reversible error, the judgment is affirmed.

BARNES v. BRADLEY.

Opinion delivered April 23, 1892. 56 90 105 88

1. *Remedies of creditor holding collateral security.*

Where a creditor holds the note of a third person as collateral security for the payment of his claim, he has the right to prosecute both claims to judgment and collect what is due him upon either, though he can have but one satisfaction of his demand.

2. *Payment—Burden of proof on debtor.*

Where collateral security has been given for the payment of a debt sued upon, it is incumbent on the debtor, if he relies on that defense, to allege and prove that the debt has been paid, whether by collection of the collateral security or otherwise.

Appeal from Garland Circuit Court.

JAMES B. WOOD, Judge.

John M. Harrell for appellant.

The court erred in compelling the defendants to take the affirmative and make out their case first, and in admitting the satisfied note in evidence. Plaintiff should have been required to show that the collateral notes had not been collected. The burden was on him. Plaintiff is estopped by his laches. 75 Am. Dec. 115, and note; 88 N. Y. 339.

G. W. Murphy for appellee.

Under the plea of payment, the burden was on defendants. 32 Ark. 593; 16 *id.* 651; Hempstead, 184. The taking of notes, checks, etc., is not payment, unless it is so agreed. 48 Ark. 267; *id.* 49, 58. The testimony shows the notes were taken merely as collateral.

COCKRILL, C. J. The appellant's answer to a suit against him upon a note which he had executed was that

the appellee had accepted from him notes of a third person in satisfaction of the one in suit. The court acting in place of a jury found, in effect, upon ample testimony, that the notes of the third person were held as collateral security for the note declared on.

1. Remedies of holder of collateral security.

The proof tended to show that the appellee had obtained judgment on the notes which he held as collateral security against the maker thereof. Conceding that the fact is established, it would not debar the creditor from prosecuting to judgment his demand against the principal debtor. It was his right to prosecute both claims to judgment and collect what is due him upon either, though he could have but one satisfaction of his demand. Schouler's Bailments, sec. 246; *West* v. *Carolina Life Ins. Co.*, 31 Ark. 476.

2. Burden of proof as to payment on debtor.

The appellant contends however that the plaintiff should have been required to show that he had collected nothing on the collateral security before he could have judgment upon the principal debt. But the burden of proving payment of the debt, whether by collection of the collateral security or otherwise, rested upon the defendant. Wood's Byles on Bills and Notes, 387-8. It was incumbent upon him both to allege and prove that defense if he desired to make it. *Plant's Mfg. Co.* v. *Falvey*, 20 Wis. 200. He did neither in this case, but relied upon an accord and satisfaction and failed.

Under pleadings properly presenting the issue, the defendant might have cast upon the plaintiff the burden of accounting for or of producing the collateral security unsatisfied, by proving a demand to that effect accompanied by a tender of the amount due; and, upon his failure to properly account, the value of the security should have been deducted from his demand. A like state of proof would be cause for granting an injunction to stay proceedings after the case has gone to judgment. *Aldrich* v. *Cooper*, 2 Lead. Cas. Eq. (pt. 1) 228, 312;

Stuart v. *Bigler's Assignees*, 98 Pa. St. 80 and cases cited; Jones, Pledges, secs. 595–6. But no such case is presented by the record.

Finding no error, the judgment is affirmed.

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ORR *v.* STATE.

Opinion delivered April 23, 1892.

School lands—Forfeiture of sale—Waiver by State.

Under section 5563 of Gantt's Digest, which provides that should a purchaser of school lands "fail to pay two installments of interest upon said purchase money, he shall forfeit said purchase, and it shall be the duty of the collector to offer such land for sale again as soon as practicable after such forfeiture," a defense to a suit on a note for the purchase money of school land which alleges a default in payment of two installments of interest is insufficient in not alleging that the State has taken steps to enforce the forfeiture.

Appeal from Miller Circuit Court.

LAWRENCE A. BYRNE, Judge.

C. C. Hamby for appellant.

When appellant made default in the payment of the note sued on, the land reverted to the State, and her contract of purchase was rescinded, and her cash payment remains the property of the State as a penalty to cover all damages occasioned by her default. Mansf. Digest, secs. 6283, 6284, 6290. 18 Ark. 269; 101 Mass. 479; 99 *id.* 305; Sugden on Vendors (14th ed.) p. 39; 9 A. & E. 508; 36 E. C. L. 181; L. R. 10 C. P. 538. Where a contract is rescinded by the vendor, even for the vendee's default, the vendor should restore what he has received upon the first sale. 30 Barb. 20; 4 *id.* 354; 29 *id.* 315; 63 *id.* 321; 15 S. & R. 227; 13 Ind. 484; 32 Iowa, 101;

4 A. & E. 599; 5 East, 449; 2 Young & J. 278; 50 Texas, 287. The answer presented a good defense.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

Sec. 5563 Gantt's Digest and sec. 6290 Mansfield's Digest were intended to *enforce* payment of the purchase money. The penalty is intended for the debtor and not to be borne by the State. They only give the State another remedy to enforce payment. 31 Ark. 219; 34 Pa. St. 288; 54 *id.* 227; 63 *id.* 317; 96 *id.* 440; 12 Conn. 499; 5 Mich. 288; Endlich, Int. Stat. sec. 466, page 664.

COCKRILL, C. J. In 1885 the State instituted suit against Belle Orr, the appellant, upon a promissory note executed March 21, 1878, due two years after date. The appellant answered, admitting the execution of the note, but denying that she was indebted thereon, "because," to quote the answer, "the said note was given for the purchase of school lands and default in the payment of interest thereon, as the law prescribes, had forfeited the contract of purchase between the plaintiff and defendant, and, under the provisions of the statutes governing such sales, the land had reverted to the State of Arkansas and was and is now subject to sale." The appellant declined to plead further after a demurrer to the answer was sustained; judgment of recovery was rendered; and the question is, did the answer present a defense?

A provision of the act of 1869 in reference to the sale of school lands, which was in force when the note was executed, was as follows:

"Should said purchaser fail to pay two installments of interest upon said purchase money, he shall forfeit said purchase, and it shall be the duty of the collector to offer such land for sale again as soon as practicable after such forfeiture, as in other cases under this act." Gantt's Dig., sec. 5563.

The appellant's theory is that the statute worked a rescission of the contract upon default in payment of two installments of interest. But the language of the statue is that the purchaser shall *forfeit* his purchase, and there is a marked difference between a forfeiture and a rescission. The rescission of a contract restores the parties to the position they occupied before it was entered into ; a forfeiture works a loss, it may be of an estate or of a sum of money, or of both. When forfeitures or penalties are imposed by contract, courts of equity lean against their enforcement when they relate to matters admitting of compensation or restoration. But "where any penalty or forfeiture," says Judge Story, "is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture if incurred; for it would be in contravention of the direct expression of the legislative will." Story's Eq. Jur., sec. 1326; *Farnsworth* v. *Railway*, 92 U. S. 49.

Provisions of the statute in force when this contract was entered into seem to indicate that the legislature intended, not only to work a forfeiture of the purchaser's estate in the land, but also to impose upon him the penalty of paying what he had promised in order to augment the school fund. Mansf. Dig., secs. 6130, 6138.

It is sufficient, however, to say of the answer in this case that it is defective in that it does not allege that the State had taken any steps indicating the intention to enforce the forfeiture. It is alleged that there had been a failure to pay two installments of interest, and that therefore a forfeiture resulted. But the legal conclusion thus presented is not an issuable fact, and its truth is not admitted by the demurrer. *State* v. *Stevenson*, 2 Ark. 260.

Conceding the truth of the facts alleged, title to the lands vested in the appellant, subject to the condition

that it should revert to the State if there was a failure to pay two installments of interest on the purchase money. The payment of interest becomes, then, a condition subsequent annexed to the estate transferred to the appellant, and it was for the State alone, through her agents, to take advantage of the non-performance of the condition in the manner pointed out by the legislature. *Schulenberg* v. *Harriman*, 21 Wall. 44, 63; *St. Louis &c. Railway Co.* v. *McGee*, 115 U. S. 469, 473.

The condition is inserted for the benefit of the vendor and not of the vendee. To give the statute the construction contended for by the appellant, who is the vendee. would place it in her power to take advantage of her own default against the wishes of her vendor. Such was not the intention of the law-makers.

The answer presented no defense, and the judgment is affirmed.

WILSON *v.* THOMPSON.

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Opinion delivered April 22, 1892.

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Local option law—Sufficiency of petition.

Under the local option law,* a petition to the county court of the county in which a school house is situated to prohibit the sale of intoxicating liquors within three miles of such school house must be signed by a majority of all the adult inhabitants residing within such territory, though it includes a portion of another county; as the county court in such case acts merely as the administrative agency whereby the statute is set in force, county lines can form no obstacle to the operation of the law.

Appeal from Yell Circuit Court, Danville District.
JORDAN E. CRAVENS, Judge.

W. D. Jacoway and *R. C. Bullock* for appellants.

The petition must be signed by a majority of the adult inhabitants residing within the prescribed area

*Mansf. Dig., sec. 4524, as amended by Acts 1889, p. 139.

regardless of county lines. The act contains no exception or qualification. It is the act of the legislature that prohibits ; the order of the county court merely puts the act in operation, and county lines form no barrier. The proceeding is a mere police regulation, and when the order is made the power vested in the county court is exhausted. See 40 Ark. 293; 35 *id.* 74; *ib.* 414; 37 *id.* 384; Cooley, Const. Lim. (4th ed.) star p. 117 to 125 and notes.

COCKRILL, C. J. This proceeding arose under the local option law. Mans. Digest, sec. 4524, as amended in 1889. Acts of 1889, p. 139. A petition was presented, under that statute, to the county court of Yell county to prohibit the sale or giving away of intoxicating liquors within three miles of the Dardanelle Male and Female Academy.

The academy is located in Yell county but within three miles of the Pope county line. The three mile radius therefore takes in a part of the territory of Pope county. The circuit court, where the cause was tried on appeal from the order of the county court, found that the petition contained the names of a majority of the adult inhabitants residing in Yell county within three miles of the academy, but that it did not contain the names of a majority of the adult inhabitants residing within three miles of the academy. In other words, the adult inhabitants residing in Pope county within three miles of the academy were excluded from the enumeration, and the prayer of the petition was granted without reference to them. The question is, does the law require that the adult inhabitants of Pope county who reside within the three mile area shall be taken into account?

As a prerequisite to the operation of the prohibitory law, the statute, to which reference is made above, prescribes that there shall be presented to the county court of the county in which the school or church to be pro-

tected is situated a petition signed by a majority of the "adult inhabitants residing within three miles" of the designated school-house or church, and that the prayer of the petition shall be that the sale of intoxicating liquors shall be prohibited within "three miles of" such house. It is further prescribed that when the order for prohibition is granted, it shall be in accordance with the prayer of the petition, and that thereafter the sale or giving away of intoxicating liquors shall be unlawful "within the limits aforesaid." The only limit of territory mentioned in the act is the three mile limit. Whenever the limit is mentioned, whether with reference to the residence of the persons who may petition, the description of the territory in the petition, or the extent of the territory within which the sale or giving away of liquor shall be unlawful, it is the same—that is, an area embraced within a circle of a three mile radius, having the school or church-house designated in the petition for its center. There is nothing in any other provision of the act to control or influence the meaning of the language used. It is plain and unambiguous.

The inhabitants residing in Pope county within the circumference described by the three mile radius are then within the letter of the statute. Their territory is also as much within the evil that the law seeks to suppress as any other part of the territory equally distant from the academy. A licensed saloon in the immediate neighborhood of a school or academy would exercise the same influence upon one side of the county line that it would if situated on the other. Imaginary lines are not barriers to the influence of the liquor traffic. There is nothing in the reason of the law to control its obvious meaning, and there is no room therefore for construction or interpretation. "The legislature has spoken, their intention is free from doubt, and their will must be obeyed,"

(Sedgwick on Statutes, p. 194), unless the constitution interposes some obstacle in its way.

The local option feature of the statute has been adjudged by this court not to transcend the power of the legislature, but to come within the class of police regulations in respect to which it is proper that the local judgment should control. *Boyd* v. *Bryant*, 35 Ark. 69; *Trammell* v. *Bradley*, 37 *ib.* 374. Our decisions upon that question are in accord with the weight of authority. See cases cited in note to *Commonwealth* v. *Kimball*, 35 Am. Dec. 326, 337, and *Feek* v. *Township Board*, 82 Mich. 393.

The questions upon that score and others involved in the case are settled in this court. But in *Trammell* v. *Bradley*, 37 Ark. *sup.*, Judge Eakin, in speaking of this act, said: "Trouble may arise in giving effect to an act where the institution is so near a county line that the surrounding area of three miles would enter two or more counties." The nature of the trouble is not indicated in the opinion, further than that it is a difficulty presented by county lines. When we look to the theory or reason upon which local option is sustained, county lines seem to form no obstruction to the three mile limit prescribed by the act.

It is not the order of the county court acting of its own force like a decree *in rem* upon the territory within the prescribed circle, or upon the citizens residing therein, that prohibits the sale of liquor. It is the statute that prohibits, and not the order of the county court. The county court is only the administrative agency appointed by the legislature to determine the contingency when the statute shall have operation. "The courts," as was said in *Trammell* v. *Bradley*, "are not empowered to order anything positive. They act only by negation. * * * The laws (that is, the statutes) operate by their own vigor, and are as valid at the beginning as, at

law, a conveyance would be, with shifting and springing uses, conditional limitations and contingent remainders." That is the theory upon which the constitutionality of such statutes is sustained.

As it is the act of the legislature which prohibits, how can county lines stop its operation?

If the legislature had enacted that the sale of liquor within three miles of the Dardanelle and all other academies should be prohibited for the period of two years, the prohibition would have extended of course over the territory in Pope county, which falls within the area of the radius. The power so to legislate is unquestioned. *Wilson* v. *State*, 35 Ark. 414, 421. But when the additional power is established, as it is by the authorities which sustain local option laws, to select an agency that can set the act in operation in a particular locality with the same effect in that locality as a general act for all similar localities would have, county lines can form no obstacle to the operation of the law thus set in motion, unless there is some constitutional defect in the power of the particular agency selected to act. Upon that ground it has been argued that the county court of one county can not be empowered to exercise jurisdiction over the local concerns of another county. But it is sufficient to answer that the duties imposed upon the county court are administrative and executive rather than judicial. They are such as are often delegated to election officers or boards. They are no more judicial than the acts of appraisement or proportionate distribution of expenses performed by a board of appraisers or of equalization; and that such functions are not strictly judicial has been determined by this court in the case of *Prairie County* v. *Matthews*, 46 Ark. 383, and by the Supreme Court of the United States in *Upshur County* v. *Rich*, 135 U. S. 467. The fact that the order made by the judge may be subjected to judicial examination by

appeal, or by an application in the nature of an appeal, does not render the original action less administrative. It is expressly so decided in both of the cases last cited. Nor is it a fatal objection to the legislation that such a duty is imposed upon a court. *Oliver* v. *Martin*, 36 Ark. 134.

The previous utterances of this court are in harmony with these views. In *McCullough* v. *Blackwell*, 51 Ark. 159, the court said: "The presentation of the petition (under the three mile law) is in the nature of an election. When the county court has acted, the votes have been cast and the election returns made." In *Wilson* v. *State*, 35 Ark. 414: "When the order is made, the power vested in the county court is exhausted." In *Williams* v. *Citizens*, 40 Ark. 290: "The proceeding under the three mile law is a police regulation and not in the nature of a suit between parties."

The circuit court erred in its judgment. The order for prohibition was made in January, 1890, and has expired by limitation of law. The appeal is therefore fruitless. For that reason the practice would have justified a dismissal without going into the question presented by the record. The costs only are now involved, but it was not for that reason that we have felt called upon to determine the cause, for costs are only an incident of litigation, and cannot be made the object of the appeal any more than of the litigation. But the cause was of practical importance, and the appellants prosecuted the appeal without delay. Having gone into the subject of the litigation and found that the judgment was erroneous, the appellants are entitled to their costs in both courts.

So ordered.

MUNZESHEIMER v. BYRNE.

Opinion delivered April 23, 1892.

Bond for costs—Witness fees—Who may collect.

The successful party in an action cannot sue on a bond for costs, executed to him by the adversary party, to recover fees due to witnesses in such action, without making the witnesses parties, unless it appears either that the fees were due to his witnesses, or that he has an interest in the fees, or that he was authorized by the parties to whom they were payable to sue for them.

Appeal from Miller Circuit Court.

C. E. MITCHEL, Judge.

Scott & Jones for appellants.

1. The appellants, as obligees in the bond, had the right to sue without joining the parties for whose benefit the suit is prosecuted. Mansf. Dig. secs. 4933, 4936; 7 Ark. 149; Newman, Pl. and Pr. 93–4; Bliss, Code Pl. secs. 55, 57, 58; 48 Ark. 355; 18 N. Y. 374; Pom. Rem. sec. 175.

2. If the complaint was imperfect, or insufficient in allegation, defendant's remedy was by motion to make more definite and specific. 31 Ark. 379; *ib.* 657; 32 *id.* 131; *ib.* 315; 38 Ark. 393.

L. A. Byrne and *E. F. Friedell*, *pro se.*

1. Every action must be brought in the name of the real party in interest, with certain exceptions. Mansf. Dig. sec. 4936; Bliss, Code Pleading, secs. 55, 56, 57. Plaintiffs do not come within the exceptions. See also 38 Ark. 72.

2. The complaint fails to show that plaintiffs are suing for the use and benefit of any party in interest, or even at the request of any party in interest.

HUGHES, J. The Eagle Phenix Manufacturing Company sued appellants and procured an attachment, having first executed the following bond:

"Eagle Phenix Manufacturing Co., Plaintiff, *v.* Munzesheimer & Klein, Defendants.

"We undertake that the plaintiff, The Eagle Phenix Manufacturing Company, shall pay to the defendants, Munzesheimer & Klein, or either of them, all damages which they may sustain by reason of this attachment if the order therefor is wrongfully obtained, and the costs of this action.

(Signed) EAGLE PHENIX MFG. CO.
By SAMUEL P. MENDEG, Agt.
L. A. BYRNE.
E. F. FRIEDELL."

At the meeting of the court, by consent, the attachment was dissolved, and judgment was rendered against the appellants for the debt, but against the plaintiffs in the suit for the costs. The appellants sued on the bond set out to recover one hundred and seventy-four dollars, witness fees, as part of the costs, making itemized statements of the fees exhibits to the complaint. The complaint does not allege that appellants had paid any part of these costs, that they were for fees due the defendants' witnesses, or that they had any interest in the fees, or that they were authorized by the parties who owned them to collect them, or sue for them—or facts which show this. The appellees demurred to the complaint: (1.) for defect of parties; (2.) because the complaint does not state facts sufficient to constitute a cause of action. The court sustained the demurrer. The appellants excepted, stood on their complaint and appealed.

The bond in suit seems to have been an attachment bond, and also a bond for costs. It provides that the plaintiffs shall pay to the defendants all damages which

they may sustain by reason of the attachment, if the order therefor was wrongfully obtained, and the costs of the action.

Section 1036 of Mansfield's Digest provides that the condition of a bond for costs by a non-resident plaintiff, or a corporation other than a bank created by the laws of this State, shall be for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court. This seems to contemplate that each party will pay his own costs, and that judgment will go against the losing party for costs expended by the other party.

"Every action must be prosecuted in the name of the real party in interest, except as provided in sections 4935, 4936 and 4938." (Mansfield's Digest, sec. 4933.) The complaint does not state facts which show that the plaintiffs would have any interest in or right to control the fruits of the judgment, if judgment should be rendered in their favor.

Section 4936 of the Digest provides: "An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or the State, or any officer thereof, or any person expressly authorized by the statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted." The statute contemplates that the bond for costs shall secure to the defendant and the officers of the court such costs as may accrue to either of them. (Sec. 1036, Mansfield's Digest). It is not alleged in the complaint that these costs accrued to the defendant, or the officers of the court. The bond does not follow the statute; yet if the plaintiffs had stated facts showing that they were suing as the trustees of an express trust or as persons with whom the contract was made for the benefit of the wit-

nesses holding the certificates, they could maintain the action without making the witnesses parties, the bond being good as a common law bond. But none of those things are shown.

The judgment is affirmed.

COHN v. HOFFMAN.

Opinion delivered April 23, 1892.

Mortgage—Amount required to redeem.

An execution purchaser of a mortgagor's interest in land is entitled to redeem upon payment of the mortgage debt, and cannot be required to pay any other debts of the mortgagor not a charge upon the premises when the judgment lien attached.

Appeal from Jackson Circuit Court in Chancery.

JAMES W. BUTLER, Judge.

Compton & Compton for appellant.

At the commencement of this suit, plaintiff did not stand in the attitude of a judgment creditor of Bray. He had long before become the purchaser or assignee of Bray's equity of redemption at the sale and execution, by force of which the lien of his judgment was exhausted and ceased to exist. Freeman on Judg. (3d ed.), sec. 390; 4 Cow. 133. As purchaser of the equity of redemption he is in privity of estate with Bray, stands in his shoes, and can only redeem as Bray himself might redeem; that is, upon payment, not only of the mortgage debt, but of all other debts due from him to the mortgagee. 23 Ark. 479; 3 Ark. 556; Strobh. (S. C.) Eq. 257.

Robert Neill for appellee.

1. The right to redeem upon payment of the mortgage debts is *res judicata*. 45 Ark. 302.

2. It is immaterial whether appellee is *now* a judgment creditor or not; his rights were acquired by virtue

of *having been* a judgment creditor, and by having purchased at execution sale the equity of redemption in Bray's land, upon which his judgment was a lien at the date of his purchase. It is stated in 23 Ark. 493, "that when a subsequent mortgagee or judgment creditor files a bill to redeem, he will be allowed to do so on payment of the mortgage debt only." A purchaser of the equity of redemption by a deed without covenants takes the land charged with the payment of the *mortgage* debt. 15 Am. & Eng. Enc. Law, p. 833, and note 2, p. 834, note 1; Boone on Mortgages, secs. 160, 163; 43 Ind. 211.

HUGHES, J. The appellee had a judgment lien on the lands he seeks to redeem in this suit from two mortgages which were prior in time, and the lien of which was superior, to the appellee's judgment lien. Appellee had execution upon his judgment, sold the lands thereunder, and bid them in. After appellee's judgment was rendered, and became a lien upon the lands, subject to the liens of appellee's two mortgages, and before appellee's purchase, the appellant had bought up several considerable claims against one Bray, his mortgagor and the judgment debtor of the appellee; and in April, 1881, before the purchase by appellee at the execution sale in October, 1881, the appellant bought the interest of Bray in the lands, in satisfaction of his demands against him, and took a deed therefor, and went into possession of the lands. The appellee, after the time for redemption from the execution sale had expired, took a deed also to the lands from the sheriff. He brought this suit to redeem the lands by payment of the amount of appellant's mortgages only, and for an account of rents and profits.

The appellant contends that the appellee is not entitled to redeem; but if he is, that he can only redeem by paying all of the indebtedness of Bray to the appellant, as well that which was created after the lien of the appellee's judgment had attached to the land as the two

prior mortgages; as also the value of improvements and the amount of taxes paid by the appellant upon the lands, having, as he avers, made the improvements and paid the taxes in good faith, believing that he was the owner of the lands.

A demurrer to the bill was overruled. The answer was made a cross-complaint. The plaintiff demurred to all the paragraphs of the answer and cross-complaint except paragraph nine, which claimed the value of improvements and taxes. The demurrer was sustained. The defendant elected to stand upon his answer and cross-complaint. The cause was referred to a commissioner, with directions to state an account of the amount due on the mortgages held by the defendant against Bray at the date of the rendition of the judgment in favor of the plaintiff; of the value of lasting improvements made and taxes paid by the defendant, distinguishing improvements made before from those made after the commencement of this suit; also of the rental value of the lands for each year after defendant went into possession, showing the balance each year in favor of the plaintiff or defendant, until a final balance should be reached for the whole time; and that he report. The report was made by the commissioner, was excepted to, the exceptions were overruled, and judgment went for the appellee that the two mortgages of appellant be discharged by the rents and profits of the lands, after giving the appellant credit for the taxes and permanent improvements made by him, and that the appellee was entitled to the possession of the lands; and a writ of possession was awarded appellee. The appellant appealed.

The only questions presented by the record are: was the appellee entitled to redeem? and was he required to pay the debts created after his judgment lien attached to the land, or only the mortgage debts which were prior to the judgment, to enable him to redeem? The assignee

of an equity of redemption may redeem. *Scott* v. *Henry*, 13 Ark. 112; 2 Jones on Mortgages, sec. 1061.

By the purchase of Bray's equity of redemption at the execution sale, the appellee acquired all Bray's interest in the land which had any existence at the date of the rendition of the judgment in favor of appellee and against Bray, which became and was a lien upon the lands from the time it was rendered till the sale. At the date of the rendition of the judgment, Bray was the owner of the land, subject to prior incumbrances. When the appellee bought at the execution sale and had procured his deed, his title related to the date of the rendition of the judgment, and he became the owner of the lands, with the right which Bray had, at the rendition of the judgment, to redeem the lands by paying the mortgage debts only.

He was certainly not required to do more than this, as the purchaser and owner of the equity of redemption. Otherwise the mortgagee, without his consent, could deprive him of the value of his judgment lien by extending credit to the mortgagor and judgment debtor, after the lien of the judgment had attached. This, if it did not destroy, would greatly lessen the value of a judgment lien, without the agency or consent of the lienor, where there was a prior mortgage upon the property bound by the lien of the judgment.

The case of *Anthony* v. *Anthony*, 23 Ark. 479, relied upon by appellant, was a case between a mortgagor and mortgagee, where the rights of no third party were involved. The decision in that case was upon the ground that he who seeks equity must do equity, and that, under the circumstances of that case, the mortgagor, having come into a court of equity to redeem mortgaged property, should be required to pay not only the mortgage debt, but any other indebtedness of his to the mortgagee. In that case this may have been equitable; but we do

not think it would be equitable to apply that rule in this case, but, on the contrary, that the application of it to cases like this would work great injustice.

"The interest of a judgment creditor, under his lien, in the real estate of his debtor is limited to the actual interest of the debtor at the time the lien attaches, which is the day of the rendition of his judgment, and he holds free from subsequent alienations or incumbrances, but subject to prior alienations and incumbrances;" and the same is not effected by failure to sue out execution or sell after a levy. *Watkins* v. *Wassell*, 15 Ark. 73. This being the law, we are unable to understand how the judgment creditor is in any worse attitude after he purchases, under execution upon his judgment, the interest or equity of redemption of the judgment debtor than he was before when he had only a lien upon it. "The mortgagee cannot require the payment of any other debt, not a charge upon the premises, as a condition of redemption." 2 Jones on Mortgages, sec. 1081. *Burnet* v. *Denniston*, 5 Johns. Ch. 35.

No question under the betterment act is presented, there being no cross-appeal by the appellee.

The judgment is affirmed.

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CLEARY v. STATE.

Opinion delivered April 23, 1892.

1. *Sabbath breaking—Indictment.*

An indictment, under section 1883 of Mansf. Dig., for laboring on the Sabbath, is sufficient if it charges the offense in the language of the statute, negativing that the labor comes within the exception named therein.

2. *Sunday labor—Putting in telegraph instruments—Work of necessity.*

A conviction of laboring on Sunday will not be set aside where the evidence establishes that defendant, a telegraph line repairer in the employ of a railway company, selected that day to put in new instruments at a station because it was necessary to disconnect the wires at that point, and there were fewer trains running, and consequently less danger of collision, than at any other time; to make out a defense it should also have been shown that the trains could not, without serious inconvenience, have been stopped on another day than Sunday, if necessary, long enough to permit the work to be done.

Appeal from Pope Circuit Court.

J. G. WALLACE, Judge.

Dodge & Johnson and *C. B. Moore* for appellant.

1. The indictment is defective in failing in any manner to specify what the "laboring" consisted of. Mansf. Dig. sec. 2121, par. 2.

2. The work done was a *work of necessity*, and clearly falls within the spirit of the exceptions contained in our statute. Mansf. Dig. secs. 1883, 1885, 1888; 80 Ky. 291; Whart. Cr. Law, sec. 1431 (*b*); 34 Pa. St. 398; 4 Cush. (Mass.) 243; 6 Mass. 76; 143 *id.* 28; 4 O. St. 566; 33 Ind. 416; 67 Ind. 588; *ib.* 595; 79 *id.* 393; 20 Ark. 289; 31 Ark. 520.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

1. The indictment follows the language of the statute. That is sufficient. Mansf. Dig. sec. 1883; 47 Ark. 476.

2. It is admitted that the labor does not come within the letter of the exception. Nor does it come within the spirit, so far as can be ascertained from the language of the exception. Our statute prohibits *laboring*, and there is no exception of works of necessity but only household duties. The cases cited by appellant are based upon statutes excepting "works of necessity," etc. In this case no *necessity* ever was shown for doing the work on the Sabbath, which could as well have been done on another day. See 29 Ark. 400.

1. Sufficiency of indictment for laboring on Sabbath.

HUGHES, J. Section 1883 of Mansfield's Digest, for a violation of which the appellant was indicted, is as follows: "Every person, who shall, on the Sabbath or Sunday, be found laboring, or shall compel his apprentice or servant to labor or to perform other services than customary household duties, of daily necessity, comfort or charity, on conviction thereof, shall be fined one dollar for each separate offense." The indictment charges the offense in the language of the statute, negativing that the labor performed by the defendant came within the exception contained in the statute. The indictment is sufficient.

2. What are works of necessity.

By consent the cause was tried by the court sitting as a jury. The facts are as follows, as agreed upon by the parties: "On a certain Sunday or Sabbath within twelve months next before the date of the finding of the indictment against the defendant, the said defendant, Cleary, in the County of Pope, in the State of Arkansas, was found laboring and did labor and work in and about a certain building in the town or village of London, in putting in telegraph instruments and establishing a telegraph office in said town of London; that said defendant, Cleary, is a telegraph line repairer and laborer on

the line of the Little Rock & Fort Smith railway, and his business is to repair the telegraph lines when broken and to put in new instruments and the establishing of new telegraph offices; and that he is in the employment of the railroad telegraph department and works, under the direction and control of said department. That all the movements and running of all the railway trains, both passenger and freight, are directed by telegraph so as to prevent collision. That there are fewer trains running on the Little Rock & Fort Smith railway on the Sabbath day than on the other days of the week, and the defendant, having been ordered and directed to put in the instruments and to establish a new telegraph office at the town of London, chose and selected the Sabbath day to do the work, for the reason that, in putting in the telegraph instruments in the new office, it was necessary to disconnect the telegraph lines at the point where he was working, so that, during the time he was thus working and had the lines cut or disconnected, no message could be transmitted over the telegraph lines past the town of London either way; and that the defendant chose the Sabbath day to do the work, for the reason that, there being fewer trains on the railroad on the Sabbath, there was less danger of collision occurring by reason of the lines being cut or disconnected as above stated, and that thus the safety of passengers and employees on the trains was better secured than if he had chosen some other day to do the work."

The court declared the law as follows: "It is not unlawful to keep open on Sunday telegraph offices on established telegraph lines and transmit messages over the same, but telegraph companies cannot employ Sunday as a day for establishing new telegraph lines or for putting in new offices on lines already established. The defendant, servant of the company, adopted Sunday as a

day to put in a new office on a telegraph line, and is therefore guilty as charged in the indictment."

There was no error in the court's declaration of the law. Was the declaration sustained by the proof? "The exceptions in a penal statute, which are required to be negatived, are such as are so incorporated with and a part of the enactment, as to constitute a part of the definition or description of the offense." *State* v. *Abbey*, 29 Vt. 60. Not all labor on the Sabbath is forbidden by the statute, but only that which is in the performance of customary household duties, of daily necessity, comfort or charity. Such labor, not in the discharge of household duties, as is a necessary incident to the accomplishment of a lawful purpose is not a violation of the statute. *Crocket* v. *State*, 33 Ind. 416. It is a general rule that that which must be stated as a part of or a necessary description of a penal offense in an indictment must be proven by the prosecutor. It is a general rule of evidence that where the negative of an issue does not permit direct proof, or where the facts come more immediately within the knowledge of the defendant, the *onus probandi* rests upon him. The State, for instance, is not required to prove that one who sells spirituous liquors has no license. When the State made a *prima facie* case in the cause at bar by proving that the defendant performed labor on Sunday not apparently a work of necessity, the burden was then upon the defendant to show that the labor was a work of necessity, that his case came within the exception in the statute. *Fleming* v. *People*, 27 N. Y. 334.

It does not appear that the trains on the railway might not have been stopped on another day than Sunday, if necessary, long enough to have permitted the work to be done without serious delay, inconvenience or hindrance in running its trains.

The facts as agreed upon fail to show a necessity for doing the work on Sunday. Mere inconvenience is not a necessity.

The judgment is affirmed.

VAN VLEET *v.* HAYES.

Opinion delivered April 23, 1892.

Contract to increase salary—Conditions—Waiver.

While plaintiff was in the employment of defendants as traveling salesman at a salary of $1200, they agreed, upon certain conditions, to increase his salary to $1500; if the conditions were not performed, his salary was to continue $1200. One of the conditions was that he should abstain from drinking and gambling. In a suit by him to recover the increase of salary, *held*, that a violation of the condition mentioned operated as a forfeiture of the increase of salary, and the forfeiture was not waived by defendants' retention of plaintiff in their employment after knowledge of the violation.

Appeal from Lee Circuit Court.

GRANT GREEN, Jr., Judge.

Carroll & Pemberton and *S. J. Shepherd* (of Memphis, Tenn.) for appellants.

1. The instruction given for appellee is erroneous and misleading. It assumed that the only condition precedent to entitle appellee to a salary of $1500 was a certain increase of sales and a certain reduction of expenses, and utterly ignored the abandonment of certain vicious habits, which was also a condition of the increase.

2. The court erred in adding to the request of appellants the clause as to condonation of appellee's bad conduct by retaining him in their employ after being informed that he had violated a part of his contract. The question of condonation or waiver of breach of con-

tract by a master by retaining the servant after knowledge of breach, is a question of fact for the jury. Wood on Master and Servant, p. 239; 1 Th. & C. (N. Y.) 363; 19 Pick. (Mass.) 349; 3 Rich. (S. C.) 161.

James P. Brown for appellee.

MANSFIELD, J. While the plaintiff, Hayes, was in the employment of the defendants, Van Vleet & Co., as a traveling salesman, at a salary of $1200 per year, they agreed, upon certain conditions, to increase his salary to $1500. If the conditions were not performed on his part, his salary was to continue to be only $1200. He remained in the service of the defendant, after the date of this agreement, for a period of nineteen months. At the end of that time he was discharged, and subsequently brought this action to recover a balance alleged to be due on his salary, computing it at $1500. The action was defended on the ground that the unconditional salary had been fully paid, and that the excess, which the plaintiff claimed, was not due to him for the reason that he had not complied with all the conditions on which its payment was promised. The parties do not agree in their statements as to all the conditions of the contract. It was embraced originally in a correspondence, the language of which was ambiguous, and parol evidence was received without objection to explain its meaning. The plaintiff testified that some of the conditions were rescinded by mutual consent. This was denied by the defendants. One of the conditions required that his sales should reach a given sum. By another a limitation was imposed upon the amount of the plaintiff's expenses. It was shown by testimony on the part of the defendants that a third condition of the contract was that the plaintiff during his term of service should abstain from drinking and gambling. And there was evidence tending to show that this condition was habitually violated. The cause having

been tried by a jury, their verdict was for the plaintiff, and he obtained judgment for the sum demanded by his complaint.

The grounds of the motion for a new trial are that the court erred in its charge to the jury and in refusing three instructions requested by the defendants.

The court's first instruction was erroneous because it directed a verdict for the plaintiff if the jury found his sales reached the required sum and the condition as to expenses was "changed," without requiring any finding as to whether the contract embraced other conditions or whether the latter had also been performed. If the stipulation as to expenses was a subject of controversy on the trial, this instruction was also objectionable as being on that point too indefinite.

The first and second instructions requested by the defendants were properly refused, for the reason that they require no finding that the matters to which they relate were covered by the condition of the contract.

The defendant's third request to charge was as follows: "If the jury find that one of the conditions of the contract between the plaintiff and defendants was that the plaintiff should not engage in gambling, and should not drink intoxicating liquors, and that he did, as a matter of fact, drink and gamble, then their verdict should be for the defendants." This instruction was proper, and the court erred in refusing it as asked and in giving it with the clause which the court added. The clause referred to was to the effect that, on the issue presented by the instruction, the verdict should not be for the defendants if the jury found that, after being informed that the plaintiff had violated the contract in the respect mentioned, they retained him in their employment and enjoyed the benefit of his services.

It is easy to understand that the defendants may have regarded it as a matter of importance that their

business should be represented by a man of good habits. The testimony shows that the plaintiff had been addicted to drinking and gambling; and if he agreed to refrain from these vices while he was serving the defendants, and this was made one of the conditions upon which his salary was to be increased, the stipulation was binding upon him, and he was not entitled to recover unless he had observed it. The condition would not be waived by a failure to discharge him because of its violation, for the reason that it was entirely consistent with the admitted terms of the contract that he should remain in the service of the defendants notwithstanding his breach of the agreement. The contract was not such that upon its breach the defendants were called upon to declare a forfeiture of the right to compensation under it, or to discharge the plaintiff. On the contrary, it was expressly stipulated that if the plaintiff failed to keep the conditions of the contract, his salary should be the same he had received up to the date of the agreement. And this necessarily looked to a continuance of the relation existing between the parties unless it was dissolved for a cause other than the plaintiff's failure to peform the special agreement on which he has sued. He knew how he was conducting himself, and if he was not fulfilling the obligations of the contract, he had no reason to expect that his work would be paid for according to the salary for which it provided. And from the evidence it does not appear that he has any cause to complain that he was not discharged at an earlier day. *Hunter* v. *Gibson*, 3 Rich. Law, 161.

As the finding of the jury might have been different if it had been made under a correct charge, the judgment will be reversed, and the cause remanded for a new trial.

PINE BLUFF WATER & LIGHT CO. *v.* DERRISSEAUX.

Opinion delivered April 30, 1892.

Negligence—Excavation in street.

Under a special finding that defendant opened a ditch in a public street and negligently left it unguarded, and that plaintiff's cow fell into it in the night-time and was killed, plaintiff is entitled to judgment.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

Bell & Bridges for appellant.

The work was let to an independant contractor for whose negligence the appellant was not liable. 53 Ark. 503; 16 S. W. Rep. 9.

N. T. White for appellee.

The bill of exceptions does not purport to set forth all the evidence, and the presumption is that every material fact was proved. 44 Ark. 74; 54 *id.* 162. The instructions were correct. 54 Ark. 131.

COCKRILL, C. J. The court found specially that the appellant company through its employees opened a ditch in the public street, that they negligently left it unguarded, and that the appellee's cow fell into it in the night-time and was killed; and judgment was rendered for its value. As the bill of exceptions does not profess to set forth all the testimony, the only question presented by the record is, does the judgment follow from the special findings? We answer in the affirmative.

Affirm.

HACKETT CITY *v.* STATE.

Opinion delivered April 30, 1892.

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Construction of contradictory statute—To whom municipal fines payable.

The rule is that where there is no way of reconciling conflicting clauses of a statute and nothing indicating which the law regards as of paramount importance, force should be given to those clauses which would make the statute in harmony with other legislation on the same subject.

Accordingly, where sec. 5860, Mansf. Dig., provides that all fines and penalties imposed by any court shall be paid into the county treasury, "provided that all fines and penalties of city courts and courts of incorporated towns, for violating city and town ordinances, *not defined as offenses against the State*, may be retained by the city or town;" and sec. 5863, *ib.*, a part of the same statute, requires the city marshal or other collecting officer, to pay to the county treasurer all fines and penalties collected by him except "such moneys as may be collected for violation of city or town ordinances;" and where other statutes on the same subject manifest the intention to confer upon the municipality all benefits arising from fines and penalties imposed for violations of municipal ordinances: *Held*, that an incorporated town is entitled to fines collected in the mayor's court for violations of town ordinances imposing penalties for acts which were also offenses against the State.

Appeal from Sebastian Circuit Court, Greenwood District.

JOHN S. LITTLE, Judge.

Suit by the State for the use of Greenwood district of Sebastian county against the town of Hackett City. The facts are stated in the opinion.

Clendening, Read & Youmans for appellant.

1. Section 5860, Mansf. Dig., means that when a mayor of a city of the second class, under the power con-

ferred on him by sec. 800, imposes fines for offenses *against the State*, they shall be paid into the county treasury. See sec. 5863. 54 Ark. 368.

2. There is no evidence that the fines were collected and paid into the city treasury.

J. B. McDonough, Prosecuting Attorney, for appellee.

All fines for crimes against the State belong to the county, and the legislature cannot divert them. Mansf. Dig. secs. 744, 748, 818, 875, 927, 5860; Acts 1871, p. 82; Acts 1833, p. 290; Art. 7, sec. 23, Const. 1874.

COCKRILL, C. J. The appellant is an incorporated town. Fines were collected through the mayor's court for violation of town ordinances imposing penalties for acts which were offenses against the State. In a suit against the town for money had and received, the circuit court held that the county was entitled to such fines, and gave judgment accordingly. The single question is whether that conclusion is justified by the statute.

The section upon which the county bases its argument for recovery is as follows: "All fines, penalties and forfeitures imposed by any court or board of officers whatsoever shall be paid into the county treasury for county purposes. *Provided*, that all fines and penalties of city courts and courts of incorporated towns, for violating city or town ordinances *not defined as offenses against the State*, may be retained by the city or town for the maintenance of the courts of such city or town." Mansf. Dig. sec. 5860.

The construction of the exception to this section gives rise to this controversy, and the doubt arises upon the phrase, "not defined as offenses against the State."

A subsequent section of the same act requires the town marshal, or other collecting officer of the town, to pay to the county treasurer all fines collected by him, with the following exception, viz: "*Provided*, that this

shall not require the city marshal to turn over such moneys as may be collected for violation of city or town ordinances." Mansf. Dig. sec. 5863. Both of these exceptions were in the Revenue Act of 1873, and were re-enacted in the Revenue Act of 1883.

Provisions of other statutes are in line with the purpose of the exception last quoted. In relation to cities (which are included in the first exception quoted, as well as incorporated towns) a clause of another statute required the police judge to pay into the city treasury all fines, with no limitation save that they were collected in "city cases." Mansf. Dig. sec. 818.

A "city case" in that connection can only mean a prosecution for the violation of a city ordinance, as distinguished from a State case or a prosecution for violating a statute or other State law. The provision comes from the incorporation act of 1869 (Gantt's Digest, sec. 3286), and was re-enacted in the like act of 1875;* and the act of 1885† in reference to cities of the first class, and the act of March 30, 1891,‡ which relates to towns and cities, contain similar provisions.

There is a general enactment also that where a fine imposed for the violation of a municipal ordinance is not paid, the prisoner may be forced to work it out for the benefit of the municipality. Mans. Dig. secs. 748 and 927. This, too, is a re-enactment of a former statute.

These provisions show the purpose of conferring upon the municipality all the benefits arising from the penalties imposed for violating municipal ordinances. Unless controlled by the section first quoted, this intention is clear and unmistakable. What then is the meaning of that section?

It must be remembered that an act which is an offense against the State may be made an offense against

*Acts 1874–5, p. 25. †Acts 1885, p. 99. ‡Acts 1891, p. 97.

the municipality by ordinance, that the same act may be punished by either jurisdiction, and that the mayor of the town is invested with jurisdiction to punish for the State as well as for the municipal offense. Mans. Dig. 797, 800. Until the act of March 30th, 1891, each jurisdiction was free to punish, and collect a fine, for the same act. *Van Buren* v. *Wells*, 53 Ark. 368.

Was it intended by section 5860 that both fines should be paid into the county treasury?

It was the clear intention of that section to give to the county all fines arising from the enforcement of the State law by the mayor in his capacity of justice of the peace. It is equally clear, if we look alone to the other provisions referred to, that it was the intention to give to towns and cities all fines arising from the violation of municipal ordinances.

What limitation upon their meaning is found in the clause "not defined as offenses against the State?" Construed according to its grammatical connection, it makes a municipal ordinance the thing "defined as an offense against the State." It cannot be construed otherwise without supplying an ellipsis to make out the sense. That of course the court would supply in order to carry out the evident intent of the legislature. But if the meaning wrought out of the clause would render it inconsistent with the plainly expressed meaning of another section of the same act, which is in harmony with other provisions of statutes *in pari materia*, the court can only leave it as it is found, without undertaking to declare its meaning.

If the literal and true meaning of the section is that all fines go to the county except such as arise from the violation of municipal ordinances prescribing punishment for acts which are not offenses against the State, it would yield to the subsequent clause of the same act which exempts town officers from paying to the county

any moneys arising from fines collected for the violation of town ordinances, because the other acts upon the same subject show that the latter provision is more in consonance with the legislative intent. The rule in such cases is well stated in the syllabus of the case of the *Railway* v. *Commissioners of Wyandotte County*, 16 Kas. 587, an opinion by Judge Brewer, as follows: "Where there is no way of reconciling conflicting clauses of a statute, and nothing indicating which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject." Endlich, Stats. sec. 183. That construction is in accord too with the general practice of the counties, towns and cities under the law in question.

The judgment should be reversed, and the complaint will be dismissed here. The appellant should recover all its costs in both courts.

It is so ordered.

STATE *v.* FORT SMITH.

Opinion delivered April 30, 1892.

City fines payable to city.

All fines imposed by city courts for violation of city ordinances are payable into the city treasury, notwithstanding the acts punished are also offenses against the State.

Hackett City v. *State*, *ante*, p. 133, followed.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

Action by the State, for the use of the Fort Smith district of Sebastian county, against the city of Fort Smith, to recover the amount of certain municipal fines

collected and paid into the city treasury for the violation of the city ordinances, the acts punished being also offenses against the State. Judgment was rendered for the defendant, from which plaintiff appeals.

J. B. McDonough, Prosecuting Attorney, for appellant.

Under sec. 5860, all fines for crimes against the State belong to the counties, and the legislature cannot divert them. Acts 1871, p. 82; Acts 1883, p. 290; Art. 7, sec. 23, Const.; Mansf. Dig. secs. 744, 748, 818, 875, 927, 5860.

The *City Attorney* for appellee.

The city is entitled to all fines for violation of city ordinances, even they be for crimes against the State also. Acts 1885, p. 99, sec. 4; Mansfield's Dig. secs. 5860–5863.

COCKRILL, C. J. This case is controlled by the decision in the case of *Hackett City* v. *State*, *ante* p. 133. The appellant in that case is an incorporated town, while the appellee, Fort Smith, was, during a part of the time for which the recovery is sought, a city of the second class, and during the residue a city of the first class. But a review of the legislation referred to in the Hackett City case will show that the difference in the facts tends to strengthen rather than weaken the city's position. The judgment in its favor will be affirmed.

LITTELL v. JONES.

Opinion delivered April 30, 1892.

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1. *Deed of trust—Delegation of power of sale.*

If it be conceded that a trustee can delegate his power to sell under a deed of trust, one who relies upon a sale thereunder made by another than the trustee, to whom it is alleged the trustee delegated such power, must prove such delegation.

2. *Curtesy—Vested Estate—Homestead.*

Prior to the adoption of the constitution of 1874 a husband by marriage acquired no vested estate of curtesy in his wife's land until birth of issue; where issue were born since that time, his right of curtesy in the wife's homestead yields, during their minority, to her children's superior right to hold the homestead.

3. *Execution sale—Estate of curtesy.*

A purchaser at execution sale of the right of curtesy of a husband in his deceased wife's homestead, subject to the homestead rights of her minor children, acquires the husband's interest, but no right of enjoyment of the homestead during the minority of the children.

4. *Mortgage—Marshalling assets.*

Where minor children claim a homestead in a part only of the land left by their mother, all of which was subject to a mortgage executed by her, the part not claimed should first be sold to satisfy the lien to which the right of the children was subject.

5. *Statute of frauds—Sufficiency of receipt as memorandum.*

A receipt is insufficient as a memorandum to satisfy the statute of frauds which does not disclose the terms of the contract nor even furnish intimation of the essential provisions of the agreement.

6. *Statute of frauds—Agreement to release land.*

A contract by the purchaser of land at execution sale, made after the period for redemption has expired, to relinquish his claim against the land is not a contract for the redemption of land, but for the sale of an interest in or concerning it, within the statute of frauds; where such contract is repudiated, payments made under it should be refunded.

Appeal from Saint Francis Circuit Court in Chancery.
MATTHEW T. SANDERS, Judge.

Action by John I. Jones, as next friend of the minor children of Mrs. E. R. Richards, deceased, against Philander Littell. The original complaint alleged that the minors were entitled to a homestead in 160 out of 240 acres of land, 80 acres of which was situated in Lee county, the remainder in St. Francis county; that the land belonged to their mother, at her death in 1879; that she derived title by inheritance from her father in 1867; that in 1869 she was married to J. E. Richards, father of plaintiffs, and occupied the land as homestead until her death; that during her life she had joined with her husband in a deed of trust to Wynne, Dennis & Beck to secure an indebtedness, part of which remained unpaid; that after her death Dunn & Wills obtained a judgment against J. E. Richards, her husband, and on an execution issued thereon the land was sold and bought by defendant, Littell. The prayer was that the 160 acres in St. Francis county be set apart and decreed to be the homestead of the minors; that the remainder of the land be first sold to satisfy the indebtedness to Wynne, Dennis & Beck, secured by the deed of trust; and that the purchase of defendant under the execution be canceled as to the homestead part of the land.

A supplemental complaint alleged that, during the pendency of the action, all matters in controversy were settled with defendant, by his agreeing to accept the amount due on the Dunn & Wills judgment, which had been bought by him, and to relinquish all his right and title to the land to the minor children; that, by terms of that agreement, J. E. Richards was to pay $200 in cash to Littell, balance in six months; that, in pursuance thereof, J. E. Richards paid to W. H. Howes, attorney of record for Littell, $200, and took the following receipt: "Received of J. E. Richards two hundred

dollars on account of the amount due Philander Littell as assignee of Dunn & Wills upon a judgment obtained in the name of said Dunn & Wills in the St. Francis circuit court against said J. E. Richards; this money being received in and upon agreement of compromise, whereby said Richards has agreed to pay off said judgment, and interest due thereon, within six months from this date. [Signed] W. H. HOWES, Atty. for Philander Littell." That the balance was tendered within six months, but was refused; and such balance was paid into court subject to final decree. The supplemental complaint also alleged that, during the pendency of the suit, defendant became the owner of the note and mortgage held by Wynne, Dennis & Beck; that plaintiffs through their father offered to pay off the mortgage debt, but defendant refused the money; that defendant fraudulently procured one Aldridge to make a sale of the land without authority from the trustee, J. W. Wynne, and defendant purchased the land for an inadequate price, and took possession thereof. The prayer of the supplemental bill was that the terms of the settlement be enforced, and defendant divested of title under the execution sale; that his purchase under the mortgage be cancelled, and that he be compelled to account for rents and profits.

Defendant answered, stating that J. E. Richards, the father of the minor plaintiffs, had a life estate by curtesy in the lands sold under execution; that he bought the lands at the Dunn & Wills' execution sale, and thereby became the owner. He denied that had ever entered into any compromise or settlement of the matter, pending the original bill, or that he ever stated or agreed that if the judgment was paid he would relinquish his right to the land. He stated that he was informed that the money was paid, as stated in the complaint, to W. H. Howes, his counsellor, but that he has never accepted it; that the alleged agreement, if made,

was not in writing; and he pleaded the statute of frauds. He denied that Richards ever tendered him any money for any purpose whatever; alleged that he had bought the deed of trust of Wynne, Dennis & Beck; that, after he bought the note and mortgage from Wynne, Dennis & Beck, the trustee therein, J. W. Wynne, authorized him to take such action as to the sale as he might see proper; that he (Littell) advertised the lands for sale on the 15th of June, 1885, and posted notices in four places in St. Francis and Lee counties; that the lands were publicly sold by Aldridge as agent for said trustee; and that he became the purchaser at said sale. He admitted that he was in possession of the lands, and denied generally all allegations in the complaint, made contrary to his interest.

Defendant subsequently filed what he termed "a supplemental bill," stating the death of his former counselor, W. H. Howes, making the latter's administratrix a party, and praying that she be required to pay into court the sum of $200 paid by plaintiff under the alleged settlement; which amount was by her paid into court.

The court at the hearing found that the settlement of the Dunn & Wills judgment was made as alleged in plaintiff's supplemental complaint, and decreed that it be enforced; also found that the sale of the land under the Wynne, Dennis & Beck mortgage was fraudulent, and decreed that it be cancelled. Defendant has appealed.

Littell pro se.

1. The husband was entitled to curtesy in the lands—an estate subject to sale under execution.

2. The land was not scheduled as a homestead before sale, nor redeemed; and, after the time for redemption expired, Littell, by his deed, acquired the life estate of Richards.

3. The evidence fails to show the compromise agreement was made or accepted by Littell.

4. The trustee authorized Littell to execute the trust, and do all things necessary to enforce the mortgage. A mortgagee may sell by attorney or agent. Jones on Mortg. sec. 1861.

Geo. H. Sanders for appellee.

1. The land was the home of Mrs. Richards, which on her death descended to her minor heirs. This right is superior to the curtesy estate of the husband. Acts 1852; Gould's Dig. sec. 29, ch. 68; Const. 1868; Const. 1874; 54 Ark. 9. The right of homestead existed in the children at the death of Mrs. Richards, and they could not abandon or lose their rights by want of occupation or failure to schedule under sec. 3006, Mansf. Dig. See 37 Ark. 316; 26 *id.* 633; 41 *id.* 309. The effect of the constitution of 1868 was to abolish curtesy initiate. 47 Ark. 176. Under the constitutions of 1868 and 1874 the homestead was not subject to sale. 47 Ark. 445.

2. The relief prayed that the land not subject to the homestead right be first sold before resorting to the homestead is always granted in equity. 40 Ark. 102; 32 *id.* 438.

3. The sale under the mortgage was void for want of authority to sell. Jones on Mortgages, sec. 1862.

4. The compromise agreement, independent of the written receipt, was not within the statute of frauds. It was simply an extension of the time to redeem. 41 Ark. 268; 9 B. Mon. 452; Freeman on Ex. sec. 316. The memorandum in writing was sufficient to take the case out of the statute, considered in connection with all the circumstances, pleadings and proceeding. Pomeroy on Spec. Perf. sec. 85, and note 4; 1 McMullen, Ch. 311; 7 Pick. 301.

1. Delegation of power of sale under deed of trust.

HEMINGWAY, J. It was alleged in the supplemental complaint that the sale under the deed of trust was made by a stranger to it, without the knowledge or consent of the trustee; the answer admitted that the sale was not

made directly by the trustee, but averred that he authorized the appellant to make a sale whenever he saw proper and to do whatever was necessary in that behalf, and that the sale was in fact made by Aldridge under the authority and as the agent of the trustee. If it were conceded that the trustee could lawfully delegate such power, it would devolve upon the party asserting the sale to show that it had been delegated to the party who made the sale. In this case the defendant alleged that the trustee had conferred his power upon Aldridge, and the burden was upon him to establish it. We are directed to no proof of the fact, and cannot find that it existed. For this reason, if for no other, the sale was invalid, and the mortgage stands as though no attempt to sell had been made.

2. When curtesy not a vested estate.

The court properly found that the land sold under execution embraced the homestead of the mother of the minor plaintiffs, and that it descended to them, under the constitution of 1874, free from liability for her debts during their minority. Their homestead right was superior to the curtesy of their father (*Thompson* v. *King*, 54 Ark. 9), and therefore to the claim of purchasers from him.

But it is insisted that the rights of the parties are to be determined by the Constitution of 1868, and that it did not extend the benefit of homestead exemptions to married women. If the first proposition were correct, we should concur in the conclusion contended for; but we deem it incorrect. The acquisition of the land and the marriage of the parents occurred before the Constitution of 1874 was adopted; but these facts vested no right of curtesy. Before any such right exists, there must be the additional fact of the birth of issue, which is not shown to have occurred before the Constitution of 1874 was adopted, which extended the homestead right to married women. This was in effect a change in the law

prescribing the descent of property, but it disturbed no vested right to curtesy, for the simple reason that no right had vested.

Persons who would be entitled to inherit under existing laws may suffer detriment by changes in the law that alter the course of devolution; but there is no such thing as a vested right in a prospective heirship or in the maintenance of the laws of descent, and though their change disappoint reasonable expectations, it comes within no constitutional inhibition. Cooley's Const. Lim. (6th ed.) p. 438 *et seq.*

3. Estate of curtesy subject to execution sale.

While the curtesy of the husband is postponed to the homestead right of the minors, it is an interest in the land which is subject to sale under execution. So that the appellant took by his purchase under execution the interest of the husband, but acquired no right to the use or enjoyment of the homestead during the minority of the children. The fact that it was the homestead of the mother and descended to the minors free from her debts does not exempt the interest of her husband from liability to sale for his debts; for the exemption operates only as against her debts.

4. Marshaling assets.

The minors claim as their lawful homestead that part of the land situate in St. Francis county; and as it does not appear to exceed in amount or value what they are entitled to claim, it should be allowed them as against their father and those claiming under him. The exemption is not asserted as to the Lee county tract, and the defendant acquired the right to its immediate possession; but as the children's right of homestead is superior to the husband's right of curtesy, and both were acquired subject to a prior lien, the latter should be first sold to satisfy it—that is, the Lee county land must be sold before resorting to the land in St. Francis county.

5. Sufficiency of receipt as a memorandum.

The plaintiffs set up a contract with the defendant whereby he bound himself "to relinquish his claim

against the land," in consideration of a sum paid in cash and a sum to be paid and which is alleged to have been duly tendered; and insist that under this contract the defendant is precluded from claiming the land. He denies that he made the agreement and pleads the statute of frauds. See Mansf. Dig. sec. 3371, subd. 4. Upon the issue of fact we find against him. Upon the oral proof alone he can claim no advantage, and the written receipt of his attorney of record turns the scale against him.

There is more merit in his plea of the statute of frauds. The plaintiffs to overcome it say (1) that the receipt is a sufficient writing to satisfy the statute, and (2) that the contract was not one for the sale of lands or any interest in or concerning them.

We do not consider the receipt a sufficient writing to answer the requirement of the statute; it not only does not disclose the terms of the contract relied upon, but, of itself and without the aid of oral proof, it furnishes no intimation even of the essential provisions of the agreement.

6. Agreement to release within statute of frauds.

The other response to the plea—that is, that the contract was for a redemption of land and not for the sale of an interest in or concerning it—has presented a more difficult question. But we think a little scrutiny discovers in it a fatal error. The contract was not made or discussed until after the time to redeem had expired and the rights of the execution defendant were extinguished. The purchaser had then acquired a perfect equitable title to the defendant's interest, and he held a naked legal title, subject to be divested whenever the purchaser should see fit to demand a deed. The defendant had no substantial interest left, and no right to demand any. *Whiting* v. *Butler*, 29 Mich. 122.

He might acquire an interest, just as other persons might; but his former ownership gave him no advantage in that respect. So long as the right to defeat the pur-

chase exists, agreements to extend the time or modify the conditions for redemption have been held not to come within the statute, for the defendant is in many respects regarded as the owner of the land, and by such agreements purchases nothing, but merely holds what he already has. Such is not the case when the sale has become indefeasible, for as the purchaser is then entitled to the land without regard to the will or conduct of the defendant, if the latter would acquire, he can but purchase it. To speak of an agreement under such circumstances as a contract to redeem involves a contradiction in terms; for redemption implies a subsisting right as against a defeasible claim. Black's Law Dic. p. 1008. We have examined the cases cited and many others, and have not found that cases like this have ever been held not to come within the statute. On the contrary, we find that such cases are held to be within it. *Lucas* v. *Nichols*, 66 Ill. 41; *Smalley* v. *Hickok*, 12 Vt. 153-63; Op. of Campbell, J. in *Whiting* v. *Butler*, 29 Mich. 144; *People* v. *Rathbun*, 15 N. Y. 528.*

As the appellant disaffirms the contract because it was not in writing, he is liable to refund the money paid upon it; and as he holds the mortgage for which the land is bound, he should in equity be compelled to credit upon it the amount paid to him upon his repudiated contract. *People* v. *Rathbun*, 15 N. Y. 528.

For the error in holding that contract to be binding, and for errors growing out of it that entered into the stating of the account, the judgment must be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

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* See 12 Am. & Eng. Enc. Law, p. 241, note. (Rep.)

PEARSON v. STATE.

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Opinion delivered April 30, 1892.

Burglary of county funds—Legislature may release treasurer.

The legislature is not precluded from passing an act to release a county treasurer from liability for school and county funds stolen by burglars, without fault on his part, from a safe furnished him by the county, by reason of the provision of sec. 3, art. 14, of the State Constitution, which ordains that no school tax shall be appropriated to any other purpose than that for which it was levied, nor by the provisions of the State and Federal Constitutions that prohibit legislation divesting property rights or impairing the obligation of contracts.

Appeal from Logan Circuit Court.

HUGH F. THOMASON, Judge.

A. S. McKennon for appellant.

Political divisions of the State government do not sustain such relations to the State as to create between them and the State such a contract as is contemplated by the Federal and State Constitutions. See Cooley, Const. Lim. pp. 150, 337; 4 Wheat. 518; 6 How. 301; 16 *id.* 369; 3 Wall. 51. These principles apply only to *private* corporations, and not to mere agencies of government or parts of its machinery. An entirely different rule prevails as to *public* corporations, or those created for *public* purposes only. The legislature may, at will, create, modify or abolish these. Bish. on Cont. 561. The prohibitory clause of the Constitution only applies to private rights and contracts, and the charters of such bodies as are essentially public in their nature and purposes are not contracts, nor protected from legislative

interference. 3 Am. and Eng. Enc. Law, 745; Black on Const. Prohibition, secs. 44–50; 3 Pars. on Cont. 529; 4 Ohio, 427; 13 Ill. 27; 15 B. Mon. 642; Cooley, Const. Lim. 150, 337; 10 How. 511, 513. Counties, townships and school districts are only *quasi* corporations, and are part of the machinery of the government. The legislature has absolute control over them and the taxes raised by them or for them. See 25 Ill. 187–191; 100 U. S. 548. Sec. 3, art. 14, Const., has no application. There is no attempt to *appropriate* the funds. The funds are gone, and the only question is the relief from liability of innocent parties. Cooley, Const. Lim. 201.

Anthony Hall for appellee.

1. The act of February 15, 1889, is unconstitutional and void because it annulled the contract by judgment that bound Pearson and his sureties to pay Logan county and the school districts the amount due them, and suspended the operation of the general law in force for the benefit of appellants. It thus impairs the obligation of contracts, within the prohibition of both the Federal and State Constitutions. Mansf. Dig. secs. 1187, 4771, 6344, 6172; 1 Wait's Actions and Def. p. 72; 1 Parsons on Contracts, p. 6; 2 Wait's Ac. and Def. 305; 31 Ark. 387; 38 *id.* 454; Cooley, Const. Lim. (5th ed.) 292; 18 Cal. 590; 1 Kent's Com. 275; 105 U. S. 13; 4 Wheat. 694–5; 54 Tex. 153; 28 Ark. 329; Const. 1874, art. 2, sec. 17; Const. U. S., art. 1, sec. 10; 1 How. 311; 2 *id.* 608; 24 How. 461; 102 U. S. 203; 96 U. S. 69; *ib.* 432; Cooley's Const. Lim. (5th ed.) 352, 353. The act was an attempt to deprive appellees of their right, under the laws of the State, to have their judgment enforced, and is therefore void. Const. 1874, art. 2, sec. 17; Cooley's Const. Lim. (5th ed.) pp. 352–3; 28 Ark. 555; 1 How. 311; 2 How. 608; 2 Wall. 10. It was in direct conflict with sec. 25, art. 3, Const.; Cooley, Const. Lim. (5th ed.) p. 438, 445.

2. The act appropriated school funds, acquired by local taxation in each of these various school districts, for other purposes than that for which they were levied. Const. Ark., art. 14, sec. 3; 46 N. W. Rep. 914; Mansf. Dig. sec. 6204; Cooley, Const. Lim. (5th ed.) 296; 54 Tex. 153; 15 How. 304; Angell & Ames on Corp. secs. 779, 779*a*.

HEMINGWAY, J. The single question in this case is, whether it was competent for the legislature to release the treasurer of Logan county from his liability to pay the county and various school districts therein the amounts received by him for them, on the ground that the money was taken by burglars, without fault on his part, from a safe furnished him by the county for keeping it.

The appellant contends that the power of the legislature was absolute; that counties and school districts are but agencies of the State created by it to aid in the conduct of government, and that they, with their possessions, are subject to the will of the legislature, to be controlled, maintained or destroyed as it directs—except as the power is limited by provisions expressly applicable to it.

The burden is upon the appellee to show that the power is denied to the legislature. He insists that it is denied (1) by the provision of section 3, art. 14, of the State Constitution, which ordains that no school tax shall be appropriated to any other purpose nor to any other district than that for which it was levied; and (2) by the provisions of the State and Federal Constitutions that prohibit legislation divesting property rights or impairing the obligation of contracts. Secs. 8–17 and 21, art. 2, Const. 1874; Const. U. S. sec. 10, art. 1, and 14 amdt.

We think it clear that the appellee's first ground is not well taken. The provision relied upon prohibits only certain appropriations of the school tax, and, as the act

of the legislature relied upon by the appellant did not appropriate the school tax, or any part of it, it does not contravene that provision.*

The school tax, to which alone the Constitution applies, had been appropriated by burglars, as the preamble of the act recites, before its passage, and was not subject to legislative appropriation. The act did not concern it, but concerned only the liability of a keeper of public money, by the terms of a bond, to indemnify the various municipalities interested in it against his failure to pay over moneys thus lost. If the enactment transcended the powers of the legislature, the limitation must be found in the other provisions relied upon, and not in the one under consideration.

If the bond had been executed to a private individual, it is clear that the legislature could not have released the liability; but whether the constitutional provisions for the protection of private contract, and property rights, which are found in much the same form in the constitutions of most of the States and of the United States,

*The act referred to is as follows:

"Whereas, W. H. Pearson was, on the 17th day of February, 1887, Treasurer of Logan county, Arkansas, and then had in his possession and keeping the various funds belonging to said county and the various school districts therein, aggregating a sum between eleven thousand and twelve thousand dollars in currency, which was by said Pearson deposited in a fire-proof safe furnished by said county for that purpose, said safe being placed in a vault in the Clerk's office of said county with two iron doors; and

"Whereas, On the night of said 17th day of February, 1887, said safe was burglarized and all of said funds stolen therefrom, without fault of said W. H. Pearson; *Therefore*,

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

"Section 1. That said W. H. Pearson and (omitting names of sureties), the sureties on his bond as such Treasurer of Logan county, be, and they are hereby, relieved of any and all liability for, or payment of, any and all of said funds, aggregating between eleven and twelve thousand dollars, and from any damages, penalties, interest and costs, in any manner pertaining or incident thereto." Acts 1889, p. 181.

apply to the contracts and property of municipal and *quasi* municipal corporations, is a question upon which judicial deliverance has been frequent, full and not entirely uniform. There is no legal question upon which the books contain a richer or more abundant treasure of learning and judicial argumentation.

It was indicated in the Dartmouth College case* that the right of the legislature, as regards the property of municipal corporations, was broader than existed in the case of private corporations, and from that time to the present this has been a conceded principle. But it was said by different judges, in their separate opinions in that case, that the power of the legislature over the property of corporations purely public was not absolute or unlimited; and while there are some later cases to be found that seem to question this view, it is generally approved, and it is now established that though such property is subject to a very broad legislative regulation, its confiscation or diversion violates the provisions relied upon. *Board of Park Com.* v. *Common Council*, 28 Mich. 240.

The power of regulation seems to have no limit within the scope of municipal uses, and is restrained only when it attempts a total diversion. It affords a wide, almost limitless, field for legislative action. The legislature may do with the property whatever the municipality is bound to do, either at law or in equity; or whatever upon recognized moral principles ought to be done; and it has been held that it may do acts of charity or gratitude for the municipality—though this can not be considered as established.

It seems profitless to repeat the arguments and conclusions with which the books abound upon the subject. All the purposes of this case are met when we announce our conclusion; those interested in the subject will find

**Dartmouth College* v. *Woodward*, 4 Wheat. 518.

in the references a treatment to which the writer could hope to add nothing.

The statement that counties and school districts are agencies of the State, and therefore subject to legislative control or annihilation, is a misleading generality. The corporate entity is a legislative creation, and its powers may be restrained, its functions changed, or its existence destroyed, at the will of the legislature; but in so far as it has acquired and holds property, it is but a trustee for the local public; and although its powers be withdrawn or its existence ended, the property which survives it belongs to the same public, and must be in some way applied to its use. It has no contract right to exist as a corporation, but the public that it represented has a vested right in the municipal property acquired for its benefit, and is entitled to demand that such property be applied to its uses. Cooley's Const. Lim. (6th ed.) p. 291; *Lucas* v. *Board of Commissioners*, 44 Ind. 524; *Skinkle* v. *Essex Road Board*, 47 N. J. L. 93; *Town of Milwaukee* v. *City of Milwaukee*, 12 Wis. 93; *Essex Road Board* v. *Skinkle*, 140 U. S. 334; *City of N. O.* v. *N. O. Water Works*, 142 U. S. 79; *Hasbrouck* v. *Milwaukee*, 13 Wis. 50; *State* v. *Haben*, 22 Wis. 660; *People* v. *Hurlbut*, 24 Mich. 95, *et seq.*; *Board of Park Commissioners* v. *Common Council*, 28 Mich. 240 *et seq.*; *Spaulding* v. *Andover*, 54 N. H. 38; *Aberdeen Female Academy* v. *Mayor, etc.*, 13 S. & M. (Miss.), 645; 1 Dill. Mun. Corp. sec. 68*a*; *Town of Guilford* v. *Supervisors*, 13 N. Y. 149.

Although the property cannot be diverted from the use of its original beneficiary, the manner of the use is subject to legislative regulation, and the legislature may direct and control the use; and if the original beneficiary enjoy it in any way, there is neither diversion nor confiscation, which the constitution prohibits. If the legislature uses it as the beneficiary ought to have done, the

law deems it as devoted to the use of the beneficiary—and this though the particular application be made to satisfy a demand not enforcible in law or equity, but sanctioned, only by established principles of right and fair dealing. *Creighton* v. *San Francisco*, 42 Cal. 446; *Sinton* v. *Ashbury*, 41 Cal. 525; 1 Dill. Mun. Corp. secs. 68 and 75; *New Orleans* v. *Clark*, 95 U. S. 644.

The power of the legislature to release a debt due to a municipality is of the same kind as its power to impose a debt on a municipality. It can do neither arbitrarily or capriciously, and must do either within the scope of a proper superintending control and trusteeship. Speaking as to the latter power, this court said, in *Perry County* v. *Conway County*, 52 Ark. 430: "The better doctrine is, that the power of the legislature to impose the debt of one county upon another, depending upon the existence of a moral obligation from the new county, or the county receiving new territory, to pay part of the old debt, the legislature may so ordain whenever it finds the moral obligation to exist." Applying that principle to this class of cases, we hold that the power of the legislature to release a municipal claim depends upon the illegal, inequitable or unjust character of the claim and the moral obligation to release it, and that whenever it finds a debt to be of that character it may exercise the power.

Whether the legislative finding of a moral obligation is subject to judicial review we need not determine; it is certainly conclusive unless it clearly appears to be baseless. *Hoagland* v. *Sacramento*, 52 Cal. 142.

In this case the treasurer was a bailee, or *quasi* bailee, of a large fund, for which he was bound by written contract to account, with no exoneration on account of sums that might be taken from the treasurer's safe by burglars. He was required to keep the fund and was forbidden to use or lend it. That he might perform his

undertaking, the county provided a vault and safe in which the money was kept until it was taken by burglars. He had in every respect been faithful, and done all that the highest degree of prudence could demand. The money was taken from the place provided by the county for keeping it without any fault on his part, and the legislature finds that it is contrary to broad equitable principles—the ordinary principles of just and fair dealing—to compel him to stand the loss.

Such facts have been interposed as constituting a perfect defense in suits upon bonds such as he gave (1 Dill. Mun. Corp. sec. 238, note 4; *Halbert* v. *State*, 22 Ind. 125); and although it has been held that the defense was cut off by the terms of the bond, the fact that it has been interposed by learned counsel and considered by exalted tribunals argues that it has a foundation of fairness and justice to rest on. It would constitute a complete defense to an ordinary bailee, and the fact that it is not a perfect defense under the exacting terms of a written contract does not disprove the justness of releasing the demand.

The course of legislation in this and other States lends support to that view. As far back as 1840, and continuously since that time, acts have been passed in this State to release officers and their sureties from debts legally due by them to various counties, where the liability arose without fault of the officer; and similar legislation abounds in other States. While such acts do not determine the question of constitutional law, they bear evidence of the public sense of justice and right. Whether the considerations that induce such acts are adequate, and whether public policy and interests are subserved by such legislation, are questions of grave doubt; but their solution is with the legislative, and not with the judicial, department of the government.

Similar acts have been sustained by other courts. *Board of Education* v. *McLandsborough*, 38 Am. Rep.

582; *Mount* v. *State*, 46 Am. Rep. 192; Mechem on Officers, sec. 913.

The act in question was treated by counsel for appellee as a gift of municipal property, and if that was its character, it could not be sustained; but when subjected to the test of rigid scrutiny, it is seen to be, not a gift of property, but a release of a claim which, though legally due, the legislature found that it would be unjust and oppressive to collect.

In this view of the act, it comes within the scope of legislative authority. It follows that the court erred in refusing to quash the execution.

Reversed and remanded.

DAVIS *v.* DAY.

Opinion delivered May 7, 1892.

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Homestead—Not subject to judgment lien.

Since a judgment founded upon a debt contracted under the Constitution of 1874 does not become a lien upon so much of the debtor's land as constitutes his homestead, a sale of such homestead under execution does not convey title as against one who claims under mortgage executed by the debtor after rendition of the judgment and before sale, although the debtor made no written or other selection of the homestead as exempt.

Appeal from Lonoke Circuit Court.

JOSEPH W. MARTIN, Judge.

John C. & C. W. England for appellants.

Robinson owned 360 acres of land. He was living upon a tract adjoining the tracts sold. Until he made his selection, no question of homestead could arise. In order to avail himself of the homestead right, the defendant must file with the clerk a proper schedule and see that the clerk issues a supersedeas. 40 Ark. 352; 47 *id.* 400.

Thos. C. Trimble for appellees.

No schedule was necessary. The land was the homestead of Robinson. It was not subject to the lien of the judgment or to sale under execution. 52 Ark. 101; *ib.* 213; *ib.* 493. The debtor may sell, exchange or even give it away, and his creditors have no cause of complaint. 45 Ark. 385; 43 *id.* 434.

COCKRILL, C. J. This is a contest between the appellants and the appellees over the title to the NE. ¼ sec. 17, T. 2 N., R. 9 W. The court awarded the tract to the appellees. The parties trace title to one Robinson as a common source. The appellants are execution purchasers under a judgment against Robinson, and the appellees claim through a deed of trust executed by him. The lands are in Lonoke county, and the judgment under which appellants claim was a subsisting lien on Robinson's lands (except his homestead) in that county when he executed the trust deed through which the appellees claim title, and the lien was still subsisting when the appellants purchased the quarter section in question at execution sale. As the record states that the judgment was founded upon a debt contracted under the Constitution of 1874, the judgment was not a lien upon the defendant's homestead, and a sale or mortgage of the homestead by him carried the property unincumbered by the judgment lien. *Cohn* v. *Hoffman* 45 Ark. 376.

The question for determination therefore is, was the quarter section in controversy or any part of it the homestead of Robinson?

If it was not, the appellants' title at execution sale relates to the date of the judgment in the circuit court, which is anterior to that of the deed of trust. If Robinson's homestead was on the land, the appellants can take no advantage from the circumstance that he failed to claim it as exempt as against the sale under execution, because the deed of trust, through the execution of which

the appellees derive title, was duly recorded when the levy and sale under the execution were made; and as the judgment could not be a lien on the homestead, the appellants' title would relate only to the date of the levy, which was subsequent to the lien of the deed of trust, and the title derived through the latter would prevail.

Robinson was the head of a family and a resident of Arkansas. He established his home upon the land in dispute before the rendition of the judgment, and resided there continually until both parties to this suit had obtained their deeds. His improvements were mostly upon the tract in question. But his dwelling house, according to his testimony, was partly on the southwest quarter of that quarter section, and partly on the contiguous southeast of the northwest quarter upon which his farm extended. The northwest quarter of the northeast quarter was not improved. Robinson's testimony is further as follows, viz: "I really all the time considered my homestead to consist of the northeast quarter northeast quarter, the south half northeast quarter and southeast quarter of the northwest quarter." His testimony is conclusive of where the homestead lay.

The law is peremptory that the lien of a judgment shall not attach to a homestead, and there is no requirement that a debtor shall make a written or other selection of it in order to make it effectual against the lien. The only test is, was the land in fact a homestead? The testimony leaves no doubt but that the south half and the northeast quarter of the tract in controversy was Robinson's homestead, and was therefore freed from the lien of the judgment under which the appellants claim. The northwest quarter of the tract was not embraced in the homestead, and to that extent the lien of the judgment attached.

It follows that the appellees have the title to three-fourths of the northeast quarter above described, and to

that extent the judgment is right; and that the appellants have the title to the northwest quarter of the tract, and the judgment awarding it to the appellees is wrong. The judgment will be reversed, and the cause remanded with instructions to enter judgment quieting the appellees' title to the 120 acres indicated, and awarding possession to appellants to the northwest quarter of the tract.

It is so ordered.

ALTHEIMER v. HUNTER.

Opinion delivered May 7, 1892.

Liability of administrator carrying on intestate's business.

An administrator procured an order from the probate court directing him to continue his intestate's mercantile business. On the faith of this order he purchased goods from plaintiff on credit. Upon his failure to pay for them plaintiff procured an order from the probate court that he pay the account out of the assets of the estate, which the administrator refused to do. In an action on his bond as such administrator, *held*, that as plaintiff could not look to the general assets for payment, the complaint, which alleged a *devastavit* of assets of the estate, was insufficient in failing to allege a *devastavit* of the trade assets.

Appeal from Arkansas Circuit Court.

JOHN A. WILLIAMS, Judge.

Gibson & Holt and *N. T. White* for appellant.

While it is true, in part, that the sureties on an administrator's bond are liable only for debts contracted by the intestate during his lifetime, and that debts contracted by an administrator cannot be made a charge against the estate for which the sureties would be liable, yet it has always been the custom and rule that costs of administration are paid out of the assets of the estate. These costs are legal charges to be paid out of the assets before creditors are paid. Altheimer's claim was allowed

as a claim for costs by the probate court, and the administrator ordered to pay same. The order was made by a court having jurisdiction, and cannot be attacked collaterally. See cases 30 Ark. 312; 34 *id.* 204; 39 *id.* 265; 51 *id.* 415. The adjudication of the probate court is binding on the sureties. 46 Ark. 260; Mansf. Dig. sec. 142; 25 Ark. 241.

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

The order was void for want of jurisdiction in the probate court. 25 Ark. 471; 27 *id.* 302; 52 *id.* 350; 52 *id.* 89; 34 *id.* 204. An administrator cannot make a contract for a dead man. 17 Ark. 567. Nor has he the power to enlarge the liability of his intestate, or bind the assets in his hands by any agreement of his own, nor can the probate court give him such power. 10 Ark. 254; 19 *id.* 676; 50 *id.* 442; 34 *id.* 204; 30 Mo. App. 638. The liability of the sureties is fixed by the terms of the bond, and is limited to the official default or miscarriage of the administrator *as such.* Appellees are not responsible for Hunter's personal liability.

COCKRILL, C. J. The appellees are sureties of Hunter who was administrator of the estate of Graves. Hunter, after qualifying as administrator, procured an order of the probate court directing him to continue the mercantile business which his intestate was conducting when he died, and afterwards he purchased goods on a credit of Altheimer for that purpose, on the faith of the order. He failed to pay the account due for the merchandise, and Altheimer procured an order from the probate court directing the administrator to pay the account out of the assets of the estate. The administrator refused to do so, when Altheimer brought this suit against the sureties on his official bond, alleging the facts substantially as above set forth, and also that the administrator had converted assets of the estate to his own use in a sum in excess of his claim, that the administrator was

insolvent, and that creditors of the estate were unpaid. Such is the substance of the allegations of the complaint.

The complaint was adjudged insufficient, and the cause dismissed upon demurrer interposed by the sureties. The appeal is prosecuted to test the correctness of that ruling.

It is certainly not within the ordinary authority of a probate court to empower an administrator to continue the mercantile business of the deceased. An executor may continue the business of his testator when empowered to do so by the will, but he becomes personally liable for all the debts he contracts in the prosecution of his trust, and whatever may be the binding force of a debt contracted by an executor in pursuance of the authority of the will, it is certain that an administrator is not empowered to bind the estate of a dead man by making a contract for him. *Bomford* v. *Grimes*, 17 Ark. 567.

But an executor or administrator is entitled to be indemnified out of the assets of the estate for expenditures made or liabilities incurred in the legitimate exercise of his trust. *Bomford* v. *Grimes*, 17 Ark. *sup.*; *Yarborough* v. *Ward*, 34 *id.* 204; *Perry* v. *Cunningham*, 40 *id.* 185.

The questions (1) whether the persons who have extended credit to the administrator have any right, except such as is derived through the administrator, to resort to the assets of the estate (*Laible* v. *Ferry*, 32 N. J. Eq. 791), and consequently whether that right can be of any avail to them while he is indebted to the estate (*Pool* v. *Ellis*, 64 Miss. 555; *Crouch* v. *Edwards*, 52 Ark. 499), and (2) whether the orders of the probate court above mentioned can be regarded as having adjudicated those questions in this case in favor of Altheimer (*Turner* v. *Tapscott*, 30 Ark. 322; 1 Woerner, Administration, sec. 152; 2 *ib.* sec. 356), are subjects which it

would be interesting to pursue; but there is another point which is decisive of the case, and the state of the docket does not justify the consumption of time to make investigations which counsel have not made, when they are not essential to the determination of the cause.

Conceding, without deciding, that it was only error, and not a want of power, in the probate court to direct the continuance of the intestate's mercantile business by his administrator, and to allow Altheimer's claim in the form of a judgment in the latter's favor to be paid as expenses of administration, the allegations of the complaint are still short of stating a cause of action against the sureties. The order of the probate court directing the administrator to continue the mercantile business of the intestate created no greater power in the administrator than if it had been made upon directions to that effect to an executor by the terms of a will. But in the latter case the authorities are uniform to the effect that neither the executor nor his trade creditors can resort to the general assets of the estate for the purpose of reimbursement or payment unless it is clear that the testator intended to make them liable for the debts contracted by the executor. In such a case advances are made by the administrator, and credit extended by those who give him credit, upon the faith of the assets embarked in the trade or business, and their remedies are confined to such assets. 2 Woerner, Administration, sec. 328, p. 689, n. 5; *Jones* v. *Walker*, 103 U. S. 444; Ex parte *Garland*, 10 Ves. Jr. 110; *Laible* v. *Ferry*, 32 N. J. Eq. *sup.*

There is no allegation in the complaint that the administrator has committed a *devastavit* as to any of the trade assets—the only assets in which the plaintiff can be said to have an interest. No *devastavit* is alleged then which could in any event be the foundation of a cause of action by the plaintiff. It cannot be said that the judgment of the probate court establishes the fact

otherwise, for the allegation of the complaint is merely that the account was allowed by the probate court and ordered paid. The presumption, in the absence of a contrary showing, is that the court made the allowance with reference to, and ordered the payment out of, the assets which were alone liable therefor.

The judgment is right and will be affirmed.

ARMSTRONG *v.* DONNELLY.

Opinion delivered May 7, 1892.

Tax sale—Premature return of delinquent list.

The fact that the collector made return of lands delinquent for the taxes of 1881 on April 20, 1882, if premature, did not invalidate a sale for such taxes made on June 11, 1883, under the act of January 26, 1883, which extended the time for paying such taxes until April 20, 1883.

Appeal from Miller Circuit Court.

C. E. MITCHEL, Judge.

Scott & Jones for appellant.

No substantial right of the tax-payer was violated or infringed, even if the delinquent list was returned one day too early. Gantt's Dig. secs. 5165, 5183. This was a mere irregularity cured by the statute after two years. 46 Ark. 96.

Arnold & Cook for appellee.

The return of the delinquent list was premature, and the sale void. 35 Ark. 507; Miller's Digest, sec. 133; 6 Ark. 219.

BATTLE, J. This was an action of ejectment instituted in the Miller circuit court by the appellant against the appellee to recover lot 9 in block 2 in Deutschman's Addition to the Town of Texarkana. As an evidence of his title plaintiff exhibited with his complaint a tax deed

executed by the county clerk of Miller county to appellant on the 28th of July, 1885. It recites that the lot was sold on the 11th of June, 1883, for the non-payment of the taxes of 1881, and is in statutory form.

Appellee denied that he had been in unlawful possession of the lot, and alleged that he was the lawful owner; and in exceptions to plaintiff's evidence of title attempted to show that the sale for taxes was illegal for many reasons which do not appear in the deed.

Upon the trial of the cause before the court, a jury being waived, the appellant introduced and read his tax deed as evidence without objection; and the appellee proved that the delinquent list of land for the non-payment of the taxes of 1881, in which was the lot in controversy, was returned on the 20th of April, 1882. Considerable other testimony was adduced by appellee, but was excluded by the court upon the objection of appellant. The court found for appellee, holding that the sale for taxes was illegal because the lot was prematurely returned delinquent on the 20th of April, 1882; and rendered judgment accordingly. Was the sale illegal because the delinquent list was returned prematurely?

Conceding that the delinquent list was not returnable until immediately after the 20th of April, 1882, as appellee contends and the court below held, all prejudice to the owner of the lot in controversy thereby was removed by subsequent legislation. On the 26th of January, 1883, the General Assembly, by an act, extended the time allowed for the payment of all unpaid taxes for the years 1880 and 1881 until the 20th of April, 1883, and declared that if such taxes were paid by said day, all penalties for the non-payment thereof should be remitted; and made it the duty of the county clerks of the several counties of this State to immediately re-deliver to the collectors of the counties all lists returned for the years 1880 and 1881 in their respective counties, and to

charge such collectors with the amount thereof, less the penalty and costs due thereon; and made it the duty of the collectors to collect the taxes due thereon from the parties liable, in the same manner as other taxes due upon the tax books were collected; and provided that all such taxes which were not paid by the said 20th of April, 1883, should, with the penalties thereon for non-payment, be collected immediately thereafter in the manner *then* provided by law. (Acts of 1883, pp. 3, 7.) The lot in controversy was not sold until the 11th of June, 1883. Under the acts of 1883, referred to above, the owner had from the 26th of January, 1883, until the 20th of April, 1883, in which to pay the taxes. Had he done so, he would have been relieved of the penalty and costs charged against his lot. He was, therefore, not prejudiced by the return of the delinquent list on the 20th of April, 1882, instead of immediately thereafter, and the sale was not illegal on that account.

Reversed and remanded for a new trial.

RAILWAY COMPANY *v.* STATE.

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Opinion delivered May 7, 1892.

1. *Constitutional law—Railway signals.*

If section 5478, Mansf. Dig., which provides a penalty for failure of a railway company to signal at a highway crossing, is unconstitutional in so far as it awards a part of the penalty to an informer, instead of awarding the entire penalty to the school fund, its remaining provisions are legally separable and will stand.

Railway Company v. *State*, 55 Ark. 200, followed.

2. *Criminal proceeding—Penalty.*

The provision of Const. 1868 (art. 1, sec. 4). that "no person shall be held to answer a criminal offense unless on the presentment or indictment of a grand jury" is inapplicable to an action to recover the penalty imposed on a railway company for failure to signal at a highway crossing.

3. *Amendment—Substitution of party plaintiff.*

Where an action to recover from a railway company the penalty for failure to give signal before crossing a highway is prosecuted by the informer in his own name, the error in not bringing the suit in name of the State cannot be cured by amendment substituting the State as plaintiff.

Appeal from Miller Circuit Court.

C. E. MITCHEL, Judge.

C. W. Bell, for the use of himself and Miller county, Arkansas, brought suit against the St. Louis, Arkansas & Texas Railway Co., to collect the statutory penalty for defendant's failure to signal at a certain highway crossing. Defendant demurred because the plaintiff had no capacity to sue, and because the complaint failed to

state a cause of action. The court sustained the demurrer upon the first ground. Plaintiff asked leave to amend by making the State a party plaintiff for the use of himself and Miller county—an application in which the prosecuting attorney of the district, on the part of the State, joined. Whereupon the court, over defendant's objection, permitted the amendment, and allowed the State to be substituted as party plaintiff. Defendant suffered judgment by *nil dicit* and appealed.

Bunn & Gaughan and *Sam H. West* for appellant.

1. C. W. Bell had no right to bring the suit. Mansf. Dig. secs. 5482, 5324, 4933.

2. It was error to *substitute* one plaintiff for another. Our statutes of amendment allow the adding of a party plaintiff who has an interest, but does not mean that the complaint of a party who has *no* cause of action may be amended by substituting one who has such cause. This would be bringing a new cause of action. 67 Am. Dec. 186; 67 Barb. 484; 34 Ark. 144; 97 Am. Dec. 510; 12 How. 407; 14 Pet. 156; 56 Barb. 492; Bliss, Code Pl. secs. 428–9; 14 N. Y. 506; 46 N. Y. 544.

3. The procedure to enforce sec. 5478, Mansf. Dig. is exclusively criminal. 45 Ark. 387; 116 U. S. 616; 38 Ark. 579; 6 *id.* 131; 101 U. S. 188; 92 *id.* 214; 13 Wall. 409.

1. Validity of statute concerning railway signals.

HEMINGWAY, J. This court decided, in the case of *Railway Company* v. *State*, 55 Ark. 200, that if section 5478, Mansf. Dig., was unconstitutional in so far as it awards a part of the penalty to an informer, the remaining provisions were legally separable and would stand. We are now asked to review the decision, but nothing is suggested that was not considered upon the hearing of that cause, and we abide in the conviction that our conclusion was correct.

2. What are criminal offenses.

It is next insisted that the act creates and defines a crime, for which the punishment is a fixed penalty; and

that a proceeding for its recovery can only be instituted by indictment.

The provision that no man shall be put to answer any criminal charge but by presentment, indictment or impeachment is found in the Constitution of 1836, and, in so far as it is material in this case, it was re-enacted in the Constitution of 1868.* It is contended that all acts tending to prejudice the public good, made penal by statute, constitute criminal offenses within the meaning of that provision. The act for which a recovery is sought in this case was not a crime at common law, is not declared such by the statute, and is not visited by a penalty that the rules of criminal procedure have any peculiar adaptation to enforce. The legislature did not intend to define a criminal offense; and if it did so, it is because all the acts of a tendency detrimental to the public, which are prohibited by statute, necessarily become criminal offenses. But penalties are imposed generally out of considerations for the public rather than as compensation for a private wrong, for they are superadded to recoveries of actual damage; and if the provision relied upon was ever held to extend to proceedings generally to recover statutory penalties, we are not aware of it. On the contrary, penalties have been claimed and recovered in ordinary civil actions, and upon motions in this as well as in circuit courts, and there is no intimation anywhere that the Constitution prescribed a different remedy. It may be that the question has never been pressed, but its decision is involved, in adjudged cases; and a view against that contended for is, and long has been, generally accepted by the bar and the courts. Thus for willful and wanton wrongs the injured party is allowed to recover, in excess of compensation, exemplary damages as a penalty calculated to promote the public

* Const. 1868, art. 1, sec. 9.

safety. So penalties have been imposed by statute upon telegraph companies, and recoveries by civil action had for a failure to deliver messages, not by way of compensating the party, but to quicken the performance of a public duty. So in other cases penalties are imposed by this court, and by circuit courts, upon motion, which go to compensate no private loss, and are provided to promote the general good. We think the prohibited act is not a criminal offense, within the meaning of the Constitution.

3. Amendment of complaint by substitution of plaintiff not permissible.

The demurrer to the complaint was properly sustained, as it showed that the plaintiff was not, and that the State was, the party entitled to prosecute the action. Leave to amend by striking out the sole plaintiff and substituting another should not have been granted. The right of amendment is broad, but does not warrant the substitution of a stranger for the sole plaintiff in the cause. *Otis* v. *Thorn*, 18 Ala. 395; *Davis Avenue R. Co.* v. *Mallon*, 57 Ala. 168; *Milliken* v. *Whitehouse*, 49 Me. 536; *Dubbers* v. *Goux*, 51 Cal. 154.

If the plaintiff, when the demurrer was sustained, could not amend his complaint so as to state a cause of action in himself, the cause should have been dismissed at his cost. If the State so desired, it might institute an action for the same matters, but it could not cure the defects in plaintiff's action by stepping into his place. This it attempted, and the court improperly permitted it, to do, against defendant's objection. If it were treated as the institution of a new suit, and the name of the State written in place of the original plaintiff's, the complaint would disclose a cause of action; but neither the court below nor the parties so treated it. They treated it as an amendment, and the question presented by the demurrer was, whether it showed a right in the State to prosecute and recover in the action of the original plaintiff. That was the issue tendered by the parties and decided

by the court, and it is but just and right that we take it as the question for our decision.

Our answer is in the negative. The State could not thrust itself into Bell's action and recover for a wrong of which he complained; and as the complaint disclosed such a case, the demurrer to it should have been sustained.

Reversed and remanded.

DYER v. AMBLETON.

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81 462

Opinion delivered May 7, 1892.

Res judicata—*Second appeal.*

Matters adjudged by the Supreme Court on appeal cannot be re-tried in the circuit court nor reviewed by the Supreme Court on a second appeal.

Appeal from Yell Circuit Court in Chancery, Danville District.

JORDAN E. CRAVENS, Judge.

This was a suit by the heirs at law of A. Ambleton against A. J. Dyer, the purpose of which was, among other things, to recover a tract of land known as the Mountain farm. The cause was before this court upon a former appeal (*Ambleton* v. *Dyer*, 53 Ark. 324), where it was decreed that John B. and George C. Ambleton, two of the heirs, each recover from Dyer a fourth interest in the land, and also a proportionate share of the rents and profits, the amount of which was fixed by the decree. The cause was remanded with directions to render judgment accordingly. Thereupon Dyer filed an amended answer and counter-claim in the court below against

John B. and George C. Ambleton, asking that he be paid for half of certain improvements placed by him upon the land and for half of the taxes paid by him. The Ambletons moved to strike the answer from the files because it was not filed in time, and because it set up matters that had formerly been adjudicated. The motion was sustained, and the answer stricken from the files. Dyer has appealed.

H. S. Carter and *Robert Toomer* for appellant.

Dyer's amended answer should not have been stricken from the files, because these matters were not litigated until after the cause was remanded. It is never too late for a court of conscience to do justice, and Dyer was certainly entitled to recover the taxes paid for Ambleton's one-half interest in the land and improvements. Mansf. Dig. sec. 2644; 45 Ark. 410; 46 *id.* 109.

W. D. Jacoway for appellees.

Appellant is bound by the directions of this court made in the decision of this case when here before. 53 Ark. 234. That decision was final. 1 Johns. Cases, 281; 1 Am. Dec. 113; 14 Ark. 307; 44 *id.* 383; 29 *id.* 174; 16 *id.* 181.

HEMINGWAY, J. The matters presented by the rejected answer were adjudged by this court upon a former appeal. If there was error in their determination, it might have been corrected on a motion for a rehearing presented within apt time. But the circuit court could not re-try issues determined here, and this court has no power to review upon a second appeal its former conclusions. We then found that the plaintiffs were absolutely entitled to recover a fixed sum for the use of the land; and when the cause was remanded for judgment, it was not competent to reduce or extinguish that sum by setting off the value of improvements or amounts paid for taxes against it. If the defendant desired to claim

such offsets in this case, he should have presented his claim before the final hearing; but when the rights of the parties had been determined without reference to it, it was not competent to change the conclusion reached by taking it into account.

Affirmed.

SCHATTLER *v.* CASSINELLI.

Opinion delivered May 7, 1892.

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76 464
77 576
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Tax deed—Description of land.

A tax deed, and a decree confirming it, described the tract of land sold as "E. part of N. ½ of SE. ¼ of SE. ¼" of a section, containing 7.54 acres. There was nothing in the description itself or in the circumstances, such as a recital of ownership, to identify the land sold, except that the taxes were delinquent for that year on a tract of land, of the required area, in the shape of a trapezoid, and situated in the east part of N. ½ of SE. ¼ of SE. ¼ of the section named. *Held:*

(1) That the description was insufficient to identify the trapezoid.

(2) That the circumstances rebutted the presumption that it was intended to sell a tract of the stated area in the form of a parallelogram described upon the east line of the larger tract as a base with the north and south lines as laterals.

(3) *Semble*, that if there were nothing to rebut the presumption of a sale of a parallelogram, the description was too indefinite to convey title.

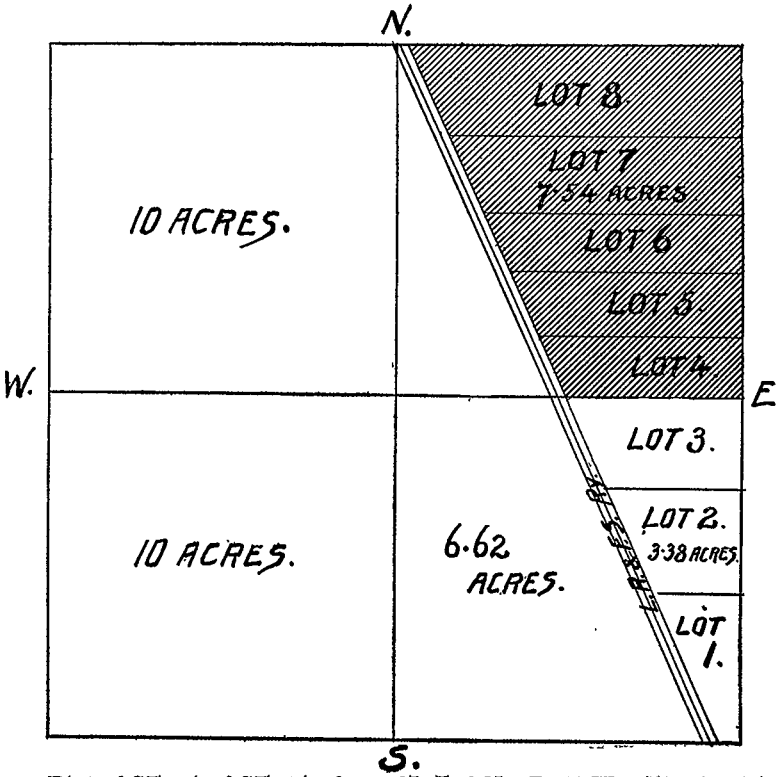
Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

L. D. Cassinelli and Anna La Fore brought suit against Charles Schattler to quiet their title to a certain tract of land situated in the SE. ¼ of SE. ¼ of Sec. 27, T. 2 N., R. 12 W., described by metes and bounds, containing 7.54 acres and lying in the shape of a trapezoid, as will be seen from the accompanying plat. They alleged that defendant claimed the land under a pretended tax forfeiture of the land by the description of the E.

part of N. ½ of SE. ¼ of SE. ¼ of sec. 27, T. 2 N., R. 12 W., which forfeiture is void for uncertainty in description; that defendant had procured a decree confirming his tax title by the same description. Defendant filed an answer and cross-complaint, relying upon his tax title and decree confirming it; and prayed that the complaint be dismissed, for costs and for general relief. The court found that the description in the tax title and decree was void for uncertainty, cancelled defendant's tax title, and vacated the decree confirming it. Defendant has appealed.

Reference is made in the opinion to a plat of the land in controversy which accompanied the complaint and is as follows:



Plat of SE. ¼ of SE. ¼ of sec. 27, T. 2 N., R. 12 W. The land in controversy is represented by the black in the diagram.

Marshall & Coffman and *Vaughan & Collins* for appellant.

1. All inquiry as to the validity of the defendant's tax title was cut off by the decree of confirmation. 52 Ark. 400; 50 *id.* 188; 42 *id.* 345; 18 S. W. Rep. 633. These cases overrule 22 Ark. 118, in so far as that case holds that the sale of lands after payment of taxes is a fraud which vitiates the confirmation decree.

2. If the decree of confirmation is void on its face for want of description, then the decree and deed are no cloud on plaintiff's title, and the bill does not lie. 30 Ark. 579; 37 *id.* 643; 50 *id.* 484. Nor was Cassinelli in possession. 37 Ark. 643.

3. The description is not void for uncertainty. It locates the part of the forty acre tract in which the disputed tract lies. 50 Ark. 484. It is definitely located by oral testimony, which is admissible for that purpose. Welty on Assessments, secs. 80, 86; Cooley on Tax. 404; 50 Ark. 484; Mansf. Dig. secs. 5677–81, 5790. As to the necessary identification, see Cooley on Tax. p. 404, 486; 2 N. Y. 66; 49 Pa. St. 440; 32 *id.*, 52; Cooley on Tax. 407.

