9

ARKANSAS REPORTS

VOL. 58.

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

JUNE, 1893—MARCH, 1894

THOMAS DWIGHT CRAWFORD,
REPORTER.

LITTLE ROCK, ARKANSAS:
PRESS OF
GAZETTE PUBLISHING COMPANY,
SUCCESSORS TO ARKANSAS LITHOGRAPH & PRINTING CO.
1894.

Rec'd Nov. 26, 1894.

PRINTED AND BOUND BY
GAZETTE PUBLISHING COMPANY,
SUCCESSORS TO ARKANSAS LITHOGRAPH & PRINTING CO.
LITTLE ROCK, ARKANSAS.

JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME.

HENRY G. BUNN,[1] - - - - CHIEF JUSTICE.

BURRILL B. BATTLE,
SIMON P. HUGHES,
WILLIAM W. MANSFIELD,
RICHARD H. POWELL,[2]
CARROLL D. WOOD,[3]
} ASSOCIATE JUSTICES.

---

1. Appointed by the Governor, May 1, 1893, to fill the vacancy, pending an election, caused by the resignation of Chief Justice Cockrill; elected Sept. 2, 1893, and commissioned Sept. 19, 1893.
2. Appointed by the Governor, May 19, 1893, to fill the vacancy, pending an election, caused by the resignation of Judge Hemingway.
3. Elected Sept. 2, 1893, to fill vacancy caused by the resignation of Judge Hemingway, and commissioned Sept. 19, 1893.

RULE 2

As amended by the Supreme Court, February 24, 1894.[1]

Motions to affirm judgments in delay cases must be accompanied by statements from the record of all facts necessary to show that the appeal or writ of error is prosecuted for delay merely, and show that appellee has complied with section 1306 of Mansfield's Digest. Such motions will be called for submission on a day specified by the court; and the appellant will have until that day in which to file a response, accompanied by brief.

---

1. See Rules of the Supreme Court, 44 Arkansas, 9.

CASES REPORTED.

A

PAGE

Aikin *v.* State 544
Altheimer (Western Assurance Co. *v.*) . . . 565
Ayers (Baker *v.*) . . . 524

B

Baker *v.* Ayers . . . 524
Baker *v.* State 513
Barry (Railroad Co. *v.*) . 198
Bassham *v.* Railway Co. 399
Bland *v.* Fleeman . . . 84
Bloyd *v.* Railway Co. . 66
Boles *v.* State 35
Boyd (McMurray *v.*) . 504
Bransford (Buck *v.*) . . 289
Briney (Fordyce *v.*) . . 206
Brown *v.* Wright . . . 20
Buck *v.* Bransford . . 289
Burks *v.* Goodbar . . 283
Byars (Railway Co. *v.*) . 108

C

Cain *v.* State 43
Cantwell *v.* Pacific Express Co. 487
Carpenter *v.* Ellenbrook 134
Carpenter *v.* State . . 233
Childress (Moore *v.*) . . 510
Clark (Railway Co. *v.*) . 490

D

Denmark *v.* State . . 576
Desha (Phillips *v.*) . . 250
Dial (Railroad Co. *v.*) . 318
Duffer (Frizzell *v.*) . . 612

E

PAGE

Ellenbrook (Carpenter *v.*) 134
Evans *v.* State 47
Excelsior Mfg. Co. *v.* Owens 556

F

Fellner (W.U. Tel. Co. *v.*) 29
Felsenthal (Marquese *v.*) 293
Fitzgerald *v.* Saxton . . 494
Fleeman (Bland *v.*) . . 84
Fleener *v.* State . . . 98
Fordyce *v.* Briney . . . 206
Fordyce *v.* Nix . . . 136
Fort Smith Oil Co. *v.* Slover 168
Frizzell *v.* Duffer . . . 612
Fuller (Townsly-Myrick Dry Goods Co. *v.*) . . 181
Fuller *v.* Townsly-Myrick Dry Goods Co. . 314

G

Goodbar (Burks v.) . . 283
Goolsby (Railway Co. *v.*) 401

H

Hackett (Railway Co. *v.*) 381
Hammond (Railway Co. *v.*) 324
Hardage *v.* Stroope . . 303
Harrell (Railway Co. *v.*) 454
Helena *v.* Hornor . . . 151
Hempstead Co. *v.* McCollum 159

PAGE

Hempstead Co. *v.* Royston 113
Pilliard (Horton *v.*) . . 298
Holder *v.* State . . . 473
Hornor (Helena *v.*) . . 151
Horton *v.* Hilliard . . 298
Howard *v.* State . . . 229

J

James *v.* James . . . 157
Johnson *v.* Peck . . . 580
Johnson *v.* State . . . 57
Jones *v.* Malvern Lumber Co. 125
Jones *v.* State 390

L

Lawson (Sidway *v.*) . . 117
Leep *v.* Railway Co. . . 407
Little Rock *v.* Wright . 142

M

Mace *v.* State 79
Malvern Lumber Co. (Jones *v.*) 125
Marquese *v.* Felsenthal . 293
Martin *v.* State . . . 3
Matthews (Richardson *v.*) 484
Mayes (Railway Co. *v.*) . 397
McCollum (Hempstead Co. *v.*) 159
McCowan *v.* State . . 17
McDonnell *v.* State . . 242
McFadden *v.* Stark . . 7
McMurray *v.* Boyd . . 504
Moore *v.* Childress . . 510

N

Newport *v.* Railway Co. 270
Nix (Fordyce *v.*) . . . 136

O

PAGE

Owens (Excelsior Mfg. Co. *v.*) 556

P

Pacific Express Co. (Cantwell *v.*) . . . 487
Peck (Johnson *v.*) . . . 580
Perdue, *ex parte* . . . 285
Petty *v.* State 1
Phillips *v.* Desha . . . 250
Piggues (State *v.*) . . 132
Providence Life Ass. Soc. *v.* Reutlinger . . . 528

R

Railroad Co. *v.* Barry . 198
Railroad Co. *v.* Dial . . 318
Railway Co. *v.* Bassham 399
Railway Co. (Bloyd *v.*) . 66
Railway Co. *v.* Byars . 108
Railway Co. *v.* Clark . 490
Railway Co. *v.* Goolsby . 401
Railway Co. *v.* Hackett . 381
Railway Co. *v.* Hammond 324
Railway Co. *v.* Harrell . 454
Railway Co. (Leep *v.*) . 407
Railway Co. *v.* Mayes . 397
Railway Co. (Newport *v.*) 270
Railway Co. *v.* State . 39
Railway Co. *v.* Torrey . 217
Reutlinger (Providence Life Ass. Soc. *v.*) . . 528
Richardson *v.* Matthews 484
Rosewater *v.* Schwab Clothing Co. . . . 446
Royston (Hempstead Co. *v.*) 113

S

PAGE
Satterfield (Van Winkle *v.*) 617
Saxton (Fitzgerald *v.*) . 494
Schwab Clothing Co. (Rosewater *v.*) . . . 446
Shafer (Stinson *v.*) . . 110
Sidway *v.* Lawson . . 117
Slover (Ft. Smith Oil Co. *v.*) 168
Southern Ins. Co. *v.* White 277
Spearman *v.* Texarkana 348
Stark (McFadden *v.*) . 7
State (Aikin *v.*) . . . 544
State (Baker *v.*) . . . 513
State (Boles *v.*) . . . 35
State (Cain *v.*) 43
State (Carpenter *v.*) . . 233
State (Denmark *v.*) . . 576
State (Evans *v.*) . . . 47
State (Fleener *v.*) . . . 98
State (Holder *v.*) . . . 473
State (Howard *v.*) . . 229
State (Johnson *v.*) . . 57
State (Jones *v.*) . . . 390
State (Mace *v.*) . . . 79
State (Martin *v.*) . . . 3
State (McCowan *v.*) . . 17
State (McDonnell *v.*) . . 242
State (Petty *v.*) . . . 1
State *v.* Piggues . . . 132
State (Railway Co. *v.*) . 39
State (Vaughan *v.*) . . 353
State *v.* aWshmood . . 609
Stinson *v.* Shafer . . . 110
Stroope (Hardage *v.*) . 303

T

Tennant *v.* Watson . . 252
Texarkana (Spearman *v.*) 348
Torrey (Railway Co. *v.*) 217
Townsly - Myrick Dry Goods Co. *v.* Fuller . 181
Townsly - Myrick Dry Goods Co. (Fuller *v.*) . 314

V

Van Winkle *v.* Satterfield 617
Vaughan *v.* State . . 353

W

Washmood (State *v.*) . 609
Watson (Tennant *v.*) . 252
Western Assurance Co. *v.* Altheimer 565
Western Union Tel. Co. *v.* Fellner 29
White (Southern Ins. Co. *v.*) 277
Wilson *v.* Young . . . 593
Wright (Brown *v.*) . . 20
Wright (Little Rock *v.*) 142

Y

Young (Wilson *v.*) . . 593

CASES CITED.

A

PAGE

Adams *v.* Jett, 6 Bush, 585..... 486
Adler *v.* Conway Co. 42 Ark. 488.. 111
Adler *v.* State, 35 Ark. 530..... 231
Adler-Goldman Com. Co. *v.* Hathcock, 55 Ark. 579..... ... 453
Alabama Gold L. Ins. Co. *v.* Johnston, 80 Ala. 467..... 533
Albany N. Rd. Co. *v.* Brownell, 24 N. Y. 345..... 434
Allard *v.* Smith, 2 Met. 298..... 112
Allen *v.* McGaughey, 31 Ark. 252..260-8
Allen *v.* State, 26 Ark. 333 239
Almy *v.* Church, 26 Atl. 58..... 503
Alvis *v.* Oglesby, 81 Tenn. 172.... 96
Ames *v.* Sturtevant, 2 Allen, 583.. 186
Anderson *v.* Bennett, 19 Pac. 769.71, 74
Anderson *v.* Seamans, 49 Ark. 475 16
Andrews *v.* Simms, 33 Ark. 771... 452
Anthony *v.* Manlove, 53 Ark. 423.. 155
Apel *v.* Kelsey, 47 Ark. 413. 124
Apperson *v.* Burgett, 33 Ark. 328.. 260
Ark. Midland Ry. *v.* Canman, 52 Ark. 517.. .....131, 509
Atkinson *v.* Heer, 44 Ark. 174....596-7
Atkinson *v.* Ward, 47 Ark. 540.... 260
Atlanta, &c. Rd. Co. *v.* Newton, 85 Ga. 517 470
Aurora Fire Ins. Co. *v.* Eddy, 55 Ill. 213..... 575
Ayres *v.* Husted, 15 Conn. 517..... 293

B

Bagby *v.* Champ, 83 Ky. 13..... 486
Bagley *v.* Shoppach, 43 Ark. 375.. 601
Bailey *v.* Starke, 6 Ark. 192..... 587
Baker *v.* Scott, 62 Ill. 86..... 310
Baker *v.* State, 44 Ark. 134..... 611
Balt. & O. R. Co. *v.* Baugh, 149 U. S. 368 .....71, 74, 75
Balt. & O. R. Co. *v.* McKenzie, 81 Va. 71.. 204
Balt. & O. R. Co. *v.* Reynolds, 6 U. S. App. 75 75
Balt. & O. R. Co. *v.* Trustees, 91 U. S. 130..... 401
Balt. & O. Tel. Co. *v.* Lovejoy, 48 Ark. 301..... ... .601, 440
Bancroft *v.* Home Benefit Ass'n, 120 N. Y. 14..... 535
Bank *v.* Chillicothe, 7 Ohio, 411... 273
Banks *v.* Green, 35 Ark. 84..... 512
Barnett, *ex parte*, 51 Ark. 215 287
Barr *v.* Boyles, 96 Pa. St. 31 193
Barth *v.* State, 18 Conn. 432..... 3
Bartlett *v.* Bangor, 67 Me. 460 150

PAGE

Barton *v.* State, 29 Ark. 68..... 19
Bazemore *v.* Mullins, 52 Ark. 207. 292
Bean *v.* Loftus, 48 Ark. 371..... 186
Beard *v.* Dansby, 48 Ark. 183 122
Beard *v.* Wilson, 52 Ark. 290..... 444
Bearden *v.* State, 44 Ark. 331 520
Bell *v.* Welch, 38 Ark. 139..... 401
Benton *v.* State, 30 Ark. 343..... 362
Berlin *v.* Cantrell, 33 Ark. 611 450
Berry *v.* State, 31 O. St. 227..... 522
Bertine *v.* Varian, 1 Edw. Ch. 343. 590
Berton *v.* Anderson, 56 Ark. 470 .. 592
Bigham *v.* Brewer, 4 Sneed, 482... 232
Billings *v.* State, 52 Ark. 308..... 129
Blackburn *v.* Morton, 18 Ark. 392. 374
Blankenship *v.* State, 55 Ark. 244. 38
Bloyd *v.* Railway Co. 58 Ark. 66 .....213, 226, 337
Blunt *v.* Williams, 27 Ark. 374.... 374
Board Com'rs *v.* Aspen Mining Co. 32 Pac. 717..... 444
Bogert *v.* Phelps, 14 Wis. 89...185, 193
Boick *v.* Bissell, 45 N. W. 55 469
Borden *v.* Tillman, 39 Tex. 262.... 268
Borgman *v.* Railway Co. 41 Fed. 667.....71, 72, 75
Borschenious *v.* People, 41 Ill. 236 164
Boston Beer Co. *v.* Mass. 97 U. S. 25..... 418
Boyd *v.* Roane, 49 Ark. 397....187, 188
Boykin *v.* State, 34 Ark. 443..... 578
Braceville Coal Co. *v.* People, 35 N. E. 62..... 423
Brechbill *v.* Randall, 102 Ind. 528. 418
Bridendolph *v.* Zellers, 3 Md. 333. 232
Bright *v.* Bostick, 27 Ark. 55..... 139
Brill *v.* Eddy, 115 Mo. 596..... 387
Brinkley *v.* Willis, 22 Ark. 1.....94, 95
Bronson *v.* Schulten, 104 U. S. 416 231
Brown *v.* Agnew, 6 W. & S. 238... 589
Brown *v.* Brown, 8 Met. 576..... 573
Brown *v.* State, 28 Ark. 126..... 37
Bryan *v.* Acee, 27 Ga. 87..... 141
Budd *v.* New York, 143 U. S. 517.. 416
Bulliner *v.* People, 95 Ill. 406..... 365
Bullock *v.* Neal, 42 Ark. 278..... 111
Burke *v.* Snell, 42 Ark. 57..... 506
Burke *v.* State, 34 O. St. 79 102
Butcher, etc. Co. *v.* Crescent, etc. Co. 111 U. S. 746 418
Butterfield *v.* Walsh, 36 Io. 534.... 268
Byers *v.* Engles, 16 Ark. 543...257, 265

C

Caldwell *v.* N. J. Steamboat Co. 47 N. Y. 282..... 140

PAGE
Calkins *v.* State, 98 A. D. 121..104, 102
Camden *v.* Doremus, 3 How. 515... 374
Camp *v.* Bennett, 16 Wend. 48 232
Campbell *v.* N. E. L. Ins. Co. 98 Mass. 389 533
Candee *v.* Lord, 2 N. Y. 269..... 196
Carr *v.* State, 43 Ark. 104..... 179
Carroll *v.* Pryor, 38 Ark. 283..... 111
Carroll *v.* Saunders, 38 Ark. 216 .. 111
Carter *v.* Goad, 50 Ark. 155 28
Casteel *v.* Casteel, 38 Ark. 477 135
Catlett *v.* Railway Co. 57 Ark. 461. 399
Chaffin *v.* McFadden, 41 Ark. 42.. 42
Chamblee *v.* Stokes, 33 Ark. 543... 17
Chambliss *v.* Reppy, 54 Ark. 539.. 486
Chaplin *v.* Lee, 18 Neb. 440. 107
Chapman *v.* N. Y. etc. R. Co. 33 N. Y. 369..... 388
Chicago, etc. Rd. *v.* Lundstrum, 20 N. W. 198.....72, 74
Chicago, etc. Rd. *v.* May, 15 A. & E. R. Cas. 323.....71, 74, 78
Chicago, etc. Rd. *v.* McLallen, 84 Ill. 109..... 204
Chicago, etc. Rd. *v.* Ross, 112 U. S. 377.....71, 72, 203
Chicago, etc. Ry. *v.* Swanson, 49 Am. Rep. 718..... 74
Chisolm *v.* Chisolm's Ex'ors, 41 Ala. 327..... 303
Christensen *v.* Union Trunk Line, 32 Pac. 1018..... 469
Christian *v.* Ashley Co. 24 Ark. 142.....597-599
Clark *v.* Campbell, 2 Rawle, 215... 268
Clary *v.* State, 33 Ark. 561..... 37
Cleghorn *v.* N. Y. Cent. etc. R. Co. 56 N. Y. 47..... 378
Clem *v.* State, 42 Ind. 420..... 283
Cleveland *v.* Grand Trunk Ry. Co. 42 Vt. 449..... 469
Cleveland, etc. R. Co. *v.* Keary, 3 O. St. 201..... 72
Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151 616
Clough *v.* McDonald, 18 Kas. 114.. 14
Coates *v.* People, 72 Ill. 303..... 53
Cobb *v.* Cov. Mut. Ben. Ass. 153 Mass. 167.....280, 540
Coffin *v.* Anderson, 4 Blackf. 395.. 240
Cohn *v.* Hager, 30 Ark. 28..... .. 16
Cole *v.* Chicago, etc. R. Co. 71 Wis. 114..... .....177, 178
Colburn *v.* Woodworth, 31 Barb. 381..... 621
Cole *v.* Pennell, 2 Rand. 174..... 232
Commissioners *v.* Holyoke W. P. Co. 104 Mass. 451..... 433
Commonwealth *v.* Annis, 15 Gray, 199..... 3
Commonwealth *v.* Clifford, 8 Cush. 215.....37, 38
Commonwealth *v.* Eastern Rd, Co. 103 Mass. 254..... 434
Commonwealth *v.* Hays, 14 Gray, 62..... .....104, 106
Commonwealth *v.* Mason, 105 Mass. 163..... 522
Commonwealth *v.* Perry, 155 Mass. 117..... 423, 437
Commonwealth *v.* Riggs, 14 Gray, 378..... 3
Commonwealth *v.* Trimmer, 1 Mass. 476 19
Commonwealth *v.* Tuckerman, 10 Gray, 173..... ..... 104, 106
Commonwealth *v.* Ward, 2 Mass. 397..... 250
Conn. Gen. L. Ins. Co. *v.* McMurdy, 89 Pa. St. 363 543
Conn. Gen. L. Ins. Co. *v.* Union Trust Co. 112 U. S. 250... 535
Connor *v.* Abbott, 35 Ark. 365... . 486
Continental L. Ins. Co. *v.* Rogers, 119 Ill. 474 533
Cooke *v.* Curtis, 6 H. & J. 93 240
Coon *v.* Atwell, 46 N. H. 510 28
Cornish *v.* Dews, 18 Ark. 172 291
Costigan *v.* Rd. Co. 2 Denio, 659 .. 623
Cotton *v.* Marsh, 3 Wis. 221..... 616
Coughlin *v.* Haeussler, 50 Mo. 126.. 374
Cowdrey *v.* Cowdrey 131 Mass.. 186..... 302
Cowles *v.* Railroad Co. 84 N. C. 309. 71
Crawford *v.* Williams, 1 Swan, 341. 234
Creed *v.* People, 81 Ill. 565..... 365
Crispin *v.* Babbitt, 81 N. Y. 516 ... 226
Crockett *v.* Robinson, 46 N. H. 454. 310
Cross *v.* Fombey, 54 Ark, 179 291
Cross *v.* Phelps, 16 Barb. 502..... 186
Cupp *v.* Welch, 50 Ark. 294..... 124
Cushman *v.* Insurance Co. 70 N. Y. 72..... 535
Cuthbertson *v.* N. C. Home Ins. Co. 2 S. E. 258.... 281

D

Damon *v.* Bryant, 2 Pick. 411..186, 193
Daniels *v.* Ballentine, 23 O. St. 532..... 159
Darrigan *v.* N. Y. etc. R. Co. 52 Conn. 285.....71, 72, 203
Dartmouth College *v.* Woodward, 4 Wh. 518 428
Davies *v.* Nichols, 52 Ark. 554..... 111
Davis *v.* Gaines, 48 Ark. 370..... 438
Davis *v.* State, 68 Ala. 58 417
Day *v.* Woodworth, 13 How. 363... 441
Dean *v.* McLean, 21 Am. Rep. 130 .....598, 601
Degg *v.* Midland R. Co. 1 H. & N. 773..... 324

PAGE
Demopolis *v.* Webb, 25 A. & E. Corp. Cas. 268..... 149
Denny *v.* Mattoon, 2 Allen, 361 ... 121
Denny *v.* Railroad Co. 13 Gray, 481 159
Derby *v.* Alling, 40 Conn. 410..149, 150
Derton *v.* Boyd, 21 Ark. 264..... 252
Des Moines *v.* Hall, 24 Ia. 234..... 149
De Witt *v.* Post, 11 Johns. 460..... 232
Dick *v.* State, 30 Miss. 634..... 249
Dicus *v.* Bright, 23 Ark. 107..... 252
Dixon *v.* State, 29 Ark. 171 57
Dobbin *v.* Railroad Co. 81 N. C. 446... .....71, 74
Dobbins *v.* Oswalt, 20 Ark. 619.... 368
Doe *v.* Laming, 2 Burr. 1100 309
Doebler's Appeal, 64 Pa. St. 9....310–2
Dolan *v.* State, 40 Ark. 461. ...240, 371
Dorsey *v.* Dorsey, 37 Md. 64..... 122
Doswell *v.* Adler, 28 Ark. 85..... 260
Douglass *v.* Flynn, 43 Ark. 398.... 155
Dow *v.* Beidelman, 49 Ark. 325.... 416
Dow *v.* Beidelman, 125 U. S. 680... 416
Dubuque, etc. Ass'n *v* City, 30 Ia. 176..... 159
Duff *v.* Allegheny R. Co. 36 Am. Rep. 675 323
Duggins *v.* Watson, 15 Ark. 118... 471
Dunham *v.* Rackliff, 71 Me. 349... 389
Dunlap *v.* Hunting, 2 Denio, 643 .. 186
Dunn *v.* State, 2 Ark. 229.....54, 55
Dyer *v.* Taylor, 50 Ark. 314..... 453

E

Earl *v.* Camp, 16 Wend. 562..... 186
Eaton *v.* Del. etc. R. Co. 57 N. Y. 382..... 323
Edwards *v.* State, 22 Ark. 253..... 368
Ellis *v.* Smith, 10 Ga. 253..... 268
Emma Cotton Seed Oil Co. *v.* Hale, 56 Ark. 237..... 178
Equitable L. Ins. Co. *v.* Hazlewood, 75 Tex. 348 543
Erie, etc. Ry. *v.* Smith, 125 Pa. St. 259 179
Evans *v.* Trenton, 24 N. J. L. 764. 351
Evanston *v.* Gunn, 99 U. S. 665 ... 389
Everson *v.* Powers, 89 N. Y, 527... 622

F

Fanning *v.* State, 47 Ark. 442....161–7
Fargason *v.* Edrington, 49 Ark. 207 179
Farris *v.* State, 54 Ark. 4..... 519
Fecheimer *v.* Robertson, 53 Ark. 101..... 296
Fellows *v.* Griffin, 17 Miss. 362.... 232
Fitch *v.* Am. Popular L. Ins. Co. 59 N. Y. 557..... 533
Fitchburg Rd. Co, *v.* Grand Junction Rd. etc. Co. 4 Allen, 198.... 434
PAGE
Fleming *v.* Brooklyn R. Co. 1 Abb. N. C. 433..... 323
Fletcher *v.* Peck, 6 Cr. 87..... 422
Flower *v.* Pa. R. Co. 69 Pa. St. 216 393
Flynn *v.* Equitable L. Ins. Co. 78 N. Y. 568 543
Fones *v.* Phillips, 39 Ark. 39.71, 213, 226
Ford *v.* State, 34 Ark. 650.....239, 368
Ford *v.* Blagg, 38 Ark. 475..... 90
Fort Smith *v.* McKibbin, 41 Ark. 45..... 156
Fort Smith *v.* Yantis, 35 Ark. 438. 401
Fowler *v.* Armour, 24 Ala. 194 622
Fox *v.* Harding, 7 Cush. 516..... 34
Frazier *v.* State, 56 Ark. 242 396
Freeman *v.* Brenham, 17 B. Mon. 608..... 112
Frorer *v.* People, 141 Ill. 171..... 419
Fullerton *v.* Houpt, 12 Ark. 399... 42

G

Gardenhire *v.* Smith, 39 Ark. 280.. 623
Gardner *v.* Butler, 30 N. J. Eq. 702 352
Garibaldi *v.* Carroll, 33 Ark. 568.111–2
Garner *v.* Wright, 52 Ark. 385 ...26, 27
Garretzen *v.* Duenckel, 50 Mo. 104. 388
Gates *v.* School Dist. 57 Ark. 370.. 623
Gauss Sons *v.* Orr, 46 Ark. 129.... 621
Georgia Pac. R. Co. *v.* Propst, 4 So. Rep. 711..... 323
Gerrish *v.* Hunt, 66 Ia. 682..... 194
Gerrish *v.* Seaton, 73 Ia. 15..... 194
Gibson *v.* Herriott, 55 Ark. 92....90, 91
Giddens *v.* Bolling, 9 So. Rep. 274. 374
Gillis *v.* Space, 63 Barb. 177..... 623
Godcharles *v.* Wigeman, 113 Pa. St. 431..... 423
Goddard *v.* Railway, 57 Me. 217... 140
Good, *ex parte*, 19 Ark. 410..... 287
Goodbar *v.* Box, 54 Ark. 6..... 296
Goodsell *v.* Seeley, 46 Mich. 623... 283
Gordon *v.* Brewster, 7 Wis. 355.... 622
Gore *v.* State, 52 Ark. 285..... 520
Graffenried *v.* Kundert, 31 Ill. App. 394..... 378
Graham *v.* Pac. R. Co. 66 Mo. 536. 140
Grand Rapids, etc. R. Co. *v.* Huntley, 38 Mich. 537..... 129
Grattan *v.* Met. L. Ins. Co. 80 N. Y. 281.....543–4
Grattan *v.* same, 92 N. Y. 274 543–4
Green *v.* Abraham, 43 Ark. 420...121–4
Green *v.* Omnibus Co. 7 C. B. 290.. 388
Green *v.* State, 38 Ark. 304..... 371
Greenwood *v.* Freight Co. 105 U. S. 13..... 428
Greer *v.* Laws, 56 Ark. 37.....129, 453
Griffin *v.* State, 14 O. St. 61..... 249

H

PAGE
Hageman *v.* Hageman, 129 Ill. 164 310
Haines *v.* Territory, 13 Pac. 8..... 365
Haley *v.* State, 49 Ark. 151..... 37
Halley *v.* Oldham, 5 B. Mon. 233.. 268
Hancock *v.* Yaden, 121 Ind. 366.426, 427
Haney *v.* State, 34 Ark. 263 116
Hanks *v.* Harris, 29 Ark. 323..... 348
Hannah *v.* Carrington, 18 Ark. 91. 291
Hannon *v.* Gibson, 14 Mo. App. 33 13
Harbour, *ex parte*, 39 Ark. 126.... 287
Harman *v.* May, 40 Ark. 146 269
Harriet *v.* Swan, 18 Ark. 495 ....90, 94
Harris *v.* King, 16 Ark. 124 97
Harris *v.* State, 73 Ala. 495..... 379
Harrison *v.* Cachelin, 23 Mo. 117.. 268
Harrison *v.* Detroit R. R. Co. 19 Am. St. 180.....71, 78
Havis *v.* Jefferson, 14 S. W. 1101.. 444
Hawkins *v.* Bowie, 9 G. & J. 437.. 232
Hawkins *v.* Taylor, 56 Ark. 45.596, 605
Hawthorn *v.* People, 109 Ill. 311.. 440
Hays *v.* Millar, 77 Pa. St. 238..... 469
Healy *v.* Conner, 40 Ark. 352..... 348
Hecht *v.* Skaggs, 53 Ark. 293..599, 602
Henderson *v.* Jones, 10 S. & R. 322 240
Henshaw *v.* Hunting, 1 Gray, 203. 150
Hepler *v.* Bank, 97 Pa. St. 420 378
Herdic *v.* Roessler, 109 N. Y. 127.. 418
Hershy *v.* Baer, 45 Ark. 240..... 401
Hershy *v.* Berman, 45 Ark. 309 135
Hershy *v.* Clarksville Inst. 15 Ark. 130..... 450
Hershy *v.* Rogers, 45 Ark. 306.. .. 135
Hill *v.* Coolidge, 33 Ark. 621..... 261
Hill *v.* State, 41 Tex. 257..... 249
Hilliard *v.* Hilliard, 52 Ark. 283... 300
Hillman *v.* Chester, 12 Heisk. 34 .. 232
Hindman *v.* O'Connor, 54 Ark. 627 93–7
Hines *v.* Chambers, 29 Minn. 7.... 186
Hirschman *v.* People, 101 Ill. 560. 365
Hirsh *v.* Weisberger, 44 Mo. App. 506..... 232
Hoadley *v.* No. Transportation Co. 15 Mass. 304..... 159
Hobbs *v.* Lowell, 19 Mass. 410..... 503
Hobbs *v.* Tex. & Pac. R. Co. 49 Ark. 357..... 334
Hoboken Land, etc. Co. *v.* Mayor, 7 Vroom, 546..... 149
Hoffman *v.* McFadden, 56 Ark. 217 27
Hogg *v.* State, 3 Blackf. 326 19
Holder *v.* State, 58 Ark. 473 523
Holford *v.* Alexander, 46 Am. Dec. 253..... 232
Holland *v.* Rogers, 33 Ark. 251.... 493
Hollenberg *v.* Lane, 47 Ark. 394 .. 563
Hollingsworth *v.* State, 53 Ark. 390 478
Holyoke Co. *v.* Lyman, 15 Wall. 519..... 432
PAGE
Home Mut. L. Ass. *v.* Gillespie, 110 Pa. St. 84..... 534
Hood *v.* State, 26 Am. Rep. 21..... 5
Hornor *v.* Hanks, 22 Ark. 580 260
Horton *v.* Hendershot, 1 Hill, 118. 186
Hough *v.* Railway, 100 U. S. 216.71, 78
Houk *v.* Allen, 126 Ind. 568..... 283
House of Lords, 3 Bing. 193..... 420
Houston *v.* Brown, 23 Ark. 333.... 587
Howard *v.* State, 47 Ark. 437..... 503
Hudspeth *v.* State, 50 Ark. 534.365, 519
Hunn *v.* Railroad Co. 78 Mich. 513 71–6
Hunter *v.* Truckee Lodge, 14 Nev. 24..... 14
Huntington *v.* Attrill, 146 U. S. 657 597
Hurley *v.* State, 29 Nev. 17 .....240, 362, 371, 374

I

Illinois Cent. Ry. Co. *v.* Whittemore, 43 Ill. 420.....334, 335
Independence Co. *v.* Dunkin, 40 Ark. 331 115
Insurance Co. *v.* Brodie, 52 Ark. 11..... 543
Insurance Co. *v.* Gridley, 100 U. S. 614..... 543
Insurance Co. *v.* Trefz, 104 U. S. 197..... 541
Insurance Co. *v.* Wilkinson, 13 Wall. 222..... 535

J

Jackson, *ex parte*, 45 Ark. 158..... 287
Jackson *v.* Allen, 30 Ark. 115..... 260
Jackson *v.* Chamberlain, 8 Wend. 620..... 268
Jackson *v.* Johnson, 15 Am. Dec. 433..... 512
Jamison *v.* State, 37 Ark. 445..... 46
Jennings *v.* McIlroy, 42 Ark. 236.. 291
Jett *v.* Shinn, 47 Ark. 373.....596–7
Johnson *v.* Com. 22 Pa. St. 109.... 620
Johnson *v.* Davenport, 42 Ala. 317. 303
Johnson *v.* Insurance Co. 22 Atl. 107..... 280
Johnson *v.* McDaniel, 15 Ark. 110. 601
Johnson *v.* Richardson, 44 Ark. 365.....122, 124
Johnson *v.* State, 58 Ark. 57 550
Jones *v.* Fletcher, 42 Ark. 422.261, 263
Jones *v.* Graham, 36 Ark. 400..... 97
Jones *v.* So. Ins. Co. 38 Fed. 19.... 574
Jones *v.* Terry, 43 Ark. 230..... 188
Jones *v.* Vestry, 19 Fed. 59.. 508
Judson *v.* Bessemer, 6 So. 267..... 444

K

PAGE
Kansas City Planing Mill Co. *v.* Brundage, 25 Mo. App. 268..... 13
Keeton *v.* Keeton, 20 Mo. 541..... 91
Kelly *v.* McDonald, 39 Ark. 387... 139
Kelso *v.* Robertson, 51 Ark. 397... 155
Kemp *v.* Cook, 18 Md. 130..... 232
Kennedy *v.* Green, 3 M. & K. 699.. 91
Kentucky Cent. R. Co. *v.* Gastineau's Adm'r, 83 Ky. 121..... 323
Kieley *v.* Mining Co. 2 C. L. J. 705. 71
King *v.* Railroad Co. 69 Miss. 245.. 388
Kittrel, *ex parte*, 20 Ark. 499..... 287
Klenk *v.* Knoble, 37 Ark. 298.....147–8
Kleppner *v.* Laverty, 70 Pa. St. 72 310
Kline *v.* Ragland, 47 Ark. 115..... 27
Knowlton *v.* Bartlett, 1 Pick. 273.. 616
Krulevitz *v.* Eastern R. Co. 28 A. & E. R. Cas. 138..... 387

L

Laird *v.* Moonan, 32 Minn. 358.... 14
Lake View *v.* LeBahn, 120 Ill. 92.. 150
Lang *v.* Oppenheim, 96 Ind. 47.... 587
Lavender *v.* Hudgens, 32 Ark. 763 362
Leach *v.* Moore, 57 Ark. 583..... 93
Leatherberry *v.* Odell, 7 Fed. 648. 508
Lee *v.* Hill, 24 Am. St. 666.....601, 602
Lee *v.* State, 56 Ark. 7..... 478
Leftwich *v.* Commonwealth, 20 Grat. 716..... 46
Lemay *v.* Johnson, 35 Ark. 230.... 135
Leonard *v.* Canton, 35 Miss. 189 .. 275
Lewis *v.* Webb, 3 Greenleaf *326.. 122
Lincoln *v.* Field, 54 Ark. 471..... 561
Little Rock *v.* Barton, 33 Ark. 442. 611
Little Rock *v.* Board, 42 Ark. 160.. 611
Little Rock, etc. Ry. *v.* Atkins, 46 Ark. 436..... 131
Little Rock, etc. Ry. *v.* Cavanesse, 48 Ark. 106..... 368
Little Rock, etc. Ry. *v.* Duffey, 35 Ark. 602..... 338
Little Rock, etc. Ry. *v.* Eubanks, 48 Ark. 473.....129, 131
Little Rock, etc. Ry. *v.* Hanniford, 49 Ark. 291..... 440
Little Rock, etc. Ry. *v.* Leverett, 48 Ark. 338.....130, 180, 208, 215
Little Rock, etc. Ry. *v.* Miles, 40 Ark. 298..... 509
Little Rock, etc. Ry. *v.* Worthen 46 Ark. 312..... 438
Liverpool Steam Co. *v.* Phœnix Ins. Co. 129 U. S. 397..... 417
Logan Co. *v.* Trimm, 57 Ark. 487.. 117
Lonkey *v.* Cook, 15 Nev. 58..... 14
Lothrop *v.* Fitchburg Rd. 150 Mass. 423..... 177
PAGE
Louisville & N. R. Co. *v.* Allen, 78 Ala. 494..... 129
Lucas *v.* Locke, 11 W. Va. 81..... 616
Lynn's Adm'r *v.* Sisk, 9 B. Mon. 135..... 605
Lyon *v.* Tams, 11 Ark. 205..... 28

M

Mabry *v.* State, 50 Ark. 492..... 520
Maclin *v.* State, 44 Ark. 115..... 362
Maley *v.* Barrett, 2 Sneed, 501.... 186
Manchester Cotton Mills *v.* Manchester, 25 Grat. 825..... 146
Mangan *v.* State, 76 Ala. 60..... 417
Marr *v.* Lewis, 31 Ark. 203..... 293
Marshall *v.* Ramsauer, 30 Ark. 532 251
Martin *v.* Railway Co. 55 Ark. 521 158–9
Mass. Gen. Hospital *v.* State Ass. Co. 4 Gray, 227..... 433
Masterton *v.* Mayor, 7 Hill, 61. .. 33
Matlock *v.* Reppy, 47 Ark. 148..... 28
May *v.* Buckeye Ins. Co. 25 Wis. 291..... 574
May *v.* State, 14 O. 467..... 250
Mays *v.* Rodgers, 37 Ark. 155..... 592
Mayor *v.* Horn, 26 Md. 194..... 122
Mayor *v.* Huff, 60 Ga. 221..... 352
Mayor *v.* Morris Canal, etc. Co. 1 Beasley, 547..... 149
Mayor *v.* Muzzy, 33 Mich. 61..... 352
McAlpin *v.* Duncan, 16 Cal. 126... 14
McAunich *v.* Miss. etc. Rd. Co. 20 Iowa, 342..... 440
McBride *v.* Grand Rapids, 7 Mich. 236; S. C. 49 do. 239..... 351
McClintock *v.* Lary, 23 Ark. 215 .. 139
McCloy *v.* Arnett, 47 Ark. 455..... 300
McCorry *v.* King's Heirs, 39 Am. Dec. 165..... 512
McCoy *v.* State, 46 Ark. 141..... 478
McCracken *v.* Hayward, 2 How. 612 599
McDaniel *v.* Parks, 19 Ark. 671.622, 624
McDaniel *v.* Correll, 19 Ill. 226.... 121
McDonald *v.* Savoy, 110 Mass. 49.. 469
McGaughey *v.* Brown, 46 Ark. 32.90, 96
McGehee *v.* Mathes, 21 Ark. 40.... 611
McKay *v.* Jones, 30 Ark. 152..... 251
McKibbin *v.* Ft. Smith, 35 Ark. 352 146
McStea *v.* Mason, 27 Ark. 395..... 401
Meadows *v.* Campbell, 1 Bush, 104 112
Mechanics Ins. Co. *v.* Thompson, 57 Ark. 279..... 280
Meier *v.* Portland Cable Co. 16 Ore. 500..... 150
Mercier *v.* Chace, 11 Allen, 194.... 303
Merfield *v.* Burkett, 56 Ark. 592... 602
Metropolitan Ins. Co. *v.* McTague, 20 Vroom, 587..... 541
Milam Co. *v.* Robertson, 47 Tex. 235..... 232

PAGE
Miller *v.* Mo. Pac. Ry. 19 S. W. 58 ....73, 75
Miller *v.* N. Y. etc. R. Co. 21 Barb. 513.... 434
Miller *v.* State, 15 Wall. 498.... 432
Minneapolis Railway Co. *v.* Beckwith, 129 U. S. 27....440, 441
Minturn *v.* Larue, 23 How. 435.... 274
Mississippi, etc. Rd. Co. *v.* Wynne, 42 Miss. 315.... 232
Missouri, etc. R. Co. *v.* Humes, 115 U. S. 512....440, 415
Missouri, etc. R. Co. *v.* Mackey, 127 U. S. 205.... 440
Mitchell *v.* Etter, 22 Ark. 178.... 96
Mix *v.* Ill. Cent. Ry. Co. 116 Ill. 502 606
Mobile *v.* Yuille, 3 Ala. 140.... 416
Mobile Rd. *v.* Aschraft, 48 Ala. 15. 469
Monk *v.* Capen. 5 Allen, 146.... 303
Moore *v.* City, 42 Ark. 68.... 149
Morris *v.* Edmonds, 43 Ark. 427... 512
Morrison *v.* Davis, 20 Pa. St. 171.. 159
Mosby *v.* Mosby, 9 Grat. 602.... 616
Moser *v.* White, 29 Mich. 59.... 122
Moulor *v.* Am. L. Ins. Co., 111 U. S. 335.... 533
Munn *v.* Illinois, 94 U. S. 113....415-6
Murphy, *re*, 22 Mo. App. 476.... 164
Murray *v.* Rapley, 30 Ark. 568.... 16
Musselman *v.* Eshleman, 10 Pa. St. 394.... 91

N

Nashville, etc. R. Co. *v.* Starnes, 9 Heisk. 52.... 388
National Bank *v.* Ins. Co. 95 U. S. 678.... 533
Neal *v.* Newland, 4 Ark. 459.... 450
Neville *v.* State, 26 Ark. 614.... 239
New Albany, etc. R. Co. *v.* Fields, 10 Ind. 187.... 281
Newman *v.* Davis, 24 Fed. 609.... 265
New Orleans, etc. R. Co. *v.* Harrison, 48 Miss. 112.... 323
New Orleans, etc. R. Co. *v.* Hurst, 36 Miss. 660....139, 140
New Orleans, etc. R. Co. *v.* Statham, 42 Miss. 607.... 140
Newton *v.* Askew, 53 Ark. 476.... 401
New York L. Ins. Co. *v.* Fletcher, 117 U. S. 519.... 544
Nordman *v.* Craighead, 27 Ark. 369 17
Norris *v.* State, 22 Ark. 524.... 597
Northern Pac. R. Co. *v.* Petersen, 4 U. S. App. 574.... 72
Norton *v.* State, 15 Ark. 71.... 82

O

Oberg, *in re*, 21 Ore. 406.... 440
Organ *v.* Railroad Co. 51 Ark. 261. 139
Osborne *v.* Railroad, 68 Me. 49.... 324
PAGE
Oswald *v.* Grenet, 22 Tex. 94.... 150
Oviatt *v.* Brown, 14 O. 285.... 268
Owen *v.* Jones, 14 Ark. 503.... 129

P

Paine *v.* Mooreland, 15 O. 435.... 268
Palmore *v.* State, 29 Ark. 248.... 63
Parker *v.* Kuhn, 21 Neb. 413.... 92
Parker *v.* Walrod, 16 Wend. 514... 193
Patton *v.* State, 50 Ark. 53.... 503
Patty *v.* Goolsby, 51 Ark. 71.... 310
Pearsall *v.* Smith, 149 U. S. 231... 92
Peay *v.* Capps, 27 Ark. 164.... 260
Peel Splint Coal Co. *v.* State, 15 S. E. 1000.... 426
Pelican Ins. Co. *v.* Wilkerson, 53 Ark. 353.... 572
Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339.... 140
Penzel Co. *v.* Jett, 54 Ark. 428.... 296
People *v.* Ah Sing, 19 Cal. 598.... 19
People *v.* Bogart, 36 Cal. 248.... 18
People *v.* Calvin, 60 Mich. 123.... 365
People *v.* Courtney, 28 Hun. 589... 366
People *v.* Cronin, 34 Cal. 191.... 365
People *v.* Curling, 1 Johns. 319.... 250
People *v.* Galland, 55 Mich. 628... 106
People *v.* Gibbs, 9 Wend. 29.... 605
People *v.* Hennessey, 15 Wend. 147 102
People *v.* Hurst, 62 Mich. 276.... 107
People *v.* Knapp, 71 Cal. 1.... 365
People *v.* Manning, 48 Cal. 335.... 374
People *v.* Marion, 28 Mich. 257.... 249
People *v.* Morrow, 60 Cal. 142.... 365
People *v.* O'Neal, 67 Cal. 378.... 365
People *v.* Petmecky, 99 N. Y. 422.. 365
People *v.* Schwartz, 32 Cal. 160.... 18
People *v.* Simons, 60 Cal. 72....550, 64
People *v.* Vice, 21 Cal. 344.... 38
People *v.* Weithoff, 51 Mich. 203.. 82
People *v.* Wheeler, 65 Cal. 77.... 365
People *v.* Wiley, 3 Hill, 194.... 522
People's Savings Bank, etc. Co. *v.* Egg Case Co. 4 U. S. App. 603.. 528
Percy *v.* Cockrill, 53 Fed. 875.... 91
Perkins *v.* Com. 7 Grat. 651.... 250
Perrin *v.* Blake, 1 W. Bl. 672.... 307
Pickett *v.* Merchants' Nat. Bank, 32 Ark. 369.... 261
Pickett *v.* School Dist. 25 Wis. 558 ....351, 352
Pickett's Heirs *v.* Legerwood, 7 Pet. 147.... 231
Pindall *v.* Trevor, 30 Ark. 267..260, 265
Pipkin *v.* Williams, 57 Ark. 242... 124
Pleasant *v.* State, 13 Ark. 378.... 479
Polk *v.* Faris, 9 Yerg. 209.... 310
Polk *v.* State, 40 Ark. 484; S. C. 36 Ark. 117.... 365
Pope *v.* State, 22 Ark. 372.... 371
Porter *v.* Seiler, 23 Pa. St. 424.... 389

PAGE
Porter *v.* State, 57 Ark. 267..... 239
Port Huron *v.* McCall, 46 Mich. 565 273
Powell *v.* Com. 114 Pa. St. 292.415, 417
Powell *v.* Murray, 2 Edw. Ch. 644. 590
Powell *v.* State, 34 Ark. 693..... 102
Priester *v.* Augley, 5 Rich. 44..... 387
Provost of Beverly's Case, 40 Ed. III..... 307
Pryor *v.* Downey, 50 Cal. 388..... 122
Pudritzky *v.* Knight of Honor, 76 Mich. 428.....543

Q

Quincy *v.* Hall, 1 Pick. 357..... 193
Quincy Mining Co. *v.* Kitts, 42 Mich. 34..... 76
Quinn *v.* N. J. Lighterage Co. 23 Fed. 363..... 226

R

Railroad Co. *v.* Maine, 96 U. S. 510 432
Railroad Co. *v.* Reeves, 10 Wall. 176..... 159
Railway Co. *v.* Adcock, 52 Ark. 406 334
Railway Co. *v.* Davis, 56 Ark. 51.. 139
Railway Co. *v.* Henderson, 57 Ark. 402..... 371
Railway Co. *v.* Higgins, 53 Ark. 466..... 229
Railway Co. *v.* Lesser, 46 Ark. 236 417
Railway Co. *v.* Rice, 51 Ark. 476.. 79
Railway Co. *v.* Triplett, 54 Ark. 299 .....347, 332, 70-78, 213, 215, 226
Ramsey *v.* People, 142 Ill. 380..... 423
Randall *v.* Railroad Co. 109 U. S. 483..... 71
Randolph *v.* Lampkin, 14 S. W. 538 283
Reed *v.* Ash, 30 Ark. 775..... 96
Reed *v.* Com. 7 Bush, 641..... 19
Reeve *v.* Phœnix Ins. Co. 23 La. An. 219..... 281
Regina *v.* O'Donnell, 7 Cox, C. C. 337..... 522
Regina *v.* Jackson, 1 C & K. 384... 107
Reid *v.* Hart, 45 Ark. 41..... 401
Reilly *v.* Racine, 51 Wis. 526..... 150
Requa *v.* Rochester, 45 N. Y. 129.. 149
Rex *v.* Smith, Russ. & R. 267..... 107
Reynolds *v.* Holland, 35 Ark. 56... 116
Reynolds *v.* Tooker, 18 Wend. 594. 293
Rhodus *v.* Com. 2 Duv. 159..... 19
Rice *v.* Dorrian, 57 Ark. 545....451, 527
Rich *v.* N. Y. etc. R. Co. 87 N. Y. 382..... 598
Richards *v.* Richards, 10 Bush, 617 486
Richards *v.* Rote, 68 Pa. St. 248... 121
Richardson *v.* Coleman, 29 N. E. 909..... 283
Richardson *v.* Jones, 12 Grat. 53.. 232
Richmond *v.* Mississippi Mills, 52 Ark. 6.....296, 297
Rider *v.* People, 110 Ill. 11..... 365
Riggan *v.* Wolf, 53 Ark. 537..... 401
Rightor *v.* Gray, 23 Ark. 228..... 251
Riley *v.* Norman, 39 Ark. 158..... 139
Roberts *v.* State, 21 Ark. 183..... 37
Robertson *v.* County Com'rs, 5 Gilman, 559..... 599
Robson *v.* Tomlinson, 54 Ark. 229. 296
Rosenkranz *v.* Wagner, 62 Cal. 151 13
Roughton *v.* Brown, 8 Jones, 393.. 232
Roxbury *v.* Boston, etc. R. Co. 6 Cush. 434..... 434
Ruble *v.* Helm, 57 Ark. 304..... 448
Rugan *v.* Sabin, 53 Fed. 415..... 91
Rush *v.* French, 25 Pac. 816..... 374

S

St. Francis Co. *v.* Lee Co. 46 Ark. 67..... 401
St. Louis, etc. R. Co. *v.* Bennett, 53 Ark. 208..... 323
St. Louis, etc. R. Co. *v.* Com. Ins. Co. 139 U. S. 223..... 159
St. Louis, etc. R. Co. *v.* Gaines, 46 Ark. 567.....215, 228
St. Louis, etc. R. Co. *v.* Harper, 44 Ark. 527..... 348
St. Louis, etc. R. Co. *v.* Ledbetter, 45 Ark. 246..... 323
St. Louis, etc. R. Co. *v.* Marker, 41 Ark. 542..... 130
St. Louis, etc. R. Co. *v.* Rapp, 39 Ark. 558..... 111
St. Louis, etc. R. Co. *v.* Rosenberry, 45 Ark. 256..... 399
St. Louis, etc. R. Co. *v.* Weakly, 50 Ark. 406..... 281
St. Louis, etc. R. Co. *v.* Yocum, 34 Ark. 497..... 42
San Antonio, etc. R. Co. *v.* Wilson, 19 S. W. 910..... 424
Sanders *v.* State, 85 Ind. 318..... 232
Sannoner *v.* Jacobson, 47 Ark. 31 ..... 451, 527
Schreiber *v.* Sharpless, 110 U. S. 76 606
Schroeder *v.* Railway Co. 18 S. W. 1094.....72, 74
Schumm *v.* Seymour, 24 N. J. Eq. 144..... 275
Scott *v.* Beutel, 23 Grat. 1..... 268
Scott *v.* State, 42 Ark. 73.....37-8
Scott *v.* State, 49 Ark. 156..... 279
Searcy *v.* Yarnell, 47 Ark. 269..... 103
Sexey *v.* Adkinson, 34 Cal. 346.... 186
Sexton *v.* Brock, 15 Ark. 345..... 139
Shackelford, *v.* State, 33 Ark. 539 .....240, 371
Shaffer *v.* Union Mining Co. 55 Md. 74..... 431

PAGE
Sharp *v.* Johnson, 22 Ark. 79 ..453, 129
Shaul *v.* Duprey, 48 Ark. 331..... 318
Shea *v.* Ottumwa, 67 Ia. 39..... 150
Sheehan *v.* Railroad, 91 N. Y. 332. 203
Sheldon *v.* Van Buskirk, 2 N. Y. 473.....186, 193
Shellabarger *v.* Thayer, 15 Kas. 619..... 14
Shelley's Case, 23 Eliz.....307–314
Sherman *v.* Smith, 1 Black, 587... 433
Shields *v.* Ohio, 95 U. S. 324..... 433
Shields *v.* Smith, 37 Ark. 47..... 452
Shinn *v.* Taylor, 28 Ark. 528..... 260
Sims *v.* Cumby, 53 Ark. 418..... 155
Sinking Fund Cases, 99 U. S. 700 .....415, 431
Smedly *v.* State, 30 Tex. 214.. ... 38
Smith *v.* Blakeman, 8 Bush, 479... 112
Smith *v.* Craft, 12 Fed. 861..... 297
Smith *v.* Craft, 17 Fed. 705..... 297
Smith *v.* Craft, 123 U. S. 436..... 297
Smith *v.* Finley, 52 Ark. 373..... 188
Smith *v.* Painter, 5 S. & R. 223.... 268
Smith *v.* State, 33 Ind. 159..... 46
Smith *v* Wabash etc. R. Co. 92 Mo. 359..... 203
Sneed *v.* State, 47 Ark. 180....240, 371
Snyder *v.* Railroad Co. 60 Mo. 415. 323
Southwestern Tel. Co. *v.* Woughter, 56 Ark. 206.....77, 215, 228
Spalding *v.* Wathen, 7 Bush, 663.. 486
Spaulding *v.* Lowell, 23 Pick. 71.273–4
Spring Valley Water Works *v.* Schottler, 110 U. S. 347.....417, 434
Starnes *v.* Hill, 16 S. E. 1011 310
State *v.* Absence, 4 Port. 397..... 37
State *v.* Addington, 12 Mo. App. 214; S. C. 77 Mo. 110..... 417
State *v.* Ah Loi, 5 Nev. 99..... 37
State *v.* Baldwin, 70 Ia. 180..... 106
State *v.* Blan, 69 Mo. 317..... 53
State *v.* Brown, 49 Vt. 437..... 164
State *v.* Brown & Sharpe Mfg. Co. 25 Atl. 246.....431, 435, 439
State *v.* Butler, 21 S. C. 353... ... 106
State *v.* Calhoun, 50 Kas. 523 232
State *v.* Curran, 12 Ark. 321..... 445
State *v.* Dalton, 27 Mo. 13..... .. 53
State *v.* Deschamp, 53 Ark. 490.... 438
State *v.* Dupuy, 52 Ark. 48..... 296
State *v.* Elliott, 2 S. W. 411..... 365
State *v.* Fire Creek, etc. Co. 33 W. Va. 118..... 423
State *v.* Fritts, 48 Ark. 66..... 5, 6
State *v.* George, 8 Ired. 324..... 240
State *v.* Goff, 20 Ark. 289 621
State *v.* Goodwill, 33 W. Va. 179... 421
State *v.* Graham, 38 Ark. 519..... 38
State *v.* Hawkins, 15 Ark. 259..... 83
State *v.* Hing, 16 Nev. 310..... 365
State *v.* Jennings, 27 Ark. 419.... 116
State *v.* Johnson, 38 Ark. 568..... 401
PAGE
State *v.* Kent, 22 Minn. 41..... 102
State *v.* Loomis, 22 S. W. 350..... 423
State *v.* Lyon, 45 N. J. L. 272..... 105
State *v.* Marsh, 37 Ark. 356..... 438
State *v.* Mason, 108 Ind. 48..... 606
State *v.* McGinnis, 76 Mo. 326.... 365
State *v.* McGuire, 69 Mo. 197..... 365
State *v.* Miller, 53 Ia. 154..... 82
State *v.* Moore, 104 N. C. 714..... 418
State *v.* Neel, 48 Ark. 289..... 287
State *v.* Oakley, 51 Ark. 112..... 46
State *v.* O'Kean, 35 La. An. 901... 107
State *v.* Pardee, 37 O. St. 66 522
State *v.* Parker, 34 Ark. 158..... 46
State *v.* Payton, 90 Mo. 220 53
State *v.* Porter, 26 Mo. App. 201... 102
State *v.* Railroad Co. 12 Gill & J. 399..... 156
State *v.* Railroad Co. 54 Ark. 546.. 42
State *v.* Roark, 23 Kas. 153..... 553
State *v.* Rorie, 23 Ark. 726..... 83, 84
State *v.* Smith, 40 Ark. 431..... 116
State *v.* Sterrett, 71 Ia. 386..... 365
State *v.* Tompkins, 32 La. An. 620. 104
State *v.* Trenton, 22 Atl. 731..... 444
State *v.* Ward, 48 Ark. 36.....46, 101
State *v.* Wisdom, 84 Mo. 190..... 365
State *v.* Witt, 39 Ark. 216..... 38
State *v.* Zeibart, 40 Ia. 169..... 53
Stegar *v.* State, 99 Am. Dec. 472... 38
Stewart *v.* Freeman, 10 Harris, 120 268
Stewart *v.* Smiley, 46 Ark. 376.... 96
Stillwell *v.* Adams, 29 Ark. 346.... 17
Stirman *v.* Cravens, 29 Ark. 561... 260
Stokes *v.* Stickney, 96 N. Y. 323... 605
Straughan *v.* State, 16 Ark. 37.... 163
Sun. Ins. Co. *v.* Jones, 54 Ark. 376. 574
Sutherland *v.* Wyer, 67 Me. 64.... 623
Suydam *v.* Keys, 13 Johns. 445.... 186
Sweeny *v.* Hunter, 145 Pa. St. 363. 419

T

Taliaferro *v.* Barnett, 47 Ark. 359. 162
Tatman *v.* Strader, 23 Ill. 494..... 82
Taylor *v.* Beck, 13 Ill. 376..... 575
Taylor *v.* Railroad Co. 22 N.E. 876. 71–78
Taylor *v.* Saurman, 110 Pa. St. 3.. 417
Terry *v.* Rosell, 32 Ark. 495..... 139
Texas, etc. R. Co. *v.* Eddy, 42 Ark. 527..... 139
Texas, etc. R. Co. *v.* Orr, 46 Ark. 182..... 131
Thompson *v.* King, 54 Ark. 12..... 301
Thompson *v.* State, 26 Ark. 323... 239
Thomson *v.* Lee Co. 3 Wall. 320... 275
Thorn *v.* Weatherly, 50 Ark. 237.. 26
Thorogood *v.* Bryan, 8 C. B. 115..470–1
Tolchester Beach etc. Co. *v.* Steinmeier, 20 Atl. 189..... 388
Toliver *v.* State, 35 Ark. 395...111, 116
Tomlinson *v.* Jessup, 15 Wall. 459. 432

PAGE
Towle *v.* Pac. Imp. Co. 33 Pac. 207 469
Trammell *v.* State, 26 Ark. 534.... 239
Treadaway *v.* State, 37 Ark. 443 .. 46
Trieber *v.* Andrews, 31 Ark. 163... 139
Triplett *v.* Railway Co. 54 Ark. 289 347
Turner *v.* Collier, 37 Ark. 528..... 401
Tyler *v.* Morris, 34 Am. Dec. 395.. 232

U

Union Pac. Ry. Co. *v.* Fort, 17 Wall. 558..... 176

V

Vandever *v.* Griffith, 2 Met. 426... 112
Vaughan *v.* State, 57 Ark. 1 365
Vedder *v.* Fellows, 20 N. Y. 126... 334

W

Wade *v.* State, 7 Bax. 80..... 378
Waldo *v.* Russell, 5 Mo. 387..... 268
Wales *v.* Stetson, 2 Mass. 143..... 428
Walker *v.* State, 35 Ark. 386..... 111
Walker *v.* State Ins. Co. 26 Pac. 718 281
Walton *v.* Hargroves, 42 Miss. 18.. 268
Walworth *v.* Pool, 9 Ark. 394..... 623
Ward *v.* Young, 42 Ark. 542..... 387
Warmoth *v.* Com. 81 Ky. 133..... 106
Watkins *v.* Eureka Springs, 49 Ark. 131..... .. 444
Watkins *v.* Turner, 34 Ark. 663.... 452
Watson *v.* Murray, 54 Ark. 508.... 260
Watson *v.* Watson, 53 Ark. 415.... 111
Webster *v.* Little Rock, 44 Ark. 537 499
Weed *v.* Panama R. Co. 17 N. Y. 362 388
W. U. Tel. Co. *v.* Brown, 108 Ind. 48 606

PAGE
W. U. Tel. Co. *v.* Hall, 124 U. S. 444..... 32–3
W. U. Tel. Co. *v.* Short, 53 Ark. 434 417
Whittier *v.* Franklin, 46 N. H. 23. 469
Wigley *v.* State, 41 Ark. 225..... 401
Wilbur *v.* Flood, 16 Mich. 43..... 478
Wilkinson *v.* Com. Ins. Co. 30 Ia. 119.....535–6
Williams *v.* Edwards, 12 Ired. 118. 231
Williams *v.* McIlroy, 34 Ark. 92..260–6
Williams *v.* Van Metre, 19 Ill. 293. 450
Willis *v.* McNeill, 57 Tex. 465..... 141
Wilmerding *v.* Russ, 33 Conn. 67.. 94
Wilson *v.* Slaughter, 53 Ark. 137 ..261, 265
Wilson *v.* State, 24 Conn. 57..... 3
Wingfield *v.* McLure, 48 Ark. 510. 318
Winter *v.* Bandel, 30 Ark. 362 368
Wood *v.* Carpenter, 101 U. S. 135.. 91
Wood *v.* Hartford Fire Ins. Co. 13 Conn. 533..... 575
Wood *v.* King, 57 Ark. 284..... 16
Woodard *v.* Jaggers, 48 Ark., 250...90–1
Woods *v.* Lindvall, 4 U. S. App. 62 72
Worthington *v.* Welch, 27 Ark. 464 401
Worthy *v.* Johnson, 8 Ga. 236..... 91
Wright *v.* Davis, 28 Neb. 479..... 92
Wright *v.* Graham, 42 Ark. 140...120–2
Wright *v.* State, 35 Ark. 639..... 362
Wycough *v.* State, 50 Ark. 107..... 599
Wyman *v.* State, 13 Wis. 663..... 503

Y

Yeates *v.* Pryor, 11 Ark. 58..... 28
Yeatman *v.* Day, 79 Ky. 186..... 122
Youngblood *v.* Birmingham etc. Co. 12 So. Rep. 579..... 440
Younger *v.* State, 37 Ark. 116..... 20

ERRATA.

On page 325, ninth line of fifth headnote, before "understood" insert *he*.

On page 408, first and third lines of second headnote, for "discount" substitute *deduction*.

On page 484, second line of headnote, for "8909" substitute *3909*.

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS.

PETTY *v.* STATE.

Opinion delivered June 3, 1893.

Sunday—Keeping open store.

Keeping open a butcher shop and selling meats and vegetables from it on Sunday is a violation of Mansfield's Digest, sec. 1887, as amended by act March 2, 1885, imposing a fine on "every person who shall, on Sunday, keep open any store or retail any goods, wares and merchandise."

Appeal from White Circuit Court.

GRANT GREEN, JR., Judge.

The appellant *pro se.*

The word *store* has a well defined and understood signification, which is broader than the word *shop*. The words are not synonymous. See 45 Ark. 348; 25 Am. Rep. 646; 19 N. H. 135; 29 Ala. 651; 2 Am. Cr. Rep. 470; 3 Cr. Law. Mag. 640. The legislature never made it a crime to keep open a *shop*, unless it was *in fact* a store.

James P. Clarke, Attorney General, for appellee.

In common parlance "shop" and "store" mean about the same thing. See Webster, Int. Dic.; Anderson, Law Dic.; 14 Gray, 378; 15 *id.* 199; Browne, Jud. Int. Words. Our statute requires that words shall be taken in their common acceptation. 56 Ark. 386.

POWELL, J. At the January term, 1893, the appellant, N. B. Petty, was indicted by the grand jury of White county, charged with the crime of Sabbath breaking by keeping open a store on the 12th day of June, 1892, in said county, and upon trial was found guilty, and appealed to this court.

The evidence of the only witness shows that the appellant, in the year 1892, was engaged in selling meats and also vegetables in their season; that he occupied a latticed building which had doors and locks thereon; that witness was in the employ of appellant; that he helped appellant sell meats and vegetables for about three months in the summer of the year 1892; and that the shop was open every Sunday during that time. The place is designated by witness as a butcher shop.

It is contended by counsel for appellant that the keeping open this shop does not come within the inhibition of the statute (sec. 1887 Mansfield's Digest, as amended by the act of the General Assembly, March 2, 1885), which is as follows: "Every person who shall, on Sunday, keep open any store or retail any goods, wares and merchandise, or keep open any dram shop or grocery, or who shall keep the doors of the same so as to afford ingress or egress, or retail or sell any spirits or wine, shall, on conviction thereof, be fined in any sum not less than twenty-five dollars, nor more than one hundred dollars."

Webster's International Dictionary gives the following definitions to "shop" and "store:" "Shop. A building or an apartment in which goods, wares, drugs, etc., are sold by retail. Synonymous with store, warehouse." "Store. Any place where goods are sold, whether by wholesale or retail; a shop." Anderson's Dictionary of Law gives the following definition of shop: "A place kept and used for the sale of goods. In this country shops for the sale of goods are fre-

quently called stores." Rapalje & Lawrence's Law Dictionary defines store as synonymous with shop. These definitions are supported by the Supreme Court of Massachusetts in the cases of the *Commonwealth* v. *Riggs*, 14 Gray, 378; *Commonwealth* v. *Annis*, 15 Gray, 199. *Barth* v. *State*, 18 Conn. 432; *Wilson* v. *State*, 24 *id.* 57; Browne's Judicial Interpretations, under the word "shop," page 419.

According to these definitions, the names "shop" and "store" may be used interchangeably, and although the indictment charges the appellant with keeping open a store and the witness denominates it a butcher shop, in common parlance the meaning is the same. The evidence shows the place kept open and called a shop by the witness was a place kept for the sale of meats and vegetables, which are merchandise when kept for sale; and the second clause of the statute, "or retail any goods, wares or merchandise," taken in connection with the first clause, shows that the word store, the keeping open of which is prohibited, is that place where goods, wares and merchandise are sold. We therefore hold that the place kept open, as shown by the evidence, comes within the inhibition of the statute, and affirm the judgment.

Mansfield, J., dissents.

MARTIN *v.* STATE.

Opinion delivered June 10, 1893.

Incest—Indictment.

An indictment of a father for incest committed by *adultery* with his daughter is defective if it fails to allege that the father was at the time a married man.

Appeal from Logan Circuit Court.

HUGH F. THOMASON, Judge.

The appellant *pro se.*

The indictment is not sufficient, and the demurrer should have been sustained. It charges "adultery" without alleging that either of the parties was married. 56 Ind. 263; 26 Am. Rep. 21; 58 N. H. 331; 6 Gratt. (Va.) 673; 2 Dall. (Pa.) 124.

James P. Clarke, Attorney General, for appellee.

BUNN, C. J. The defendant, Joe Martin, was indicted in the circuit court of Logan county, at its August term, 1891, for the crime of incest, charged to have been committed with his daughter, Mattie Martin, on May 10, 1891. He was tried and convicted at the January term, 1893, and sentenced accordingly to imprisonment for three years in the penitentiary.

A demurrer to the sufficiency of the indictment was filed and overruled, and exceptions noted. A motion for a new trial after verdict was filed, containing five several grounds. The motion for new trial was overruled, and exceptions noted.

The demurrer raises the question of the sufficiency of the indictment, and as, in our view, the disposition of this question will necessitate a remanding of the case, we will dispose of it only.

This prosecution was instituted under section 1578 of Mansfield's Digest, which reads as follows, to-wit: "Persons marrying who are within the degrees of consanguinity within which marriages are declared by law to be incestuous, or void absolutely, or who shall commit adultery or fornication with each other, shall be deemed guilty of incest."

Section 1579 fixes the punishment, in case of conviction, by imprisonment in the penitentiary for any period not less than three nor more than ten years.

The indictment charges the crime of incest, and that the same was committed as follows, to-wit: "The said Joe Martin, on the 10th day of May, 1891, in the county aforesaid, then and there being the father of Mattie Martin, a woman, unlawfully, wickedly and feloniously did commit adultery to and with the said Mattie Martin and did then and there feloniously and incestuously carnally know her the said Mattie Martin, child and daughter as aforesaid of him the said Joe Martin."

The demurrer, being a general demurrer, does not specifically point out the defects in the indictment, neither is any defect therein referred to in the brief and argument of counsel for defendant, and we are therefore compelled to discover such defects for ourselves as we are able to do.

It will be observed that it is alleged in the indictment that the defendant committed the crime by the act of adultery with his daughter, without it being alleged that either the defendant or his daughter was, or that both were, married or unmarried.

In *State* v. *Fritts*, 48 Ark. 66, this court say: "A party indicted for the crime of incest committed by fornication cannot be convicted, unless it is both alleged and proved that he was unmarried at the time specified in the indictment."

In that case fornication and adultery are in effect defined as in the standard law dictionaries of the times, (see Burrill, Anderson's, Black, Rapalje and Bouvier), and by the weight of authorities otherwise (see notes to *Hood v. State*, 26 Am. Rep. 21.) Where both are unmarried, their sexual intercourse is fornication. Where both are married, and not to each other, their sexual intercourse is adultery. And when one is married and the other unmarried, their sexual intercourse is adultery of the married one, and fornication of the unmarried one.

whichever is the subject of the charge. Therefore, if the defendant is guilty of the crime of incest by having committed adultery with his daughter, every allegation necessary to charge him with adultery should be made in the indictment, and the allegation that he was a married man at the time is a necessary allegation, as the allegation that he was an unmarried man would have been necessary had he been charged with the crime of incest by having committed fornication with his daughter.

A particular description of the specific act which constitutes the crime of incest, when committed by parties within the prohibited degrees, as well as the status of the party charged, seems to be insisted upon in all the authorities, by practice at least. It is probably well, after all, to adhere to the rule laid down in the case of *State* v. *Fritts*, 48 Ark. *supra*, however technical it may seem.

This will also answer one of the objections to the five instructions given by the court below, at the request of the prosecution.

We deem it unnecessary to dispose of the issues raised by the motion for a new trial.

For its error in overruling the demurrer to the indictment, the judgment of the Logan circuit court is reversed, and this cause is remanded with directions to sustain the demurrer and for further proceedings in accordance herewith.

McFADDEN v. STARK.

Opinion delivered June 10, 1893.

1. *Mechanic's lien—Amendment of complaint.*
   In an action by a sub-contractor to enforce a lien for materials furnished in the erection of a building, it is error to strike out of the complaint as immaterial an amendment, made by leave of court, to the effect that, at the time of furnishing the materials, notice was given to the owners of the building of the intention to furnish them and of their value.
2. *Indefiniteness of pleading—Remedy.*
   A complaint to enforce a sub-contractor's lien which alleges that the land owner contracted with the contractor for the erection of a building is sufficient on demurrer, without stating the amount payable under the contract; indefiniteness in pleading can be reached only by motion to make more definite.
3. *Sub-contractor's lien—Sufficiency of complaint.*
   Allegations, in a complaint to enforce a sub-contractor's lien for materials furnished, to the effect that, at the time of furnishing such materials, plaintiff notified the land owners of his intention to furnish them and the value thereof, and that they were furnished at the contractor's request and used in the construction of the building, inferentially show that the materials were furnished for the purpose of being used in construction of the building, and are sufficient on demurrer.
4. *Mechanic's lien—Filing account.*
   As between the owner of land and one who claims a lien on it for materials furnished, it is immaterial that the affidavit upon which the lien is based does not sufficiently set out the account, as required by the statute, if suit was brought within ninety days after the materials were furnished, and the complaint was a substantial compliance in this respect with the statute.
5. *Pleading—Defective affidavit.*
   The sufficiency of an affidavit for a mechanic's lien cannot be reached by demurrer to a complaint which seeks to foreclose such lien.

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

Thornton & Smead for appellant.

1. The court erred in striking out the marginal amendment to the complaint. It was material, and entitled plaintiff to a lien upon complying with secs. 4403–4 and 4418 Mansfield's Digest. 11 Wis. 295; 4 Abb. Pr. (N. Y.), 432; 54 Wis. 474; 50 Mo. 306; 6 Bradw. (Ill.), 621; 53 Miss. 171; 33 Ark. 253; 12 *id.* 685; 9 *id.* 448; 32 *id.* 313; 49 Fed. Rep. 754; 14 *id.* 866; 31 Ark. 486; 51 *id.* 302. The complaint contained all the requirements of the act of 1885.

2. It was not necessary to set out the contract *in extenso* or substantially; the complaint charged *there was a contract*, and that was all that was necessary, as the lien of a material-man or sub-contractor does not depend on contract but is created by use of the materials, or the work of the mechanic, on the building. 49 Ark. 479; Houck on Liens, p. 106; 15 Ill. 189; 32 Md. 130; 14 Ala. 33; 21 Ind. 344; 3 Watts (Penn.), 141; 4 Minn. 546.

3. The complaint states that plaintiff furnished the materials at the request of the contractor, and that they were used in the construction of the buildings. 31 Pac. Rep. 316. An exact compliance with the statute is not required. The lien grows out of the *use* of the materials. 31 Pac. Rep. 316; 49 Ark. 479; 30 *id.* 29; Houck on Liens, p. 106. No technical omission will defeat the claim. 30 Ark. 573; Phillips, Mech. Liens, sec. 16, p. 27.