4. There is sufficient evidence in this case to locate the land. 58 Penn. St. 266; 51 Ia. 346; 93 Ill. 116; 36 Mich. 80; 13 Oregon, 470; 71 Ala. 53; 42 N. J. 401; 22 Cal. 363; Cooley on Tax. 408.

5. But if the description cannot be aided by parol proof, the land should be laid off in a parallelogram off the east end. Devlin, Deeds, 1019; 45 Ark. 17; 2 Ohio, 327; 53 Miss. 259; 60 *id.* 107; 84 Ala. 193; 121 Ill. 455; 5 So. Rep. 104; 58 Miss. 877.

Williams & Shinn, *Ratcliffe & Fletcher*, and *E. W. Kimball* for appellee.

1. The right of review of a confirmation of tax title is beyond question. 22 Ark. 118; 33 *id.* 162; 24 *id.* 431; 98 U. S. 61; 42 Ark. 345; Mansf. Dig. sec. 5195, as

amended by Acts 1887, p. 53; 36 Ark. 591; 3 Metc. (Ky.) 298; 14 B. Mon. 272. The bill lies to remove the cloud of tax title upon wild land (39 Ark. 196); or to rescind a void decree (30 Ill. 215).

2. The deed presented for confirmation was absolutely void for uncertainty of description. The description speaks for itself, and no one could even apply it to the land claimed. 30 Ark. 657; *ib.* 640; 3 *id.* 18; Black on Tax Titles, secs. 38, 81, 220–2; Cooley on Tax. pp. 404–8, 486; Mansf. Dig. sec. 5677; Welty on Assessments, secs. 80–88; Devlin on Deeds, secs. 1010–11, 1405–6, 1432; 142 U. S. 664. It cannot be laid off as a parallelogram, for it would include land on which the taxes have been paid.

HEMINGWAY, J. The appellant claims a tract of land under a tax deed and decree confirming it. The only description in the deed or decree is "E. part N. ½ SE. ¼ of SE. ¼ sec. 27, town. 2 N. range 12 W., containing 7.54 acres;" there is no circumstance in the description—as of ownership—to assist in its identification. The question is, does this identify the land? It is conceded that the taxes had been paid upon a part of the land which would come within a parallelogram, of the stated area, described by taking the east line of the tract as a base and its north and south lines as laterals; and that it was not intended to sell a tract in a parallelogram but one in a trapezoid. It is clear that any tract of the requisite area, taken out of the east half of the twenty acre tract, would, in a general sense, come within the description, and it is impossible to determine just what was intended, unless there is some rule of legal construction that gives to the description a meaning different from its popular acceptation.

The appellant contends that such is the case, and that the law intends from the description a tract of the stated area in the form of a parallelogram described upon

the east line of the larger tract as a base with the north and south lines as laterals. Such is the rule often applied by courts in construing descriptions as between parties to them, where there is a clear intention shown to affect some part of a definite tract, and the parties furnish no other means to identify the part. But this rule is not unbending, even in such cases, and yields to a proper showing that the parties intended otherwise; and proof that the party acting upon the land owned but one tract coming within the description, and it not in a parallelogram, has been permitted to control.

Therefore if the rule apply at all in cases where the description is not made by the owner but is found in proceedings that prejudicially affect him, it could not govern in this case, because the circumstances and the claim made by the appellant show that there was no intention to sell a tract in a parallellogram. When the circumstances rebut such intention and supply no other, the description is left uncertain and meaningless, and notice does not inform the owner that he is liable to lose his land or the public what is to be sold. The case of *Stewart* v. *Aten's Lessee*, 5 Ohio St. 257, presents a description strikingly similar to the one under consideration, and it was adjudged void for uncertainty, for the reasons stated by us. But if there was nothing in the circumstances to rebut the presumption of an intention to sell a parallelogram, it may be seriously doubted whether the description standing alone would come within the rule invoked and be held sufficiently definite. For in cases where such descriptions have been aided by the rule, it appeared, either by direct recital in the description or from the circumstances, who owned the land intended; and the ownership indicated was held sufficient to perfect the identification. *Judd* v. *Anderson*, 51 Ia. 345, may be cited as an example. In this case we find nothing in the description itself or in the

circumstances to indicate who owned the land sold for taxes; and as ownership was not disclosed as a means of identification, it may be questioned whether the description before us could in any case be adjudged sufficient.

The plat on file may be used to illustrate the great injustice that the rule invoked would work, if applied to tax sales and proceedings to confirm them. Mrs. La Fore owns lots 5 and 6, containing, say, two acres; and Cassinelli owns lots 7 and 8, containing, say, three acres; and all are a part of the east half of the twenty acre tract. Suppose Mrs. La Fore should pay taxes on two acres as in the eastern part of the tract and take her receipt, and that Cassinelli should fail to pay upon his part; that Mrs. La Fore should see advertised for sale as delinquent "three acres in the east part" of the tract, assessed to an unknown owner. Would she, or any ordinarily intelligent and prudent owner in her position, think that a part of her land was to be sold? We think not; and if not, such description is practically no description, since it lacks the first requisite of one—notice to the owner. Yet if the rule be applied, such a sale would be valid; and pass, not the land intended, but the land in a parallelogram along the entire line of the tract, including a part of her lots. Thus a rule of judicial origin, which was designed to ascertain the meaning of parties to a description when they had not clearly expressed it, would be employed against one who was a stranger to the description and ignorant that it was intended to apply to his land; the result would be to pass land which no one intended, or was authorized, to sell, and which persons ordinarily conversant with land descriptions would not expect to be sold. A description which can be understood and made definite only by judicial construction does not accomplish the essential functions of a description in tax proceedings; and as the law requires

one to be made for the practical purpose of protecting the owner, any that conveys no certain meaning to persons ordinarily versed as to such matters does not answer the requirement. One which is intelligible only to a high order of legal understanding conveys no meaning to others—the vast majority of tax payers—and should not be adjudged sufficient as the basis of a tax proceeding, or of a proceeding to confirm a tax sale upon constructive notice.

As the rule is of judicial origin, intended to aid in the practical administration of justice, it should not be extended beyond the sphere of its usefulness to a class of cases where it is calculated to work injustice and wrong.

Whether the court could have granted the relief upon a complaint which showed that, though the defendant was asserting a claim to the land, his deed and decree contained no certain description of it, we need not decide. For the defendant filed a cross-bill with his answer, and incorporated in it a prayer for general relief; he thereby invoked the judgment of the court upon the conflicting claim of title which he set up, and this warranted the court in determining the merits of the entire controversy and adjudging the effect of the deed and decree.

Affirm.

FERGUSON *v.* HANAUER.

Opinion delivered May 7, 1892.

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1. *Partnership assets—Land—Conveyance.*

Where land is purchased by two partners, for the use of the firm and with its funds, and there is no agreement that it shall be held for their separate uses, it will be treated in equity as partnership assets; and if a deed conveying such land be executed by one of the partners in the firm name in the co-partner's presence and with his consent, it operates as an effectual conveyance of the land.

2. *Mortgage—Effect of release of debt.*

Release of a debt secured by mortgage is no discharge of the mortgage lien where the right to enforce it is expressly reserved.

3. *Practice—Intervention—Misjoinder.*

Where a wife is permitted, in a suit against her husband, to intervene to set up claim to a homestead in her husband's lands, under act of 1887, ch. 64, sec. 2, she cannot object that there is a misjoinder of parties or causes of action, since such matters do not concern her.

Appeal from Mississippi Circuit Court in Chancery. JAMES E. RIDDICK, Judge.

On the 18th day of March, 1880, Louis Hanauer sold to H. C. Hampson and D. L. Ferguson, partners by the style of Ferguson & Hampson, a plantation in Mississippi county, called "Nodena," for $22,541, of which $9000 were paid in cash out of partnership funds, a vendor's lien being reserved for the balance. There was no agreement that the land should be the separate property of the partners. On January 4, 1884, Ferguson & Hampson, being largely indebted to Schoolfield, Hanauer & Co., a firm of which Louis Hanauer was a member, Ferguson executed in the firm name a deed of trust of the plantation to D. H. and F. P. Poston, trustees, to secure the above indebtedness. Hampson was present at the

time, and assented to the execution of the deed. On December 28, 1888, Ferguson & Hampson severally executed contracts releasing the plantation to Schoolfield, Hanauer & Co., and to Louis Hanauer, receiving from them separate releases of all indebtedness to Hanauer or to the firm of Schoolfield, Hanauer & Co., which releases contained the following clause:

"It is understood, however, that said Hanauer and the firm of Schoolfield, Hanauer & Co. shall retain the benefits of any liens, mortgage or deed of trust which they may now have on or against said property, and may enforce them in any way they may deem proper."

Hanauer brought suit to foreclose his vendor's lien, making Ferguson & Hampson, D. H. & F. P. Poston, trustees, and the firm of Schoolfield, Hanauer & Co., defendants. Ferguson & Hampson severally answered, admitting the facts alleged, and consented that the lien be foreclosed. Schoolfield, Hanauer & Co. answered, asking that the balance remaining after paying off the vendor's lien be paid toward the satisfaction of the deed of trust.

M. A. C. Ferguson, wife of D. L. Ferguson, was allowed to intervene and become party to the suit, and moved the court to strike out all that part of the complaint of Hanauer which sought to enforce the foreclosure of the deed of trust of January 14, 1884, because it was a misjoinder of causes of action and did not affect all of the defendants in the same way. The court overruled this motion, and Mrs. Ferguson excepted. [Hanauer's complaint did not seek to enforce the foreclosure of the deed of trust; Schoolfield, Hanauer & Co's. answer contains a prayer to that effect.] Thereupon, on the 4th of May, 1889, Mrs. Ferguson filed her answer and cross-complaint, making the plaintiff and the defendants in the original suit parties defendants thereto. She alleged that her husband was entitled to claim a homestead in

160 acres of the land on which he resided, and that he refused to claim it; that sufficient land was left to discharge the vendor's lien; that she did not join in the execution of the deed of trust nor acknowledge the same. She asked that the homestead be set apart to her.

The court denied her right to a homestead and rendered judgment foreclosing the vendor's lien and directing any surplus to be applied to the debt secured by the deed of trust. Mrs. Ferguson has appealed.

E. F. Adams for appellant.

1. There was a misjoinder of causes of action and of parties, and appellant's motion should have been sustained. Mansf. Dig. secs. 5014, 5016; 27 Ark. 582.

2. If the lands were not partnership property, Mrs. Ferguson could certainly set up her homestead right under the Constitution without the aid of the act of 1887. 46 Ark. 159; Const. art. 9, secs. 3, 4; Acts 1887, p. 90; 41 Ark. 94; 40 *id.* 69.

3. Ferguson & Hampson were tenants in common, and a tenant in common is entitled to homestead. 54 Ark. 9; 41 *id.* 94; 39 *id.* 301; 29 *id.* 280.

4. The fact that Mrs. Ferguson owned the Ellis place is not an estoppel. 42 Ala. 317.

5. Mrs. Ferguson had the right to compel Hanauer to resort to the other lands before selling the homestead. 46 Cal. 638; 19 Iowa, 405; 30 *id.* 412; 48 Penn. St. 315; 31 Ark. 203.

6. The lands are not partnership lands, but under the laws of Arkansas they were held in common. The deed to them was as individuals. Mansf. Dig. sec. 467; 31 Ark. 580. Hence there has never been any conveyance to the Postons as trustees. 3 Sneed (Tenn.), 594; 36 Ark. 456.

7. But if partnership lands, they could not be conveyed in the mode attempted. 15 Gratt. 35–6; Story on Part. sec. 94. The mere fact that tenants in common

are partners and that the lands are purchased with partnership funds does not make the land partnership assets. 5 Metc. (Ky.) 562; 39 Am. Dec. 697; 27 Tenn. 88; 12 Leigh (Va.) 264; 37 Am. Dec. 654; 24 N. Y. 513; Freeman on Cot. and Part. secs. 114–18; 2 Sand. (N. Y.) 561; 3 How. (Miss.) 360.

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

1. The land belonged to the firm of Ferguson & Hampson, a partnership, and no exemptions can be claimed in partnership property. 46 Ark. 48; 48 Ark. 557; 2 Bates on Part. sec. 1131. That it was partnership property, the proof is clear, and the deed so recites. 1 Bates on Part. sec. 281; 1 Devlin on Deeds, sec. 49; 36 Ark. 464.

2. The deed was signed by one partner, and the other was present and assented to it. This is sufficient. 1 Devlin on Deeds, sec. 110; 1 Ark. 206; 4 *id.* 450; 14 *id.* 31; 20 *id.* 325.

3. Before the act of 1887, the assent of the wife was not necessary to convey a homestead. 37 Ark. 298. But the act of 1887 could not affect a mortgage executed three years before. 40 Ark. 423; 47 *id.* 515.

1. Effect of conveyance of land by single partner.

HEMINGWAY, J. It may be stated as settled at this time that when land is purchased by partners for the use of the firm and with its funds, and there is no agreement or design that it shall be held for their separate use, it will be treated in equity as vested in them in their firm capacity, whether the title is in all the partners as tenants in common, or in less than all. 1 Bates, Part. sec. 281 and cases. And if a deed conveying such land be executed by one partner in the firm name in the presence of his co-partners and with their consent, it operates as an effectual conveyance of the land. 1 Bates, Part. sec. 292; 1 Devlin on Deeds, sec. 110; *Peine* v. *Weber*, 47 Ill. 41; *Pike* v. *Bacon*, 21 Me. 280; *Wilson* v. *Hunter*, 14 Wis. 683; *Smith* v. *Kerr*, 3 N. Y. 144; *Haynes* v. *Sea-*

chrest, 13 Ia. 455; *Gibson* v. *Warden*, 14 Wall. 244; *Holbrook* v. *Chamberlin*, 116 Mass. 155; *Sigourney* v. *Munn*, 7 Conn. 11; *Edgar* v. *Donnally*, 2 Munf. 387. It follows that the deed of trust was valid, and that the wife of Ferguson could assert no subsequently acquired homestead right to defeat it.

2. When mortgage not extinguished by release of debt.

But it is contended that the deed of trust was extinguished by the release of the debts, and that, it being cancelled, the wife can assert her homestead rights under the act of 1887.* The instrument of release does not admit of the construction contended for. It contains an express stipulation that Hanauer, individually, and the firm of Schoolfield, Hanauer & Co. should retain the benefits of all liens, mortgages or deeds of trust that they then held against the property, with the privilege of enforcing them as they might deem proper. The purpose of the parties is manifest, and their agreement must be construed accordingly. The parties plainly agreed that Hanauer and the firm of Schoolfield, Hanauer & Co. should apply the securities to the debts, and that they should not look to Ferguson or Hampson individually for any balance that might be due. Under the agreement the deed of trust was not satisfied, and Hanauer is permitted to maintain this suit.

3. Practice in interventions.

The objection that there was a misjoinder of parties and of causes of action comes without force from Mrs. Ferguson, as it relates to matters that did not concern her.

Affirm.

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* The act of 1887, ch. 64, p. 90, provides:

"Section 1. That no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same.

"Section 2. That * * * if the husband neglects or refuses to make such claim (of homestead), his wife may intervene and set it up."

WATSON v. CAMPBELL.

Opinion delivered May 7, 1892.

Tax sale—Return of assessment.

A sale of land for the taxes of 1883 is void where the assessment list for that year was filed on June 20, 1883, instead of on June 19, as required by statute.

Appeal from Woodruff Circuit Court in Chancery.
MATTHEW T. SANDERS, Judge.

J. N. Cypert for appellant.

The assessor filed his assessment list on the 20th of June, 1883, when it should have been filed by the first Monday in June. Mans. Dig. sec. 5676.

House & Cantrell for appellee.

The assessment list was not returned until June 20, 1883. The law required it to be returned on or before the first Monday in June. This was a mere duty imposed on the assessor by law, the non-observance of which did not deprive the owner of any right, and he cannot complain. 46 Ark. 96. Such irregularities are cured by statute. Mansf. Dig. sec. 5791.

HUGHES, J. This is a suit brought by the appellee to recover possession of land upon a deed made to the appellee by the Commissioner of State Lands, dated January 24, 1888. The cause was transferred to equity. The appellant answered and attacked the deed of the appellee, which was founded upon the forfeiture of the land to the State for the non-payment of taxes due thereon for the taxes of 1884.

By act of March 5, 1885, the payment of taxes for the year 1884 had been extended. The forfeiture was made therefore upon the assessment for 1883, which was returned to the clerk's office and filed on the 20th of

June, 1883, whereas it should have been returned to and filed in the clerk's office by the first Monday in June, as the law then required.

The failure to return the assessment to the clerk's office was prejudicial to the owner of the land. The board of equalization of real property was then required by law to meet on the first Monday in June, and it might continue in session two weeks, but could not continue longer than two weeks in session. Any party aggrieved by any action of the board of equalization might appeal therefrom to the county court. The session of the board of equalization had ended, by limitation of law, in 1883, before the assessment was returned. The tax-payer's right of appeal from any action of the board was therefore cut off by the failure to return the assessment list in time. Sections 5687, 5688, Mansfield's Digest; Cooley on Taxation, 366. "The tax-payer ought always to be at liberty to insist that directions which the law has given to its officers for his benefit shall be observed." In such cases the law is mandatory, as it is generally expressed.

For the failure to return the assessment list of 1883 within the time required by law, the forfeiture was void, and the deed thereon is void. The finding and judgment of the circuit court should have been for the defendant (appellant here). The judgment is reversed, and the cause remanded for judgment in accordance with this opinion, after allowing the appellee for taxes paid by him.

ON REHEARING.

Opinion delivered May 21, 1892.

HUGHES, J. It is insisted that there is error in the opinion heretofore delivered in this cause, based on a mistake of fact, in this, that the court stated in the opinion that the assessment list, on which the forfeiture for

taxes was declared, should have been returned to the clerk's office on or before the first Monday in June, 1883, and was not returned till the 20th of June. That the time for filing the assessment list for 1883, which was fixed by section sixty-five of the revenue act of 1883 (p. 237, Acts of 1883), was on or before the first Monday in June, but by section 226, p. 293, Acts of 1883, the time had been extended fifteen days for filing the assessment list for that year. This is true, and it escaped the attention of the writer, as the counsel for appellee stated in their brief that the assessment list should have been filed by the first Monday, but was not filed till the 20th of June. The extension applied only to the year 1883, and was not therefore carried into the Digest.

But the question still is, was this assessment filed in time to be within the requirement of the statute, which is mandatory and was intended to protect the rights of the tax-payer? The first Monday of June in 1883 was the fourth day of the month. The extension of fifteen days which applied also to the time for the meeting of the board of equalization, made the day for the return of the assessment and the meeting of the board of equalization in the year 1883 the 19th day of June. The assessment list was not returned to the clerk's office till the 20th of that month. As stated in the opinion, the board of equalization could, under the statute, have continued in session two weeks, but not longer, and was not required to continue so long in session. Under the statute the tax-payer had the right of appeal from any action of the board of equalization. There is no evidence in the record that the board was in session after the 19th of June. Besides, the time within which the tax-payer might make his application to the board to have his assessment corrected, or adjusted, and appeal from its action, if he saw fit, could not be shortened by the failure of the assessor to return his assessment within the time required by

law. If it could be shortened one day, why not until he would be deprived of all but one day, within which to assert his rights? The principle applied to the facts stated in the opinion applies to the state of facts we are considering here.

The motion for reconsideration is therefore denied.

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BURGETT v. WILLIFORD.

Opinion delivered May 7, 1892.

1. *Judgment—Collateral attack—Process.*

   A decree against infant defendants is valid against collateral attack where they were notified of the pendency of the suit by service on them, as well as on their guardian, of a copy of the summons in the cause directing the guardian to be summoned to answer a complaint filed against them, although the writ did not direct that the infant defendants also should be summoned to answer.

2. *Tax sale—Purchase by co-tenant.*

   While a tenant in common of lands cannot, as against a co-tenant, acquire title to the co-tenant's interest by purchase at a sale of the whole for delinquent taxes (*Cocks* v. *Simmons*, 55 Ark. 104), a title so acquired is good against strangers.

3. *Conflict of laws—Limitation of actions.*

   The period when infants arrive at the age of majority, for purposes of the statute of limitations, is determined by the law of the forum.

Appeal from Crittenden Circuit Court.

JAMES E. RIDDICK, Judge.

W. G. Weatherford for appellants.

The decree in the Ferguson & Hampson case is void. The court never acquired jurisdiction over the minors. They were never served with legal notice, nor does the decree recite that they were, but "as appears and is shown by the return of the sheriff, etc." A summons

must be issued to the sheriff commanding him to summon the defendants *therein named.* Mansf. Dig. secs. 4967, 4968. The defense *must* be by regular guardian if there is one, or by one appointed. No judgment can be rendered against an infant until after defense by guardian. *Ib.* 4957. The appointment of a guardian *cannot be made* until after service of summons. *Ib.* sec. 4958; 39 Ark. 61. There is no legal way to bring an infant into court except by *naming him* in the writ. See 40 Ark. 42, 56; 42 *id.* 222; 11 Humph. 191; 49 Ark. 397; 19 Wall. 570; 36 Ark. 211; 31 *id.* 493. Infants must be summoned and served, or the court has no jurisdiction and the appointment of guardian *ad litem* is void. 63 Cal. 554; 66 *id.* 53; 68 Tex. 215; 18 Wall. 350. See also *Galpin* v. *Page*, 18 Wallace; *Pennoyer* v. *Neff*, 95 U. S.; *Ins. Co.* v. *Bangs*, 103 U. S.

U. M. & G. B. Rose and *E. F. Adams* for appellees.

1. The appellants have not shown title to any of the tracts, in accordance with the rule in 38 Ark. 181, and hence must fail.

2. The Ferguson & Hampson decree includes the greater part of the lands. The summons is in proper form; but if not, the decree cannot be collaterally impeached. It is the judgment of a domestic tribunal of general jurisdiction, and can only be attacked by a direct proceeding. Every question involved in reference to the validity of this decree is settled by 49 Ark. 392. See also 50 Ark. 338; 13 S. W. Rep. 134. But the summons was directed to Peter L. Burgett and the minors, and was served upon them all. Courts are not disposed to encourage frivolous objections to process. See 4 Ark. 429; *ib.* 520; 6 *id.* 476; 13 *id.* 415; 14 *id.* 59; 25 *id.* 97; 32 *id.* 278; 32 *id.* 407; 34 *id.* 682; 36 *id.* 293; 37 *id.* 450; 44 *id.* 404; 45 *id.* 36; 48 *id.* 33. And if a writ is amendable, it will be considered as amended when collaterally questioned. 12 Ark. 421; 19 *id.* 306; 47 *id.* 374. The

errors in the decree are mere clerical ones; in the complaint the lands are properly described. In such cases mere clerical errors will be disregarded. 38 Ark. 195; 40 *id.* 110; 1 Thomps. Trials, sec. 1094.

3. Bettie Burgett is clearly barred by limitation. All questions of limitation are settled by the law of the forum. Story, Confl. Laws, sec. 577.

HUGHES, J. This is a suit in ejectment brought by the appellants to recover of the defendants about three thousand acres of land in Crittenden county, which are described in the complaint. The cause was tried by the court without a jury. The court found the facts, declared the law and gave judgment for the appellants, from which the defendants appealed.

A decree of the Crittenden circuit court in chancery rendered in favor of Daniel L. Ferguson and H. L. Hampson, the vendors of the appellee, Williford's, intestate, against Peter N. Burgett as administrator and guardian of Bettie, Ida W. and Peter L. Burgett, minors, and against the said minors as the infant heirs at law of the said Peter N. and Elizabeth G. Burgett, both deceased, as also the statutes of limitation of two years and of seven years, were relied upon by the appellees to defeat the claim of the appellants.

The Ferguson & Hampson decree was rendered upon a complaint in equity, to which said Peter L., Bettie and Ida W. Burgett were made parties by name as the infant heirs at law of the said Peter N. and Elizabeth G. Burgett. A guardian was appointed for them, and appeared and answered the complaint. The decree in the cause was that the claims of the defendants to the lands described in it were clouds upon the title of the plaintiffs, Ferguson and Hampson, and that they be removed, and that the title of the said Ferguson & Hampson be quieted. The decree has not been reversed or set aside. It is stated by both the counsel for appellants and appel-

lees that this decree covers nearly all the lands embraced in this controversy, and that if the said decree is valid, it settles this controversy in favor of the appellees as to the lands covered by it. But the appellants attack this decree on the ground that it was rendered without jurisdiction of the minor defendants thereto. To support this contention, they say that no summons issued for said infant defendants; that they were not served with process; that the decree is therefore void for the want of notice to them.

1. When judgment not void for irregular process.

As stated above, they were named as defendants in the complaint. The summons in the record which issued in that cause with the return upon it is as follows:

"SUMMONS IN ACTION BY EQUITABLE PROCEEDINGS.

The State of Arkansas to the Sheriff of Crittenden County:

You are commanded to summon Peter L. Burgett, administrator of Peter N. Burgett, and guardian of Bettie, Ida and Peter Burgett, minors, to answer in twenty days after the service of this summons upon them, a complaint in equity filed against them, in the Crittenden circuit court, by Ferguson & Hampson, and warn them that, upon their failure to answer, the complaint will be taken for confessed; and you will make a return of this summons on the first day of next October term of said court.

Witness my hand and the seal of said court, this 29th day of September, 1880.

[SEAL]

A. H. FERGUSON, Clerk.

RETURN.

State of Arkansas, County of Crittenden.

I have this 29th day of September, A. D. 1880, duly served the within by giving a copy of the same to the within named Peter L. Burgett, as administrator and guardian of the within named Bettie, Ida and Peter Bur-

gett, minors, and giving to each of the said minors a copy of the same, as herein commanded.

W. F. BEATTIE, Sheriff,

Fees, $3.25. By W. F. MADOX, D. S.

Returned and filed this 29th day of September, A D. 1880.

A. H. FERGUSON, Clerk."

The recitals of the decree are as follows: "And now on this day this cause came on for hearing upon the bill and exhibits thereto and the answer of S. P. Swepston, guardian *ad litem* of the infant defendants, Bettie, Ida and Peter Burgett, herein appointed, and it appearing to the court that due and legal process of the pendency of this suit and of the filing of the bill herein, had been had upon defendants, Peter L. Burgett, as administrator of the estate of Peter N. Burgett, deceased, and as guardian of said infant defendants, Bettie, Ida and Peter Burgett, children and heirs at law of the said Peter N. Burgett and Elizabeth G. Burgett, both now deceased, in the way and manner by law required, as appears and as shown by the return of the sheriff of the county in the summons issued herein and filed."

It is insisted that there could be no valid service upon the infant defendants unless their names had been included in the summons as defendants. The omission to name them in the summons as defendants was doubtless a clerical error. The summons was amendable. *Galbreath* v. *Mitchell*, 32 Ark. 278; *Richardson* v. *Hickman*, *ib.* 407; *Martin* v. *Godwin*, 34 *id.* 682. "Where suit is defective in a matter that is amendable, it will be considered as amended when collaterally questioned." *Whiting* v. *Beebe*, 12 Ark. 421.

That the infant defendants were notified of the pendency of the suit against them by service of a copy of the summons that was issued in that cause (a copy of which, with the return thereon, appears in the record)

upon each of them, is apparent. See *McNutt* v. *State*, 48 Ark. 33. The Ferguson & Hampson decree is not void.

There were in the complaint three or four other pieces of land, not included in this decree. We are unable to find that appellants show title to or right to possession of either of these pieces, save the north half of fractional section 7, 320.44 acres, in township 4 north, range 8 east. An undivided half interest in this, with other lands, was purchased by Joel Higgins, Exr., by Mrs. E. G. Burgett, under whose will appellants claim title. Afterwards, and while Mrs. Elizabeth G. Burgett still owned her undivided one-half interest, the tract was sold on the 11th day of March, 1867, by the sheriff of Crittenden county for the taxes of 1865–6, and bought by J. M. Terry, who received a certificate of purchase for the same, and, after the expiration of the time allowed by law for redemption had expired, assigned said certificate of purchase to Mrs. E. G. Burgett, upon which a deed was made to her as assignee of Terry; and acknowledged February 16, 1871. The deed bears date June 28, 1860, which is evidently a mistake, probably made in copying. There is no objection made to this deed, except that it is said that the land was assessed to residents, and sold as the lands of non-residents are required to be sold for taxes. The tax deed recites that the land was assessed to Higgins & Randall, non-residents. So this objection falls.

2. Validity of purchase by co-tenant at tax sale.

It is also objected that, as Mrs. Elizabeth G. Burgett had a deed for and claimed an undivided interest of one-half in the land at the time of the tax sale, she, as tenant in common with the owner of the other half, was obliged to pay the taxes, and could not suffer the land to sell for taxes, and purchase her co-tenant's interest, and thereby get a title to it. It is very true she could not, against her co-tenant. But there is no reason why she

could not thus acquire title as against strangers to whom she stood in no fiduciary relation. If her co-tenant does not complain, a stranger, to whom she stands in no relation of trust or confidence, cannot. We see no reason why the appellant's title to this tract is not good, unless their right of action was barred when their suit was begun.

3. Law of the forum governs as to limitation of actions.

This suit was brought on the 16th day of November, 1886. The appellant, Bettie Burgett, was born December 23d, 1862. Peter Burgett, one of the appellants, was born July 22d, 1866, and Ida W. Burgett, another one of the appellants, was born March 20th, 1869. It follows, therefore, that Bettie Burgett's right of action was barred before the suit was brought. The right of action of the appellants, Peter L. and Ida W. Burgett, was not barred when this suit was brought. To avoid the statute the appellants say that they were citizens of Mississippi, where the period of majority for females is the age of twenty-one years. But we understand that questions arising upon the statute of limitations must be settled according to the law of the forum.

It is also contended by the appellants that the appellee's intestate, Williford, entered a lease, which was not produced but said to be lost, as to the existence and contents of which some parol evidence was heard by the court. The court determined adversely to the appellants, and we will not disturb the finding. The evidence as to this lease was not satisfactory.

There were some errors made in the Ferguson & Hampson decree, in describing some of the land in the wrong township, which are unimportant, as the pleadings show what was intended. They were described in the complaint, which the decree followed. It follows therefore that the judgment of the Crittenden circuit court must be affirmed, except as to the one-third interest each of Peter L. and Ida W. Burgett in said N. ½ frl.

sec. 7, T. 4 N., R. 8 E., in Crittenden county. As to the said Peter L. and Ida W. Burgett, the judgment is reversed and remanded for a new trial, so far as it relates to their one-third interest each in the said N. ½ of frl. sec. 7, T. 4 N., R. 8 E.

PENDLETON v. SPEAR.

Opinion delivered May 16, 1892.

Mortgage foreclosure—Confirmation of sale.

Where, under a decree of foreclosure, the mortgagee obtains a regular sale of the mortgaged premises for a fair price, he is entitled to a confirmation of the sale and satisfaction of his decree, without regard to any rights in the mortgaged premises acquired by a purchaser from the mortgagor *pendente lite.*

Appeal from Miller Circuit Court in Chancery.
W. S. EAKIN, Special Judge.

Pendleton and two others, surviving partners of Wickham & Pendleton, procured a decree against A. F. Spear, and Mary E. Spear, his wife, foreclosing a mortgage on a town lot in Texarkana, and a tract of land consisting of twenty-eight acres, situated in NE. ¼ of NW. ¼ of sec. 29, T. 15 S., R. 28 W. A commissioner was appointed with directions to sell the land, first offering the town lot and then the twenty-eight acres, *after giving the notice prescribed by law for the sale of real estate under execution.* The commissioner reported that on November 1, 1890, he sold the town lot to Geo. H. Langsdale; that when he was proceeding to offer for sale the twenty-eight acres of land, he, at the request of Langsdale, (who claimed to be owner of that portion of the land ordered to be sold which was situated in the north half of the forty-acre tract above described), and over the protest of Thomas Orr, offered for sale to the

highest bidder that portion of the tract situated in the south half of the forty-acre tract; that the land was sold to Thomas Orr, and brought enough to pay off the mortgaged debt.

Defendants filed exceptions to the commissioner's report, and asked that the commissioner be ordered to re-sell the tract of land, and to begin at the northeast corner of the tract and sell a sufficient quantity to pay the balance due under the decree. Thomas Orr was permitted to intervene in the suit and resist the confirmation, alleging that he had, in December, 1887, purchased from defendants the land situated in the S. ½ of the forty acre tract, though his title was not recorded until December, 1890. He asked that the commissioner's report of sale as to this tract of land be not confirmed; that he be ordered to re-sell, beginning at the NE. corner of the tract. Langsdale, also, was permitted to intervene and insist upon confirmation of the report, alleging that he was the owner, by record title, of the N. ½ of NW. ¼ of sec. 29; that he had been in possession thereof since 1886, when decree in his favor was rendered by consent in a suit wherein W. H. Bush, administrator, and others were plaintiffs and the defendants herein were defendants; that the mortgage to plaintiffs herein, executed previously to that time, had been a cloud upon his title and had been removed by the commissioner's sale.

Upon the hearing, which appears from the decree to have been upon the report of the commissioner, the exceptions of defendants, the amended and substituted interplea of Thomas Orr, the interplea of Langsdale, the deposition of A. F. Spear, the oral testimony of witnesses in behalf of Orr, and of witnesses in behalf of Langsdale, the court approved and confirmed the sale of the town lot, and set aside the sale of the south half of the forty-acre tract; and in its decree the court made the following special findings.

"First. That the title of George H. Langsdale was of record prior to that of Thomas Orr, but, at the time of the consent decree between Langsdale and Spear and wife, all parties were in possession of the lands then in controversy. That the testimony is conflicting as to Langsdale's actual notice of Orr's purchase of the lands in controversy, and upon this question of fact the court does not deem it necessary here to pass.

"Second. That the burden of the mortgage created by Spear and wife upon the lands in favor of Wickham & Pendleton, and subsequently alienated by Spear and wife to Langsdale and Orr, should fall upon the several parcels in the inverse order in regard to the time of the the alienation, but since all these parties obtained possession of their several parcels of land, the mortgage of Wickham & Pendleton was foreclosed, and the parties had then and there an opportunity of having the assets of Spear and wife marshaled and the burden placed where it properly belonged. This was not done, and the chancellor in a former decree condemned all of the lands for the satisfaction of the debt of Wickham & Pendleton, and this court will not now go back and alter the terms of that decree and place the burden upon any particular portion of the land in controversy. And it is further ordered and decreed that the commissioner is hereby ordered to re-advertise and sell said lands on the second day of March, 1891, on a credit of three months, in accordance with the decree in this cause hereinbefore rendered, and in making said sale said commissioner shall commence at the northeast corner upon east boundary line of said tract, and sell the same in lots of five acres until a sufficient quantity is sold to satisfy the balance due the plaintiff, A. B. Pendleton *et al.*, as surviving partners, and the interest thereon, together with the costs of this suit, and that, in the event the lands so sold include the interest allotted to interpleader, G. H. Langs-

dale, by a decree of this court in a cause wherein W. H. Bush as administrator of Daniel Dulin, deceased, *et al.*, were plaintiffs, and Mary E. Spear *et al.*, were defendants, then it is decreed that Thomas Orr contribute one-half of said sum, and that the interpleader, George H. Langsdale, have a lien upon the interest of said Thomas Orr for said contribution; and if the same be not paid within thirty days after the purchaser at said commissioner's sale is required to pay the purchase price, that he, the said Langsdale, may have execution hereof; and that the costs be paid equally by the interpleaders herein."

Scott & Jones for appellants, Pendleton *et al.*

1. The court erred in allowing Langsdale and Orr to interplead. After the decree of foreclosure, interpleas came too late. They should have been presented before the decree of foreclosure; it is too late to inject their dispute into this case.

2. There is no statute requiring a *commissioner* to commence at the northeast corner to sell. The order did not so direct. The fact that the commissioner designated the part to be sold (a sale of the whole not being necessary), instead of referring the matter to the court, is not sufficient of itself to quash the sale. The discretion of the commissioner, if abused, may be corrected. 2 Metc. (Ky.), 550; 11 S. W. Rep. 606; 1 *id.* 394. The interpleas should be dismissed, and the sale confirmed.

J. D. Cook for appellant, Langsdale.

1. It was error to refuse to marshal the assets of Spear. The decree was not final until the property, or a sufficient amount thereof, had been sold to satisfy the plaintiff's claim, and the sale approved. 4 Ark. 293; 8 *id.* 67; 10 *id.* 333; 18 *id.* 209.

2. Orr is estopped. 10 Ark. 211; 18 *id.* 142; 24 *id.* 271; 33 *id.* 465; 36 *id.* 96; 39 *id.* 131; 6 Cush. 163; 13 Lea, 577; 10 Mass. 403.

3. This was not an execution sale, and the commissioner was not bound by secs. 3052–3, Mansf. Dig.; 34 Ark. 399.

John Hallum for appellee, Thomas Orr.

The lands should be sold, commencing at the NE. corner. Mansf. Dig. secs. 3052–3. The decree is right, and should be affirmed.

PER CURIAM. When the appellants had obtained a regular sale for a fair price of the mortgaged premises under their decree of foreclosure, they were entitled to a confirmation of the commissioner's report of sale and the satisfaction of their decree, without regard to any equities or rights which Orr may have acquired in the mortgaged premises *pendente lite*.

The order of sale which the commissioner executed did not require that officer to commence to sell at the NE. ¼ of the tract. The statements of the appellant's abstract that there was no irregularity shown in the conduct of the sale, and that the land brought a fair price, are not controverted by the other parties. We take them therefore as true.

As against Mrs. Spear, the defendant in the suit to foreclose, the plaintiffs were entitled to confirmation of the report of sale. But Orr could assert no right in this suit except such as Mrs. Spear could assert, for his purchase from her was after the litigation. The sale as to him should therefore have been confirmed. It was error to allow Orr and Langsdale to protrude the controversy between themselves into the plaintiffs' litigation. They were not parties to the foreclosure suit, and the decree in no wise settled or affected the rights or equities between them.

The ends of justice did not demand that the plaintiffs in that suit should be harassed and delayed by their litigation. The court should therefore have refused their petitions to become parties to this suit, and left them

free to settle their controversy in a separate suit.

The decree of the circuit court will be set aside, the petitions of Orr and Langsdale will be dismissed without prejudice to either, and the cause will be remanded with directions to confirm the commissioner's report of sale.

It is so ordered.

MUSKEGON LUMBER CO. *v.* MYERS.

Opinion delivered May 16, 1892.

Overdue tax sale—Redemption—Costs.

Where the owner of land brings suit against the land commissioner, under act of 1887, ch. 13, to quiet his title to land sold to the State in an overdue tax suit, alleging that he paid the taxes and penalty to the county treasurer, but without offering to pay the attorney's fee for foreclosing the State's lien, he is not entitled to judgment, which would carry the costs, although pending the suit the legislature relinquished the State's title to the land.

Appeal from Grant Circuit Court in Chancery.

A. M. DUFFIE, Judge.

Suit by Muskegon Lumber Co. against C. B. Myers, State Land Commissioner, and J. J. Beavers, clerk of Grant county, to quiet plaintiff's title to certain land. The facts sufficiently appear in the opinion.

John B. Jones and *E. W. Kimball* for appellant.

Since the passage of the act of March 25, 1891, releasing the claims of the State to these lands, there is no controversy between appellant and the State.

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

The decision in this cause was rendered before the passage of the act of March 25, 1891, and the decision, if right then, as it was, should not be reversed. The legislature cannot set aside a judgment or decree. 20

Mich. 27; 2 Pa. St. 22; Cooley's Const. Law, p. 112; 29 Mich. 69.

COCKRILL, C. J. Only the shell of this controversy remains—the merits have been resolved in favor of the appellant by the legislature, pending this appeal.

The lands in suit had been sold to the State under a decree rendered in pursuance of the act of March 12, 1881, known as the overdue tax law. They were subsequently placed upon the tax books as though there had been no acquisition of title by the State, and were sold by the collector, as the lands of the former owners, for the unpaid taxes of previous years, including those the non-payment of which was the foundation of the decree under which the State acquired title. Within two years from the date of the collector's last sale, the former owners of the lands paid to the county treasurer the amounts that would have been required to redeem the lands from tax sales under the law applicable to redemption from collector's sales.

The appellant is the vendee of the former owners. It filed its complaint against the State and county officers to restrain them from selling the lands or doing other acts that would cast a cloud upon its title, and prayed that its title be quieted against all claims. The court dismissed the complaint and adjudged the costs against the appellant.

Pending the appeal the legislature passed an act, the effect of which is that the State relinquishes all claim of title to lands acquired by the State under the overdue tax law, where the officers have proceeded and the taxes have been paid, as was done in reference to these lands, and directs the land commissioner to withhold such land from sale. Acts 1891, ch. 68, p. 125.

As the State's only claim of title comes through the overdue tax decree, the appellant's lands fall within the very letter of the act last mentioned, so that, by the con-

cessions of the State through the legislature, the prayer of the appellant's complaint is practically granted. It is useless therefore to consider any question relating to the appellant's title. The costs only are involved; and conceding, without deciding, that suit could be maintained against the State's officers for either of the purposes indicated in the complaint, we think the costs were rightly adjudged against the appellant for the following reasons, viz: the full amount due to the State for redemption under the act of February 15, 1887, (Acts 1887, ch. 13, p. 13), upon which the appellant based its action, has not been paid, nor does the appellant offer to pay it.

The act requires the owner who desires to redeem his land, which has been purchased by the State under an overdue tax degree, to pay the attorney's fee incurred in foreclosing the tax lien as part of the costs of redemption. It is conceded that the State paid the attorney's fee for foreclosing the lien on these lands, and that there has been no offer by the land owner to repay.

If therefore it be conceded that the payment to the county treasurer to the full amount necessary to effect a redemption was equivalent to payment to the land commissioner, who alone was authorized to receive the redemption money under the act of 1887, the appellant would take nothing. Because if it can be held, as the appellant contends, that the State is estopped to deny the legality of the acts of the county officers, equity would not aid the complainant to enforce the estoppel until it does equity by offering to pay what it should have paid to perfect the right it seeks to enforce.

Without prejudice to the appellant's rights under the act of 1891, above referred to, the decree is affirmed.

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GUNTER v. FAYETTEVILLE.

Opinion delivered May 16, 1892.

Municipal corporation—Annexation—Notice.

An order of the county court annexing territory to a city upon its petition is erroneous where notice of the time and place of hearing was not given, as required by sec. 785, Mansf. Dig., notwithstanding a majority of the property holders in the territory sought to be annexed appeared at the hearing.

Appeal from Washington Circuit Court.

EDWARD S. MCDANIEL, Judge.

Proceeding by the city of Fayetteville to annex certain contiguous territory. No notice of the time and place of hearing in the county court was given, as required by sec. 785, Mansf. Dig., but T. M. Gunter and others, comprising a majority of the property owners, appeared and remonstrated against the annexation. The petition was granted in the county court; on appeal to the circuit court the judgment was affirmed. Remonstrants have appealed.

B. R. Davidson for appellant.

No notice was given in accordance with the requirements of the law. Nor was the want of notice waived by the appearance of remonstrants. But there were some property owners who did not appear at all.

F. M. Goar for appellee.

Notice of time and place was duly given. The ordinance was valid. All objections to the notice were waived by appearance.

COCKRILL, C. J. When a city has taken the necessary steps to entitle it to present its petition to the county court for the annexation of contiguous territory, and a time has been fixed by the county court to hear

the petition, public notice must be given of the intended move. That is a requirement of the statute. Mansf. Dig. 785, 922. The notice must be published in a newspaper or posted as the statute specifies. *Id.* 785. The object of the notice is to give all persons interested the opportunity to contest the petition to annex. *Vestal v. Little Rock*, 54 Ark. 323.

The provisions of the statute show that the right to be heard to remonstrate against the prayer of the petition is guarantied to every person in interest. But, without notice of the annexation proceedings, there is no opportunity to be heard. Statutory warning of the intended application is therefore a condition precedent to the power of the county court to annex the territory, whether the court shall be said to act in an administrative or judicial capacity. *Shumway* v. *Bennett*, 29 Mich. 451.

In this case it is not shown that notice of the proceeding was given in either of the modes provided by statute, but a majority of the property holders in the territory to be annexed appeared on the day fixed by the court for a hearing and contested the prayer of the petition. The questions were determined adversely to them in the county court and again on appeal in the circuit court, and they have prosecuted their appeal to this court.

The statute probably did not contemplate the allowance of an appeal in this class of cases, for the legislation is borrowed from States where the acts prescribed to be performed by the county court in our act are administrative purely, and where no appeal is allowed. But the right to appeal has been found elsewhere, and is established by the decisions of this court. *Dodson* v. *Fort Smith*, 33 Ark. 508; *Foreman* v. *Marianna*, 43 *ib.* 324; *Vestal* v. *Little Rock*, 54 Ark. *sup.*

It is argued that the want of notice in this case is

cured by the appearance of remonstrants. If all who have the right to remonstrate had appeared, the argument would be unanswerable, for appearance is a waiver of notice. But the record shows that some of those whose lands lie in the territory sought to be annexed did not appear. They were interested and were entitled to notice. Whether residents and tax-payers of the city who voted against annexation are also persons in interest who are entitled to remonstrate, it is not necessary to decide, because the appearance of a part of the land-owners of the coveted territory did not waive any right of others similarly interested who did not appear. The most that could be claimed, in an ordinary suit between litigants under like circumstances, would be that the judgment should be affirmed only as to those who appeared. But this class of cases is anomalous—the court acts upon the territory as a whole, without the power of dividing it or of severing any part. *Vestal* v. *Little Rock*, 54 Ark. *sup.*

According to the case last cited, if it does not appear that the territory as a whole should be annexed, it is error to annex any part of it. No case is made by the city on this record against the land owners in the tract desired to be annexed who did not appear, for they have not waived notice, and without notice there was no power to annex their lands to the city. No part of the territory therefore can be annexed until it is shown that the proper notice has been given.

The questions as to the proof necessary to authorize annexation, and the right to amend the petition in order to cut off territory described in the petition when that becomes necessary, are bountifully treated in the cases of *Vestal* v. *Little Rock*, 54 Ark. *sup.; Vogel* v. *Little Rock*, 55 Ark. 609, and *Woodruff* v. *Eureka Springs*, 55 Ark. 618.

Reverse and remand for further proceedings.

PINE BLUFF WATER CO. *v.* SEWER DISTRICT.

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Opinion delivered May 16, 1891.

Sewer district—Authority of commissioners.

The object of the organization of a sewer district, and the authority of its board of commissioners, being limited to the construction of sewers and to paying for the same, the commissioners have no authority to bind themselves as a board, or the sewer district, for water furnished for flushing sewers in the district.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

U. M. & G. B. Rose and *Bell & Bridges* for appellant.

The water was not furnished to the city, but to the sewer commissioners. The sewers had not been turned over to the city. The commissioners could not claim the benefit of a contract to which they were not parties. 1 Whart. Cont. sec. 507; 2 *id.* sec. 784.

N. T. White for appellee.

Appellant agreed with the city to furnish water for flushing sewers, and has received pay for that service in the rent charged for fire hydrants. It does not matter whether the water was furnished by flush tanks or through hose and a fire nozzle, so long as no additional burden was imposed. Am. & Eng. Enc. Law, 3d vol. p. 863, and notes; 1 Parsons on Cont. 466–7–8; 49 Ark. 464; 31 *id.* 411; 31 *id.* 155; 46 *id.* 136.

BATTLE, J. This was an action instituted by the Pine Bluff Water & Light Company against Sewer District No. 1, in the City of Pine Bluff, and the commissioners of the district, to recover the sum of $900 for water furnished the district for flushing sewers. The

district sued was organized about the month of November, 1888, for the purpose of constructing sewers. Its object and the authority of its board of improvement, or commissioners, were limited to the construction of sewers and paying for the same. The board had no authority to enter into any contract, except such as were in the scope of said authority. When the sewers were completed, they became subject to the control of the City of Pine Bluff, and the board of the sewer district no longer had lawful control over them. They had no authority to contract or bind themselves as a board or the sewer district for water furnished for flushing the sewers in the district. Mansfield's Digest, secs. 825, 895; *Martin* v. *Hilb*, 53 Ark. 300.

Judgment affirmed.

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

SOUTHWESTERN TELEPHONE CO. *v.* WOUGHTER.

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Opinion delivered May 16, 1892.

1. *Master and servant—Risks of employment.*

When a servant enters into the service of another, he assumes all the ordinary and usual risks and hazards incident to his employment; an instruction that he assumes such risks only as are *necessarily* incident to such employment is erroneous.

2. *Injury to servant—Latent defect—Liability of master.*

A telephone company undertook, by its manager, to personally supervise the removal of a telephone pole, which appeared to be sound, though the inside was decayed, and ordered a servant to climb the pole and detach the wires. As he did so, the pole broke and threw him to the ground, seriously injuring him. In a suit by the servant to recover damages, *held*, that, in the absence of contributory negligence on part of the servant, the company's liability depended upon its failure to use the means a prudent man would have employed to protect the servant from harm.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

J. W. Crawford and *S. M. Taylor* for appellant.

1. An employee assumes all the risks *ordinarily* incident to his employment, and not those only which are *necessarily* incident to the employment. The second instruction was error. Bish. Non-Cont. Law, sec. 675 and cases; 135 Mass. 418; 113 *id.* 396; 54 Ark. 389; 46 *id.* 388. Upon the undisputed facts of this case, the risk was one which the law cast upon the plaintiff. He was of full age and experienced, and knew the nature of the risk. 26 L. J. (N. S.) Ex. 221; 61 Ill. 130; 50 Wis. 462; 129 Mass. 268.

2. If the company used proper care in its employment of its foreman, it is not responsible for any negligence of which he may have been guilty in directing plaintiff to ascend the pole. If negligent, it was the negligence of a fellow servant. 135 Mass. 209; 96 Pa. St. 246; 32 Minn. 54.

3. The fourth instruction is objectionable because there was no evidence to show that the master personally assumed the direction of the work. Dunbar was not the master. 11 Ore. 257.

M. A. Austin for appellee.

1. The defect in the pole was latent, and while in such case the employer is not liable for an injury through a latent defect whose existence he did not expect, still if the employer should have known of the defect and failed to learn of it through negligence, he is liable. 44 Cal. 187; 17 Wall. (U. S.), 553; 78 Ala. 494; 30 Mo. 115; 83 N. Y. 7; 4 Oh. St. 566; 33 Am. & Eng. R. Cas. 549; 14 A. & E. Enc. Law, p. 891.

2. A master is required to exercise due care in supplying and maintaining suitable instrumentalities for the performance of the work, and is liable for negligence in

not doing it. 44 Ark. 524; 17 Wall. 657; 28 A. & E. R. Cas. 514; 110 Mass. 260.

3. The instructions embodied the law, and there was evidence to sustain the verdict.

W. S. McCain for appellant in reply.

1. The complaint is bad.

2. When an adult servant does an act known to be dangerous, he cannot hold the master liable for having directed him to do it, if injury results from performing the act. Patterson, Ry. Ac. Law, sec. 334; 139 Mass. 580; 28 A. & E. R. Cases, 308; 11 *id.* 201; 150 Mass. 423.

3. Appellee is barred by his own contributory negligence. 51 Ark. 467; 46 *id.* 388; 9 S. E. Rep. 1082.

BATTLE, J. This was an action by appellee against appellant for personal injuries received by appellee while in the employment of the defendant. At the trial in the circuit court there was evidence adduced tending to prove the following facts:

Appellant was a corporation engaged in operating a telephone line in the City of Pine Bluff in this State. Appellee was twenty-six years of age, and was an experienced lineman. Many of the poles in the line of the appellant were of cypress timber and decayed. E. M. Dunbar, the manager of appellant, employed the appellee to remove the decayed poles. At this time appellee had been in Pine Bluff a short time, was not familiar with cypress timber, and knew not how long the poles had been in the ground. There was nothing connected with some of them, so far as could be seen, that proved them unsafe to climb, they appearing to be sound. Their soundness or unsoundness could only be ascertained by boring or cutting into them, as the outside appeared sound while the inside was decayed.

Appellee commenced work for appellant on the 24th of October, 1889, and continued until the 26th of November following. On the 26th of November, Dunbar, who

was then appellant's manager, ordered him to go up a certain pole and loosen the wires attached to the same as quick as he could. The pole was thirty-seven feet high. Appellee had dug around it with a spade several days before and decided that it was all right. He had previously climbed it several times, and was satisfied it was safe. Dunbar had no more reason to believe it was unsafe than he, except that Dunbar knew the age of the pole and appellee did not. At the time Dunbar ordered him to ascend, Dunbar said something about the safety of it, and both of them examined it, and it appeared to be safe. He (appellee) shook it, satisfied himself that it was safe, and then ascended it and loosened the wires as he was ordered to do, and as he did so the pole broke and fell, and threw him to the ground, seriously injuring him. The cutting of the wire caused it to break and fall. If it had been guyed, it would not have fallen, but it was not.

Dunbar was not usually with the workmen, when engaged in removing the poles, to decide which were defective, and when he was absent they did so without him. Appellee was in the habit of relying on his own judgment about the safety of climbing the poles.

Upon this evidence the plaintiff requested, and the court gave to the jury, the following instructions, among others, over the objections of the defendant: "A person engaged in any hazardous employment only assumes such risks as are necessarily incident to such employment, and has the right to presume that his employer will exercise proper care in the conduct of the work, so as to protect him from all danger, except such as is actually and necessarily incident to the employment.

"If the jury believe from the evidence that the superintendent or foreman ordered him to go up the pole, and the plaintiff obeyed the order of the superintendent or foreman in ascending the pole and removing the wires

therefrom, and that the danger of ascending and performing this work was not so apparent that a prudent man would refuse to take it under the orders of his superintendent or foreman, and that while he was thus engaged the accident occurred without any act of negligence on the part of the plaintiff, and occasioned the injury, they will find for the plaintiff.

"The court instructs the jury that where a master personally assumes the direction of work which is being performed by his servant, and in consequence of following the directions of the master the servant is injured, the former is liable when the danger incurred was not fully known to the servant, was not obvious to him from his knowledge, and he had reasonable cause to believe that he could follow the directions in safety, and was in the exercise of due care."

The jury returned a verdict for the plaintiff; and the defendant appealed.

Did the court err in instructing the jury?

1. What risks a servant assumes.

When a servant enters into the service of another, he assumes all the ordinary and usual risks and hazards incident to his employment. He is presumed to have these risks in contemplation, and to contract in reference thereto when he enters into the employ of the master; and consequently can not recover for injuries resulting to him therefrom. *St. L., I. M. & S. Ry.* v. *Gaines*, 46 Ark. 555; *L. R., M. R. & T. Ry. Co.* v. *Leverett*, 48 Ark. 333, 346; Wood's Master and Servant (2nd ed.), sec. 349.

It is the duty of the master to use reasonable care, diligence and caution in providing for the safety of his servant, and in furnishing for their use in his work safe and suitable instrumentalities and appliances in the prosecution thereof and in keeping the same in repair. While he does not insure the safety of his servants, yet he is bound to take heed that he does not, through his

own want of care and prudence, expose them to unreasonable risks or dangers, either from the character of the tools with which he supplies them, or the place in which he requires them to operate. He is in duty bound not to expose them to danger of which he knows, or has reason to know, they are not aware. Before ordering them to perform any service, he should warn them fully of the latent dangers incident thereto, if there be any, of which he knows, or, in the exercise of proper diligence, ought to know; and this duty "extends even to patent dangers when he knows the servant, by reason either of his youth or his inexperience, is not aware of the danger to which he is exposed; or * * * which are unknown to the servant from any cause, and which would not readily be ascertained except by a person possessed of peculiar knowledge, which he has no reason to suppose the servant possesses." *Smith* v. *Peninsular Car Works*, 60 Mich. 501; *Walsh* v. *Peet Valve Co.*, 110 Mass. 23; *Tissue* v. *Baltimore & Ohio R. Co.*, 112 Penn. St. 91, 98; *Benzing* v. *Steinway & Sons*, 101 N. Y. 552; *Railway* v. *Rice*, 51 Ark. 478; Wood's Master and Servant (2nd ed.), sec. 352.

Among the duties of the servant is the obligation to obey all reasonable commands of the master. In obeying the commands of the master, if he has no information or knowledge to the contrary, he has a right to presume that the master has done and will do his duty toward him, and can rely upon the judgment and discretion of the master in its performance. When he is ordered by the master to perform certain services, or to perform them in a certain place, and the risk or danger of obedience is not obvious or apparent to him, he can ordinarily act upon such presumption and reliance, and obey such orders, without being chargeable with contributory negligence or with the assumption of the risk of so doing. He need not stop to ascertain the dangers and risks inci-

dent to obedience, when they are not already patent or known to him, but may, in confidence that the master has done and will do his duty to him, act at once in obedience to the master. In that case the order is an implied assurance to him that there is no danger in obeying it, and he can act accordingly without subjecting himself to the imputation of negligence. If in so doing he is injured, he can recover damages from the master, unless the master be guilty of no negligence. If, however, the danger or risk of injury from obedience is so great and so obvious and apparent to him as to render it, under the circumstances, unreasonable and imprudent for him to obey, but he voluntarily obeys and is injured, he would be guilty of contributory negligence and without remedy against his master. In that case it was not his duty to obey. *Cook* v. *St. Paul, Minneapolis & Manitoba Ry. Co.* 34 Minn. 45; *Lorentz* v. *Robinson*, 61 Md. 64; *Connolly* v. *Poillon*, 41 Barb. 366; *Haley* v. *Case*, 142 Mass. 316; *Miller* v. *Union Pacific Ry.* 12 Fed. Rep. 600; *Roberts* v. *Smith*, 2 H. & N. 213; *Keegan* v. *Kavanaugh*, 62 Mo. 230; *Noyes* v. *Smith*, 28 Vt. 59; *L. R., M. R. & T. Ry. Co.* v. *Leverett*, 48 Ark. 347; *Leary* v. *Boston & Albany R. Co.* 139 Mass. 580; *Lothrop* v. *Fitchburg Railroad*, 150 Mass. 423; *McDermott* v. *Hannibal & St. Joseph R. Co.* 87 Mo. 285; S. C. 28 Am. & Eng. Railroad Cases, 528; Cooley on Torts (2d ed.), pp. 655, 656; 2 Thompson on Negligence, pp. 974, 975.

2. Liability of master for injury to servant.

In this case the appellant was constructively present by and through its manager, and must be held accordingly. Assuming, but not deciding, that the facts are as above stated, appellant undertook to personally supervise the removal of a defective and unsafe telephone pole, and ordered the appellee to climb it and detach the wires therefrom. Before doing so it was its duty to appellee to exercise ordinary care and prudence in ascertaining the latent defects in the pole, and inform him of the

defects thereby discovered and the probable risk of ascending the pole. If appellee already had such information, there was no duty to give it. The true question was, not whether appellant could have discovered the defects and risks before appellee obeyed its order, but whether it used those means a prudent or careful man would or ought to have employed to find them out and failed to make known to appellee, before he obeyed its order, the defects discovered, if any, and the probable risk of ascending the pole on account of the same. If it failed to do so, it was responsible to appellee for the damages he sustained by his fall, unless he (appellee) was guilty of contributory negligence.

The circuit court erred in instructing the jury.

Reversed and remanded for a new trial.

RAILWAY COMPANY *v.* MORGART.

Opinion delivered May 16, 1892.

Appeal—Repeated reversals—Dismissal.

Where two judgments in the same cause awarding damages to the plaintiff, based upon the same evidence, have been reversed for want of evidence to sustain them, and a third judgment is obtained upon substantially the same evidence, such judgment will be reversed and the cause dismissed, since it is evident that the litigation can serve no legitimate end.

Appeal from Nevada Circuit Court.

CHARLES E. MITCHEL, Judge.

Dodge & Johnson for appellant.

This case has been reversed twice. 45 Ark. 318; 8 S. W. Rep. 179. The same evidence was used except the evidence of Jack Weed. The same instructions were asked, objected to and given, and the same verdict was

rendered. The additional facts adduced do not change the legal aspect of the case, and it should be reversed again. 13 S. W. Rep. 740; 11 S. W. Rep. 212.

Scott & Jones for appellee.

1. Review the evidence in detail and contend that the verdict is amply supported.

2. The instructions have already been passed on by this court, except the fourth, which contains the principle that if the negligence of the master was combined with that of a fellow servant, and thus combined caused the injury, the plaintiff is entitled to recover. Wharton on Neg. sec. 227; 35 Ill. 217; 106 U. S. 700; 95 U. S. 546; 10 Gray, 274; 3 Vroom, 151; 46 Wis. 497; 135 Mass. 575.

3. There should be an end of litigation in this case. Three juries have passed upon it. 39 Ark. 491.

HUGHES, J. This is the third appeal in this case by the Railway Company. On the first appeal, reported in 45 Ark. 318, the court, through Judge Smith, said: "The testimony on both sides shows that the proximate cause of the disaster was the high speed at which the train was moved, in disregard of the danger signals;" and that "it was impossible for the jury, with a proper regard for the undisputed facts in the case, to absolve Morgart from blame in the matter of accelerated speed." It was also said in the opinion, that "the jury could not have found that the condition of the track or of the trestle was the immediate cause of the wreck." On the second appeal, reported in 8 S. W. 179, the testimony was precisely the same as on the first, and the judgment was reversed for the same reason for which the judgment on the first appeal was reversed. The only material additional testimony on the third trial was that of John C. Weed, an experienced railroad employee, who had been for sixteen years in the employment of the defendant company, but was not in its employment at the time he

gave his testimony. His testimony, so far as we deem it material, was in substance: That he was not present at the place of the wreck when it occurred; that he arrived at the place of accident about two hours after it occurred. He says: "I discovered, when I got there, that the bridge had been raised from four to six inches, and the rails at the south end of the trestle were swinging so that they were clear of the ground. The stringers of the bridge had been raised from four to six inches. I don't know where the joint of the rail was. When I speak of the swinging rail, I mean that the stringers on the bridge had been raised up, and the rails were not solid on the embankment. The wheels seemed to have dropped down on the ties about twenty feet south of the bridge. There was evidence, for about twenty feet on the rail that I could see, of a wheel riding the rail, but I could not tell which wheel it was. From what I saw I should say the swinging rails were not safe, and were sufficient to cause the wreck." "I know nothing of the condition of the bridge at the time of the accident."

The testimony for the defendant tended to show that a short time, a few minutes, before the wreck, the bridge was in safe condition for a train to pass over it at a proper rate of speed; that the conductor of the train, Morgart, the plaintiff's intestate, had been expressly notified the morning before the wreck, which occurred a little after twelve o'clock, that the bridge would be repaired that day, and had been warned to look out; that he was expressly forbidden by the rules of the company to run his train at a speed above fifteen miles an hour; that he had been furnished with a copy of these rules; that, at the time the wreck occurred, his train was running from twenty to thirty miles an hour; that slow boards were up near the bridge; that they mean, run at four to six miles an hour till the track is safe again; that going south it is down grade for some distance before

reaching the bridge; that on down grade the conductor has charge of the train, and it is his duty to have the the brakes applied; that "engineers are subject to the orders of the conductors having charge of the trains," etc.; that the train of which the deceased was in charge crossed the same bridge going north the morning of the wreck at 7 or 8 o'clock; that it was backing when the wreck occurred, the tender in front, the engine following, then the caboose, followed by twenty-one or two flat cars, the first six of which were off the track and broken up, the second six of which were off the track, and the others, nine in number, were standing on the rails south of where the tender left the track.

If the testimony of John C. Weed was to be believed, the jury might have inferred that the swinging rails at the south end of the bridge described by him were swinging when the train reached the bridge, and were the proximate cause of the wreck. But we are unable to comprehend how this statement can be true.

It is contrary to common observation, reason and experience that the tender and engine, with all the cars in the train, could have passed over these "swinging rails," and any of the cars remained on the rails south of them afterwards. We are impressed with the conviction that, in the nature of the circumstances, this could not have been the case. Recognizing the rule that it is the province of the jury to determine the credibility and the weight of the testimony, where there is testimony that does not carry on its face evidence of its falsity, or which in the nature of things cannot be true, the court is constrained to hold that it is impossible that this evidence about the swinging rails could be true. For the want of evidence, therefore, to sustain the verdict of the jury, the judgment in this cause is reversed.

As this is the third judgment which has been reversed in this cause for the want of evidence to support the ver-

dict of the jury, and as litigation should have an end when it has been thus protracted, and it is apparent that it can serve no legitimate end, the cause is dismissed.

HOFFMAN v. MCFADDEN.

Opinion delivered May 16, 1892.

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1. *Mechanic's lien—Based on contract.*

   Under the statute creating a lien for work done or materials furnished in making improvements on real property, the lien exists only where the labor is performed or materials furnished under contract, express or implied, with the owner of the land, or with "his agent, trustee, contractor or sub-contractor." Mansf. Dig. sec. 4402.

2. *Married woman—Capacity to contract.*

   A married woman may make a contract for the improvement of her separate property, and such contract may be the basis of a mechanic's lien for labor or materials.

3. *Mechanic's lien—Married woman—Agency.*

   The contract of a husband to improve his wife's property will not bind her so as to subject her property to a mechanic's lien unless he was authorized to contract as her agent; and his authority will not be implied from the marital relation or from the fact that he manages her real estate, nor be inferred from her knowledge that he is causing her land to be improved or from her consent thereto.

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

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

1. There is no proof of a contract with appellant.

2. The agency of the husband being denied, the burden was on appellee to prove it. They have not done so. The contention that the marital relation constituted the husband the agent of the wife is in conflict

with the authorities. Kelly, Cont. Mar. Women, secs. 22, 23; 41 Ark. 177; Jones on Liens, secs. 1263–6.

3. There is no proof of ratification by the wife.

4. She is not estopped by silence, nor by her acts. 50 Ark. 128; 3 Smith's Lead. Cases, 2114; 44 Oh. St. 485; 61 N. H. 95; Bisp. Eq. secs. 290–1; 143 Mass. 413; 69 Cal. 255; 111 Ill. 518; 145 Mass. 134; 76 N. Y. 50; 107 U. S. 20.

5. There must be a contract between the owner of the lot and some other person for the erection of the house or the purchase of materials, and this fact being established and labor performed or materials furnished in pursuance of such contract, the lien is created. This is the true intent and meaning of 30 Ark. 25; Mansf. Dig. sec. 4402; Phillips, Mech. Liens, secs. 9, 65; 5 Ark. 218; 25 *id.* 491; 44 *id.* 485; 32 *id.* 60; 17 *id.* 483; 89 Ill. 139; Jones on Liens, sec. 1235.

6. In early cases the power of a married woman to encumber her separate estate with a mechanic's lien for improvements was denied. See 8 Ark. 366; 10 Lea (Tenn.), 452; 15 Am. & Eng. Enc. Law, p. 13, n. 1; Jones, Liens, sec. 1261 and cases. If later rulings in this State have changed this rule, still the contract and the intent to charge the separate estate must be clearly proven. 46 Md. 357; 58 N. H. 185; 41 Ark. 177; 72 Am. Dec. 512, notes.

7. The contract of the husband cannot create a mechanic's lien upon the estate of the wife. 45 Conn. 563; 49 Ill. 53; 38 Ind. 482; 44 *id.* 290; 26 Iowa, 297; 42 Mich. 389; 8 Mo. App. 446; 36 N. Y. 293; 55 Pa. St. 386; 3 Head, 542; 33 Vt. 457; 43 Wis. 556; Jones on Liens, sec. 1262; Phillips, Mech. Liens, sec. 101; 15 Am. & Eng. Enc. Law, p. 12, sec. 3.

White & Woolridge and *W. S. McCain* for appellee.

1. An agency is often implied merely from the circumstances of the case and the relationship of the parties.

The wife was the party benefited; she was present, saw the work progressing, gave directions, but gave no intimation that the building was without her consent. 2 Gr. Ev. 108.

2. By our statute the presumption is that the husband was acting as agent or trustee of the wife. Mansf. Dig. sec. 4637; *ib.* sec. 4482.

3. This is purely a statutory question, and in States where the statute is as liberal as ours, the ruling is that the husband in such cases is presumed to act as agent of the wife. 95 Penn. 403; 46 Neb. 220; 44 N. W. Rep. 1136; 3 Neb. 449; 13 *id.* 521; 62 Ala. 252; 88 Ala. 512; 41 N. W. Rep. 693; 27 Ill. App. 492; 46 N. W. Rep. 1072; 145 Mass. 345; 130 *id.* 347; 85 Ind. 352; 46 Ill. 18; 6 Mo. App. 413; *ib.* 601; 47 Mo. 495; 2 Jones on Liens, secs. 1260–71; Phillips on Mech. Liens, secs. 98–104. See also 32 Ark. 445; Malone on Real Property, 402, 410; 53 N. Y. 93.

MANSFIELD, J. This action was brought to enforce a lien claimed by the plaintiff, McFadden, upon a house and lot belonging to the defendant, Mrs. A. C. Hoffman, for the price of materials furnished by the plaintiff and used in the erection of the house. The lot is the defendant's separate property, and the complaint alleges that the materials were purchased by Ed. Hoffman, her husband, and that in obtaining them he acted as her agent. The answer denies that the husband of the defendant was her agent, or that he purchased the materials for her or with her consent. And it alleges that the house was erected against her express objection. The action was brought at law, but upon the plaintiff's motion was transferred to the equity docket. The decree of the chancellor was in favor of the plaintiff, and the defendant has appealed.

Under the statute of this State creating a lien for work done or materials furnished in making improve- 1. Mechanics lien is based on contract.

ments on real property, the lien exists only where the labor is performed, or the materials supplied, under a contract, express or implied, with the owner of the land improved, or with "his agent, trustee, contractor or sub-contractor." Mansf. Dig. sec. 4402. The terms of the act import no intention to create a lien in the absence of such contract, and there is no decision of this court giving the statute by construction a wider meaning than its language implies. *Rogers* v. *Phillips*, 8 Ark. 366. The views as to the origin of a material man's lien, expressed by Judge Walker in *Cohn* v. *Hager*, 30 Ark. 25, and referred to in the argument, go no further than to indicate an opinion that the lien may be asserted, although the materials are not furnished under a contract with the land-owner, if they are supplied under an agreement with his contractor.

2. Capacity of married woman to contract.

In *Rogers* v. *Phillips*, 8 Ark. 366, it was decided that a married woman could not enter into a contract such as would subject her property to a mechanic's lien. But, since the time of that decision, a married woman has been empowered by the laws of this State to hold, devise, bequeath or convey her property, real and personal, "the same as if she were a *femme sole*." Const. 1874, art. 9, sec. 7; Mansf. Dig. chap. 104. And it has been held that while the constitutional and statutory provisions by which this change has been effected do not expressly enlarge a married woman's capacity to contract generally, the statute does by implication enable her to charge her separate estate. *Walker* v. *Jessup*, 43 Ark. 163. Under existing laws her power to convey her real property is unlimited, and it is well settled that she may mortgage it for the payment of her husband's debts. *Scott* v. *Ward*, 35 Ark. 480. We think she may also enter into a contract for its improvement, and that such contract may be made the basis of a mechanic's lien for labor or materials. 2 Jones on Liens, sec. 1260; *Haupt-*

man v. *Catlin*, 20 N. Y. 248; *Fowler* v. *Seaman*, 40 N. Y. 592.

3. When married woman's property subject to mechanic's lien.

As she may contract personally for the improvement of her estate, she can of course do so by an authorized agent; and her husband may become her agent for that purpose. But his authority to make such contract will not be implied from the marital relation nor from the mere fact that he occupies or manages and controls her real estate. 2 Bishop, Mar. Wom. sec. 396; 2 Jones on Liens, sec. 1264; Mechem on Agency, sec 63; *Rudd* v. *Peters*, 41 Ark. 177. The laws of this State declare that the property of a married woman "shall not be subject to the debts of her husband." Const. art. 9, sec. 8; Mansf. Dig. sec. 4624. This declaration applies as well to a debt which he contracts for the improvement of her estate as to any other. In some of the States a mechanic's lien may be asserted on property which has been improved with the knowledge and consent of the owner, but without any contract on his part. But our statute, as we have seen, requires a contract with the owner; and this cannot be implied from the knowledge of the wife that her husband is causing her land to be improved, nor from her mere consent thereto. If he contracts as her agent, it must appear that he was authorized to do so. And his authority cannot be derived by implication from circumstances which ordinarily owe their existence solely to the marriage relation. 2 Jones on Liens, sec. 1265; *Gilman* v. *Disbrow*, 45 Conn. 563; Phillips, Mech. Lien, secs. 105, 106, and cases cited; *Conway* v. *Crook*, 66 Md. 291; *Fetter* v. *Wilson*, 12 B. Monroe, 90; *Kansas City Planing Mill Co.* v. *Brundage*, 25 Mo. App. 268; *Jones* v. *Walker*, 63 N. Y. 612; 2 Bishop, Mar. Wom. sec. 396; *Knott* v. *Carpenter*, 3 Head, 542. A married woman may, by silently acquiescing in the contract of one who to her knowledge assumes to act as her agent, be estopped to deny the agency. And where the husband contracts

for the improvement of his wife's property with one who believes him to be the owner, and the wife, knowing this fact, permits the work to be done without disclosing her right, it has been held that she will be estopped to set up her title in defense of an action to enforce the contractor's lien. Bigelow on Estoppel, 602, 603; 2 Jones on Liens, sec. 1264. But in this case we find in the conduct of the defendant no element of estoppel. Her husband did not assume to act as her agent, and the plaintiff knew that she was the owner of the lot on which the house was erected.

It is argued that, under section 4637 of the Digest, the husband of the defendant is presumed to have contracted as her agent. The section referred to is taken from the act of December 15th, 1875, and is as follows: "The fact that a married woman permits her husband to have the custody, control and management of her separate property shall not of itself be sufficient evidence that she has relinquished her title to said property, but in such case the presumption shall be that the husband is acting as the agent or trustee of his wife." There is much in the phraseology and provisions of the act mentioned to justify the question whether any part of it applies to real property. *Rudd* v. *Peters*, 41 Ark. 184. But the section quoted has been construed to mean that the husband shall not acquire title by the wife's permission to use, control or manage her property. *Rudd* v. *Peters*, 41 Ark. *supra*. The presumption it raises is for the protection of the wife's property against seizure for the husband's debts. It makes the latter's control or management of the property evidence only of an agency for that purpose and not of any power to bind the property by contract. If the presumption of the statute could be resorted to for the purpose of showing the authority to make a contract by virtue of which the wife's property may be subjected to a lien, it might become an instrument for depriving her of the rights it was designed

to protect. The burden of the proof then was on the plaintiff to establish the agency alleged in his complaint.

The building erected was located only about forty feet from a house occupied by the defendant and her husband. She witnessed the progress of the work, and gave some directions to the carpenters as to the manner of executing it. Her husband had expressed a desire to have the building so constructed that she would be pleased with it, and one of the witnesses testified that "she was present every day and had the work done to suit her." But it is not shown that she manifested any greater interest in the improvement than a wife would usually take in the building of a house upon land belonging to her husband and put up so near to the place of her residence. Nor does it appear that there was any greater deference to her wishes in the plan of the house than is commonly shown by a husband in causing a similar work to be done at his own expense. The contract for the work was made with the husband, and the labor of the carpenters was all paid for by him. All the materials purchased from the plaintiff and others were procured on the husband's order, and, for aught that appears to the contrary, they were sold entirely on his personal credit. The defendant testified that she objected to the erection of the house for reasons which she states; and in this respect her testimony is supported by that of two other witnesses. She also states that her husband was not authorized to act as her agent, and that she was not consulted about the contract for the improvement, and had no knowledge of its terms.

Our opinion is that on the proof adduced the plaintiff was entitled to no relief. The judgment will therefore be reversed, and the complaint dismissed.

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BROOKS v. WESTERN UNION TELEGRAPH CO.

Opinion delivered May 21, 1892.

Telegraph companies—Refusal to deliver message.

The act of March 31, 1885, imposes a penalty on telegraph companies for refusing to transmit messages, but prescribes no penalty for a refusal to deliver a message after it has been transmitted.

Appeal from Garland Circuit Court.

JAMES B. WOOD, Judge.

The complaint in this case is as follows:

The plaintiff, J. B. Brooks, a resident of Garland county, State of Arkansas, complains of the defendant, a foreign corporation, doing business under the laws of the State of Arkansas, and alleges—

That, on the 13th day of August, 1890, at Hot Springs, county and State aforesaid, defendant failed and refused to deliver to the plaintiff the following message, received by defendant's agents in Hot Springs, to-wit:

"*Eden, Ill., Aug. 13, 1890.*

To J. B. BROOKS,

Hot Springs, Ark.:

Father is dying.

(Signed) T. C. BROOKS."

That said message was sent by T. C. Brooks, brother of plaintiff, at Eden, State of Illinois, at the office of defendant, all charges demanded being paid, and that said message was transmitted over the wires of defendant and received in its office in Hot Springs on the 13th day of August, 1890; that, through the willful and gross negligence of the agents and servants of defendant, at Hot Springs aforesaid, defendant failed and

refused to deliver said message to plaintiff with reasonable promptness, though he made demand therefor, to it or its servants, on the 1st day of September, 1890. That thereby the defendant became indebted in the amount of five hundred dollars to the State of Arkansas, for whose use the same is given in the sum of two hundred and fifty dollars, and to plaintiff for whose use the same is given in the sum of two hundred and fifty dollars; whereby an action accrued to the plaintiff, according to the provisions of section 10 of an act granting certain privileges to, and prescribing certain duties of, telegraph and telephone companies, and for other purposes, passed by the legislature of the State of Arkansas, and approved March 31, 1885. Whereupon, the plaintiff prays judgment for five hundred dollars ($500) and for other relief."

A demurrer to the complaint was sustained, and plaintiff appealed.

Charles D. Greaves for appellant.

The word "transmit" is broad enough in its meaning to include delivery. 6 S. W. Rep. 513; 62 Ind. 371; 84 *id.* 176; Gray on Telegraphs, secs. 65, 71, 73. The complaint charges willful and gross negligence. Jones on Bailments, pp. 9, 22, 46, 119, 120; 6 El. & Bl. 891, 900. It follows the language of the statute. 1 Griffith (Ind.), 46; *ib.* 121. See also 41 Ark. 79.

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

The complaint really charges a neglect to deliver, and not a refusal. There is no liability under the statute for such neglect. 50 Ark. 80; 109 Ind. 405; 108 *id.* 163; 116 *id.* 361. The statute is highly penal, and is strictly construed. A mere *neglect to deliver* does not come within the act.

COCKRILL, C. J. The act of March 31, 1885, imposes a penalty upon a telegraph company for refusing to "transmit over its wires to localities on its line" any message tendered to the company for transmission.

The controlling question in this case is, does this language impose a penalty for the company's refusal to deliver a message to the addressee after it has been transmitted over its wires to the locality on its line to which it is addressed?

The terms of the act are confined to a refusal to "transmit over the wires." The language is not to transmit and deliver the message, as in the Indiana act referred to in argument; nor is it simply "to transmit," as in our act of 1881, which was construed to mean to transmit to the addressee, in the *Little Rock, etc., Telegraph Co.* v. *Davis*, 41 Ark. 79. The terms of the present act confine the penalty to the refusal to transmit over the wires to the locality on the line to which the message is addreseed.

The statute is penal, and its terms cannot be extended beyond their obvious meaning. Where there is a doubt, such an act ought not to be construed to inflict a penalty which the legislature may not have intended. This is a familiar rule of construction. Applied to this case, it resolves the question in favor of the company, for it cannot be said that the language plainly implies the intention to visit a penalty for a refusal to deliver a message after it has been transmitted. It follows that it is only when a telegraph company doing business in this State refuses to transmit a message tendered to it that the penalty is incurred. *Frauenthal* v. *Western Union Telegraph Co.*, 50 Ark. 78.

When the message is transmitted, and the company neglects or refuses to deliver it when its obligation requires delivery, the person injured is remitted to his common law remedy. The appellant does not contend that he has alleged facts entitling him to recover on the latter score. We find no error, and the judgment will be affirmed.

Ex parte GAINES.

Opinion delivered May 21, 1892.

Taxation—Hot Springs reservation—Leasehold estate.

The estate of a lessee of land belonging to the United States situated on the Hot Springs reservation is not exempt from State taxation.

Appeal from Garland Circuit Court.

JAMES B. WOOD, Judge.

This proceeding was instituted to determine the State's right to tax leasehold estates on the permanent United States Reservation at Hot Springs. The assessor listed for taxation for the year 1889 the leasehold interests and improvements of the owners of the New Rector and other bath houses. A. B. Gaines, one of the owners, petitioned the county court to quash the assessment of his estate in certain of the bath houses, upon the ground that the property was not subject to taxation. The petition having been denied, he appealed to the circuit court. The State, Garland County and the City of Hot Springs, being interested in the decision, were allowed to intervene and resist the petition.

The cause was tried upon an agreed statement of facts, which in substance stated that the bath house property, assessed by the assessor, was upon the permanent Hot Springs Reservation, and that the appellee and others, who had similar bath house interests on the reservation, held the same by virtue of leases executed by the government of the United States through the proper officers having authority to execute such leases; that the leases were executed originally in December, 1878, for a

period of five years, and expired December 15, 1888; that the leases have been renewed from time to time by the Secretary of the Interior, and invariably to the owner or owners of the houses at the time of the expiration of the leases; that, as a ground rent and for the enjoyment of the hot water and bath house privileges, the lessees pay to the United States $35 per tub annually in twelve equal installments on the first day of each month. That the bath houses and all fixtures were erected and are owned by the lessees, and the United States has no interest in them.

Upon these facts the circuit court held the assessment of Gaines' leasehold estate, with the improvements, invalid, and quashed the assessment. The State, the County and the City have appealed.

E. W. Rector for appellants.

1. All property is subject to taxation in this State, except that enumerated in sec. 5597, Mansf. Dig. The property in this case does not *belong exclusively* to the United States. Appellee has an "estate for years" in the land, and owns absolutely the buildings and improvements, privileges, etc. An estate for years is an interest in land. Taylor's Land. & Ten. (7th ed.), sec. 14. In the act admitting this State into the Union, there is no reservation of the jurisdiction of the United States over the Hot Springs Reservation, and there has been no cession since by the legislature. Opin. Atty. Gen'l, vol. 6, p. 265; 17 Johns. Rep. 225; 114 U. S. 525; Const. U. S. art. 1, sec. 8; 22 Wall. 527.

2. But if the lands are not subject to taxation, the *improvements* are; they belong exclusively to the lessees. 2 Peters, 137; Taylor, Land. & Ten. 433; 18 Op. Atty. Gen'l, 226; Mansf. Dig. secs. 3001–2, 5585–6; 4 Ark. 289.

3. Improvements on the public lands are subject to taxation. 4 Ark. 289; Burroughs, Tax. 130–1; 30 Cal. 635; 6 How. 291; 12 *id.* 36; 37 Cal. 54; 4 Otto. 762.

4. None of these improvements are *means* or *instruments* of the United States government. 4 Wheat. 316; 7 Wall. 77; 9 *id.* 579; 18 *id.* 5.

5. Even if the property was not subject to taxation at the time of assessment, yet, by act of Congress since passed, the United States *consents* that all structures, etc., may be taxed by the State. The statute is merely declaratory of a right that existed prior to its passage.

George G. Latta for appellee.

By the compact between the United States and the State, all the rights of the national government were reserved, and the usual restrictions and articles of agreement as to the rights of the general government were protected and reserved. There has been no act of Congress parting with any right held by the general government, nor conferring authority upon the State to levy taxes for any purpose. Section 5 of the act of Congress, passed after the institution of this suit, has no effect upon it. Public domain is not taxable by the States. Cooley, Taxation, p. 87. Reservations and chattels real growing out of reservations are not taxable by the States. *Ib.* pp. 355, 371. To tax this property would be a direct and positive interference with the revenue of the United States, which is prohibited. Art. 1, sec. 8, Const. U. S. See 4 Wheat. 316, 431; 17 Wall. 322; 11 *id.* 113; 22 Ind. 276; 105 Mass. 49; 3 Cold. (Tenn.) 325; 1 Abb. U. S. 22; 12 Wall. 416, 427; 32 Ind. 1; 22 Wis. 225; 16 Pet. 435; 2 *id.* 442; 2 Wall. 200; 101 Mass. 329; 7 Wall. 26; 9 Wheat. 738; 17 Wall. 32. Property the title to which is in the United States, or held for whatever purpose, is exempt from taxation, and all interests growing out of the same are also exempt. 93 Ill. 30; 34 Am. Rep. 155.

COCKRILL, C. J. In the act of Congress admitting Arkansas into the Union of States, there was no reservation of Federal jurisdiction over the Hot Springs Reservation, and there has been no subsequent cession

of jurisdiction by the State to the United States. The property of individuals on or within the Reservation has therefore always been subject to taxation by the State. *Ft. Leavenworth R. Co.* v. *Love*, 114 U. S. 525.

No part of the Reservation, while owned by the United States, can be subjected to taxation by the State. *Van Brocklin* v. *Tennessee*, 117 U. S. 151. But when the government parts with its title, or any interest therein, the property or interest which the government parts with becomes subject to taxation. When it makes a lease to an individual of any interest or privilege in its lands within the Reservation, the interest of the lessee, whatever it may be, may be taxed, subject however to all the rights and interests which the United States retains in the property.

The record in this cause shows that what is said by Judge Miller in reference to the possessory right of miners, in the government lands, to dig for ores, is strictly applicable to the right acquired by the government's lessee in this case. "This claim," said he, "may be sold, transferred, mortgaged and inherited without infringing the title of the United States. Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it." *Forbes* v. *Gracey*, 94 U. S. 762; see *Colorado Co.* v. *Commissioners*, 95 *id.* 265; *Van Brocklin* v. *Tennessee*, 117 U. S. 177.

The interest of the lessee in the land is not the property of the United States, and it is not a means employed by the government to obtain a governmental end. The power to tax that interest does not involve therefore the power to destroy or disturb any interest of the United States government.

Our attention is called to a provision in the lease in this case to the effect that there should be no assignment of it by the lessee without the consent of the Secretary of the Interior. Conceding that that provision would prevent a purchaser at tax sale from becoming the owner of the lessee's interest without the assent of the Secretary, it would operate only upon the remedy of the purchaser, and would not affect the power of the State to levy the tax.

But the act of Congress, which was passed since the assessment and levy of the taxes in dispute, assenting to taxation by the State of all structures and other property in private ownership on the Reservation relieves the State, and the purchaser at the tax sale, of any embarrassment that might arise on that score.* All property in Arkansas belonging to individuals is subject to taxation except such as is specially exempted by the Constitution. Nothing else is or can be made exempt. *Little Rock, etc., R. Co.* v. *Worthen*, 46 Ark. 312. The interest which the appellant acquired by his lease was property, and is not exempt under the law. It was the duty of the assessor to return it for taxation.

The court erred, therefore, in quashing the assessment. The judgment will be reversed, and the appellee's application to quash the assessment will be dismissed.

It is so ordered.

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*The act of Congress referred to (act March 3, 1891, sec. 5) provides: "That the consent of the United States is hereby given for the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation."

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EMMA COTTON SEED OIL CO. *v.* HALE.

Opinion delivered May 21, 1892.

Master and servant—Risks of employment.

While a servant assumes the ordinary risks only of his employment, and the master assumes the duty of furnishing safe appliances, still if a servant, having sufficient intelligence to appreciate the dangers to which he will be exposed, knowingly consents to occupy a place set apart to him, he assumes the risks incident thereto, and dispenses with the obligation of the master to furnish him with a better place; but if, by reason of youth and inexperience, he is not acquainted with the dangers incident to the work or to the place which he is engaged to occupy, he does not assume the risks of his employment, and the master will be held to indemnify him against the consequences of his failure to give him proper instruction.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

N. T. White for appellant.

1. In the first three instructions given for appellee, the court told the jury, in effect, that the law imposes upon an employer the duty of exercising reasonable care and prudence to *protect* its employers and to provide a reasonably safe place and maintain reasonable safeguards against accidents. They are not the law. 48 Ark. 346; 35 *id.* 602; 41 *id.* 382; 39 *id.* 17; Wood's Master and Servant, secs. 335–372. When an employee, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if subsequently injured by exposure. He must use his eyes to see what is open and apparent, and if he fails, he cannot recover. 48 Ark. 346; 2 A. and E. Ry. Cases, 144. The rule applies with equal force to minors. 39 Ark. 17; 27 Ill. 498; 90 Ill. 333; 28 Ind. 28, 371; 9 Cush.

(Mass.) 112; 49 Mich. 466; 55 *ib.* 120; 1 Cold. (Tenn.) 611.

2. Whether Hale was of sufficient mental capacity to fully comprehend the danger should have been submitted to the jury under proper instructions.

3. Proprietors of manufacturing establishments are charged with the duty of providing their employees with a suitable place in which their work may be performed with a reasonable degree of safety to them. Ordinary care in this regard is all that is required of the master. He is not an insurer against injuries, and is chargeable only when negligence can be imputed to him. 62 Barb. (N. Y.) 218; 25 N. Y. 562; 68 Ill. 545; 31 Ind. 174; 102 Mass. 572; 10 Gray (Mass.) 274; 10 Allen (Mass.), 233.

4. The use of the box was one of the risks assumed by appellee. He made no objections, and continued in the employment. If the child's own act is the direct cause of the injury, while the negligence of the defendant is only such as to expose him to the possibility of injury, the child cannot recover. S. and R. on Neg. 49 and note 2; 58 Me. 384; Whart. on Neg. sec. 311, note 1; 8 Gray, 123; 9 Allen, 401; 4 *id.* 283; 29 Barb. 234; 43 How. Pr. 333; 26 Ill. 259; 42 Ill. 174; 27 Ind. 513; 40 Ind. 545. An infant 14 years of age is presumed to have sufficient capacity to be sensible of danger and to have power to avoid it; and this presumption stands unless overthrown by proof. 88 Pa. St. 35; 12 Rep. (Ala.) 69; 18 N. Y. 248. Defendant cannot be held liable for not having adopted special precautionary measures for his protection. 51 Md. 47; Wharton, Neg. secs. 214, 217; 20 Am. L. Reg. 732; 11 Rep. 754; 29 Conn. 549; 5 Oh. St. 541.

Austin & Taylor for appellee.

1. The first three instructions for appellee, when taken together, clearly embody the law. 48 Ark. 345; 44 *id.* 300; 11 A. and E. Cas. 175; *ib.* 190; *ib.* 199, 201; 15 *id.* 247; *ib.* 271; 135 Mass. 575; Pierce on Railroads,

370; 100 U. S. 213. The master assumes the duty of exercising reasonable care and diligence to furnish the servant with a reasonably safe place to work, and when the service required is of a peculiarly dangerous character, it is the duty of the master to make reasonable provision to protect him from dangers to which he is exposed while in the discharge of his duty. 31 Kas. 586; 16 Lea, 391; 14 A. and E. Enc. of Law, 902 and cases; 14 S. W. Rep. (Ark.) 653; 44 Ark. 529; 110 Mass. 260; 42 N. H. 245, 260; 42 Ala. 672; 35 Ark. 602; 32 Vt. 473. The master may not be able to perform this duty in person, but he must see that it is done. The law casts on him certain duties, and if he deputes their performance to another, as to these duties the one so deputed is not a fellow-servant, but stands in the master's place, and his negligence binds the employer. 44 Ark. 529–30; 38 Wis. 289; 1 Cold. (Tenn.), 611. A servant may rely upon his master furnishing safe machinery and appliances, and in the absence of notice is under no primary obligation to investigate and test it. 23 N. E. Rep. 1021; 48 Ark. 347; 33 Mich. 133; 29 Minn. 137; Wood, M. & S. sec. 396.

2. One whose duty it is to perform the master's duties is not a fellow-servant. 39 Ark. 28; 7 A. & E. Enc. Law, 824; 18 So. Car. 262; 1 N. Y. 516; 84 N. Y. 77; 15 A. & E. R. Cas. 323.

3. The rule that an employee assumes the risks, etc., does not apply to a young person quite inexperienced in the use of dangerous machinery. It is the duty of the master to fully inform him and caution him as to the danger. 3 F. & Fin. 662; 51 N. J. Law, 507; Cooley on Torts, 553; Wharton, Neg. sec. 216; 17 Wall. 553.

4. As to contributory negligence and the care and caution required of a child, see Sh. & Redf. Neg. sec. 28; 17 Wall. 660; 120 N. Y. 526; 39 Ark. 526; 48 Ark. 347; 84 Ala. 133. If, by reason of youth and inexperi-

ence, appellee did not appreciate the danger of his position, the knowledge will not defeat his right to recover. 13 S. W. Rep. 801. See also 46 Ark. 396; 66 Wis. 268; 35 Minn. 45; 38 Mo. App. 221; 32 Minn. 230; 17 Wall. 657; 43 N. W. Rep. 1135.

BATTLE, J. John F. Hale, a minor, by his next friend, sued the Emma Cotton Seed Oil Company for damages sustained by him while in the company's employ. Evidence was adduced by him at the trial in the action which tended to prove the following facts:

Hale was born in March, 1875. Before he was fourteen years of age he was employed by the Emma Cotton Seed Oil Company to feed a "cake crusher" in its mill. The "cake crusher" which he was required to feed had three cast rollers about ten or twelve inches in diameter and eighteen inches long, and two were placed above the other, and were set as close to each other as they could be to work, and were geared together. The rollers had large teeth in them, and were so arranged that when the cake came between them they broke it up. There was a hopper over and above the rollers. It was about ten inches from the top of the hopper down to where the rollers came together, and about four feet and six inches from the floor to the top of the hopper. The rollers were not enclosed. Hale at first stood on the floor and threw the cakes into the hopper, and they passed between the rollers and were crushed. Being too low on account of his height to do his work while standing on the floor, without unnecessary labor, a box two and a half feet long, eighteen inches wide and ten inches high, was placed upon a greasy and slick floor, without any fastening, in close proximity to and in front of the hopper, for him to stand on. After this he stood on the box and threw the cakes into the hopper. The cakes were brought to him on a truck. One night, about the first of January, 1889, after he had been at work in the mill

at his employment for eight or ten days, when he was turning around to pick up a cake on the truck, the box upon which he was standing at the time slipped and threw him over, and as it did so he threw out his arm to catch, and in doing so threw one of his hands into the hopper, and it was caught by the rollers and crushed. Amputation became necessary, and the injured hand and a part of his arm were taken off.

Upon this evidence the court gave to the jury, over the objections of the defendant, the following instructions:

"When the defendant employed the said Hale and put him to work to feed the crusher, it assumed the duty of providing him with a reasonably safe place to work, and with reasonable safeguards against danger, so as not to increase any danger attendant upon such work. The said Hale assumed the ordinary risk incident to the employment, but did not assume any risk that might result from the negligence of the defendant in not providing a reasonably safe place for such work, and maintaining reasonable safeguards.

"2. When the employment is hazardous, the employer assumes the duty of exercising reasonable care and prudence to protect the servant he employs, and to provide a reasonably safe place, and to maintain, at all times, for such employee, reasonable safeguards against accident while so engaged.

"3. You are further instructed that the standard of ordinary care varies with age and capacity, and if the jury believe that at the time of the accident in question the plaintiff, John F. Hale, was in the exercise of that ordinary care and caution reasonably to be expected of one of the age and capacity of said Hale under all the circumstances of the case, that the injury complained of resulted from the negligence of the defendant in not providing him with a reasonably safe place and appli-

ances at which he worked, then the plaintiff is entitled to recover in this action."

Other instructions were given.

The jury returned a verdict in favor of the plaintiff against the defendant for $4000. Judgment was rendered accordingly, and the defendant appealed.

The instructions which were given over the objections of the defendant are ambiguous and misleading. They may be reasonably interpreted to mean that a master is bound to furnish his servant with a reasonably safe place in which to work and with safeguards against accidents. This is not the law.

It is well settled that when one enters the service of another, he takes upon himself the ordinary risks of the employment in which he engages. On the other hand, the employer takes upon himself an implied obligation to provide the person employed with suitable instruments and means with which to do his work, and to provide a suitable place in which such person, when exercising due care himself, can perform his duty safely or without exposure to dangers that do not come within the obvious scope of his employment. But the servant can dispense with this obligation. If, having sufficient intelligence and knowledge to enable him to see and appreciate the dangers to which he will be exposed, he knowingly assents to occupy a place set apart to him by the master and does so, he thereby assumes the risks incident thereto, and dispenses with the obligation of the master to furnish him with a better place. It is then no longer a question whether such place could not with reasonable care and diligence be made safe. Having voluntarily accepted the place occupied by him, he cannot hold the master liable for injuries received by him because the place was not safe. *L. R., M. R. & T. Ry.* v. *Leverett*, 48 Ark. 346; *Davis* v. *Railway*, 53 Ark. 117; *Fones* v. *Phillips*, 39 Ark. 17; *Coombs* v. *New Bed-*

ford Cordage Co. 102 Mass. 572; *Sullivan* v. *India Man'f'g Co.*, 113 Mass. 396.

If, however, the servant, by reason of his youth and inexperience, is not aware of or does not appreciate the danger incident to the work he is employed to do or to the place he is engaged to occupy, he does not assume the risks of his employment until the master apprises him of the dangers. It would be a breach of duty on the part of the master to expose a servant of this character, even with his consent, to such dangers, without first giving him such instructions and caution as would, in the judgment of men of ordinary minds, understanding and prudence, be sufficient to enable him to appreciate the dangers, and the necessity for the exercise of due care and caution, and to do the work safely, with proper care on his part. For a breach of his duty the master is bound to indemnify such servant against the consequences. He cannot escape this liability by delegating the duty to instruct or inform to another person. But if such servant receives the information and caution from any source, and accepts the place and undertakes the work, he assumes the risks ordinarily incident thereto, and cannot thereafter recover for injuries because the place was not safe. As to such work or place and its dangers, he would then be placed on the footing of an adult, and could not, on account of infancy, be relieved of the consequences of such risks. *Davis* v. *Railway*, 53 Ark. 117; *Fones* v. *Phillips*, 39 Ark. 17; *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572; *Sullivan* v. *India Man'f'g Co.* 113 Mass. 396; *Dowling* v. *Allen*, 74 Mo. 13; note to *Hickey* v. *Taaffe*, 26 Am. Law. Reg. 736. Wood on Master and Servant, secs. 350, 351.

It appears that the injury received, in this case, by Hale was caused by the box turning or slipping while he was standing on it and feeding the "cake crusher." Whether he knew or ought to have known what caution

or care was necessary for him to use while standing on the box performing his work, in order to avoid the injuries that he received, or appreciated the danger of the failure to use such caution, or had received the necessary instruction and warning before the injury, is a question for the jury.

Reversed and remanded for a new trial.

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

LONG v. LANGSDALE.

Opinion delivered May 21, 1892.

Innocent purchaser—Prior unrecorded conveyance.

One who purchases land in good faith and for a valuable consideration and enters into possession acquires a good title as against the unrecorded title of a prior purchaser from the same grantor.

Appeal from Miller Circuit Court in Chancery.

W. S. EAKIN, Special Judge.

E. F. Friedell and *John Hallum* for appellants.

The fee to lands sold by the United States remains in the government until transferred by patent. 132 U. S. 239; 13 Pet. 36; Lester, Land Laws, 665. The statute does not begin to run until the patent issues. 13 Wall. 99; 132 U. S. 239.

Scott & Jones for appellees.

An unrecorded deed is not permitted to prevail against a subsequent purchaser without notice. Tiedeman on Real Property, sec. 816; 2 Kent, Com. (5th ed.) sec. 456; 23 Ark. 735.

HEMINGWAY, J. Both parties claim the land in controversy under transfer from Mary E. Spear. The deed to the plaintiffs was prior in date, but was not recorded until after the transfer to the defendant, his

entry upon the land, and the institution of this suit. The court found that the defendant purchased the land for a valuable consideration, without notice of the prior transfers from Mrs. Spear, believing in good faith that she owned the land. There is nothing in the abstract or brief of plaintiff challenging this finding of fact, and we accept it as correct. Upon it, the judgment for the defendant was proper.

Affirm.

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NIX v. DRAUGHON.

Opinion delivered May 21, 1892.

1. *Judicial sale—Inadequate price.*

   Exceptions to the confirmation of a judicial sale will not be sustained because the property sold for an inadequate price if no offer is made to advance the bid.

2. *Sale of land in a body—Exception.*

   Where defendant made no objection to a decree condemning his land to be sold as one tract, he cannot, after sale, for the first time, object that it was not sold in subdivisions.

Appeal from Miller Circuit Court in Chancery.
C. E. MITCHEL, Judge.

Draughon and Allen Bros. obtained judgment against Nix foreclosing a mortgage upon two tracts of land situated in the City of Texarkana, given to secure a debt of $1950. A commissioner was appointed to sell the property. After making the sale he filed his report, showing that he had complied with the order of the court and had sold each tract of land, one for $1000 and the other for $800, and that they were bid off by plaintiffs. To the confirmation of this report, defendant filed exceptions, as follows :

(*a*) "There were no bidders attending the sale except the complainants, who bid the lands off at a grossly inadequate price, to-wit: the lot described as 150 feet square is reasonably worth the sum of $2000, but was sold to complainants on their first and only bid for the sum of $1000.