4. A substantial compliance with the statute is all that is required. See 61 Ind. 187; 58 *id.* 492; 37 Penn. 125; 2 Phila. 102; 15 Am. and Eng. Enc. Law, p. 179; 4 Metc. (Ky.), 316; 42 Me. 141; 32 Ark. 69; 46 Mo. 337; *Ib.* 595; 51 Ark. 315, 307; 49 *id.* 572. The complaint with the exhibit constitutes a substantial compliance with the law. But if the exhibit was defective, the court should have allowed it to be amended. 15 Am.

and Eng. Enc. Law; 7 Wis. 105; 32 Ark. 281; Green's Code Pl. sec. 407; Mansfield's Digest, sec. 5083; 53 Ark. 235.

5. If appellees had notice at the time the materials were furnished, etc., the lien was fixed at that time, and no subsequent payments could defeat appellant's claim. Mansfield's Digest, sec. 4402, 4421; 51 Ark. 313.

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

1. Amendments are largely matters of discretion, and this discretion will not be controlled by appellate courts unless grossly abused. Bliss, Code Pl. secs. 428–9. The amendment of an account and affidavit, if filed in the clerk's office as the foundation of the lien is not allowable. 2 Jones on Liens, sec. 1455. The affidavit must set forth the particular matters entitling claimant to a lien. Acts 1885, p. 77; 2 Jones Liens, secs. 1390–1–2.

2. The mechanic's lien laws, being in derogation of the common law, are strictly construed, especially as to the steps taken to establish and fix the legal right. Jones on Liens, sec. 1555.

3. The complaint must set forth the facts which show that plaintiff has a lien and the right to enforce it; it must show a full compliance with the statute. 94 U. S. 545; 65 How. Pr. 146; 5 Minn. 74; 46 Tex. 599; 52 *ib.* 621; 24 Wis. 564; 34 Mo. 150; 43 Cal. 515; 36 Mo. 613; 30 Ark. 682. It is a special proceeding, and all jurisdictional facts must appear. 57 N. Y. 409; 63 *id.* 624.

4. The contract was not set out in the complaint *in extenso* or substantially. Under the law in Mansfield's Digest, secs. 4402–3, the owner is bound by the *notice* given by the sub-contractors, and in 30 Ark. 29 it is said the lien grows out of the fact that materials are furnished, etc., but the lien grows out of the fact

that the owner has notice and by using the materials impliedly assents to it. Under the act of 1885, the owner is bound to the contractor and all who work or furnish materials by reason of the *contract*. 2 Jones on Liens, sec. 1289; 134 Pa. St. 277; *Ib.* 289; 16 S. W. Rep. 1045; 77 Mich. 199.

5. It is not shown that the materials were furnished to be put into the building under the contract. 2 Jones, Liens, sec. 1327, 1330.

6. There is a variance between the complaint and exhibit; while the former may be amended, the latter cannot.

BATTLE, J. This action is based on the act of the General Assembly of this State, entitled "An act for the better protection of mechanics, artisans, materialmen and other sub-contractors," approved March 17th, 1885, and was brought on the 8th of December, 1890, to enforce a lien for labor performed and materials furnished in the construction of a building on certain lots owned by the defendants, Stark and Moore. The complaint in the action, as amended by interlineation, is as follows:

"R. H. McFadden, Plaintiff,

vs.

"T. J. Moore, N. H. Stark, Chris Johnson, Defendants.

The plaintiff, R. H. McFadden, states that the defendants are justly indebted to him in the sum of nine hundred and eight dollars and seventy-nine cents for labor performed and materials used in the construction of a building owned by defendants, T. J. Moore and N. H. Stark, and known as the Stark and Moore building, and situated on parts of lots 14, 15, 16 and 17 of the old court house square in the city of Camden, county of Ouachita, and State of Arkansas, and more definitely described as follows, to-wit:

"'A lot of land situated on the corner of Adams and Jefferson streets, fronting on Adams street 59 feet and 9⅓ inches, and running back the width of the front with Jefferson street 110 feet to Ouachita alley. Said parcel of land being the southwest corner of the old court house square.'

"That said labor was performed and material furnished at the request of the defendant, Chris Johnson, who had contracted with his co-defendants to construct said building, and by him used in the construction of said building. That he presented an itemized account of said labor and material to said defendant and contractor, Chris Johnson, who certified to the correctness of the items amounting to eight hundred and forty-eight dollars and seventy-nine cents, but refused to certify to the items amounting to sixty dollars. That thereupon plaintiff made affidavit to the correctness of the last named items, and also said refusal, and within ten days after the completion of the contract for said building by said Chris Johnson, on November 24, 1890, plaintiff, on 29th day of November, 1890, presented said itemized account, amounting to nine hundred and eight dollars and seventy-nine cents to defendants, T. J. Moore and N. H. Stark, certified and sworn to as above, and demanded payment of the same from them, which was by each of them refused, and at the same time (they) refused to endorse on the same the time of presentation or to hold back the whole or *pro rata* part thereof. That thereupon, and within ten days after the completion of the contract for said building by defendant Johnson, to-wit: on the 2nd day of December, 1890, plaintiff filed in the office of the circuit clerk of Ouachita county, in which said building is situated, said itemized account so certified and sworn to, with an affidavit attached thereto, showing the presentation of said account to said contractor, Johnson, and his action thereon and the action of

plaintiff in making affidavit to said disputed items, amounting to sixty dollars, and his subsequent presentation, within ten days after completion of said contract by contractor Johnson, of said account to defendants, T. J. Moore and N. H. Stark, and his demand of payment of the same by them, and their refusal, as well as their refusal to endorse on the same the time of presentation, and to hold out the full or *pro rata* share of said account. Said affidavit also contained a correct description of the building in the construction of which said labor and materials in said account mentioned were used and the ground on which the same is situated. A copy of said account sworn to as above is filed herewith and asked to be made a part of this complaint. Plaintiff says that he has a lien upon said building and the ground on which the same is situated for said labor and materials. Wherefore he prays judgment for the sum of nine hundred and eight dollars and seventy-nine cents and costs against defendant, Chris Johnson; that a lien be declared upon said building and land for the payment of the same, and for other relief." On the margin of the complaint is the following amendment: "And at the time of furnishing the material to contractor, Johnson, he notified said Stark and Moore of his intention of furnishing said material and performing said labor on said building and the value thereof."

The defendants, Stark and Moore, moved to strike out the marginal amendment and demurred to the complaint, both of which the court sustained, and rendered judgment against plaintiff in favor of Stark and Moore; and plaintiff appealed.

The defendant, Chris Johnson, made no defense; and judgment was rendered against him in favor of plaintiff for the amount of the account sued on.

1. Amendment of pleading.

1. The motion was improperly sustained. The statutes expressly authorize the amendment of pleadings

by inserting allegations material to the case. The marginal amendment was made by leave of the court and was material, as will hereafter appear in this opinion.

2. Remedy for indefiniteness of pleading.

2. Appellees insist that their demurrer was properly sustained because the contract between them and Johnson was not set out in the complaint. Under the laws of this State a contract with the owner of the ground upon which a building or other improvement is constructed is essential to the establishment of a mechanic's lien in favor of a sub-contractor. Under the act of April 25, 1873, he is limited in his lien to the amount "originally contracted for between the employer and contractor;" and under the act of March 17, 1885, the owner is required to reserve one third of the contract price for his benefit, and it is only when the owner fails or refuses to do so, or to promptly pay the amount due him when his claim is presented in due time and properly certified, or fails or refuses to properly endorse his claim or hold out the amount due thereon out of the reserved fund when it is presented without the certificate of the principal contractor, but with the proper affidavit, is he entitled to a lien. "The lien, however, is created, not by the contract, but by furnishing the materials or doing the work. * * * Yet a contract creating an indebtedness on the part of the person whose property is to be charged with a lien, must exist in the first place, and then the performing of labor or the furnishing of materials * * creates the lien." *Kansas City Planing Mill Co.* v. *Brundage*, 25 Mo. App. 268; *Hannon* v. *Gibson*, 14 Mo. App. 33, 37; *Rosenkranz* v. *Wagner*, 62 Cal. 151; 2 Jones on Liens, section 1232 and cases cited.

The contract of the owner with the contractor is the authority by which the right is given to the contractor to erect or construct a building or other improvement on the ground of the owner, and is a limit of such right,

and a measure of the liability of the owner for labor performed and material furnished in the making and construction of the building or improvement. It is the foundation of the sub-contractor's lien. By it the owner consents to the services of the laborers and material-men employed by the contractor. In view of this fact, the law gives to the sub-contractor a lien on the improvement and the ground on which it is erected, on the performance of specified conditions, for the labor performed and materials furnished by him in the construction of the improvement. But as the owner has only consented to pay, for the entire labor and materials necessary to complete the improvement, the sum he has stipulated to pay the contractor, the sub-contractor is necessarily limited in all cases in the amount of his lien to the contract price, unless the owner expressly or impliedly consents to a lien for an additional or further sum. As a compensation for the charge against his property, the owner is entitled to a credit on the contract price for the amount he is compelled to pay to relieve his land. In this way the owner is not forced to pay anything in addition to the stipulated price for services and materials, and the contractor is required to comply with his contract with laborers and material-men, and reasonable protection is provided for the sub-contractor, and the owner is secured. In protecting the sub-contractor the law places it without the power of the owner to defeat his lien by payments in disregard of his claim. Mansfield's Digest, secs. 4405, 4421, 4424; Acts of 1885, p. 76, sec. 3; *Shellabarger* v. *Thayer*, 15 Kas. 619; *Clough* v. *McDonald*, 18 Kas. 114; *Laird* v. *Moonan*, 32 Minn. 358; *Hunter* v. *Truckee Lodge*, 14 Nev. 24; *Lonkey* v. *Cook*, 15 Nev. 58; *McAlpin* v. *Duncan*, 16 Cal. 126; 2 Jones on Liens, sec. 1290.

It is evident, therefore, that a plaintiff in an action to enforce a mechanic's lien should set forth in his com-

plaint so much of the contract of the owner with the builder as is necessary to show his lien and the amount thereof.

The only allusion to a contract of the owner in the complaint in question is contained in these words: "who had contracted with his co-defendants to construct said building." It is obvious that the complaint in this respect is indefinite and uncertain. This is a defect which cannot be reached by a demurrer, but must be taken advantage of, if at all, by a motion to make more definite and certain. Mansfield's Digest, section 5082.

3. Complaint to enforce sub-contractor's lien.

3. Appellees contend that their demurrer was properly sustained, because the complaint "does not show or allege that (the) materials claimed to have been furnished were furnished for the purpose of being used in said building under said contract between the contractor, Chris Johnson, and the other defendants, Moore and Stark, the owners." But this is not true. In the marginal amendment it is stated that "at the time of furnishing the material to (the) contractor, Johnson, he notified said Stark and Moore of his intention of furnishing said material and performing said labor on said building and the value thereof;" and in the body of the complaint it was alleged "that said labor was performed and (said) material (was) furnished at the request of the defendant, Chris Johnson, who had contracted with his co-defendant to construct said building, and (were) by him used in the construction of said building." From these allegations it is inferable that the materials were furnished for the purpose of being used in the construction of the building, if not clearly so, vaguely, in which event they can be made definite on a motion for that purpose.

While the complaint in question is by no means a model of pleading, yet enough is stated in it to show that appellant was entitled to a lien for some undisclosed

amount, under the act of March, 17, 1885. In view of this fact we have refrained from deciding whether a sub-contractor can be entitled to a lien for an amount exceeding his share of the reserved fund, under the act of 1885, as it is not shown that such share is not equal to the amount of his claim, and that it is necessary for us to decide the question in this case.

4. Sufficiency of affidavit.

4. Appellees, in support of their demurrer, say that the affidavit upon which the lien is claimed is insufficient. This affidavit is required to be filed in the same period of time as is provided by law "in cases of persons doing work or furnishing things under contracts therefor directly with the owner" (Acts of 1885, p. 76, sec. 4), which is ninety days after all the things have been furnished or the work has been done (Mansfield's Digest, sec. 4406). It is alleged in the complaint that the performance of the contract of the principal contractor was completed on the 24th of November, 1890, and that the plaintiff presented his claim, certified and sworn to, to the defendants, Stark and Moore, on the 29th day of November, 1890. This action was brought on the 8th of December, 1890, within ninety days after the contract with the owners was completed and ten days after plaintiff's claim was presented. In cases like this, under such circumstances, it has been held by this court that a substantial compliance with the statute is all that is required, and "that the neglect to comply fully and technically with directions which were intended for the protection of third persons, who might acquire rights in or liens upon the same property, could by no possibility tend to the defendant's prejudice," and would not defeat the lien of plaintiff. *Cohn* v. *Hager*, 30 Ark. 28; *Murray* v. *Rapley*, *id.* 568; *Anderson* v. *Seamans*, 49 Ark. 475; *Wood* v. *King*, 57 Ark. 284.

5. How defect in affidavit reached.

But the affidavit could not have been reached by demurrer, and its sufficiency is not, therefore, before us

for consideration. *Stillwell* v. *Adams*, 29 Ark. 346; *Nordman* v. *Craighead*, 27 Ark. 369; *Chamblee* v. *Stokes*, 33 Ark. 543.

The judgment of the circuit court in favor of appellees is, therefore, reversed, and the cause is remanded with instructions to the court to deny the motion and overrule the demurrer, and for other proceedings.

Bunn, C. J., did not participate in the decision of this cause, being disqualified.

McCOWAN v. STATE.

58 17
73 34
58 17
80 497

Opinion delivered June 10, 1893.

Larceny—Indictment—Allegation of ownership.

An indictment charging the defendant with stealing "two ladies' walking jackets, of the value of ten dollars each, the property of W. L. C. & Co.," without giving the names of the owners or alleging that "W. L. C. & Co." is a corporation, and without further description of the property, is insufficient.

Appeal from Lafayette Circuit Court.

CHARLES W. SMITH, Judge.

T. E. Webber for appellant.

The judgment should have been arrested. The allegation of ownership is necessary and must be laid in the names of the joint and several owners, *not in partnership name.* 47 Ark. 233; 29 *id.* 68; 37 *id.* 116; 42 *id.* 73; 55 *id.* 246; 2 Bish. Cr. Law, sec. 718 *et seq.*

James P. Clarke, Attorney General, for appellee.

Under the common law, the ownership must be alleged in the names of the joint and several owners. But the tendency now is to disregard technicalities and formalities. Our code is in harmony with this reformation. Crim. code, sec. 127. This is not a case of

variance, as in 55 Ark. 244, but the indictment designates the ownership in a manner simple and plain enough for a person of common understanding to grasp it, and this is sufficient under the code. 80 Cal. 229; 77 Cal. 445; 19 Cal. 598; 13 Bush (Ky.), 337; 55 Ark. 244.

HUGHES, J. The indictment in this case is for larceny, and describes the property alleged to have been stolen as "two ladies' walking jackets," and lays the ownership in "W. L. Connevey & Co.," without stating the names of the firm or partnership of "W. L. Connevey & Co. and without further description of the property alleged to have been stolen. There was a motion in arrest of judgment on the ground that the names of all the joint owners of the property were not stated in the indictment, which was overruled.

At common law, if the stolen goods are the property of partners, or joint owners, the names of all the partners or joint owners must be stated. The case of the *People* v. *Bogart*, 36 Cal. 248, was an indictment for larceny, in which the ownership of the coins stolen was laid in "Wells, Fargo & Co.," without stating the names of the firm of "Wells, Fargo & Co." and without stating that "Wells, Fargo & Co." was the name of a corporation. This was held insufficient under the Califonia code, which is substantially the same as ours. According to that case, we hold that if "W. L. Connevey & Co." is the name or style of a firm or partnership, the names of the several persons who compose the firm should be stated. Or if the indictment should state that one member of the firm, naming him or her, had special property in the goods stolen by reason of separate possession, an allegation of ownership in him or her would be sufficient. If "W. L. Connevey & Co." is the name of a corporation, the indictment would have been good, had it contained an allegation to that effect. *Id.; People* v. *Schwartz*, 32 Cal. 160; 2 Bishop, Cr. Pro.

secs. 718, 723; *Hogg* v. *State*, 3 Blackf. 326; *Commonwealth* v. *Trimmer*, 1 Mass. 476; 1 Bishop, Cr. Pro. sec. 493 *et seq.*

It is true that, in 19 Cal. 598, in the case of *People* v. *Ah Sing*, an indictment for larceny, which laid the ownership of the stolen goods in "Hanach, Eisner & Co.," without further description of the owners, was held sufficient, under a provision of the California code, which is exactly the same as the 2nd clause of section 2121 of Mansfield's Digest, which provides that an indictment is sufficient if it contains a "statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended."

In the case of *Reed* v. *Commonwealth*, 7 Bush, 641, an indictment for larceny was held sufficient which laid the ownership of the stolen property as "the property of the Tennessee River Packet Co., D. W. Swan, Little Brothers and others," without stating the names of the several owners. To support this the court relied upon a provision of the Kentucky code which is the same exactly as section 2107 of Mansfield's Digest, which provides that "no indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits."

But there should always be sufficient particularity and certainty in an indictment, in a matter of substance, to enable the defendant to prepare for his defense, and to plead his acquittal or conviction successfully, should he be again indicted for the same offense. Wharton, Cr. Pl. sec. 166*b;* *Rhodus* v. *Commonwealth*, 2 Duvall (Ky.), 159; *Barton* v. *State*, 29 Ark. 68.

All the members of a partnership sometimes go out and cease to be members, and entirely new members take their places, and yet retain the name of the old

firm. It cannot therefore be readily known who are members of a firm from the style or name of the firm.

There is not sufficient description of the offense in the indictment here without the names of the joint owners of the property to identify the act, and render the names of the joint owners of the property immaterial, and thus make the indictment sufficient under section 2111 of Mansfield's Digest, which provides that "where an offense involves the commission (of), or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, is not material."

The offense described is laid as the stealing, taking and carrying away of "two ladies' walking jackets of the value of ten dollars each, the property of W. L. Connevey & Co." which is a very general and indefinite description of the offense, and insufficient of itself. The indictment being bad in substance, no judgment should have been rendered thereon against the appellant. *Younger* v. *State*, 37 Ark. 116.

The motion in arrest of judgment should have been sustained. The judgment is reversed, and the cause is remanded for further proceedings.

---

58 20
64 220
58 20
76 480

BROWN v. WRIGHT.

Opinion delivered June 10, 1893.

1. *Rights of married women—Presumption as to law of Texas.*
In the absence of proof of the laws of Texas as to the rights of married women, the common law rule that money delivered by a married woman to her husband for investment becomes his property will not be presumed to be in force in that State, since the jurisprudence of Texas was not derived from the common law; in such case the rights of the parties will be determined

according to the law of the forum, and the husband held a trustee for the wife's benefit.

2. *Estoppel—Wife's land in husband's name.*

That a wife permitted the legal title of land of which she was equitable owner to remain in her husband's name for two years will not estop her from claiming its proceeds where it is not shown when she ascertained that the conveyance had been made to him, and no act on her part indicated a willingness to have it treated as his property; especially as to creditors of her husband who knew that the land was her property.

3. *Husband's fraud—Ratification by wife.*

Where a husband made fraudulent representations in the sale of land which stood in his name but equitably belonged to his wife, having been purchased with her means, her acceptance of the purchase money without knowledge of the fraud is not a ratification of it.

Appeal from Arkansas Chancery Court.

JAMES F. ROBINSON, Chancellor.

J. H. and J. A. Brown brought suit against Wm. Wright and Annie, his wife. The complaint alleges that on April 30, 1887, William Wright owned certain property in Tyler, Texas, known as Wright's hotel; that he fraudulently represented to plaintiffs that his title was unincumbered, and thereby induced plaintiffs to buy it from him at its full value, $2500, paid in cash; that he and his wife, Annie, thereafter removed from Texas to Pine Bluff, Arkansas, and invested the money received of plaintiffs in a hotel at Pine Bluff, and took the title in the name of defendant, Annie; that the Pine Bluff property was afterwards sold, and the money re-invested in a hotel at Stuttgart and other real estate in Arkansas county, and the title of the last mentioned real estate was also taken in her name and is now held and claimed by her as her own; that, about a year after plaintiffs had purchased and paid for the hotel in Tyler, they discovered for the first time that this hotel property, as defendants well knew when they sold to plaintiffs, was incumbered by a mortgage which defend-

ants had joined in making to one Mrs. Loftin on April 19, 1886, to secure a debt of $1000 payable two years after date and bearing twelve per cent. interest from maturity, the existence of which mortgage defendants intentionally concealed from plaintiffs; that, the mortgagee having advertised the property for sale under the mortgage, the plaintiffs, to save their title, were compelled to pay, and did pay, the full amount of the incumbrance; that both defendants are insolvent, and have no property except that sought to be reached in this action; and that the object of defendants in procuring the title to this property to be taken in the name of defendant, Annie, was to defeat plaintiffs' claim. Prayer was for judgment for the amount expended by plaintiffs to remove the incumbrance, that the lands mentioned be subjected to plaintiffs' claim, and for general relief.

The answer of both the husband and wife sets up that when the hotel at Tyler was bought, $1200 of the price was paid with her money, and that the remainder was afterwards paid by her with money which she made by keeping boarders, and that the husband, though holding the legal title, was really a trustee for her. They deny that either of them made any false representations about the lien, but say that plaintiffs bought subject to this, as it was on the public records. The answer also sets up a homestead right in the property sought to be subjected to plaintiffs' claim.

Assuming the answer to contain a counter-claim, the plaintiffs filed a reply denying the averments of the answer. This reply also contained an affirmative allegation that defendants made plaintiffs a warranty deed to the hotel at Tyler. This reply seems to have treated as an amendment to the complaint, and defendants filed an answer to it, denying that defendant, Annie, made a warranty deed.

J. H. Brown, one of the plaintiffs, testified: "I am sixty-three years old, am a cotton broker at Tyler, was formerly a merchant and knew defendants at Tyler many years. They kept a hotel there, and I sold them railroad and family supplies. John A. Brown and I bought their hotel at Tyler, called the Wright hotel, and paid them $2500 in cash therefor, its full value. Before buying I questioned William Wright, one of the defendants, closely about the title, and he said there was not a dollar's incumbrance on it. His wife said the same thing. They told me the same thing when they delivered the deed. We have offered to sell the property for $2500. Some months after buying the property we found there was a $1000 mortgage on it, given to Mrs. Loftin by Wright and wife, and we paid this in self protection and had it transferred to us. We got a warranty deed signed by both defendants. I herewith exhibit it. He had purchased this land from J. P. Baird. Wright was poor, and had no other property, I think, unless it was a little place near Tyler which was not paid for."

John A. Brown, the other plaintiff, testified substantially the same as J. H. Brown.

William Wright testified: "My wife owned forty-seven acres of land near Tyler. She sold it and invested the money in the property known as Wright's hotel at Tyler. The deed to that was taken in my name, but was paid for with her money obtained from the sale of her land. When this hotel was sold, the money was invested in a hotel bought at Pine Bluff from D. L. Ringler, and the deed taken to my wife, as it was her money. When the Ringler property was sold, the proceeds were invested in land in Arkansas county, which was exchanged for the property now in suit. I did not make the statement to Ringler which he testified to in his deposition. When I sold the hotel to plaintiffs, I was

not insolvent; I afterwards sold a piece of land for $1200."

Annie Wright testified: "My husband and I went to Tyler about eleven years ago. I bought forty-seven acres of land in my own name and with my own money. When I sold this I gave the money to my husband to buy the lots in Tyler (afterwards known as the Wright hotel), and without my knowledge he took the deed in his own name. I did not know for some time that he had done this, and when I discovered it I was very much dissatisfied. My husband worked in the railroad shops; I was a boarding house keeper, and bought the lots in Tyler to build a boarding house, which I kept for one year and managed myself. I refused to sign the deed to Brown until he gave the check for the price to me and in my name. When the Wright hotel was sold I invested the proceeds in a hotel at Pine Bluff, bought from D. L. Ringler, and when the latter was sold I invested the proceeds in land in Arkansas county, which I exchanged for the land in suit. I did not know my husband was insolvent."

By stipulation of counsel it was agreed that defendants would each deny that they had ever made any statement to anybody, to the effect that the Wright hotel at Tyler was unincumbered, and this denial was to be taken as if deposed to in a deposition.

Upon this testimony the chancellor found in favor of the wife and dismissed the complaint as to her, but rendered judgment against the husband for $1000 and interest.

Plaintiffs have appealed.

W. S. McCain and *T. J. Ormsby* for appellant.

1. Where a vendor falsely represents that his title is perfect when he knows it is incumbered, he is liable for deceit. If he gives an express covenant of

warranty, the vendee has the option to sue for deceit or on the broken warranty. 15 Ark. 114; 4 *id.* 467; 11 *id.* 58; 40 *id.* 422. The reply should be treated as an amendment to the complaint, and thus state a count upon the covenant. The proof sustains both counts.

2. The proof shows that the property bought was bought with the husband's money. 50 Ark. 237; 30 *id.* 124; 37 *id.* 22; 42 *id.* 503. Under the common law the money became the husband's. 68 Ill. 119; 50 Ind. 288; 41 Tex. 422 and cases *supra.* See also 42 Ark. 503. What the law of Texas is, in the absence of proof, is difficult of solution. 52 Ark. 385; 51 *id.* 459. This case is similar to 50 Ark. 42. See also 30 Ark. 79. The trust seems to be an afterthought to defeat creditors. 48 Ark. 169; 34 *id.* 467.

3. By enjoying the benefits of her husband's fraud, she must be held to have ratified his acts. Mechem on Ag. sec. 743, note 1; 28 Ark. 59; 54 *id.* 220; 29 *id.* 131; 111 U. S. 395; 12 Wall, 360; Story, Agency, sec. 139 and notes. An action of deceit lies against one who keeps money after he knows it was obtained by deceit. 1 Wharton, Cont. 267–70; Tiedeman on Sales, sec. 173. If defendants obtained money by fraud and invested it in other property, equity will follow it up as long as it can be traced. 51 Ark. 351.

1. Presumption as to laws of Texas.

MANSFIELD, J. 1. It is suggested by counsel for the appellants that the complaint was treated in the court below as if it were so amended as to claim damages for a breach of the covenants contained in the deed. But we find nothing in the record to warrant us in supposing that the chancellor so regarded the complaint or in holding that he might properly have done so. We must therefore consider it as stating only the facts embraced in its original form as presented by the transcript. As found there, it states no cause of action arising out of any contract with Mrs. Wright, or result-

ing from any tort committed by her, either in person or by an authorized agent; and the only relief it seeks against her is to have the land she holds in Arkansas subjected to the satisfaction of the judgment prayed for against her husband. That relief is sought on the ground that the land was purchased with the husband's money, and that the deed was taken in the wife's name to defeat the collection of the plaintiffs' claim.

The Arkansas property was purchased with the money received on the sale of the Texas hotel; and the latter was paid for with money belonging to Mrs. Wright and delivered to her husband for the purpose of making the purchase. She testifies that the deed was taken in his name without her knowledge or consent, and on this point there is no contradiction of her testimony. It also appears, from the undisputed facts of the case, that she refused to execute a deed on the sale to the plaintiffs except upon the condition that the purchase money should be paid directly to her, and that it was only by a compliance with such condition that the conveyance from her was obtained.

But it is argued that when the wife's money passed into the possession of the husband, prior to his purchase of the hotel, it became his, and that he was therefore the equitable, as well as legal, owner of the property purchased with it. Whether, under the laws of Texas, the money ceased to be the separate property of Mrs. Wright when thus delivered to her husband for investment, we cannot decide, for the reason that what the law of that State is has not been proved.

It is insisted that the money became the property of the husband by the rule of the common law. But as the jurisprudence of Texas was not founded upon or derived from the common law, we cannot presume that that law is in force there. *Thorn* v. *Weatherly*, 50 Ark. 237; *Garner* v. *Wright*, 52 Ark. 385.

With no proof before him as to the law of Texas, the chancellor could not determine the right to the Tyler hotel otherwise than according to our own laws (*Garner* v. *Wright*, 52 Ark. *supra*). Under these the mere possession of the wife's money by the husband would not have converted it into his property; and he would have held the hotel purchased with it as a trustee for her benefit. Mansfield's Digest, sec. 4637; *Kline* v. *Ragland*, 47 Ark. 115; *Hoffman* v. *McFadden*, 56 Ark. 217.

2. When wife not estopped to claim property in husband's name.

2. But it is further insisted that the appellee permitted the title to the hotel to remain in the name of her husband for such length of time as to bar her equitable right to it as against his creditors. It appears to have been held in his name for about two years; but it is not shown when she ascertained that the conveyance had been made to him, and the evidence discloses no act on her part indicating a willingness to have it treated as his property. Moreover the plaintiffs were distinctly informed of her claim before their purchase was completed, and they recognized it by paying her the purchase money. She is not then, as against them, estopped to assert that her husband held in trust for her; and as they must have understood that she received the money for her separate use, its investment in her name in the lands purchased in this State was not in fraud of their rights.

3. Ratification by wife of husband's fraud.

3. This disposes of the only question raised by the pleadings. For, as before stated, the action is not upon the covenant embraced in the deed nor for the breach of any other contract, but is for deceit, and that is not charged against the appellee. The covenant was not expressly against incumbrances, and if the plaintiffs had sued for its breach, we cannot know but that Mrs. Wright might have shown that, under the laws of Texas, she was not liable upon it. But it is very earnestly con-

tended that Mrs. Wright ratified the false representation of her husband by accepting its benefit, and that on the proof a personal judgment should have been rendered against her for the sum she obtained as the fruits of his fraud. Conceding that the deceit alleged against William Wright was not so purely a tort,* that it was necessary to show that it was actionable by the law of Texas, in order to maintain a suit for it here,† and that, notwithstanding the nature of the complaint, it was proper for the chancellor to consider any evidence tending to show that Mrs. Wright participated in or ratified the wrongful act of her husband, we do not think the facts warranted relief against her on either of these grounds. A preponderance of the evidence does not, in our judgment, show that when she received the purchase money for the hotel she knew that a false representation had been made to effect its sale; and without such knowledge her acceptance of the money was not a ratification of the fraud. Mechem on Agency, secs. 113, 148; *Lyon* v. *Tams*, 11 Ark. 205. As to the declarations attributed to her by the disputed testimony of the plaintiffs, with reference to the incumbrance of the hotel, we are not satisfied that they were relied upon, or were such that the plaintiffs had a right to rely upon them, under the circumstances detailed in the statement of the case. *Yeates* v. *Pryor*, 11 Ark. 58; *Matlock* v. *Reppy*, 47 Ark. 148; 2 Bish. Mar. Wom. secs. 257, 258.

Our conclusion therefore is that, on the case made by the pleadings and the proofs adduced, the complaint, in so far as it is against Mrs. Wright, was properly dismissed.

Affirmed.

---

* See *Coon* v. *Atwell*, 46 N. H. 510.

† See *Carter* v. *Goad*, 50 Ark. 155 and authorities there cited.

NOTE—There is a note to the above case in 21 L. R. A. 467, on the presumption as to the law of other states. (Rep.)

WESTERN UNION TELEGRAPH CO. *v.* FELLNER.

58 29
65 540
58 29
186 340

Opinion delivered June 17, 1893.

Telegraph company—Failure to deliver message—Damages.

Failure of a telegraph company to deliver a message, whereby a purchase of property in the market was not consummated, will not entitle the sender to recover more than nominal damages, though the property advanced in value before the delay was discovered, if no purchase was subsequently made, and there is no evidence that, if it had been made, the property so purchased would have been sold at a profit.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

Clendening, Mechem & Youmans for appellant.

Before a recovery can be had for more than nominal damages an actual and substantial loss suffered must be shown. 44 Ark. 439. No loss is shown beyond the price of the telegram. There is no proof that he would have sold on the 31st of August. The general rule is that anticipated profits cannot be recovered. In 7 Hill, 61, *there was a contract* to deliver, and plaintiff was allowed to recover the difference it would have cost him to perform the contract and the price he was to receive. Profits upon a contract never made are too remote and uncertain to be taken into consideration. See 83 Ky. 104; 55 Pa. St. 256; 98 Mass. 232; 1 Col. 230; 33 Wis. 558; 124 U. S. 444; 100 N. C. 300; 48 Fed. Rep. 310.

Rogers & Read for appellee. *B. H. Tabor* of counsel.

Appellant's contention is that, to enable plaintiff to recover, it must be made to appear that he did actually make a purchase of the bonds at a loss, and that the measure of damage is the difference between the price on

the day they would have been bought had the message been delivered, and the price on the day he might have first purchased them, after learning the message had not been delivered, and cite 1 Col. 230; 33 Wis. 558; 124 U. S. 453; 48 Fed. Rep. 810. Of these the only one that supports appellant's contention is the latter case. In this case the damages which follow the breach were fixed by a definite and certain rule, the daily quotations of stock exchange. The stock steadily advanced to the day of suit. The purchase to be made constituted the only inducement and entered directly into the contract with the defendant company, and the damages claimed constituted the direct, proximate and inevitable result of the breach. See 44 N. Y. 264; 7 Hill, 60; 53 Ark. 434; 48 *id.* 502; 5 So. Rep. 397; 21 Pac. Rep. 339; 4 N. Y. Sup. Ct. 666; 49 N. W. Rep. 88; 16 S. W. Rep. 1095; 26 N. E. Rep. 534; 19 S. W. Rep. 336, and many others cited in the opinion of the circuit judge. The company is liable for its failure to deliver. 53 Ark. 434; Allen's Tel. Cases, note p. 455. The message disclosed on its face its purpose. 19 Am. St. Rep. 55; 10 *id.* 699 and note p. 785. The loss of a purchase was a proximate result of defendant's breach of contract, and is capable of certain admeasurement. 9 Exch. 341; 7 Hill, 61; 16 N. Y. 489; 9 Am. Rep. note p. 149; 10 *id.* note p. 782; 1 Am. L. Reg. 685; Allen's Tel. Cases, 61–63; 13 Cal. 422; 1 Daly, 575; 32 Barb. 530; 75 Ga. 785; 37 Iowa, 214; 115 Ind. 191; 18 Ill. App. 56; 52 Ind. 1. 21 Pac. Rep. 339; 58 Tex. 170; 64 Wis. 644; 98 Mass. 232; 60 Me. 7; 55 Penn. 262; 44 N. Y. 263.

HUGHES, J. This is an appeal from a judgment for damages against the Telegraph Company, for failure to deliver a message sent by the appellee, Fellner, over its line. There is a cross-appeal by Fellner.

The case was tried by the court without a jury, and the court made the following findings of facts and declarations of law:

"That on the night of August 26, 1891, plaintiff delivered to defendant, in Fort Smith, Ark., the following message: 'Henry Clews & Co., Broad St., N. Y. Buy me 100 Burlington & Quincy common stock, and 10,000 Sante Fe incomes. Wire price. S. FELLNER.' That said message was an order to buy for plaintiff 100 shares C. B. & Q. Ry. common stock and 10,000 A. T. & S. F. income bonds. That defendant received said message, and for 75 cents paid by plaintiff agreed to transmit it to Henry Clews & Co., which it negligently failed to do. That plaintiff inquired frequently at defendant's office for answer to his message and, receiving none, on Saturday, August 29, 1891, telegraphed Henry Clews & Co., asking if they had filled his order, to which they replied by telegram that they had not; that, at the time of the receipt of this message, it was too late in the afternoon of Saturday for plaintiff to place his order before Monday, August 31, 1891; that plaintiff made no purchase of the stocks and bonds; that Henry Clews & Co. never received the message delivered by plaintiff to defendant on August 26, 1891; that said Henry Clews & Co. had in their hands $2000 belonging to plaintiff, and they had agreed with plaintiff to advance money and buy for plaintiff stocks or bonds or both whenever so ordered by him, charging him 6 per cent. per annum on all sums advanced, they holding the $2000 to secure the same and prevent loss to themselves; and that if they had received the night message of August 26, 1891, they would on the following day have purchased for the plaintiff the property mentioned therein. That on Monday, August 31, 1891, the price on exchange at New York of the 100 C. B. & Q. had advanced $550 over its price on August 27,

1891, and that the same has continued steadily to advance in price to the present time. That the 10,000 Sante Fe income bonds had advanced on August 31, $312 over their price of August 27, 1891, but on September 1, 1891, they depreciated and could have been had at the same price that they had sold for on August 27. From September 1, however, they had steadily increased in value to the present time. The premises considered, the court declares the law to be that, by defendant's negligence in not transmitting plaintiff's telegram, plaintiff has sustained proximate and certain damages in the sum of $550 from his loss of a purchase of the Burlington & Quincy stock, but plaintiff has not sustained any certain damage from his loss of a purchase of the Sante Fe incomes. Wherefore the court finds the issues for plaintiff and assesses his damage at $550. It is therefore by the court considered, ordered and adjudged that plaintiff, Samuel Fellner, do have and recover of and from the defendant, Western Union Telegraph Company, the sum of $550, together with his costs here laid out and expended."

Is the appellee entitled to more than nominal damages?

The case of the *Western Union Telegraph Company* v. *Hall*, 124 U. S. 444 is very much but not exactly like this one. In that case the plaintiff delivered to the Telegraph Company for transmission, the following message: "11—9—1882. To Chas. T. Hall, Exchange, Oil City, Pa. Buy ten thousand if you think it safe. Wire me. GEO. F. HALL." (Meaning ten thousand barrels of oil.) Through the negligence of the employes of the company the message was forwarded to Oil City without the name of the party to whom it was addressed, and the operator at Oil City had to telegraph back for the name, so that the message, which reached Oil City at 11 o'clock a. m. and would have been delivered to

Chas. T. Hall at 11:30 a. m. had it been properly sent, was not delivered till 6 o'clock p. m. of the day it was sent, before which hour the exchange had closed, in consequence of which the oil could not be purchased that day. At the opening of the exchange on the next day, the price of the oil had advanced. Had the dispatch been properly sent and promptly delivered, Chas. T. Hall would have bought by 12 o'clock m., on the 9th of the month, the oil he was directed to buy for plaintiff at $1.17 per barrel, but by the next day the market price of oil had advanced to $1.35 per barrel, at which price Chas. T. Hall, not deeming it advisable, did not purchase. It was not shown by the evidence whether the price of petroleum advanced or declined after the 9th of November. Here is the difference between that case and the one at bar. In this case the evidence is that the 100 C. B. & Q. had advanced $550 by August 31 over the market price on August the 27th, and that the same had continued steadily to advance in price to the time of the trial of the cause.

In the case of *Western Union Telegraph Company* v. *Hall*, above stated, Mr. Justice Matthews, speaking for the Supreme Court of the United States, said: "It is clear that in point of fact the plaintiff has not suffered any loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place. It has been well settled since the decision in *Masterton* v. *The Mayor of Brooklyn*, 7 Hill, 61, that a plaintiff may

rightfully recover a loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself, as the direct and immediate result of its fulfillment. In the language of the Supreme Judicial Court of Massachusetts in *Fox* v. *Harding*, 7 Cush. 516, these are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into and in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit. * * * The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. The familiar rules on this subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of the contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last."

In the case at bar there was no contract entered into, on the appellee's behalf, for the purchase of the stocks and bonds; there is no evidence that had the stocks and bonds been bought for plaintiff on the 27th of August, they would have been sold at a profit at any time at all, though the evidence shows that it might have been done at any time before this suit was brought. If

the appellee had bought, and had held the bonds till after the suit was brought, and there is no evidence that he would have done so, it cannot be found from the evidence that he could afterwards, or that he would, have sold for a profit, as we cannot presume that they continued to advance, or held the advance over August 31 afterwards.

We are of the opinion that the damages in this case are too remote, speculative and contingent to warrant a recovery.

The judgment of the circuit court as to the Santa Fe incomes is affirmed; as to the Burlington & Quincy common stock it is reversed as to the $550 damages in favor of appellee, and the cause is remanded for further proceedings.

BOLES *v.* STATE.

58	35
e70	165
58	35
d72	525
58	35
80	97

Opinion delivered June 17, 1893.

1. *Indictment—Misnomer of grand juror.*

   Where the name "Swafford John" was found on the alternate grand jury list, and the record failed to show that a juror of that name served or was excused, but did show that John Swafford was sworn as a grand juror, an indictment found by the grand jury should not be quashed where the court finds that the latter was the person selected by the jury commissioners and described as "Swafford, John."

2. *Indictment for robbery—Ownership of property.*

   An indictment for robbery under the statute (Mansfield's Digest, sec. 1599), as at common law, must allege the ownership of the property taken.

Appeal from Madison Circuit Court.

EDWARD S. MCDANIEL, Judge.

Lee Boles was convicted of robbery in the Madison circuit court on change of venue from Carroll county.

The indictment charges that "the said Lee Boles and Bone Terry, in the said county of Carroll in the eastern district thereof, in the State of Arkansas, on the 10th day of July, 1892, unlawfully, forcibly, violently and by putting in fear, did take, from the person and possession of one R. A. Martin, one United States treasury note, lawful money of the United States of America, of the denomination and value of $5; one paper bill, current money of the United States of America, of the denomination and value of $5, a further description of which is to the grand jury unknown; five paper bills, the denomination of which is to the grand jury unknown, current and lawful money of the United States of America, and of the aggregate value of $50; five silver coins, lawful money of the United States of America, of the aggregate value of $5; and the grand jury do accuse the said Lee Boles and Bone Terry of the crime of robbery, against," etc.

The assignments of error are stated in the opinion.

J. M. Pittman for appellant.

James P. Clarke, Attorney General, for appellee.

1. Misnomer of grand juror.

MANSFIELD, J. Before pleading to the indictment on which he was convicted, the defendant moved to set it aside on the ground that there was "a substantial error in the formation of the grand jury" by which it was found. Mansf. Dig. sec. 2157.

In support of this motion he read in evidence a record entry, made at the term at which the indictment was found, showing the lists of grand and alternate grand jurors returned by the jury commissioners. From this it appeared that the name "Swafford John" was found upon the alternate list, and that the name "John Swafford" was not found upon either of the lists. And as the record failed to show that a juror described as "Swafford John" was either excused from service or

sworn, but did show that "John Swafford" was sworn as a member of the grand jury, the defendant contended that no person of the latter name had been selected by the jury commissioners or summoned from the bystanders. But the court found from the record that the "John Swafford" sworn as a juror was the same person selected by the commissioners and described by them as "Swafford, John." On this finding the court very properly overruled the motion.

2. Indictment for robbery must allege ownership.

The sufficiency of the indictment was challenged both by demurrer and by motion in arrest of judgment; and we think it is obviously defective in failing to allege the ownership of the money charged to have been taken. That allegation is found in all the common law precedents of indictments for robbery, and we have been unable to find any adjudged case in which it has been dispensed with under a statute similar to ours. 3 Greenleaf, Ev. sec. 223, note 2; 2 Bish. Cr. Pr. sec. 1002. The section of our statute defining the crime is as follows: "Robbery is the felonious and violent taking of any goods, money or other valuable thing from the person of another by force or intimidation; the manner of the force or the mode of intimidation is not material, further than it may show the intent of the offender." Mansf. Dig. sec. 1599. This is but an affirmance or adoption of the common law offense of robbery, and the indictment must therefore allege all the facts necessary to constitute the offense at common law. One of these facts, according to all the authorities, is that the property taken belonged to the person robbed or to a third person. *Commonwealth* v. *Clifford*, 8 Cush. 215; *State* v. *Absence*, 4 Port. (Ala.) 397; *Roberts* v. *State*, 21 Ark. 183; *Clary* v. *State*, 33 Ark. 561–2; 2 Bish. Cr. Law, secs. 788, 789, 1156 n. 1, 1159; 2 Bish. Cr. Pr. secs. 1002, 1006; 3 Greenleaf, Ev. sec. 224; *Brown* v. *State*, 28 Ark. 126; *Haley* v. *State*, 49 Ark. 151; *Scott v. State*, 42 Ark. 73; *State* v.

Ah Loi, 5 Nevada, 99; *Smedly* v. *State*, 30 Tex. 214; *People* v. *Vice*, 21 Cal. 344; *Stegar* v. *State*, 99 Am. Dec. 472 and notes.

The indictment pursues substantially the language of the statute. But that is not always sufficient, even where the offense charged was created by the statute. *State* v. *Graham*, 38 Ark. 519. "Where the offense," said Judge Smith, "is purely statutory, having no relation to the common law, it is generally sufficient to follow the language of the statute." *State* v. *Witt*, 39 Ark. 216. But here it was plainly the intention of the legislature not to create an offense, but to provide for the punishment of one existing at the common law; and of that offense the matter omitted by this indictment is an essential element, although the statute does not expressly mention it. *Commonwealth* v. *Clifford*, 8 Cush. 215. In the case just cited the indictment was upon a statute similar to ours, and the Supreme Court of Massachusetts held it bad because it failed to allege the ownership of the property. The same ruling was made in the *People* v. *Vice*, 21 Cal. 344, and in other cases cited above.

Mr. Bishop says that in robbery the ownership of the property "must be alleged * * precisely as in larceny." 2 Bish. Cr. Pr. sec. 1006. And we presume that it would not be contended that an indictment for larceny would be good if it contained no allegation of either a general or special ownership. 2 Bish. Cr. Law, sec. 789; 2 Bish. Cr. Pr. secs. 718, 720. See also *Scott* v. *State*, 42 Ark. 73; *Blankenship* v. *State*, 55 Ark. 244.

The judgment will be reversed, and the cause remanded with instructions to the circuit court to quash the indictment and to hold the defendant subject to the further action of the grand jury on the charge against him.

RAILWAY COMPANY *v.* STATE.

Opinion delivered June 17, 1893.

58 39
66 115
58 39
e77 141
58 39
82 458
58 39
85 284

Duty of railway to signal at crossing—Defective complaint.

Under Mansfield's Digest, sec. 5478, imposing a penalty upon a railway for failure to ring a bell *or* sound a whistle at a highway crossing, a complaint which alleges a failure to ring a bell *and* sound a whistle does not state facts sufficient to constitute a cause of action, and a judgment by default based upon it will be reversed on appeal.

Appeal from Sebastian Circuit Court, Greenwood District.

T. C. HUMPHRY, Judge.

Dodge & Johnson for appellant.

This court held in 55 Ark. 200, that the complaint, although in form an indictment, was a civil proceeding, and that the court had jurisdiction. But the complaint is defective, and no judgment could be rendered on it. Mansfield's Digest, sec. 5478; 54 Ark. 546. No violation of law was charged.

James P. Clarke, Attorney General, for the State.

54 Ark. 546 is not conclusive. In that case, it was an indictment. In this case a civil complaint. 55 Ark. 200. Construing the pleading as an entirety, the purpose appears to claim a penalty for failure to either ring a bell or sound a whistle. 31 Ark. 657. The cause of action is probably defectively stated, but the appellant's remedy was a motion to make more definite and certain. Mansfield's Digest, secs. 5082, 1310.

POWELL, J. The appellee, on the 11th day of September, 1889, filed in the circuit court of Sebastian county, for the Greenwood district thereof, the following pleading: "The grand jury of Sebastian county, in and for the Greenwood district thereof, in the

name and by the authority of the State of Arkansas, accuse said railroad company of the crime of failing to sound a bell and to whistle a steam whistle, committed as follows, to-wit: The St. Louis, Iron Mountain & Southern Railroad Company on the 20th day of August, 1889, in the county and district aforesaid, the said company operating and maintaining a railroad, among other places, from Fort Smith, Arkansas, to and near Greenwood, Arkansas, for the running of passenger, freight and other cars, and there being a crossing of said railroad across the Greenwood and Hackett City road, near the town of Greenwood, on the day and year aforesaid, the said company unlawfully failed to ring a bell and to whistle a whistle on a locomotive and train of cars at the distance of eighty rods from the place where the said railroad crosses the said Greenwood and Hackett City road, locomotive and train of cars run by said company being run along said railroad at said time, and said company failed to keep a bell ringing and a whistle whistling from said point of eighty rods until said train had passed said crossing, against the peace and dignity of the State of Arkansas.

"J. B. McDonough.

"Prosecuting Attorney, Twelfth Circuit of Arkansas."

The appellant failing to enter its appearance, or to plead, answer or demur to said action, a judgment by default was duly rendered against it.

After the judgment by default had been entered, the appellant herein applied to this court, by petition, praying for a writ of certiorari to the clerk of the Sebastian circuit court, compelling him to certify up the record in this case, and that the judgment herein be quashed.

This court upon a hearing denied the prayer of the petition, the court holding that the pleading, although in the form of an indictment, was in reality a complaint,

that the circuit court had jurisdiction to entertain the proceeding and render judgment thereon, and that this judgment was not subject to collateral attack, but that the remedy was by appeal.

After the refusal of the writ of certiorari, the apellant, on January 12, 1892, prayed an appeal, which was duly granted by the clerk of this court.

This suit is based upon section 5478, Mansfield's Digest, which is as follows: "A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of two hundred dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer and the other half to the county."

The only question raised in this case which we believe necessary to decide is, does the pleading herein treated as a complaint set up facts sufficient to constitute a good cause of action against appellant? Freeman on Judgments, sec. 538, says that judgments by default are proper subjects of appeal, and are reversed when the complaints on which they are based do not state matters sufficient to constitute a cause of action; that the default does not admit any fact which the plaintiff has not thought proper to allege. Black on Judgments lays it down as a rule (sec. 183) "that a judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered, * * * so where the complaint is defective in substance to the extent of failing to show a cause of action, no judgment can be entered upon it." This would be reversible error. The rulings of this court are in harmony with those above quoted. *Fullerton* v. *Houpt*, 12 Ark. 399; *St.*

Louis, etc. R. Co. v. *Yocum*, 34 *id.* 497; *Chaffin* v. *McFadden*, 41 *id.* 42.

In the case of *State* v. *Railroad Company*, 54 Ark. 546, upon an indictment based upon the same statute as this suit, and almost a literal copy of the complaint herein, the court said: "The offense charged here is the failure to perform a duty which under the law may be discharged by doing either of two specific acts. The non-performance of either of the acts is therefore an affirmative element of the offense, and without its averment the indictment is not valid. The railway company satisfies the law by using either a bell or a whistle at the places and in the manner required. To aver then that the company neglected 'to ring the bell' would not state a violation of the statute, since it may have been obeyed by sounding the whistle. But an averment that the company 'neglected to ring the bell or to sound the whistle' would sufficiently state a neglect to perform a statutory duty by either method. And so an allegation that the defendant 'neglected to sound the whistle and also neglected to ring the bell' would be equivalent to saying that neither act was done. But the averment in the indictment is that the defendant 'did unlawfully fail and neglect to ring the bell and sound the whistle,' and that 'it unlawfully failed to keep said bell ringing and whistle sounding,' etc. Now the ringing of the bell and the sounding of the whistle are not here referred to as separate and distinct acts; but in each clause of the indictment they are stated as if they constituted one continuous act which in its entirety was necessary to complete the duty required by the statute. The import of the language thus employed is to impute to the defendant a non-feasance arising, not from a failure to do either of the acts, but from a neglect to perform both of them at the same time. And to say, in the form of expression used by the pleader, that the defendant failed

to perform the *two* acts does not exclude the idea that he may have performed one of them. The indictment is therefore bad for uncertainty."

This, although a civil action, is penal in its character, and should be strictly construed.

The complaint in this case has the same defect as the indictment above construed.

The complaint failing to set up a valid cause of action, no judgment can be rendered thereon. The judgment is reversed, and cause remanded.

CAIN *v.* STATE.

Opinion delivered June 24, 1893.

Indictment for false pretenses—Disjunctive description of property.

An indictment which charges that defendant by false pretenses obtained thirty dollars, described as follows, to-wit: Thirty dollars in treasury notes of a given denomination, thirty dollars in silver certificates of a given denomination, etc, describing the thirty dollars so obtained in six different ways, is equivalent to an averment that the money obtained was thirty dollars in treasury notes, *or* in silver certificates, etc., and is bad for uncertainty.

Appeal from Randolph Circuit Court.

JOHN B. MCCALEB, Judge.

STATEMENT BY THE COURT.

The defendant was indicted at the August term, 1892, of the Randolph circuit court, for the crime of obtaining money under false pretenses, from one A. Z. Schnabaum, in manner as set forth in the indictment, which (omitting what is not peculiar to the case) is as follows, to-wit:

"The said George Cain, on the 22nd day of September, 1890, in the county and State aforesaid, did design-

edly, and by false pretense, represent to one A. Z. Schnabaum, then and there being, that he was the owner of one bale of cotton of the value of forty dollars, which he then and there, upon the representations aforesaid, sold to the said A. Z. Schnabaum, receiving therefor the sum of thirty dollars in good and lawful money of the United States, to-wit, thirty dollars in United States treasury notes, commonly called 'greenbacks,' of the denomination of five dollars each; thirty dollars in United States silver certificates of the denomination of ten dollars each, and of the value of ten dollars each; thirty dollars, one United States gold certificate of the denomination of twenty dollars and of the value of twenty dollars, and one United States silver certificate of the denomination of ten dollars and of the value of ten dollar; thirty dollars in the gold coin of the United States, of the denomination of ten dollars each and of the value of ten dollars each; thirty dollars in the silver coin of the United States of the denomination of one dollar each and of the value of one dollar each; thirty dollars in the nickel coin of the United States of the denomination of five cents each and the value of five cents each, with felonious intent to cheat the said A. Z. Schnabaum and to obtain said money: when, in truth and in fact, the said George Cain did not own one bale of cotton of the value aforesaid, or of any other value, at the time, and that said representations were then and there feloniously, falsely and knowingly made with the intent to cheat and defraud the said A. Z. Schnabaum and to obtain from him the money aforesaid, and, by means of said felonious, false representations so knowingly made, the said George Cain did then and there obtain from said A. Z. Schnabaum the said thirty dollars and of the value of thirty dollars, against the peace and dignity of the state of Arkansas."

To this indictment a demurrer, containing one general cause and seven special causes, was interposed, overruled and exceptions noted. Three other indictments for the same offense had been previously found in the same court against the defendant, all of which had been previously quashed.

At the said term, trial was had, defendant convicted and sentenced to imprisonment in the penitentiary for the period of one year.

Motion in arrest of judgment was made and overruled, exceptions taken and noted, but as this involved substantially the same issue as made by the general demurrer, it will not be further noticed.

Motion to set aside the verdict of the jury and for a new trial was then made, overruled and exceptions noted.

The motion for new trial contains nine several and distinct grounds, the third and fourth grounds being for alleged errors in the court in giving certain instructions at the instance of the State, and in refusing certain others asked by the defendant, none of which will be specially referred to in this decision.

P. H. Crenshaw for appellant.

James P. Clarke, Attorney General, for appellee.

BUNN, C. J., (after stating the facts.) There may be other defects in the indictment which are affected by the demurrer, but only the description of the money alleged to have been obtained, as affected by the general demurrer, will be discussed.

The indictment charges that the defendant, by means of false pretenses, obtained from the injured party money to the amount of thirty dollars, no more, no less, and then proceeds to state what was the kind of money, and also the denomination of each kind, in which the thirty dollars as a sum was paid to defendant, setting forth no less than six different kinds of lawful money of

the United States, naming the denominations of each kind, in one or the other of which the said amount of thirty dollars was paid over to the defendant by the injured party by reason of the false pretenses charged.

This manner of describing the money obtained as charged could only be intended as a sort of drag-net, which, while it might catch a great many things that are not fish, yet might, peradventure, catch the fish also.

The meaning of the description is the same as if the different clauses of the sentences were connected by the disjunctive conjunction "or," and the same in effect as if the grand jury should say to the defendant: "You obtained by false pretenses these thirty dollars in gold coin, but if not in gold coin, then in gold and silver certificates, but if not in these certificates, then in silver coin," and so on and so forth. It scarcely requires the citation of authorities to show that such a multiform manner of description of property is bad for uncertainty, not putting the defendant on notice as to what he is to defend against.

The rule governing the description of property in cases of larceny is applicable to cases of obtaining money under false pretenses, since the latter is but a species of the former crime. Bishop on Cr. Pro. vol. 2, sec. 173; *Smith* v. *State*, 33 Ind. 159; *Leftwitch* v. *Commonwealth*, 20 Grat. 716; *Treadaway* v. *State*, 37 Ark. 443; *Jamison* v. *State*, *ib*. 445.

The rule governing the particularity of description in such cases is stated in a general way in 1 Wharton, Cr. Law. sec. 355, which is quoted with approval in *State* v. *Parker*, 34 Ark. 158. This particularity of description is held to be essential in *State* v. *Oakley*, 51 Ark. 112, and also in the embezzlement case of *State* v. *Ward*, 48 Ark. 36; and it seems to be everywhere held by this court that particularity of description of the property stolen or obtained in this way is governed by a

rule not materially different from that of the common law.

It will be observed that the objectionable feature of the description in this indictment is not a want of particularity of description of the various and several kinds of money named, but rather in the disjunctive and alternative manner in which the several descriptive clauses are stated. It seems that it is only in special instances that the disjunctive word "or" can be properly used. 1 Bish. Cr. Pro. secs. 585–586.

We deem it unnecessary to discuss issues made by the objections to the giving of certain instructions, and the refusal of the court to give others on the request of the defendant.

For its error in overruling the demurrer to the indictment, the judgment of the Randolph circuit court is reversed, and the cause is remanded with directions to sustain the demurrer and to otherwise proceed in the matter as the law directs.

EVANS v. STATE.

58 47
75 145
58 47
81 419
58 47
88 582

Opinion delivered July 1, 1893.

1. *Disqualification of judge—Exchange of circuits.*
   A circuit judge who has temporarily exchanged circuits with another judge, under the regulations prescribed by law, is not disqualified to preside at the trial of a cause there pending because of the disqualification of the regular judge.

2. *Indictment—Misprision.*
   An obviously clerical error in the use of "defendant" for "defendants" will not vitiate an indictment.

3. *Homicide—Joint indictment.*
   An indictment jointly charging two persons with murder committed by shooting with a gun held in their hands is not demurrable because they "are alleged to have had in their hands

only one gun by and through the instrumentality of which only they are alleged to have taken the life of" deceased.

4. *Evidence—Dying declaration.*

A statement by one who has been shot respecting the circumstances under which the wound was inflicted is admissible as a dying declaration, in a prosecution for the killing of such person, if made at a time when he did not expect to survive the injury, although this was five or six days before his death and at a time when he did not apprehend immediate dissolution.

5. Res gestae—*What are not.*

Evidence of what defendant said to a witness about the shooting three hours after it occurred is not admissible as part of the *res gestae.*

6. *Evidence—Uncommunicated threats.*

Where defendant testified that he killed deceased under apprehension of mob violence, and that his reason for fearing a mob was that he had overheard threats made by one G. on a previous occasion, which threats, however, G. denied having made at that time and did not remember having made at all, it is not an abuse of discretion for the court, after testimony on both sides is closed, to refuse permission to defendant to prove, in substantiation of his own testimony, that G. had made such threats elsewhere in the hearing of others, unless they had been communicated to defendant before the killing.

7. *Verdict—Form.*

A verdict of guilty of murder is not affected by omission of the words "in manner and form as charged in the indictment."

Appeal from Ouachita Circuit Court.

ALEXANDER M. DUFFIE, Judge. (On exchange of circuits with Judge Chas. W. Smith.)

Bunn & Gaughan and *Jesse B. Moore* for appellant.

1. The demurrer should have been sustained to the indictment because:

(*a.*) Defendant and Neyman are accused of murder, but only one of them is charged with the acts constituting the offense, and which one is not shown. 37 Ark. 408; *id.* 412, 421; 38 *id.* 519; 1 Wharton, sec. 285; Mansfield's Digest, sec. 2105; 33 Ark. 561.

(*b.*) The defendant and Neyman are alleged to have had in their hands only one gun, through the instrumen-

tality of which the crime was committed. This involves the concurrence of a physical and a moral act impossible of existence and presumptively false.

2. Review the instructions given and refused, and contend that there was error. Citing many authorities.

3. It was error to exclude the testimony of Martha Hutchinson. If not part of the *res gestae*, it was admissible to admit the testimony of Ainsworth. 48 Ark. 338.

4. It was error to exclude the testimony of Bishop and Scarborough. This testimony would have tended to prove the theory of threatened violence by a mob, and that appellant's fears of mob violence were not the result of imaginary but substantial causes. It would also have contradicted Goode in his denial of having made threats, and have shown the real animus of Goode, and his bias and prejudice against appellant. 29 Ark. 250.

5. The verdict does not state that appellant was guilty "as charged in the indictment."

6. It was error to admit the witness Goodwin to testify to the declarations of Wamble as a dying declaration. These declarations were made at particular times when he was being moved under temporary pain, etc. It does not appear that there was an abiding conviction of impending death, or that his condition was hopeless; that they were made in extremity, at the point of death, or when every hope had gone, etc. 1 Greenl. Ev. secs. 156, 158; 39 Ark. 227; 55 Cal. 72; 8 Tex. App. 71; 63 N. Y. 38; 17 Ala. 622; Whart. Cr. Ev. sec. 292 and note.

7. The verdict is against the law and the evidence.

James P. Clarke, Attorney General, for appellee.

1. The indictment is sufficient under the statute. Mansf. Dig. sec. 2106.

2. The allegation as to the gun in their hands is not defective. It was not a physical impossibility,

though improbable. 72 Ill. 303; 30 Conn. 500. The allegation that the gun was held in the hands of defendants is not essential, and may be treated as surplusage. Kerr on Hom. sec. 257; 67 Mo. 13; 27 *id.* 13. But our statute makes all present aiding and abetting principals. The act of each is therefore the act of all. Mansf. Dig. sec. 1506; 105 Mass. 592; 27 Mo. 13; 72 Ill. 303.

3. The exchange of circuits was made by agreement, according to law. Mansf. Dig. secs. 1374–5, 1471.

4. The instructions as a whole correctly embody the law.

5. The statements made by appellant three hours after the killing were mere narratives of past occurrences, and in no sense part of the *res gestae*. 19 Ark. 590; 46 *id.* 141; 34 *id.* 480; 43 *id.* 289; 43 *id.* 102.

6. The proper predicate was laid for the admission of Wamble's dying declarations. It was the province of the court to determine their admissibility, and of the jury to give them their proper weight. 1 Gr. Ev. sec. 160; 20 Ark. 36.

BATTLE, J. The appellant, Evans, was indicted by a grand jury of the Union circuit court for murder. On his motion the venue was changed from Union to Ouachita county, where he was tried in the circuit court, and convicted of murder in the second degree, and his punishment was fixed at twenty-one years in the penitentiary.

1. Authority of circuit judge to exchange circuits.

On the 22nd of November, 1892, A. M. Duffie, judge of the 7th judicial circuit, and C. W. Smith, judge of the 13th judicial circuit, of Arkansas, entered into a written agreement, by which they exchanged circuits from the 22nd to the 24th day of November, 1892, inclusive, the said C. W. Smith agreeing to perform the duties of the 7th circuit, and A. M. Duffie agreeing to

discharge the duties of the 13th, for said period. In this period of time Judge Duffie presided as judge of the Ouachita circuit court, and appellant was tried. Before his trial he protested against Judge Duffie presiding therein because, he said, Judge Smith was "related within the fourth degree by affinity to Henry Wamble, the person charged in the indictment herein to have been killed by the defendant, the said C. W. Smith being the uncle by blood of the wife of said Henry Wamble, who is also deceased, leaving issue surviving each of them now living;" and because Judge Duffie was presiding under said agreement, which had been filed and made a part of the record of the court. The State filed a demurrer to the protest, and the court sustained it.

Appellant insisted that Judge Duffie had no right or was disqualified to preside in his trial because of Judge Smith's relationship to the deceased. How this could disqualify Judge Duffie we are unable to understand. The constitution authorized them to temporarily exchange circuits or hold courts for each other under the regulations prescribed by law; and the statute empowered them to exchange circuits or hold courts for each other for such length of time as seemed to them practicable and to the best interest of their respective circuits and courts. The disqualification of one to preside in causes pending in his courts or the impropriety of his so doing might well have been a good cause or reason for the exchange. In exchanging circuits they had the right to fix the time according to what in that respect seemed to them practicable and to the best interest of their respective circuits and courts. When the exchange was made, the law did not limit the right of either to preside in trials to those wherein the regular judge was not disqualified. The disqualification of one did not attach to the other or affect his qualification.

The indictment of the appellant was as follows: "The grand jury of Union county, in the name and by the authority of the State of Arkansas, on oath accuse the defendants, John Evans and Dick Neyman, of the crime of murder, committed as follows, to-wit: The said defendant, on the first day of May, 1892, in Union county, Arkansas, did unlawfully, wilfully, feloniously, and of their malice aforethought, and with premeditation and deliberation, assault, kill and murder one Henry Wamble, in the peace of the State, by shooting him, the said Wamble, with a gun loaded with gun-powder and leaden bullets, which said gun was then and there a deadly weapon, and in the hands of them, the said John Evans and Dick Neyman, had and held, with the felonious intent, and with malice aforethought and with deliberation and premeditation, him, the said Henry Wamble, to kill and murder, against the peace, etc."

Appellant demurred to it for the following reasons:

1st. "That in said indictment the defendant and Dick Neyman are accused of the crime of murder, but that only one of them is charged with the acts constituting the offense, and which one is not shown."

2nd. "That the defendant and Dick Neyman are alleged to have had in their hands only one gun, by and through the instrumentality of which only they are alleged to have taken the life of Henry Wamble."

2. Effect of clerical misprision in indictment.

The demurrer was overruled. The first ground points out what is obviously a clerical error. The indictment shows that *defendants* was unquestionably intended instead of "defendant." There can be no excuse for mistaking its meaning.

3. Validity of joint indictment for murder.

The second ground is untenable. The defendants, if they were present aiding and abetting the killing, were principals and were properly indicted as such. It is immaterial which of them is charged with having inflicted the mortal wound, because, both being present

aiding and abetting, the law imputes the injury caused by one to the other. They are accused of a murder committed by shooting with a gun held in their hands. This act, although improbable, is not physically impossible. The demurrer, for its purposes, admits it and the other allegations in the indictment to be true. If true, the defendants are guilty of murder, and the demurrer was properly overruled. *State* v. *Dalton*, 27 Mo. 13; *State* v. *Blan*, 69 Mo. 317; *State* v. *Payton*, 90 *id.* 220; *Coates* v. *People*, 72 Ill. 303; *State* v. *Zeibart*, 40 Iowa, 169; Kerr on Law of Homicide, secs. 276, 277.

In the trial evidence was adduced tending to prove, among other facts, the following: On the 29th of March, 1892, "a warrant was placed in the hands of the deceased, Henry Wamble, who was a deputy sheriff, for the arrest of the appellant and Dick Neyman, upon a charge of murder. The deceased summoned a posse to aid in making the arrest," and on the next day, about or little before sunrise, they went to the house of Neyman and entered it and found signs of its having been occupied the previous night. As they came out of the back door the appellant and Neyman were discovered about 75 or 80 yards from the house, retreating to the woods. "The deceased called to them several times to halt, and they stopped, leveled their guns, and a general firing followed on both sides. After the shooting the appellant and Neyman escaped into the woods, and the deceased was found lying on the ground fatally wounded, a ball having entered just above the left hip joint, ranged backward and a little downward, and lodged in the spinal column."

4. As to dying declarations.

In the course of the trial the State introduced Francis Goodwin as a witness, who testified, substantially, as follows: Henry Wamble died at the house of witness. After he was shot and five or six days before he died, he said he was bound to die. He said, at six

different times, that he did not believe he would ever get well. In moving him his wound hurt him, and he said that he would not get well, that the wound would kill him, and then he made the following statement: While he, the deceased, was in Neyman's house with his posse some one said, "Here they are." He went to the back door and "started" toward the garden and saw appellant and Neyman running off. He advanced toward them while they were retreating until he reached the garden palings. He "hailed" them as many as three or four times and notified them that he held a warrant for their arrest. About the time he reached the garden they "turned" and presented their guns. He saw that they intended to shoot, and he "drew" his gun to his face and fired as quickly as he could. He and the appellant fired about the same time; if any difference, he fired first. Appellant shot him.

The statement of the deceased was admitted as evidence over the objections of the appellant. He insists that it was not admissible, because it was not made under a sense of impending death, and with the prospect of almost immediate dissolution.

The declarations of a person who has been wounded, respecting the circumstances under which the wound was inflicted, are admissible in prosecutions for the killing of such person, if made at a time when he did not expect to survive the injury, and all hope of recovery had been supplanted by the conviction that he would certainly die. The time when made need not be when the declarant apprehended immediate dissolution. But they are admissible if made at any time when he believed that death was impending and certain. *Dunn* v. *State*, 2 Ark. 229, 246, 247; Wharton's Criminal Evidence (8th ed.), secs. 276-284 and cases cited.

It is within the province of the court to hear the circumstances under which the declarations were made

and to determine whether they are admissible. But after they are admitted it is within the province of the jury to weigh them and the circumstances under which they were made, and give to them only such credit, upon the whole evidence, as they may think they deserve. 1 Greenleaf on Evidence, sec. 160; *Dunn* v. *State*, 2 Ark. 247.

We think that the circumstances under which the declarations in question were made were sufficient to warrant the court in admitting them.

5. As to *res gestae.*

The appellant offered to prove what he said to Martha Hutchinson about the shooting three hours after it occurred, and the court would not permit him to do so. It was no part of the *res gestae*, and was properly excluded.

6. As to uncommunicated threats.

Appellant in his own behalf testified, substantially, that he thought that Wamble and his posse were a mob in pursuit of him when he fired at them; and that his reason for fearing a mob was: On the day of the coroner's inquest over the body of Charles Austin, on the Goode place, he heard Charles Goode, and he thought from the voice, Will Britt, in an old field, in a pine thicket near the Goode place, talking, and, among other things, heard Goode say that if he could get a crowd to go with him, he would hang appellant to a limb or drive him out of the country. After the close of the testimony in behalf of appellant, Charles Goode, in behalf of the State, testified that he did not make the statement mentioned by appellant, and that he did not remember having made the same statement on the Goode place, on the day of the inquest, in the presence of Marshall Bishop and John Scarborough. Appellants, after the close of the testimony in rebuttal for the State, for the avowed purpose of substantiating his testimony as to the language used by Goode offered to show by Bishop and Scarborough that they had heard

Goode make use of language similar in import, if not identically the same, on the Goode place, on the day of the inquest, and the court refused to allow him to do so.

Appellant's excuse for shooting at Wamble and his *posse* was, he mistook them for a mob seeking to inflict on him some great injury. He sought to sustain his testimony on this point by the rejected testimony. The facts he proposed to prove by Bishop and Scarborough could not have added to his fears of a mob and in this respect sustained the theory of his defense unless they had been communicated to him before the shooting, and there was no evidence that they were. They did not tend to show the existence of a mob, since the evidence in the whole case only tended to prove that one man proposed to form a mob, and he did not undertake to hang or drive him out of the country, unless others would assist. Appellant did not propose to attack the veracity of Goode, but simply to "substantiate" his own testimony. Under such circumstances we do not think the court abused its discretion in refusing to allow him to introduce the excluded testimony for the purpose of substantiating his testimony at the time when the testimony in behalf of both parties had been closed.

Many instructions were given over the objections of the appellant, and many were asked by him and modified by interlineations and erasures and given as modified. We have examined all of them carefully, and given to them due consideration, and find, when considered and construed as a whole, as the court expressly instructed the jury to do, no error in them as given, and in the refusal to give them as asked, prejudicial to appellant.

7. Form of verdict.

The verdict returned into court was: "We the jury find the defendant, John L. Evans, guilty of murder in the second degree, and assess his punishment at twenty-one years in the State penitentiary. C. S. KEITH, Foreman." The omission of the words "in manner

and form as charged in the indictment" did not affect its validity. *Dixon* v. *State*, 29 Ark. 171.

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

The Chief Justice did not sit in this case, having been of counsel.

JOHNSON *v.* STATE.

58 57
58 550
58 57
62 307

Opinion delivered July 1, 1893.

1. *Homicide—Self defense—Impending danger.*
   An instruction that a homicide was justifiable if deceased was making an attack on defendant under circumstances indicating an intention to take away his life or to do him great bodily injury, or if it so appeared to defendant as a reasonable man and the circumstances were such as to excite the fears of a reasonable man, is too broad and unqualified; it must appear that the danger is not only impending but so pressing and urgent as to render the killing necessary.
2. *Self defense—Right of assailant to withdraw.*
   An instruction is erroneous which excludes the right of self defense if defendant was the assailant, though he may afterwards have abandoned the conflict in good faith and struck the fatal blow only to save his life or prevent great bodily harm.
3. *Protection of officer—When forfeited.*
   Where defendant's wrongful acts brought on a difficulty, the fact that he was an officer of the peace, and in the course of the difficulty attempted to arrest deceased, will not avail as a defense.