(*b*) "The second tract of land sold lies in the city limits, is 360 feet square and is susceptible of division into fourteen lots, and, if so subdivided, would sell for a much greater sum than if sold without subdivision. This lot, containing about three acres of land, was not subdivided by the commissioner, but was sold in gross for the sum of $800. The sale, conducted as it was, amounts to a judicial confiscation of defendant's property, and a loss of $3200 to pay a debt of $1800. For these reasons, the court being the vendor and complainants being amply secure in their mortgage rights and lien on the property, defendant appeals to the court to exercise its legal and equitable discretion and set the sale aside. The first described piece is his homestead, and ought not to be sacrificed wantonly. The second piece ought to be subdivided into lots before resorting to the homestead."

Affidavits in support of these exceptions were introduced. The court declined to set aside the sale, but granted defendant fifteen days in which to procure an advance of the bid in amount sufficient to equal ten per cent. of the purchase price at commissioner's sale. After lapse of fifteen days, there being no offer to advance the bid, the report was confirmed. Defendant has appealed.

John Hallum and *E. F. Friedell* for appellant.

1. The land sold at a grossly inadequate price. Property should not be sacrificed. 20 Ark. 653; 32 *id.* 391.

2. The acre tract should have been subdivided. Cases *supra* and 23 Ark. 661.

Scott & Jones for appellee.

No collusion or unfair dealing is charged. Simply an inadequate price is alleged. No application to the court was made to have the tract subdivided. It is rather late to complain now. As to the practice in making resales, see 13 Fed. Rep. 871; 3 *id.* 689.

1. Judicial sale not set aside for inadequacy of price.

HEMINGWAY, J. The sale was made in accordance with the decree, and there was no showing that it was conducted fraudulently or unfairly. The fact that the lands sold for an inadequate price was not sufficient to entitle the defendant to a resale, and the court did not err in refusing to order one. *Fry* v. *Street*, 44 Ark. 502; *Blackburn* v. *Selma Ry.* 3 Fed. Rep. 689; 2 Dan. Ch. Pr. (4th ed.), 1285.

2. Validity of sale of land in a body.

The defendant cannot complain that the three acre tract was sold in a body. The decree condemned it as one tract, and if he wished it to be sold in subdivisions, he should have asked the court to so order or the master to so offer it. He could not remain silent with regard to the matter until the sale was made, and afterward be permitted to insist upon it by way of objection to confirming the sale.

Affirmed.

FRAZIER v. STATE.

Opinion delivered May 21, 1892.

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1. *Rape—Physical examination.*

In a prosecution for rape the court properly refused to charge the jury, upon defendant's request, that "in order to support the testimony of a female that she has been raped an examination of her person should have been made immediately, say, within a day or two, after the act was charged to have been commited;"

also that "it is not proper to convict a man of the charge of rape upon the testimony of the woman alone, unless she has been subjected to proper medical examination within such time as will enable a discovery as to such marks of violence on the body at other points than those at the immediate point of penetration."

2. *Instruction—Credibility of witness.*

An instruction that "if the jury find that any witness has sworn falsely to any material fact, they may, if they see proper, disregard the whole testimony of such witness" is improper, since false swearing would warrant the jury in disregarding the entire testimony of a witness only when it was wilfully done, and when the jury did not believe the other parts of the testimony.

Appeal from Cleveland Circuit Court.
CARROLL D. WOOD, Judge.

Frazier appeals from a conviction of rape. The evidence of the prosecuting witness was to the effect that the appellant gained possession of her person without physical force, but by means of threats of choking her if she resisted or made outcry. Appellant insists that the trial court erred, (1) in that there was no proof of the venue of the offense, (2) in refusing to give the fourth and seventh instructions asked by him and copied in the Reporter's first head-note to this opinion, and (3) in giving certain instructions asked by the State.

Met L. Jones for appellant.

1. The venue is not proven.

2. No force whatever is shown.

3. The court erred in refusing the fourth and seventh requests for appellant.

W. E. Atkinson, Attorney General, and *Charles T. Coleman* for appellee.

1. The fourth and seventh requests for instructions were properly refused. They are not the law.

2. It is not necessary that physical force be used. Any intimidation, by threats or otherwise, which over-

comes the will is sufficient. 32 Ark. 710; 13 *id.* 360; 2 Bish. Cr. Law, sec. 1125.

3. The venue may be inferred from the circumstances in proof.

1. As to physical examination in rape cases.

HEMINGWAY, J. There is no proof of the venue of the offense, and the judgment cannot be sustained. As the case must be retried, we have thought best to consider the charge to the jury. We think the court properly refused to give the fourth and seventh instructions asked by defendant;* we have been directed to no principal or precedent in support of them, and they embody principles that seem necessarily unsound.

2. Instruction as to credibility of witnesses considered.

There was no error in the instructions given for the State, unless it be found in the following: "If the jury find that any witness has sworn falsely to any material fact, they may, if they see proper, disregard the whole testimony of such witness." False swearing as to a particular fact warrants a jury in discrediting the entire testimony of a witness only when it is wilful, and the instruction is incomplete in omitting this. Moreover, the instruction might be construed as warranting a jury in disregarding testimony which it believed to be true, if it emanated from a witness who had sworn falsely to some other fact. Thus construed, it does not reflect the law, for, although a witness is found to have wilfully testified falsely to a material fact, the jury will not be warranted in disregarding other parts of his testimony which appear to be true.

As there is absolutely no proof of venue, the judgment must be reversed, and the cause remanded.

* The instructions referred to are copied in the Reporter's first head-note.

RAILWAY COMPANY *v.* RYAN.

Opinion delivered May 21, 1892.

1. *Principal and agent—Penalty.*

   Where a railway ticket agent, contrary to orders, made an excessive charge of passenger fare, his act is within the scope of his authority, and the company is liable for the statutory penalty.

2. *Constitutional law—Railway passenger rates.*

   The act of April 4, 1887, regulating the rates of charges for the carriage of passengers by railroads, is constitutional.

   Railway Company v. *Gill*, 54 Ark. 101, followed.

Appeal from Crawford Circuit Court.

HUGH F. THOMASON, Judge.

This is an action by William Ryan against the St. Louis & San Francisco Railway Co., to recover the penalty prescribed by the act of April 4, 1887, for an overcharge in a passenger fare. The answer set up substantially the same defenses made in *Railway Company* v. *Gill*, in 54 Ark. 101. The evidence showed that the overcharge was made by defendant's ticket agent, contrary to defendant's express orders. The cause was tried by the court sitting as a jury, and the following findings of fact and declaration of law were made, viz.:

"The court finds that said Wm. Ryan, on October 11th, 1887, applied to J. W. Riley, the regular agent of defendant, at Lilly Station, for a ticket to Mountainberg, a distance of twelve miles; that the agent, Riley, furnished him the ticket, and charged and received therefor sixty cents, which is in excess of the amount allowed by law, and that plaintiff did not carry more baggage than he is allowed by law to carry free of charge upon a first-class ticket. The court also finds that defendant is a corporation doing business under the laws of Arkan-

sas, and that its road is more than seventy-five miles in length.

"The court declares the law to be that where the agent acts within the scope of his authority, his principal is bound, although the principal may not have authorized the agent to so act, and that the agent is responsible to his employer for any violation of instructions given him, whether the same be general or special."

Judgment was rendered for plaintiff in the sum of $50, and a further sum of $10 was taxed as an attorney's fee. Defendant has appealed.

E. D. Kenna and *Adiel Sherwood*, with *B. R. Davidson*, for appellant.

1. It was error to refuse to allow appellant to show that three cents a mile was an unjust and unreasonable rate. Const. U. S. 5th Amdt.; *ib.* 14th Amdt.; 134 U. S. 418, 467, 482; 116 *id.* 331.

2. The act is unconstitutional and void. Cases *supra*.

3. Riley was a special agent—a mere station agent; he had no authority to demand excessive fares, and his unauthorized acts do not bind the company. 11 East, 43; 10 Met. 259; 4 Gray, 16; 49 Mich. 333; 55 N. Y. 93; 1 Moody & Mal. 433; 2 Cromp. & Jer. 494; 6 Fed. Rep. 175; 70 Mo. 632; 9 Pet. 607, 627-8-9. The acts of Riley were outside of the line of his employment. 130 U. S. 416; 10 C. B. 665; 70 Mo. 672; 20 Mo. App. 632; 2 Exch. L. R. 267; 9 Fed. Rep. 139.

HEMINGWAY, J. It is conceded that Riley was the agent of the railway company duly authorized to sell the ticket which Ryan claims to have bought, and to charge for it lawful fare. But the company insists: (1) that no ticket was in fact sold; and (2) that if it was sold, the charge of excessive fare was unauthorized, and was therefore the individual act of Riley and not the act of the company.

Upon the first point there is proof sufficient in law to warrant a finding against the company, and we can not disturb the verdict unless it appears that the act was that of Riley for which the company was not chargeable.

1. Liability of principal for acts of agent.

Riley was employed for the express purpose of selling tickets and collecting fare for the company; and in making the sale to Ryan he was doing that part of the company's business that he was put there to transact. The penal act was no departure from the company's business, or doing an independent wrong for the personal ends of Riley; it consisted alone in the improper manner in which he transacted the company's business expressly committed to him. As we understand the law, the master is liable for the penal acts of his agent, done within the scope of his authority and in executing the master's business. Mechem on Agency, sec. 745; Story, Ag. sec. 308; *George* v. *Gobey*, 128 Mass. 289; *Wallace* v. *Merrimack, etc., Co.* 134 Mass. 95; *Peterson* v. *Knoble*, 35 Wis. 85; *Kreiter* v. *Nichols*, 28 Mich. 496; *Isaacs* v. *Railroad Co.* 47 N. Y. 122; *Mott* v. *Consumers' Ice Co.* 73 N. Y. 543.

It follows therefore that the company is liable in this case.

The appellant cites many cases in which it was held that acts complained of were the individual acts of the servant, for which the master was not chargeable. We have carefully examined them, and in their light reached the conclusion announced. Some of them are criminal cases, in which a different rule for determining the master's liability obtains. *Com.* v. *Nichols*, 10 Met. 259; *People* v. *Parks*, 49 Mich. 333. Others are cases where the complaint was based upon acts not authorized, and not, as in this case, upon the unauthorized manner of doing the thing enjoined. *Grover & Baker*

Co. v. *Railway Co.* 70 Mo. 672; *Freidlander* v. *Railway Co.* 130 U. S. 416.

2. Power of legislature to regulate passenger rates.

As to the constitutionality of the act we need only refer to the case of *Railway Co.* v. *Gill*, 54 Ark. 101. The case of the *Chicago, etc., Railway Co.* v. *Minnesota*, 134 U. S. 418, is much relied upon by the appellant. Whether it is at all in point, or whether this case is ruled entirely by the case *Budd* v. *People*, 143 U. S. 517, we are not called to determine. For although the act in force when the appellant company was formed permitted a higher charge than the maximum prescribed by the act assailed, the Constitution then in force provided that such acts might be altered, revoked or annulled, by the legislature, subject only to a condition that no injustice should be done to the corporators. The appellant organized subject to the State's reserved right to alter, revoke or annul the act relative to such charges, and impliedly agreed to its exercise. When the right was exercised, the legislature proceeded in accordance with that agreement, and therefore infringed no constitutional right, unless the charge worked an injustice to the corporators of defendant. The answer in this case is substantially the same as that in Gill's case, and for the reason there stated we hold that it does not make a case of such injustice as makes the act unconstitutional.

Affirmed.

TRIMBLE v. RAILWAY CO.

Opinion delivered May 21, 1892.

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1. *Circuit clerk—Fee for administering oaths.*

A circuit clerk is entitled to a fee of ten cents each time he administers an oath, without reference to the number of persons who take it; while it is the duty of the court, when practicable, to have all jurors or witnesses sworn at the same time, still if they are unnecessarily sworn separately, the clerk is entitled to the fee for each oath administered.

2. *Costs—Affidavits to accounts of witnesses.*

Since witnesses can get their fees only by swearing to their accounts for attendance, the clerk's fees for taking their affidavits should be taxed as part of the costs in the case.

3. *Circuit clerk—Fees.*

In construing sec. 3235, Mansf. Dig., fixing the fees of clerks of the circuit court—*Held:*

(*a*) They are not entitled to the fee "for each continuance" where there was no order of continuance and the cause went over by lapse of the term.

(*b*) They are entitled to the fee "for indexing each case each time" for each record entry indexed.

(*c*) They are entitled to the fee "for each submission" only where there is a submission of the cause upon an issue of law or fact, and not where there is a submission of a question arising in the cause, as, for instance, the submission of a motion for a new trial.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

Action by Trimble against the St. Louis & San Francisco Railway Company. The case is stated in the opinion.

Sandels & Hill for appellant.

1. The clerk is entitled to 10 cents for *each* juror sworn. Citing secs. 3225, 3235, 4006, 4011, Mansf. Dig.; 4 Oh. St. 177; Suth. St. Const. secs. 237–8.

2. The clerk is entitled to 10 cents for swearing each witness to his attendance. Mansf. Dig. secs. 1042–3, 3266, 3270, 3272; 44 Fed. Rep. 407; Am. Dig. 1890, p. 806, citing 7 Pac. Rep. 388. "The expenses of the jurat annexed * * * is taxable as part of the costs." The witness fee is $1.50 per day, and it was intended he should receive this amount net.

Clayton, Brizzolara & Forrester for appellee.

1. An officer is only entitled to such fees as the law expressly provides, and he can only collect where the law makes provision for him. 25 Ark. 235; 32 *id.* 45; 47 *id.* 442; 4 A. & E. Enc. Law, 314, note 5.

2. The charge for two continuances was unlawful—there was no motion for, nor order of, continuance. The clerk performed no service, and is entitled to no fee. 67 Mo. 691.

3. The clerk was only entitled to fee for three indexes; he has charged for six. He charges for indexing each paper. Mansf. Dig. sec. 3235.

4. The clerk is not entitled to a fee for "submission," except for a technical submission of the case to the court for decision upon an issue of law or fact. 2 Bouv. L. D. 674; 2 Rap. & L. Law Dict. p. 1229; 49 N. H. 180; 9 Wend. 661; 67 Mo. 691.

5. There is no provision that the fee for swearing witnesses to their attendance shall be taxed as costs.

6. The clerk is only entitled to 50 cents for swearing a jury, and his charge of 10 cents for swearing 14 jurors is illegal. There is no provision of law to pay the clerk for swearing jurors as to their qualifications. 9 Abb. Pr. (N. S.) 310; 37 Hun. 237–240; 11 Neb. 95-98.

Sandels & Hill in reply.

The only items before this court are the two disallowed, from which the clerk appeals, and the three items decided against the cross-appellants.

HEMINGWAY, J. This case presents cross-appeals, on behalf of the clerk and defendant respectively, from a judgment taxing costs. The clerk contends that two items claimed by him were improperly disallowed; and the defendant, that three items were improperly allowed The defendant argues the legality of certain claims which the court disallowed, but it is clear that it cannot complain of these orders; and as the clerk does not, they are not before us. We, therefore, consider the court's action with reference to five items of the claim as to which the unsuccessful party is complaining.

1. Fee of clerk for administering oaths.

The clerk charged and the court disallowed $1.40 for swearing fourteen jurors to answer questions as to their qualifications. If the oath was administered fourteen times, as seems to be conceded, the charge was proper and should have been allowed, whether fourteen persons or more took it. If it was administered less than fourteen times, less was chargeable, as the statute allows only ten cents for administering each oath, without reference to the number of persons who take it. The courts should see that litigation is not made unnecessarily burdensome, and should, when practicable, have all the jurors or witnesses, as the case may be, sworn at the same time. But if such persons are unnecessarily sworn separately, the clerk is entitled to ten cents "for each oath administered"—so says the statute.

2. Fee for taking affidavit to account of witness.

The clerk charged and the court disallowed thirty cents for swearing three witnesses to the accounts for their attendance. Witnesses can get their fees only by presenting and swearing to an account. Mansf. Dig. sec. 3270. The statute clearly indicates that the *per diem* is to be net; and as an affidavit is required, we

think it should be taxed as a cost of the case. Mansf. Dig. sec. 3272. If so, since the fee bill authorizes the clerk to charge for each oath administered ten cents, we think the claim should have been allowed.

3. Fees of clerk: (a) for continuances.

The clerk claimed for two continuances thirty cents, which the court allowed. There was no order of continuance, and the causes went over with the lapse of the term. The statute fixes fees for services performed by the clerk, and was not intended to compensate him for accidents to which his service did not contribute. We think the claim improper.

(b) For indexing.

The clerk charged and the court allowed "for indexing three times, thirty cents." It is contended that the statute allows ten cents for indexing each case each term of court, and that no more can be allowed, though more than one order is made and indexed. The statute provides "for indexing each case each time, ten cents." The clerk is required to make a complete index of the record, and it should point to every record entry. We think that for every entry indexed he is entitled to ten cents.

(c) For submissions.

The clerk charged and the court allowed "15 cents for entering a submission" of a motion for a new trial. The statute allows "for each submission, 15 cents;" we think a submission within the provision is a submission of the cause upon an issue of law or fact, and not a submission of a question arising in the cause, and that the allowance was improper.

For the errors indicated the judgment is reversed, and a judgment will be entered here to conform to this opinion.

CRAMPTON *v.* SCHAAP.

Opinion delivered May 21, 1892.

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1. *Fraud—Voluntary conveyance.*

Where the grantor in a voluntary conveyance was not insolvent, the fact that he was in debt raises no presumption of fraud as to subsequent creditors.

2. *Voluntary conveyance—Homestead.*

The intention of a vendee, in procuring a conveyance of land to his wife for use as a home, that it should be exempt from his debts does not render the conveyance fraudulent as to subsequent creditors.

Appeal from Sebastian Circuit Court in Chancery, Fort Smith District.

T. C. HUMPHRY, Judge.

John Schaap sued Alice W. Crampton, alleging that, on the 19th of September, 1887, B. S. Seybert was indebted to him and gave his two promissory notes to him, upon which, after allowing credits, there was, at the time of the institution of this suit, due $192.63; that Seybert died in 1888, leaving defendant as his widow, and she was appointed administratrix of his estate, and that, before the expiration of two years after such appointment, on her application, the administration was closed and the assets of the estate, which was wholly insolvent, vested in her absolutely, by order of the probate court, leaving nothing whatever to pay the debts of the estate; that, in February, 1890, the defendant had intermarried with D. C. Crampton; that there was no existing administration of the estate of B. S. Seybert; that, in his lifetime, B. S. Seybert had purchased certain real estate, fully described, consisting of 167 48-100 acres; that he caused the deeds of the same to be made

in the name of defendant, his wife; that he paid for the same; that the deed to her was a fraud upon his creditors, and the title in her was colorable only, and she had no interest therein; that Seybert was largely indebted at the time; that after the administration closed, defendant sold said lands and has in her possession the proceeds thereof, which plaintiff asked should be applied to the payment of his debt.

An attachment was sued out upon the ground of the non-residence of defendant, and W. R. Martin was summoned as garnishee. The garnishee answered that he had in his possession, belonging to defendant, $222.63.

Defendant filed a general demurrer. Before it was acted upon, the cause was transferred to equity, and the demurrer was overruled. Defendant's answer admitted that she was the widow of B. S. Seybert, and had married D. C. Crampton; that she had been administratrix of Seybert's estate; that all of its assets had, on her petition, been vested in her absolutely, and that nothing was left for the creditors of the estate; that there was no existing administration of the Seybert estate; admitted the purchase of the lands mentioned in the complaint by Seybert in his lifetime, and that the deeds were in her name, and that she had since sold the same; alleged that, at the time of the purchase of the land, Seybert was solvent, and that the lands were purchased with money of her own, inherited from her father's estate; alleged that no debts now exist which Seybert owed at the time of the purchase; denied that the deeds to her were fraudulent; and alleged that plaintiff's claim had never been probated against Seybert's estate.

The court found that, prior to the contraction of the debt to plaintiff, Seybert purchased the lands mentioned in the complaint and had the same conveyed to his wife; that the conveyances to his wife were voluntary and fraudulent, as to antecedent and subsequent creditors,

and made with the purpose of defrauding the subsequent creditors; that defendant remained in possession of said lands jointly with her husband till his death, and exclusively afterwards until a few days before the bringing of this suit, when she sold the same, and part of the proceeds were arrested in the hands of W. R. Martin, garnishee herein, who holds $222.63 subject to the order of the court, and said sum was in his hands when the garnishment was served, coming to defendant from such sale; that defendant was a non-resident of the State, and that Seybert was indebted to plaintiff in the sum of $197. Judgment was that the attachment be sustained, and the garnishee ordered to pay over the sum in his hands, or so much thereof as is necessary to satisfy plaintiff's judgment, and that defendant pay the costs. Defendant has appealed.

Clendening, Read & Youmans for appellant.

In order for a subsequent creditor to impeach a conveyance actual fraud must be shown, or that there were pre-existing debts still unpaid. 38 Ark. 427; 50 Ark. 42; 42 *id.* 173. The evidence fails to show this. See also the cases in 16 Ark. 474, and 39 *id.* 111.

Joseph M. Hill for appellee.

The appellee in this case proved fraud in fact, and pre-existing debts at the time the voluntary conveyance was made, within the rule. 38 Ark. 422; 50 *id.* 42; 34 N. Y. 508; 42 Ark. 170; 33 Ark. 762. As to when a deed made to repay a debt to a wife is fraudulent, see 11 S. W. Rep. 840; 9 S. E. Rep. 175; 13 S. W. Rep. 82; 9 So. Rep. 228; 14 S. W. 837; 25 N. E. Rep. 1016; 92 U. S. 183; 44 Pa. St. 413; Wait, Fr. Conv. sec. 100.

MANSFIELD, J. The conclusion reached in considering this cause, on the evidence adduced, makes it unnecessary to decide the questions presented by the demurrer to the complaint.

1. When voluntary conveyance not fraudulent.

To avoid a voluntary conveyance, a subsequent creditor must show that it was made with the actual intent to defraud. *Drigg & Co.'s Bank*, v. *Norwood*, 50 Ark. 42. He cannot, like a prior creditor, raise a presumption of such intent by merely showing that the grantor was in debt at the date of the conveyance. A presumption of fraud as to subsequent creditors does arise on proof that the grantor was insolvent. But this presumption is not as to such creditors conclusive. *Rudy* v. *Austin*, *ante* p. 69. If it be conceded that Seybert, the grantor in the present case, was insolvent at the time of the conveyance to the defendant, the presumption arising as to the intent with which the grant was made is not supported by circumstances such as were held to make it conclusive in the cases cited. It does not appear, as it did in those cases, that, soon after the execution of the deed, the grantor contracted debts which he could not reasonably have expected to pay. Nor is any connection whatever shown between the debts he then owed and that of the plaintiff, which accrued more than nine years after the date of the conveyance. The evidence also fails to show that any part of the indebtedness then existing was paid by contracting other debts, or that the plaintiff is entitled to be subrogated to the right of a prior creditor to avoid the conveyance. *Rudy* v. *Austin*, *supra;* Bump, Fraudulent Conv. 322. Whether, in the absence of any circumstance similar to either of those mentioned, a presumption resting alone on the insolvency of the grantor will be repelled by the facts urged against it here, is a question we need not decide in this case; for we think the evidence insufficient to establish Seybert's insolvency. Three witnesses called by the plaintiff gave testimony on the question of his indebtedness. But neither of them states the amount of his debts or facts from which the amount may be estimated. Nor does either of these witnesses make any statement from

which the extent or value of his property may be arrived at. One of them, a merchant, who appears to have had more information as to Seybert's circumstances than either of the others, states that he was "reckless" in trading and "owed everybody from whom he could buy on credit from 1878 to 1887." But the extent to which he obtained credit, or whether this course of trading began before the purchase of the lands conveyed to the defendant, is not shown. The same witness says that Seybert, who was a physician, was the most successful man he knew in his practice and in buying cattle. And his testimony shows that the witness did not cease to credit him until in 1882, which was several years after the purchase of the lands. One of the other witnesses says that, according to statements made to him by Seybert, the latter was largely in debt from 1877 to the time of his death. But what proportion his indebtedness at any time bore to the value of his property, or what part of it was incurred in purchasing the lands referred to, is not shown. The witness, however, states that in 1878 Seybert spoke of his indebtedness for lands, saying he had bought beyond his means. The conveyance complained of was made in May, 1878. Whether any of the lands were purchased at an earlier date does not appear. But it does appear that, at the time of the principal purchase, only the sum of two hundred dollars was paid upon the price. The third of the three witnesses mentioned states that his impression in 1878 was that Seybert's circumstances were tolerably good. But the witness had no certain information as to what his situation was. From all the facts bearing on that question it is fairly to be inferred that Seybert was in debt at the time the lands were purchased. But we think the evidence does not warrant a finding that he was then insolvent. And without proof of insolvency

there is no presumption as to the plaintiff's debt against the validity of the conveyance.

2. When conveyance of land to wife not fraudulent.

But it is said that the actual intention to defraud is proved by a witness who states that Seybert requested his advice as to whether lands conveyed to his wife would be liable for his debts. The witness understood, from the conversation had with him, that he desired to protect the lands from subsequent debts growing out of the "uncertainties of business," and not that he then contemplated contracting debts. We think the intention indicated by this conversation, when it is considered in the light of other facts found in the record, was not fraudulent, and may be reconciled with the purpose simply to settle this property upon the defendant, so that it would be secured to her as a home—not exposed to the hazard of Seybert's business enterprises. And if credit be given to her testimony, Seybert had used money belonging to her equal in amount to the cost of the lands, and the conveyance to her was by way of restoring an inheritance from her father's estate. However that may have been, the lands were improved and occupied as a homestead, and the purchase money was for the most part obtained by a mortgage upon the property executed during the year in which it was bought and only satisfied by a sale which took place a short time before the institution of this suit. The sum which was actually paid on the purchase, from means acquired by Seybert, can not be exactly ascertained from the evidence. But it was probably not larger than a man of his station might reasonably expend in renting a comfortable place of residence, for the period during which he occupied these lands. It is said to be a duty which a man owes to his family to provide for them a home. 2 Jones, Liens, sec. 1263. In the effort made to discharge that duty, it is not apparent that Seybert was guilty of any wrong, even to a prior creditor. And we cannot see that his

conduct furnishes a just ground of complaint to one whose debt had no existence until many years after the purchase. *Edmonson* v. *Meacham*, 50 Miss. 34.

We think the evidence does not justify the finding and decree of the chancellor. The judgment will therefore be reversed, and the complaint dismissed.

BAUCUM v. COLE.

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Opinion delivered May 21, 1892.

1. *Fraud—Consideration—Release of homestead by wife.*

   The transfer by a husband to his wife of $510 out of the proceeds of his homestead, which was sold for $2,000, in consideration of her joining in the deed and relinquishing dower, is not so out of proportion to the consideration as to evidence fraud.

2. *Practice—Time of trial of attachment—Waiver.*

   If it is error to set down the attachment branch of a cause, and an interplea therein, for trial before the return term of the action, the error is waived by going to trial without objection.

Appeal from Pulaski Circuit Court.
ROBERT J. LEA, Judge.

G. F. Baucum & Co. brought suit against J. J. Cole by attachment in the Pulaski circuit court December 6, 1890, returnable at the following March term, charging the defendant with fraud in disposing of his property, and with attempting to so dispose of it. Plaintiffs garnished $510 in the hands of Wallace & Lorance in Pulaski county, and attached personal property in Lonoke county valued at more than $400.

On the 12th day of December, 1890, defendant, having given the required notices, filed his schedule claiming a portion of the property attached in Lonoke county as exempt; also a traverse of the grounds of attachment, together with a motion that the attachment be at once

discharged. At the same time his wife, M. E. Cole, who was allowed to intervene, claimed the money garnished and some of the property attached in Lonoke county, and asked that the issues be at once tried. Plaintiffs demurred to these several proceedings, but the court overruled their demurrer and proceeded to try all the issues forthwith. Plaintiffs introduced evidence to show fraud on defendant's part in disposing of a mule at Hot Springs and in transferring a portion of the proceeds of his homestead to intervener, his wife.

The court found in substance that defendant, in December, 1890, sold his homestead of 80 acres to Wallace & Lorance for $2000; that, after paying certain debts for which the grantees became responsible, there would be left the sum of $510 due defendant; that M. E. Cole refused to relinquish her dower in the homestead unless this sum was paid to her for her dower interest therein, which was agreed to by defendant and Wallace & Lorance, and she then signed the deed relinquishing her dower.

Upon these facts the court declared the law to be "that a debtor in failing circumstances has the right to sell his homestead to pay such debts as he may choose, and no creditor has a right to complain, even though he may not be paid; as that property, while used as such, is beyond his reach, and cannot be subject to the payment of his debts; and that, as a matter of law, there was no fraud in the transaction of Cole of which the plaintiffs could complain." As to the intervention of M. E. Cole, the court declared the law to be "that a married woman has the right to refuse to relinquish her inchoate dower interest in the homestead unless a part of the purchase money therefor be paid to her; and if, by reason of her refusing to relinquish her dower interest, the husband in good faith accedes to her demand, in order to enable him to make a sale, and allows such part of the

purchase money to go to her as would be in proportion to the value of said dower interest, this would not be a fraud upon his creditors." The court held that the facts failed to establish legal fraud, and dissolved the attachment; and held that the property claimed by the intervener belonged to her, and sustained the intervention. Judgments were accordingly rendered for defendant and intervener. Plaintiffs have appealed.

W. J. Terry for appellants.

1. The court erred in trying the issues at the October term. Mansf. Dig. secs. 356, 358, 383, 5125.

2. The court erred in declaring the law to be that a wife could exact of her husband a certain *pro rata* of the purchase money equal to her dower interest in the homestead, and that his giving her this would not be a fraud on creditors. 31 Ark. 580; 1 Wash. R. P. (5th ed.) p. 312; 18 W. Va. 522; 16 Iowa, 578; 55 Md. 42; 13 Allen (Mass.), 60; 8 N. Y. 110.

3. Actual fraud is shown in the disposition of Cole's property.

Vaughan & Collins for appellees.

1. As to property which is exempt there can be no fraudulent disposition on the part of the debtor. 1 Wade, Att. sec. 213; 2 *id.* sec. 419; Waples, Att. 534; 33 Ark. 414; 37 *id.* 614; 44 *id.* 180; 49 *id.* 219.

2. No objection was made to the trial of the cause —it is too late to object here for the first time that the cause was prematurely tried.

HEMINGWAY, J. The court below found that the plaintiffs' allegation of fraud was not proved, and accordingly dissolved the attachment. The order, which was the legal consequence of the finding, was correct, unless there was something in one of two transactions hereafter considered to constitute fraud.

The court found specifically that there was no fraud upon creditors in the sale of the mule at Hot Springs;

the burden was upon the plaintiff to show that there was, and we do not find that such proof was made.

1. Release of homestead as consideration.

The court found that the debt attached was to be paid to M. E. Cole, the wife of the defendant, in consideration of her having joined him in the conveyance of their homestead and relinquished her dower in it. That the relinquishment of dower is a valuable consideration to support a transfer of property by the husband to the wife, was settled in *Hershy* v. *Latham*, 46 Ark. 542; as the husband cannot convey his homestead unless his wife joins in the conveyance, it would follow that her joining in such conveyance was an additional consideration to support a settlement by the husband. We cannot say that the transfer to the wife of $510 of the proceeds of sale of a homestead worth $2,000 was so out of proportion to the consideration as to evidence fraud; the court below having found there was no fraud, such must be accepted as the fact. Other circumstances are referred to as indicating fraud, but they do not warrant us in disturbing the verdict. It follows that the court did not err in dissolving the attachment or in awarding to Mrs. Cole the debt attached.

2. Practice as to time of trial of attachment.

It is argued that the court erred in trying the issue upon the traverse of the attachment and the interplea, before the return term of the action. Without deciding what the proper practice is, it is sufficient to say that the plaintiff is in no position to urge the objection. The issues were tried without objection, and the implication is that the parties consented. It is true the plaintiff demurred to the traverse and the interplea, but a demurrer questions the sufficiency of the pleading and presents no objection to the order fixing the time for trial. If it is pertinent to such an order, it is as tendering an issue and invoking the court's judgment upon it.

Affirm.

HEARD v. KNIGHTS OF HONOR.

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Opinion delivered May 21, 1892.

1. *Vendor and vendee—Defense to action for price.*

In an action for the purchase price of land where the deed was deposited in escrow till the money should be paid, and the vendee entered into possession, he cannot resist payment on the ground that the title was encumbered, but must look to the covenants in the deed for indemnity against prior liens.

2. *Statute of frauds—How availed of.*

The defense of the statute of frauds cannot be insisted upon on appeal where it was not set up or relied upon in the lower court.

Appeal from Conway Circuit Court in Chancery.
JEREMIAH G. WALLACE, Judge.

This was an action by the Morning Star Lodge of Knights of Honor against George M. Heard for the purchase money of a tract of land, the deed for which, as alleged in the complaint, had, in pursuance of the sale, been delivered to W. J. Stowers as an escrow, subject to the orders of Heard upon payment of the purchase money, which he agreed to pay on January 1, 1891.

Heard, in his answer, admitted that he had agreed to purchase the land, and that a deed had been prepared and delivered to Stowers, as stated. But he alleged that, at the time of making the contract, there was a legal and valid mortgage upon said land, which was duly recorded, and which is now a lien upon the land; that he had offered to pay the amount of the purchase money for the land immediately upon the satisfaction of the mortgage and accept and receive the deed; that appellee neglected and refused to remove said lien, and still refuses to do so; that for this reason, and this alone, had he refused to pay the purchase money.

The case was tried on oral testimony before the court sitting as a jury. The court, on its own motion,

after hearing the evidence and argument of counsel, transferred the case to the equity docket, and rendered a decree, reciting the facts as follows:

"Plaintiff, on the 13th day of September, 1890, sold to defendant the following described lands, situated in Conway county (describing the lands), for the sum of $828, and on same day the plaintiff executed a deed conveying said land to said defendant with the usual covenant of warranty, which deed was, by agreement of parties, deposited with W. J. Stowers in escrow to be delivered to defendant on the payment of the purchase money, which defendant verbally agreed to pay January 1, 1891. Defendant went into possession of said land, cut about forty cords of wood thereon and plowed up about three acres of said land. At the time of said purchase and sale, there was an unsatisfied mortgage of record which was *prima facie* a lien on said land, which defendant had no actual knowledge of and which he did not contemplate paying, the sum above mentioned being the full value of said land. The amount that now appears to be due upon said mortgage debt is $305; on or before the 1st of February, 1891, defendant offered to pay the amount of said purchase money to said plaintiff, less the amount of said mortgage debt; and, upon plaintiff's refusal to accept the same, defendant declined to carry out his contract to purchase the same. Upon these facts it is by the court ordered and decreed that the plaintiff do have and recover of and from the defendant the said sum of $828, and a lien is hereby declared on said land for said sum, but the execution of said judgment, to the extent of the amount of said mortgage debt, to-wit, $335, is hereby postponed until plaintiff shall procure the legal satisfaction of the same, whereupon said amount shall be due and payable and its payment may be enforced, as hereinafter provided, for the residue of this decree. It is further ordered and decreed that if the sum of $495, with

six per cent interest from January 1, 1891, be not paid within twenty days, said land may be sold."

Costs were adjudged against the plaintiff. Defendant appealed, and plaintiff has taken a cross-appeal.

Moose & Reid for appellant.

1. Appellant should not be compelled to accept an encumbered title, pay the purchase price and be compelled to trust to a suit to recover on the warranty in the deed. The contract was executory, and the Lodge could not have specific performance, without performing its part of the contract, and convey a good title. 14 S. W. 864; Suth. on Dam. 192, *et seq.*: 2 Eng. 153; 21 Ark. 235; 23 *id.* 582; *ib.* 639; 38 *id.* 128; 44 *id.* 145, 192; 19 Vesey, 220; Waterman, Sp. Perf. secs. 502, *et seq.*: 13 Ves. 81; 38 Ark. 31; 104 Mass. 407; 21 Barb. 381; 45 Ark. 17.

2. The contract for sale was verbal and within the statute of frauds. Pom. Sp. Perf. sec. 30; Fry on Sp. Perf. secs. 384, 388; 1 Ark. 391; Waterman, Sp. Perf. sec. 260; 6 Barb. 98; Wood, St. Frauds, sec. 482.

Ratcliffe & Fletcher for appellee.

1. The contract was executed. On payment of the purchase money the deed would take effect without delivery. 3 Wash. Real Pr. (4th ed.), pp. 299, 303–4; 14 Ohio, 308; 63 Am. Dec. 241; 17 Ga. 267; 11 Ark. 75; 22 *id.* 284; *ib.* 435. In case of defect of title, the remedy is at law on the covenants in the deed. 21 Ark. 588–9; 40 Ark. 422; 47 Ark. 293.

2. The mortgage was of record, and defendant can not now be heard to plead want of knowledge or to ask relief by reason of a supposed defect of title. 47 Ark. 339; *ib.* 164; 46 *id.* 347; 27 *id.* 250; 26 *id.* 30.

3. Appellant is in no condition to offer to rescind. He does not offer to surrender possession or pay for the wood cut or for rent. 15 Ark. 286; 20 *id.* 438; 17 *id.* 603; 25 *id.* 204; 30 *id.* 545-6; 2 Suth. Dam. 202-3; 41

Barb. 420; 26 Wis. 585. But if he had offered to rescind, this is not a case for rescission. It is only a case of partial failure of consideration, easily compensated in damages. 26 Ark. 314; 13 *id.* 522; 2 Suth. Dam. 203.

4. Appellant gained all he contended for, and has no reason to complain.

5. The question of the statute of frauds was not raised nor relied on below. When the deed was executed and delivered as an escrow, this was sufficient. 42 Wis. 437; Wood, St. Fr. p. 338. A purchaser in possession cannot plead the statute of frauds. Wood, St. Fr. sec. 237; 2 Suth. Dam. 204; 5 Porter, 94.

1. Defense to action for price of land.

HEMINGWAY, J. The defendant admitted in his answer that he contracted to buy the land at the price claimed in the complaint, and the only ground relied upon to defeat a recovery was that the plaintiff's title was encumbered. In our opinion the defense is unavailing. When the contract was made, the plaintiff prepared and tendered a deed which the defendant agreed to accept, and which, under the contract, was deposited as an escrow, beyond plaintiff's control, to be delivered to the defendant when he paid the stipulated price. The plaintiff satisfied the terms of the contract when he made the escrow, and the defendant was bound to pay the stipulated price for the title it passed; the contract was so far executed that the defendant entered into possession and used and enjoyed the land, and the only thing needed to complete its execution was the payment of the purchase money, whereby the escrow would become operative as a deed. Such being the case, the defendant cannot refuse to comply with his part of the contract merely because the deed would pass an encumbered title. If he wished a title free from encumbrances, he should have satisfied himself in that regard before he approved the escrow and took possession of the land; having taken possession and agreed to pay for that deed, he is

liable upon his promise, and must look to the covenants of the deed for indemnity against prior liens. He certainly has no cause to complain of the decree which postpones, *pro tanto*, the collection of the price until the lien is satisfied.

2. Statute of frauds should be pleaded.

He argues here that no recovery can be had because the contract was within the statute of frauds. That defense was not set up or in any way relied upon below; the answer admitted that the contract was made, and sought to avoid payment only because there was a defect in plaintiff's title. That precludes a reliance upon the statute of frauds here, and relieves us of the necessity of considering the questions urged with reference to it.

Affirm.

ORGAN *v.* STATE.

Opinion delivered May 28, 1892.

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Inter-state commerce—Exportation of game.

The act of the legislature prohibiting the exportation of game and fish from the State does not violate the commerce clause of the Federal Constitution.

Appeal from Crittenden Circuit Court.

J. E. RIDDICK, Judge.

Organ was convicted of a violation of the act prohibiting the exportation of fish and game from the State. It is conceded that he was master af a steamboat plying the Mississippi river between West Memphis, in Crittenden county, Arkansas, and Memphis, Tenn., and that as such master he received and transported a barrel of fish from the former to the latter place, and that the fish were taken from public waters in Crittenden county. Organ has appealed, and contends that the act under which the conviction was had is unconstitutional.

The act of April 12, 1889, ch. 117, as amended by the act of March 31, 1891, ch. 88, provides as follows:

"Section 1. That all the game and fish, except fish in private ponds, found in the limits of this State, be and the same are hereby declared to be the property of the State, and the hunting, killing and catching of same is declared to be a privilege.

"Sec. 2. It shall be unlawful for any person to export any fish or game from this State until April 12, 1895, and any person violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than twenty-five (25) nor more than fifty (50) dollars; *Provided*, That it shall not be unlawful under this act to export beaver, opossums, hares or rabbits, ground hogs or woodchucks, raccoons, squirrels, snipes or plover. *Provided*, The same shall be shipped openly.

"Sec. 3. It shall be unlawful for any railroad company, steamboat, express company, or any other common carrier, to take for carriage any fish or game consigned to points beyond the limits of this State.

"Sec. 4. Any such common carrier may refuse to receive any package which it may suppose contains fish or game designed for export, and may cause said package to be opened, or may satisfy themselves in any other way that said packages do not contain game or fish.

"Sec. 5. Any common carrier violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than two hundred dollars.

"Sec. 6. Any violation of this act shall be prosecuted in the name of the State of Arkansas, and one-half of the fine shall be paid into the county treasury as other fines are required to be paid, and the other half shall go to the informer.

"Sec. 7. Justices of the peace shall have jurisdiction of prosecutions under this act.

"Sec. 8. All laws and parts of laws in conflict herewith are hereby repealed, and this act shall be in force from and after its passage."

W. M. Randolph for appellant.

1. The act, so far as it undertakes to vest the property in the fish in the State, is void. 18 How. 74; 94 U. S. 391; Angell on Watercourses, sec. 535; 60 N. Y. 56-67; Tiedeman on Lim. Police Power, sec. 125, p. 451; Cooley, Const. Lim. (6th ed.) p. 642; 5 Day, 22; 5 Conn. 391; 20 Com. Bench (N. S.), 1.

2. The act violates that part of the Constitution which confers upon Congress the power to regulate commerce. 9 Wheat. 196; 15 Wall. 232; 121 U. S. 230; 117 *id.* 34; 114 *id.* 196; Cooley's Const. Lim. (6th ed.), 595, 596; 141 U. S. 62.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman*, for appellee.

1. The ownership of the fish is in the State, and the act is only declaratory of the common law. 97 Ill. 333; 31 Cent. Law Jour. 271, and cases cited. The legislature may therefore make such regulations as to the taking of fish as it may deem necessary for their protection. Tied. Lim. of Police Power, sec. 122; 60 N.Y. 10. The constitutionality of such laws has been expressly upheld. 29 Ind. 409; 5 Mass. 266; 10 *id.* 212.

2. Game laws may indirectly affect interstate commerce, but they are held to be within the proper scope of the State's police power, and not an encroachment upon Congressional prerogative. 60 N. Y. 10; 97 Ill. 333; 1 Mo. App. 15; 7 *id.* 524. Under our statute, fish cannot lawfully become the subject of commerce with other States. The statute declares the taking of fish a privilege, granted upon the express condition that they shall

not be taken for export. 31 Cent. Law Journal, 271, and cases cited. See the case in 19 Kas. 127.

HEMINGWAY, J. The ownership of fish is in the State for the benefit of its people in common, and the legislature has the right to permit individuals to catch them upon such terms and conditions as it may impose, and to restrict the property acquired in them, when caught, to such extent as it deems proper. *McCready* v. *Virginia*, 94 U. S. 391; *American Express Company* v. *People*, 133 Ill. 649; *Magner* v. *People*, 97 Ill. 333.

It may prohibit catching them entirely, or for a specified season; or it may permit them to be caught for the use of the person who makes the catch, and withhold the right to sell them, or ship them for sale. When preserved for the common benefit of the people of the State, they are not articles of commerce in any sense, and we cannot see that they become such simply because the legislature permits them to be caught by individuals for use within the State only.

One who catches them had originally no separate property in them, and no right to acquire it except as the legislature might provide; as all right of property in them is derived from the State, it is subject to such terms as the legislature imposes. It saw fit, in the act assailed, to confer a right of property, but to so limit it that the article should not be shipped from the State, the purpose being to restrict the use to those who originally owned it in common. The restriction was imposed by right of ownership, and not in the exercise of any assumed power to regulate the commercial uses of private property.

Under this limitation fish never pass from the dominion of the State as proprietor or become articles of commerce in the sense contended for by the defendant, because the qualified property right is conferred upon condition that the use shall be restricted and shipment

from the State not allowed. It follows that the act does not violate the commerce clause of the Federal Constitution, and it could not be seriously contended that it violated any other constitutional provision.

We are aware a different conclusion has been reached by the courts of Kansas and Idaho. *State* v. *Saunders*, 19 Kas. 127; *Territory* v. *Evans* (Idaho), 23 Pac. Rep. 115. But that announced seems to us the better one, and is sustained by the Supreme Court of Connecticut in an opinion to which we refer for a more extended discussion of the subject. *State* v. *Geer*, 61 Conn. 144.

Affirm.

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RAILWAY COMPANY *v.* ROSS.

Opinion delivered May 28, 1892.

1. *Railway accident—Evidence held to establish contributory negligence.*

In an action to recover damages for the negligent killing of plaintiff's intestate, it appeared that deceased owned a lumber shed fronting on a spur track of defendant, and that while a flat car was being sent down this track deceased called to the brakeman in charge not to let it move a box car on the track in front of the shed; that the brakeman requested him to throw something under the flat car to stop it; and that while so doing he stepped on the main track in front of the tender of the engine, which was backing up, and was killed. It appeared that deceased knew the mode of switching; and that the engineer usually rang the bell when backing the engine, but did not do so on this occasion. *Held*, that deceased was guilty of contributory negligence.

2. *Dismissal of action—Act of 1891.*

Where the evidence shows that there could be no recovery for the killing of plaintiff's intestate on account of his contributory negligence, the cause will be dismissed, under the act of April 14, 1891, (ch. 159, sec. 2).

Appeal from Saline Circuit Court.

A. M. DUFFIE, Judge.

Action by Josephine Ross, administratrix of her husband, George Ross, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. The facts are stated in the opinion.

Dodge & Johnson for appellant.

1. Upon the admitted facts, Ross was guilty of negligence, which was the direct and proximate cause of his death, and for which defendant cannot be held liable. 45 Ark. 248; 46 *id.* 92; 49 *id.* 259; 36 *id.* 371; 47 *id.* 477; 46 *id.* 513; 54 *id.* 434.

2. The verdict was contrary to the law as declared by the court. 48 Miss. 112; 12 Am. Rep. 356; 19 Wend. 343; 69 Pa. St. 210; 57 *id.* 339; 1 H. & W, 773; 26 L. J. (Exch.) 171; 24 A. & E. R. Cases, 430; 143 Mass. 536; 51 N. W. Rep. 254; 36 Iowa, 465, and cases *supra.*

3. The cause should be reversed and dismissed under sec. 2, Acts 1891, p. 280.

A. D. Jones and *Blackwood & Williams* for appellee.

1. Appellant admits the damages are not excessive, and that there is no error of law in the case. No exceptions were saved to the admissibility of testimony. The sole question then is, "Was there *any* evidence upon which to base the verdict?" We contend that there was.

2. Ross was not a volunteer nor a trespasser. 10 Q. B. (L. R.) 298; 4 L. R. Exch. 258; 6 *ib.* 123; 43 Oh. St. 224; 65 Tex. 577; 60 *id.* 180; 111 Eng. C. L. 390; Thomp. on Neg. 1045. He was on the track by license or custom. 72 Ill. 349; 31 Ill. App. 179; 65 Pa. St. 273; 66 N. Y. 249; 33 Ark. 375; 48 *id.* 493.

3. The evidence shows negligence on the part of appellant's servants. No bell was rung—no warning given—the engineer either did see Ross or could have seen him if watchful. 52 Ark. 164; 54 *id.* 215; 46 *id.* 423; 50 *id.* 482; 33 *id.* 375; 36 *id.* 46; *ib.* 376; 47 *id.* 502; 49 *id.* 263; 58 Am. Rep. 512; 54 Tex. 615; 33 Md. 542.

4. The use of flying switches is negligence *per se*. Thompson on Neg. vol. 1, pp. 423–4, 452; Beach, Cont. Neg. sec. 72; 67 N. Y. 417.

5. No warning was given. 53 Ark. 201; 24 Am. L. Rev. p. 591; 32 Minn. 212; 101 N. Y. 419.

6. Whether Ross was guilty of negligence was a question for the jury under proper instructions of the court. 56 N. Y. 32; 101 N. Y. 419; 32 Minn. 212; 30 *id.* 495; 67 N. Y. 417.

HUGHES, J. The appellee brought this action to recover of appellant damages for the killing of her husband, which, she alleged in her complaint, was caused by the negligent backing on him, by the appellant's servants, of a tender pushed by an engine on the railway of appellant at Alexander, in Saline county, in this State. The appellant denied negligence, and alleged that the plaintiff's intestate was a trespasser on its track, and was guilty of contributory negligence at the time he was struck by the tender. A jury trial resulted in a verdict of ten thousand dollars for the appellee. Appellant brought the case to this court by appeal.

No exceptions were taken on the trial to any evidence, or to any instructions given by the court, and there is no contention that the damages were excessive.

The grounds of a motion for a new trial were:

First. That the verdict was contrary to the evidence.

Second. That it was contrary to the law as declared by the court.

1. Evidence held to establish contributory negligence.

The facts in evidence were about as follows: George Ross, the deceased, was killed near his saw mill and lumber shed, in the incorporated town of Alexander, on the 6th day of August, 1890. The shed was built on the right of way of the appellant, and fronted about twenty feet on a spur track of the appellant on the east side, and ran back thirty or forty feet. Through the

center of this shed, reaching back to the saw mill, was a tramway upon which lumber was brought from the mill to the shed to be loaded on to cars on the spur track. The shed was built several years ago, by consent of the company, to facilitate the loading and shipping of lumber from the mill, from which George Ross had shipped a considerable quantity. The spur track runs south from the main track of the railroad at Alexander, and passes the shed a short distance. A flat car was cut off and sent down this spur track. At the time a box car was standing on the spur track in front of the shed. Ross, the deceased, hallooed to the brakeman on the flat car and requested him not to let the flat car move the box car standing in front of the shed. The brakeman requested Ross to throw something under the flat car to stop it, stating that there was no brake on it, and that he could not stop it. Ross picked up two scantlings, went between the spur track and the main track, threw one scantling immediately after the engine and tender passed near him going south. The flat car passed over this scantling, struck the box car on the spur, and rebounded, when Ross threw the second scantling, the end of which flew up near Ross when the wheels of the car struck it. To prevent being struck by the end of this scantling, Ross stepped back on to the main track, three or four feet in front of the tender on the main track, as the engine and tender were going backwards north; and was struck by the tender and killed, his body having been carried by the tender about forty-two feet before the car was stopped.

The evidence shows that Ross was familiar with the manner in which this switching was done; that it was the habit of the engineer in charge of the engine to ring his bell when returning, as he was at the time of the accident; that on this occasion the bell was not rung. It was also in testimony that coal was piled on the ten-

der so high that the engineer could not have seen Ross, as he returned, and there was testimony that he might have seen him. The evidence showed that between the spur track and the main track, where Ross was standing, there was a distance of about three feet.

It is contended by the counsel for the appellee that making a flying switch is evidence of negligence *per se.* If this be conceded, there is no evidence that this caused Ross' death. They say also that Ross was not a volunteer, that he had the right to be upon the track, and that the company was bound to exercise toward him greater care than that which is due a mere trespasser or intermeddler. Granting this to be true, still it does not excuse Ross' failure to exercise that degree of care that a reasonably prudent man ought to have exercised under the circumstances. The railroad employees had no reason to suppose that Ross, a fully grown man possessing a knowledge of the manner in which the switching was done there, would step on to the main track two or three feet in front of the moving tender. The natural presumption was, considering the instinct of self preservation, that he would do no such thing. The inevitable conclusion is that his own act in stepping back in front of the moving tender was the proximate cause of his death, which was very unfortunate and sad, as he is shown to have been a good and useful man.

For the want of testimony, therefore, to support the verdict, the judgment must be reversed.

2. Practice as to dismissal of actions on appeal.

As the evidence shows there could be no right of recovery on account of the contributory act of the deceased, the cause is dismissed, in the exercise of the court's discretion, under section two of the act of the legislature of 1891, p. 280.

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JOYNER v. HARRISON.

Opinion delivered June 4, 1892.

1. *Tax sale—Loss of assessment roll.*

Proof that the assessment roll for a certain year cannot be found in the office where the law requires it to be kept, will not defeat a deed of the land commissioner based upon a forfeiture of land to the State for that year's taxes, the deed itself being evidence of title in the purchaser.

2. *Little River county—Assessment for 1867.*

The act of March 6, 1867, which created the county of Little River, did not require that the lands detached from Sevier county to aid in the formation of the former county should be carried on the assessment books of the latter county for the year 1867; but, on the contrary, provided that all steps to be taken in the collection of the taxes upon such lands for that year should be taken by the officials of the new county.

3. *Forfeiture to State—Subsequent sale by collector.*

Where land has been forfeited to the State for non-payment of taxes, it is not thereafter subject to sale by the county collector for the taxes for which it had been forfeited, or for any other taxes.

Appeal from Little River Circuit Court in Chancery. RUFUS D. HEARN, Judge.

Joyner brought suit against Harrison to quiet title to land situated in Little River county, claiming title under a tax deed, executed on November 24, 1879, reciting that the land was sold for the taxes of the years 1872–6, inclusive. Defendant filed an answer and cross-complaint in which he relied upon a deed to him from the State Land Commissioner, dated August 10, 1881, based upon forfeitures for non-payment of taxes for the years 1867, 1870, 1871, 1873–5. He alleged that plaintiff's deed was a cloud upon his title, and prayed that it be removed. The cause was submitted upon the pleadings and the deposition of the clerk of Sevier county, who testified that he had carefully examined the assessment

rolls on file in his office, and found no assessment of the land in question for the year 1867; that the tract did not appear on the duplicate tax books on file in his office for that year. The court decreed that plaintiff's tax-deed was a cloud upon defendant's title, and removed the same. Plaintiff has appealed.

By the act of March 5, 1867, the county of Little River was created from territory previously belonging to the counties of Sevier and Hempstead. The land in question was detached from Sevier county. Section 11 of the act provides "that the taxes assessed for the year 1867, upon the property and inhabitants of the county of Little River, shall inure to the benefit of, and belong to, said county of Little River; and, to that end, it shall be the duty of the clerk of the county court of the county of Sevier, whenever the assessment list of the taxable inhabitants and property of said county shall be returned by the assessor of said county, to make out and furnish to the said sheriff of the county of Little River, a complete and accurate list of all taxable inhabitants and property on said assessment list, which fall within the limits of said county of Little River, as stricken off from the county of Sevier; which said list shall be certified as correct, under the seal of his office; and it shall be the duty of said sheriff, immediately after such list comes to his hands, to file the same in the office of the clerk of the county court of said county of Little River; and he shall immediately give notice, as now required by law, that he has filed said assessment, and that all persons aggrieved thereby can attend at the next term of the county court in said county, and have the same adjusted."

L. A. Byrne for appellant.

1. There was no legal assessment upon which to base a forfeiture for the taxes of 1867. 18 How. 137; 34 Fed. Rep. 701. The assessor of Sevier county was the

only officer authorized to make the assessment of the land in controversy for the year 1867. The testimony of the clerk shows that there was no assessment of the land for that year, and that no taxes were extended on the tax books against said land for that year. A tax deed void in part is void *in toto*. Black, Tax Titles, sec. 97; 32 Ark. 131.

2. The State is estopped, and her vendee acquires no better right than she had. Herm. on Est. vol. 2, pp. 812, 813, 1264–5; 34 Fed. Rep. 701.

W. S. Curran for appellee.

1. The evidence of the clerk that no assessment was found in his office is not sufficient to overturn the *prima facie* case made by the commissioner's deed. 49 Ark. 266.

2. The lands having been forfeited to the State, they were erroneously on the tax books at the time they purport to have been sold. The State had purchased the lands, they were not subject to taxation, and the clerk's sale was void. 5 S. W. Rep. 555.

1. Presumption in favor of tax deed.

COCKRILL, C. J. 1. Proof that the assessment roll for 1867 could not be found in the office where the law required it to be kept will not overcome the statutory presumption in favor of the regularity of the steps taken by the taxing officers. *Scott* v. *Mills*, 49 Ark. 266.

2. Validity of assessment.

2. The law did not require that the lands detached from Sevier county to aid in the formation of the county of Little River should be carried on the clerk's books of the old county for 1867, the year in which the new county was formed, but on the contrary provided that all steps to be taken in the collection of the taxes upon such lands for the year 1867 should be taken by the officials of the new county. Proof, therefore, that the taxes were not extended against the lands in dispute in Sevier county for that year shows no irregularity in the tax proceedings.

3. The land commissioner's deed, through which the appellee claims, recites that it is based upon a forfeiture for non-payment of taxes for several years, those due for 1875 being the last. The deed is evidence of the facts thus recited. There is no proof when the forfeiture took place. Regularly, the sale would have taken place in 1876, and, in the absence of proof to the contrary, the presumption is that the officers performed their duty and sold the land in that year. As the land commissioner assumed to sell the land for that forfeiture, the presumption is that it continued to be the property of the State from the time it was certified as forfeited land. After it was forfeited to the State, it was not subject to sale for the taxes for which it had been forfeited or for any other taxes. It follows that the subsequent sale under which the appellant claims was unauthorized, and that the judgment is right.

3. State lands not liable to forfeiture.

Affirm.

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RAILWAY COMPANY *v.* NEEL.

Opinion delivered June 4, 1892.

1. *Contract construed—Proximate cause of injury.*

The defendant, a railway company, entered into an agreement with a narrow gauge railway company to furnish to the latter facilities for running its engines and cars over defendant's track between Rob Roy and Pine Bluff, stations on defendant's line; plaintiff shipped cotton over the narrow gauge road consigned to himself at Pine Bluff, and took bills of lading therefor; in consequence of defendant's failure to comply with its contract, the narrow gauge railway company was unable to carry the cotton to Pine Bluff, and was compelled to throw it off at Rob Roy, where it was exposed to the rain and mud, and thereby loss was incurred for which plaintiff seeks damages. *Held*—

(*a*) That the contract between the two railway companies did not constitute a partnership nor make the narrow gauge railway company the agent of defendant for receiving freight.

(*b*) That if it be conceded that the plaintiff might recover for a violation of a contract to which he was not a party, he cannot recover in this case because the proximate cause of the injury complained of was, not the violation by defendant of its contract with the narrow gauge railway company, but the exposure of the cotton to the rain and mud.

2. *Carrier—Liability for property accepted.*

A common carrier becomes responsible for the care and custody of property from the time such property is accepted for transportation.

3. *Effect of carrier's refusal to accept property.*

Where a carrier wrongfully refuses to accept property tendered for transportation, the shipper cannot abandon the property, or leave it exposed to the ravages of the weather, at the carrier's expsnse; it would still be his duty to preserve it, and it would be his right to recover of the carrier the reasonable expense therefor, together with the proximate damages for the delay.

4. *Bill of lading—Conclusiveness as receipt.*

A recital in a bill of lading that the goods were received "in apparent good order" refers only to the external condition of the goods, and as between the original parties is only *prima facie* proof of the true condition of the goods when received.

5. *Carrier—Liability for damages.*

A carrier is liable for damages accruing to goods received for shipment from the time they are received, and not from the date of the bill of lading only; and if the evidence warrants a difference of opinion about the fact, it is for the jury to determine whether the goods were actually received before the bill of lading issued.

Appeal from Jefferson Circuit Court.
JOHN M. ELLIOTT, Judge.

Suit by C. M. Neel against the St. Louis, Arkansas & Texas Railway Co.

The complaint alleges two causes of action, viz:

(1) That plaintiff built a railroad from Rob Roy, a station on defendant's line of railway, distant seven miles from Pine Bluff, to Swan Lake, in Jefferson county, for the purpose of transporting freight and passengers to and from Pine Bluff. That the railway so built was

incorporated as the Pine Bluff & Swan Lake Railway Co., and during the year 1886 was run and operated under said name, the plaintiff being president and chief stockholder. That, on the 7th day of July, 1886, the Pine Bluff & Swan Lake Railway Co. entered into a contract with defendant whereby it was agreed that the former should run its own trains over the latter's track from Rob Roy to Pine Bluff. That, at this time, defendant and the Pine Bluff & Swan Lake Railway Company were both narrow gauge roads, and as defendant contemplated widening its gauge, it was agreed that when the change was made, it should maintain a third rail on its track between Rob Roy and Pine Bluff, so as to allow the passage of trains of the Pine Bluff & Swan Lake Railway between Pine Bluff and Rob Roy. That the contract was to be and remain in full force until July 7, 1887, and that, by said contract, the Pine Bluff & Swan Lake Railway Company and defendant become partners in the transportation of passengers and freight from Swan Lake to Pine Bluff, and operated their respective lines of railway jointly and divided their receipts for freight and passengers from the date of the execution of the said contract until October 18, 1886, when defendant tore up its rails and widened its gauge, but neglected to put in the third rail, as stipulated in the contract, and thereby prevented the transportation of freight and passengers to Pine Bluff along the line of said Pine Bluff & Swan Lake Railway until December 22, 1886. Plaintiff further states that he, at divers times between the 18th day of October and the 17th day of November, 1886, delivered his own cotton, amounting to 143 bales, to the Pine Bluff & Swan Lake Railway Company for shipment to himself at Pine Bluff, and took bills of lading therefor; that, in order to pay for money and supplies advanced by him,

divers persons delivered 320 bales of cotton to the said Pine Bluff & Swan Lake Railway Company consigned to plaintiff at Pine Bluff, and took bills of lading therefor; that plaintiff delivered to the said Pine Bluff & Swan Lake Railway Company for shipment to himself at Pine Bluff about 200 tons of cotton seed and took bills of lading therefor. But that, by reason of defendant company violating its said contract and refusing to allow the trains of the Pine Bluff & Swan Lake Railway Company to pass over its road, said cotton was carried to Rob Roy and there thrown off and exposed to the rain and mud, and was damaged in the sum of $10 per bale, and the cotton seed of the value of $8 per ton was entirely lost. Whereby plaintiff was damaged in the sum of $6,230.

(2) As a second cause of action, plaintiff alleges that, some time between October 18 and November 17, 1886, plaintiff delivered to defendant at Rob Roy station 623 bales of cotton and 300 tons of cotton seed, worth $8 per ton, consigned to plaintiff at Pine Bluff, and took bills of lading therefor; that defendant let said cotton and cotton seed lie in the mud and exposed to the rain at Rob Roy until said cotton was damaged $10 per bale and the cotton seed entirely lost, and plaintiff thereby was damaged in the sum of $8,630.

The following is the agreement referred to in the complaint:

"Memorandum of agreement, entered into this 7th day of July, 1886, between the St. Louis, Arkansas & Texas Railway and the Pine Bluff & Swan Lake Railway, for the interchange of traffic and the mutual protection of each other's interest.

"(1) Both parties agree to maintain the following rates between Rob Roy and Pine Bluff, subject to the St. Louis, Arkansas & Texas classification:

1st.	2d.	3d.	4th.	5th.	6th.		A.	B.	C.
17c.	15c.	12c.	10c.	9c.	8c.		$16.00.	$14.00.	$11.00.

"Passenger rates, 25 cents per whole ticket and 15 cents per half ticket; and each passenger without a ticket shall be charged 30 cents for full fare and 25 cents for half fare.

"(2) The above rates shall be the minimum figures to be charged at any station on the Pine Bluff & Swan Lake Railway to or from Pine Bluff.

"(3) The Pine Bluff & Swan Lake Railway agrees to pay the St. Louis, Arkansas & Texas Railway the following rates on all business handled by the Pine Bluff & Swan Lake train between Rob Roy and Pine Bluff:

1st.	2d.	3d.	4th.	5th.
7c.	7c.	5c.	5c.	5c.

"Car loads, $2.50 per car; cotton, 20 cents per bale; 15 cents for each passenger carried.

"(4) The Pine Bluff & Swan Lake Railway agrees to accept, between Rob Roy and all stations on its line, 20 cents per hundred on less than car loads and $12 per car in car loads, and 75 cents per bale on cotton, and 50 cents for each full-fare ticket for any business from or to points on or reached by the St. Louis, Arkansas & Texas Railway.

"(5) Where any of the rates herein work a hardship on either party, the same may be changed or modified by mutual consent of the parties hereto upon ten days' notice in writing.

"(6) Agents of the St. Louis, Arkansas & Texas Railway at Pine Bluff and Rob Roy shall examine and check all freight and passengers carried between Rob Roy and Pine Bluff on the Pine Bluff & Swan Lake Railway trains.

"(7) All settlements to be made weekly by draft or in cash, and the books of the Pine Bluff & Swan Lake

Railway shall be open for inspection for agents of the St. Louis, Arkansas & Texas Railway at all times.

"(8) It is further agreed that the St. Louis, Arkansas & Texas Railway, after its change in gauge from present to standard gauge, shall maintain a third rail upon its track between Rob Roy and Pine Bluff to accommodate the passage of trains of the Pine Bluff & Swan Lake Railway between the points mentioned.

"(9) It is also further agreed that the Pine Bluff & Swan Lake Railway shall furnish its own terminal facilities at Pine Bluff, and shall be at the expense of handling all freight forwarded over or received by that company.

"(10) It is further agreed that the Pine Bluff & Swan Lake Railway shall run its own trains, hauled by engines owned by itself, between Pine Bluff and Rob Roy, over the track of the St. Louis, Arkansas & Texas Railway, subject to the rules and regulations governing the employees of the St. Louis, Arkansas & Texas Railway; that the trains of the Pine Bluff & Swan Lake Railway shall at no time and under no circumstances enter upon the track of the St. Louis, Arkansas & Texas Railway without first having received permission or orders to do so from the division superintendent, master of transportation, train dispatcher, or some other authorized official of the latter company.

"(11) It is further agreed that the Pine Bluff & Swan Lake Railway Company train is to do no business at any station on the St. Louis, Arkansas & Texas Railway between Pine Bluff and Rob Roy.

"(12) A violation of this contract by the Pine Bluff & Swan Lake Railway will be sufficient to annul the same at the option of the St. Louis, Arkansas & Texas Railway, or *vice versa*.

"(13) This contract shall be in force and continue

until the 7th day of January, 1887, and may terminate thereafter by either party giving ninety days' notice.

"PINE BLUFF & SWAN LAKE RAILWAY,
"Per C. M. NEEL, President.
"ST. LOUIS, ARKANSAS & TEXAS RAILWAY CO.,
"Per S. W. FORDYCE, President."

The defendant's answer put in issue all the material allegations of the complaint. The jury, upon the evidence and under the court's instructions, found for the plaintiff and assessed his damages at $10 per bale for 623 bales of cotton with interest thereon, and also damages for loss of 300 tons of cotton seed at $8 per ton with interest. Defendant has appealed. So much of the evidence as is necessary to its proper understanding is stated in the opinion.

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

1. It was error to admit evidence as to the contract between the appellant and the Swan Lake railroad. The contract did not constitute a partnership, nor make the Swan Lake railroad the agent of appellant to receive freight on its behalf. 139 U. S. 223; 104 U. S. 146; 42 Ark. 465; Bates on Part. sec. 66 and note.

2. The appellant was not responsible for damages to the cotton prior to its receipt, nor subsequent to its attachment. It was incumbent on plaintiff to prove that the damage was caused during the period the cotton was delayed. 43 Mich. 609.

3. But the delay was not the cause of the damage; the entire damage was caused by the acts, fault and negligence of the servants and agents of plaintiff. 63 Tex. 322.

4. Appellant not responsible until actual delivery to the railroad. Hutchinson, Car. secs. 760, 750.

N. T. White, *House & Cantrell*, *S. W. Williams* and *W. P. Grace* for appellee.

1. By the contract of July 7th, both railroad companies were bound jointly and severally to carry freight and passengers as common carriers from Rob Roy to Pine Bluff. Hutch. on Car. sec. 158; *ib.* 159–160; 11 Wend. 571; 78 N. C. 294; 7 Rich. (S. C.) Law, 202; 14 Pick. 289; 7 Hill (N. Y.), 292; 3 Duvall (Ky.), 4; 112 *id.* 180; 48 N. H. 339.

2. If the railroad received the cotton and seed for transportation, and they were damaged thereafter while in its possession, it is certainly liable. Hutchinson on Car. secs. 64–89. The evidence is ample on this point.

3. Delivery to the company made it liable without a bill of lading. Hutch. on Car. 729–730.

4. The damages are not excessive.

5. Where the verdict and judgment are right upon the whole record, the judgment will be affirmed, though the court erred upon some questions of law, or admitted some irrelevant testimony. 54 Ark. 415; 7 *id.* 543.

COCKRILL, C. J. The appellee argues that the proof establishes two uncontroverted grounds for recovery of compensation from the railway for damages to his cotton and cotton seed.

1st. Because of the appellant's violation of the contract entered into between it and the Swan Lake railway.

2d. Because the appellant received the cotton and cotton seed for transportation and thereafter negligently allowed it to be damaged by exposure to the rain and mud.

The first position is untenable, and all the evidence in relation to it should have been excluded from the jury.

The second position is sound if true in fact, but the fact is that the jury awarded damages in the highest amount that the cotton and cotton seed can be said to have sustained, while the uncontroverted proof is that a part of the damage was incurred after the property had

been taken from the company's possession under writs of attachment against the appellee—the company's responsibility having then ceased. Moreover, the consideration of evidence pertinent to the second branch of the cause was withheld from the jury by the court's charge.

1. Construction of contract.

1. The contract between the two railway companies did not constitute a partnership between them, nor did it make the Swan Lake railroad the agent of the appellant company for the purpose of receiving freight for and on its behalf. All the cases cited by the appellee on this branch of the case relate to one or the other of those positions, and are therefore inapplicable.

What is the proximate cause of an injury.

The contract plainly intended to confer a license upon the Swan Lake railway to run its trains over the appellant company's track between Rob Roy and Pine Bluff. It created no other right, unless it was to limit the appellant's rights to make certain charges for freight and passengers. If the appellant violated its contract, the Swan Lake Railway could recover all damages legally traceable to the unwarranted breach. But if that company had been the owner of the cotton and cotton seed in question, and were substituted for Neel as plaintiff in this cause, the violation of the contract would not warrant the recovery of damage occasioned by the exposure of the cotton to the mud and rain, because the violation of the contract was not the proximate cause of that injury. The actionable injury was the deterioration in the quality of the cotton. The proximate cause of the deterioration was the exposure to the rain and mud, and not the violation of the contract by tearing up a rail. If the cotton had been properly cared for, the delay would not have caused any deterioration in quality, and the market price is shown to have advanced pending the delay. The only injury in proof came from the failure to properly care for the property. But "in actions of this description the injury complained of must

be shown to be the direct consequence of the defendant's negligence. This is the only practical rule which can be adopted by courts in the administration of justice. It is not enough that the act charged may constitute one of a series of antecedent events without which, as the result proves, the damage would not have happened." *Hoadley* v. *Transportation Co.*, 115 Mass. 304.

The rule is illustrated by a variety of cases, and is sustained by an unquestioned line of authority. *Little Rock Railway Co.* v. *Talbot*, 47 Ark. 97; *Martin* v. *Railway Co.* 55 *ib.* 510; *St. Louis, etc., Railway* v. *Commercial Insurance Co.* 139 U. S. 223; *Dubuque Wood Co.* v. *Dubuque*, 30 Iowa, 176.

If the Swan Lake Company in the case supposed could not recover, of course Neel, the appellee, could not; for a derivative right through that company, which is a party to the contract, is the most that could be claimed for him, if it be conceded that he can derive any right through the contract. See 1 Shearman & Redf. Neg. sec. 118; 2 Whart. Cont. sec. 786.

2. Liability of carrier for property accepted.

2. The contract imposed no obligation upon the appellant to receive or care for the cotton, etc., and the duty to do so—the violation of which the second position assumes—must be sought under its general obligation as a common carrier.

No bill of lading was issued by the appellant company for any of the 300 tons of cotton seed, or for forty odd bales of cotton. At what time the company accepted this property for transportation, if ever, is not certain from the evidence. But it did not become responsible for the custody or care of it until it was accepted. Hutchinson, Carriers, secs. 82, 94–5.

3. Effect of carrier's refusal to accept property.

If the company wrongfully refused to accept it when tendered, that would not justify the shipper in abandoning the property or in leaving it exposed to the ravages of the weather at the carrier's expense. It would still

be the shipper's duty to preserve the property, and it would be his right to recover the reasonable expense therefor of the carrier, together with the proximate damages for the delay. But the damage resulting from his own want of care in failing to provide proper protection for his property is not the result of the delay or of the carrier's violation of its public obligation to receive and transport. He cannot visit that loss therefore upon the company. *Houston, etc., Railway* v. *Smith*, 63 Texas, 322.

The appellant requested the court to charge the jury substantially to that effect, but the court refused to do so. That was error.

4. Conclusiveness of bill of lading as a receipt.

The residue of the cotton was carried to Rob Roy by the Swan Lake Railway, and was allowed to remain where it was unloaded by its employees until it was attached by Neel's creditors. The testimony of one of the employees of the Swan Lake Company tends to prove that it was received by the agent of the appellant company at Rob Roy for shipment as rapidly as it arrived there. But the testimony of Neel, the appellee, tends to prove that it was held by the Swan Lake Railway in the expectation that that company would be able to transport it to Pine Bluff on its own trains, and that from time to time thereafter bills of lading were issued for it by the appellant. The court refused to charge the jury that if they believed that phase of Neel's testimony to be the true state of the case, there could be no recovery against the appellant for any damages which accrued prior to the issuance of the bills of lading. It is manifest that the court ought so to have charged the jury unless the clause in the bills of lading which recites that the cotton for which they were issued was received "in apparent good order" precludes the carrier from showing that the cotton was damaged before it was received by it.

There is some obscurity and probably conflict in the statement of the law upon this subject by the adjudged cases and the text writers. The authorities all agree that neither the clause "in good order" nor "in apparent good order" precludes the carrier from showing that the goods were damaged when received, if the injury was invisible or latent. But some of them intimate, if they do not state, that proof of a visible or patent injury is inadmissible in the face of such a clause. The true rule, as it appears to us, is that the clause "in apparent good order" refers only to the external condition of the goods, and as between the original parties is only *prima facie* proof of the true condition of the goods when received, like any other recital or statement of fact in a receipt not amounting to a contract. Porter, Bills of Lading, sec. 43; Hutchinson, Carriers, secs. 122, 125. The question is ably discussed, and the reasons for the rule clearly stated, in the case of *Witzler* v. *Collins*, 70 Me. 290.

5. When liability of carrier accrues.

In charging the jury upon this subject, however, it should be made plain that the carrier is liable for damages accruing to goods received for shipment from the time they are received and not from the date of the bill of lading only. If the evidence warrants a difference of opinion about the fact, it is for the jury to determine whether the goods were actually received before the bill of lading issued.

Other points are pressed upon our consideration by the appellant, but those determined are the cardinal questions in the cause, and when the errors as to them are pointed out, the court is not apt to go wrong upon a new trial.

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

It is so ordered.

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MARTIN v. TENNISON.

Opinion delivered June 4, 1892.

Appeal bond—Sufficiency.

Where a defendant, on appealing from a judgment of a justice of the peace sustaining an attachment, executed a bond conditioned that the surety therein would satisfy the judgment of the circuit court to the extent of the value of the goods attached, such bond does not comply with section 4135 of Mansf. Dig., and will not support a summary judgment against the surety, under sec. 4153, *ib.*

Appeal from Searcy Circuit Court.

B. B. HUDGINS, Judge.

Tennison & McMahan brought suit against G. W. Manes before a justice of the peace, and procured an attachment to be levied on some cotton. From a judgment in plaintiffs' favor defendant appealed, and executed a bond with T. J. Martin as surety, conditioned that the surety would satisfy the judgment of the circuit court *to the extent of the value of said cotton.* The circuit court sustained the attachment and entered judgment against Manes for the debt and costs. At a subsequent term plaintiffs moved for a judgment *nunc pro tunc* against Martin on the appeal bond. The court found that the value of the cotton exceeded the amount of the judgment and costs, and ordered that judgment against Martin be entered now for then. Martin has appealed.

R. H. Powell for appellant.

The bond in this case does not conform to the statute, and judgment cannot be rendered upon it as a statutory bond. 54 Ark. 15; Mansf. Dig. secs. 4135, 4153.

BATTLE, J. The bond in question is not a statutory bond, because it does not contain the conditions required by section 4135 of Mansfield's Digest. Instead of being conditioned to perform the judgment appealed from in

the event it was affirmed on appeal, or if, on a trial anew in the circuit court, judgment was given against appellant, that he would pay such judgment, he and his surety thereby undertook to satisfy the same to the extent of the value of the cotton attached in the action. It does not conform to the requirements of the statute, or answer its purpose, and cannot be enforced in the manner provided by section 4153 of Mansfield's Digest. *Lowenstein* v. *McCadden*, 54 Ark. 13.

The judgment of the circuit court is reversed, and the motion for a judgment *nunc pro tunc* is hereby dismissed.

SIMON *v.* ADLER-GOLDMAN COMMISSION CO.

Opinion delivered June 4, 1892.

Attachments—Priority of liens.

Under sec. 325 of Mansf. Dig., providing that "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," the lien of an attachment which is first placed in the sheriff's hands is superior to that of one subsequently delivered to him, though the latter was levied first.

Appeal from Lafayette Circuit Court.

CHARLES E. MITCHEL, Judge.

The Adler-Goldman Commission Co. obtained judgment sustaining an attachment against one Hoffman. H. T. Simon, Gregory & Co. intervened, claiming a prior lien on the proceeds of certain property sold under the attachment. Their claim was disallowed, and they have appealed.

L. A. Byrne for appellants.

The lien of an attaching creditor is not complete until the levy of the writ upon the property; as between creditors, the one whose writ is first levied first com-

pletes his lien and has prior right to the property. Mansf. Dig. sec. 325; 48 Ark. 304; 29 *id.* 80; 34 *id.* 399.

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

1. An attachment is but a preliminary execution (23 Ark. 287), and is a lien from the time of delivery of the order to the sheriff. Mansf. Dig. sec. 325; 39 Ark. 97.

2. The lien, once established, can only be lost through some fault of the plaintiff. Freem. on Ex. secs. 196, 207.

HUGHES, J. The sheriff of Lafayette county had in his hands a writ of attachment of date November 19, 1888, in favor of the appellee which was levied on property of one Hoffman, the defendant in the suit. He also had in his hands two separate writs of attachment in favor of the appellants, of date the 20th of November, 1888, all of which writs came to his hands on the days of their date. The appellants discovered that Hoffman owned a piece of land, which had not been levied upon by the appellee, and had their attachments levied upon it on the 20th, the day it was issued. On the 24th of the same month, the appellee, having had its writ levied upon other property not sufficient to satisfy its debt, the writ still being in the hands of the officer, had it levied also upon a piece of land, upon which the appellant's attachment had been levied on the 20th. The property was sold under the attachment in favor of the appellee. The appellants filed their petition in the circuit court and asked that the proceeds of the sale of property be paid to them. A demurrer was sustained to their petition, from which judgment they have appealed. "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." Mansf. Dig. sec. 325; *Bergman* v. *Sells*, 39 Ark. 97.

Affirmed.

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GILKERSON-SLOSS COMMISSION CO. *v.* SALINGER.

Opinion delivered June 4, 1892.

Husband and wife—Partnership.

A married woman cannot form a partnership with her husband in a mercantile business, by virtue of her constitutional right to hold separate property and her statutory right to transfer her separate personal property and carry on any trade or business.

Appeal from Monroe Circuit Court.
GRANT GREEN, JR., Judge.

Ewan & Thomas and *W. S. McCain* for appellants.

The common law restrictions have been removed by statute, and under our present laws there is no reason why a husband and wife cannot form a partnership. Mansf. Dig. sec. 4625; 30 Ark. 727; 43 *id.* 212; 122 N. Y. 308; 3 Biss. 405; 51 Wis. 204; 1 Lindley on Part. * 124, 210; 9 Neb. 16; 49 Ark. 430; 52 *id.* 237.

W. F. Hill for appellee.

A married woman cannot be held responsible for the debts of a firm composed of herself and husband as mercantile partners. 29 Ark. 346; 9 Am. & Eng. Enc. Law, p. 794; Harris, Cont. Mar. Women, sec. 582; 30 Ark. 17; 30 *id.* 678; 29 *id.* 207; 43 *id.* 212, 217; 91 Ind. 384; 73 Mich. 146; 16 Am. St. Rep. 572; 3 Allen, 127; 5 *id.* 460; 140 Mass. 521; 44 Ohio St. 192; 54 Tex. 16; 30 Md. 402; 23 Fla. 83; 20 W. Va. 571; 73 Mich. 35; Harris, Cont. Mar. Women, sec. 618.

HUGHES, J. The question is presented by a demurrer which the court below sustained to the following complaint:

"The plaintiff, Gilkerson-Sloss Commission Company, a corporation incorporated under the laws of Missouri, doing business at St. Louis, state that Louis Salinger died on the 26th day of November, 1890; that

at the time of his death, and for five years previous thereto, the defendant, Lena Salinger, was the wife of said Louis Salinger; that, for some time previous to January 20, 1888, the defendant and one William Hooker were partners in trade, under the firm name of William Hooker & Co., doing a general mercantile business at Brinkley, Ark., and on said 20th day of January, 1888, said William Hooker sold and transferred all his right and interest in the property and assets of said firm of William Hooker & Co. to said Louis Salinger, and thereby said Louis Salinger and the defendant, Lena Salinger, became jointly interested in the ownership of said partnership property, and said Louis and Lena then and there agreed to adopt the firm name and style of L. Salinger & Co., and to carry on and continue said mercantile business as partners with each other, and they did adopt said name and style of L. Salinger & Co., and did, pursuant to such partnership agreement, carry on such business from the said 20th day of January, 1888, until the day of said Louis Salinger's death, to-wit: November 26, 1890, and while such partnership business of L. Salinger & Co. was being carried on, to-wit, during the year 1890, the plaintiff sold and delivered to L. Salinger & Co. goods, wares and merchandise to the sum of $1,260.36, for part of which said L. Salinger & Co. executed to plaintiff two promissory notes. An itemized statement of plaintiff's account against said L. Salinger & Co., including the amount of said notes, together with the notes, is herewith filed, showing all credits to which they are entitled, and leaving a balance of $571.59 due and unpaid to plaintiffs. No part of said indebtedness has been paid except as credited on said statement."

Can a married woman become the partner of her husband in a mercantile business?

In many of the States it is held that she may, under statutes enlarging the powers of married women and

removing in part their disabilities at common law. It is so held in *Suau* v. *Caffe* in 122 N. Y. 308. But the weight of authority is that she cannot. At common law the legal existence of the wife was merged in that of the husband, and they could not contract with each other.

Section 7 of article 9 of the Constitution of 1874 provides that "the real and personal property of any *femme covert* in this State acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property and may be devised, bequeathed or conveyed by her the same as if she were a *femme sole*, and the same shall not be subject to the debts of her husband."

It has been held that under this section a married woman may convey her separate estate, and acknowledge the execution of a deed for registration as a *femme sole*. *Roberts* v. *Wilcoxson*, 36 Ark. 355. She cannot, however, make an executory contract to convey land which will bind her or her heirs. *Felkner* v. *Tighe*, 39 Ark. 357; *Crisman* v. *Partee*, 38 Ark. 31.

By section 4625 of Mansfield's Digest, it is provided that "a married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services, shall be her sole and separate property, and may be used and invested by her in her own name; and she may alone sue or be sued in the courts of this State, on account of the said property, business or services."

Under similar statutes, it has been held, by some courts, that a married woman could not become the partner of any one in business. In *Abbott* v. *Jackson*, 43 Ark. 212, Judge Eakin said: "It is well settled, too, that a married woman under such statutes as that of

April 28, 1873, can form a partnership as a sole trader with a third person other than her husband." But it has not been heretofore determined expressly in this State that a married woman can or that she cannot enter into partnership with her husband.

In *Countz* v. *Markling*, 30 Ark. 17, it was held that a judgment by confession rendered against the husband in favor of the wife is void, and will be quashed on certiorari. This was on the ground of the legal unity of husband and wife and the inability of the wife to sue the husband at common law. In *Pillow* v. *Wade*, 31 Ark. 678, it is held that husband and wife are incapable of contracting with each other.

Under a statute similar to ours, it is held, in *Haas* v. *Shaw*, 91 Ind. 384, that a wife cannot form a partnership with her husband. See also *Lord* v. *Parker*, 3 Allen, 127; *Plumer* v. *Lord*, 5 Allen, 460; *Speier* v. *Opfer*, 73 Mich. 35; Harris, Contracts of Mar. Women, sec. 618; *Mayer* v. *Soyster*, 30 Md. 402; *Carey* v. *Burrus*, 20 W. Va. 571; *DeGraum* v. *Jones*, 23 Fla. 83.*

In view of the legal unity and identity of husband and wife at common law, and the wife's incapacity to sue the husband at law, and the rulings of our court upon the incapacity of the wife to contract with her husband, we are of the opinion that the wife, under our statute, cannot form a partnership with her husband. As the credit in this case was given to the firm of which she could not be a member, and as she is sued as surviving partner of that firm, there can be no recovery against her in this action.

The judgment is affirmed.

HEMINGWAY, J. I am constrained to record my dissent from the decision in this case, and from much that is said in the opinion by way of argument. I am of

*See the principal case annotated in 16 L. R. A, 526; also *Seattle Board of Trade* v. *Hayden*, 16 L. R. A. 530. (Rep.)

opinion that, under the Constitution and laws of Arkansas, a married woman is, as to her separate personal property, clothed with all the powers of a single woman; that she may make contracts in reference to it with her husband or with others, binding upon her in law, just as though she were single; that she may be sued upon said contracts in a court of law, where the action is otherwise properly cognizable in law; and that since it is settled that she may engage in business as a partner with others than her husband, it follows, from exactly the same reasons, that she may embark her property or services in a partnership with him.

My reasons, in brief, are that whatever law can be appealed to as authorizing her to form a partnership with any person is without limitation or restrictions as to the person with whom she may form it; and that as it confers a power without restriction in that respect, it can be held to exclude the husband only by a system of judicial construction which seems to me to be legislation—and that toward restraining the power vested under an act which is highly remedial and expressly calls for a liberal construction. Mansf. Dig. sec. 4639.

At the common law, a married woman had no power to make a valid contract with her husband or with anybody else. Her disability was general, and whatever power she now has must be found in the statutes. They authorize her to bargain, sell, assign or transfer her separate personal property, and carry on any trade or business and perform any labor or services on her sole and separate account. This has been held as authorizing her to make contracts and enter into partnerships; and how it can be said that the right is given to be exercised as to one person and is not as to any other, I do not comprehend. By its terms it extends as much to dealings with one person as with another; and if it exists at all, it exists generally as to all persons, unless the courts

limit a power which came from the legislature unlimited. If I were attempting to restrict the operation of the act and limit the exercise of the power to any person or class of persons according to principles of public policy, I should have to consider whether it would not be better to include the husband and exclude others, than to permit a partnership with all others and forbid it as to him. But as I view the act, it contains no restrictions, and I have no right to engraft any to meet my ideas of policy.

In the case of *Suau* v. *Caffe*, 122 N. Y. 308, a very clear and convincing discussion of the question may be found; and in the case of *Toof* v. *Brewer*, 3 So. Rep. 571, the question is exhaustively and ably considered. That case depended upon the laws of Arkansas, and the Supreme Court of Mississippi, upon a review of our decisions and statutes and the general current of authorities, held that a woman could become a business partner of her husband in Arkansas.

There are decisions that hold otherwise; but they rest upon the legal unity of husband and wife—a condition that has had no existence, except in law reports, since legislation gave to married women the right to acquire, own and dispose of their property, and to take and enjoy the income from it free from any interference or control by their husbands. As such decisions are based upon a condition that has been deliberately abrogated by statute, I think the courts should be controlled by the new law and not by the old condition.

I believe the two decisions cited state the law, and sustain the positions taken, with unassailable reasoning, and I beg leave to refer to them for a fuller treatment of the subject.

I am authorized to state that Judge Battle concurs in this opinion.

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PHELPS v. HOLDERNESS.

Opinion delivered June 11, 1892.

1. *Gambling contract—Intention of parties.*

When parties enter into a contract for the apparent sale and delivery of cotton, but with the intention of adjusting the profit or loss by the rise or fall of the price of the commodity without its actual delivery, the transaction is a gambling venture, and the contract will not be enforced.

2. *Cotton futures—Advances by broker not recoverable.*

A broker who makes such a contract for a customer for a commission is a *particeps criminis*, and cannot recover money advanced for the customer to make good his loss.

3. *Gambling contract—Case stated.*

Plaintiffs sued defendant for money advanced by them as his brokers for the purchase of cotton. The correspondence between the parties showed that plaintiffs were willing to buy or sell cotton for defendant at their own risk, without inquiry as to his financial ability, so long as he put up the necessary "margins;" that when he failed to advance further funds, plainiffs, without offering to deliver the cotton purchased and demanding the price, promptly "closed out" the contract and demanded the difference between the contract and the market price. Defendant testified that it was never his intention to receive or deliver any cotton. *Held*, That the evidence justified a finding that the contract was a gambling transaction, and plaintiffs can recover no losses incurred in forwarding it.

Appeal from Dallas Circuit Court.

CARROLL D. WOOD, Judge.

William A. and Ashton Phelps, as surviving partners of the firm of John Phelps & Co., sued A. S. Holderness upon an open account for money paid out and advanced for defendant at his instance and request. Denfendant denied the indebtedness, alleged that the advances were made without authority from him, and that the advances were "for a simple speculation in cotton market results, and never contemplated any delivery of said cotton, but was simply a wager, contrary to law,

and cannot be enforced, because against a criminal prohibitory statute and against public policy."

William A. Phelps, one of the plaintiffs, testified as follows: "On December 14, 1885, our firm bought, through Messrs. Emmett & Purch, brokers, for account of A. S. Holderness, three hundred bales of cotton for delivery in April, 1886, at 9 27-100 cents. This purchase was made by the order of A. S. Holderness, contained in a letter addressed to our firm, dated December 12, 1885. This letter contained a check for $600 for original margin. * * * On February 6, 1886, the market having declined to such an extent as to exhaust the original margin of $600, our firm sent a telegram to A. S. Holderness, asking for an additional margin of $400, to which he responded February 8, 1886, by remitting a check for that amount. On February 18, 1886, a further decline having occurred, our firm again telegraphed him, quoting the market and calling on him for a further margin of $300. Our firm did not get a reply to this dispatch until the following day, when we received a telegram reading as follows: 'I have decided to advance no more margins on futures.' Upon receipt of said telegram our firm immediately instructed our brokers, Messrs. Emmett & Purch, to close out the April contract, which they did at once at 8 42-100 cents. From the time my firm telegraphed him, on February 18, 1886, to the time our firm received his reply, on the afternoon of February 19, 1886, there was a further decline of twelve-hundredths of a cent. Our firm closed out the contract under rule 29 of the Cotton Exchange, governing transactions in cotton for future delivery. Our firm were responsible to Emmett & Purch for whatever loss might have resulted and which did result in a loss of $1212.05. The amount of our claim against A. S. Holderness consists of $1212.05, less margin furnished by him, $999.50, leaving balance due of $212.55."

The correspondence between the parties was made a part of the plaintiffs' evidence, and is as follows:

"FORDYCE, ARK., December 4th, 1885.

"MESSRS. JOHN PHELPS & CO., NEW ORLEANS.

"I have an idea of investing in futures to the amount of two or three hundred bales of cotton, and as I have never thought of engaging in the business before, I am not posted in it. If I decide to deal in futures, I wish to operate through your house, and would be glad to have you answer the following questions:

"First—What amount of money per bale will I have to advance on April or May futures?

"Second—Has the buyer the right to close out any time during the month the futures are bought for? If not, at what time during the month?

"Third—Is the commission the same as it would be for handling spots?

"Fourth—Will St. Louis exchange pass with you at par? If not, at what discount?

"Fifth—What is your opinion about the future of cotton?

"Any other information about the business will be appreciated by one of your former patrons.

"Yours very truly,

"A. S. HOLDERNESS."

On December 7th Phelps & Co. answered as follows:

"We have your favor of the 4th instant. We answer your questions relative to futures in their order.

"First—We require an original margin of two dollars per bale at the time of making the purchase; in case the market declines, additional margins to keep it good.

"Second—You can close out at any time you wish.

"Third—We charge $25 per 100 bales for buying or selling, covering both transactions.

"Fourth—Exchange on St. Louis will be at a small discount at this season.

"Fifth—The course of the market is uncertain at present; it looks as if it would go still lower.

"We do not advise any one to buy or sell futures, as it is not a good thing for any one engaged in a regular business."

On December 12th Holderness replied as follows:

"Enclosed please find sight draft on Allen, West & Co., St. Louis, Mo., for six hundred ($600) dollars, which you will please invest in cotton futures for the month of April."

On December 14th Phelps & Co. telegraphed in answer.

"Bought three hundred Aprils, nine twenty-seven hundredths."

And wrote as follows:

"We have your favor of 12th inst., with draft of J. E. Hampton on Allen, West & Co., St. Louis, $600, remitted as margin and now buy for your account 300 B. cotton for April delivery, 9 27-100. We understand that you want to buy as many April contracts as $600 will serve as the original margin for. If our action is not approved, telegraph on receipt of this. When you want to close out, you had better use the wires. The mails are too slow for that kind of business."

To which, on December 17th Holderness replied:

"Yours of the 14th to hand. In reply, you acted as we intended for you to with the $600 remitted as margins. Would be glad for you to keep us posted by sending us weekly the New Orleans Cotton Exchange market report."

On February 6th, Phelps & Co. telegraphed Holderness:

"Remit four hundred dollars additional margin. Advise by wire."

On the 7th Holderness telegraphed in answer: "I will send four hundred dollars additional margin to-morrow." And on February 8th wrote as follows: "In accordance with your instructions of the 6th by wire, which reached me on Sunday, I enclose to you sight draft on Geo. Taylor & Co., St. Louis, Mo., for four hundred dollars as additional margins."

On February 18th, Phelps & Co. telegraphed to Holderness:

"Aprils, eight fifty-four. Remit three hundred dollars margin. Answer."

And on February 19th, Holderness answered:

"I have decided to advance no more margins on futures."

Plaintiffs also read in evidence the deposition of Thos. J. Semmes, a practicing lawyer in the City of New Orleans, to prove the law of Louisiana in regard to contract, for future delivery, who testified as follows:

"That the laws of Louisiana as to contracts for future delivery is settled by the Supreme Court of Louisiana in the case of *Conner & Hall* v. *Robertson*, reported in the 37th Annual, pp. 818 and 819; that in that case the court says: 'The law is now perfectly settled, that an executory contract for the sale of goods for future delivery is not infected with the quality of a wager by reason of the fact that, at its date, the vendor had not the goods, and had not entered into any arrangement to provide for them, and had no expectation of receiving them unless by subsequently going into the market and buying them.' They also say that wagering contracts are void, but the illegal intent to wager under the guise of a contract, 'in order to affect the contract, the alleged illegal intent must have been mutual, and the intent of one party, not communicated to or concurred in by the other, will not avail."

In testifying in his own behalf, Holderness admits the genuineness of the letters and telegrams attached to Phelps' deposition, recites the facts in regard to the purchase substantially as stated by Phelps, denies their authority to make advances for him, and alleges that the transaction was a wager on the price of cotton. On this latter point he says:

"When I first went into the matter I knew nothing about it. It was a mere venture. I did not then know that it was regarded as gambling, but afterwards learned that it was. I never intended to risk more than a thousand dollars. I never at any time directed the plaintiffs to advance any money for me, and don't know whether they ever did advance any for me, but if they did, they did it at their own instance and not at mine. There never was any intention in the transaction that there should be any cotton delivered. It was a purchase of futures, in which it was a bet or wager on the future price of cotton. The whole thing was a speculation in cotton futures, and it was in no sense ever expected that it should in any sense take the course of a spot transaction. The plaintiffs never offered me any cotton; never made a tender of the cotton, nor ever intimated to me that they would do so. If they had tendered me the cotton itself, I don't know whether I would have been bound to take it or not." * * * "I don't know who plaintiffs bought the cotton from, and don't know whether the seller expected to deliver it or not."

The cause was submitted to the court without a jury. The court found that the defendant never authorized the plaintiffs to advance any money for him; that the money paid out by plaintiffs was $212.05; that this money was advanced for the purpose of sustaining margins for 300 bales of cotton in a future contract in which there was to be no delivery of the cotton in question.

Upon the findings judgment was for defendant. Plaintiffs have appealed.

Mark Valentine for appellant.

1. Phelps & Co. were authorized to make the advancements as the agents of appellee, and the loss should fall on the principal.

2. The contract was not a wager or gambling. 108 U. S. 269; 110 U. S. 509; 37 La. An. 819.

Met L. Jones and *H. G. Bunn* for appellee.

1. The evidence shows clearly that no cotton was intended to be delivered, or offered to be delivered; it was simply a gambling contract. 47 Ark. 192; 5 McCrary, 80; 38 Mo. App. 383; 6 Cent. L. J. 229; 110 U. S. 509; 45 N. W. Rep. 304; 18 Atl. Rep. 797; 19 *id.* 1084; 13 S. W. Rep. 1076; 25 Ill. 534; 36 Ill. 179; 47 N. W. Rep. 1001.

2. There is no proof that appellants ever paid the amount claimed.

COCKRILL, C. J. Phelps, a broker, sued Holderness for money advanced and expended by the former at the latter's request. The court found especially that the transaction out of which the suit grew was a wager on the rise and fall of the price of cotton.

If that conclusion is sustained by the evidence, there could be no recovery, and the judgment is right.

The testimony of Holderness and the correspondence between him and Phelps justify the conclusion that Holderness desired to try his fortune in the cotton market with no intention of selling or buying, receiving or delivering, a bale of cotton, and that Phelps viewed the transaction in that light.

But there is no direct testimony of the terms of the contract of purchase which Phelps claims to have made for Holderness, and it is argued that, in the absence of proof that Holderness' vendor participated in his illegal design, the contract must be held to be valid. But the

assumption that there is no proof of the vendor's participation in Holderness' illegal design, and the conclusions deduced therefrom, are foreign to the controversy. The controversy does not arise between the supposed vendor and Holderness, but between the latter and Phelps. According to the ruling in some of the States, Phelps, upon the evidence adduced, might be said to be Holderness' vendor. *Flagg* v. *Baldwin*, 38 N. J. Eq. 229.

But treating him as agent, as his counsel does, and Holderness as his principal, the cause stands thus, or at least the court might have found that it was thus: The principal instructs his broker to make a wager for him on the price of cotton. The broker replies that he has followed instructions. A controversy arises between the two. In that case there is no presumption in favor of the broker to the effect that he in fact deviated from his instructions and entered into a contract for the actual delivery of cotton. Until he has proved the contrary, the fair inference from the facts is that he made a wagering contract for his principal.

We have assumed that the transaction between Phelps and Holderness was a mere cover for a gambling operation. Whether it was so depends upon their intention at the inception of the contract, and that was a question of fact. That the court was warranted in its deduction that it was a gambling device may be seen from Holderness' testimony and the correspondence between him and Phelps.

Holderness testifies that it was never his intention to receive or deliver any cotton. The correspondence shows that Phelps was willing to buy or sell at his own risk an unlimited quantity of cotton for Holderness, without any inquiry as to his financial ability to meet the obligations he might enter into, provided only Holderness would put up the necessary "margins."

That is a circumstance tending to show that he did not understand Holderness' offer to deal through him in "futures" upon "margins," as a *bona fide* proffer to buy cotton for actual delivery. *Cobb* v. *Prell*, 5 McCrary, 80 and note.

The subsequent steps taken by him in order to protect himself from liability, in pursuance of the contract which he made, tend to sustain that theory. When Holderness' margin was absorbed, demands for additional margins were made by Phelps, and when at last Holderness declined to furnish any more funds, nothing was said about delivering the supposed cotton and demanding the price, as in a contract to deliver the commodity sold, but he was promptly "closed out" and a demand for the difference between the contract and market prices was made upon him. It is that difference that is the subject of this suit. These facts and circumstances afford evidence of a contract for the payment of the difference between the rise and fall in the price of cotton. A venture upon the turn of prices of any commodity is simply gambling—gambling of the same sort as a venture upon the turn of a card. The radical difference between the two is the method of the deal only.

Phelps was privy to the gambling contract—a *particeps criminis*—and can recover no losses incurred in forwarding the transaction. *Fortenbury* v. *State*, 47 Ark. 188; *Irwin* v. *Williar*, 110 U. S. 499.

Affirm.

RAILWAY COMPANY *v.* BEARD.

Opinion delivered June 11, 1892.

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Contract—Measure of damages for breach.

One who is aggrieved by defendant's breach of a contract to furnish him with a certain job of printing can recover only the net benefit which would have accrued to him from a performance of the contract, and cannot recover damages on account of the purchase of a printing press not needed for any other work, though defendant, after making the contract, requested him to purchase it.