Appeal from Faulkner Circuit Court.

ROBERT J. LEA, Judge.

J. H. Harrod for appellant.

1. The instruction given for the State was erroneous. The question of the *degree* of the offense was for the jury to determine. It was not accompanied by an explanation of the degrees of homicide, and was not so

guarded as to allow the jury to infer an abandonment of the purpose to kill, from the circumstances of the homicide. 29 Ark. 248. It was erroneous because it was based upon and recited facts not in evidence. 36 Ark. 127; 54 *id.* 336.

2. The ninth instruction should have been given as asked by defendant, and its modification was error. It ignored entirely the question of abandonment of the difficulty in good faith.

3. The tenth instruction should have been given. 52 Ark. 45.

4. The modification of the twelfth was error and prejudicial.

5. It was error to modify the fourteenth and especially so to modify it verbally. 51 Ark. 177.

6. The verdict is not sustained by the evidence.

James P. Clarke, Attorney General, for appellee.

1. There is no prejudicial error in the instruction given for the State. 49 Ark. 543; 54 *id.* 4.

2. It is true the ninth instruction is open to criticism because as modified it does set forth the theory of abandonment of the conflict by defendant in good faith; but the instruction was predicated upon another phase, and the court modified so that it would correctly state the law applicable to that phase. As the court was not asked to instruct on the theory of abandonment of the attack, the objection fails. The court gave sec. 1553, Mansfield's Digest.

3. The fourteenth instruction is not very clear in itself, and it may be conceded that it is not very accurate as a declaration of law. The proposition asserted had no bearing upon the issue before the jury. Appellant's plea was self defense—not that he was an officer attempting to make an arrest. If incorrect, the jury were not misled. Thompson, Charging the Jury, sec. 123; 22 Ark. 207.

HUGHES, J. The appellant, J. S. Johnson, was convicted of murder in the second degree for the killing of one Williams, and has appealed to this court. The killing was not denied, but the defendant contends that it was done in self defense. The defendant was, at the time of the killing, the constable of the township in which the killing occurred, and contends that, at the time he killed the deceased, the deceased was advancing upon him with a drawn stick and striking at him, because the defendant, as constable, had told him he would arrest him, and had told him to consider himself under arrest for an assault, which he contends the deceased had made upon Manning, a brother-in-law of the defendant, to prevent the said Manning from taking from the possession of the deceased a plow that belonged to the defendant, the possession of which he contends the deceased had taken without right and without his consent.

So much of the evidence only as will throw light upon the declarations of law given and refused by the court at the trial, will be stated in substance as it appears in the abstract of appellant, which is admitted by the State to be correct.

Williams, the deceased, was a share-cropper on the place of J. F. Johnson, the father of the appellant, whose contract with Williams was that he would furnish him with team and tools to cultivate his land. J. S. Johnson, the appellant, was also cultivating land on the farm, and owned his tools. The deceased had taken the defendant's plow without the defendant's consent. The defendant had gone to the deceased and got his plow, and informed the deceased that he would need the plow for several days. On returning to his field early the next morning, the defendant found that his plow had been taken away, and thought, from tracks he saw, that the deceased had taken it again. He returned to his father's house and told him that the deceased had his

plow, and requested his father to get the plow, reminding him that it was his duty to furnish the deceased with tools. The father of the defendant thereupon requested his son-in-law, Manning, to go and get the plow, saying that the deceased was friendly to Manning. Manning, who was on a visit with his wife and child to his father-in-law, and was about ready to start home, said he would not go if there was to be any trouble, but, being assured by the defendant that there would be no trouble upon his part, consented to and did go to the field where the deceased was plowing, which was perhaps about one hundred yards from the residence of J. F. Johnson. The defendant followed behind Manning, and there is evidence tending to show that Wash Johnson, the brother of the defendant, also went along with them.

They approached the deceased as he came to the end of a cotton row, in which he was plowing, as it appears, with the defendant's plow. They spoke to the deceased, saying "Good morning;" and Manning said, "You are plowing her out," to which the deceased replied, "Yes." Manning then said to Williams that Mr. Johnson sent him over to get the plow, and to say to him that he would get him another plow, if he wanted another. Williams replied that he would not let the plow go till he got another. Manning thereupon stepped forward, according to the testimony of Williams' wife, who states that she was present, and said, "My name is Manning, don't you know me," and, as he said this, stooped to unhitch the horse of the deceased from the plow, and Williams then drew a stick, and, Mrs. Williams says, "then Jim and Wash Johnson drew their pistols. (The defendant was called, familiarly, "Jim Johnson.") Manning picked up the plow, and Jim said to him, 'Put down the single tree,' and Manning did it. Manning then started off with the plow, and the defendant told

him to put down the plow and take the stick away from Williams. Jim said to Mr. Williams, 'Consider yourself under arrest;' and Mr. Williams said, 'I will not be arrested by you;' and then Jim, the defendant, fired."

Mrs. Williams, who was the only person present, save the deceased, Manning, Jim and Wash Johnson, says that when the second shot was fired, her husband, the deceased, was falling, and was upon the ground when the last shot was fired, and that he expired immediately; that at the first shot they were ten feet apart.

It appeared that there had previously been some bad feeling between the defendant and Williams, the deceased, and that the defendant, some time previous to the killing, had been told that Williams had threatened his life, and that Johnson had said that he did not want any trouble and would mind his business, but that he was on his own premises, and did not propose to be run off.

The defendant, in his testimony, states that when Manning stepped up to the plow next to the horse, "Williams picked up a stick and stepped toward Manning," that he told Williams to lay the stick down, that he was not going to have any trouble, and for him to behave himself. He said: "I told him if he did not put his stick down, I would arrest him. He said, 'You will have to call in some of your neighbors to help you.' I told him again, if he did not lay down his stick, I would arrest him. He started toward me with his stick drawn, and advanced toward me, and I told him to stop, but still he came on. He came very close, striking at me with his stick, when I shot the first time. He struck again, and I shot the second time. I was preparing to shoot again when I saw he was hit. * * * I was constable of the township, and carried my pistol all the time because I thought I had a right to do so. My

brother Wash did not go over with Manning and myself."

There was some testimony tending to contradict Mrs. Williams, and to show that she was not present when the shooting occurred, but that she came up immediately afterwards.

There was evidence tending to show that the stick which Williams had at the time he was shot was about as long as a man's arm, about three inches wide at one end, about one and a half at the other and about one inch thick, "of heart pine and good weight," and a witness said, "I think it would have weighed four or five pounds. I had hold of the stick. I think a fatal blow could be given with it in the hands of a man with ordinary strength."

The court gave the jury the following instruction at the instance of the attorney for the State, over the objection of the defendant, to which he excepted, to-wit:

"The jury is instructed that a man cannot bring about a quarrel or rencounter and then justify himself under the law of self defense, unless he in good faith endeavored to abandon the difficulty and did all within his power consistent with his safety to avert the necessity of killing before the mortal injury was inflicted, and if the jury believes from the evidence that the defendant, being armed with a deadly weapon, went either alone or with Thad Manning and Wash Johnson, or either of them, to the field where the deceased Williams was plowing, for the purpose of getting a plow, intending, if Williams would not give it up to him, to take it by force, and, if Williams resisted, to kill him, and that Williams did resist, and the defendant shot and killed him, then the defendant cannot justify himself under the law of self defense, and such killing would be murder in the first degree, unless he had in good faith abandoned the affray and done all in his power, consistent with his

safety, to avoid the danger and avert the necessity of the killing before the mortal injury was given.

This instruction is not substantially defective, and there is not reversible error in it.

The court refused the third, the sixth and seventh instructions asked for by the defendant, and refused the eighth as asked, but modified it and gave it as modified, to all which the defendant excepted. We do not discuss these instructions, because we think the law was sufficiently declared by the court, as to matters they were designed to cover, in other instructions that were given.

Exceptions were reserved to the court's refusal to give the ninth instruction asked for by the defendant without modification, and to the court's modification of it and giving it as modified.

1. As to right of self defense.

The instruction as requested was as follows: "The defendant seeks to justify the killing on the ground that the deceased was making an attack on him under such circumstances as indicated an intention to take away his life or do him great bodily injury, and that whether such harm was intended or not, if it so appeared to the defendant as a reasonable man at the time, and if the circumstances were such at the time as to excite the fears of a reasonable man, and the jury believe that the defendant really and in good faith acted under the influence of such fear, and not in a spirit of revenge, then the killing would be justifiable."

The court modified the instruction by adding the following: "Provided he was not the assailant or did not bring on the difficulty and had done all within his power consistent with his safety to avoid the danger and to avert the necessity of the killing when the mortal injury was given." And gave the instruction as so modified.

This instruction, as was said of a similar instruction in *Palmore* v. *State*, 29 Ark. 248, was "too broad

and unqualified." To excuse homicide it must appear that the danger is not only impending, but so pressing and urgent as to render the killing necessary. This idea was left out of the instruction as asked, but this was favorable to the defendant, and as to this he could not complain.

2. Right of assailant to withdraw.

But the modification is vicious, and prejudical to the defendant. It is true as a legal proposition that where a defendant brings upon himself a difficulty, in which he continues until he brings upon himself a necessity to kill, the law will not hold him guiltless, "yet it is not to be doubted that a person accused of crime may show in justification that, although he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind and conduct, and honestly endeavored to escape from it, but could not without striking the mortal blow." There should always be left room for repentance and the abandonment of an evil or unlawful purpose. *People* v. *Simons*, 60 Cal. 72. "This space for repentance is always open," says 1 Bishop, Cr. Law, sec. 871. "When, therefore, a combatant, to abandon the conflict and not to gain fresh strength or a new advantage, withdraws as far as he can, but the other will pursue him, if the taking of life becomes inevitable to save life, he may lawfully kill his pursuer. But a mere colorable withdrawal avails nothing." *Id.* n. 1; 1 Hale, P. C. 479, 480.

The modification to this instruction excludes the right of self defense, where the defendant is the assailant, though he abandons the conflict in good faith, and strikes the fatal blow thereafter, only to save his own life or to prevent great bodily harm being inflicted upon him.

The instruction told the jury, in effect, that if the defendant was the assailant, that fact cut him off from the right of self defense, though he afterwards abandoned

the conflict in good faith, and did not kill till forced to do so by an actual, impending and pressing necessity, or by the appearance of such a necessity which was sufficient to excite the fears of a reasonable man that his life was in danger, or that he was in danger of great bodily harm, and that there was no escape from the danger but by slaying his antagonist.

For the error in giving this instruction, the judgment must be reversed.

The tenth instruction is obnoxious to the objection to the ninth before it was modified. There was no error in refusing it.

The modification of the twelfth instruction was not prejudicial.

3. When protection of officer forfeited.

The fourteenth instruction as modified involves some close questions of law upon which the decisions are not harmonious, but as a majority of the court are of the opinion that the theory sought to be embodied in said instruction before it was modified—that the defendant was acting in his official character in seeking to preserve the peace when he fired the fatal shot, or that he killed the defendant in attempting to arrest him for a breach of the peace—has support in the evidence, we refrain from discussing it. That instruction as asked is as follows: "You are instructed that if you find from the evidence that the defendant was a constable, and the deceased was making an assault upon Manning in defendant's presence, the defendant had the right to arrest the deceased."

The court refused this instruction as asked, and modified the same by adding at the end thereof the following:

"Provided deceased was not justifiable in the assault; and he would be justifiable in the assault if necessary to prevent Manning from taking from him the plow without his consent." The defendant excepted to

the refusal of his instruction as asked, and excepted to the above modification and giving the same as modified.

When the court came to instruct the jury, after reading the above instructions as above modified, it verbally added the following statement to the jury: "Provided the deceased used no more force than was necessary to repel the unlawful force used against him."

To this verbal statement of the court the defendant at the time excepted.

A majority of the judges think the instruction was wrong as asked, and that the modification neutralized it, and that as modified it was harmless. It is the opinion of the majority of the court that if the wrongful acts or conduct of the defendant brought on the difficulty, he could not take shelter behind his character as an officer, but that he stood as any other person, without the right to claim anything in that difficulty by reason of the fact that he was an officer.

The sixteenth instruction as modified is not prejudicial, and there was no error in giving it.

For the error in giving the ninth instruction as modified, the judgment is reversed, and the cause is remanded for a new trial.

BLOYD *v.* RAILWAY COMPANY.

58 66
58 213
58 337
58 66
59 482
58 66
f67 215

Opinion delivered July 1, 1893.

Master and servant—Negligence of vice-principal.

The foreman of a squad of railroad workmen, whose charge extends to building and repairing many trestles and bridges, who has the power to employ and discharge the men, and whose duty it is to oversee and direct their work, is so far a vice-principal of the railroad company that the latter will be liable for his negligence in giving inconsistent orders to the men whereby one of them is injured.

Appeal from Carroll Circuit Court, Western District.

EDWARD S. MCDANIEL, Judge.

Action by Jesse Bloyd against the St. Louis & San Francisco Railway Company for personal injuries caused by defendant's negligence while plaintiff was in its employment. The facts are stated in the opinion.

J. D. Walker and *Crump & Watkins* for appellant.

Munden was a vice-principal, and represented the master, and was not a fellow-servant with appellant. An injury resulting from his negligence was not a risk assumed by appellant. 24 Am. L. Rev. 190; 54 Ark. 292; 112 U. S. 377; 84 N. C. 309; 3 Sawy. 437; 56 Ga. 645; 121 Mass. 121; 76 N. C. 6; 10 Fed. Rep. 711; 4 Pac. Rep. 121; 4 N. W. Rep. 399; 31 Oh. St. 287; 5 *Id.* 541; 8 *Id.* 249; 17 *Id.* 197; 53 Tex. 206; Whart. Neg. p. 205; 74 Mo. 13; 1 Sh. & Redf. Neg. (4th ed), sec. 226; 108 Ill. 280; 20 Oh. 415; 52 Conn. 285; 78 Va. 745; 24 W. Va. 37; 2 Duvall, 114; 9 Bush, 559; 9 Heisk. 866; 85 Mo. 588; 20 N. W. Rep. 198; 25 *Id.* 921; 37 La. Ann. 650; 16 Neb. 254; 3 McCrary, 352; 17 A. & E. R. Cases, p. 514 and note.

E. D. Kenna and *B. R. Davidson* for appellee.

1. The complaint did not state a cause of action; it failed to negative the fact that Munden and plaintiff were co-servants. 55 Wis. 453; 44 Ark. 527; Wood, Mast. & S. sec. 419.

2. The order to move forward was proper—if it was not properly obeyed, it was the fault of the engineer who was a co-servant of plaintiff. 42 Ark. 420; 72 Ill. 256.

3. The doctrine of fellow-servants was laid down in 3 M. & W. 1, and was first applied to railroads in 5 Exch. 343, and has been followed in America, with but few exceptions. 1 McMul. (So. Car.) 385; 4 Met.

(Mass.), 49; 36 Am. Dec. 279; 67 *id.* 589. Kentucky, Ohio and possibly a few other States, have endeavored to evade the force of the rule, but *superiority of grade* affords no test. 123 Mass. 152; 82 Pa. St. 432; 62 Me. 463; Wood on Master & Serv. secs 435, 846, 847; 2 Rorer on Railroads, 1196; Wharton on Neg. sec. 229; 42 Ark. 421. This State has not followed the cases holding the superiority or rank or grade rule, but makes the *duty neglected* or *act performed* determine the question, regardless of rank or different departments, etc. See 39 Ark. 17–42; 41 *id.* 393; 44 *id.* 527; 46 *id.* 398; 51 *id.* 467; 54 *id.* 296. Munden was a mere *foreman of part of a bridge gang*, and he and the gang were all working under Bradley, the bridge-master. Munden was not performing *a master's duties*. Cases *supra;* 58 Wis. 525; 22 Ind. 26; 4 Am. Law Rev. 1890.

4. Plaintiff was clearly guilty of contributory negligence in walking deliberately in front of a train when he had heard the order to go forward. 46 Ark. 403; 55 Wis. 405.

MANSFIELD, J. The appellant brought this action to recover damages for an injury sustained while performing labor for the appellee as one of a squad of men engaged in sharpening and driving piles at a trestle on the appellee's road. The timber used for the piling, together with the machinery employed in the work, was carried to the trestle by a train consisting of an engine, caboose and several flat cars; and it was one of the duties of the appellant to assist in unloading the cars. He and the other pile drivers worked under the immediate direction and control of M. C. Munden, who was their foreman, and who had power to employ and discharge them. Munden had no power to employ or discharge the train crew; but they were also subject to his orders while actually in the field and co-operating with his men in building and repairing trestles. In a general

sense, the work on trestles was done under the supervision of one Bradley, who was the defendant's superintendent of bridges. But it does not appear that Bradley was at any time present when work was going on, or that he ever personally supervised the labor of the gang, or exercised any direct control over them. Bloyd was employed by Munden, and, so far as the evidence discloses, he and the other men of the squad to which he belonged had no knowledge of any other superior or master in the service. Munden seems to have performed no labor whatever in common with the men he controlled. His business was to oversee and direct their work, and it was their duty to obey his orders.

On the day the injury complained of was received, three flat cars loaded with piles were placed in front of the engine and taken to the trestle. These cars were pushed to the north end of the trestle, where they were detached and left standing, while the engine with four flat cars behind it was backed about seventy-five yards and stopped where a part of it rested on the south end of the trestle. Bloyd and the other men were then ordered by Munden to go from the caboose to the front cars and unload them, which they did. When they had finished unloading the front cars, Munden ordered them to go back and unload the cars behind the engine, and about the same time directed the train-men to move forward one or two car lengths. The witnesses are not agreed as to whether the order to the men on the front cars to go back, and that to the train-men to move forward, were given without a pause or not. Bloyd himself testified that he and others started back at once on receiving the order, and that, before they had gone half way to the engine, Munden ordered the train to advance. Whatever the fact may have been as to the exact time of the order to the train-men, the engine moved forward while Bloyd and several

others were still on the trestle between the engine and the unloaded cars; and Bloyd, who was probably not seen by the engineer, in his effort to escape was struck by the step of the engine and knocked off the trestle. He fell upon the unloaded piling 17 or 18 feet below the trestle, and one of his feet was broken by the fall. This was the injury sued for, and the complaint alleges that it was caused by the negligence of Munden. The cause was pending here on appeal at the time of the passage of the act defining who are fellow-servants and who are not, approved February 28th, 1893, and the question to be decided is not therefore affected by any provision of that statute.

It is not necessary to detail all the facts bearing upon the questions of negligence and contributory negligence, presented by the pleadings. Of these it is sufficient to say that if, as a matter of law, the negligence of Munden was imputable to the defendant, a verdict for the plaintiff could not have been disturbed here for the want of evidence to support it. It therefore becomes our duty to inquire whether the finding of the jury was made under a correct charge as to the relation which Munden and the plaintiff bore to each other as employees of the railway company. The facts establishing that relation are not in dispute; and the court's charge was to the effect that Munden was the fellow-servant of the plaintiff, and that the defendant was not therefore liable for his alleged negligence.

All the authorities approve the doctrine that a master is exempt from liability to his servant for an injury to the latter resulting from the negligence of a fellow-servant. But there is great diversity of opinion as to the precise facts which make one person the co-servant of another, in the sense essential to the exemption. (*Railway Co.* v. *Triplett*, 54 Ark. 289.) And it seems that the courts have been inclined to determine

whether the relation exists, or does not exist, according to the circumstances of each case, as it arises, rather than to formulate any rule of general application.* On the facts of this case, the material question is whether Munden was a mere foreman, overseeing a gang of laborers, or was an agent of the company, clothed with its authority in the management and supervision of such part of its business as to make him the company's representative. If he occupied the former position, the laborers had assumed the risk of his negligence; but in the latter case he was a vice-principal, and if he was guilty of negligence in that capacity the company is liable. *Dobbin* v. *Railroad Co.* 81 N. C. 446; *Fones* v. *Phillips*, 39 Ark. 39.

In some of the adjudged cases the distinction between the relations indicated by the words foreman and vice-principal is apparently made to depend more upon the extent or magnitude, than upon the nature, of the work of which the offending servant has charge. *Taylor* v. *Railroad Co.* 22 N. E. Rep. 876, 878; *Borgman* v. *Railway Co.* 41 Fed. Rep. 667; *Hunn* v. *Railroad Co.* 78 Mich. 513; *Balt. & O. R. Co.* v. *Baugh*, 149 U. S. 368. Other courts, proceeding upon what we think a sounder principle, have attached no importance to the extent of the work, but have considered only whether it was such as required a skillful or careful supervision; and where such supervision was necessary to the safety of the laborers engaged upon the work, they have held

*Beach, Contrib. Neg. sec. 333; *Hunn* v. *Railroad Co.* 78 Mich. 518; *Randall* v. *Railroad Co.* 109 U. S. 483; *Chicago, &c. Railroad* v. *Ross*, 112 U. S. 387, 389; *Hough* v. *Railway Co.* 100 U. S. 216; *Balt. & O. R. Co.* v. *Reynolds*, 6 U. S. Appeals, 75; *Dobbin* v. *Railroad Co.* 81 N. C. 446; *Anderson* v. *Bennett*, 19 Pac. Rep. 769; *Railway Co.* v. *Triplett*, 54 Ark. 289; *Chicago & A. Ry. Co.* v. *May*, 15 A. & E. R. Cases, 323; *Darrigan* v. *Railroad Co.* 24 Am. L. Reg. p. 458; S. C. 52 Conn. 285; *Kieley* v. *Mining Co.* 2 Cent. Law Journal, 705; *Harrison* v. *Detroit R. R. Co.* 19 Am. St. Rep. 180.

it was the master's duty to bestow it, and that if he appointed an agent to perform that duty he was responsible for his negligence. *Darrigan* v. *Railroad Co.* 52 Conn. 285; S. C. 24 Am. L. Reg. p. 459; *Cleveland, etc. R. Co.* v. *Keary*, 3 Ohio St. 201; *Chicago, etc. R. Co.* v. *Lundstrum*, 20 N. W. 198; *Schroeder* v. *Railway Co.* 18 S. W. Rep. 1094; *N. Pac. R. Co.* v. *Petersen*, 4 U. S. App. 574.*

In *Chicago, etc. Railroad* v. *Ross*, 112 U. S. 377, it was held that the conductor of a railroad train, while acting as such, and having "the right to command the movements of the train, and to control the persons employed upon it, represents the company * * * and does not bear the relation of fellow-servant to the engineer and other employees" on the same train. The rule established by that case, as it has been generally understood and applied by the Federal courts, is that the relation of fellow-servants "should not be deemed to exist between two employees, where the function of one is to exercise supervision and control over some work undertaken by the master, which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management." *N. Pac. R. Co.* v. *Petersen*, 4 U. S. Appeals, 579. The court from whose opinion this quotation is made has declared in another case that the rule, as thus understood, "is right in principle and is supported by the weight of authority." *Woods* v. *Lindvall*, 4 U. S. App. 62. In approving the doctrine of the same case, a text writer of authority says: "What is the special attribute of the master? Is it the mere fact that he provides materials for the work, or that he selects the servants? Is it not, more than anything else, that in him is vested the right and duty of

*See also separate opinion of Judge Shiras in *Borgman* v. *Railway Co.* 41 Fed. Rep. 667.

giving orders, and directing what work shall be done, and how it shall be done? If the master chooses to delegate this authority to some one else, on what possible principle can he be allowed to relieve himself from the responsibility of having proper orders given." 1 Shearman & Redfield on Neg. sec. 228. By another text writer the rule of the Ross case is styled "the rule of humanity and justice." Beach, Contrib. Neg. sec. 331.

"The real test," says Mr. Wood, "by which to determine whether a general manager or foreman is the representative of the master, so as to make his acts the acts * * * of the master, is to ascertain whether in reference to the matter complained of *his will is at the time supreme.* That is, is he authorized, as to the particular work in hand, to direct and control the servants under him, as to the method of performing it, and are they bound to yield to his orders the same obedience as they are required to yield to the master himself." Wood's Master & Servant, p. 865.

In *Miller* v. *Mo. Pac. Ry. Co.* 19 S. W. Rep. 58, the Supreme Court of Missouri decided that "the conductor of a material train, having control of it and its movements, and a foreman over a gang of men engaged in repairing a railroad track, having power to direct them what to do and when to do it, are not fellow-servants of the men composing such gang." There the plaintiff's husband, who was one of the laborers under the foreman's control, was in the act of passing from one of the cars to another just as they began to move at a signal given to the engineer by the conductor, and the jar threw him between the wheels, where he received injuries resulting in his death. The evidence tended to show that the deceased was absorbed in his work, and that the train was moved without giving him any warning. Judge Black, in delivering the opinion of the court, said: "The defendant seeks to be relieved from liability in

this case on the ground that Miller lost his life by the negligence of a fellow-servant, thus invoking the rule that the defendant is not liable to one servant for the negligence of a fellow-servant. The case made by the evidence stands on other and different grounds, as we view it. When the master gives to a person power to superintend, control and direct the men engaged in the performance of work, such person is, as to the men under him, a vice-principal; and it can make no difference whether he is called a superintendent, conductor, boss or foreman. * * * The conductor being a vice-principal, it became his duty to give due and timely warning of his intention to move the train." And in the same connection it is said to be "one of the absolute duties of the master to use ordinary care to avoid exposing the servant to extraordinary risks." This Missouri case—somewhat like the case at bar as to part of the facts on which the decision turned—is not different in principle from many other cases that might be cited. *Schroeder* v. *Railway Co.* 18 S. W. Rep. 1094; *Anderson* v. *Bennett*, 19 Pac. Rep. 765; *Taylor* v. *Railroad Co.* 22 N. E. Rep. 876; *Hunn* v. *Railroad Co.* 78 Mich. 513; *Chicago & A. Ry. Co.* v. *May*, 15 A. & E. R. Cases, 320, 324; *Chicago etc. R. Co.* v. *Lundstrum*, 20 N. W. Rep. 198; *Dobbin* v. *Railroad Co.* 81 N. C. 446; *Chicago, St. P. etc. Ry. Co.* v. *Swanson*, 49 Am. Rep. 718; *Cowles* v. *Railroad Co.* 84 N. C. 309.

In *Balt. & O. R. Co.* v. *Baugh*, 149 U. S. 368, it is said that the ruling in Ross' case was made upon the ground that the conductor whose negligence caused the injury was "clothed with the control and management of a distinct department," although his management extended to only one train. In the case just cited the Supreme Court held that the engineer of a locomotive which was running detached from any train could not be regarded as in control of a department of the rail-

road company's business so as to make him a vice-principal, although he was in charge of the engine, and the rules of the company declared that under such circumstances an engineer should be regarded as a conductor.* The court distinguishes the case from Ross' case on the ground that the running of an engine, by itself, could not constitute a separate branch of service, and on the farther ground that the plaintiff, the fireman of the locomotive, was not injured by reason of his obedience to any order of the engineer. Baugh's case being thus distinguishable from the Ross case, the former is not an authority against treating the defendant's foreman, Munden, as a vice-principal. For Munden had charge of such work as might well be called a separate branch of the defendant's business, within the rule of the Ross case as that rule was explained by Judge Brewer, and applied by the court, in *Borgman* v. *Railway Co.* 41 Fed. Rep. 667; and here there is also evidence tending to show that the injury to the plaintiff was received in obeying the foreman's order. It is held, however, in the Baugh case that the question as to a master's liability to his servant for the negligence of another servant does not turn merely on the matter of subordination and control, but depends rather on whether the act of alleged negligence is done in discharge of some positive duty of the master to his servant. *Balt. & O. Ry. Co.* v. *Baugh*, 13 Fed. Rep. 914.

We have seen that the Supreme Court of Missouri regards it as one of the master's positive duties to exercise ordinary care in avoiding the exposure of his servant to extraordinary risks. *Miller* v. *Railway Co.* 19 S. W. Rep. 58. And that duty, it is plain, can only be performed in many instances through a proper supervision of the work on which the servant is engaged. That Judge Cooley considers such supervision an absolute duty

*The Chief Justice and Judge Field dissented.

is shown by the following extract from the opinion of the court, delivered by him, in *Quincy Mining Co.* v. *Kitts*, 42 Mich. 34: "This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation; and if it becomes necessary to entrust its performance to a general manager, foreman or superintendent, such officer, whatever he may be called, must stand in the place of his principal and the latter must assume the risk of his negligence. The same is true of the general supervision of his business: if there is negligence in this, the master is responsible for it, whether the supervision be by the master in person or by some manager, superintendent or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to entrust his superintending authority." The rule thus stated is quoted and approved in *Hunn* v. *Railroad Co.* 78 Mich. 513, where it was held that "a train dispatcher who has absolute control over a division of a railroad, so far as the running and operating of trains is concerned, is not a fellow-servant with other employees acting under his orders." In thus ruling the court said: "It is the duty of the master to supervise, direct and control the operations and management of his business, so that no injury shall ensue to his own employees through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations who can only act through natural persons." On the same subject the Supreme Court of Indiana, with reference to the liability of a railroad company for the negligence of a master mechanic, uses the following language: "It is also the master's

duty to do no negligent act that will augment the dangers of the service. In this instance Torrence was doing what the master usually and properly does when present in person, for he was commanding, and directing the execution of what he had commanded. By his own act he made it unsafe to do what he had commanded should be done. Acts of the master were therefore done by one having authority to perform them, and the breach of duty was that of one who stood in the master's place." *Taylor* v. *Railroad Co.* 22 N. E. Rep. 876. The negligence for which the master is made liable by these decisions is that which Mr. Thompson describes as the "direct negligence of the master, or his vice-principal," where he "personally interferes, and either does, or commands the doing of, the act which causes the injury." And for this, he says, "the master is answerable for damages to the same extent as though the relation of master and servant did not exist." Thomp. Neg. 971, 972. An application of the rule thus stated is shown by the decision of this court in *S. W. Telephone Co.* v. *Woughter*, 56 Ark. 206. In that case the manager of the defendant, while personally supervising the removal of a telephone pole which appeared to be sound though the inside was decayed, ordered a servant to climb the pole and detach the wires. The servant undertook to obey the order, and, in doing so, was thrown to the ground and injured by the breaking of the pole. It was held that, in the absence of contributory negligence on the servant's part, the defendant company was responsible for the damages he sustained, if it failed to use the means a prudent man would have employed to protect the servant from harm. "Among the duties of the servant," said the court, "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." It was further said that, in that case, the company "was constructively present by and through its manager, and must be held accordingly." Now, it was not the rank or title of the manager which made the company present in his person, but the authority with which he was clothed, and the duty of supervision he undertook to perform; and if an officer or agent of inferior grade had been, for the time, invested with the same power, and had undertaken to perform the same duty, the company would, we think, have been equally liable for his negligence. *Railway Co.* v. *Triplett*, 54 Ark. 302; *Hough* v. *Railway Co.* 100 U. S. 213; *C. & A. R. Co.* v. *May*, 15 A. & E. R. Cases, 324. Whart. Neg. sec. 235.

The business of which Munden had charge extended, it seems, to many trestles and bridges, and was clearly such as required supervision. In conducting it he exercised the powers of a master, and was charged with the performance of a master's duty to the men under his control. And if the plaintiff was injured through his negligence in attempting to obey one of his orders, it does not answer the demands of justice to say that they were fellow-servants. *Taylor* v. *Railroad Co.* 22 N. E. Rep. 876; *Harrison* v. *Detroit* (Mich.), 19 Am. St. Rep. 180. According to this view, the charge of the court as to the relation existing between Munden and the parties to the suit was an error for which the judgment must be reversed.

In remanding the cause for a new trial, it is necessary to observe that the fifth instruction given at the defendant's request defines the care which it was the duty of the plaintiff to exercise for his own safety in language that may be construed to require a higher degree of diligence than the law exacts. On this point,

however, it is sufficient to refer to *Railway* v. *Rice*, 51 Ark. 476, and to the authorities there cited.

Reversed.

The Chief Justice did not participate in the decision of this cause.

---

58 79
81 121

MACE *v.* STATE.

Opinion delivered July 1, 1893.

Gaming—Betting on base-ball.

Base-ball is a "game of skill" within the statute which makes betting on "any game of hazard or skill" an offense. (Mansf. Dig. sec. 1835.)

Appeal from Crawford Circuit Court.

HUGH F. THOMASON, Judge.

E. B. Pierce and *Jesse Turner, Jr.*, for appellant.

Betting on a game of base-ball is not a violation of the criminal laws of this State. Review the legislation and decisions of the State, citing Mansf. Dig. sec. 1827, 1834, 1842 to 1847, etc.; Rev. St. ch. 44, secs. 1 and 9; 15 Ark. 71; *Ib.* 259; 23 *id.* 726; 31 Ark. 462; 18 B. Mon. (Ky.), 35; 1 Kas. 474.

James P. Clarke, Attorney General, for appellee.

The object of the statute was to suppress *betting* on any game of hazard or skill. Base-ball is a *game* of *skill*. Reviews the legislation of this State and others, and of England and the decisions, citing 35 Ark. 72; 27 *id.* 360; 23 *id.* 726; 12 Tex. 274-5; 18 Ark. 544; 33 *id.* 138-9; 5 Sneed, 509; 2 El. & Bl. 286; 10 M. & W. Exch. 728; 1 Jur. (N. S.), 660; 53 Iowa, 154; 14 Gray (Mass.) 390.

POWELL, J. At the June term of the Crawford circuit court, the appellant, B. C. Mace, was indicted

for betting on a game of base-ball. The indictment in substance is as follows: The said B. C. Mace, on the 10th day of May, 1892, in the county aforesaid, unlawfully did bet the sum of one dollar, on a certain game of hazard or skill, then and there played, called base-ball.

The appellant interposed a general demurrer to the indictment, which was overruled by the court. The appellant then entered a plea of not guilty, was tried, convicted and fined $10. He then filed his motion for a new trial, assigning as a reason therefor that the court erred in overruling his demurrer to the indictment. The court overruled the motion, and the defendant prayed an appeal to this court. The only question presented for the consideration of the court in this case is, whether betting on a game of base ball is a violation of the criminal laws of the State of Arkansas.

The appellant was indicted under section 1835 of Mansfield's Digest, which reads as follows: "If any person shall be guilty of betting any money, or any valuable thing, on any game of hazard or skill, he shall, on conviction, be fined in any sum not less than ten dollars nor more than twenty-five dollars."

This section of the statute is embodied in what is known as the gaming laws of the State, and the terms gaming, betting and gambling may, in most instances, be used interchangeably.

The legislation of this State, although not as voluminous as that of many of the other States, seems to fully cover the vice of gambling or betting on games, which is the vice intended to be prohibited.

Section 1827, Mansfield's Digest, prohibits the setting up, keeping or exhibiting the banking games, naming many that were known, and by its provisions all banking games, or gambling devices of any other like description, are prohibited. By section 1828 it is made indictable to be interested, either directly or indirectly,

in the gambling devices prohibited in section 1827. Section 1829 makes it indictable to bet on the games prohibited, and punishes the betting by the same penalty as for keeping or exhibiting, or being interested in, these gambling devices. Section 1834 prohibits betting on any game of cards. This section is as follows: "If any person shall be guilty of betting any money, or any valuable thing, on any game of brag, bluff, poker, seven-up, three-up, twenty-one, vingtun, thirteen cards, the odd trick, forty-five, whist, or at any other game at cards known by any name now known to the laws, or with any other or new name, or without any name, he shall, on conviction, be fined in any sum not less than ten nor more than twenty-five dollars."

The playing at cards is not prohibited; it is the betting on these games which is the vice legislated against. We suppose that no one would contend that this statute is not comprehensive enough to include the betting upon all games at cards, known at its passage, or that have since been invented, or that may be invented, with or without a name.

The games known as the banking games, prohibited by the laws, are rarely resorted to as a means of recreation or for pastime, except in connection with gambling, and are in themselves harmless, and would have demanded no legislation but for the fact that the keeping of them furnishes a resort for the congregation of the idle, thoughtless and vicious, where they may gratify that inclination and disposition to gamble which is said to be implanted in man's nature, and which is most difficult to bring within the restraint of the law. It is said, the Indian will stake his wife, and the ancient German would stake himself, to gratify the passion. Blackstone, vol. 4, page 171, says, gaming, "taken in any light, is an offense of the most alarming nature; tending by necessary consequence to promote public idleness, theft

and debauchery among those of a lower class; and among persons of a superior rank, it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honor and virtue."

We deem it unnecessary to enumerate the reasons for the enactment of the various statutes upon the offense of gaming, and think we may safely say, as did the learned commentator upon the English law, that the legislature has been careful to prevent the destructive vice, and that our laws against gaming are not deficient.

In the case *Tatman* v. *Strader*, 23 Ill. 494, under a statute of that State which prohibits betting on games, the court says: "The word game in our language has a very broad and comprehensive signification."

Illustrations innumerable might be given to show that the ordinary and popular understanding of the word "gaming" includes feats of physical power and skill, as a game of quoits, ball, etc. In the case of the *State* v. *Miller*, 53 Iowa, 154, under a statute which prohibits the playing at any game for any money or other property of any value, the court holds that billiards is a game within the inhibition. In the case of the *People* v. *Weithoff*, 51 Mich. 203, it was held that the betting on a game of base-ball was prohibited under a statute prohibiting the betting upon any game of skill or chance. The court, per Cooley judge, said that base-ball was a game, in its strictest sense.

After the enactments above quoted prohibiting the banking games and the betting thereon and the betting at games of cards, upon an indictment charging raffling as a game, reported in 15 Ark. 71 *(Norton* v. *State)*, the court said the act complained of may be within the mischief, but not within the prohibition, of the law against gaming, and if the practice grew to be an evil, it would require further legislation for its sup-

pression. This game seems to have been played with dice. At the same term of the court, under an indictment for a game called rondo (*State* v. *Hawkins*, 15 Ark. 259), which was a game played by rolling balls upon a billiard table, at which the players bet against each other, the court said, it would be a forced construction of the law to hold that it includes "such games as rondo was here shown to be. Upon the same principle, we would have to hold that billiard tables, ten pin alleys, a fives court and the like are gambling devices." At the next session of the legislature, the statute upon which this indictment is based was passed, doubtless for the very purpose of remedying the defect in our gaming laws made manifest by the rendition of the above decisions; and, the legislature being convinced of the fact that legislation against special games would not accomplish the object intended, professional gamblers being as fertile in devising means of evasion as the legislature had been in its attempts to prevent the vice, that this special class of legislation would ever be lame and deficient unless all betting upon games was prohibited, enacted this law for the purpose of curing all defects in the laws then in force, for the prevention of gambling upon games; and it appears to us that this statute is comprehensive enough to include all betting upon games of whatever name. In the act no game by name or class is mentioned. The only qualification or restriction is that it is a game either of hazard or skill. The statute is self-explanatory. By the decisions above quoted, base-ball is held to be a game, and that it is one of skill cannot be doubted.

The case of the *State* v. *Rorie*, 23 Ark. 726, we think, is not in conflict with the interpretation herein given of the statute. The indictment in that case charged the defendant with betting on a game of horse racing. The court, in ruling upon it, held that horse

racing was not a game but a sport, and not embraced in this section of the statute. While there are many authorities which hold that horse-racing is a game within the inhibition of similar statutes to ours, there are many reputable authorities which hold the contrary. See 8 Am. & Eng. Enc. of Law, p. 1038, note 5.

We hold that the overruling the demurrer to the indictment was right. To rule otherwise would in our opinion be derogatory to the statutory rule for the construction of the laws upon gaming. Mansfield's Digest, sec. 1840.

Judgment affirmed.

Battle, J., dissenting. In *State* v. *Rorie*, 23 Ark. 726, it was held that horse racing was not a game within the meaning of the statute which makes betting on "any game of hazard or skill" an offense. For the reasons given for so holding, I think that base-ball is not such a game within the meaning of the statute.

Mansfield, J., concurs in this dissenting opinion.

---

58 84
61 543
61 581
61 589

BLAND v. FLEEMAN.

Opinion delivered July 1, 1893.

1. *Fraud—Purchase of trust property by trustee.*

   Where an administrator sells land of the estate, a subsequent purchase of the land by him from the vendee, made before the sale is confirmed, is equivalent to a purchase at his own sale, and is constructively fraudulent.

2. *Limitation—Begins to run, when.*

   In the absence of actual fraud, the statute of limitations begins to run, in favor of an administrator who purchases land of the estate at his own sale, from the time the parties in interest are apprised that the sale to him has been confirmed, notwithstanding the administration has not been closed.

3. *Notice—Knowledge of facts leading to inquiry.*
Notice of facts and circumstances which would put a man of ordinary intelligence and prudence on inquiry is, in the eye of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose.

4. *Statutes of limitation—Binding in equity.*
Mansf. Dig. sec. 4474, providing that actions for the recovery of lands sold at judicial sales shall be brought within five years after the date of such sales, as well as the general statute of seven years (Mansf. Dig. sec. 4471), is binding upon courts of equity, as well as of law, unless the delay after the cause of action accrued was superinduced by fraud or concealment.

5. *Limitation—Constructive trust.*
Where an administrator purchases land under execution in favor of the estate, he becomes clothed with a constructive trust in favor of the estate which will be barred by the statutes of limitation.

Appeal from Franklin Circuit Court in Chancery, Ozark District.

HUGH F. THOMASON, Judge.

U. M. & G. B. Rose and *J. V. Bourland* for Bland, et al.

1. *Fraud.* The payment to Parkes on a claim, never probated, of $1000 was an express violation of law. Mansf. Dig. sec. 103. The keeping open the administration for twelve years was in line and keeping with other fraudulent acts. 53 Ark. 232; Mansf. Dig. 206. Courts of chancery are still able to ferret out acts of fraud and relieve against them. 20 Ark. 527; 40 *id.* 407; 53 Ark. 232. The purchase of lot 3 before confirmation avoided the sale as fraudulent. 55 Ark. 85. It was also the homestead. 47 *id.* 445. Lot three was not inserted in the petition to sell, nor order of sale, and the court had no jurisdiction. The sale was void. 55 Ark. 562; 47 *id.* 218; 26 *id.* 257; 72 Ala. 7; 64 Mo. 518; 1 Story, 478; 11 Ark. 375; 1 Wall. 636.

2. *The statute of limitations.* As to whether a purchase by an administrator at his own sale is void or voidable, see 12 Am. & Eng. Enc. Law, p. 222, note;

44 N. Y. 237; 25 Ark. 306; 32 *id.* 619; 48 *id.* 489; 4 How. (U. S.), 557; notes to *Hindman* v. *O'Connor*, 13 Law Rep. An. 493. However, the law is well settled that the statute does not begin to run in favor of an administrator as against the heirs until he is discharged from his trust. 18 Ark. 495; 22 *id.* 473; 28 *id.* 19; 42 *id.* 28; 48 *id.* 248. It would not begin to run until demand made, after his discharge. 22 Ark. 1; Wood on Lim. sec. 200.

3. *Laches.* Under the facts of this case, laches cannot be imputed to the heirs. 2 Wall. 87; 2 Eden, 285; 6 Wheat. 481; 4 How. 503; 29 Ark. 591; 5 How. 276; 18 Wall. 493; 43 Ark. 35; 107 Mass. 313; 11 Pick. 173; 28 Miss. 466; 22 Ark. 7; 46 Ark. 25; 48 *id.* 250. The heirs had every confidence in Fleeman—they had no suspicions. The sale as made never was confirmed. The purchases by Fleeman were concealed and were never submitted to the probate court for confirmation. To fix acquiesence on a party, it must appear that he knew the facts. 10 Ves. 428; 29 Ark. 135; 28 *id.* 64; 2 Selden, 268; Perry, Trusts, sec. 230; 1 Jac. & Walk. 67; 5 H. S. C. 627; 12 Vesey, 355; 5 Ball & B. 345; 16 Md. 456; 3 Stock. 23. Independently of peculiar circumstances, equity adopts as a bar the period which bars a suit at law. 3 Sumner, 486; 1 White & T. L. C. in Eq. 258. A trustee cannot set up an adverse holding against his *cesiui que trust.* Perry on Trusts, sec. 863. His possession as administrator was not notice of any new right claimed by him. 51 Miss. 146. See also 12 Sup. Ct. Rep. 425. The law of constructive notice can never be so applied as to relieve a party from responsibility for actual misstatements and frauds. 14 Mich. 604; 90 Am. Dec. 239; 84 *id.* 589; 115 U. S. 538; 21 Wall. 342; 111 U. S. 190.

J. E. Cravens and *J. M. Moore* for Fleeman.

1. No actual fraud is shown in the accounts and settlements. Chancery will not interfere to correct mere irregularities or errors. 50 Ark. 222; 48 *Id.* 547; 36 *Id.* 390; 39 *Id.* 257; 50 *Id.* 228; 51 *Id.* 16; 33 *Id.* 733. The transactions occurred many years ago, and if any cause of action ever existed, it is barred. 42 Ark. 491.

2. There was no fraud in connection with the sale and purchase of the land.

3. The omission of lot 3 from the petition and order of sale was a mere clerical omission, and did not render the sale void. The probate court acquires jurisdiction over the estate. 10 Ark. 549; 19 *Id.* 515-16. It proceeds *in rem.* 14 *Id.* 252-3; 11 Mass. 226; 2 Peters, 62. See cases 31 Ark. 74; 25 *Id.* 58; 30 Fed. Rep. 250; *Ib.* 246. Confirmation cures defects in proceedings. 47 Ark. 417; 52 *Id.* 342. Misdescriptions or clerical errors may be corrected. 33 Ark. 296; 28 *Id.* 372; *Ib.* 120; 49 *Id.* 406.

4. Plaintiffs are barred by lapse of time and acquiescence. 55 Ark. 85; 7 S. & M. (Miss.), 409; 7 Pick. 6; 101 U. S. 139; 28 Fed. Rep. 276; 40 Fed. Rep. 774; 36 Ark. 401; 30 N. W. Rep. 9; 2 Wall. 95. A disavowal of a trust puts the statute in motion. His possession becomes adverse from the time he repudiates or disavows it. 7 Johns. Ch. 90; 3 Peters. 52; 4 Mason. 151–2; 10 Peters, 223. Where a trustee denies the right of the *cestui que trust*, his holding becomes adverse. 115 U. S. 151; 120 *Id.* 386; 20 Mo. 538; Strobh. Eq. S. C. 340. The administration as to this land virtually closed in 1874. As to it he had no further duties to perform. Notorious acts of hostility to the title of the *cestui que trust* are a renunciation of the trust. 22 Ark. 1; 16 Ark. 122. In 46 Ark. 25, the court say that the doctrine that the statute will not bar an express trust is

subject to two qualifications. See p. 34. See also 48 Ark. 248; Wood on Lim. sec. 205; 2 Perry on Trusts, sec. 863; 53 Pa. St. 352; 5 Ind. 259. Even if the purchase by Fleeman was *void*, the deed of Parkes & Quaile gave *color of title* which supports adverse possession and puts the statute in motion. 13 How. 477; 21 Ark. 370; 34 *Id.* 547.

JOHN FLETCHER, Special Judge. R. H. Adams died in 1863. On November 19, 1865, M. F. Fleeman married his widow, and, on November 27, 1865, he took out letters of administration upon the estate of Adams. Fleeman made regular annual settlements in the probate court up to 1875, but his final settlement was not made until August 4, 1880, at which time he was discharged.

On 26th day of December, 1883, a part of the heirs interested in the estate, and who were non-residents, brought suit in the United States court at Fort Smith, Arkansas, against Fleeman and the other heirs, who were residents of this State, for the purpose of falsifying the settlements of Fleeman and to recover lands of the estate which, it was alleged, Fleeman had fraudulently sold and caused to be purchased for his benefit. That suit was on April 24, 1887, dismissed for the want of jurisdiction, and, on the 24th day of May, 1887, this suit was brought by all the heirs, in the Franklin circuit court in chancery, for the same purpose. From the decree of the court below all the parties have appealed.

As to certain claims probated against the estate and which, it is alleged, were fraudulently allowed by the administrator, the circuit court decided there was no fraud; and, as to the accounts of Fleeman, the court found, to use the language of the decree, that there were "no such errors arising from fraud, accident or mistake as to justify opening the same, that such irreg-

ularities as appear therein may have been susceptible of explanation at the time, whilst not so after so long a lapse of time, for which reason the court declines to disturb the settlements." We have carefully examined the record, and as to this we think the conclusions of the circuit judge are correct.

1. As to purchase of trust property by trustee.

The lands are designated in the record as lots 1 to 7 inclusive. The leading questions in the case arise as to lots 2 and 3. These two tracts were sold by Fleeman, as administrator, at public sale on January 6, 1868, for the purpose of paying debts probated against the estate. Prior to the sale, Perry F. Webb, a neighbor of Fleeman, in conversation with Fleeman's wife, expressed a desire to purchase lot 2, but said he did not feel able to pay for it on so short credit as was to be given. Mrs. Fleeman informed him that she would like to have a half interest in this tract, and would take half at whatever price he might pay. She also requested Webb to bid off lot 3 for her at the sale. This tract (lot 3) had been previously set apart to her as her dower in the lands of R. H. Adams, and only the remainder interest was advertised for sale. Webb bid off lot 2 at the sale for $6,000.00 in his own name; but lot 3 brought so much more than was anticipated by Webb that he ceased bidding, and it was purchased by Parkes & Quaile for $3,845.00. Whether Fleeman knew of the arrangement between Webb and Mrs. Fleeman, we need not inquire. We find that, before the sale was confirmed, he entered into an agreement with Webb to take the half of lot 2 adjoining lot 3 at the same price which Webb bid for it, and, when Webb's note for $6,000.00 became due, he allowed him credit for one-half thereof, and charged himself as administrator with it. This tract sold for within $255.00 of its appraised value, and within about $1,800.00 of the price which Adams gave for it just before the war. We are unable to say from the evidence

that there was any positive or actual fraud in the sale of this tract, but the fact that Fleeman acquired an interest in the land before the sale was confirmed was equivalent to a purchase at his own sale, and the law condemns it as fraudulent. *Woodard* v. *Jaggers*, 48 Ark. 250; *Gibson* v. *Herriott*, 55 Ark. 92; *McGaughey* v. *Brown*, 46 Ark. 32.

2. When statute of limitation begins to run.

Fleeman pleads the statutes of five and seven years limitations. But it is argued by counsel for plaintiffs that the statute was not set in motion in his favor until after his final settlement and discharge, August 4, 1880, and that five years did not thereafter elapse before the bringing of the first suit.

The rule, we believe, is universally established that the statute will not bar an express trust. "But this doctrine" says Chief Justice Cockrill, in *McGaughey* v. *Brown*, 46 Ark. 34, "is subject to two qualifications, namely, that no circumstances exist to raise a presumption of the extinguishment of the trust, and that no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest which requires them to act as upon an asserted adverse title." Citing Angell on Lim. 174, 472; Wood on Lim. 212, 213; *Harriet* v. *Swan*, 18 Ark. 495.

The sale to Webb was reported to the probate court, and was confirmed on February 4, 1868. The purchase money was regularly accounted for and paid out to the parties entitled thereto, and the accounts of the administrator regularly approved by the court. In so far as the probate court was concerned, the property passed from the trust, and the administrator was discharged therefrom. *Fort* v. *Blagg*, 38 Ark. 475.

The sale was not void but voidable, and the parties interested had their right of action to set it aside at any time after being apprised of the facts of the purchase by Fleeman. *McGaughey* v. *Brown*, 46 Ark. 32;

Woodard v. *Jaggers*, 48 Ark. 250; *Gibson* v. *Herriott*, 55 Ark. 92; *Musselman* v. *Eshleman*, 10 Pa. St. 394, S. C. 51 Am. Dec. 493; *Worthy* v. *Johnson*, 8 Ga. 236, S. C. 52 Am. Dec. 403.

3. Knowledge of facts leading to inquiry.

The fact that the administration had not been closed was no impediment to plaintiff's right of action. We can see no reason why they could not and should not have sued before as well as after the final settlement and discharge of the administrator, unless it be that they were not apprised of the facts which rendered the sale and purchase by Fleeman invalid. In *Keeton* v. *Keeton*, 20 Mo. 541, the administrator purchased property at a sale made by himself, as was done in this case. The court said: "With regard to the statute of limitations, it will run from the time the facts are brought home to the knowledge of the party. He then has a cause of action, and there is no reason for placing him in a better situation than any other suitor. Having a cause and being fully aware of it, there is nothing to prevent the statute from running against him." 1 Bigelow on Fraud, 33.

Actual notice of the evidence or facts upon which an action may be sustained is not necessary to put the statute in motion. As said by the United States Circuit Court of Appeals, Eighth Circuit, in *Percy* v. *Cockrill*, 53 Fed. Rep. 875: "Notice of facts and circumstances which would put a man of ordinary intelligence and prudence on inquiry is, in the eye of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose. Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have lead. Where a person has sufficient information to lead him to a fact, he shall be deemed conversant with it." Citing *Kennedy* v. *Green*, 3 Mylne & K. 699, 722; *Wood* v. *Carpenter*, 101 U. S. 135, 141; *Rugan*

v. *Sabin*, 53 Fed. Rep. 415; *Parker* v. *Kuhn*, 21 Neb. 413, 421, 426, 32 N. W. Rep. 74; *Wright* v. *Davis*, 28 Neb. 479, 483, 44 N. W. Rep. 490. See also Buswell on Limitations, sec. 385; *Pearsall* v. *Smith*, 149 U. S. 231.

Both W. W. Adams and Mrs. Bland, the ancestor of all the plaintiffs, except Adams, were advised of the sale of the lands. Adams lived with Fleeman on lot 3, which adjoins lot 2, from the date of the sale until after he became of age in 1877. He testified that he knew, "ever since soon after the sale in 1868, that Fleeman claimed to be the owner of a half interest in lot 2, of the reversionary interest in lot 3, and since his wife's death in May, 1872, the absolute owner of lot 3," and that he had always heard while living with Fleeman that Parkes and Webb purchased the land at the sale. He was engaged in business on his own account since 1875. So far as the testimony shows, no effort was made by Fleeman or any one to conceal the facts of his purchase. Webb and Parkes & Quaile, the purchasers at the probate sale, lived at or near Ozark where Adams did business. The probate court records showed the sales by Fleeman, and, when confirmed, Fleeman's deeds from Webb and from Parkes & Quaile were of record in the recorder's office, and the deed from Parkes & Quaile bore date before the sale was confirmed by the court. R. A. Bland, a son of Mrs. Bland and one of the plaintiffs, visited Franklin county, ten or twelve years before the first suit was brought, to get information in regard to the estate, and the papers in the estate were shown him and the business explained to him by one of Fleeman's attorneys.

In May, 1874, Mrs. Bland wrote Fleeman a letter enquiring about the estate and the lands which had been set apart to Mrs. Fleeman as dower. This letter was answered by Walker & Mansfield, Fleeman's attorneys,

who informed her that the administration was kept open because it was thought something might possibly be had upon one or two claims due the estate and still unsettled, and inviting an investigation of all the acts of the administrator. She was also informed that "the reversionary interest or estate in remainder, in the lands held as dower was sold by order of the court to the highest bidder and purchased by Quaile & Parkes, and that Fleeman had purchased from them at an advance of $1000 on the price they gave for it." In conclusion they said to her: "But those interested in the question as to this, or the manner in which Mr. Fleeman has administered upon Mr. Adams' estate, are not expected to take our opinion, or even any statement of facts by us, as being correct. They are expected to look into those matters for themselves or through their own attorneys."

It is apparent that, at least as early as 1874 or 1875, all the material facts going to establish plaintiffs' cause of action were known to W. W. Adams and Mrs. Bland, as appeared of record, except the fact that Fleeman's purchase was made before the confirmation of his sale, and this fact could have been as easily discovered in 1875 as in 1883. *Leach* v. *Moore*, 57 Ark. 583.

It is true that W. W. Adams did not become of age until 1877, and that Mrs. Bland, the other heir, died during the same year, but after that he waited more than five years before commencing suit, and the heirs of Mrs. Bland were affected with all the notice chargeable to her. If it be that the statute of seven years (Mansf. Dig. sec. 4471) is not applicable to Adams, yet, according to the view we have taken, he is barred by the statute of five years (Mansf. Dig. sec. 4474) applicable to judicial sales. *Hindman* v. *O'Connor*, 54 Ark. 627.

If we were able to find from the evidence that Fleeman was guilty of positive or actual fraud in the sale and purchase, or that he in any way concealed the facts

from plaintiffs, our conclusion would be different; but while there may be circumstances pointing to actual fraud, they are not, in our opinion, sufficient to establish the charge. There is nothing to show any effort at concealment. The case, as we hold, is one of constructive fraud only, as to which the rule is less rigid than where actual fraud or concealment has been perpetrated. Buswell on Limitations, sec. 385; *Wilmerding* v. *Russ*, 33 Conn. 67.

The case at bar is different from that class of cases wherein the administrator has not accounted for property which has come to his possession, or has not in any way paid over the proceeds thereof, or where there has been no order of court for him to do so, or where there is no right of action until final settlement or order to pay over, as in *Harriet* v. *Swan*, 18 Ark. 495; *Brinkley* v. *Willis*, 22 Ark. 1, and other cases cited by counsel for plaintiffs.

In *Harriet* v. *Swan*, at page 505, the court said: "In May, A. D. 1844, Mrs. Barden made her last settlement with the probate court, showing in her hands a balance belonging to the estate, which balance was struck from an aggregate, which included the appraised value of the appellants. She never, afterwards, surrendered these effects to distributees, or divided them between herself as dowress and such distributees, or made any effort to do so, so far as anything appears on this record; on the contrary, she never closed the administration in any way, or sought any discharge from it, as is expressly admitted; and from everything that appears on the record, from the time of that settlement (her will having been made some four years previously) until the day of her death, the affairs of the estate, and the possession of the slaves, seem to have been, in all respects material to the question we are considering, in the same condition that it had been from

the death of her husband up to the time of that settlement." At pages 506-7 the court further said: "The rule is, that 'if a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust;* and if the only circumstance is, that he does not perform his trust, his possession operates nothing as a bar because his possession is according to his estate.' "

In the case of *Brinkley* v. *Willis*, 22 Ark. 1, the administrator had wholly failed to account for the property or its proceeds; besides, it seems the plaintiff, Mrs. Brinkley, was a married woman at the time the cause of action arose. The court said (at pages 5 and 6): "We are not certain that any cause of action existed against Willis concerning the slave George, till Willis had swapped him to Russey, which was about or near the time when the infant, Nancy Floyd, became Nancy Brinkley, and who thenceforward has been under the disability of coverture. And more especially because the defendant Willis, as an executor and therefore a trustee, charged with the execution of an express trust till discharged therefrom by due course of law, would hold the property, or its proceeds, in trust for the legatees, without he had, by notorious acts hostile to their claim and right, renounced the trust and converted the property to his own use."

4. Statutes of limitation binding in equity.

Moreover the court in that case refused to be bound by the statute of limitations. But our general statute of seven years (Mansf. Dig. sec. 4471) in reference to lands in express terms applies to "any action or suit, either in law or equity," and the statute of five years (Mansf. Dig. sec. 4474), while not referring in express terms to courts of equity, seems equally as comprehensive; it says: "All actions against the purchaser, his heirs or assigns, for the recovery of lands sold at judicial sales shall be brought within five years after the

date of such sale, and not thereafter; saving to minors and persons of unsound mind the period of three years after such disability shall have been removed."

These statutes are equally applicable to and binding upon courts of law and courts of equity, unless the delay after the cause of action accrues is superinduced by fraud or concealment. They operate upon the *cause* rather than the *form* of action. *McGaughey* v. *Brown*, 46 Ark. 34; *Mitchell* v. *Etter*, 22 Ark. 178; *Hindman* v. *O'Connor*, 54 Ark. 627; *Alvis* v. *Oglesby*, 87 Tenn. 172, 10 S. W Rep. 313.

Lot 3 embraced the homestead of Adams. By clerical error or mistake this tract was neither described in the petition or order of sale. It was advertised, appraised and sold, however, as if it had been described in the petition and order of sale, and it seems to have been the understanding of the probate judge, administrator and his attorneys, that it was so described and ordered to be sold, but the error was not discovered until a short while before the suit was brought in the United States court. It is argued by counsel for plaintiffs that the sale was on this account absolutely void. It is unnecessary for us to decide this question; for, if the proposition be admitted, it cannot strengthen plaintiffs' case; because, this tract having been set apart to Mrs. Fleeman as her dower in the real estate before the sale, she held possession of it as such until her death in 1872, at which time all the debts had been paid, and the time had expired for probating other claims. The administrator had no right to possession of the land after Mrs. Fleeman's death, and there was no duty imposed upon him as administrator in reference to it. *Reed* v. *Ash*, 30 Ark. 775; *Stewart* v. *Smiley*, 46 Ark. 376. His deed, if void, formed color of title under which he has openly and continuously held possession of the land as his own, of which fact plaintiffs had actual knowledge.

5. Statutes of limitation apply to constructive trusts.

Lot 9 in block 20 and lot 5 in block 28 in the town of Ozark were purchased by Fleeman at execution sale to satisfy a judgment in favor of the estate, in 1867. The tract designated as lot 1 in the record is situated in Sebastian county. The estate held a mortgage upon this tract to secure $646.86, which was foreclosed by decree of court; the land was sold August 2, 1869, and the attorney in charge of the proceedings bid it off in Fleeman's name at $505.00. Fleeman was not present at the sale of this tract, and did not know it was bid off for him until informed by the attorney. He charged himself with his bid in each case, and afterwards sold part of the Ozark property and all of the tract in Sebastian county for more than he bid for them. There was no concealment of the facts or intentional fraud in either purchase; both were made in the absence of higher bidders. As to these tracts Fleeman was not a trustee of an express trust; but by his purchase of them he became clothed by operation of law with a constructive or implied trust only, as held by this court in *Jones* v. *Graham*, 36 Ark. 400. See also *Harris* v. *King*, 16 Ark. 124. The general rule is that the statutes will bar a constructive trust. *Hindman* v. *O'Connor*, 54 Ark. 627. Counsel in argument have urged no ground for relief as to the other tracts, and we find none disclosed by the record.

The decree of the court below, in so far as it is inconsistent with this opinion, is reversed, and the case will be here dismissed at the cost of plaintiffs.

Mansfield, J., being disqualified, did not sit in this cause.

FLEENER v. STATE.

58 98
69 456

58 98
84 140

58 98
185 48

Opinion delivered July 4, 1893.

1. *Embezzlement—Allegation of agency.*
   In an indictment for embezzlement by an agent an allegation that defendant was "the agent of the Pacific Express Company at Wheatley, Arkansas," is a sufficient averment of the agency.

2. *Description of money embezzled.*
   An indictment for embezzlement is not defective in failing to give a particular description of the money embezzled, where it states that the particular denominations and kinds of money embezzled are unknown to the grand jury.

3. *Ownership of property embezzled.*
   An indictment lies against an agent for converting to his own use the money of his employer, as well as for converting to his own use the money of any other person, which may have come into his possession or under his care by virtue of his employment; the words "any other person" in the statute (Mansf. Dig. sec. 1638) meaning any person other than the person guilty of the embezzlement.

4. *Proof of corporate existence—General reputation.*
   Corporate existence of the injured party may be proved by general reputation.

5. *Embezzlement—Felonious intent.*
   In a prosecution of an agent for embezzlement, where the only evidence relied upon to prove a felonious intent tended to establish that defendant had fraudulently concealed from his employer the fact of having received money belonging to him, it was error to refuse an instruction, in effect, that the mere failure of defendant to pay over to his employer the amount in his hands would not constitute the offense of embezzlement, that it must further appear that defendant had fraudulently concealed the amount in his hands belonging to his employer.

6. *Embezzlement—Settlement by bondsmen no defense.*
   It is no defense to a prosecution for embezzlement that defendant's bondsmen made good to his employer all losses suffered by reason of the alleged embezzlement.

Appeal from Saint Francis Circuit Court.

GRANT GREEN, JR., Judge.

George Sibly for appellant.

1. The indictment is bad. It does not directly or sufficiently charge that the defendant was the agent or clerk of an incorporated company; that he made way with money without the consent of his employer; that the money "*belonged to another person;*" that it "came to his possession by virtue of his employment." 12 Ark. 608. It should have described the money. 48 Ark. 36; 51 *Id.* 119; *Id.* 114; 2 Bish. Cr. Law (9th ed), sec. 374; 6 Am. & Eng. Enc. Law, par. 4; 29 Ark. 68; 42 Ark. 517; 37 *Id.* 444; *Id.* 447; 54 *Id.* 611. It should have charged that appellant received it "from another person." 2 Bish. Cr. Law, sec. 365-7; 6 Am. & Eng. Enc. Law, p. 477; 78 N. Y. 377. Also the *intent* to injure and defraud. 6 Am. & Eng. Enc. Law, p. 496 *c.* and note 3.

2. There was no proof that the Pacific Express Company was an incorporated company.

3. It was error to refuse the second instruction. 2 Bish. Cr. Law, secs. 372 to 375, 376, 379; 6 Am. & Eng. Enc. Law, pp. 454-5, par. 2 and note 2.

4. Appellant gave bond with a foreign guarantee company as surety—the company paid the amount claimed to be due; the State has now no interest in the matter. 6 A. & E. Enc. Law, p. 462 and note. The statute was not intended to be a debt collector. 2 Bish. sec. 3-376, 374; 6 A. & E. Enc. Law, 469 and note, and p. 476, n. 3.

5. The money was properly charged up to defendant on his books, and hence it was not embezzlement. 6 Am. & E. Enc. Law, p. 469, note 2 and 473 and note; 16 Neb. 179.

James P. Clarke, Attorney General, for appellee.

1. The indictment follows closely sec. 1638, Mansf. Dig. The word *money* has a definite legal meaning.

2 Bish. Cr. Law, sec. 357; 44 Tex. 620; Mart & Yerger (Tenn.), 129. A sufficient excuse was made for not particularly describing the money. 48 Ark. 40. The precise words of a statute need not be followed, a substantial compliance is sufficient. 47 Ark. 488. The words "any other person" mean any person other than the person indicted. 15 Wend. 147. The word "feloniously" sufficiently charges the *intent*. 1 Whart. Cr. Law, sec. 977; 34 Ark. 159; 50 N. W. Rep. 472.

BUNN, C. J. The defendant, A. W. Fleener, was indicted at the October term, 1892, of the St. Francis circuit court, for the crime of embezzlement; at the March term, 1893, found guilty and sentenced to imprisonment in the penitentiary for the period of one year. Motions in arrest of judgment and also for a new trial were overruled, and appeal taken to this court.

The indictment, omitting formal parts, is as follows, to-wit: The said A. W. Fleener, on the 15th day of June, 1892, in the county of St. Francis, aforesaid, then and there being over the age of sixteen years, and being the agent of the Pacific Express Company, at Wheatley, Arkansas, said Express Company being a corporation organized and incorporated under the constitution and laws of the State of Nebraska, and doing business in the State of Arkansas and county of St. Francis; and having in his possession as such agent as aforesaid, and then and there having come into his possession as such agent as aforesaid, two hundred and fifty-one dollars and sixty-four cents current money of the United States, the particular denominations and kind of which is to the grand jury unknown, the property of the Pacific Express Company, unlawfully, feloniously and fraudulently did make way with, embezzle and convert to his own use, without the consent of the Pacific Express Company as aforesaid, against the peace and dignity of the State of Arkansas."

To this indictment a general demurrer in short on the record was interposed.

Section 1638, Mansfield's Digest, under which the indictment presumably was found, is as follows, to-wit: "If any * * * officer, agent, clerk or servant of any incorporated company, or any person employed in such capacity, shall embezzle or convert to his own use, without the consent of his master or employer, any money, goods * * * belonging to any other person, which shall have come into his possession * * * by virtue of such employment or office, he shall be deemed guilty of larceny, and on conviction shall be punished as in cases of larceny."

The demurrer raises two or three questions as to the allegations of the indictment: first, that it is not explicit enough in alleging the agency of the defendant; secondly, that the money alleged to have been embezzled is not sufficiently described; thirdly, that it failed to allege that the money embezzled by him belonged to another person, meaning another person than the master; and, lastly, that the indictment does not allege that the money came into the possession of defendant by virtue of his employment.

1. Sufficiency of allegation of agency.

The allegation that the defendant was "the agent of the Pacific Express Company at Wheatley, Arkansas," is sufficient.

2. Description of money embezzled.

The want of more particular and definite description of the money received and alleged to have been embezzled by the defendant is sufficiently excused by the recital that a more particular description was unknown to the grand jury, and this meets the requirement suggested in *State* v. *Ward*, 48 Ark. 36.

3. Ownership of property embezzled.

While the language of our statute (sec. 1638, Mansfield's Digest) is rather obscure, in so far as the words "belonging to another person" are concerned, and may seem to justify a different construction—the construc-

tion given by the English courts—yet, in view of the very nice and technical distinction between larceny and embezzlement, we are constrained to adopt the construction given to similar words in New York, Missouri and Minnesota, and hold that "another person means another person than the person guilty of the embezzlement," in contradistinction to the English rule, which holds that the same words mean "another person other than the master." *People* v. *Hennessey*, 15 Wendell, 147; *State* v. *Porter*, 26 Mo. 201; *State* v. *Kent*, 22 Minn. 41.

This is not in conflict with *Powell* v. *State*, 34 Ark. 693, which was an indictment against a general household servant, who, having the custody of some tools under the superior possession of the master, appropriated the tools to his own use. This was held to be larceny, and not embezzlement, and the decision is in accord with the weight of authorities. The same authorities hold that when the servant comes into possession of the property before the master, and his possession is by reason of his relation as such servant, and he appropriates it to his own use before it comes into the possession of the master, and while yet in his possession, the fraudulent appropriation thus made is embezzlement, and not larceny. See note 98 Am. Dec. 126–129.

The rule of construction in New York, Missouri and Minnesota, and perhaps other States, is considered necessary in order that there be not a *hiatus* in the law, as there would otherwise seem to be.

4. Proof of corporate existence.

The objection that the proof of the corporate existence of the injured party is not sufficient, we think, was properly overruled. A mere *de facto* corporation, it seems, may be the victim of embezzlement. Evidence of general reputation of corporate existence is regarded as sufficient in such cases. *Burke* v. *State*, 34 Ohio St. 79; *Calkins* v. *State*, 98 Am. Dec. 121. And if the same

rule is to be applied in criminal as in civil cases, it would seem that one dealing with even an ostensible corporation, as such, is not permitted to deny its corporate capacity. *Town of Searcy* v. *Yarnell*, 47 Ark. 269; note to 79 Am. Dec. 437.

The State put in evidence the authenticated copies of articles of association and other papers alleged to have been necessary to the proper organization of such corporations in the State of Nebraska, and these are copied in the bill of exceptions. In a note to the bill of exceptions, as copied in the transcript, the clerk of the circuit court informs us that the statutes of Nebraska used in evidence had been taken out, and that he could not copy them in the transcript. So much thereof as pertained to the organization of corporations in that State and used as evidence should have been made part of the bill of exceptions, as they were part of the evidence in the case. Had we before us the copy used on the trial, in any other form than as part of the bill of exceptions, we could not legitimately make use of it. In the absence of this evidence, it is to be presumed that the action of the court in determining that the organization of the corporation thereunder was in conformity thereto is conclusive on us.

The defendant's own testimony sufficiently established the fact that he was the agent of the Pacific Express Company at Wheatley, Arkansas, and also that the company assumed to do business and was notoriously doing business, whether strictly according to law or not. It at least could be the victim of embezzlement, and a felonious deprivation of its property, it seems, ought to be the subject of our criminal law.

5. Instruction as to felonious intent considered.

The third ground of the motion for new trial assigns as error the ruling of the circuit court in refusing to give to the jury the second instruction asked by the defendant. It is in words and figures as follows, to-wit:

"The mere failure to pay over to the Pacific Express Company the money in his hands by defendant, at the proper time, would not, of itself, constitute the offense of embezzlement, but, to constitute embezzlement, it must appear that the defendant did retain money of the Pacific Express Company, that came to his hands by reason of his agency, by attempting to, in some manner, conceal from the company the fact that he was in possession of same, or by falsely and fraudulently keeping his accounts so as to prevent the company from knowing the defendant had it in his possession, and, the taking and receiving the same being lawful, the appropriation thereof must appear to have been felonious."

In order to show the felonious intent in cases like this, the weight of authority is to the effect that some kind or degree of concealment or acts misleading the master should be proven. Notes to *Calkins* v. *State*, 98 Am. Dec. 132–134; *Commonwealth* v. *Tuckerman*, 10 Gray, 173; 1 Wharton, Cr. Law, sec. 1030; *State* v. *Tompkins*, 32 La. An. 620; 13 Cent. L. Journal, 464.

Having failed to give any other, covering the same ground, the most important in the case, the circuit court should have given this instruction, under the peculiar facts of this case, with proper explanations of the nature of the offense, and the character of evidence admissible to prove the intent or want of intent with which the unlawful appropriation was made.

As the case will be reversed and remanded for this error, which indeed may have been a very grave one, we deem it proper not to speak further of the instruction, especially as applicable to the facts of the case.

6. Settlement by bondsmen no defense.

The fourth ground of the motion for new trial is a novel one. The defendant contends that, having hired the guarantee company to make his bond for faithful

performance of duty to the Pacific Express Company, and that company having paid the express company for all losses claimed by it to have been suffered by reason of defendant's alleged embezzlement, therefore there was no crime committed; that the express company had no longer any interest at stake, and even that the State has no interest in the matter. In this the defendant is mistaken. This is no longer a controversy between himself and the two companies, or either of them, and has not been since he fraudulently appropriated the money of the express company, if indeed he did so appropriate it. It is now a controversy between the State of Arkansas and himself, which the State will not permit either one of the said companies to determine at present or in the future, nor will the State acknowledge the validity of any settlement of it, by any thing they both, or either of them, have done in the past.

We see nothing materially wrong in the rulings of the circuit court on other points not noted herein.

For its error in refusing the second instruction asked by the defendant, and not giving the same with proper explanation, as suggested, the judgment of the St. Francis circuit court in overruling defendant's motion for new trial is reversed, and the cause is remanded with direction to grant a new trial and proceed in accordance with this opinion.

Additional opinion of Battle, J.

The second instruction that the defendant asked for should have been given. To constitute the offense with which he is charged, there must be an appropriation by one of the property of another, with a fraudulent or felonious intent to make it his own, and deprive the owners of dominion over the same. The fraudulent intent is essential to the offense. Without it there may be misconduct, but there will be no criminality. *State*

v. *Lyon*, 45 N. J. L. 272; *State* v. *Baldwin*, 70 Iowa, 180; *State* v. *Butler*, 21 S. C. 353; *Com.* v. *Hays*, 14 Gray 62; *Warmoth* v. *Com.* 81 Ky. 133; 2 Bishop, Criminal Law, sec. 372; 1 Wharton's Criminal Law (9th ed.), sec. 1009.

"The question * * whether any particular act of conversion was infected or accompanied by a fraudulent purpose is a question of fact to be passed upon by the jury. But the submission of that question to their determination ought to be accompanied with suitable instructions in the matters of law which pertain to it." *Com.* v. *Tuckerman*, 10 Gray, 173, 202; *People* v. *Galland*, 55 Mich. 628.

The evidence in this case tends to prove, substantially, among others, the following facts: The defendant was the agent of the Pacific Express Company, at Wheatley, in this State. As such agent, it was his duty to make monthly reports of the receipts of money by him in his capacity of agent, and remit the same to the company at Omaha, in Nebraska. In one month he received about $255. He reported that he had received $4.75 and said nothing about the remainder. He altered the books of the company so as to make it appear that he had forwarded the entire amount, changing the receipt of the express messenger to make it so appear. When he was detected, he admitted that he was "short," but failed to pay his indebtedness incurred on the account of the missing money. The receipt of the money which he failed to report, it seems, only appears in the alteration of the receipt book of the company, in which it is made to appear to have been sent to his principal.

The second instruction asked for by the defendant was suitable to this state of facts. The failure of the defendant to pay over to the Pacific Express Company the sum unaccounted for did not, in itself, constitute the

offense of embezzlement. *Rex* v. *Smith*, Russ. & Ryan, 267; *People* v. *Hurst*, 62 Mich. 276; *Chaplin* v. *Lee*, 18 Neb. 440; *State* v. *O'Kean*, 35 La. An. 901; 2 Bishop, Criminal Law, sec. 376. But if, having received it by virtue of his employment for transmission to the Express Company, he failed to pay it over, the fact that he concealed his possession of it from his principal, if true, was strong evidence of the commission of the offense. Such concealment might have been effected by false entries upon the books of the company, or by the failure to make any entry upon them at all, or by representations known to be untrue, or by failure to report the receipt of the money when it was his duty to do so, or by any device resorted to for the purpose of disguising the truth from the knowledge of his principal, and thus inducing it to rest in a false security. *Com.* v. *Tuckerman*, 10 Gray, 204; *Regina* v. *Jackson*, 1 C. & K. 384; 2 Bishop, Criminal Law, sec. 376–378.

But there is no prescribed set of circumstances by which a fraudulent conversion must be shown. If shown in any way, it is sufficient. The sufficiency must be left alone to the jury to determine, under the instructions of the court. The defendant's second instruction, technically, is not correct. It does not cover the whole law upon the subject; neither was it intended to do so. But it does cover, substantially, all the evidence adduced tending to show a felonious intent; and, for that reason, it should have been given with an explanation as to what was necessary to constitute a concealment. In the nature of the case, the intent must have been proved by the evidence adduced at the trial, or not at all.

Reversed and remanded.

Powell, J., being absent, did not sit in this cause.

RAILWAY COMPANY *v.* BYARS.

Opinion delivered October 14, 1893.

Instruction—Invasion of province of jury.

In an action against a railway company to recover a penalty for an overcharge of passenger fare, it is error to instruct the jury "that if the plaintiff shows that the defendant has placed, at intervals along the line of its road, mile-posts showing the distances, this is, *prima facie*, the distance, and will be considered by the jury as sufficient evidence of the distance, until shown to be erroneous."

Appeal from Franklin Circuit Court, Ozark District.

JEREMIAH G. WALLACE, Judge.

Action by Byars against Missouri Pacific Railway Company. The facts are stated in the opinion.

Dodge & Johnson for appellant.

D. B. Locke for appellee.

BUNN, C. J. This is an action by the appellee, as plaintiff, against the appellant company as defendant, instituted in the Franklin circuit court for the recovery of the statutory penalty for an overcharge of passenger fare, on the Little Rock and Fort Smith Railroad, between the towns and stations thereon of Ozark and Alma; it being alleged in the complaint that the distance between the two points is twenty-five miles and no more, and that, on the 6th day of December, 1890, the said defendant company, by and through its servants, was operating said railroad, and that, on that day, the conductor of one of its passenger trains demanded and received of plaintiff, a passenger thereon, the sum of 85 cents as fare between said points. Prayer for $300 penalty and reasonable attorney's fee.

The defendant answered denying that it owned or was operating said railroad, and that it did, on the day

named, demand, take and receive from plaintiff as his fare between said points the said 85 cents, or any unlawful sum, or at any time.

Trial was had at the March term, 1891, of said circuit court, on the issues there made, and in the progress of the same, at the instance of the plaintiff, the court gave the jury the following instruction, to-wit: "That if the plaintiff shows that the defendant has placed at intervals along the line of its road mile-posts showing the distances, this is, *prima facie*, the distance, and will be considered by the jury as sufficient evidence of the distance, until shown to be erroneous."

Verdict for $250.00 penalty and $10.00 attorney's fee, from which defendant appealed, setting up in its motion for new trial (which was overruled, and the overruling excepted to) the want of evidence to sustain the the verdict, the excess of the penalty imposed, and the error of the court in giving said instruction.

The constitutional restriction upon courts in this State on the subject of charging juries as to matters of fact ought not to be disregarded, and it is without the province of the courts, in any given case, to say what is *prima facie* evidence unless made so by law, or to say that any state of facts is sufficient; and, for this error of the circuit court in this instance, its judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. It is deemed unnecessary to consider the other points raised.

58 110
64 599
58 110
f66 314
58 110
187 544

STINSON v. SHAFER.

Opinion delivered October 14, 1893.

Bill of exceptions—When to be filed.

Where time is given to a party beyond term to prepare and tender a bill of exceptions to the judge "which, when approved, signed and filed with the clerk of this court, shall be and become a part of the record in the cause," a bill of exceptions presented to the judge within apt time will not become part of the record unless signed by him and filed with the clerk before expiration of the time allowed.

Appeal from Lafayette Circuit Court.

WILLIAM S. EAKIN, Special Judge.

L. A. Byrne for appellants.

1. Contend that the assignment was valid, and should be sustained.

2. Under the order of court, appellants had until the last day of the statutory limit within which to file the bill of exceptions. The time of *presentation* only was limited to the 25th of March. The case does not fall within the rule in 52 Ark. 554, and 53 *id.* 415.

Scott & Jones and *Montgomery & Moore* for appellees.

Time was given to the 25th of March to prepare and tender the bill of exceptions. It was approved by the judge on the 23rd of March, but was not filed until the 12th of June. Hence there is no bill of exceptions in the case. 52 Ark. 354; 53 Ark. 415.

WOOD, J. The court below gave time beyond term to perfect bill of exceptions in the following order, viz.: "On further motion it is granted said defendants until the 25th day of March, 1891, in which to prepare and tender their bill of exceptions herein to the present judge of this court, which, when approved, signed and filed

with the clerk of this court, shall be and become a part of the record in this cause." The bill of exceptions was presented to the judge on the 23rd of March, 1891, was signed by him the latter part of May and filed with the clerk on the 12th day of June following.

Former decisions of this court have settled the practice as to reducing exceptions to writing beyond the trial term. *Garibaldi* v. *Carroll*, 33 Ark. 568; *Walker* v. *State*, 35 *id.* 386; *Toliver* v. *State*, *ib.* 395; *Carroll* v. *Saunders*, 38 *id.* 216; *Carroll* v. *Pryor*, 38 *id.* 283; *St. Louis &c. R. Co.* v. *Rapp*, 39 *id.* 558; *Adler* v. *Conway County*, 42 *id.* 488; *Davies* v. *Nichols*, 52 *id.* 554; *Watson* v. *Watson* 53 *id.* 415.

In *Watson* v. *Watson*, 53 Ark. *supra*, the appellant was allowed "until the third day of the Bradley circuit court, to *present* his bill of exceptions." In the present case appellants were allowed until the 25th of March, 1891, in which to *prepare* and *tender* their bill of exceptions. Thus far it will be seen that the two orders are in legal effect exactly the same. But counsel for appellant contends that the latter clause of the order in the present case "which when approved, signed and filed with the clerk of this court shall be and become a part of the record," takes the case out of the rule established in *Watson* v. *Watson*. We do not think so. A bill of exceptions, when signed by the judge and filed with the clerk in proper time, becomes, *proprio vigore*, a part of the record. *Bullock* v. *Neal*, 42 Ark. 278. Bills of exceptions frequently conclude with the language above quoted, but it is merely *pro forma*. If the object of the learned counsel in adding this language to the order was, as he states, to get the benefit of the statutory limit in the event the bill was not perfected on or before the day named, then he should have compassed his purpose by an order to that effect in pointed and definite terms. It is conceded that this language of itself fixes no time at

all, but we are asked to construe it to mean the statutory limit. No such sweeping phraseology can have that effect. The time may be extended to the last day of succeeding term (Mansf. Dig. 5157); but, when extended, a day certain must be fixed to come within the prescribed limit. In *Garibaldi* v. *Carroll*, 33 Ark. 568, the court say that it is not implied by the language of the statute "that the time, when given, if not specifically limited, will extend to the last day of the next term. * * * And it cannot be conceived, with any reason, that giving time to a party for the mere purpose of reducing an exception to writing can have the effect, if no day is named, of suspending the judgment until the end of the next term."

The Supreme Court of Kentucky, whose statute is the same as ours, requires that the bill of exceptions be signed and filed during term time, and where time is extended it shall be to a day certain at the succeeding term. The authorities uniformly, so far as we have been able to investigate, require that a day certain be fixed. *Meadows* v. *Campbell*, 1 Bush (Ky.), 104; *Smith* v. *Blakeman*, 8 Bush, 479; *Freeman* v. *Brenham*, 17 B. Mon. 608; *Allard* v. *Smith*, 2 Met. (Ky.) 298; *Vandever* v. *Griffith*, *ib.* 426. It is important for the profession and litigants, in the speedy administration of justice, that this practice be adhered to. *Stare decisis et non quieta movere.*

The statute is exceedingly liberal in its provisions, and circuit courts, while granting indulgence under it, must exercise and exact diligence in seeing that their orders are complied with.

There being nothing presented by the record for the consideration of this court, the judgment of the lower court is affirmed.

HEMPSTEAD COUNTY *v.* ROYSTON.

Opinion delivered October 14, 1893.

Change of venue—Liability of initial county for expenses of trial.

Under the act of April 6, 1889, providing "that, within 30 days after the termination of any cause, in any circuit court of this State, that was tried on change of venue from another county, it shall be the duty of the clerk of said court to make an itemized statement of *all the expenses* incurred by his county in the trial of any such cause, and present it to the county court of the county in which the cause originated," and "that the county court to whom any *such bill of costs* are (is) presented, properly authenticated, shall allow the same as if the case had terminated in his own county," *held*, that the county in which a cause originated is liable for all of the current expenses incurred in another county in the trial of the cause, as well as for the costs, for which it was already responsible.

Appeal from Hempstead Circuit Court.

RUFUS D. HEARN, Judge.

Jas. H. McCollum for appellant.

Hempstead county is not liable for the items charged for. By act April 6, 1889, (Acts 1889, p. 120,) Clark county was liable not for "costs" but for all "expenses." 4 Ark. 473; 10 *id.* 467. It was intended to change the rule laid down in 40 Ark. 329, and make the original county pay all "expenses," the word costs being used in this sense. 34 Ark. 263; 35 *id.* 56; 27 *id.* 418; 40 *id.* 431.

R. B. Williams, for appellee.

The summoning of jurors, issuing certificates to them, and such other like services, are a necessary part of the expenses of the court, and have never been treated as a part of the "costs" of any case. 40 Ark. 329. The language of the act of 1889 will not justify the construction given it by appellant. It created no new

liability, but merely fixed a time within which the accounts were to be presented.

WOOD, J. Appellees, clerk and sheriff of Hempstead county, filed in the county court of Hempstead accounts for fees as follows:

Fee-bill, Hempstead county, October term, Circuit Court, 1891.

STATE OF ARKANSAS, *v.* WM. and AB. EASTER, } *Change venue, Clark county.*

To C. E. ROYSTON, Clerk:

To issuing 35 jurors' certificates of attendance $17.50

To J. C. JONES, Sheriff:

Summoning 42 extra jurors 21.00

STATE OF ARKANSAS, *v.* LUKE SULLIVAN. }

To C. E. ROYSTON, Clerk:

Issuing 12 jurors' certificates of attendance.. 6.00

To J. C. JONES, Sheriff:

To summoning 20 extra jurors..... 10.00

STATE OF ARKANSAS, *v.* JOE J. RICHARDSON. }

To C. E. ROYSTON, Clerk:

To issuing 12 juror certificates..... 6.00

To J. C. JONES, Sheriff:

To summoning 35 extra jurors..... 17.50

This fee-bill was disallowed by the county court; appellees appealed to the circuit court, where the case was tried *de novo* by the court sitting as a jury, and upon the following agreement as to the facts, viz:—

"The cases of the State of Arkansas against Wm. and Ab. Easter, and the State of Arkansas against Luke Sullivan and J. J. Richardson, were tried in Hempstead

circuit court upon change of venue from Clark county, and the plaintiffs, C. E. Royston, as clerk of Hempstead county, and James C. Jones, as sheriff of Hempstead county, performed the services herein charged for. The defendants, Wm. and Ab. Easter and Luke Sullivan, were acquitted, and J. J. Richardson was convicted. As shown by the fee-bill, the services charged for were rendered in connection with the several juries which tried said cases."

Under the act of the general assembly, approved April 6, 1889 (Acts of 1889, p. 120), is Hempstead county liable for the services rendered or Clark county? The act of 1889 is as follows: "Sec. 1. That within thirty (30) days after the termination of *any* cause, in any circuit court of this State, that was tried on change of venue from another county, it shall be the duty of the clerk of said court to make an itemized statement of *all the expenses incurred* by his county in the trial of any such cause, and present it to the county court of the county in which the cause originated."

"Sec. 2. That the county court to whom *any such bill of costs* are (is) presented, properly authenticated, shall allow the same as if though the case had terminated in his own county."

Prior to the passage of this act, the county where the offense was committed was liable only for those expenses which were proper to be taxed against the defendant, when convicted and not having property to pay, or, in other words, for the "costs in the cause."* The county trying the case was liable for all the current expenses of the court during the progress of the trial. This often placed heavy burdens upon the trial county. Capital cases and other felonies, on change of venue, have been known to consume days, and even weeks, in their adjudication. The expenses incident to holding a

* *Independence Co.* v. *Dunkin*, 40 Ark. 331.

court are necessarily great, and, although incurred by reason of an offense committed in another county, they had to be borne by the trial county, under the law before the passage of the act of 1889.

Applying the general rules for the construction of statutes to the above act, we conclude that the legislature intended to relieve the *trial county* by making the *initial county* liable for "all the expenses incurred" by the *trial county* on account of the change, including *the current expenses of the court*, as well as those for which it was already liable, to-wit: *the costs in the cause.* Hence, the word "costs" in sec. 2 should be interpreted *expenses*. *Haney* v. *State*, 34 Ark. 263; *Reynolds* v. *Holland*, 35 *id.* 56; *State* v. *Jennings*, 27 *id.* 419; *State* v. *Smith*, 40 *id.* 431; Sedgwick on Stat. and Const. Law, 354 (n); Potter's Dwarris, 214. See also Sutherland on Stat. Con. 341, where the following language is used: "Where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent." This view, we think, gives meaning to the legislative enactment. Under the former law, the court, upon motion of the prosecuting attorney, or anyone interested, or on its own motion, could have ordered the clerk to certify the costs to the proper county, and it was not necessary to pass the act in order to have the clerk certify the costs within a certain time. The clerk, who might reasonably be supposed to be interested in costs due his county, scarcely needed a legislative reminder to cause him to promptly discharge his duty. It follows, from what we have said, that, whether the services charged for be considered as expenses of court, or costs in the cause, in neither case is Hempstead county liable.

This court refuses to consider and determine the question as to whether there is anything due the appellees. I do not concur with the majority in that view. True, the amount involved in this controversy is of small consequence, but it is certainly an important question as to whether the clerk is entitled to any fee for issuing certificates to jurors, and whether the sheriff is entitled to any fee for summoning same. So far as the clerk is concerned, the decision of this court in *Logan County* v. *Trimm*, 57 Ark. 487, is conclusive of the issue as to him. But this court has never yet passed upon the question, as here presented, as to whether the sheriff is entitled to fees for summoning extra jurors, and I deem this question one of sufficient public importance to demand an authoritative announcement from this court. I think it is squarely presented, fully argued, and should be decided.

Reversed and dismissed.

SIDWAY *v.* LAWSON.

Opinion delivered October 21, 1893.

58 117
60 275
58 117
61 105
62 83
62 324
62 433
58 117
68 79
58 117
74 91
58 117
c81 158
81 159
58 117
83 348
84 339
58 117
f90 602
f90 603
90 604

1. *Power of legislature to cure defects.*

   The legislature has power to cure a defect in proceedings, conveyances and acknowledgments by a retrospective statute, wherever the defect or thing wanting is something the necessity for which it might have dispensed with by prior statute.

2. *Effect of curing act on pending suits.*

   Unless pending suits are excepted, acts curing irregularities in the execution or acknowledgment of conveyances operate upon suits pending in equity, on appeal or otherwise, at the time of their passage.

3. *Conveyance of homestead—Defective execution.*

   Failure of a wife to join with her husband in executing and acknowledging a conveyance of his homestead, as required by

the act of March 18, 1887, is a defect which was cured by the subsequent act of April 13, 1893, if no third person had acquired an interest in the land affected by the conveyance.

Appeal from Carroll Circuit Court in Chancery, Eastern District.

EDWARD S. MCDANIEL, Judge.

U. M. & G. B. Rose and *W. F. Pace* for appellants.

There is no usury. 33 Ark. 645; 35 *id.* 53; *ib.* 55; 26 *id.* 358. Questions of interest and usury are determined by the law of the place of payment, regardless of the situs of the property pledged as security. The mortgage is only an incident of the debt. 3 Ark. 727; 2 Vern. 395; 10 Wheat. 383; 3 Green's Chy. 128; 1 Hast. Chy. 17; 14 N. J. Eq. 56; 7 Oh. St. 388; 10 R. I. 393; 14 Am. Rep. 691–2; 1 Neb. 108; 93 Am. Dec. 331; 11 Iowa, 1; Story, Conf. Laws, sec. 287 *a*; 1 Suth. Dam. 641.

Crump & Watkins and *W. S. McCain* for appellees.

1. The mortgage is void under the Acts of 1887, p. 90. The wife did not join in the deed. She only relinquished dower. This is not sufficient. Thompson, Homest. sec. 528–534; 21 Ill. 45; 89 *id.* 320; 2 Allen, 202; 11 Gray, 332; 13 Bush, 391; 53 Iowa, 481; 55 *id.* 753.

2. The evidence makes a clear case of usury. 54 Ark. 40. The rule in 26 Ark. 358 and 33 *id.* 645 has been abolished by statute. Mansf. Dig. sec. 4736.

U. M. & G. B. Rose in reply.

1. There is an express release of homestead in the mortgage.

2. Sec. 4736, Mansf. Dig., is only a privilege, and not a prohibition.

Rose, Hemingway & Rose for appellants.

If the mortgage was void under the act of 1887, it is cured by the act of 1893. It applies to pending suits. 42 Ark. 141 has been overruled. 43 Ark. 421; 44 *id.* 365; 45 *id.* 41; 48 *id.* 187; Cooley, Const. Lim. (6th ed.) 468; 30 Cal. 138.

Crump & Watkins and *W. S. McCain* for appellees on the act of 1893.

The act of 1893 does not apply to a case pending in this court on appeal. 42 Ark. 141. This case has not been doubted or overruled. See 16 Ark. 384; Rose on the Constitution, 60.

BATTLE, J. This was an equitable action, commenced by Lawson and wife against L. B. Sidway, to set aside a deed of mortgage on account of usury. The defendant answered, denying the usury and making his answer a cross-complaint, asked for a decree for the possession of the lands conveyed by the deed, according to the terms thereof; and then the plaintiffs answered, saying that the mortgage was void because the property mentioned therein was their homestead.

The circuit court found that the mortgage, and the note which it was given to secure, were tainted with usury, and declared the mortgage canceled, set aside, and held for naught; and the defendant appealed.

Upon a careful consideration of the evidence adduced at the hearing in the court below, we are of the opinion that there is no usury in the note or mortgage.

The mortgage was signed and delivered by the appellees to appellant, and purports to convey to him certain lands of the husband, which constitute their homestead, in trust to secure the payment of a promissory note of Lawson. Appellees contend that it was not executed in accordance with the requirements of the act entitled "An act to render more effectual the constitu-

tional exemption of homestead," approved March 18, 1887, because the wife did not "join in the execution" of the same, and is, therefore, void; and appellant insists that if the contention of appellees be correct, it was validated by the act entitled "An act to cure defective conveyances and acknowledgements," approved April 13, 1893.

Section one of the act of March 18 provides, "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;" and the act of April 13, declared that all such conveyances, mortgages, and instruments, which have been executed since the 18th of March, 1887, and are defective or ineffectual because they were not executed and acknowledged in compliance with section one, and the record thereof, shall be as valid and effectual as though the "act to render more effectual the constitutional exemption of homestead" had never been passed.

The final decree of the circuit court in this action was rendered on the 24th day of August, 1891. It is contended, in behalf of appellees, that the latter act does not affect the mortgage in question, because this decree was pronounced on a day prior to its enactment. *Wright* v. *Graham*, 42 Ark. 140, supports this contention, but appellant insists that it is clearly erroneous, and should be overruled.

1. Power of legislature to cure defects.

As to the power of the legislature to cure defects in proceedings, conveyances and acknowledgments by a retrospective statute, it is said: "If the thing wanting, or failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to

dispense with it by a subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." *Green* v. *Abraham*, 43 Ark. 420; Cooley's Const. Lim. (6th ed.) 457.

This power is further limited. The legislature cannot, by the enactment of a retrospective statute, exercise a power in its nature clearly judicial. It is prohibited from so doing by the constitution. The powers of the government are divided into three distinct departments, the legislative, executive and judicial; and every "person or collection of persons, being of one of these departments," is prohibited from exercising "any power belonging to either of the others," except wherein it is expressly directed or permitted by the constitution. Constitution of 1874, art. 4.

Under our constitution it is within the exclusive province of the courts to determine adversary suits within their jurisdiction pending between litigants, according to established principles, "and to enforce their decisions by rendering judgments and executing them by suitable process." The legislature cannot control them in the exercise of such jurisdiction by declaratory statutes designed to interpret previous enactments; or determine the rights of such litigants by substituting in the place of the well settled rules of law its arbitrary will; or set aside or annul final judgments or decrees; or grant or authorize a new trial; or direct a rehearing of a cause after it has been finally determined, and the judgment therein has become final and conclusive on the parties; or allow an appeal from a judgment or decree after the time for taking it has expired. *Denny* v. *Mattoon*, 2 Allen, 361; *Richards* v. *Rote*, 68 Pa. St. 248; *McDaniel* v. *Correll*, 19 Ill. 226; *Lewis* v. *Webb*, 3

Greenleaf, *326; *Mayor* v. *Horn*, 26 Md. 194; *Pryor* v. *Downey*, 50 Cal. 388; *Dorsey* v. *Dorsey*, 37 Md. 64; *Yeatman* v. *Day*, 79 Ky. 186; *Moser* v. *White*, 29 Mich. 59. This power cannot be constitutionally exercised by the legislature, because, if it could, the legislature would have the right to deprive the judiciary of its most essential prerogative. In that case the courts could no longer finally adjudicate and determine the rights of litigants. "The will of the legislature would be substituted in the place of fixed rules and established principles, by which alone judicial tribunals can be governed. The power to correct errors, and to revise and reverse judgments, which, in the strictest sense of the word, has always been deemed essentially judicial, would be transferred to the legislative branch of the government, even to the extent of controlling the final decrees of the tribunal of last resort." An exercise of such authority "would lead to the entire destruction of the order and harmony of our system of government, and to a manifest infraction of one of its fundamental principles."

2. Effect of curing act on pending suits.

But the legislature can enact statutes on subjects which properly come within the cognizance of courts, which may form the basis of judicial consideration and judgment in suits pending at the time of their enactment. Curative statutes, when valid and applicable, should govern the courts in such cases, unless pending suits are excepted. They govern on the ground that "the bringing of the suit vests in a party no right to a particular decision, and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered." *Green* v. *Abraham*, 43 Ark. 420; *Johnson* v. *Richardson*, 44 Ark. 365; *Beard* v. *Dansby*, 48 Ark. 183; Cooley's Const. Lim. 468, 469.

In *Wright* v. *Graham*, 42 Ark. 140, the court said: "The acknowledgement of the mortgage was

defective in that it did not state that it was executed by the mortgagor for the consideration therein set forth. * * * It is urged that this defect was cured by an act of 1883, passed for the purpose of curing defective acknowledgements. But this cause was decided before the passage of that act, and we cannot consider it. The question on appeal is, did the chancellor err? That must be determined by the law as it then existed, or we would overrule a decision which was correctly made." But this is not a correet statement of the law. The final order appealed from in that case was a decree in chancery. The question in that case was not, "did the chancellor err?" The appeal transferred the action to the appellate court, and it stood for rehearing upon the same pleadings and evidence upon which it was heard in the court below. Upon that record the appellate court had the right to decide questions of law and fact, and was as untrammeled in the exercise of this right as the court below. We, therefore, see no good reason why the curative statute, in the absence of vested rights acquired by third persons before its enactment, should not have governed the appellate court, in this state of the case, as it did inferior courts in suits pending in them at the time of its passage. The rights of the parties were undetermined, and the appellate court occupied the position of the court below at the time it heard the cause and before the rendition of its final decree; and it was the duty of the appellate court to have rendered judgment according to the law in force at the time, as it was of the inferior court when it acted. Such a construction of the curative act would not have constituted its enactment an exercise of judicial power, or violated the constitution, or infracted any fundamental principle of our government. Cooley's Const. Lim. (6th ed.) 468, 469.

3. Defects in conveyances of homesteads.

Did the act of April 13 cure the defects in the mortgage in question, if any? The name of the wife does

not appear in the granting part, nor anywhere else in the mortgage, except in a clause which declares that she releases to the grantee all her right or possibility of dower. If defective, it was because the wife did not join in its execution according to the act of March 18, 1887. That act made every instrument affecting the homestead of the husband invalid if the wife failed to join in its execution and acknowledge the same. It vested no additional interest in the wife. The husband could abandon the homestead, and it would become liable to his debts, notwithstanding the act of March 18, 1887. *Pipkin* v. *Williams*, 57 Ark. 242. The legislature undertook to create no interest or estate by the act, but to prescribe the manner in which instruments affecting the homestead of a married man should be executed and acknowledged; at the same time recognizing the homestead as the husband's, and not the wife's, nor as the joint property of the husband and wife.

Assuming that the mortgage in question was invalid, the defect in the execution of it was cured by the act of 1893, no third party having acquired an interest in the land affected by it. It was such an instrument as the legislature can make valid by a retrospective statute. *Green* v. *Abraham*, 43 Ark. 420; *Johnson* v. *Richardson*, 44 Ark. 365; *Apel* v. *Kelsey*, 47 Ark. 413; *Cupp* v. *Welch*, 50 Ark. 294; Cooley's Const. Lim. 457. In validating it the legislature has only given effect to the act of the parties according to their intent.

This being an action in equity, the decree appealed from does not prevent the curative act of 1893 healing the defects in the mortgage and giving it effect according to the intention of the parties. It is now a valid mortgage.

The decree of the circuit court is, therefore, reversed, and the cause is remanded for proceedings consistent with this opinion.

58 125
72 412
98 125
77 10

58 125
78 361

58 125
87 290

58 125
89 540
90 209

JONES v. MALVERN LUMBER CO.

Opinion delivered October 21, 1893.

1. *Negligence—Defective boiler—Evidence.*

In an action by an employee to recover for personal injuries from explosion of a boiler, after evidence has been introduced to show that the "hammer test" used by defendant in testing the boiler's strength is not effective, and not the test usually applied to boilers, it is admissible to show in rebuttal that such test was usually employed by persons in the vicinity engaged in operating similar machinery.

2. *Custom—Not proved by single instance.*

That a particular test of steam boilers was employed by a designated company has no tendency to prove that such test is the usual and customary one.

3. *Negligence—Evidence.*

Previous acts of negligence cannot be shown to explain the cause of explosion of a steam boiler where it does not appear when the negligent acts were committed, or that they had any relevancy to the explosion.

4. *Witness—Impeachment.*

A witness cannot be impeached by contradicting his statement with reference to a matter entirely immaterial to the question at issue.

5. *Incompetent evidence—When not prejudicial.*

Admission of incompetent evidence is not prejudicial where the facts towards which it is directed are proved by other and competent evidence.

6. *Master and servant—Patent risks.*

An employee is required to notice patent defects in machinery about which he is employed, and is bound to assume the risk thereof, to the same extent as if their existence had been within his actual knowledge.

7. *Contributory negligence—Burden of proof.*

Contributory negligence is a defense, and must be affirmatively proved by the defendant.

8. *Instruction—Jury not required to be "satisfied."*

In civil cases, the jury are not required to be "satisfied" by a preponderance of the evidence; it is sufficient that the verdict should be given on a mere preponderance of the evidence.

Appeal from Hot Spring Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Wood & Henderson for appellant.

1. The court erred in its ruling on questions of evidence. Wilbert was the representative of the company, and his declarations, indicative of knowledge of the danger and unsafe condition of the boiler, should have been allowed to have been proved. 4 West. Rep. 641; 6 Am. Dec. 267; 1 Am. & Eng. Enc. of Law, 419, note 2; 105 U. S. 263; 37 Ark. 47.

2. It was admissible to show negligence at the time of the injury which contributed thereto. 48 Ark. 473; 1 Greenl. Ev. sec. 51–2; *Ib.* 448.

3. Dangers arising from defects which might have been discovered by the master are not risks assumed by the servant as incident to his employment. 48 Ark. 347; Wood, Mast. & S. pp. 749, 713, 757–8.

4. The fourth instruction for appellee was erroneous. The word "satisfied" was not proper. Besides, it told the jury they could not find for appellant unless satisfied that he was free from contributory negligence, thus putting the burden on appellant, when it was on the company. 48 Ark. 475; *ib.* 348; 46 *id.* 182; *ib.* 436.

5. The sixth for appellee was wrong. The master's duty did not end with the employment of a competent and skilfull foreman and boiler-maker. It could not delegate master's duties so as to free it from responsibility, if the foreman or boiler-maker was negligent. They were not fellow-servants with appellant. McKinney, Fellow-Servants, 54, 56, 64–5, 87 to 88; Beach, Cont. Neg. 351, note; 4 Am. & E. Enc. Law, 58–9, note 1 on p. 62–3; 48 Ark. 333.

6. It was the duty of the company to have the boiler properly tested. 110 Mass. 240; 109 Penn. 296; 80 N. Y. 46; 54 Ark. 289.

N. P. Richmond and *Sanders & Watkins* for appellees.

1. The declarations of Wilbert not admissible. He was a mere laborer, and no authority was delegated to him except to patch the boiler. Mech. Ag. sec. 714; 1 Gr. Ev. secs. 113, 114. But Wilbert testified, and appellant got the benefit of his testimony anyhow.

2. The evidence of Ryan as to the tests used on the Hot Springs Railroad was not prejudicial. It was in contradiction of the evidence in chief and permissible. The other objections are purely technical, and in no wise prejudiced appellant.

3. The second instruction is the same as that asked by plaintiff in his sixth and seventh, and is laid down as the law by all text writers. Wood, M. & S. secs. 336–7, 372, 377. "An employee, having opportunity to know of danger and risk, is presumed to know of such danger; and if he does not inform himself of such danger, he cannot recover." 41 Ark. 549; 48 *id.* 347.

4. The fourth did not cast the burden on plaintiff as to contributory negligence.

5. The sixth is supported by 46 Ark. 566; 35 *id.* 602; 44 *id.* 529.

6. All that was legal and asked in the twelfth and thirteenth was embraced in the eleven already given.

MANSFIELD, J. This was an action to recover damages for a personal injury received by the appellant while he was running an engine for the appellee on a tramway used for carrying logs to its lumber mill. The injury was inflicted by the explosion of the engine's boiler, and the complaint alleged that the explosion resulted from the appellee's negligence in using a defective boiler. This allegation was denied by the answer, which charged that the explosion was caused by the appellant's own negligence.

A short time before the accident the boiler was repaired by Joseph Wilbert, a machinist, who was not in the appellee's service, but was sent by his employers at the appellee's request to do the work, and performed it under the direction of W. B. Lovell, the lumber company's master-mechanic. On the trial Wilbert was sworn as a witness for the appellant, and testified that, at the time he repaired the boiler, he declared it unsafe. Subsequently the appellant called John Smith by whom he offered to prove that he heard Wilbert make the declaration referred to, but the court excluded Smith's testimony. This ruling was not prejudicial to the appellant, for the reason that the evidence it excluded related to a fact already before the jury in the testimony of Wilbert himself, whose statement that he made the declaration at the time fixed by Smith was uncontradicted.

1. Evidence as to testing boilers.

It was shown that the only tests of the boiler's strength, made after it was repaired, were made by sounding its rivets and braces with a hammer, and by the pressure of steam raised for that purpose; and testimony was adduced by the plaintiff to prove that the "hammer test" was not effective, and was not the test usually applied. In rebuttal the defendant introduced J. A. Bratt, a person engaged in the milling business, and asked him what tests the mill men of the vicinity generally applied to the steam boilers used in their business. The question was objected to, but the court permitted the witness to answer, and he stated that the "hammer test was the one usually applied, so far as he knew." The defendant's duty to its servants did not require it to resort to unusual or impracticable tests; and we think the question was proper, as eliciting evidence tending to show that one of the tests applied by the company's master-mechanic was that usually employed by persons engaged in operating similar machin-

ery. *L. & N. R. Co.* v. *Allen*, 78 Ala. 494; *Grand Rapids etc. R. Co.* v. *Huntley*, 38 Mich. 537. If the answer was regarded as objectionable on the ground that it did not disclose the extent of the witness' knowledge of the subject, the plaintiff should have moved to exclude it or insisted upon a more definite statement.

2. Custom not proved by single instance.

But the court erred in permitting Ryan to testify that the "hammer test" was used by the Hot Springs Railroad Company; for the practice of a single company had no tendency to prove the usual and customary test.

3. Evidence of previous acts of negligence.

So also the testimony of Lovell as to acts of negligence committed by the plaintiff in running the engine prior to the day of the explosion was improperly admitted. The witness did not state when the acts occurred, and it does not otherwise appear that they had any relevancy to either of the questions which the jury had to decide. *L. R. & F. S. Ry.* v. *Eubanks*, 48 Ark. 473.

4. Impeachment of witness.

It is submitted that they were competent because they contradicted a statement previously made by the plaintiff as a witness in his own behalf. But that statement was itself made with reference to a matter entirely immaterial, and the plaintiff could not be impeached by its contradiction. *Billings* v. *State*, 52 Ark. 308.

5. When incompetent evidence not prejudicial.

There was, however, other and competent evidence amply sufficient to prove the facts to which the evidence thus improperly admitted was directed, and the errors of the court in receiving the latter would not, of themselves, justify us in disturbing the verdict. *Owen* v. *Jones*, 14 Ark. 503; *Sharp* v. *Johnson*, 22 Ark. 79; *Greer* v. *Laws*, 56 Ark. 37.

One of the assignments made in the motion for a new trial is based upon the court's refusal to give the plaintiff's twelfth and thirteenth requests. These both apply to the question whether there was a proper test of the boiler after it was repaired; and we think the jury were sufficiently charged on that point by the instruc-

tion given by the court of its own motion, when taken in connection with other instructions given on the motion of the plaintiff.

As to the incompleteness, pointed out by counsel, in the defendant's sixth instruction, it is enough to say that it was probably rendered harmless by the instruction just mentioned, which appears to have been given in immediate connection with it.

6. Assumption of patent risks by servant.

The defendant's second request is in harmony with a rule approved by this court in cases analogous to this, and we think it is not open to the objection urged against it. The objection is that it made it the appellant's duty to search for the defects in the boiler. But, as we construe the instruction, it only required him to notice such as were patent, and bound him to assume the risk of these to the same extent as if their existence had been within his actual knowledge. *St. Louis, etc. Ry.* v. *Marker*, 41 Ark. 542; *L. R. etc. Ry.* v. *Leverett*, 48 Ark. 333.

7. Burden of proof as to contributory negligence.

These points, made in the argument of appellant's counsel, have been thus noticed with a view to a new trial, which we think should be granted because of the court's action in giving the defendant's fourth request. That instruction is as follows: "The jury are instructed that, in order to find for the plaintiff in this case, you must be satisfied by a preponderance of evidence that the boiler furnished by the defendant for use by the plaintiff was not reasonably safe and suitable, and that the defendant knew, or by the use of ordinary diligence might have known, that the said boiler was unsafe and defective, and that the plaintiff was free from contributory negligence on his part in operating and running said boiler."

The defense of contributory negligence presented an issue as to which the burden of proof was upon the defendant. *L. R. etc. Railway* v. *Leverett*, 48 Ark.

334; *L. R. etc. R. Co.* v. *Eubanks*, 48 Ark. 475; *Texas etc. Railway* v. *Orr*, 46 Ark. 182. But the instruction quoted, by its terms, places the burden upon the plaintiff, and requires him to prove, by a preponderance of the evidence, not only the negligence charged in the complaint, but also, as a further fact essential to his recovery, the absence of negligence on his part contributing to the injury. Such is the obvious import of the language used, and we are unable to find in the rest of the charge a reason for believing that it was intended to have any other meaning. Certainly we cannot presume that the jury might have reasoned out of the whole charge a different meaning. The instruction is embraced in a single sentence of not unusual length, and the proposition it asserts with respect to the boiler in the first clause is equally and directly applicable to what is said of contributory negligence in the second clause. And the form of the instruction appears to us to be hardly less objectionable than that of the instruction condemned in *L. R. etc. Railway* v. *Atkins*, 46 Ark. 436.

As to the facts relied upon to sustain the charge of contributory negligence, the evidence was conflicting; and we are unable to see from the record that the verdict was not probably controlled by that question, or that the last clause of the instruction copied above did not affect the finding of the jury upon it.

8. Jury not required to be "satisfied."

With reference to the same instruction, it should be added that the use of the word "satisfy" was also improper. See *Arkansas Midland Railway* v. *Canman*, 52 Ark. 517.

Reversed and remanded.

STATE v. PIGGUES.

Opinion delivered October 28, 1893.

Criminal procedure—Effect of giving security for fine.

Where one convicted of a misdemeanor has given a bond with security for payment of the fine and costs, as provided by Acts of 1887, ch. 148, and has been released by the sheriff, he cannot be retaken if the bond subsequently proves worthless.

Appeal from Howard Circuit Court.

WILL P. FEAZEL, Judge.

James P. Clarke, Attorney General, for appellant.

Under sec. 1213, Mansfield's Digest, it was the duty of the sheriff to take defendant into custody, and, if the fine and costs were not paid *immediately*, to hire him out, etc. 37 Ark. 437. The object of the act of 1887 was to *facilitate* the collection of fines, etc. The intention of the legislature is the only inquiry here, and such a construction should be placed upon the act as best answers the intention the law-makers had in view. 15 J. R. (N. Y.) 357, 380; 12 Tex. 399; 11 Ark. 47. It was not intended to *abrogate* or repeal sec. 1213, or to *discharge* the prisoner. 23 Ark. 304. The two laws should be construed *in pari materia*, and reconciled if possible. 50 Ark. 137; 45 *id.* 93; 40 *id.* 448; 5 *id.* 349. The act merely *suspended* the execution of the judgment until the bond became due, and *facilitates* its enforcement, if default was made.

BUNN, C. J. The appellee, Boston Piggues, was indicted, at the August term, 1892, of the Howard circuit court, for the crime of gaming, and, on his plea of guilty, was fined ten dollars. Judgment was rendered under section 1213 of Mansfield's Digest,* and appellee

*Mansfield's Digest, section 1213, provides that, "when any person shall be convicted of any misdemeanor under the laws of this State,

then gave his obligation with sureties, under the act of April 5, 1887, entitled "An act to facilitate the collection of fines and costs in criminal cases." † Default was made at the maturity of the obligation, and execution was issued against appellee and his sureties, as provided in the act in such cases, the obligation having the force and effect of a judgment. The execution was returned *nulla bona*, neither the appellee nor his sureties having property out of which the amount could be made.

At the February term, 1893, of said court, the State, by her attorney, petitioned the court for an execution against the defendant, containing a *capias* clause, to which the defendant demurred, which was by the court sustained, and the State appealed.

Thus we are presented with the question, whether or not, the note or bond mentioned in the first section of the act of April 5, 1887, having been given, the same is intended to operate as a finality as to the defendant, so far as the criminal prosecution is concerned. This of course involves an inquiry into the meaning of that act, when taken in connection with section 1213 and other sections of Mansfield's Digest.

---

by any court of competent jurisdiction, the court shall render judgment against the person so convicted, which judgment shall direct that the person convicted be put to labor in any manual labor workhouse, or on any bridge or other public improvement, or that the person be hired out to some person, as hereinafter provided, until the fine and costs be paid, which shall not exceed one day for each 75 cents of the fine and costs."

† Act April 5, 1887, provides: "Section 1. That whenever any person shall be convicted of a misdemeanor, by any court or justice of the peace, and shall give security for the fine and costs adjudged against him, the sheriff or other officer taking such security shall forthwith file with the clerk of the court or justice of the peace rendering the judgment the bond or note so taken which bond or note, when so filed, shall have the force and effect of a judgment, and if the same be not satisfied at the maturity thereof, the clerk of the court or justice of the peace, as the case may be shall issue an execution against the defendant and the said securities, which execution so issued shall have the same force and effect as other executions in criminal cases."

There is nothing in the act itself which authorizes the sheriff to continue his custody of the defendant after he has given the obligation required. He is then released from the custody of the sheriff, to all intents and purposes, just as he would have been, on his hirer having given the required obligation, had he been hired out under sections 1213 and 1214, Mansfield's Digest. He seems to be no longer the subject of the sheriff's custody in any manner. The act makes no provision for his recaption. It evidently contemplates that there is nothing else left to do but to collect the obligation. We cannot sanction the arrest and imprisonment of misdemeanants without some express authority for it, or at least some more strongly implied authority than we have been able to find in the law on the subject as it now stands. The judgment of the Howard circuit court is therefore affirmed.

---

58 134
72 187

58 134
81 335
81 428

58 134
p 83 77

CARPENTER v. ELLENBROOK.

Opinion delivered October 28, 1893.

Appeal—Oral evidence—Review.

Where it appears that oral testimony was taken at the hearing in chancery, and the testimony was not brought into the record, either by bill of exceptions, or by reducing it to writing and causing it to be filed as part of the evidence, it will be presumed on appeal that there was sufficient evidence to support the decree.

Appeal from Garland Circuit Court in Chancery.

ALEXANDER M. DUFFIE, Judge.

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

The mortgage was void for duress. Citing 15 Cent. L. J. 232; 15 Neb. 57; 78 Ga. 67; 106 Mass. 291.

A. Curl for appellee.

The decree recites that the cause was heard upon the pleadings, depositions, etc., and *oral proof.* This latter was not brought into the record by bill of exceptions or otherwise. This court will not disturb the findings of a chancellor, when it is manifest that the whole testimony is not before this court. 44 Ark. 74; 54 *id.* 159; 55 *id.* 122; 41 *id.* 292. As to duress see 18 Ark. 215; 49 *id.* 70; 46 Ind. 532; 18 Cal. 265.

MANSFIELD, J. This was a suit to foreclose a mortgage. The answer alleged that the mortgage was executed under duress; but the finding of the chancellor was against the defendants, and the relief sought by the complaint was granted. They have appealed.

The decree recites that oral testimony was heard at the trial; and this was not brought into the record, either by bill of exceptions, or by reducing it to writing and causing it to be filed as a part of the evidence. All the testimony not being before us, we must, according to the practice of this court in such cases, presume that the finding made upon it is correct. And, as the appeal presents no question that can be determined without considering the sufficiency of the evidence to establish the defense relied upon, the judgment will be affirmed. *Casteel* v. *Casteel*, 38 Ark. 477; *Hershy* v. *Berman*, 45 Ark. 309; *Lemay* v. *Johnson*, 35 Ark. 230; *Hershy* v. *Rogers*, 45 Ark. 306.

58 136
61 563
58 136
67 144
58 136
f69 210
58 136
73 187
74 52
58 136
h78 380
78 561
80 165
f81 503
f82 63
58 136
83 8
j 84 49
58 136
87 127
58 136
f90 467

FORDYCE v. NIX.

Opinion delivered October 28, 1893.

1. *Pleading—Nature of action—Misjoinder of causes.*

The complaint alleged that plaintiff and his family were passengers on defendants' railroad; that the conductor in charge of defendants' train, disregarding the contract of carriage, refused and failed to put plaintiff off at his destination, and compelled him to debark at a station beyond, using profane and insulting language in the presence of plaintiff and his family: that, by violation of their contract and the insults and mistreatment, he had been damaged $2500; *Held*, that, though the complaint alleges a contract of carriage, and its breach, the action will be regarded as founded in tort, and not demurrable for misjoinder of causes.

2. *Carrier—Failure to stop at station—Punitive damages.*

In an action by a passenger against a railroad company to recover damages for failure to put him off at his station, where there was evidence that defendants' train did not stop at the station, that the name of the station was not called, that the conductor was intoxicated, and used profane and insulting language to plaintiff, and that plaintiff was quiet and peaceable, a verdict for $1000 as punitive damages is not excessive.

3. *Instruction—Amount of damages.*

An instruction that the jury may allow punitive damages "*not exceeding the amount sued for*," while erroneous, as suggesting that the jury might disregard the evidence adduced, will not be cause for reversal, where it affirmatively appears that the verdict was amply sustained by the proof.

Appeal from Columbia Circuit Court.

CHARLES W. SMITH, Judge.

Action by Nix against Fordyce & Swanson, receivers of St. Louis, Arkansas & Texas Railway Co. The facts are stated in the opinion.

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

1. A claim for damages for breach of contract cannot be joined in the same complaint with one for exemplary damages growing out of abusive and insulting

language used by a conductor, after the station to which plaintiff was bound was passed. Mansf. Dig. sec. 5014; Bliss, Code Pl. sec. 125; 53 Barb. 238; 33 Ark. 316.

2. Punitive damages ought not in any case to be disproportionate to the actual damages proven. 69 Tex. 277; 5 S. W. Rep. 317.

3. The damages were excessive.

4. It was error to instruct the jury that if they found * * that defendants' agents acted wilfully, etc., they could allow additional exemplary or vindictive damages "*in any amount not exceeding the amount sued for.*"

Thornton & Smead for appellee.

1. In support of the instruction given for plaintiff, see 42 Ark. 328; 19 S. W. Rep. 107.

2. There was no misjoinder of actions. Mansf. Dig. sec. 5014; 33 Ark. 316; Green, Code Pl. sec. 15; 16 How. 243. But demurrer is not the proper remedy under the code, but a motion to strike. Mansf. Dig. secs. 5016–17; 32 Ark. 495; Green's Code Pl. sec. 937; 39 Ark. 163. A failure to move to strike is a waiver of all objections to a misjoinder. 1 Met. (Ky.) 313; 51 Ark. 261, and cases *supra.*

3. The verdict is not excessive. There is no rule to measure exemplary damages by, except the discretion of the jury, and, in the absence of passion or prejudice, this court will not interfere. 15 S. W. Rep. 470. The jury may award such damages as, in their judgment, will prevent a repetition of the offense, although the actual damages measured by a pecuniary standard are very small. 35 Ark. 494; Addison, Torts, 1392. See 9 So. Rep. 375; 40 Miss. 395; 13 Bush (Ky.), 122; 1 Dillon, C. C. 568; 36 Miss. 660; 49 N. H. 358; 11 Lea (Tenn.) 98; 68 Mo. 329; 11 Nev. 350; 36 Wis. 557; 5 Taunt. 442. The right to recover exemplary damages is not

confined to cases of actual malice. 2 Sedg. Dam. 26, 28; Sedg. Torts, 227.

4. It was the province of the jury to settle the conflict of testimony, and this court does not disturb a verdict on the question of the weight of the evidence. 46 Ark. 527; 15 *id.* 356; 7 *id.* 174; 47 *id.* 199; 2 *id.* 364; 47 Ark. 567; 49 *id.* 396. If there is any evidence to support it, the verdict will not be disturbed. 31 Ark. 163.

WOOD, J. Appellee filed his complaint for damages, alleging that he, wife and two daughters, left Detroit, Texas, to visit relatives and friends at Buckner, Arkansas, a regular stopping point on appellants' railroad; that they were passengers, having purchased tickets, which conductor received on train; that the company, disregarding its contract of carriage, *refused* and failed to stop at Buckner, their destination; that appellee requested conductor, half mile beyond the station, to back up train and allow them to debark, which he refused to do, using profane and insulting language in the presence of appellee and family; that conductor was rough and insulting from time they passed Buckner to Waldo, where they got off; that, by violation of their contract and the insults, outrages and mistreatment, he had been damaged $2500.

Appellants demurred for misjoinder, which being overruled, they saved exceptions and answered, denying every allegation except contract of carriage, and charged appellee with contributory negligence. Verdict and judgment for $1000; appeal duly prosecuted.

1. Nature of action.

The contract of carriage, its wilful breach, and the insult and injury resultant, damnifying appellee as he claims in the sum of $2500, as set forth in the complaint, we hold constituted a tort. Under the reformed procedure, courts regard the *substance* rather than the *form*. *Substantia prior et dignior est forma.* As was said by the Supreme Court of Mississippi, in a very

similar case: "The character of the action must be determined by the nature of the grievance, rather than the form of the declaration." *New Orleans, etc. R. Co.* v. *Hurst*, 36 Miss. 660. But, measured by the most technical rules of pleading, the complaint contains all the necessary allegations for an action *ex delicto*. Such was evidently the intention of complainant, the facts warranted it, and we so treat it. It follows, considering appellant's demurrer as a motion to strike, which is the proper practice, (Mansf. Dig. secs. 5016, 5017; *Organ* v. *Railroad Company*, 51 Ark. 261; *Riley* v. *Norman*, 39 *id.* 158; *Terry* v. *Rosell*, 32 *id.* 495) that it was properly overruled.

2. When punitive damages recoverable against carrier.

Was the verdict excesssive? Since the trial judge, who saw and heard the witnesses, has refused to disturb it, this court, according to a rule long ago established, and supported by the great weight of authority, will not interpose, unless the amount is so flagrantly unjust or unreasonable as to indicate passion, prejudice, corruption, or a failure to appreciate the law and facts presented. *Sexton* v. *Brock*, 15 Ark. 345; *McClintock* v. *Lary*, 23 *id.* 215; *Bright* v. *Bostick*, 27 *id.* 55; *Trieber* v. *Andrews*, 31 *id.* 163; *Kelly* v. *McDonald*, 39 *id.* 387; *Texas, etc. R. Co.* v. *Eddy*, 42 *id.* 527; 3 Sutherland on Dam. sec. 953; 1 Sedg. on Dam. sec. 388. It was peculiarly the province of the jury to weigh the evidence and gather from the conflict the true state of facts. Viewing the evidence in the strongest light for appellee (*Railway Co.* v. *Davis*, 56 Ark. 51), the jury might have concluded that appellant's train did not stop at all at Buckner; that the name of the station was not called; that the brakeman was asleep, and the conductor intoxicated; that the conductor used profane and insulting language to appellee in the presence of ladies and others; that his conduct almost precipitated a fight, and would have done so but for the interference of a passenger; that, when

importuned to go back and let appellee and family off at their destination, he was very rough and insulting; that appellee was quiet and peaceable, his "conduct being that of a gentleman."

Railroad companies, as common carriers of passengers, are authorized, and it is their duty, "to do all acts and things necessary to protect passengers from all acts of fraud, *imposition or annoyance.*" Acts 1889, p. 123. It is made a crime for conductors to become intoxicated while running a train. Mansf. Dig. sec. 5480. Railroads are required to furnish sufficient accommodations for transporting, and to take, transport and discharge, passengers who have paid their fare, and, upon refusal by the corporation or its agents, they are liable in damages to the party aggrieved. Mansf. Dig. secs. 5475, 5476. The contract they make is one they must make and must perform, differing in that regard from contracts simply "*inter partes*," so that a breach on their part, grossly negligent or wilful, is not merely a breach of contract but a tort. 2 Sedg. Dam. sec. 859; 3 Sutherland, Dam. sec. 941.

Under the obligations imposed by law upon railroads for the protection of passengers from *indignities, insults and injuries*, the facts presented by this record make a case for punishment by way of example. 3 Suth. Dam. sec. 950; 1 Sedg. Dam. secs. 347, 360; *New Orleans etc. R. Co.* v. *Hurst*, 36 Miss. 660; *New Orleans etc. R. Co.* v. *Statham*, 42 *id.* 607; *Caldwell* v. *N. J. Steamboat Co.* 47 N. Y. 282; *Graham* v. *Pacific R. Co.* 66 Mo. 536; *Penn. R. Co.* v. *Books*, 57 Pa. St. 339; *Goddard* v. *Railway*, 57 Me. 217. The verdict was not excessive.

3. Instruction as to amount of damages considered.

The trial court should not have told the jury, however, that if the conduct of appellants was wilful, etc. "they may allow him additional vindictive or punitive damages, not exceeding the amount sued for,"

the objection being to the words, "not exceeding the amount sued for." Verdicts of juries in actions sounding in exemplary damages, while they cannot exceed the amount claimed in the complaint, should, nevertheless, in each case be reasonable, and commensurate with the wrong done, as shown by the evidence adduced. The amount claimed in the complaint is frequently so exorbitant and disproportionate to the facts proven as, of itself, to suggest prejudice, and to tell the jury in such cases that they might find in any amount, not exceeding amount claimed, would be tantamount to saying that they would be justified in finding an excessive verdict. The Supreme Courts of Georgia and Texas have condemned instructions containing the above language. *Bryan* v. *Acee*, 27 Ga. 87; *Willis* v. *McNeill*, 57 Tex. 465. It should be said, however, that these were cases between private individuals, and in both the court found that the verdicts were excessive, and that therefore the charge of the trial judge might have been prejudicial. In the case before us, the jury having found for less by $1500 than the amount claimed, and being amply sustained by the proof, it appears they were not misled, nor appellant prejudiced by the instruction.

Affirmed.

Bunn, C. J., did not participate in the decision of this cause.

58 142
68 69

58 142
84 53
d 84 54

58 142
85 528

58 142
e90 180

LITTLE ROCK v. WRIGHT.

Opinion delivered November 4, 1893.

1. *Homestead—Encumbrance—Dedication of street.*
A married man who in 1870 laid off his homestead into blocks, lots and streets for the purpose of sale, reserving as his homestead the block on which his residence stood, did not, by dedicating the streets to public uses, create an encumbrance of his homestead in violation of sec. 2, art. 12, Const. 1868, which provided that "the homestead of any resident of this State who is a married man or head of a family shall not be encumbered in any manner while owned by him."

2. *Streets—Acceptance of dedication.*
An offer to dedicate streets in a tract of land adjoining a city of the first class by laying it off into blocks, lots and streets was accepted by the act of April 28, 1873, providing that all tracts of land which adjoin a city of the first class, and which is or shall be laid off into lots or blocks, shall be a part of the city.

3. *Adverse possession—Public street.*
Where a city has accepted the dedication of a public street, subsequent continued possession by the dedicator will not be presumed adverse to the city, nor the city's right lost by delay for more than seven years in opening up the street for public use, in the absence of proof of adverse holding.

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

Morris M. Cohn, City Attorney, for appellants.

1. Wright had the right to contract or limit his homestead claim, and did so by his bill of assurances. There is no proof that his homestead, including the streets, is not far in excess of the value allowed by the Constitution of 1868. The homestead was limited by that constitution. In that respect it differs from the Constitution of 1874. See Const. 1868, art. 12, sec. 3; Const. 1874, art. 9, secs. 4, 5.

2. The change from farming to urban property reduced the homestead claim. 5 Kas. 592–5. Espe-

cially when accompanied by bill of assurance and plat. 12 Iowa, 516, 519; 17 Tex. 74; 51 Ark. 527, 530. In 37 Ark. 298, 307, it was held that a homestead owner might reduce its limits or bounds to any *reasonable* extent.

3. Under the Constitution of 1868, the homestead could be sold and conveyed, or any part of it. 37 Ark. 298; 12 Iowa, 516, 519; 51 *ib.* 527; 2 Dill. 320; Thomps. Homest. sec. 453. A dedication by bill of assurance is a conveyance, and not an *incumbrance.* Elliott, Roads and Streets, 89 and note; 12 Iowa, 516; 17 Tex. 74, and Arkansas cases, *supra.*

4. By act of April 28, 1873, the plotting and creation of an annexation to a city made it a part of said city without further action by the city. Acts 1873, p. 287; 42 Ark. 66; 44 *id.* 536; 36 *id.* 166.

5. The bar of the statute cannot avail appellees. Elliott, Roads, 89; 67 Iowa, 39; 24 N. W. Rep. 582; 16 Oregon, 500; 19 Pac. Rep. 610. A city is under no obligation to open streets *at once,* nor until it needs them for use. 19 Pac. Rep. 614; Elliott, Roads and Streets, 90 and note; 80 Ala. 489; 2 So. Rep. 155; 9 *id.* 584; 62 Mich. 29; 28 N. W. Rep. 775; 62 Mich. 46; 28 N. W. Rep. 785. None of the acts done by appellees were adverse or inconsistent with the city's rights to open the streets *whenever the public necessities required them.* Elliott, Roads and Streets, 669 and note 3; 71 Cal. 21; 11 Pac. Rep. 808.

T. B. Martin and *Geo. L. Basham* for appellees.

1. The law of abandonment of the homestead, or any part thereof, is too well settled in this State for argument.

2. Injunction was the proper remedy against a municipal corporation to prevent a trespass. 2 Dill. Mun. Corp. sec. 662; 12 B. Mon. 610; 24 Iowa, 283.

3. Under the Constitution of 1868 the homestead could not be *encumbered.* A highway or street is a

legal incumbrance. Elliott, Roads and Streets, p. 553; 2 Mass. 97; 11 Am. Rep. 426; 50 Mo. 496; 1 Ala. 645; 10 Conn. 422; 51 Ill. 206; 3 Gray, 516; 36 Me. 557; 59 *id.* 322; 3 N. H. 335; 27 Vt. 739; 48 Ind. 52.

4. Municipal corporations are bound by the statute of limitations. 41 Ark. 45; 12 B. Mon. 610. These decisions apply where the grantor remains in possession. Wood on Lim. sec. 265, p. 551; 44 Wis. 498; *Ib.* 111; 24 Iowa, 283. By section 1, Acts 1873, p. 287, Wright's addition became a part of the city, from which period, at all events, the statute began to run. The evidence clearly shows the possession to be adverse, and the city is barred.

BATTLE, J. The city of Little Rock, through its council, by a resolution, on the 26th day of March, 1889, directed its engineer to open Gaines street and Marianna Avenue, on the South and West sides of block three, in Wright's addition to said city. Lucy M. Wright, Sallie L. Wright, Weldon E. Wright and Ida M. Wright brought this action in the Pulaski chancery court, against the city and F. J. H. Rickon, its engineer, to restrain them from carrying the resolution into effect. The court made a temporary order restraining the defendants from enforcing the resolution, and, on final hearing, made the injunction perpetual, and the defendants appealed.

The facts in the case are substantially as follows: "In 1870, Weldon E. Wright owned a tract of land adjoining the city of Little Rock, on the South, containing about one hundred acres. The same was at that time, and for many years previous had been, the homestead of Wright and his wife, Lucy M. Wright, and his children, the appellees." On the 5th of February, 1870, Weldon E. laid the same off into blocks, lots, streets and alleys, made a plat thereof and called it "Weldon E. Wright's Addition to the city of Little Rock;" and executed and attached to the plat a "bill of assurances,"

his wife joining in the execution thereof. In the "bill of assurances" the streets, as shown in the plat, were dedicated to the public use, including Gaines Street on the west, and Marianna Avenue on the south, of block 3 in the addition.

Under the provisions of section 1 of an act of the legislature of April 28, 1873, the addition became a part of the city of Little Rock. At the time the "bill of assurances" was executed, the dwelling house of Wright was situated on block 3 of the addition, where he then resided with his family, and where he continuously resided with them up to the time of his death, in the spring of 1884, and where his family, appellees, have ever since continuously resided. Gaines street on the west, and Marianna avenue on the south, of block 3 were, at the time of the filing of the "bill of assurances," inclosed under a common fence, and formed a part of the homestead. Two of the houses, constituting a part of the homestead, were then, and are now, on the line of so much of the streets as were enclosed. The parts of the streets so enclosed, and the two houses, were used and occupied by Weldon E. from the time the "bill of assurances" was executed until he died, and by appellees, from his death to the institution of this action, as a part of the homestead.

Upon this state of facts appellees contend that the city has no right to use the ground in controversy as streets, for the following reasons:

1. Because it was a part of the homestead of Weldon E. Wright at the time he attempted to dedicate it to public use, and could not, under the constitution of 1868, which was then in force, be encumbered by streets.

2. Because the offer to dedicate had never been accepted on the part of the public.

3. And because they had held adverse possession of it, under claim of title, for the statutory period.

If this contention be true, they were entitled to the relief sought. The rule is, an injunction will not be granted to restrain a mere trespass, because, ordinarily, the party injured has a full and adequate remedy at law. But this rule is not observed in cases of municipal corporations, when they are about to make an effort to take possession of private property "upon the pretense that it has been dedicated as a public street or highway by the owner, when, in fact, there has been no dedication, or, if it ever occurred, the easement has been lost through non-user, and abandoned by the city, and by a continuous and adverse possession on the part of the owner of the fee for" the statutory period of limitation. In such cases an injunction should be granted to the owner to prevent the officers of the corporations from making the attempt, upon the ground that the attempt, if successful, would be an appropriation of the freehold, and a destruction of the value of the land in the character in which it was enjoyed; also upon the ground, that private persons are unable to contend with corporations upon equal terms, and for the purpose of quieting the title and possession. *McKibbin* v. *Fort Smith*, 35 Ark. 352, 359; *Manchester Cotton Mills* v. *Manchester*, 25 Grat. 825; 1 High on Injunctions (3rd ed.), sec. 349; 2 *id.* secs. 1272, 1273, and cases cited

It is true that cities of the first class are authorized, by an act entitled "An act for the better government of cities of the first class, and to confer enlarged and additional powers on such cities, and to provide in what manner changes may be made in the number of aldermen and wards of such cities," approved March 21, 1885, to prevent or remove encroachments or obstructions upon any of the streets. But it did not confer upon them the authority to tear down and remove the enclosures and houses, and take possession of the lands, of the citizens, for public use. The legislature could not confer such

authority, except in accordance with that provision of the constitution which declares that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor." In exercising the power to prevent or remove encroachments or obstructions upon the streets, they should avoid trespassing on the grounds of the citizen.

But is appellees' contention true? Could Wright dedicate any part of his homestead to the public for a street, under the constitution of 1868? It is insisted that he could not, because that constitution declared that "the homestead of any resident of this State who is a married man or head of a family shall not be encumbered in any manner while owned by him," except in certain cases not here in question. The reason given for this contention is, that a street is an encumbrance, within the meaning of the constitution. If this be true, it does not follow that the dedication for a street was in violation of the constitution then in force; for it was held in *Klenk* v. *Knoble*, 37 Ark. 298, that the owner of a homestead might, under the constitution of 1868, mortgage such a part of it as was not necessary to the enjoyment of it as a homestead. The court in that case, in speaking of the the constitution of 1868, said: "The constitution does not limit the *minimum* extent of the lot. The resident may make his homestead as small as he pleases, provided it be not so contracted as to show an intent to evade the law, by making it too small for actual use as a homestead. * * * He was not required by any policy to retain forever, as part of his homestead, more of it than he might deem reasonably sufficient, and might determine to hold and use the balance as other property. He might manifest his intention in any sufficient way, without being driven to visible separation by walls. Any facts or circumstances showing a permanent design may be considered. As it

was a thing, in itself, which he might properly do, it would show no intent to evade the law to declare it, in a mortgage of the property, so divested of its homestead character. With this qualification that the amount retained must appear reasonable, and *bona fide*, and not colorable."

Weldon E. Wright was not prohibited by any law from conveying his homestead, or any part of it. He had the right to do so. For the purpose of selling it for the highest prices he could realize, he laid it off into blocks, lots and streets. This purpose was clearly legitimate. Having the power to reduce it below the constitutional *maximum*, he could not have violated the constitution by an effort to do so by legitimate means. Had he been successful in his undertaking, his property would have advanced in value as he sold the lots into which it was divided, and would, probably, have been far more useful and profitable than it would otherwise have been. In this view of the facts, "the amount retained" as a homestead by the reservation of a block for that purpose was not only *bona fide*, but reasonable; and comes within the qualification of the right to encumber, as stated in *Klenk* v. *Knoble*.

Was the offer to dedicate lands for streets accepted? The act of the legislature of April 28, 1873, entitled "An act to provide for adding territory to cities of the first class," provided that "all tracts of land or territory which adjoins or is adjacent or contiguous to a city of the first class, and which is or shall be laid off or subdivided into lots, or blocks, or additions, shall be and the same is hereby declared to be a part of such city, and shall be subject to all the *power*, *authority*, *jurisdiction*, franchises, liabilities and ordinances governing such city; and such territory shall become incorporated with and a part of such city." This was an acceptance of the offer to dedicate. The declaring the tract of land

which was laid off into blocks and lots a part of the city made it a part of the city as laid off. *Moore* v. *City*, 42 Ark. 68: *Demopolis* v. *Webb*, 25 American & English Corporation Cases, 268, 271; *DesMoines* v. *Hall*, 24 Iowa, 234, 242, 243; *Requa* v. *Rochester*, 45 N. Y. 129, 131; *Mayor* v. *Morris Canal & Banking Co.* 1 Beasley, 547, 560; *Derby* v. *Alling*. 40 Conn. 410, 434, 435; *Hoboken Land, etc. Co.* v. *Mayor*, 7 Vroom, 546; Elliot's Roads & Streets, pp. 116, 117.

The act of April 28, 1873, provided that the land laid off into blocks and lots shall "be subject to all the power, authority," and "jurisdiction" of the city. Section 3209 of Gantt's Digest, then in force, in defining this "power, authority," and "jurisdiction" in part, provided that "the city council shall have the care, supervision and control of all the public highways, bridges, streets, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair, and free from nuisances." So the act, by express words, subjected the land laid off into streets to the power, authority, and jurisdiction conferred on cities by this section, and thereby accepted the offer of Wright to dedicate, and made the land dedicated public streets.

It is true that section 738 of Mansfield's Digest, which is a re-enactment of section 3210, Gantt's Digest, provides that "no street or alley, which *shall hereafter* be dedicated to public use by the proprietor of ground in any city, shall be deemed a public street or alley, or to be under the care or control of the city council, unless the dedication shall be accepted and confirmed by an ordinance specially passed for that purpose." But this statute was passed on the 9th of March, 1875, is prospective in its operation, and did not divest the public ways in Wright's Addition of their character as streets.

Has the right of the city to the streets in question

been lost by non-user or adverse holding? What is adverse possession? No possession consistent with the right of the true owner can be adverse to him. In this case the land was dedicated to public use for streets, but it remained enclosed and obstructed after the dedication. The city had the right to postpone the removal of the obstructions, and the opening of the streets, until such time as its resources permitted, and the public necessities demanded. As the city only acquired the right to use the land as streets, and Weldon E. reserved all other rights, he had the authority to use the land for pasturage, or the growth of crops, or for any other purpose consistent with the right of the city, until the authorities of the city, in the lawful exercise of its power, determined to open the streets. *Henshaw* v. *Hunting*, 1 Gray, 203; *Bartlett* v. *Bangor*, 67 Me. 460; *Lake View* v. *LeBahn*, 120 Ill. 92; *Reilly* v. *Racine*, 51 Wis. 526; *Derby* v. *Alling*, 40 Conn. 410; *Meier* v. *Portland Cable Co.* 16 Oregon, 500; *Oswald* v. *Grenet*, 22 Texas, 94; *Shea* v. *Ottumwa*, 67 Iowa, 39.

The city has not lost its right by adverse posssession. It is true that R. J. Lea, a witness, testified that Weldon E. Wright, in his life time, and appellees, since his death, have occupied the land dedicated for the streets in question, openly, notoriously, continuously, and adversely, under claim of title to the same for more than seven years. But he testified as to the acts of ownership, control, and possession done by the claimants, which were such as they had the authority to do, and were consistent with the right of the city. These acts were not sufficient to show adverse possession. The statement of Lea as to the possession being adverse was clearly an expression of an opinion, and is not competent evidence.

It was within the province of the city council of Little Rock to determine when the streets in question

should be opened. Mansfield's Digest, section 737. It has done so. In the absence of evidence proving the contrary, the presumption is, it has not abused its power in so determining. The evidence fails to show such abuse.

The decree of the chancery court is therefore reversed, and appellees' complaint is dismissed.

HELENA v. HORNOR.

58 151
59 465

58 151
60 502

58 151
73 226
73 604
76 443
76 450
76 455

58 151
f 84 54
84 520

Opinion delivered November 4, 1893.

1. *Limitation—Action to recover tax-lands.*

The act of January 10, 1857, which provides that no action for the recovery of any lands, or for the possession thereof, against any person who may hold such lands by virtue of a purchase thereof at auditor's sale for the non-payment of taxes, shall be maintained unless it appear that the plaintiff, his ancestor or grantor, was seized or possessed of the lands in question within two years next before the commencement of such action, applies to the character of the instrument, and not to the name of the officer executing it, and when the legislature subsequently transferred the duties of the auditor, with reference to lands forfeited for non-payment of taxes, to the commissioner of State lands, the provisions of the act of 1857 became applicable to tax-deeds executed by the commissioner.