Appeal from Miller Circuit Court.

CHARLES E. MITCHEL, Judge.

Action by C. E. Beard against the St. Louis, Arkansas & Texas Railway Co. The pleadings and evidence are stated in the opinion.

Bunn & Gaughan and *Sam H. West* for appellant.

1. The court erred in its instructions. The purchase of a press and type cannot be considered as an element of damages. There was no contract to purchase same.

2. The instructions asked by appellant state the correct rule as to the measure of damages. 53 Ark. 443; 33 *id.* 545; 5 L. R. A. 493; 5 Am. Rep. 177.

3. The verdict is excessive.

Scott & Jones for appellee.

1. The rule of damages was correctly stated by the court. 9 Exch. 354; 53 Ark. 434.

2. The damages were not excessive. At the time of making the contract it was understood that new material and presses were necessary, and they were purchased; and, by reason of the breach of the contract, appellee suffered loss by the depreciation in value of this material. See Wood on Master & Serv. (2d ed.) 245.

BATTLE, J. Appellee sued the appellant on an oral contract made by him with defendant, which is set out in his complaint as follows: "It was orally contracted and agreed by and between plaintiff and defendant as follows: That in consideration plaintiff would furnish the material and print for said defendant its schedule or time table for the running of its trains, that said defendant would pay to plaintiff the sum of ten cents for each copy of said schedule so by defendant printed, and that each issue or edition of said schedule should be three thousand copies, and that said contract should remain in force between said parties so long as the general office of the said company of said defendant, then at Texarkana, should remain in Texarkana, and during said time that whenever any change in the time of running its trains should be made by the defendant that the plaintiff should print a new schedule of three thousand copies at ten cents each, and that said plaintiff should have the space of two weeks, after being furnished by defendant with a schedule, in which time to print the same."

Upon the trial of the action, plaintiff testified substantially as follows: "On August 13, 1888, being engaged at Texarkana, Ark., in the business of job printing, I consummated a contract with F. Huffsmith, appellant's superintendent of transportation, which had been pending and talked about for thirty or sixty days. * * * I informed Huffsmith that I was not prepared to do the character of printing wanted, but did not agree to buy a job press; it was not contemplated that I should do so; I told him I could do the printing either on Col. Warren's or Mr. Allen's press. After I had printed Card No. 9, Huffsmith told me I must get a job press. I did purchase a very large one not needed at Texarkana for any work except such as I had contracted to do for appellants. After the job was taken from me I shipped the press back to New Orleans. It cost me laid down at

Texarkana about $1800; do not remember the exact amount. The original contract did not require me to buy a press."

Upon this evidence in part the appellant asked the court to instruct the jury as follows: "If you find from the testimony that the contract sued on by plaintiff was liable to be terminated by the removal of defendant's general offices from Texarkana, then you are instructed that plaintiff, in purchasing press, type and other supplies to do printing for defendant, is presumed to have assumed the risk of the loss which he might or may have sustained by reason thereof, and he cannot recover herein for any depreciation of the value of such printing press, type and other material so purchased." And the court refused to give it as asked, but amended it by adding the words, "unless the same was produced by the breach of the contract so alleged to have been made by the defendant," and gave it as amended over the objection of the defendant.

The plaintiff recovered a judgment, and the defendant appealed to this court.

The court erred in amending the instruction asked for by the appellant and giving it as amended. According to appellee's own testimony, and there was no evidence to contradict it, the parties to the contract in question did not contemplate appellee buying a job press, but on the contrary it was expected that he would not. What Huffsmith told him to do, after the contract was entered into, was no part of the contract. He was consequently not entitled to any damages on account of the purchase of the press. The damages recoverable by him, if any, are the value of the benefits he would have directly received from the contract in the event it had been performed, and did not receive, less the reasonable expenses he would have incurred in the performance of

his part thereof. 2 Sedgwick on Damages (8th ed.), sec. 609.

The instruction as asked should have been given, and the error incorporated into it by the amendment should have been avoided in other instructions which were given.

Reversed and remanded for a new trial.

BAXTER v. STATE.

Opinion delivered June 11, 1892.

Improvements—Repairs pending suit.

Where a lessee under an invalid lease is entitled to recover the value of a house erected by him upon the leased premises, and the house is partially destroyed by fire pending a suit to cancel the lease, he may restore it to its undamaged condition, in order to preserve what the fire left, and recover the full value of the house as repaired.

Appeal from Garland Circuit Court.

JAMES B. WOOD, Judge.

The State brought suit for the use of Garland county against George W. Baxter, A. J. Walsh and others to cancel a lease of land belonging to the county. Upon a former appeal, *State* v. *Baxter*, 50 Ark. 447, the lease was adjudged invalid. This appeal was taken to determine the propriety of the disallowance by the court of certain improvements. The facts are stated in the opinion.

Leatherman & Teague for appellants.

Chas. D. Greaves and *J. P. Henderson* for appellee.

HEMINGWAY, J. Upon a former appeal in this case, *State* v. *Baxter*, 50 Ark. 447, the questions of law involved were settled, and directions for a re-trial given which the court observed in the second trial. This leaves for our determination matters arising from the facts.

Upon the abstract of the record furnished by counsel for the appellants, we cannot say that there was any error in the finding as to the facts except as to the amount to which appellant A. J. Walsh is entitled to allowance for improvements on the lots occupied by him. It seems to be conceded that, before the suit was brought, he in good faith built a house on the land which was worth on the day of trial $1200; but the court held that he was not entitled to credit for $700 of this sum because the value was due to an expenditure incurred after the institution of the suit in repairing a damage occasioned by fire.

If a new house had been built, or unnecessary additions or changes had been made in the old one, Walsh could claim no allowance on account of any enlargement arising therefrom. But if the house for which the allowance is asked is substantially the same as that originally put there, we see no reason why he should not be allowed its full value at the time of the trial, in the fact that part of its value was due to necessary repairs made in the damaged structure, although they were made pending the suit. There is nothing to show that the house now there is not substantially the same as that originally built, or that any part of its present value is due to repairs or additions that were not necessary to the preservation or use of the damaged structure. It was of wood, cost originally more than was expended in repairs and more than its present value; it is fair to presume that if no repairs had been made it would soon have become valueless, and that the repairs were made to prevent such loss. If the county had recovered the land before the fire, he would have been entitled to the value of the undamaged structure; as no recovery was had until after the fire, he was still entitled to claim the value of the damaged house before surrendering the land, and if he restored it to its undamaged condition in order

to preserve what the fire left, he imposed no burden on the county that would not have rested upon it if the fire had not occurred, and did only what was necessary to protect his own interest. Without such repair, the damaged house would soon have become a valueless ruin; and we know of no principle of equity or fair dealing which demands that he should suffer this loss, or avert it at his own expense; provided, he imposed no burden on the county that was not necessary to his protection, and would not have rested on it if the fire had never occurred. If he desisted from the repair, what was left would be lost to him; if he made it, the county was where it would have been if the fire had never occurred. To deny him the value of the repaired structure would be inequitable and unjust, and we think he should have the allowance of the value reported by the master, to-wit, $1200, unless the value has diminished since the master reported, in which event he should have the value at the time of re-stating the account as herein directed.

The decree is affirmed as to all the appellants except Walsh; as to him it is reversed, and the cause will be remanded with directions to re-state the account as above indicated, and upon re-statement to enter a decree in accordance with the former opinion.

GOODBAR v. LOCKE.

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Opinion delivered June 11, 1892.

1. *Pledge—Assignment for benefit of creditors.*

A pledge of choses in action to a trustee for the benefit of certain creditors does not constitute an assignment for the benefit of creditors, since an equitable estate remains in the pledgor; nor does it hinder or delay unsecured creditors, since they may reach the pledgor's equitable estate under process.

2. *Fraudulent conveyance—Case stated.*

A firm of insolvent merchants, in pursuance of a plan agreed upon with certain of their creditors, made absolute conveyances to them of all their tangible property in payment of valid claims; and to further secure such claims pledged to one of the creditors as trustee all their choses in action as collateral security, with a direction that the residue of the pledge, after paying the debts secured, should be returned to the pledgors. In a suit at law by unsecured creditors to test the validity of the conveyances, *held*, that the conveyances, on their faces, were valid, and did not constitute an assignment for the benefit of creditors; and that a finding of the jury that there was no fraud in the transaction was conclusive, there being testimony to warrant it.

Appeal from Franklin Circuit Court in Chancery, Ozark District.

HUGH F. THOMASON, Judge.

Goodbar, Love & Co. sued W. R. & S. B. Locke, alleging that they had made a fraudulent disposition of their property, and procured writs of attachment to be issued; also caused writs of garnishment to be served on L. C. Locke, M. F. Locke and J. G. Orme, who filed answers to the interrogatories, denying any indebtedness or the possession of any assets.

The defendants had been engaged in a mercantile business conducted on a credit basis under the style of W. R. & S. B. Locke; were also interested in the cash store of J. G. Orme & Co. They were indebted to their father and brother, M. F. and L. C. Locke, in a sum aggregating about $25,000, and owed J. G. Orme a considerable sum. In pursuance of a plan agreed upon with M. F. and L. C. Locke and J. G. Orme, defendants, on November 12, 1888, executed a bill of sale of all the stock of merchandise in the store of W. R. & S. B. Locke invoiced at $5600 and valued at $4200; also certain live stock worth $548, and fourteen bales of cotton worth $600. They also conveyed to L. C. Locke a storehouse and lot in the town of Alma for $400. In payment of

their debt to J. G. Orme, they conveyed to him by bill of sale their interest in the business of J. G. Orme & Co., and paid him $900 in money; and he assumed the debts of that partnership. They further conveyed to L. C. Locke all their notes and book accounts, aggregating about $45,000, by an instrument which, after reciting that M. F. and L. C. Locke had become security for the debts above mentioned, provided as follows:

"Now, therefore, in consideration of the sum of one dollar to us paid, and the consideration above expressed, we, W. R. & S. B. Locke, do hereby transfer, assign and set over unto L. C. Locke, as trustee for M. F. Locke and L. C. Locke, all notes and accounts due us from all parties whomsoever, as collateral, to secure said M. F. Locke and L. C. Locke for all indebtedness incurred by them, or either of them, by reason of said suretyship. (A schedule of said notes and accounts is hereby attached and made a part hereof.) And we hereby authorize and empower said L. C. Locke, as trustee, to collect said notes and accounts with all possible dispatch (and, in case a note or an account cannot be collected, to secure the same if possible), and out of the proceeds to pay, first, the necessary costs of collection of said notes and accounts; and, second, to pay to said M. F. Locke and L. C. Locke, or either of them, all sums, with legal interest, which they have paid out by reason of the suretyship herein specified, and after said M. F. Locke and L. C. Locke are fully indemnified, said trustees will return the residue to said W. R. & S. B. Locke."

Upon special interrogatories, the jury found that defendants, on November 12, 1888, were wholly insolvent; that they conveyed all their property to the garnishees at the same time and in pursuance of an agreement previously entered into with the garnishees. The general verdict was for the defendants. Plaintiffs have appealed.

Winchester & Bryant for appellants.

1. The transaction was a fraud upon creditors. The various instruments, conveying *all* the property, executed simultaneously and in pursuance of a preconcerted plan, must be considered as one transaction, and constitute an assignment, and is void because it does not conform to the statutes. Mansfield's Digest, sec. 305; 47 Ark. 367; 54 *id.* 30; 53 *id.* 101; 52 *id.* 6; 43 Fed. Rep. 728; 129 U. S. 329.

2. The instrument conveying the notes and accounts to L. C. Locke, trustee, is an assignment for benefit of creditors and void. Mansf. Dig. sec. 305. It comes clearly within the definition laid down by Sandels, J., in 52 Ark. 30. Its purpose was to *raise a fund to pay debts*. 53 Ark. 101; 54 *id.* 6. 52 *id.* 48.

3. It is void because it hinders and delays creditors. 47 Ala. 200; 2 Bigelow on Fraud, 306-7; 4 Comst. 211; 16 N. Y. 484; 21 N. Y. 168; 1 Sand. Chy. 135; 11 Wend. 187–225. It conveys *all* the debtor's property, and, after paying their *relatives*, the trustee is instructed to pay the residue back to the debtors. If *all* the creditors had been provided for, the reservation of the surplus would have been all right, but where a part only are provided for, and the debtor is insolvent, and the conveyance carries all the debtor's property, such a reservation vitiates the instrument. 2 Bigelow, Fraud, 219–20 and note p. 220–225; 96 N. Y. 75; 17 S. W. Rep. 777; Cent. L. J. Feb. 5, 1892, p. 125; 47 Ark. p. 370; 7 Watts, 43; Kent's Com. Vol 2, 534–5, note "A," top p. 708–9, 8th Ed.

4. The verdict was contrary to the evidence. The issue was tried by a jury, when the statute says the issue on the attachment should be tried by the court. Mansf. Dig. secs. 346, 354–5; 34 Ark. 718. The verdict is simply persuasive, like a verdict of a jury in an equity case, and this court should try the question *de novo*, and is not bound by the scintilla rule. The whole transaction

was simply an effort to evade our assignment laws by an insolvent firm.

Sandels & Hill for appellee.

1. The bill of sale to L. C. Locke & Co., the bill of sale to Orme, and the warranty deed to the lot are each in form what they purport to be. Neither of them is, nor do they all together constitute, an assignment. The transfer of the notes and accounts was merely a pledge or transfer as collateral security. The equity of redemption was retained, and on its face it was not an assignment. 53 Ark. 101; 54 *id.* 234; 53 *id.* 544; 54 *id.* 9; 52 *id.* 30.

2. The finding of the jury is conclusive.

3. The instrument transferring the notes and accounts as collateral is not void as hindering and delaying creditors. 82 Ill. 548; Colebrooke on Coll. Sec. sec. 86 *et seq.*; 21 N. Y. 133.

HEMINGWAY, J. All errors alleged relate to the trial of the issue upon the affidavit for attachment.

The first is, that the conveyance of the land, the two bills of sale and the transfer of the choses in action, taken together, constitute an assignment for the benefit of creditors, which, not conforming to the statute regulating assignments, was fraudulent, and furnished grounds for attachment.

The first three instruments purported to convey property directly from debtor to creditor in payment of valid debts, and if they were in fact what they purported to be, they did not constitute an assignment in whole or in part. Whether they were in fact what they appeared to be, or were parts of a scheme to assign property in violation of the laws of the State, was a question of fact for the jury; the law draws from them no conclusion contrary to the verdict.

It is next insisted that the transfer of the choses in action was upon its face an assignment for the benefit of

creditors, and that for this reason the attachment should have been sustained. It purported to transfer to L. C. Locke certain choses in action "as collateral to secure" M. F. Locke and L. C. Locke for all indebtedness incurred by them by reason of their having become sureties to the assignors upon certain described debts. If the choses were transferred as collateral security, the legal consequence was that the equitable ownership remained in the assignors, while the assignees held them in pledge. Colebrooke, Coll. Sec., sec. 87, and cases cited.

As the debtors were not, by the terms of the instrument, divested of the beneficial ownership, it was not an assignment; and although the debtors may have had no reasonable hope of paying the debts and retaking the collaterals, the property remained in them, and could be reached by unsecured creditors as other equitable assets may be. But it is argued that even if the choses were pledged, the transaction as to them was fraudulent because it hindered and delayed the creditors of the pledgors; the debts it secured were valid, and the debtors had a right to secure them by a reasonable pledge of their property; and as it does not appear that the value of the pledges was so in excess of the debts secured as to warrant a legal inference of fraud, and there appears to be no hindrance or delay to unsecured creditors not necessarily incident to the securing of one creditor in preference to another, we are not warranted in holding as matter of law that this pledge was fraudulent.

The direction to return the residue of the pledge to the debtors was not unlawful or fraudulent, since the creditors, while the pledge was held, could resort to it and reach the residue, and there was in fact no legal hindrance or delay interposed. Where such a provision is found in an assignment for creditors, it is held to be a fraud upon unsecured creditors because the debtor retains no interest in the property assigned that they

can reach, and the residue is thereby guarded, as against them, for the benefit of the debtor. This reason does not exist in case of a pledge or mortgage, and the rule is therefore inapplicable.

Finally, it is argued that if fraud did not appear by the face of the papers, it in fact entered into the transactions, and the verdict that there was no fraud should be set aside. Many facts and circumstances to support this view are forced upon our attention with great force, but are we at liberty to consider their weight? The issue was tried in a proceeding at law, and it is settled by a uniform line of decisions in this State that, in such cases, the finding of the judge or jury is conclusive upon us if there was any testimony to warrant it; it is not our province to weigh the evidence or determine upon which side the preponderance is found. When we find evidence which, if believed by the judge or jury, would have warranted the finding, our investigation must end.

This rule has been uniformly applied to trials upon the attachment issue, and we need say no more than that we find in the record evidence to warrant the verdict in this case.

Affirm.

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HERSHEY v. LUCE.

Opinion delivered June 11, 1892.

Contract—Mistake of parties as to legal effect.

Where an instrument of writing accurately expresses the intent and meaning of the parties to an agreement, the fact that they thought it was a mortgage, when it was in fact a conditional sale, does not change its character or effect.

Appeal from Sebastian Circuit Court in Chancery, Fort Smith District.

EDGAR E. BRYANT, Judge.

This suit grows out of the case of *Stryker* v. *Hershey*, 38 Ark. 264. In that case the court held that, in the absence of parol evidence, the two instruments therein construed imported on their faces a conditional sale. Upon a re-trial of the case, parol testimony was introduced to show that the instruments were intended to constitute a mortgage. The trial court found that they constituted a mortgage. It is conceded that if this finding was correct, the judgment should be affirmed; otherwise it should be reversed. The evidence upon which the court's finding was based is sufficiently stated in the opinion. The instruments referred to, and the circumstances attending their execution, are stated in the report of the case in 38 Ark. *supra*.

Jos. M. Hill for appellant.

The only point in this case is whether the deed and agreement set forth in 38 Ark. 266 constitute a mortgage or conditional sale. If a conditional sale, the title is in appellant. This court held the same agreement and deed to be a conditional sale in 38 Ark. 264; and, even admitting all the extrinsic facts put in evidence to have been properly admitted, there is a failure to show that a mortgage was intended. See Jones on Mort. sec. 326; 101 Pa. St. 514; 4 Pac. 113; 7 Cr. 218; 3 So. Rep. 698; 31 N. W. Rep. 303; 29 *id.* 737; 52 Tex. 453; 32 Minn. 111; 80 Ill. 188; 44 Mo. 429; 42 Cal. 169; 28 Miss. 328; 50 Conn. 267; 107 Ill. 275; 47 Wis. 160; 58 Ala. 37; 27 W. Va. 576; 27 Kas. 232; Jones, Mort. secs. 256–281.

Clendening, Read & Youmans for appellee.

This court, in 38 Ark. 264, held the instruments to be a conditional sale, in the absence of parol testimony. The evidence shows both Rogers and Latham intended a mortgage, and their intention concludes the matter. 57 Wis. 415; 52 Ark. 73; 14 Pick. 480; 7 Cr. 218; 35 Vt. 125; 55 Cal. 352; 5 Ark. 321; 16 Ala. 472; 1 Sand.

Chy. 56; 20 Ohio, 472; 46 N. Y. 611; 46 Ill. 214; 109 Mass. 144; 12 How. 139.

HEMINGWAY, J. Whether certain oral proof admitted by the court was admissible, and whether the purchaser of the legal title at execution sale took subject to secret antecedent equities, are questions that we deem it unnecessary to determine. If each were solved favorably for the appellee, the judgment could not stand if the deed and contemporaneous agreement be construed against his view of them; for it is conceded that if they constitute a conditional sale, the title is in the appellant. That these instruments upon their face alone, without proof of extrinsic facts and circumstances, disclose a conditional sale, was ruled by this court in the case of *Stryker* v. *Hershey*, 38 Ark. 264. Regarding that as settled, we are called to determine their legal character in the light of the proof of extrinsic circumstances. We must therefore look to see what there is in it to give the instruments a character different from that indicated upon their face. It is, in substance, that the parties made an agreement; that the agreement, as made, was reduced to writing; that the writing was read over and signed as a correct memorial of the agreement; and that one of the parties, and perhaps the other, understood that it was a mortgage. There is no proof that anything was agreed upon which was not correctly incorporated in the writing, or that the latter contained anything that was not in fact agreed upon. The effect of the evidence is that the parties thought that the agreement which they made came within the legal definition of a mortgage, when in fact it lacked the essential elements of such an instrument, and its provisions stamped it as a conditional sale. The essential element of a mortgage not appearing in the instruments is an indebtedness from Rogers to Latham; for, as was held by the court in the case cited, if the deed was intended as security for a debt, they con-

stituted a mortgage, otherwise a conditional sale. The extrinsic evidence furnishes no proof of this element. There is no direct proof of an indebtedness, and no proof of circumstances from which the law could imply it. It does not appear that either party undertook or intended that Rogers should become the debtor of Latham; or that there was any such disparity between the price paid and the value of the property as would indicate an intention to secure a debt, and not to transfer the estate; or that, after the deed was made, the parties dealt with the property as belonging to Rogers, and as held by Latham only as a security. The inference is that the parties understood the transaction to be a mortgage, not because the agreement made, or their intention if formulated into an agreement would in law have constituted, a mortgage; but because they misconceived the characteristics of a mortgage, and believed that to be a mortgage which in law is held to be a conditional sale.

In other words, while the parties made an agreement, which was accurately put in writing, that expressed their intent and meaning, they gave it a name inapt, according to legal nomenclature. This furnishes no reason to give it an effect different from that its terms indicate; and we conclude that there was nothing in the evidence of extrinsic facts to change the character of the transaction as shown upon the face of the writings.

Reverse and remand, with directions to enter a judgment for plaintiffs in accordance with the prayer of the complaint.

On Rehearing.

Opinion delivered July 1, 1892.

Hemingway, J. Upon the hearing of this cause, we were of the opinion that the plaintiff was entitled to recover the interest claimed in the land described in the complaint, and accordingly adjudged that the judgment

should be reversed, and the cause remanded with directions to enter judgment in accordance with the prayer of the complaint. The defendant has made a motion to modify the judgment of reversal and directions contained in it, on the ground that it operates to cut off his claim for taxes, repairs and improvements. The plaintiff resists the motion because the defendant, being a tenant in common, is not entitled to set up a claim of that character.

The cause was submitted upon abstracts and briefs that did not disclose that the plaintiff asked any accounting for rents, or the defendant for taxes, repairs or improvements. No right as to either was submitted to us, considered or wittingly adjudged; and there is nothing before us now upon which we can determine the merits of such claims. We therefore leave all questions relative thereto open, and when the cause is remanded the court may order an account stated according to the rights of the parties and the principles of equity applicable thereto. To this extent the judgment of reversal will be modified; in other respects it will stand.

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GREER v. FERGUSON.

Opinion delivered June 11, 1892.

1. *Power of partner to execute mortgage.*

   A mortgage executed by one of a firm composed of two partners, in the presence of the other, and with his consent, as security for a firm debt, is binding upon the firm.

2. *Attorney—Lien.*

   An attorney is not entitled to a lien on land for his services in defending the title thereto.

   Hershy v. *Du Val*, 47 Ark. 86, followed.

3. *Revivor of action—Foreign executors.*

   On the death of a defendant *pendente lite*, the suit cannot be

revived against his executors appointed in another State so as to render a judgment against them binding upon his estate, notwithstanding they voluntarily appeared to the action. The fact that such executors are authorized by statute (Mansf. Dig. sec. 4937) to sue in any of the courts of this State as though qualified under its laws does not imply authority to be sued for a decedent. Nor does the fact that the suit was revived in the name of an administrator *ad litem* validate a judgment against such executors where no judgment was asked or rendered against the administrator *ad litem*.

Cross Appeals from Mississippi Circuit Court in Chancery.

J. E. RIDDICK, Judge.

Greer & Adams brought suit in chancery to enforce a claim of $4660 against Ferguson & Hampson and Louis Hanauer, alleging that the claim arose out of professional services rendered them in defending their title to certain land. They also procured an attachment to be levied upon the land. The complaint alleged that Ferguson & Hampson had fraudulently conveyed the land to D. H. &. F. P. Poston as trustees to secure a large sum due to Schoolfield, Hanauer & Co., of which firm Louis Hanauer was a member; that the trust deed was void on its face, and was executed by D. L. Ferguson without authority; that the debt to Schoolfield, Hanauer & Co. was feigned; that Ferguson & Hampson were insolvent; that Louis Hanauer had no other property within jurisdiction of the court. The prayer was that the amount sought to be recovered be declared a prior lien on the land, and that plaintiffs recover the amount due them.

Schoolfield, Hanauer & Co. and Louis Hanauer denied that plaintiffs were ever employed by them, or any of them; alleged that plaintiffs were employed solely by Ferguson & Hampson, and that Louis Hanauer was represented, in the case referred to, by his own counsel. They denied that the trust deed was fraudulent. Hampson's answer admitted that Ferguson & Hampson owed

plaintiffs a small balance, not exceeding $200, on their fee. During the pendency of the suit, Hanauer died, a resident of the State of Tennessee. Upon suggestion of his death, the suit was revived against Hugh R. McVeigh as administrator *ad litem*, there being no administrator upon Hanauer's estate in this State. Subsequently, W. W. Schoolfield and D. H. Poston, executors of the will of Hanauer under appointment of the probate court of Shelby county, Tennessee, appeared and were made defendants to the suit. Thereafter the administrator *ad litem* appeared no further in the action, and no relief was asked or granted against him.

Upon final hearing, the court found that plaintiffs were retained under a joint employment by Ferguson & Hampson and Hanauer. The attachment was dismissed at plaintiffs' cost. For their services the court allowed plaintiffs a fee of $1500 with interest, and rendered judgment against Ferguson & Hampson and against Hanauer's executors for that amount. The court adjudged the trust deed to D. H. & F. P. Poston to be valid, and held that plaintiffs were not entitled to an attorney's lien on the land. Plaintiffs have appealed; as likewise did Hanauer's executors and Hampson.

E. F. Adams for appellants.

1. The facts found by the court are conclusive as to the employment of appellants jointly by Ferguson & Hampson and Hanauer, and the finding is sustained by the evidence. 38 Ark. 144; 45 *id.* 41; 53 *id.* 161; *ib.* 327; *ib.* 537; 54 *id.* 229.

2. The trust deed was fraudulent and void as to creditors. One partner cannot convey real estate not of record in his name, even though it be partnership property. In this case the lands were owned by Ferguson and Hampson as tenants in common. Pars. on Part. (1st ed.) top p. 367; *ib.* (2d ed.), 389; 27 Am. Dec. 452; 29 *id.* 463; 19 Ga. 14; 1 Sumn. 173; 36 Miss. 40; 21 Ala.

437, and many others. See 15 Gratt. (Va.), 35, 36; 70 Pa. St. 79. The statutes of Arkansas make them tenants in common. Mansf. Dig. sec. 647; 31 Ark. 580; 36 *id.* 456.

3. Appellants were entitled to a lien on the lands. 38 Ark. 591; 36 *id.* 591; 15 Johns. 405; 15 How. (U.S.) 417; 13 Ark. 194; 1 Cow. (N. Y.) 172; 4 Cow. (N. Y.) 416.

4. Hanauer was a non-resident, and the attachment as to him should have been sustained.

5. This suit was properly revived against Hanauer's executors, and they entered their appearance, and the judgment is binding on Hanauer's estate. Mansf. Dig. sec. 4937; 20 Ill. App. 210; 3 Biss. 504; 37 N. Y. 523; 7 Cow. 64; 28 Ark. 253; Mansf. Dig. secs. 5231–2; 143 U. S. 215.

U. M. & G. B. Rose for Hanauer *et al.*

1. The appellants were not entitled to a lien; their services were purely defensive. Mansf. Dig. sec. 3937; 47 Ark. 86.

2. The deed to Ferguson & Hampson was to them as partners, and there is no evidence that they held as tenants in common. It was partnership property. 1 Bates on Part. sec. 281; 1 Dev. Deeds, sec. 49; 46 Ark. 464.

3. One partner can, with the assent of his co-partner, convey partnership lands by deed in the firm name. 1 Devlin, Deeds, sec. 110; 1 Ark. 206; 4 *id.* 450; 20 *id.* 325.

4. The court erred in reviving the cause against the foreign executors of Hanauer, and in rendering a personal judgment against his estate. Mansf. Dig. secs. 4937, 5231–2–3; Story, Conf. Laws, sec. 513; 1 Woerner, Am. Law. Adm. secs. 157–8, 160; Whart. Confl. Laws, sec. 616; Schouler, Ex. & Adm. sec. 179; 15 Peters, 5; 14 How. 375; 5 C. E. Green, 242; 11 Ill.

211; 6 Mo. App. 135; 7 Humph. 91; Walker (Miss.), 211; 5 Blatch. 501; 1 Hare, 482; 1 Dana, 445; 87 Pa. St. 142; 10 Yerger, 283; 3 Head, 87.

HEMINGWAY, J. For convenience we may divide the judgment below and treat it, first, as a judgment against Ferguson & Hampson, and, second, as a judgment against the executors of Hanauer.

From the first the plaintiffs alone appeal; and they complain at the court's action in discharging the attachment, and also in refusing to charge a lien upon the land to secure a judgment in their favor, it being rendered upon a claim for services as attorneys in defending a former suit against the present defendants for the recovery of the land.

From the second both parties have appealed; the plaintiffs because the sum awarded them is too small, and the executors of Hanauer because there was any recovery against them.

It is insisted that the attachment should have been sustained on the ground that the defendants had fraudulently disposed of the land attached. The act relied upon as evidence of fraud was the making of a mortgage for the land by Ferguson in the name of the firm of Ferguson & Hampson. It is argued that the mortgage was not a valid conveyance, and that, as it placed a colorable incumbrance upon the land, it had a tendency to hinder and delay the creditors of Ferguson & Hampson, and was therefore fraudulent. The mortgage is claimed to have been invalid, first, because the land belonged to the persons composing the firm as tenants in common, and was not the property of the firm. Of this fact there is no proof; and as the burden of proof was upon the plaintiffs, we must find against them.

1. Power of single partner to execute deed.

The next reason assigned for its invalidity is, that it was executed by but one of the two partners, and this, it is claimed, was beyond his power. As it was

executed by one in the presence of the other and with his consent, as security for a firm debt, it was binding upon the firm. *Ferguson* v. *Hanauer*, *ante*, p. 167.

2. Attorney's lien.

As the claim arose out of services rendered in defending the title to the land, and not in the recovery of the land, the attorneys acquired no lien upon it. *Hershey* v. *DuVal*, 47 Ark. 86.

We are therefore of opinion that, upon the abstract and brief filed, no error prejudicial to plaintiffs appears in the judgment, so far as it affects Ferguson & Hampson.

3. As to revivor of actions against foreign executors.

In considering the judgment in so far as it affects the estate of Hanauer, we are confronted by the question, whether the court could revive the suit in the name of his foreign executors so as to render any judgment against them binding upon his estate. After the cause was submitted, we referred this question to counsel for re-argument, and have been furnished with briefs which direct our attention to many authorities. We have examined the citations, and find the question settled by the authority of adjudged cases and of text writers with exceptional unanimity.

It was decided by the Supreme Court of the United States in the case of *Vaughan* v. *Northup*, 15 Pet. 5. Judge Story, after stating the question, says for the court: "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other State; and whatever operation is allowed to it beyond the original territory of its grant is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the

administrator is exclusively bound to account for all the assets which he receives under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of other States have no right to interfere with or to control the application of those assets according to the *lex loci.* Hence it has become an established doctrine that an administrator appointed in one State cannot, in his official capacity, sue for any debts due to his intestate in the courts of another State; and that he is not liable to be sued in that capacity in the courts of the latter, by any creditor, for any debts due there by his intestate. The authorities to this effect are exceedingly numerous, both in England and America; but it seems to us unnecessary, in the present state of the law, to do more than to refer to the leading principle as recognized by this court in *Fenwick* v. *Sears*, 1 Cranch, 259; *Dixon's Exrs.* v. *Ramsay's Exrs.* 3 Cranch, 319; and *Kerr* v. *Moon*, 9 Wheat. 565." The authority of this case was not impaired by a dissenting opinion, and has been recognized without question by that court as a correct and final statement of the law.

Other courts and text writers have adopted it, and no useful service would be performed by any quotation from them. *Sloan* v. *Sloan*, 21 Fla. 589; *Judy* v. *Kelley*, 11 Ill. 211; *McGarvey* v. *Darnall*, 32 Ill. App. 226; *Beeler* v. *Dunn*, 3 Head, 87; *Sparks* v. *White*, 7 Humph. 86; *Allsup* v. *Allsup's Heirs*, 10 Yerger, 283; *Magraw* v. *Irwin*, 87 Penn. St. 142; *Brownlee* v. *Lockwood*, 20 N. J. Eq. 242; *Peale* v. *Phipps*, 14 How. 375; *Winter* v. *Winter*, Walker (Miss.), 211; Schouler on Exrs. and Admrs. secs 173 and 179; Wharton, Confl. of Laws, sec. 616; 1 Woerner, Admr. secs. 157-8 and 160; Story's Confl. of Laws, sec. 513; *Caldwell* v. *Harding*, 5 Blatchf. 501; *Curle* v. *Moor*, 1 Dana, 445.

The plaintiffs argue that, as the court acquired jurisdiction of Hanauer, it could proceed to a final determination of the case against his foreign executors. We think the law is settled otherwise. The court lost its jurisdiction of his person by his death, and could proceed to a judgment binding upon his estate only upon a substitution for him of some person lawfully empowered to defend for him. *Judy* v. *Kelley*, 11 Ill. 211; *McGarvey* v. *Darnall*, 32 Ill. App. 226; *Rentschler* v. *Jamison*, 6 Mo. App. 135.

It is next argued that since the executors appeared, defended the case and appealed from the judgment, no question of their power to defend for Hanauer's estate can be raised. A defendant may confer jurisdiction over his own person by consent, but one defendant cannot by his consent confer jurisdiction over the person of another, unless he is by law authorized to represent such other. In this case the executors could not invest themselves with authority to represent Hanauer's estate denied to them by the laws of the State, nor acquire such authority by merely assuming it.

Further reliance is placed upon the statute of this State which expressly authorizes foreign administrators and executors to sue in its courts as though qualified under its laws; and it is argued that express authority to sue carries implied authority to be sued for the decedent. It is to be presumed that when the statute was passed the legislature knew that a foreign executor or administrator could neither sue nor be sued in our courts, and we knew of no reason that would warrant us in holding that, as the legislature expressly changed the law in one particular, it intended to change it in the other. The legislature might well extend its comity to the officers of foreign States, without essaying the undertaking, of at least doubtful authority, of extending its power or control over them.

But this contention is disposed of by the case quoted from, under a statute similar to ours, where the court says: "Indeed, the very silence of the act as to any liability of the personal representative to be sued in the courts of the district for such assets, so received, would seem equivalent to a declaration that he was not to be subjected to any such liability." *Vaughan* v. *Northup*, 15 Pet. 8.

Our attention has been specially invited to the case of *Lawrence* v. *Nelson*, 143 U. S. 215, which, it is claimed, changes or at least modifies the previous rulings of the Supreme Court of the United States; but we think it presented a different question, and that it is in perfect harmony with the earlier decisions upon the question in hand. The facts are as follows: Two partners had obtained a decree for money in a suit brought by them in the circuit court of the United States for the Eastern District of Arkansas against the administrator of their co-partner, qualified under the laws of Illinois; the administrator had filed a bill to review and reverse that decree, on the ground that, as he was an Illinois administrator, the court had no jurisdiction to render a decree against him; upon a final hearing the bill of review had been dismissed for want of equity. The complainants in the original suit then filed their bill against the administrator in the circuit court of the United States for the Northern District of Illinois, alleging the foregoing facts and praying that a decree be rendered in their favor for the amount of the original decree. There was a demurrer to the bill, which was overruled; and, the respondents electing to stand by it, a decree was rendered in accordance with the prayer of the bill. The respondents appealed, and the decree was affirmed. The opinion sets out the Arkansas statute authorizing foreign administrators to sue in the courts of the State; and in effect holds that, in instituting the proceeding by bill of review, the

administrator was the actor; that he proceeded under the authority conferred on him by the statute; that he thereby submitted the question of jurisdiction in the original suit to a court competent to try it, and that the decision upon it was conclusive against collateral attack. It is perfectly plain that the decision rests upon the decree in the case in which the administrator was the actor, and there is no intimation that the decree in the case in which he defended had any validity; on the contrary, the cases holding otherwise are cited without question, and it is certainly inferable that a different conclusion would have been reached if the question had been presented in a direct proceeding to reverse either decree.

In the last place it is insisted that as the court revived the case in the name of an administrator *ad litem*, the judgment was right, and should have been affirmed. Whether it was proper to revive the case in that way may be doubted, but need not be decided. The person so appointed did not appear at the hearing, and there was no judgment asked or rendered against him. The judgment was against the foreign executors; and if none could properly be rendered against them, the fact that one might have been rendered against the administrator *ad litem* does not help out the one rendered. The question is, was it proper? and the response, that it was not.

The judgment against Ferguson & Hampson is affirmed; but as the foreign executors were improperly brought into the case, the judgment against them is reversed, and the cause as against Hanauer's estate is remanded.

TILLMAN v. THATCHER.

Opinion delivered June 11, 1892.

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Usury—Recourse to prior valid claim.

If a note tainted with usury is founded upon an antecedent valid account, the creditor may sue upon the account.

Appeal from Lafayette Circuit Court.

WILLIAM S. EAKIN, Special Judge.

D. L. King for appellants.

The note was void for usury. Acts 1887, p. 50, 51; 41 Ark, 331. The account is thus left to stand upon its original merits. 35 Ark. 217; 105 N. Y. 539; 12 N. E. Rep. 48; 98 N. C. 107; 17 S. W. Rep. 713.

HUGHES, J. The appellee, Thatcher, was indebted to the appellants, merchants at Dallas, Texas, for goods bought of them, in the sum of $355. Thatcher gave his note, dated at Texarkana, Ark., to the appellants for $355, bearing interest from date at 12 per cent per annum, in settlement of the account. The appellants, recognizing that the note was void for usury, sued on the original account. The appellee says the note was a satisfaction of the account, and pleads usury.

The court refused to instruct the jury, at the plaintiff's instance, that if the jury found from the evidence that the defendant was indebted to the plaintiffs in the sum of $355 upon an account for goods sold, and that the defendant gave the plaintiffs the note for the same bearing interest at the rate of 12 per cent per annum, the note was void for usury, and they should find for the plaintiffs. The court gave for the defendant four instructions, in effect the converse of the one refused.

"If a security founded upon an antecedent lawful consideration becomes void, or tainted by an usurious element, the original demand will be revived and may be

enforced." *Rountree* v. *Brinson*, 98 N. C. 107. "The taint of the subsequent illegal contract does not relate back to or affect the original contract." *Humphrey* v. *McCauley*, 55 Ark. 143; *Marks* v. *McGehee*, 35 Ark. 217.

The court erred in refusing and in giving instructions.

Reversed and remanded for a new trial.

REEVE *v.* LADIES' BUILDING ASSOCIATION.

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Opinion delivered June 11, 1892.

1. *Building associations—Usury.*

In a loan made by a building association to a shareholder, in the usual form, there can be no usury, because the rate of interest payable by him is contingent upon the length of time required to pay out his shares.

2. *Stock payments—Interest.*

A shareholder in a building association who procures a loan from it is not entitled to charge the association interest on his stock payments, nor to cause interest on the loan to cease running, from the time the payments are made, to the extent that they reduce the principal. All that he is entitled to receive is a share of the profits of the building association's dealings with the whole fund of subscriptions.

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

John B. Jones for appellant.

1. The transaction is a mere loan of money, and is void for usury. 128 Ill. 70; 39 Pa. St. 137; 89 *id.* 15; 14 Lea, 677; 2 Col. 418; 21 Ga. 697; 69 Ala. 419; 19 W. Va. 776; *ib.* 784; 28 N. E. Rep. 801; 25 Oh. St. 215; 41 Md. 418; 24 Conn. 147; Endlich, Building Ass. secs. 331, 335, 356, 378, etc.; 68 Tex. 282; 12 Rich. Eq. 124; 3 Cr. 180; 55 Ia. 385; 75 N. C. 292; 10 S. W. Rep. 789; 7 Neb. 173, 181; 81 N. C. 58; 3 H. & J. (Md.), 109; Tyler on Usury, 289, 290; 34 Barb. 157; 41 Ark. 339; 33 Barb. 103; 81 Va. 677.

2. Our statute provides that where partial payments are made interest shall be calculated to the time, and the payment deducted.

3. Fines are illegal unless authorized by statute. Endlich, secs. 96, 405; 7 Neb. 173; *ib.* 181.

4. The contract is usurious on its face; the uncertainty as to the time the payments shall continue and the association be wound up, and the stock reach par value, does not validate it. 12 Rich. Eq. 124; 55 Ia. 424; Endlich, secs. 331, 335, 337, 355, 356, 378; 19 W. Va. 697–8; 7 Neb. 173; 81 N. C. 58.

Blackwood & Williams for appellee.

1. Under the law there is no usury in these transactions. 10 Am. & Eng. Corp. Cases, 426; Endl. B. Ass. sec. 7, p. 386; 14 Lea (Tenn.), 677; 46 Ga. 166; 100 Ill. 420; 114 *id.* 182; 25 A. & E. Corp. Cases, 665; 13 Gray, 157; 6 Allen (Mass.), 1; 1 Allen, 100; 43 N. H. 197; 25 Barb. 263; 1 Abbott (N. Y.) App. Dec. 350; 22 Kas. 624; 62 Ind. 264; 10 Md. 397; 26 N. J. Eq. 351; 1 McAr. (D. C.) 385; 63 Ga. 373; 2 Beas. 427; Endlich, B. Ass. secs. 42, 326–7, 371; 35 Pa. St. 469; 10 Wright (Pa.) 495; 88 Pa. St. 216; 6 Bing. N. C. 334; 15 Eng. L. & Eq. 477; 8 *id.* 57; 31 Eng. Chy. (6 Hare) 87; 3 DeG. M. &. G. 1032.

2. The contract is an entirety. When a member borrows he must keep his contract and cannot call for an account of profits until the time mentioned in the contract. Endlich, B. A. sec. 430; 63 Ga. 373; 97 Pa. St. 523; 6 Allen, 1; 77 Va. 293.

3. The contract is not usurious on its face. It only stipulates for 9 per cent. 25 Ark. 195. Usury must be proved. 9 Pet. 378; 25 Ark. 260.

4. The evidence shows that the interest does not exceed 10 per cent. 46 Ga. 166.

HUGHES, J. This was a bill filed in Pulaski chancery court by appellant against appellee to cancel two mort-

gages given by appellant, one on block 152, City of Little Rock, to secure payment of dues, etc., on $1200 of stock, and the other on lots 10, 11 and 12, block 65, City of Little Rock, given by appellant to secure payment of dues, etc., on $7000 of stock in appellee's association, on the alleged ground that the transactions were usurious loans; and asking judgment over against said association for all sums paid in on said transactions.

Are these contracts usurious?

1. As to usury in building association contracts.

We do not deem it necessary to the determination of this question to decide whether these transactions were sales or redemptions of the shares of the appellant, or transactions in partnership funds, as they are held to be in many of the decisions of the courts of last resort.

The evidence shows that in each of these transactions there were two separate contracts.

First. The taking of shares in the association by the appellant and the contract to pay for the shares monthly as stipulated.

Second. The sale or transfer of the shares to the association, in consideration of the advance to the appellant of the value of his shares, in anticipation of their par value at the time when all the shares of all the members should be at par by reason of the accumulations of the association.

When this may be is uncertain, as it must depend upon the prosperity of the association. Whenever these shares are at par, the borrowing member ceases to make his monthly payment of dues, and interest on the advance made to him. What rate of interest he must pay is uncertain, and cannot be known until the final calculation can be made. The amount he may pay the association may be far less, or it may be more, than the sum he receives with interest thereon at the rate of ten per cent per annum. There is then in the transaction an element of uncertainty, a hazard, that seems to exclude the idea

of a loan of money at a usurious rate of interest. "Where the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious." *Spain* v. *Hamilton's Adm'r*, 1 Wall. 604; Tyler on Usury, p. 98; *Lloyd* v. *Scott*, 4 Pet. 205.

This principle is applied to contracts of insurance, of bottomry, to post-obits and annuities. Tyler on Usury, p. 175 *et seq.*: *Delano* v. *Wild*, 6 Allen, 1; *Bowker* v. *Loan Fund Ass'n*, 7 Allen, 100.

In *Parker* v. *Fulton Loan & Building Association*, 46 Ga. 166, the court said: "Even on the idea that he was borrowing the money, and was merely selling his interest in the dividend, it was wholly a matter of contingency whether he paid seven per cent, or more or less than that, for the money. This fact, this uncertainty or contingency, introduces into the transaction an element wholly foreign to an agreement to pay so much for the use of money."

The association does not know what it will get back, or what the borrower will eventually pay, as that depends entirely on how long it will take to reach the point of final winding up. *Id.*; *Bibb Co. Ass'n* v. *Richards*, 21 Ga. 592; *Shannon* v. *Dunn*, 43 N. H. 194; *Burns* v. *Metropolitan Building Ass'n*, 2 Mackey's Rep. 7.

There are expenses and losses incident to the business of these associations, which must be considered in estimating the value of the shares of the members before maturity. *Pattison* v. *Albany Building & Loan Ass'n*, 63 Ga. 373.

The testimony in this case shows that if the appellant had kept his contract, the interest he would have paid on the moneys he received from the association would have been in one of the transactions 7 3-16 per cent. per annum, and in the other 4 1-8 per cent.

2. As to interest on stock payments.

It is contended by the counsel for appellant that the statutory rule for computing interest where partial payments are made is applicable to these transactions, and that the payments of monthly dues should bear interest, or cause interest to cease upon the principal, from the time they are made to the extent that they reduce the principal. But "the member nowhere reserves the right to charge the association interest on his stock payments. He has no claim as a member to such interest, and it cannot be assumed that, by incurring the additional obligations towards the association involved in the grant of an advancement, his previous rights in respect to it have become enlarged. He continues liable on his original undertaking. A borrower's claim to have these items taken into account and to be given credit therefor at any intermediate stage "has no foundation in law or equity." "It must be remembered that he is in the first place a member, and only in the second place a borrower. In the former capacity he has no right to an account of profits except upon the termination of the scheme." "As for interest upon his several stock-payments, his contract with the building association, upon acceding to it, never contemplated such a thing. No such stipulation, expressed or implied, ever entered into the bargain. All he was entitled to, all he reserved to himself the right to claim, was a share of the profits of the building association's dealings with the whole fund of subscriptions." Endlich, Building Ass'ns, sec. 456.

Where the contract, however, is for a mere loan of money, upon which a rate of interest greater than that allowed by law is exacted, no device, shift or cloak, whatever its form or how specious soever it may be, can protect it from the taint of usury.

The decree of the Pulaski Chancery Court is affirmed.

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TAYLOR v. VAN BUREN BUILDING ASSOCIATION.

Opinion delivered June 10, 1892.

Building associations—Usury.

There is no usury in an advancement upon its shares by a building association made in the usual form to a shareholder (*Reeve* v. *Ladies' Building Association, ante*, p. 335 followed); nor can there be usury in any contract which expressly provides that no unlawful interest shall be paid.

Appeal from Crawford Circuit Court in Chancery. HUGH F. THOMASON, Judge.

B. T. Duval and *S. S. Wassell* for appellant.

The transactions were mere loans of money, and usurious and void. 10 S. W. Rep. 787; 63 Ga. 373; 14 Lea, 677; 2 Cold. 418; 10 Md. 397; 96 Am. Dec. 147; 73 N. C. 292; 12 Rich. Eq. 214; 7 Neb. 173; 19 W. Va. 684; 11 Bush, 296; 26 Pa. St. 269; 39 *id.* 137; *ib.* 156; 30 *id.* 465; 25 Ohio St. 186; 48 Iowa, 385; 55 *id* 424; 24 Conn. 147; 68 Tex. 282. All the courts, except in those States where building associations are regulated by statute, and perhaps two States where the partnership theory prevails, treat the transactions as loans. Endlich, B. Ass. secs. 354-358; 10 S. W. Rep. 787; 12 *id.* 945; 69 Ala. 413. More than 10 per cent. interest *on the amount* received is charged, and the partial payment plan provided by our statute is not followed. Endlich, B. A. sec. 374.

Turner & Turner and *Sandels & Hill* for appellee.

The transactions are not usurious. Tyler, Usury, p. 110; 25 Ark. 258. Because not loans, but simply dealings in partnership funds by members with the association. Tyler, Usury, p. 92; 2 Beas. 428; 23 Gratt. 787; 1 McArthur, 385; 2 *id.* 594; 46 Ga. 166; 21 *id.* 592; 63 *id.* 373; 13 Gray, 157; 43 N. H. 194; 10 Md. 397; 69 Ala. 456; 11 C. E. Green, 351; 100 Ill. 413; 62 Ind. 264.

The English cases of 6 Bing. N. C. 180, and 8 Scott, 300, have been followed ever since. 5 DeG. & Sm. 17; 15 Eng. L. & Eq. 477; 6 Allen, 1; 22 Kas. 624; 25 Barb. 263; 91 N. Y. 43. The money was not to be repaid, but only certain monthly dues until the stock matured. This was uncertain, and depended upon certain contingencies. Tyler, Usury, p. 98; 1 Wall. 604; 4 Pet. 205; Tyler on Usury, pp. 173, 175. The interest does not exceed ten per cent, and it is expressly stipulated that no more should be claimed or collected. Endlich, B. Ass. secs. 372, 374, 388, 389, 390, 456; 97 Pa. St. 514; 7 Peters, 103; 6 S. E. Rep. 333.

HUGHES, J. The appellant brought this suit below to set aside three mortgages executed to defendant corporation, alleging that the mortgages were usurious.

The first mortgage was conditioned: "That whereas, B. L. Orrick sold to the Building and Loan Association twenty shares of stock for the sum of two hundred and forty dollars, and by the terms of said sale Orrick has bound himself to pay all subsequent dues on the stock thus sold and interest on the face of the stock at the rate of 9 per cent. per annum, that is to say, $5 dues per month on the stock and $3.75 interest per month," etc., "and all fines imposed," and thereupon, upon failure to perform the conditions of the bond for three months, the mortgagee to sell said property, "the proceeds of the sale, after paying costs of sale, shall be applied to the payment of the four hundred and forty dollars and the accrued interest thereon at 9 per cent. per annum, less the amount of dues and interest paid by said Orrick, and thereupon the certificates of stock shall be cancelled and annulled, the remainder of the proceeds, if any, to be paid to the mortgagor." And there is the following stipulation: "It is also understood that in no instance shall any claim be made by said building association for any interest or any

moneys mentioned herein, or any money in lieu of interest, which shall exceed the rate of 10 per cent. per annum." The second deed of trust has the same conditions, and recites the sale of twenty shares of stock for $462.50. The third deed of trust is identical with the other two, except it recites the sale of forty shares of stock for $925.

The answer denies that said transaction was a loan of money, but avers that it was a purchase and redemption of said twenty shares of stock.

Plaintiff took no proof. Defendant took the deposition of Jesse Turner, Jr., and that of S. A. Pernot.

Jesse Turner, Jr., testified: "We were advised that, in case of foreclosure, if only the actual amount received by a member was secured by the deed, the transaction would be unobjectionable. This information was imparted to the directors, and the plan was adopted, although it does not secure the premium, and the secretary was instructed to prepare all contracts in accordance with this plan. I prepared the contracts referred to in the complaint. I did not at first calculate to ascertain whether 9 per cent. on the face of the stock sold in each case would exceed 10 per cent. on the amount actually received, because I supposed that a proper construction of the clause contained in each deed of trust, to the effect that in no event shall any claim be made by said association for any interest on any of the moneys mentioned in the deed of trust, or any money in lieu of interest which should exceed 10 per cent., would, by its terms, limit the contract to that rate. I have, since the institution of this suit, however, made various calculations and find that, in reference to the first transaction mentioned in plaintiff's complaint, 9 per cent. on the face value of the stock would exceed 10 per cent. on the amount actually received for the same, the sum of one dollar. As to the other transactions, 9 per cent. on the face of

the stock would fall short of 10 per cent. on the amount received for the stock."

S. A. Pernot testified: "A member (non-borrowing member) obligates himself to pay one per cent. per month on the face value of his stock until the amount of those payments called dues, with the earnings of the association, should be sufficient to pay the face value of every share in the association. When that condition is brought about, the association terminates. Members, who wish to anticipate the time of winding up, sell their shares to the association and agree to keep the same alive, the vendor continuing to pay the monthly dues on the stock in accordance with his original agreement; and superadded to this original obligation as a member of the association, he enters into another obligation, when sale of stock is consummated, to pay in monthly installments 9 per cent. per annum on the face value of the stock transferred, sold to the association, until the association winds up. He gives the 9 per cent. in the way of interest for the privilege of getting in advance what the non-selling members only get at the end of an indefinite number of years, namely, when the association shall have wound up. Inasmuch as there may be a number of applicants to sell stock, and the funds in the treasury not sufficient to meet the demands, and each applicant being equally entitled to it, the question of priority is settled by offering premiums at an open competitive bidding for the privilege of selling stock. Each party wishing to sell his stock to the association makes a formal application in writing for that purpose, stating the number of shares he wishes to dispose of and the security he has to offer, in compliance with the requirements of the association. If the party's bid be accepted, and his security be found sufficient, he executes a bond and deed of trust to the association, conditioned that he will continue to make payments on

his stock, called dues, and his interest, together with all fines, and that he will continue such payments until the series is wound up. That is, he shall continue to pay until the financial condition of the association is such that the association will pay, dollar for dollar, all stock which has not previously been sold to it. When this condition exists, the before mentioned obligations of the selling members are cancelled, the non-selling members are paid the face value of their stock and the association winds up."

Pernot further says: "We credit the defaulting member with the gross amount of all stock payments (dues) paid in by him from the beginning of the association up to the date in question (that is, the day his mortgage is foreclosed), and add to it all interest payments made by him on his stock subsequent to the date of sale of his stock. The aggregate is the sum total of all the credits to which he is entitled. We charge the defaulting member with the actual amount he received from the association for the stock. On this amount we calculate interest at the rate of 9 per cent. from the time the money was paid to him up to the time in question. The association would have wound up February 22, 1890, if the contracts in this case had been carried out. The association itself has never built any houses. When there is money on hand and no applications for it, we loan it to outsiders at 10 per cent. This is under our constitution and by-laws."

The court below dismissed the complaint, and gave the appellee a decree.

The controlling and main questions of law in this cause are discussed and settled in the case of *Reeve* v. *Ladies' Building Association*, *ante*, p. 335. The transactions in this case, which it is contended are usurious, are governed by the principle applied in that.

Besides, in the three mortgages involved in this cause, there could not be usury, because in each it is provided that "it is also understood that in no instance shall any claim be made by said building association for any interest or any moneys mentioned herein, or any money in lieu of interest, which shall exceed the rate of ten per cent per annum. It would seem that there can be no usury in a contract that expressly provides that no unlawful interest shall be paid, unless in fact the transaction was a device or cloak to cover usury. If the borrower pay more than the contract seeks to oblige him to pay, it cannot be referred to the obligation of his contract; it is outside of the contract, and not a part of the bargain. Under this provision, the borrower is not obliged to pay more than the amount he receives and 10 per cent. per annum interest thereon. When he shall have done that, he may, under the contract, cease to make further payments; he is not obliged to do more. There can be no usury in this.

The decree is affirmed.

STONE v. STATE.

Opinion delivered June 11, 1892.

1. *Assault and battery—Justification.*

   A police officer cannot justify an assault and battery of a prisoner on the ground that she was creating a disturbance on a public street by using loud and obscene language, and that he could not otherwise quiet her.

2. *Hearsay evidence—When prejudicial.*

   A verdict of guilty in a criminal cause, though amply sustained by competent evidence, will be set aside where hearsay evidence was improperly admitted to contradict evidence of defendant which might have mitigated the punishment.

Appeal from Garland Circuit Court.

A. M. DUFFIE, Judge.

The appellant was convicted of an assault and battery, committed on Lena Walton. The witnesses testified as follows:

D. J. Smith testified: "I heard a disturbance at Lena Walton's, and went over there. Defendant called me and another man to assist him, and we went in and helped to arrest Lena. She held back and would not go, and we three had all we could do to bring her out of the house. When I first saw her she was bleeding profusely about the head. She had a wound about the head, and was very bloody. On the way to jail she began swearing and using profane language on the street, and defendant put his hands to her throat and choked her to keep her from using such language. He choked her twice before reaching the jail. I did not see him strike her in the house. She was bleeding when I first saw her. She is a big, strong woman, and it took all three of us to get her to jail. In going to jail the other man and I had hold of her arms, and the defendant pushed from the rear. I don't know whether the defendant was mad or not, but he seemed to be. I got pretty mad."

The State then introduced J. D. Page to prove what Lena Walton testified before the police court. Defendant objected to the testimony on the ground that no foundation had been laid, and that the defendant was not a party to that suit. The court sustained the objection.

R. L. Williams testified: "I am sheriff of Garland county. A subpœna was placed in my hands for Lena Walton, but after diligent search I was unable to find her, and returned the subpœna as not served. I am informed that she has left the State."

J. D. Page was then re-called and testified: "Lena Walton swore in the police court that defendant came in her house and hit her over the head with a pistol; that

she did not resist his attempt to arrest her until he struck her with his pistol. Her face was covered with dry, clotted blood at the time. She said she wanted the officers to see what had been done to her. The defendant was present when she testified, and denied the truth of her statements. I do not know whether I have stated all that she testified to or not. I am an attorney-at-law, and she came to see me about being arrested."

The defendant testified: "I am a policeman of the City of Hot Springs, Arkansas. Some time about the first of March, Eliza Johnson came to me and requested me to go down and stop a disturbance at Lena Walton's. I went down in a short while and found Lena and a white man, with whom she was living, in a row. She was on the inside of the house and he was on the outside, and they were cursing and abusing each other. I arrested the man, and told Lena to keep quiet or I would have to arrest her. I started off with the man in charge, and Lena kept cursing and using indecent language. I saw Crosby across the street, and called him over to assist me. I went back to the house to arrest Lena. I left the man in charge of Crosby and went to the back door and demanded admittance, but she would not let me in, and I went to the other door. She tried to close that, and I stuck my foot in it to prevent her from closing it, and forced it open and demanded her arrest. She grabbed an iron poker and tried to strike me with it, but I caught it and took it away from her. She then took a flat-iron to strike me with, but I took that away from her. She then started to get a butcher knife which was lying on the table, and I struck her with my pistol and then grabbed her hands, and I struck her because I was afraid she would cut me with the knife if I did not. She is a large, powerful woman. I was unable to take her alone, and called in Mr. Smith and another man who had come up to the door to assist

me. It was all we three could do to take her out of the house. She fought, kicked and pulled back. We had a great deal of trouble in taking her to the jail.

"The knife was lying on the table. I was nearer the knife than she was. I knew she was trying to get the knife, and struck her to prevent her from getting it. She did not say she was going to get the knife, and did not threaten to cut me. I was afraid she would cut me if she got it. On the way to the jail I cut off her wind. Did this to prevent her from disturbing the people by her loud and boisterous language. The streets were full of people of both sexes, and she was using the most obscene language. When I went to the house I told Lena Walton I demanded her arrest, and in the name and by the authority of the City of Hot Springs I demanded admission."

On motion of the State, the court gave the following instruction:

"If you find from the evidence that the defendant arrested Lena Walton, and while he had her in charge he choked her to prevent her from talking, you will find him guilty of an assault and battery."

The defendant asked for, and the court refused to give, the following instruction:

"If you find from the evidence that the defendant was, at the time the offense is alleged to have been committed by him, a police officer of the City of Hot Springs, and that he had Lena Walton in charge under arrest, and that while she was in his charge she was creating a disturbance by using loud and obscene language, and that defendant was unable to quiet her or stop her except by choking her, then he had a right to use just such a force as was reasonably necessary to stop the disturbance."

At the instance of the defendant, the court gave the following:

"An officer has a right, in making an arrest, to use such force as is necessary to secure the arrest, and if he is assaulted while so doing, he has a right to use such force as is reasonably necessary to protect himself."

The court, on its own motion, gave the following:

"The courts of the country are established to punish violations of the law, and if, while defendant had Lena Walton in custody, she was disturbing the peace by using loud and obscene language, it was his duty to take her before the courts to have her punished, but he had no right to use force to prevent her."

Leatherman & Teague for appellant.

The court admitted improper evidence prejudicial to appellant. 22 Ark. 372; 29 *id.* 17; 33 *id.* 539; 42 *id.* 285.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

An officer is criminally responsible for any excess of force in arresting an offender or detaining him after arrest. 43 Tex. 93; 2 Tex. App. 20; 1 So. Car. 292; 4 Tex. App. 175; 7 Blackf. 74; 35 Me. 472. No unnecessary force or violence should be used in making the arrest. Mansf. Dig. sec. 2006. The improper evidence did not influence the jury, and a judgment should not be reversed except for prejudicial error. Mansf. Dig. sec. 2468; 55 Ark. 342; *ib.* 369; 54 *id.* 4; 51 *id.* 145; *ib.* 132; *Simpson* v. *State*, *ante*, p. 8.

1. Officer not justified in assaulting prisoner.

MANSFIELD, J. We find no error in the court's charge to the jury. The first instruction requested by the defendant declares in effect that a police officer may justify an assault and battery on the ground that it was committed as a means of suppressing disorderly conduct. The request was properly refused.

2. When hearsay evidence prejudicial.

The evidence of J. D. Page, so far as it relates to the testimony of Lena Walton given in a proceeding to which the defendant was not a party, was hearsay, and

the court erred in admitting it. The verdict is amply sustained by competent evidence. But the testimony improperly received contradicted that of the defendant as to some circumstances of the case which the jury were at liberty to consider in mitigation of his punishment if they gave credit to his statement. We cannot therefore say that the court's error was not prejudicial.

Reversed and remanded for a new trial.

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EUREKA SPRINGS v. O'NEAL.

Opinion delivered June 11, 1892.

1. *Keeping a dram-shop—Former conviction.*

Since a city may lawfully provide that each day on which a dram-shop is kept without license shall constitute a separate offense, it follows that, under a valid ordinance containing such a provision, a conviction of keeping a dram-shop on a given day is no bar to a prosecution for keeping it open on a subsequent day where the proof relied upon to sustain the second charge is not the same as was adduced in support of the first.

2. *Continuous offense—Validity of municipal ordinance.*

Under section 767 of Mansf. Dig., which provides that "if a thing prohibited or rendered unlawful (by municipal by-laws or ordinance) is in its nature continuous in respect of time, the fine or penalty for allowing the continuance thereof, in violation of the by-laws or ordinance, shall not exceed $15 for each day that the same may be unlawfully continued," the offense of keeping a dram-shop without license is a continuous one; hence a city ordinance defining that offense cannot provide that each unlawful sale shall constitute a separate violation thereof nor impose a penalty for a continuance of the offense, in excess of $15.

3. *City ordinance void in part—When valid* pro tanto.

A clause in a city ordinance which is invalid because in conflict with a statute will be treated as stricken out if separable from, and not necessary to the efficiency of, the other provisions of the ordinance.

4. *Validity of ordinance—Excessive penalty.*

A city ordinance which imposes for the continuance of an offense

a penalty in excess of the amount prescribed by sec. 767, Mansf. Dig., is not for that reason invalid, since it is also provided by sec. 768, *ib.*, that, in a prosecution under such an ordinance, judgment will be rendered for such an amount only as the act authorizes.

Appeal from Carroll Circuit Court, Western District.

EDWARD S. MCDANIEL, Judge.

An ordinance of the City of Eureka Springs provides that it shall be unlawful for any person to keep a dram-shop or saloon within the city limits without first procuring a license therefor to be issued by the clerk of the city for a stated period, on the payment of a sum fixed by the ordinance. The ordinance also provides that any person violating its provisions shall be punished by a fine of twenty-five dollars for the first offense and fifty dollars for each subsequent offense, and that each sale made without a license shall constitute a separate offense. The appellee was prosecuted before the police judge on two separate informations, charging him with distinct violations of this ordinance. One of these informations charged that the defendant kept a dram-shop on the 24th day of November, 1890, and the other charged a like offense committed on the 25th day of the same month. Having been convicted on the first charge, he pleaded that conviction in bar of the prosecution on the second. But the finding of the police court was against him, and from both convictions he appealed to the circuit court. In the latter court he was again convicted on the first charge, and subsequently interposed the plea of former conviction to the second.

The issue thus formed was tried by the court, without a jury, upon an agreed statement of facts. The agreed statement shows that the defendant kept a dram-shop in the city on the 25th day of November, 1890, and and that he had no license for that month. It also shows that the conviction relied upon to sustain the defendant's

plea was obtained on proof that he kept a saloon on the 24th day of November, 1890. On these facts the court declared the law to be that the defendant could be fined but once for a violation of the ordinance committed within the period for which he should have procured a license. The finding was, therefore, for the defendant, and he was discharged. The city has appealed.

Crump & Watkins for appellant.

The court erred in holding that defendant could be fined but once for said offense committed within the period for which license should have been granted. Mansf. Dig. secs. 751, 765; Horr & Bemis, Municipal Ord. sec. 264; 41 Ark. 456.

The appellee *pro se.*

The ordinance is void. Mansf. Dig. sec. 751; *ib.* 767, 4519; 31 Ark. 462; 2 Bish. Cr. Law (4th ed.), sec. 1137; 12 S. W. Rep. 1015; Whart. Crim. Law (9th ed.), sec. 1508; 1 Dillon, Mun. Corp. (3d ed.), sec. 276, 342.

1. Sufficiency of plea of former conviction of keeping dram-shop.

MANSFIELD, J. The charter of the appellant city confers upon it the power to license dram-shops, and to impose a penalty for keeping them without a license. Mansf. Dig. sec. 751. And it may lawfully provide that each day on which a saloon is thus kept shall constitute a separate offense. *Siloam Springs* v. *Thompson*, 41 Ark. 456. It follows that, under a valid ordinance containing such provision, a conviction for keeping a dram-shop on a given day is no bar to a prosecution for keeping it on a subsequent day, where the proof relied upon to sustain the second charge is not the same adduced in support of the first. Wharton, Cr. Pl. & Pr. secs. 472, 475. It can make no difference that both days are embraced in the period for which the defendant should have procured a license, since the penalty inflicted for the first offense applies to that only, and can afford no protection against a punishment for the second. Horr & Bemis on Municipal Ordinances, sec. 264.

The defendant, however, contends that so much of the ordinance in question here as provides a penalty for each offense after the first is void because it imposes a fine in excess of that permitted by a provision of the incorporation act, and for the additional reason that it undertakes to make each sale constitute a separate offense. The statutory provision referred to is as follows:

"If a thing prohibited or rendered unlawful is, in its nature, continuous in respect to time, the fine or penalty for allowing the continuance thereof, in violation of the * * * ordinance, shall not exceed fifteen dollars for each day the same may be unlawfully continued." Mansf. Dig. sec. 767.

The keeping of a dram-shop is a continuous thing, within the meaning of this provision. And the statute does not intend that each day on which it is unlawfully kept shall constitute more than one offense. As each day may include an indefinite number of sales, the aggregate penalty for which might exceed the maximum punishment the city has the power to inflict for that space of time, the clause of the ordinance making each sale a separate offense is inconsistent with the statute.

3. When city ordinance is valid in part only.

But as that clause is separable from the penalty of the ordinance, and is not necessary to the efficiency of the other provisions, it may be treated as stricken out. *State* v. *Marsh*, 37 Ark. 356; Horr & Bemis on Mun. Ord. sec. 139. With that clause eliminated, the ordinance may be construed as making each day on which it is violated a repetition of the offense it punishes.

4. Ordinance not valid because penalty is excessive.

The objection that by its terms it will still inflict an excessive penalty for each offense after the first is not fatal to its validity; for, by another section of the incorporation act, it is provided that if any ordinance impose a greater fine than the act permits, it shall be lawful, in any prosecution under it, to render judgment for such

amount only as the act authorizes. On this view of the ordinance, we hold that the court's declaration of law was not correct, and that it was error to sustain the defendant's plea.

Reversed and remanded for a new trial.

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BOARD OF IMPROVEMENT v. SCHOOL DISTRICT.

Opinion delivered June 11, 1892.

Assessment for local improvements—Liability of school buildings.

While the Constitution does not exempt school buildings from assessment for local improvements, the statute which provides that all real property within a city, or within a district thereof, may be assessed for local improvements of a public nature (Mansf. Dig. sec. 825) does not contemplate that school property should be assessed.

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Judge.

W. G. Whipple for appellant.

School buildings and grounds are exempt from general or ordinary taxation. Const. art. 16, sec. 5; Mansf. Dig. sec. 5597. But this does not exempt them from local assessment. Const. art. 19, sec. 27; Cooley on Tax. (1st ed.), p. 147; 6 L. R. A. 156; 36 Ind. 338; 10 Am. Rep. 36; Dillon, Mun. Corp. vol. 2, secs. 776–7. Churches, though exempt from general taxation, are liable to local assessment. Cooley, Tax. (1st ed.), p. 458; 36 Ind. 338; 10 Am. Rep. 36; 11 John. 77; Elliott on Roads and Streets, p. 403; Desty on Tax. vol. 1, p. 121; 13 Pa. St. 104; 6 R. I. 235; 2 Mich. 587; 38 Ind. 3; 8 Bush, 508; 6 L. R. A. p. 852–4. Hospitals, asylums, etc., come under the same head. 19 Ohio, p. 110; 50 Mo. 153; 115 Ill. 245; 69 N. Y. 353; 116 Mass. 181; 17 Am. Rep. 153. Also cemeteries. Elliott, Roads, etc. 403; Cooley, Tax. 458; 7 Md. 517; 46 N. Y. 506.

The same doctrine applies to institutions of learning. Elliott, p. 403; Cooley, p. 458; 8 R. I. 474; Desty, Tax. p. 121. A school district is not a municipal corporation, nor in any sense part of the governmental machinery. See 1 Dill. Mun. Corp. secs. 22, 24; Elliott, Roads and Streets, p. 403; 55 Ark. 148; Desty on Tax. vol. 1, p. 121; 26 Mo. 468; 55 Ia. 150; 22 N. E. Rep. 624; 46 Ia. 275; Cooley, Tax. 146.

Morris M. Cohn for appellee.

The property held by school districts is not owned by them, but is held by the city in trust. Mansf. Dig. secs. 825 to 895, 6120, 6269, 6270. In the absence of statutory provisions, the property of a public political body is not subject to assessment or taxation. Mansf. Dig. sec. 835; 13 Ark. 752; 21 *id.* 40; 116 Mass. 189; Cooley, Tax. (1876) 130; 1 DuVall, 295; 31 Ark. 387. School districts are *quasi* public corporations. 38 Ark. 454; 26 Ark. 37; 1 Dill. Mun. Corp. (4th ed.) secs. 24, 25, pp. 43–4, note 3; 43 N. W. Rep. 822; Elliott, Roads and Streets, pp. 403, 404. See cases 94 Ind. 554; 71 N. Y. 498; 116 Mass. 193; 17 Wall. 329; 12 L. R. A. 852. These cases show that public property of the United States, the State, county or the city are not subject to local assessments. See also 17 Wall. 329; 80 N. Y. 302, 306; 42 Pa. 21; 51 Ill. 39, 52; 44 Conn. 360; 26 N. E. Rep. 403; 126 Ind. 261; 26 N. E. Rep. 156.

HEMINGWAY, J. This case involves the question of the liability of a public school house to assessment under the provisions of the digest with reference to "assessing property for local improvements in cities of the first class." Mansf. Dig. sec. 825 *et seq.* The school board contends that the school house is not liable to such assessment, while the board of improvement contends that it is. It is conceded that the improvement district was regularly organized, and that the school house is embraced within it; the contention is that because it is a school

house, belonging to a public school board, it is not liable to the assessment. The claim of exemption is placed: first, upon the fifth section of the sixteenth article of the Constitution of 1874, which provides that "public property, used exclusively for public purposes, churches used as such, cemeteries used exclusively as such, school buildings and apparatus, libraries and grounds used exclusively for school purposes, and buildings and grounds and materials used exclusively for public charity," shall be exempt from taxation; and, second, upon the terms of the act that regulates the assessment of property for local improvements, and describes the property to be assessed simply as "all the real property situated in the district."

We have no difficulty in disposing of the first ground relied upon. The rule established by a consensus of authorities—text writers and adjudged cases—is that the constitutional exemption refers alone to taxes for general purposes of revenue, and has no reference to special taxes or assessments for local improvements. If the case of *Peay* v. *Little Rock*, 32 Ark. 31, is an authority against it, that of *Davis* v. *Gaines*, 48 Ark. 370, is in support of it; and if there be any conflict between these cases, we approve the latter, as right upon principle and in line with the authorities. Cooley, Tax'n, (2d ed.), p. 207, and cases cited.

As to the second ground relied upon to sustain the claim of exemption, we find the authorities divided. The argument in favor of the exemption is that as the statute, in defining the property to be assessed, does not expressly mention public property or include it by any necessary implication, the presumption is that it was not intended to be assessed.

A leading case in support of the contention is *Worcester County* v. *Worcester*, 116 Mass. 193. The question there arose upon the liability of a court house to

assessment by a sewer district. The court held that, although it was not exempt by the statute, which had reference to general taxes only, it was free from taxation; because, being public property, acquired by public funds, managed by public authorities, constituting an instrumentality for the performance of public functions, it was not to be deemed a subject of taxation, either general or special, unless the intent of the legislature to render it so clearly appeared.

In the case of the *City of Atlanta* v. *First Presbyterian Church*, 12 L. R. A. 852, the question of the liability of a church to assessment was presented to the Supreme Court of Georgia. The statute provided that all real estate abutting on the street improved should be assessed, and the contention was that churches were expressly exempted from taxation, and that if the exemption applied to general taxes only, it implied an exemption from special taxes or assessments. The court held that the statutory exemption furnished no immunity from the special taxes, and that there was no implied exemption in favor of churches; but in discussing the latter question Judge Bleckley said: "We can be morally certain that they (the terms of the act providing for the assessment) comprehend more than the legislature intended they should; for they cover, by their letter, public as well as private property, and subject the whole alike to assessment, lien, levy and sale. That the public property of the United States, the State, county or the city was intended to be dealt with thus is so improbable that we can have no hesitation in holding that an implied exception as to all public property can and should be engrafted upon the act by construction."

In the case of the *County Com'rs, etc.*, v. *Maryland Hospital*, 62 Md. 127, the question arose upon the assessment of property held by the Board of Managers of the State Hospital, for street construction. The court said

"that to bind the land of the State in any way that may divest it from the State, or destroy or impair one of its established agencies or means for carrying on its functions, the legislature must unequivocally give its sanction. * * * It is not material whether the State's property may be taken from it by a tax in the nature of assessment for benefits or in some other way. The danger exists of taking that which belongs to and is essential to the State; and it cannot be exposed to this danger without its direct sanction."

A like conclusion has been reached by other courts. *City of Toledo* v. *Board of Education*, 26 N. E. Rep. (O.), 403; *Edgerton* v. *Huntington School Twp.* 126 Ind. 261; *State* v. *Hartford*, 3 Am. & Eng. Corp. Cases, 610.

Although a special tax or assessment is not usually embraced within the meaning of the general term "tax," the rule under which public property is presumed to be exempt from one justifies the presumption as to the other. In speaking of the latter, Judge Cooley says: "Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the legislature in adopting them. Such is the case with property belonging to the State and its municipalities and which is held by them for governmental purposes. All such property is taxable, if the State shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the State

and by all its municipalities for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact." Cooley on Taxation (2d ed.), p. 172.

It is uniformly conceded that this rule is correct when applied to general taxation; the reason sometimes given for it is the improbability that the legislature would levy a tax upon that which results from a tax, and must be replaced by a tax, and which is used for governmental purposes; another reason is found in the rule of statutory construction which presumes that the legislature never intends to affect or transfer any governmental right or property, unless it expresses its intention to do so in explicit terms or makes the inference irresistible. Whichever be the true reason of the rule, it is well settled; and we think it should apply alike to special, and to general, tax laws.

If it be argued that the reasoning upon which the rule is placed does not apply to special taxes for local improvements, because the levy would fall upon one public body for the benefit of a smaller one, or because the entire school district would pay the tax while the small improvement district must bear the loss from the exemption, the answer is that the same is the case with regard to general taxes. Exemption of the State House and other State institutions relieves every taxable subject in the State from the burden of taxation, but it deprives the particular county or school district in which they are situate of the entire county or school tax; and so the exemption of county property from State taxes benefits the county only, and deprives the entire State of revenue; still, in all such cases, it is held that exemption is implied wherever liability is not expressed or necessarily implied. If the disparity of burden and benefit does not prevent the operation of the rule as to general taxes, we see no reason why it should as to

special assessments. See Endlich on Int. Stat. secs. 161–3; Sedg. on Const. Stat. pp. 28, 337, 521; Suth. Stat. Const. p. 421; *Galveston Wharf Co.* v *Galveston*, 63 Tex. 14; *Rochester* v. *Rush*, 80 N. Y. 302; *People* v. *Brooklyn Assessors*, 111 N. Y. 505; *Jones* v. *Tatham*, 20 Penn. State, 398; *Directors of Poor* v. *School Directors*, 42 Penn. State, 21; 2 Dill Mun. Corp. (4th ed.), sec. 773; *People* v. *Doe*, 36 Cal. 220; *West Hartford* v. *Board*, 44 Conn. 360.

It is argued that, upon the authorities, exemptions of public property from local assessments is denied, and cases to sustain the argument are to be found, decided by high and learned courts. See *St. Louis Public School* v. *St. Louis*, 26 Mo. 468; *Sioux City* v. *School District*, 55 Ia. 150; *McLean County* v. *Bloomington*, 106 Ill. 209; *Adams County* v. *Quincy*, 130 Ill. 566.

But in our opinion they are based upon error. The reason upon which they rest, as stated by the Supreme Court of Iowa, is that "taxation is the rule and exemption the exception," and that statutes under which exceptions are claimed must be strictly construed. To sustain this, Cooley is cited. The same reason is given by the Supreme Court of Illinois, and Dillon is cited. Both courts seem to have overlooked the fact that the authors in the citations made were considering the subject with reference to private property, and had stated the rule with reference to public property to be that exemptions would be implied unless otherwise expressed. Cooley on Tax'n (2d ed.), p. 172; 2 Dill. Mun. Corp. (4th ed.), sec. 743.

It is argued that even if public property is exempt, the exemption does not extend to the property of public school districts, inasmuch as they are not, strictly speaking, municipal corporations, and education is not a governmental function. The Constitution provides that the State shall ever maintain free public schools, and in per-

forming this duty it exercises a function strictly public and governmental. It created school districts and imposed upon them in part this duty, and in order to discharge it they own school houses. They have no other duty than to perform for the State this public function, and only that they may do it is the house held. The State may abolish them, take the property, and undertake directly or through other agencies this public function. The means of controlling the property would thereby be changed, but its use would be unchanged; and there is nothing in the policy of the law to exempt the property while held and controlled by the State, which would deny the exemption while held by the State's agent and used in the performance of its duties. *Green* v. *U. S.* 9 Wall. 655, and authorities above cited.

There is nothing in the act to require the inference that it was intended to embrace public property held by the Government, the State or any of the State's subordinate agencies and used for public purposes. It could not include the first, and this the legislature no doubt knew; but there is as much reason to suppose that it intended to include the property of the Government as that of the State. An exception must be implied as to the property of the Government; and as no appropriate remedy is provided for collecting sums due from the State or any of its agencies, there is no inference that the legislature intended to include such property, and the presumption is that it was to be exempted.

Affirmed.

COCKRILL, C. J., dissenting. I do not concur in the court's judgment in this case, and do not think that the authorities relied upon sustain it. Nor does it seem to me that there is a division in the express adjudications on the question involved.

The principle which underlies the difference between a tax for general benefits and a special assessment for

the payment of local improvements, recognized in the opinion, should in my judgment resolve the present question against the school district. The former is recognized by the authorities as a continuing burden that must be submitted to for the public good, while the latter is in the nature of a payment for a direct and immediate local benefit—*a quid pro quo*, as much as the consideration is which is agreed to be paid for the purchase of any other benefit or improvement. It is a principle of natural equity that one who enjoys a benefit shall pay for it. When the improvement is made in accordance with the statute, this moral obligation becomes a legal one, unless the exemption is found in the written law. No valid reason exists why the State, the county, the city or the school districts should not pay for the benefits derived by them, the same as other property owners. *Hassan* v. *Rochester*, 67 N. Y. 528, 535.

There is no presumption that the legislature intended to violate a principle of natural equity. It may do so when not inhibited by the Constitution, but justice to a co-ordinate department should impel us to establish the rule that inclusion and not exemption will be presumed when the act is silent in cases like this, because the legislature is presumed to intend to act fairly.

The language of the act under consideration is broad enough to include public property, and the only plausible reason, it seems to me, that is given for exempting it is that a governmental agency will be lost or impaired by subjecting the property of the State, county, etc., to sale to satisfy the claim. But a complete answer to that argument is that it is not necessary to resort to that remedy. The property need not be sold. No property used by a city, county or school district in furthering the design of the origin of the corporation can be sold to satisfy a debt; but it has never been considered that that circumstance was a prohibition against liability.

On the contrary, such corporations are constantly compelled to pay their legal obligations without a sale of the public property owned by them.

The cases cited by the court to sustain its judgment go no further than to hold that property such as that in question cannot be sold, and they do not, therefore, reach the question in the case.

Thus the case of *State* v. *Hartford*, 3 Am. & Eng. Corp. Cases, 610, and that of *County Commissioners* v. *Maryland Hospital*, 62 Md. 127, were both attempts to sell the State's property which was used for governmental purposes, to pay for a local improvement; and the efforts failed because the sale was not authorized. The case of *Worcester County* v. *Worcester*, 116 Mass. 193, was a like effort to deprive the county of its court house and jail, and met with a like fate.

The case of *Edgerton* v. *Huntington School Township*, 126 Ind. 261, does not seem to bear upon the question; and that of *Toledo* v. *Board of Education*, 26 N. E. Rep. 403, does not sustain the point to which it is cited by the court.

In the first of the two cases last cited, the court decided only that lands granted by Congress to the State for school purposes could not be subjected to direct or indirect taxation, and that for that reason the legislature had no *power* to subject them to assessment for local improvement. The court in that case relies upon a similar case in Illinois, but the Supreme Court of the latter State had no trouble in reconciling it with the opposite of the rule it is now cited to sustain. The question of the power of the legislature of this State to subject the land in suit to assessment for local improvement is conceded.

The case of *Toledo* v. *Board of Education* is meagerly reported, and the opinion throws no light on the question at issue. It is there adjudicated, however,

that the city, in which the school property which abutted the local improvement was situated, should pay the assessment, thereby relieving the other abutting owners of the burden of paying the school property's *pro rata*. The city, I take it, was co-extensive with the school district, while the improvement district comprised but one of a large number of streets. The court, therefore, practically reached the conclusion contended for by the Improvement Board in this case. The case may then be said to sustain the board's position.

Confining the language of the other three cases to the facts before the courts determining them, the only rule that can legitimately be deduced from them is that public property held for governmental purposes cannot be *sold* to pay for local improvements unless the sale is expressly authorized; and that general language in a statute will not be deemed to be intended to change the law and authorize the sale of such property.

To that rule I fully assent. It is in accord with the Illinois decisions cited by the court as opposed to the conclusion reached in it, and it does not militate against the liability of the school district to be enforced otherwise than by sale of its property, as the Illinois opinions explain. All that relates to the subject in the Georgia case cited is confessedly *obiter*. The authority of Dillon and of Cooley is invoked in the opinion in this case, but it is not and cannot be claimed that either has lent the weight of his name to maintain the judgment.

It is true the statute creates no remedy except by sale of the property improved. But when once it is established that there is no intention to exempt the school district from liability, the courts will devise a remedy if the legislature has provided none, for a right never fails for lack of a remedy. The Illinois law is the same as ours in that respect, and the question is satis-

factorily answered in *McLean County* v. *Bloomington*, 106 Ill. 209, and cases there cited.

There is nothing in any of the cases cited by the court to militate against the doctrine that the courts will devise a remedy in such a case. The first two cases, as I have before said, were against the property of the State. As against the State the courts are powerless, for the suitor can have no remedy against the State unless it is expressly provided by the written law. The moral obligation of the State to contribute its *pro rata* of the payment due remains nevertheless, and the collection fails only because the courts are without power as against the State. *Hassan* v. *Rochester*, 67 N. Y. *sup.*

The case in the 116 Mass. was a proceeding by certiorari to quash the illegal levy by which it was sought to divest the county of the title to its court house. In such cases there is no discretion in the court except to grant or deny the writ. Consequently no other remedy could have been granted by the court in that case.

The doctrine that the intention to exempt public property from taxation will be presumed because it is not probable that the public will tax itself to raise money to pay over to itself, is manifestly inapplicable to the case of an improvement board. The local improvement board is not the public. It is not a municipality, or a part of the governmental function; it is only an agency of the property holders for the purpose of making the required improvement and collecting the assessments to pay for it. *Fitzgerald* v. *Walker*, 55 Ark. 148; *Pine Bluff Water Co.* v. *Sewer District*, *ante*, p. 205. It is a small part only of the school district, and to collect a tax from the whole city, (which is the school district), to pay for improving the street in front of the school would not be a case of the public taxing itself to repay itself, any more than if the tax was collected from the public to pay the contractor who built the school

house on the school ground. It would be just as convincing to argue that no tax should be collected from the contractor's property, because it must be repaid to him.

But, in addition to all this, there is another view of the subject which I think ought not to be passed over without consideration.

The Constitution recognizes the difference between a tax and a local assessment, and points out the exemptions intended to operate against the first (Art. 16, sec. 5), but makes no exemption of liability to pay for the benefit derived from the local improvement. Art. 19, sec. 27. Both sections are in the same instrument, and were adopted at the same time. Is it not fair to presume that as the framers made the exemptions in one case and made none in the other, they intended no exemptions which they did not express? *McLean County* v. *Bloomington*, 106 Ill. *sup.*; *Adams County* v. *Quincy*, 130 *id.* 566; *Sioux City* v. *School District*, 55 Iowa, 150; *St. Louis Public Schools* v. *St. Louis*, 26 Mo. 468.

Moreover, the command of that instrument is that assessments for local improvements shall be uniform. Where a part is exempt, uniformity is destroyed. *Davis* v. *Gaines*, 48 Ark. 370; *Monticello* v. *Banks*, *ib.* 251. When the Constitution has said that the assessment shall be uniform, by what rule of construction shall the court say it shall not be?

I think the judgment should be in favor of the Improvement Board.

RICHARDSON *v.* STATE.

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Opinion delivered June 18, 1892.

Criminal law—Former conviction in municipal court.

The act of March 30, 1891, section 1, authorizes cities and towns to prescribe the same penalties for violations of its ordinances as are prescribed for similar offenses against the State; section 3, *ib.*, provides that a conviction before any police or mayor's court shall be a bar to further prosecution before any justice of the peace for such offense. *Held*, that a conviction in a mayor's court of a violation of a town ordinance will bar a prosecution for the same offense before a justice of the peace, although the town has not prescribed the same penalty for such violation as is prescribed for a similar offense against the State.

Appeal from Dallas Circuit Court.

CARROLL D. WOOD, Judge.

Richardson has appealed from a conviction of the offense of gaming. The cause was tried before the circuit court, sitting as a jury, upon the following agreed statement of facts, viz:

"It is agreed that the defendant, Jim Richardson, did, in the town of Fordyce, Dallas county, Arkansas, on the 16th day of May, 1891, play a game of hazard or skill with dice, called 'craps,' and bet money thereon, and that, on the 6th day of June, 1891, he went before the mayor of the town of Fordyce and pleaded guilty to said charge, and was fined five dollars and costs, and the said fine and costs were paid; that said plea before the mayor was in all respects regular; that, on the 26th day of August, 1891, he was tried before J. C. Hillman, a justice of the peace of Fordyce township, Dallas county, Arkansas, for the same offense, and convicted and fined ten dollars; that said trial and conviction before the said Hillman was in all respects regular and in accordance with law, from which judgment the defendant appealed to this court. It is agreed that the defendant pleaded

former conviction by the mayor when on trial before the justice of the peace. It is further agreed that the town of Fordyce had not prescribed the same penalty for gaming for the violation of the ordinance of said town, as is prescribed for similar offense against the State laws by the statutes of the State, as provided by the acts of the legislature of Arkansas for 1891, page 97, approved the 30th day of March, 1891."

The circuit court overruled defendant's plea of former conviction, and, upon his declining to answer further, judgment was rendered against him imposing a fine of ten dollars, the smallest fine allowed by sec. 1835 of Mansf. Dig.

Thornton & Smead for appellant.

It was not the intention of the legislature that the act should be inoperative until the city council should see proper to exercise the power conferred by sec. 1. Section 3 makes a conviction before the mayor a bar, whether the council has acted or not. For construction of acts, see 3 Ark. 285; 13 *id.* 58; Bacon, Ab. 1, 5, 10; 3 Ark. 513. The sections are independent of each other, and either of them can stand alone. It was intended to exempt a man from more than one trial for the same offense.

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

1. The conviction before the mayor was had on the information of the offender himself and therefore was no bar. 32 Ark. 722.

2. The 3d section is dependent upon the first. The act should be construed as a whole.

COCKRILL, C. J. The first section of the act of March 30, 1891, confers upon municipal corporations the power to prescribe the same penalties for the violation of an ordinance as the statute prescribes as a punishment for the same offense against the state. Acts 1891, p. 97. Prior to that enactment a municipal corporation had no

power to impose a fine to exceed twenty-five dollars for violation of an ordinance. The statute therefore enlarged the power.

The third section of the act is as follows: "Whenever any party shall have been convicted before any police or mayor's court in any city or town in this State, or before any justice of the peace, said conviction shall be a bar to further prosecution before any mayor's or police court or justice of the peace for such offense, or for any misdemeanor embraced in the act committed."

It is argued that the latter section has effect only where the municipal ordinance imposes the same fine as the statute. It may be that the legislature presumed that the municipalities would hasten to make their ordinances to conform to the State law as to the penalties imposed, inasmuch as the second section of the act permits them to appropriate to their own use all fines raised from the violation of ordinances; but the legislature has not seen fit to make such action a condition precedent to to the operation of the third section. There is nothing in the act to indicate such intention. The third section has full force, whether the municipality avails itself of the enlarged power conferred by the first or not.

2. A conviction before the mayor's court and the infliction of the smaller fine, on the information of the offender or under other circumstances which show the intention merely to elude prosecution by the State, would be no bar to an indictment for the same offense. *Bradley* v. *State*, 32 Ark. 722. But the agreed statement of facts in this case precludes the inference that the fine was collusively imposed. We understand it to mean that the proceedings before the mayor were regular, which precludes the idea of a self-imposed fine or a collusive prosecution. There is nothing in the record of the proceedings of the mayor's court inconsistent with the agreed statement.

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

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ARKADELPHIA LUMBER CO. *v.* ARKADELPHIA.

Opinion delivered June 18, 1892.

1. *Municipal ordinance—Printed copy.*

   A printed copy of a city ordinance published by authority of the city is *prima facie* evidence of the legal existence of the ordinance and of its contents.

2. *License fee—Fixed by resolution.*

   Under an ordinance authorizing the city council to fix a license fee as it shall from time to time deem proper, it may be fixed by a mere resolution.

3. *Right of city to regulate ferries.*

   Under the power to regulate ferries within its corporate limits a city has power, where only one bank of a river is within its limits, to regulate all ferries operated from such bank.

4. *Ferry license—Reasonableness.*

   A license fee of twenty-five dollars for the privilege of keeping a ferry within the corporate limits of a city is a reasonable regulation, and not a tax.

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

J. H. Crawford for appellant.

1. The so-called ordinance was not passed in the manner prescribed by law. Mansf. Dig. sec. 924; 66 Iowa, 688; 59 *id.* 26; 38 Kas. 573; 1 Dillon, Mun. Corp. (4th ed.), sec. 51.

2. The river and ferry are outside the jurisdiction of the city. 53 Ark. 314; 25 Am. L. Rev. 599; Mansf. Dig. sec. 758; Gantt's Dig. sec. 3241; 11 Wall. 423; 1 Dill. Mun. Corp. (4th ed.), sec. 788; 54 Ark. 509.

3. The tax was for revenue only, and not a license fee. 42 N. J. Law, 368; Mansf. Dig. sec. 758; 7 So. Rep. 885–892; 1 Dill. Mun. Corp. sec. 368; 34 Ark. 603;

25 Am. L. Rev. 606–8; 22 Fed. Rep. 701; 72 Md. 548; 91 N. C. 554; 52 Ark. 301; 43 N. J. Law, 175; 20 Atl. Rep. 179; 42 Ark. 82.

The appellee *pro se.*

1. The landing on the west bank of the river is within the corporate limits, and therefore came under the city's power of municipal regulation.

2. The fee is not a tax, nor was it levied solely for revenue. Twenty-five dollars will be presumed a reasonable fee, unless the contrary appears. 52 Ark. 30. It was the city's duty to keep an inspection of the ferry's condition, banks, landing and boats. 9 Law. Rep. An. 69. Before courts will interfere and declare a license fee unjust and unreasonable, a flagrant case of excessive and oppressive abuse of power in levying the tax must be shown.

3. The council could accomplish its purpose by resolution as well as by ordinance. 14 Law. Rep. An. 268; 28 N. E. Rep. 849.

BATTLE, J. Appellant was charged with, and convicted of, a violation of an ordinance of the city of Arkadelphia requiring persons keeping public ferries in that city to pay a license fee of twenty-five dollars for the year 1891.

The ordinance violated provides that "the city council shall, at their regular meeting in January of each year, or as soon thereafter as practicable, levy a tax for the exercise of the following privileges, and such others as they may from time to time deem proper to tax, to-wit: Alleys, ten-pins, nine-pin or any other pin alleys, * * * ferry over Ouachita river. * * *" It also provides that any one exercising the privileges therein mentioned, without first having obtained a license therefor, shall, on conviction, be fined in any sum not less than five nor more than twenty-five dollars for each separate offense. The city council, by resolution,

resolved "that, from and after the 10th day of June, 1891, the license fee required from all public ferries within the limits of said city" should "be reduced from seventy-five to twenty-five dollars for the year 1891."

1. Municipal ordinance proved by printed copy.

It is first contended in behalf of appellant that the ordinance was not passed by the city council in the manner prescribed by law. But this does not appear from the evidence. A printed copy of the ordinance published by authority of the city was introduced as evidence in the trial. This was at least *prima facie* evidence of the legal existence of the ordinance and its contents. The burden was on the defendant to overcome this evidence (*Van Buren* v. *Wells*, 53 Ark. 368, 377), and it failed to do so."

2. License fee may be fixed by resolution.

The ordinance requiring the license authorizes the council to fix the license fee as it from time to time should deem proper. In pursuance of this authority the council had the right to fix the fee for 1891 by resolution. *Burlington* v. *Putnam Ins. Co.* 31 Iowa, 102, 106.

3. When city may regulate ferries.

Appellant contends that its ferry is not subject to police regulation by the City of Arkadelphia, because the Ouachita river, where it is established, is not within its territorial limits. But it does not follow that this contention is correct because the reason given for it may be true. The evidence shows that the river is a navigable stream, and that its west bank is within the corporate limits of the city. The right to operate a ferry over it is dependent on and incident to the ownership of the banks on which the landing is made, and not on the possession or jurisdiction of the water of the stream. Mansfield's Digest, secs. 3309, 3312. Having the right to regulate ferries within its corporate limits, it is obvious that the city has the power to require the owner of so much of the western bank of the river as is within its boundaries to pay a license fee before he can operate a ferry from such bank by reason of his ownership, and to

regulate the same. But it is evident that its ordinances regulating ferries could be successfully evaded by procuring a license to run a ferry from the bank outside its limits, and that the right to regulate would be of no service to the city unless it also has the right to regulate ferries operated from the opposite bank. Without the last mentioned right, the power to regulate which was delegated to the city would be ineffectual. But this can not be. The legislature, in granting to the city the power to regulate, vested it with all other authority necessary to enable it to successfully exercise the power granted, and thereby gave it the right to regulate the ferries operated from either bank.

4. Reasonableness of ferry license.

It is next insisted that the twenty-five dollars required to be paid for the license was a tax. The object of the ordinances of the city upon the subject of ferries is apparent. They provide, among other things, that, before any person shall exercise the privilege of keeping a public ferry over the Ouachita river in the said city, he shall first procure a license for so doing, and shall give bond with approved security, conditioned for the faithful performance of the duties of a ferryman and for the payment of all damages that may accrue through his negligence in the discharge of such duties ; and provide that he shall keep a boat or boats in good repair, suitable for the Ouachita river, and ferry over and give due and ready attendance to passengers on all occasions, and shall give the like attention when wagons and other property are to be transported, and failing to do this shall forfeit and pay to the party delayed or injured the sum of five dollars, to be recovered by an action before the mayor, with all costs that may accrue, and that any person or persons moving, taking away or in any manner injuring any ferry boat or skiff belonging to or kept by any public ferryman for transporting persons or their property over the Ouachita river within the limits of said city shall be

deemed guilty of a misdemeanor, and, on a conviction had, be fined in any sum not less than ten nor more than twenty-five dollars. Obviously their intention is to regulate. To accomplish this object a license is required. Before it can be issued twenty-five dollars must be paid, not as a tax, as denominated in one of the sections of the ordinances, but as a price for the ferry franchise or privilege. They prohibit any one from exercising the ferry privilege until a license be granted, and require the twenty-five dollars to be paid, and a bond to perform the duties of ferryman, with approved security, to be executed, before the license can be granted, thereby showing that the twenty-five dollars are exacted as the price of the privilege, and that the license is required as a means of regulating. This being true, the twenty-five dollars is a license fee, and not a tax. *Chilvers* v. *People*, 11 Mich. 43.

But municipal corporations have no right to use the power to license and regulate as a means of increasing their revenues. They may require a fee sufficient to cover the expense of issuing the license and all other expenses which may be incurred in the enforcement of such police inspection or superintendence as may be lawfully exercised over the business. If the fee is not plainly unreasonable, the courts ought not to interfere with it. In view of the right of the City of Arkadelphia to fix the fee for a ferry license sufficiently high to cover all expenses which may be incurred in the enforcement of all the police regulations which it may lawfully enforce as to ferries, it does not appear that the fee required in this case was unreasonable. *City of Fayetteville* v. *Carter*, 52 Ark. 301.

Judgment affirmed.

HEMINGWAY, J., dissenting. I am of the opinion that the judgment should be reversed.

In the first place, I think the terms of the ordinance clearly disclose that it was designed to levy a tax for the

purpose of revenue, and if so it was confessedly in excess of the city's power.

In the next place, I think that if it be treated as designed to regulate and license, the sum exacted is so out of proportion to the cost of licensing and regulating as to be in law unreasonable and therefore to avoid the ordinance.

NOTE.—The above case is annotated in 39 Am. & Eng. Corp. Cases, 73. (Rep.)

MOORE v. MURRELL.

Opinion delivered June 18, 1892.

Attorney—Authority as to collection of notes.

Where an attorney receives notes, which he afterwards reduces to judgment, with directions "to do with them the best that he can," the meaning of the direction is a question for the jury under all the circumstances of the case, and an instruction that the attorney was authorized to accept articles of property as satisfaction is erroneous.

Appeal from Lonoke Circuit Court.

JOSEPH W. MARTIN, Judge.

W. R. Moore sued George P. Murrell, a nurseryman, upon a judgment upon certain notes for a sum aggregating $1788.71, obtained against him in 1878. The defendant answered that in 1879 he turned over to plaintiff's lawyer fruit trees worth $2100 in full settlement of the judgment. The defendant testified that in 1879 he was insolvent, and that he received letters from S. Brundidge, Jr., plaintiff's attorney, ordering fruit trees in settlement of the judgment obtained against him; that he shipped them in good condition, and that they were worth $2100; that he never heard from Brundidge, although he wrote to him twice about the matter; that he also wrote to plaintiff, who lived at Memphis, Tenn., but got no response.