2. *Municipal corporation—Limitation.*

The statute of limitation may be pleaded against a municipal corporation.

3. *Lands—Town-lots.*

The term "lands," as used in the act of January 10, 1857, includes town-lots.

Appeal from Phillips Circuit Court.

GRANT GREEN, JR., Judge.

James P. Clarke for appellant.

1. The lots belonged to a municipal corporation, and were not subject to taxation. They were "public

property," and whoever insists upon a forfeiture of such property must show by proper averment that it is of such a character as to subject it to taxation. Cooley, Taxation, 172, 173.

2. What is supposed to be section 1 of the act of January 10, 1857, is found in Gantt's Digest as section 4117, and the only liberty taken by the digester, was to add the word "any" before the word "act" where the latter first occurs. But the digester, in carrying the section into Mansfield's Digest, as section 4475, makes material and unwarranted changes in its wording. This he had no power or authority to do. The legislature *makes* the law, not the digester.

3. This statute, which was construed in 53 Ark. 422, does not apply to this case, because (1) appellee does not hold under a purchase made at a sale by a sheriff or auditor (55 Ark. 192); (2) appellee did not acquire his title under the act of 1857, providing for a *redemption of lands*. "Lands" do not include "town-lots," within the meaning of our revenue laws. Gould's Dig. p. 955; Gantt's Dig. sec. 5188; Mansf. Dig. sec. 5760.

J. J. & E. C. Hornor for appellee.

1. Only "public property, used *exclusively for public purposes*," is exempt. Const. art. 17, sec. 5; Mansf. Dig. secs. 5586, 5597. It must be shown that the claim falls within the exemption, and it was not alleged nor proven. 32 Ark. 135; 25 *id.* 293; 18 A. & E. Corp. Cas. 28; 1 Duval, 295.

2. Appellant is barred by section 4475, Mansfield's Digest. The duties of the auditor have been by law put upon the commissioner of State lands, and the change of verbiage was warranted by law. 43 Ark. 398; 51 *id.* 397; 53 *id.* 423; *Ib.* 418.

3. "Land" embraces town-lots. 2 Blackst. Com. p. 16; Mansf. Dig. sec. 5585-6.

WOOD, J. This is an action of ejectment brought by the city of Helena for certain lots deeded to the city by Edward Fitzgerald in 1873. The answer pleads two years adverse possession under a tax deed executed by the commissioner of State lands in 1888, conveying the lots in controversy, which lots the State had acquired by a forfeiture and sale for the non-payment of the taxes of 1885. The deed was in regular form, and made an exhibit to the answer. Demurrer to the answer overruled, appellant resting, judgment was rendered for appellee, from which an appeal was duly prosecuted.

Appellant's counsel presents three questions for our consideration, which we will state in the order disposed of. (1.) Does section one of "An act entitled an act to quiet land titles in this State" approved January 10, 1857, apply to deeds of the commissioner of State lands? (2.) Can the appellee plead this bar against a municipal corporation? (3.) Are "town-lots" included in the word "lands" used in the act?

1. Section one of the act of 1857 is as follows: "That no action for the recovery of any lands, or for the possession thereof against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof, at sheriff's or auditor's sale, for the non-payment of taxes, or who may have redeemed the same from the auditor of this State, by virtue of act providing for the redemption of lands forfeited to this State for the non-payment of taxes, or who may hold such land under an auditor's deed, commonly known as a donation deed, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the lands in question within two years next before the commencement of such suit or action." What purports to be the above section appears

in Mansfield's Digest, as sec. 4475, and is as follows: "No action for the recovery of any lands, or for the possession thereof, against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector or commissioner of State lands, for the non-payment of taxes, or who may have purchased the same from the State by virtue of any act providing for the sale of lands forfeited to the State for the non-payment of taxes, or who may hold such lands under a donation deed from the State, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the lands in question within two years next before the commencement of such suit or action." It will be observed that the digester substituted for the words "sheriff's or auditor's," appearing in the first section above copied, the words "collector or commissioner of State lands," and for the words "redeemed the same from the auditor of this State," the words "purchased the same from the State," and inserted the word "any" before the word "act," and substituted the word "sale" for the word "redemption" and for the words "auditor's deed," the words "donation deed."

It is contended that these were *material* changes, and wholly unauthorized. We do not so regard them. The office of commissioner of State lands was created July 15, 1868, and the landed interest of the State placed under its control. Mansf. Dig. sec. 4177. note *n.* and sec. 4183. Sec. 9, same act provides: "He shall also have the charge, control and disposition of all lands forfeited, or that may be hereafter forfeited, to or purchased by the State for the non-payment of taxes, and such commissioner shall dispose of such lands as is or may be provided by law." Mansf. Dig. sec. 4185. Before that time these functions were performed by the auditor. Secs. 151, 155, 159, ch. 148, Gould's Dig.

The deed of the auditor and of the commissioner of State lands, conveyed the same thing—*i. e.* "all the right, title, interest and claim" of the State to forfeited lands. Secs. 163, 164, ch. 148, Gould's Dig.; sec. 667, Mansf. Dig. When the digester in 1884 came to collate and compare the laws concerning lands forfeited to the State for the non-payment of taxes, he found that the name of the officer having charge of the land department had been changed, but that the office and its functions remained the same, so that in substituting the words "commissioner of State lands" for "auditor" where it appears in sec. 1 of the act of January 10, 1857, he was only doing what the legislature had already done, in effect, when they transferred to him the identical duties with reference to forfeited lands which had before been performed by the auditor. A comparison of the statutes would most likely discover the reasons for the other changes mentioned as made by the distinguished digester, but they are not raised by this contention.

The section under consideration has been held to apply to donation deeds executed by the commissioner of State lands (*Sims* v. *Cumby*, 53 Ark. 418), although the language of the act is: "who may hold such lands under an *auditor's* deed, commonly known as a donation deed." The second section of the act has been held as operative in cases where deed of commissioner of State lands was involved. *Douglass* v. *Flynn*, 43 Ark. 398; *Kelso* v. *Robertson*, 51 Ark. 397; *Anthony* v. *Manlove*, 53 *id.* 423. In the case of *Douglass* v. *Flynn*, *supra*, this language is used: "The statute is a short one in four connected sections, referring to each other and all applying to the same class of cases. * * * The sections are interlocked not only by express cross-references, but by the constant use of the word 'such'." Construing the whole act with reference to its title and all of its sections, there can be no uncertainty as to the sub-

ject-matter or the legislative intent. The purpose was to quiet the title of those who held, or might hold, under a deed from the State for forfeited lands after two years adverse possession. The title conveyed was the State's title, not the auditor's, or the land commissioner's; they were the mere agents or instrumentalities through whom the sovereign acted. The act applies to the character of the instrument, and not to the name of the particular functionary executing it. When the legislature transferred the duties of the office of auditor with reference to forfeited lands to the commissioner of State lands, that, *ipso facto*, made the provisions of the act of January 10, 1857, apply to deeds executed by said commissioner. The digester, therefore, was not changing, amending or extending the law, but simply, by apt words, preserving harmony and consistency in statutes *in pari materia* already existing, and arranging the same into a symmetrical system. Sedg. on Const. and Stat. Con. 209, 212, *et seq*; Sutherland, Stat. Con. 293, *et seq*. 289; 1 Kent, 463; *State* v. *Railroad Company*, 12 Gill & Johnson, 399.

2. Can the appellee avail himself of the statute bar as against a municipal corporation? In the case of *Fort Smith* v. *McKibbin*, 41 Ark. 45, this court held that "municipal corporations, like natural persons, are subject to limitation statutes." Many authorities were cited in that case and considered by the court upon what the learned judge who delivered the opinion termed the "vexed question." We will not go over again the "field of conflict," but stand by that decision as a rule of property affecting municipalities. The subject-matter of a statute of limitations is immaterial; where a party brings himself fully within its terms, he acquires a good title. This the appellee by his answer has done, and hence the demurrer was properly overruled.

3. The term "lands" as used in the act in our judgment includes "town-lots."

Affirmed.

---

58 157
83 567
58 157
87 579

JAMES v. JAMES.

Opinion delivered November 11, 1893.

Negligence—Proximate cause.

Where a ginner agreed to gin cotton, left at his gin, by a certain time, and failed to do so, and the cotton was subsequently destroyed by fire while at his gin, his failure to gin the cotton within the time agreed was not the proximate cause of its destruction.

Appeal from Randolph Circuit Court.

JOHN B. MCCALEB, Judge.

STATEMENT BY THE COURT.

Appellee filed his complaint before a justice of the peace, alleging that he, as constable, had levied a writ of attachment upon 2064 pounds of seed cotton, which he delivered to appellant upon contract to gin the same immediately; that appellant neglected to gin said cotton according to agreement, and that, by reason of such failure, same was burned. He prays judgment for $56.70, and obtains verdict and judgment for that amount, from which appellant appeals.

Appellee testified that he delivered the cotton levied upon, under an order of the court, to the appellant under a special contract that he, appellant, would gin the same on the following Monday, the cotton being delivered on Saturday; that the appellant neglected to gin same on Monday; that on Tuesday he went to the gin to mark the cotton and roll it off the yard, but it had not been ginned; that on Thursday following the cotton was burned; and that it was worth $56.70. This was all

the evidence on behalf of appellee as to the contract, and all that is necessary to state in order to understand the opinion of the court.

J. C. Hawthorne for appellant.

P. H. Crenshaw for appellee.

WOOD, J., (after stating the facts.) The theory upon which a recovery is sought in this case is presented by the complaint, the testimony of appellee, and the following instruction given by the court upon its own motion: "The jury are instructed that if they believe, from a preponderance of the evidence, that the plaintiff, while acting as constable, delivered to the defendant or his agent the cotton in controversy under a contract that the defendant would gin it by a certain time, and that the defendant negligently failed or refused to gin said cotton as agreed and that the same was thereby destroyed, they would be authorized to find for the plaintiff."

No causal relation is shown between the failure of appellant to comply with his contract to gin, and the fire, which was the direct cause of the loss of the cotton. The appellee does not seek recovery upon the ground that the bailee for hire did not use ordinary care in the preservation of the cotton, or that he negligently destroyed it. The rule of law founded in justice and common sense, and of universal application, as expressed in the maxim, "*Causa proxima, non remota, spectatur*," makes the first instruction as above quoted, when applied to the facts, clearly erroneous. This is the only just and correct measure of liability. True, we might say if the cotton had been ginned on Monday, and carried away on Tuesday, it would not have been burned on Thursday. To use language similar to that employed by Justice Battle in the case of *Martin* v. *Railway Co.* 55 Ark. 521, the failure to gin on Monday "was one of

a series of antecedent events without which the loss would not have occurred, but such failure was in no sense the proximate cause of the loss." *Denny* v. *Railroad Co.* 13 Gray, 481; *Daniels* v. *Ballentine*, 23 Ohio, St. 532; *Martin* v. *Railway Co.* 55 Ark. 521; *Dubuque Wood & Coal Ass'n* v. *City*, 30 Iowa, 176; *St. Louis etc. Ry. Co.* v. *Commercial Ins. Co.* 139 U. S. 223; *Hoadley* v. *Northern Transportation Co.* 115 Mass. 304; *Railroad Co.* v. *Reeves*, 10 Wall. 176; *Morrison* v. *Davis*, 20 Pa. St. 171.

We deem it unnecessary to pass upon other questions raised, for, if the case is presented again in the court below, it must be constructed and tried upon a different theory.

Reversed and remanded.

HEMPSTEAD COUNTY *v.* MCCOLLUM.

Opinion delivered November 11, 1893.

Prosecuting attorney—Fee for conviction of felony.

Under an indictment joining a count for burglary with one for larceny, a verdict of guilty on both counts, followed by judgment sentencing defendant for both offenses, constitutes two convictions, within Mansf. Dig. sec. 3233, allowing a prosecuting attorney a fee of $25 for each conviction on indictment for any felony not capital.

Appeal from Hempstead Circuit Court.

RUFUS D. HEARN, Judge.

R. B. Williams, for appellant.

Fanning v. *State*, 47 Ark. 442 settles this case adversely to appellee. There was but one indictment, one plea, one legal proceeding of record, one judgment, and hence but *one conviction*. There was but one case between the State and the defendant.

Tompkins & Greeson for appellee.

The defendant was convicted of *two* offenses, larceny and burglary, and there should have been separate sentences. Mansf. Dig. sec. 2317. 47 Ark. 442 only holds that there was *one* conviction. In this case defendant was convicted of burglary and of larceny, two distinct offenses. Defendants may be indicted separately or jointly for such offenses. Mansf. Dig. sec. 1621.

WOOD, J. This case was tried upon the following facts: "Pitt Anderson was indicted for the crimes of burglary and grand larceny. The indictment contained two counts, one for burglary and the other for grand larceny. There was but one indictment, one plea of not guilty, one trial before one jury. The jury trying the case returned into court the following verdict, to-wit: 'We, the jury, find the defendant guilty of burglary, and assess his punishment at three years in the penitentiary; and also find the defendant guilty of grand larceny, and assess his punishment at two years in the penitentiary, Jno. D. Trimble, Foreman.' And thereupon the court rendered the following judgment: 'It is therefore considered, ordered and adjudged by the court that said defendant be remanded into the custody of the sheriff of Hempstead county, and that he be conveyed by him without delay to the penitentiary house of the State of Arkansas, and there confined at hard labor for the period of five years from the 28th day of October, 1891, and that the State of Arkansas do have and recover of the said defendant all the costs of this prosecution, and have execution therefor.'"

Upon this state of facts, the appellee, prosecuting attorney, asked and obtained judgment for a fee for two convictions, $25 each. The county appeals.

Prosecuting attorneys are allowed a fee of $25 for each conviction on indictment for any felony not capital. Mansf. Dig. sec. 3233. Burglary and grand larceny,

though cognate in the sense that they may be joined in the same indictment, the one often following so closely upon the other as to appear to be part of the same transaction, are, nevertheless, as different in their constituent elements as murder and rape. Wharton says: "There is no reason why, on a conviction on each count, such *convictions* should not, in all cases where the counts are for a chain of cognate offenses, be treated as would be convictions on separate indictments." Whart. Crim. Pl. and Pr. p. 910, sec. 910. "*Conviction* is the finding of a person guilty of an offense." Rap. & Lawrence's Law Dic. Bouvier's, Black's, Burrill's, Anderson's, give nothing which expresses it more succintly or more completely. See also 1 Bish. Crim. Law, sec. 223. It is the final consummation of every step in the procedure from the indictment to the judgment. But it is insisted that, as there "has been but *one indictment, one plea, one legal proceeding of record, one judgment*, there is but *one conviction*, although there were two accusations, and the same person was affected by the proceeding and judgment on each accusation, which accusations, proceeding and judgment were all joint." We confess, if the reasoning in Fanning case (47 Ark. 442) obtains, this case should be reversed, for they are analagous to the extent that there is but "one indictment, one plea, one legal proceeding of record and one judgment;" and that was the reason which controlled the opinion, *and not that there had been only one offense committed.* But, with the utmost deference to the court, and the learned judge who delivered the last opinion, we can but conclude that the first opinion delivered by the same judge in that case was the better one, more in accord with both the spirit and letter of our criminal jurisprudence,

and should not have been reconsidered and decided differently.*

In that case sixteen persons were indicted jointly, pleaded guilty, were fined, and a judgment rendered against *each*, but in one entry. The prosecuting attorney was allowed a fee of ten dollars in each case, and on appeal the Supreme Court first said: "There was no error in this. Sec. 3233, Mansf. Dig., allows a fee for each conviction. Each of the defendants was convicted, although all were included in the same judgment entry." The last opinion in *Fanning* v. *State* does not come properly within the doctrine of *stare decisis*. *Taliaferro* v. *Barnett*, 47 Ark. 359. No property rights have grown up under it, and we overrule it, for the reasons, 1st, that it announces an erroneous doctrine as to fees upon conviction in criminal cases, and 2nd, because it has inaugurated a method of criminal procedure which is decidedly more hurtful to follow than to overrule. We know of no vicarious principle in the criminal law as to actual offenders. Every man must answer for himself as to any act or omission for which the law has prescribed a penalty. It matters not whether alone, or in company with others, whether he be charged separately, or jointly as soon as his guilt is legally ascertained, he is a convict. The method of procedure where there is but one defendant and many offenses, or many defendants and one offense, all joined in one indictment, is adopted for considerations of convenience, and in no sense to relieve of responsibility. We think it far more in consonance with reason to say, with Judge

*NOTE.—In the case of *Fanning* v. *State*, referred to in the opinion in this case, a written opinion was handed down by Judge Smith on June 18, 1886, affirming the judgment of the lower court. Subsequently, and at the same term of court, this opinion was, on reconsideration, withdrawn, and a substituted opinion filed, reversing the judgment of the lower court. The first opinion was consequently not published, and the second is found in 47 Ark. 442. (Rep.).

Smith in the first opinion of *Fanning* v. *State*, that where there are sixteen defendants in one indictment and each convicted, there was but one judgment but *sixteen convictions*, than to say, with him in the last opinion, that there were sixteen defendants and each convicted, but only one judgment and one conviction. The best authors upon criminal law and procedure sustain the correctness of our position. Wharton says: "Where two or more persons are sentenced jointly to pay a fine, each may be fined up to the full statutory limit. That limit is not that a certain lumping sum is to be paid to the State by all the defendants together; but it is that *each* wrong-doer is to be made liable to pay such amount in full for his own *particular violation* of the law. The fact that he is joined with others in the conviction and sentence does not lessen his liability. The same rule applies to the distribution of imprisonment. *Each* defendant is to be *singly* sentenced according to his personal deserts. * * Where several persons are jointly indicted, they should be sentenced *severally*, and the imposition of a joint fine is erroneous." Wharton's Crim. Pl. & Pr. secs. 941, 314; *Straughan* v. *State*, 16 Ark. 37. Mr. Bishop says: "On a joint trial the *cases of all the defendants* are submitted to one jury. Treating them as *separate cases* although joined in the same indictment. * * The punishment, we have seen, is to be several; and the sentence is, in form several, not joint. It requires each to render the full penalty, the same as though he had done the criminal act, or had been convicted, alone. * * The jury should be directed to consider the question of each defendant's guilt by itself. And the verdict of guilty should be in a form which can be construed as several; though it will be so if it finds each guilty by name." Bishop, Cr. Pro. vol. 1, secs. 1027, 1033, 1035, 1036, 1037.

The verdict is *several*, the sentence is *several*, the *judgment several.* Then why not the conviction *several?* Wharton says it is: "In an indictment against two or more the charge is several as well as joint, and the *conviction is several.*" Wharton, Cr. Pl. & Pr. sec. 314; *State* v. *Brown*, 49 Vt. 437; *Borschenious* v. *People*, 41 Ill. 236. In the Illinois case just quoted, the statute is almost identical with ours—"for each conviction, etc." We are aware that the Missouri Court of Appeals in *Re Murphy*, 22 Mo. Ap. 476, holds to the view announced in the last opinion in *Fanning* v. *State.* Whether the reasoning in that case, or the apprehension expressed that the construction of section 2339, Mansfield's Digest, under the first decision, might lead to oppression, were the considerations moving the court to reconsider and withdraw their first opinion, we are unable to divine. But we think that the probability that one defendant might be oppressed by reason of the costs taxed up on account of other defendants in the same indictment is indeed but a probability, and a very slight one. Such a condition is most likely never to occur. When defendants are convicted, they are usually present in person, or have bondsmen to answer for them; it is not probable that the clerk will tax more costs against any defendant than by the judgment of the court he ought to pay; and if he does, the court, upon motion to retax, can arrange the costs in each case and against each defendant, as seems just and proper. The very language of the act shows that the costs are to be adjudged by the court against defendants convicted, who are all present in person, or have bondsmen who are responsible.

The court or prosecuting attorney, under Mansf. Dig. secs. 2216 and 2218, may sever the trial of persons jointly indicted for misdemeanor; but the parties themselves were not granted that privilege. The parties charged in felonies may sever at their discretion. Sec. 2217, Mansf.

Dig. Doubtless prosecuting attorneys, to lighten their own and the labor of the courts, as well as to diminish as much as possible the expenses of prosecution, joined all parties, and all offenses that could be joined, in the same indictment. But since the decision in *Fanning* v. *State* we venture to say that the procedure has very generally been reversed. In view of the very meager salary of two hundred dollars now allowed the district attorney, it is expected, of course, that he should look to the perquisites following convictions for compensation. But if he should include all parties jointly interested in felonies and misdemeanors, and all felonies which may be joined, in the same indictment, in many of the circuits, we opine, his salary would be scarcely sufficient to pay expenses around the circuit. Hence prosecuting officers are not to be censured for drawing separate indictments. It is, of course, immaterial to the prosecuting attorney, except as to the saving of labor, for by drawing separate indictments he gets the same pay as before. But the annoyance to the court and expense to the county of trying a multiplicity of suits which could all be embraced in one trial is very great, and by the view we have expressed will be obviated. We know that a mere matter of public policy cannot influence the decision of courts. But here both sound reason and public policy demand a return to the doctrine announced in the first opinion in *Fanning* v. *State*. There were two offenses in one indictment, a verdict of guilty as to both, and the judgment of sentence should have been on each count. Sec. 2317, Mansf. Dig. There was one judgment entry, but two convictions; and the prosecuting attorney was entitled to a fee on each conviction.

Affirmed.

Mansfield, J., did not participate in this case.

BATTLE, J., (concurring.) Pitt Anderson was tried for and convicted of burglary and grand larceny on an indictment in which these offenses were joined. The prosecuting attorney, who represented the State in that cause, claims fees for two convictions. The statute, using the word "felony" in the singular and not plural number, says that he shall be allowed a fee of $25 for *each conviction* for *any felony* not capital." The only question in the case is, were there two convictions?

Ordinarily, but one offense can be charged in the same indictment. The statutes prohibit it, except in certain cases. Section 1621 of Mansfield's Digest says: "For larceny committed jointly with burglary the offender shall be held to restitution, as in other cases of larceny, and the offender may be indicted for such offenses either separately or jointly in different counts of the same indictment." Other offenses, which need not be named, can be joined. Mansfield's Digest, sec. 2109. In every case there must be separate and distinct accusations in the indictment for each offense charged, and the jury in their verdict should find him guilty or not guilty of each of them.

"If the defendant," says the statute, "is convicted of two or more offenses, the punishment of each of which is confinement, the judgment shall be so rendered that the punishment in one case shall commence after the termination of it in the others." Mansf. Dig. sec. 2317. This statute evidently applies to cases where the same defendant is convicted of separate offenses on different indictments, or one indictment for separate offenses which can be joined (*Toliver* v. *State*, 35 Ark. 395), and obviously treats the finding the defendant guilty of each offense a conviction, without regard to the manner in which he is accused. If not, why should two judgments, or what is equivalent to two judgments, be rendered?

The statutes, in defining the penalties of different offenses, provide what punishment the offender shall suffer on conviction thereof. For instance, it says: "Whoever shall be *convicted* of burglary shall be imprisoned in the penitentiary for a period of not less than three nor more than seven years;" and "whoever shall be guilty of larceny, when the value of the property stolen exceeds the sum of ten dollars, upon *conviction* thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than five years." They virtually denominate the legal ascertainment of the guilt of the defendant of each separate offense a conviction.

The statute fixing the fees of prosecuting attorneys should be construed in connection with the statutes prohibiting the joinder of more than one offense in the same indictment, and the exceptions, and prescribing how judgments on convictions of the same defendant for several offenses punishable by confinement shall be rendered. In construing it in this way, it seems to me that the word "conviction," as used in the statute fixing fees, means the legal ascertainment of the guilt of the defendant of an offense, and that the prosecuting attorney in this case is entitled to two fees, as there were two convictions.

In *Fanning* v. *State*, 47 Ark. 442, sixteen persons were indicted for one and the same offense. There was but one offense, one accusation, one trial, and but one conviction (no separate convictions), and of course the prosecuting attorney was entitled to a fee for only one conviction. That case is unlike this, and I think the opinion of the court therein is correct.

I concur with the court in the conclusion it has reached in this case, but not in the premises on which it is based.

58	168
61	55
58	168
f66	502
58	168
f78	387
f79	23
79	24
f82	346

FT. SMITH OIL CO. *v.* SLOVER.

Opinion delivered November 18, 1893.

1. *Master and servant—Risks assumed.*

   It is error to charge the jury that a servant's implied assumption of risk is confined to the particular work or class of work for which he is employed, and that if the master orders him to work temporarily in another department of the general business, where he is associated with a different class of servants, he does not assume the risks incident to that service.

2. *Duty of master towards servant.*

   An employer is liable for an injury to an employee if the circumstances were such that the employer owed it as a duty to the employee to instruct him as to the dangers of his employment, and failed to do so, and he was injured in consequence of such failure.

3. *As to who is vice-principal.*

   A foreman having power to employ, control and discharge laborers in his department is a vice-principal as regards the duty to warn such laborers of latent risks in their employment.

4. *Evidence—Declarations of agent.*

   In an action against a master to recover damages for the killing of a servant in an accident, it is not admissible to prove that defendant's superintendent said that the accident would not have happened if he had been present, that he would have stopped the machinery before allowing deceased to go where he did; such declaration being a mere expression of opinion, not part of the *res gestae*, nor an admission made while in performance of any duty as agent.

5. Res gestae—*Statements of deceased.*

   Statements of deceased, made half an hour after the injury, and after he had been carried home, in response to questions by his wife, are not part of the *res gestae*.

Appeal from Sebastian Circuit Court, Fort Smith District.

C. J. FREDERICK, Special Judge.

STATEMENT BY THE COURT.

The appellees, the widow and only son of John Slover, deceased, recovered a judgment against the appellant in the sum of $2500, damages on account of the death of said Slover caused by an injury received by him through the negligence, as the complaint alleges, of Mike Burke, the superintendant of the oil department of the appellant's cotton seed oil mill and cotton compress, which were in two distinct and separate departments in the same building, the oil department being on an upper story in a room about fifty feet long, and the compress department being in another room, on the ground floor, the two being separated by a brick wall. John Edrington was the superintendent of the compress department, Mike Burke of the oil department, both under John Mathews, the general superintendent of the oil mill and cotton compress, and each having full control in his department, with authority to hire, control and discharge hands.

In Burke's department there were two cotton seed and one meal conveyers, which extended the full length of the room, and were about eleven feet from the floor, thirteen inches from the joists, which were at right angles to them, and twenty-five inches from the ceiling or floor overhead. These joists were two feet and six inches apart. The meal conveyer was between the two seed conveyers, the top of it being on a level with the bottom of the seed conveyers. The left-hand seed conveyer was about twenty inches, and the right-hand seed conveyer about three feet and nine inches from the meal conveyer. They all were parallel, the full length of the room. These seed conveyers were metal screws nine inches in diameter, inclosed in oblong boxes about one foot across but open on the top side next the joists. Under each of these seed conveyers ran a row of four

cotton gins, the tops of the hoppers of which were connected with the seed conveyers. Over the top of the hopper of each of these gins played a board, a foot long, six or seven inches wide, three-fourths of an inch thick, with a square hole used to cut off and let on a supply of cotton seed for the gin. On the occasion of the injury a long ladder had been leaned against the top of the left hand first gin next to the entrance to the room. This ladder not quite but nearly reached the board that played over the top of the hopper.

About 12 o'clock M. on the day of the injury, the meal conveyer had choked with meal and ceased to run, and several employees were upon it, engaged in unchoking it. Burke, the superintendent and engineer of the oil department, and in charge of the machinery and business generally in that department, went from the oil department downstairs into the compress department, where Slover was employed, and whose duty it was to operate a lever that moved a hydraulic press. His duties were in this department alone. Finding Slover idle, Burke requested him to go up into the compress department and assist in unchoking the meal conveyer, giving him no directions and leaving him to do what he chose and as he chose to do it. When they went up to the oil department, Burke in front, Burke passed to the rear of the room, and through a window, on to a trapeze on the outside of the wall, to assist in unchoking the meal conveyer. He had been there but a very short time when Slover was heard to cry out, and it was discovered that his left leg was caught by the screw in the left hand seed conveyer, his right leg hanging down by its side, between it and the meal conveyer. The seed conveyers were running, but made scarcely any noise and were empty, carrying no seed. How Slover got up where he was, was matter of conjecture only. As soon as it could be done, after he was discovered caught in

the seed conveyer, the boxing of the conveyer was sawed, his leg extricated, and he was placed in a stretcher and borne by men down stairs and a block away to his home, which he reached twenty-five or thirty minutes after the accident.

The room in which he was injured had five large windows, and the day he was injured was a bright one.

Slover had assisted in building the oil mill, and, about three years and four months before the injury, was assistant engineer in the oil department, whose duty it was to oil the cotton seed conveyers by putting oil in the journals. Then there was no meal conveyer in the room, but the summer before the injury the meal conveyer and two lines of shafting had been placed in the room, which was the only change since Slover had worked there as assistant engineer.

Slover was 37 years old, a stout healthy man, and weighed about 205 pounds, was five feet and some inches in height.

Evidence tended to show that there was no regular way of approach to the meal conveyer. Some of the employees climbed up by a ladder, and some pulled up by main strength from the top of a cotton gin; there were two or three ladders in the room. It was an unusual thing, which had scarcely ever occurred, for any one to undertake to reach the meal conveyer by climbing on the seed conveyer, and it was unneccessary to do so; the seed conveyer could be easily stopped by throwing a band, by means of which in part they were operated.

Burke denied that he ordered Slover to do the temporary work outside of his employment, but said that he requested him to assist; denied that Mathews, the general superintendent, had given him authority to use and control Slover, but said he had told him he might use him if he needed him.

The appellant contends that Burke was a fellow-servant with Slover, denies negligence, and charges Slover with contributory negligence. The appellees contend that Burke, in ordering Slover from his usual employment, to do a temporary work outside of it which was attended with danger, was guilty of negligence in not instructing Slover, and in not stopping the machinery while the work was being done.

Clendening, *Read & Youmans* and *H. C. Mechem* for appellant.

1. The evidence is not sufficient to support the verdict.

2. It was error to admit Mrs. Slover's testimony of what Capt. John Mathews told her, after the accident. It was no part of the *res gestae*, and was inadmissible as an admission of an agent of defendant. Mech. Ag. sec. 714, and cases cited; 46 Ark. 207; 52 N. W. Rep. 304; 54 *id.* 1000.

3. The evidence of Mrs. Slover as to the statement of intestate should have been excluded. It was not part of the *res gestae*. 48 Ark. 339; 9 Cush. 36; 58 Mich. 156; 95 N. Y. 274; 103 *id.* 626; 12 Or. 392; 83 Ga. 257; 80 Ind. 182; 28 A. & E. R. Cases, 467; 97 Mo. 165; 9 So. Rep. 577; 25 Pac. 876; 128 Ill. 545.

4. The case was tried, and the plaintiffs requested charges, upon the theory (1) that defendant was guilty of neglect in the performance of the ordinary master's duties, and (2) that Slover had been ordered out of his usual duty, and defendant was responsible for injury from whatever cause (except his own negligence) while he was performing that unusual duty. Our contention was that the jury should have been instructed as to the relative duties of master and servant, so that if they found that Slover was *ordered* into a new position, they would know what were the ordinary duties of master

and servant, for the neglect of which the action could be maintained.

5. Burke and Slover were fellow-servants. 39 Ark. 17; Wood, M. & S. ch. 16; Wharton, sec. 205; 2 Thompson on Car. ch. 20; 81 N. Y. 516; 6 Cush. 75; 112 N. Y. 614; 7 A. & E. Enc. Law, p. 839 and note 1, and 842, note 1; 2 Thomp. Neg. p. 1026; Cooley, Torts, p. 541; 3 Wood, Ry. Law, sec. 338; 25 Am. & Eng. R. Cases, 513, note; 1 N. Dak. 336; 26 Am. St. Rep. 621; 44 Ark. 524; 54 *id.* 279.

6. The second instruction for plaintiffs was error, because, (1) there was no evidence to prove that Slover was *ordered* to the lint room by Burke. But if he was, (2) there was no competent evidence that Burke had any such authority from defendant. If he had no such authority, Slover, in complying, became an ordinary servant, with no greater rights than any other employee there. (3) It does not state the law correctly. 71 Wis. 114; 79 Me. 398; 24 Fed. Rep. 906; 61 Mo. 526; 139 Mass. 580. (4) It assumed that the jury knew, or would know before the court finished instructing them, what the risks were which a servant assumed; what the doctrine of assumed risks was. And the court refused defendant's instructions defining such risks and duties. See Wood, M. & S. p. 694.

J. B. Turner and *Winchester & Bryant* for appellees.

1. Burke and Slover were not fellow-servants. Burke's right to employ and discharge hands at will, with personal oversight and supervision of such hands when employed, with full discretionary control of his department, made him a vice-principal as to Slover while employing hands, giving orders, or directing their execution. 16 Am. St. 372; 9 *id.* 479; 13 *id.*

243; 24 *id.* 722. Wood, M. & S. secs. 445-6-8; 54 Ark. 302; 18 Fed. Rep. 866; 108 Ill. 228.

2. By ordering Slover on dangerous service, not usual to the rest of his ordinary employment, he became vice-principal as to that service, and was guilty of an abuse of authority for which defendant is liable. Wood, M. & S. p. 899-900; Cooley, Torts (2d. ed.), p. 66; 37 Mich. 204; 17 Wall. 553; 11 Am. Law Reg. p. 101; 52 Ill. 410; 11 R. I. 153; 28 Ind. 28; 3 Am. St. Rep. 92.

3. If we regard Slover as though he were a mere stranger, and as going to Burke's assistance at his request when he was in the discharge of that service, he and Burke were not fellow-servants. Beach, Cont. Neg. (2d ed.) p. 438-9; 2 Thomps. Neg. p. 1045; 4 Exch. 254; 6 *id.* 123; Wood, M. & S. sec. 339-340; 10 Q. B. 198; 16 C. B. (N. S.) 398; 54 Am. Rep. 803; 57 *id.* 606; 54 Ark. 302.

4. The evidence of Mrs. Slover as to admissions by Mathews was introduced solely to contradict him, and was admissible.

5. The statements of the intestate were part of the *res gestae.* Wharton on Ev. secs. 258, 267; 48 Ark. 338; 43 *id.* 102; Anderson's Dic. Law, p. 888; Whart. Ev. sec. 258; Greenl. Ev. sec. 108; Woods Pr. Ev. (1886) p. 424, 453; 20 Ark. 225.

HUGHES, J. Twenty-eight instructions were given in this case, an equal number for the plaintiff and the defendant. Sixteen asked by the defendant were refused. There was no evidence upon which to base the fourth instruction, as modified and given by the court, for the plaintiff below. The sixteenth given for the plaintiff, to the effect that the burden of proving negligence on the part of the defendant was on the plaintiffs, and of proving contributory negligence on the part of the deceased was upon the defendant, accords with the rules settled by the former decisions of this court.

1. Risks assumed by servant.

Some of the other instructions are abstract, some not explicit, some obscure, and others are based upon the same theory as that embodied in the second given for the plaintiff, which is the only one we feel called upon to notice at length in this opinion, and which we find is, in our opinion, erroneous. It is as follows: "The servant's implied assumption of risk is confined to the particular work or class of work for which he is employed. There is no implied undertaking of risks, except such as accompany, and are part of, the contract of hiring between the parties. If the servant, by the express or implied authority of the master, is carried beyond the contract of hiring, he is carried away from his implied undertaking as to risks. If the master orders him to work temporarily in another department of the general business, where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, assume the risks incident to that service, or assume the risk of the negligence of such class of employees, but would be entitled to recover, if injured by reason of the negligence of such class of employees; provided he himself was not guilty of contributory negligence."

While an employer is not an insurer of the lives or persons of his employees, he does impliedly engage that he will not expose them to unnecessary and unreasonable risks to life or serious bodily injury.

Negligence is defined to be "the omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do, under all the circumstances surrounding and characterizing the particular case."

In the case at bar it was proper, in determining the question of negligence, that the jury should consider the age, intelligence and extent of judgment of the deceased, and the character of the service demanded of him, whether the dangers of the service were apparent or not, and whether they were such as a man of such judgment, experience and intelligence as he possessed was capable of understanding and appreciating.

In the *Union Pacific Railway Co.* v. *Fort*, 17 Wallace, 558, where a youth of inexperience was ordered to do a temporary work outside of his usual employment, and was injured in attempting to obey the order, the court said: "If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he must have known that its execution was attended with danger. Or at any rate, if he chose to obey, that he took upon himself the risk incident to the same." Before an employer can be held liable for an injury to an employee, while in his employ, the evidence must show in every case that the employer has neglected some duty which he owes to the employee; and the mere fact that the employee was requested by the employer to do a temporay work outside of his ordinary employment is not a violation of a duty which he owes to his employee. If an employee, in obedience to the order of his employer, undertake to do work outside of his usual employment, without objection upon his part, and there is danger incident to performance of the work which is not apparent, or which the employee could not reasonably be expected, from lack of knowledge and experience, to understand and appreciate, and the employee's inexperience and lack of knowledge is known, or ought to be known, to the employer, then it is the duty of the employer to instruct the employee how to proceed

in the performance of the work and caution him as to the dangers incident thereto, and if the employer fail or neglect to so instruct his employee, and warn him of the danger, and the employee is injured by reason of such negligence of the employer, the employer is liable in damages for the injury thus occasioned. An employee assumes all ordinary risks within the scope of his employment, whether ordinary employment, or special employment.

If Slover, the deceased, was requested by Burke to assist in unchoking the meal conveyer, and voluntarily undertook to do so, he assumed all the risks ordinarily incident to such service. *Cole* v. *Chicago, etc. R. Co.* 71 Wis. 114; *Lothrop* v. *Fitchburg Railroad*, 150 Mass. 423; 2 Thompson on Negligence, p. 976, sec. 7.

When he undertook to perform the service, he stood in the same relation to the appellant he would have borne had he been specially employed to do the work. *Cole* v. *Chicago, etc. R. Co.* 71 Wis. 114; *Lothrop* v. *Fitchburg Railroad*, 150 Mass. 423; 2 Thompson on Negligence, p. 976, section 7.

2. Duty of master toward servant.

If he was inexperienced and ignorant of the approaches to the meal conveyer, and the apparent approaches to the same were such as were likely to lead Slover, on account of his inexperience and ignorance, to undertake to ascend to the meal conveyer in the way he did, and the danger of ascending to it in the way he did was unknown and not apparent to him on account of such ignorance and inexperience, and Burke knew or ought to have known these facts, it was his duty to have informed Slover how to reach the meal conveyer, and to have instructed him and cautioned him sufficiently to have enabled him to comprehend the dangers, and to ascend to the meal conveyer safely by the exercise of proper care. If the circumstances were such that the appellant owed it as a duty to Slover to instruct him, and

it failed to do so, and Slover was injured on account of its failure to do so, the appellant was liable in damages for the injury. But if the conditions which imposed upon the appellant the duty to instruct did not exist, there was no negligence in the failure to do so.. *Cole* v. *Chicago, etc. R. Co.* 71 Wis. 114; *Lothrop* v. *Fitchburg Railroad*, 150 Mass. 423; 2 Thompson on Negligence, p. 976, section 7.

In *Lothrop* v. *Fitchburg Rd.* 150 Mass. 423, it is said: "The general rule of law is, that when the danger is obvious, and is of such a nature that it can be appreciated and understood by the servant as well as by the master, or by any one else, and where the servant has as good an opportunity as the master or as any one else of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable care, the servant cannot recover, against the master, in consequence of the condition of things, which constituted the danger. If the servant is injured, it is from his want of care."

In *Emma Cotton Seed Oil Co.* v. *Hale*, 56 Ark. 237, it is said: "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. * * 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. If, however, the servant, by reason of his youth and inexperience, is not aware of or does not appreciate the danger of the work he is employed to do, or the place he is employed to occupy, he does not assume the risks of his employment until the master apprises him of the danger."

If Burke had the power to employ and discharge laborers in his department, and he was the foreman in his department, the duty of the master to instruct, if he owed that duty to Slover, devolved on Burke.

3. As to who is vice-principal.

The admission of the testimony of Mrs. Slover, that Capt. Mathews, the general superintendent of the company, told her that "the accident never would have happened if he had been there, that he would have stopped the machinery before he would have let him go up there," was erroneous. It was not a part of the *res gestae*. It did not tend to throw light upon or explain the accident, and did not emanate from it, and was remote from it in point of time. If this evidence was admissible to contradict Mathews, it was immaterial, because Mathews' statement was but an expression of an opinion, and if it had been desired to get his opinion as an expert, he should have been called as a witness by the appellees. It could not be used as an admission by Mathews as agent to bind the company, for it was not made by him while he was in the prosecution of the business of his agency, or while in the performance of any duty as agent. The statement of Mathews did not explain any act of agency, and accompanied no such act. *Fargason* v. *Edrington*, 49 Ark. 207; *Erie etc. Ry. Co.* v. *Smith*, 125 Pa. St. 259; Mechem on Agency, sec. 714.

4. When agent's declaration inadmissible.

The statements of the deceased to Mrs. Slover were made about twenty-five or thirty minutes after the injury, and after he had been extricated from the seed conveyer in which his leg was caught, and had been borne a block away, and were made in response to questions asked him by Mrs. Slover. In *Carr* v. *State*, 43 Ark. 104, it is said, in reference to statements which are part of the *res gestae*: "Nor need any such declarations be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let down from the moment of the event they illustrate.

5. Statements held not a part of *res gestae*.

But they must stand in immediate causal relation to the act, and become part, either of the action immediately preceding it, or of action which it immediately precedes." It is sometimes difficult to determine when declarations should be considered as part of the *res gestae*. Here the declarations were made twenty-five or thirty minutes after the accident had happened, and after Slover had been extricated from the seed conveyer, placed upon a stretcher, and borne a block away, and the whole transaction had terminated.

Mr. Wharton, in his work on Evidence, pp. 258 and 267, says: "The *res gestae* may be defined as those circumstances, which are the undesigned incidents of particular litigated acts, and are admissible when illustrative of such acts. These incidents may be separated from the act by lapse of time more or less appreciable. Their sole distinguishing feature is that they should be necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or eminations from, such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act, a relation not broken by individual wariness seeking to manufacture evidence for itself. Therefore, declarations which are the immediate accompaniments of an act are admissible as part of the *res gestae*; remembering that immediateness is tested by closeness, not of time, but by causal relation as just explained." This is quoted with approval in *Little Rock, etc. R. Co.* v. *Leveretl*, 48 Ark. 338, and is, we think, an accurate statement of the rule.

It appears to the court that these statements of the deceased made to his wife have no causal relation to the act they are supposed to have been intended to illustrate; that they were not so connected with the principal fact, or such immediate emanations from it, or such immediate

accompaniments of it, as to constitute parts of the *res gestae;* and that it was error to admit them.

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

---

58 181
81 463
182 420

TOWNSLY-MYRICK DRY GOODS CO. *v.* FULLER.

Opinion delivered November 25, 1893.

Sheriff—Justification under process.

Where a sheriff attempts to justify a seizure of goods in the hands of a mortgagee under execution against the mortgagor by proving that the mortgage is fraudulent, the mortgagee may prove that the judgment, which was rendered in a justice's court, while regular on its face, was void for want of jurisdiction of the mortgagor.

Appeal from Scott Circuit Court.

EDGAR E. BRYANT, Judge.

Sandels & Hill for appellant.

1. The parol testimony was admissible and proper to show that the justice's judgment was void. 46 Ark. 153; 43 *id.* 232; 52 *id.* 373; 22 Pac. Rep. 505.

2. The rule is that an officer is protected by process in his hands, if regular on its face, when he confines himself to a levy on property in possession of the defendant in execution. Where he levies on property in possession of third persons, he is not protected by a *prima facie* valid judgment and execution; it must be in fact valid and legal. Freeman, Ex. sec. 101; 19 Mo. App. 587; 6 Hill (N. Y.), 311; 2 Pick. 411; 5 Hill, 194; 7 Ill. App. 635; 4 N. W. Rep. 334; Drake on Att. sec. 185*a*, and notes; 8 Ark. 406.

3. A response to a motion for a new trial is not allowable under the code system, as a plea *puis darrein*

continuance. 33 Ark. 801; 2 Herman on Est. 1425; 12 N. W. Rep. 858. See 7 Ark. 502.

4. The proceeds of an illegal sale go in mitigation of damages, and not in bar thereof. See 29 Ark. 448; 45 *id.* 112; 55 *id.* 329; 3 Dana (Ky.), 494; 12 Conn. 473; 20 Conn. 206; 26 *id.* 484; 7 Ohio St. 299; 47 Pa. St. 118; 14 Pick. 356; 40 Wis. 612; 45 N. H. 339; 28 Ill. 135; 3 Suth. Dam. 482; 16 Wend. 608.

Daniel Hon for appellee.

1. The execution was regular on its face, and was a protection to the officer in levying on any property of the *defendant.* Freeman, Ex. sec. 102. The jury found that the property was Wilson's. See Herman on Ex. 215, 218.

2. Appellee was entitled to plead as a defense to the motion for a new trial the facts stated. Mansf. Dig. sec. 5033; Myers, Ky. Code, 378 and cases cited.

3. Where a party elects to sue for the proceeds of an illegal sale, and especially where he receives and receipts for them, he waives the trespass. See 125 Ind. 381; 113 N. Y. 450; 22 Oh. L. J. 338; 8 L. R. A. 216; 52 Ark. 458; 93 Mo. 331; 17 Barn & Cr. 310; 149 Mass. 141; 1 W. & S. 108; 63 Mo. 19, 22.

4. The judgment is right on the whole case.

Jos. M. Hill for appellant on motion for rehearing.

5 Wend. 170 (S. C. 21 Am. Dec. 181) holds that a ministerial officer may justify under process, whether of a superior or inferior court, of general or limited jurisdiction, where the process is fair on its face, and contains no notice of a want of jurisdiction of the person. But it does not hold that an officer is protected by such process when he levies on property not in possession of the defendant in execution. Nor does any case cited in notes to 21 Am. Dec. *supra* hold that the officer is protected by fair process when he exceeds the

authority of that process, and levies on property in possession of some one other than that named therein; but, on the contrary, on p. 208, the exception is expressly recognized, and numerous cases cited. See also 41 Ark. 285; 15 Ark. 283; 8 *id.* 406; Freeman, Ex. sec. 102.

BATTLE, J. This was an action instituted by the Townsly-Myrick Dry Goods Company against L. P. Fuller to recover damages. The claim was based on the following facts: On the 16th of March, 1891, D. A. Wilson, a merchant doing business at the town of Olio, in this State, being indebted to plaintiff, executed to it his promissory note for $2000, and at the same time executed, acknowledged and delivered a mortgage, whereby he conveyed to plaintiff certain goods, wares and merchandise to secure the payment of the note, and stated therein the conditions on which the mortgagee might thereafter take possession of them and sell the same for the purpose of paying the note. The mortgage was duly recorded. On the 15th of May, 1891, Wilson having committed a breach of the conditions, plaintiff took possession of the mortgaged property. On the 9th of May, 1891, Israel Brothers, a justice of the peace, issued an execution on a judgment which purported to be confessed before him, in his judicial capacity, by Wilson in favor of Barton Bros. for the sum of $90; and delivered the same to the defendant, who was then sheriff, and he executed the same in his official capacity, on the 30th of May, 1891, by forcibly taking from the possession of the plaintiff a part of the mortgaged property and selling the same at public outcry.

The facts which we have stated were proved at the trial. To justify his action the defendant introduced in evidence the judgment and execution under which he acted, both of which were subsequent to the mortgage; and attempted to show that the mortgage was executed by Wilson to defraud his creditors. To show that the

seizure of the property was wrongful, the plaintiff offered to prove that the judgment was void by the following testimony of Wilson: "Daniel Hon and Israel Brothers came to my store-house on the 29th of April, 1891, and Hon and I went into the store and had a talk about a claim for $90 that he had for collection against me in favor of Barton Bros. I told him I could not pay it, but it was a just debt. He said something about saving costs to me, and I said I wanted to save all I could. He said he had been to see Brothers that morning and Brothers had come to Olio with him to get his mail. Hon then went to the door, and called Brothers in. When he came in, Hon had some papers in his hand, and read over the amount of the Barton Bros. account, and asked me if it was all right. I said it was, and a just claim. I do not remember of Brothers saying anything about it at the time. We were standing by, or leaning on, the counter in the storehouse. Five or six people were around there, but none noticing our conversation. Any of them could have been reached by raising the voice. No court was cried, no officer in attendance—nothing was said about a court. I did not know I was confessing judgment, and did not know a court was in session. I did not offer to confess judgment, and did not know one was rendered till the 9th of May, when execution was issued. Don't know whether I would have confessed judgment had I known Mr. Hon desired it or not. Hon called for pen and ink, and I got it, and went to another part of the store to wait on a customer, and nothing more was said on the subject. No summons was ever served on me in the case referred to, and I never confessed judgment in the case, unless the facts above stated constituted the same." And the court refused to allow it to introduce the testimony, and plaintiff excepted. Other testimony to the same effect was offered by the plaintiff, and excluded by the court.

The jury returned a verdict, and the court rendered judgment thereon, in favor of the defendant; and plaintiff moved for a new trial, on the ground, among others, that the court erred in excluding testimony as before stated. To this motion the defendant filed a response, setting up the facts which were not shown in the trial, such as he claimed would estop the plaintiff from prosecuting his action. The court sustained the response, and denied the motion; and plaintiff appealed.

"Appellant's motion for a new trial does not set up any of the grounds mentioned in the 2nd, 3rd, and 7th subdivisions of section 5151 of Mansfield's Digest, and therefore no issue of fact could be made upon it." The response thereto should have been wholly disregarded, or, on motion, should have been stricken from the files of the court.

The exclusion of the testimony offered by appellant presents the only question necessary for us to consider. The underlying principle which controls its admissibility is clearly and forcibly stated by Chief Justice Dixon in *Bogert* v. *Phelps*, 14 Wis. 89–92, in nearly this language: "In case of an action against the officer by the party against whom process issued, the process itself, being valid on its face, constitutes a complete justification. But in case of suit by another person claiming title to the property seized, under the party against whom process issued, which title is contested on the ground of fraud, the officer must, in addition to showing that he acted under such process, show also that he acted for or on behalf of a creditor. Where he acts under process of execution, this is done by producing the judgment on which it is issued. If it be mesne process, then the debt must be proved by other competent evidence. This proof, however, is required, not because it affects the process, or is in that respect necessary to protect the officer, but because it affects the title to the property in

question. No one but a creditor can question the title of the fraudulent vendee; and hence the officer must show that the relation of debtor and creditor exists between the party against whom the attachment or execution ran and the person in whose behalf it was issued. It is a necessary link in the chain of evidence by which the fraud is to be established." *Bean* v. *Loftus*, 48 Wis. 371; *Damon* v. *Bryant*, 2 Pick. 411; *Ames* v. *Sturtevant*, 2 Allen, 583; *Suydam* v. *Keys*, 13 Johns. 445; *Earl* v. *Camp*, 16 Wend. 562; *Hines* v. *Chambers*, 29 Minn. 7; *Cross* v. *Phelps*, 16 Barb. 502; *Horton* v. *Hendershot*, 1 Hill, 118; *Maley* v. *Barrett*, 2 Sneed, 501; *Dunlap* v. *Hunting*, 2 Denio, 643; S. C. 43 Am. Dec. 763; *Sheldon* v. *Van Buskirk*, 2 N. Y. 473; *Sexey* v. *Adkinson*, 34 Cal. 346; S. C. 91 Am. Dec. 698 and note; Cooley on Torts, sec. 463; 1 Freeman on Executions (2d ed.), sec. 101.

In this case, the appellee, in his official capacity, levied upon the mortgaged property by virtue of an execution in favor of Barton Bros. and against Wilson, who he claimed was the owner of the property. He attacked the mortgage to appellant as fraudulent and void. As it was valid between the parties to the same, and, if fraudulent, was only void, under the statute of frauds, as to creditors and purchasers, it was necessary for him to prove that the execution, under which he acted, was issued on a *valid* judgment, in order to show that he had the right to attack the title of appellant by seizing the mortgaged property; for in that way only could he show that he was representing a creditor. A void judgment is not sufficient for that purpose. See cases above cited.

Says Mr. Freeman: "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally

worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. The first and most material inquiry in relation to a judgment or decree, then, is in reference to its validity. For if it be null, no action upon the part of the plaintiff, no action upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in the legislature or other department of the government, can invest it with any of the elements of power or vitality. It does not terminate or discontinue the action in which it is entered, nor merge the cause of action; and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which the void judgment was entered or in some other action." 1 Freeman on Judgments (4th ed.), sec. 117.

In all adversary suits "in which a defendant does not voluntarily appear, service of process upon him in some mode authorized by law is indispensable, and if it appears, even in a collateral proceeding, that any judgment has been rendered against one who has neither voluntarily appeared nor been served with process, it must be treated as void." *Boyd* v. *Roane*, 49 Ark. 397, 411; 1 Freeman on Judgments, sec. 120*a*.

A domestic judgment of a court of general jurisdiction, whether the record shows jurisdiction affirmatively or is silent upon the subject, is not subject to collateral attack based upon extrinsic evidence showing want of jurisdiction. It is said "that the question of the jurisdiction of a court of record over the parties to any domestic judgment must in all collateral proceedings be determined by the record; and that the answer to this question is not, except in some direct proceedings

instituted against the judgment, to be sought from any extraneous proof." *Boyd* v. *Roane*, 49 Ark. 397; 1 Freeman on Judgments, secs. 131–134. But this is not true as to the judgments of justices of the peace. They keep no unimpeachable memorial of their transactions. "Any statement in relation to jurisdiction found in their minutes is only *prima facie* evidence; in opposition to which it may be shown, by any satisfactory means of proof, that the authority of the court did not extend over the matter in controversy, nor over the parties to the action." *Jones* v. *Terry*, 43 Ark. 230; *Smith* v. *Finley*, 52 Ark. 373; 2 Freeman on Judgments, sec. 517.

In *Jones* v. *Terry*, 43 Ark. 230, the plaintiff sued upon a judgment recovered by him upon a promissory note before a justice of the peace. The defendant answered and denied that the justice had ever acquired jurisdiction over his person. Upon demurrer to the answer this court said: "The defendant was not sued for the original debt. That was merged in the judgment, if there has been a valid one. And all matters which might have been litigated before the justice, save only the question of jurisdiction, are concluded by that judgment. * * * But it may be shown by extrinsic evidence, in the face of a recital in the judgment that the defendant was served with process or appeared to the action, that in fact he had no notice and that the judgment is therefore void for want of jurisdiction."

Smith v. *Finley*, 52 Ark. 373, was an action to recover the possession of a town-lot. The plaintiff claimed title by virtue of a purchase made by him at a sale under a deed of trust executed by the defendant to secure a debt, and a subsequent conveyance made in pursuance of the terms of the purchase. The defendant pleaded that the deed of trust was void for usury. The original transaction was shown by the evidence to be usurious. A judgment by confession rendered by a jus-

tice of the peace against the defendant for a debt secured by the deed of trust was introduced in evidence. The justice, who rendered the judgment, testified that he went with the plaintiff, who recovered the judgment, to the defendant's house, and she then, at the date of the judgment, and with the plaintiff's consent, confessed the judgment. On cross-examination, he stated that he went with the plaintiff to defendant's home, and she stated that she owed the note; but that she did not come to his office to confess judgment, and he did not see her in his office. The defendant testified that the justice merely asked her if she owed the note, and she answered "Yes;" that she did not understand that she was confessing judgment, and did not do so. The plaintiff in the action to recover the town-lot insisted that she was estopped by the judgment from setting up usury. This court held that the parol testimony was admissible to show want of jurisdiction, and was conclusive of that fact, and that the judgment of the justice was, therefore, void.

In this case the appellee, in his official capacity of sheriff, seized property which was held in possession and claimed by appellant under a mortgage. Appellant denied his right to do so. Appellee responded by saying that he seized it by virtue of an execution against the mortgagor, and that the mortgage was fraudulent and void. Appellant replied that if it was fraudulent, it was valid against every one except creditors and purchasers, and that appellee did not represent either of them. Upon this they joined issue. Appellee introduced the execution and judgment of the justice of the peace upon which it was issued, both of which were subsequent to the mortgage, as an evidence of his right to attack it for fraud, in the right of a creditor. Appellant offered to prove that the judgment, although regular upon its face, was invalid—void—for want of jurisdiction of the defendant against whom it was rendered, and,

therefore, did not prove the existence of any debt or right to seize the property, and the court refused to allow him to do so. The evidence was competent, and should have been admitted.

The judgment of the circuit court is, therefore, reversed, and the cause is remanded for a new trial.

Wood, J., did not participate in the decision of this cause.

Bunn, C. J., dissenting. This cause was heard and affirmed near the close of the last (November) term of this court, and comes up now on a motion for a new hearing, and the former judgment of affirmance is set aside by the majority of the court, (Justice Wood not participating), from which latter judgment, and the opinion upon which it is founded, I dissent for the reasons following:

Wilson was a merchant at Olio, a town in Scott county, and became indebted to the plaintiff and appellant to a certain amount as claimed, and, desiring to secure it, on March 16, 1891, executed and delivered to it a mortgage with power of sale, conveying to it his storehouse and stock of goods, which included the shoes in controversy. Said indebtedness was evidenced by three notes of $2000 each, aggregating $6000, but which, it is suggested, were mere cumulative amounts, the real indebtedness being $2000 only, as shown by the mortgage in controversy. Under the provisions of this mortgage, or deed of trust, appellant, through its attorney and agents, took possession of said stock of goods and storehouse (except the front room thereof); and the rear room, containing said goods, was placed in charge of their local agent, Tate, on the 16th May, 1891. The mortgage was recorded on the 16th May, 1891. The default on the part of Wilson, as mortgagor, which justified the taking

possession of the property by appellant, as mortgagee, seems to have been a failure of Wilson to make monthly statements of affairs to it, as stipulated; Wilson himself being named as the agent of mortgagees and put in possession at first.

Wilson was also indebted to Barton Bros. in the sum of ninety dollars, and the agent of the latter instituted proceedings before Israel Brothers, a justice of the peace of the place, to put their claim into judgment, on the 29th April, 1891, filing complaint and causing summons to issue, but at this point the attorney and agent of Barton Bros. and the justice of the peace went over to the store of Wilson, and there, it seems, had a conversation with him about the indebtedness, which he said was just, and they expressed themselves as wishing to save Wilson unnecessary costs and expense, while he expressed a desire to the same effect. At this point the testimony of the justice of the peace and the attorney on the one hand, and Wilson on the other, differ, the one claiming that Wilson confessed judgment and the other that he did not—a controversy over which we have little to do in this proceeding, as the whole of it is detailed in a motion to have the same read in evidence for the purpose of impeaching the judgment by confession therein rendered on the same day, and which motion being overruled presents the sole question of importance in this case as will be seen as we proceed.

On the 30th May, 1891, an execution was issued upon the confessed judgment, and placed in the hands of one of the deputies of appellee, and on the same day levied on the shoes in controversy, by forcibly breaking into the rear room of Wilson's said store-house, where they were as aforesaid, and taking them therefrom, and in due time selling them at execution sale; said rear room having been securely barred by the said agent of

appellant when he was put in charge thereof on the 16th May aforesaid.

The appellant sued the appellee sheriff as a trespasser in taking said goods from its possession as the property of Wilson, to satisfy the judgment by confession in favor of Barton Bros., and laid its damages at three hundred and fifty dollars, and defendants put the mortgage of plaintiff in issue as being in fraud of the other creditors of Wilson. Judgment for defendant in circuit court, and plaintiff appealed; verdict of jury, in effect, that mortgage was fraudulent.

The sole question in the case, of any importance, is, did the circuit court err in excluding the testimony offered by plaintiff to impeach the judgment by confession in favor of Barton Bros. by matters *dehors* the record or minutes of the same? In other words, and to put it so it will perhaps be better understood: Under such circumstances, in order to place himself in an attitude to attack the plaintiff's mortgage, was the sheriff required to do more than exhibit the judgment in due form, upon which his process, also in form, was issued; or is he required, on issue made to that effect, to establish all the antecedent facts going to make the judgment valid? It is plainly to be seen that the question is one of title only, and not one of relative strength of claim, for the sheriff, should he fail to show his adversary's title invalid, must lose, whatever may be the character of the judgment under and by virtue of which he has proceeded. To put it more concisely, and as the books have it, the sheriff, as defendant in such a case, has only to show that he represents a creditor of the common debtor. The position then of the sheriff is, that his judgment, admittedly good on its face (which means that it contains all jurisdictional and other essential recitals), is the evidence of the fact that the relation of creditor and debtor in fact exists between Barton Bros. on the one

side and Wilson on the other. The position of the appellant is that the judgment is not *the* evidence, the conclusive evidence, of that fact in a proceeding like this. The majority of the court sustain the contention of appellant, and I, that of appellee, and in support of the position here assumed the following authorities are cited: *Sheldon* v. *Van Buskirk*, 2 Comstock (N.Y.), 473; *Bogert* v. *Phelps*, 14 Wis. 88; *Damon* v. *Bryant*, 2 Pick. 411; *Parker* v. *Walrod*, 16 Wend. 514; *Quincy* v. *Hall*, 1 Pick. 357; *Barr* v. *Boyles*, 96 Pa. St. 31.

To illustrate the extreme nicety of the point at issue, the foregoing authorities, and doubtless others, are or may be referred to as sustaining the other view. It will be seen on close inspection, however, that, in some of the decisions referred to in the opinion of the majority of the court, it is said that the sheriff must show a valid judgment. That introduces another inquiry—what is a valid judgment, as used in this connection? The court would hold that it is such a judgment as will hold good against all the assaults that may be made upon it by extraneous testimony, while it is maintained in this opinion that it can have no other meaning than that it is a judgment good on its face. The transcript of such a judgment is presented as documentary evidence of the defendant's standing in court—nothing more, nothing less. The court inspects it, and finds it *prima facie* evidence of the fact, and therefore admits it. The plaintiff proposes to attack the title *dehors* the record, but the plaintiff's title is called in question also. Will they be permitted to win on the weakness of their adversary's title, rather than by the strength of their own? Besides, let it be supposed that the invalidity of the judgment, after judicial inquiry permitted, is established. Does that destroy the relation of judgment-creditor and judgment-debtor existing between the parties to the judgment. They are no parties to this

proceeding, and are not to be affected by it in any manner. By such a course, the sheriff is denied the right to show by his judgment that he represents a creditor—in fact, it will be thus shown that no judgment-creditor really exists, and thus the holder of a mortgage, although almost confessed and shown to be fraudulent as to the other creditors of the common debtor, is allowed to win his case, and make way with the property which is the bone of contention. In the meantime an anomalous state of affairs is presented (for instance in this case) of Barton Bros., although adjudged to be no judgment-creditors of Wilson, still pursuing Wilson with the executions on their void judgment, as it is denominated by this court. Nor is it clear that Wilson himself can find any remedy for the evil which is still pursuing him. Thus in *Gerrish* v. *Seaton*, 73 Iowa, 15, which was a case wherein the defendant was endeavoring to get rid of a judgment rendered against him without notice, while quoting approvingly from the case of *Gerrish* v. *Hunt*, 66 Iowa, 682, the court say: "We there said that 'a judgment rendered without service of notice or other process required by law is void for want of jurisdiction in the court rendering it.' This familiar rule of law need not be supported by a citation of authorities. Such a judgment will be set aside and process enjoined thereon by chancery. *But this relief will not be granted if the party holding such void judgment has a valid claim whereon it was rendered, to which there is no defense.*" Is not the claim of Barton Bros. against Wilson confessedly a valid one? Is there any defense to it? The defendant himself swears that it is just. If the defendant himself cannot get rid of the judgment by direct proceeding, how can another do so in a mere collateral proceeding? After all is done, after the judgment has been impeached in the collateral proceeding, after the sheriff has been deprived of his weapon of offense,

his sword as it were, after he has been held to represent no creditor, that creditor in fact is still a creditor, and Wilson still his debtor.

We are reminded, at this stage of the argument, that the judgment of the justice of the peace, because there was no jurisdiction of the person of Wilson, is utterly null and void, notwithstanding it appears fair on its face. There is no question as to the jurisdiction of the subject-matter, and all jurisdictional facts, whether of the subject-matter or of the person appear, in the recitals. Such a judgment may be voidable, but void never. The very fact that it requires judicial ascertainment and judicial determination to show what will be done with it proves conclusively that it is only voidable. This being so, it not only requires proper proceedings to annul it, but it requires those proceedings to be at the instance of the proper parties and against the proper parties.

Mr. Black, in his work on Judgments, section 605, vol. 2, says: "One of the most important applications of the rule giving a qualified admissibility to a judgment as evidence against strangers is in the case where it is invoked as a proof of the relationship of debtor and creditor between the parties. It is now well settled upon high authority that where no fraud or collusion has been shown in the recovery of a judgment, such judgment is conclusive of the fact and the amount of the indebtedness of the judgment-debtor, and it cannot be collaterally impeached by third persons in a subsequent suit where such indebtedness is called in question. * * And a judgment obtained without fraud or collusion is conclusive evidence, in suits between creditors in relation to the property of the debtor, of the fact and amount of the indebtedness of the latter." This would be so in a contest between Barton Bros. and the appellants as to which might first subject the property to his claim. How much better is the position of

the sheriff, as representing the former, than that which they themselves occupy, for it is said everywhere, that a ministerial officer without notice of antecedent defects, as he is, occupies a more favorable position than would the person he represents, who is presumed to be acquainted with all the facts, including defects, if there be any.

In the case of *Candee* v. *Lord*, 2 N. Y. 269, also reported in 51 Am. Dec. 294, the judge delivering the opinion said: "In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts *mala fide*. A judgment, therefore, obtained against the latter without collusion, is conclusive evidence of the relation of debtor and creditor against others: 1. Because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and, 2. Because the claims of other creditors upon the debtor's property are through him, and subject to all previous liens, preferences or conveyances made by him in good faith."

It follows, from the principles suggested, that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon default, confession or contestation, is, upon all questions affecting the title to his property, conclusive evidence against his creditors to establish, first, the relation of creditor and debtor between the parties to the record, and, second, the amount of the indebtedness. In the present case the judgment is fair on its face, no fraud or collusion is charged or suggested as a matter of suspicion even, and the debt is a just one without question from any one, and withal the judgment stands unchallenged by Wilson, even upon the ground set up in this cause, by which it is now sought to be annulled.

It is unnecessary to do more than merely suggest the vast difference between a want of jurisdiction of

the subject-matter of litigation, and that of the persons of the parties to it. The defects in the latter may be, in many instances and in various ways, waived and acquiesced in, but the former is no where the subject of consent. One may be precluded notwithstanding there is defect of jurisdiction of the person, but never in the case of a want of jurisdiction of the subject-matter.

Finally, quoting from Freeman on Judgments, (section 529, vol. 2): "But the general rule seems now to be almost universally acknowledged and enforced, that an officer, acting under process, regular and valid on its face, and issued by a court which might lawfully exercise jurisdiction over the subject-matter of the action, is protected, although the court has no jurisdiction over the defendant, unless the officer had notice of the fact." This cannot refer exclusively to cases where property in possession of defendant in execution is taken, because it is too well settled that an execution good on its face is of itself and alone a protection, without having to refer to the judgment.

The point, as I have said, is an extremely nice one, we may say, in the last degree technical, but the view I take of it is the only one in which all the authorities can be reconciled.

The cases cited in the opinion of the majority as having been decided by this court, it is suggested, are scarcely applicable to this case, because neither of them is purely a contest of title to the property of the common debtor, because in those cases the defendants are the direct impeachers of the judgment, and because of other differences not necessary to mention.

I think, therefore, that the judgment in this cause should have been affirmed, as in the first instance.

58 198
63 395
63 569
58 198
82 509
58 198
87 280

RAILROAD COMPANY v. BARRY.

Opinion delivered November 25, 1893.

1. *Fellow servants—Train dispatcher and fireman.*
A train dispatcher of a railroad, who has control of the movements of its trains, is not a fellow servant with those engaged in operating its trains, and the company will be liable for his negligence in ordering the movement of trains whereby a fireman is injured.

2. *Damages—Expenses of sickness—Instruction.*
Where the only evidence as to the expenses of plaintiff's sickness was that of plaintiff who testified that he paid the doctor everything he had and still owed him, without stating any amount, it is error to instruct the jury that they might consider, as an element of damages, the past and prospective expenses of the sickness, and allow such damages as in their judgment would be a fair and just compensation for the same, not exceeding the amount sued for.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

Action by Barry against the Little Rock & Memphis Railroad Company for personal injuries. The facts are stated in the opinion.

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

1. The legal principles applicable to this case are of elementary simplicity. (1) The company is required to make rules reasonably adapted to secure the safety of its employees. And (2), in those jurisdictions where the train dispatcher is not considered a fellow servant with train men, it is required that train orders shall be intelligible, and such as, if obeyed, will not result in an accident. As illustrating these points, see, 91 Ala. 112; 24 Am. St. 863; 41 A. & E. R. Cas. 339; 60 Miss. 977.

2. The cause of the accident was the recklessness of the engineer in charge of the special, and he was a fellow servant of the plaintiff, as were also the men in

charge of the freight train. 42 Ark. 417; 46 *id.* 555; 51 *id.* 469; 54 *id.* 318; 39 *id.* 17; 109 U. S. 479; 15 A. & E. R. Cases, 244 and note; 8 *id.* 110; 24 *id.* 448; 65 Miss. 264; 41 A. & E. R. Cas. 486; 149 U. S. 368; 88 Cal. 337; 48 A. & E. R. Cas. 337 and note; *id.* 116; 41 *id*, 414, 398; 39 *id.* 330; McKinney on Fellow Servants, p. 283.

3. The proof is that the conductor was competent. See 1 S. W. Rep. 500; 44 A. & E. R. Cas. 637; 3 Cush. 270.

4. It was error to instruct the jury that the train dispatcher was a fellow servant with the fireman. 39 Ark. 17; 42 *id.* 417; 45 *id.* 318; 46 *id.* 555; 54 *id.* 289; 78 Ind. 77; 8 A. & E. R. Cas. 175; *ib.* 171; 15 *id.* 298 and note; 5 *id.* 523; 77 Mo. 410; 58 N. Y. 217.

5. It was error to instruct the jury that they might allow for expenses of sickness *wheu none were proved.* 16 Ark. 651; 23 *id.* 289; 24 *id.* 251; 42 *id.* 58; 41 *id.* 382; 37 *id.* 594; 36 *id.* 242.

W. L. Terry and *J. M. Moore* for appellee.

1. The appellant failed to comply with the requirements of the law in regard to its duty to appellee as master. 54 Ark. 300; 44 A. & E. R. Cas. 604; 12 *id.* 236; 8 *id.* 162.

2. The negligence of the engineer, who is claimed to be a fellow servant, was not the proximate cause of the accident. Even if the relation of fellow servant existed, if the corporation owed appellee a duty which it failed to perform, thus concurring with the engineer in negligence, the corporation is liable, notwithstanding the negligence of a fellow servant was the immediate or direct cause of the injury. 54 Ark. 300; 5 A. & E. R. Cas. 530; 44 *id.* 619.

3. The train dispatcher and firemen were not fellow servants. 54 Ark. 300; 23 A. & E. R. Cas. 444; 31

id. 332; 24 *id.* 395; 12 *id.* 236; 110 U. S. 390.

4. The conductor was grossly ignorant or neglectful of his duties. 33 A. & E. R. Cas. 312.

5. There is evidence as to the expenses of sickness. See Barry's testimony.

HUGHES, J. The appellee was fireman on a special passenger train of the appellant, which came in collision with a freight train standing on the main track of appellant's road, at Forrest City. The appellee, perceiving that a collision would occur, jumped from his position on the special train, believing, as he testified, that it was necessary for him to do so to save his life. He was, as the evidence tends to show, injured thereby, and upon the verdict of a jury recovered a judgment against the appellant for $10,000, to reverse which the case was brought here on appeal.