Brundidge testified as follows:

"Something over ten years ago, while I was reading law, and before I was admitted to practice, the claim of W. R. Moore against G. P. Murrell was placed in my hands for collection by some traveling agent, I think, of W. R. Moore—at least it was some traveling man—with instructions to take it and do the best I could with it, as it was regarded as a bad claim. I instituted suit in the Lonoke circuit court on the Murrell claim, and, not having license to practice, Mr. Coody's name was signed to the complaint as attorney. Afterwards, when I had been licensed to practice and had removed to Jacksonport, learning that Murrell was insolvent, I corresponded with him with a view of adjusting the claim, carrying out my instructions to do the best I could with it. Mr. Murrell wrote me that he was in the fruit tree business, and was unable to pay any money on the claim, but would ship me about four hundred dollars worth of fruit trees. This letter from Murrell has been lost or destroyed. Upon inquiry I learned that a good lot of fruit trees could be disposed of in Jackson county, and I got Mr. I. T. Davis to act as agent for me in disposing of the trees at Newport. Davis made out the order, which I signed, and which is here shown to me. Murrell was instructed by letter to ship trees to Newport, and my name was signed to the letter by Davis. I wrote Murrell, giving him particular instructions how to ship the trees. Davis reported to me that the trees came in bad condition and not enough was realized to pay the freight. I never received anything from Murrell for Moore except those trees. I never had any correspondence with Moore about this claim at any time whatever, and I did not know whether the claim was a note or an account. I do not know who placed the claim in my hand; my best recollection is that it was some traveling agent of W. R. Moore. I think this was some time in 1878, and I do not

know where the party resided. I was not licensed at the time, but I suppose the party thought I would be soon. I don't recollect whether the party advanced any costs or not, but I don't think any costs were ever paid. I think I wrote the complaint and got Mr. Coody to sign it. I do not know how long I had the claim in my possession before I brought suit. My best recollection is that the party authorized me to take judgment, but the only positive instructions I received was to do the best I could. I never saw Murrell about the matter, but my recollection is that I wrote him before suing. I don't think it is possible for me to be mistaken either as to the time when I received the claim, or as to the party from whom I received it. I never had a line in writing from the party from whom I got the claim, either before or after the judgment was taken. I never wrote to W. R. Moore in my life, and never received a letter from him."

The plaintiff testified that he never employed Brundidge, and never authorized him to compromise the judgment; that, about the time this judgment was recovered, plaintiff had a traveling man in Arkansas who had general authority to transact his business, but not to compromise this judgment, nor to authorize any one else to do so.

The court charged the jury in the following language: "A general agent who has the full management and control of his principal's business may appoint other agents and clothe them with such authority as the principal could do." Also that "an agent with the authority to settle a claim according to his own best judgment may make such settlement as he sees fit, and if done honestly and in good faith, the principal would be bound."

Verdict was for defendant. Plaintiff has appealed.

T. C. Trimble and *J. H. Harrod* for appellant.

Unless Brundidge was the *duly authorized agent* of

Moore, there was no evidence whatever to support the verdict, and the instructions were abstract. And there is absolutely no evidence on this point. Until Brundidge's agency was established, it was error to instruct the jury as to the power and authority of a general agent, or as to the effect of a settlement made by such an agent.

S. W. Williams and *Blackwood & Williams* for appellee.

1. When a claim is found in the hands of an attorney, the presumption is that it is rightfully there. 4 Wash. C. C. 511; 58 Tex. 708; 75 Mo. 441.

2. The court's charge as to the power of a general agent to appoint other agents, and that "an agent with the authority to settle a claim according to his own best judgment, may make such settlement as he sees fit, and if done honestly and in good faith, the principal would be bound," was correct. Mechem on Agency, secs. 195-6, 519; Story on Agency, sec. 21; 1 Am & E. Enc. Law, p. 350, and cases in note 2. The presumption is that an agent acts within the scope of his authority. 25 Ark. 219.

HEMINGWAY, J. Can it be said, as matter of law, that when an attorney receives notes, which he afterwards reduces to judgment, with directions "to do with them the best that he can," he is authorized to accept as satisfaction articles of property? The court below charged, in effect, that the law should be so held; and if this was erroneous, the judgment must be reversed.

An attorney is authorized by ordinary employment to prosecute a claim to judgment and satisfaction, but he can take in satisfaction nothing but money, and of it no less than the amount due. If the authority exists in the case stated, it is not because it is among the usual powers of an attorney, but because it was specially conferred in the particular case by the directions given.

What does the direction "do the best you can" with a claim mean? Does it confer the general authority to dispose of the claim as the attorney thinks proper? Or is it an injunction to vigilance and activity in discharging the ordinary duty of an attorney? Or is its meaning variable, depending upon circumstances and the connection in which it is found? The last seems to us all the correct view of the matter. If a doubt is expressed as to the possibility of making a collection, and the response is, "do the best you can," it could hardly be taken to intend more than to enjoin an effort to collect, notwithstanding the poor prospect of success; if, in connection with such doubt, an intention is expressed that property might be obtained in settlement, it might well be intended to authorize such settlement. The direction, standing alone, would not usually disclose the full intention of the client, and to discover such intention resort to the circumstances and connection would be necessary. If the language used, when read in such connection, can be fairly said to show an intention on part of the client to confer such authority, it should be said to exist; but unless such intention be thus fairly deducible, the authority should be denied. The direction, standing alone, means no more than to enjoin an active effort to collect in the ordinary line of an attorney's duty. What it meant in this case is a question of fact for a jury, to be determined as we have indicated; and not a question of law for the court. We conclude that the court erred in its charge upon this point.

Objection is made to another part of the court's charge; but we are of opinion that while it may not be an accurate statement of the law, it is substantially correct in this case. We think that the charge was not abstract, but applicable to the case as made by the evidence.

Whether the attorney was employed by an agent of the plaintiff, and whether the plaintiff received a letter from defendant, notifying him of the settlement with the attorney, which called for an answer, are questions of fact for a jury; and it is only proper for us to say that there was sufficient evidence as to each point to warrant an instruction applicable to it.

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

MILLER LUMBER CO. v. WILSON.

Opinion delivered June 18, 1892.

1. *Estoppel—Admission.*

   An admission will not estop the person making it from showing the truth where it is not shown that the person setting up the estoppel knew of the admission or relied upon it.

2. *Mechanic's lien—Authority of tenant.*

   One who is in possession and control of land has no authority, without the knowledge or consent of the owner, to contract for the erection of a building thereon and thereby create a mechanic's lien.

Appeal from Miller Circuit Court.

CHARLES E. MITCHEL, Judge.

L. A. Byrne for appellant.

Frunk had no interest in the land, and had no authority to charge it with a mechanic's lien. 25 Ark. 490; Mansf. Dig. secs. 4406–7. It was error to give the last clause of the second instruction.

HUGHES, J. The appellee sought to enforce a mechanic's lien upon buildings which he had erected upon land owned at the time of their erection by W. L. Whittaker, who sold the lands afterwards to Jones, Law & McKee, who sold the same to the appellant.

The contracts for the erection of the buildings were made with one Frunk, who was at the time erecting a saw mill upon the land, and was supposed to be the owner of it. There is no evidence that Frunk owned any interest whatever in the land, or that Whittaker, the owner, knew of the contracts for the buildings or the fact that they were being, or had been, erected till after they were erected. Some evidence was introduced on the trial to show that Whittaker had stated in the presence of a witness that he had sold the land to Frunk, but there was no evidence that it was known to Wilson, the appellee, that Whittaker had ever said this, or that this statement of Whittaker influenced Wilson to believe that Frunk owned the land, or that he gave credit to Frunk on the faith of the statement.

At the plaintiff's request, over the objection of the appellant, the court gave instructions two and three, which are as follows:

"2d. If you find from the evidence that, at the time plaintiff did the work and labor sued for herein, the defendant Augustus Frunk was and has been for some time in possession of the lands built upon as the owner or proprietor thereof, and that W. L. Whittaker, from whom defendant purchased, stated that he had sold said land to defendant Frunk, then is W. L. Whittaker estopped from denying ownership in defendant, so far as the lien in this case is concerned.

"3d. If you find that Augustus Frunk was lawfully in possession of the land in controversy in this suit and upon which the buildings were erected, and that he was exercising control of the same, and that while Frunk was in possession he contracted with Wilson for the work for which this suit is brought, then is Frunk the proprietor of said land, within the meaning of the statute giving liens to mechanics and material used in this State."

1. Estoppel by admission.

The appellant saved proper exceptions to the giving of these instructions. The giving of these instructions was error. How could Wilson claim the benefit of an estoppel by reason of a statement that Whittaker made to the effect that he had sold the land to Frunk, unless Wilson knew that the statement had been made by Whittaker and had relied upon it? There is no evidence that this was so.

2. Authority of tenant to create mechanic's lien.

The third instruction assumes that one in lawful possession and control of land is authorized to contract for the erection of buildings upon it. This, as stated, without more, is certainly not the law. In the case, *Rudd* v. *Peters*, 41 Ark. 184, the court said, it does not "follow because one is a trustee, or agent to hold and control property, he is authorized to bind the owner with contracts which may become liens upon it. Such powers must be express, or must be shown to arise within the scope of the agency. An overseer, for instance, is an agent to control a plantation, but he could not bind the real estate by contract, or even its crops, without more authority than arises from his agency."

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

HOGG v. LASTER.

Opinion delivered June 18, 1892.

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Implied contract—Household services.

Plaintiff was left an orphan without means at the age of ten years; and was taken by defendant into his family and fed, clothed and sent to school. During her minority she rendered services for defendant, and continued to do so for three years after she became of age. In an action for the value of her services during these three years, *held*, that although the burden of proof was upon plaintiff to show an implied promise to pay for her services, the jury ought to be instructed that if, under

all the circumstances of the case, including the relation the parties bear to each other, the services were of such a nature as to lead to a reasonable belief that the parties understood that the services would be paid for, they should find an implied promise to that effect.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

S. M. Taylor and *J. W. Crawford* for appellant.

1. Upon the uncontroverted facts in proof plaintiff was not entitled to a verdict.

2. The first instruction for plaintiff is not the law. 33 Ark. 215; 5 Am. Dec. 730; 2 Martin, 269; 14 Wend. 209; Wood on Master and Serv. (2d ed.) secs. 62, 65.

3. The court erred in refusing the fifth and sixth prayers asked by defendant. Wood, M. & S. p. 123; 45 Iowa, 308, and cases *supra*; 13 N. J. Eq. 151; 2 Pars. Cont. (6th ed.) marg. p. 47; 1 Am. Dec. 632; 62 Iowa, 208; 28 *id.* 548; 52 *id.* 733.

HUGHES, J. This is an appeal from a judgment in favor of appellee against the appellant for $200, rendered in a suit in which the appellee claimed that the appellant was indebted to her in the sum of $468 for 39 months' service rendered by her for him. The appellee was left an orphan at about the age of ten years, without means, and at the request of a neighbor was taken by the appellant into his family, fed, clothed and sent to school some and treated well. She rendered services for appellant during her minority, cooking, milking cows, ironing clothes, and doing other household work. After she became of age she continued in the same way, and this suit is brought to recover 39 months' services after she attained her majority.

There was no express contract between her and the appellant that she should be paid for her services. She testifies that she expected pay, but said nothing to appellant about it till she left him. He testified that he had

not expected to pay her, and that he stated to her that he could not do so soon after she became of age, but that she could remain with him if she preferred to do so. He also stated that her board, clothing and medical attention furnished by him had been worth more than her services, and offered to set off their value against her claim. She replied, denying that he told her he could not pay her wages, and denying that she owed him for board, clothing and medical attention.

After the evidence was introduced, the court gave the following instructions to the jury, against the objection of the defendant:

"1. If the jury find from the evidence that the plaintiff performed work and labor for the defendant, then the law implies an obligation on the part of the defendant to pay her for such work and labor unless there was an express contract by which she was to perform such work and labor as a gift or gratuity."

The court refused to give the following instructions asked for by defendant:

"5. One who, having been received in infancy into a family not of kin to her, seeks to recover for services rendered to such family has the burden of proof to show either an express contract or surrounding circumstances from which a contract can be implied, and if it appears that she was received as a child, she must prove an express contract for wages before she can recover, and the mere expectation on the one part to pay and on the other to receive wages, never expressed by the parties to each other, does not constitute an express contract.

"6. One who, having been received in infancy into a family not of kin to her, seeks to recover for services rendered to such family, has the burden of proof to show either an express contract or surrounding circumstances from which a contract can be implied, and if it appears

that she was received as a child, she must prove an expressed contract for wages before she can recover."

The jury gave a verdict for the plaintiff in the sum of $200.

Defendant filed a motion for a new trial for the following causes:

1. The court erred in giving the first instruction asked for by the plaintiff.

2. The court erred in refusing to give the fifth instruction asked for by defendant.

3. The court erred in refusing to give the sixth instruction asked for by defendant.

4. The verdict of the jury was contrary to the evidence.

5. The verdict of the jury was contrary to the law.

6. The pleadings and evidence in the case do not warrant the verdict and judgment in favor of the plaintiff.

The motion for a new trial was overruled by the court.

Exceptions were saved, and all evidence brought upon record by bill of exceptions.

"Although the burden of proof is upon the plaintiff, as in other cases, to show an implied promise, the jury ought to be instructed, that if, under all the circumstances of the case, the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made for them, then the jury should find an implied promise, and a *quantum meruit;* but if otherwise, then they should find that there was no implied promise." *Guild* v. *Guild*, 15 Pick. 131; *Tyler* v. *Burrington*, 39 Wis. 376; *Pritchard* v. *Pritchard*, 69 Wis. 373. "In all such cases, it is a matter for the jury to determine whether the services were rendered under an implied contract for wages or not." *Hart* v. *Hart's Adm'r*, 41 Mo. 445. In such an inquiry it is proper to consider the relation

the parties bear to each other and other matters which may affect it.

It follows therefore that neither the instruction given, nor those refused, state the law.

For error in giving instruction number one, the judgment is reversed, and the cause is remanded for a new trial.

GREEN v. STATE.

Opinion delivered June 18, 1892.

Burglary—Butcher's shop.

An indictment for burglary committed in breaking and entering a "butcher's shop" is sustained by evidence that the house entered was used exclusively for the sale of meats, though no animals were slaughtered or dressed there.

Error to Saline Circuit Court.

A. M. DUFFIE, Judge.

A. Curl, for appellant.

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

HUGHES, J. The appellant was indicted and convicted of burglary in breaking and entering a store-house used as a butcher's shop. The evidence showed that the house which he entered was used exclusively as a place for the sale of breakfast bacon, ham, sausage and fresh meats; that no animals of any kind, the flesh of which were exposed in the shop, were slaughtered or dressed by the proprietor; that was all done by other parties elsewhere. The court was asked to give to the jury the following instruction, which was refused, the refusal to give which is alone insisted upon as error: "A butcher's shop or butchery is a place where animals are slaughtered and dressed for market."

In *Doe* v. *Spry*, 1 B. & Ald. 617, it was held that it was sufficient, if the defendant sold the flesh, to consti-

tute him a butcher; and it was said: "There are in many markets butcher's shops where no animal ever is or can be slaughtered, and yet without doubt the persons occupying them carry on the trade of butchers there." The word "butcher" may and often does include the person who cuts up and sells meat. Judicial Interpretation of Common Words and Phrases (by Irving Browne,) p. 57. The instruction was properly refused.

Affirmed.

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RAILWAY COMPANY *v.* ROBERTS.

Opinion delivered June 18, 1892.

1. *Railway—Negligent killing—Sufficiency of evidence.*

   In an action against a railway company for damages for a negligent killing, a finding of the jury that defendant was guilty of negligence is sustained by evidence that defendant's trainmen carelessly permitted steam to escape from its engine, whereby a team driven along the highway became frightened and ran away, and deceased was thrown out of his wagon and killed by defendant's engine at a crossing on defendant's track.

2. *Negligence—Proximate cause.*

   Where all the evidence showed that the proximate cause of the death was the frightening of the team, it was error to direct a verdict for plaintiff if the jury found that the injury to his intestate was caused by defendant's negligence either in blowing off steam or in failing to keep the crossing in repair.

Appeal from Clay Circuit Court, Western District. J. E. RIDDICK, Judge.

This was a suit of W. J. Roberts, as administrator, for the benefit of the estate of Daniel Roberts, who was alleged to have been killed by the negligence of defendant's trainmen.

Briefly, the facts were as follows: On October 4, 1888, Roberts and Lewis started from the town of Corning, going north. They were driving a two-mule team. For some 600 yards the public road ran sixty-five or

seventy feet west of defendant's track and parallel with it. Then it crossed the track. After deceased and his companion had driven about 200 yards north, a north bound train, going twenty-five or thirty miles an hour, came in sight. As it approached, the team became frightened and began to run. There was evidence from which the jury might have inferred that the mules were frightened by escape of steam; that, although the trainmen saw the team was frightened, they continued to blow their whistle and to permit the steam to escape from the time the mules took fright until the accident occurred, and that no effort was made to check the speed of the train. The driver lost all control of the mules; they ran on until they reached the crossing, when they turned and attempted to cross the track just in front of the approaching engine. The wagon crossed with slight injury, but Roberts was jolted out on the track. As he fell upon the ground, he was instantly struck by the pilot beam of the engine, and was so badly injured that he died immediately. There was testimony that the crossing was defective; also that a wagon could have been driven over it safely at an ordinary rate of speed.

The defendant requested the court to instruct the jury as follows: "6. If the jury find from the evidence that the engineer of defendant's train was, at the time of the accident, on the lookout, and saw the deceased just before and as he started across the track, and immediately used every effort in his power and control to check his train, but failed because of the nearness of his engine to the deceased, the court instructs you that there was no negligence on the part of the defendant, and you will find for the defendant."

The court modified the instruction asked by adding: "Unless you find that the accident and injury was directly caused by the engineer negligently blowing off

steam or by the negligence of defendant in not keeping the crossing in repair."

The jury returned a verdict for plaintiff in the sum of $1000.

Dodge & Johnson for appellant.

1. Neither the frightening of the team nor the defective track was the proximate cause of the accident, but running the engine over him after the deceased fell upon the track, which could not be avoided. 139 U. S. 237; 10 Wall. 176; 20 Pa. St. 171; 13 Gray, 481; 115 Mass. 304; 30 Iowa, 176.

2. The railroad cannot be held responsible for sounding its whistle in accordance with law. Mansf. Dig. sec. 5478; 53 Ark. 203; 16 Atl. Rep. 235; 114 Mass. 351. See also 14 S. W. Rep. 1067; 12 *id.* 953; 46 Ark. 523; 69 Me. 208; 98 N. C. 247.

3. The court erred in its charge to the jury, 16 S. W. Rep. 169; 49 Ark. 264.

4. Also in refusing to declare the law as asked by defendant. 125 Mass. 91; *ib.* 93; 52 Tex. 587; 18 Iowa, 280, 380; 36 Iowa, 462.

F. G. Taylor for appellee.

1. The proximate cause of the injury was the combined effect of negligently frightening the team, a defective crossing and negligence in running over deceased. 53 Ark. 201; 9 S. W. Rep. 577. The team was frightened by escaping steam, which is negligence. Wood, Railway Law, sec. 324.

2. If the defective condition of the crossing caused the accident, the railroad company is liable. 52 Ark. 368.

3. The verdict is amply sustained by the evidence, and there was no prejudicial error in the instructions.

1. Negligence a question of fact.

MANSFIELD, J. Whether the injury complained of resulted from negligence on the part of the defendant was, under the circumstances of the case, a question for the jury. The evidence is sufficient to sustain their find-

ing, and the damages recovered do not appear to us to be excessive. *Penn. R. Co.* v. *Barnett*, 59 Pa. St. 259; *Phila. etc. R. Co.* v. *Killips*, 88 Pa. St. 405; *Railway* v. *Hall*, 53 Ark. 7.

2. What is proximate cause of killing.

The court's second, third, eleventh and thirteenth instructions were correct; and we discover no objection to the twelfth that is not merely formal. The fourth and fifth instructions, and so much of that given by the court upon its own motion and numbered six as related to the road-crossing, were misleading. But the error in these three instructions was probably rendered harmless by the last clause of the sixth. If there was error in any part of the tenth instruction, it was not unfavorable to the defendant. And so far as the instructions refused were proper, they are covered substantially by the court's charge. But, in giving the sixth instruction requested by the defendant with the change made by the court, an error was committed which we cannot treat as otherwise than prejudicial to the defendant. The effect of that instruction was to direct a verdict for the plaintiff if the jury found that the injury to his intestate was caused by the defendant's negligence either in blowing off steam or in failing to keep the crossing in repair. It made the defendant's liability the same in either case; and the plaintiff was thus allowed to recover if the jury found there was negligence as to the crossing, although they were unable to find that there was any whatever in frightening the team. But all the evidence shows that the proximate cause of the injury was the frightening of the team. *Billman* v. *Railway Co.* 76 Ind. 166. If that was due to the company's negligence, it was liable for all the consequences resulting directly from it; otherwise it was liable for none of them. The deceased was not injured in driving or attempting to drive over the crossing. He was carried there involuntarily by the frightened team, and the defendant was not responsible

for his being there if its negligence was not the cause of the fright to the team. The question as to the company's liability would not be changed if it were shown that the condition of the crossing was perfect, and that the deceased would have been carried safely over it but for a defect in the wagon. The condition of the crossing was not, therefore, material to the issue. And yet the instruction in question permitted the jury to make it decisive of the cause.

For this error the judgment must be reversed, and a new trial directed.

ASHLEY v. LITTLE ROCK.

Opinion delivered June 18, 1892.

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1. *Constitutional law—Jury trial.*

   The constitution secures the right of trial by jury in all cases in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized and equitable remedies administered.

2. *Specific performance—Parties.*

   In a suit in equity to compel specific performance of a contract for the conveyance of land adverse claimants in possession cannot be made parties unless their claims be in some manner connected with the plaintiff's equity, or with the title of the vendor in the contract.

3. *Jurisdiction of equity—Recovery of land.*

   The equitable owner of land cannot sue an adverse claimant in equity to recover possession, although his remedy at law against such claimant would be barred before the legal title could be procured from the trustee who holds the legal title, where it does not appear that such trustee has refused to allow his name to be used in a suit at law, and no excuse is shown for not having applied to equity for the legal title.

4. *Accounting—Multiplicity of suits.*

   Equity will not assume jurisdiction of a suit to try title and recover possession of land, upon the ground that it is necessary to take an accounting of rents and profits, since a court of law

is competent to administer that relief; nor upon the ground that there are numerous adverse claimants in possession of different portions of the land.

5. *Equity jurisdiction—Cloud on title—Partition.*

Equity has no jurisdiction of a suit against an adverse claimant in possession of land, to remove a cloud on the title, nor to decree partition thereof.

6. *When equity has jurisdiction to try title.*

It is only where the powers of a court of equity have been called into action by the main purpose of the bill, and where the legal title and possession are incidental only to the relief sought, that a court of equity will try title to land and decree possession.

7. *Practice—Dismissal.*

A dismissal of a complaint as to certain defendants for want of jurisdiction should be without prejudice to bring another action.

8. *Code pleading—Mistake as to relief sought.*

Since public policy forbids disturbance of possession of a railway's track, though acquired without right, a complaint which alleges that a railway company without right took possession of and laid its track upon plaintiff's land and prays for recovery of possession thereof will, under the code procedure, be treated on demurrer as a suit to enforce plaintiff's lien for compensation for the unlawful taking; if the complaint states facts sufficient to constitute a cause of action, it should not be dismissed because plaintiff was mistaken in the relief asked.

9. *Specific performance—Multifariousness.*

A complaint by a vendee against a vendor of land asking for specific performance of a contract to convey an undivided half interest therein is not multifarious in seeking also to enforce a lien for compensation against a railway company which had appropriated a portion of the land without authority, since the enforcement of the lien is specific performance of the contract as to that portion of the land, and the railway company is interested in having all claimants of the land made parties to the suit in order that it may get a clear title when the compensation is settled.

Appeal from Pulaski Chancery Court.
DAVID W. CARROLL, Chancellor.

Sanders & Watkins for the Ashley heirs.

Upon the facts stated, a clear case of equitable jurisdiction was made, and the bill was not subject to

the objection of misjoinder of parties or causes of action. Story, Eq. Pl. pp. 271, 284; Pom. Eq. Jur. pp. 243 to 274; 4 Ark. 340; 11 *id.* 720; 20 *id.* 25; 2 How. U. S. 619; 17 N. Y. 592. The relief sought is purely equitable. 14 Ark. 345; 29 *id.* 612; 37 *id.* 286; 30 *id.* 278; 44 *id.* 436.

Dodge & Johnson for the Railway Company and Athletic Association.

The prayer of the bill embraces within its scope seven different objects, viz: specific performance, partition, discovery, removal of clouds, dispossession, account of rents, prevention of multiplicity of suits.

1. In specific performance no one is a proper party who is not or was not a privy to the contract, or who did not hold or acquire under parties to the contract. Pom. on Sp. Perf. sec. 483; Fry on Sp. Perf. p. 79; 3 M. & Cr. 63, 69; 6 Hale, 155; 4 Porter, 374; 15 Ala. 271; 36 N. Y. 561; 8 Wall. 571; 8 Wheat. 290; 14 Fla. 53; 17 N. J. Eq. 255; 17 N. Y. 125; 20 How. 94; 39 Cal. 294; 113 U. S. 555; 73 Md. 289; 65 N. C. 34.

2. Partition cannot be made a substitute for ejectment. 47 Ark. 238; 40 *id.* 155; 44 *id.* 338; 59 N. Y. 430; 19 Wend. 367; 5 Den. 385; 2 Paige, 387; 29 Wis. 333; 23 Wall. 466; 17 Atl. Rep. 627; 40 Wis. 579; 16 Fla. 26; 85 N. Y. 434; 84 Ala. 70; 37 Fed. Rep. 273.

3. Bills of discovery abolished. Mansf. Dig. sec. 4921; Sedg. & W. Trial of Title to Land, secs. 168–9, 170–1.

4. Equity cannot relieve against a cloud, unless complainant is in possession, or the land wild, unimproved and unoccupied. 19 Ark. 141; 23 *id.* 761; 24 *id.* 438; 27 *id.* 233, 95, 417, 680, 158; 29 *id.* 616; 30 *id.* 585; 37 *id.* 645; 39 *id.* 202; 43 *id.* 32; 44 *id.* 436; 116 Mass. 558; 86 Ill. 313; 67 Ala. 103; 1 Bibb (Ky.), 67; 110 U. S. 21; 20 Fed. Rep. 339; 11 N. W. Rep. 807; 105 U. S. 189.

5. Ejectment the only remedy against adverse claimant. Mansf. Dig. secs. 2624-5-6-7; 41 Ark. 466.

6. Upon recovery in ejectment plaintiff is entitled to rents and profits. 31 Ark. 344.

7. Multiplicity of suits. See Pom. Eq. Jur. sec. 251; 34 Fed. Rep. 826; 5 Johns. 278; Dicey on Parties, pp. 508, 515; 32 Ark. 305, 508; 7 Wendell, 158; Sedg. & Wait. Tr. Tit. secs. 239, 240; 24 How. 277; Mansf. Dig. secs. 2525-6.

8. The bill is multifarious. Story, Eq. Pl. 271, 272; 96 U. S. 341; Barb. Parties in Eq. 493; Story, Eq. Pl. sec. 284 *b.;* 1 Dan. Ch. Pl. & Pr. p. 339, c. 6, sec. 4.

9. Complainants barred by laches. 124 U. S. 188; 120 U. S. 387-8; 17 Wall. 336; 6 S. W. Rep. 449 and notes; 50 Ark. 141.

W. L. Terry and *T. E. Gibbon* for Pulaski County, *Morris M. Cohn* for the City of Little Rock, and *Ratcliffe & Fletcher* for Scruggs, Ennis & Co., cite additional authorities.

Sanders & Watkins in reply.

1. The American doctrine is that all persons interested should be made parties. Mansf. Dig. secs. 4948 *et seq.:* 37 Ark. 517; 33 *id.* 240; 11 *id.* 120; 3 *id.* 364; 116 Mass. 90; 4 Minn. 145; 11 Mich. 17; 9 Iowa, 98; 23 Mo. 423; 39 Cal. 297; 4 Hun, 108; 4 Peters, 202.

2. Six out of the seven objections made by appellees to the bill are well recognized heads of equity jurisdiction.

3. A court of equity is the proper forum in which to recover against a railway company for land taken without right. 51 Ark. 258.

4. The right of a party holding an equitable title to bring ejectment is fully discussed in 36 Ark. 461.

5. There was no misjoinder. Story, Eq. Pl. pp. 87, 88, 89; Pom. Sp. Perf. p. 545-6; Pom. Rem. p. 383; Pom. Eq. Jur. secs. 114, 242.

JOHN B. JONES, Sp. J. Roswell Beebe and Chester Ashley entered the lands upon which a portion of the City of Little Rock stands. The title was placed in the name of Beebe, under a written contract that he held one-half in trust for Ashley. Beebe laid out the lands into lots and blocks, and divided and conveyed all except the irregular strip along the river front now in controversy. This was not laid out or divided, but the title remained in Beebe at his death.

The heirs of Ashley filed a complaint in equity against the heirs of Beebe, alleging that they held the title to one-half the land in trust for them, and refused to convey; that neither they nor the heirs of Beebe were in possession; and prayed for specific performance and for partition.

The City of Little Rock, St. Louis, Iron Mountain & Southern Ry. Co., Pulaski County, Athletic Association, Pulaski Gas Light Co., Charles F. Martin, Scruggs, Ennis & Co., Neimeyer & Darragh and George H. Meade were also made defendants. The complaint alleged that the City of Little Rock, without right or title, put the other parties in possession of separate portions of the land, and that they are in possession under some kind of written title made by the city. That defendant railway company, without right or authority, took possession of and appropriated a strip of land through the entire tract, and laid its tracks thereon, and is operating its roads over it. Plaintiffs pray that the claims of these defendants be decreed void, as clouds on the title, and that they be decreed to deliver up possession of the land.

The heirs of Beebe answered, substantially admitting the allegations of the complaint, and made their answer a cross-complaint. The City of Little Rock and others alleged to be in posssession filed separate motions to dismiss the complaint and cross-complaint for misjoinder and for multifariousness, and demurred on the

ground that the complaint did not state facts sufficient to constitute a cause of action. No judgment was rendered on the demurrer, but the chancellor dismissed the complaint and cross-complaint on the motions.

The complaint stated a good cause of action against the heirs of Beebe. Were the other defendants properly joined? Did the complaint state facts sufficient to give a court of equity jurisdiction to try the title under which these defendants claimed possession?

1. Right of jury trial.

A party in possession, claiming title adverse, is entitled to have his claim tried at law by jury. Sec. 7, art. 2, Constitution 1874; *Govan* v. *Jackson*, 32 Ark. 553. "The distinction between law and equity is constitutional, to the extent to which the 7th amendment forbids any infringement of the right of trial by jury, as fixed by the common law." The right of trial by jury extends to all cases in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies administered. *Root* v. *Railway Co.* 105 U. S. 189; *Parsons* v. *Bedford*, 3 Pet. 447.

Many States have adopted what is known as the Reformed Procedure, abolishing the distinction between law and equity. There is much conflict of judicial opinion as to the jurisdiction conferred on courts of equity by such legislation. Some authorities relied on by counsel are from such States. A complete amalgamation of law and equity is impossible, so long as the jury trial is retained. Pomeroy's Equity Jurisprudence, sec. 116. The distinction between the two systems of procedure is expressly preserved by our code. Mansfield's Digest, secs. 4918, 4919. The jurisdiction of our courts of equity is practically the same as that of the Federal courts, and the High Court of Chancery of England. Our code simply abolished forms, and established liberal rights of amending defective pleadings.

Counsel for appellants urge that, the action being for specific performance, all persons claiming an interest in the land should be made parties to it. "In a bill for specific performance, one who claims adversely to the vendor cannot be made a party for the purpose of having his claim settled by decree, so as to be binding on him in relation to his claim of title." *Lange* v. *Jones*, 5 Leigh, 192; *Willard* v. *Tayloe*, 8 Wall. 571.

2. Parties to suit for specific performance.

In specific performance, as in other causes of equity jurisdiction, an adverse claimant in possession cannot be made a party, unless his claim be in some manner connected with the plaintiff's equity or with the title of the vendor in the contract. A court of equity has no more power to deprive an adverse claimant in possession of the right of trial by jury in an action for specific performance than in other equitable actions. In each case to which our attention has been called where jurisdiction to try an adverse claim has been sustained, the claim has been under a party to the contract, or in privity with the title of the vendor. The language used in *Seager* v. *Burns*, 4 Minn. 141, approaches nearer the contention of appellants than any other case we have examined. But the facts show the adverse claim there was under a judgment against the vendor. So the case comes within the rule.

3. When equity has no jurisdiction of suit to recover land.

It is contended that, appellant's title being equitable, they have no remedy at law, and before they could procure the legal title through a court of equity the statute of limitations will cut off their remedy; that while they have a present right, it will be lost if they are forced to wait to procure a legal title, and that therefore equity will furnish a remedy. The heirs of Beebe could bring ejectment. It is not alleged they have refused to do so, nor refused to allow their names in such suit. No excuse is shown for delay in applying to a court of equity for the legal title, till the statute of limi-

tations will have run before they can procure a decree.

The plaintiff cannot, for the reason only that his title is equitable, force an adversary claimant into a court of equity, when facts are not stated to connect the adverse claim with plaintiff's equity. The plaintiff cannot deprive the adverse claimant of the right of trial by jury, by neglecting to acquire the legal title. Plaintiff should first acquire the legal title, then a court of law is the proper forum in which to try the right to possession. *Fussell* v. *Gregg*, 113 U. S. 550.

Appellants urge cloud upon title, partition, discovery, multiplicity of suits, confusion of boundaries, and an account of rents and profits, as grounds of equity jurisdiction.

4. As to accounting.

An account of rents and profits is a legal and not an equitable remedy. Early in the history of this State courts of law were invested with the same powers, in matters of discovery, that existed in courts of equity. *Field* v. *Pope*, 5 Ark. 66.

As to multiplicity of suits.

As to multiplicity of suits, a court of equity may restrain, in order to prevent numerous suits, as in nuisance, trespass and trespass involving confusion of boundaries, and like cases, where plaintiff's title is admitted. But if plaintiff's title be disputed, he must in general first have it settled at law, for the reason that courts of equity do not in general try title to lands. Pomeroy's Equity Jurisprudence, sec. 252.

If the main subject of the action be equitable, with various legal questions growing out of it, a court of equity will not turn such legal questions over to a court of law to settle, but, having jurisdiction of the equitable subject of the litigation, to prevent multiplicity of suits, will take jurisdiction of all matters arising out of it. *Richmond* v. *Dubuque & Sioux R. Co.* 33 Iowa, 487; *Root* v. *Railway Co.* 105 U. S. *supra.*

It is well settled, a court of equity has no jurisdiction to remove a cloud on title against one in possession claiming adverse title. The same is true of partition. *London* v. *Overby*, 40 Ark. 155.

5. As to cloud on title and partition.

To give a court of equity power to try title and decree possession of land, the equitable grounds must be such that the title and possession depend on the equitable relief sought, such as specific performance, trust, fraud, accident, mistake and like equitable cases, where the title and possession is merely incidental to and follow the relief to be granted. It is only where the power of the court of equity has been called into action by the main purpose of the bill, and where the legal title and possession is incidental only to the relief sought, that a court of equity will try title to land and decree possession. *Green* v. *Spring*, 43 Ill. 282.

6. When equity has jurisdiction to try title.

It will be seen that the character of equitable grounds appellants sought to invoke does not fall within the class that empowers a court of equity to try title and decree possession of land. The defendants, City of Little Rock, Pulaski County, Pulaski Gas Light Co., Athletic Association, Charles F. Martin, Scruggs, Ennis & Co., Neimeyer & Darragh and George H. Meade, were not properly joined as defendants. The order dismissing the complaint as to them should have been without prejudice. *Deery* v. *McClintock*, 31 Wis. 202.

7. Practice as to dismissals.

The case as to defendant railway company stands on different grounds. When a railway company, without right or authority, takes possession of and appropriates land to its own use, and its tracks laid thereon become a portion of its line of road, public policy forbids the disturbance of the railway's possession. The owner of the land has a lien for the amount of compensation that may be enforced in equity, the same as a vendor's lien. *Organ* v. *Memphis & Little Rock R. Co.* 51 Ark. 235. Assuming the allegations of the complaint to be true, the rail-

8. Effect of mistake as to relief sought.

way company appropriated the land without right or legal authority. The heirs of Beebe and Ashley are each entitled to one-half the compensation. The railway company has the right to occupy the land, but the legal title is in the Beebe heirs, with a lien for the compensation. The enforcement of this lien is an equitable action. The filing of the complaint in equity must be treated as an election to pursue the equitable remedy. What more facts were necessary to constitute an equitable cause of action for enforcement of the lien for compensation?

The precise nature of this cause of action did not appear from the allegations and prayer of the complaint. It was framed with the object of obtaining a decree for possession—relief that could not be granted. But facts appeared that, under proper allegation, would constitute a cause of action to enforce the lien. What was the legal effect of the defects in the complaint? If the facts set up had been made more certain and definite, so the nature of the action would have appeared, would the railway company have been improperly joined? Under the old system of pleading, the allegations were required to be certain and definite, and the prayer for relief consistent with the case made by the bill. There could be no recovery except on the case made by the bill. Under that system the defects would be fatal to recovery. The main purpose of the code was to relieve parties from the consequences of poor pleading and mistake in form of actions, and to prevent a failure of justice where facts appear sufficient to constitute a cause of action, without regard to the form or mode of allegation. "When the allegations in a pleading are so indefinite and uncertain that the precise nature of the claim is not apparent, the court may require the pleading to be made definite and certain by amendment." Mansfield's Digest, sec. 5082.

The prayer for relief is no part of the statement of facts required to constitute a cause of action ; the entire omission of such a prayer would not be ground of demurrer ; such defect could only be reached by motion. Newman on Pleading and Practice, p. 664.

While, under the old system, the recovery was confined to the case made by the bill, all the code requires is that facts enough appear to constitute a cause of action. If the plaintiff be mistaken in the relief asked, still if the facts show he is entitled to some relief, the complaint cannot be dismissed, but may be amended to conform to the relief justified by the facts.

The complaint was dismissed on the ground of misjoinder of parties. A railway company is a proper party defendant to an action to enforce a lien for compensation for land wrongfully appropriated. The complaint showed appellants and the heirs of Beebe owned the land, and the company wrongfully appropriated it. The company then was a proper party to an action to enforce the lien for compensation.

Whether or not the facts stated in the complaint were sufficient to constitute a cause of action could only be raised by demurrer. The motion to dismiss for misjoinder was improper. The complaint being dismissed on the motion, the court did not reach judgment on the demurrer. The rules of pleading adopted by the code are as binding on the court now as the old system was before the code. The court cannot now visit parties with the penalties of the old rules for indefinite or uncertain pleading ; otherwise the code has failed in its object. The complaint showed a cause of action defectively stated, and on motion should have been made more definite and certain. *Bushey* v. *Reynolds*, 31 Ark. 662.

9. When bill for specific performance not multifarious.

The company also filed a motion to dismiss on the ground the complaint was multifarious. This was not a proper motion. If multifarious, the motion should

have been to strike out the cause or causes of action improperly joined with others. Newman on Pleading and Practice, p. 464; *Dyer* v. *Jacoway*, 42 Ark. 186. The facts, properly stated, would show a single cause of action for compensation. The complaint was for specific performance. The railway company, having appropriated the land, is entitled to it on payment of compensation. The money is all the heirs of Ashley and Beebe can recover from the company. The enforcement of the lien is in fact specific performance of the contract as to that portion of the land. The company is interested in having all persons parties to the suit who claim title, either legal or equitable, in order that it may get a clear title when the compensation is settled. The complaint is not multifarious. *Brown* v. *Guarantee Trust & Safe Deposit Co.* 128 U. S. 403.

The chancellor erred in dismissing the complaint and cross-complaint as to defendant railway company.

Reversed and remanded for further proceedings according to law.

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VANCE v. STATE.

Opinion delivered June 25, 1892.

1. *Criminal practice—Competency of juror.*

   A juror who states, upon the *voire dire*, that he has formed an opinion as to the defendant's guilt or innocence which it would require evidence to remove is incompetent, although he states that he could give defendant as fair and impartial a trial as if he had never heard of the case.

2. *Exclusion of experts from court room.*

   It is in the discretion of the court to exclude expert witnesses from the court room while other witnesses are being examined.

Error to Garland Circuit Court.

A. M. DUFFIE, Judge.

E. W. Martin for appellant.

1. It was error to allow North and Simpson to sit as trial jurors. 45 Ark. 165; 40 *id.* 165.

2. The court erred in refusing to allow expert witnesses to remain in the court room during the trial. Rogers, Expert Testimony, 64; 36 Ark. 117–124; 1 Wharton, Ev. sec. 492.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

1. Defendant's peremptory challenges were not exhausted when North and Simpson were called as jurors. 50 Ark. 498; 97 N. C. 471; 21 Neb. 436; 4 *id.* 75; 49 N. W Rep. 148; 9 So. Rep. 114.

2. Jurors are not disqualified by having preconceived notions about the merits of the case, if not of a nature to influence their conduct. 47 Ark. 185.

3. The exclusion of witnesses from the court room, except the one testifying, is within the discretion of the court. An exception is often made of experts, but it is not error to exclude them. Whart. Ev. sec. 491; Taylor, Ev. sec. 1400; Gr. Ev. p. 519, note 1; 1 Bish. Cr. Pr. sec. 1190; 58 Am. Rep. 638.

HUGHES, J. The appellant was convicted of an assault with intent to kill, and brought his case to this court by writ of error.

Upon examination of G. H. North and Eli Simpson, two of the jurors who tried the case, upon the *voire dire*, each of them stated that he had formed an opinion as to the defendant's guilt or innocence, and that it would require evidence to remove that opinion. Eli Simpson stated that he was in an adjoining room to that where the defendant did the shooting, eating dinner, and that he heard the shots, jumped up, ran out, and saw the defendant running or going in a fast walk up the street with a smoking pistol in his hand. On examination by the court, each of these jurors stated that he could dis-

card the opinion he had formed, and give the defendant as fair and impartial a trial as if he had never heard of the case. They were each challenged by the defendant for cause. The court declared them competent, to which the defendant excepted. Defendant had exhausted his peremptory challenges allowed by law before the jury was completed, and he was compelled to accept these jurors, which he did under protest.

The defendant's defense was insanity.

At the beginning of the trial, the defendant asked that the expert witnesses be allowed to remain in the court room and hear all of the evidence in the case, and then give their opinions upon it as to the defendant's sanity or insanity, assuming that the evidence was true. The court refused, and the defendant excepted.

The ruling of the court as to the competency of the jurors, North and Simpson, and the court's refusal to allow the expert witnesses to remain in the court room, are insisted upon as errors for which the judgment should be reversed.

1. When an opinion disqualifies a juror.

"That a juror has formed any opinion in such a case renders him *prima facie* incompetent, and it is for the State to show that such opinion is based on rumor and not of a nature to influence his conduct. But one who leaps in advance both of evidence and law, and settles in his own mind the question of guilt, is not fit to be a juror in the cause. The juror must be indifferent between the State and the prisoner. The burden of eradicating preconceived opinions upon the merits ought not to be cast upon either party. The fact that the jurors further said that they could try the case impartially was entitled to no consideration, in the face of their admissions that their minds were preoccupied by impressions of the case." *Polk* v. *State*, 45 Ark. 165, and cases cited. The jurors, North and Simpson, were incompetent, and should have been rejected upon defendant's challenge for cause.

Expert witnesses may be permitted to remain in the court room and hear the evidence. It is in the discretion of the court to exclude from the court room expert witnesses while other witnesses are being examined. No abuse of discretion appears *in this case*. *Leache* v. *State*, 58 Am. Rep. 638.

2. As to exclusion of experts from court room.

In *Regina* v. *Frances*, 4 Cox, C. C. 57, 58, which was a prosecution for murder, "a physician, who had been in court during the whole trial, was then called on the part of the prosecution, and asked whether, having heard the whole evidence, he was of opinion that the prisoner, at the time he committed the alleged act, was of unsound mind." It was held "that such a question ought not to be put, but that the proper mode of examination was to take particular facts, and, assuming them to be true, to ask the witness whether, in his judgment, they were indicative of insanity on the part of the prisoner at the time the alleged act was committed." Alderson, B., said: "To take the course suggested is really to substitute the witness for the jury, and allow him to decide upon the whole case. The jury have the facts before them, and they must interpret them by the general opinions of scientific men." See Buswell on Insanity, sec. 262 and cases cited.

For the error committed in refusing to reject the jurors, North and Simpson, for incompetency, the judgment is reversed, and the cause is remanded for a new trial.

LINCOLN *v.* LITTLE ROCK GRANITE CO.

Opinion delivered June 25, 1892.

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1. *Contract—Liquidated damages for delay—Parties.*

Plaintiff contracted, for an agreed sum, to build a foundation for a joint building to be erected by L. & F., and agreed that if the work was not completed by a time named he would pay them $20 for each day's delay thereafter, to be deducted from the

cost of the work. Plaintiff completed the foundation after the time named, and sued L. for his part of its cost. F. had paid his part of the cost. Defendant claimed a deduction of $10 per day for the delay. *Held:*

(*a*). Under the circumstances, the sum fixed to be deducted for delay, being reasonable in amount, constituted liquidated damages.

(*b*). Defendant's failure to claim a deduction of more than $10 per day did not prejudice plaintiff.

(*c*). The fact that F. paid his share of the cost and did not claim any deduction did not estop defendant from claiming it in a suit to which F. was not a party.

2. *Time contract—Extra work.*

Where an agreement stipulates that work shall be completed within a certain time, a subsequent agreement for extra work will not alter the contract as to the time for the completion of the work, further than to extend the time as much longer than the original contract provided as is necessary to complete the extra work.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

W. S. McCain for appellant.

1. The court erred in its instructions to the jury. Mans. Dig. secs. 4944–8, 5028, 5031; 30 Ark. 399; 44 *id.* 486; 54 *id.* 525.

2. The first four instructions refused were based on 14 Ark. 315; 5 Mich. 123. A sum may be agreed on as liquidated damages. For a failure to perform work, the amount may be fixed in the contract. 1 Suth. Dam. 471; Sedg. Dam. 489; Wood's Mayne on Dam. 157; 14 Ark. 315; 54 Ark. 141.

Caruth & Erb and *Eben W. Kimball* for appellee.

HUGHES, J. The complaint is as follows: "The plaintiff states that the Little Rock Granite Company is a corporation duly established by the laws of Arkansas, and on the 10th day of October, 1889, and theretofore, the Arkansas Granite Company was a corporation duly established by the laws of said State. That on said date the defendant was justly indebted to the Arkansas Gran-

ite Company in the sum of $1310.32 for work done and materials furnished by it for the defendant, at his special instance and request, and according to the account hereto attached and made part of this complaint, and to balance the same payment was then duly demanded of the defendants and refused. That thereafter said Arkansas Granite Company duly assigned, for value received, said claim and demand to the plaintiff, Zeb Ward, who, for value received, duly assigned the same to the Little Rock Granite Company, who now holds and owns the same. That by reason of the premises the defendant is indebted to said Little Rock Granite Company in the sum of $1310.32 and interest thereon. Wherefore it asks judgment," etc.

To the above complaint the defendant filed this answer:

"Comes the defendant, Lincoln, and for answer to the complaint says the plaintiffs furnished material and did work for the defendant as set out in the complaint, and the prices are correctly stated in the plaintiff's bill of particulars, but defendant denies that he is indebted to the plaintiffs therefor in a greater sum than $610, which sum he has always been and is still ready and willing to pay. The remaining $700 is unjust, and defendant owes no part thereof, because he says that the materials and the work and labor sued for were furnished and done under a contract in writing, made on May 28, 1889, in these words:

" 'This contract is to show that the Fones Brothers Hardware Company and C. J. Lincoln have employed the Arkansas Granite Company to build a stone foundation for a store and warehouse on Main street, Little Rock. Said Granite Company are to furnish all material and do the work in a good, workmanlike manner, in accordance with the specifications made out by Thomas Harding, architect. * * * And as compensation for

said work and material said Fones Hardware Company and C. J. Lincoln agree to pay said Granite Company $4.75 per cubic yard, according to measurements to be made by said architect. * * * (Here follow details as to measurements, payments, etc.) The remainder of the price is to be paid when the work is done. The Granite Company are to complete the foundation for what is designated as the Fones part of the building in four weeks from this date, and the remainder (or Lincoln part) in six weeks from this date. The stone material for the superstructure is to be delivered as needed by the contractor and workmen and to be paid for as used. If the Granite Company fail to complete the foundation within the time stipulated, or if they fail to furnish other stone material as needed from time to time for the superstructure, then they are to pay Lincoln and the Hardware company $20 per day for every day's delay over and above the time stipulated, and this amount may be deducted from any part of the price of the work or material remaining unpaid, but this payment for delay shall not continue longer than is necessary to procure the work to be done by other parties; and if said Hardware Company and Lincoln procure the work, in case of delay, to be done by other parties, then the said Granite Company are to hold them (said employers) harmless from any loss from having to pay such parties more than the price herein contracted for.'

"Said Lincoln and said Hardware Company fully complied with all the stipulations and requirements of said contract. Said Arkansas Granite Company failed and neglected to complete the Lincoln part of the foundation of said building within six weeks of the date of said contract, but delayed and procrastinated the work thereon for a period of seventy days, by which delay defendant was damaged, and is entitled to a deduction of $700 therefor. And the said Granite Company refused

to furnish the stone for the the superstructure, but for this plaintiff only asks a deduction of one dollar."

Defendant also demurred to the complaint.

To this answer plaintiff filed a reply denying the delay and denying damage, and excusing delay by extra work and material, and by delay of defendant.

A jury trial was had on the issues, and plaintiffs obtained a verdict and judgment for the full amount sued for, with interest, $1399.

Evidence was adduced to the jury tending to show that under this contract the Arkansas Granite Company, soon after its execution, had undertaken to construct, and that they had finally completed the construction of, a stone foundation for the store and warehouse of the defendant, and that the same was done by the said company in accordance with the specifications. But the evidence also tended to show that the work was not finished until about the 12th day of September, 1889, being about sixty-five days after the expiration of the six weeks mentioned in the contract. There was also evidence tending to show that there was difficulty in obtaining stone masons, and that the Granite Company pushed the work as rapidly and finished it as soon as it could be done. Also that the contract was taken at a price that proved to be much below the real cost of executing the work.

Defendant's counsel announced that his election to reduce damages from $20 to $10 per day for the delay was a matter of grace. Defendant offered to introduce evidence to show the rental value of the buildings, the foundation of which is the subject of this controversy, but stated to the court that he claimed that the provision for $20 a day was not a penalty, but liquidated damages, and that he offered the evidence to show that the $20 per day was not unreasonable, but plaintiff and his counsel objected to any evidence on this subject. And the court refused to allow the witnesses to testify on this

point as the defendant claimed that the damages were liquidated, to which refusal defendant at the time excepted. There was also testimony offered on behalf of the plaintiff, tending to show that the plan of the work had been changed in certain particulars, and that by the caving of the earth the work of laying the foundation had been delayed for the time above named. There was also testimony tending to show that, upon the estimates made by the architect, the Fones Brothers Hardware Company had paid up the amount estimated for their part of the foundation, without making any demand or setting up any claim for damages for delay under the contract. When the defendant offered the contract between the Granite Company and the Fones Hardware Company and C. J. Lincoln in evidence to show that the plaintiff had agreed to pay Lincoln $20 per day, or any sum, as liquidated damages for each day's delay, the plaintiff objected because said contract was not between the Granite Company and Lincoln alone, but was an entire contract between the company and the Fones Hardware Company and Lincoln jointly, and as the Fones Hardware Company was not a party to this suit, the contract was not evidence to sustain the defendant's claim.

The evidence being closed, the defendant asked the court to give the jury the following instructions:

"1. Where a building contractor agrees to do a piece of work in a given time, and the contract fixes an amount which he is to pay the employer in case of his failure to do the work within the time fixed, this constitutes liquidated damages; and if the contractor in such case violates his contract without fault of the employer, the contractor must pay the amount fixed by the contract."

"2. The $20 per day called for by the contract in this case is not a penalty, but is intended as liquidated damages."

"3. If Lincoln and the Fones Brothers Hardware Company were guilty of no default in carrying out their contract, and if the Granite Company did not do the work in the time fixed, then Lincoln is entitled to deduct from the contract price $10 per day for whatever delay there was on the part of the Granite Company in completing the work within the time fixed by the contract."

"4. The fact that the Hardware Company may have paid out the amount claimed for the work done on their part of the building does not estop Lincoln from claiming a deduction in this case, if he has shown himself entitled to any under the contract."

"5. Although extra work may be done by the contractor in the progress of his work, this does not do away with the provisions of the contract already in force, any farther than it is necessarily varied by the agreement for extra work."

"6. The fact that the Hardware Company were joint makers of the contract with Lincoln does not deprive Lincoln of his right in this suit to deduct any liquidated damages due him, if he has shown himself entitled to any."

The court refused to give any one of the instructions thus asked, and to the refusal of the court to give these instructions, and each of them, defendant at the time excepted. The court then, against defendant's objections, gave to the jury the following instruction:

"The defendant, Lincoln, is not entitled to claim any damages in this suit for delay in executing this contract, the Fones Hardware Company not being parties to the suit, and they being necessary parties in an action such as is set out in the counter-claim."

The court having overruled defendant's objection to this instruction and given it against his objection, defendant at the time excepted. The case was then submitted to the jury without argument, and the jury returned a verdict for the plaintiff in the sum of $1399. On the

next day the defendant filed a written motion for a new trial, in words and figures following, to-wit:

"Comes the defendant and moves the court to set aside the judgment in this case, and grant him a new trial for the following reasons:

"1. Because the court erred in refusing to allow testimony as to the rental value of the buildings.

"2. Because the court erred in refusing to give the six instructions asked by the defendant, and in refusing to give any one of them.

"3. Because the court erred in giving to the jury the instruction which it did give against the defendant's objection."

The court, on consideration, overruled the motion for a new trial, to which ruling of the court defendant at the time excepted and appealed.

The plaintiff stated in his brief that "when the defendant offered the contract between the Granite Company and the Fones Hardware Company and C. J. Lincoln in evidence to show that the plaintiff had agreed to pay Lincoln $20, or any sum, as liquidated damages for each day's delay, the plaintiff objected because said contract was not between the company and Lincoln alone, but was an entire contract between the company and the Fones Hardware Company and Lincoln jointly; and as the Fones Hardware Company was not a party to this suit, the contract was not evidence to sustain the defendant's claim." He also states that the contract named in the defendant's answer was not in evidence. The contract was copied in the answer of the defendant, and the copy was admitted by the plaintiff to be a correct copy of the contract under which the work was done. The bill of exceptions shows that the defendant offered it in evidence, but there is no statement or showing in the bill of exceptions that it was excluded. We conclude, therefore, that it was considered in evidence. In the

instruction given by the court to the jury the court told the jury that "the defendant Lincoln is not entitled to claim any damages in this suit for delay in executing this contract." This shows that it was not excluded, but was in evidence.

As an abstract proposition of law the first instruction refused is erroneous. Suppose, to illustrate, that the contract had provided that, upon failure to complete the work in a given time, for every day's delay the contractor should pay $200. Under this instruction, however unreasonable and disproportionate the amount fixed to be paid might be to the damages, the contractor would have it to pay, though it might really have been intended by the parties as a penalty, and not as liquidated damages.

We find no error in the second instruction asked for by the defendant, and think it was error to refuse it. We think that the court ought to have inferred, from the contract in this case, that the $20 per day were intended, not as a penalty, but as liqudated damages, for which it seems the parties had a right to contract. "Where the damages are at all uncertain or unliquidated, the parties ought to be allowed to anticipate and stipulate them if they choose to do so." *Williams* v. *Green*, 14 Ark. 328; *Texas & St. L. Ry.* v. *Rust*, 19 Fed. Rep. 239.

The third instruction refused could not have prejudiced the appellee, and should have been given. The failure of the appellant to claim more than $10 per day for each day's delay in completing the contract could not have injured the appellee.

There was no error in the fourth instruction asked for and refused.

The fifth instruction refused was substantially correct. It might have been framed so as to state more clearly that the agreement for extra work did not alter

the contract, as to the time for the completion of the work, further than to extend the time as much longer than the original contract provided as was necessary to do the extra work.

The sixth instruction refused should have been given. The contention that the appellant, Lincoln, could not defeat the appellee's right to recover the contract price, to the extent that he had sustained damages by its failure to perform its contract, because the appellee had sued him alone, cannot, in the opinion of the court, be maintained. If two or more parties sued jointly may defeat the plaintiff's right to recover in a case of this character, either party sued separately may do so. The plaintiff could not cut off the defendant's defense by suing only one of the parties to the contract.

It follows from what has been said that the instruction given by the court was erroneous.

The court erred in refusing to give the second, third, fourth, fifth and sixth instructions asked for by the defendant.

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

GILKERSON-SLOSS COMMISSION CO. *v.* CARNES.

Opinion delivered June 25, 1892.

1. *Conflict of jurisdiction—Law and equity.*

   A court of chancery will not, in order to avoid a multiplicity of suits, restrain a sheriff from proceeding to execute writs of attachment issued from a court of law of competent jurisdiction.

2. *Fraudulent conveyance—Preference.*

   Since an insolvent debtor may prefer a creditor, he may convey property in payment of a debt justly due if the price obtained is not less than the value of such property.

Appeal from White Chancery Court.

DAVID W. CARROLL, Chancellor.

Demby & Wymer, merchants at Judsonia, Arkansas, being embarrassed, sold their stock of goods on June 4, 1889, to two of their creditors, the Gilkerson-Sloss Commission Co. and Hill & Sons, in payment of their respective claims, aggregating $1980.95. After the sale was completed, certain other creditors of Demby & Wymer sued them, and procured attachments to be levied upon the stock of goods. Thereupon the Gilkerson-Sloss Commission Co. and Hill & Sons brought this suit to restrain the sheriff and the attaching creditors from interfering with their possession of the property, alleging that under the attachments the property would be sold and dissipated, to their great and irreparable damage, and that, to prevent a multiplicity of suits, they were obliged to have recourse to a court of equity.

The defendant filed an answer and cross-bill, alleging that plaintiffs' purchase was fraudulent. They averred that, on February 1, 1889, Demby & Wymer were indebted to themselves and other creditors (including plaintiffs) in the sum of $3493.50. That on said day Demby & Wymer were in possession of a stock of goods of the value of $3600, and claimed to have good accounts of the value of $1500, making a total of $5880. That all of said creditors, except the plaintiffs, were proposing to institute suits upon their said claims, because their claims were past due, and Demby & Wymer had failed and refused to pay them; that, by reason of the solicitations and representations of the plaintiffs and the said Demby & Wymer, they were induced to forego their advantage and right to at once institute suits upon said claims, and to grant to the said Demby & Wymer an extension of time upon their said accounts of three, six, nine and twelve months; and accepted their promissory notes, payable accordingly. That they were influ-

enced and induced to grant said extension upon the statements of the plaintiffs—mainly upon the representations of the said Gilkerson-Sloss Commission Company. That the said Gilkerson-Sloss Commission Company entered into an agreement with said debtors to induce the other creditors who were located at St. Louis to grant to said debtors an extension of time, and, in pursuance of said agreement, did induce said creditors to grant such extension of time. That the first payment of said notes fell due June 3d, 1889, and that, on June 4th, 1889, said debtors pretended to sell all of their stock of goods to plaintiffs for but little over half its real value. That said pretended sale "was in pursuance to an arrangement and agreement entered into by and between Demby & Wymer and Gilkerson-Sloss Commission Company," made at the time said company agreed to influence their St. Louis creditors to grant the said extension of time, said extension being secured by letters and statements of said Commission Company, as already averred, with the purpose of lulling the other creditors into a false repose, and in the end to receive all of the debtors' assets themselves. That it was the general belief among all the creditors of said parties that, in the event said debtors were unable to meet their said indebtedness, upon said extension, their assets would be distributed ratably, without preference, among all the creditors; and that this belief was induced by the statements of the plaintiffs, especially the statement of Gilkerson-Sloss Commission Company, who urged upon said other creditors that said debtors were solvent, that they had every confidence in their honesty and integrity, and in their honest intention to distribute their assets ratably among their creditors. The prayer was that the bill of sale should be declared fraudulent, that distribution be made of the assets, and that a receiver be appointed.

The answer to the cross-bill put in issue all the material allegations therein.

Upon the evidence, the court rendered a decree dismissing the original bill and setting aside the sale to the Gilkerson-Sloss Commission Co. and Hill & Sons, in accordance with the prayer of the cross-bill. From this decree plaintiffs have appealed. The evidence sufficiently appears in the opinion.

Morris M. Cohn for the appellants.

1. The evidence fails to establish that the appellees were influenced or induced to grant an extension by appellants, to their injury.

2. A debtor may prefer a creditor in good faith, and the fact that it hinders other creditors does not avoid the sale. Bump. Fr. Conv. (2d ed.) 184–5–6–7; see also 23 Ark. 258; 31 *id.* 167; 115 U. S. 61; 10 S. W. Rep. 458; 72 Tex. 272; 2 Big. Fraud, 490–1; 95 Mo. 373; 38 Mo. App. 73–79.

McRae & Rives for appellees.

The misrepresentations of the appellants were a fraud upon the defendant creditors. 38 Ark. 334; 2 Pom. Eq. Jur. secs. 879, 880, 884. They were misled to their injury. *Ib.* sec. 873.

1. No conflict of jurisdiction between law and equity.

MANSFIELD, J. The facts stated in the original complaint do not entitle the plaintiffs to relief in a court of equity, and so much of the decree appealed from as dismisses that complaint is affirmed. *Ford* v. *Judsonia Mercantile Co.* 52 Ark. 426; *Walker* v. *George Taylor Com. Co.*, *ante* p. 1.

2. Preferences not fraudulent.

The material allegations of the cross-complaint are denied, and the proof adduced does not support them. The sale of the merchandise could not be avoided, without showing that Demby & Wymer made it to defraud their creditors, and that the purchasers, Gilkerson-Sloss Commission Co. and Hill & Sons, participated in the fraud. *Trieber* v. *Andrews*, 31 Ark. 167. But the proof

is that the goods were sold in satisfaction of debts justly due to the purchasers, and that the price obtained for them was not less than their value. Such being the nature of the transaction, it was but a preference of creditors which the law permitted the insolvent debtors to give, and the preferred creditors committed no fraud in accepting it, even if they knew the effect would be to prevent the collection of other claims. *Christian* v. *Greenwood*, 23 Ark. 258; Bump, Fraud. Conv. p. 186.

It is said, however, that the sale was made pursuant to a previous agreement entered into by the vendors and vendees for the purpose of giving the latter an unfair advantage over the other creditors. And it is contended that such an agreement is shown by the assistance which the Gilkerson-Sloss Commission Co. and Hill & Sons gave to Demby & Wymer in procuring the extension of time granted by creditors of the latter, and also by efforts made by the former to induce other creditors to bring no suits for the recovery of their debts. The extension referred to was given in March, 1889, and it appears that the creditors granting it took notes for their debts payable at three, six, nine and twelve months. The sale in question took place on the 4th of June, 1889, after the maturity of the extension notes due at three months, and after it was known that they would not be paid. It does not appear that the stock of merchandise had been increased in the meantime, or that the sale would not have been equally advantageous to the purchasers before the extension was granted. So far as this record shows, Hill & Sons did nothing to aid in procuring the extension, beyond assenting to it themselves, and took no action to induce any creditor to refrain from suing. The Gilkerson-Sloss Commission Co. granted the extension, and spoke favorably of it to some of the other creditors. And one witness testifies that a person connected with that company told him, about the time

the extension was granted, that they had no intention of taking any legal steps for the collection of their claim. But this was several months before the sale, and it is not proved that the person making the statement was an officer or business manager of the company, or that he controlled the collection of their debts. Another witness, a creditor who granted no extension, says that he understood John Gilkerson, the president of the Commission Company, to say that all the creditors would be upon an equal footing if the extension should be granted; and that Gilkerson requested him not to sue. But Gilkerson testifies that he only made, to the creditor referred to, a statement of the facts communicated to his company, and expressed the opinion that Demby & Wymer would be better enabled to pay their debts if they obtained an extension. We find nothing in the evidence tending to show that the purchase of the merchandise was contemplated at the time the extension was granted, or that there was any agreement looking to a sale before the day on which it was made. On that day and prior to the sale it appears that the plaintiffs in the cross-complaint endeavored to obtain a confession of judgments for their debts; and we cannot see that good faith any longer required non-action on the part of the appellants.

The decree setting aside the sale will be reversed, and the cross-complaint will be dismissed.

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ELSEY v. FALCONER.

Opinion delivered July 1, 1892.

Overdue tax sale—Jurisdictional defect.

Where the complaint in an overdue tax suit alleged that the taxes on the land proceeded against were due for a certain year only, and the warning order gave notice that the suit was for

those taxes, a sale under a judgment by default which included unpaid taxes for other years is void.

Appeal from Franklin Circuit Court in Chancery, Charleston District.

HUGH F. THOMASON, Judge.

G. W. Shinn and *E. H. Mathes* for appellant.

The record nowhere discloses the fact that the court in the overdue tax suit did not have jurisdiction; such being the case, that suit cannot be inquired into for any other purpose in a collateral proceeding. 50 Ark. 188. It is immaterial that the suit was originally brought for the taxes of 1878 only. If the taxes for the subsequent years were due and unpaid, they should have been ascertained and ordered paid, and in so doing the court did not exceed its jurisdiction. 49 Ark. 350; 4 Pet. (U. S.) 365. The fact that taxes were due for any year gave the court jurisdiction, and, having rightfully obtained jurisdiction, the court could enquire into all subsequent years as to non-payment. Acts 1881, p. 67; 49 Ark. 348; 47 *id.* 323; 50 *id.* 188; 52 Pa. St. 295; 27 Minn. 109.

The court having jurisdiction, all matters are concluded by its decree, and to cure errors or irregularities resort must be had to appeal. 35 Minn. 1; 11 Biss. 289; 12 Fed. Rep. 398; 40 Cal. 291; 6 Iowa, 179; 12 Mo. App. 228; 13 *id.* 275; Burroughs, Tax. p. 280; Wells, Res. Adj. secs. 10, 428, 479, 483, 489. The decree is conclusive, except as to jurisdiction. Burroughs, Tax. p.285-6; Black, Tax Titles, secs. 58–59; 71 Ala. 529; Freem. Judg. sec. 135; Cooley, Tax. 526; 97 N. C. 136; 69 Mo. 343; 11 Ark. 519; 22 How. (U. S.), 14; 93 U. S. 165.

L. P. Sandels for appellee.

When a court of general jurisdiction has a special or limited authority conferred upon it by statute, it is a court of limited jurisdiction, and its jurisdiction must appear upon the face of the record. The jurisdictional facts must affirmatively appear, or the decree is void.

Black, Tax Titles, sec. 59; 6 Wheat. 119; 3 Iowa, 114; 22 N. J. L. 396; 35 Me. 97; Wells, Res. Adj. sec. 477; Acts 1881, p. 160. The complaint, warning order and preliminary decree only mention the taxes of 1878, while the final decree declares a lien for the taxes of 1878–9–80–81 in gross. This avoids the decree and sale. 50 Ark. 188; 49 *id.* 350; 10 Pet. 474; 16 Md. 176. Where land is sold for taxes, part of which are illegal and part legal, the whole sale is void. Black, Tax Titles, secs. 97–8; Cooley, Taxation, 497; Blackwell, Tax Titles, 190, 192; Desty, Tax. vol. 2, 866–7, 969, 972; 36 Cal. 67; 8 Blackf. 581; 36 Me. 433; 59 N. H. 392; 15 Mass. 144; 51 Miss. 782; 44 Mich. 561. Deeds to land sold under decree of court for taxes have been attacked collaterally and held void in the following cases: 6 Wheat. 119; 3 Sneed, 344; 5 Hayw. 294; 5 Wheat. 116; 20 Ill. 338; 30 Ill. 119; 12 Ill. 409; 32 Cal. 477; 13 Ill. 251; 31 Cal. 135; 39 Ill. 108; 15 Ill. 279; 5 Ia. 284; 23 Ill. 521; 6 Ia. 331; 1 Wall. 398; 6 Ia. 179; 42 Mo. 162; 26 Minn. 201; 81 Mo. 170; 60 Ill. 179; 35 Ill. 315. In Illinois it has been held, in 103 Ill. 528, that a decree confirming an assessment is conclusive against all objections; but that a decree for taxes, part of which are illegal, is *void*, and can be attacked collaterally also; where decree is for amount greater than tax actually due. 55 Ill. 249; 113 Ill. 256; 21 N. E. 511.

HEMINGWAY, J. This case involves the validity of a title acquired at a sale, known as an "overdue tax sale," made under a decree of the Franklin circuit court in chancery. Many questions are argued which go, either to the injustice of the title asserted, or to the bad policy of the law under which it was acquired; the former questions are cut off by the decree in the suit for overdue taxes, and the latter have been favorably considered by the legislature—the only tribunal having the power to correct the bad policy of legislation. The only question

presented for our consideration is, was the sale under the decree of the chancery court within its jurisdiction? The court below held that it was not; and if this be correct, the judgment must be affirmed.

The facts upon which the defect of jurisdiction was affirmed are: That the complaint alleged only that the lands were delinquent for the taxes of 1878; that the process by warning order gave notice that the suit was for the taxes of 1878; that there was no appearance to the suit, and a decree *pro confesso* was entered for the taxes of 1878 only; and that a final decree was entered and a sale made for the taxes of 1878, 1879, 1880 and 1881.

As the complaint tendered a claim for the taxes of 1878 only, and the service of process by publication distinctly gave notice of that claim, and there was no appearance by the land-owner, we are of opinion that the jurisdiction of the court was confined to the claim asserted in the complaint, and that the court could acquire jurisdiction of the claim for the taxes of subsequent years only by an amendment to the complaint and new service or the appearance of the land-owner. Newman's Pl. & Pr. p. 688; *Railway Co.* v. *State*, 55 Ark. 200; *Munday* v. *Vail*, 34 N. J. L. 418; *Windsor* v. *McVeigh*, 93 U. S. 274; *Spoors* v. *Coen*, 44 Ohio St. 497; *Dunlap* v. *Southerlin*, 63 Tex. 38; *Seamster* v. *Blackstock*, 83 Va. 232.

When the court went outside the right asserted in the complaint and attempted to adjudicate rights not therein set up or in any way referred to, it exceeded its power; and its decree, in so far as it determines such rights and orders their enforcement, was without its jurisdiction and void. But the decree adjudicates the claim asserted in the complaint, charges it as a lien on the land, and directs that enough of the land be sold to satisfy the entire decree, including it. The entire land was sold to satisfy the entire decree. The question is

whether the sale is void because made under a decree which included claims of which the court had no jurisdiction, or is validated by the presence in the decree of a claim of which the court had jurisdiction?

Upon this we have found no direct authority, though we have waited long and searched extensively for such. It is important to state that, by the terms of the statute that enter into the decree, the land was to be offered to the person who would pay the amount of the decree, with costs, for the least portion of it, to be taken out of the northeast corner; and where no person offered to pay such sum for the entire tract, it was to be sold to the State. By this provision the land that can be sold is made the exact equivalent in value of the sum legally due, and a sale of any particle in excess of such equivalent is without any warrant of law. It is thus seen that if five dollars were demanded when but one was due, and the entire land was sold for the payment of the entire demand, some part—away from the northeast corner—must have been sold to satisfy that part of the demand that was illegal. As to such part, the sale is without any legal sanction and void, and as the part sold for the illegal can not be separated from that which was sold for the legal demand, the entire sale must be treated as a nullity. *Litchfield* v. *Cudworth*, 15 Pick. 23; *Adams* v. *Morrison*, 4 N. H. 166.

Upon the first part of the proposition the opinion of Judge Cooley in the case of *Silsbee* v. *Stockle*, 44 Mich. 561, will be found very clear and instructive. Cooley on Taxation, 497. The question did not arise in that case upon the effect of a sale under a decree, a part of which was without the court's jurisdiction; but upon the power of the legislature to cure an ordinary sale for taxes a part of which were illegal, conducted according to a plan similar to that provided by our act. He there shows that the sale of a part of the land was for the illegal tax;

that it was therefore a nullity, and could not be cured by the legislature; and the same course of reasoning shows in this case that a sale of a part was to satisfy the void part of the judgment, and could not be aided by the part of the decree that was valid. We refer to that case for a lucid discussion of the question, which we consider convincing; the doubt that has crossed our minds is whether the reasoning applies to this class of cases. The conclusion to which we have come, after much hesitation, is that it does.

Affirm.

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FORDYCE v. McFLYNN.

Opinion delivered July 1, 1892.

1. *Railway—Liability as carrier of live stock.*

   A railroad which undertakes to transport live stock is liable as a common carrier, though the shipper agrees to furnish the cars and to load and unload them entirely.

2. *Injury to stock—Shipper's negligence in loading.*

   A carrier which relied upon the undertaking of a shipper of live stock to load and unload them will not be liable for an injury to the stock occasioned by the negligent manner in which the loading was done, though there was a general duty resting upon the carrier to see that they were properly loaded.

Appeal from Ouachita Circuit Court.
CHARLES W. SMITH, Judge.

Samuel McFlynn and G. W. Hall sued S. W. Fordyce and A. H. Swanson, receivers of the St. Louis, Arkansas & Texas Railway Co., to recover the value of a lioness which escaped while being carried on defendant's road and was killed.

Plaintiffs were the owners of a circus outfit, and had made a written contract with defendants whereby it was agreed that defendants should, at a stipulated rate, fur-

nish transportation over their road for the show, consisting of one stock car, one box car, three flat cars and one passenger coach, said equipment to be furnished by the plaintiffs. It was further agreed "that the six (6) cars above described shall be transported on regular freight trains of the railway company, except where extra trains are run, and it is convenient to both parties to this contract for the transportation to be performed by such extras. This agreement further provides that the party of the first part (the railway company) shall not be held liable for any loss, damage, delay, or any inconvenience that may result from such transportation. The cars above referred to are to be placed on switches by the said party of the first part at convenient places to load and unload, and are to be equipped by the owners thereof as required by the rules and regulations of the railway company. It is also understood and agreed that the cars are to be loaded and unloaded entirely by the said party of the second part."

On the night of October 20, 1890, plaintiffs loaded their circus outfit at Camden. The cage containing the lioness was placed, with other cages, on one of the flat cars, about its center. At a bend of defendant's railway a coal chute was being constructed. Some of the cap-sills, which had not been sawed off, extended within 18 inches of the stringer of the railway track. The door of the cage was struck by a cap-sill and torn off. The lioness escaped, and a few minutes afterwards was killed. No other injury was done to any of the cars of the train. A witness, who made an examination next morning, testified that, sighting down the train to see if anything projected, he found this car the most prominent, and the cage projected over the car. The conductor of the train testified that he was in charge of the train on the occasion of the escape of the lion, and that it was his duty to

examine all trains before moving out, and that he examined this one and did not refuse to move it.

At the request of the plaintiffs, the following instructions were given: "(1) The jury are instructed as a matter of law that a railroad cannot lawfully contract for exemption from responsibility, in the carrying of freight or animals, for the negligence or carelessness of itself or its servants, and if they find from the evidence that the lion was lost to plaintiffs without any negligence on the part of plaintiffs, but by the negligence or carelessness of defendant or its agents, they must find for the plaintiffs the value of the lion as proven, notwithstanding the contract offered in evidence in this case. (2) If the jury find from the evidence that it was the duty of the conductor to examine the train before starting, and ascertain if the same was properly loaded, and, in the event it was not properly loaded, to have it corrected, and that he did so examine and found no fault, then no fault can attach to plaintiffs for want of proper loading. (3) If the jury find from the testimony that plaintiffs were the owners of the flat car and other rolling stock in the train, and by special contract with defendants were to equip, load and unload the same, and that servants of plaintiffs were by said contract to travel on cars with the property of plaintiffs, and that by said special contract the defendants were released from liability for any loss, damage, delay, or inconvenience resulting from the transportation over their road of the plaintiffs' said cars and show outfit, they will find for defendants, unless they further find that defendants were guilty of negligence in the fulfillment of their contract."

The court refused to give the following instructions requested by defendants: "(1) If the jury find from the testimony that plaintiffs were owners of the flat car and other rolling stock in the train, and, by special con-

tract with defendants, were to equip, load and unload the same, and that servants of plaintiffs were, by said contract, to travel on cars with property of plaintiffs, and that, by said special contract, the defendants were released from liability for any loss, damage, delay, or inconvenience resulting from the transportation over the road of the plaintiffs' said cars and show outfit, they will find for the defendants, unless they further find that defendants were guilty of gross negligence in fulfilling their part of the contract. (3) If the jury believe from the testimony that plaintiffs were the owners of the cars transporting their menagerie and show, and in person or by their employees were in charge of the animals and other property, and under special contract with defendants to load and unload said cars, and by said contract defendants were released from all liability from loss, damage, delay, or inconvenience to plaintiffs in transporting said cars, they will find for defendants."

The jury returned a verdict for plaintiffs in the sum of $1500, and judgment was entered accordingly. Defendants have appealed.

Bunn & Gaughan and *Sam H. West* for appellant.

1. Appellant does not occupy the relation of common carrier to appellees. Lawson, Cont. of Car. sec. 16; Mansf. Dig. secs. 5475–6; 46 Ark. 236. The liability of a private carrier only applies in this case. 16 A. & E. R. Cases, 194; 18 *id.* 542–4; 29 Am. Rep. 435; 41 *id.* 141.

2. There was no negligence in this case on part of appellant. 39 Ark. 148; 16 Am. & E. Enc. Law, 389 and note.

3. The appellees undertook to do their unloading; and if the accident happened through the fault of their own employees, appellant is not liable. The contract relieved the conductor of the duty of seeing that the cars were properly loaded.

Thornton & Smead for appellees.

1. Carriers of live stock are liable as common carriers. Redfield on Rys. vol. 2, p. 4; Wood, Ry. Law, p. 10; Story, Bailments, sec. 495; Lawson, Cont. Carriers, p. 3; 79 U. S. 262; Hutch. Car. p. 175. Being common carriers, they cannot legally contract for exemption from responsibility for the negligence of themselves or servants. 84 U. S. 384.

2. As to the liability of the company for negligence, see Cooley, Torts, p. 630; Whitaker's Smith on Negl. p. 1; 84 U. S. 384; 7 Am. Rep. 540; 91 U. S. 394; 24 N. Y. 106.

1. Liability of carrier of live stock.

HEMINGWAY, J. That carriers of live stock are liable as common carriers, was decided by this court in the case of *St. Louis, I. M. & S. Ry.* v. *Lesser*, 46 Ark. 236, and is, as we think, sustained by the authorities. Hutch. Carriers, sec. 221, and cases cited. No argument can, therefore, have force that rests upon a contrary assumption. The contract in this case was a contract of carriage and not of hiring, and the liability of the receivers must be determined by the law governing the former relation. *Mallory* v. *Tioga Ry. Co.* 39 Barb. 488; *Gracie* v. *Palmer*, 8 Wheaton, 605. The case of *Coup* v. *Wabash R. Co.* 18 A. and E. Ry. Cas. 542, relied upon by appellant as leading to a different conclusion, arose out of a contract materially unlike the one in this case; and, besides, the court which decided it holds that a carrier of animals is a private and not a public carrier. *Mich., etc., Ry.* v. *McDonough*, 21 Mich. 165; *Lake Shore R. Co.* v. *Perkins*, 25 *id.* 329. And as that court takes that side of the question, its decision in a case depending upon it could have little force as an authority in this State, where the opposite view is taken. Under this view of the law, it follows that the court properly gave the first and third instructions on part of the plain-

tiff, and properly refused the first and third of the defendants.

2. Carrier not responsible for shipper's negligence.

The only other question presented upon the instructions is as to the giving of the second on behalf of the plaintiffs. By the terms of the contract, the plaintiffs undertook to furnish and load the cars for the carriage of their animals; they thereby represented themselves as competent to do the entire work of loading; and if they did it carelessly and thereby caused the injury complained of, the defendants would not be liable, although it appeared that there was a general duty resting upon the conductor to examine trains under his control and see that they were properly loaded. If such duty existed generally, its performance in this case was excused by the plaintiffs. And if the conductor, relying upon their professed competency and the careful performance of their undertaking, refrained from making the examination necessary to detect their incompetency or neglect, the carrier is not liable for injuries occasioned by either. *St. Louis, etc. Railway Co.* v. *Weakly*, 50 Ark. 397. Under this view, it is our opinion that the instruction was erroneous, and should not have been given. The appellee insists that, although this instruction be erroneous, it is no ground for reversal, because there could have been no other finding than a verdict for plaintiff. We are unable to say that no other finding could have been reached, and think the case should be submitted to a jury, upon proper instructions, to determine whether the injury was attributable to the negligence of the plaintiffs or of the defendants.

For error in giving the second instruction on part of plaintiffs, the judgment will be reversed, and the cause remanded.

FORDYCE v. JOHNSON.

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Opinion delivered July 1, 1892.

Railways—Connecting lines—Freight charges.

Under a joint traffic arrangement between three connecting lines of railway, a car-load of flour was forwarded from Verona, Mo., *via* Nichols, Mo., and Jonesboro, Ark., to Clarendon, Ark. By mistake the intermediate carrier transported the flour beyond Jonesboro, where it should have been delivered to the last carrier, to Hopefield, Ark., and delivered it to a carrier not a party to the traffic arrangement, by which it was delivered to the last carrier above mentioned at Brinkley, Ark., a station situated between Jonesboro and Clarendon. In actions to recover the statutory penalty from the last carrier for refusing to deliver the flour upon tender of the charges shown by the bill of lading, and to recover possession of the flour, *Held:*

(*a*). That where the bill of lading does not show all of the charges that are legally demandable by the carrier, the statutory penalty is not recoverable from the carrier upon its failure to deliver freight on tender of the charges shown by the bill of lading.

(*b*). That, the last carrier not being responsible for the additional charges, the consignee is not entitled to recover the goods carried upon tendering the charges in the bill of lading, but will be required to pay the additional charges made by the connecting line that was not a party to the traffic arrangement.

Appeal from Monroe Circuit Court.

JAMES E. RIDDICK (on exchange of circuits), Judge.

Two suits were instituted by B. F. & G. F. Johnson against S. W. Fordyce and A. H. Swanson, receivers of the St. Louis, Arkansas & Texas Railway Company. (1) In one action they sought to recover the statutory penalty for failure to deliver a car-load of flour consigned to them, upon tender of the freight charges due; (2) in the other to recover possession of the flour. The pleadings in the two cases alleged the same facts, and substantially the same evidence was introduced in each.

Plaintiffs alleged that they had a car-load of flour shipped to them from Verona, Mo.; that the freight charges thereon, as specified by the bill of lading, were $44.35, which was at the rate of twenty-two cents per hundred; that the flour arrived in Clarendon on the 28th day of May, 1890, and on the next day they tendered the freight charges thereon and demanded the flour, and that defendants refused to deliver it after tender of payment therefor had been made.

The defendants answered and alleged that, on or about the 29th day of May, 1890, they received the shipment of flour mentioned in the plaintiffs' complaint, at the town of Brinkley, from the Little Rock & Memphis Railway Company, and forwarded the same to Clarendon, and that the charges therefor, according to established rates, were twenty-nine dollars and twenty-three cents ($29.23), and it appeared from the way-bill that the Little Rock & Memphis Railway Company had a charge of eight dollars and six cents ($8.06) upon the flour for hauling it from Hopefield to Brinkley; that the Kansas City, Fort Scott & Memphis Railway Company had a charge upon it of twenty dollars and sixteen cents ($20.16) for hauling it from Nichols, Mo., to West Memphis, Ark., and that the St. Louis & San Francisco Railway Company had a charge upon it of sixteen dollars and ten cents ($16.10), all aggregating seventy-three dollars and fifty-five cents ($73.55). The defendants alleged that neither the St. Louis & San Francisco Railway Company nor any other person had the right, on the 14th day of May, 1890, or at any other time, to consign freight to the town of Clarendon, or any other point on their line of road, over the Little Rock & Memphis Railway line, at a rate of twenty-two cents per hundred pounds; and that if any railway company signed and executed a bill of lading whereby it was agreed that the flour mentioned should be delivered to the plaintiffs

at Clarendon over the St. Louis & San Francisco Railway, the Kansas City, Fort Scott & Memphis Railway and the Little Rock & Memphis Railway and over the defendants' line, it was without authority from the defendants and in no way binding upon them. The defendants state that if the flour mentioned in the plaintiffs' complaint was shipped as alleged from Verona, Mo., to Clarendon, Ark., the proper route would have been *via* Nichols, Mo., and Jonesboro, Ark., to its destination; that the flour was not received at Jonesboro by the defendants, and that it was not their fault that it was not received there.

The case was submitted to the court sitting as a jury.

B. F. Johnson testified that his firm, in May, 1890, ordered a car-load of flour from Verona, Mo. That the St. Louis & San Francisco Railway Company received it at that point and executed a bill of lading therefor at a twenty-two cent rate to Clarendon, Ark.; that when the flour reached Clarendon, he called at the station with the bill of lading for the flour and the defendants declined to protect it on account of the flour having been received at Brinkley, Ark., from the Little Rock & Memphis Railway Company; that the charges of that road and other roads over which the flour had been transported aggregated forty-four dollars and thirty-two cents ($44.32), and that the defendants' charges for transporting the flour from Brinkley to Clarendon were twenty-nine dollars and twenty-three cents ($29.23). That he then tendered the amount of freight as shown by the bill of lading, and that the defendants' agent refused to accept anything less than seventy-three dollars and fifty-five cents ($73.55). That the flour was worth four or five hundred dollars.

The plaintiffs then read a bill of lading signed by the St. Louis & San Francisco Railway Company at

Verona, Mo., showing a twenty-two cent rate on 20160 pounds of flour to Clarendon, Ark.

The defendants introduced B. H. Wilson, who testified that he was agent for the defendants at Brinkley; that he received a car-load of flour in the course of business from the Little Rock & Memphis Railway Company at that place; that the charges of the St. Louis & San Francisco Railway, the Kansas City, Fort Scott & Gulf Railway and the Little Rock & Memphis Railway Company amounted to forty-four dollars and thirty-two cents ($44.32), and that there was no through tariff rate from Verona, Mo., to Clarendon, *via* the Little Rock & Memphis Railway Company, and that the published rates on car-loads of flour from Brinkley to Clarendon was twenty-nine dollars and twenty-three cents ($29.23). The way-bill accompanying the car-load of flour disclosed the same facts.

D. Miller testified that he was general traffic manager for the defendants. That no one in May, 1890, or at any other time, was authorized to sign a bill of lading at Verona, Mo., for the defendants for flour, either car-load lots or otherwise, at the rate of twenty-two cents per hundred *via* Hopefield, Ark., and over the Little Rock & Memphis Railroad. That the only basis upon which they would handle freight over that route would be subject to the published rates from Brinkley proper. That the St. Louis, Arkansas & Texas Railway Co. is a party to a general tariff from Verona, Mo. to Clarendon, Ark., and other points, which provides that freight shall be routed *via* Nichols, Mo., the Kansas City, Fort Scott & Gulf Railway, to Jonesboro, Ark., and thence *via* the St. Louis, Arkansas & Texas Railway to destination; that had the flour been forwarded *via* the route just indicated, "we would have been able to protect it under our joint tariff and agreement with

connecting lines. We were unable to protect the bill of lading without actual loss."

W. C. Stith, general freight agent of Kansas City, Fort Scott & Gulf Railway Company, testified that the rate per hundred on car-load flour from Nichols, Mo. to West Memphis, Ark. was sixteen cents. A. S. Russell, general freight agent of St. Louis & San Francisco Railway Company, testified that the rate per hundred on car-load flour from Verona to Nichols, Mo., over the St. Louis & San Francisco Railway was ten cents per hundred pounds.

The court found that the plaintiffs were the owners of the flour, that it had been shipped from Verona, Mo. over the St. Louis & San Francisco Railway and consigned to the plaintiffs at Clarendon, Ark., and that the defendants were parties with the 'Frisco and the Fort Scott & Gulf Railway Companies to a joint tariff from Verona to Clarendon, which provided that freight should be routed *via* Nichols, the Kansas City, Fort Scott & Gulf Railway to Jonesboro and thence *via* the defendants' line to destination at a rate of twenty-two cents per hundred, and that the flour was to be delivered at the rate of twenty-two cents per hundred, as shown by the bill of lading ; that a tender of the freight was made for the flour, and that it was held for eight days. Judgment was rendered for plaintiffs for the recovery of the penalty in the one case and for possession of the flour in the other case. Defendants have appealed in both cases.

J. C. Hawthorne and *Sam H. West* for appellants.

1. Appellants were not parties to any tariff rate from Verona, Mo. to Clarendon, Ark.; but even if they were bound by a rate by way of Jonesboro, the car was mis-routed by no fault of appellants, and appellees are liable for the increased freight by reason of the mis-routing. 9 A. & E. R. Cases, 41. The St. L. & S. F. Ry.

was the agent of appellees. 88 Mass. 246. And if several successive carriers carry the goods according to the directions given them by the forwarding agent, they act under the authority of the owner and cannot be considered as wrongdoers, although they are carried to a place to which he did not intend for them to be sent. And in such case the last carrier will be entitled to a lien on the goods, not only for the freight earned by him on his part of the route, but also for the freight which has been accumulating since the commencement of the carriage until he receives them. 149 Mass. 196; 22 Kas. 659; 27 Mo. 17.

2. The appellees' remedy was against the St. L. & S. F. Ry. Co. on its guaranty of rates, or against the K. C., F. S. & G. R. Co., who mis-routed the freight. 49 Ark. 352.

3. Accepting the freight was not a ratification of the bill of lading. 12 S. W. Rep. 530.

4. An association among carriers for the transportation of freight and the division of the receipts in prescribed proportions does not constitute a partnership nor render the carriers jointly liable. 42 Ark. 265. See also 19 S. W. Rep. 470.

5. The Memphis road was not a party to the contract, and had a right to demand its lawful charges.

H. A. Parker for appellees.

1. As to the replevin suit, the case of 49 Ark. 291 is conclusive.

2. If several companies associate and form a continuous line and contract to ship goods for an agreed price, which the consignee pays in one sense, and which the companies divide, then as to third parties they are liable jointly and severally. 112 Ill. 180; 8 N. Y. 37; 19 Oh. St. 221; 17 N. Y. 306; 48 N. H. 339; 3 Duvall (Ky.), 4; Hutch. on Car. 159–160.

3. The act of 1885 is valid, and under it appellants are liable.

COCKRILL, C. J. Two suits between the same parties growing out of one transaction come here together. One is to recover a penalty for the railway's refusal to deliver goods to a consignee on tender of the charges shown to be due by the bill of lading under which the goods were shipped; the other is an action of replevin brought by the consignee for the possession of the goods. We leave the details of the facts to the reporter.

I. *As to the penalty:*

The penalty denounced by statute against a railway for failure to deliver freight upon tender of the charges shown to be due by the bill of lading cannot be recovered against the railway where the bill of lading does not represent the amount of charges that are legally demandable by the carrier to whom the tender is made. A plain illustration is where a through bill of lading is issued by a carrier who fixes a rate not authorized by the connecting carrier. *Gulf, etc., Ry.* v. *Dwyer*, 19 S. W. Rep. 470. In such a case the unauthorized contract does not deprive the last carrier of the right to hold the freight until his legal charges are paid. *Crossan* v. *Ry.* 149 Mass. 196.

If the carrier who issues the bill of lading is authorized to stipulate that the last carrier will transport the freight over his line at a given rate, and the first or a succeeding carrier mis-routes the freight, so that when it reaches the last carrier it is burdened with charges for carriage over another line which the owner of the goods had not agreed to pay, that does not prevent the last carrier from maintaining possession of the goods to protect his lien for all lawful charges against them, for it is no fault of his that the additional charges have been

incurred. *Crossan* v. *Ry.* 149 Mass. 199; *Vaughan* v. *Ry.* 13 R. I. 578.

If the first carrier guaranties a through rate at a given sum, when the only authority he has from the last carrier is that the latter will carry the goods over his line for a given proportion of the rate fixed by their traffic arrangements, the guaranty is not binding upon the last carrier because he has not authorized it. Such an arrangement does not make the connecting lines partners, nor constitute one the agent of the other for any purpose, except to bind it to carry over its line at the rate agreed upon between them. *Hot Springs Railroad* v. *Trippe*, 42 Ark, 465.

The carrier issuing the bill of lading cannot, therefore, throw upon the last carrier the burden of bearing an additional charge incurred through the negligence of a preceding carrier in forwarding or carrying the goods to a wrong place when the last carrier is not at fault. *Price* v. *Ry.* 12 Col. 402; Hutchinson on Carriers, sec. 491*a*.

The undisputed facts place this suit for the statutory penalty in one of two attitudes, viz.: (1) If the goods were originally shipped to go under the bill of lading by way of Brinkley on the appellants' road, there was no authority in the shipping carrier to issue the bill of lading so as to bind the appellants or the L. R. & M. Ry. to carry at the rate specified in the bill of lading; or (2) if the goods were shipped at an authorized rate to go over the appellants' line by way of Jonesboro, they were mis-routed by a preceding carrier for whose act the appellants were not responsible, and came to them bound by the charge of the L. R. & M. Ry. for the carriage over its line. Under neither state of facts could the appellants, who were forced to assume or pay the charges existing against the goods when they came to their hands, be put in default by tendering the less amount

called for by the bill of lading; and the statute does not intend to punish a railway for refusing to do what it is not legally bound to do. The penalty was not incurred, and the judgment is wrong.

II. *As to the action of replevin:*

The company refused to surrender the goods unless the charges due the other companies, and $29 for carriage over its own line, were first paid. The latter amount is much in excess of what it would have been entitled to for the haul from Jonesboro to Clarendon under its arrangement with the company which issued the through bill of lading. The bill of lading does not expressly direct that the flour shall be delivered to the appellants at Jonesboro, but the finding for the plaintiffs fixes the fact that such was the contract between the parties to it. If, therefore, the car had been delivered to the appellants at Jonesboro, the contract would have bound it to carry the freight over its line at the contract price to Clarendon, its destination. Brinkley is on the same line, and is situated between Jonesboro and Clarendon. The freight was a car-load lot which went through to its destination without break of bulk. The only difference, so far as the evidence shows, that delivery at Brinkley instead of at Jonesboro made to the appellants was that it saved to the appellants about five-sixths of the haul it would have made in case of delivery at Jonesboro. The delivery at Brinkley redounded, therefore, to the appellants' advantage, and if they receive what they contracted to carry the goods the full route for, they will have no cause to complain. As the appellees wish to stand by their contract, they cannot complain at paying the appellants the price due them under the contract

But, as we have seen above, the appellants are entitled to the charges paid or assumed to the L. R. & M. Ry. for carriage over its line. That sum the appellees can recover of the company which guarantied the through

rate (*L. R. & F. S. Ry.* v. *Daniels*, 49 Ark. 352), or of the Kansas City Company, if that company was at fault in carrying the goods to Memphis and re-shipping over the L. R. & M. Ry.

The Kansas City Company was the agent of the appellees to forward the goods, and they must bear the result of their agent's negligence instead of casting it upon the appellants by forcing them to assume the charges paid to the L. R. & M. Ry., as they attempted to do.

The court should have allowed the appellants the charges due the latter company ($8.06) in addition to the amount called for by the bill of lading. The judgment in replevin will be modified here to that extent. The judgment for the penalty will be reversed, and the complaint dismissed.

It is so ordered.

LOEWENBERG *v.* RAILWAY CO.

Opinion delivered July 1, 1892.

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1. *Carrier—Lien for freight.*

   If a carrier receives goods for shipment over several connecting lines and guaranties a through rate, where no joint rate has been agreed upon by such connecting lines, the last carrier has a lien on the goods for its own regular charges, together with the charges due the prior connecting lines advanced by it in ignorance of the guaranty, though the amount so paid, added to its charges, exceeded the guarantied rate.

2. *Railway—Duty to surrender freight.*

   The act of February 27, 1885, which provides that all railroad companies shall deliver freight to its owner upon payment, or tender of payment, of the freight charges due, as shown by the bill of lading, applies only to railroad companies that are bound by the bill of lading, either as having made, authorized or accepted it.

3. *Tender of freight charges—Waiver.*

   A demand by a carrier, by mistake, of more than is due upon freight is not a waiver of tender of the amount legally due.

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

This was a suit in replevin by I. Loewenberg against the Arkansas & Louisiana Railway Co. to recover possession of a car load of stoves and damages for unlawful detention thereof. The facts are stated in the opinion.

W. C. Rodgers, for appellant.

1. The act of February 27, 1885, is valid as a mere police regulation. 49 Ark. 201; 12 S. W. Rep. 1002.

2. The lien of a carrier for freight depends on contract with the owner; the lien need not be mentioned in the contract, *but there must be a contract* of carriage on which it may rest. A wrongdoer cannot confer on the carrier the right to assert a lien against the true owner, and when goods are sent, not according to contract with the true owner, but by some other route, there is no lien for freight. 6 A. & E. R. Cases, 364; 1 Doug. 1; 5 Cush. 137; 9 Gray, 262; Hutch. Car. sec. 468; *ib.* sec. 491; and note *ib.* 492. Appellee must rely on the bill of lading in order to assert a lien at all. Once having relied upon it, or affirmed it in order to assert its lien, it must bear its burdens. 50 Ark. 397; 37 Fed. Rep. 532.

3. In order to carry out its contract, it becomes necessary for the Ohio Valley R. Co. to employ other carriers, and these lines become the agents of the Ohio Valley and bound to carry out its contract. 50 Ark. 397; 74 Mo. 159; 6 A. & E. R. Cases, 433. The connecting carrier, by receiving the goods from the contracting carrier, becomes its agent to complete the contract. Hutch. Car. sec. 150; Lawson, Cont. Car. sec. 343; 63 Mo. 314, 377; 45 N. Y. 514; 49 *id.* 491; Hutch. Car. secs. 271–4; 39 Ark. 158; 57 Ind. 505.

4. Appellee held the goods for $53 more than they were entitled to, admitting their theory to be correct, and this was a waiver of any tender of $231.

Dodge & Johnson for appellee.

1. The last carrier has a lien for all previous charges paid and its own freight, and the shipper's remedy is against the first carrier on its guaranty. Schouler on Bailments and Carriers, p. 546; 49 Ark. 534; 54 *id.* 402; 53 *id.* 285; 41 Fed. Rep. 592; 12 S. W. Rep. 1002; *ib.* 533; 149 Mass. 197; 13 R. I. 572–6; 14 Allen, 320; 22 Kas. 659; 27 Mo. 17; 25 Wis. 241–261; 9 Am. Law Reg. (N. S.) 536; 11 Mich. 121.

2. The plaintiff refused to pay more than $180, the rate mentioned in the bill of lading. It is sufficient for defendant to show that this tender was not sufficient, even though by mistake it demanded more.

1. Lien of carrier for freight.

HEMINGWAY, J. The court below found the facts in the case as follows: That the plaintiff purchased a car load of stoves at Evansville, Indiana, for shipment to Nashville, Arkansas; that they were delivered at Evansville to the Ohio Valley Railway Company which issued a through bill of lading at a guarantied rate of 78 cents per hundred pounds; that to complete the carriage it was necessary that the freight be transported over several connecting lines before it reached Hope, Arkansas, where it was received by the defendant for carriage to the place of consignment; that the defendant had no contract or agreement with the initial road authorizing it to make a rate for defendant lower than its regular local rate, and had never agreed upon or fixed with it any joint through rate from Evansville to Nashville; that defendant received and carried the goods from a connecting carrier without knowledge of the rate guarantied; that, upon the receipt of the freight, it paid the charges that had accumulated to prior carriers, and that the amount so paid, added to the regular rate of the defendant, exceeded the rate guarantied in the bill of lading.

Upon this finding, the court held that the plaintiff was not entitled to demand the stoves except upon payment or tender of the sum of the charges paid by the defendant and the amount due it for carriage according to its regular rate of charges; as no such payment or tender had been made, its finding was for the defendant.

It was not shown below, nor is it insisted here, that the charges paid by the defendant were in excess of the regular rates of the several carriers to whom they were paid, or that the defendant made the payment with notice that the charges were in excess of what was legally due.

We are of the opinion that the court could have made no different finding upon the evidence; and that, upon the case found, the defendant was entitled to hold the stoves until the sum of the freight due it according to its regular rates and the charges advanced by it to the former carriers were paid. The authorities to sustain this conclusion are too numerous and too well established to require a review at our hands. Hutch. Car. 478*a* and cases cited; *Railway Co.* v. *Lear*, 54 Ark. 399; *Wolf* v. *Hough*, 22 Kas. 659; *Vaughan* v. *Providence, etc., Ry. Co.* 13 R. I. 578.

2. Duty of railway to surrender freight.

But it is insisted that, by the terms of the act of the 27th of February, 1885, it is made the duty of all carriers to surrender freight upon payment of the charges specified in the bill of lading, without reference to the relation which the carrier, to whom the payment is tendered, sustains to the bill of lading, and that for this reason the defendant was bound to deliver the stoves. The position is not tenable. In the case of *Fordyce* v. *Johnson*, *ante*, p. 430, in an opinion by the Chief Justice, it is held that the act relied upon applies only to carriers that are bound by the bill of lading, either as having made, authorized or adopted it. As the defendant in this case neither made nor authorized the making of the bill of lading, and

was not cognizant of its provisions until after it advanced the prior charges and earned its freight by completing the carriage, we think the bill of lading was not binding upon it, and that the act was inapplicable.

The court refused a number of prayers for declarations of law submitted by plaintiff and gave a number on part of defendant, and to its action in each respect plaintiff saved exceptions. Whether the former were correct and the latter incorrect as statements of law, we deem it wholly unnecessary to determine; for, upon the finding of facts by the court, it follows, from the principles herein announced, that there could have been no other than a judgment for the defendant.

3. When tender of freight not waived.

It is insisted that although the plaintiff made no tender of the sum due, the defendant waived it, and that the verdict should have been for the plaintiff, upon the principle announced in the twelfth prayer for instruction on part of the plaintiff—that is, that the defendant waived such tender.

As the plaintiff announced that it proposed to tender the amount in the bill of lading, without indicating that he would give more, the defendant's reply that it would accept only the sum demanded could not properly be held a waiver of tender of the sum legally due, even though it erroneously computed the sum due at an amount in excess of what it was entitled to demand. The plaintiff was not influenced by the reply to forbear making a tender of the proper amount, and it cannot be said that the defendant waived a tender which it had no reason to expect. The plaintiff was insisting that he was entitled to demand the stoves on payment of the freight specified in the bill of lading; and the defendant, that it was entitled to hold them until its freight rate and the charges advanced by it were paid. Neither party seems to have noticed that the sum demanded included an excess of charges paid; and there is quite as much reason to

hold that the defendant would have accepted the sum legally demandable, as that the plaintiff would have paid it. As the plaintiff made no tender of the sum due, and the defendant did not waive it, we think the twelfth declaration was properly refused.

Affirmed.

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BOND v. STATE.

Opinion delivered July 1, 1892.

1. *Criminal practice—Variance.*

   Where defendant was arrested upon an affidavit before a justice of the peace, charging him with selling intoxicating liquor without license, under sec. 4507 of Mansf. Dig., and convicted, under the same statute, of selling malt liquor without license, he cannot, on appeal for the first time, object to the variance.

2. *Sale of non-intoxicating malt liquor prohibited.*

   The statute prohibits the sale of any compound or preparation containing malt or alcoholic liquor, which, though not intoxicating, is used and drunk as a beverage.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

John S. Little and *Humphry & Warner* for appellant.

The charge against appellant was unlawfully selling *intoxicating liquors*. The proof shows and the court found that Pale Malt Tonic *was not intoxicating*, and defendant should have been acquitted. Citing and reviewing Cooley, Const. Lim. p. 79; 21 N. Y. 177; Bish. St. Cr. sec. 985; 36 Ark. 258; 39 *id.* 450; 50 *id.* 18; 39 *id.* 204; 51 *id.* 165. The object of the law was to prevent the sale of *intoxicating* liquors, compounds and preparations, and not to prohibit non-intoxicating beverages.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

Pale Malt Tonic is a *malt liquor*, the sale of which is prohibited by statute. Mansf. Dig. sec. 4507; 61 Vt. 505; 122 Pa. St. 299; 34 N. W. Rep. 188; 38 Ark. 656.

HUGHES, J. Upon an affidavit filed before a justice of the peace, charging him with the offense of selling intoxicating liquor without license, the appellant was arrested and brought before the justice of the peace to answer said charge. He pleaded not guilty, and was fined two hundred dollars, and appealed to this court.

The testimony was that the defendant sold a preparation called Pale Malt Tonic. The court sitting as a jury found the facts to be "that Pale Malt Tonic is prepared to be sold for use and drink as a beverage, and as a substitute for heavier drinks like beer and whiskies; that, in color, taste, odor, froth and other particulars, it presents all the appearance of a weak beer; that it exhilarates and stimulates, but could probably not be taken and retained in the system in sufficient quantities to intoxicate." The court also found that it contained:

Alcohol	.02
Sugar	.0087
Ash	.0017
Other extractive matter	.0268
Water	.9428
Total	100

Specific gravity, 1009.

To which finding of the court the defendant excepted.

The court declared the law to be that "the statute intended to and does prohibit the sale of any compound or preparation containing malt or alcohol intended for use as a beverage, without license first obtained;" to

which the defendant excepted. At the request of defendant, the court made the following finding:

"No. 5. The court fails to find from the evidence that Pale Malt Tonic is an intoxicating liquor."

The defendant asked the court to make the following findings, which were refused:

"No. 4. The court finds from the evidence that there is not sufficient alcohol or spirituous, ardent, vinous, malt or fermented liquor in Pale Malt Tonic to make a preparation or compound thereof, the sale of which is prohibited without license."

"No. 6. The court finds the facts to be that the Pale Malt Tonic alleged to have been sold by defendant is not either alcohol or spirituous, vinous, malt or fermented liquors or a preparation thereof."

"No. 7. That said preparation is not such an one as can be used as a beverage and a substitute for intoxicating liquors."

"No. 8. The court finds the facts to be that the Pale Malt Tonic, sold by defendant, is not such a preparation of either alcohol or spirituous, vinous, ardent, malt or fermented liquors, as can be used as a substitute of either, for the purposes of intoxication."

"No. 9. The court finds the facts to be that the defendant Bond, on the —— day of November, 1891, sold, in the Fort Smith District of Sebastian county, a certain beverage, known and described as Pale Malt Tonic, and that said defendant did not have license to sell alcohol or spirituous, ardent, vinous, malt or fermented liquors; that the said Pale Malt Tonic will not produce the effect of intoxication or drunkenness."

To which refusal defendant excepted.

The court refused to declare the law as asked by defendant, as follows:

"No. 2. That the law means, by the words 'preparation or compound thereof,' that there must be a

sufficient quantity of alcohol or spirituous, ardent, vinous, malt or fermented liquor in said mixture as to make the preparation or compound have the effect or influence on the system, if taken in large quantities, as the alcohol or spirituous, ardent, vinous, malt or fermented liquor would have, and that it does not mean that fifteen or twenty drops of alcohol or spirituous, ardent, vinous, malt or fermented liquors placed in a pint of another liquor would make said mixture a compound or preparation of alcohol or spirituous, ardent, vinous or fermented liquors; but if the mixture had a quantity of alcohol or spirituous, ardent, vinous, malt or fermented liquor sufficient to intoxicate a person who drank a quart or two at one time, or put him under its inflnence, then it would be a preparation or compound thereof, the sale of which without license is prohibited."

"No. 3. In testing the question of whether a mixture comes under the term 'a compound or preparation thereof,' the main, if not the sole, question is, what is the proportion of whiskey or ardent spirits to the other ingredients in the mixture? And its character is determined by that test: if there be any considerable amount—so much so that the effects as to intoxication are the same on a person taking what he can drink of said mixture—then it is a preparation thereof; if, on the other hand, a person cannot drink enough of the mixture to produce the effect, as to intoxication, of alcohol or spirituous, ardent, vinous, malt or fermented liquor, it is not a compound or preparation thereof, in the meaning of the law."

"No. 4. The court finds, from the evidence, that there is not sufficient alcohol or spirituous, ardent, vinous, malt or fermented liquor in Pale Malt Tonic to make it a preparation or compound thereof, the sale of which is prohibited by law."

The court found defendant guilty as charged, and assessed his fine at $200. Defendant saved exceptions.

Defendant moved a new trial upon the following grounds, to-wit:

1. The court erred in the finding of facts.

2. In declaring the law.

3. In rendering judgment.

4. In not finding facts as requested by defendant in the 6th, 7th, 8th and 9th respectively.

8. In not finding for defendant as requested No. 4.

9. The court erred in refusing to declare the law as requested by defendant in requests 2, 3 and 4, respectively.

12. Because the court erred in rendering judgment against the defendant after it failed to find that Pale Malt Tonic was an intoxicating liquor.

13. Judgment not supported by the evidence.

14. Judgment contrary to law.

Motion overruled, exceptions saved and appeal.

The statute is as follows:

1. Practice as to variance in misdemeanors.

Section 4507 (Mansfield's Dig.): "It shall not hereafter be lawful for any person to sell alcohol or any spirituous, ardent, vinous, malt or fermented liquors in this State, or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors, or intoxicating spirits of any character which are used and drank as a beverage in any quantity or for any purpose whatever, without first procuring a license from the county court of the county in which such sale is to be made authorizing such person to exercise such privilege."

The counsel for appellant contend that, as the charge was selling intoxicating liquors without license, no conviction can be sustained, unless the proof shows that the preparation sold was an intoxicating liquor.

It seems, from the evidence in the case and the declaration of law which the defendant asked the court

to make, that he was tried for and convicted of selling Pale Malt Tonic, and that he made no objections whatever. In the examination the evidence was directed to the sale of Pale Malt Tonic.

Its constituents, its use, color, taste, odor and effect when used as a beverage were all shown to the court by the evidence. The defendant was fully aware that the offense sought to be proven against him was a violation of the statute by a sale of a preparation known as Pale Malt Tonic.

If, though arrested on a charge of selling intoxicating liquors, he consented to be and was tried for a similar offense, prohibited by the same statute, without objection upon his part (until he reached this court), he should not be heard to urge the objection here. He was not misled. He was not prejudiced.

At most there does not seem to be a remote probability that he could have been prejudiced. If he was, it was within his power to have prevented any prejudice. That he was tried for, and that the evidence in the case was directed to, a violation of the statute, such as the charge of the circuit judge embraces, was apparent to the counsel for the appellant, as shown in the opening sentences of his argument, where he states that, "the record in this cause presents a single question for determination, which may be stated thus: 'Can a beverage, though not intoxicating, be lawfully sold to be drunk without first having obtained a license, under sec. 4507, Mansfield's Digest.'" He then proceeds to argue that the law intended to prohibit the sale of intoxicating liquors.

No written information or pleadings are required in criminal proceedings in a justice of the peace's court. Sec. 2367, Mansf. Dig. The affidavit or information was amendable. It is held in *Molen* v. *Orr*, 44 Ark. 486, that a party alleging a variance between the pleadings and

the proof must show that he has been misled to his prejudice. "That where testimony variant from the allegations of the pleadings is admitted without objection, this court will presume that the parties deemed the variance immaterial or treated the complaint as amended to admit the evidence."

The defendant did not ask any declaration of law in the court below to cover the objection he raises here.

2. Sale of malt liquor without license forbidden.

We find no error in the declaration of law made by the court, and think the proof sufficient to sustain the verdict.

The judgment is affirmed.

AMES IRON WORKS v. REA.

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Opinion delivered July 1, 1892.

1. *Conditional sale—Recoupment of damages.*

To an action of replevin for goods sold with reservation of title in the vendor until the purchase price is paid, the vendee may in defense counter-claim the damage sustained by him on account of the vendor's failure to deliver the goods at the time agreed, and tender to the vendor the balance of the purchase money after deducting such damages.

2. *Forfeiture under conditional sale—Practice in equity.*

An action of replevin to enforce a forfeiture of goods conditionally sold, caused by failure of the vendee to pay a balance of the purchase price due, may be transferred to equity and the forfeiture set aside upon equitable terms; in such case the judgment should be, not that the vendor have a lien upon the property sold for the residue of the purchase money, but that the vendor have possession of the property if the vendee fails to pay such residue within a reasonable time.

Appeal from Marion Circuit Court.
DEROOS BAILEY, Special Judge.

J. M. Rose for appellant.

This was a conditional sale of property, and the

proper remedy was replevin. 49 Ark. 63; 47 Ark. 363. The answer set up no equitable defense whatever, and the cause was improperly transferred to equity. A counter-claim for damages is not a defense to an action of replevin. Accounts cannot be adjusted or settled in an action of replevin. Cobbey on Replevin, sec. 791. Set-off is not a good defense to an action of replevin. 40 Ark. 75; 5 Watts, 516; 23 Ga. 43; 22 Mich. 419; Waterman on Set-off, sec. 144.

W. S. McCain for appellee.

1. The legal, as distinguished from the equitable, rights of the parties to conditional sales are well settled. 54 Ark. 476; 52 Ark. 207; 42 *id.* 100; 54 *id.* 30; 85 Mich. 185; 7 So. Rep. 187; 9 So. Rep. 280; 4 S. E. Rep. 152; 9 So. Rep. 350; Newmark on Sales, 306; Jones on Chat. Mort. secs. 681-698. These cases show the right to relieve after forfeiture.

2. Any claim growing out of the "contract" or "transaction" is a proper defense and counter-claim under our statute. Mansf. Dig. sec. 5034.

3. No question is made as to the quantum of damages. As to the liability, see Benjamin on Sales, 1307–1337.

BATTLE, J. The Ames Iron Works instituted an action of replevin against J. C. Rea to recover possession of an engine, boiler, pump, pulleys, shafting, one fifty saw gin, feeder and condenser, and one set of Southern Standard Press Irons, of the aggregate value of $800, claiming that it was entitled to the immediate possession of the same by virtue of the terms of a conditional sale thereof to the defendant.

The part of the defendant's answer to the plaintiff's complaint, which it is necessary to state in order to present the question decided by us, is, substantially, as follows: On or about the 22d day of May, 1887, the defendant agreed to purchase of the plaintiff the engine, boiler,

pump, pulleys and shafting sued for, and other things necessary to connect and run machinery with said engine and boiler, on condition that they should remain the property of the plaintiff until the purchase money was fully paid; and plaintiff agreed to ship the same to him at Batesville, in this State, on or before the first of June, 1887, and he agreed to pay therefor $110 cash, and various other sums at stated times, amounting to the sum of $652, and to pay $50 freight thereon. Machinery was delivered to him at Batesville on or about the 18th of July, 1887, upon his paying the $50 for freight, the $110 cash, and executing notes to the plaintiffs for the deferred payments, according to his agreement; and he hauled it a distance of one hundred miles to his home at Oakland, in Marion county, in this State, as he received it, a part thereof being in boxes. When he arrived at home and opened the boxes, he found that an inspirator and other parts of the machinery which he had purchased had not been delivered to him. He was not able to operate the machinery, on account of this failure to deliver. He at once notified plaintiff of the failure, and used reasonable diligence to get the missing parts, and was unable to procure them until it was too late to make the machinery answer the purpose for which he had purchased it, which was to gin cotton produced in 1887. It was late in the fall when he was prepared to gin, and the best part of the ginning season had passed. While he was attempting to supply the missing parts, seed cotton was offered to him which he did not take, and other cotton would have been received by him had he been prepared to gin, which he did not get because his machinery was incomplete. The result was, he was damaged, by plaintiff's failure to perform its contract, in the sum of $600.

He insisted that plaintiff should be held responsible to him for his damages, because it had notice of the

object of his purchase when it was made; and also insisted that the amount thereof should be deducted from the amount due on his notes, and that he should only be required to pay the balance due after such deduction. He alleged that he had tendered to the plaintiff such balance, and still tenders it.

He asked that the action be transferred to the equity docket; that his damages be assessed and considered a payment on his notes, and that if the damages were not sufficient to satisfy the notes, judgment be rendered against him for the balance still remaining due, and for other relief.

Plaintiff replied to the answer, denying that the defendant had been damaged, or, if he was, that it was caused by its negligence in the performance of its contract; and at the same time demurred to the answer because the facts stated therein were not sufficient to constitute a defense, counter-claim or set-off.

The action was transferred to the equity docket; and the demurrer to the answer was overruled. The action was heard upon the pleadings and exhibits thereto and the depositions of witnesses on file. The court found that the plaintiff had failed to perform its part of the contract of sale, and that defendant was damaged thereby in the sum of $350, and that he was indebted to plaintiff, on account of purchase money for all the property sued for and interest thereon, in the sum of $891.21; that the damages should be credited to the defendant on his indebtedness; which being done, there was still remaining due to the plaintiff the sum of $541.21; and adjudged and decreed that plaintiff recover of and from the defendant the $541.21, and that the same be a lien on the property in controversy, and that it be sold to pay the same, and that the notes executed by the defendant be delivered up and cancelled; and plaintiff appealed.

1. Recoupment of damages in conditional sales.

Was the counter-claim of defendant properly pleaded in this action? The right to the possession of property sued for is essential to a recovery in actions of replevin. Any state of facts which will show the existence or non-existence of such a right is, as a rule, pleadable in such actions. Thus, in an action of replevin by a mortgagee against the mortgagor to recover the possession of goods mortgaged to him, the mortgagor can successfully defend the action by showing that the debt, which the mortgage was given to secure, has been paid. *Hudson* v. *Snipes*, 40 Ark. 75.

In *Bloodworth* v. *Stevens*, 51 Miss. 475, the plaintiff brought an action of replevin for the possession of cotton which was seized and held by the defendant for rent due according to contract. The plaintiff admitted the contract, and claimed that the defendant, who was the lessor, agreed to repair a certain fence and failed to do so, and by reason thereof stock had entered his field and damaged him more than the amount of the rent. The court held that the issue presented rested upon the fact whether the rent for which the defendant seized the cotton was or was not due, and that the plaintiff might show any matter competent to discharge that liability.

In *Rogers* v. *Kerr*, 42 Ark. 100, the plaintiff brought an action of replevin for a lot of cord wood and railroad ties cut upon his land. The defendant answered and claimed the timber and the land upon which it was cut as his own, and alleged that the plaintiff claimed the land under an illegal tax title, and that neither party was in possession, and asked that the cause be transferred to the equity docket, and that the defendant's tax deed be cancelled as a cloud upon his title. It was held that the facts stated in the answer constituted a good defense, and, upon a hearing of the evidence, that the defendant was entitled to the affirmative relief for which he asked.

Our statutes provide that a defendant may set forth in his answer as many grounds for defense, counter-claim and set-off, whether legal or equitable, as he shall have; and that the counter-claim mentioned must be a cause of action in favor of the defendant against the plaintiff "arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action." Mansfield's Digest, secs. 5033–4. Here the foundation of plaintiff's claim was a contract for a sale, in which it was agreed that the title to the property in controversy, which was the subject matter of the contract, should remain in the plaintiff until paid for. By the failure of plaintiff to perform his part of that contract, the defendant claimed that he was damaged in the sum of $600. It is obvious that this failure would be a complete defense to the action, provided the damages caused thereby were equal to or exceeded the amount due to the plaintiff on the contract. But it was not. Hence it alone was not sufficient to defeat the plaintiff's right to recover the possession of the property. In order to hold possession the defendant further said he had tendered the balance due on the purchase money after his damages were deducted, and averred that he was ready and willing to pay such balance, and still tendered the same. Was this a good counter-claim?

By the terms of the contract for a sale, the machinery in controversy was to remain the property of the vendor until the purchase money was paid. In *Nattin* v. *Riley*, 54 Ark. 30, this court, in speaking of a contract like this, said: "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."

2. When equity will set aside forfeiture under conditional sale.

In this case the defendant had the right to recoup his damages and hold the property by paying the balance due on his notes, but the plaintiff denied his right to damages. It is obvious, therefore, that the balance due on the purchase money could not have been known and tendered until his damages were judicially ascertained, no estimate of damages made by the defendant being binding on the plaintiff. Why, then, should his rights under the contract be forfeited, he being willing to pay the balance? Under the circumstances, there can be no equitable reason for such a forfeiture, because the reservation of title was obviously incorporated in the contract as a security to the vendor against loss on account of delay or the non-payment of the purchase money, and because full and adequate compensation can be made for any loss which has been suffered on account of the failure to pay at maturity. According to the principles upon which equity sometimes interferes to prevent forfeitures, he should be allowed to hold the property by paying the balance of the purchase money remaining unpaid after the deduction of damages.

The case was properly transferred to the equity docket; and the demurrer was rightly overruled.

The appellant does not complain in this court of the damages assessed being excessive, or that it was not liable therefor. The assessment thereof should not, therefore, be disturbed.

The court below erred in rendering judgment in favor of appellant for the balance due and declaring it a lien on the property sued for, and ordering it to be sold to satisfy the same. It asked for no such relief, but for possession of the property. The court should have

allowed the appellee a reasonable time within which to pay the balance due on the purchase money and interest thereon at the rates specified in the notes given for the same; and (the appellee having retained possession of the property by giving bond) should have ordered and directed that, in the event he failed to do so, the appellant should have possession of the property, or the value thereof, naming it, in case a delivery could not be had; and should have caused the damages to be assessed, which appellant has suffered by reason of the detention of the property since it made demand therefor; and should have ordered and decreed that it should have and recover the same of the appellee in the event he failed to pay the balance and interest thereon within the time allowed.

The judgment of the circuit court, in so far as it is consistent with this opinion, is affirmed, and in other respects is reversed; and the cause is remanded for further proceedings.

RAILWAY COMPANY *v.* TIPPETT.

Opinion delivered July 1, 1892.

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Accident at railway crossing—Contributory negligence.

In an action against a railway company to recover damages for the killing of plaintiff's intestate at a crossing of a side-track, if the only negligence shown on defendant's part was a failure to give the statutory signal, a verdict in favor of the plaintiff will be set aside where the evidence shows that deceased was killed in attempting to cross ahead of an approaching train at a place where the view before reaching the track was partially obstructed by a cattle-chute, that deceased was familiar with the locality and knew the use made of the side-track, and that if he had looked with proper care, before stepping upon the track, he could have seen the train at such distance as would have enabled him to avoid the injury.

Appeal from Craighead Circuit Court, Jonesboro District.

JAMES E. RIDDICK, Judge.

This suit against the St. Louis, Iron Mountain & Southern Railway Company was instituted by the administratrix of James Tippett, for the benefit of his widow and next of kin. The complaint alleged that, on the 25th day of February, 1889, while James Tippett was going from his house on the west side of defendant's track to his place of business on the east side of said track, he was run over and killed by a locomotive and train of cars belonging to defendant, at a public crossing, just north of the depot in the town of Paragould, Arkansas. It charged negligence on the part of the defendant in running its engine and cars rapidly past said crossing without sounding either bell or whistle, and in having placed an obstruction near the track which cut off the view of the approaching train from the deceased. The prayer of the complaint was for damages in the sum of $25,000.

The answer of the defendant denied specifically all the allegations of the complaint, and charged that the accident was the result of contributory negligence on the part of deceased.

Plaintiff recovered verdict of $1000. Defendant has appealed. The facts sufficiently appear in the opinion.

Dodge & Johnson for appellant.

The failure of a traveler at a crossing to stop, look and listen before attempting to cross is evidence of negligence; and if injury results, he cannot recover. 16 S. W. Rep. 169; Patterson, Ry. Acc. Law, 174, 175; 95 U. S. 161; 114 U. S. 615; 12 Q. B. Div. 70, 73; L. R. 3 App. Cases, 1155. In the light of these decisions the court erred in its charge to the jury.

B. H. Crowley for appellee.

Appellant was guilty of negligence in failing to give the signals required by law. Mansf. Dig. sec. 5478;

2 Wood's Ry. Law, p. 1307, note 1, 1310, 1313, 1330. While a traveler is held to due care in stopping, looking and listening, yet he is only bound to look where to do so would aid him in determining whether a train is approaching. 2 Wood's Ry. Law, p. 1310. There is evidence to sustain the verdict.

MANSFIELD, J. Where the view of a railway track is obstructed, and the danger of a road-crossing is thus increased, a greater degree of care is required of a traveler than it would be his duty to exercise at a crossing not specially dangerous. Patterson on Railway Accident Law, sec. 177. And, without regard to any special danger at a crossing, this court has held that "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 a collision with it." *Railway Co.* v. *Cullen*, 54 Ark. 431. In the case cited it was said: "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 so to do. If the traveler neglects to do what an ordinarily prudent man would do under the circumstances, he is guilty of negligence." An application of these rules to the facts of the present case will determine whether the plaintiff's intestate was guilty of negligence contributing to the loss of his life. He was familiar with the locality, and knew the use made of the side-track upon which he was killed. He must have known also the extent to which a view of the track was obstructed by the cattle chute; and it was his duty, before going upon the track, to take such precaution for his personal safety as the circumstances would suggest to a man of ordinary prudence. He had a right to expect that the company would perform its duty in giving the signals required by law as its engine approached the crossing. But, as shown in the case cited, the negli-

gence of the company could not excuse the want of proper care on his part. He was going from his residence on the west side of the railway to his place of business on the east side, by a route he was accustomed to travel, and was struck by the train as he stepped upon the track. A witness who was following and endeavoring to overtake him states that he saw the approach of the train which inflicted the injury before the deceased reached the point where his view was obstructed by the chute; and that there was nothing to prevent the deceased also from seeing it. This testimony is partially contradicted by that of one witness, who testified that, in going from the west side over the route traveled by the deceased, a person would have to get nearly on the track before he could see very far in the direction from which the train came. But the further statement of this second witness is to the effect that when not over two feet from the track, the engine could be seen for a distance of thirty or forty yards; and all the evidence shows that, from the crossing at which the deceased was struck, the train could have been seen at such distance as would have enabled him to avoid the injury if he had but looked in the proper direction. If, then, his view was obstructed as he approached the track, it was the more incumbent upon him to look with proper care after he reached it. But the fact is without contradiction that he went upon the track a few yards in front of the cars with apparent indifference to the danger of the place; and it does not appear that the men in charge of the train could have kept it from striking him if his presence had been known. There was evidence from which the jury might have found negligence on the part of the defendant in failing to give the proper signals. But none we think which justified them in finding that the deceased would have been injured except for his own negligence. If this view of the case is correct, it was error to refuse

a new trial. It follows also that so much of the court's charge as seems to assume the existence of testimony tending to prove that the deceased could not by looking have seen the train, was abstract and therefore improper. The rest of the charge, considered as a whole, was not objectionable; and we think the court committed no error in ruling upon the instructions requested by the defendant.

Reversed and remanded.

TAYLOR *v.* JUDSONIA MERCANTILE COMPANY.

Opinion delivered July 1, 1892.

Executory contract—Failure of consideration—Election.

Where a creditor agreed, in consideration of a preference by deed of trust, to surrender to the trustee notes held as collateral security for his debt, and afterwards intervened in an attachment suit to claim the benefit of such preference, he will not be deemed to have made an election to rely upon the deed of trust which was subsequently adjudged invalid, but, the contract being executory and the consideration having wholly failed, he is under no obligation to surrender such notes.

Appeal from White Circuit Court.

MATTHEW T. SANDERS, Judge.

George Taylor & Co. interpleaded in an attachment suit brought by Kraft-Holmes Grocer Co. against the Judsonia Mercantile Co., a corporation engaged in merchandising.

The agreed statement of facts disclosed substantially the following state of case: In April and May, 1887, the Judsonia Mercantile Co., for the purpose of securing Geo. Taylor & Co. for advances to be made, gave them twenty-one notes aggregating over $1300; said notes were made by different debtors of the company for various sums, and fell due about November 1, 1887,

and were endorsed to Geo. Taylor & Co. In September, 1887, the company, being insolvent, executed a deed of trust, conveying all of their corporate property, including the notes above mentioned, to Geo. W. Hanson, as trustee, for the benefit of certain preferred creditors, including Geo. Taylor & Co. Subsequently the Kraft-Holmes Grocer Co. and certain other non-preferred creditors brought suits at law against the Judsonia Mercantile Co., and procured attachments to be levied upon its property. Upon the application of certain creditors preferred by the deed of trust, the chancery court appointed Hanson receiver of the property conveyed by the deed of trust. The appointment of the receiver was successfully resisted by the attaching creditors, this court holding that equity had no jurisdiction. (*Ford* v. *Judsonia Mercantile Co.* 52 Ark. 426). The receiver, under the court's orders, paid over to the sheriff all funds collected by him, including the sum of $616.80 collected upon the twenty-one notes above mentioned and still held by Geo. Taylor & Co. The attachments were sustained by the circuit court. At the time the attachments were sued out, the Judsonia Mercantile Co. was indebted to Geo. Taylor & Co. in the sum of $2484.46, to secure the payment of which the twenty-one notes were held.

The question in the case is, whether Geo. Taylor & Co. should receive the proceeds of these twenty-one notes or whether they should go into the general fund for the attaching creditors? Upon this point evidence was taken from which the court found the following facts: "At the time this deed of trust (from the Judsonia Mercantile Co. to Hanson) was executed and delivered, Wm. Warren, Jr., the agent of said Taylor & Co., was present and * * acquiesced in allowing said twenty-one notes to be included in the schedule of the assets of the Mercantile Company, and then agreed with the officers of said company and the trustee in said deed

to return said notes to Hanson, the trustee, to be by him administered as the other assets of said Mercantile Company, under the terms of said trust deed, and also participated in the preliminary consultation had just before said trust deed was executed. The legal inference from the agreement of Mr. Warren to surrender said notes is that it was done in consideration that his principal was thereby, as he believed, obtaining better and more adequate security for his debt. * * * Afterwards, the said Taylor & Co. intervened in certain actions at law by the attaching creditors of said Mercantile Company and * * filed a pleading, described as a motion or interplea, * * in which it is stated in substance that said Mercantile Company agreed with said Taylor & Co., in consideration of the surrender by said Taylor & Co. of said twenty-one notes held by them as collateral security, that said Mercantile Company would, as a further and better security for its entire indebtedness to said Taylor & Co., also for the benefit of other creditors named and agreed upon, execute and deliver a deed of trust upon all of its real estate, stock of goods, wares and merchandise, notes and accounts and choses in action, including those then in the possession of said Taylor & Co., and said Taylor & Co. did then and there in all good faith deliver and turn over to said company the said notes and accounts held as aforesaid."

The court found that Taylor & Co. agreed to surrender the twenty-one notes held as collateral security and accepted in lieu thereof the benefit of the trust deed; and declared the law to be that a creditor who elects between two securities for his debt is bound by his election, and if the one relied upon, by a mistake of law, becomes unavailable, he cannot resort to the security surrendered, to the prejudice of other creditors. Judgment was accordingly rendered in favor of the plaintiff. The interpleaders have appealed.

Eben W. Kimball for appellant.

McRae & Rives and *J. W. House* for appellees.

MANSFIELD, J. The money claimed by the interpleaders, Taylor & Co., was collected upon notes endorsed and delivered to them by the defendant, the Judsonia Mercantile Co., as collateral security for a debt which remains unpaid. They received the notes several months before the deed to Hanson was executed, and continued to hold them up to the date of the judgment rendered in this cause. Their right to the sum in controversy is denied on the alleged ground that they agreed to surrender the notes in consideration of having their debt preferred by the deed, and that they afterwards claimed the benefit of that preference by an interplea filed in one of the attachment suits. It is argued that this was an election to accept the provision contained in the deed, and that the security acquired by the pledge of the notes was thereby relinquished. But the interplea referred to does not import an intention to relinquish the security afforded by the notes, except upon the condition of obtaining that provided in the deed; and the latter, it is conceded, was void. An election is a choice between two rights or benefits. Bishop, Cont. secs. 779, 781; Black's Dictionary, 412. And as the deed was void, and could not possibly confer any right or benefit, no case of election was presented by its mere execution. It is true that Taylor & Co. could not "accept and reject the same instrument;" and if they had received a dividend or other advantage under the deed, they could not afterwards impeach its validity. 2 Perry, Trusts, sec. 596; Bispham's Eq. secs. 245, 306; *Frierson* v. *Branch*, 30 Ark. 457. But they have received nothing under it, and obtained no advantage whatever because of its execution; and the doctrine of election does not apply.

The plaintiff, the Kraft-Holmes Grocer Co., was not a party to the deed nor a beneficiary under it; and

we cannot see that it stands in any attitude entitling it to complain that Taylor & Co. have not executed the alleged agreement to surrender the notes. But waiving this point and conceding that Warren had authority to make the agreement, it was merely executory; and as it was based upon a consideration that has entirely failed, Taylor & Co. are under no obligation to perform it.

We think the court's declaration of law was not applicable to the case; and that, upon the facts embraced in the agreed statement, the finding should have been for the interpleaders. The judgment will therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

RAILWAY COMPANY *v.* SHOECRAFT.

Opinion delivered October 8, 1892.

1. *Railway—Killing stock—Opinion evidence.*

   In an action against a railway company for killing stock, where the engineer, having several years' experience in that capacity, testified that he sounded the stock alarm, put on the air brakes and reversed the engine when he saw the cattle, he may further testify that, in his opinion, he did all that he could to prevent killing the cattle.

2. *Evidence—Scope of objection.*

   A specific exception, at the trial, to the testimony of a witness upon the ground that it was the expression of an opinion is an objection to the character of the evidence, and not to the witness' competency to give it, and will not, on appeal, support an objection that no foundation was laid to justify the expression of opinion.

Appeal from Monroe Circuit Court.
GRANT GREEN, JR., Judge.

The Little Rock & Memphis Railway Company has appealed from a judgment against it in favor of George Shoecraft for the value of certain stock killed by the

negligence of its train-men. The case is sufficiently stated in the opinion.

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

The suppressed portions of the depositions were statements of facts and not opinions, and clearly competent. 31 A. &. E. R. Cases, 539; 11 Ohio St. 333.

H. A. Parker for appellee.

The court properly suppressed the depositions. They were merely opinions. 31 A. & E. R. Cases, 539. Even if their opinions were admissible as expert evidence, no foundation was laid, no experience was shown.

1. When opinion evidence admissible.

COCKRILL, C. J. A witness' opinion is admissible as evidence, not only where scientific knowledge is required to comprehend the matter testified about, but also where experience and observation in the special calling of the witness give him knowledge of the subject in question beyond that of persons of common intelligence. *Transportation Line* v. *Hope*, 95 U. S. 297.

We have held that farmers residing in the neighborhood of a farm over which a railway is located, who are acquainted with the property, may give opinions as to the amount of damages the owner has sustained by the location. (*St. Louis, etc., Railroad* v. *Anderson*, 39 Ark. 167; *Texas & St. Louis Railway* v. *Kirby*, 44 *id.* 103); and also that one who, by reason of his service with a railway, has special knowledge in the adjustment of freight charges, is competent to give his opinion as to the reasonableness of a given charge. *Railway Co.* v. *Bruce*, 55 Ark. 65.

Many other instances illustrative of the rule are given in 1 Wharton on Evidence, at sec. 444.

Following this rule, it has been held, in the only cases in point which have come under our observation, that an experienced locomotive engineer or fireman may testify as to his opinion of the possibility of avoiding a collision with animals which have strayed upon the track.

Bellefontaine & Indiana R. Co. v. *Bailey*, 11 Ohio St. 333; *Grinnell* v. *Chicago & N. W. R. Co.* 31 A. & E. R. Cases, 539.

In the case in hand, cattle which were crossing the track ahead of the engine were run into and killed. The engineer testified that he sounded the stock alarm, put on the air brakes and reversed the engine when he saw the cattle, and that was all he could do to prevent the collision—or to use his own language, he said: "I did all I could to prevent hitting them." The court struck that sentence from the deposition.

The fireman, who was in the cab with the engineer when the collision occurred, testified to the facts which the engineer was permitted to detail, and added the following statement: "As soon as we saw the stock, every precaution was taken and everything was done to keep from hitting them; and striking the stock was unavoidable;" but the court struck out that part of his deposition.

The effect of the excluded testimony of each witness was that it was his opinion that all had been done that could be done to avoid the collision. Under the rule given and authorities cited above, the testimony was competent. We cannot say that the exclusion was not prejudicial, because if the jury believed that the alarm was sounded, the air brakes applied and the engine reversed at the first possible apprehension of danger to the stock, they would not be informed that the fireman and engineer had performed their whole duty, without the further information that what they had done was all that could be done under the circumstances. The exclusion was therefore prejudicial.

2. Scope of objection to testimony.

The appellee urges that the proper foundation as to experience on the part of the witnesses was not laid, to render their opinions competent. But that objection cannot be made here when it was not raised at the trial.

The objection to the testimony of one of the witnesses is stated specifically to be upon the ground that it was the expression of an opinion. The fair construction of that is that the objection was to the character of the evidence, and not to the witness' competency to give it. *Hoxie* v. *Allen*, 38 N. Y. 175.

If the general objection which was made to the testimony of the other witness makes a difference, it would not change the result of the appeal because the error as to one would remain.

It is not probable that the trial judge excluded the testimony upon the ground of the incompetency of the witnesses, for it was shown that when their testimony was given they had served in their respective positions for several years, and there was no suggestion of incompetency in the proof.

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

CLAY *v.* PULASKI COUNTY.

Opinion delivered October 8, 1892.

Counties—Paupers—Burial expenses.

A county is not liable for services in caring for or burying a poor person residing therein unless such person has been declared a pauper by the county court, prior to the performance of the service.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

M. J. Clay made claim against Pulaski county in the county court, alleging that he expended the sum of $8.25 in the burial of the body of one Young, who, at the time of his death, was a pauper residing in the city of Little Rock and county of Pulaski. He admitted that

no adjudication of pauperism preceded his death, but prayed that such adjudication be now made, and, after said adjudication shall have been made, that the county pay his burial expenses.

The claim was disallowed in the county court, and in the circuit court on appeal. Petitioner has appealed.

Morris M. Cohn for appellant.

It is not necessary that the adjudication of pauperism shall precede the rendering of the services for which compensation is sought; all that is required being that the adjudication of that fact shall precede any liability on the part of the county. Const., art. 7, sec. 28; Mansf. Dig. secs. 1110 to 1114, etc.; 3 Ark. 427; 9 *id.* 240; 31 *id.* 764; 38 *id.* 213; 47 *id.* 239; 49 *id.* 145; 45 N. W. Rep. 502; 13 Ill. 371; 102 U. S. 298; 98 U. S. 314, 315.

Geo. W. Caruth and *Chas. P. Roberts* for appellee.

The statute under which 3 Ark. 427 and 9 Ark. 240 were decided has been repealed. In order to charge the county there must be a previous adjudication of pauperism. Mansf. Dig. secs. 1110–12; 30 Ark. 764; 47 *id.* 239; 49 *id.* 145.

HEMINGWAY, J. It is well settled by the decisions of this court, that there can be no recovery against a county for services in caring for or burying a poor person residing therein unless such person has been declared a pauper, by the county court of the county, prior to the performance of the services. *Brem* v. *Ark. Co. Court*, 9 Ark. 240; *Lee Co.* v. *Lackie*, 30 Ark. 764; *Cantrell* v. *Clark Co.* 47 Ark. 239; *Clark Co.* v. *Huie*, 49 Ark. 145. It follows that the court below properly held that the appellant could not maintain this suit against Pulaski county. Whether he could maintain such a suit against the city of Little Rock is a question not involved in the case, which we, for that reason, have not considered and could not decide.

Affirm.

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BERTON v. ANDERSON.

Opinion delivered October 8, 1892.

1. *Contribution by co-surety—Defense.*

Where a surety upon a guardian's bond, who has been compelled to pay over money due by the guardian upon termination of the fiduciary relation, sues his co-surety for contribution, it is no defense that the plaintiff consented that the guardian might retain and use the ward's money by paying interest therefor and that the probate court thereupon made an order reciting such consent and authorizing the guardian to retain the money "until further order."

2. *Administration—Liability of estate after settlement.*

While land descended may in equity be charged, in the hands of the heirs, with a debt of the intestate which accrued after administration upon his estate was closed, the title of a *bona fide* purchaser, acquired before commencement of a suit to charge the land with the payment of the debt, will be protected.

Appeal from Phillips Circuit Court in Chancery.
MATTHEW T. SANDERS, Judge.

John J. & E. C. Hornor for appellant.

1. A surety paying the debt of his principal has a right to contribution from his co-surety. Mansf. Dig. secs. 6403–4.

2. As the co-surety was dead, and the administration closed before appellant's cause of action accrued, his remedy at law was inadequate, and his remedy is in chancery to subject the real estate which descended to his heirs to the payment of his demand. 15 Ark. 412; 14 *id.* 253; 39 *id.* 577; 18 *id.* 118; 31 *id.* 234; 40 Ark. 433.

3. Lands descended to an heir and in his hands are subject to the right of contribution by a co-surety of the ancestor, who has paid more than his share. 31 Ark. 234; 40 *id.* 433; 53 *id.* 291. The same rule applies to a purchaser from the heirs. 40 Ark. 433; 17 Ohio St. 242; Rawle, Cov. of Title, sec. 310.

4. The consent of Berton that the guardian might retain and use the money did not release the co-surety, Anderson. The order of the court merely continued the matter to another term, or further order of court. But even between creditor and principal debtor this would not have released a surety, because the extension must be for a definite time and for a valuable consideration. 35 Ark. 463; 34 *id.* 44; Brandt on Suretyship, sec. 244.

Quarles & Moore for appellee.

Appellant has no right of action against appellee or the lands, because—

1. He is not a co-surety and does not hold the property as heir of Paul F. Anderson. Appellee is an innocent purchaser for value without notice. 18 Ark. 118; 31 Ark. 234; 40 *id.* 453; 53 *id.* 291. These were all cases of co-sureties against heirs who *then owned the lands by inheritance.* The intimation in 40 Ark. 453 is mere *dictum.* See also sec. 470 of civil code.

2. Berton by his own act became the sole surety on the bond of W. G. Moore, and he cannot now be heard to complain. See Brandt on Suretyship, secs. 227–8; 34 Ark. 73. Contribution is not enforced when inequitable.

MANSFIELD, J. This is a suit in equity brought by Leon Berton to subject certain lots in the city of Helena, which descended to the heirs of Paul F. Anderson, deceased, to contribution in the payment of a sum for which the plaintiff and the decedent were jointly liable as co-sureties on the bond of W. G. Moore as guardian of Tennie Hickman, and the whole amount of which the plaintiff has been compelled to pay, De Witt Anderson, one of the heirs of Paul F., having purchased the interests of his co-heirs in the lots, was made sole defendant to the complaint, and resisted the relief sought on the following grounds: First, he alleges that, the probate court having issued a citation against Moore to appear

and show cause why the money in his hands as guardian had not been loaned out, he appeared and filed the written consent of the plaintiff that Moore should be allowed to use the money and pay interest upon it at the rate of ten per cent. per annum; and that an order was thus obtained permitting Moore to retain the money on the terms stated. This, it is insisted, released Berton's co-surety. Secondly, the answer states that the defendant is an innocent purchaser for a valuable consideration without notice of the plaintiff's claim. Some other matters of defense are stated in the answer, but they have not been insisted upon here. The court dismissed the complaint for want of equity, and the plaintiff has appealed.

1. Contribution by co-surety.

The following facts are shown by the exhibits to the answer. The probate court, having found from the second annual account of Moore that he had in his hands the sum of $1307.19 belonging to his ward, and that he failed to report what disposition he had made of it, made an order requiring him forthwith to file such report conformably to the statute. Mansf. Dig. sec. 3515. This order having been served upon Moore, there was filed in the court a paper signed by the plaintiff and to the effect that he, as surety of Moore, consented that the latter might retain and use the ward's money and pay for its use interest at the rate of ten per cent. per annum. The court thereupon made an order reciting the filing of such consent, and also the fact that Moore had been unable to lend the money upon such security as the law required, and directing that he might retain it until the further order of the court by paying interest upon it at the rate of ten per cent. per annum. It appears to be conceded that the money mentioned in this order was the same subsequently recovered from the plaintiff as one of Moore's sureties. But there is nothing except the formal recital of the order to show that Moore had not used the money before the order was made. The language of the

recital, in referring to the money as being "in his hands," is similar to that of the order requiring him to report what disposition he had made of the money, and we do not understand it to mean anything more than that it should be "in his hands," according to an account previously settled by the court. The order was that he might "retain said sum of money * * * until the further order of the court." This does not, under the circumstances, imply that there had been no previous use of the money, and the phraseology of the recitals of the order is entirely consistent with the idea that what the guardian sought was an order authorizing him to continue to use his ward's funds, and enabling him to avoid reporting them to the court for that disposition, which the statute required. Mansf. Dig. secs. 3512, 3515, 3516. We cannot, therefore, find from the exhibits referred to, that Moore's failure to pay over the money on the termination of his guardianship resulted from his use of it under the order the plaintiff aided him to procure. Nor does that fact otherwise appear. But the writing of the plaintiff filed in the probate court does not purport to be anything more than a mere consent on his part, as one of the sureties of Moore, that the latter's request might be granted. It was not in the nature of a contract, and furnished no security, distinct from or in addition to that of the bond, against any loss to the ward which might result from the order. It was not made the basis of the recovery had against the plaintiff, and the recitals of the record show that it was not the only inducement to make the order. The order itself was at most only the court's acquiescence in an act unwarranted by the law; and it affected no right of the ward and changed in no respect the liability created by the execution of her guardian's bond. The court did not sustain towards Moore the relation of a creditor; but if its action could be regarded as having extended the time in which

the law required him to pay or account for the money, the extension was for an indefinite period, and did not, for that reason, have the effect to discharge either of his sureties. 2 Brandt on Suretyship, sec. 344. We are unable, therefore, to see that the matter set up in the first paragraph of the answer justifies the action of the chancellor in dismissing the complaint.

2. When land liable in heir's hands.

The administration upon Anderson's estate having been closed before the accrual of the plaintiff's cause of action, he was without remedy in the probate court or by any proceeding at law. Mansf. Dig. sec. 98; *Walker* v. *Byers*, 14 Ark. 246. And it is settled by previous decisions of this court that in such case the lands of a deceased co-surety, while they are held by his heirs, may in equity be subjected to contribution. *Williams* v. *Ewing*, 31 Ark. 234; *Hecht* v. *Skaggs*, 53 Ark. 291. The defendant paid nothing for his own share of the land as one of the heirs of Paul F. Anderson. To the extent of that share, he holds by inheritance and not as a purchaser from the other heirs; and, under the rule established by the cases cited, the plaintiff is entitled to the relief prayed for as against so much of the land as is thus held. But it is shown that the defendant was a *bona fide* purchaser of the rest of the land, and the question remaining is, whether that can also be charged with the payment of the plaintiff's claim.

At common law the real estate of a decedent was not liable for his simple contract debts. It was liable only for such debts as were created by specialty; and for the payment of these the heir was bound to the extent of the value of the land descended to him. But if the heir aliened the land before an action was commenced against him to recover the ancestor's debt, the creditor was without remedy, either against the land itself or the heir personally. Woerner's Law of Administration, sec. 574; *Griswold* v. *Bigelow*, 6 Conn. 258. In this State,

lands are assets in the hands of a decedent's personal representative for the payment of all his debts; and his heir cannot be sued at law upon any of his contracts. Mansf. Dig. secs. 68, 170; *Hendricks* v. *Keesee*, 32 Ark. 714. The heir, as already indicated, may in some cases be made liable in equity for the debt of his ancestor, to the extent of the assets he has received. *Hall* v. *Brewer*, 40 Ark. 433. But where land descended is conveyed by the heir to an innocent purchaser for value before the commencement of a suit to charge it with the payment of an equitable claim not enforcible against the executor or administrator, we have no statute which denies to the purchaser the protection afforded by the common law rule referred to above. And we perceive no reason justifying that rule as against the legal demand of the specialty creditor that may not with equal force be urged in favor of its application to a claim such as is asserted here. 2 Woerner's Law of Administration, sec. 579. Nor is an application of the common law rule to the present case inconsistent with the doctrine applied by the courts to many other cases in which a purchaser of lands is protected against the assertion of an equitable incumbrance or interest of which he had no notice at the time of acquiring the legal estate. Thus a vendor's equitable lien cannot be enforced against a *bona fide* purchaser without notice. And one who for a valuable consideration buys land from a trustee, without notice of the trust, will take the property discharged of the trust. Bispham's Eq. secs. 25, 262, 263; 1 Perry on Trusts, secs. 217, 218, 239; 2 *id.* 828.

Our administration laws seek to promote the early settlement of estates. *Walker* v. *Byers*, 14 Ark. 253. And it does not comport with the policy of those laws to impose a restraint upon the heir's power to alien the land he inherits after it is free of all claims allowable in the probate court. *Mays* v. *Rogers*, 37 Ark. 155. The claims

allowed there constitute a lien upon the land which relates back to the time of the decedent's death, and of which all persons are bound to take notice. And although this lien will be lost by the failure to enforce it within a reasonable time, it cannot be defeated by the heir's conveyance, executed either before or after the grant of administration. But there is no lien of a statutory nature in favor of a claim accruing too late to be authenticated against the executor or administrator. And a claim thus arising is sustained as a charge upon the estate in the hands of the heir, solely on the ground that it is an equity in the property of the ancestor superior to that of the heir. *Walker* v. *Byers*, 14 Ark. 253. But the equity of such a claim is not superior to that of a *bona fide* purchaser acquiring title before the commencement of a suit to enforce the creditor's demand. The equity of the purchaser in such case is at least equal to that of the creditor, and the claim of the latter cannot therefore prevail against it. 1 Perry on Trusts, sec. 218; Bispham's Eq., secs. 40, 175.

The decree of the court below will, accordingly, be affirmed as to that part of the land purchased by the defendant from the other heirs. But as to the residue of the land the decree will be reversed, and the cause will be remanded with directions to the chancellor to grant the relief prayed for as against the share of the land which came to the defendant by inheritance.

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RIGGIN *v.* HILLARD.

Opinion delivered October 22, 1892.

1. *Conventional subrogation—None in favor of stranger.*

In the absence of an agreement to that effect, express or implied, one who furnishes to a contractor materials to be used in the re-

pair of a court house will not be subrogated to the latter's right to proceed against the county.

2. *Equitable garnishment—Practice.*

A suit in equity to subject the debt of a third person to the extinguishment of the plaintiff's demand against his debtor is an equitable garnishment, within the meaning of the act of March 31, 1887; and if the defendant debtor is insolvent, the suit may be prosecuted without showing a judgment at law followed by a fruitless execution.

3. *Claims against county—Equitable garnishment.*

While a county is not subject to the ordinary process of garnishment, yet, in equity, when the interest of the public will not be injuriously affected, the claim of an insolvent creditor of the county may be subjected, by sale or compulsory assignment thereof, to the payment of his debts.

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

STATEMENT BY THE COURT.

The appellant filed his complaint against Hilliard, and against Owen as county judge of Jefferson county, alleging, to quote from the appellant's abstract, the following state of facts: "Owen, as county judge of Jefferson county, entered into a written contract with Hilliard for repairing and reconstructing the court-house of said county, according to which Hilliard was, at his cost, to repair and reconstruct the building and to furnish all material used in the work, for which the county was to pay him $21,700, payments to be made as the work progressed, but 15 per cent. of each monthly estimate of the work done and the materials used was to be reserved and held back until ten days after the completion of the building.

"Hilliard was personally to superintend the execution of the work, and was not to assign any part of the contract without the consent in writing of Owen, which consent was never given, and he executed a bond to Owen, as such county judge, with sureties, conditioned, among other things, that upon the completion of the

building he would deliver possession of it free from any incumbrance or claim for labor or materials.

"Hilliard employed W. Fleet Jones to do the carpenter's work, and the plaintiff, in accordance with an agreement with Hilliard and upon his promise to pay him for the same, furnished part of the material used by Jones, and as the materials were furnished he presented the bills therefor, certified to be correct by Jones, to Hilliard, and he paid him 85 per cent. of the several amounts, except the last estimate, of which he paid no part, leaving an aggregate amount due the plaintiff of $419.40, which Hilliard, after the completion of the building, refused to pay."

It was further alleged that Hilliard was insolvent, and that the plaintiff would be wholly defeated in the collection of his claim unless he could collect it out of the funds in the hands of the county judge.

The prayer was for a personal judgment against Hilliard; for a decree declaring a lien on the fund in the hands of the county judge to the amount of plaintiff's demand, for a restraining order against the county judge prohibiting him from paying to Hilliard the fund claimed by plaintiff, and for general relief. The court issued the restraining order; Hilliard interposed a general demurrer to the complaint, which was sustained by the court; the restraining order was dissolved; the plaintiff rested; and the complaint was dismissed.

A motion to reinstate the injunction against the county judge *pendente lite* was made here when the appeals were perfected, but the relief was denied upon grounds that do not affect the questions now presented. See *McFadden* v. *Owens*, 54 Ark. 118.

W. T. Woolridge and *W. M. Harrison* for appellant.

Appellant has an equitable lien on the funds appropriated by the county court, and has a right to be subrogated to the extent of the balance due Hilliard. Story,

Eq. secs. 506, 1201, 1207*a*, 1217, 1219, 1231, 1232, 1235, 1237; Bisph. Eq. sec. 351; 31 Ark. 387; see Sheldon on Subrogation, secs. 1, 11, 222; Pomeroy's Equity, secs. 186, 1400, 1416, 1419; Harris on Subrogation, secs. 1, 22; Wood on Insurance, Title, "Subrogation"; Story, Eq. sec. 499; 16 Ark. 232; 18 Ark. 86; *ib.* 508; 31 Ark. 411; 35 Penn. St. 111, 117; 2 Dev. Eq. 147.

Met L. Jones also for appellant.

The complaint is good as a creditor's bill, either under general equity jurisprudence, or the act of March 31, 1887. The object is to reach equitable interests not subject to levy or garnishment or sale at law. Pom. Eq. sec. 1415; 20 Johns. 554; 10 Md. 466; 10 Gill. & J. 226. It is not now necessary to proceed to judgment, before filing a creditor's bill. Act March 31, 1887; 4 Jones, Eq. 352; 46 Mo. 95. See also 128 U. S. 105.

N. T. White and *Crawford & Taylor* for appellee.

1. Appellant had no lien on the court house, or the funds in the hands of the county judge. 49 Ark. 94; Phillips on Mech. Liens, sec. 179, 179*a*; Mansf. Dig. sec. 2999; 60 Pa. 27; 105 N. Y. 139.

2. The county cannot be garnished. 51 Ark. 387.

3. No case of subrogation is made. Sheldon on Subrogation, sec. 3 and cases.

4. Appellant was not a party to the contract or bond, and has no right to sue upon it. 53 Ark. 503; 54 *id.* 424.

COCKRILL, C. J., after stating the facts as above set out.

It is conceded that the court house is exempt from the operation of the statute governing mechanic's liens, and that the statute does not create any claim or lien in appellant's favor upon the fund which the county has set apart to pay for the repairs.

1. No subrogation in favor of stranger.

The contention is that the appellant shows a right to equitable subrogation to the right of Hilliard to pro-

ceed against the county for the collection of an amount equal to his claim against Hilliard. But the relation of the parties to each other is not such as to invoke the application of that doctrine.

The appellant, according to his allegations, has sold to the appellee, upon his personal credit alone, materials to be used in repairing a court-house.

In the absence of a statute giving him a lien, he is in no better condition than if he had loaned the contractor money to carry out his contract with the county in making the repairs; but it is settled that the loan of money to a debtor to discharge his obligation does not entitle the lender to be subrogated to securities which the creditor held for the enforcement of the obligation. *Rodman* v. *Sanders*, 44 Ark. 504; *Kline* v. *Ragland*, 47 *id.* 118; *Steamboat White* v. *Levy*, 10 *id.* 411; Sheldon on Subrogation, sec. 243.

If there had been an agreement between the parties that the plaintiff should receive pay for his materials from the county out of the fund due Hilliard, the contractor, for repairs, or if the agreement could be implied from the conduct of the parties, the plaintiff would be entitled to subrogation by reason of his contract; but that would be conventional subrogation, which is more nearly akin to assignment than to subrogation by operation of law. There is no allegation in the complaint that there was an agreement between the appellant and Hilliard for subrogation. No foundation is laid therefore for conventional subrogation.

The claim of one whose materials are used in the construction or repair of a building is more meritorious than that of the contractor who has used the materials in the construction and refuses to pay for them. Such claims have preference in general by statute. It would doubtless work an equitable result if the legislature would make claims for materials and labor furnished in

the erection or repair of public buildings a lien upon the fund to be paid therefor, superior to the claim of the contractor. Laborers and material-men could then divert the course of the payments, which would otherwise go to the contractors, into their own hands, by virtue of the statutory subrogation. But where there is no legislation and no contract to affect the status of the the parties, the simple relation of debtor and creditor exists between the material-man and contractor, and the former can resort only to the remedies common to such creditors for the collection of their debts.

The question, then, is, does the plaintiff, a simple contract creditor, state facts entitling him to equitable relief against his debtor?

The county is not sued. It is conceded that the statute does not authorize suit in the circuit court against a county, and that it could not be made a party to this suit. The complaint alleges that the materials were furnished to Hilliard, through his agent, upon Hilliard's express promise to pay for them, and that the account is due and unpaid. That was a statement of a cause of action for a personal judgment against Hilliard. It alleges also that Hilliard is insolvent, that the county is indebted to him, and, in effect, that unless he gets his pay out of the amount due by the county, nothing can be collected.

A court of law could not reach the debt due by the county, because a county is not subject to garnishment. *Boone County* v. *Keck*, 31 Ark. 387.

2. Practice as to equitable garnishments.

It is the peculiar province of equity to reach interests of a debtor, which cannot be seized under legal process, when its aid is invoked by a judgment creditor who has exhausted his legal remedies without effect. But the act of March 31, 1887, dispenses with the necessity of a previous judgment as a condition to obtaining equitable relief under a creditor's bill. It provides that "in

suits to set aside fraudulent conveyances, and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but in such cases insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain the proper relief." Acts 1887, p. 193. The object of the act was to dispense with the useless delay and expense incident to obtaining a judgment which it is known in advance will prove fruitless. Courts of equity had already begun to relax the rule requiring a judgment and execution and return of *nulla bona* to show that the legal remedy was inadequate. The statute runs in that line; it is remedial, and should receive a liberal construction to effect the object designed by it.

Every equitable proceeding wherein a remedy is devised to apply the debt of a third person to the extinguishment of the plaintiff's demand against his debtor is a suit for an equitable garnishment. That is the object of the plaintiff's suit; and as the complaint alleges that the debtor is insolvent, and that no relief could be obtained at law, the statute dispenses with the necessity of a previous judgment. Taking the allegations of the complaint as true, the plaintiff has laid the foundation for a creditor's suit, and the question is, can the debt due by the county to the plaintiff's debtor be subjected to the payment of his demand?

3. Claim against county subject to equitable garnishment.

The case of *Boone County* v. *Keck*, 31 Ark. *sup.*, holds that public policy forbids that counties should be subjected to the process of garnishment, unless the legislature certainly evinces the intention to grant the use of the process against them. It is there ruled, as we have seen, that our statute does not extend the remedy against counties. The reasons of policy ordinarily assigned for withholding garnishment process against counties and other municipal corporations are, "the inconvenience and

impolicy of interfering with the operations of municipal bodies, by drawing them into controversies with which they have no concern, and diverting the public moneys from the channel in which * * * they are required to flow." Drake on Att. sec. 516.

The argument as to the impolicy of drawing the county into a litigation with which it has no concern has no application in this case, because there is no litigation against the county. It is not made a party to the suit. But the objection to diverting the public funds from the channel to which they have been turned by public authority exists when the cause arises in equity just as it does at law. But the remedies of equity are not fixed and unbending, like the legal process of garnishment; and if the court can ascertain that no inconvenience can result to the public by its interference with the corporation's right to pay the debt directly to its debtor, there is nothing to prevent the court from doing so.

In Minnesota, as in this State, a municipal corporation cannot be reached by the process of garnishment, but it is there held that, in a suit like this, a defendant who is the county's creditor may be compelled to assign his demand against the county to a receiver to be collected and applied to the satisfaction of the plaintiff's demand, where no reason of policy intervenes. *Knight* v. *Nash*, 22 Minn. 452.

The Supreme Court of Georgia intimate, but do not decide, that they would approve the practice, under like circumstances. *Dotterer* v. *Bowe*, 84 Ga. 769.

A similar, though not identical, practice was approved by the Supreme Court of the United States in the case of *Smith* v. *Bourbon County*, 127 U. S. 105.

In Missouri, the statute expressly prohibited the use of the writ of garnishment against a municipal corporation, but the Supreme Court of the State held that it did not protect the debt against a creditor's suit in equity to

apply it to the payment of his demand. *Pendleton* v. *Perkins*, 49 Mo. 565. The same conclusion was reached in *Speed* v. *Brown*, 10 B. Monroe, 108.

In the case of the *Bank of Tennessee* v. *Dibrell*, 3 Sneed, 379, a creditor's bill seeking to subject the salary of a State official to the payment of his debts was disallowed. But the case is in harmony with the principle underlying those already cited. The reason given by the court for the decision is that "the functions of government might be suspended" by the loss of efficient servants if the State were not permitted to pay salaries directly to her officers. See *McMeekin* v. *State*, 9 Ark. 553; *Roeller* v. *Ames*, 33 Minn. 132; 28 Am. Law Reg. p. 285. The remedy is allowed in no case where it is adjudged that the public will be injuriously affected.

It follows that relief should be granted to the plaintiff unless public policy intervenes in some way.

The complaint alleges that the debt is due upon a contract to repair a court-house. The courts commonly concur in holding that public policy forbids any interference between the county and its contractor under such circumstances if the work is still in progress, for the interference would tend to retard the occupancy of the building. But here the complaint alleges that the work has been completed. There is no longer any public interest to be subserved by withholding payment from the contractor, and no reason for withholding the debt from the reach of the remedy in this sort of proceeding. Judge Dillon goes further, and expresses the opinion that in such a case the ordinary process of garnishment should be allowed against a municipal corporation. 1 Dillon's Municip. Corp. sec. 101; *City of Laredo* v. *Nalle*, 65 Tex. 359. But the case of *Boone County* v. *Keck*, 31 Ark. *sup.*, is opposed to the view that the legal process of garnishment can be used against a county in any case. For the same reason, it was held in that case that a county

could not be made to respond to a creditor's suit supplementary to execution. Nothing else was involved or determined in the case. It was a suit directly against the county; the plaintiff's judgment debtor was not a party to it, and the only relief asked was against the county. In the case at bar the plaintiff's debtor is the party against whom relief is sought, and the county is not sued. Therein lies the cardinal difference between the cases.

The complaint states a cause of action against Hilliard, and shows a right in the plaintiff to subject the debt due by the county to the satisfaction of his demand. That can be accomplished under proper orders of the court—as by a sale or compulsory assignment of the debt for the purpose of applying the proceeds to the satisfaction of any judgment which the the plaintiff is entitled to recover.

The demurrer ought therefore to have been overruled. The judgment will be reversed, and the cause remanded with directions to overrule the demurrer.

It is so ordered.

DUKE v. STATE.

Opinion delivered October 22, 1892.

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1. *Mortgage—Adverse possession.*

Possession of mortgaged premises under claim of ownership will not be adverse to the mortgagee where the claim was made with knowledge of the mortgage, and where the claimants never in terms repudiated it.

2. *Adverse possession—Case stated.*

In a suit by the State to foreclose a Real Estate Bank mortgage, brought under the act of 1861, which requires that money due thereon should be paid "directly into the State treasury," where parties in possession of the land, to procure the dismissal of a prior suit brought for the same purpose, had paid to the

Attorney General a sum less than the amount due under the mortgage, knowing that he had no authority to receive any money or to make any settlement, their subsequent possession of the land under claim of ownership did not, by reason of such payment and the dismissal of the prior suit without prejudice, become adverse to the State, since there is no presumption that the State had notice of the unauthorized payment.

3. *Limitation—Five years statute.*

A proceeding to enforce a lien created by mortgage is not within the statute imposing a limitation of five years for the recovery of lands sold at judicial sale (Mansf. Dig. sec. 4474).

4. *Statutes of limitation construed prospectively.*

Under the act of March 31, 1887, which provides that suits to foreclose mortgages shall be barred when the debts secured are barred, the period of limitation as to causes of action existing when the act was passed should be computed from the time they were first subjected to its operation.

5. *Laches—Who may not complain.*

A defendant cannot complain of the laches of a public officer in bringing a suit on behalf of the State where the delay is in part attributable to the defendant's wrongful act in procuring a dismissal of a prior suit, and where no prejudice to defendant's rights is shown.

6. *Payment—Presumption from lapse of time.*

The presumption, after lapse of twenty years, that a mortgage debt has been paid, does not arise if within that period the debtor has recognized the debt by a payment, and there are circumstances that explain the delay in prosecuting the claim.

7. *Real Estate Bank—Constructive notice.*

The act of January 16, 1861, which provides for the foreclosure of Real Estate Bank mortgages upon constructive notice, is constitutional.

McCreary v. *State*, 27 Ark. 425, followed.

Appeal from Pulaski Chancery Court.
DAVID W. CARROLL, Chancellor.

W. S. McCain for appellants.

1. The statute of limitation began to run upon the death of the mortgagor and entry of the heirs. 34 Ark. 312; Buswell on Lim. note 2, sec. 311; Angell on Lim. sec. 452.

2. While no statute bars the sovereign, yet where the State takes part in a private enterprise not strictly governmental, and becomes involved in litigation, the same limitation applies as to individuals. 45 Ark. 81; 13 Am. & Eng. Enc. Law, 711; 12 Johns. 242.

3. The claim is stale. After the lapse of twenty years, payment is presumed. 23 Wall. 127; 5 Johns. Ch. 545; 9 Wheat. 516; 2 Washb. Real Prop. 169; Jones, Mortg. sec. 915.

4. Limitation began to run from the date of the administrator's sale in 1868, and the suit was barred after five years, the limitation on judicial sales.

5. It certainly began to run when the first suit was dismissed in 1872.

6. The suit is barred by the act of March 31, 1887.

7. This suit was commenced as to the Wells heirs December 15, 1883, and as to the Carltons and Mabel Wells February 6, 1890, more than seven years after the bill was filed. Filing a bill is not the commencement of a suit. Mansf. Dig. sec. 4967.

8. This was a proceeding *in rem*, and there must have been an actual seizure or personal service to constitute due process of law. 4 Pet. 466; 112 U. S. 294; Waples, Pro. in Rem, secs. 64, 65, 68, 611; 10 Wall. 319; 95 U. S. 715.

9. The State was charged with knowledge of the settlement with its Attorney General. Mechem on Agency, secs. 718-723; Mechem on Pub. Off. secs. 844-846; 2 Spelling on Corp. 753; Whart. on Ag. secs. 177, 184; Wade on Notice, secs. 672, 692; 29 Ark. 99; 39 Ark. 50.

10. The presumption is that an attorney has paid over money collected for his clients. 1 Gr. Ev. sec. 78; 25 Ark. 312; 11 *id.* 227; 12 Weaton, 70; Wood on Ev. sec. 76; 31 Ark. 609.

W. E. Atkinson, Attorney General, and *Chas. T. Coleman* for appellee.

1. This suit is not barred by the presumption of payment arising from a lapse of twenty years. Twenty years have not elapsed since the first suit was dismissed.

2. It is not barred by limitation. No *adverse* holding is shown. 18 N. H. 247; 23 Wall. 119; 8 Met. (Mass.) 90; 43 Ark. 469; *ib.* 521; 10 Yerg. (Tenn.) 380; 7 How. 258.

3. It is not barred by the act of March 31, 1887. This suit was not barred prior to the act, and the act is void as to pre-existing debts. 102 U. S. 206; 1 How. 311; 2 How. 612; 40 Ark. 423.

4. Service by publication under the act of January 16, 1861, is constitutional. 4 Peters, 466; 48 N. W. Rep. 773; 134 U. S. 322; 18 How. 140; 18 N. Y. 216.

5. The Attorney General had no authority to compromise the claim of the State, and there is no evidence that he attempted it. If he did, it was the unauthorized act of a public agent, and void. Story, Ag. sec. 307*a;* 25 Ark. 266; 44 Ark. 437; 47 *id.* 209; 66 Ga. 403; 24 Minn. 332; 26 *id.* 1; Nott & Hunt. 144; 8 Paige, Ch. 527; 2 Hill (N. Y.), 159. In view of these authorities, the State was not charged with knowledge of the settlement made, nor bound by it, nor estopped thereby.

6. There is no presumption that the Attorney General imparted notice by payment.

MANSFIELD, J. This was a proceeding prosecuted by the State under the act of January 16, 1861, to foreclose a mortgage executed to the Real Estate Bank by Stephen Gaster in the year 1837. The mortgage conveyed certain lands then owned by Gaster, and it was given to secure the payment of his bond to the bank for the sum of $30,000. The debt did not mature until 1861, and the mortgage expressly provided that the lands should remain in the possession of Gaster until they

should be "legally sold" to satisfy it. He continued to occupy the lands, until his death, which occurred in the year 1858 or 1859. His heirs then took possession of the property and held it until 1866, when it passed into the hands of his administrator, who was appointed in that year. The administrator continued in possession until the year 1868, when he sold the lands, under an order of the probate court, for the payment of Gaster's debts. The sale was confirmed, and the purchasers under whom the appellants claim took possession under the administrator's deed. For convenience, some of the appellants are designated in the abstract of the record as "the Carltons;" and all the others, with the exception of Mabel Wells, are referred to as the "Wells heirs."

It appears that a bill to foreclose the mortgage was filed in 1867. To this Gaster's administrator filed a demurrer, and the record shows that it was dismissed without prejudice, on motion of the Attorney General, in 1872. The bill in the present suit was filed in 1876. In accordance with the provisions of the act under which it was brought, it was exhibited against the lands embraced in the mortgage, and not against any claimant of the land or other person. But in 1883 the Wells heirs appeared, and filed an answer to the bill and a cross-complaint against the Carltons. The answer pleaded accord and satisfaction, averring that in 1872 their ancestor, D. S. Wells, and the persons under whom the Carltons claim, paid the Attorney General $2000, which he accepted in full satisfaction of the mortgage debt. The cross-bill, after stating that partition of the lands had been made between the heirs of D. S. Wells and the Carltons, prayed that whatever should be found due on the mortgage, if anything, might be apportioned to the lands of the several claimants, so that each owner might bear a proper proportion of the whole sum adjudged against all the lands. On the 14th day of May, 1890, the Wells heirs

filed an additional answer in which they plead, in bar of the suit, seven years adverse possession of the lands, and demur to the complaint, stating, among other grounds of objection to it, that the claim of the State is stale and barred by limitation. A few weeks later the record shows that they requested the court to permit them to withdraw their previous offer to submit to judgment. But it does not appear whether the court took any action upon this request.

The fourth section of the act of 1861 provides that when the bill to foreclose is filed the clerk shall make an entry in his record, stating the general objects of the bill, and "what lands it proposes to subject to foreclosure, and under what mortgage;" and that a copy of such entry, attested by the clerk and duly published in the manner required by the act, "shall be taken as notice, to the mortgagor and to all persons claiming under him and to all occupants of the lands, of the beginning and pendency of the suit." The same section provides for the publication of such record entry by "four successive weekly insertions in a newspaper published at Little Rock." This order was not made until 1890. It was published on the 6th of February in that year, and, under the provisions of the statute, its publication was the commencement of the suit as against so much of the lands as was held by the Carltons and Mabel Wells, neither of whom had previously entered an appearance.

In 1890, after the publication of the order, the Carltons filed an answer, claiming the lands held by them under the probate sale and pleading the statutes of limitation of five and seven years. They also pleaded the staleness of the demand, and demurred to the complaint. On the 14th of May, 1890, Robertson, the guardian of Mabel Wells, who was then a minor, filed a motion to quash the service by publication on the ground that it was not due process of law, and that the provision of the

statute authorizing it violates amendments 5 and 14 of the Constitution of the United States. No action was taken upon this motion or upon the demurrer until the cause was finally heard, when they were overruled. The finding of the chancellor was general and to the effect that the suit was not barred by the statute of limitations nor by the staleness of the demand. A decree was accordingly entered foreclosing the mortgage and condemning the lands to sale, and from that judgment this appeal is prosecuted.

The appellants do not question the State's right to foreclose the stock mortgages given to the Real Estate Bank. And it is not controverted by the appellee that in actions brought for that purpose the attitude of the State is such that her suit may be barred by the statute of limitations. *Calloway* v. *Cossart*, 45 Ark. 81.

As no point is made against the sufficiency of the facts stated in the complaint to constitute, originally, a cause of action, and the other questions raised by demurrer are also presented by answer, it is unnecessary to rule specially or separately upon the action of the court in overruling the demurrer.

The facts on which the chancellor acted, so far as they do not appear in the pleadings, are to be ascertained from the deposition of W. T. Wells, introduced by the appellants, and from an agreed statement of the parties. In addition to some of the facts already stated, Wells testified that Gaster cultivated the lands embraced in the mortgage continuously for more than fifteen years before his death, and that since the spring of 1865 they have been occupied and cultivated without interruption by Gaster's heirs and administrator and the persons claiming under them; and that such persons have all claimed to own the lands in fee simple under the administrator's conveyance; that about 1871 or 1872 the Carltons and Wells "made some settlement of the mortgage

sued on, and procured a suit then pending for foreclosure * * * to be dismissed;" and that "after that time the claimants and occupants of the lands always considered the matter as settled" until this suit was brought. It was admitted that the claim of the occupants to own the lands, as mentioned by Wells, was made with a knowledge that the mortgage had been given and never foreclosed; and that the claimants "had never in terms acknowledged or repudiated" the mortgage. It was also admitted that the "settlement" mentioned by Wells was a dismissal of the suit first brought to foreclose the mortgage, and that it "was procured by paying to the person then occupying the office of Attorney General a certain sum of money, said to be $1200," and that "the parties holding possession of the lands knew that the Attorney General did not have authority to accept this as a settlement of the mortgage." It is conceded that the payment referred to was not an accord and satisfaction; and it is relied upon only as a matter of evidence tending to show that, at the time it was made, the possession of the appellants became adverse to the mortgage, if it had not been so before.

1. When possession of mortgagor not adverse.

1. In the case of *Whittington* v. *Flint*, 43 Ark. 504, it was held that the "possession of the mortgagor, or his privies, including his grantees with notice, will not be adverse, nor bar an action by the mortgagee for foreclosure, or for possession of the land, unless there has been an open and explicit disavowal and disclaimer of holding under the mortgagee's title, and assertion of title in the holder brought home to the mortgagee." To the same effect is the decision of the court in *Ringo* v. *Woodruff*, reported in the same volume (43 Ark. 469.) In the latter case it was held that "to constitute adverse possession against a mortgagee it is not sufficient that the mortgagor, or those holding under him, occupy, use, improve and pay taxes on the premises, as their own

absolute property; but the possession must be in open denial of the mortgagee's title, and accompanied with such acts or declarations of the holders as are sufficient to put the mortgagee on notice that they claim and hold in hostility to his rights."

2. Proof held not to establish adverse possession.

It is plain that the facts on which the defense of limitation by adverse possession is based in this case are of no greater weight or significance than those held insufficient to establish an adverse holding in the cases cited above. The continued possession of Gaster was in the exercise of a right which he had by the express terms of the mortgage, and it is not claimed that the statute of limitations was ever put in motion during his lifetime. The purchasers at the probate sale bought with notice of the mortgage incumbrance, and therefore acquired only the equity of redemption. The possession which they took of the property was entirely consistent with the mortgagee's rights, and they and their vendees, including these appellants, are presumed to have held in subordination to the mortgage, in the absence of some "overt act of hostility" to it of which the mortgagee had notice. *Ringo* v. *Woodruff*, 43 Ark. *supra; Whittington* v. *Flint*, 43 Ark. *supra.* The transaction with the Attorney General was not such an act, nor can the State be charged with notice of it. The dismissal of the first suit was not in fact the act of those claiming the lands. So far as it was the act of any person, it was the action of the Attorney General; and on the face of the record it indicates no abandonment of the State's right on the one hand nor any disclaimer of holding subject to it on the other. If, however, the dismissal was for the purpose alleged here, it is admitted that the Attorney General acted without authority, and that the persons then claiming the lands knew that he did so. Under such circumstances, a knowledge of what was done cannot be imputed to the State on the ground that he was its attorney

and agent. Mechem's Public Officers, secs. 844, 846; *Parsel* v. *Barnes*, 25 Ark. 261; Mechem on Agency, sec. 718; *Dorsey County* v. *Whitehead*, 47 Ark. 205; *Barton* v. *Swepston*, 44 Ark. 437; *Saleski* v. *Boyd*, 32 Ark. 74.

But it is contended that the law will presume that the Attorney General paid to the State the sum received from the appellants, and that he thus imparted notice of the settlement he had made. The act of 1861 expressly provides that money collected on the bank mortgages shall be paid "directly into the State treasury." And if the money had been tendered as only a partial payment, the Attorney General was without authority, under that act or any other, to receive it. He had no official duty to perform with reference to the money, and the law entertains no presumption as to the disposition he made of it. As the State, so far as the proof shows, was without notice of the payment to him, the mere fact that the claimants or occupants of the lands thereafter regarded the mortgage as settled did not in legal contemplation change their attitude towards it.

3. Construction of five years statute of limitation.

2. As to the plea of the five years statute of limitations, it is necessary only to say that that statute has been held to apply only to actions brought for the recovery of lands and to causes of action accruing within the period of limitation which it fixes. *Phelps* v. *Jackson*, 31 Ark. 272; *Kessinger* v. *Wilson*, 53 Ark. 400. This proceeding is to enforce the lien created by the mortgage, and not to recover possession of the lands it embraces—no right to such possession having ever accrued to the plaintiff, under a provision of the mortgage already mentioned.

4. Statutes of limitation construed prospectively.

3. But it is further contended that if this suit was not barred under any other statute, it was barred by the act of March 31, 1887, which provides "that, in suits to foreclose or enforce mortgages or deeds of trust, it shall be a sufficient defense that they have not been brought

within the period of limitation prescribed by law for a suit on the debt or liability for the securities of which they were given." The act is made to take effect from the date of its passage, and does not expressly repeal any other statute. The contention of appellants is that it applied to all causes of action existing at the time it was passed, and that, as to debts not due the State, it is void, under a prohibition of the Federal Constitution, as impairing the obligation of contracts. Const. U. S. art. 1, sec. 10. But as the legislature may enact laws impairing obligations to the State, it is argued that the act of 1887 barred all suits to enforce mortgage liens in favor of the State where the debt secured was barred at the time of suing. As an action on the bond secured by this mortgage was barred before the suit was begun, the appellants' construction would make the act extinguish the State's lien the day it took effect. And if this result was contemplated as to mortgages to the State, it was intended as to all others; for it is clear that the act makes no discrimination in favor of the citizen.

Mr. Cooley says: "It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." Cooley's Const. Lim. 455. He also says that "a conflict between the statute and the constitution is not to be implied," and that "where the meaning of the constitution is clear * * * *the court, if possible, must give the statute such a construction as will enable it to have effect.* This is only saying * * * that the court must construe the statute in accordance with the legislative intent; since it is always to be presumed the legislature designed the statute to take effect, and not to be a nullity." *Ib.* 218.

A literal interpretation of the act of 1887 would make it bar at once all proceedings for the foreclosure of

mortgages where, as in this case, the debt secured had matured at such time before the passage of the act that an action to recover them would be barred. On the principle of the rule we have quoted, it is our duty to presume that no such effect was intended by the legislature. Endlich, Stat. sec. 295; *Sohn* v. *Waterson*, 17 Wall. 596, 599.

But in the case just cited Judge Bradley said: "A statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon actions which accrue after its passage." And it was there held that, in the absence of a contrary provision, the period of limitation fixed by the statute would be computed as to causes of action existing when it was passed, from the time when they are first subjected to its operation. This we understand to be the view expressed by Judge Pike in *Trapnall* v. *Burton*, 24 Ark. 371, where it was declared to be the settled doctrine of this court "that when a new statute of limitations is enacted, it will be taken to be prospective in its operation and to apply, not to causes of action which had accrued at its passage, but to those accruing thereafter, in the absence of language in the statute compelling a contrary construction." It was held, however, in that case that all causes of action existing at the time of the passage of the act of January 4, 1851, reducing the period of limitation in actions to recover lands from ten years to seven, would be barred at the end of seven years from the date of that act unless they were barred sooner under the old law; but that the act of 1851 could not be pleaded in any case until January 4, 1858. If a similar construction be given to the act of 1887, it is obvious that it affords no defense available to the appellants. We think it applies to all mortgages not barred previous to the date of its passage, except such as would be barred at once under its operation. But no mortgage to which

it applies would be barred in a shorter time after its passage than the period of limitation prescribed for the debt secured, unless barred sooner by adverse possession. The act would not bar this suit, in any view we are able to take of it. And we do not decide what effect, if any, it had on the rule of limitation previously applicable to foreclosure proceedings.

5. Who may not complain of laches.

4. It is also insisted that the State's right of foreclosure is barred by laches, and that a court of equity should refuse to enforce the mortgage because of the staleness of the demand. Laches is such neglect or delay on the part of the person asserting a claim as makes it inequitable, under the circumstances of the case, to grant the relief he seeks. *Galliher* v. *Cadwell*, 12 Sup. Ct. Rep. 873; *Gibson* v. *Herriott*, 55 Ark. 85; *Glenn* v. *Hebb*, 17 Md. 260. And it was said in *Gibson* v. *Herriott*, *supra*, that whether the time the negligence has continued is sufficient "to make it effectual as a bar, is a question to be resolved by the sound discretion of the court." As shown by the statement of the case, the lien of the plaintiff was asserted as early as 1867 by a bill to which the administrator of Gaster filed a demurrer in 1868. Although the notice required by the statute was not given prior to 1872, the presumption is that the suit would have proceeded regularly to decree and without unnecessary delay but for its dismissal, procured in the manner stated above. To that dismissal the neglect of the proper officer to bring this suit at an earlier day may, in part at least, be attributed. And of this the appellants are in no attitude to complain. *Callender* v. *Colegrove*, 17 Conn. 1; *Gunton* v. *Carroll*, 101 U. S. 426; *Loring* v. *Palmer*, 118 U. S. 321; *Lyon* v. *Lyon*, 8 Ired. Eq. 201. It does not appear that they have been prejudiced by the delay thus caused, nor by that due to any other cause. And, in the absence of any prejudice to their rights, we think the State is not barred by the mere lapse of time.

Galliher v. *Cadwell*, 12 Sup. Ct. Rep. 873; *Callender* v. *Colegrove*, 17 Conn. 1.

6. When presumption from lapse of 20 years rebutted.

But it is urged that there has been a lapse of twenty years without any recognition of the mortgage debt; and that the law therefore presumes it to have been paid. We think the payment made to the Attorney General was a very distinct recognition of the debt, and its force is not broken by the fact that it was made to obtain a settlement which the parties knew the Attorney General was without authority to make and could not therefore make, consistently with a performance of his official duty. This suit was brought, as to all the appellants, within twenty years from the time of the payment referred to. And the case is not without circumstances explanatory of the delay which occurred in the prosecution of the claim. 2 Whart. Ev. sec. 1361; 2 Greenl. Ev. secs. 527. 528; 1 Jones, Mort. sec. 915.

7. Act for foreclosure of real estate bank mortgages valid.

5. The only point remaining for consideration is made upon the motion of Mabel Wells' guardian, and this is that the court acquired no jurisdiction to condemn the lands to sale for the reason that the statute makes no provision for either a seizure of the lands or a personal service of process. The suit was brought and prosecuted in the manner provided for by the act of 1861. The constitutionality of that statute was questioned, generally, in *McCreary* v. *State*, 27 Ark. 425, and it was there held to be a valid enactment. The proceeding it authorizes is *in rem*, and the jurisdiction exercised under it, and the process by which that jurisdiction is acquired, have been upheld so often by this court in similar cases that it is sufficient now to cite the decisions in which they have been sustained. *St. Louis &c. Ry.* v. *State*, 47 Ark. 323; *Williams* v. *Ewing*, 31 Ark. 229; *Williamson v. Mimms*, 49 Ark. 336; *McCarter* v. *Neil*, 50 Ark. 188; *Doyle* v. *Martin*, 55 Ark. 37; *Gregory* v. *Bartlett*, 55 Ark. 33; *Scott* v. *Pleasants*, 21 Ark. 364; *McLaugh-*

lin v. *McCrory*, 55 Ark. 442; *Worthen* v. *Ratcliffe*, 42 Ark. 330. See also *Parker* v. *Overman*, 18 How. 137; *Pennoyer* v. *Neff*, 95 U. S. 737; *Boswell's Lessee* v. *Otis*, 9 How. 348.

Finding no error in the decree, it is affirmed.

MERCHANTS & PLANTERS BANK *v.* MEYER.

56 499
69 310

Opinion delivered October 22, 1892.

1. *Landlord's lien—Mortgage.*

   A landlord's lien upon a crop for rent is not displaced by his taking a mortgage upon the crop to secure it.

   Franklin v. *Meyer*, 36 Ark. 97, followed.

2. *Landlord's lien—Conversion.*

   Where a cotton factor sells the crop of a tenant under circumstances which would reasonably apprise him of the landlord's lien for rent, he will be liable to the landlord as for a conversion of the crop.

3. *Mortgaged chattels—Conversion by agent of mortgagor.*

   Where an agent of a mortgagor, by absolute sale, disposed of mortgaged chattels and paid the proceeds, which were sufficient to satisfy both mortgages, to a prior, in exclusion of the rights of a junior, mortgagee, he will be liable to the latter for damages sustained by the wrongful conversion.

4. *Remedies of mortgagee of chattels converted.*

   A mortgagee of chattels who has lost his security by the wrongful act of another is not compelled to look to the personal responsibility of the mortgagor, or to show his insolvency, or to follow the property, before recovering of the wrong-doer.

5. *Practice on appeal—Misnomer.*

   Where a defendant was designated in the complaint, and answered upon the merits, by the name of the "Hammett *Warehouse* Company," its former name, it cannot object on appeal that judgment was without objection rendered against it by the name of the "Hammett *Grocer* Company," its present name.

6. *Banks—Duty to pay checks.*

   Where a bank receives a general deposit of money from a customer, without actual knowledge or notice of any lien thereon in

favor of another, it is bound to honor the customer's checks until his deposit is exhausted, and is liable to no one else for so doing.

7. *Effect of making note payable at bank.*

Where a note is payable at a certain bank, the bank is not required to appropriate to the part payment thereof money which was deposited, after maturity of the note, to the credit of the maker thereof.

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

M. A. Austin for appellants.

1. There was no conversion by the Hammett Grocer Company. It is apparent that appellee knew, or could have known, that the Hammett Warehouse Company was selling the cotton and placing the proceeds in a solvent bank to the credit of Ritchie & Fitzhugh; he did not warn Howell or the company, or demand the proceeds, but stood by without objection, and hence is estopped. Bigelow on Estoppel (2d ed.), 452; 2 Johns. 573; 31 Ark. 131; Jones, Liens, sec. 583; 95 Ill. 346.

2. The Hammett *Warehouse* Company was sued, and without evidence the judgment was against the Hammett *Grocer* Company.

3. It was not the duty of the bank, after its debt was paid, to retain the surplus, and it is not liable for conversion in failing to do so. It had no right to transfer money from the account of Ritchie & Fitzhugh to the credit of Meyer without authority from the former. Not even to pay a note left with it for collection. 12 La. An. 257; 7 Wall. 447; 31 Mich. 230; 1 Morse on Banks (3d ed.), secs. 214, 317; *ib.* 324.

J. M. & J. G. Taylor for the Hammett Grocer Company.

The company received the cotton as a cotton factor, sold same for a commission and did not convert the proceeds, but deposited same with the bank to the credit of

Ritchie & Fitzhugh, the bank having a prior mortgage. 35 Ark. 539; 37 *id.* 115; Jones on Chat. Mortg. 490.

N. T. White for appellee.

1. Both the Bank and the Grocer Company had notice. Hunn was the president of Hammett Company and cashier of the bank, and his knowledge was binding on both companies. 54 Ark. 54.

2. Appellee had a landlord's lien, which was prior to all other claims or demands against his tenants, Ritchie & Fitzhugh. 25 Ark. 417; 25 *id.* 609; 31 *id.* 557; 33 *id.* 707; *ib.* 737; 36 *id.* 525; 45 *id.* 447. The waiver in favor of the bank did not displace the landlord's lien upon the balance of the crop. 33 Ark. 392–5. Nor was it displaced or affected by taking a mortgage. 36 Ark. 96, The remedies sought in this case are sanctioned in 33 Ark. 387; 35 *id.* 225; 52 *id.* 58.

3. As to the surplus in the bank's hands, after paying the debt due it, it was under obligation to see that the rest was paid. 35 Ark. 233; 33 *id.* 395.

4. The bank and the Hammett Company were joint *tortfeasors*, and both liable for appellee's entire debt. Bish. Non-Cont. Law, sec. 521; *ib.* secs. 519–20–22, 539; 15 Ark. 452; 23 *id.* 131; 39 *id.* 387.

5. It is too late here for the first time to object that the judgment was against the *Grocer* Company, when the *Warehouse* Company was sued. 6 Ark. 172; 7 *id.* 410.

BATTLE, J. Victor Meyer brought this action against Ritchie & Fitzhugh, the Merchants & Planters Bank, and the Hammett Warehouse Company, in the the Jefferson circuit court, on the equity side thereof, to recover the amount due to him for the rent of a plantation for the year 1889.

The main facts in the case are as follows: Meyer, being the owner of the plantation in Jefferson county known as the "Corinne Place," leased the same for the

year 1889 to Ritchie & Fitzhugh for $1400, for which they executed their note to him, and thereby promised to pay the same on the first day of November, 1889, at the Merchants & Planters Bank. In the month of March following, finding that they would need money to enable them to cultivate the place, they secured from the Merchants & Planters Bank a loan of $2000 for that purpose. In order to aid them in procuring this loan, Meyer agreed with the bank to postpone the collection of his note until the bank was paid. On the 4th day of March, 1889, they gave to the bank a mortgage on all the crops raised by them on the "Corinne Place" in the year 1889 and on a certain lot of mules and farming implements, to secure it in the payment of the $2000. The indebtedness for the loan was evidenced by four promissory notes mentioned in the mortgage, which provided that if they were not paid on or before the 15th day of October, 1889, it could be foreclosed by public sale. Further than this the dates of the maturity of the notes do not appear in the record here.

On the 5th of March, 1889, the day following the execution of the mortgage to the bank, Ritchie & Fitzhugh executed a mortgage on the same property to Meyer to secure him in the payment of the note executed to him by them for rent, and therein provided that it should be subject to the mortgage executed to the bank to secure the $2000. This mortgage was duly acknowledged and filed for record on the day of its execution.

During the year 1889, Ritchie & Fitzhugh raised on the "Corinne Place" more than ninety-seven bales of cotton—how much more does not appear. They delivered ninety-seven bales of it, in many small lots, at divers times, to the Hammett Grocer Company, a corporation engaged in the business of a cotton factor, to be sold on commission, with instructions to deposit to their account in the bank so much of the proceeds of the sale thereof as was not

delivered to them. It sold the cotton in more and smaller lots than it received it and at as many times, and, after deducting its commissions, deposited the residue of the proceeds of the sales, at different times, in various sums, amounting in the aggregate to $4,310.50 in the bank, to to the credit of Ritchie & Fitzhugh. All of this money was appropriated by the bank to the payment of the notes which were secured by the mortgage executed to it, and the checks which were drawn by Ritchie & Fitzhugh on the bank at divers times.

Meyer deposited the note, which was executed to him for rent, with the bank on the 31st of October, 1889; but, at the time it became due, there was nothing to the credit of Ritchie & Fitzhugh with the bank. After its maturity, two sums, $978.93 and $347.43, the proceeds of a portion of the 97 bales of cotton, were, respectively, deposited on the 16th of November and the 11th of December, 1889, with the bank. The larger portion of these two deposits were applied by the bank to the payment of the notes which Ritchie & Fitzhugh owed it, and the remainder was paid on the checks of the depositors.

The Hammett Grocer Company knew, through its officers, at the time it received the cotton, that Ritchie & Fitzhugh rented the "Corinne Place" of Meyer in 1889 and cultivated it in that year. It did not know that they cultivated any other place. It knew that they were not able to cultivate it without financial assistance, for they applied to it for such aid, and it refused it. The bank had no actual notice or knowledge that Meyer had any lien on or interest in the deposits which were made with it by the Hammett Grocer Company, at the time it appropriated and paid them out.

Upon these facts Meyer sought to hold the bank and Hammett Grocer Company responsible, by this action, for the rent of the "Corinne Place" for 1889, complaining that there was nothing left to pay the note held by

him, and that Ritchie & Fitzhugh were insolvent. The Hammett Grocer Company was designated in the complaint and sued as the Hammett Warehouse Company, and at one time bore that name. The only defense pleaded by it was that, in receiving and selling the cotton and paying over the proceeds of the sale, it acted as a cotton factor, and had no notice of plaintiff's liens, and, therefore, was not guilty of conversion. Nothing was alleged or proved in mitigation of damages.

The circuit court decreed that $260, which was in the hands of a receiver appointed in this action, be paid to plaintiff; and that plaintiff recover of the Hammett Grocer Company $1064.03, and of the bank $169.61, the amounts so recovered being the sum due to Meyer for rent; and the Hammett Grocer Company and the bank appealed.

1. Landlord's lien not displaced by mortgage.

The mortgage executed by Ritchie & Fitzhugh to Meyer did not displace the lien on the crops, which he would have been entitled to hold as landlord in the absence of other liens. The powers conferred and rights and interests acquired by the mortgage were cumulative. The landlord's and the mortgage liens could have been enforced at the same time during their existence. *Franklin* v. *Meyer*, 36 Ark. 96.

2. Conversion of crop subject to landlord's lien.

Did the Hammett Grocer Company have notice of the fact that Meyer held a lien on the ninety-seven bales of cotton delivered to it by Ritchie & Fitzhugh, at the time it received and sold them? It had notice of every fact necessary to show that he had such a lien, except, perhaps, actually knowing that the rent was unpaid; but it had knowledge of enough to put it on inquiry to ascertain the fact in that regard, and that was sufficient notice of whatever an inquiry would have revealed. It knew that Ritchie & Fitzhugh were tenants of Meyer, and that he had a lien on the crops grown by them, because the statute gave it to him, and every one is pre-

sumed to know the law. It also had reason to believe that they were unable to grow the crops without financial aid from others, because they applied to it for such assistance. The reasonable apprehension was that the rent was unpaid; and good faith and a proper regard for the rights of another demanded an inquiry as to the payment of the rent before making any sale or disposition of the cotton which would likely impair or destroy the landlord's lien. That inquiry, properly made, would have discovered the lien. It, therefore, had notice. *Watt* v. *Scofield*, 76 Ill. 261; *Dunn* v. *Kelly*, 57 Miss. 825.

Having notice, it was liable to Meyer for the damages suffered by him on account of the violation or destruction by it of his landlord's lien. *Hussey* v. *Peebles*, 53 Ala. 432; *Hudson* v. *Vaughan*, 57 Ala. 609; *Lavender* v. *Hall*, 60 Ala. 214; *Thompson* v. *Powell*, 77 Ala. 391; *Dunn* v. *Kelly*, 57 Miss. *supra; John* v. *Smith*, 64 Miss. 816.

3. Conversion of mortgaged crop.

As to the mortgage which was executed to Meyer, it admits that it received and sold the cotton, but seeks to justify its action by saying that it had no notice of a lien created thereby, and that it acted as a cotton factor and delivered the proceeds of the sale to Ritchie & Fitzhugh and their agent, the Merchants & Planters Bank. Further than this it does not seek to excuse or extenuate its acts. It does not pretend to say that the sale was made with the consent of Meyer. It did not sell under Meyer's mortgage or subject to it, but independently of and in hostility to it, and sold the cotton as the absolute property of Ritchie & Fitzhugh, and for them asserted dominion and control as against every other person, except perhaps the bank, whose rights it respected, at the request of its principals, to the extent of depositing with it a part of the proceeds of the sale. No effort was made to show that the mortgage to Meyer was left unimpaired, or that he can still enforce the same against the

property which was subject to it. The fair inference from the record is that all remedy under the mortgage against the property has been lost through the sale made by the Hammett Grocer Company. There is no contention to the contrary, but it is virtually conceded.

Under these circumstances was the Hammett Grocer Company liable to Meyer in any manner? An absolute sale of property mortgaged by a valid deed, which has been duly acknowledged and filed for record, made by any one acting as agent of the mortgagor, in exclusion or defiance of the rights of the mortgagee, is a conversion for which such agent is liable to the mortgagee, though the sale is made in good faith and without actual notice of the mortgage. *Brown* v. *Campbell*, 44 Kas. 237; *Coles* v. *Clark*, 3 Cush. 399; *Spraights* v. *Hawley*, 39 N. Y. 441; *Marks* v. *Robinson*, 82 Ala. 69; *Perkins* v. *Smith*, 1 Wilson, 328; *Stephens* v. *Elwall*, 4 Maule & S. 259; *McCombie* v. *Davies*, 6 East, 538; *Hoffman* v. *Carow*, 22 Wend. 285; *Hills* v. *Snell*, 104 Mass. 173; *Willams* v. *Merle*, 11 Wend. 80; *Saltus* v. *Everett*. 20 Wend. 267; *Pease* v. *Smith*, 61 N. Y. 477. If the mortgagee was entitled to the possession of the property at the time of the conversion, he could, at common law, have maintained an action of trover for the value of the property; but if he was not, trespass on the case was the remedy. *Forbes* v. *Parker*, 16 Pick. 462; *Welch* v. *Whittemore*, 25 Me. 86; *Googins* v. *Gilmore*, 47 Me. 9. In cases where a valuable right or property is destroyed or lost by the wrongful act of another, the law, as a rule, provides a remedy. If it be a landlord's lien, he is entitled to his remedy in the nature of an action on the case for damages; and the same has been held to be the law as to equitable liens. *Hovey* v. *Elliott*, 53 N. Y. Superior Court Rep. 331; *Hale* v. *Omaha Bank*, 64 N. Y. 550; *Husted* v. *Ingraham*, 75 N. Y. 251; 1 Jones on Liens, sec. 95. A subsequent mortgagee only holds an equita-

ble title in the property mortgaged, subject to all the existing rights and equities of the prior mortgagee, and is most unquestionably entitled to sue for and recover damages to his rights and interests in the property which have been caused by the wrongful act of another. *Newman* v. *Tymeson*, 13 Wis. 172; Jones on Chattel Mortgages, sec. 492, 500.

Under the statutes of this State which make the filing of a mortgage for record notice to all persons of its existence, the Hammett Grocer Company had notice of the mortgage held by Meyer. Mansf. Digest, sec. 4743. Its acts, therefore, being in hostility, defiance and usurpation of his rights under the mortgage, were clearly wrongful. It is not a sufficient defense for it to show that it deposited the proceeds of the sales made by it with the bank, which held a prior mortgage on the cotton. The bank was not entitled to more than enough to satisfy the indebtedness which the mortgage held by it was executed to secure. There was enough to satisfy both. The consequence is, the Hammett Grocer Company, having violated the rights of Meyer, is liable to him for damages.

4. Mortgagee's remedies for conversion.

All forms of action having been abolished by the Code of Practice in civil cases in this State, no question can arise in this case, as at common law, as to whether an action of trover, trespass or case was the remedy. *Organ* v. *Memphis & L. R. R. Co.* 51 Ark. 235. It is enough to find that the Hammett Grocer Company, having violated or destroyed Meyer's liens, is liable to him for the damages occasioned thereby, the measure of which in this action is his debt and interest, nothing having been shown in mitigation. Before recovering this damage, he was not compelled to look to the personal responsibility of Ritchie & Fitzhugh, or to show their insolvency, or to follow the cotton. *Worthington* v. *Hannah*, 23 Mich. 536; *Longey* v. *Leach*, 57 Vt. 377;

Peckinbaugh v. *Quillin*, 12 N. W. Rep. 104; Jones on Chattel Mortgages (3d ed.), secs. 448, 449. Having his remedies, he could elect to pursue any of them.

5. Practice on appeal as to misnomer.

It is said by the appellants that the circuit court erred in rendering judgment against the Hammett Grocer Company when it was not sued. The evidence shows that it and the Hammett Warehouse Company are the same company, and that it was formerly the Hammett Warehouse Company. It is evident that it was meant and understood to be sued. By the latter name it was sued and answered upon the merits. The defenses pleaded by it were defenses which no other company had a right to set up. Having made its defenses under the name by which it was sued without objection, it cannot take advantage of the misnomer in this court for the first time.

6. Duty of bank to pay depositor's checks.

A rule different from that which fixes the liability of the Hammett Grocer Company governs the accountability of the Merchants & Planters Bank in this action. Banks sustain a peculiar relation to their depositors, and deal in money which bears no marks by which its identity can be ascertained. When money is placed as a general deposit in a bank, it is no longer the property of the depositor, but immediately becomes the money of the bank. The depositor becomes the creditor of the bank, and the bank his debtor; and the bank is bound by an implied contract to honor the checks of the depositor to the extent of his deposit. When his checks are drawn in proper form, the bank is bound to honor them. It cannot excuse a refusal to pay them by showing that it had reason to believe that the checks were given for an unlawful purpose, or that other persons had liens or claims on the money deposited. Having no actual notice or knowledge that the money is the property of another or incumbered by liens or claims of others, it cannot lawfully refuse to pay a check of the customer. In such

an event it is bound to honor his checks until his deposit is exhausted, and is liable to no one on account of such payments. *Gray* v. *Johnston*, L. R. 3 H. L. Cases, 14; *Bank* v. *Clapp*, 76 N. C. 482; *Walker* v. *Manhattan Bank*, 25 Fed. Rep. 255; *Goodwin* v. *American Nat. Bank*, 48 Conn. 550; *Keane* v. *Roberts*, 4 Madd. 332, 357; 1 Morse on Banking (3d ed.), sec. 317, and cases cited. We do not, however, mean to say that a bank, having such notice or knowledge, would or would not, under any circumstances, be bound to pay a check of a customer to the extent of his deposit, that question not being presented for our consideration.

In this case the Merchants & Planters Bank had no actual notice or knowledge that Meyer had any lien on the money deposited with it; and it was bound to pay the checks of Ritchie & Fitzhugh, in whose name it was deposited, until it was exhausted, and was not liable to Meyer because it did so. But the note held by Meyer was delivered to the bank for collection before its maturity. It was made payable at the bank. Was it the duty of the bank to pay it?