The road is a single-track road, and the special and the freight were both coming west when the collision occurred. Between Edmonson and Forrest City there was no telegraph station, but there was one at Edmonson, and one at Hopefield, which places are east of Forrest City, on the appellant's road, and west of Memphis. The testimony shows that the freight train left Edmonson at 9:40 A. M., and that it was then about three hours behind its schedule time, and that it did not reach Forrest City until 1:35 or 1:50 P. M., the same day. It was due at 7:45 A. M. but was over five hours and thirty minutes late, having been delayed between Edmonson and Forrest City by the breaking in two of the train. The special train left Memphis at 11:40 A. M.; left Hopefield at about 12:35 P. M., and passed Edmonson at 12:54 the same day. The superintendent of the road told the conductor of the special to keep a sharp lookout for the freight, and the conductor told the engineer of the special that the freight was in the bottom—the country between the Mississippi and St. Francis rivers—and that

he must keep a sharp lookout for it. Just east of Forrest City, through Crowley's Ridge, there is a deep cut and a reverse curve on the road in the shape of the letter S. The freight train was a heavy and long one, and could not side-track at Forrest City, and the rear cars of the freight train extended back into this cut in Crowley's Ridge. When the special reached this cut, its whistle was sounded, but very soon after it ran into the freight cars. The freight train had been at the station at Forrest City only about one minute, according to the testimony of the engineer of the freight, when the accident happened. The officers of the freight train, it appears, had no knowledge, or information that the special was behind it. The orders for the government of the trains, as to how they should run, where they should stop, etc., were given by a train dispatcher, and are required by the rules of the company to be in writing, and verbal orders are not permitted. The testimony shows that it is the train dispatcher's duty to give orders to the different trains, that he controls their movements and should keep himself informed as to their whereabouts. The only orders given to the conductor and engineer of the special, as shown by the testimony, were those mentioned in the testimony of J. H. Bard, the telegraph operator at Forrest City, which are the following:

"LITTLE ROCK & MEMPHIS RAILROAD. Telegraph Train Order No. 5.

"MEMPHIS, Oct. 26, 1890.

"To C. & E. of Eng. 5, Hopefield;

C. & E. No. 5, Forrest City;

C. & E. Eng. 4 and No. 6, Brinkley:

"Engine 5 will run from Hopefield to Argenta extra. When No. 5. is overtaken, pass and run ahead of them. Meet No. 6 and engine 4 at Brinkley. Do not pass Brinkley unless engine 3 is there.

"A. J. W.

"Conductor and engineer must each have a copy of this order.

Time received: 12:23 p. m. O. K. given at 12:25 p. m.

Conductor	Train	Made	At	Recv'd By
Heth	Eng. 5	Complete	12:29 p. m.	G.
Hedrick	No. 5	"	2:44 p. m.	B.
Fennessey	Eng. 4	"	6:20 p. m.	Fi.
Kearns	No. 6	"	6:45 p. m.	Fi."

It is contended by the appellant that under its rules these orders were sufficient, and by the appellee that under the circumstances of this case they were not sufficient.

The court refused to instruct the jury at the instance of the appellant, as follows, to-wit: "You are instructed that the engineer, conductor and brakeman of the freight train and the train dispatcher were fellow servants of the plaintiff; and if you find that the accident resulted from the negligence of any of them, you will find for the defendant."

The court modified this instruction by striking out the words, "and the train dispatcher," and gave it as modified. To this modification the appellant excepted.

At the instance of the appellee the court gave to the jury the following instructions: "If you find for the plaintiff, in assessing his damages you may consider the character of the injuries received by him; how far they have disabled him, or may in the future disable him, from pursuing his ordinary occupation; and also the physical pain and suffering to which he has been, or may be in the future, subjected by reason of such injuries; the effect of the injury on his health; the past and prospective expenses of his sickness resulting from his injury; and allow such damages as in your judgment would be a fair and just compensation for the same, not exceeding the

amount sued for." To the giving of which the appellant excepted.

The only question we consider here is, were these instructions obnoxious to the objections urged against them? Did the court err in modifying the third and in giving the fourth?

1. When train dispatcher a vice-principal.

There is an irreconcilable conflict of authority upon the vexed question, who are fellow servants? In Massachusetts it is held that all who are engaged in a common employment, working to accomplish a common result, are to be regarded as fellow servants. Many, and perhaps a majority of the States adopt this rule. But it is said that the tendency of recent decisions is to narrow this rule. In *Chicago etc. Railroad* v. *Ross*, 112 U. S. 377, 390, the court said: "There is a clear distinction to be made, in their relation to the common principal, between the servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of a corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of superintendence and discretion." In *Sheehan* v. *Railroad*, 91 N. Y. 332, a superintendent and assistant superintendent, acting as train dispatchers, were held to be vice-principals. In *Smith* v. *Wabash etc. R. Co.* 92 Mo. 359, it is held that the train dispatcher, in ordering the movement of trains, is to be regarded as the representative of the railroad company, where he has sole and exclusive control in directing their movements.

In *Darrigan* v. *N. Y. etc. R. Co.* 52 Conn. 285, it is held that it is the duty of the railroad company to devise some suitable and safe method of running special and irregular trains, so as to avoid collision, and when the method employed is to have the trains controlled by a train dispatcher, the latter, as to employees in charge of trains, stands in the place of the company. The

court said: "It is immaterial that these men are hired and paid by a common employer, and that the employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate all distinctions between those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all duty and all liability to those in its service." See also *Chicago etc. R. Co.* v. *McLallen*, 84 Ill. 109. The decisions in Ohio, Kentucky, Illinois and Tennessee are substantially in harmony with the cases cited.

It seems impossible to formulate any general rule for all cases. Each case must, to some extent, be governed by the peculiar circumstances attending it. In *Baltimore & Ohio R. Co.* v. *McKenzie*, it was held that under the circumstances of that case, a section boss and night watchman represented the company, the court saying: "Where injuries are caused by the negligence of a servant who is charged with the performance of duties which, by law, it is incumbent on the master to perform, such servant is regarded as the representative of the master, and, in legal contemplation, his negligence is the negligence of the master." 81 Virginia, 71. Judge Cooley says: "The master is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally, or in respect of the particular duty then resting upon the negligent employee, the latter so far occupied the position of his principal, as to render the principal so far chargable for his negligence as for personal fault." Cooley on Torts, 564.

Under the circumstances of this case, the movements of the trains being under the direction and control of the train dispatcher, in directing and controlling their movements he was performing the master's duty, and

was not a fellow servant with the plaintiff, but the representative of the company, for whose negligence, if any, resulting in injury, the company is liable. There was therefore no error in the modification of the third instruction given for the appellant, as modified.

2. Measure of damages.

The fourth instruction, as to the measure of damages, given for the appellee, is erroneous in this, that it told the jury they might consider, as an element of the plaintiff's damages, the past and prospective expenses of his sickness resulting from his injury, and allow such damages as in their judgment would be a fair and just compensation for the same, not exceeding the amount sued for. The only evidence in regard to expenses of plaintiff's sickness, caused by the injury is his own, which is as follows: "I have paid the doctor all the money I had, after selling everything I had, and still owe him." How much this was is not shown. How then could the jury estimate it? They could not find the amount from the testimony, and there was therefore no evidence upon which to base this part of the instruction. It was calculated to mislead the jury, and make them think the damages were entirely at their discretion. How far it affected their finding we cannot tell. There were elements of speculative damages in the case contemplated in the framing of the instructions, and the jury were at liberty under it to think they were authorized to speculate as to the amounts of the past expenses of the plaintiff's sickness arising from his injury.

For the error in giving the part of this instruction referred to, the judgment is reversed, and the cause is remanded for a new trial.

58 206
81 598

FORDYCE v. BRINEY.

Opinion delivered November 25, 1893.

1. *Fellow servants—Car-inspector and car-repairer.*

One whose duty it is to inspect cars, to call the attention of a car-repairer to defects, and to direct his labor, is a fellow servant of the car-repairer, where both are under the control and supervision of a foreman who had charge of the business of the company at that place.

2. *Duty of master—Regulations.*

Where a car-repairer was injured while making repairs under a car attached to a train, the railroad company will be liable for any injury to him caused by its failure to exercise reasonable care in providing such regulations as would, to a person of ordinary prudence, seem sufficient to insure the safety of an employee so engaged.

3. *Duty of servant to obey rules.*

In an action by a car-repairer to recover for injuries received in the service of a railroad company, it is not prejudicial *to the company* to charge that it was the duty of an employee to acquaint himself with and obey necessary rules, and, in case of injury from failure to obey them, ignorance of such rules is no excuse unless the employee's failure to know them was not due to want of care on his part.[1]

4. *Duty of servant to take precautions.*

Where plaintiff testified that it was the duty of car-repairers, when they went under trains, to put out red flags, but that the company never before had a train on the repair track that he knew of, it was error to refuse to charge that though the car, under which plaintiff was working, was on the repair track, if the train of cars to which it was coupled was ready to be pulled out, plaintiff would be required to take the same care for his safety that he would if such train were standing on any other track.

Appeal from Craighead Circuit Court, Jonesboro District.

JAMES E. RIDDICK, Judge.

---

[1] See *Little Rock, etc. R. Co.* v. *Leverett*, 48 Ark. 348.

STATEMENT BY THE COURT.

This action against the receivers of the St. Louis, Arkansas & Texas Railway Company, was to recover for a personal injury received by the plaintiff while he was repairing a car. The receivers appeal from a judgment rendered in the plaintiff's favor on the verdict of a jury.

The court's fifth, sixth, seventh and eighth instructions were as follows:

5. While plaintiff must be held to have assumed all risks ordinarily incident to his employment of car-repairer, yet it was the duty of the defendants, or their employees, to use ordinary care in providing him a safe place in which to perform such work. If it was the duty of the plaintiff to go under cars for the purpose of repairing them while on the repair track, it was also the duty of the defendants to use ordinary precaution to prevent his injury by adopting such rules and regulations as would to a person of ordinary prudence seem sufficient to insure his safety while he was engaged at such work; and if they failed to exercise ordinary care in this respect, but allowed their employees to move engines and cars upon said repair track without any regulation which could reasonably be supposed sufficient to protect those engaged in repairing cars on said track, and injury resulted to them from such negligence on the part of the defendant, then they will be liable, although the negligence of a fellow servant may have also contributed to such injury, unless plaintiff was also guilty of negligence contributing to the injury.

6. If the car-inspector, having the control of the plaintiff and the authority to direct him in his work, ordered him to go under a caboose attached to a train of cars on the repair track, and, while obeying such orders and exercising ordinary care on his part, the plaintiff was injured by the negligence of the car-inspector in

failing to give any notice to the engineer or person in charge of the train, or if he was injured through the failure of the defendant to exercise ordinary care in providing any regulation sufficient for the protection of those working on the repair track, then the defendants are liable, and the jury should find for the plaintiff, unless he, himself, was guilty of negligence contributing to such injury.

7. While it is the duty of the railway company to make and promulgate necessary rules and regulations for the safety of its employees, it is also the duty of the employee to acquaint himself with such rules and regulations and to obey them, and, in case of any injury resulting to such employee from his failure to obey such rules and regulations, he will not be permitted to excuse himself by saying that he did not know the rules, unless it appears that he had no sufficient means of acquiring such information, and that his failure to know them was not from any want of care on his part; and in this case if you find that a regulation or rule of the defendants required employees working under cars to hang out a danger signal so that it might be observed by the train men, and that plaintiff failed to obey this regulation, then he cannot recover, and the finding must be for the defendants unless it is shown that the plaintiff had no notice of such rule, and that his ignorance in this regard was not occasioned by any want of care or attention on his part.*

8. If the caboose, under which the plaintiff was working at the time of the injury, was attached to a train of cars at the time he began his work, then whether the plaintiff was guilty of negligence in going under said caboose to work is a question for the jury,

*In *Railway Co.* v. *Leverett*, 48 Ark. 333, 348, it was held that "an employee of a railroad company is not bound by a rule of the company which is not brought to his attention."

depending upon the circumstances in proof. If the position taken by the plaintiff was dangerous, and such that a man of ordinary prudence would not have taken, and if the connection of the train and caboose or other circumstances were sufficient to warn a person of ordinary prudence of his danger, then plaintiff would be guilty of contributory negligence in going under said caboose, and he cannot recover.

The sixth instruction requested by the defendant and given by the court was as follows:

6. If the jury find from the evidence that the railway company or the defendants have established and promulgated a rule for the protection of car-repairers, requiring them, before going under a car to make repairs, to hang out a danger signal, and that the plaintiff went under the car where he received the injury without obeying such rules or regulations, then you are instructed that the plaintiff was guilty of negligence, and if you further find that, had the plaintiff obeyed such rules or regulations, the injury might not or ought not to have happened, you will find for the defendants.

The following was the defendants' tenth instruction, as requested.

10. You are instructed that, although you may find from the evidence that plaintiff went under the car by the direction of C. A. Higgi, yet if you find that plaintiff failed to hang out a danger signal, and then, while he was under the caboose, the engineer or fireman coupled on to the train to which the caboose was attached, and commenced to move it, and the plaintiff was thereby injured, he cannot recover, as the failure to hang out the danger signal was an act of negligence on his part.

As modified by the court and given to the jury the defendants' tenth instruction was as follows:

10. You are instructed that, although you may find from the evidence that plaintiff went under the car by the direction of C. A. Higgi, yet, if you find that the regulations of said defendants required employees to hang out a danger signal while at such work, and that the plaintiff failed to hang out such signal, and that, while he was under the caboose, the engineer or fireman coupled on the train to which the caboose was attached, and commenced to move it, and the plaintiff was thereby injured, he cannot recover, as the failure to hang out the danger signal was an act of negligence on his part.

The other facts are sufficiently stated in the opinion.

J. C. Hawthorne and *Sam H. West* for appellants.

1. The court erred in giving the fourth instruction. The car-inspector was not a vice-principal unless he had power to employ and discharge other servants. He was merely a sub-manager or foreman of higher grade, and was fellow servant with appellee. 129 Mass. 268; 19 Am. St. Rep. 180; 55 N. Y. 579; 17 N. Y. 153; 108 Ill. 288; 64 N. Y. 5; Wharton, Neg. 229; 76 Me. 143.

2. The fifth is abstract and misleading. Beach, Cont. Neg. sec. 141.

3. The injury was brought about by plaintiff's own negligence. 41 Ark. 532; 51 *id.* 467; 44 *id.* 293.

4th. The sixth is objectionable because it assumes that the car-inspector was not a fellow servant, and that his failure to give notice to the engineer was negligence. 19 Am. St. 180; 62 N. Y. 99.

5. The first, second and third asked for defendant should have been given. A servant assumes all risk ordinarily incident to his employment, including the negligence of fellow servants. A car-inspector is a fellow servant. 4 Met. 49; 125 Mass. 79; 20 Rep. 301; 135 Mass. 209.

6. It is the duty of a railroad company to make and promulgate rules, etc., for the safety of employees, but it is also the duty of an employee to acquaint himself with and obey them. The question as to whether plaintiff's failure to place a danger signal out was the proximate cause of the injury should have been submitted to the jury. 33 Oh. St. 227; 63 Tex. 549; 70 *id.* 226; 60 N. Y. 326; 58 N. Y. 411.

7. It was error to refuse the thirteenth. 58 Mich. 584.

L. L. Mack for appellee.

1. Higgi was the boss car-repairer, a vice-principal acting for the company; had charge of the movements of the cars being repaired, and control of the hands engaged therein. Plaintiff was under his orders at the time. The power to employ and discharge hands is not necessary to constitute a vice-principal. The true test is—was Higgi employed to discharge any of the duties of the master. Whit. Smith, Neg. pp. 148, 149; 7 Am. & E. Enc. Law, p. 844, and note; 44 Ark. 524.

2. The proof shows gross negligence committed in the presence of the company's boss car-repairer. The employer is bound to take reasonable care to furnish the employee with adequate material and resources for the work; to see that a sufficient number are employed, where it is dangerous to leave the work to a few only; to make rules for safe working; to inform him of extraordinary risks, etc. They are part of the contract of hiring. Whit. Smith, Neg. p. 126; *ib.* 132–3; 44 Ark. 524; 51 *id.* 467.

3. The plaintiff may recover, notwithstanding his contributory negligence, if the defendant had knowledge in time to prevent the injury by the use of proper care. Whit. Smith, Neg. pp. 374–5; 4 A. & E. Enc. Law, p. 40; 48 Ark. 106.

MANSFIELD, J., (after stating the facts.) At the time of the injury for which the plaintiff recovered, he and Charles Hickey were in the service of the railway company at its round-house in Jonesboro, the former as car-repairer and the latter as car-inspector. C. Bushmeyer was foreman of the round-house, and appears to have had charge of the business of the company at that place. He alone had power to employ and discharge the men who worked for the company there, and Hickey and the plaintiff both worked under his supervision and control.

The position of Hickey, so far as the record discloses it, may be stated in a few words: It was his duty to inspect the cars, and to call the attention of the car-repairers to such defects as he found to exist. It then became their duty to make the necessary repairs, under his direction and instruction.

The company had at Jonesboro a track which was used as a repair track, and sometimes for making up trains. On the morning the plaintiff was injured, a caboose and about twenty-five flat cars were standing coupled together on this track; and the plaintiff, who had been informed that the train thus made up was going out that morning, went under the caboose, by the request of Hickey, to repair it. While he was under the caboose, which was behind the cars, an engine was coupled to the cars, and the train was started without ringing the bell or sounding the whistle. At a signal from Hickey, the train was stopped, but not until its movement had resulted in the injury complained of.

On the trial it was shown that a rule of the company, appearing on its time cards, required employees to put out signals when they were repairing cars coupled together; and that the signal in day time was a red flag, which it was the duty of the workman making the repairs to put out. In testifying for himself, the plain-

tiff admitted that he knew that red flags were used as danger signals in going under cars off the repair track, but stated that they were never used on that track; and it appears that he used none on the occasion referred to.

Two of the principal questions which the charge of the court submitted to the jury, as affecting the liability of the defendant, were: (1) whether Hickey was a vice-principal; and (2) whether the company performed its duty in adopting rules to promote the safety of its employees while engaged in repairing cars.

1. Doctrine of fellow-servants.

On the first of these questions, the fourth instruction of the court was to the effect that "if it was the duty of the plaintiff, as car-repairer, to work under the authority and control of the car-inspector," and he was so working at the time he was injured, then the car-inspector was not his fellow servant. This was error. There was no evidence that Hickey, the car-inspector, sustained to the car-repairers any relation other than that of a mere foreman directing their labors; and the possession of such authority as that implied did not make him the representative of the defendant. *Fones* v. *Phillips*, 39 Ark. 39; *Bloyd* v. *Railway Co. ante*, p. 66. The first clause of the sixth instruction is equally objectionable, on the same ground. And in this connection it is proper to say that there was no evidence tending to show that Hickey was charged with the duty of performing any act looking to the safety of the place where the plaintiff was directed to work.

2. Duty of master to adopt regulations.

The court's fifth instruction, and the second clause of the sixth instruction, apply to the second question stated above, and both of those instructions are assigned as error. Upon a similar question the following language was used by this court in *Railway Co.* v. *Triplett*, 54 Ark. 289, and with reference to a rule adopted by the defendant in that case: "It is claimed by the company that if this rule was sufficient, when faithfully observed

by its employees, to guard against the danger, the company has discharged its duty. This seems to be the general rule of the law, when the circumstances are such that a reasonably prudent person might rely upon rules and regulations to afford protection. But if the master sees proper to rely upon such methods of protection to his servants, and the occasion demands it, he should also adopt such measures as may be reasonably necessary to secure the observance of such rules." And the court added that "the degree of care" the master should exercise "must always be measured by the exigencies of the particular case." It was accordingly held in that case that "where a car-repairer was engaged in work under a car so situated that a jar from an approaching car would cause it to fall and crush him, it is the duty of the company, when apprised that its regulations are insufficient to protect him, to adopt such measures as will afford him reasonable protection against the dangers incident to the performance of his duties." These quotations sufficiently indicate a just and practical rule for measuring the diligence required of this defendant in discharging its duty to the car-repairers as to a safe place in which to work. If the signal, which, by the company's rule, it was made their duty to give by displaying a red flag, was a safe-guard upon which "a person of ordinary prudence" might rely as affording "reasonable protection" against the dangers to which the workmen were exposed in pursuing their labors on the repair tracks, then the company would not be guilty of negligence by failing to resort to other means of protection before the rule proved to be ineffectual, or there was reason to believe that it was so. But if the company knew, or ought reasonably to have known from the circumstances, that the rule was inefficient, because it was in itself insufficient, or because it was disregarded by the persons operating the trains, then a failure to adopt such other or

additional rule or regulation as "a reasonably prudent person" would rely upon for protection would be negligence. *Railway Co.* v. *Triplett*, 54 Ark. 299–301.

We think the court did not intend to apply to the question of the defendant's negligence any doctrine not approved by the decision in Triplett's case; and we think the evidence was such as to warrant an appropriate charge in harmony with the rule there applied. But the charge on this point is not as explicit as a phraseology somewhat different from that employed would have made it; and it contains some expressions that may possibly have led the jury into regarding it as the duty of the company to adopt some measure with special reference to the safety of the plaintiff on the particular occasion of his injury, whether there was reason for distrusting the efficiency of the general rule or not. Nor is it entirely clear to us that other expressions used may not have been taken to require such provision against danger as would insure the absolute safety of the plaintiff.* But it is not probable that this part of the charge was actually misleading, and we cannot say that a fair and reasonable construction would make it so.

3. Duty of servant to obey rules.

The next assignment complains of the court's seventh instruction. But that instruction was plainly without prejudice to the appellant, as will appear by comparing it with an instruction on the same subject held to have been correctly given in *Railway Co.* v. *Leverett*, 48 Ark. 348.

The eighth and last of the court's instructions was also objected to. But the only defect mentioned by counsel was cured by the sixth instruction given at the defendant's request, and by its tenth instruction, which was also given with a modification properly made by the court.

---

*See *St. Louis, etc. Ry. Co.* v. *Gaines*, 46 Ark. 567; *S. W. Telephone Co.* v. *Woughter*, 56 Ark. 210.

4. Duty of servant to take precautions.

The defendant requested the following instruction, which the court refused to give: "The jury are instructed that, notwithstanding the caboose, under which the plaintiff was working at the time he received the injury complained of, was on the track known as the 'repair track,' if a train of cars to which the engine was coupled was backed upon the repair track, ready to be coupled with an engine and pulled out, then the plaintiff would be required to take the same care and precaution for his safety and protection that he would be required to do, had the caboose and train of cars been standing coupled together on any other track in the yard."

On the facts of the case, this instruction was proper, and it was error to refuse it. The plaintiff testified that "it was usual, and the duty of car-repairers, when they went under trains, to put out red flags;" but that "the company never before had a train on the repair track that he knew of." His own testimony tends strongly to show, if it does not admit, that the company's rule was within his knowledge; and his statement can hardly be said to be a denial that the rule applied as well to a train off the repair track as to one on it. The track was not, in a proper sense, a repair track, while it was being used in making up a train; and as the defendant knew that the caboose under which he was injured was attached to a train made up on that track, and soon to be taken out, he must have known that the same necessity for observing the rule existed as if the train had been upon any other track.

For the errors of the court in refusing the instruction just noticed and in giving the fourth instruction and the first clause of the sixth instruction, the judgment is reversed, and the cause remanded for a new trial.

58 217
73 55
76 73
77 6
58 217
f79 23
79 24
82 197
f82 346
82 536

RAILWAY COMPANY *v.* TORREY.

Opinion delivered November 25, 1893.

1. *Master and servant—Negligence of foreman.*

A master is not liable for an injury to a servant caused by the negligence of a foreman occupying the position of vice-principal, while performing an act of labor in common with the labors of the servant, unless his own negligence as master contributed with that of the foreman as a laborer to produce the injury.

2. *Liability of master for negligence of vice-principal.*

If it be conceded that a foreman in charge of a gang of bridge carpenters, with authority to direct when and where they shall work, is a vice-principal, it is error to charge that an employee can recover if he was negligently ordered by such foreman to a dangerous position, and, while in that position and by reason thereof, was injured, when he himself was exercising due care; the charge should state, as far as practicable, the facts which, if proved, would make the order negligent, and these facts must have been such as involve a failure to perform some duty which the company owes to the employee.

3. *Duty of master to warn servant.*

An instruction that it is the duty of the master to warn an inexperienced servant of the dangers liable to be encountered by him in the performance of his duties is not proper where there is no evidence tending to prove either that plaintiff was without experience; or that the master knew, or ought to have known, that he was inexperienced; or that experience was necessary to enable him to do with safety the act in the performance of which he was injured.

Appeal from Monroe Circuit Court.

ROBERT J. LEA, Judge, on exchange of circuits with Grant Green, Jr.

STATEMENT BY THE COURT.

This was an action to recover damages for a personal injury sustained by the plaintiff while he was serving the railway company as a bridge carpenter under the direction of one Sanford, who was foreman of a

gang of men engaged in repairing a bridge over White river. The complaint alleges that the plaintiff was ordered by the foreman "to hold a certain block and tackle which had been negligently wrapped around a stay on the bridge, so as to allow an engine to pass, and that while holding the block and tackle the passing engine caught the rope attached to the block and caused the block to strike him upon the head." The answer denied that the block and tackle were negligently wrapped, and stated that the injury was caused by the negligent manner in which the plaintiff held the block and tackle.

On the trial of the cause, which was before a jury, the plaintiff testified that he was 32 years old. That in September, 1888, he entered into the service of the appellant, as a bridge carpenter, under L. M. Sanford, foreman, and on the 28th day of November, some two months afterwards, they were engaged in repairing White river bridge, and were lowering a shaft that had a rope fastened to a lateral or cross-beam at the top of the bridge immediately over the center of the track. The other end of the rope was attached to a block weighing some ten to twenty pounds. That, while the shaft was being lowered, an engine approached the end of the draw, some eighty feet from where they were engaged at work. The foreman took the rope and block, which were suspended from the top of the bridge some twenty feet above the track, and wrapped it around an iron brace or stay extending from the floor of the bridge near the track to the top of the bridge. He wrapped the rope around the stay some three or four feet from the floor, and told the appellee to hold it until the engine passed. That he did not know whether the engine was approaching at the time he took hold of the rope. He did not let the rope slacken at all but held it where it was when he took it. The engine approached at once, and one

corner of the cab caught the rope, and jerked it loose from him, and in unwrapping it from around the brace the block struck him over the eye, and inflicted a painful injury. There was a walk some five feet wide on the floor of the bridge and north of the track, extending from one end to the other. The brace around which the rope and block was wrapped was between the walk and the railway track. That he stood on the platform holding the rope, and it was just long enough to be wrapped twice around the brace. That the block was up against it, and he held the hook at the end of the block. The rope was wrapped around a brace north, or up the river from the track, and between the track and the platform of the bridge. That he was looking at the engine when it approached, and not looking at the rope when it was caught on the corner of the cab. If the foreman called him, he did not hear him. That he was five feet and a half high, and might have held the rope high enough for the engine to pass with his hands, by taking hold of it a short distance from the brace and pressing it up, but he did not know it would be caught at the corner of the cab until it was too late. He had never seen a rope held back for an engine to pass before, and was not warned as to the danger incurred in the work.

Sanford testified that, on the 28th day of November, 1888, he was repairing the drawbridge at Clarendon, and had a block and tackle, one end fastened to the top of a lateral brace and the other end fastened to a shafting on which was a cog-wheel ready to be lowered, when an engine came up to the end of the draw and stopped. He had the flag at the usual place at the end of the draw. The engine stopped, and the conductor came to the flag and seemed very impatient to get across, and walked past the flag and came up to the center of the bridge, and when he got there he informed him that he could pass in a very few minutes. The engine

started on the drawbridge, and he seized the lower end of the rope and swung it around a column on the upstream or north side of the track, and told the plaintiff to hold the slack that was in the rope up close to the upstream side of the bridge so the engine could pass. By this time the engine was very close to the rope, and he noticed that the engine or something else had attracted Mr. Torrey's attention to such an extent that he wasn't noticing the rope he held, and he told him to hold it. That he was looking at the engine, and had let the rope slacken, and one strand of it caught on the corner of the cab, and the rope was drawn from around the brace, the block striking Mr. Torrey in the face, knocking him down. When he saw the rope was slackened, he spoke to the appellee once or twice, but failed to attract his attention. The speed of the train was from three to five miles per hour. On cross-examination he said that if Mr. Torrey had held the rope in the position he took it, the cab of the engine would not have caught it, and if Mr. Torrey had not permitted the rope to slacken, the accident would not have happened.

The plaintiff also read the deposition of the same L. M. Sanford, taken March 10, 1892, in which he testified that he had written a letter to the plaintiff in which he stated that he gave no signal for the engine to pass, and that the conductor flagged the train over the bridge without his authority. That the engine was on them so quick and at such speed that there was little or no time for planning safety either way; and as to whether Mr. Torrey permitted the rope to slacken when the engine passed he could not say. That engines were not permitted to pass over the bridge at a speed exceeding six miles per hour, under the rules of company, until signaled to do so by him. That the engine at the time of the accident was running above the speed allowed by the company. That the appellee was not as familiar

with the way in which to hold the block and rope out of the way of passing engines as other men in his employ, but he possessed the requisite activity to hold the rope back, and that the rope had been held back sufficiently far to allow an engine to pass when hanging in the same position. He saw that something had directed the plaintiff's attention to the engine, and that the rope had slackened somewhat, and he was then commanded to be careful and hold the rope further back out of the way, but before his attention could be called to it the corner of the cab caught the rope. That the plaintiff had ample time in which to hold the rope in such a manner that the passing engine would not have caught it.

The defendant introduced John Williams who testified that he was a locomotive engineer, and had been for nine years; that he was on an engine on defendant's road on the 28th day of November, 1888, and that when they reached the White river bridge, Sanford, the foreman of the bridge gang, was engaged in lowering a shafting about the center of the draw. The rope and block were suspended from the center of the top of the bridge, and this rope was wrapped around a brace on the up river side of the bridge by the foreman, and given to one of his men to hold before he received a signal from his conductor to move forward. That he saw the rope wrapped around the brace before he pulled out, and thought the engine would pass clear. He did not know whether he saw the plaintiff holding the rope or not; he saw some one of the hands, and as he passed the cab of the engine caught the rope, and jerked it from around the brace, and it struck the tender. He did not know that it struck the plaintiff until they reached Brinkley. That they were not allowed to pass over a bridge at a greater speed than four miles per hour, and that he was running at the rate of not more than three or four miles per hour when he passed over the draw.

This is all the evidence that was introduced on the trial of the cause.

The charge of the court seems to have proceeded upon the assumption that the injury received by the plaintiff was due to one or more of the following causes:

(1) To the negligence of the conductor or engineer in going over the bridge without a signal from the foreman, or at an unusual rate of speed; (2) to the negligence of the foreman in ordering the plaintiff to hold the block and tackle, without warning him of the danger to which he would be exposed in doing so; (3) to the negligence of the plaintiff himself in failing to adjust or hold the rope in a proper manner.

The court gave instructions on all these points, and an exception was taken to each instruction. But in the argument of the cause only the exceptions to the fourth, fifth, sixth and ninth instructions have been insisted upon.

The defendant's second request, referred to in the opinion, was refused by the court, and is as follows:

"2. The jury are instructed that a bridge carpenter, an engineer, and a conductor when engaged in operating a railroad in the service of the same company, are fellow servants; and a foreman of a bridge gang, so far as any work or labor done or performed by him, is also a fellow servant with a carpenter in the same service; and this is so, even if the foreman had a right to employ and discharge the carpenter. And if the plaintiff was injured either by want of attention or ordinary care on his part, or by the negligence of the engineer or conductor, or by the failure of the foreman to perform his tasks or work undertaken by him in a skilful manner, they will find for the defendant."

The court's fourth, fifth, sixth and ninth instructions are as follows:

"4. A foreman of the defendant in charge of a force of bridge carpenters, with authority to hire and discharge such carpenters, and to direct when and where they should work, would not be a fellow servant of such men under his control; and if the jury believe that the plaintiff, while in the employ of the defendant, and while working under the control and direction of a foreman, was negligently and carelessly ordered by said foreman to a dangerous position, and that while occupying that dangerous position, and by reason thereof and of said order, he was injured while he himself was exercising due care, the plaintiff may recover for such injuries.

"5. A person in the employ of another, upon work which is by both the employee and the employer known to be dangerous, must himself exercise ordinary care to avoid his own injury, and if the injury is the result of his own rashness in going into a dangerous place, he cannot recover; but it is the duty of an employer, and of his foreman when he employs a foreman to control and direct his workmen in their work, to warn an inexperienced workman of the dangers liable to be encountered by him in the performance of his duties, but he would not be required to do this if by reason of his age and experience in such work the workman may be presumed to be aware of such danger.

"6. If the jury believe that the plaintiff was injured by reason of attempting to hold the block and rope under the order of his foreman, then, in arriving at a conclusion as to whether said foreman or the plaintiff was guilty of negligence, they may take into consideration their age and experience, and their means of knowing whether the position he was ordered to take was dangerous or not, and all other circumstances surrounding the injury; and if they believe from the evidence that the plaintiff was carelessly ordered by his foreman to take hold of the block and rope while the train was coming, that the

position was dangerous, and that the plaintiff, by reason of his inexperience, was unaware of the danger, and that the foreman failed to warn him, and that the injury to the plaintiff was the direct result of such carelessness on the part of his foreman, the jury will find for the plaintiff.

"9. The jury are instructed that if they find from the evidence that the plaintiff could have, by the use of ordinary care and attention, seen that the rope was not high enough to permit the engine to pass, and took hold of the rope, and held it without protest or an attempt to adjust it so as to permit the engine to pass clear, or otherwise protect himself from the approaching engine, he could not recover; but, in arriving at their conclusion as to whether the plaintiff was in the exercise of ordinary care at the time he received the injury, the jury may take into consideration his skill and experience and the length of time he had been engaged in such work as he was then performing."

The verdict was for the plaintiff, and from the judgment rendered upon it the defendant has appealed.

J. C. Hawthorne and *Sam H. West* for appellants.

1. It may be conceded that the foreman, so far as giving orders to appellee, was a vice-principal; but, as to any act which related to the performance of his duties as a co-laborer, he was not a vice-principal, but a fellow servant. In wrapping the rope around the brace, he was a fellow servant. 108 Ill. 576; 35 Ark. 602; 41 Ark. 382; 17 N. Y. 153; 55 N. Y. 608; 81 *id.* 516; 105 *id.* 159.

2. The court erred in refusing the seventh direction. 5 Oh. St. 541; Wood, Master and Servant, 763–766; 63 N. Y. 449; 76 *id.* 125.

3. There was no testimony that appellee was inexperienced, or that appellant knew that he was un-

skilled. 5 N. E. Rep. 187; 139 Mass. 580; 17 Wall 554; 106 N. Y. 512, 518.

4. Plaintiff must abide the consequences of his own negligence. 39 Ark. 17.

H. A. Parker for appellee.

1. The law was fully given in the instructions, and it was not error to refuse another code of instructions on part of appellant. It would simply have misled the jury. 38 Ark. 344.

2. The law of this case is fully settled by this court. 48 Ark. 345; 44 *id.* 300; 53 *id.* 458.

3. Sanford was a vice-principal. 44 Ark. 529; 35 *id.* 602; 39 *id.* 28; 17 S. W. Rep. 748.

4. It is the duty of one engaged in a *complex* business to establish definite regulations for the protection of his employees, and a failure to adopt such rules, as well as a laxity in their enforcement, is regarded as negligence *per se*. 3 Wood, Ry. sec. 382; 54 Ark. 289.

5. Appellee only assumed the *ordinary* risks. 54 Ark. 297; 20 S. W. Rep. 1090.

6. There was no proof of contributory negligence, and the burden was on the company. 48 Ark. 345.

7. Being inexperienced, and having no knowledge of the danger, appellee was entitled to protection. 54 Ark. 117; *ib.* 458; 21 S. W. Rep. 631; 46 Ark. 396; Sh. & Redf. Neg. 140 to 150.

8. The second instruction for appellee is supported by 18 S. W. Rep. 178. The love of life and the instinct of self-preservation will stand for proof of care until the contrary appears. 18 S. W. 178; 66 Pa. St. 399; 78 Mo. 212.

9. The second and third asked by appellant are in the face of 54 Ark. 117. The fifth is too liberal to defendant. 117 Mass. 407; 21 S. W. 631. If Sanford knew this was a dangerous place, or could have known

it by exercising his duty, and put appellee in said place, and he was injured, then appellant is liable. 17 S. W. 743.

1. Doctrine of fellow servants applied.

MANSFIELD, J., (after stating the facts.) In the matter of merely wrapping the rope of the block and tackle around the brace of the bridge, the foreman was not performing a master's duty, but an act of labor in common with the labors of the plaintiff; and as to that act we think the foreman and the plaintiff were fellow servants. If therefore the accident was caused by the foreman's negligence in wrapping the rope, the defendant was not liable unless its own negligence as master combined with that of the foreman as a laborer, to produce the injury.* The defendant's second request, then, so far as it goes, is consistent with the law; and it was not proper that it should go further, unless there was evidence to justify the court in submitting to the jury the question whether the company was guilty of contributory negligence. The only fact relied upon to prove such negligence was the order directing the plaintiff to hold the block and tackle. As that might have been given by one who had no authority beyond that of overseeing the labor of the carpenters, it would not, in itself, have warranted a finding that the foreman was acting in a representative capacity; and if he exercised only the power of a mere foreman, then his negligence was not the negligence of the defendant.† The court's fourth instruction assumes that there was evidence to show that he had authority to hire and discharge the carpenters. The abstracts do not embrace such evidence. If, however, it was adduced on the trial, its

*See Wood on Master and Servant, sec. 438; 1 Shearman & Redfield, Neg. sec. 233; *Fones* v. *Phillips*, 39 Ark. 17; *Crispin* v. *Babbitt*, 81 N. Y. 516; *Quinn* v. *New Jersey Lighterage Co.* 23 Fed. Rep. 363; *Railway Co.* v. *Triplett*, 54 Ark. 299; 2 Thompson, Neg. sec. 10, p. 981.

†*Fones* v. *Phillips*, 39 Ark. 39; *Bloyd* v. *Railway Co. ante*, p. 66.

tendency to prove that the company was responsible for any negligence committed by the foreman in giving the order complained of did not necessarily call for the absolute rejection of the defendant's second request, but only for its modification by the addition of a clause requiring the jury to determine whether there was such negligence, and if there was, whether it contributed to the accident. In refusing the request, and in omitting to make his charge touch upon the point it presents, the trial judge probably held that there was no evidence from which the jury could have reasonably found that the negligent wrapping of the rope was the dominant cause of the injury. But the position in which the rope was found when the engine reached it in passing over the bridge, according to the view we get of it from the record, was such that we think the jury might have concluded that, if it had been properly wrapped, it would not have sagged so as to come in contact with the cab; and that the untimely approach or speed of the train allowed no opportunity to adjust the rope after the plaintiff could with reasonable diligence have discovered the necessity of doing so. On this theory the plaintiff's injury might therefore have been attributed entirely to the negligence of his fellow servants; and as it was a theory not without support in the evidence, a charge applicable to it might properly have been given.

2. Negligence of vice-principal.

As already indicated, we are not prepared to hold that the court was right in assuming that there was evidence from which the jury might have found the existence of facts sufficient to make the foreman a vice-principal. Conceding, however, for the purposes of this opinion, that there was such evidence, the fourth instruction was not in other respects correct. It told the jury that the plaintiff was entitled to recover if it was shown that he was negligently and carelessly ordered "by the foreman to a dangerous position, and that, while occupy-

ing that dangerous position, and by reason thereof and of said order, he was injured, while he himself was exercising due care." This was too general. The court should have stated, as far as it was practicable to do so, the facts which, if proved, would make the order negligent; and these facts must have been such as involved a failure to perform some duty which the defendant company owed to the plaintiff as its servant. One of the duties it owed him was that of exercising a reasonable care to avoid exposing him to "unreasonable risks or dangers." Another duty required the company to warn him of such dangers as he would be exposed to in obeying its orders, and of which it knew or had reason to know he was not apprised. (Wood's Master & Servant, secs. 348, 352; *S. W. Telephone Co.* v. *Woughter*, 56 Ark. 206; *St. Louis, etc., Co.* v. *Gaines*, 46 Ark. 555.) The terms of the fourth instruction would apply in a general sense as well to one of these duties as to the other; but it defines neither of them, and therefore gives no test of the negligence on which the liability of the defendant depended. And, drawn as it was, it was liable to misconstruction by the jury, and was calculated to mislead them into treating as negligence the mere act of ordering the plaintiff "to a dangerous position," although the position may have exposed him to no unusual hazard, and its danger may have been one ordinarily incident to the service he had undertaken to render.

3. Duty of master toward servant.

The fifth, sixth and ninth instructions all contain misleading clauses as to the experience or inexperience of the plaintiff as a workman. There was no evidence tending to prove that he was without experience as a bridge carpenter, and none to show that any special training or practice was necessary to enable him to do with safety to himself the act in the performance of which he was injured. And in this part of its charge we think the court could only have said with propriety

that, if the jury believed from the evidence that the plaintiff was suddenly called upon to perform an unaccustomed duty, when, by reason of the rapid approach of the engine, he had no time for preparation or reflection, it was proper to consider these circumstances in determining whether he exercised reasonable care. *Railway* v. *Higgins*, 53 Ark. 466.

The sixth instruction is objectionable on the additional ground that it seems to make the defendant liable for the foreman's failure to warn the plaintiff of the danger of holding the rope and block, without regard to whether the foreman knew, or ought to have known, that the plaintiff was not aware of the danger.

For the errors designated, the judgment is reversed, and the cause remanded for a new trial.

HOWARD *v.* STATE.

58 229
872 533

Opinion delivered November 25, 1893.

58 229
79 302
81 518

Error coram nobis—*Newly discovered evidence.*

A writ of error *coram nobis* does not lie on behalf of one convicted of murder, after the time for obtaining a new trial has expired, on the ground of newly discovered evidence proving that another person committed the crime.

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

B. W. Johnson and *T. J. Gaughan* for appellant.

The writ of error *coram nobis* was properly issued. 35 Ark. 520. The court erred in submitting the cause to a jury. Mansf. Dig. sec. 2297, clause 6. The writ of error *coram nobis* is only a motion for a new trial after sentence and judgment, and the court should have granted a new trial, after granting the writ, without

further proceedings. Motions for new trial are in the sound discretion of the court. Why not the writ of error *coram nobis?* 41 Ark. 229.

James P. Clarke, Attorney General, for appellee.

No ground for a writ of error *coram nobis* was shown, and the court should have sustained the demurrer to the assignment of error. Stephen, Pl. (Tyler), 142; Tidd's Pr. 1136–7; 7 Am. & Eng. Enc. Law, 810; Black, Judg. sec. 300; Freeman, Judg. sec. 94; 35 Ark. 530; 9 *ib.* 185; T. Raymond, 231; 1 Levinz, 294; 3 Dowl. 70; 2 Rolle, 53; 1 Swan (Tenn.), 341; 17 Miss. (9 Sm. & M.) 362; 42 Miss. 315; 2 Rand. (Va.) 174; 18 Md. 130; 3 *id* 333; 34 Am. Dec. 396; 1 Watts & S. (Pa.) 438; 1 Brown (Pa.), 75; 11 Johns. (N. Y.) 460; 16 Wend. (N. Y.) 48; 8 Jones (N. C.), 393. It cannot reach to facts submitted to a jury, or found by a referee, or by the court sitting to try issues. 104 U. S. 416; 12 Gratt. 55; 9 G. & J. 437. See also 47 Tex. 235.

FLETCHER, Special Judge. At the November term, 1892, of the Ouachita circuit court, Henry Howard was convicted of murder in the first degree, and sentenced to be hanged. After the term had expired, he applied to the judge of that court for a writ of error *coram nobis*. The judge, upon examination of the petition and accompanying affidavits, granted the writ returnable at the next term of the court, and suspended execution of the sentence until the writ could be heard.

Howard assigned as error of fact, for which the judgment should be set aside, that, since the November term had expired, he had learned and can prove that Ed Lindsey and Tom Heiner were the murderers of Joel Jones, the party killed, and that he was innocent of the charge upon which he had been convicted; that this evidence was unknown to him at the time of his trial and

conviction, and that he can prove the facts by the parties whom he named as witnesses.

The State filed a demurrer to the assignment of error, which was overruled by the court. A response was then filed denying the allegations in the assignment of error. The issue thus formed was submitted to a jury, which returned a verdict for the State, upon which the former judgment was affirmed, and Howard appealed to this court.

The writ of error *coram nobis* is now but little in use. In practice the same end is usually accomplished by motion. The office of the writ is to correct an error of fact in respect to a matter affecting the validity and regularity of the proceedings in the same court in which the judgment was rendered and where the record is, when the error assigned is not for any fault of the court; those errors which precede the judgment—as error in the process, or through default of the clerk; where an infant appears by attorney, and not by guardian; where the defendant was insane at the time of the trial, or died before judgment. And this writ has been sustained where the defendant was induced to plead guilty to a charge of felony through fear and by reason of the threats of a mob.

But it will not lie to contradict or put in issue any fact that has been already adjudicated in the action. An issue of fact wrongly decided is not error, in that technical sense to which the writ refers. If the error lie in the judgment itself, it must be corrected by appeal or writ of error to a superior court. Stephens on Pleading, 142; Tidd's Prac. 1136, 1137; 6 Am. & Eng. Enc. Law, 810; Black on Judgments, sec. 300; Freeman on Judgments, sec. 94; *Pickett's Heirs* v. *Legerwood*, 7 Pet. 147; *Bronson* v. *Schulten*, 104 U. S. 416; *Adler* v. *State*, 35 Ark. 530; *Crawford* v. *Williams*, 1 Swan (Tenn.), 341; *Williams* v. *Edwards*, 12 Ired. (34 N. C.)

118; *Richardson* v. *Jones*, 12 Grat. 53, 56; *Sanders* v. *State*, 85 Ind. 318; S. C. 44 Am. Rep. 29; *State* v. *Calhoun*, 50 Kas. 523; S. C. 18 L. R. A. 838; *Fellows* v. *Griffin*, 17 Miss. (9 Sm. & M.) 362; *Miss. etc., Railroad Co.* v. *Wynne*, 42 Miss. 315; *Cole* v. *Pennell*, 2 Rand. (Va.) 174; *Kemp* v. *Cook*, 18 Md. 130; *Hirsh* v. *Weisberger*, 44 Mo. App. 506; *Bigham* v. *Brewer*, 4 Sneed, 432; *Bridendolph* v. *Zellers*, 3 Md. 333; *Tyler* v. *Morris*, 34 Am. Dec. 395; *DeWitt* v. *Post*, 11 Johns. 460; *Camp* v. *Bennett*, 16 Wend. 48; *Roughton* v. *Brown*, 8 Jones (N. C.), 393; *Hillman* v. *Chester*, 12 Heisk. 34; *Holford* v. *Alexander*, 46 Am. Dec. 253; *Hawkins* v. *Bowie*, 9 G. & J. (Md.) 437; *Milam County* v. *Robertson*, 47 Tex. 235; Baylies on New Trials and Appeals, 440.

The allegation in this case is that the court erred in finding a fact against the plaintiff in error on which issue was joined on his plea of not guilty, contrary to the truth; and it may be that even that was not because the finding was not right according to the proof then before the court, but by reason simply that he can now produce evidence sufficient, as he supposes, to establish the fact as then alleged by him. While nominally the issue attempted to be made on the assignment of error is that others committed the crime, it is in fact an effort to re-examine the same issue joined upon the plea of not guilty. It is in reality an attempt in this way to get a new trial after the term has expired, on the ground of newly discovered evidence.

The statute (Mansfield's Digest, sec. 3909, 5155) provides for a new trial in civil cases after the term has expired on the ground of newly discovered evidence, but no such provision is made in reference to criminal cases (Mansfield's Dig. sec. 2295, 2296, 2297), and none was allowed at common law. 1 Graham & Waterman on New Trials, 504, 507; 2 *id.* 72, 77; *Sanders* v. *State*, 85 Ind. 318; 44 Am. Rep. 33.

If appellant has been wrongfully convicted, his only remedy is by petition to the governor for pardon.

There was no ground for the writ, nothing upon which an issue proper to be submitted to a jury could have been formed. The demurrer should have been sustained to the assignment of error; but the verdict of the jury produced the same result, and we affirm the judgment.

CARPENTER v. STATE.

58 233
60 407
58 233
62 292

Opinion delivered December 2, 1893.

1. *Verdict—Degree of murder.*
   Mansf. Dig. sec. 2284, which requires that "the jury shall, in all cases of murder, find by their verdict whether he be guilty of murder in the first or second degree," was not repealed by the criminal code.
2. *Admissibility of deposition of deceased witness.*
   The deposition of a witness, since deceased, taken before the examining court, is not admissible on the trial of a criminal cause where it does not appear, either from the magistrate's certificate or other competent evidence, that defendant was present and had the privilege of cross-examination, although the deposition contains the headings "Cross-examination" and "Re-direct examination."
3. *Evidence—Former statements.*
   It is only when a witness has been impeached that it is admissible to show that former statements by him, under oath or otherwise, were similar to those made by him on the trial.
4. *Joint crime—Evidence.*
   Upon the theory of the State that the murder was committed by defendant and his brother, evidence as to a conversation between the latter and deceased the day before the killing relating to the ground of the quarrel is competent for the defense.

Appeal from Ashley Circuit court.

GEORGE C. SHELL, Judge.

STATEMENT BY THE COURT.

The defendant and appellant, Ben L. Carpenter, was indicted at the January term, 1892, of the Ashley circuit court, and in said court, at its following August term, was tried for the murder of H. J. Hannibal, on the following indictment (omiting the formal parts), to-wit: "The said Ben L. Carpenter, in the county and State aforesaid, on or about the 28th day of September, 1891, did feloniously, wilfully and with malice aforethought and with premeditation and deliberation, kill and murder one H. J. Hannibal, then and there being, by shooting him, the said H. J. Hannibal, with a gun, then and there loaded with gunpowder and leaden bullets, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Arkansas."

The jury returned into the court the following verdict, to-wit: "We, the jury, find the defendant guilty of the charge alleged in the indictment;" and upon this verdict the court subsequently rendered judgment and sentence of death upon the defendant. This forms the first ground for the motion for a new trial.

In the progress of the trial, the testimony of Sallie Hannibal, widow of deceased, as taken down by the justice of the peace, in the examining court, and as certified by him, after proof of her death, was by the State offered in evidence over the objection of the defendant, (except that portion relative to conduct of and conversation between the deceased and W. O. Carpenter, brother of the defendant, on the day before the killing), the defendant insisting first, that the whole of said statement was inadmissible, and secondly, being admitted, the part relating to the conduct of, and conversation between, deceased and W. O. Carpenter on the day previous to the day of the killing should also be admitted. The court, however, excluded the part aforesaid, and admitted the remainder. The certificate of the justice of

the peace to the statements of witnesses taken down by him when sitting as an examining court, among others, those of Sallie Hannibal, is as follows, to-wit: "I, W. S. Lawson, an acting and duly commissioned justice of the peace in and for said county, hereby certify that the above and foregoing eighty-five pages contain the substance of the evidence in the examination of the charge of murder against W. O. and B. L. Carpenter for the murder of H. J. Hannibal on the 28th day of September, 1891.

Witness my hand this 3rd day of October, 1891.

(Signed) W. S. LAWSON, J. P."

The admission of this deposition was the third ground of motion for a new trial.

The court, also over the objection of defendant, refused to permit W. O. Carpenter to testify as to what occurred between himself and the deceased on the two days previous to the killing.

The testimony of Sallie Hannibal, thus excluded, is as follows, to-wit: "I heard the conversation on Sunday morning. They were fifty yards away. Mr. Hannibal told Mr. Carpenter that he could put the mules in the field if he wanted to, and Mr. Carpenter said, if he did, he would kill him, and Hannibal made no reply, but got over the fence into the cow-pen. He got over the cow-pen fence and went up to the gap, where Mr. Carpenter was standing, and offered to pay him damages. I heard the conversation. In a few minutes Mr. Carpenter walked off. Carpenter told him then he would put (up) the gap. Hannibal told him no, he should not; he'd put it up next morning himself. He did not put it up next morning, because he did not have time. Mr. Carpenter was pretending to put it up. I don't know why he would not let Carpenter put up the gap."

The testimony of W. O. Carpenter thus excluded by the court, was as follows, to-wit: "That, on Sunday morning preceding the killing (on Monday following), he went down to his field and found that the deceased, Hannibal, had thrown down his fence which he (Carpenter) had repaired on Saturday before, and was putting it up when the said Hannibal came out and with threats and curses drove him away, and said he would kill him (Carpenter) if he tried to put up the fence." This exclusion of testimony forms the tenth and eleventh grounds of motion for new trial.

Hugh Estelle, a boy 15 years old, and at the time of the killing living with the deceased, was endorsed on the indictment as one of the prosecuting witnesses, but called by the defendant, and had (from his own statements) testified before the coroner's jury, wherein he had stated that the defendant, Ben L. Carpenter, had first shot the deceased twice with a shot gun, and then W. O. Carpenter had shot him three times with a pistol, whereas on the trial he testified that defendant did not shoot deceased at all, but that W. O. Carpenter did all the shooting, and explained the conflicting statements by saying that he was coerced by Mrs. Sallie Hannibal and Mrs. Bell to swear as he did before the coroner's jury, and that the same was false.

To bolster up the witness' testimony, the defendant offered to prove, by several other persons, that witness had stated to them separately, soon after the killing and on the same day, in language substantially as he testified on the trial. This testimony was not admitted by the court, and forms the ninth ground of motion for new trial.

The killing occurred early Monday morning, September, 28, 1891, about fifty or sixty yards from the house of deceased. The controversy between the Carpenter brothers and the deceased grew out of the acts of

the deceased in letting down the fence of the former, which was the division fence between their field and his cow-pen, or in making a gap in the same so as to let in the stock of deceased into the field of the Carpenters, there being there well grown crops of peas and other food for stock. The conflict between the witnesses for the State and those for the defendant consisted mainly in one party testifying that defendant shot deceased twice with a shot gun and his brother afterwards three times with a pistol, and that deceased was unarmed at the time; and the other party testifying that defendant did not shoot deceased at all, but that his brother did all the shooting, and that deceased was armed with a pistol, and was attempting to shoot the brother, W. O. Carpenter.

This is all of the facts necessary here to state, and this is necessary only to show the bearing the excluded testimony might have had, and its exclusion may have had, upon the result of the trial.

The twelfth ground of motion for new trial was in the nature of newly discovered evidence as to the disqualification of juryman, J. W. Berry, but as the consideration of this question is unnecessary, and will probably not arise again, we withhold any opinion in relation thereto.

Dan W. Jones & McCain and *Geo. W. Norman* for appellant.

1. The jury shall in all cases of murder find by their verdict *the degree.* Mansf. Dig. sec. 2284. A verdict which does not find the degree of murder is fatally defective. 26 Ark. 323; 26 *id.* 534; *ib.* 614; 34 *id.* 649; 26 *id.* 230.

2. It was error to admit the alleged deposition of Sallie Hannibal (who was dead), taken before the examining court. 33 Ark. 539; 29 *id.* 22; 40 *id.* 461; 1 Gr. Ev. (3rd ed.) sec. 166; 1 Spencer (N. J.), 66.

3. Instruction No. 10, given at the State's instance, is not in harmony with Nos. 1 and 2 previously given on part of defendant, and is misleading.

4. J. W. Berry, a juror, should have been excused. Mansf. Dig. sec. 2238.

5. It was error to refuse to admit the testimony of Mrs. Shell and others to bolster up the evidence of Hugh Estelle. 1 Starkie (6 Am. ed.), p. 186; 2 Phil. Ev. 445–6; 1 Gr. Ev. (3rd ed.) sec. 469.

6. The court erred in excluding parts of the deposition of Sallie Hannibal as to the interview between deceased and W. O. Carpenter, and in excluding the testimony of Carpenter as to what happened Sunday morning preceding between witness and deceased. 13 Am. Rep. 492; 29 Ark. 261.

James P. Clarke, Attorney General, and *Chas. T. Coleman* for appellee.

1. Sec. 2284, Mansf. Dig., is not found in the criminal code. See Cr. Code, secs. 254–5–9, 260, etc. All laws inconsistent with it were repealed. The code was intended as a complete system of criminal procedure, and supersedes all others. 10 Bush (Ky.), 299; 56 Ark. 20, dissenting opinion. If the act of 1838 was impliedly repealed by the code, the common law would govern, and the verdict is good. Under the common law a verdict of "guilty" is competent to mean guilty of all that the indictment well alleges. 1 Bish. Cr. Proc. sec. 1005*a* and cases cited; 26 Ark. 439.

2. The deposition of Sallie Hannibal was admissible. 40 Ark. 454.

3. A party cannot fortify his witness by such evidence as that offered. 10 Gray, 485; 1 Park. Cr. Rep. 147; 1 Clif. 98; Whart. Cr. Ev. sec. 492.

4. There is no conflict between the tenth request for the State and the first and second for defense.

1. Verdict should find degree of murder.

BUNN, C. J., (after stating the facts.) As to the first ground of motion for new trial, we are unable to see anything in section 2284, Mansfield's Digest (which requires juries in the trial of cases of murder to find the degree of murder) inconsistent with sections 254, 255, 259 and 260 of the criminal code, as originally numbered, or with any other section of same; and while there may be a difference of opinion as to whether or not the code, in attempting to cover the whole ground of our criminal procedure, may not contain a provision tantamount to this section 2284 of the Digest, yet it must be confessed by all that the latter is more explicit, direct and definite than anything to be found in the code on the subject. We are of the opinion that the statute in question is not inconsistent with anything in the code, and further, that it is not repealed by implication. Besides, it has been so long recognized, acted upon and treated without question or controversy, as the law, and has in fact become so fixed and established as a part of our criminal jurisprudence that we should be loth to dispense with its most excellent use in our criminal practice. *Thompson* v. *State*, 26 Ark. 323; *Trammell* v. *State*, 26 *id.* 534; *Neville* v. *State*, 26 *id.* 614; *Ford* v. *State*, 34 *id.* 649; *Allen* v. *State*, 26 *id.* 333; *Porter* v. *State*, 57 *id.* 267. We are of opinion, therefore, that this ground of the motion for a new trial was well taken, and should have been sustained.

2. Admission of deposition of deceased witness.

The admission of the deposition of the deceased witness, Sallie Hannibal, without some proof that the defendant was present and had the privilege of cross-examination, when her statement was made and taken down by the justice of the peace, we think, was improper. We do not think that the mere use of the heading "Cross-examination" and "Re-direct-examination" employed by the person taking down the statements, is sufficient to establish the fact that the defendant was present, and

cross-examined the witness. We are of the opinion, however, that the certificate of the justice of the peace, made in obedience to the law on the subject, is a sufficient authentication and proof of the fact that such was the substance of the testimony of the witness as given before him on the occasion, to make the deposition *prima facie* at least. Had his certificate shown that the defendant was present, or had that fact been shown by any other competent testimony, the deposition would have been admissible, in accordance with the rule adhered to in many decisions of this court. *Hurley* v. *State*, 29 Ark. 22; *Shackleford* v. *State*, 33 *id.* 539; *Dolan* v. *State*, 40 *id.* 461; *Sneed* v. *State*, 47 *id.* 180. The third ground of the motion for new trial was, for the reason stated, well taken and should have been sustained.

3. Proving former statements of witness.

As to the refusal of the court to admit testimony to bolster up the testimony of witness Hugh Estelle, which furnishes the ninth ground for the motion for new trial, the court can only state the rule (or rather an exception to the rule) to be that where an effort by the opposite side is made to impeach the witness under certain circumstances and on certain grounds, evidence is admissible to show that former statements of the witness, either under oath or not, were similar to those he makes on the trial. *Henderson* v. *Jones*, 10 S. & R. (Pa.) 322; *State* v. *George*, 8 Ired. (N. C.) 324; *Cooke* v. *Curtis*, 6 Harris & Johnson (Md.), 93; *Coffin* v. *Anderson*, 4 Blackford (Ind.), 395.

The court cannot, however, rule on the point, except to sustain the court below, for the reason, that the bill of exceptions as copied in the abstract of counsel, or in the transcript, as we have been able to find, does not show how or by whom the witness was attempted to be impeached.

4. Evidence in case of joint crime.

We think the tenth and eleventh grounds were well taken. Upon the theory of the State that the murder

was committed by the two Carpenters, the parts of the testimony of Sallie Hannibal and W. O. Carpenter which the court below refused to admit could not have been prejudicial to the State, as we view it, and since, upon its theory, it was a joint murder, anything bearing upon the case of one, we think, might have been admitted, provided it was not inadmissible upon other grounds.

The appellant complains that the tenth instruction given by the court at the instance of the State is inconsistent with—in fact, completely at war with—one and two given by the court at the instance of the defendant. It seems that one and two were given first, and hence the propriety of the saying that "number ten is at war with numbers one and two." Under the state of facts in the case, and the various therories predicated thereon, there is an obvious repugnancy, but we are inclined to find less fault with number ten than with numbers one and two, but since the error, viewing it in this light, was not prejudicial, at least could not have been objected to by the defendant, we make no ruling to affect this appeal, but only by way of suggestion that a more successful effort to harmonize the instructions may be made in the further proceedings in this behalf.

For the errors of the court below, pointed out in the foregoing opinion, the judgment is reversed, and the cause remanded for further proceedings.

Justices Hughes and Wood did not participate herein.

58 242
62 534
58 242
f74 34
77 543
58 242
86 129
f86 130

McDONNELL v. STATE.

Opinion delivered December 2, 1893.

1. *Indictment—Forgery.*
   An indictment which alleges the *forging, counterfeiting and altering* of an instrument is not demurrable as charging more than offense.
2. *Indictment—Allegation of tenor.*
   In an indictment for forgery, the phrase, "in words and figures as follows, to-wit," imports an exact copy.
3. *Forgery—Variance.*
   An indictment for forging a school warrant, which is described as containing certain figures on its face, will not be sustained, without proving that the figures in question were upon the warrant when it passed out of defendant's possession.
4. *Forgery—Intent to defraud.*
   The charge of an intent to defraud several persons will be sustained by proof of intent to defraud any one of them.
5. *Expert testimony—Comparison of handwritings.*
   An expert may give his opinion whether certain writing was done by defendant, after comparing it with a letter already in the case admitted to be in defendant's handwriting.

Error to Faulkner Circuit Court.

JAMES S. THOMAS, Judge.

McDonnell was indicted for forgery. The indictment contained two counts, the first of which, omitting the caption and formal commencement, alleged as follows:

"The said Will McDonnell, on the 3rd day of February, A. D. 1891, in the county and State aforesaid, fraudulently and feloniously did forge, counterfeit and alter a certain writing on paper, purporting to be a school warrant, which said writing on paper is in words and figures as follows, to-wit:

'No. 32 District School Fund,
District No. 38.
January the 30, 1891.

Treasurer of Faulkner County, Arkansas:

Pay to M. G. Bailey, or order, the sum of twenty-five ($25.00) dollars, for teaching school, out of the school fund.

J. A. OLIVER,
H. M. LAWRENCE,
Directors.'

and being endorsed on the back 'Mr. M. G. Bailey,' and with the further endorsement on the back, to-wit:

"'Received on the within warrant $25.00 twenty-five dollars, in full payment.

February 3, 1891. M. G. BAILEY,
W. MCDONNELL.'

with intent then and there fraudulently and feloniously to obtain possession of the property of J. A. Oliver and H. M. Lawrence, and of S. P. C. Smith and of School District No. 38 of Faulkner county, Arkansas, against the peace and dignity of the State of Arkansas."

A second count of the indictment charged that defendant feloniously and fraudulently uttered the instrument which is set out in the first count. It is contended that there was a variance between the second count and the evidence, in that this count alleged that the warrant was endorsed by "Will McDonnell," when in fact it was endorsed by "W. McDonnell."

Defendant demurred to the indictment because it charged more than one offense, and because the facts stated did not constitute a public offense within the jurisdiction of the court. The demurrer was overruled, and defendant excepted.

The trial developed the following testimony on behalf of the State: Oliver testified: "In January, 1891, I was school director of School District No. 38, in Faulk-

ner county, Arkansas, as was also H. M. Lawrence. On the 30th of that month I drew a warrant on the treasurer of the county in favor of M. G. Bailey, a school teacher in the district, for twenty dollars, and signed said Lawrence's name to it, he having authorized me to do so. I recognize the warrant shown in court as the warrant I drew. I think I wrote in the face of the warrant the figures '$20.00.' I know nothing about the brackets around the figures, which are now ($25.00). The word 'five' has been inserted in the warrant since it left my hands." Lawrence and two other witnesses testified that they saw the warrant after it was issued, and that it was written for $20.00. Smith testified: "In January and February, 1891, I was treasurer of Faulkner county. On the 3rd day of February, 1891, the defendant brought the order here exhibited in court to me, and I paid him $25.00 on it. The word 'five' was written dimly with a pencil, and I was afraid it would rub out, and it would not then show $25.00 on its face as it showed payment of $25.00 on its back, and my recollection is that I wrote in the face of the warrant the figures and marks now found on same, to-wit, ($25.00), but I am not positive of this. Defendant and I had no conversation at the time about his making it good to me if there was anything wrong with it. I afterwards discovered that there was something wrong about the order." The State here introduced the warrant and read the same in evidence to the jury.

The defendant testified in his own behalf as follows: "I was running a gin for another party in the town of Greenbrier, in Faulkner county, Arkansas, in January, 1891, and went into the store of the witness, Moore, when one of them said to me that Bailey, a negro, had a school order for $20, which he wished to sell, and there were $2 or $3 in it if I wanted to buy it. I bought it, paying $18.50 or $19.50 for it. Did not look at it. Took

Mr. Moore's word for the amount. I afterwards gave the order to one Buno, requesting him to carry it to town and get it cashed for me, but he gave it back to me the next day. Sometime afterwards I came down to Conway and saw Treasurer Smith, and when I gave the order to him he called my attention to the fact that the order was for $25, and I told him I understood it was for $20, and if there was anything wrong about it I would correct it. I identify the letter shown to me by the prosecuting attorney as the one I wrote to Treasurer Smith."

A. R. Witt testified on behalf of the State: "I kept the postoffice at Conway four years, and had occasion to compare the handwritings of different parties, and consider myself competent to compare writings and give an opinion as to their identity. Witness then compared the writing in the letter written by defendant to Treasurer Smith with the word "*five*" in the warrant, and gave it as his opinion that both were written by the same party. Samuel W. Williams testified that he had practiced law forty years, and had had a great deal of experience in comparing handwritings. Witness believed that the word "*five*" in the warrant was written by the person who wrote the letter to Smith. D. R. Fones testified to the same effect. Witness was cashier of the Bank of Conway, and had had considerable experience in comparing signatures.

Defendant has appealed from a judgment upon a verdict against him. The errors assigned by him are stated in the opinion.

A. S. McKennon for appellant.

1. The common law rule that the pleader must set out in the indictment the forged writing, according to its tenor, in words and figures—a *fac simile*—has not been modified by statute. Mansf. Dig. sec. 2117; Bish.

Cr. Pr. (3 ed.) sec. 403; 2 Arch. Cr. Pr. and Pl. (8 ed.) p. 1567, note.

2. The endorsement was not part of the order. 2 Bish. Cr. Pr. 410. But, having copied it in the indictment, it became material, and must be proven as laid. 1 Gr. Ev. (13 ed.) secs. 63–4–5; 1 Bish. Cr. Pr. (3 ed.) secs. 483, 486; 2 *id.* secs. 407–8. The variance was fatal. 1 Gr. Ev. secs. 64, 65; 2 Bish. Cr. Pr. 406; 2 Arch. Cr. Pr. and Pl. 1567–8 and notes; 32 Ark. 609.

3. If the figures were put in the order after the warrant passed from defendant's hands, it was not his instrument, and could not be put in evidence against him. 8 Ark. 500; 132 *id.* 609. See also 1 Gr. Ev. secs. 64–5; 2 Arch. Pr. and Pl. 1567–8; 2 Bish. Cr. Pr. 406 and notes 3, 5; *Ib.* 408, note 8; *Ib.* 408, notes 5–9.

4. The indictment alleges an intent to defraud the directors *and* school district No. 38. This was impossible, and was and could not be proved.

5. The record shows that the case was tried by *eleven* jurors. 1 Thompson, Trials, p. 5.

James P. Clarke, Attorney General, for appellee.

1. The indictment speaks for itself.

2. The comparison of the forged writing with a letter written by defendant, and the opinions of witnesses that both were written by the same person, was allowable. 1 Gr. Ev. (4th ed.) secs. 579–582.

3. The first instruction was properly refused. Figures are not a part of an order or bill, and need not be described or proved. 1 Mass. 62; *ib.* 202; 2 Mass. 397; 7 Met. 50; 7 Gratt. 651; 5 Ohio, 5; 100 Ill. 263. If the figures were added after the warrant was passed by defendant, they were not part of it, and might have been omitted in the description. 8 Leigh, 732; 6 Rand. (Va.) 693.

4. It was not necessary to prove an intent to defraud *all* the persons named. An intent to defraud *any* or *all* is sufficient. Russ. & Ryan, 291; *ib.* 169; 8 Car. & P. 274; 1 Johns. (N. Y. 320; 25 Wend. 472.

1. Sufficiency of indictment for forgery.

WOOD, J. In view of the proof, it was unnecessary to employ the word "alter" after the word "forge" in the indictment. For the sake of clearness, it might have been omitted. The indictment is not defective on that account, however. The word "alter" may be treated as surplusage. The demurrer was properly overruled. 1 Bish. Cr. Pro. secs. 481 to 485; also secs. 401, 419, 426; 1 Wharton's Prec. of indictments, 264, 267; 3 Rice on Ev. p. 773; Acts of 1893, p. 67.

2. When necessary to set out exact copy.

It appears that the forgery in this case consisted in the alteration of a school warrant. The director who wrote it testified that he thought he wrote in the face of the warrant the figures $20.00; that he knew nothing of the brackets around the figures, which are now ($25.00); that the word "five" had been inserted in the warrant since it left his hands. The treasurer (Smith) testified that he paid the appellant $25 on the warrant exhibited in court; that the word "five" was written dimly with a pencil, and, being afraid it would rub out and not show $25 on its face, as it showed payment of $25 on its back, his recollection is, he wrote in the face of the warrant the figures and marks now found on same, to-wit, "($25.00)," but of this he was not positive. Other witnesses, who saw the warrant before it was received by the treasurer, state that it was written for twenty dollars. One said he did not know about any figures in the face of the warrant, and another thought he saw the figures $20.00. A letter, identified by appellant while on the witness stand as one written by him, was introduced, and experts testified that the word "five" in the warrant, in their opinion, was written by the same person who wrote the letter.

Appellant's first request was as follows: "If you believe from the evidence that the figures and characters as follows, "(25.00)," were inserted in the warrant adduced in evidence after the same passed out of defendant's hands, then said warrant is not the instrument of defendant, and cannot be considered as evidence against him, and you should acquit him."

Considering the allegations and the proof, this request should have been granted. It was not error to admit the warrant when offered, because it was a *facsimile* of the instrument described in the indictment. But it being shown *aliunde* that the figures "($25.00)" might have been inserted by Smith after the warrant passed out of appellant's possession, the jury should have been permitted to pass upon this; and if they ascertained such to be the fact, the defendant, under the charge as laid, was entitled to an acquittal *secundum allegata et probata.*

The defendant has the right to insist upon such certainty and precision in the indictment as will not mislead him in his defense, and as will relieve him of the danger of jeopardy for the same offense. 3 Rice on Ev. sec. 119, *et seq.* The term, "in words and figures as follows, to-wit," implies the same exactness as the word "tenor," which imports an exact copy. Webster, Dic. "Tenor;" Maxwell's Cr. Pro. 161.

3. Variance between indictment and proof.

Here the defendant was informed by the indictment that he had forged a school warrant, which was described in words and figures, and in the face of the warrant appeared the figures "($25.00)." These figures were essentially descriptive of the instrument he is charged to have forged, and he could not be convicted, as thus charged, by producing an instrument that did not have these figures in the face of it when it left his hands. They are just as essential to the identity of the instrument in this case as a description of color would

be in an indictment for larceny. Where, for instance, a man was charged with stealing a black horse, proof of a white horse would not sustain the charge; neither, here, will the charge be sustained without proving the figures "($25.00)" were upon the warrant when it passed out of defendant's possession. 1 Greenleaf, Ev. secs. 56, 58 and 65, and authorities there cited; *Griffin* v. *State*, 14 Ohio St. 61; *People* v. *Marion*, 28 Mich, 257. As the case must be remanded, should the prosecuting attorney conclude the evidence shows the figures "($25.00)" were added by Smith after he received the warrant, doubtless he will quash and refer, and describe the instrument as it was when appellant altered it. This would make quite a different case. Then when the district attorney offers the warrant in its present shape, should it be objected to, the testimony of Smith would make it admissible, and it would be none the less the instrument as charged to have been forged by the defendant although changed after it passed out of his possession.