7. Effect of making note payable at bank.

As to the authority of a bank at which the note of its customer is made payable, the authorities are divided. One line of them holds "that a banker at whose house negotiable paper is made payable, may apply to its payment funds of the maker or acceptor held on deposit at its maturity, the relations of banker and customer, and the tenor of the instrument, justifying the inference that the customer intended this to be done." *Indig* v. *National City Bank*, 80 N. Y. 106; *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 N. Y. 82, 88; *Citizens' Bank* v. *Carson*, 32 Mo. 191; *Robarts* v. *Tucker*, 16 Ad. & El. (N. S.) 578; *Forster* v. *Clements*, 2 Camp. 17; *Mandeville* v. *Bank*, 9 Cranch, 9; *Lazier* v. *Horan*, 55 Iowa, 75; *Whitaker* v. *Bank of England*, 6 C. & P. 700; Byles on Bills (7th ed.), pp. * 19, 188; Edwards on Bills &c. (2d ed.)

*166; 1 Randolph on Commercial Paper, sec. 125; 1 Daniel on Negotiable Instruments, secs. 325, 326; 2 Morse on Banking, sec. 557. Another line holds that the bank has no such authority, in the absence of a usage binding on the maker or of instructions from him to that effect. *Wood* v. *Merchants' Saving, Loan & Trust Co.* 41 Ill. 267, 270; *Ridgeley Nat. Bank* v. *Patton*, 109 Ill. 479, 483; *Exchange Bank* v. *Bank of North America*, 132 Mass. 150, 151; *Scott* v. *Shirk*, 60 Ind. 160, 161; *Grissom* v. *Commercial Nat. Bank*, 87 Tenn. 351; S. C. 10 S. W. Rep. 774. But it is not necessary for us to decide this question. The bank in this case was under no obligation to pay the note held by Meyer. At the time of the maturity of the note, there were no funds of Ritchie & Fitzhugh in the bank. In such a case there could be no implied authority to pay. *Coates* v. *Preston*, 105 Ill. 470; *In the matter of Brown*, 2 Story, 502; 2 Parsons on Bills & Notes, 78. The absence of funds negatives such an intention on the part of the makers.

The bank was not required to appropriate to the part payment of the note the money which was deposited, after its maturity, to the credit of Ritchie & Fitzhugh. *Nat. Bank of Newburgh* v. *Smith*, 66 N. Y. 271; *Voss* v. *Bank*, 83 Ill. 599; *People's Bank* v. *Legrand*, 103 Pa. St. 309; *First Nat. Bank* v. *Shreiner*, 110 Pa. St. 188; Daniel on Negotiable Instruments, sec. 326. Such an act does not evidence an intention that it should be, the note being dishonored. The fact that the subsequent deposits were not sufficient to pay the note also relieved the bank of the duty to appropriate; for if it had, the note could not have been taken and held by it as an evidence of its authority to pay and as a voucher. *Coates* v. *Preston*, 105 Ill. 470; *In the matter of Brown*, 2 Story, 502; 2 Parsons on Bills and Notes, 78.

The bank had the right to appropriate the deposits to the payment of the notes held by it against Ritchie &

Fitzhugh whenever they became due and payable; and also had the right to appropriate the deposits, which were made after the notes became due, in the same manner. It was authorized to do so by virtue of the mortgage executed to it by Ritchie & Fitzhugh.

The result is, the judgment against the bank should be reversed, and, Meyer not having appealed, the judgment against the Hammett Grocer Company should be affirmed; and it is so ordered.

PENN v. GARVIN.

Opinion delivered October 22, 1892.

56 511
68 166
68 169

Deed—Acknowledgment by agent valid.

A notary public is not disqualified to take an acknowledgment to a mortgage by reason of the fact that he had acted as agent for the mortgagor in obtaining the loan of money which the mortgage was intended to secure.

Appeal from Boone Circuit Court in Chancery.

B. B. HUDGINS, Judge.

Penn as grantee of Murphy brought suit against Garvin to cancel a mortgage of land executed by Murphy to Garvin to secure a loan alleged to be usurious. Garvin answered, denying the usury. He made his answer a cross-complaint, and prayed for foreclosure of the mortgage. Penn answered the cross-complaint, insisting (1) that the mortgage was usurious and (2) that the acknowledgment of the mortgage was bad, being taken by a notary who was the agent of one or both of the parties. The evidence established the fact that the acknowledgment of the mortgage was taken by a notary public who had acted as Murphy's agent in procuring the loan from Garvin.

The court dismissed the complaint of Penn, and entered decree foreclosing Garvin's mortgage. Penn has appealed.

W. F. Pace and *W. S. McCain* for appellant.

1. The usury, being commissions paid to the *lender's agent* over and above ten per cent., avoids the mortgage. 51 Ark. 545; *ib.* 547.

2. If F. M. Garvin was the agent of Murphy, then his certificate of acknowledgment as a notary is invalid. He was a party in interest and incompetent to act as an officer. 37 Ga. 678; 9 Ark. 62; 61 Ill. 307; Pingrey on Mortg. sec. 48; 46 Ga. 253; 45 Tex. 567; 14 S. W. Rep. 32; 9 S. E. Rep. 616; 20 Iowa, 231; 7 Watts, 227.

3. The fact that Murphy did not covenant against this mortgage will not avail. A purchaser can plead usury, unless he has specially agreed not to do so. Wiltsie on Mortg. sec. 396.

U. M. & G. B. Rose and *Crump & Watkins* for appellee.

1. There is not a particle of evidence that F. M. Garvin was the agent of his father, T. E. Garvin. 51 Ark. 548; 54 *id.* 573. The relation of the parent and child raises no presumption of agency. Bishop on Contracts, 500.

2. One who buys subject to a mortgage cannot set up mere formal defects. 48 Ark. 258; 1 Jones on Mortgages, 736; *ib.* 744; 44 N. Y. 55. See also 98 Mass. 305; 104 *id.* 249; 129 *id.* 398; 1 Abb. N. C. 97; 107 N. Y. 404; 43 N. J. E. 616; 38 Ohio St. 300; 35 Vt. 317; 55 Vt. 201; 69 Me. 494; 48 Iowa, 163; 40 Mich. 371; *ib.* 65; 40 Barb. 435; 34 Mich. 302. There is no case which holds that the agent of the grantor is disqualified to take the acknowledgment. See 6 N. Y. 422; 14 Oh. St. 151; 36 *ib.* 665; 14 Wis. 674; 5 Iowa, 96; 46 Mo. 404; 14 Bank Reg. 513; 69 Me. 583; 63 Ill. 130.

HEMINGWAY J. The defense of usury presents no question of law not settled by former decisions of this court; the questions of fact it presents must be resolved against the appellant.

The only other question in the case is, whether a notary public is disqualified to take an acknowledgment to a mortgage by reason of the fact that he had acted as agent for the mortgagor in obtaining the loan of money, which the mortgage was intended to secure. The appellant insists that the notary is disqualified in such a case, and relies upon many adjudged cases to which we are cited.

Upon examining them, we find that wherever it has been held that an officer, otherwise competent, was disqualified to certify an acknowledgement, the ruling was placed, either upon the ground that he was a party to the deed acknowledged (*Green* v. *Abraham*, 43 Ark. 420; *Stevens* v. *Hampton*, 46 Mo. 404; *Wasson* v. *Connor*, 54 Miss. 351; *Groesbeck* v. *Seeley*, 13 Mich. 329; *Davis* v. *Beazley*, 75 Va. 491), or that he was beneficially interested in it (*Withers* v. *Baird*, 7 Watts, 227; *Jones* v. *Porter*, 59 Miss. 628; *Wilson* v. *Traer*, 20 Iowa, 231).

We have been directed to no case, and have knowledge of none, in which it has been held that the certifying officer is precluded from exercising the ordinary functions of his office with reference to a particular deed, merely because he acted as agent for the grantor in the negotiations preceding its execution. Such disqualification can not be put upon the ground that he is a party to the deed, for in fact he is a stranger to it; nor upon the ground that he is interested in it, for he acquires nothing by it, and its execution satisfies no undertaking by which he is bound. It can not be put upon the ground of public policy, for the formality of an acknowledgment was designed for the protection of the grantor, and the fact that the officer certifying it had acted as his agent in

matters out of which the deed grew would not unfit him to act with a proper regard to the grantor's rights. Nor can it be put on the ground that the act is judicial, for relationship to a party disqualifies an officer to perform a judicial act, and it is settled that relationship to the grantor is no disqualification to taking an acknowledgment.

But it is contended that, as the grantor can not take his own acknowledgment, and can not do by agent what he can not do in person, the acknowledgment in question is void. We think the argument has no application to the facts of this case. If the grantor had been an officer authorized to take acknowledgments, and the acknowledgment had been certified by his deputy or agent, the argument would be applicable to the case. But the grantor did not attempt in person or by another to certify his own acknowledgment; the certificate was made by the officer in his own name under the authority conferred by the statute, and not under any power from the grantor. He acted as an officer discharging a power appertaining to his office, and not as the agent of anybody.

The question is, whether he was disqualified in this particular case to exercise a power otherwise appertaining to his office, on account of the fact that the deed acknowledged grew out of negotiations in which he acted as agent for the acknowledging party. There is nothing in the letter of the statute that imposes such disqualification, and we think there is nothing in its spirit or policy to give it such effect.

Our conclusion, therefore, is that there was no disqualification. *Kutch* v. *Holly*, 14 S. W. Rep. 32; *Sawyer* v. *Cox*, 63 Ill. 130.

Affirm.

ATTERBERRY v. STATE.

Opinion delivered October 22, 1892.

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1. *Larceny—Servant.*

The felonious taking of goods from the owner's store by a clerk who had custody of them is larceny, and not embezzlement.

2. *Who are principal offenders.*

One who, in pursuance of a previous agreement, is present at the commission of a larceny and receives and carries away the stolen goods is liable as a principal in the commission of the crime.

3. *Jury retiring to deliberate—Oath to officer.*

It is too late after verdict to object, for the first time, that a jury retired from the court in charge of an officer to whom the special oath has not been administered, where it appears that the defendant was present when the jury retired and neither asked that the special oath be administered to the officer nor objected to his taking charge of the jury, and it does not appear that either the officer or the jury was guilty of any misconduct.

Appeal from Marion Circuit Court.

B. B. HUDGINS, Judge.

Robert Atterberry and Abe Williams were indicted for larceny of three suits of clothes and other property, of the total value of $59, belonging to W. C. McBel. Both were convicted. Atterberry has appealed.

The evidence is sufficiently stated in the opinion. The court instructed the jury, at the instance of the State, as follows:

"2. If you find that E. C. McBel feloniously took and carried away goods such as is described in the indictment, of the property of W. C. McBel, of the value of more than ten dollars, and that defendants were present, aiding, abetting, ready and consenting to aid and abet in said act, you would be authorized to convict the defendants; provided said defendants knew at the time said goods were being stolen by the said E. C. McBel,

and this is true although you may find that the said Ernest McBel was at the time the clerk or agent of the said W. C. McBel to sell said goods." The court refused to give the following instruction requested by the defense:

"1. I charge you that in larceny the larceny is complete the moment the goods are taken in possession by the person stealing same; and that if, after that, one receives the goods knowing them to have been stolen, this, of itself, could not constitute the crime of larceny on the part of one so receiving them."

Appellant insists that the evidence was insufficient to support the verdict, and that the court erred in giving the above instruction asked by the State and refusing to give the instruction asked on behalf of the defense.

DeRoos Bailey for appellant.

1. The court erred in failing to administer the oath required by the statute. Mansf. Dig. secs. 2265, 2268; Bish. Cr. Pr. vol. 1, secs. 991–2–3; Bish. St. Cr. secs. 86, 90.

2. The first instruction should have been given. Bish. Cr. Law, vol. 2, secs. 794, 799; 37 Ark. 274; 41 *id.* 173.

W. E. Atkinson, Attorney General, and *C. T. Coleman* for appellee.

It was error to fail to administer the oath to the officer, prescribed by sec. 2265, Mansf. Dig. 38 Ill. 514; 44 *id.* 452; 124 *id.* 218; 14 S. W. Rep. 480; 46 Hun. 667; 16 Wis. 355. Is it a *reversible* error? The record recites that the jury retired in charge of a *sworn* officer. No objection was made at the time, 116 Ind. 51; 14 Bush, 340. Our law is not so strict as in some States. 32 Ark. 309. No prejudicial error appears.

2. The instruction properly refused. Mansf. Dig. secs. 1505, 1508; 32 Ark. 727; 42 *id.* 94.

HEMINGWAY, J. The appellant alleges as a ground for a reversal that the verdict is not supported by the evidence. In determining it we are called to decide whether the evidence warranted a finding that he was guilty of any offense; and if so, whether it was larceny, or some other crime, as embezzlement or receiving stolen property.

As to the material facts, there is no controversy. The defendant was a witness in his own behalf, and his statement agrees in all essentials with the testimony of the State's witnesses. That E. C. McBel was a salesman in the store of his father, that he took, from the goods kept for sale there, articles charged to have been stolen, that he handed them to the defendant and one Abe Williams, who were at the store, and they carried them away, and that this was done in pursuance of a previous arrangement between the parties, are admitted facts. It is further admitted that the defendant and Abe Williams knew that the goods belonged to W. C. McBel, and not to E. C. McBel.

The excuse defendant offered for taking the articles was that E. C. McBel had promised to give them to him and Williams by way of compensating them for services to him, and that they thought he had authority from the owner to do it.

I. Whether the act was criminal or not depended upon the animus of the defendant in doing it. If he really believed that such authority existed, and took them under such belief, he would not be guilty of any offense, even though the authority did not exist; but if he knew that the authority was wanting, his act was criminal, for he knew that W. C. McBel owned the articles, and that they were taken with the intent to deprive him of them. That he was not mistaken as to the authority, but on the contrary knew there was none, has been found by the jury; and we think the circumstances of the

1. Larceny by servant.

taking, as detailed by the defendant and other witnesses, inevitably lead to that conclusion. As this finding of a felonious intent is sustained by the evidence, we have next inquired whether the facts make a case of larceny against the defendant. The articles taken were kept for sale by their owner in a store in which E. C. McBel had authority to be present and sell the goods. They were legally in the possession of the owner, even if for a time left in the custody of the salesman; and an appropriation of them by the latter was a trespass on the possession of the former, within the meaning of the law defining larceny. *Powell* v. *State*, 34 Ark. 693; 2 Bish. Cr. L. (8th ed.) secs. 365, 823–6 *et seq.*

2. Who are principal offenders.

As the goods were appropriated in the presence of the defendant and in execution of an agreement with him, and the defendant was there to receive and carry them away, he was a party to the act of appropriation, equally as if it had been done by his own hand, and was likewise liable to prosecution for it. Mansf. Dig. sec. 1508. We think the conviction for larceny was in accordance with the evidence.

II. From what has been said, it follows that there was no error in giving the second instruction for the State or in refusing the first for the defendant. The former was a fair declaration of the law of the case; and there was no evidence to which the latter was pertinent.

3. Administering oath to officer in charge of jury.

III. It is urged, as a ground for reversal, that upon the final submission of the cause the jury retired from the court room to consider of its verdict in charge of an officer who had not taken the oath prescribed by section 2265 of Mansfield's Digest. This presents the most difficult question in the case. We think it proper that such oath should be administered; for if the section relied upon relates only to the care of the jury before final submission of the cause, the common law practice requires that the officer put in charge of the jury when

the cause is submitted shall take the special oath. 1 Bish. Cr. Pro. sec. 991–2–3; *Lewis* v. *People*, 44 Ill. 452; *McCann* v. *State*, 9 Sm. & M. 465. Accepting this as the better and proper practice, what effect does its omission have upon the verdict? It has been held by some courts, that it was fatal to the verdict, and that, too, when the objection was first presented by motion for a new trial. Cases *supra*. But a different view has been taken by other courts. *Davis* v. *State*, 15 Ohio, 72; *Bennett* v. *Com.* 8 Leigh, 745. We are constrained to think that there is no reason why the omission in all cases and under all circumstances should vitiate the verdict. Under our system of trials in felony cases, the defendant is present in court. He is aided by counsel of his own choice, when he is able to employ them; of the court's appointment, when he can employ none. His attitude is widely different from that of the defendant in the courts of England a century ago. The court still owes him an absolutely fair and impartial trial—the right to make proof of everything he offers in denial, mitigation or excuse of the act charged, and to have it fairly passed upon by a jury; but he owes to the court fair dealing as well as candor, and should not be permitted to undo its work on account of omissions which he deemed too trivial at the time to bring to its attention, and which are not shown or charged to have affected the fairness of the trial or prejudiced his rights. As a general rule, when the court is about to do what it should not do, or to omit what it should do, the defendant should call attention to the threatened error and object to it, and if the court then commits it, he must save his exception; and unless this is done the act or omission can not be urged as ground for a new trial. This rule applies to the exclusion of proper, or the admission of improper, evidence; to the refusing of proper, or the giving of improper, instruc-

tions. It rests upon the duty to deal fairly with the court, which forbids that a losing litigant should complain of errors which the court might and presumably would have avoided, or cured in apt time, if they had been called to its attention. Guided by the reason of this rule, this court held, in *Ruble* v. *State*, 51 Ark. 126, which was a prosecution for a misdemeanor, that it was too late after a verdict to object for the first time that a jury, taken from the regular panel which had been sworn for the term, had not been specially sworn, as the statute provided, to try that case; and in *Hayden* v. *State*, 55 Ark. 342, which was a prosecution for a felony, that the verdict would not be set aside because the defendant was tried without arraignment or plea, where the trial was had as upon a plea of not guilty. Applying the reason of those cases to the question in hand, we hold that it is too late, after verdict, to object, for the first time, that a jury retired from court in charge of an officer to whom the special oath had not been administered, where it appeared that the defendant was present when it retired and neither asked that the special oath be administered to him nor objected to his taking charge of the jury, and it does not appear that either the officer or the jury was guilty of any misconduct. It appears from the record in this case that the jury retired in charge of an officer acting under the general oath of his office, and that the defendant and his attorney were present; but it does not appear that he asked the court to administer the special oath or objected to the officer taking charge of the jury.

He conceded to the jury, thus attended, the right to determine the cause, if it gave him his liberty; and should not be permitted to question such right, merely because it took an unfavorable view of his case. There is not a suggestion that the jury or the officer in charge

of it was guilty of any misconduct, and we are of the opinion that the matter in hand furnished no ground for a new trial.

Affirmed.

NEAL v. TAYLOR.

Opinion delivered October 29, 1892.

Injunction of judgment—Damages on dissolution.

When a bond for injunction of a judgment was conditioned for the payment of the damages sustained if the injunction should be decided to have been wrongfully granted, a surety on the bond is not bound for the amount of the judgment, upon dissolution of the injunction, if it does not appear that an opportunity to collect the judgment was lost by reason of the injunction.

Appeal from Washington Circuit Court.

E. S. McDANIEL, Judge.

Suit upon an injunction bond, brought by B. C. Neal against John P. Moore and Jerry M. Taylor, his surety.

The bond given by Moore to obtain the restraining order was as follows:

"John P. Moore, Plaintiff,

vs.

B. C. Neal, J. C. Massie and James Burkett, Defendants.

"We undertake that the plaintiff, John P. Moore, shall pay to the defendants the damages, not exceeding two hundred and fifty dollars, which they, or either of them, may sustain by reason of the injunction in this action if it is finally decided that said injunction ought not to have been granted. JNO. P. MOORE,

JERRY M. TAYLOR."

There was no bill of exceptions. The court found the facts to be as follows: "That, on the 11th day of

October, 1888, judgment was rendered in favor of B. C. Neal against John P. Moore for the sum of $175 before J. C. Massie, a justice of the peace of Washington county, Arkansas; that, on or about the 12th day of August, 1889, said Moore presented his petition to the Washington circuit court, alleging that said judgment was void, and praying that the party plaintiff in said judgment, the justice of the peace and the constable, be restrained from collecting said judgment, and upon the final hearing be perpetually enjoined from enforcing said judgment, and alleging in said petition also that an execution had been issued on said judgment and had been levied upon a wagon and team, the property of said Moore; that said Moore executed the bond and complaint set forth and obtained a restraining order from the chancery side of the Washington circuit court, restraining said Neal, the said justice and the constable from proceeding to collect said judgment or enforcing said execution, which restraining order was in full force and effect until the 3d day of January, 1890, when said cause was heard in the circuit court and said bill dismissed for want of equity, said injunction dissolved, and no damages were claimed in or assessed by said court; that, at the time said restraining order was issued, an execution had been issued on said justice's judgment, and had been levied by the constable upon a wagon and team, the property of the defendant, Moore, of sufficient value to satisfy the same; that, by virtue of such restraining order, said property was returned to said Moore, and the execution was returned to said justice; that the same property had been levied on under two former executions, but had been scheduled and claimed as exempt by said Moore; that, at the time of the issuance of said writ of injunction, said Moore had not exceeding $500 worth of personal property, and was at the time entitled to claim said amount as exempt. And the court finds that said judg-

ment is valid and unpaid, and finds the issues for the plaintiff."

Thereupon plaintiff moved the court to declare the law to be: "That, when a suit has been brought upon an injunction bond where the collection of a judgment has been stayed, the measure of damage is the amount of the judgment with interest and cost." The court refused to make the declaration asked, but rendered judgment in favor of plaintiff for the sum of $6.56, the amount of the interest on the judgment during the time it was enjoined. Plaintiff has appealed.

B. R. Davidson for appellant.

The measure of damages in an action on a bond when a judgment has been enjoined, is the amount of the judgment, interest and costs. Mansf. Dig. sec, 3722; 13 Ohio, 135; 9 S. W. Rep. 801; 5 S. & M. 301; 5 S. W. Rep. 561.

COCKRILL, C. J. The only liability assumed by the obligors, in the injunction bond sued on, was that they would pay to the party enjoined the damages which he might sustain by a wrongful injunction. There is no stipulation to pay the amount of the judgment enjoined, in case the injunction should be dissolved. The only way in which the obligee in the bond could bring the payment of his judgment within the terms of the bond would be to prove that he had lost the opportunity to collect it by reason of the injunction. It may be that in that event the full amount of the judgment could be assessed as damages sustained by reason of the injunction. See *Crawford* v. *Woodworth*, 9 Bush, 745. But the court resolved the question of fact involved in that consideration against the appellant, and, with this fact against him, the condition of the bond does not warrant a recovery of the amount of the judgment. *Ferguson* v. *Tipton*, 1 B. Monroe, 28; *Ashby* v. *Tureman*, 3 Littell, 6. We have nothing before us except the court's special finding

of facts set out in the judgment. There is no bill of exceptions.

In the case of *Hunt* v. *Burton*, 18 Ark. 188, a recovery of the full amount of two judgments enjoined was sustained in a suit at law against the surety in the injunction bond, without a showing that the fruits of the judgments were lost by reason of the injunction. But there is a wide difference between the facts of that case and this. The bond in that case contained the condition, then but not now required by statute, that the sureties would abide the decision of the suit for injunction and pay all sums of money adjudged against their principal therein. See *Blakeney* v. *Ferguson*, 18 Ark. 347.

In the decree dissolving the injunction, the court adjudged against the principal the amount of the judgments which had been enjoined, together with damages; and it was ruled that the sureties were liable for the amounts so adjudged. In the text of High on Injunctions* it is stated, upon the authority of the Supreme Court of Missouri, that a surety who is bound only by a condition such as that construed in *Hunt* v. *Burton* would not be liable for the amount of the judgment enjoined unless the amount was adjudged against the principal on the dissolution of the injunction. And that comports with the reasoning of this court in the case of *Blakeney* v. *Ferguson*, 18 Ark. *sup.*, where the court seemed to hold that the statute and the form of the bond itself contemplated that the court dissolving the injunction should in every case ascertain what damages the obligee had sustained, and that he could recover none at law that had not been awarded against the principal in the cause wherein the injunction was dissolved; though a different view was taken of the same statute in *Marshall* v. *Green*, 24 Ark. 410.

*High on Inj. sec. 1639.

The judge granting the injunction in this case could have required a bond to secure the *payment* of the judgment in case the injunction should be dissolved, as a condition to the issue of the restraining order, if it appeared to him that the rights of parties demanded such protection. The power to impose equitable conditions in such cases is recognized by the general equity practice (*Russell* v. *Farley*, 105 U. S. 433), and is authorized by statute. Mansf. Dig. secs. 3741, 3745. But no such condition was imposed, no damages were assessed on dissolution of the injunction, and none were proved on the trial.

To hold the surety liable for the amount of the judgment would be to make his obligation broader than the terms of his bond. That of course cannot be done.

Affirm.

PINDALL *v.* LOAGUE.

Opinion delivered October 29, 1892.

Lease to pay debts—Effect of discharge in bankruptcy.

A contract of lease stipulated that the rents should be applied to the payment of any debts which the lessor or his brothers owed the lessee, it being agreed that the lessee should assign to the lessor the claims against his brothers when paid. Certain of the lessor's debts referred to had been incurred prior to a discharge in bankruptcy. In a suit by the lessor to compel an accounting of rents, *held*, that the lessee is entitled to credit, upon the amount found due as rents, to the extent of the entire indebtedness of the lessor and his brothers; and the lessor isentitled to an assignment of so much of the lessee's claims against his brothers as may be discharged by such rents.

Appeal from Desha Circuit Court in Chancery.
JOHN M. ELLIOTT, Judge.

Pindall & Rogers for appellant.
R. L. Bright for appellant.

After Eddins' discharge in bankruptcy, he by the agreement promised *in writing* to pay all the indebtedness of himself and brothers. 26 Ill. App. 182; 122 N. Y. 408; 2 So. Rep. 332; 53 Am. Dec. 493; 52 *id.* 779; 67 *id.* 498; 86 N. C. 331; 53 N. Y. 521.

J. E. Bigelow for appellee.

1. The court properly discharged the notes of the plaintiff's brothers. They were not his notes, and he could only be made liable by virtue of his undertaking in the lease contract that they might be paid out of the net proceeds of the plantation. The appellant never complied with the stipulations in the lease, and without full performance he cannot claim credit. 2 Pars. Cont. sec. 4, ch. 3, part 2; 5 M. G. & S. 522; Bish. Cont. sec. 1420; 12 Johns. 165; 16 Oh. 238.

2. These notes when paid were to be assigned to plaintiff; this was never done.

BATTLE, J. On the 23d day of December, 1876, B. I. Eddins and his brothers, A. H. Eddins, T. T. Eddins and M. E. Eddins, were indebted to Jacob Vance in a large sum of money, and B. I. Eddins was the owner of a plantation in Desha county in this State, which was known as the "Graddy Plantation." To secure this indebtedness, B. I. Eddins entered with Vance into a contract in the following words:

"MEMPHIS, TENN., December 23, 1876.

"This Contract and Agreement entered into between B. I. Eddins, of Shelby county, Tennessee, of the first part, and Jacob Vance, of Lincoln county, Tennessee, of the second part:

"Witnesseth: That B. I. Eddins, of the first part, leases the Graddy Plantation in Desha county, Arkansas, for the term of five years, commencing January 1, 1877, unless the indebtedness of B. I. Eddins and brothers is paid sooner to the said Vance, with the following conditions between both parties: The said Vance agrees

to take charge of the said Graddy Plantation, and furnish all plow stock, farming implements, supplies for hands for said farm during the term of said lease, and to pay necessary expenses to run the same to the full capacity, according to the seasons of each year, for the best advantage of both parties, and not to give the hands more than one-half of the crop, unless the said Vance finds it to our interest to do otherwise. He also agrees to cultivate all cleared land under fence suitable, if it is possible for him to get hands to do so. He also agrees to fence and cultivate the deadening on said place. The said Vance is to own all plow stock and farming implements placed on said place by him until paid by said Eddins. The said Eddins, of the first part, agrees to take all horses and mules furnished by the said Vance to work on said place at a fair valuation on a credit until the 25th day of December, 1877, and to be charged with all moneys advanced by said Vance to run the said plantation. The said Vance is to run the said place as economically as he can. In consideration of all that Vance agrees to do in furnishing and running said place, the said Eddins agrees that the said Vance may own and dispose of all the crops made on said place during the term of this lease in the following way: First, to pay all expenses of running the said farm, charged to Eddins; second, Vance is to pay himself five hundred dollars for his services for superintending the said place for each year; and all balances of the net proceeds of crops raised on said place to be applied to any indebtedness which I owe to the said Vance, and what my brothers, A. H., T. T. and M. E. Eddins owe him at this time; the said Vance to transfer the claims on my brothers to me when paid; the balances, if any, to be paid to B. I. Eddins. At the expiration of this lease, the said Vance is to return the said plantation to the said B. I. Eddins in good order and condition, except the usual wear and

proper use of the same, with all the plows, horses and mules, also the farming implements, machinery and fixtures of said place.

"Witness our hands and seals in duplicate.

B. I. EDDINS, [SEAL]
JACOB VANCE, [SEAL]."

The indebtedness of B. I. Eddins referred to in this contract, and intended to be secured thereby, was evidenced by four notes, as follows: One note executed by B. I. Eddins, M. E. Eddins and W. E. Eddins, dated December 25, 1861, for $440, payable three months after date to John Maddox, and by him assigned to Jacob Vance; a balance of $677.08 due on a note executed by B. I. Eddins for $1550.70, dated January 10, 1862, and payable on or before December 25, 1862, to Jacob Vance and A. H. Eddins, administrators of S. G. Eddins, deceased; one note of B. I. Eddins for $655.72, dated November 30, 1867, and payable one day after date to Jacob Vance; and one note executed by M. E. Eddins and B. I. Eddins for $1080, dated March 8, 1870, and payable one day after date to Jacob Vance. The indebtedness of the brothers mentioned in the contract, and thereby intended to be secured, was evidenced in part by five notes executed by A. H. Eddins, T. T. Eddins and M. E. Eddins, dated December 15, 1875, payable to Jacob Vance, due one day after date, for the following amounts: Three for $1000 each, making in the aggregate $3000, one for $939.49, and the other for $935.25.

Vance took possession of the "Graddy Plantation" under his contract with Eddins, and held and cultivated it for the time it was leased to him.

Some time in the year 1881 Eddins brought this action against Vance in the Desha circuit court, on the equity side, and charged him, in his complaint, with a failure to perform his contract in many respects, and alleged that he was considerably damaged thereby; and

asked that an account be taken of such damage and the liabilities of Vance to him on account of the lease. Vance answered and claimed, among other things, that in any account that might be stated he should be credited with the indebtedness referred to in the lease.

During the pendency of this action Vance brought suit against A. H., T. T. and M. E. Eddins, on the notes executed by them as before stated, in the chancery court of Lincoln county, in the State of Tennessee, and on the 10th of April, 1884, recovered judgment against them, in that action, for the sum of $7,300.87, and afterwards collected thereon the sum of $1500. The object of the Tennessee suit was to prevent the statute of limitations barring the recovery of a judgment on the notes sued on.

On the hearing of this cause, the facts before stated, as well as other facts not necessary to mention, were shown by the preponderance of evidence adduced. It was also shown that B. I. Eddins was adjudged a bankrupt, and was, on the 17th of July, 1868, discharged from all debts and claims which were provable against his estate in bankruptcy, so far as he could be discharged therefrom, according to the act of Congress establishing a uniform system of bankruptcy throughout the United States then in force. The court found that he was only indebted to Vance for the amount due on the note executed by him and M. E. Eddins for $1080, and appointed a master and directed him to state an account as prayed for in the complaint. The master stated an account, in which he charged Vance, among other things, with the value of the cotton raised on the "Graddy Plantation" during the time he leased it, as found by the master, less the expenses incurred in raising the same, and with six per cent. per annum interest on the amount found owing by Vance on the crop of each year of the lease from the last day of the year in which the same was raised to the first day of January, 1888; and credited him, among

other things, with the amount due on the note of B. I. Eddins and M. E. Eddins for $1080, and with no part of the amount due on the other indebtedness referred to in the lease. Vance excepted to the account stated, because the master did not give him credit for such amounts, but the court overruled his exceptions, and approved the account. According to this account, Vance was liable to Eddins for a balance of $7808.60, for which, and six per cent. per annum interest thereon from the 26th of January, 1888, the day on which the master filed his report, to the day of the final decree herein, the court rendered judgment in favor of Eddins against Vance; and the defendant appealed.

Since the appeal in this action was taken, both parties have died, and the cause has been revived by agreement in the name of X. J. Pindall, as special administrator *ad litem* of Jacob Vance, deceased, appellant, against John Loague as public administrator of the estate of B. I. Eddins, deceased, appellee. Loague was appointed administrator by a court of the State of Tennessee.

During the argument of this cause, appellant stated to the court that he did not ask for judgment against appellee for any balance that Eddins owed Vance. This disclaimer limits our inquiry, and makes it only necessary for us to ascertain whether Vance owed Eddins anything, and, finding that he did not, relieves us of the necessity of making further investigation.

The manifest intention of the lease to Vance was to secure the payment of the indebtedness of Eddins and his brothers to him. It was only to continue five years, or until this indebtedness was paid. The parties to it thereby agreed that Vance should dispose of all the crops made on the "Graddy Plantation" during the term of the lease, and appropriate the proceeds thereof in the following manner: "First, to pay all expenses of running the said farm, charged to Eddins; second, Vance is

to pay himself five hundred dollars for his services for superintending the said place for each year; and all balances of the net proceeds of crops raised on said place to be applied to any indebtedness which I owe to the said Vance, and what my brothers, A. H., T. T. and M. E. Eddins owe him at this time, the said Vance to transfer the claims on my brothers to me when paid; the balances, if any, to be paid to B. I. Eddins." According to the terms of this lease Vance was entitled to a credit for the entire indebtedness intended to be secured thereby. Credited in this manner, and with interest on such indebtedness at the rate and for the same time he was charged by the master, as he in equity and good conscience was entitled to be, it is evident that Vance owed Eddins nothing, provided all the debits against him were correctly charged in the account stated, as to which there can be no controversy here on the part of appellee, as Eddins did not appeal.

Eddins' discharge in bankruptcy did not affect his contract to lease, as it was made after he was adjudged a bankrupt. He was not prohibited from obligating himself to pay the debts from which he was discharged. Indeed he was under a moral obligation to pay them when he could, and could have revived them by even a verbal promise to pay. *Lanagin* v. *Nowland*, 44 Ark. 84; *Worthington* v. *DeBardlekin*, 33 Ark. 651; *Apperson* v. *Stewart*, 27 Ark. 619.

Eddins and Vance were entitled to the performance of their contract. Vance was entitled to a credit for the sums $440, $677.08 and $655.72 and interest on each sum from the maturity of the respective notes executed by Eddins for the same to the first of January, 1888, on the $7808.60 which the master found to be owing by him on the last mentioned day; and, after this credit is given, Eddins is entitled to the assignment of so much of the aforesaid indebtedness of his brothers as will be equal to

the amount thereafter remaining and interest thereon. Not having the proper parties before us, we will not enforce this right of Eddins. It may be enforced in another action.

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

GOODRUM v. GOODRUM.

Opinion delivered October 29, 1892.

1. *Bequest in lieu of dower—Election.*

   Acceptance by a widow of a bequest of money under her husband's will, with knowledge that it was intended in lieu of dower, will be presumed to be an election to take under the will, notwithstanding she gave no receipt for the money and expressed no intention, in words or in writing, to make such election.

2. *Election made under mistake—When retracted.*

   An election by a widow to take a bequest under her husband's will, in lieu of dower, may be retracted by her where such election was made in ignorance of the insolvency of the estate, if her ignorance was not culpable, and no prejudice will result to the estate or to parties interested therein.

3. *Dower—Allotment.*

   Where, after a widow elected to take a bequest in lieu of dower and before she retracted such election, the executor sold certain lands of her husband's estate, she is not entitled to dower therein, but an equivalent to her dower in the lands sold will be assigned to her out of other lands of the estate.

Appeal from Lonoke Chancery Court.

DAVID W. CARROLL, Chancellor.

Sam W. Williams for appellant.

1. Under the circumstances of this case, there was no election to take under the will. Within twelve months the widow executed a quit-claim deed to the heirs, and brought suit for dower within sixteen months. This

brings her within the statute. 52 Ark. 193; Mansf. Dig. secs. 2596–7 and 2584.

2. The right of election is perfect for eighteen months after the husband's death, unless the widow does some act to estop her, or put the estate to disadvantage; otherwise she can renounce in the mode prescribed by statute. 60 Mo. 444; 20 Pick. 556. The right of the widow to elect liberally construed. 3 Sandf. Ch. 519; 5 Paige, Ch. 318.

3. An election must be made with full knowledge of all the facts, to bind the party. 4 Jones, Eq. (N. C.), 178; 2 Rich. (S. C.), 218. An election, before the circumstances necessary to a judicious and discriminating choice are ascertained, is not binding. 36 Pa. St. 467; 2 Yeates (Pa.), 302; 43 Pa. St. 474; 13 Cal. 133; 7 Ga. 20; 3 N. J. Eq. (2 Green), 504; 20 Pick. 556; 15 N. Y. 365. See also 9 Mo. 11, 60 *id.* 444, 67 *id.* 175, 91 *id.* 465 and 92 *id.* 647, upon a statute similar to ours. In Ohio a solemn election made and declared in court may be set aside on petition. 11 Oh. St. 386. The mere receiving and occupying property is not an election. 20 Pick. (Mass.) 556. See 12 How. 256. See also 9 Gill (Md.), 361; 2 Des. (S. C.), 53; 4 *id.* 274; 4 McLean, 99; 97 N. C. 236; 1 S. E. Rep. 452.

U. M. & G. B. Rose and *Thos. C. Trimble* for appellees.

Mrs. Goodrum by her acts has made her election to take under the will. "Acceptance of the testamentary provision is the most ordinary way of making election." 2 Jarman, Wills, 40. Mr. Pomeroy says: "The rule seems to be plainly deducible from the American cases, which are placed in the note, that where a widow is required to elect between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable act of ownership over it, if

done with her knowledge of the right to elect, and not through a clear mistake as to the position and value of the property, will be deemed an election by her to take under the will and to reject her dower." 1 Pomeroy, Eq. Jur. sec. 515. Pomeroy is sustained by all the authorities, except perhaps 97 N. C. 236. See 12 Bush, 510; 3 Green, 235; 1 Bailey, 324; 43 Penn. St. 484; 77 *id.* 160; 25 *id.* 468; 5 J. J. Marsh. 214; 17 S. & R. 16; 40 Ga. 562; 54 Cal. 207; 6 Heisk. 516; 92 N. C. 706; 14 Gratt. 518; L. R. 2 Eq. Cas. 834; 23 N. J. Eq. 171; 76 Ga. 759; 58 Ga. 319; 41 Iowa, 324; 68 Mo. 441; 7 Bush, 367.

HUGHES, J. This is a suit brought by appellant for dower in the lands of her deceased husband, William Goodrum, who died on the 13th of October, 1886, leaving a will in which he bequeathed to the appellant a policy of insurance upon his life for two thousand dollars, expressly in lieu of dower in his estate. In February, 1887, about three and a half months after the testator's death, the money was collected on the policy by the executor of the will and paid to the appellant. It was explained to her by the executor of the will that the bequest was in lieu of dower in the estate, and this she seems to have fully understood. She was not ignorant of her legal rights. So far as appears from the evidence in the case, no inventory of the estate had been made at the time, and whether the appellant knew the situation of her husband's estate or the amount of debt against it, or whether it was solvent or not, or the relative value of the bequest to her and her dower interest, does not appear, save from the circumstances of the case. On the 10th of October, 1887, the appellant renounced the will by quit-claim deed to the heirs. She then brought suit for dower. It is contended that she had elected to take under the will, and that she cannot retract that election.

Her attorney, Col. Sam W. Williams, testified that, a few days before the expiration of twelve months after the death of the testator, he "looked into the condition of the estate, and found that it was in debt in excess of the assets, and that Mrs. Goodrum would get nothing under the will, as all there was was subject to debts." He then advised her to renounce and take dower.

It does not appear that Mrs. Goodrum gave any receipt for the $2000 paid her, or that she ever expressed in writing or by words that it was her purpose in receiving it to thereby make an election to take the bequest made to her in the will in lieu of her dower. But this is naturally and legitimately to be inferred, as she is presumed to have known her legal rights and that she could receive the money only as a devisee under the will. When the money was paid to her she had but recently lost her husband, and it is natural to presume that she was still suffering from the affliction. There had, at the time, been no inventory or statement of the condition of her husband's estate made, as far as the evidence shows, and in all probability she did not then know the amount of indebtedness against it, whether it was solvent or insolvent. Her action in taking the $2000 bequeathed her in lieu of dower indicates that she believed the estate to be solvent, as otherwise it is not to be presumed she would have relinquished her dower without expecting to get something in lieu of it. Her husband had made the bequest to her, and she doubtlesss thought she could retain it. Is she bound by the election, under all the circumstances of the case?

1. Equitable doctrine of election.

No general rule can be laid down in all cases as to what will or will not constitute an election that may not be retracted in proper time. Each case must be determined upon its own circumstances. 2 Story's Eq. Jur. sec. 1097. In the case of *Fitzhugh* v. *Hubbard*, 41 Ark. 64, this court, through Judge Smith, defines election in

such cases as this as follows: "An election, in equity, is the choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property, already his own, which is attempted to be disposed of in favor of a third party, by virtue of the same instrument." "A person, who accepts a benefit under an instrument, must adopt the whole instrument, giving full effect to its provisions and renouncing every right inconsistent with it." This is the equitable doctrine of election.

2. When election may be retracted.

An election once made, under circumstances which show that the party required to elect had, or might by the exercise of reasonable diligence have had, such information in regard to the relative value of those things between which a choice must be made as would enable the party making the election to make an intelligent and discriminating choice, cannot be retracted. When made without such information, it cannot be retracted to the prejudice of the estate, or persons who have changed their condition in consequence of such election.

There can be no revocation of an election, unless the person making it "can restore the other persons affected by his claim to the same situation, as if the acts had not been performed or the acquiescence had not existed." *Yorkley* v. *Stinson*, 97 N. C. 236; 2 Story's Eq. Jurisprudence, sec. 1097; *Dillon* v. *Parker*, 1 Swanston, 382.

If one make an election before the circumstances necessary to a judicious and discriminating choice are ascertained, we take it that he would not be bound, unless he was culpable for his ignorance in the premises. One cannot close his eyes and refuse to be informed, and afterwards plead ignorance.

The Supreme Court of Pennsylvania lays down the rule much stronger than we have stated above in *Anderson's Appeal*, 36 Pa. St. 496, which holds that the burden of proof in a case of this kind is upon the party who con-

tends that a binding election has been made to prove that the party electing did have full knowledge of the relative value of the things he is to choose between, and of the circumstances necessary to a judicious and discriminating choice. We do not find it necessary to determine in this case where the burden of proof rested, in this behalf, because we find that the circumstances of this case show that Mrs. Goodrum, at the time she made her election, did not have the information that would have enabled her to make an intelligent and discriminating choice between the bequest in the will and her dower interest.

3. As to allotment of dower.

We therefore are of the opinion that, as it may be done without prejudice to the estate, she should be allowed to retract her election and that dower should be assigned her in the lands of which her husband died seized, save certain lands sold by the executor of the will before she filed her renunciation. She can have no dower in these, but dower will be assigned out of other lands equivalent to her dower in the lands sold. With these directions, the decree is reversed and remanded.

FOMBY v. COLQUITT.

Opinion delivered October 29, 1892.

Innocent purchaser—Burden of proof.

The burden of proof is on a party who claims protection as a *bona fide* purchaser of property, without notice of a prior unrecorded deed.

Appeal from Columbia Circuit Court.

CHARLES W. SMITH, Judge.

Thornton & Smead for appellant.

The lien of the landlord is paramount to that of a mortgagee. The cotton was delivered to the landlord

in payment of rent, and he thereby acquired the title to it, and sold it to appellant.

B. F. Askew and *J. Y. Stevens* for appellee.

The deed to Mrs. Perritt was not put on record—Pyle was left in possession—and appellee had no notice, actual or constructive, of the claim of Mrs. Perritt. He was therefore an innocent purchaser. 16 Ark. 543; Sugd. Vendors, vol. 3 (6th ed.), p. 329, note 1; 31 Ark. 85.

HUGHES, J. This is an appeal from a judgment in replevin in favor of the appellee for the recovery of two bales of cotton. On the 28th of March, W. W. Pyle executed to the appellee as trustee a deed in trust upon all of his cotton crop to be raised in the year 1890, in the county of Columbia, in this State. On the day after its execution the deed was filed in the office of the clerk of the county for record. It was given to secure the payment for supplies to be furnished W. W. Pyle with which to make a crop for 1890. On the first of January, 1889, W. W. Pyle had conveyed to his sister, Mrs. Perritt, eighty acres of land, and had rented the land of her for 1889 and 1890. Mrs. Perritt failed to file her deed for record until after the institution of this suit. In November, 1890, Mrs. Perritt received the two bales of cotton in controversy, which were grown on the land she bought of Pyle, on account of her rent, and sold them to the appellant, Fomby, of whom they were replevied by the trustee, Colquitt, who claimed that the trust deed was taken without any knowledge upon the part of the beneficiary in the trust deed of the ownership of the land by Mrs. Perritt, and that he is an innocent purchaser and has the better right to the cotton. The beneficiary in the deed of trust had died before the trial.

There is no proof in the case that he did not have notice of the sale of the land to Mrs. Perritt when the deed in trust was taken by him from Pyle, or before he furnished the supplies to Pyle to secure payment for

which it was given. If he had such notice when he took the deed of trust from Pyle, or before he furnished Pyle the supplies upon it, or if he had notice of circumstances that ought to have put a prudent business man upon inquiry, and he failed to make inquiry, he was not an innocent purchaser. The burden was upon him to prove that he had no notice. *Gaines* v. *Summers*, 50 Ark. 322; Tiedeman on Sales, sec. 329, pp. 534 and 535.

For the want of evidence to support the finding in this behalf, the judgment must be reversed, and the cause remanded for a new trial.

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AMERICAN CASUALTY COMPANY *v.* LEA.

Opinion delivered October 29, 1892.

1. *Corporation—Libel.*

   A corporation may be guilty of, and can be sued for, a libel.

2. *Foreign insurance company—Liability to suit.*

   Under sec. 3834, Mansf. Dig., which provides that no foreign insurance company shall do business in this State until it has filed with the Auditor a stipulation "that any process affecting the company served on the Auditor or the party designated by him or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within the State," *held*, a foreign insurance company which has appointed the Auditor as its agent to receive service of process may be sued, in the manner designated, upon any cause of action arising within the State, whether arising out of its insurance contracts or not.

3. *Writ of prohibition—Practice.*

   Upon a petition to prohibit a circuit judge from proceeding to hear a cause pending in the circuit court, for want of jurisdiction of the person of the defendant, the Supreme Court will not consider the truth or sufficiency of the allegations of the complaint in such cause.

Petition for Writ of Prohibition to Pulaski Circuit Court.

ROBERT J. LEA, Judge.

Sandels & Hill for petitioner.

1. A foreign insurance company can be sued in this State only upon liabilities growing out of its insurance contracts. Such is the intention of the legislature. Suth. Stat. Const. secs. 211, 218, 240, 241, 246, 284; 139 U. S. 223; 14 Atl. Rep. 689; 18 How. 404; 106 U. S. 350; Morawetz on Corp. sec. 980; 22 Fed. Rep. 275; 29 *id.* 35; 44 Pa. Stat. 422; 50 Fed. Rep. 683; 17 N. W. Rep. 504; 16 *id.* 84; 30 Fed. Rep. 350; 50 N. W. Rep. 565; 25 N. E. Rep. 173; Reno, Non-Res. secs. 45–46.

2. Soliciting subscriptions, advertising etc., is not "doing business within the State," within the statutory intention. 71 Ala. 60; 8 Am. & Eng. Enc. Law, p. 346 *et seq.;* 113 U. S. 727; Beach, Priv. Corp. sec. 416; 32 Fed. Rep. 434, 802; 8 So. Rep. 84.

Martin & Murphy and *Dan W. Jones*, for respondents.

1. A corporation is liable to action for damages for libel. 2 Waterman on Corp. p. 432, sec. 281, and cases cited.

2. By sec. 11, art 12, Const. and Mansf. Dig. sec. 3834, foreign corporations are placed upon a level with domestic corporations, and "*any* legal process" may be served upon them through their agent. 96 U. S. 369; 12 Wall. 65; 31 Fed. Rep. 294; 22 Fed. Rep. 305; 51 Mich. 5.

HUGHES, J. This is a petition by the insurance company praying for a writ to prohibit the circuit judge from proceeding in a cause pending before him, as judge of the Pulaski circuit court, which is a suit for libel by J. W. Callaway against the company and its agents; in which suit process was issued against the defendants, and served upon the Auditor of the State as the agent of the insurance company, which is a foreign corporation organized in the State of Maryland, and doing "an accident, casualty, and employer's liability insurance busi-

ness in this State, and no other business in this State," as stated in the petition for the writ of prohibition. The petition states that the company had complied with the insurance laws of the State, and had appointed the Auditor of the State to receive service of process for it; and the service in the said suit was upon the Auditor, by delivering to him a copy of the summons, as provided by the statute.

The company, by attorney, appeared specially only, and filed a motion to quash the return on the summons, on the ground that the court had no jurisdiction of either the company or the subject matter of the suit. The motion was denied. Hence the application for the writ of prohibition.

The complaint in the circuit court (a copy of which is exhibited with the petition to this court) states that "as an unlawful means of advertising its business," etc., the defendant company "falsely and maliciously did publish, and cause to be published, libelous and defamatory matter about him, and accused him therein of having been guilty of embezzlement, which is a felony."

Now, the contention of the insurance company is that it can be sued in this State only upon liabilities growing out of its insurance contracts, while it does no other than an insurance business in the State; and that it cannot, therefore, be held to answer upon this service in a suit for libel in this State.

1. Corporation may be guilty of libel.

It is well settled that a corporation may be guilty, of and can be sued and indicted for, libel. Odgers on Libel and Slander, 368 and 369; Townsend on Slander and Libel, sec. 261.

2. Liability of foreign insurance company to suit.

We are not prepared to accede to the proposition that a foreign insurance company, doing only an insurance business in this State, can be sued only upon liabilities arising out of its insurance contracts made in this State. The cases cited in the brief of counsel to main-

tain this position go only to the extent of holding that the foreign corporation must be doing business in the State where it is sued, and that the cause of action upon which it is sued must have arisen in the State where the suit is brought. We understand that when the foreign corporation agrees to "be found" in the State, it may be sued as a domestic corporation or a citizen of the State upon any liability upon a cause of action arising within the State. Foreign as well as domestic corporations transact their business by agents, and wherever the duly authorized agent of the corporation is found, transacting its business, the corporation itself is found. *St. Clair* v. *Cox*, 106 U. S. 355.

Sec. 11, art. 12, Const. of Ark., provides that "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 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." Section 3834 of Mansfield's Digest is as follows: "No insurance company, not of this State, nor its agents, shall do business in this State, until it has filed with the Auditor of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the Auditor or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the com-

pany within this State." "Whether the stipulation is filed or not, service on the Auditor is sufficient service on the company, the latter being estopped to deny that it had filed the required stipulation," when the company is doing business in the State, as it can do business in the State only upon compliance with the statute. *Ehrman* v. *Teutonia Ins. Co.* 1 McCrary, 123; *St. Clair* v. *Cox*, 106 U. S. 356.

3. Practice upon application for writ of prohibition.

Whether the agents bind the corporation by their action, whether they act within the scope of their authority, express or implied, whether what they do grows out of or has any connection with the business of the corporation in this State, are questions not to be decided by this court in the first instance. They must be first tried by the circuit court upon the pleadings and the evidence. This corporation says, for instance, that it is not guilty of publishing the libel charge, and, therefore, denies its liability to suit in the courts of this State. This may be pleaded in bar and given in evidence, and, if true, will defeat the plaintiff's claim. It cannot, therefore, be properly a subject of plea to the jurisdiction. In this controversy we must take the plaintiff's cause of action to be such as he has alleged it to be in his complaint; otherwise we shall be trying the merits of the controversy for the purpose of determining whether we have power to try them. *Nat'l Condensed Milk Co.* v. *Brandenburgh*, 40 N. J. L. 112. The truth of the allegations of the complaint, as well as the sufficiency of them to constitute a cause of action, are not questions now before this court.

The only question now here is, whether the circuit court obtained jurisdiction of the corporation by the service of the summons upon the Auditor as its agent. If so, it can render a personal judgment against the corporation, if the pleadings and proof in the case warrant it. The service was in accordance with the statute. The prayer of the petition is denied.

KIZER LUMBER COMPANY v. MOSELY.

Opinion delivered November 5, 1892.

1. *Equity—Mechanic's lien.*

Equity has jurisdiction of a suit to foreclose a mechanic's or material-man's lien.

2. *Practice—Setting aside decree obtained without notice.*

A decree by default in an equitable proceeding will not be set aside at a subsequent term upon a motion based on the ground that defendant had no notice of the pendency of the suit; the proper practice is to file a complaint in equity alleging that defendant had no notice of the pendency of the suit, and also that he had a valid defense thereto.

3. *Material-man's lien—Continuous account—Limitation.*

If a material-man begins to furnish materials for the erection of a house without any specific agreement as to the amount to be furnished, or the time within which they are to be furnished, and there is at the time an understanding that further materials may be required of him, and he is afterwards called upon, from time to time and at short intervals, to furnish materials appropriate to the condition and progress of the building, he is entitled to a lien for the materials furnished as under an entire contract, and the last item of the account is the date from which the limitation of the time of filing the lien is to be taken.

4. *Judicial sale without notice—Relief in equity.*

A sale to plaintiff of defendant's property by virtue of a decree enforcing a lien will be set aside in equity where defendant had no notice of the pendency of the suit or of the sale until it was too late to protect himself and prevent the disposal of his property under the decree.

Appeal from Miller Circuit Court.

CHARLES E. MITCHEL, Judge.

W. H. Arnold for appellant.

1. The sheriff's return of service is conclusive. Its truth cannot be controverted. 40 Ark. 141; 25 *id.* 311; 39 *id.* 70; 44 *id.* 202.

2. The motion to set aside the decree is not based upon any of the grounds in sec. 3909, Mansf. Dig.; but

if it had been, sec. 3911 requires a complaint setting forth the grounds, and a good defense. If not actually served, defendant's remedy was to enjoin. 32 Ark. 459; 53 *id.* 11; 52 *id.* 80.

3. The ninety days commenced to run only from the date of the last item of the account. Jones on Liens, sec. 1435; 44 Md. 453; 3 Col. 255; 2 Disney (Ohio), 544; 40 Mo. 244.

BATTLE, J. This action was brought by appellants against Jacob Mosely, in the Miller circuit court, on the equity side, to enforce a lien for materials furnished the defendant and used by him in building a residence in Miller county, in this State. The summons in the case was returned by the sheriff legally served. The defendant failed to appear at the time at which he was required to do so, and a decree by default was rendered against him in favor of the plaintiffs for $197.82, the amount of the account sued on and interest; and it was ordered that the residence and the fractional block on which it was built be sold to satisfy the same. The property was accordingly sold, and was purchased by the plaintiffs. At a subsequent term the defendant filed two motions, one to set aside the sale and the other to vacate the decree, on the ground that no summons or other process had been served on him and that he had no knowledge of the decree until long after the term at which it was rendered had expired, and his property had been sold. Upon hearing the evidence adduced by the parties as to the service of the summons, the court sustained both motions; set aside the decree and sale; transferred the cause to the law docket; and gave to the defendant permission to file an answer in the original action at the term following. In pursuance of this leave he filed an answer, in which he denied that he was indebted to plaintiffs in the amount sued for, and alleged that he had a running account with plaintiffs, and that the lum-

ber charged to him had been furnished under different contracts, and that he had paid, in part, for the same in hauling and money. The issues joined were tried by a jury, who, after hearing the evidence, returned a verdict for plaintiffs in the sum of $184.10, the amount of the account sued on without interest, and found that plaintiffs were only entitled to a lien for $21.26; and judgment was entered accordingly.

1. Jurisdiction of equity

These proceedings were irregular. The circuit court erred in setting aside the decree by default, and transferring the cause to the law docket. It has been held by this court that an action to foreclose a mechanic's lien can be brought on the equity side of the court. *Murray* v. *Rapley*, 30 Ark. 568.

2. Practice as to setting aside decree.

Plaintiffs brought this action and recovered a decree in equity. To set aside the decree the defendant should have proceeded in equity. He undertook to do so by filing a motion. He should have filed a complaint and alleged therein, not only that he had no notice of the pendency of the action, but also that he had a good and valid defense. *State* v. *Hill*, 50 Ark. 458. Overlooking the irregulrity in the proceedings of the court below, we will, for the porposes of substantial justice, treat the motion and answer as a complaint in equity and dispose of the cause accordingly.

3. Limitation as to filing materialman's decree.

We find from the evidence that no process was served upon the defendant, and that he had no notice of the pendency of the action until after the sale. The evidence adduced at the trial proves that he owes to the plaintiffs the sum of $184.10, and interest thereon from the 4th of May, for lumber furnished to build his residence. The lumber was furnished in the year 1887 on nine different days, as follows: March 11, 23, 24, 28, April 1, 4, 7, 14, and May 4; and the account to secure a lien was filed with the clerk of the circuit court of Miller county on the 8th of July, 1887. Only $21.26 was due for lumber

furnished within ninety days before the filing of the account. The contention of the defendant is, that the plaintiffs only have a lien for the $21.26. Have they a lien, and, if so, for how much of the amount due them?

Before any one can secure a lien, under the statutes of this State, for materials furnished, he must "file with the clerk of the circuit court of the county in which the building, erection or other improvement to be charged with the lien is situate, and within ninety days after" the materials were furnished, "a just and true account of the demand due or owing to him, after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit." Mansfield's Digest, sec. 4406. If the materials were furnished under one contract, he should file the account within ninety days after the last was delivered; but if the materials were furnished under separate and distinct contracts, it should be filed under each contract, within, the time limited. *Livermore* v. *Wright*, 33 Mo. 31; 2 Jones on Liens, secs. 1431–1434, and cases cited. If, however, he began to furnish "without any specific agreement as to the amount to be furnished," or the time within which they were to be furnished, and there was a "reasonable expectation that further material" would "be required of him," and he was "afterwards called upon from time to time to furnish the same," he should file it within ninety days after the last item was delivered. In such a case, if the materials were "furnished at short intervals, and were appropriate to the condition and progress of the building, a presumption would arise that it was understood from the beginning that the "material-man was to furnish the same" for the construction of the building as the same should be required; and the account therefor should be considered as one continuous account and one demand; and the last item thereof would be "the date from which the limitations

of the time of filing" should be taken. *Trustees* v. *Heise*, 44 Md. 453; *Jones* v. *Swan*, 21 Iowa, 181, 184; 2 Jones on Liens, secs. 1435, 1436, and cases cited.

When the defendant purchased of the plaintiffs the first lot of lumber, he made no contract to buy any other material, but said to them that he might need more. He did need it, and called upon them from time to time to furnish the same, which they did, and charged it to him on account. It was furnished at short intervals, and, it seems, was appropriate to the progress of his house, and he used it in building the same. The presumption is, it was furnished under one contract; and the amounts due for the same should be treated as one demand. The consequence is, the time for filing the account for all the materials furnished commenced running from the date of the last item of the same, and plaintiffs have a lien for the whole of it.

4. Judicial sale without notice set aside.

As the defendant had no notice of the pendency of the action, and that his property was to be sold, until it was too late to protect himself against the same and prevent the disposal of his property under the decree, it would operate unjustly and as a fraud upon him and give to the plaintiffs an undue advantage to permit the sale to stand. It was properly set aside.

The order setting aside the sale is, therefore, affirmed, but the order setting aside the decree and the proceedings subsequent are reversed, and the cause is remanded for the enforcement of the decree which was vacated.

RAILWAY COMPANY *v.* SAGELEY.

Opinion delivered November 5, 1892.

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1. *Evidence—Value of horse—Price paid.*

In a suit for the value of a horse alleged to have been negligently killed, where the plaintiff testified as to the market value of the animal, he may be required on cross-examination to disclose how much he paid for it.

2. *Railway—Presumption as to killing of stock.*

Where a dead animal is found near a railroad track, there is no legal presumption that it was killed at all, or, if killed, that it was killed on the track or by a train.

Appeal from Crawford Circuit Court.
HUGH F. THOMASON, Judge.

Sageley sued the St. Louis & San Francisco Railway Company to recover damages in the sum of one hundred dollars, the value of a horse alleged to have been negligently killed by defendant's train. The questions which arise in the case are sufficiently stated in the opinion. The jury awarded to the plaintiff the amount of damages sought. Defendant has appealed.

B. R. Davidson for appellant, with whom are *E. D. Kenna* and *Adiel Sherwood.*

1. The price plaintiff paid for the horse was competent evidence. 16 S. W. Rep. 576; 54 Ark. 554; 46 *id.* 93; 47 *id* 497, 500, 501.

2. The fact that a horse is found wounded or dead near the track raises no presumption that the injury was done by a train. There must be evidence to connect the injury with the operation of trains. 42 Ark. 122; 78 Ky. 621.

3. The first instruction for plaintiff was error. The statute simply makes a *prima facie* case where the killing is confessed or is shown to have been done by the railroad's engine or cars. Mansf. Dig. secs. 5537, 5554;

52 Ark. 162; 42 *id.* 122, 126; 53 *id.* 96; 48 *id.* 366, 370; 39 *id.* 413, 419; 33 *id.* 816.

1. Price paid as evidence of value.

HEMINGWAY, J. The plaintiff testified in his own behalf, and upon cross-examination the defendant asked what he paid for the horse and of whom he bought it. The question was objected to by his attorney, and he answered that he paid $45 for it and bought it of one Foster. The court excluded the answer, and the defendant excepted. Was it admissible? It is certainly true that the value of the horse when it was killed, and not what plaintiff paid for it, was the measure of his damages; but as the witness had given his opinion as to the value of the horse, we think the question came within the legitimate scope of cross-examination, and that the answer should have been left for the jury to consider in determining the weight to be given his testimony as to value. It may have been entitled to but little weight; he may have bought the horse at a bargain, its condition may have improved, valuable qualities may have been discovered or developed, or the market may have advanced; and some such fact might have accounted for a great disparity between the price paid and the estimated value. If such were true, no one knew it better than the witness, who should have been permitted to explain it; whether the explanation explained, or left the disparity unexplained, and how far, in the latter case, it should affect the estimate made by the witness, are proper questions for a jury; we think it sufficiently related to his evidence in chief and to the issue to render it admissible. The fact, if such it be, that it related to a collateral matter did not justify its exclusion, for while it is not proper to impeach a witness by proof elicited from another witness contradicting the former as to his testimony upon a collateral matter, this rule does not apply to a cross-examination, which may be carried into collateral matters. 1 Greenl. Ev. 449; *Hollingsworth* v. *State*, 53 Ark. 387.

Whether the court's action was a reversible error, we need not determine, for the holding that the evidence was proper will be sufficient to guide the court upon a future trial.

2. No presumption as to stock found dead near railway.

The next question arises out of the court's action in giving, against defendant's objection, the following instruction: "The court instructs the jury that if they find from the evidence that the horse in question was found killed or mortally wounded so near the road-bed of defendant company that he was probably thrown there by a passing train of defendant company, then the presumption is that the wounding or killing was done by defendant's train, and that it resulted from want of due care, and defendant would be liable unless this presumption is rebutted by defendant company."

It may be proper to say, in considering this point, that upon the trial it was conceded that the horse was found dead near the defendant's road-bed; but it was contended, and there was evidence tending to show, that it was not injured by the train, but died of disease at a place to which it casually strayed or had been driven as suitable for its death. The pivotal question in the case was, did the horse die of injuries received upon the track? and the instruction quoted was designed to guide the jury in determining it. By it the jury was given to understand that if the horse's nearness to the track when found dead raised a probability that it was thrown there by a train, the law would so presume. We are of opinion that no degree of probability that such was the fact would furnish a basis for a legal presumption that it was, and that a probability of the fact would warrant a jury in finding it only if it was the strongest probability arising upon all evidence as to the cause of the injury. Unless the horse was injured by the train, the action could not succeed; whether it died of such injury or of disease, was purely a question for the jury, to be deter-

mined upon a consideration of all the evidence; and it was not proper for the court to indicate what weight should be attached to a probability arising from any circumstance or set of circumstances, or that a probability of any fact would justify the jury in finding the fact unless it was satisfied upon all the evidence that such probability fairly preponderated as against counter-probabilities. From the fact that the horse was found dead near the railroad track, the law presumed nothing, no matter what probabilities might arise, nor how well they might warrant the finding of a jury. It was incumbent on the plaintiff to prove, by a preponderance of evidence, that the horse was killed on the track, and he could not satisfy this requirement by proof of a fact from which it seemed probable, and then appeal to a legal presumption to overcome other or stronger probabilities. If, upon all the evidence, the jury believed that the horse was killed on the track, then, under the rule fixed by the statute, the presumption would arise that it was killed by a train, and that its death was due to the defendant's negligence; but in a case where a dead animal is found near a railroad track, there is no statute that raises the presumption that it was killed at all, or, if killed, that it was killed on the track or by the train. On the contrary, it has been ruled by this court that there must be evidence to connect the injury with the running of the train. *St. Louis, etc., Ry. Co.* v. *Hagan*, 42 Ark. 126.

There was no substantial error in other parts of the charge, but for the error in giving this instruction the judgment will be reversed, and the cause remanded.

NICKLASE v. MORRISON.

Opinion delivered October 5, 1892.

1. *Tax sale—Trees cut during period of redemption.* 56 553 57 428 57 582

Where land is sold at an over-due tax sale all trees thereafter cut from it by the original owner, during the period allowed for redemption, which are not consumed in the customary use of the land, will, at the expiration of the period of redemption, become the property of the tax purchaser.

2. *Trees unlawfully cut—No recovery of enhanced value.*

Where, upon expiration of the period of redemption, a purchaser at an over-due tax sale has received his deed, he is entitled to all trees unlawfully cut from the land by the original owner during the period of redemption, without reimbursement of the amount that the trees were enhanced in value by being cut.

Appeal from Randolph Circuit Court in Chancery.
JAMES W. BUTLER, Judge.

On the 27th day of April, 1886, Mrs. Regina Nicklase brought replevin against B. C. Morrison to recover certain logs of timber purchased by her from Mrs. Olive G. Lewis. Defendant set up title to the logs in himself. On the 30th day of April, 1886, Mrs. Lewis brought suit against Morrison to quiet her title to the land from which the logs were cut. She alleged that defendant claimed to own the land under an over-due tax deed; that, on the 27th day of April, 1886, she had tendered to him the amount necessary to redeem the land, which he had refused; and she tendered that sum into court with a prayer that his tax deed be removed as a cloud upon her title. Defendant filed an answer, which he requested to be taken as a cross-complaint, and asked that Mrs. Nicklase be made a party defendant thereto. He alleged his ownership of the land and of the logs cut therefrom; and prayed that Mrs. Nicklase be required to litigate her right to the timber in this action. By consent the two suits were consolidated. Mrs. Nicklase filed her answer

in which she prayed that, in the event that the title of Mrs. Lewis should be established, she should recover the value of the logs; that, in the event that Morrison's title should be established, an account should be taken of the stumpage value of the logs and their value at the time they were taken by Morrison, and that she recover of him the value of the timber in excess of its value in the tree.

The evidence established the following facts: The land, which had belonged to Mrs. Lewis, was purchased by Morrison at an over-due tax sale, made on the 17th day of April, 1883, and deed executed to Morrison on February 5th, 1886. On April 20th, 1885, Morrison made a verbal agreement with Mrs. Lewis to allow her one year from that date in which to redeem the land by paying the taxes, penalty and costs with interest. On the 27th of April, 1886, Mrs. Lewis tendered Morrison the amount necessary to redeem the land, but he refused to accept it. After the agreement to redeem was made and four or five months before the year for redemption had expired, Mrs. Lewis cut the timber in controversy and sold it to Mrs. Nicklase. The lands were wild and chiefly valuable for the timber.

The court, after hearing the evidence, found that Morrison was the owner of the land from which the timber was cut, and dismissed the suit of Mrs. Lewis for want of equity; also found that the timber was cut after expiration of the time for redeeming from the over-due tax sale, but before the execution of the deed to Morrison, and that the timber was the property of Morrison; and decreed that Mrs. Nicklase take nothing by her suit, and that she pay all costs. Mrs. Nicklase has appealed.

J. C. Hawthorne and *House & Cantrell* for appellant.

1. The contract for an extension of time was a valid contract based upon a valuable consideration, and does

not come within the statute of frauds. 13 Mich. 124; 9 B. Mon. (Ky.) 452; *ib.* 264; 70 Pa. St. 224; 42 Ark. 221. See also Cooley, Tax. sec. 4, p. 535; Burroughs on Tax. p. 359; 38 Am. Dec. 679; 4 Ired. Eq. 398; 27 Mich. 260; 66 *id.* 27; 2 Bibb (Ky.), 459; 2 Bush (Ky.), 407; 4 *id.* 586; 18 N. J. Eq. 108; 82 N. C. 510; 55 Pa. St. 369; 69 *id.* 443; 73 *id.* 453; 41 Iowa, 197.

2. In 53 Ark. 430, it is held that the time for redemption was two years from the sale by the commissioner. But the sale is not confirmed by the court. 53 Ark. 445; 34 *id.* 346; 23 *id.* 41; 38 *id.* 80.

3. The time for redemption not having expired, appellant was the owner of the timber cut, by virtue of her purchase from Mrs. Lewis before the expiration of the time.

J. W. & J. M. Stayton for appellee.

1. The two years had expired, whether the time began from the date of sale or the date of confirmation. The sale was confirmed August 15th, 1883. The offer to redeem was not made till April 27th, 1886—more than two years afterwards. 51 Ark. 453.

2. The pretended contract was not in writing, and was void. Mansf. Dig. sec. 3371, 4th subd.; 8 Wait's Actions and Def. pp. 547–8; 9 S. E. Rep. 736; 22 N. E. Rep. 90; 32 N. W. Rep. 417; 19 S. W. Rep. 497; 13 N. E. Rep. 842; 41 Ark. 264.

3. The over-due tax sale cut off all defenses. 49 Ark. 336; 52 *id.* 400; 55 *id.* 41, 398.

4. Morrison, the owner of the land, was entitled to all timber cut during the period of redemption, especially where the timber constituted the chief value of the land. 5 Cow. 80; 31 Cal. 304; 21 Wend. 125; 15 Johns. 309; 2 Wend. 509; 79 Ill. 467; 28 Mich. 296; 45 Mich. 113; 47 Mich. 554.

5. The timber belonged to Morrison before it was cut; appellant could not sever it, call it personalty, claim

it and convert it to her use. Nor is she entitled to reimbursement for the enhanced value. 44 Ark. 210; 54 *id.* 187; 55 *id.* 307.

HEMINGWAY, J. The appellant contends that the person who owned the land up to the time of the overdue tax sale offered, in apt time, to redeem it from the purchaser at the sale; that the failure to perfect the redemption was due alone to the unlawful refusal of the appellee to accept the offer; and that as the offer had been preserved by a tender with the bill of complaint, it operated to protect the owner's right to the land and, through it, appellant's title to the trees. Whether the conclusion is legally deducible from the premises stated, we need not determine; for the facts in proof do not warrant the major premise.

If any offer to redeem was ever made, it was on the 27th of April, 1886; and in whatever light we view the case, the right to redeem had then expired. If we look to the statute, unaffected by the agreement, to ascertain when the period of redemption expired, and assume that it began on the day the sale was confirmed, as is contended by appellant, we find that it expired on the 15th day of August, 1885, since the confirmation was on that day in 1883. On the other hand, if it be conceded that the agreement was not within the statute of frauds, and was operative to extend the period of redemption according to its terms, it only stipulated for an extension of one year from the day it was made, to-wit, the 20th of April, 1885, and therefore the period as extended had expired before the tender was made. So, without determining when the period of redemption began, or whether the agreement to extend it was invalid as within the statute of frauds, but assuming that the appellant's contention is correct, we find that the offer to redeem was not made in apt time, and that the facts of this case do not justify the position taken.

1. Tax sale carries timber.

It is contended, in the next place, that the appellant acquired title to the trees, because they were cut by the former owner and sold to her while such owner was lawfully in possession of the land, and had a right to redeem it. That presents the question whether the purchaser of the timber from one in possession under a right to redeem is entitled to it as against the purchaser of the land, after the right to redeem has expired and the latter has received a deed, where it appears that the trees comprised the principal value of the land, and they were not cut in the course of the customary use of the land or in order to its customary enjoyment.

We are of opinion that although the sale had been made and confirmed, and the amount of the bid had been paid by the purchaser, the legal title to the land remained in the former owner during the time allowed to redeem it, and gave the right of possession with the right of use in the customary way. Such a right has been held to entitle one to sever matured crops, to mine coal, or to receive the flow of oil, and apply the produce to his own use. 2 Freeman, Ex. sec. 323; *Ward* v. *Carp River Iron Co.* 47 Mich. 65; *Hardenburg* v. *Beecher*, 104 Pa. St. 20. While it exists, the purchaser has no right to invade the possession of one holding under it, or to in any way interfere with his lawful use and enjoyment of it.

But although such purchaser does not acquire a legal title nor the right to present enjoyment, he does acquire an inchoate interest in the land and right to its future enjoyment, which will become consummate at the expiration of the time to redeem, unless the right to redeem is sooner exercised; and that inchoate right is not confined to the indestructible soil, but extends as well to everything affixed to it, as buildings or standing trees, except such as may be consumed in the customary use of it. Any other rule would be manifestly unjust to the purchaser, and very seriously embarrass sales made

subject to the right to redeem. For the purchaser bids for the land, and not for a part of it, and by the confirmation his offer is accepted; thereafter he is irrevocably bound; and as it must be presumed that his bid was made with reference to the condition and value of the property offered, he is entitled, if no redemption is made, to get the land he bid for, and not what may be left of it after a term of wasteful and destructive use.

So in this case if the trees had been standing when the appellee obtained his deed, they would have been his, by virtue of his purchase; and we cannot see how the unlawful severance and sale of them can deprive him of that right and vest it in another. If such a result could be lawfully accomplished, no one would be so foolish as to bid any fair price for lands thus sold, but bids would be limited to sums deemed adequate for the indestructible elements of the soil. It would prejudice alike the rights of debtors and creditors, and our legislation was certainly never thus designed. The case of *Whitney* v. *Huntington*, 34 Minn. 458, is quite similar to this, and in it the court decided that when the deed was delivered, the purchaser was entitled to trees cut during the period of redemption, or in default thereof to their value. The opinion is well reasoned, clear, and, we think, convincing; in it will be found a citation of the authorities bearing upon this question, and to them we refer.

Our conclusion is, that when the appellee got his deed he was entitled to the land and to all trees unlawfully cut from it during the period of redemption. Tiedeman, Real Property, sec. 82.

2. Enhanced value of trees not recoverable.

It is insisted, in the last place, that the appellant is entitled to be reimbursed to the extent that the trees were enhanced in value by being cut. They were the trees of the appellee, and neither the appellant nor any other person could acquire a debt against him by doing unlawful and unauthorized acts about them. Whatever

of force there is in the contention is resolved against the appellant in the case of *Stotts* v. *Brookfield*, 55 Ark. 307, which makes it unnecessary to say more here.

Affirm.

LEMMONS v. STATE.

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Opinion delivered November 5, 1892.

1. *Carrying pistol—"As a weapon."*

On a trial for unlawfully carrying a pistol, the court properly refused to charge the jury, at defendant's request, that he should be acquitted if he was carrying the pistol for the purpose of mere temporary or casual transportation, "and not for *aggressive* use as a weapon;" since one who carries a pistol for use as a weapon is within the prohibition of the statute, whether he intended to use it aggressively or defensively.

2. *Carrying weapon—"Upon his own premises."*

An unmarried son who lives at his father's house is not authorized to carry weapons upon an adjacent tract of wood-land belonging to his father, if he had no share in its management or control, notwithstanding he had license to enter upon the land for the purpose of cutting wood and making rails.

Appeal from Randolph Circuit Court.

JOHN B. MCCALEB, Judge.

Lemmons has appealed from a conviction of carrying a pistol as a weapon. The facts are sufficiently stated in the opinion.

Samuel R. Allen for appellant.

1. An unmarried son living with his father and making his home there as one of the family may carry a pistol as a weapon upon the premises. He had an *interest* in the premises, and a right to be there, to the exclusion of the public. 45 Ark. 536.

2. One who carries a pistol for the purpose of returning it to the owner and not for use as a weapon is not guilty, under the statute. 34 Ark. 448.

W. E. Atkinson, Attorney General, and *Charles T. Coleman* for appellee.

1. Defendant had no *interest* or estate in the land, and it did not constitute his premises. 45 Ark. 536; 49 *id.* 176.

2. Aside from interest or estate in the land, there is but one other light in which land can possibly be considered as a man's premises, and that is in the sense of a *home* for him. If a person occupy as a home the tenements of another, although he has no estate therein, yet they would be deemed in law his premises, in so far as his right to wear arms was concerned. 28 Tex. App. 44; 55 Ark. 186. But a man's premises in this sense would not extend beyond the *curtilage*, and not to outlying wood-land.

MANSFIELD, J. The defenses relied on at the trial were, first, that the pistol was not carried as a weapon, and, secondly, that the place where it was carried was upon the appellant's own premises. The grounds urged as sufficient to obtain a reversal are that the court erred in refusing instructions appropriate to each of these defenses, and also in the charge given to the jury as to the second.

Upon the first point testimony was introduced to show that the pistol was taken to the place where the State's witness saw it in the hands of the defendant, for the purpose of returning it to a person from whom it had been borrowed; and the court was requested to instruct the jury to acquit the defendant if they believed from the evidence "that he was carrying the pistol for the purpose of mere temporary or causal transportation, as to return it to its proper owner, and not for aggressive use as a weapon." The request was refused; but by the court's charge the jury were told that the defendant should be acquitted if it was shown by a preponderance of the evidence that he did not carry the pistol as a weapon.

A pistol is carried as a weapon when it is carried "for the purpose of having it convenient for use in fight." *Carr* v. *State*, 34 Ark. 450. And it is immaterial whether the person carrying it intends to be the aggressor in a conflict or to act only on the defensive. But, by the use of the word "aggressive," the defendant's request was given such form that the jury would have understood it to mean that he was entitled to an acquittal if they believed it was not his purpose to use the pistol in making an attack. It was not error, therefore, to refuse it. The facts were such that the instruction would have been proper if the objectionable word had been omitted. But the point to which it applied was in general terms covered by the court's charge; and the defendant cannot avail himself of the court's failure to make, of its own motion, a correction in the language of his request which would have changed materially its meaning.

1. When pistol carried as a weapon.

The place where the pistol was carried was a piece of wood-land embraced in lands belonging to and occupied by the defendant's father. The defendant was of age at the time the offense is charged to have been committed, but was unmarried and living with his father. During the summer preceding the winter in which the pistol was carried, he made a crop on a part of his father's lands situated at a short distance from the wood-land referred to; and he testified that he had the privilege of cutting wood and making rails on the wood-land for the purpose of fencing the land "if he desired to do so." But there was no proof that this privilege was at any time exercised. How far the wood-land was from his father's house is not shown, and it does not appear what quantity of land the father owned, or how much of it was improved, or what proportion of it had been cultivated by the defendant. But the court was requested to charge that if "the defendant was a single person and lived with his father on the tract of land, and made

2. Right to carry upon one's own premises.

his home there, that would be his premises, and he would be entitled to carry a pistol on such premises." This request was also properly refused. It was intended to present to the jury a theory not warranted by the evidence; and the conclusion of law it states is not deducible from the facts assumed. It makes the entire tract of land the premises of the defendant, simply because he lived there with his father and was unmarried. Whatever weight these facts might in some cases have as evidence tending, in connection with other circumstances, to prove a participation in the control of lands, they do not of themselves imply such participation, nor show any right to it. But there was no attempt to prove that the defendant controlled, either exclusively or jointly with his father, any part of the lands except the part he cultivated. And the case before us does not make it necessary to decide whether a son, living in the house of his father upon a farm in which he has no estate or legal interest, may not lawfully carry a pistol on any part of the property, if he is permitted to share in its management or control.

The Attorney General concedes that, as an inmate of his father's house, the defendant could have lawfully carried a pistol on the grounds habitually used in immediate connection with the dwelling-house and forming what is designated in England and by some American statutes as the curtilage. Bishop, Stat. Cr. sec. 286, and notes 12, 13. As his father's tenant, he was also entitled to treat as his own premises the portion of the land he cultivated, while it was under his control. But he was not prosecuted for carrying the pistol elsewhere than upon the wood-land; and his right with reference to that consisted of a mere license to enter upon it for the special purpose of obtaining wood for fuel and timber for making rails. This privilege, which he probably enjoyed in common with others, gave him no such interest in or control over the wood-land as entitled him to

the protection of the statutory exception. That such is the law is shown by the decisions of this court in cases previously arising under the same statute. *Kinkead* v. *State*, 45 Ark. 536; *Clark* v. *State*, 49 Ark. 174. As it appears from his own testimony that the defendant had not rented the wood-land, and as the State produced no evidence that he carried a pistol on any other part of the lands, he was not prejudiced by anything contained in the court's charge. The clause of the charge especially complained of is to the effect that a person who has rented land must have control of it in order to make it his premises, within the meaning of the statute. This was not incorrect as a declaration of the law; and it was probably given because the court understood the position of the defendant to be that his tenancy extended to the wood-land. *Jones* v. *State*, 55 Ark. 186.

Affirmed.

BOND *v.* MONTGOMERY.

Opinion delivered November 12, 1892.

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1. *Homestead—Probate sale.*

Under the Constitution of 1874, as well as that of 1868, the probate court had no jurisdiction to order the sale of the homestead of a decedent for the payment of his debts subject to the rights therein of his widow and minor children.

2. *Void probate sale—Subrogation.*

One who purchases the homestead of a decedent at a void probate sale for the payment of debts, under the belief that he is acquiring title, will be subrogated to the rights of the creditors to the payment of whose claims the purchase money was appropriated. The maxim of *caveat emptor* applies where there is a failure of title at a probate sale because of a want of ownership of the property in the testator or intestate, but not to a defect in the title of the purchaser occasioned by a failure of the sale to pass the title of the testator or intestate.

3. *Illegal probate sale—When purchaser not* in pari delicto.

Under the act of April 25, 1873, which provides that any administrator or executor who shall undertake to sell the homestead of a deceased person after it has been selected by the widow or minor children shall be guilty of a misdemeanor, one who purchases the homestead of a deceased person at an administrator's sale after it has been selected by the widow is not by reason thereof *in pari delicto* with the administrator, is guilty of no immoral or criminal act, and is entitled to be subrogated to the rights against the estate which were held by the creditors whose claims his money has paid.

4. *Purchaser not an accomplice.*

The mere fact that the purchaser at such administrator's sale assisted in making an appraisement of the homestead, at the request of the administrator, did not make him an accomplice in the administrator's misdemeanor, since there is no presumption that he advised or encouraged the administrator to make the sale.

5. *Subrogation—Parties.*

In a suit by the purchaser at a void administrator's sale to be subrogated to the rights of the creditors whose claims were discharged by the purchase money, the complaint should allege the names of the creditors whose claims were discharged, and should make such creditors parties defendant.

Appeal from Monroe Circuit Court in Chancery.
GRANT GREEN, JR., Judge.

STATEMENT BY THE COURT.

On the 7th of January, 1890, appellants filed in the Monroe circuit court a petition, alleging therein that Robert E. Bond died on the 14th of December, 1872, intestate, leaving appellant, Nancy J. Bond, his widow, and the other appellants, some of whom were his children, his heirs, surviving; that he owned and occupied, at the time of his death, the northwest quarter of section twenty-seven in township one south, and range two west, in Monroe county, in this State, as a homestead; that J. T. Oates and his widow, Nancy J. Bond, were respectively appointed administrator and administratrix of his estate, and qualified as such, and took upon themselves the

burthen of its administration; that, thereafter, Nancy J. filed an application in the office of the clerk of Monroe county, in which she described the tract of land mentioned above, and claimed the same as a homestead, and asked that it be reserved from sale; that the clerk entered upon the record of the court an order that it was so reserved, on her application; and that, afterwards, J. T. Oates, as administrator, procured from the Monroe probate court an order directing him to sell the land so reserved, subject to the homestead, for the purpose of paying the claims probated against the estate, and, on the 9th of June, 1883, sold it at public auction, subject to the homestead, to Polk Montgomery for $505, it being two-thirds of the appraised value thereof, and, the purchase money having been paid, conveyed it to him, in the same manner, on the 5th of May, 1884; and that, when it was set apart as a homestead, all the children were minors, and three of them did not arrive of age until after the sale, and Nancy J. is still the widow of the deceased. The prayer of the petition was that the application, and all other papers on file, and the orders of the probate court in respect to the sale of the land, be certified to the circuit court, and that the order and sale be set aside and declared void.

Montgomery, the purchaser, appeared and answered, admitting the allegations of the petition to be true, and averring that, at the time the land was ordered to be sold, the claims which were probated against the estate of Bond and remained unpaid amounted to the sum of $957.01, and that the lands were sold to pay these claims; and asked that the cause be transferred to the equity docket, and that he be subrogated to the rights of the creditors of the deceased.

Appellants filed a demurrer to the answer, and the court overruled it and transferred the cause to the equity docket, and, appellants electing to stand upon their

demurrer, ordered, adjudged and decreed that Montgomery be subrogated to the rights of the creditors.

Price & Parker for appellants.

1. The creditors were not parties, nor was the administrator; hence appellee must comply with Mansf. Digest, sec. 5023. 43 Ark. 469; 32 *id.* 289; 31 *id*, 360–4; *ib.* 203.

2. The sale was void. 47 Ark. 445; 50 *id.* 329.

3. The appraisement was void. 55 Ark. 268.

4. Appellee was not entitled to subrogation. He did not pay the whole debt. 5 Wait's Ac. and Def. 213; 7 Atl. Rep, 788; 5 Atl. Rep. 877.

5. The sale being void, no rights grew out of it. Rorer, Jud. Sales, sec. 4; 39 Ark. 571. Appellee was a mere wrong-doer—a volunteer. 1 N. E. Rep. 485; 124 U. S. 534; 120 *id.* 287; 3 N. E. Rep. 753; 11 Atl. Rep. 122; 14 N. W. Rep. 331; 93 Am. Dec. 783 and note.

6. Appellee violated the criminal law in buying the homestead. Acts 1873, page 247, sec. 9; Gantt's Digest, sec. 3162. All sales made in violation of criminal law are against public policy and void. Greenwood on Pub. Pol. 580 to 586; Bish. on Cont. secs. 467 to 549.

7. Money paid voluntarily with full knowledge of all the facts, or under a mistake of law, does not entitle one to subrogation. See Harris on Sub. 130; 7 N. E. Rep. 52; 44 Ark. 271; 50 *id.* 314; 10 Peters, 137; 23 Am. Dec. 773; 53 Ark. 130; Wait's Ac. and Def. vol. 1, p. 84, sec. 2, and vol. 4, p. 486, sec. 12; 13 Wall. 517.

Sanders & Watkins for appellee.

1. By paying the $500 to the administrator under the sale authorized by the probate court, which was paid to the creditors of the estate, the appellee was subrogated to the rights of the creditors. Sheldon on Subrogation, sec. 35; 10 Gill & Johnson (Md.), 65; Woerner, Am. Law of Adm. vol. 2, page 1071; 108 Ind. 579; 64 Miss. 555; 29 Ark. 47. See also 53 Ark. 545; 52 *id.* 499.

2. The creditors were not necessary parties. 41 Fed. Rep. 614.

BATTLE, J., after stating the facts as above reported.

1. When probate sale of homestead void.

Under the Constitutions of 1868 and 1874, the probate court had and has no jurisdiction to order the sale of a homestead of a deceased person for the payment of his debts, during the minority of his children, or so long as his widow remains unmarried, or does not abandon it, or shall not be the owner of a homestead in her own right. During this time the homestead is exempt from sale for the payment of the debts of the deceased owner. The order of sale in this case was, therefore, an absolute nullity. *McCloy & Trotter* v. *Arnett*, 47 Ark. 445; *Nichols* v. *Shearon*, 49 Ark. 75; *Stayton* v. *Halpern*, 50 Ark. 329.

The circuit court and the parties treated the answer of appellee as a cross-complaint. Appellee offered no resistance to the prayer of appellant's petition, but conceded all they asked. All he asked was to be subrogated to the rights of the creditors of the estate of Robert E. Bond, deceased. Is he entitled to be subrogated to such rights? is the principal question presented for our decision.

2. Purchaser at such sale subrogated to creditor's rights.

Upon the right of purchasers at void execution or judicial sales to subrogation to the rights of creditors to the payment of whose claims the purchase money paid by them has been appropriated, courts are not agreed. Many consider them as volunteers acting without compulsion and for no purpose of protecting any interest of their own, and under a mistake of law, and therefore not entitled to the protection of courts of equity. On the other hand, others hold that the doctrine of subrogation rests upon the natural principles of equity and justice; that purchasers at such sales who are entitled to the benefit of subrogation are not volunteers; that they purchase at a sale made under the coercive process of law,

under the honest belief that they are getting the property sold, and their money is actually applied to the benefit of the owner in paying his debts or removing charges or liens upon his property; and that it would be in the highest degree inequitable and against good conscience to permit the owners, the administrators or creditors, as the case may be, to hold or enjoy at the same time the benefit of the property sold and the money of the purchaser without recompense, and that, in order to prevent this injustice and wrong, they should be subrogated to the rights of the creditors, or to the benefit of the liens or charges, to the payment of whom or which their money has been applied. According to the latter view, it is the belief of the purchaser that he is getting the property sold, and the actual application of the money to the benefit of the owner in paying his debts in removing a charge or lien on his estate, which constitute the equity. There is no conflict between this view and the maxim of *caveat emptor*. That maxim applies where there is a failure of title, "because of a want of ownership in the property by the defendant in the execution or in the intestate," or testator, "but it does not apply to the defects in the title of the purchaser occasioned by a failure of the sale to pass the title of the defendant's intestate," or testator. The latter view has been adopted by this court, and is sustained by the decided preponderance of authority. *Waggener* v. *Lyles*, 29 Ark. 47; *Nichols* v. *Shearon*, 49 Ark. 75; *Meher* v. *Cole*, 50 Ark. 361; *McGee* v. *Wallis*, 57 Miss. 638; *McLaughlin* v. *Daniel*, 8 Dana, 182; *Bright* v. *Boyd*, 1 Story, 478; S. C. 2 Story, 605; *Scott* v. *Dunn*, 1 Dev. and Bat. Eq. 425; *Valle's Heirs* v. *Fleming's Heirs*, 29 Mo. 164; *Blodgett* v. *Hitt*, 29 Wis. 182; *Hatcher* v. *Briggs*, 6 Oregon, 31; *Short* v. *Porter*, 44 Miss. 533, 538; *Crippen* v. *Chappel*, 35 Kas. 495; S. C. 57 Am. Rep. 187; *Levy* v. *Martin*, 48 Wis.

198; Freeman on Void Judicial Sales, secs. 51-54, and cases cited.

3. Purchaser at such sale not *particeps criminis.*

But it is said that the administrator committed a misdemeanor by undertaking to sell the homestead, and that the appellee was a *particeps criminis*, and is not entitled to be subrogated to the rights of creditors. To sustain this contention an Act of the General Assembly, numbered 105 and approved April 25, 1873, is relied on. Section 1 of that act provides that whenever any resident of this State shall die leaving a widow or children who may desire to claim the benefit of the homestead of the deceased, she or they, as the case may be, shall file, with the clerk of the probate court of the county in which the homestead is situated, an accurate description of the land so claimed, and apply to have the same reserved from sale; and section 2 provides that it shall be the duty of the clerk, immediately after the filing of the application, to enter upon the records of said court that said homestead has been duly reserved from sale upon the application of such claimant or claimants. Section 9 then provides that when these sections have been complied with by the parties claimant, "any administrator or executor of the estate of the deceased who shall assume the possession of, or in any manner disturb the widow or children of the deceased in the enjoyment of said homestead, or undertake to sell the same, shall be guilty of a high misdemeanor, and shall, upon conviction, be imprisoned in the county jail for a term not less than one nor more than two months, and shall be fined in any sum not less than one hundred nor more than five hundred dollars." The first two sections are in Mansfield's Digest, but the ninth is omitted. Finding no constitutional provision or statute repealing any of them, we think that all of them are still in force. This being true, is appellee entitled to be subrogated to the rights

of creditors who have received the purchase money, to the extent that they have thereby been paid?

Appellants insist that he is not, and cites *Martin* v. *Hodge*, 47 Ark. 378, 383, to support their contention. In that case, this court, using the language of Lord Mansfield in *Holman* v. *Johnson*, 1 Cowp. 341, said: "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted." In that case the court laid down the rule in cases when the principal party to the immoral or illegal act, or offense, seeks relief. That case was an action of replevin, in which the defendant sought to prevent a recovery by the plaintiff because he had violated the statute making it criminal to sell lottery tickets in this State, and because the defendant, as he contended, had come into the possession of the property in controversy by reason of such violation. The court did not undertake, in that action, to lay down any rule to determine in all cases when a party to an illegal or immoral act can recover in an action brought in disaffirmance of such acts. In that case the court said: "The test to determine whether a plaintiff is entitled to recover *in an action like this* or not, is his ability to establish his case without any aid from an illegal transaction." The facts, the authorities cited, and the language of the court in that case, clearly show that it only undertook to define the rule governing such cases, and no others.

The rule as stated in *Martin* v. *Hodge* is correct; that is to say, whenever a contract or other transaction is illegal, and the parties thereto are, in contemplation of law, *in pari delicto*, courts will not aid either party, by enforcing or setting aside the contract or obligation

while it is executory, or by enabling him to recover the title to property which he has parted with by its means. But "where a contract otherwise unobjectionable is prohibited by a statute which imposes a penalty upon one of the parties only, the other party is not *in pari delicto*, and, upon disaffirming the contract, may recover, as upon an implied assumpsit, against the party upon whom the penalty is imposed, for any money or property which has been advanced upon such contract." This is not only consonant to principles of sound policy and justice, but is sustained by the authorities. *Curtis* v. *Leavitt*, 15 N. Y. 9; *Tracy* v. *Talmage*, 14 N. Y. 162, 181; *Oneida Bank* v. *Ontario Bank*, 21 N. Y. 490; *White* v. *Franklin Bank*, 22 Pick. 181, 186, 188; *Lowell* v. *Boston & Lowell R. Co.* 23 Pick. 24, 31, 32; *Walan* v. *Kerby*, 99 Mass. 1; *Thomas* v. *City of Richmond*, 12 Wall. 349; *Parkersburg* v. *Brown*, 106 U. S. 487, 503; *Prescott* v. *Norris*, 32 N. H. 101; *Lester* v. *Howard Bank*, 33 Md. 558; Pomeroy's Eq. Jur. sec. 403 and cases cited; Bishop on Contracts (ed. of 1887), secs. 627, 628, and cases cited.

The Oneida Bank v. *The Ontario Bank*, 21 N. Y. 490, is a fair illustration of the latter rule and its reason. In that case a statute of New York declared that "no banking association or individual banker, as such, shall issue, or put in circulation, any bill or note of such association or individual banker unless the same shall be made payable on demand, and without interest," and that every violation of the statute by any officer or member of a banking association, or by any individual banker, shall be deemed and adjudged a misdemeanor, punishable by fine or imprisonment or both, in the discretion of the court having cognizance thereof. Drafts were issued by a bank to one Perry for money advanced, in violation of this statute. The question in the case was: Could Perry, who dealt with the bank, and took from it the drafts which the statute prohibited, reject the drafts, they be-

ing void, and recover the money or value which he advanced on receiving them? The court held that he could. Chief Justice Comstock, speaking for the court, said: "The argument for the defendant against this position rests wholly on the idea that Perry, in receiving the post-dated drafts, was as much a public offender as the bank or its officers issuing them. * * * But such were not the relations of both the parties to these transactions. Whatever there was of guilt in the issuing of the drafts, it was the creature of the statute. There is no rule of ethics or principle of the common law, against the issue of time obligations by banks or bankers. The offense is therefore precisely of the nature, form and proportions which the legislature have declared. By that authority, and that alone, the bank is prohibited from issuing, but not the dealer from receiving; and the punishment is denounced solely against the individual banker, or the officers, agents and members of the association. The same power which created the offense has designated the criminal parties. * * * If the issuing of the drafts was prohibited, and if they were also void, Perry nevertheless had a right to demand and recover the sums of money which he actually loaned to the defendant."

A further review of the authorities is unnecessary. They are sufficiently examined in the cases cited above. Whatever doubt may have been entertained as to the latter rule, it is now well settled by authority.

The act of April 25, 1873, does not make the buying or offering to buy the homestead of a deceased person, at an administrator's or executor's sale, after it has been selected by the widow or minor children and reserved for sale, a criminal offense. The administrator or executor attempting to sell is alone subject to the penalty. He alone is declared to be the criminal by the statute creating the offense. The person assuming to be the purchaser at the pretended sale is guilty of no criminal

or immoral act, and has not violated the act; and stands as though the effort to sell was not criminal in any respect; and is, therefore, according to *Nichols* v. *Shearon*, 49 Ark. 75, and cases cited above, entitled to be subrogated to the rights against the estate which were held by the creditors whose claims his money has paid.

4. Appraiser at such sale not an accomplice.

It is suggested that appellee is not entitled to subrogation because he aided the administrator in making the sale by appraising the homestead, and thereby became an accomplice in the commission of a misdemeanor. To make him an accomplice he must have assisted in the appraisement with the intent to encourage or induce the administrator to make the sale. The mere appraisement did not operate to make him an accessory to the misdemeanor committed by the administrator in undertaking to sell the homestead. The statute under which the appraisement was made provided that "before any executor or administrator should sell any lands and tenements, or any interest therein, by the order of the court, he shall have such lands and tenements appraised by three *disinterested* householders of the county in which the lands and tenements are situated." Such appraisers should be selected because they are not interested in the sale. The presumption is, the administrator endeavors to do his duty in the selection of them. When he selects them he has fully determined to make the sale; the order for that purpose is already made. The presumption is, he selects them because they are disinterested, and that they make the appraisement in the performance of a duty, with no intent to advise or encourage the administrator to sell or desire to control his subsequent action, and without regard to the course he may thereafter pursue in regard to the sale, they being disinterested. There is no occasion for them to appraise, if their object is to advise and encourage, as they can do so

just as effectually by other means. There is no necessary connection between the two acts.

As it does not appear that appellee was, criminally, an accomplice in the effort to make the sale, it is unnecessary to consider what would have been his rights in respect to subrogation, if he had been such an accomplice.

But it nowhere appears that the purchase money paid by appellee was appropriated to the payment of the creditors. This being true, he was not entitled to subrogation; and the court erred in overruling appellant's demurrer to his answer or cross-complaint.

5. Parties to suit for subrogation.

Appellee also failed to make the creditors, to whose rights he seeks to be subrogated, parties defendant to his cross-complaint. Such creditors were indispensable parties, and should have been made defendants. *Kyner* v. *Kyner*, 6 Watts, 227. Their rights were involved, and they had a right to defend them. As they were not made parties, we will not undertake to decide what the rights of appellee as to them are, under the peculiar facts of this case.

For the errors indicated the decree of the circuit court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

HARRIS v. WATSON.

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Opinion delivered November 12, 1892.

1. *Administration—Sale of homestead—Subrogation.*

One who merely *purchases* at administrator's sale land set apart by the probate court as the homestead of minor children of a deceased person is not guilty of a violation of the act approved April 25, 1873, which made it a misdemeanor for an administrator to *sell* land so set apart, and such purchaser is entitled

to be subrogated to the rights against the estate which were held by the creditors whose claims his money has paid.

Bond v. *Montgomery*, *ante*, p. 563, followed.

2. *Limitation—Suit against legatees and distributees.*

Section 470 of the Civil Code, which limited the period within which a creditor of a deceased person, who has failed to appear before the commissioner appointed by the chancery court and prove his claim, might bring a direct action against the legatees or distributees, was impliedly repealed by art. 7, sec. 34, of Const. 1874, which gives to probate courts exclusive jurisdiction of matters of administration of the estates of deceased persons.

3. *Subrogation—Parties.*

Creditors, to whose rights a purchaser at a void probate sale seeks to be subrogated, are necessary parties to a suit to obtain such subrogation.

Appeal from Jackson Circuit Court in Chancery.

JAMES W. BUTLER, Judge.

STATEMENT BY THE COURT.

E. L. Watson filed his complaint in the Jackson circuit court in chancery on the 11th of August, 1887, and stated therein that "John Harris died in 1872, leaving as his heirs Benjamin Harris, John G. Harris and Elizabeth Harris, leaving also considerable personal estate to the value of about $5000; that, on the same day, Frank Wishon was appointed administrator. That the intestate owed about $12,500; and to the plaintiff $342.89, also to Watson & Weast $529.73, Watson & Son $728.25, and Watson & Ingalls $225.45; which had been assigned to plaintiff, making in all $2026.32, inclusive of interest. That Wishon made a final settlement with the probate court, showing a balance due of $166.02. That, on the 14th day of May, 1880, J. R. Loftin was appointed administrator in his stead. That when intestate died he owned the following lands: Northwest quarter of northeast quarter, section 31, southwest quarter, south half of northwest quarter, north half of southeast quarter of southeast quarter, section 30, town-

ship 14 north, range 1 west. That the son, J. G. Harris, and daughter, Elizabeth Harris, were infants when he died, and that the east half of southwest quarter and west half of southeast quarter of section 30 were set apart by the probate court as a homestead until the infants should become twenty-one years of age. That, the personal property proving insufficient to pay the debts, Loftin obtained an order from the probate court at the July term, 1880, to sell the homestead subject to the right of the infants. That the lands were accordingly sold on the 4th day of September of the same year to the plaintiff, he paying for the east half of southwest quarter $534.00, and for the west half of the southeast quarter $534.00, which sums were paid to the said administrator.

"That, on the 13th day of October, 1880, the sale was approved, and the court ordered a deed to be executed to the plaintiff, which was accordingly done May 6, 1881. That the sum thus paid by plaintiff was applied to the extinguishment of the debts of the estate *pro rata,* leaving a large part of the debts unpaid. That Loftin afterward made a final settlement with the court, and was discharged, and that Robert Brown had been appointed administrator; but that he had no other assets in his hands, except said homestead, which had been unlawfully sold. That said infants have now become of full age. That plaintiff has become subrogated to the rights of the creditors to the amount of his bid, $1068.00, with interest from the 4th day of February, 1881.

"Plaintiff prayed that the lands be sold, that the proceeds be applied to paying his debts, and that the residue, if any, be paid to said administrator."

The defendants answered, alleging, among other things, that the children of John Harris, deceased, arrived of age as follows: Benjamin Harris on the 30th day of March, 1887, J. G. Harris on the 19th of July, 1880, and

Elizabeth Harris on the 30th of July, 1883; and that plaintiff did not sue within two years after his cause of action accrued. They also demurred to the complaint.

After hearing the evidence adduced by both parties, "the court found that the ages of the children were proved as stated, and that the homestead had been duly set apart by the probate court; that the plaintiff took nothing by the purchase of the homestead, but that he was entitled to be subrogated to the rights of the creditors to the amount of $1068, deducting the amount of $147.41 received by plaintiff as a creditor, leaving a balance of $920.59, which was allowed to bear interest at the rate of six per cent. from February 4, 1881, making the amount due at the date of the decree $1486.69. The court decreed that the same be a lien on the land, that it should be sold for the payment thereof, and that the defendants pay the cost of the suit. The defendants appealed."

U. M. & G. B. Rose and *S. R. Allen* for appellants.

1. It is admitted that where a sale is merely void, but the property is sold to pay a debt that is justly due, and the property is subject to sale to pay the debt, the right of subrogation exists. 29 Ark. 47; 50 *id.* 361. But the property sold must be subject to sale for the payment of the debt for which it is sold. Freeman, Void Jud. Sales, sec. 35. The sale in this case was an absolute nullity. 47 Ark. 454. And against public policy. *Ib.*

2. Gantt's Digest, sec. 3162, is in force yet.

3. *Nichols* v. *Shearon*, 49 Ark. 76, goes to the verge of the law. In this case Watson was purely a volunteer, and not entitled to subrogation. 25 Ark. 129; 44 *id.* 507; 47 *id.* 112; 53 *id.* 109.

4. All persons aiding in the commission of a misdemeanor are principals. Watson was a purchaser and instigator of the sale, and liable to indictment. Gantt's Digest, sec. 3162; 18 Ark. 198; 45 *id.* 361; 47 *id.* 188; 49

id. 160. He cannot, therefore, come into equity with clean hands, claiming the right of subrogation. 1 Pom. Eq. sec. 402; 1 Whart. Cont. sec. 340; 4 Dill. 207; 13 Wall. 523; 5 Barb. 616; 53 Ark. 275.

5. The claim is barred by limitation. The statute allows two years for the probate of claims and two years more for the pursuit of heirs and distributees, and no more. Civil Code. sec. 470. This section has never been repealed. 40 Ark. 440.

Robert Neill and *J. M. Moore* for appellee.

1. The homestead became subject to sale for the payment of debts when the youngest child became of age. The heirs took subject to the debts of their ancestor. 48 Ark. 237–8; 47 *id.* 452.

2. The sale was void, but appellee paid his bid, which was used by the administrator in paying debts of the estate, and he is entitled to be subrogated to the rights of the creditors whose debts he has paid. 29 Ark. 47; 49 Ark. 76.

2. One who purchases at a void judicial sale, and pays his money in good faith, is not regarded as a volunteer. 50 Ark. 365; 33 *id.* 490; 45 *id.* 153; 47 *id.* 430; 53 *id.* 559; Sheldon on Subrogation, sec. 209; Freeman, Void Jud. Sales, 52–53; 29 Mo. 152; 1 Dev. & Bat. Eq. 425.

3. The act of 1873 was repealed by the Constitution of 1874. But if in force, it is directed only against the *seller*. 45 Ark. 366.

4. Sec. 470 of the Civil Code is repealed by the Constitution of 1874. There is no statute bar against the enforcement of claims allowed by the probate court. 54 Ark. 67; 37 *id.* 158; 48 *id*, 282.

BATTLE, J., after stating the facts as above reported.

1. Purchaser at void sale entitled to subrogation.

The sale of the lands, which were occupied by John Harris as a homestead at the time of his death, and were set apart by the probate court to his minor children until

they should become of age, was void. The purchaser did not commit any offense under the Act of the General Assembly, numbered 105 and approved April 25, 1873, by attempting to buy the land. He stands as though the effort to sell was not made a criminal offense, and is entitled to be subrogated to the rights against the estate which were held by the creditors whose claims his money has paid. *Bond* v. *Montgomery*, *ante*, p. 563.

2. Limitation to suit against legatee or distributee.

Appellants insist that this action is barred by limitation, and to sustain this contention rely upon section 470 of the Code of Practice in Civil Cases. This section is a part of chapter 3 of title 10 of the Code, which provided for the settlement of the estates of deceased persons. Section 465, which is the first section of that chapter, provided that "the personal representative, heir, devisee, legatee, distributee or creditor of a deceased person may institute an action by equitable proceedings for the settlement of his estate, and in such action may make all having an interest in the estate and settlement defendants." Section 467 provided that the court shall make an order in all such actions "for the creditors of such decedents to appear before a commissioner, to be appointed by the court, and prove their claims by a certain day to be named in the order." Section 468 provided that "a creditor appearing before (a) commissioner, and presenting his claims, becomes thereby a party to the action, and is concluded by the final judgment of the court allowing or rejecting his claim;" and section 469 provided that "creditors failing to appear and prove their claims, agreeably to such order, shall have no claim against the executor or administrator, who has actually paid out the estate in expenses of administration, and to creditors, legatees or distributees." Section 470 then provided: "Legatees and distributees shall be liable to a direct action by a creditor to the extent of (the) estate received by each of them, notwithstanding the failure of the cred-

itor to appear, and the discharge of the personal representative, as prescribed in the preceding section; and *that liability* shall continue for the same period that the liability of the personal representative would have continued but for said discharge." It is obvious that the liability referred to in the last section is the liability of the legatees and distributees to the creditors who did not appear before the commissioner and present his claim in the actions by equitable proceedings for the settlement of the estates of the deceased persons mentioned in the preceding sections; and that section 470 did not limit the continuance of any other liability. As the five preceding sections were impliedly repealed by the Constitution of 1874, which gives to probate courts exclusive jurisdiction of matters of administration of the estates of deceased persons, such limitation is not in force in this State, and does not affect this action.

3. Parties to suit for subrogation.

Appellee failed to make the creditors, to whose rights he seeks to be subrogated, parties to this action. It is evident they were necessary parties. It would be a violation of natural justice to dispose of their rights without affording them an opportunity to be heard. As they were not made parties, we will not undertake to decide what the rights of appellee as to them are, under the peculiar facts of this case.

On account of this defect in the parties to this action, the judgment of the court below is reversed, and the cause is remanded for further proceedings.

LOGAN COUNTY *v.* ROADY.

Opinion delivered November 12, 1892.

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1. *Sheriff—Compensation of deputy.*

The county is not bound to pay for the services of a deputy sheriff in attending upon the circuit court; the sheriff must compensate his deputies out of the fees and emoluments of his office.

2. *Expenses of court.*

Such services are not such a necessary part of the expenses of the circuit court as the circuit judge is empowered, by section 1376 of Mansf. Dig., to certify to the county court for payment.

Appeal from Logan Circuit Court.
HUGH F. THOMASON, Judge.

STATEMENT BY THE COURT.

The Logan circuit court, at its January term, 1890, made an order for the sheriff of Logan county to employ special bailiffs during the term. Under this order O. C. Wood, sheriff, employed his chief deputy, the appellee, to act as court-room bailiff. On August 6, 1890, appellee filed in the office of the clerk of the county court of Logan county his claim against the county, as follows:

"Logan County,

"To W. C. Roady, Deputy Sheriff of Logan County, Dr.

"January Term, 1890.

"To services as guard and special bailiff, appointed by the sheriff of Logan county, O. C. Wood, from the 6th day of January, 1890, to the 1st day of February, 1890, inclusive, twenty-four days, at $3 per day; circuit judge having entered an order for sheriff to employ necessary assistance during said court. $72.00

"W. C. ROADY."

"State of Arkansas, }
Logan County. }

"I hereby certify that the foregoing account is correct and just, and that the services therefor charged were ordered by the circuit court at its January, 1890, term.

"W. R. CHERRY,
"Clerk of Circuit Court.

"H. F. THOMASON,
"Judge, etc,"

And duly verified by appellee, as required by section 1412, Mansfield's Digest.

On October 10, 1890, the Logan county court disallowed the claim, and appellee appealed to the circuit court.

On trial *de novo* in the circuit court appellee testified:

"I am the plaintiff in this action. I am a deputy sheriff of Logan county. Have been deputy sheriff constantly since November 1, 1888. I am the chief or office deputy of the sheriff of the county. O. C. Wood is the sheriff of the county. I was deputy sheriff at the January, 1890, term of this court. For that term of the court the criminal docket contained 164 cases. There were about fifteen persons in jail at that term. I was employed by the sheriff as court-room bailiff for that term of the court, and did the general 'roustabout' work of a court-room bailiff. My services were necessary to facilitate the court in its work. G. G. Dandridge was the jailor, and also waited on the grand jury. J. C. Berry and J. G. Ashinghust were the special bailiffs who had charge of the petit juries in the Bolling and Coulter murder cases. These cases occupied the court for fifteen days. These juries were kept in charge by bailiffs Berry and Ashinghust. The county court allowed Dandridge, Berry and Ashinghust each $2 per day during the time that they served as bailiffs. While I was employed as

court-room bailiff, I was acting deputy sheriff, though I don't think that my fees for process served during that term of the court would exceed five or six dollars. I think, while I was acting as court-room bailiff during that term of the court, I lost deputy sheriff's fees to the amount of seventy-five or one hundred dollars. At the April, 1890, term of the Logan county court, the county court allowed me fees amounting to about sixty or seventy dollars. These were my fees in *nol. pros.* cases, and in cases where defendants were acquitted, the county being then liable for the costs. I do not know what my fees at that term of the court amounted to in cases where the parties were convicted. I also had fees in a great many cases that were continued and not disposed of at that term of the court. All of these fees were for services rendered before I was employed as court-room bailiff. I served as court-room bailiff twenty-four days. I charged $3. This I think was a reasonable charge, and the services were worth this amount. The county court refused to allow me this account."

The court declared the law in this case to be "that the county is liable for said sum of $72," and rendered judgment in favor of appellee for the amount of his claim against appellant; "and further ordered that, upon filing a copy of this judgment with the county clerk, he issue his warrant to said Roady for said sum," to which judgment appellant at the time excepted.

A motion for new trial was filed on the following points: (1) The court erred in declaring the law to be with the plaintiff. (2) The court erred in rendering judgment against the defendant. (3) The judgment of the court is not sustained by sufficient evidence. (4) The judgment of the court was contrary to the law. The motion for new trial being overruled, the county took her bill of exceptions, and appealed to this court.

Anthony Hall for appellant.

1. Constructive fees not allowed—no officer entitled to fees not specifically allowed by law. Mansf. Dig. sec. 1414. Persons who serve the public must be content with the compensation provided by the plain letter of the law. 67 Mo. 687; 25 Ark. 235; 32 *id.* 45; 47 *id.* 442; 55 *id.* 387.

2. Sheriffs may appoint deputies (Mansf. Dig. sec. 6318), but there is no provision to compensate deputies, except the fees allowed sheriffs. *Ib.* sec. 3247; 22 Ark. 595.

3. These services were not a part of the necessary expenses of the circuit court, which the circuit judge could certify to the county court for payment. Mansf. Dig. sec. 1410.

John S. Little for appellee.

The circuit court has power by proper orders to compel sheriffs to employ special bailiffs to aid the court in expediting its business, and the fees therefor become part of the necessary expenses of the circuit court, to be paid on the certificate of the circuit judge. Mansf. Dig. secs. 1376, 1431–2, 6326–7; 23 Ark. 723, 724.

HUGHES, J., after stating the facts as above reported.

1. Sheriff must compensate his deputies.

This case is controlled by section 1414 of Mansfield's Digest, which provides: "The county court is hereby prohibited from auditing and allowing to any officer any fee or allowance not specifically allowed such officer by law, and in no case shall constructive fees be allowed to or paid officers by any county of this State." *Cole* v. *White County*, 32 Ark. 45.

"The sheriff is allowed a *per diem* for attending upon the court when in session, and fees for serving all process, etc., etc., and the law seems to have contemplated that he would compensate his deputies out of the fees and emoluments of his office." *Jefferson County* v. *Hudson*, 22 Ark. 595. In this case Hudson claimed pay

for the services of seven deputies rendered the circuit court for sixteen days.

In the case at bar the appellee was the regular deputy of the sheriff, and performed such duties as the sheriff was obliged to perform in his official capacity and for which the sheriff received pay. These services were not a part of the necessary expenses of the circuit court which the circuit judge might certify to the county court for payment under the statute. 2. Expenses of court.

The declaration of law by the circuit court was erroneous. The judgment is reversed, and the cause is remanded for a new trial.

SANDERS *v.* SANDERS.

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Opinion delivered November 12, 1892.

Homestead—Liability—Money converted by attorney.

Under Constitution 1874, art. 9, sec. 3, which provides that the homestead of a married man shall not be subject to the lien of any judgment such as may be rendered against, *inter alia*, "attorneys for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity," where an attorney, a married man, received money to indemnify himself against liability as surety for his client and converted it to his own use, his homestead cannot be subjected to the lien of a judgment for such money, since the money was not collected in his capacity as attorney, and was held by him, not as trustee of an express trust, but as surety to protect himself against loss.

Appeal from White Chancery Court.

DAVID W. CARROLL, Chancellor.

W. R. Coody for appellant.

1. The proof shows that A. P. Sanders received the money as an attorney. 13 Ark. 644; 11 *id.* 212; 38 *id.* 96.

2. It follows that his homestead comes within the exceptions of art. 9, sec. 3, Const. 1874. 35 Ark. 28; Thompson on Homesteads and Ex. sec. 547.

3. No change of securities, or subsequent contract to pay in future, or with interest, could change the claim from a fund collected as an attorney to a simple debt by contract. Thomps. Homestead and Ex. secs. 311, 312, 359; 45 Ark. 376.

J. W. House for appellee.

1. House & Sanders were never employed to collect the insurance. It was a simple contract debt by which they were to keep the money until the attachment suit was decided.

2. Even if it was a breach of trust, it was waived, and the subsequent agreement that A. P. Sanders should pay 10 per cent. on the amount made it a simple contract debt. 76 Va. 839; 67 How. Pr. 241; Perry on Trusts, secs. 849, 870; 2 Herm. on Estoppel, secs. 768–9, 1063, 1064–5; 11 Heisk. 589; 86 N. Y. 339; 29 Mich. 153; 68 Ala. 167.

BATTLE, J. Appellant brought this action in the White circuit court in chancery, to subject the homestead of Albert P. Sanders, deceased, to sale to pay a claim which he holds against the estate of the deceased. At the time Albert P. died, he left a widow and a minor child surviving him. This suit was brought while the widow remained unmarried, and the child a minor.

The claim sued on, as we find from the evidence, originated as follows: In January, 1882, T. N. Sanders, the appellant, owned a small stock of hardware and tinners' tools, which were insured for his benefit by the Fire Association of Philadelphia, to the extent of $500, against fire. In February following the entire stock was burned. The loss was adjusted at $500. Before it was paid, Witter, Langstaff & Co., who were creditors of T. N. Sanders, brought an action against him; sued out an

order of attachment, and caused the Fire Association to be summoned as a garnishee.

Albert P. and Joseph W. House were then attorneys at law, and associated as partners under the firm name of House & Sanders. T. N. Sanders employed them in his suit. The Fire Association paid the $500 to the sheriff who held the order of attachment. To relieve the money from the attachment and garnishment, T. N. Sanders caused House & Sanders, in their individual capacity, to execute a bond to the sheriff, conditioned that, if the attachment was sustained, the $500 would be forthcoming and subject to the order of the court. The bond was executed upon the condition, and with the understanding and agreement, that House & Sanders should hold the money until the suit by the creditor was decided. In pursuance of this agreement, a check for the $500 was delivered to Albert P., and he collected it and used the money. Appellant made out a claim against his estate for the money and presented it to the administrator, and a part of it was allowed by the administrator and the probate court.

Was the homestead of the deceased subject to sale to satisfy the debt contracted by the conversion of the money? Appellant contends that it was a debt for moneys collected and used by an attorney, and that the homestead, under section 3 of article 9 of the Constitution, was subject to sale under execution or other process which could have been issued, in the lifetime of the deceased, on a judgment for the same. The section referred to is as follows: "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 to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against *executors*

administrators, *guardians*, *receivers*, *attorneys* for moneys collected by them and *other trustees* of an express trust for moneys due from them in their fiduciary capacity."

Questions similar to the one presented for our decision in this case have been decided by courts under the bankrupt acts of the United States. The bankrupt act enacted by Congress in 1841 provided that all persons whatsoever, residing in any State, territory or district of the United States, owing debts which shall not have been "created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other *fiduciary capacity*," shall, on a compliance with the requisites of the bankrupt law, be entitled to a discharge under it; and further declared, among other things, that no person should be entitled to a discharge who should "apply trust funds to his own use." In the case of *Chapman* v. *Forsyth*, 2 How. 202, these clauses were construed by the Supreme Court of the United States. "The case was an action of assumpsit for the proceeds of 150 bales of cotton shipped to and sold by the defendants as brokers or factors of the plaintiff. One of the defendants pleaded a discharge in bankruptcy." Mr. Justice McLean, speaking for the court, said: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and the violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated, 'the defalcation of a public officer,' 'execu-

tor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act. The view is strengthened and, indeed, made conclusive by the provisions of the fourth section, which declares that no 'merchant, banker, factor, broker, underwriter, or marine insurer,' shall be entitled to a discharge, 'who has not kept proper books of accounts.' In answer to the second question, then, we say, that a factor, who owes his principal money received on the sale of his goods, is not a fiduciary debtor within the meaning of this act."

In *Hennequin* v. *Clews*, 111 U. S. 676, the question decided was, "whether a discharge in bankruptcy under the act of 1867 operates to discharge the bankrupt from a debt or obligation which arises from his appropriating to his own use collateral securities deposited with him as security for the payment of money or the performance of a duty, and his failure or refusal to return the same after the money has been paid or the duty performed? or whether a debt or obligation thus incurred is within the meaning of the 33d section of said act, * * * which declares that 'no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act?'" Mr. Justice Bradley, after a review of the authorities, in delivering the opinion of the court, said: "The present case is not precisely like either that of *Chapman* v. *Forsyth*, or *Neal* v. *Clark*;* but it is very difficult to distinguish it, in principle, from the cases of commission merchants and factors failing to account for the proceeds of property committed to them for sale. There is no more—there is

*95 U. S., 704.

not so much—of the character of trustee, in one who holds collateral securities for a debt, as in one who receives money from the sale of his principal's property —money which belongs to his principal alone, and not to him, and which it is his duty to turn over to his principal without delay. The creditor who holds a collateral holds it for his own benefit under contract. He is in no sense a trustee. His contract binds him to return it when its purpose as security is fulfilled ; but if he fails to do so, it is only a breach of contract, and not a breach of trust. A mortgagee in possession is bound by contract, implied if not expressed, to deliver up possession of the mortgaged premises when his debt is satisfied ; but he is not regarded as guilty of a breach of trust if he neglects or refuses to do so, but only of a breach of contract. * * * It is, no doubt, true, as said in *Chapman* v. *Forsyth*, that a construction of the excepting clauses which would make them include debts arising from agencies and the like, would leave but few debts on which the law could operate. At all events, we think that the previous decisions of this court and of the State courts in the same direction, accord with the true spirit and meaning of the act of Congress, and with the necessities of our business conditions and arrangements."

We think that the clause of the Constitution of this State which we have under consideration should be construed in a similar manner. The policy of the bankrupt acts of Congress and the Constitution of 1874 are alike. Debts "created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee or while acting in any other fiduciary capacity" were not included in those from which a bankrupt was discharged. The homestead is not, under the Constitution of 1874, exempt from sale under execution or other process issued on judgments rendered "against executors, administrators, guardians, receivers, attorneys for moneys

collected by them and other trustees of express trust for moneys due from them in their fiduciary capacity." The cases enumerated in each are cases of special trusts. The persons expressly designated as not coming within the homestead exemption of the Constitution of 1874 are persons who hold moneys exclusively for the benefit of others, and the relations between whom and those for whom they hold money are purely of confidence and trust; and the "other trustees of express trust" mentioned must mean the same class of trustees. The debts excepted are those contracted by them for such moneys.

Albert P. Sanders did not receive the money in this case as an attorney. The execution of bonds in attachment proceedings and receiving money as an indemnity for sureties are outside of the duties of an attorney. Albert P. received the money in this case, not as an attorney of appellant, but as one of his sureties to protect himself and House against any losses they might suffer on account of being sureties on the forthcoming bond.

This case is very much like that of *Hennequin* v. *Clews*. Albert P. held the money, which was converted, for the benefit of himself and House under contract. His contract bound him to return it, in some form, to appellant when its purpose as a security was fulfilled. His failure to do was a breach of contract. He did not hold for the benefit of appellant, except in the manner stated; and did not, therefore, come within that class of persons who are excluded from the benefit of the homestead exemption by the Constitution of 1874.

The decree of the court below is affirmed.

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MERFIELD v. BURKETT.

Opinion delivered November 12, 1892.

Justice of the peace—Jurisdiction—False return by constable.

Under sec. 40 of art. 7 of the Constitution, which gives to justices of the peace jurisdiction, in certain cases, in "matters of contract" and "in all matters of damage to personal property where the amount in controversy does not exceed the sum of one hundred dollars," *held*, where a constable was sued before a justice of the peace for a false return on execution, and for failure to make plaintiffs' debt, which exceeded the sum of one hundred dollars, out of property levied upon under the execution, the justice of the peace acquired no jurisdiction because the action was *ex delicto*, and not *ex contractu*, and because if the wrong complained of was "a damage to personal property," the amount in controversy exceeded one hundred dollars.

Semble, that the wrong complained of was not "a damage to personal property."

Appeal from Washington Circuit Court.

JAMES M. PITTMAN,, Judge.

E. B. Wall for appellants.

1. The jurisdiction of justices is defined by sec. 40, art. 7, Const. 1874, and the justice had jurisdiction. See 40 Ark. 124; 43 *id.* 375; Endlich, Int. St. sec. 535; Mansf. Dig. sec. 3061–6, 4128–33; Endlich, Int. St. sec. 157; Cooley, Torts, p. 629, 650–4 (ed 1880).

2. But if the justice had no jurisdiction, the circuit court acquired none *on appeal*. But the circuit court had original jurisdiction (43 Ark. 375), and proceeded under sec. 3964, Mansf. Dig. No question of jurisdiction was raised (52 Ark. 318), and it is too late to raise it in this court. Endlich, sec. 157; Freeman, Judg. sec. 126; 55 Ark. 200.

HUGHES, J. This is an appeal from a judgment of the circuit court against the appellants for costs in a cause commenced in the court of a justice of the peace by appellants against the appellee, as constable, for making

a false return upon an execution in his hands in favor of the appellants against one Zack Thomas, and for neglect of duty by the constable in failing to make the plaintiffs' debt out of property of said Thomas levied on by the constable, the amount of the debt being, as shown by plaintiffs' account filed with the justice, $211.75, exclusive of interest and costs.

This was intended to be a summary proceeding under the statute for non-feasance of the officer in not making sale of the property he had levied upon by virtue of the execution in his hands in favor of the appellant, and which it appears was of sufficient value to have satisfied the plainfiff's debt. The question of jurisdiction is the only question we determine in this case. Had the justice of the peace jurisdiction of the cause? If he had no jurisdiction, the circuit court acquired none upon appeal from the justice.

Justices of the peace have jurisdiction, exclusive of the circuit court, in all matters of contract where the amount in controversy does not exceed the sum of one hundred dollars, excluding interest, and concurrent jurisdiction in matters of contract, where the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest, and in all matters of damage to personal property, where the amount in controversy does not exceed the sum of one hundred dollars. Sec. 40, art. 7, Const.

The cause of action in this case does not arise *ex contractu*, but *ex delicto*. It is not based upon any promise of the officer, or any contract, express or implied, but upon his negligence or refusal to perform a duty which the law imposed upon him, the breach of which is a wrong. *Charleston* v. *Stacy*, 10 Vt. 562; *Osborn* v. *Bell*, 5 Denio, 370.

If this be considered an action to recover a statutory penalty, then the justice had no jurisdiction, as held in

Baltimore & Ohio Telegraph Co. v. *Lovejoy*, 48 Ark. 301. If the wrong done the plaintiff could be a matter of damage to personal property (but we do not think it could), then the amount in controversy here is over one hundred dollars, and the justice could have no jurisdiction. The circuit court should have dismissed the appeal for the want of jurisdiction.

The judgment is reversed, and the cause is dismissed for the want of jurisdiction.

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FORDYCE v. JACKSON.

Opinion delivered October 19, 1892.

1. *Railway—Liability to express messengers.*

   Where a railway company, without any express contract, undertakes to carry an express messenger in a car provided by it for the use of the express company, it owes to him the same duty to use every reasonable precaution to carry him safely that it owes to an ordinary passenger.

2. *Negligence—Obstruction on track.*

   In an action by an express messenger for injuries sustained in a railway accident, proof that the engine collided with a bull upon the track near a bridge, that the tender broke loose from the express car, which went through the bridge, and that plaintiff was injured by the fall of the car, makes a *prima facie* case of liability on the part of the railway company that is not overcome by proof that the animal came upon the track without knowledge of the company's employees; to rebut the presumption of negligence it should be further shown that the company, or its servants, exercised due care to keep the animal off the track and to prevent a collision with it.

3. *Collision with cattle—Duty of railway to fence track.*

   The duty of a railway company to exercise every reasonable precaution to prevent injury to passengers requires of employees in charge of trains faithful watchfulness to prevent accidents by collisions with cattle, and requires the company to keep a clear right of way to afford them the facility of performing that duty; if these or other precautions are insufficient to guard

against that danger, and a fence will render the track safe from the intrusion of cattle, the company's obligation demands the more effective precaution.

4. *Erroneous instruction—When not prejudicial.*

If the undisputed facts establish a state of case which entitles plaintiff to recover for the defendant's negligence, the latter cannot complain that the court's charge imposed a higher degree of care than the law justifies.

5. *Bill of exceptions—Affidavits of bystanders.*

Under secs. 5160-1, Mansf. Dig., affidavits of bystanders to prove exceptions taken at the trial cannot be filed and become part of the record if it does not appear by the record that the exceptions were presented to the judge and disallowed, and there is no suggestion in the affidavits that the judge refused to certify such presentment and disallowance in the record.

6. *Court's charge—Want of specificness.*

That the court's charge was general in its terms is no ground for reversing a judgment if no request was made for a more specific charge.

7. *Damages—Excessiveness.*

Evidence that plaintiff had several ribs broken, a hip contused, his nose broken and disfigured, a permanent case of catarrh superinduced and the sense of smell impaired, as results of an injury, will justify an award of $5000 as damages.

Appeal from Lafayette Circuit Court.

WILLIAM S. EAKIN, Special Judge.

Action by Dan C. Jackson against S. W. Fordyce and A. H. Swanson, receivers of the St. Louis, Arkansas & Texas Railway Company, to recover damages for injuries received in a railway accident. The facts are sufficiently stated in the opinion.

Bunn & Gaughan and *Sam H. West* for appellant.

1. Plaintiff's relation to the company does not warrant a recovery. There was no special contract; and if a passenger, he was not in the proper car, and took the inherent risk. 47 Am. & E. R. Cases, 586; Beach on Cont. Neg. 55; Patterson, Ry. Ac. Law, 286; 1 A. & E. R. Cas. 79; 8 *id.* 396; 47 *id.* 492-4; Mansf. Dig. sec.

5477; 34 A. & E. R. Cas. 355; 1 *id.* 234; Wood, Ry. Law, p. 1042.

2. The first instruction lays down too rigid a rule as to the degree of care. Carriers are not insurers of passengers. 48 N. W. Rep. 1031; 40 A. & E. R. Cas. 703. The fourth on the measure of damages is erroneous. 36 Mo. App. 215; 15 A. & E. R. Cas. 265; 19 Mo. App. 107–112; 3 Bush (Ky.), 587; 96 Ill. 162–174; 18 A. & E. R. Cases, 47; 21 L. J. (Q. B.) 233; 9 Exch. 341–356.

3. The evidence shows due care and diligence on part of the railway to avoid an unavoidable accident.

Scott & Jones for appellee.

1. The certificates and affidavits copied in the record are not a bill of exceptions, and cannot be considered as part of the record. There is no showing that there was any disagreement between the judge and counsel; nor that matters were requested to be saved and were refused. They are mere *ex parte* papers. Mansf. Dig. secs. 5160–1.

2. Jackson was in the car furnished by defendants for express matter and messengers. He was a passenger. 15 S. W. Rep. 280; 48 Ark. 460.

3. The instructions are copied from the language of this court. 34 Ark. 613; 2 Redf. Law of Railways, p. 219; 51 Ark. 459.

4. After the wreck was shown, there arose a presumption of negligence. 51 Ark. 457.

5. If a fence was necessary for the protection of passengers, then the company was guilty of negligence in not fencing their track. 30 Pa. St. 234; 72 Am. Dec. 698; 46 Ark. 182.

6. Plaintiff was on the train with the knowledge and consent of the conductor, and thus the relation of passenger and carrier is established. See 3 Head, 638;

74 Pa. St. 421; 66 N. Y. 313; 14 How. 468; 13 A. & E. R. Cas. 55.

7. The damages are not excessive.

Bunn & Gaughan and *Sam H. West* for appellant, on motion for rehearing.

The measure of damages is a question of law. It was the duty of the court to tell the jury what were the elements of damages, and not leave them to find what could be treated as a necessary result of the jury. 36 Mo. App. 215; 15 A. & E. R. Cas. 265; 3 Suth. Dam. 426; 3 Sedg. Dam. (8th ed.), 577; 3 Bush (Ky.), 587; 96 Ill. 162–174; 18 A. & E. R. Cas. 47; 21 L. J. (Q. B.), 233; 9 Exch. 341–56.

1. Liability of railway to express messenger.

COCKRILL, C. J. The plaintiff was the messenger of the Southern Express Company engaged in conducting the express company's business on the line of the appellants' railway. The car provided by the railway for the use of the express company was derailed while the plaintiff was discharging his duties as express messenger, and he was injured in the wreck which followed. He recovered judgment for the personal injury, and it is argued by the appellants that his relation to the company does not warrant a recovery.

It is true there was no express contract between the plaintiff and the railway company; but as the railway undertook to carry him, it was bound to use every reasonable precaution to carry him safely. He could recover, therefore, in tort, just as any passenger may, for the violation of this general duty. All the cases upon this and analogous questions are to that effect. Thompson on Carriers, p. 45, sec. 5; Patterson's Railway Ac. Law, sec. 222; 2 Wood, Railway, p. 1042 and n. 3; *Yeomans* v. *Navigation Co.* 44 Cal. 71; *Penn. Co.* v. *Woodworth*, 26 Ohio St. 585; *Brewer* v. *Railway*, 124 N. Y. 59; *Seybolt* v. *Ry.* 95 *id.* 562; *Blair* v. *Ry.* 66 *id.* 313; *Gulf, etc. Railway* v. *Wilson*, 15 S. W. Rep. (Tex.), 280.

2. Evidence held to establish negligence.

The testimony on behalf of the plaintiff tended to show that two causes conduced to the wreck, viz., a bull on the track and a rotten bridge.

The undisputed facts were that a bull came upon the track near the bridge, the engine ran over the animal, the tender broke loose from the express car, the latter went through the bridge, and the plaintiff was injured by the fall of the car.

Those facts establish a *prima facie* case for recovery in the plaintiff's favor, for the accident would not have happened, ordinarily, had the track been safe and the train operated with care. *Seybolt* v. *Ry.* 95 N. Y. *sup.*; *Railway Co.* v. *Hopkins*, 54 Ark. 209; *St. Louis, etc. R. Co.* v. *Harper*, 44 *id.* 524.

To overcome the case thus made, the railway points to testimony introduced by it tending to show that the bridge was in sound condition, and that the bull came upon the track without the knowledge of the company's employees. This testimony is contradictory of that of the plaintiff, but it does not extirpate it. If it could be conceded, however, that the jury was bound to find that the bridge was safe, the plaintiff's *prima facie* case would not be overcome, because the railway did not show that the company, or its servants in charge of the train, had exercised due care to keep the animal off the track or to prevent a collision with it. It is no answer for the railway to prove simply that the animal came there without its knowledge.

3. Duty of railway toward passenger.

In this State it is the general custom to permit cattle to run at large. It is apparent to those who operate railroads that roaming cattle are a constant menace to the safety of an unguarded track. The railway's obligation, to every one whom it undertakes to carry in the relation of a passenger, is that it will take every reasonable precaution to avert injury to his person, whether from collision with cattle or from other danger which it

has reason to apprehend. The omission of any reasonable precaution to effect that end is negligence. *Arkansas Midland Railway* v. *Canman*, 52 Ark. 517.

This obligation requires of the employees in charge of trains faithful watchfulness to prevent accidents by collision with cattle, and it requires the company to keep a clear right of way to afford them the facility of performing that duty. If these or other precautions are insufficient to guard against the danger, and a fence will render the track safe from the intrusion of cattle, the company's obligation demands the more effective precaution. "If the want of a proper fence makes the railway unsafe, and an accident happens to a passenger in consequence, the company are responsible to him, although they are under no obligation to the adjacent (land) owner," or the owner of cattle, to fence the track. *Buxton* v. *N. E. Ry.*, 3 L. R. Q. B. 549; *Lackawanna, etc., Ry.* v. *Chenewith*, 52 Pa. St. 382; *Gulf, etc., Railway* v. *Wilson*, 15 S. W. Rep. *sup.*; *Cornwall* v. *Sullivan Railroad*, 8 Fost. (N. H.) 161, 169.

Now the testimony, considered in its strongest bearing for the railway, did not warrant the jury in finding that the company had taken the necessary precaution to prevent collision with cattle.

There is nothing tending to prove that the track could not have been made safe by the use of a fence at the point where the bull entered upon the right of way; and the uncontradicted statement of the fireman shows that he did not exercise due care in maintaining a lookout. He testifies that he quit his watch just as the train entered upon the curve in the road where the accident happened. He knew that the engineer could not keep watch upon both sides of the curve at that point, and common prudence demanded that he should remain at his post until his companion could see both sides of the track from his place in the cab. The curve was short, and the

duty which he turned to perform was not imperative at that moment, and it could have been performed upon the straight track before reaching or after passing the curve. If the fireman had kept a lookout, the presumption is he would have discovered the animal in time to avert the accident, unless prevented by the trees and bushes which, some of the witnesses say, grew near the track at that point. But if prevented by that cause, it would have offered no excuse for the company, as before stated.

4. When erroneous instruction not prejudicial.

The appellants argue that the charge of the court imposes a higher degree of care upon the railway, in its effort to avoid danger to passengers, than the law justifies. The instruction mainly complained of * is couched in language copied from an opinion of this court. But if we should concede that its language is too rigid for application in this case, the verdict should not be disturbed because the undisputed facts establish a state of case upon which the plaintiff should recover.

5. Amending bill of exceptions by affidavits of by-standers.

The appellants attempt to add to the bill of exceptions allowed by the trial judge by presenting certificates filed with the circuit clerk and affidavits attesting the truth of his additional exceptions. But their effort must prove futile, because the record fails to show that the omitted exceptions were presented to the judge for allowance and rejected by him. It is only where the exceptions are presented to the judge for allowance and are rejected by him that the statute permits them to be preserved by the certificate and affidavits of bystanders. Mansf. Dig., secs. 5160–1.

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* The portion of charge of the lower court above referred to was copied from the opinion in the case of *George* v. *St. L., I. M. & S. Ry. Co.* 34 Ark 625., and is as follows:

"The jury are instructed that passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and that if any injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the damage occurs, the carrier is responsible."

When the judge rejects any part of the bill of exceptions presented to him for allowance by either party, he should certify that fact, if the aggrieved party desires, in the bill of exceptions. The foundation is then laid for preserving the excluded exceptions by the aid of bystanders. If the judge refuses to certify this disallowance of any matter, it is time enough then to attempt to bring that fact upon the record by the bystanders. For aught that appears here, the judge allowed the bill of exceptions, presented to him by the appellant. There is no intimation to the contrary in the bill of exceptions, the certificates or affidavits. We cannot extend our consideration therefore beyond the exceptions contained in the bill allowed by the judge.

Let the judgment be affirmed.

OPINION ON MOTION FOR REHEARING.

COCKRILL, C. J. The appellant has filed a motion for reconsideration upon the ground that the court's charge on the measure of damages is erroneous, and that the damages awarded are excessive. Both questions were considered by the court, but neither is adverted to in the opinion.

It is argued that the charge is wrong for two reasons, viz.: 1. Because, after enumerating some of the elements of damages which the plaintiff might recover, it adds: "As well as all damages, present or future, which from the evidence can be treated as the necessary result of the injury complained of." 2. Because the language just quoted leaves the jury to determine what are the elements of recovery, when that is a question of law.

The first objection would be well taken if the charge enumerated all the plaintiff's elements of recovery, for in that event the court would be understood as indicating that there was still something else that the jury, in its

discretion, could throw into the award. But the court did not enumerate all of the elements of recovery—the impairment of the sense of smell is one not enumerated. It is conceded that a recovery for that cause is proper if the jury believed the plaintiff's testimony on that point.

6. As to want of specificness in the court's charge.

We are brought, then, to the second ground of objection, and the question is, did the court err in failing to specify the elements of damage for which the jury might make an assessment in the plaintiff's favor?

It is not contended that the charge contains a misstatement of the law on the subject, but that it was the court's duty to go further than it did and make the charge more specific.

It was the defendant's right to have the rule for the ascertainment of damages specifically defined by the court, so that the jury would have an accurate guide to conduct them to a proper award. But the defendant should have requested a more specific charge, if it conceived that the jury would be misled by the general language of the charge. It is the settled practice in this State that a party cannot avail himself of an omission which he made no effort to have supplied in the trial court. Our practice is in accord with the following statement from the text of Judge Thompson's work on Charging the Jury, sec. 82: "If the charge is not a clear misdirection—if there is a *mere tendency* in it to mislead the jury, the defendant must ask additional explanatory instructions, in order to avail himself of its defectiveness in a court of error; but where it *necessarily* * * * misleads the jury, it is a fatal error. Nor will a judgment be reversed, because the charge is so general in its terms as to leave it doubtful whether the jury understood its application to the evidence. Here, as in the preceding case, the remedy of the party is to ask additional instructions before the jury retire. So where the judge has laid down a proposition, which, in the abstract,

is clearly right, but there is something peculiar in the situation of the parties, or their relations to each other, which would require a modification of it, and which has escaped the attention of the judge, it is the duty of counsel to call his attention thereto."

The charge in this case was right in the abstract, and a more specific instruction was not asked by the defendant. There is therefore no reversible error in the charge.

7. Damages held not excessive.

As to excess in the award of damages: The plaintiff had several ribs broken, a hip contused, his nose broken and disfigured, a permanent case of catarrh superinduced and the sense of smell impaired, as results of the injury—at least the jury could have found that state of facts from the testimony. We cannot adjudge that $5000 is an excessive award of damages for these injuries.

Motion denied.

O'CONNELL v. ROSSO.

Opinion delivered November 19, 1892.

1. *Form of action—Duplicity—Waiver.*

Where it was uncertain whether the complaint intended to state a cause of action for breach of a contract or for a tort in the nature of trespass, and the defendants made no objection on that score but invited both issues, they cannot object that the court's charge covered both issues.

2. *Contract—Damages.*

In an action for breach of a contract no damages can be awarded for a tort which attended the breach.

3. *Exemplary damages—Trespass.*

Exemplary damages may be awarded in an action of tort where the trespass was committed with deliberate violence or oppression.

4. *Damages for breach of contract—Preparatory expenditures.*

Where the anticipated profits under a contract are too speculative to admit of clear and direct proof, a party aggrieved by its wrongful termination can recover his legitimate expenditures made to carry out the contract, less the value of any material left on hand; but if, by a partial performance of the contract, he has enjoyed a portion of the benefits of his preparatory expenditures, his damages should be proportionately lessened.

5. *Exclusion of improper testimony—Presumption.*

Where illegal testimony is admitted and afterwards withdrawn from the jury, the presumption is that the verdict was based upon legal testimony only.

Appeal from Arkansas Circuit Court.

JOHN A. WILLIAMS, Special Judge.

Joe Rosso sued John O'Connell and H. P. Bradford, in Jefferson circuit court, and alleged that in April, 1888, he contracted with defendants to take charge of the "Recreation Park" in Pine Bluff; that plaintiff, under the contract and agreement made between him and defendants, was to and did enter into possession of said park in April, 1888; that he was put into possession thereof under said agreement for the purpose of supplying visitors with soda water, lemonade, ice cream, luncheon and other confections and articles usually kept in the line of refreshments; that, having entered into possession under the agreement, he supplied himself, at great cost and expense, with a soda fountain, ice cream, lemonade and other articles and confections for the purpose of supplying visitors, and employed a band of music for those visitors at the park who desired to engage in dancing, and plaintiff was to be allowed to collect from the dancers a fee for the music rendered. Plaintiff stated that it was agreed by defendants that, in consideration of the supplies and refreshments furnished by him as aforesaid, he should be entitled to any profit he might make from sales to visitors and money collected for

music rendered, and that he should have the exclusive use and possession of said park for that purpose until November 1, 1888, free of rent. Plaintiff stated that the defendants, on or about the 29th day of June, 1888, in violation of their said contract and agreement with plaintiff and in violation of the rights of plaintiff, without legal process or authority of law, forcibly ejected plaintiff from the park and grounds, and forcibly and unlawfully threw his soda fountain and apparatus, furniture, goods and other supplies and confections out of the park, whereby plaintiff was damaged in loss of money, of time and of profits in his business then and there engaged in, by being thrown out forcibly as aforesaid and against his will, in the sum of fifteen hundred dollars. Wherefore plaintiff prayed judgment for said sum and costs and all other proper relief.

Defendants' answer, in substance, denied that they had violated their contract with plaintiff, and alleged that plaintiff had been guilty of such insulting conduct toward the patrons of the park, as to forfeit his rights under the contract.

On defendants' motion the case was transferred, on change of venue, to Arkansas county.

There was evidence that tended to support the allegations of the complaint. Plaintiff submitted with his testimony an itemized list of losses incurred and damages claimed by him, which was as follows:

Ten gallons of syrup spoiled, worth	$ 24 00
Damage to cook-stove, utensils, fixtures, loss on goods, such as meats, fish, vegetables and restaurant supplies	35 00
Damage to stock of cigars by exposure, breakage, and shortage	15 00
Paid for cigar license	2 40
Two-thirds of barrel of gasoline, evaporated	10 00
Coal oil lost	3 00

One and a half barrels cider, worth	6 00
Twenty three pairs of skates which I ordered for the rink in the park, at $1.25 per pair	28 75
Two dozen chairs	16 00
Damage to tables	4 00
Ice box	7 00
Expense of moving my household goods to be near the park	7 50
Freight charges paid on soda fountain from Boston to Pine Bluff, ordered for park	20 75
To cash paid for musicians to get them to come from Hot Springs to Pine Bluff	20 00
Expenses of trip to Little Rock	15 00
Expenses of trip to Pine Bluff	25 00
Two months salary for time lost after leaving park until engaged in present business, at one hundred dollars per month	200 00
Probable profits	500 00

The court ordered the last four items to be erased from the list, and permitted the jury, upon retiring, to take with them the list so erased.

At the plaintiff's request the court gave the following, among other, instructions, viz.:

"4. If the jury believe from the evidence that the defendants wrongfully ejected the plaintiff from said park, as charged in his complaint, either by themselves or their servants at their direction, and that this was done in a reckless disregard of the rights of plaintiff, and the plaintiff has suffered any actual damages therefrom, then the jury are authorized to find exemplary damages, that is, such damages as will compensate plaintiff for the wrong done him, and to punish the defendants and to furnish an example to deter others from the like practices."

"5. If the jury believe from the evidence that the plaintiff was wrongfully ejected by the defendants or

their agents, and without any conduct on the part of the plaintiff as worked a forfeiture of his contract, they may consider the expense plaintiff incurred in making preparations for carrying out the contract and allow plaintiff such part of this expense as they think right under all the circumstances."

The court refused to give the following instruction asked by defendants, viz.:

"6. The jury are instructed that any damages that they may find from the evidence that O'Connell and Bradford sustained by reason of wrongful and improper conduct on the part of Rosso, may be considered by them in mitigation or satisfaction of any damage they may find from the evidence Rosso sustained by reason of wrongful conduct on the part of Bradford and O'Connell."

The jury returned a verdict in favor of plaintiff in the sum of $750. Defendants have appealed, and insist that the court erred in giving instructions four and five asked by plaintiff, in refusing instruction six asked by defendants, in permitting plaintiff to testify as to certain losses incurred by him, and in allowing the jury to take to the jury room the list of losses submitted by plaintiff.

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

1. The court erred in admitting plaintiff's testimony that he had expended $200 to secure musicians, and other items for freight charges, moving goods, etc., before breach of contract, and in allowing the jury to consider such expenditures. It was also error to permit the jury to take with them the list containing these items to the jury room. The presumption is, it had some influence with the jury. 102 U. S. 459–460; 43 Ark. 102.

2. It was error to charge the jury as to exemplary damages. 1 Suth. on Dam. p. 716 *et seq.*; 91 U. S. 492;

21 How. 213; 16 S. W. Rep. 789; Cooley on Torts, p. 694 and note; 35 A. & E. R. Cases, p. 466.

3. Defendants were entitled to recoup such damages as they had sustained by the improper conduct of plaintiff in carrying on his business pursuant to his contract. 2 Metc. (Ky.), 539; 1 Suth. Dam. p. 226–7, 724; 1 Story, 100; 132 U. S. 531; 1 Suth. Dam. p. 229 and note; 4 S. & R. 249; 14 How. 443; 120 U. S. 630; 22 Pick. 510, 517; 1 Baldw. 59; 41 Ark. p. 301; 53 Ark. 7.

S. M. Taylor and *J. W. Crawford* for appellee.

1. Expenditures in preparation for the performance of a contract, which were a necessary preliminary to its performance, or within the contemplation of the parties as necessary, are properly estimated in assessing damages for breach of the contract. 1 Suth. Dam. p. 121; T. Raym. 77; 2 Cush. 46; 4 *id.* 408; 8 Barb. 423; 5 Iowa, 266.

2. The allegations of the complaint and the proof show a case for exemplary damages. 35 Ark. 492; Addison, Torts (3d ed.), p. 992; 15 Ark. 452; Sedg. Dam. (6th ed.), p. 554. Defendants made no objections to the sufficiency of the complaint, and, both parties having introduced evidence on the issue covered by the instructions in question, it is too late after verdict to object to the sufficiency of the complaint. 44 Ark. 524; 54 *id.* 289. The evidence was sufficient to justify a verdict for exemplary damages. 1 Suth. Dam. p. 724–5; 37 Mich. 34; 21 Iowa, 379; 13 Iowa, 128.

3. The sixth instruction, as to *mitigation* or *satisfaction* of damages, was properly refused. 1 Suth. Dam. p. 226, sec. 3; *ib.* p. 227.

4. The objectionable items on the list were stricken therefrom by a pencil mark drawn through them, and the jury were instructed to disregard them. The presumption is, the verdict was based upon legal evidence only. 43 Ark. 102; 102 U. S. 451.

5. If upon the whole record the judgment is right, it will be affirmed. 28 Ark. 59; 46 *id.* 485.

1. When objection to duplicity not available.

COCKRILL, C. J. It is not certain from the complaint whether the plaintiff intended to state a cause of action as for a breach of contract, or for a tort in the nature of trespass. The appellants, who were the defendants below, made no objection to the complaint on that score, but in their answer proffered an issue upon the breach of contract and the commission of the trespass. The objection now made to the charge of the court is that the complaint did not warrant any instruction as to exemplary damages, and that the expenses incurred by the plaintiff to carry out the contract could not be recovered.

A charge upon either phase of the case was applicable to one of the issues tendered by the defendants; and, as they had invited the issues, they cannot be heard to complain that the court gave an appropriate charge to the jury upon each of them. Our inquiry, therefore, is, does the charge as to the measure of damages declare the law, and was it applicable to either phase of the case?

2. Damages for breach of contract.

If the action had been prosecuted solely to obtain compensation for the loss of the contract, the circumstances attending the breach could not affect the result, and no damages could be awarded for a tort which the proof of those circumstances showed had been committed. 2 Sedg. Dam. sec. 602. No exemplary damages could be awarded in that case.

3. Exemplary damages in torts.

But the charge as to exemplary damages was applicable to the tort set out in the complaint upon which the defendants joined issue. Such damages may be awarded wherever a trespass is committed with deliberate violence or oppression. *Clark* v. *Bales*, 15 Ark. 452; *Barlow* v. *Lowder*, 35 *ib.* 492. No objection is made to the form of the charge. No error is therefore pointed out as to that.

4. Damages for breach of contract.

As to the other branch of the charge upon the measure of damages: A plaintiff is entitled to recover the expenses incurred by him in his preparation to perform a contract which, without his fault, the defendant has put an end to, where the anticipated profits under the contract are too speculative to admit of clear and direct proof. 2 Sedg. Dam. sec. 607; 5 Lawson's Rights, etc., sec. 2623; *United States* v. *Behan*, 110 U. S. 338; *Howard* v. *S. & B. Mfg. Co.* 139 *ib.* 199. That was the state of case made by the proof in this case, under the issue upon the breach of the contract. The plaintiff was, therefore, entitled to recover the loss he had sustained by reason of his outlay and expenses made and incurred in the fair endeavor to perform the contract which he had assumed. He had partially enjoyed the benefit of his preparatory expenditures in the partial performance of his contract. It was proper, therefore, to apportion such expenditures, and the defendants have not suggested that the charge ought not to bear an interpretation which leads to that result.

It was proper for the jury to take into consideration the amounts paid by the plaintiff to secure the services of musicians which the defendants required him to provide; the freight charges on his soda fountain brought from Boston to Pine Bluff,* and the amount paid for tobacco license to enable the plaintiff to supply that article to the defendants' patrons, for that was fairly within the scope of the plaintiff's duty under the contract. There was no error, therefore, in admitting testimony of the plaintiff's expenses in reference to those matters, or in instructing the jury in regard to them.

*Inasmuch as it does not appear from the evidence that the soda fountain was not worth the price paid for it in addition to the freight charges, it is not clear upon what ground plaintiff was held entitled to recover the freight charges upon it. (Reporter.)

When the jury retired to deliberate, the court permitted them to take with them a list of the items of expense which the plaintiff testified he had incurred, instructing them not to consider any claim for anticipated profits or other excluded demands.

Among the items which were not excluded from their consideration was a claim of $28.77 for money expended by the plaintiff for skates, and the sum of $7.50 for moving his household effects from one location to another in Pine Bluff. The jury must have understood that they were at liberty to take these items into consideration in assessing damages against the defendants.

The removal of the plaintiff's household goods was not made in execution of the contract, but solely for his convenience. The expenditure was not properly chargeable to the defendants. Nor was he entitled to recover the cost of materials left on hand when the contract was violated. The most that can be demanded in such a case is the difference between the legitimate expenditure made to carry out the contract and the value of the material left on hand. *United States* v. *Behan*, 110 U. S. *sup.* But the value of the skates was not proved. There is no presumption that they are without value. Consequently, there was no basis for a calculation of damages on account of their purchase.

5. Presumption where improper testimony is excluded.

The list of items referred to contained several which could not be made the basis of recovery. The plaintiff had been permitted to testify as to some of them. Before delivering the list of items to the jury, the court caused those just referred to to be marked off or erased, and instructed the jury not to consider them, and thereby withdrew the previously admitted incompetent testimony in reference to them. The presumption is that the verdict is based upon the legal items only. *Carr* v. *State*, 43 Ark. 99.

There is, therefore, no reversible error as to that. The defendants could not have been prejudiced by the court's refusal to give, as part of its charge, their prayer for an instruction as to damages to be recovered by them against the plaintiff, for the proof would not have warranted a finding of more than nominal damages in their favor, even if the prayer contained a correct statement of the law. A finding of nominal damages in their favor could not reduce the amount of the verdict against them, so as to warrant a reversal. No other question in the case is urged by the appellants or considered by the court.

Full atonement may be made for the error pointed out by deducting $36.27 from the verdict. If the appellee will enter a *remittitur* for that amount, upon the usual terms, within 15 days, judgment may stand for the reduced amount; otherwise the judgment will be reversed, and the cause remanded for a new trial.

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RAILWAY CO. v. YARBOROUGH.

Opinion delivered November 19, 1892.

1. *Limitation of action—Damage by overflow.*

   Where, at the time a railway embankment is erected, it is uncertain whether it will cause adjoining land to overflow or not, and growing crops are subsequently overflowed by reason of such embankment, the statute of limitations begins to run, not from the time the embankment was erected, but from the time the injury occurred.

2. *Non-expert opinion—Cause of overflow.*

   The opinion of a non-expert witness that an overflow was caused by a railway embankment is inadmissible where it does not appear that the facts upon which his opinion was based could not have been sufficiently described to the jury.

3. *Measure of damages—Destruction of growing crop.*

The damages recoverable for the destruction of a growing crop by overflow are limited to the actual value of the crop at the time of its destruction, with legal interest from date of injury; such value is to be ascertained from consideration of the circumstances existing at the time of its destruction, as well as at any time before the trial, favoring or rendering doubtful the conclusion that it would attain to a more valuable condition, and from consideration of the hazards and expenses incident to the process of supposed growth or appreciation.

Accordingly, where the evidence shows that the growing crop was destroyed by back-water from a railway embankment, but that a few days afterwards there was a general overflow which would have destroyed the crop had the embankment not been erected, a verdict for damages which was based upon the assumption that the crop would have matured will be set aside.

Appeal from Nevada Circuit Court.

CHARLES E. MITCHEL, Judge.

This was an action by W. E. Yarborough against the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for the destruction of the plaintiff's growing crops during an overflow of the Red River. The crops were destroyed on the 9th day of May, 1888, and the action was commenced on the 20th day of November, 1889. The complaint alleges that the defendant's road-bed was constructed across the Red River bottom in 1873; and that it was so carelessly constructed and maintained that, by reason of the insufficiency of its openings and trestles to permit the escape of the water during an overflow, the water was dammed up by it and caused to flow back upon the plaintiff's lands. The first paragraph of the answer admitted that the road-bed was constructed in 1873, but denied the charge of negligence and the other material allegations of the complaint. The second paragraph pleaded the statue of limitations, alleging that the plaintiff's right of action did not accrue within three years next before the commencement of the action.

On the trial much evidence was given to the jury as to the topography of the country in the vicinity of the plaintiff's farm and as to the manner in which the flowage passed on to the low lands adjacent to the river—also as to the character of some of the overflows occurring before and since the building of the road. The plaintiff, testifying in his own behalf, stated that the crops destroyed consisted of twenty-five acres of corn and sixty-five acres of cotton, and that, at the time of their destruction, the corn was about "knee high," and the cotton large enough to have received one working; that the average yield of his land in corn would have been, in 1888, forty-five bushels per acre, and that corn was worth, at the time the crop would have matured, fifty cents per bushel; that the average yield of his land in cotton would have been for that year nearly a bale per acre; that on the sixty-five acres in cotton he would have made sixty bales; and that the average price he obtained for cotton produced the same season was nine cents per pound. This testimony of the plaintiff was admitted over the objection of the defendant.

Royston Nash, a witness for the plaintiff, testified that he lived on Red River fifty years and had seen a few overflows there. There had been overflows in 1866, 1867, 1876 and 1880. Since the railroad had been built in 1873 witness noticed a difference. The overflow had been more frequent and was higher. This question was asked witness: "What is the occasion of that?" The question was objected to, but the objection was overruled. Witness answered: "I think it is the embankment or dump." To this answer the defendant objected, but the objection was overruled.

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

"If the jury find for the plaintiff, the measure of damage will be the actual cash value of the crops

destroyed, if the jury find from a preponderance of the evidence any such destruction, at the time of their destruction, with interest thereon at the rate of six per cent. per annum from the date of said destruction."

The court refused to give the following instruction, requested by the defendant:

"10. The jury are instructed that if they find from the evidence that the defendant did erect its railway embankment south of Red River, upon its own grounds, and not upon ground belonging to the plaintiff, and that for want of sufficient openings, trestles, culverts and bridges in said embankment, plaintiff was injured; and if they find that the construction of said railway was permanent in its character, and that its erection and continuance was necessarily an injury to the plaintiff and others, and that it was permanent in its effects, and that such permanent structures wrongfully obstructed the flow of water from above them; and if you find that said embankments were constructed in 1873, and their continuance ever since was necessarily an injury to the plaintiff, and by reason thereof plaintiff was injured, he cannot recover in this action, because said embankment was constructed more than three years before the commencement of this suit, and the plaintiff is barred by the statute of limitations."

The jury returned a verdict for the plaintiff, and assessed his damages at $1092.50. The defendant moved for a new trial on various grounds, embracing the ruling mentioned as to the admission of testimony and as to instructions to the jury. The motion was refused, and the railway company has appealed.

The other facts necessary to an understanding of the questions decided are stated in the opinion.

Dodge & Johnson for appellant.

1. The verdict was contrary to the evidence.
2. The opinions of witnesses who were not experts,

and who had no personal knowledge upon which to base an opinion, were incompetent, and the court erred in allowing such evidence to go to the jury. 17 S. W. Rep. 364; Laws. Exp. Ev. pp. 203, 496.

3. The court erred in admitting testimony as to what should be the criteria of the measure of damages. The actual cash or market value of the crops at the time they were destroyed is the only true and correct measure of damages, and not what the yield and price would have been had the crop matured. 10 S. W. Rep. 576; 85 Ill. 594; 47 Ga. 260; 41 Wis. 602; 11 S. W. Rep. 123, 337; 16 Ill. 530; *ib.* 534; 66 Barb. 88; 29 N. Y. 37; 33 Conn. 514; 17 Ill. App. 631; Thomps. Neg. sec. 1262.

Scott & Jones for appellee.

1. The evidence of Royston Nash was admissible as expert evidence. 14 S. W. Rep. 611.

2. The measure of damages was their actual cash value at the time of their destruction (10 S. W. Rep. 576), and to establish that value, its probable yield and the value of such yield may be taken into consideration. The difference between the value of the probable crop and the expense of making and marketing it will in most cases give the value. 11 S. W. Rep. 526.

3. The claim was not barred. 52 Ark. 240.

1. Limitation to action for damage by overflow.

MANSFIELD, J. 1. The damage which the plaintiff sued to recover was not original in the sense that it necessarily resulted from the erection of the railway embankment. But after that structure was completed the injury complained of was still entirely uncertain and contingent and such as might never happen. In this respect the case is similar to that of the *St. Louis, etc. R. Co.* v. *Biggs*, 52 Ark. 240; and, according to the rule there laid down, the statute of limitations did not begin to run until the crops were destroyed. *Troy* v. *Cheshire R. Co.* 23 N. H. 83. The defendant's tenth instruction was not,

therefore, applicable to the facts, and the court was right in refusing to give it.

2. Admissibility of opinion of non-expert.

2. The opinion of Royston Nash, admitted in evidence against the objection of the defendant, does not appear to us to fall within any of the exceptions to the general rule requiring witnesses to state facts and excluding their mere opinions. It is not claimed that Nash possessed any scientific knowledge on the subject as to which his opinion was given, and he did not testify as an expert. As a non-expert, in order to make his opinion competent, it was essential not only that it should relate to a matter with which he was specially acquainted, but the subject matter must have been such as could not be otherwise sufficiently described. For if it was practicable for him to detail to the jury the facts within his knowledge as fully and perfectly as he had observed them, then the jury should have been left free to draw their own conclusion, and his opinion was inadmissible. 1 Whart. Ev. sec. 512; 1 Greenleaf, Ev. sec. 440, note *a*, p. 535; *Bennett* v. *Meehan*, 83 Ind. 566; *Commonwealth* v. *Sturtivant*, 117 Mass. 122; *Fort* v. *State*, 52 Ark. 180; 1 Bishop, Cr. Pro. sec. 1178; *Brown* v. *State*, 55 Ark. 599; *Railway Co.* v. *Bruce*, 55 Ark. 70; *Railroad Co.* v. *Schultz*, 43 Ohio St. 270, and cases cited; *Fraser* v. *Tupper*, 29 Vt. 409; *Crane* v. *Northfield*, 33 Vt. 124. The case of the *Gulf, Colorado & Santa Fe Railway* v. *Locker*, 14 S. W. Rep. 611, cited to support the admission of the opinion in question, follows a ruling of the same court in *International, etc., R. Co.* v. *Klaus*, 64 Texas, 294; and the decision in the latter case appears to rest mainly on the authority of *Porter* v. *Mfg. Co.* 17 Conn. 249. In the Connecticut case it was held that the opinion of a non-expert as to the sufficiency of a dam to withstand the pressure of the waters of a certain stream was properly received, in connection with the facts on which it was based. The court did not, however, uphold

the competency of the opinion on the ground merely that the witness had enjoyed special opportunities for observing the dam and the stream across which it was erected; but it was announced, as an additional reason for the decision, that the facts on which the witness' opinion was founded could not be definitely stated to the jury. And we find nothing in the opinions of the Supreme Court of Texas in the cases referred to, which indicates that the facts in those cases were not also regarded as of such nature that they could not be reproduced before the jury precisely as they appeared to the witness.

Nash had resided on Red River for many years, and his observation of its overflows was probably such as to make any opinion thus formed admissible if the facts observed could not themselves be perfectly described. But we do not see from the record that such description was impracticable. Having stated that since the building of the railroad the overflows have been more frequent and higher than they were previous to the road's construction, he was asked to state the cause of this difference, and answered that it was caused, in his judgment, by the embankment on which the track of the road is laid. This was the opinion objected to; and, as it appears in the record, it would seem to be founded alone on the increased frequency and depth of the overflow. It is clear that these two facts could have been placed before the jury without the least difficulty. It was only necessary to mention them. The witness, however, in the course of his further testimony, stated some additional facts, which, it is fair to presume, were not without influence in forming his opinion. The more important of the facts thus subsequently stated were that before the road was built the plaintiff's lands were overflowed from the front, or towards the river, and that now they are first covered with waters coming from the rear in the direction of the railroad; that since the construction of

the road the current of the water above is not so swift as formerly; and that, during the overflow which destroyed the crops, the water was four or five feet higher on the north side of the road than it was on the south side. These additional facts could also be detailed in such manner as to enable the jury to understand their force and bearing as fully as the witness did; and they did not cure the previous error of admitting his opinion. *Railroad Co.* v. *Schultz*, 43 Ohio St. 270; *Fraser* v. *Tupper*, 29 Vt. 409.

3. Damages for destruction of crop.

3. The court's charge properly limited the damages recoverable by the plaintiff to the actual value of the crops destroyed, with interest thereon from the date of the injury at the rate of six per cent. per annum. *Byrne* v. *Railway Co.* 38 Minn. 213; *Folsom* v. *Log Driving Co.* 41 Wis. 602; *Lommeland* v. *Ry. Co.* 35 Minn. 412; *Sabine R. Co.* v. *Smith*, 73 Texas, 1. But, under the circumstances of the case, a wrong standard of value was given to the jury by permitting the plaintiff to prove the average yield of his lands and the market value of similar crops sold after their maturity the year his crops were planted. 3 Sedg. Dam. sec. 937. The extent of his loss is to be measured by the value of the crops in the condition they were in at the time of their destruction. *Richardson* v. *Northrup*, 66 Barb. 85. And the method proper to be observed in ascertaining their value at that time cannot be better stated than by quoting the language used by Mr. Sutherland in treating of the measure of damages applicable to the class of cases to which this belongs: "The jury," he says, "may estimate, with the aid of testimony, the value of the crop at the time of its destruction, in view of all the circumstances existing at that time, as well as at any time before the trial, favoring or rendering doubtful the conclusion that it would attain to a more valuable condition, and all the hazards and expenses incident to the process of supposed

growth or appreciation." 1 Suth. Dam. 193. The principle of the text quoted is exemplified by the case of *Parsons* v. *Pettingell*, 11 Allen, 507. That was an action to recover damages for the destruction of the plaintiff's house and furniture, destroyed for the purpose of staying a conflagration; and it was held that, in estimating the damages sustained, the jury should consider the situation of the property and the chance of its being saved, although it was not on fire, and should determine its value with reference to the peril to which it was exposed. And so in this case we think a just valuation of the plaintiff's crops cannot be made without considering their condition and the circumstances in which they were placed. They consisted of corn and cotton at such stage in their growth that the cotton could have had only a prospective value, and the corn no other value unless it could have been used as fodder. The water which destroyed them was, as the plaintiff testified, backed on to his lands from the rear and passed over them into the river. But the evidence shows that the overflow became general, and that, a few days after the loss of the crops, the river was out of its banks in front of the plaintiff's farm and covered it with water flowing directly to it. It thus appears that the destruction of the crops by the general overflow was impending, if not inevitable, at the time the water backed upon them. And yet it is evident, from the damages assessed, that the jury have valued the crops as if they might have matured but for the wrong ascribed to the railway. We think the proof did not warrant an assessment so large, and that the court erred in refusing to set aside the verdict.

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

ROBSON *v.* HOUGH.

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Opinion delivered November 26, 1892.

1. *Homestead—Tenancy in common.*

A tenancy in common will support a homestead exemption, without exclusive possession by the tenant who claims the privilege.

2. *Homestead—When right attaches.*

When real estate descends to several persons as tenants in common, one of whom is married and residing on the land at the ancestor's death, intending to continue his residence upon it when the descent is cast, the privilege of the homestead attaches to his interest in the land the instant the estate vests in him, and precludes his creditor from acquiring a judgment or execution lien upon the land.

3. *Homestead—Leasehold estate.*

A leasehold estate is sufficient to support a homestead exemption.

4. *Homestead—Abandonment.*

Where the claimant testified that he had moved his family from the homestead temporarily, in order to be near a saw mill at which he expected to and did obtain work, a finding that he had not abandoned the homestead is sustained by the evidence.

Appeal from Phillips Circuit Court.
GRANT GREEN, JR., Judge.

Robson, Block & Co. obtained judgment in 1888 against N. A. Hough, and in 1891 procured an execution to be levied upon his undivided interest, as one of the four heirs of his mother, in certain lands which had descended from her. He filed a schedule, claiming that, being the head of a family, the land constituted his homestead. The court found that the land was exempt, and awarded a *supersedeas* to stay the execution. The sufficiency of the evidence to sustain the finding is the only question raised on the appeal.

Hough testified as follows:

"I am a married man and head of a family, and resident of the State of Arkansas and County of Phillips,

and was married and resided as aforesaid at the time of the rendition of the judgment herein. My home is on the land in controversy, and was at the time the judgment was rendered, and is now and has been ever since that time. My mother died February 13th, 1890, and I inherited the land levied on from her. During the early part of the year 1890, I had rented a portion of the place from my mother. There was a mortgage on the place due Francis Smith, Caldwell & Co., given by my mother, and after her death, the heirs, who were all of age, agreed that the proceeds of the place should go to paying off the mortgage, and I undertook to carry out the agreement and pay the same amount that I had agreed to pay my mother before her death. I paid to my brother, L. Hough, $130 at one time, which amount was sent by him to Smith, Caldwell & Co. I afterwards paid $75. The land in controversy was all the land my mother owned at her death. My home was on the land in controversy when the judgment was rendered, and it was my home when the execution was issued and levied, and my home is there now. The land is worked by tenants. Some time in the early part of 1890 I moved my family temporarily to Poplar Grove, which is about two miles from the land, in order that I might be more convenient to a saw mill, at which I expected to and did get work. I rented the place for $300 from my mother for the year 1890, and was living on it at the time of her death." No other testimony was introduced.

Palmer & Nicholls for appellants.

1. Appellee could not be a tenant and own the land at the same time. No step had even been taken to have partition of the land, and his share set apart to him. At the time of the death of his mother, he was a tenant, and on her death the lien of the judgment attached, and was prior to the subsequent claim of homestead. 43 Ark. 107.

2. Appellee, being a tenant in common, could not claim as a homestead his undivided interest in the lands. 27 Ark. 648.

3. The character of a homestead must have been impressed upon the land prior to the attaching of the lien of the judgment. 33 Ark. 399; 31 *id.* 145; 41 *id.* 94; 29 *id.* 280; 46 *id.* 43; 51 *id.* 84; 42 *id.* 175.

Quarles & Moore for appellee.

1. The law does not require that the appellee shall before trial take steps to have partition made and his interest set apart to him. 27 Ark. 648; Acts 1887, page 90; 39 Ark. 301; 35 *id.* 49; 41 *id.* 94; 54 *id.* 13. A tenancy in common is sufficient to support a claim for homestead. 41 Ark. 95; 54 *id.* 13.

2. Temporary absence does not defeat a homestead claim. 41 Ark. 309; 37 *id.* 283; 52 *id.* 91.

1. Homestead in estate in common.

COCKRILL, C. J. An estate in common with others is sufficient to support a homestead exemption, without exclusive possession by the tenant who claims the privilege. *Ward* v. *Mayfield*, 41 Ark. 94; *Thompson* v. *King*, 54 *id.* 9.

2. When right of homestead attaches.

When real estate decends to several persons as tenants in common, one of whom is married and residing on the land with his family at the ancestor's death, intending to continue his residence upon it as a home when the decent is cast, the privilege of the homestead attaches to his interest in the land the instant the estate vests in him, and precludes his creditor from acquiring a judgment or execution lien upon the land, to be asserted as superior to the homestead right.

There is no complaint of the judgment, except that it is not warranted by the proof. The general finding in favor of the appellee is as effective as a special finding of all the facts stated above would have been. The evidence warranted such a special finding. The same presumptions are indulged as though the finding were

the verdict of a jury. *Jones* v. *Glidewell*, 53 Ark. 161.

3. Homestead in leasehold estate.

The appellee was the tenant of the ancestor when the latter died, and that fact is relied upon to cut off the homestead exemption. It tends to strengthen the right. A leasehold estate is sufficient to support the exemption. The testimony warranted the finding that the appellee had established his home on the land under that estate. The addition to his estate which he acquired by inheritance did not make the place any the less his home or subject it to the judgment or execution lien. No interest of a debtor in his homestead can be subjected to the creditor's judgment.

4. As to abandonment of homestead.

The question as to the debtor's abandonment of his homestead was submitted to the court and determined against the creditors on the testimony. The finding on that score also is sustained by the evidence.

Affirm.

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BRITTINUM v. JONES.

Opinion delivered November 26, 1892.

1. *Co-tenancy—Lien for rents.*

A tenant in common has no lien on the estate held in common for his share of the rents collected by his co-tenant.

2. *Co-tenancy—Accounting of rents.*

A tenant in common may maintain an action against the heirs of his co-tenant for an accounting of rents collected by them after the co-tenant's death, but not of the rents collected by such co-tenant.

Appeal from Monroe Circuit Court in Chancery.
MATTHEW T. SANDERS, Judge.

U. M. & G. B. Rose and *H. A. Parker* for appellants.

1. The court below was evidently governed by *Hamby* v. *Wall*, 48 Ark. 135, which *was* the common law; but it is changed by statute. Gould's Dig. p. 95—"Accounts." This was omitted from Mansfield's Digest, though it has never been repealed. The statute is a re-enactment of the statute of Anne, and its meaning is plain. Freeman on Co-Ten. sec. 273. But in this case Brittinum had given Jones a power of attorney to collect his part of the rents. *Ib.* sec. 268; 33 Vt. 593; 80 Am. Dec. 653; 4 Kent, Com. 370. Nor do we see how *Hamby* v. *Wall* can be reconciled with 31 Ark. 345 and 40 *id.* 155.

2. It is urged that the claim for rents should have been made against the administrator of Jones. To this it may be answered: This order was made because the demand was not verified before suit was brought. But the first complaint filed was sworn to. The administrator was made defendant, but the court ordered the suit dismissed as to him. Everything relating to the co-tenancy was involved in the suit for partition; and as the court had jurisdiction of the cause, it should have proceeded to do complete justice. 23 Ark. 212; 14 *id.* 50; 42 *id.* 443; Freeman on Co-Ten. sec. 425; 1 Story, Eq. 656*b;* 16 Ark. 181.

3. The administrator was not a necessary party. 40 Ark. 433; Freeman on Co-Ten. sec. 454, 512.

4. As to limitation, Jones acted as agent of Brittinum, never repudiated the agency, and hence the statute never began to run. 8 Ark, 429; 25 Ark. 466. There was also a mutual account between the parties, and the statute begins to run from the date of the last item. Mansf. Dig. sec. 4492; 48 Ark. 426.

5. One tenant in common has a lien for rents due him. 39 Hun, 692; 4 Paige, 336; 60 Barb. 163, 180; 48 N. Y. 106, 124.

House & Cantrell for appellee.

1. The claim for rents received prior to the death of appellee's ancestor was a claim against his estate, and his heirs are not liable. Not having been probated against the estate of their ancestor, it is barred.

2. Appellants have already recovered judgment for the rents received since the death of the ancestor. A recovery for three years' rents next before the filing of the suit barred further suit. Mansf. Dig. secs. 2644, 2645, 2646; 2 Lans. (N. Y.) 283. Ejectment was the proper remedy. 40 Ark. 155.

3. The claim was barred by limitations. 66 Pa. St. 192.

4. The demand was not sworn to. Mansf. Dig. sec. 102. The administrator was not made a party. No legal demand was presented. Woerner's Law of Adm. sec. 386.

BATTLE, J. This is an action for partition of the lands which were originally owned and held in fee simple by Mills E. Brittinum and Reuben S. Jones as tenants in common, each one being the owner of one undivided half. While they held the land in this manner, Jones died in December, 1882, intestate, leaving the appellees his heirs surviving. After this Brittinum brought this action against the appellees for a partition of the lands and for an account of the rents and profits thereof received by Jones in his life-time and by his heirs after his death. During the pendency of the action Brittinum died and left a will by which he devised his interest in the lands to appellants. The action was then revived in their names and in the name of his administrator, and they filed a substituted complaint in which they alleged, among other things, that Reuben S. Jones took the entire control of the lands and collected the rents and profits arising therefrom from the year 1872 to 1882 inclusive, and failed to account to Mills E. for his part thereof; and that

appellees, since the death of Jones, have received the rents and profits.

Appellees answered and averred that Reuben S. collected the rents of the lands for the years 1873 to 1881 inclusive, and accounted for the same to Mills E.; and denied that they received any rents belonging to Mills E. or appellants which have not been lawfully accounted for and paid; and asked that the lands be divided.

There was no controversy about the partition, but there was as to the rents and profits. The circuit court ordered that the partition be made, but refused to require the appellees to account.

1. Co-tenant has no lien for rents.

Appellants contend that they should have been held to account for the rents received by their ancestor. But this is not true, unless appellants held a lien on the land for the part of the rents collected by Reuben S. Jones which belonged to Mills E. Brittinum. In *Clark* v. *Hershy*, 52 Ark. 473, 492, it was held that one tenant in common has no lien for his share of the rents collected by his co-tenant. This being true, appellants have none, and appellees can not be held personally liable for any part of the rents collected by their ancestor. *Turner* v. *Risor*, 54 Ark. 33. The indebtedness of Reuben S. Jones to Mills E. Brittinum for the rents collected, if any, formed a part of the estate of Mills E., when he died, and became payable to his executor or administrator, and the estate of Reuben S., by proceedings against his administrator, was liable for the same in the same manner it was for the claims against it which were not secured by any lien. The result is, the administrator of Reuben S. Jones not being a party to this action, no account can be taken, in this case, of the rents and profits collected by his intestate.

2. Co-tenant must account for rents collected.

But appellees should have been held to account for one-half of the rents collected by them since the death of their ancestor. It was alleged in the complaint, and was

not denied in their answer, that they had collected the rents since the death of Reuben S. Jones. But they say that they have, in another action, accounted for and paid the same. The collection stands admitted. But neither the pleadings nor the evidence adduced at the hearing, as far as stated in the abstract, show the amount. The burden of proving the payment was upon appellees, and they failed to make the proof.

The decree of the circuit court is, therefore, affirmed as to the partition, and is reversed as to so much of the same as relieves the appellees of the duty of accounting for the rents collected by them; and the cause is remanded with instructions to ascertain whether the liability of appellees to Mills E. Brittinum or appellants for rents of said lands received by them, and the extent thereof, have been adjudicated and determined by a court of competent jurisdiction, in another action, wherein Mills E. Brittinum and appellees or appellants and appellees were parties and such rents were involved, and in the event it has been, to dismiss this action as to such rents; and in case it has not been, to ascertain how much rent has been collected by appellees, how much has been paid by them, to charge them with one-half of the amount collected, credit them with the amount paid, deduct the amount credited from the amount charged and render judgment against them for the remainder; and for the purpose of complying with these instructions, take proof, if necessary; and for other proceedings.

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SWEET v. DESHA LUMBER CO.

Opinion delivered November 26, 1892.

1. *Code pleading—Uncertainty reached by motion.*

   If a complaint states facts which show a cause of action in favor of plaintiffs, any defect in the manner of statement, rendering the complaint vague or uncertain, may be reached by motion to make the complaint more definite and certain, but not by demurrer.

2. *Statute of frauds—Contract not to be performed within one year.*

   A parol agreement on the part of defendant to place cars upon its track at plaintiffs' mill until such time as their business would justify defendant in building a switch at the mill, and then to build the switch and place cars upon it, the obligation to continue so long as plaintiffs should operate a mill on the line of defendant's road, is a contract which may be completed within one year, and is not within the statute of frauds requiring contracts "not to be performed within one year from the making thereof" to be made in writing.

Appeal from Desha Circuit Court.

JOHN M. ELLIOTT, Judge.

Sweet & Trippe brought suit against the Desha Lumber and Planing Company. A demurrer to the complaint was sustained. Plaintiffs have appealed. The complaint was substantially in the following language:

The plaintiffs state that in 1887 their wives and co-plaintiffs, Sallie E. Sweet and Lizzie T. Trippe, were the owners of lot 9, in block O, in the town of Arkansas City, Arkansas; that these plaintiffs had, with consent of the said Sallie E. Sweet and Lizzie T. Trippe, erected upon the said lot a large and commodious planing mill with steam boiler and machinery to do all kinds of work usually done in planing mills, said mill being located on a railroad where they could have cars of lumber loaded and unloaded; that the said plaintiffs, having established said planing mill prior to 1887, were doing a paying busi-

ness; that said defendant, owning the land adjoining the said lot and being desirous of purchasing said lot in order to complete a large plant for a saw mill, offered Mrs. Sweet and Mrs. Trippe $1000 for said lot, and further agreed verbally with these plaintiffs, if they (as a further consideration) moved to some other lot or lots located upon the defendant's railroad, it would at all times, where plaintiffs desired it, place cars at their mill until their business would justify it in putting a switch in for said plaintiffs.

Plaintiffs state that this was the moving consideration which induced them to give up the lot to the defendant and move their machinery to another location; that, at the time said Mrs. Sweet and Mrs. Trippe sold lot 9 to said defendant, they would not have consented to take the offer made by defendant, but for the verbal agreement of placing the cars as aforesaid, which verbal agreement was to be performed within twelve months, and that the said defendant did place cars at their mill, as by verbal contract. Plaintiffs state that, feeling sure that the defendant would fulfill its verbal agreement, they gave up the lot upon which their mill was located to defendant and purchased lots 1, 2, 3 and 4, in block D in Arkansas City, which lots are adjoining the railroad which belongs to said defendant, and at a very heavy expense erected a large building thereon, built platforms and offices, and placed their boiler, engines and machinery thereon, all of which is now in good working order, all at a very heavy outlay both of money and time; that they have purchased new machinery and placed it in said mill, all of which was done upon the faith and promise that defendant would faithfully carry out its promise in switching cars of lumber to and from the mill when plaintiffs so requested. Plaintiffs knew, at the time of the erection of the mill on lots 1, 2, 3 and 4 in block D, that they would have to rely upon the defendant to place

cars at the mill for them, but, believing the corporation to be composed of men who would carry out all contracts, built their mill. Plaintiffs would further state that defendant had partially kept this agreement up to the 25th of December, 1889, when the agent of said corporation notified plaintiffs that, after the first day of January, 1890, it would place no more cars at their mill for them, and since the said first day of January, 1890, defendant, although often requested so to do, has refused and still refuses to furnish and place cars as they agreed to do. Plaintiffs state that they had no other means of getting lumber to or from their mill except by wagon, which would entail such a heavy expense that they could not stand it, and they would be forced to tear down the mill and move it to some other more convenient place or close the mill business altogether. Plaintiffs say that, by virtue of the refusal of defendant to perform its contract in placing cars at their mill, as agreed to, and to place a switch at their mill, they have been damaged in the sum of $10,000 ; and they ask judgment for that amount.

The court sustained a demurrer to the complaint, and dismissed the suit. Plaintiffs have appealed.

Pindall & Rogers for appellants.

1. This case is not within the statute of frauds. There is nothing to show that the contract was not to be performed within the year. 54 Ark. 199 ; 72 Tex. 70 ; 118 N. Y. 586.

2. The contract has been fully performed by appellants. The appellee has received the consideration. To permit the corporation to interpose the statute would be to convert it into a statute of fraud, pure and simple. 40 Ark. 391 ; 55 *id.* 587 ; 49 *id.* 507.

James Murphy for appellee.

1. The verbal agreement falls within the sixth subdivision of sec. 3371 of Mansfield's Digest. 22 Hun (N.

Y.), 412; 11 East, 142; 10 Wis. 55; 15 Wend. 336; 46 Ark. 80.

2. The complaint is inconsistent and insufficient in law to constitute a cause of action.

1. Construction of pleading.

HEMINGWAY, J. Construing the complaint liberally, as the code provides, we think it may be said to state facts showing that a contract was made and broken by defendant, and to contain an allegation that plaintiffs were damaged by the breach in the sum of $10,000. From those facts springs a right of action maintainable in the circuit court; if there was any defect in the manner of stating them, rendering the complaint vague or uncertain, it could have been reached by motion to make more definite and certain, but not by demurrer. *Bushey* v. *Reynolds*, 31 Ark. 657; *Bush* v. *Cella*, 52 Ark. 378.

2. Agreement not to be performed within one year.

It is insisted that the complaint was founded upon a contract that was not to be performed within one year, and was, therefore, void because not in writing. Mansf. Dig. sec. 3371, sub. 5. It becomes necessary, in determining this question, to ascertain what the contract, as set out in the complaint, is. Turning to the complaint, we find that the allegations are not direct or perspicuous, and can well appreciate the difficulties, growing out of this fact, that the learned judge below encountered in his efforts to pass upon the demurrer. But, as we understand the complaint, the contract on part of the defendant was, that it would place cars upon its track at plaintiffs' mill for their use, until such time as their business would justify defendant in building a switch at said mill, and that it would then build the switch and place cars upon it; the obligation to continue so long as plaintiffs should operate a mill on the line of defendant's road in Arkansas City.

The proper construction of the statute relied upon was carefully considered by this court in the case of the *Railway Co.* v. *Whitley*, 54 Ark. 199; as our conclusions

are recorded in the opinion therein delivered, and we have seen no reason to change or modify them, it is unnecessary to again enter upon any review of the authorities or discussion of the matter.

We are unable to say, upon the statement of the contract as we understand it to be made in the complaint, that it "was not to be performed" in one year; its duration might extend further, but there was nothing in its terms to preclude the idea that it might within that time be fully executed, and there was no understanding or intention that it "was not to be performed." The obligation contemplated immediate service, and was to continue so long as plaintiffs operated a mill in Arkansas City on the line of defendant's road, and upon that event to terminate. It was entirely possible that within one year the plaintiffs would cease to operate it, and in that event the contract could have been completed within the year.

Reverse and remand, with directions to overrule the demurrer.

ROTH v. HOLLAND.

Opinion delivered November 26, 1892.

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Administration—Application to sell land—Laches.

Unnecessary delay for the period of more than seven years, on the part of the creditor, in procuring letters of administration to be issued upon the estate of his debtor is such laches as will defeat an application of the administrator to sell lands of the estate which had been in the possession of the deceased's heirs during that period of time.

APPEAL from White Circuit Court.

MATTHEW T. SANDERS, Judge.

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

The application to sell is barred. 39 Ark. 116; 67

Mo. 420; 2 Gill, 348; 23 Ark. 510; 18 Ala. 307; 14 Munf. 181; 41 Iowa, 255; 49 N. H. 295; 15 Mass. 58; 16 *id.* 178; 6 Johns. Ch. 387; 8 Greenl. 220; 16 Maine, 312; 49 Miss. 500; 4 Mich. 314–15; Woerner, Adm. p. 38 *et seq*; 55 Cal. 574; 44 Ill. 205; 23 *id.* 491; 18 *id.* 519; 7 Wheat. 60. Our court has followed the principle of these cases, that the application must be in reasonable time, but, unlike them, it has not declared any general definite rule as to what is reasonable. 37 Ark. 155; 46 *id.* 373; 47 *id.* 470. The delay and laches in this case are unreasonable.

Sanders & Watkins for appellee.

1. Rogers was guilty of no laches in the prosecution of his suit, or in the attempt to enforce the payment of his debt.

2. The application is not barred. 49 Ark. 248; 37 *id.* 159; 54 *id.* 66; 6 Halst. 56; 44 Ill. 203; 51 Ill. 308; Woerner, Adm. p. 1027. No limitation could run until an administrator was appointed. 51 Mo. 303; 33 Ark. 141; 38 *id.* 243.

HEMINGWAY, J. On the 1st day of July, 1887, John G. Holland, as administrator of the estate of Mary J. Watkins, deceased, presented his petition to the probate court for leave to sell a tract of land for the payment of debts. So far as the petition disclosed, there was but one claim against the estate—a judgment rendered by the circuit court of White county in favor of Thomas J. Rogers. As to it, the petition alleges that, on the 20th of January, 1870, Rogers presented to the administrator his account for the sum, including principal and interest, of $637.59; that the administrator refused to allow the account, but it was allowed, in full, by the probate court, and for $350.00 upon appeal to the circuit court; that, upon appeal to this court, the judgment was reversed and the case remanded, but that it was manifest by the opinion delivered that Rogers was entitled to

the allowance of $100.00 and interest from date of the account, and the parties agreed that a judgment for that amount should be rendered, which resulted in a judgment for $262.00 rendered by the circuit court on the 24th of January, 1884. The petition contained averments relied upon to excuse the subsequent delay in applying to sell the land.

G. C. Roth, claiming the land by mesne conveyances from the heirs at law of Mrs. Watkins, appeared in the probate court in resistance of the petition, and filed his answer thereto. The answer contained the following among other allegations: That Mrs. Watkins died in January, 1858, intestate; that the lands passed to the possession of her heirs, and had been ever since in the exclusive possession of the heirs and those claiming under them; that, before the death of Mrs. Watkins, Rogers brought suit upon the account against her and her husband, and recovered a judgment thereon in the circuit court; that they took an appeal to the Supreme Court, pending which she died; that he permitted the cause against her to abate, and prosecuted it against Watkins only, and upon a trial in the Supreme Court the judgment was reversed, and the cause remanded to the circuit court; that he prosecuted the action against Watkins to a final determination in the circuit court, and it was therein adjudged in November, 1869, that he recover nothing of Watkins; that thereupon, on the 26th of January, 1870, he presented his claim to the administrator of Mrs. Watkins, who refused to allow it, and has since prosecuted it as is alleged in the petition.

The averments of the answer show a connected chain of title from the heirs of Mrs. Watkins to Roth, and that he and those under whom he claims had been in the continuous possession of the land after her death for more than twenty-five years before the application was made.

He pleaded the seven years statute of limitations, and the laches of the administrator, in bar of the petition.

The administrator demurred to the answer, the demurrer was sustained, and the prayer of the petition granted; upon appeal to the circuit court, the same action was taken, and Roth has appealed to this court.

In the view that we have taken of the case, it has not seemed necessary to consider or pass upon the sufficiency of the matter relied upon to excuse the delay in proceeding against the land after the judgment of allowance; but we have assumed that the excuse was sufficient, and considered the case just as though the application to sell had been made immediately after the allowance. The question then is, whether the right to sell the land is barred by the continuous non-action of the creditor and possession of the heir from the death of Mrs. Watkins in January, 1858, to the presentment of the claim to the administrator in January, 1870.

The effect of the delay of the administrator after his appointment has been considered by this court in former cases; and in some of them the delay shown was held sufficient, and in others insufficient, to defeat the power. Upon their authority it may be taken as settled that the right to sell will be lost by the "gross laches" or "unreasonable delay" of the administrator in applying for leave. *Mays* v. *Rogers*, 37 Ark. 155; *Brown* v. *Hanauer*, 48 Ark. 277; *Stewart* v. *Smiley*, 46 Ark. 373; *Graves* v. *Pinchback*, 47 Ark. 471.

But we have no case in which the administrator applied for leave in apt time after his appointment, and the contention was that the power was lost by delay in taking out letters. The question is, whether such delay has the same effect to defeat the power of sale, as the delay of the administrator to apply for leave to sell.

The reason upon which the limitation is placed in the latter class of cases is, that the heirs have a right to

the indisputable possession of their inheritance as early as a just regard for creditors will permit, which precludes any unreasonable delay on part of the creditors in the assertion of their rights. 2 Woerner, Am. Law. of Adm'n, sec. 465.

But delay on part of creditors alike postpones the unconditional enjoyment of the heir and deters him from improving or selling his inheritance, whether it relates to the procuring of letters or of an order of sale; and if it is sufficient to bar the power to sell in one case, for exactly the same reason it should be in the other. Delay in taking out letters, and delay in applying to sell after they are taken out, alike keep alive uncertainty in the tenure of the heir, and are alike due to the non-action of the creditor. For, although letters are issued upon application of the administrator, it is within the power of creditors to compel administration after thirty days from the debtor's death; and if it is delayed, it is as much due to them as is the delay in applying for leave to sell. Our conclusion therefore is, that the right to sell is lost by delay in administering, whenever a like delay after administering, in proceedings to sell, would forfeit it. *Unknown Heirs of Langworthy* v. *Baker*, 23 Ill. 491; *Ricard* v. *Williams*, 7 Wheat. 116.

This leads us to consider whether the right to sell was lost by delay extending from January, 1858, when Mrs. Watkins died, until January, 1870, when the first steps looking to a sale were taken. Although the decisions of this court establish the rule that the right to sell is lost by "gross laches" or "unreasonable delay," they do not announce any uniform rule for determining what constitutes such unreasonable delay or gross laches. In the case of *Mays* v. *Rogers*, 37 Ark. *supra*, it was held that unexplained delay for ten years was unreasonable, and in later cases similar rulings have been made where the delay was longer. What considerations influenced

the ruling that ten years was too long to delay, or by what analogies the question of limitation could be decided, is not indicated. If ten years is too long, why is not seven? and what affords the reason for a distinction? Courts in considering what delay would, and what would not, bar the right, have usually applied the limitation prescribed by some statute in which it discovered analogies that were deemed sufficient to make it applicable. Thus, in some cases the statute limiting the time for presenting claims against the estates of decedents has been thought to furnish a rule; while in others the statute limiting the lien of judgments has been looked to; and in others that limiting the right of entry upon land. But it is not held that any statute can be taken to furnish a rule of limitation inflexibly controlling in all cases, and the statement is often found that what delay is reasonable must be determined by the court in its sound discretion in each case. Such is the language of this court in the case of *Mays* v. *Rogers*, 37 Ark. *supra*.

The rule, stated thus broadly, is in a state of uncertainty which must needs perplex creditors and involve titles. To relieve it entirely of uncertainty, we think could not be done or attempted with propriety; but we think a statement may be made, as applicable when there are no special circumstances to explain and palliate the delay, which does not leave it absolutely subject to the peculiar views of the judge who happens to try each case. It is expressly provided by statute that no person, except certain persons laboring under disability, shall maintain any suit in law or equity for lands, but within seven years next after his right accrued. Mansf. Dig. sec. 4471; and where the occupant holds under a tax sale or a judicial sale, a shorter time is prescribed by statute for the assertion of adverse claims. Neither of these statutes, nor any other statute, embraces within its purview the administrator's authority to sell lands; but

taken together they show that in contemplation of law seven years is deemed a sufficient time for the assertion of title to land, and that it is the policy of the law that title cannot be asserted, or the right of the occupant assailed, after a delay beyond that time. So where the occupant is a trespasser, without any other right than that by possession, and the claimant has a perfect title in law and equity, the delay of the latter to assert this title for more than seven years is deemed so unreasonable and so hostile to the public good, that the statute interposes a bar; and certainly where the occupant is rightfully in possession, and entitled to acquire an indisputable right after creditors have enjoyed a reasonable opportunity to enforce their demands, a similar delay of the latter could not be held more reasonable or more promotive of the public good. It would certainly disclose a queer and unfortunate inconsistency in the law, if any delay which legislation has stamped as unreasonable in the one class of cases should be adjudged by the courts to be reasonable in the other class. The courts should not so adjudge the question of reasonableness as to produce such inconsistency.

Whether there is a shorter statute of limitation applicable to some other right, whose analogies would make it operative in this case we have not determined; but we think it the manifest policy of our laws, as declared by the statutes above cited, that a delay for more than seven years is not reasonable, and therefore defeats the right of a creditor, or an administrator in his behalf, unless there is something to excuse the delay. *Ricard* v. *Williams*, 7 Wheat. 119.

In this case it was nearly twelve years from the time when the creditor might have compelled administration until he took the first step toward charging the estate. This included the time covered by the war, when delay is held to have been excusable; but if it be excluded,

there is left a term of more than seven years during which the creditor might have compelled administration, presented his claim for allowance and applied for a sale of the land. If he had been the absolute owner of the land, and it had been occupied for that time by one without right, his delay would have barred his right of recovery; because it is deemed so unreasonable and so against public policy that a statute was enacted to effect a bar. If it be so unreasonable in the contemplation of law, as to lead to the enactment of a statute justifying the divestiture of a perfect title, it must be held so unreasonable as to bar an inferior right, which the law requires to be asserted in a reasonable time. As the right to proceed against the estate of Mrs. Watkins was always available, the fact that the creditor was seeking to make his money from her husband is no excuse for the delay.

We think the answer set up facts sufficient to defeat the application, and that the demurrer to it should have been overruled.

Reverse and remand.

APPERSON v. FARRELL.

Opinion delivered November 26, 1892.

Mechanic's lien—Priority over mortgage.

Under Mansf. Dig. sec. 4408, which provides that a mechanic's lien upon a building, erection or other improvement "shall be preferred to all other liens and incumbrances attached to or upon such building, erection or other improvement, and to the land on which the same is situated, made subsequent to the commencement of such building, erection or other improvement," a lien for work done on a building is superior to the lien of a mortgage given and recorded before the particular work was begun but after the building was commenced.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

Farrell brought suit against the Elite Lumber Co. to enforce a mechanic's lien upon a saw mill, and made Miller, appellant's intestate, party to the suit because he held a mortgage on the same property. Judgment was rendered in the lower court for the plaintiff. The facts are stated in the opinion of the court.

Eben W. Kimball for appellant.

The mortgage lien of Miller is superior to the lien of Farrell. Secs. 4410–11, Mansf. Dig.; 32 Ark. 59. There is no repugnancy between these sections and sec. 4408. They may well stand together, and have been on our statute books, and have been digested for years, and have been construed by our courts.

Auten & Moss for appellee.

The lien of a mechanic dates from the *commencement of the building*. Mansf. Dig. sec. 4408; 2 S. & R. (Pa.), 138; 44 Iowa, 72; 32 Wis. 362; 18 Wall. (U. S.), 659; Phillips on Mech. Liens, sec. 226; 4 Dillon, 575. Secs. 4410–11 are from the act of 1843, and are repealed by the act of 1873, from which sec. 4408 is taken. This was a new law, and covered the entire ground, and is the latest expression of the legislative will, and must govern. 10 Ark. 590; 31 *id.* 19; 43 *id.* 426; 41 *id.* 149; 33 Mo. App. 509.

HUGHES, J. This is an appeal from a judgment holding that the lien of the appellee for an amount due him for work done by him as a mechanic is superior to the lien of a mortgage in favor of appellant's intestate, given and recorded, and conveying the building upon which the appellee did the work, and the lot upon which it was situated. The mortgage was recorded before the work was commenced, for which the appellee claims a lien, but after the building was commenced.

The case was tried by the court upon the following agreed statement of facts: "The facts are that the Elite (Lumber) Company commenced, about June 1st, 1890, the erection of a mill in Argenta; that the appellee performed work on this mill till about October 1st, 1890, for all of which he was fully paid by the Elite (Lumber) Company; that, about October 1st, 1890, he left off work on the mill and left the State, and went North to put up some other mill, and returned about January 1st, 1891, and worked more or less on this mill until about the 19th of February, 1891, his wages amounting to some $70; that the Elite (Lumber) Company then failed, and did not pay these last earned wages, for which Farrell now claims this lien; that the Elite Lumber Company, on the 12th day of July, 1890, gave Miller a mortgage on this mill property to secure the payment of $5000 borrowed by the company of Miller, which mortgage was duly recorded on the 14th day of July, 1890, and still subsists. All the work for which a lien is claimed was done nearly six months after the mortgage was recorded."

Section 4402 of Mansfield's Digest provides that "every mechanic, builder, artisan, workman, laborer or other person who shall do or perform any work or labor upon or furnish any materials, machinery or fixtures for any building, erection or other improvement upon land, etc., under or by virtue of any contract, express or implied, with the owner or proprietor thereof," etc., "shall have for his work or labor done," etc., "a lien upon such building, erection or improvement, and upon the land belonging to such owner or proprietor on which the same is situated, to secure the payment of such work or labor done."

Mansfield's Digest, sec. 4408, reads: "Liens under this act shall be preferred to all other liens and incumbrances attached to or upon such building, erection or other improvement, and to the land on which the same is

situated, made subsequent to the commencement of such building, erection or other improvement." This section is the same as section 7 of the act of 1873, the 20th section of which repeals all acts or parts of acts in conflict with it. Section 4408, being the latest expression of legislative intent upon the subject, and being apparently in irreconcilable conflict with section 4410, taken from the act of 1843, must prevail. Section 4410 gave the laborer or mechanic a lien from the time his work was commenced, and not from the time the building was commenced. For cases construing similar statutes, see *American Fire Ins. Co.* v. *Pringle*, 2 Serg. & R. (Pa.) 138; *Neilson* v. *Eastern Ry. Co.* 44 Ia. 72; *Davis* v. *Bilsand*, 18 Wall. 659.

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sale for taxes of 1883 void where assessment list filed June 20, 1883. *Watson* v. *Campbell*, 184.

tenant in common may, as against stranger, acquire co-tenant's title. *Burgett* v. *Williford*, 187.

bill against Land Commissioner to redeem overdue tax land held insufficient for want of tender of costs. *Muskegon Lumber Co.* v. *Myers*, 199.

bath-houses and leasehold estate on U. S. Reservation at Hot Springs taxable. Ex parte *Gaines*, 227.

loss of assessment roll will not defeat tax-title—deed itself is evidence of title. *Joyner* v. *Harrison*, 276.

assessment in Little River county for 1867 considered. *Ib.*

land forfeited to State not liable to. *Ib.*

school buildings not subject to assessment for local improvement. *Board of Improvement* v. *School District*, 354.

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presumption that public property was not to be taxed. *Ib.*

overdue tax sale void when decree included taxes for years not embraced in warning order. *Elsey* v. *Falconer*, 419.

purchaser at tax sale acquires standing trees. *Nicklase* v. *Morrison*, 553.

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TIMBER:
purchaser at tax sale acquires all standing trees. *Nicklase* v. *Morrison*, 553.
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