Those authorities which hold that marginal figures, stamps, vignettes, water-marks and ornamental designs and devices, may be omitted in description, when the instrument is set out according to its tenor, because they are no part of the instrument, are not in conflict with the doctrine above announced. If, in addition to the tenor, such unnecessary descriptive averments were carried into an indictment for forgery, they would have to be proven as essential to the identity of the instrument thus described. *Hill* v. *State*, 41 Tex. 257; *Dick* v. *State*, 30 Miss. 634.

Inasmuch as the verdict, being general, would have been good upon the first count, had the jury been properly instructed, we deem it unnecessary to pass upon the question of variance suggested as to the second count and the proof. Should another indictment be brought, as it

is not necessary to set out the indorsement, the prosecuting attorney will doubtless avoid all possible difficulty of that kind. *Commonwealth* v. *Ward*, 2 Mass. 397; *Perkins* v. *Commonwealth*, 7 Grat. 651.

4. Intent to defraud.

The appellant's fifth request, which was, in substance, that the intent must be to defraud all the parties named as charged in the indictment, that an intent to defraud one or more is not sufficient, was very properly overruled. The reverse we understand to be the law. Where several are named, an intent to defraud all, or any one, will sustain the charge. 2 Bish. Crim. Pro. secs. 422, 425; *People* v. *Curling*, 1 Johns. (N. Y.), 319.

5. Experts may compare handwritings.

The third, fourth, fifth and sixth grounds for a new trial are not insisted on by counsel in his brief, presumably for the reason that he does not regard them as available. In view of a new trial we only notice them to say that the court did not err in permitting the expert testimony on the comparison of handwriting. The letter offered as an examplar was identified by appellant, and no collateral issue could be raised concerning its genuineness. 1 Greenleaf on Ev. secs. 579, 581 and authorities cited; 3 Rice on Ev. sec. 496; *May* v. *State*, 14 Ohio, 467.

For the error indicated, the cause is reversed, and remanded for a new trial.

PHILLIPS v. DESHA.

Opinion delivered December 2, 1893.

Certiorari—Practice.

Where a writ of certiorari to the county clerk was ordered by the circuit court, but not issued, a response by the clerk that a transcript of the record in the case had been presented with the petition for a certiorari is insufficient; in the absence of a

waiver, the writ must be issued, and a transcript of the record returned with the clerk's response.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

Blackwood & Williams for appellant.

The writ of *certiorari* must be issued, and the record returned with the response. 30 Ark. 152; *Ib.* 532; 21 *id.* 264; 23 *id.* 107; *Ib.* 228.

Vaughan & Collins for appellee.

This case is not parallel with the cases cited by appellant. The writ and return may be waived, where the record is presented duly certified and identified, as was done here. 23 Ark. 228.

WOOD, J. Desha filed his petition for a writ of certiorari to the county clerk; his petition was granted, and an order made that the writ issue. The county clerk, by attorney, James Coates, who also appears upon the record as attorney for petitioner, responded in writing that he had already filed a full and complete transcript of all the record of the Pulaski county court in relation to the removal of Albert Desha in the office of the clerk and numbered "165½." The transcript thus filed was an exhibit which he had furnished petitioner, and was attached to his petition nearly two months before writ was ordered. Appellant demurred to this response, which was overruled, and appellant, excepting and resting, appealed.

The writ was ordered but not issued. It was not waived, if it could be waived. There was no such record before the court as the law requires upon proceedings by certiorari, and the demurrer to the clerk's response should have been sustained. *McKay* v. *Jones*, 30 Ark. 152; *Marshall* v. *Ramsauer*, *id.* 532; *Rightor* v. *Gray*,

23 Ark. 228; *Derton* v. *Boyd*, 21 Ark. 264; *Dicus* v. *Bright*, 23 Ark. 107.

Reversed and remanded.

---

58 252
71 323
58 252
e73 89
j73 99

TENNANT v. WATSON.

Opinion delivered December 9, 1893.

1. *Attachment—Prior equities.*
   The object of the statute providing for attachment to secure a debt (Mansf. Dig. sec. 324,) is to prevent subsequent alienations and incumbrances, not to cut off, destroy or affect the prior rights, equities or incumbrances of third persons.
2. *Registration of conveyances—Parol equities.*
   Mansf. Dig. sec. 671, which provides, in substance, that no bond or instrument for the conveyance of any real estate shall be valid unless filed for record, applies only to instruments of writing affecting real estate, and not to equitable rights therein which exist only in parol.
3. *Execution sale—Purchase by plaintiff.*
   A purchaser of property at a sale under execution in his own favor takes it charged with all the rights and equities, which exist only in parol, that might be asserted against the defendant in the execution.

Appeal from Miller Circuit Court.

RUFUS D. HEARN, Judge.

L. A. Byrne for appellants.

1. An order of general attachment binds the property of defendant from the day it is placed in the hands of the sheriff. 39 Ark. 97.

2. Davis' primary motive was to put the property out of the reach of his creditors, and the deed, being absolute on its face, placed the title in Humphrey. His creditors had a right to presume the property was his, and he was thus enabled to get credit on the faith of owning it, in which case Humphrey's creditors have a

right to subject it to their debts. Waite, Fr. Conv. secs. 387, 389, 398; 10 Conn. 65; 55 Ark. 123; 50 *id.* 42; 34 N. J. Eq. 158; *ib.* 19. The whole transaction was a fraud on creditors. 5 Lawson's Rights & Rem. sec. 3090.

3. No man should, by the acts of others, be given a false credit. 2 Mason, 252; 28 Fed. Rep. 788; 1 Wade on Att. sec. 225.

4. The deed to Davis was absolute; nothing to put creditors or purchasers on notice. The law is opposed to secret trusts. Mrs. Davis is estopped; for, by her negligence, she has misled the creditors of Humphrey to their prejudice. 55 Ark. 296; Mansf. Dig. sec. 671; 30 Ark. 111; 24 Fed. Rep. 609.

Arnold & Cook for appellee.

The deed of Mrs. Davis was recorded *before the sale*, and was notice to plaintiffs. Mansf. Dig. sec. 671; 24 Fed. Rep. 609. Plaintiffs had actual notice of Mrs. Davis' equities, before the sale. But the continuous possession of Mrs. Davis was notice. 16 Ark. 543; *Ib.* 541. If plaintiffs had notice, actual or constructive, they were not innocent purchasers, 16 Ark. 543; *Ib.* 341; 30 *id.* 111; *Ib.* 249; 31 *id.* 21–2; 34 *id.* 85; 24 Fed. Rep. 609.

BATTLE, J. This action was brought by Tennant, Walker & Company against Jesse Watson to recover the possession of a certain tract of land in Miller county. They based their right of action upon a deed executed by A. S. Blythe, as sheriff of Miller county, bearing date the 12th day of September, 1890.

Rhoda Davis, on her application, was made a defendant, and she and Jesse Watson answered and said, among other things, that Watson was not in the unlawful possession of the land; that the defendant Davis and her husband, F. M. Davis, on the 27th of July, 1888, conveyed it to Thomas H. Humphrey to secure the pay-

ment of a debt of F. M. Davis to Humphrey for $200; that it was agreed by the parties, at the time, that the conveyance should only operate as a mortgage to secure the payment of the debt; that, afterwards, on the 3rd day of January, 1889, the debt having been paid, Humphrey and his wife conveyed the land to the defendant Davis; that, after the conveyance of Humphrey and wife, plaintiffs, on the 3rd day of January, 1889, caused an order of attachment in their favor, and against Humphrey, to be levied on the land; that the attachment was sustained, and the land was ordered to be sold as the property of Humphrey, and was sold to the plaintiffs; that the sheriff who made the sale executed the deed on which this action is based; that the defendant Davis duly notified the plaintiffs, before and at the time the land was levied on, that she was the owner, and caused them to be notified of her claim at the sale.

The issues in the case were tried by a jury on the 23rd of June, 1891, and a verdict was returned, and a judgment thereon was rendered, in favor of the defendants; and the plaintiffs appealed.

The facts of the case are substantially as follows: F. M. Davis, the husband of the defendant, Davis, was the owner of the land, and indebted to Humphrey in about the sum of $200. Being the owner, and indebted, he conveyed the land to Humphrey, by deed absolute on its face, to secure the payment of the indebtedness. Mrs. Davis redeemed the land by paying the debt, but took no deed, or assignment of the mortgage, until about two months thereafter, to-wit, on the 3rd day of January, 1889, when Humphrey and wife conveyed the land to her by deed, which was acknowledged and filed for record on the 11th day of January, 1889. In the meantime, appellants sued out an order of attachment against Humphrey, and caused it to be levied on the land on the 3rd day of January, 1889, at 4 o'clock P. M.

On the 11th of June, 1889, the court sustained the attachment, and ordered the land to be sold at public vendue. On the 20th of July, 1889, it was sold according to the order of the court, and appellants became the purchasers. Not having been redeemed, the sheriff conveyed it to them on the 12th day of September, 1890.

There was a cabin on the land, and about fifteen acres of it were cleared and in a state of cultivation. F. M. Davis testified in the trial that he was in possession of the land at the time he conveyed to Humphrey, and at all times since remained in possession, and had a tenant on it; and that when the land was sold he appeared and protested against the sale. The defendant Watson testified that he was "the tenant of Mr. Davis, and had lived on the land for the past three years, and made a crop on the place each year." He was on the place as Davis' tenant when the deed to Humphrey was executed.

Shall the judgment of the circuit court be affirmed?

1. Attachment does not cut off prior equities.

The statutes of attachment provide that "the plaintiff in a civil action may, at or after the commencement thereof, have an attachment against the property of the defendant, * * * as a *security* for the satisfaction of such judgment as may be recovered." Mansfield's Digest, sec. 309. Section 325 of Mansfield's Digest provides 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; and the lien to the plaintiff is completed upon any property or demand of the defendant by executing the order upon it in the manner directed in this chapter." But this lien is allowed for no purpose except that for which the attachment is allowed. It creates no estate in the property attached, nor divests prior rights or equities therein. "It is neither a *jus ad rem* nor a *jus in re*." The stat-

utes, by making the attachment by which it is created a security for the satisfaction of such judgment as may be recovered, in effect, declare its only object to be to secure the judgment by preventing subsequent alienations and incumbrances. It is no part of its office to cut off, destroy, or affect the prior rights, equities, or incumbrances of third persons. But on the contrary the statute under which it can be created provides: "Any person may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or of any attached debt, present his complaint, verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property, or an *interest in or a lien on* it under any other attachment *or otherwise*, and setting forth the facts upon which such claim is founded, and his claim shall be investigated." Mansfield's Digest, sec. 356. And in this connection they further provide: "The court may hear the proof, or may order a reference to a commissioner, or may impanel a jury to inquire into the facts. If it is found that the claimant has a title to, a *lien on or any interest* in such property, the court shall make such order as may be necessary to protect his rights." Mansf. Dig. sec. 358.

But these rights, equities and incumbrances may be such as can be lost through the neglect of the person in whose favor they exist to comply with the statutes upon registration, or by a *bona fide* purchaser for value, and without notice, acquiring the property.

2. Statute of registration construed.

Section one of an act entitled "An act concerning the recording of deeds," approved December 19th, 1846, which is section 670 of Mansfield's Digest, declares that "every deed, bond or instrument of writing, affecting the title in law or equity to any property, real or personal, within this State, which is or may be required by law to be acknowledged, or proved and recorded, shall be constructive notice to all persons from the time the

same is filed for record in the office of the recorder of the proper county; and it shall be the duty of such recorder to endorse, on every such deed, bond, or instrument, the precise time when the same is filed for record in his office." As a penalty for the failure to file such deed, bond, or instrument of writing for record, section two of the same act, which is section 671 of Mansfield's Digest, declares "that no deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond, or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and *ex-officio* recorder of the county where such real estate may be situated."

The latter section came up for construction in *Byers* v. *Engles*, 16 Ark. 543. That case was an action of ejectment, and the facts in it were as follows: The land in controversy was claimed by the plaintiffs as purchasers at a sale under execution. The defendant claimed under a deed from the defendant in the execution. The regularity of the sale was unquestioned. The defendant in the action of ejectment purchased the land sometime before the judgment under which the plaintiffs claimed as purchasers was rendered, and paid for it, and took a deed of conveyance, but failed to file it for record until after the execution was levied. He, however, filed it before the sale. About thirty acres of the land were cleared. There were no buildings on it. There were houses near the line, and on an adjoining

tract. He occupied these houses, and cultivated the land, and was in possession of it at the time the judgment was rendered, and so continued until after the sale under the execution, at which, "in an ordinary tone of voice, he declared that the land was his." Under these facts this court held that the plaintiffs had sufficient notice of the title of the defendant; that it was given at the sale and by the possession; that notice in either way was sufficient; and that, "as a necessary consequence," the defendant's title, being "in all respects regular and of older date," must prevail over the title acquired by the plaintiffs.

In construing section 671 the court said that the object of the statute was to protect the innocent purchaser and creditor from fraud by secret conveyances and contracts; and held that the statute should be so construed as to affect this object, and at the same time never become an instrument of fraud, and that, upon such construction, judgment creditors and purchasers at sales under executions are, alike with subsequent purchasers and mortgagees, affected by notice of a prior unregistered deed or contract, touching real estate; that notice is equivalent to registration as to all persons; and that it is in time if given before the sale. In so holding the court said: "One of two alternatives is left us: we must either give such potency to the judgment lien, as to let it cut its way over all deeds, securities, or conveyances, whether in law or equity, that are not registered at the date of the judgment, wholly irrespective of notice, and thereby leave the statute, that was enacted to prevent fraud, an engine in the hands of sharpers in the law, to enable them to perpetrate it. In which event, the whole question of notice, whether to the creditor or the purchaser, is discarded, because all such titles are swept off as fraudulent, by the mere failure to put them of record, and the purchaser relies upon the perfect title,

thus communicated, by force of the lien. Or we must adhere to the liberal construction which, with a few exceptions, is universally given to such statutes; and hold that, as the sole purpose of the statute was to prevent fraud by secret conveyances, any notice given at any time before the fraud is perpetrated, as it accomplishes all that the statute was intended to accomplish, shall be held as equivalent to registry notice. Under all the circumstances we think it safest to adopt the latter alternative. * * * * * * Up to the time of sale, * * * there would seem to be no necessity for giving notice to any one. But when the property is about to be sold, the creditor, as well as the purchaser, has a right to know what incumbrances there are upon it. Public policy requires this, to prevent a sacrifice of property, and the interest of the creditor in making his debt, as well as an assurance to the purchaser that he buys clear of all titles not made known to him at that time, requires it. And if notice of the prior incumbrance is not then given, as well to the creditor as the purchaser, the actual notice, substituted in the place of the registry notice, is not as broad and full; and, consequently, cannnot be received instead of such registry notice, and both the creditor and purchaser may rely upon the statute that declares all deeds, etc., of which notice is not given, void as against them. And although the purchaser at such sale, by virtue of the statute, gets a perfect title to the property purchased, free from all incumbrances, of which notice is not given, it is not because the lien attached in the first instance to a perfect unincumbered title, or that such title was in fact in the debtor at the time of sale, but because the first purchaser, notwithstanding his superior title, failed to give notice of it. Wherefore, it was, by force of the statute, swept off as fraudulent, and left

the title in the purchaser as perfect as if the prior conveyance had never been made."

The case of *Byers* v. *Engles* has been cited approvingly by this court in *Hornor* v. *Hanks*, 22 Ark. 580; *Peay* v. *Capps*, 27 Ark. 164; *Doswell* v. *Adler*, 28 Ark. 85; *Shinn* v. *Taylor*, *Ib.* 528; *Stirman* v. *Cravens*, 29 Ark. 561; *Jackson* v. *Allen*, 30 Ark. 115; *Pindall* v. *Trevor*, *Ib.* 267; *Apperson* v. *Burgett*, 33 Ark. 328, 336; *Williams* v. *McIlroy*, 34 Ark. 92; *Atkinson* v. *Ward*, 47 Ark. 540; *Watson* v. *Murray*, 54 Ark. 508. The titles in question in *Doswell* v. *Adler*, *Shinn* v. *Taylor*, *Jackson* v. *Allen*, *Apperson* v. *Burgett*, *Pindall* v. *Trevor*, and *Williams* v. *McIlroy*, were acquired at sales under executions, and the doctrine of *Byers* v. *Engles* was reaffirmed in them.

But *Allen* v. *McGaughey*, 31 Ark. 252, is in seeming conflict with this doctrine. The plaintiff in that case bought a large plantation, containing 1200 acres of land. A part of it was the south west quarter of section 11. It was described in the deed by which the plantation was conveyed to him as the south east quarter of section 11. When he bought the land, he paid the purchase money, and took possession of it. The defendant afterwards recovered a judgment against his grantor, and sued out an execution thereon, and caused it to be levied on the tract which was misdescribed; and the sheriff sold it under the execution, and, the defendant having purchased it, conveyed it to him by deed. The plaintiff then filed a bill to correct the mistake and set aside defendant's deed; and this court held that the defendant was not an innocent purchaser for value without notice, and that he purchased subject to all the equities of the plaintiff existing against the land at the time of the sale, and said: "The defendant claims as purchaser at execution sale, to which the rule *caveat emptor* applies. He gets no warranty of title by his

deed, but takes the estate encumbered with all the equities upon it at the time of his purchase, such, only, as the defendant in the judgment had, charged with all the equities that might be asserted against him;" and that "no defense as an innocent purchaser without notice can be interposed by a purchaser at an execution sale."

Allen v. *McGaughey* was cited approvingly in *Pickett* v. *Merchants' National Bank*, 32 Ark. 369; *Williams* v. *McIlroy*, 34 Ark. 85; *Jones, McDowell & Co.* v. *Fletcher*, 42 Ark. 422; and *Wilson* v. *Slaughter*, 53 Ark. 137.

In *Pickett* v. *Merchants' National Bank*, the judge delivering the opinion of the court quoted approvingly what was said in *Allen* v. *McGaughey* about a sale under execution, and applied it to a purchase at a sale under a decree foreclosing a deed of trust. The purchaser contended that, at the time of the sale, the property sold was encumbered by taxes, which it was required to pay, and that the amount of the taxes should be deducted from its bid. In disposing of this contention, what was said in *Allen* v. *McGaughey* about purchasers at sales under executions was quoted; and the court said that the property was encumbered "with unpaid taxes, and, as we presume, was *purchased for less on that account.*"

In *Hill, Fontaine & Co.* v. *Coolidge*, 33 Ark. 621, "Leonidas Johnson executed to Hornor a deed of trust on his claim probated against the estate of Thomas Johnson, deceased, to secure a debt he owed to Coolidge, and left the claim with Hornor. The deed was duly recorded. Afterwards, the lands of the deceased were sold by order of the probate court, and a part of them were purchased by Leonidas Johnson, who paid for them by receipting to the administrator for the probated claim without the knowledge or consent of Coolidge. After-

wards Hill, Fontaine & Co. recovered a judgment against Leonidas Johnson, and had the land sold under the execution to satisfy it, and at the sale bought the land." This court held that Hill, Fontaine & Co., having purchased at a sale under an execution in their favor, were not innocent purchasers for value, and that "the trust on the claim followed and attached to the land into which the claim was converted," notwithstanding the purchase at the execution sale.

Williams v. *McIlroy* was an action of ejectment to recover possession of land which was originally owned by Robert R. Williams. Two of the defendants purchased it from him on the 2nd of May, 1871. On the same day he executed to them a deed, but misdescribed the land; and on the 21st of May, 1873, executed to them a second deed for the same land, and therein described it correctly. On the 19th of September, 1872, the plaintiffs recovered a judgment against Robert R. Williams; and afterwards sued out an execution on it, which was levied on the land by the sheriff, and he sold it under the execution on the 12th of July, 1873, and the plaintiff in the judgment purchased it. After the time for redemption expired, the sheriff executed to him a deed for the same. The defendants in the action of ejectment were in the possession of the land, and the two deeds executed to them were upon record at the time it was sold under the execution. This court held that the purchaser at the execution sale acquired no title, and said: "The grantees in the first and second deeds were not only in possession of the land when appellee purchased at the sheriff's sale, but both deeds were upon the public records, whereby appellee had notice, when he purchased the land, of the mistake in the first deed, and its correction by the second. *Byers et. al.* v. *Engles*, 16 Ark. 543. Appellee purchased under his own execution, parted with nothing on

his bid, and was not an innocent purchaser for value without notice, etc. *Allen* v. *McGaughey et. al. sup.*"

In *Jones, McDowell & Co.* v. *Fletcher*, 42 Ark. 422, the facts were in part as follows: On the first day of February, 1872, William R. Vaughan and C. R. Vaughan purchased a plantation from Jones, McDowell & Co., and took an absolute deed therefor, and executed a mortgage back, with power of sale, to Jones, McDowell & Co., for the purpose of securing so much of the purchase money as remained unpaid. The deed to the two Vaughans, on its face, was to them as tenants in common, and the mortgage to Jones, McDowell & Co. was executed in like manner. On the 11th of October, 1873, Thomas Fletcher, as executor of Richard Fletcher, deceased, recovered a judgment against C. R. Vaughan. On the 7th of November, 1873, C. R. Vaughan conveyed his interest in the land to William R. Vaughan, and he (William R.) afterwards, conveyed to E. H. English, and English to George F. Rozelle, and Rozelle to Adams, and Adams to White. After this, on the 3rd of March, 1874, Fletcher caused an execution to be issued on his judgment, and levied on an undivided half interest in the land as the property of C. R. Vaughan. One half of the land was sold under the execution, and Fletcher purchased at the sale, and, no redemption having been made in the year, a deed was executed and delivered to him by the sheriff on the 15th of December, 1875. On the 17th of January, 1876, Fletcher filed his complaint against Jones, McDowell & Co., the Vaughans, and those claiming under them, alleging that Jones, McDowell & Co. had given notice that they would sell the land under the mortgage on the 24th of January, 1874; that the mortgage had been purchased by Rozelle with moneys belonging to the Vaughans; that the conveyances from C. R. to William R. Vaughan, and from William R. Vaughan to English, and from English to Rozelle, were fraudulent; that an

action at law had been instituted by him for the recovery of the lands; and asked that Jones, McDowell & Co. be enjoined from selling the land under the mortgage until his action at law could be tried. The defendant answered, and alleged that the lands were purchased with partnership funds, and were partnership property; and the plaintiff, in reply, alleged that the Vaughans owned and held them as tenants in common, and not as partners. Assuming that they were partnership property, the court held that the judgment of Fletcher was a lien on the lands, subject to the equities of the partners and the derivative equities of their creditors; and this lien was a valid transfer for the purpose of severing the joint estate of C. R. and William R. Vaughan, and did have that effect, as between the partners; and that by the conveyance of C. R. Vaughan the equities of the creditors were destroyed, and his title passed to William R. Vaughan, subject to the liens of Jones, McDowell & Co. and Fletcher; and that Fletcher acquired, by his purchase at the execution sale, one-half interest in the land, in the same manner he would have done had C. R. Vaughan been at the time of the sale a tenant in common of one-half interest in the land. Before coming to this conclusion, the judge delivering the opinion, in the course of his reasoning, remarked: "The general rule undoubtedly is, that a creditor of one of the partners buys at an execution sale with the rule *caveat emptor* before him, and that he must take notice of all equities, whether liens, strictly speaking, or not, and that at such purchase he buys only the share or interest of the debtor partner. In *Allen* v. *McGaughey*, 31 Ark. 252, the court said: 'The defendant claims as purchaser at an execution sale, to which the rule *caveat emptor* applies. He gets no warranty of title by this deed, but takes the estate incumbered with all the equities upon it, at the time of his purchase, such, only, as the defendant in the execution

had, charged with all the equities that might be asserted against him.'" It is obvious that these remarks were an *obiter dictum*, were not necessary to the decision of the case, were incidentally made, and did not affect the conclusion of the court.

In *Wilson* v. *Slaughter*, one of the defendants purchased an interest in land at a sale under an execution, with full knowledge of all the facts, and of the equities of the plaintiffs. "Under such circumstances," the court said, "the purchaser takes no greater right than the debtor himself had;" and cited *Pindall* v. *Trevor*, 30 Ark. 249; *Allen* v. *McGaughey*, 31 Ark. 252; and *Newman* v. *Davis*, 24 Fed. Rep. 609.

3. Effect of purchase by plaintiff at execution sale.

From the foregoing cases it appears there is no conflict as to the proper construction of section 671 of Mansfield's Digest, or as to the doctrine in cases to which it does not apply. That section relates only to deeds, bonds, or instruments of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity. According to the construction of it in *Byers* v. *Engles*, it was an enactment in part of the rule adopted for the protection of innocent purchasers for value without notice, as to such instruments. But it omits to mention the rights and equities which are not evidenced by writing. The act of which it is a part is upon the subject of registration, and has no reference to anything which cannot be recorded. As to the construction of it, there is no conflict of decisions by this court, but on the contrary the construction placed upon it in *Byers* v. *Engles* has been frequently reiterated and endorsed, and has stood unchallenged and approved by this court for the last thirty-eight years. There is no conflict between the doctrine of *Byers* v. *Engles* and the rule of *Allen* v. *McGaughey*. The title set up in the latter case against the purchaser at the sale under execution only existed

in parol, while in the former it was evidenced by a deed. The former construed a statute which only related to unrecorded deeds, bonds, and instruments of writing affecting titles to real estate, and held that purchasers at sales under execution with notice, actual or constructive, of such instruments of writing took the property sold subject thereto, and limited the notice by the sale, while the latter applied the rule for the protection of innocent purchasers for value, without notice, to rights and equities which exist in parol, and made a purchase by a plaintiff in an execution at a sale thereunder of no effect as to them. Both cases were cited with approval in *Williams* v. *McIlroy*. The remarks in *Allen* v. *McGaughey*, as to a purchaser at a sale under an execution only taking the estate the defendant in the judgment had, charged with all the equities that might be asserted against him, are an *obiter dictum*. All that case decides is that a purchaser of property at a sale under an execution in his own favor takes it charged with all the rights and equities, which exist only in parol, that might be asserted against the defendant. The cases which have cited it do not deny the doctrine of *Byers* v. *Engles*. They only go to the extent of holding that a purchase by any one with notice of any legal or equitable right in a third person cannot prejudice the interest of such person.

The dictum in *Allen* v. *McGaughey* is not sustained by the weight of authority. Mr. Pomeroy, in his work on Equity Jurisprudence, says: "It is a rule universally adopted, and in strict accordance with the general doctrine concerning *bona fide* purchasers, as established in this country, that, in all the instances heretofore mentioned, even where the lien of a subsequent judgment is subject to an outstanding equity, if the judgment is enforced at a sheriff's sale, and the judgment debtor's land is sold and conveyed to a *bona fide* purchaser for a valuable

consideration and without any notice, he stands in the position of any other *bona fide* purchaser who acquires the legal estate, and takes the land free from any unrecorded mortgage and any outstanding equitable interest or lien *not appearing of record* which might have affected the land in the hands of the judgment debtor. In other words, such a purchaser at the execution sale is to all intents a purchaser in good faith for a valuable consideration and without notice, as is described in the succeeding section." In the succeeding section referred to he says: "Among the other instances in which the general doctrine has been applied, and the defense sustained, by the American Courts, the following are some of the most important: Where a person becomes a *bona fide* purchaser of land at execution sale, and perfects his purchase by receiving the sheriff's deed, he stands in the same position as any other purchaser in good faith without notice who acquires the legal estate; he takes the land free from any unrecorded mortgage or other equitable interest or lien not appearing of record which would have affected the land in the hands of the judgment debtor, and of which the judgment creditor might even have had notice." 2 Pomeroy's Eq. Jur. (2nd ed.) secs. 724, 774, and cases cited.

Mr. Freeman, in his work on Executions, says: "The purchaser at an execution sale takes his title subject to such liens, easements and equities, as it was subject to in the hands of the defendant in execution, unless he can show that he is a purchaser in good faith and without any notice, actual or constructive, of the existence of such lien, easement or equity. We have heretofore had occasion to treat of the rights of purchasers at execution sales, when brought in conflict with claims derived from unrecorded instruments made by the defendant, or based upon some other secret transaction not known to the purchaser. We then said: 'Wherever,

under the law, a deed or mortgage is valid without being recorded, a subsequently attaching judgment lien against the grantor or mortgagor will not be of any benefit to the lien holder as against the deed or mortgage. But a *purchaser* at a sale under a judgment is, to the same extent as if he were a purchaser at a private or voluntary sale, protected from claims previously acquired by third persons from the judgment debtor, of which he has no actual nor constructive notice. But if, at the time of the sale, the purchaser has actual notice of any legal or equitable right in a third person, or if, in the absence of such notice, the instrument evidencing such right is properly of record, or if possession is held under it, then the title acquired by the purchaser cannot prejudice the interests of such third person." 2 Freeman on Executions (2nd ed), sec. 336 and cases cited; 2 Freeman on Judgments (4th ed.), secs. 366, 366a.

The rule as stated by these authors, we think, is correct in principle, and is sustained by the weight of authority. 2 Leading Cases in Equity, Pt. 1 (4th Ed.), pp. 93, 94, 225 and cases cited; *Clark* v. *Campbell*, 2 Rawle, 215; *Smith* v. *Painter*, 5 Serg. & R. 223; *Oviatt* v. *Brown*, 14 Ohio, 285; *Scott* v. *Beutel*, 23 Grat. 1; *Borden* v. *Tillman*, 39 Texas, 262; *Paine* v. *Mooreland*, 15 Ohio, 435; *Ellis* v. *Smith*, 10 Ga. 253; *Butterfield* v. *Walsh*, 36 Iowa, 534; *Jackson* v. *Chamberlain*, 8 Wend. 620; *Stewart* v. *Freeman*, 10 Harris, 120; *Harrison* v. *Cachelin*, 23 Mo. 117, 126; *Waldo* v. *Russell*, 5 Mo. 387; *Halley* v. *Oldham*, 5 B Mon. 233; *Walton* v. *Hargroves*, 42 Miss. 18. It is more just and equitable than the dictum in *Allen* v. *McGaughey*, and, so far as it is consistent with the statute as construed in *Byers* v. *Engles*, should prevail. Why not? Why should third persons acquire by a purchase from a debtor at a private or voluntary sale more than they do by a purchase at a sale under an execution against him? Are third persons de-

serving of greater protection in the one case than in the other? There is no good reason for such a distinction. On the contrary, the purposes of the law in the latter case would be better subserved, purchasers at sales under execution would be more encouraged, the needless sacrifice of property at such sales would be oftener avoided, and the symmetry of our laws would be more nearly maintained, by giving in it the same protection as is given in the former case.

The case we have under consideration falls within the rule in *Allen* v. *McGaughey*. Appellants purchased at a sale under a judgment in their favor, and are, therefore, not innocent purchasers for value, and acquired nothing; for F. M. Davis, was, at the time the order of attachment was sued out against Humphrey, the real owner of the land in controversy. Mrs. Davis had paid the debt which the deed to Humphrey was executed to secure. Humphrey only had the legal title, and held it in trust until he conveyed to Mrs. Davis. Being a mortgagee in fact, he never held an interest which was subject to attachment. *Harman* v. *May*, 40 Ark. 146. The deed which he executed to Mrs. Davis was, in effect, an assignment of the right to the land which he held as a mortgagee, and nothing more.

Appellants were not predjudiced by the judgment of the circuit court; and it is therefore affirmed as to them.

NEWPORT *v.* RAILWAY COMPANY.

Opinion delivered December 9, 1893.

58 270
59 357
58 270
61 78
58 270
67 416
58 270
68 61
58 270
181 247
58 270
83 277

1. *Incorporated towns—Levees.*
An incorporated town has no power to contract for the construction of a levee, nor to bind itself to pay therefor.

2. *Contract* ultra vires—*Ratification.*
Since an incorporated town cannot contract for the construction of a levee, it will not be held to have ratified such a contract by accepting the benefit of work done under it.

Appeal from Jackson Circuit Court.

JAMES W. BUTLER, Judge.

J. M. Moore for appellant.

1. The town of Newport had no power to make the contract; it was *ultra vires* and void. Secs. 749 to 782, Mansf. Dig. There is no *express* authority to build levees or contract for same. Municipal corporations possess no power except such as are *expressly* given or necessarily implied. 2 Wood, 594; 31 Ala. 76; 11 Am. & Eng. Corp. Cases, 248; 108 U. S. 110; 3 Wall. 330; 13 Wis. 37; 9 Mich. 165; 33 Ark. 704; Dillon, Mun. Corp. sec. 89; 33 N. H. 427; 31 Ark. 462; 128 Ill. 465; Cooley, Taxation, pp. 209, 210.

2. If the contract was entered into colorably for the purpose of aiding or securing a railroad, it is nevertheless void. Art. 12, sec. 5, const; 134 Ill. 451; 33 So. Car. 2; 37 Minn. 498; 77 Iowa, 454.

3. The yeas and nays were not called and recorded on the passage of the ordinance. Mansf. Dig. sec. 774; 40 Ark. 105.

4. The acceptance of the work by the authorities was not a ratification, nor could it estop the town from denying the power of the council to make the contract.

10 Wall. 683; 9 Bush, 189; 24 N. J. Eq. 143; 1 Dillon, Mun. Corp. sec. 463; 81 Am. Dec. 104.

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

1. The statute expressly gives the power to construct "*levees*," among other things. Mansf. Dig. secs. 737, 740, 741, 749, 750. This power is *not* confined to cities, but extends to towns. See 49 Ark. 199.

2. The contract was not colorable. The levee was actually built, and was indispensable to the existence of the town.

3. As to calling the yeas and nays, this question is raised for the first time in this court. 46 Ark. 163; 53 *id.* 269. But the record shows they were called and recorded.

4. If the making of the contract was within the powers of the town, it was susceptible of ratification. 1 Dillon, Mun. Corp. sec. 463; 96 U. S. 351; 107 U. S. 357; 19 Fed. Rep. 393.

HUGHES, J. The facts in this case are substantially as follows: The town of Newport made a contract with the Batesville & Brinkley Railway Company to construct a levee on two sides of the town to protect it from overflow, and was to pay the company therefor, in the warrants of the town, ten thousand dollars; and the Railway Company was to have the privilege of using the levee as a road-bed for its railway.

One line of the levee was completed, accepted and paid for by the town, after which it declined and refused to accept and pay for the other line of the levee, one of these lines being north, and the other south, of the town. The company, having, as it contends, completed the levee according to the contract, brought this suit to recover a balance of $4480, which it alleges to be due on the contract. There is also a *quantum meruit* count in the complaint, for work and labor done, and materials fur-

nished, in constructing a levee at the instance and request of the town.

The town answered, admitting that it attempted to execute the contract, but says, the contract was made for the purpose of inducing the railway company to locate and construct its road through the town, and to establish one of its principal stations there, and denies the power of the town to make the contract. It also denies that the levee was constructed for its use, or at its request, and says that it was constructed for the use of the railway company; it also says that the work was not done according to contract, and that the work and materials of the railway company were not of the value alleged; and that it had paid full value for all work done and materials furnished.

The cause was submitted to a jury upon the evidence in the case, and instructions by the court recognizing power in the town council to make a contract to construct a levee. All proper exceptions were preserved to the instructions given by the court, and to the court's refusal of instructions, in effect, denying power in the town council to make the contract.

The fifth instruction given by the court, to which exception was saved, is as follows: "The jury are instructed that if they find from the evidence in this case that the defendant entered into a contract with the plaintiff to pay it $10,000 in town warrants for the construction of a levee described in the written contract made with the defendant, together with its crossings and drains, and under that contract the plaintiff, with the full knowledge and consent of the defendant, under the supervision of its council, or a committee appointed by it, proceeded to construct said levee under said contract with the privilege of using it as a road-bed or railroad track, and to keep the same in proper repair, and the plaintiff did so construct, use and keep the same in

proper repair, so far as permitted by the defendant, they will find for the plaintiff whatever may be shown to be due and unpaid under said contract."

The jury found specially that the railway company, in constructing the levee around the town, had complied substantially with the contract sued upon, and returned a verdict for the railway company. The appellant seeks to reverse this judgment on appeal to this court.

Had the incorporated town of Newport the power to make the contract which was the foundation of this suit?

1. Incorporated towns cannot build levees.

In 1 Dillon, Mun. Corp. sec. 89, it is said: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." In *Spaulding* v. *Lowell*, 23 Pick. 71, 74, Chief Justice Shaw, in speaking of municipal and public corporations, says: They "can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association." "It is proper, too, that these powers should be strictly construed, considering with how little care chartered privileges are these days granted." *Bank* v. *Chillicothe*, 7 Ohio, 411; *Port Huron* v. *McCall*, 46 Mich. 565. "They act not by any inherent right of legislation, like the legislature of the State, but *their authority is delegated*, and their powers, therefore, must be *strictly pursued*."

Is there any express grant of power to an incorporated town to make a contract for the building of a levee?

Sec. 740, Mansfield's Digest, provides that "the city council shall have power to establish and construct and to regulate landing places, levees, etc." Sec. 8 of the incorporation act of March 9, 1875. This refers to cities of the first and second class, but not to incorporated towns. Their powers are not always the same. In enumerating the powers of municipal corporations of all classes in section 18 of the act of March 9, 1875, the power to construct levees is not given, though, as we have seen, it is given in section 8 of the act to cities of the first and second class. It follows, therefore, that there is no express grant of power to incorporated towns to construct levees.

Construing the powers of municipal corporations strictly, does it appear, beyond "any fair, reasonable doubt," that the power of an incorporated town to make a contract for the construction of a levee exists? Is such power "necessarily or fairly implied in or incident to the powers expressly granted," or is such a power "essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable?" It does not appear to us that it is necessary that an incorporated town should possess such a power, in order to the exercise of its corporate powers, the performance of its corporate duties, and the accomplishment of the purposes of its organization. Unless such is the case, the power is not implied from the grant of general powers to an incorporated town. *Spaulding* v. *Lowell*, 23 Pickering, 71, 74. No "long established and well settled usage" appears to have existed with incorporated towns to exercise the power to construct levees.

In *Minturn* v. *Larue*, 23 Howard, 435, the court said: "It is a well settled rule of construction of grants by the legislature to corporations, whether public

or private, that only such powers and rights can be exercised under them as are clearly comprehended within the records of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." *Thomson* v. *Lee Co.* 3 Wall. 320.

In *Leonard* v. *Canton*, 35 Miss. 189, a good reason is given for the rule that grants to corporations by the legislature should be strictly construed. It is because they "are invested with a portion of the authority that properly appertains to the sovereign power of the State," and the State never surrenders its just authority save by grants that are clear and unambiguous.

When the exercise of power by a municipal corporation will result in the imposition of burdens or taxes upon the inhabitants, the existence of the power ought to be clear beyond a fair, reasonable doubt. A different rule might lead to mischievous and oppressive consequences. We are of the opinion that the incorporated town of Newport, in making the contract for the construction of the levee in this case, acted without either express or implied power, and that the contract was therefore void.

2. Contract *ultra vires* cannot be ratified.

Was the contract such as could be ratified by accepting the benefit of work done under it, or is the town estopped by permitting the work to be done under it and accepting the benefit of such work?

In *Schumm* v. *Seymour*, 24 N. J. Eq. 144, it is said: "It is a general and fundamental principle of law, that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation, or its officers, to make the contract. And a contract beyond the scope of the corporate powers is void." "The doctrine of equitable estoppel has no place in a case where usurped powers have been exercised by municipal officers,

who, in so doing, were contravening public policy, as well as known positive law." "Where officials are acting within the terms of their delegated powers, though they may be acting carelessly, negligently, or in culpable betrayal of their trust, they are the agents of those whose property is liable to be charged; and if the latter acquiesce in or fail to interpose when the negligent or culpable conduct of their agents is open to their view, they will not afterwards be allowed to set it up when the effect of so doing will be to subject innocent parties to the burden that would otherwise fall upon themselves."

Judge Dillon, in sec. 463, 1 Dillon on Municipal Corporations, states the law in this behalf plainly and tersely, thus: "A municipal corporation *may ratify* the unauthorized acts and contracts of its agents or officers, which are *within the scope of the corporate powers, but not otherwise.* * * * But a subsequent ratification cannot make valid an unlawful act without the scope of corporate authority. An absolute excess of authority by the officers of a corporation, in violation of law, cannot be upheld; and where the officers of such a body fail to pursue the requirements of a statutory enactment under which they are acting, the corporation is not bound. In such cases the statute must be strictly followed; and a person who deals with a municipal body is obliged to see that its charter has been fully complied with; when this is not done, no subsequent act of the corporation can make an *ultra vires* contract effective."

As the contract sued on in this case was without the scope of the corporate powers of the incorporated town of Newport, it could not be ratified, and the town was not estopped to deny its invalidity by having accepted and received the benefit of work done under it, with the knowledge and consent of the town.

The judgment of the circuit court is reversed, and judgment will be rendered here for the appellant.

---

58 277
62 47
58 277
63 204
58 277
70 280
58 277
77 602
58 277
179 483

SOUTHERN INSURANCE CO. *v.* WHITE.

Opinion delivered December 9, 1893.

1. *Fire insurance—Ownership of property—Admission.*
   Where, in an action on a policy of fire insurance, the defense is that plaintiff was not the sole owner of the property insured, as represented in his application, and there is a conflict of evidence upon the question, it is error to exclude statements, made by plaintiff before the loss, to the effect that he had sold the property.
2. *Impeachment of witness—Evidence of infamy.*
   Where objection is taken to the competency of a witness because of his conviction of an infamous crime, the record of such conviction, if in existence and accessible, should be produced, as the legal evidence of his infamy.
3. *Promissory warranty—Effect of breach.*
   Failure of insured to comply with a promissory warranty in an application will not be excused because the agent of the company told him that the application was a mere matter of form, and he did not read the application, if he had opportunity to read it, and no fraud was practiced on him.
4. *When interest begins to run.*
   Where an insurance policy provides that the loss shall not become payable until sixty days after proof of loss has been received by the company, interest on the amount of loss should be computed from the day the loss became payable.
5. *Instruction—Invading province of jury.*
   Where the jury have failed to agree, it is error to instruct them, "If you can't each get exactly what you want, get the next best thing to it."

Appeal from Conway Circuit Court.

JEREMIAH G. WALLACE, Judge.

Moose & Reid and *Ratcliffe & Fletcher* for appellant.

1. Randolph's testimony was admissible. The record of conviction should have been produced. 49 Ark. 156–8; 1 Gr. Ev. sec. 375.

2. It was error for the court to say to the jury "If you can't get exactly what you want, get the next best thing to it." 29 N. E. 909; 42 Ind. 420; 126 *id.* 568; 10 N. W. 44; 14 S. W. 538.

3. An application for an insurance policy is part of the contract, and he who can read, and has warranted his answers to be true, will not be heard to say he was ignorant of its contents, in the absence of fraud or mistake. 2 S. E. 258. See also 26 Pac. 718; May on Insurance (2 ed.), secs. 156, 183, 185; 23 La. An. 209; 45 Wis. 622; 26 N. E. 230; 22 Atl. 107; 15 S. W. 166; 10 Ind. 187.

WOOD, J. This was an action against appellant to recover upon certain insurance policies; one issued the 10th of October, 1890, the other the 9th of November, 1890. The property insured was destroyed by fire 12th December, 1890. It was agreed, if appellee recovered, that the amount of loss should be $1635. Verdict and judgment for $1716, from which there was an appeal.

Appellant seeks to prevent recovery upon two grounds: (1) Because it claims that others were the owners of the property at the time policies were issued to assured; (2) the appellee agreed to keep with ten feet of gin stand a barrel full of water and two buckets, which he failed to do. We will dispose of these as they are presented.

1. Admissions as evidence.

1. In the application which appellee signed is this question: "Is any other party interested in the property?" Answer: "No." Upon the question of own-

ership, several witnesses for appellant testified that, the spring before the fire occurred, they had bought the property, had paid part of the purchase money, and gone into possession, and had the entire control and management of same since 1st of October, 1890. The appellee denied that he had sold the property to these parties; claimed that they were tenants upon his place, and working for him. It is sufficient to say, upon this contention, that we find no error in the refusal of the court to give the first and second requests for instructions, as asked by appellee, since the first and second charges of the court upon its own motion were sufficient; and the verdict of the jury on this point would be conclusive for appellee. In view of the conflict in the testimony, however, the court should have permitted the witness Randolph to testify. The appellee proposed to prove by him "that he was present at the time the trade was made, as detailed by the witnesses who claimed to have bought the property from appellee, and that he had heard appellee say, since the trade, that he had sold the property." This testimony was relevant, and it is impossible to tell how much weight the jury might have attached to it.

2. As to impeachment of witness.

When objection was made to his competency on account of conviction for an infamous crime, the record of such conviction should have been produced by the objectors. It was in existence and accessible, and the only legal evidence of his infamy. 1 Greenleaf, Ev. sec. 375; *Scott* v. *State*, 49 Ark. 156–8, and authorities there cited.

3. Breach of promissory warranty.

2. The appellant requested the court to say to the jury "that if plaintiff failed to keep a barrel and two buckets of water within ten feet of the gin stand at the time same was burned, he cannot recover." In the application was also this question: "Will you agree, as a condition of this insurance, to keep in same room, within ten

feet of gin stand, one barrel full of water and two buckets?" Answer: "Yes."

The following excerpts from the policies and the application will show that the application was made a part of policy No. 81741 for $1200, and that the stipulation, as set forth in the above question and answer, was an express promissory warranty.

From the application: "The subscriber requests insurance by the Southern Insurance Company of New Orleans, and agrees to and with the said company that the same is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured; and said answers are considered the basis on which insurance is to be effected, and the same is understood as incorporated in, and forming a part and parcel of, the policy." Also: "Special reference being had to assured's answers (including diagram) on back hereof, made a warranty and a part hereof." From the policy: "If an application, survey, plan or description of property be referred to in this policy, it shall be a part of this contract, and a warranty by the insured." And on a red slip of paper attached to the policy, and containing a description of the property, is this: "Special reference being had to assured's application No. ——, which is made a warranty and a part hereof." The application is numbered ——.

The following clause in the policy shows the effect of a breach of this warranty. "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein." *Johnson* v. *Insurance Co.* 22 Atl. 107; *Cobb* v. *Covenant Mut. Ben. Ass'n*, 26 N. E. 230. This court, in the case of *Mechanics Ins. Co.* v. *Thompson*, 57 Ark. 279, by Battle, J., held that the failure of the as-

sured to perform an agreement of this kind would bar recovery. In that case there was some effort to prove a performance, but it was not sufficient. Here it is confessed that there was no compliance whatever, and no attempt to comply. The appellee seeks to avoid the effect of non-compliance by saying "that the agent of the company told him that the application was mere matter of form, and did not amount to anything; that he was in a hurry, and did not stop to read it, nor did the insurance agent read it to him." He had an opportunity to read the application. There is no pretense of fraud or imposition being practiced upon him by the agent. He does not claim that the questions were not asked him, or that he did not answer them, or that his answers were not truly stated. The agent denies telling appellee that "it was mere matter of form, and did not amount to anything." But, even if he had, it would be a mere matter of opinion on the agent's part; and to say that appellee could be misled by such a statement would subject him to the impeachment of gross ignorance or carelessness, neither of which appears from this record. It would be an anomaly in the law to permit a party to avoid the effect of a written contract upon such a flimsy pretext. *St. L. etc. Ry. Co.* v. *Weakly*, 50 Ark. 406; *Cuthbertson* v. *N. C. Home Ins. Co.* 2 S. E. 258; *Walker* v. *State Ins. Co.* 26 Pacific, 718; *New Albany, etc. R. Co.* v. *Fields*, 10 Ind. 187; May on Ins. secs. 183, 185; sec. 156 *et seq.*

The assured must have been in possession of the last policy about one month before the fire occured, and no objection was made by him to any of its stipulations. He cannot be heard now to complain. *Reeve* v. *Phœnix Insurance Co.* 23 La. An. 219. Therefore, it was error to refuse appellant's first request, as above set forth. The fifth, in view of the proof, should have been given without modification, and accordingly the third, given

by the court on its own motion, should have been withheld. These latter propositions contravened the doctrine just announced, and were erroneous.

4. When interest begins to run.

The policies contained this clause: "The loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by the company." The court's fourth charge (on its own motion) told the jury that they might calculate the interest from the day the fire occured, 12 Dec. 1890. We presume this was an oversight. Interest should have been computed from the day the loss became payable.*

5. Instruction held to invade jury's province.

There remains but one other question for our determination. The bill of exceptions shows "that on the morning after the jury had been permitted to separate, after having failed to agree, the court told the jury to retire and consider of their verdict, and said to them: "*If you can't each get exactly what you want, get the next best thing to it;*" which was excepted to, and made appellant's fifth ground in motion for new trial. We can readily understand how the patience of trial judges may be put to crucial tests by the seeming obstinacy or obtuseness of jurors failing to agree upon a verdict in a case which, to the judge, may appear of easy and ready solution. But, nevertheless, under such circumstances, the court must suffer and endure; and if it finds it necessary to give the jury additional instructions, let its language be circumscribed by the constitution (art. 7, sec. 23,) and such as not to indicate that the jury would be justified, under any circumstances, in bringing in a verdict merely for the sake of expediency. While not intended in that sense, evidently any juror might reasonably construe the above langauge to mean that he might yield his individual convictions of right, and agree with his fellows, for the sake of agreeing, whether his judgment

* See *Sun Ins. Co. v. Jones*, 54 Ark. 376. (Rep.)

was convinced and his conscience satisfied, or not. This was its most natural purport. "The next best thing," to some of the jurors, might have been a verdict for the appellee, when they really believed that he was not entitled to it. In *Goodsell* v. *Seeley*, 46 Mich. 623, 10 N. W. Rep. 44, it is said: "The law contemplates that they (the jurors) shall by their decisions harmonize their views if possible, but not that they shall compromise, divide or yield for the mere purpose of an agreement."

The law requiring unanimity upon the part of the jury intends the deliberate judgment of each, concurring with that of all the others, in making a verdict. This is indicated by the oath they take. Mansf. Dig. sec. 4006. It is within the discretion of the court to keep them together for such length of time as may be reasonable to effectuate this purpose. The language thus addressed to the jury was reversible error. *Richardson* v. *Coleman*, 29 N. E. 909; *Clem* v. *State*, 42 Ind. 420; *Houk* v. *Allen*, 126 *id.* 568; *Randolph* v. *Lampkin*, 14 S. W. 538.

Reversed and remanded for new trial.

BURKS *v.* GOODBAR.

Opinion delivered December 9, 1893.

Assignment—Withholding assets.

In order to defeat an assignment on the ground of a fraudulent withholding of assets, the property withheld must be such as would have been of value to creditors.

Appeal from Drew Circuit Court.

DAVID A. GATES, Special Judge.

J. M. & J. G. Taylor for appellant.

The withholding must be of something *of value* to the creditors. 46 Ark. 405.

Wells & Williamson, for appellees.

The notes were valuable, and their withholding was a fraud on creditors. 46 Ark. 405 ; 53 *id.* 81.

JOHN B. JONES, Special Judge. F. M. Baxter made an assignment to appellant, Burks, for the benefit of his creditors. The property consisted mainly of a stock of goods. The deed is in form a general assignment with preferred creditors. Appellees sued out an attachment, and levied on the goods assigned. The cause was tried by the court. On the trial of the cause, appellees claimed the assignment void for several reasons. We deem it necessary to mention but one. The evidence shows that several years ago Baxter purchased from Tillar two lots in the town of Monticello for $360, and received a title bond, and had since kept the interest paid, but at date of the assignment owed Tillar all the principal. Sometime before the assignment, Baxter sold the lots to Smith for $550, and received cash something over $80, and took two notes each for $200 and one for $60 and executed a bond for title to Smith. The deed of assignment reserved one of these $200 notes, and household goods, amounting in the aggregate to not more than $500 in value, as exempt. The other two Smith notes amounting to $260 with some interest were withheld from the assignment. Baxter swore he held these notes out for Tillar to pay the purchase money due him ; that he did not consider them worth anything except in that way, as he had no title to the land, and had only given Smith a bond for title ; that Tillar afterwards desired him to collect the notes, and pay him the money, rather than take the notes himself.

The court held this to be a fraudulent withholding of assets from Baxter's creditors, and adjudged the assignment void.

Smith could not have been compelled to pay the notes ($260) until title was furnished him to the lots by payment to Tillar of the $360 purchase money. The other $200 note was exempt. The withholding of the $260 notes, purchase money due Tillar, was not a fraudulent withholding of assets. The notes could have been of no value to Baxter's creditors. In order to defeat an assignment on the ground of a fraudulent withholding of assets, the property withheld must be such as would have been of value to the creditors.

The judgment is reversed.

Ex parte PERDUE.

Opinion delivered December 16, 1893.

Habeas corpus—Validity of commitment by magistrate.

On certiorari to review the action of the circuit court in refusing to discharge a prisoner on *habeas corpus*, where it appears that petitioner is held under a regular commitment by a magistrate in a cause wherein he had jurisdiction, the sufficiency of the evidence upon which the commitment was made will not be inquired into.

Certiorari to Union Circuit Court.

CHARLES W. SMITH, Judge.

Jesse B. Moore for petitioners.

Jas. P. Clarke, Attorney General, for respondent.

BUNN, C. J. The defendants, charged with the crime of removing mortgaged property, on being properly brought before Lee Ward, one of the justices of Union county, were by him bound over to appear before the Union circuit court, and for that purpose were commit-

ted to the Union county jail, in default of making bail in the sum of two hundred and fifty dollars each.

Subsequently, they presented their petition to the Hon. Charles W. Smith, the judge of the 13th judicial circuit, which includes the said county of Union, and with it the evidence in the cause, or so much thereof as affects the issue relied on in the petition. Upon the hearing of this petition, the judge of the circuit court denied the prayer thereon, and remanded the prisoners without change of order as to bail. Furnishing special bail for the occasion, the prisoners, through their counsel, have filed their petition in this court in the nature of an appeal from the order of the circuit judge, and present with the same a transcript of the proceedings in the case, and ask a review, and the attorny general appears, waives the issuance and service of the writ, and consents that the transcript so presented may be held and taken as the transcript duly certified by the proper officer, and attached to his return.

The ground, and the only ground, upon which this application is made, is that the deed of trust, by which the lien is alleged to be created upon the property alleged to have been unlawfully removed, *does not contain the name of a grantee; that is to say, does not name any person as trustee.* The deed of trust seems to have been made out, or attempted to be made out, upon a printed form, and there was a failure to insert, in the blank spaces left for that purpose, the name of any person to act as trustee.

This is an application for an absolute discharge, and not for bail, on the sole ground that, since there is no grantee named in the deed of trust, it does not create such a lien as is contemplated in our statute prohibiting the removal of mortgaged property, and that, therefore, defendants are guilty of no crime known to the law. The application is made under section 3572, Mansfield's

Digest, and particularly under the first subdivision of that section, and the language is as follows, to-wit: "Sec. 3572. If it appear that the prisoner is in custody by virtue of process from any court legally constituted, or issued by any officer in the exercise of judicial proceedings before him, such prisoner can only be discharged in one of the following cases: First. Where the jurisdiction of such court or officer has been exceeded either as to matter, place, sum or person." * * *

The law prohibiting the removal of mortgaged property is contained in the act of March 7, 1893 (Acts 1893, p. 74).

This court, on proper petition and showing, will review the action of judges of the other courts of the State, on application for writs of *habeas corpus*. *Ex parte Good*, 19 Ark. 410; *Ex parte Kittrel*, 20 *id.* 499; *Ex parte Harbour*, 39 *id.* 126; *Ex parte Jackson*, 45 *id.* 158.

On application for the writ sued out for the purpose of securing the absolute discharge of prisoners, like the application now before us, this court said, in the case of *State* v. *Neel*, 48 Ark. 289: "If the person restrained of his liberty is in custody under process, nothing will be inquired into, by virtue of the writ, beyond the validity of the process upon its face, and the jurisdiction of the court by which it was issued." The same rule is stated in effect in *Ex parte Barnett*, 51 Ark. 215.

The jurisdiction of the justice of the peace in this case, as to the subject matter—the crime alleged—to examine and commit the person charged, is unquestioned, and the commitment is in good form. The difficulty seems to be (according to the contention of the defendants, so fairly presented by their counsel) that since the deed of trust, if not the sole evidence of the commission of the offense charged, is, at all events, such an essential part of the evidence as without it the charge

in no case could be sustained, therefore, if that evidence be inadmissible or incompetent in a trial of the cause, no case can possibly be made out, and therefore no crime known to the law is really properly charged.

It will be readily seen that to rule upon the admissibility or competency of testimony becomes a necessity, if the position of defendants be the correct one. But, is not this passing upon the character of evidence purely a function of the court of original jurisdiction to examine and commit in a case like this? We cannot interfere with courts of primary jurisdiction, whose judgments upon questions of this kind are conclusive until reversed or annulled in some manner requiring the exercise of this court's appellate jurisdiction. The simple question, is or is not the deed of trust sufficiently formal to create the lien, and become the proper subject of record? is sufficient perhaps to suggest that this court should proceed no further.

In some jurisdictions, where, by statute, the court or judge, hearing the application for discharge under the writ, is permitted or required to inquire if the prisoner is held for reasonable or probable cause, the rule is obviously different; but we have no such statute.

Again, in capital cases, on applications for the privilege of bail, and not for absolute discharge, the judge or court hearing the same, in the very nature of things, must examine the testimony in the case, in order to ascertain if any given case is one in which the proof is not evident nor the presumption great, as provided in the constitution; and in unquestionably bailable cases the testimony will be examined by the judge issuing the writ, in order to determine the amount of bail. This one, however, is a different character of case.

Prayer of petition denied.

BUCK *v.* BRANSFORD.

Opinion delivered December 16, 1893.

1. *Equity—Marshaling assets.*
   Where a husband and his wife pledge the personal property of both to secure the husband's debt, under agreement that the wife's property should not be resorted to unless the husband's proved insufficient, a judgment creditor of the husband cannot compel the pledgee to exhaust his remedy against the wife's property before resorting to the husband's.
2. *Practice—Attachment.*
   A bill to compel a marshaling of assets is not a proceeding in which an attachment may be issued.

Appeal from Lonoke Chancery Court.

DAVID W. CARROLL, Chancellor.

George Sibly and *Thos. C. Trimble* for appellant.

Plaintiff had no other remedy than the one instituted, and was entitled to have the assets marshaled. 1 Story, Eq. Jur. secs. 637–8 *et seq;* Jones, Chat. Mortg. sec. 788; 40 Ark. 104; 48 *id.* 238. Everything Bransford had was in the house at the time the deed of trust was given, or subsequently, and was bound by the deed of trust (Jones, Chat. Mortg. secs. 156, 170 *et seq; ib.* 561, 565); and could not be sold on execution. 18 Ark. 60; *ib.* 508, 183; 22 *id.* 38.

MANSFIELD, J. The defendant James L. Bransford having purchased from the defendants Fletcher and England, a lot of furniture, he and his wife, L. E. Bransford, executed a deed whereby they conveyed the furniture to W. J. Beard in trust to secure the payment of the purchase money. It appears that the deed also embraced certain articles of furniture belonging to Mrs. Bransford; but what proportion in value such articles bore to the other furniture conveyed with them is not shown. As collateral security for the payment of the

same debt, Mrs. Bransford, at the time of executing the trust deed, indorsed and delivered to England and Fletcher two notes, which were her separate property. These notes were, however, received by the pledgees under an agreement that they should not be resorted to as a means of satisfying the principal debt unless the furniture proved insufficient for that purpose.

After the date of these transactions, the plaintiff, Buck, obtained a judgment against the defendant James L. Bransford before a justice of the peace, and sued out execution thereon, which was levied upon part of the furniture in the possession of the Bransfords, who had retained it under a provision of the deed. Mrs. Bransford claimed the property levied upon, and the constable released it because of the plaintiff's failure to give an indemnifying bond with such sureties as were acceptable. Subsequently, Buck instituted this suit against all the parties to the trust deed, alleging that Fletcher and England had received large sums in money and property on their debt, and had collected, or could collect, the notes received from Mrs. Bransford, but that they had failed to enter any credit upon the record of the trust deed. There is no distinct and express averment that the value of the furniture and the amount of the collateral securities exceed the balance due to Fletcher and England, but the prayer of the complaint is that the assets be marshaled, and that a sufficient part of the property conveyed be sold to satisfy the plaintiff's judgment.

The defendants answered jointly, setting up the agreement with Mrs. Bransford as to the notes belonging to her, and that England, after buying the interest of Fletcher in the mortgage debt, had come to a settlement with Bransford and wife, whereby he had released the articles of furniture belonging to Mrs. Bransford, and that they had conveyed to him, by absolute bill of

sale, the remainder of the furniture in satisfaction of the balance due on his debt. The amount of the balance due to England is stated in the answer, and by the answer he offers to surrender the furniture on the payment to him of the sum at which he had received it in the settlement.

During the progress of the cause the plaintiff sued out an attachment which appears to have been levied upon part of the furniture, and at a later day Mrs. Bransford filed a separate answer, claiming the goods attached as her separate property, and exhibiting a schedule of the same, previously filed in the clerk's office. The court dismissed the complaint for want of equity, and quashed the order of attachment. Buck has appealed.

1. As to marshaling assets.

The deed of trust is in such form as to be, in effect, only a mortgage; but, as the equity of redemption in a chattel is not subject to execution, if the property conveyed had been more than sufficient to pay the debt secured, a bill would have been maintainable to close the trust and apply the excess in the proceeds of the mortgaged property, so far as it belonged to James L. Bransford, to the satisfaction of the plaintiff's judgment. *Hannah* v. *Carrington*, 18 Ark. 91; *Cornish* v. *Dews*, 18 Ark. 172; *Jennings* v. *McIlroy*, 42 Ark. 236; *Cross* v. *Fombey*, 54 Ark. 179. But the evidence shows that the value of the trust property did not exceed the balance due to England; and that, before the complaint was filed, he had, by the settlement mentioned in the joint answer, become the purchaser of all the furniture, except so much of it as, by that settlement, was treated as belonging to Mrs. Bransford. As his purchase appears to have been free from fraud or collusion, and at a price larger than any that could probably have been otherwise obtained, the court properly allowed it to stand, unless

the plaintiff has shown an equity in his favor sufficient to avoid it. *Bazemore* v. *Mullins*, 52 Ark. 207.

The price at which England took the furniture conveyed to him by the bill of sale was not equal to the amount of his debt, and the balance due him was paid by allowing him to retain a sum sufficient for that purpose out of funds collected on one of the notes held as collateral security. Mrs. Bransford, it seems, consented to the payment thus made, in consideration of obtaining the release of that part of the furniture claimed as her separate property. The articles released were not probably worth more than the sum paid to redeem them, and if her claim to their original ownership is not well founded, the settlement could not, without injustice to her, be set aside, as to those articles, except by reimbursing her for the money she paid to accomplish the settlement. If full effect be given to the settlement, her right to the furniture she claims cannot be denied; and if the settlement be entirely disregarded, then the lien of the mortgage is to be considered a subsisting one, and the whole of the property to which it attaches would be required to discharge it. The plaintiff was not therefore injured by the disposition made of the property, unless he had an equity arising out of the existence of the collateral securities, and to which the settlement referred to was detrimental. He contends that it was his right to have the whole amount of the notes pledged by Mrs. Bransford collected and applied towards the payment of England's claim, before resorting to the mortgaged property, and that the latter should have been made to satisfy only the balance on that debt which would have remained after such partial payment. To justify this position, he cites the familiar rule that where a "creditor has a lien upon two funds for payment of his debt, and a subsequent creditor a lien upon one only of such funds," the former may

be required "to exhaust his remedy against the fund which is especially given for his security before resorting to that in which the subsequent creditor is interested." Colebrooke, Collateral Securities, sec. 98. But this rule is never applied where its operation would be unjust to any person interested in the fund or property to be affected. (*Marr* v. *Lewis*, 31 Ark. 203; *Reynolds* v. *Tooker*, 18 Wend. 594). And its application to the facts of this case would require us not only to ignore the conditional agreement by which the notes were pledged, but also, in effect, to appropriate Mrs. Bransford's property to the payment of a debt for which it is in no wise liable. As against her, such a decree would, of course, be inequitable. *Ayres* v. *Husted*, 15 Conn. 517.

The chancellor did not err in dismissing the complaint. Nor was it error to discharge the attachment. The statute makes no provision for the issue of attachments in actions such as this, and the order obtained from the clerk was improperly granted. 2. Practice in attachments.

Affirmed.

MARQUESE *v.* FELSENTHAL.

58 293
63 52
58 293
71 515

Opinion delivered December 16, 1893.

1. *When mortgage in form not construed an assignment.*

A conveyance by a merchant of her entire stock of goods to a trustee, upon its face a mortgage, is not converted into an assignment for the benefit of creditors by the fact that the debt secured was payable on demand, that the grantor was unable to continue business, and that the trustee was authorized to take immediate possession.

2. *Fraud—Promise to secure creditor.*

The fact that a mortgage was executed in fulfillment of a previous oral agreement that the mortgagor would give the mort-

gagee security whenever requested does not, of itself, constitute a fraud, but is a fact proper to be considered on an issue of fraud.

Appeal from Ouachita Circuit Court in chancery.

CHARLES W. SMITH, Judge.

Morris M. Cohn for appellant.

1. The mortgage is fraudulent and void. There was a secret agreement to secure and prefer the Camden Bank, thus allowing the debtor to make a show of assets and obtain a false credit. It was virtually taking a mortgage and withholding it from record. Secret understandings have the effect of secret liens, and are condemned when they injure parties who have no knowledge of them. 2 Verm. 261; 2 Johns. Ch. 35; 7 B. Mon. (Ky.) 374; 6 Paige, 526; 105 U. S. 100, 118; 73 Wis. 654; 41 N. W. Rep. 436; 67 Wis. 101; 30 N. W. Rep. 298; 69 Wis. 138; 123 Ill. 381; 15 Neb. 320; 7 N. W. Rep. 873; 21 Ohio St. 547; Wait, Fr. Conv. secs. 235, 236, 237; 12 Fed. Rep. 861-2; 28 *id.* 788.

2. The instrument was an assignment, and void under our statute. 31 Ark. 429, 437; 52 Ark. 30; *Ib.* 48; 53 *id.* 101; 54 *id.* 6; *Ib.* 428; 53 *id.* 537, 544; 1 McCrary, 176. Such a provision, which contemplates a continuance of business, an indefinite delay in winding up the trust, clearly makes the instrument fraudulent as to other creditors. 7 Md. 380; 11 *id.* 73. Add to this the fact that the trust was closed up by the debtor's relatives and clerks, who had ample opportunity to appropriate proceeds, and a case is clearly shown of fraud as to creditors. Wait, Fr. Conv. sec. 241.

Bunn & Gaughan for appellees.

1. The promise by a debtor to secure one of his creditors when he may demand it does not invalidate an instrument afterwards made to secure the debt. 17 Fed. Rep. 705; 123 U. S. 440.

2. The deed of trust did not constitute an assignment. 53 Ark. 101; 54 *id.* 234; 57 Ark. 222.

McCAIN, Special Judge. Eva Felsenthal, an embarrassed merchant, mortgaged her stock of goods to a trustee to secure a debt owing by her to the Camden National Bank. Her other creditors, who are the appellants herein, attack this mortgage.

1. When mortgage not construed an assignment.

1. Appellants contend that the mortgage is really an assignment, and void for want of compliance with the assignment law. The general distinction between a mortgage and an assignment is well understood. The one is intended to secure, the other to satisfy, a debt. A mortgage contemplates a personal effort to pay the debt, or at least reserves the right, by doing so, to restore the mortgagor's title. An assignment on the other hand denotes the Appomattox of the grantor's business career, and implies a surrender of his property to his creditors without the hope of redeeming it.

The form of the two instruments is quite similar, and, where the conveyance is unskillfully drawn, it is sometimes difficult to determine to which one of the two classes it belongs. If, therefore, the instrument on its face is ambiguous, it may be read in the light of surrounding circumstances, to see whether it be really a mortgage or an assignment. It is the privilege of an insolvent person, however, to make either a mortgage or an assignment, as he may think proper; and if, upon its face, a given instrument is clearly a mortgage, the court has no right to convert it into an assignment. The fact that a merchant has become hopelessly insolvent suggests the appropriateness of an assignment, rather than a mortgage; but the law permits him to make either, and he may have reasons satisfactory to himself for making the one rather than the other. Taking the deed of trust in this case by its four corners, it is a mortgage pure and simple. True, the debt was payable on demand, the

grantor was unable to continue business, and the trustee was authorized to take immediate possession; but these facts do not of themselves convert a mortgage into an assignment. This case is quite similar to that of *Robson* v. *Tomlinson*, 54 Ark. 229, in which Chief Justice Cockrill said: "Neither the possession of the goods, nor the unreasonableness of the debtor's expectation of paying the debt at maturity, nor his intent never to pay, is the criterion for distinguishing a mortgage from an assignment. The controlling guide, according to the previous decisions of this court, is, was it the intention of the parties, at the time the instrument was executed, to divest the debtor of the title, and so make an appropriation of the property to raise a fund to pay debts? If the equity of redemption remains in the debtor, his title is not divested, and an absolute appropriation of the property is not made."

In *Penzel Company* v. *Jett*, 54 Ark. 428, this court held: "To ascertain whether the parties intended the instrument as a security for debts, or as an absolute appropriation of the property described to raise a fund to pay debts, all its provisions must be read together. If, when viewed as a whole, the intent of the parties is found to be the former, the instrument must be declared a mortgage; if the latter, an assignment." To the same effect the law is laid down by Judge Sandels in *State* v. *Dupuy*, 52 Ark. 48, and in *Fecheimer* v. *Robertson*, 53 Ark. 101. If there are some expressions in *Richmond* v. *Mississippi Mills*, 52 Ark. 30, and in *Goodbar* v. *Box*, 54 Ark. 6, seemingly in conflict with the other cases cited, they may be reconciled by the consideration that either a mortgage or an assignment is rendered void if the parties to it are guilty of an actual fraudulent intent in making it. Fraud vitiates everything, and the court never hesitates to disregard the language of an instrument if it can be shown, by evi-

dence *dehors*, that it was made with the actual intent to defraud creditors. As was well said in *Richmond* v. *Mississippi Mills*, *supra:* "The law will not be blinded by form or manner." If however, a person acting in good faith makes a mortgage, there would seem to be no occasion for the court to construe it to be an assignment merely for the purpose of setting it aside, notwithstanding the court might think it more appropriate for the mortgagor, under the circumstances, to make an assignment.

2. When agreement to give security not fraudulent.

2. Appellants insist that the mortgage is fraudulent, and therefore void, because it was made in fulfillment of a previous oral promise. Such a promise, it is urged, constitutes a secret lien, and is of itself a fraud upon other creditors. This question is discussed *pro* and *con* in *Smith* v. *Craft*, reported in 12 Fed. Rep. 861, and in 17 *id.* 705; but the case was afterwards taken to the Supreme Court of the United States, and that court held that such an agreement was not of itself a fraud, but that it was a fact proper to be admitted and considered in evidence on an issue of fraud. *Smith* v. *Craft*, 123 U. S. 436.

If there were other circumstances in a given case tending to show a conspiracy between the creditor and the debtor to defraud other creditors, or that the purpose of the favored creditor had been to enable the debtor to make a show of assets, and thereby to obtain credit in such case, a standing secret agreement for a preference should be accorded much weight on an allegation of fraud. It is not sufficiently shown, however, by the evidence in this case that the bank officials acted with such evil design. The promise to secure, complained of by appellants, is quite general. It was only an understanding, to quote the language of the cashier, "that they were to give me security at any time when I should ask it." This promise is little more, perhaps,

than any honorable debtor holds himself ready at all times to make to an indulgent creditor. The promise was not a specific agreement to mortgage the stock of goods now in controversy. In appropriating the entire stock of goods to the satisfaction of this one debt to the exclusion of other claims, the bank and its debtor do not present themselves in an amiable light to a court which has for one of its maxims that equality is equity, but we cannot ignore the law which allows preferences to be made. One principal objection which has prevailed against abolishing preferences is, as we understand, that it would prevent the fulfillment of meritorious promises to prefer. While our suspicion of fraud is excited by the conduct of the bank, still the burden of proof is upon the appellants, and, in our opinion, they have failed to sustain the allegations in this particular.

There are one or two other points discussed in the briefs of counsel, but we deem it unnecessary to pass upon these.

Let the decree of the chancellor be affirmed.

HORTON v. HILLIARD.

58 298
60 479

Opinion delivered December 16, 1893.

1. *Dower and homestead—Practice.*

The existence and location of the homestead must be considered by the probate court on approving the report of commissioners appointed to assign dower, although the petition for dower does not mention the homestead, as the commissioners are bound to take notice of the homestead, whether mentioned in the petition or not.

2. *Dower—Assignment.*

Dower and homestead being distinct rights, a widow, entitled to a homestead in part of the decedent's lands, is entitled also to

receive as dower one-third of the entire real estate, including the homestead, and may have it laid off elsewhere than upon the homestead.

Appeal from Chicot Circuit Court.

CARROLL D. WOOD, Judge.

W. G. Streett, *Wm. B. Streett* and *U. M. & G. B. Rose* for appellant.

1. The widow is entitled to dower, and to homestead in addition thereto; and she has a right to select her homestead, and require the commissioners to lay off dower in the balance of the lands, so as not to include the homestead. Mansf. Dig. secs. 2571, 2590; 47 Ark. 455; 40 *id.* 26, 27; 33 Vt. 651; 31 Ark. 145–9, 150; 33 *id.* 399; 40 *id.* 17; 47 *id.* 510; Const. Ark. art. 9, sec. 6; 42 Ark. 503. The dower and homestead rights are cumulative. Smyth, H. & Ex. pp. 286, 292; Thomps. Homesteads, sec. 555 *et seq;* 41 Ala. 327; 42 *id.* 315; 48 *id.* 70; 22 Wis. 120; 97 Mass. 392; 5 Allen, 146; 11 *id.* 194; 50 Ill. 477; 60 *id.* 281; 4 Heisk. 222; 35 Vt. 290; 5 Mo. 273; 46 Miss. 64; 32 Mich. 380. The homestead right is paramount. 54 Ark. 9; 21 Tex. 605; 68 Mo. 13; 32 Mich. 380.

2. The case should have been tried *de novo.* 52 Ark. 283; 34 *id.* 240; 33 *id.* 508; 38 *id.* 388; 26 *id.* 527, 532.

D. H. Reynolds for appellee.

The issue as to the homestead could not be raised in the circuit court for the first time by amendment. 26 Ark. 533; 27 Ark. 11, 12; 38 Ark. 388; 44 *id.* 376; 48 *id.* 352; 44 *id.* 379; 25 *id.* 15.

JOHN B. JONES, Special Judge. Isaac H. Hilliard died, intestate, in 1882, leaving him surviving appellant, his widow, and no children, but leaving a brother and the children of a deceased sister his heirs at law. Hilliard, at the time of his death, owned and lived upon a

plantation of about 2000 acres in Chicot county. Application was made to the probate court for the assignment of dower, and an order made appointing commissioners in October, 1884, and the commissioners did not act until October, 1885. They then reported to the court an assignment of dower, and the report was at once approved. The widow was then absent from the State, and had no notice of the action of the commissioners. The dower was so laid off as to include the residence, and ignore the existence of the homestead. After her return in November, 1885, the widow filed objections to the report and order approving it, and appealed the cause to the circuit court. On trial of the appeal she objected to the report, and moved to amend the petition for dower, so as to set up the homestead; but the court ruled that the question of homestead was not before the probate court, and therefore could not be tried in the circuit court, refused the amendment, and confirmed the report of the commissioners.

The circuit court should have tried the cause *de novo*. *Hilliard* v. *Hilliard*, 52 Ark. 283.

1. As to homestead and dower.

Every person dealing with the estate was bound to take notice of the homestead. The purchaser at probate sale must take notice of it. It is a misdemeanor, punishable by fine and imprisonment, for the administrator to attempt to sell the homestead. *McCloy* v. *Arnett*, 47 Ark. 455. The fact that the petition for dower did not mention the homestead did not affect that right. The commissioners could not lay off the homestead, but were bound to take notice of it, whether mentioned in the petition or not. Their duty was to assign dower. The dower could not be legally assigned without recognizing the existence and location of the homestead. The existence of the homestead, then, was properly before the probate court on approval of the report of the commissioners, and was before the circuit court on trial of

the appeal. "The commissioners appointed to lay off dower in the lands of the deceased husband shall, at the request of the widow to be endowed, lay off the same on any part of the lands of the deceased, whether the same shall include the usual dwelling of the husband and family or not; *provided*, the same can be done without essential injury to such estate." Sec. 2590, Mansfield's Digest.

The widow was deprived of the benefit of this statute by the action of the commissioners in proceeding without notifying her and giving her the privilege of selecting her dower. The report should not have been approved unless it appeared from it, or other evidence, that the widow had notice and an opportunity to avail herself of the privilege given her by the statute.

Our constitution gives the homestead to the widow and minor children as a right in the estate, in addition to the dower of the widow. Sec. 6, art. 9, is as follows: "If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's rights to cease at twenty-one years of age—and the shares to go to the younger children, and then all go to the widow, and provided said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate."

In construing this section of the constitution, this court in *Thompson* v. *King*, 54 Ark. 12, said: "Its terms, and the reason upon which it is founded, show that the minor children were thereby intended to be pro-

vided for during their minority, independently of the widow."

2. As to assignment of dower.

The widow's dower was fixed by law, and the commissioners to assign it bound to lay it off where she requested it, whether it included the dwelling or not, before the adoption of the constitution, and the framers of that instrument did not intend to diminish her dower right as then existing by law, but intended the homestead thereby given to the widow and minor children to be a right in addition to the dower, unless it be in cases where the real estate does not exceed the homestead. Dower and homestead rights are different in character; dower is a life estate that, after assignment, may be sold and conveyed as other estates. The homestead is not such a right as can be used in any manner other than as provided by the constitution. If there are no minor children, and the widow attempts to convey the homestead, she forfeits the right. The rents and profits are to be divided, so long as there are children under 21 years of age. If, then, dower should cover the same lands occupied as a homestead, the value of the dower would be diminished by the rents and profits to be divided with the minor children; nor could the widow sell such dower so laid off, and deliver possession and enjoyment of the estate to the purchaser, while the homestead existed.

In Massachusetts the statute provided that the homestead exemption should continue after the death of the householder, for the benefit of the widow and children, some one of them continuing to occupy such homestead until the youngest child is 21 years of age, and until the death or marriage of the widow. In construing this statute in *Cowdrey* v. *Cowdrey*, 131 Mass. 186, the court said: "The effect of the homestead statutes is to give the widow an estate in addition to her rights in the property of her deceased husband. They are not designed to curtail her right of dower, but to give her

the additional benefit of a homestead for herself and minor children. Upon this ground, it was held in *Monk* v. *Capen*, 5 Allen, 146, that the fact that a widow had received an assignment of dower and an allowance out of the personal property of her husband did not preclude her from claiming the additional benefit of an estate of homestead."

In *Chisolm* v. *Chisolm's Executors*, 41 Ala. 327, it was held that a widow having had dower allotted to her is no bar to her application for a homestead. See also *Johnson* v. *Davenport*, 42 Ala. 317; *Mercier* v. *Chace*, 11 Allen, 194; Waples on Homestead and Exemption, 614 and 615.

In allotting dower it is not proper to deduct the homestead and assign the dower out of the remainder of the estate. The widow is entitled to dower in the whole estate.

Reversed and remanded for further proceedings according to law.

HARDAGE *v.* STROOPE.

Opinion delivered December 23, 1893.

58 303
d67 521
67 522
58 303
d72 238
58 303
75 21

1 *Common law—Rule in Shelley's Case.*

Under section 566 of Mansfield's Digest, adopting the common law of England so far as applicable, the rule in Shelley's Case is in force in this State, except in so far as it has been repealed by section 643, *ib.*, abolishing fees tail.

2. *Real property—Construction of deed.*

A conveyance of land to a grantee "for and during her natural life, and then to the heirs of her body in fee simple, and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this State," comes within

the rule in Shelley's Case, and vests an estate of inheritance in the grantee, so that she becomes seized of the land in fee simple.

Appeal from Clark Circuit Court in Chancery.

JOHN E. BRADLEY, Special Judge.

U. M. & G. B. Rose and *J. H. Crawford* for appellants.

1. Mrs. Carroll's children took a *vested* remainder in fee, and after their death the mother inherited from them the fee simple in the estate. Citing 1 Fearne Cont. Rem. 216; 2 *id.* 73; 2 Washb. Real Prop. 226, 233, 243, 240, 227, 230, 224, 225, 250; 4 Kent, Com. 203, 205, etc.; 23 Ark. 179; Tiedeman, Real Prop. secs. 402, 401, 398, etc.; 2 Cruise, Real Prop. ch. 1, secs. 9, 4, 58; 6 Wall, 458, 476; 19 *id.* 167, 176; 113 U. S. 340; 141 *id.* 313; 4 Pet. 90; 12 Ala. 141; 46 Am. Dec. 249; 4 Johns. 61; 10 Tex. 560; 23 Penn. St. 31; 19 N. E. Rep. 539; 12 S. W. Rep. 349.

2. The rule in Shelly's Case applies in this case; the heirs would take by descent and not by purchase, and they would be bound by her conveyance. 4 Kent, Com. 209, 216; 2 Washb. Real Pr. 270, 273, 274, etc.; 4 Maule & Sel. 362; 64 Pa. St. 9; 70 *id.* 72.

Murry & Kinsworthy for appellee.

1. The children of Mrs. Carroll took only a contingent remainder, which never became vested, they dying before their mother. 4 Kent, Com. *202, 200, etc; 23 Pa. St. 31; 44 Ark. 458; 49 *id.* 125; 14 So. E. Rep. 640; 44 Ch. Div. 154; 20 Atl. Rep. 1002; 85 N. Y. 177; 18 Atl. 826; 26 N. E. Rep. 897; 2 Washb. Real Prop. 250; 1 Dougl. 265; 21 Atl. Rep. 826; 53 Ark. 185.

2. The rule in Shelly's case, *as modified by our statute*, doubtless is in force, *in a proper case*, in this State (51 Ark. 71), but it has no application here. At

common law, Mrs. Carroll would take an *estate tail*, which, by the operation of the rule in Shelly's Case, would be raised to an estate in fee simple; but not so in Arkansas, for, by statute, the rule has been rendered inoperative. Mansf. Dig. sec. 643. See 4 Kent *226, 228, etc.; 10 L. R. A. 162; 107 Ill. 182-6; 9 L. R. A. 165; 25 N. E. Rep. 1013; 21 Atl. 826; 15 S. W. 623; 26 N. E. 895; 20 Atl. 645; *Ib.* 497; 17 Atl. 11; 21 *id.* 596. It is only in cases where the technical words "heirs," or "heirs of the body," are used that the rule in Shelley's Case ever applies; and if we adopt the theory of appellant, and eliminate from the deed the words "and then to the heirs of her body in fee simple," we have a conveyance which does not contain these technical words, and is not subject to the operation of the rule in Shelley's case. 20 Atl. 624; 100 N. C. 254.

BATTLE, J. J. L. Stroope and wife conveyed the land in controversy to Tennessee M. Carroll, "to have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then, in that case, to be divided and distributed according to the laws for descent and distribution in this State." After this, Mrs. Carroll conveyed it in trust to James M. Hardage to secure the payment of a debt. She had two children born to her after the conveyance by J. L. Stroope and wife, but they died in her life time. She died leaving no heirs of her body, but left her father, W. S. Stroope, surviving. After her death the land was sold under the deed of trust, and was purchased by Joseph A. Hardage. W. S. Stroope, the appellee, now claims it as the heir of Mrs. Carroll, and Joseph A. Hardage, the appellant, claims it under his purchase.

The rights of the parties depend on the legal effect of the following words contained in the deed to Mrs.

Carroll: "To have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this State." Appellee contends that Mrs. Carroll only took a life estate in the land under this clause, and that he is entitled to the remainder, she having left no descendants. On the other hand, the appellant contends that the remainder in fee vested in the children, and, when they died, Mrs. Carroll inherited it, and the whole estate in the land became vested in her; and that, if this contention be not true, the deed to Mrs. Carroll comes within the rule in Shelley's Case, and vested in her the estate in fee simple; and that in either event he is entitled to the land.

It is obvious that the deed to Mrs. Carroll created in her no estate in tail. Her grantor reserved no estate or interest, nor granted any remainder, after a certain line of heirs shall become extinct, but conveyed the land to her to hold during her life, and then to the heirs of her body *in fee simple*. No remainder vested in her children. It was to be inherited by the heirs of her body, and they were her descendants who survived her and were capable of inheriting at the time of her death. They might have been grand-children. They were not the children, as they died in the lifetime of their mother.

The effect of the deed, as explained by the *habendum*, in the absence of the rule in Shelley's Case, was to convey the land to Mrs. Carroll for her life, and then to her lineal heirs, and in default thereof to her collateral heirs. As there can be collateral heirs only in the absence of the lineal, the deed conveyed the land to Mrs. Carroll, in legal phraseology, for her life, and after her death to her heirs.

Two questions now confront us: (1.) Does the rule in Shelley's Case obtain in this State? (2.) And, if so, does the deed in question fall within it?

(1.) Is it in force in this State?

1. Rule in Shelley's Case.

Section 566 of Mansfield's Digest provides: "The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British parliament in aid of or to supply the defect of the common law made prior to the fourth year of James the First (that are applicable to our own form of government), of a general nature and not local to that kingdom, and not inconsistent with the constitution and laws of the United States or the constitution and laws of this State, shall be the rule of decision in this State unless altered or repealed by the general assembly of this State."

The rule in Shelley's Case, as stated by Mr. Preston, which Chancellor Kent says is full and accurate, is as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 4 Kent, Com. *215. Its origin is enveloped in the mists of antiquity. It was laid down in Shelley's Case in the 23rd year of the reign of Queen Elizabeth, upon the authority of a number of cases in the year-books. Sir William Blackstone, in his opinion in *Perrin* v. *Blake*, 1 W. Bl. 672, cites a case in 18 Edw. II. as establishing the same rule. The earliest intelligible case on the subject, however, is that of the *Provost of Beverly*, 40 Ed. III,

which arose in the reign of Edward III, and substantially declared the rule as laid down in Shelley's Case.

Various reasons have been assigned for the origin of the rule. Chancellor Kent, upon this subject, says: "The judges in *Perrin* v. *Blake* imputed the origin of it to principles and policy deduced from feudal tenure; and that opinion has been generally followed in all the succeeding discussions. The feudal policy undoubtedly favored descents as much as possible. There were feudal burdens which attached to the heir when he took as heir by descent, from which he would have been exempted if he took the estate in the character of a purchaser. An estate of freehold in the ancestor attracted to him the estate imported by the limitation to his heirs; and it was deemed a fraud upon the feudal fruits and incidents of wardship, marriage and relief to give the property to the ancestor for his life only, and yet extend the enjoyment of it to his heirs, so as to enable them to take as purchasers in the same manner and to the same extent precisely as if they took by hereditary succession. The policy of the law would not permit this, and it accordingly gave the whole estate to the ancestor, so as to make it descendible from him in the regular line of descent. Mr. Justice Blackstone, in his argument in the Exchequer Chamber in *Perrin* v. *Blake*, does not admit that the rule took its rise merely from feudal principles; and he says he never met with a trace of any such suggestion in any feudal writer. He imputes its origin, growth and establishment to the aversion that the common law had to the inheritance being in abeyance; and it was always deemed by the ancient law to be in abeyance during the pendency of a contingent remainder in fee, or in tail. Another foundation of the rule, as he observes, was the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ances-

tor, and thereby giving him the power of disposition. Mr. Hargrave, in his *Observations concerning the Rule in Shelley's Case*, considers the principle of it to rest on very enlarged foundations; and, though one object of it might be to prevent frauds upon the feudal lord, another and a greater one was to preserve the marked distinctions between descent and purchase, and prevent title by descent from being stripped of its proper incidents, and disguised with the qualities and properties of a purchase. It would, by that invention, become a compound of descent and purchase—an amphibious species of inheritance, or a freehold with a perpetual succession to heirs without the other properties of inheritance. In *Doe* v. *Laming* (2 Burr. 1100), Lord Mansfield considered the maxim to have been originally introduced, not only to save to the lord the fruits of his tenure, but likewise for the sake of specialty creditors. Had the limitation been construed a contingent remainder, the ancestor might have destroyed it for his own benefit; and if he did not, the lord would have lost the fruits of his tenure, and the specialty creditors their debts."

But, whatever may have been the cause of its origin, its effect has been "to facilitate the alienation" of land "by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease." Its operation in this respect has commended it to the favorable consideration of the most learned and able men of Great Britain and the United States, and, doubtless, contributed to its preservation and continuance, and enabled it to survive the innovation of legislation and the changes and fluctuations of centuries. Based upon the broad principles of public policy and commercial convenience, which abhor locking up and rendering inalienable any class of property, it has ever been in harmony with the genius of the institutions of our country and with the liberal and commercial spirit of the age.

Hence, it has been recognized and enforced as a part of the common law of nearly every State where it has not been repealed by statute. *Starnes* v. *Hill*, 16 S. E. Rep. (N. C.) 1011; *Baker* v. *Scott*, 62 Ill. 86; *Hageman* v. *Hageman*, 129 Ill. 164; *Dœbler's Appeal*, 64 Pa. St. 9; *Kleppner* v. *Laverty*, 70 Pa. St. 72; *Polk* v. *Faris*, 9 Yerger, 209; *Crockett* v. *Robinson*, 46 N. H. 454; 4 Kent's Com. Marginal pages, 229–233; 2 Washburn on Real Property (5th ed.), pp. 655–657.

The rule has never been changed in this State, except in one respect—estates tail have been abolished. Section 643 of Mansfield's Digest provides that whenever any one would become seized at common law "in fee tail of any lands or tenements, by virtue of a devise, gift, grant or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant or conveyance." To this extent it has been repealed. In other respects it remains in full force in this State; and it was so held in *Patty* v. *Goolsby*, 51 Ark. 71.

(2.) Does this case come within the rule?

2. Construction of deed.

"Whenever there is a limitation to a man which, if it stood alone, would convey to him a particular estate of freehold, followed by a limitation to his heirs * * * (or equivalent expressions), either immediately, or after the interposition of one or more particular estates, the apparent gift to the heirs," according to the rule in Shelley's Case, "is to be construed as a limitation of the estate of the ancestor, and not as a gift to his heirs." The theory was that, in cases which come within the rule, the heirs take by descent from the ancestor, and they cannot do so unless "the whole estate is united,

and vests as an executed estate of inheritance in the ancestor." This theory was based upon the fact that "the ancestor was the sole ascertained and original attracting object, the ground-work of the grantor's or testator's bounty," and upon the presumption, arising from the fact, that the grantor or testator, as the case may be, "meant the person who should take after the ancestor should be any person indiscriminately who should answer the description of heirs * * of the ancestor, and be entitled only in respect of such description," and that the estate devised or conveyed should vest in them in that character only. "In order to effectuate this intent, and secure the succession to its intended objects," the rule rejects, as inconsistent and incompatible with this primary or paramount intent, "any other intent that the ancestor should take an estate for life only, and the heirs should take by purchase," and vests the estate of inheritance in the ancestor. This was considered necessary to accomplish the primary object of the grantor or ancestor. 2 Fearne on Remainders, pp. 216–220.

"Hargrave has justly observed," says Fearne on Remainders, "that the rule cannot be treated as a medium for discovering the testator's intention, but that the ordinary rules for the interpretation of deeds should be first resorted to; and that when it is once settled that the donor or testator has used words of inheritance, according to their legal import; has applied them intentionally to comprise the whole line of heirs to the tenant for life; has made him the terminus, by reference to whom the succession is to be regulated; then the rule applies. But the rule is a means for effectuating the testator's primary and paramount intention, when previously discovered by the ordinary rules of interpretation; a means of accomplishing that intention to comprise, by the use of the word heirs, the whole line of

heirs to the tenant for life, and to make him the terminus, by reference to whom the succession is to be regulated. And the way in which the rule operates, as a means of doing this, is by construing the word heirs as a word of limitation; or, in other words, by construing the limitation to the heirs general or special, as if it were a limitation to the ancestor himself and his heirs general or special." 2 Fearne on Remainders, p. 221.

In *Dœbler's Appeal*, 64 Pa. St. 9, Judge Sharswood, in discussing the rule in Shelley's Case, said: "If the intention is ascertained that the heirs are to take *qua* heirs, they must take by descent, and the inheritance vest in the ancestor. The rule in Shelley's Case is never a means of discovering the intention. It is applicable only after that has been discovered. It is then an unbending rule of law, originally springing from the principle of the feudal system, and though the original reason of it, the preservation of the rights of the lord to his relief, primer seisin, wardship and marriage, has passed away, it is still maintained as a part of the system of real property which is based on feudalism and as a rule of policy. It declares inexorably that where the ancestor takes a preceding freehold by the same instrument, a remainder shall not be limited to the heirs, *qua* heirs, as purchasers. If given as an immediate remainder after the freehold, it shall vest as an executed estate of inheritance in the ancestor; if immediately after some other interposed estate, then it shall vest in him as a remainder. Wherever this is so, it is not possible for the testator to prevent this legal consequence by any declaration, no matter how plain, of a contrary intention. That is a subordinate intent which is inconsistent with, and must therefore be sacrificed to, the paramount one. Even if he expressly provides that the rule shall not apply—that the ancestor shall be tenant for life only and impeachable for waste—if he interpose

an estate in trustees to support contingent remainders—or, as in this will, declare in so many words that 'he shall in nowise sell or alienate, as it is intended that he shall have a life interest only,' it will be all ineffectual to prevent the operation of the rule. No one can create what is in the intendment of the law an estate in fee, and deprive the tenant of those essential rights and privileges which the law annexes to it. He cannot make a new estate unknown to the law."

"The policy of the rule," says Chancellor Kent, "was that no person should be permitted to raise in another an estate which was essentially an estate of inheritance, and at the same time make the heirs of that person purchasers." 4 Kent's Com. 216.

At common law the word "heirs" was necessary to convey a fee simple by deed. No equivalent words would answer the purpose. If the conveyance was not made to a man and his heirs, the grantee only took a life estate, notwithstanding the estate was limited by such phrases as "to A forever," or "to A and his successors," and the like. An express direction that the grantee should have the fee simple in the land would not have supplied the place of the word "heirs." But in this State the question as to what estate a deed to land conveys is determined by the intent of the parties, as ascertained from the contents of the deed and the power of the grantor to convey. When construed in this manner, it is obvious that the intention of the deed in question was to convey the land in controversy to Mrs. Carroll for life, then to her lineal heirs, and, in default thereof, to her collateral heirs; in other words, to Mrs. Carroll for life, and, after her decease, to her heirs. The intention that the heirs were to take only in the capacity of heirs is manifest. The deed comes within the rule in Shelley's Case. The estate of inheritance vested in Mrs. Carroll,

and she became seized of the land in fee simple. 2 Washburn on Real Prop. (5th ed.) p. 653.

"As a consequence from the foregoing principles, whoever has a freehold which, by the terms of the limitation, is to go to his heirs, may alien the estate, subject only to such limitation as may have been created between his freehold and the inheritance limited to his heirs." 2 Washburn on Real Prop. 651.

It follows, then, that Mrs. Carroll had the right to convey the fee in the land in trust to secure the payment of her debts; and that a sale of such estate, under the deed and in conformity with law, was valid.

The decree of the court below is reversed, and the cause is remanded for proceedings consistent with this opinion.

FULLER v. TOWNSLY-MYRICK DRY GOODS CO.

Opinion delivered December 23, 1893.

Injunction—Judgment at law.

The collection of a judgment at law will not be restrained merely because it is void, where plaintiff fails to show that he has no adequate remedy at law.

Appeal from Scott Circuit Court in Chancery.

EDGAR E. BRYANT, Judge.

Suit by Townsly-Myrick Dry Goods Company and D. A. Wilson against L. P. Fuller, sheriff, Barton Bros., and Israel Brothers. The facts are stated by the court as follows:—

The appellees petitioned the circuit court for certiorari to quash a judgment against D. A. Wilson in favor of Barton Bros., obtained in the court of Israel Brothers, a justice of the peace. The writ of certiorari and a

temporary restraining order were issued and served, but not until after the sale of the goods by the sheriff, as mentioned hereafter. Before the suit was brought, the sheriff had levied the execution issued upon the judgment sought to be quashed upon a part of a stock of goods in the store-house of Wilson, which was claimed by the Townsly-Myrick Dry Goods Company under a mortgage made to it by Wilson. The service of the writ upon the sheriff having been made after the sale of the goods under the execution, he held the proceeds of the sale subject to the order of the court.

Upon motion of the appellants, Townsly-Myrick Dry Goods Company was stricken from the complaint. Upon motion of the appellees, in which said company joined, by permission of the court, the cause was transferred to equity, and the plaintiffs filed an amended complaint in equity, the temporary restraining order being continued in force.

The issuance of the execution upon the judgment of the justice of the peace, its levy upon the property and the sale of the goods by the sheriff, and the fact that he held the proceeds of the sale, were stated in the complaint, which alleged that the judgment on which the execution had been issued was void for the want of jurisdiction of the person of Wilson, against whom it had been rendered, and it was further alleged in the complaint that, before the rendition of said judgment, said Wilson had executed a mortgage on the goods so sold by the sheriff to said company, and that the company had taken possession of the goods under the mortgage; that Barton Bros. were threatening to proceed further under said judgment by having further execution. The prayer was that the sheriff be restrained from paying over the proceeds of the sale to Barton Bros., and that he be ordered to pay the same to the Townsly-Myrick Dry Goods Company; that the

justice of the peace be restrained from issuing further executions on the judgment, and that Barton Bros. be restrained from enforcing the same; and for general relief.

The appellants demurred to the complaint on the grounds that the court had no jurisdiction of the subject-matter of the action, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled. The appellants answered, having excepted to the overruling of the demurrer. The answer admitted the facts as set out here, and denied that the judgment on which the execution had been issued was void.

The court decreed that the judgment of Israel Brothers, the justice of the peace, was void, made the injunction perpetual, and ordered the proceeds of the sale of the property in the hands of Fuller, the sheriff, paid to Townsly-Myrick Dry Goods Company. The case is here on appeal from this decree.

On the same day after the judgment had been rendered, the plaintiffs below asked leave of the court to amend the complaint by striking from it so much of the prayer of the complaint as asked that the sheriff be directed to pay to the Townsly-Myrick Dry Goods Company the money he had received upon sale of the goods under the execution, and for leave to pay the same, which the sheriff had paid to it under the decree, back to the sheriff, and they also moved that the decree be so amended as to leave out the directions in it to the sheriff to pay the money received from sale of the goods under the execution to them; which was resisted by the defendants, and refused by the court. The plaintiffs, at the time excepted. From this refusal of the court there is no appeal by the plaintiffs, the appellees here.

Daniel Hon for appellants.

1. The findings of a chancellor on a question of fact, while not conclusive, are persuasive. 41 Ark. 292.

2. The judgment of the justice was not void. 52 Ark. 373; 8 Wend. 568; 11 Pac. Rep. 158; Freeman, Judg. sec. 53 *et seq.;* 43 Ark. 233.

3. The remedy at law was adequate. A judgment will not be enjoined when there is no evidence of a good defense to the merits, or where it is contrary to equity and good conscience. 32 Ark. 438. There was only a lack of formality in rendering the judgment. 42 Ark. 560. Equity does not enjoin for mere errors or irregularities. *Ib.* 560. The remedy is by appeal.

Sandels & Hill for appellee.

1. Injunction was the proper remedy. 22 Pac. Rep. 505; 30 Ark. 594; 33 *id.* 778. A justice has no jurisdiction to entertain an injunction suit. 44 Ark. 381; 55 *id.* 101. All questions as to affidavits, etc., were waived by answering over. 43 Ark. 231.

2. The recitals of a justice's entries are only *prima facie* true, and may be overturned by *parol.* 46 Ark. 231; 43 *id.* 232. There was no *court*, and no *legal* confession of judgment. 52 Ark. 373; 8 Wend. 568.

HUGHES, J. (after stating the facts). The plaintiff got what he sought to obtain by his suit, *i. e.* the proceeds of the sale of the goods.

If the judgment of the justice of the peace was void, the appellees have not alleged or shown that they were without full, complete and adequate remedy at law. "Equity will not enjoin a judgment merely because it is void. The plaintiff must show in his bill for injunction that he has no adequate remedy at law, either by appeal from the judgment or by certiorari, or by application to the court which rendered it, or in any

other legal manner." *Wingfield* v. *McLure*, 48 Ark. 510; *Shaul* v. *Duprey*, 48 *ib.* 331.

The judgment is affirmed, save that part of it which declares the judgment of the justice of the peace void, and makes the injunction perpetual; but as to those particulars it is reversed and remanded, without prejudice to any right of the appellees to take such further steps as they may think proper.

RAILROAD COMPANY *v.* DIAL.

58 318
67 55

Opinion delivered December 23, 1893.

Railway—Duty to one assisting an employee.

Where a boy fifteen years of age, at the request of the conductor of a freight train, undertakes to throw off the brake on a car, and is injured by striking his head on an iron bridge, he cannot recover from the railroad company on account of its negligence in failing to warn him of the danger, if the conductor had no express or apparent authority to employ him, and there was no exigency which called for the exercise of implied authority.

Appeal from Garland Circuit Court.

A. M. DUFFIE, Judge.

STATEMENT BY THE COURT.

Appellant was making up a train at its depot in the city of Hot Springs. On the yard of the company, near the depot, at a street crossing, a bridge spanned the track. Appellee, a boy fifteen years of age, was standing erect upon a freight car as it passed under the bridge, and, same being too low to admit of his passage in this position, he was struck upon the head, and knocked from the car, receiving a severe scalp wound, from which he suffered greatly, and was permanently disfigured. He sues the company for $5000, alleging that he was in-

duced to go upon the car by the conductor of appellant for the purpose of throwing off a brake; that the car was not in motion when he ascended; that on reaching the brake he found he could not move it, and informed the conductor, who signalled the engineer to back the cars; that, as soon as the brake was loosened, he threw it off, and the cars began to move, and he made an effort to get down, but, before he could do so, the cars had passed under the bridge, and he was struck, and received the injury of which he complains, which he says was caused by the gross carelessness and negligence of the appellant. He says also that he had never been in the employment of the appellant, knew nothing of the operating of said cars, or the labor incident thereto, and had no knowledge of the height of the bridge, or that there was danger in the task he was performing.

The appellee was the only witness on his own behalf as to the occurrence, and his testimony, in substance as it relates to the cause and manner of the injury, corresponds with the allegations of his complaint. He says that a freight train was standing on the track at the passenger depot near the intersection of Benton and Malvern avenues in the city of Hot Springs. He was standing on the platform, and the conductor said: "Lewis, get up on top of that freight car, and throw a brake off." He got on the car, and told the conductor he could not throw it off; it was so tight. The conductor signalled the engineer, and the train was backed two or three feet, and then went forward. He threw the brake off, and started to get down, and the conductor told him not to get down; that he might get hurt. The train was pulled east toward Malvern; then backed up and got two loaded cars, and started east again. He says he must have looked back up towards town, and did not see the iron bridge at the crossing. It struck him on the top of the head, and knocked him

off, and he did not know what happened after that. He was standing on top of the car when it went under the bridge. At the time the conductor told him to get on the car he was about ten yards off. Had gone down to the depot for the purpose of blacking boots, carrying grips, etc., which he frequently did. Was in the habit of doing so. The conductor and train men all knew him well. Used to black their boots, and help them to do other work on the cars, and they did not drive him away. They used to tell him to jump on the cars and let off the brake, and they would give him a ride. Rode on the engine one time, and on baggage car another time, to Cove Creek, and they sent him back on train. Never got on train unless told to do so by train men.

The answer of the company denied all the allegations of the complaint, and it introduced the general superintendent, the conductor, baggagemaster, engineer, fireman and brakeman. The superintendent stated that he employed all conductors and men working on all trains, and had given all conductors and trainmen orders to keep boys off the trains. The conductor and several others testified that they had orders to keep boys out of the yard and off the cars, and the conductor said he had ordered appellee off that morning. There was proof by the employees of the company that appellee was in the habit of jumping on and off the cars, that they had tried to keep him out of the yard and off of the cars, and that they had often ordered him out of the yard, and that he had made himself troublesome to them. Verdict and judgment for $500. The railroad appeals.

J. M. Moore for appellant.

The conductor had no authority to put plaintiff to work, or to direct or require bystanders to assist in operating the train ; and a stranger who assists in such

work cannot recover for injury sustained while engaged in such voluntary work. 38 A. & E. R. Cas. 14; 72 Mo. 62; 60 *id.* 415; 69 Pa. St. 213; 4 A. & E. R. Cas. 599; 68 Me. 49; Thomps. Neg. 1045; 45 Ark. 246.

E. W. Rector for appellee.

The conductor, although acting contrary to his *express* authority, has *implied* authority to employ appellee to do the work he was requested to do, and appellee was not a *volunteer* nor a *trespasser*, but a *servant* put in a *perilous* position *without warning or notice.* Wood, Mast. and Serv. (2nd ed.) p. 576; 83 Ala. 238; 3 Am. St. Rep. 715; 3 So. Rep. 764; 107 Mass. 108; 9 Am. Rep. 11; 41 *id.* 337; 27 Am. St. Rep. 902; 5 *ib.* 510; 16 N. W. Rep. 331; 7 Am. St. Rep. 432; 26 *id.* 927; 57 Am. Rep. 268.

2. The instructions for appellee were based upon 48 Ark. 460 and 46 *id.* 423.

WOOD, J., (after stating the facts). The controverted questions of fact are settled by the verdict in favor of appellee. Did the court declare the law in the following instruction: "(2) That if you believe that Louis Dial got on the cars of the defendant, at the request of Hensley, to unset the brake of said car, and that Hensley knew at the time, or had sufficient time and opportunity to know, and ought to have known, that plaintiff, when standing on the top of one of the defendant's cars, could not pass under the iron bridge without injury to himself, and did not warn plaintiff of the danger, and that plaintiff had no knowledge of the danger of his position on said car, you should find for the plaintiff in such sum as is warranted by the evidence, if you believe that Hensley had authority to employ the boy for said purpose, or that said employment came within the scope of his authority?"

The evidence as to the conductor having no express authority to employ brakemen was not disputed.

Other instructions, conveying the same idea as to the authority of the conductor and the duty of the company, were given, and this seems to have been the theory upon which the case was tried. Another instruction was given which told the jury, "if the conductor acted *within the apparent scope of authority, etc.*" "The conductor of a railway train by virtue of his employment has, ordinarily, no authority to bind the corporation by a contract. But as he is invested with authority to control all the movements of the train, and is bound to look out for the safety and reasonable comfort of the passengers, exigencies may arise in which, by virtue of his position, he may make contracts which would be binding upon the corporation, where they became indispensably necessary for the performance of his duties." Wood on Railways, 449.

The proof shows that the conductor had no power to employ brakemen. The extent of his express authority was to control the movements of his train with such subalterns as were furnished him by the superintendent, who "employed all men working on all trains" of the company. As the agent of the company, to the conductor was delegated the power to control the movements of his train. To effectuate this main purpose which the corporation had in view in his employment, he would have the implied authority to do all things reasonably necessary. Mechem on Agency, 281, 311.

No exigency had supervened, no urgent circumstances were shown; nothing to call for the exercise of implied authority.

But the company would be liable, notwithstanding the conductor, in calling upon appellee, acted contrary to positive instructions, if in so doing he was within the scope of authority which it had caused or permitted him

to appear to possess, *i. e.* the apparent scope of his authority. But here again the proof fails to show "any direct act, negligent omission, or acquiescence" on the part of the company that could be legitimately construed by appellee or any one else as conferring power upon conductors to call in boys to the assistance of the regularly employed brakemen of the company.

The application of principles, fundamental and axiomatic, concerning the express, implied, or apparent authority of agents to bind their principals, to the case under consideration, very clearly fixes the status of the appellee to appellant, and determines the degree of care which the latter must exercise. This boy was not of such a tender age as to be incapable of exercising ordinary care and reasonable diligence for his own protection. He was ten yards away, and under no obligations or restraint to obey the commands of the conductor. He was too diligent to hear and accept the invitation of one who had no authority to invite him. His assistance was not needed, and, in thus going where he had no right to be, he became technically a trespasser. The appellee then owed him no positive duty of care, and only the negative duty not to injure wilfully, wantonly, or by gross negligence. The law governing this case, as thus announced, will be found supported by the following authorities: *Eaton* v. *Delaware, etc. R. Co.* 57 N. Y. 382; *Fleming* v. *Brooklyn R. Co.* 1 Abbot's N. C. 433; *Kentucky Central R. Co.* v. *Gastineau's Admr.* 83 Ky. 121; *Duff* v. *Allegheny R. Co.* 36 Am. Rep. 675; *New Orleans, etc. R. Co.* v. *Harrison*, 48 Miss. 112; cases cited in Pierce on Railroads, 370; *St. L., I. M. & S. R. Co.* v. *Bennett*, 53 Ark. 208; *Flower* v. *Pa. R. Co.* 69 Pa. St. 216; *Georgia Pac. R. Co.* v. *Propst*, 4 So. Rep. 711; *Snyder* v. *Railroad Co.* 60 Mo. 415; *St. Louis, I. M. & S. Ry. Co.* v. *Ledbetter*, 45 Ark. 246; *Osborne* v.

Railroad, 68 Me. 49; Thompson on Negligence, 1045; *Degg* v. *Midland R. Co.* 1 H. & N. 773.

The learned counsel for appellee in his exhaustive brief, which we have fully examined and considered, has based his able argument upon hypotheses not justified by the evidence, and the court below erred in adopting that view of the law upon the facts proven. It is unnecessary to pass upon the other points presented, as the case was tried upon the theory above discussed.

Reversed and remanded.

RAILWAY COMPANY *v.* HAMMOND.

Opinion delivered January 6, 1894.

58 324
70 443
58 324
73 208
77 294

1. *Master and servant—Rules.*
   The reasonableness of a rule adopted by a railroad company for protection of its employees is purely a question of law, and not of fact.

2. *Instruction—Negligence.*
   An instruction, in an action against a railroad company for the negligent killing of plaintiff's intestate, which charges that if the jury find that deceased "was killed by any of the alleged wrongful acts, negligence or default of" defendant company, they will find for the plaintiff, is erroneous if any one of the several acts of negligence alleged in the complaint, if proved, would not justify a recovery.

3. *Railway—Duty to give notice of trains.*
   A railroad company, which maintains a rock quarry alongside its track is not guilty of negligence in failing to give the foreman in charge of the quarry notice of the approach of a train running on irregular time.

4. *Negligence—Failure to sound whistle.*
   An engineer in charge of an extra freight train is not guilty of negligence in not sounding the whistle or giving other notice of his approach to a rock quarry where men were at work, if the rules and regulations of the railway company did not require him to do so.

5. *Instruction—Risk assumed by servant.*

An instruction, in an action against a railroad company for the death of an employee, which charges, in effect, that defendant would be liable if its foreman in charge of laborers at a quarry required deceased, one of such laborers, to be on the railroad track on a hand-car at a time when, being young and inexperienced, he was exposed to the danger of a collision with a train running on irregular time, is erroneous where that was part of the work deceased was employed to do, and understood the nature of the risk.

6. *Whether a foreman is a vice-principal.*

Whether the foreman in charge of laborers at the quarry was, under the circumstances of this case, acting as a vice-principal is a question of fact for the jury.

Appeal from Fulton Circuit Court.

JOHN H. WOODS, Special Judge.

Action by Hammond, as administrator of Geo. C. Golden, deceased, against the Kansas City, Fort Scott & Memphis Railway Company. The facts are stated by the court as follows:—

The appellee, administrator, as plaintiff, instituted this action in the Fulton circuit court to recover of appellant company, as defendant, damages in the sum of $5000, for the negligent killing of George C. Golden, his intestate, for the use and benefit of James O. Golden, father of and next of kin to deceased. Verdict for $1300. Motion for new trial made and overruled. Exceptions taken. Appeal taken, and bill of exceptions tendered and certified.

The complaint, omitting merely formal part and description of parties, is as follows, to-wit: "That on the day and year aforesaid, (31st May 1889,) the said George C. Golden, in the line of his employment, and under the direction of the agent, who was in charge of said rock quarry, was on board of a hand-car, proceeding from said rock quarry, over the defendant company's railroad, to the station of Ravenden, in Lawrence county, Arkansas, when said Golden was, by the negligence of

defendant and its servants, run over by a freight train running on said defendant company's railroad, and, without fault or negligence on his part, then and there killed. And plaintiff avers that the death of said Golden was caused by the negligence of defendant company, its servants and employees, in this: (1) The said freight train was a special or extra train, not running on the time of any regular train, and that the agents of defendant company, whose duty it was to regulate the running and time of all trains, were guilty of negligence in not informing the agent of the company in charge of said quarry when said train would pass the quarry. (2) The engineer in charge of said train neglected to sound the whistle or give the usual and necessary notice of the approach of said train to said rock quarry; and that if said notice had been given, the plaintiff's intestate would have heard it, and have been thereby enabled to get off the track and avoid the danger of said train. (3) The company's foreman in charge of said rock quarry was guilty of gross negligence in requiring or procuring said deceased to be on the railroad track at that time when he was exposed to the danger of trains running on irregular time; he, the said plaintiff, being young, and wholly inexperienced in all matters pertaining to the running of trains or railroads; and plaintiff alleges that said killing was without fault of said intestate, and could not have been prevented by him. That said decedent, George C. Golden, was unmarried, and left, him surviving, as his sole heir at law, his father, James O. Golden, a resident of Fulton county, Arkansas, who is about 57 years of age, and is, and was at the date of his said son's death, in feeble health. That said James O. Golden, with his wife, the mother of said deceased, Rebecca Golden, who is fifty-two years of age and an invalid, was wholly dependent upon said decedent for a support and maintainance, and for such

care and attention as the parent's situation in life needed and required, he residing with them, and that, by reason of the death of said decedent, said James O. Golden has been damaged in the sum of $5000. Wherefore, plaintiff prays judgment for said sum of $5000, and for other relief."

The defendant, answering, specifically denied each of the material allegations, and further denied that it was the duty of the defendant, its agents or servants, to notify the agent in charge of the quarry of the passage of the extra freight train; that the engineer in charge of the extra train neglected to sound the whistle or to give the usual signal of the approach of his train to the quarry, and that it was his duty to give such notice on his approach to said quarry, and that, if said notice had been given, plaintiff's intestate would have heard it, and therefore been enabled to get off the track, on the approach of the train, so as to avoid being killed thereby; that the foreman in charge of quarry was guilty of gross negligence, or any negligence, in requiring or having deceased to get on said hand-car, or that he was exposed to any danger by being thereon, from the running of any trains. And further defendant alleges that if deceased came to his death by the negligence of the engineer or any of the trainmen on the freight train, or of any of the men on the hand-car at the time of the accident, then, in either case, all being but fellow servants of deceased, the plaintiff could not recover; that deceased came to his death by and through his own contributory negligence in negligently jumping backwards and alighting in front of the hand-car then in motion.

The deceased, Geo. C. Golden, about three days before his death, was employed by James Sellers, the defendant company's foreman, as one of the hands to work under him at the company's rock quarry, on its railroad, about two and one half miles east of Ravenden,

a depot on its road, and the nearest telegraph station to the quarry. Sellers had authority, or exercised the authority, to employ and discharge hands at his pleasure. R. J. and A. K. Welsh, 24 and 22 years of age, respectively, were employed by him about the same time as was Golden, who was about 21 years old. Golden is not shown to have had any experience in the line of that employment, nor in railroading. Neither is it shown very satisfactorily that he was without experience. He was reared as a farmer's boy, but had worked two years at saw-milling, and is shown to have been a stout young man, and a good hand to work, and devoted a portion of his earnings to the support of his father, 57 years old, and his mother, 52 years old, both feeble and unable to support themselves, being without means and without any real estate. The plaintiff is shown to have been duly appointed and qualified as administrator of the estate of the deceased.

On the 31st day of May, 1889, at the request of their foreman, Sellers, the deceased and the Welsh brothers boarded a hand-car standing on the track at the quarry, with the foreman, and started for Ravenden, for the purpose of enabling the foreman to make report to higher officials of the railroad as to number of cars that were loaded at the quarry and ready to be taken out by a subsequent train.

The three young men were merely engaged in propelling the hand-car by working the lever; the Welsh brothers being on the rear end and looking forward, and Golden on the front end looking backward. At first the foreman stood on front end with Golden, and while there, warned him to keep a lookout as an extra train might come along at any time, as he said. Such was his testimony, although nothing was said of this by the Welsh brothers in their testimony.

When they had proceeded about one-half or three-fourths of a mile from the quarry, (at what speed it is not shown,) and after passing around a curve in the road, occasioned by a hill, and while on the farther end of the curve, they were seemingly thrown into a state of excitement, by the sounding of a whistle of the engine of an extra freight train of twenty-five or thirty cars, and running at the rate of twenty or twenty-five miles an hour, and approaching from the rear of the hand-car. The foreman immediately ordered the brakes to be put on, and this was at once done by the Welsh brothers, and then they both jumped off as did the foreman, one of the Welshes to the one side and the other and the foreman to the other, while Golden either jumped or fell off backwards in the middle of the track with his face upwards, and the hand-car then but slowly moving passed over him, and he, probably in his fright, catching hold of the front end, held on with such tenacity that the foreman, with all his efforts, could not release him from the hand-car. In this condition and situation, the train, with speed then reduced to fourteen or fifteen miles an hour, struck the hand-car, knocked it off the track, and passed over Golden its entire length, killing him instantly.

Between the time the whistle was sounded and the collision, the hand-car had moved about sixty-five feet, and the train had gone between 500 and 600 feet in addition, it being about that distance from the hand-car when the whistle sounded.

The testimony of foreman Sellers, testifying for defendant company, is to the effect that Golden, from his position, looking back towards the approaching train, should have seen it at a distance of 1000 feet, had he kept a proper lookout. The testimony of Anderson, the engineer on the freight train, testifying for defendant also, is to the effect that, being at his post in the cab of

the engine, as soon as he saw the hand-car he blew the whistle, and sounded "down brakes" time and again, and as rapidly as he could to be understood.

Other matters in evidence will be referred to in the opinion, should occasion demand such reference.

Wallace Pratt and *Olden & Orr* for appellant.

1. The allegations of the complaint do not constitute negligence. There was no rule of the company requiring the whistle to sound in passing a quarry, and it was not negligence in the company to fail to make such a rule or regulation. 52 N. W. Rep. 153; 7 S. E. Rep. 119; Patterson, Ry. Ac. Law, p. 160; 109 U. S. 477–485; 19 S. W. Rep. 38. There was no crossing at the quarry.

2. If defendant is liable at all, it must be for negligence committed at the time, and not for what it might have done, and the result of such probable acts upon the deceased. 11 N. W. Rep. 24; 2 Pac. Rep. 748; 2 N. E. Rep. 185.

3. Golden was fully instructed as to his duties by the foreman. When a youth of sufficient intelligence, or a person of inexperience, enters the service of another, and his duties are fully explained to him, he then assumes all risks incident to that service. 13 N. W. Rep. 819; 19 S. W. Rep. 600; 53 Ark. 117; 39 *id.* 17.

4. The acts of negligence stated in the complaint had no casual connection with the act of deceased in jumping from the hand-car, and were not the proximate cause of the injury. The injury was caused by his own negligence. 36 Ark. 41, 371; 40 *id.* 298; 41 *id.* 382; 44 *id.* 293; 95 U. S. 615.

5. A railroad company is not liable to an employee for injury occasioned by the negligence of a fellow-servant. The engineer of the train and the foreman of the gang were fellow-servants of the deceased. 42 Ark. 417; 39 *id.* 17; 35 *id.* 417; 46 *id.* 555; 51 *id.* 567. Wood on Master and Servant, 990.

6. Golden, after being notified, assumed all risks. 60 Md. 395; 51 *id.* 47; 41 *id.* 298; 14 R. I. 357; 38 Minn. 117; 21 A. & E. R. Cas. 535; 112 Mo. 223; 66 Mich. 277.

Sam'l H. Davidson and *Robert Neill* for appellee.

1. The foreman of the quarry gang was a vice-principal. He was placed at an isolated place between stations, with no telegraphic or other communication. He had full charge of the work—had authority to employ and discharge hands. It was his business to put out danger signals. If he had done so, the accident would not have happened. He represented the company, and his negligence was the company's negligence. It was negligence not to have a rule requiring trains to sound an alarm at the quarry, and it was negligence in the foreman not to have trains warned that a hand-car was in front on the road.

2. The complaint should be treated as amended to conform to the proof. 29 Ark. 323; 40 *id.* 352; 54 *id.* 289.

3. The law imposes on railroads the duty of establishing and *enforcing* regulations necessary to protect employees. 54 Ark. 289; 112 U. S. 377.

4. The quarry foreman was a vice-principal.

5. Contributory negligence is matter of defense, and must be proved. 48 Ark. 106; *Ib.* 461.

6. It is the duty of the master to make and publish such regulations or provisions for the safety of employees as will afford them reasonable protection against the dangers incident to the performance of their duties. 112 U. S. 377; McKinney on Fellow Servants, par. 24, (d), page 62 and note 1; 31 Kas. 586.

BUNN, C. J., (after stating the facts). One of the causes of complaint of the appellee is to the effect that the appellant company had failed and neglected to

1. Reasonableness of rule adopted by master.

establish reasonably sufficient rules and regulations to govern the conduct of its business in respect to the running of trains by the rock quarry, so as to afford reasonable protection to the men there employed, and while on the hand-car, as deceased was when killed.

This is a charge of direct negligence on the part of the company, and of itself involves no question of agency or relation or degree of service, for it is not to be thought of that rules and regulations, as here understood, are other than immediate directions of the master.

It is conceded everywhere that, in order to insure, as far as practicable, order and system in a dangerous and complicated business like that of railroading, it is the duty of the company to establish rules and regulations reasonably conducive to that end, not alone because its business may prosper the more, in that its conduct is thus made the more orderly and systematic, as it must necessarily do, but because another, and none the less important, effect of such reasonable rules and regulations must necessarily be to add to the safety and security of the company's employees engaged in the labor which the business demands.

Further than this, as was said by this court in the case of *Railway Company* v. *Triplett*, 54 Ark. 299–300: "This seems to be the general rule of law, when the circumstances are such that a reasonably prudent person might rely upon rules and regulations to afford protection. But if the master sees proper to rely upon such methods of protection to his servants, and the occasion demands it, he should also adopt such measures as may be reasonably necessary to secure the observance of such rules." In many jurisdictions the duty of seeing that the rules and regulations are enforced is expressed in stronger terms, but this court has never gone further than is indicated in the above extract.

It will be seen that the objection to the insufficiency of the rules of the company was confined to an allegation that, if the rules had been such as to require of the engineer of the freight train to sound his whistle on his approach to the quarry, it would have been sufficient, in this, that the men on the hand-car, a half mile or three-fourths of a mile away, could have or would have heard it, and, being at such a distance from the approaching train, could easily have got off the track in time to avoid all danger of collision, and that thus the life of the deceased might or would have been saved.

On the other hand, it is in evidence that the rock quarry not being a regular stopping place or station of any kind, in the meaning of that term, the engineer of a passing train was not required by the rules to sound the whistle on his approach to it, unless he was signaled from the men there at work; and then he was required to sound the whistle, not to notify them of his approach, but rather as an answer to, and recognition of, their signals.

The full details of the purposes for which the men at the quarry were required or permitted to put out signals to passing trains are not set forth in evidence, as would have been more satisfactory; but this much is shown, namely, that these men were to put out the signals when there were obstructions on the track there, and these signals were a green flag, advising the engineer to slow up and get his train under his control, and a red flag, to stop. It is further stated that the signals were to be regulated by the person in charge of the quarry. We gather, also, that there was a rule of the company (whether this same one or another, we cannot determine), which required any person placing an obstruction on the track to give the necessary signals to passing trains, and also that it was the duty of one finding an obstruction on the track to give these signals

at once. In all cases, it would seem from the evidence, the signals were to be placed at stated distances from the point of obstruction, either way, and the distances named, we infer, were thought to be sufficient to enable the engineers to stop, or get their trains under control, before reaching the point of danger.

It will thus appear that the issue made amounts to nothing more than a controversy as to the relative value and efficiency of the rule suggested by appellee, and the one in vogue by the company; that is to say whether the engineer of the approaching train should be required by the rules to sound the whistle as a warning to those at the quarry of his coming, or that the men at the quarry should give signals to him of any cause to slow up or stop, and he should sound the whistle in response to their signals, not as a notice of his coming, but rather that he has observed and will heed the warning made by the signals at the quarry. In the one case the whistle would always be sounded; in the other, it would be sounded only as there was any special local reason for stopping or getting the train under control.

It is said in *Railway* v. *Adcock*, 52 Ark. 406, (which was a case not unlike this one in respect to the rules and regulations of the railway company, although unlike this one in the particular object of these rules, as therein stated) that, "the facts being uncontroverted, it was the province of the court to declare the regulations reasonable. To submit the question to the jury for determination, under the circumstances, was simply to leave the matter to their discretion, which was error." That the mere reasonableness of a rule or regulation is purely a question of law, and not of fact, as announced in that case, is supported by the following: *Vedder* v. *Fellows*, 20 N. Y. 126; *Ill. Central Ry. Co.* v. *Whittemore*, 43 Ill. 420; and inferentially by *Hobbs* v. *Tex. & Pac. Ry. Co.* 49 Ark. 357.

In *Ill. Central Ry. Co.* v. *Cole*, 43 Ill. *supra*, it is said, in explanation of the doctrine: "It was proper to admit testimony, as was done, but, either with or without this testimony, it was for the court to say whether the regulation was reasonable, and, therefore, obligatory upon the passengers. The necessity of holding this to be a question of law, and, therefore, within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them today, and another tomorrow. In one trial a railway would be held liable, and in another, presenting the same question, not liable. Neither the companies nor passengers would know their rights or their obligations."

The rule in vogue, as shown in evidence in this case, does not in terms extend to the protection of employees passing from point to point on hand-cars while engaged in the legitimate prosecution of the company's work. Perhaps the very meagre statements of the witnesses testifying on this subject were confined to cases of obstructions at the quarry, because the minds of the witnesses were mostly directed to that point, in connection with the inquiry as to what was not the duty of the engineer of an approaching train, as to the men then at work; and perhaps a further examination of the witnesses on the subject might have discovered some additional rule. Be that as it may, the little of the rules and regulations of defendant company that was brought out in evidence does not seem to us to have any very direct bearing upon the subject of protection to employees running on hand-cars. It may be that there are none such, and it may be that special precautions in each instance and on each occasion is thought to be best. We

cannot pass any judgment on this phase of the question, since the evidence gives us no sufficient data.

On the other hand, the rule suggested by appellee as a proper one could under no circumstances possess any virtue, except in cases of persons near enough to the quarry, and the sound of the whistle there, to hear it, and yet far enough away to have more time to get off the track than they would have after the train comes in view and sounds the whistle, as is the rule in vogue, or as was done in the present case.

It is impossible to say how far or near, then, persons must be to hear the whistle in any case, and still more so, when they are on a running hand-car, in a rugged and hilly country, where the transmission of sound is obstructed and the sound itself is lost in the more immediate noise of the running car. Sounding the whistle at the quarry, or at any other point, would of course afford no protection to persons out of hearing, and yet so far from their destination as that they will be overtaken. The positive evil of the rule suggested is made apparent, for, having taken the place of a better rule, perhaps, it is nevertheless, of itself, in that case useless. The suggested rule, therefore, would only be applicable to special instances, and its application, if attempted to be extended beyond these special instances, might interfere with the application of more salutary general rules. We are unable to say that the refusal of the company to have the regulation suggested by the appellee was unreasonable. At all events, it was error to submit the question to the jury.

Leaving the subject, then, of the making and publishing of suitable rules, we come now to consider acts of negligence on the part of the company's employees, which were the proximate or contributory cause of the injury complained of.

It is too well settled to admit of discussion that a servant injured by the negligence of a mere fellow servant has no cause of action against the master. A co-servant may sometimes be guilty of negligence resulting in injury to another servant, while he is in the performance of some duty belonging to the master, and thus make the master liable; but the rule is unbending that a master is not liable for an injury to one of his servants which has been caused by the negligence of a fellow servant, while the negligent one was acting in the sphere of his employment as such.

This being the rule, universal in its application, it is useless to discuss, in this or any other case, the negligent acts of a mere fellow servant to the deceased. We are principally, if not altogether, concerned in the inquiry as to who, connected in any manner with the accident resulting in the death of Golden, was a vice-principal, if such there was.

The rule, if, indeed, it can be called a rule, by which the relation an employee sustains to the master and to other employees may be determined in any case, is fully discussed by this court in the late case of *Bloyd* v. *Railway Co.*, *ante* p. 66, and the authorities therein cited, and we will not attempt a further discussion of the principle, except in so far as it may bear upon its proper application in this case.

It goes without saying that railroading, in almost all of its departments and branches, is such a dangerous business as that, in order for the company to do its duty to its employees, in exercising ordinary care looking to their safety, security and protection, much of the work, by reason of its complications and number of men engaged, requires its control, direction and supervision. The master may perform his duty of supervision in person, or he may delegate it to another, in which latter case, however, he is not relieved of any of its obliga-

tions in case of a failure of performance on the part of his vice-principal, or middleman, any more than if the failure was his own, while acting personally in the matter.

The question as to who is a vice-principal or fellow servant, in any given case, is mostly, if not altogether, a matter of fact in the present state of the law; each case standing on its own peculiar state of facts.

The doctrine of risks assumed by one entering into the employment of another, and the non-liability of the master for injuries resulting to an employee from the carelessness and negligence of a fellow servant, is well expressed in the following statement, and we think it is sustained by all the authorities: "He who engages in the employment of another, for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services. The perils arising from the carelessness and negligence of those who are in the same employment are no exceptions to the rule; and when a master uses due diligence in the selection of competent and trustworthy servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service." The foregoing statement embodies the principle enunciated in *Little Rock, etc. Ry. Co.* v. *Duffey*, 35 Ark. 602.

We deem it unnecessary, in this connection, to discuss the law applicable to cases of contributory negligence, as that is so well settled as to require no other consideration than that we may give to it in discussing the instructions in this case.

2. Instruction as to negligence disapproved.

The first instruction given by the court at the instance of plaintiff is in these words: "You are

instructed that the statutes of Arkansas give a right of action whenever the death of the person shall be caused by the wrongful act, neglect or default of any person, company or corporation, in the name of the personal representative of such deceased person, for the benefit of the next of kin of such decedent; and if you find, from the evidence, that the decedent, George C. Golden, was killed by any of the alleged wrongful acts, negligence or default of defendant company, then you will find for the plaintiff, and assess such damages as you shall deem warranted from the whole evidence and instructions of the court, unless you further find that the deceased by his own concurring negligence contributed to his death."

3. Duty of railway as to giving notice of trains.

There are three separate and distinct charges of negligence made specifically in the complaint, and only three. The first is that the defendant company was negligent in not informing the agent of the company in charge of the quarry when the extra freight train would pass. This allegation is, of course, based upon the objection that there was a failure to have a regulation to that effect. That question has been disposed of, against the contention of the appellee, in our discussion of the reasonableness of the rules, and conclusion thereon.

4. As to failure of engineer to give signals.

The second charge of negligence in the complaint is that the engineer in charge of the extra freight train was guilty of negligence in not sounding the whistle or giving the usual notice of his approach to the quarry, thus enabling the deceased to have got off the track in time to save himself. The failing to sound the whistle without a signal from the quarry-men was no negligence on the part of the engineer of the approaching train, as the rules and regulations did not require him to do so. Nor was he negligent in failing to give any other notice of his approach, for the same reason. Besides, it is not shown, or attempted to be shown, or contended, that the

engineer was anything else than a fellow-servant to the deceased.

5. As to risks assumed by servant.

The third charge of negligence in the complaint is that James Sellers, the foreman in charge of the rock quarry, required or procured the deceased, one of his laborers at the quarry, to be on the railroad track (on the hand-car) at the time when, being young and inexperienced, he was exposed to the danger of collision with trains running on irregular time. In the instruction immediately following this one, it is stated by the court, at the instance of plaintiff, that the placing of the deceased on the hand-car by the foreman was in the line of the foreman's business and of the employment of the deceased, or words to that effect. If that be true, there was no negligence in the foreman's placing the deceased on the hand-car for the purpose of assisting in propelling the same to Ravenden, notwithstanding his youth and inexperience; and if, on the other hand, it was not strictly in the line of his employment, yet, if he continued in this extra hazardous service after being informed of its peculiar hazard and danger, he could not complain on that account merely. After all, it does not appear that there was any extra hazard in this particular service that all men of ordinary intelligence do not fully understand, unless it be that extra trains are run on no regular schedule, and are not as capable of being regulated by rules as are regular trains. The control of the movements of this hand-car is not shown to have been any part of the work of the deceased. The question of his youth and inexperience was not in this case exactly like that question as it arises in most cases. Here his experience, if he had experience, may not have aided him to any great extent, while his inexperience had little to do with increasing the dangers of the situation. The experience of the foreman was the experience that mostly, if not alto-

gether, was expected to affect the success of the run on the hand-car. The inexperience of the deceased might have rendered him less self-possessed in the moment of danger, and the less skilled in escaping and extricating himself from danger when it was upon him, and the hazard was therefore greater than that of work he was acquainted with; but his inexperience probably had nothing to do with running the hand-car into danger, for he did not control its movements.

The first instruction was erroneous, and not only erroneous, but so much so as to be incurable by any other, since, under any state of things, we could never know, but that any verdict the jury might render was affected by its mistaken theory.

6. Whether a foreman is a vice-principal.

The second instruction given by the court at the instance of plaintiff is as follows, to-wit: "The jury are instructed that if they believe, from the evidence, that the plaintiff's intestate, at and prior to the date when it is alleged by the complaint that he was killed, was in the employ of defendant company; that he was hired by an agent of the company in charge of the rock-quarry in Lawrence county, as foreman thereof, to work in said rock-quarry; that said foreman was by the defendant invested with authority to employ, control and discharge men at said quarry, such control of the men and the management of their work being referred to his judgment and discretion, and not governed by detailed regulations published or made known by defendant company to both such agent and the deceased; and that said agent, within the scope of such authority, and in the performance of the duties the deceased had been so employed to perform, through negligence and want of due caution, placed said deceased in a position where he was exposed to the danger of being run over by passing trains, and he was, in consequence of such negligence of such agent or foreman, killed by a train of defendant

company, and without being himself negligent in the use of reasonable means to avoid the danger, then they will find for the plaintiff."

The hypothetical part of this instruction is based upon evidence going to show that the foreman of the quarry was a vice-principal, representing the master, in charge of the hands and work at the quarry, as well as in the running of the hand-car to Ravenden, stated by the court, in effect, to be a part of the quarry work. That was a legitimate question to submit to the jury. And if the jury should find facts sufficient to constitute the foreman a vice-principal, representing the company in his control and supervision of the deceased, then it was legitimate to inquire into the negligence of the foreman, which contributed to the death of deceased, whether that negligence consisted in omissions and lack of precaution, in violation of and neglect to avail himself of the rules and regulations, or in affirmative acts. But the particular act named as the act of negligence in the instruction, namely, the act of putting deceased on the hand-car at the time and under the circumstances, was no act of negligence on the part of the foreman, for that was, in the instruction, conceded to be a part of the work the deceased was employed to do. The instruction was therefore erroneous.

The fourth instruction asked by plaintiff and given by the court is not so materially wrong but that it might have been corrected by the use of apt expression upon which to predicate the idea that in an emergency one's want of presence of mind and prudence is sometimes excusable.

The fifth of these instructions is not included in the motion for new trial, and the sixth is erroneous because of its indefiniteness. It is misleading. The objection to the third does not appear to have been insisted on. We deem it unnecessary to consider the instruction

asked by defendant and refused by the court, since the judgment of the court below must be reversed for the error pointed out.

Reversed and remanded, with leave to plaintiff to amend his complaint if he so desire.

WOOD, J., dissenting. The complaint in this case alleges "that Geo. C. Golden, in the line of his employment, and under the direction of the agent who was in charge of said rock quarry, was on board of a hand-car proceeding from said rock quarry over the defendant company's railroad to Ravenden, a station in Lawrence county, Ark., when said Golden was, *by the negligence of defendants and its servants, run over by a freight train running on said defendant company's railroad, and, without fault or negligence on his part, then and there killed.*" Thus it would stand, omitting the formal parts and the three separate assignments setting forth the specific acts of negligence. The company, without in any manner objecting to the complaint, answers, and "*denies that said deceased Geo. C. Golden was run over and killed by or through the negligent acts of defendant or its servants;*" then denying specifically the several assignments of negligence as alleged in the complaint.

Witnesses on behalf of appellant testified among other things as follows: Locomotive engineer:—"That the practice was to sound the whistle when the flag was out for danger; that they always answered with a whistle when the flag was out for danger, and slowed down; that he saw no such signal that day; that, had there been signals out at the quarry, would have slowed up." And on re-direct examination: "If there was no danger at the quarry, signals would not be put out."

And the Fireman, on direct examination: "If there had been a signal flag placed out at the quarry, we would have whistled when approaching the quarry; if a flag

had been out, it would have been on the right hand side of the track, to attract our attention, a green flag to slow up and a red flag to stop; if we had seen one, we would have whistled." On cross-examination: "I saw no signal when we came by the quarry. Signals are not allowed, unless obstructions are on the track. Signals should be placed out *if anything is on the track.* It would be the duty of the man obstructing the track, or finding it obstructed, to put out signals. *It would be the duty of the man who had charge of the quarry to regulate the signals.* The signal would be placed fifteen telegraph poles from the point of danger. The telegraph poles are about 175 feet apart. Caution signals are only given to slow up the train." And on re-direct examination: "It simply slowed down when signal was given. To slow down is to slack the speed so that the train is under the control of the engineer, in case there was rock on the track. It was not required to whistle at the quarry."

The evident purpose of this testimony was to exculpate appellant from the charge of negligently killing young Golden, an employee at the rock quarry, who, under the direction of the foreman of said quarry hands, was at the time on a hand-car a half mile away from the quarry, but proceeding to Ravenden on business pertaining to the quarry. This was the subject-matter of the inquiry. It was the province of appellant to introduce this proof, and it did so without objection on part of appellee. But it was not its province to limit the application of the rules it discloses to the quarry spot, and say, *Thus far they applied*, but not *to a half-mile, or any other distance, beyond;* nor is it its province to say that a hand-car was not contemplated as *an obstruction*, within the purview of these rules. These were questions for the jury, under the instructions of the court. The apppellant should be held to

respond to every phase of the issue which this proof in connection with all the other proof in the case raises, namely:

1. If the jury concluded that such rules as were thus shown applied to *hand-cars*, as obstructions, and were intended to protect *all the quarry men*, including those working immediately at the quarry, as well as those passing to and from Ravenden, and on the track in the vicinity of the quarry, and engaged in work pertaining to the quarry, then they were justified in saying that the foreman was negligent in not seeing that proper signals were placed on this occasion, warning passing trains of the danger ahead.

2. Should the jury conclude that these rules were not intended to apply to hand-cars, and the men required to be on them, going to and from Ravenden to make the necessary reports of the work at the quarry, then it would appear that the company had no rules for their protection, and the question would recur as to the negligence of the company in failing to make some reasonable rules for their safety.

To my mind there is no avoiding the responsibility for the negligent death of Golden, it matters not which "*horn of the dilemma*" the appellant takes. If the rules as proven applied to *hand-cars*, and were intended to afford protection to the men who were required to propel them, then the foreman, whose duty it was to "look after the signals," should have seen that caution or danger signals were properly placed; and in failing to take this precaution he was guilty of negligence, for which the company was liable. In coming to this conclusion, I assume, of course, that there was proof to show that he was the company's vice-principal, and I think there was ample proof to justify the jury in so finding. He was in charge of thirteen or fourteen men, having entire control over them, hiring and discharging

at his pleasure; they were engaged in a dangerous work, getting out riprap, loading same, switching cars, etc. for that purpose, and constantly required to be on and about the company's track where five or six trains were passing daily. That the duties incumbent upon him to put out signals of danger, etc., providing for the safety of the men at work, were master's duties, there can be no question. If the rules, as proven, did not apply for the protection of the men on the hand-car, then the awful sequence of that ride to Ravenden on that day demonstrated the necessity for some such reasonable regulations.

A quarry two and a half miles from telegraphic communication, thirteen or fourteen men at work, any of them subject to be called at any time to propel a hand-car to Ravenden, on a track containing curves and where trains were liable to come along at any time at the rate of twenty-five or thirty miles per hour, demanded, it seems to me, some rules for their protection.

The precautionary steps taken by the foreman on this occasion were entirely insufficient to meet the necessities of the case; and if he be left without any definite rules, to improvise such measures as each exigency may call for, the company should be held liable where he negligently fails to do his duty. It would seem, from the evidence, that Golden had a right to suppose, when he consented to go upon this perilous journey, that trains would whistle when they passed the quarry, and he would thus be notified of their approach; for one witness testified that the foreman said that was a rule of the company; and another, that trains generally whistled when they passed the quarry.

The foreman put this young man, of three days experience, on the front of the car, standing with his back to the direction in which it was going, and told him "*to look out*," that the train was liable to come along at

any time, and put him where he could see it; yet it appears from the evidence that a train came dashing around a curve at the rate of twenty-five or thirty miles an hour, and was within 500 feet of them before any of them saw it. And so great was the consternation, even of the foreman, with all his experience, at the sudden and unexpected appearance of the fast moving freight, he exclaimed, "My God, boys! There's the train. Throw on the brakes!" One of the witnesses testified that appellee either fell off on his back, or jumped off backwards and fell on his back on the track. The jury were justified in concluding that this sudden stopping of the hand-car threw the young man backwards on the track, which was a reasonable and natural explanation of the inextricable attitude in which he was placed. So that the simple caution to "look out" was not sufficient; and the failure to take some other step, which he should have done under the rules provided, according to the proof; or else the failure of the company to make reasonable provision for the safety of these men, was negligence which contributed directly to the death of appellee. The verdict of the jury in my judgment was right, and the complaint should be treated as amended to conform to the proof. In the case of *Triplett* v. *Railway Co.* 54 Ark. 289, the complaint was as follows: "That the defendant so carelessly and negligently managed and operated its train and cars that they passed over the body of the deceased, and thereby without the fault of the deceased he was killed." A comparison of this with the complaint as copied above in this case will show that they are very similar in phraseology, and in legal purport the same.

In the Triplett case, Mr. Justice Fletcher, speaking for the court on a motion for rehearing, said: "At the trial, evidence was introduced without objection to show, on behalf of the plaintiff, that the railway company had

failed to afford a proper and safe place for the deceased to work, and had not exercised proper care in affording him protection. * * The company introduced evidence upon the same issue. In fact, the burden of the evidence in the case was upon this issue. * * * The facts thus developed were undisputed, and the court gave instructions on both sides as to the law bearing upon the same." And, citing the case of *St. L., I. M. & S. R. Co.* v. *Harper*, 44 Ark. 527, concluded the opinion in the language of the court in that case: "After verdict for the plaintiff the complaint may be considered as amended to conform to this proof." I think the facts of this record call for the application of the same rule of law. *Hanks* v. *Harris*, 29 Ark. 323; *Healy* v. *Conner*, 40 Ark. 352.

It is obvious that the court has considered the instructions of the trial judge in the light of the complaint before verdict, and finding such of them as it has passed upon erroneous remands the cause with leave to amend the complaint.

I think, viewing the whole charge with reference to the complaint as already amended as above suggested, which the verdict upon the issues raised has already accomplished, there is no reversible error.

SPEARMAN *v.* TEXARKANA.

58 348
90 305

Opinion delivered January 13, 1894.

Public policy—Contract of board of health with member.

Where a physician who constitutes a member of the board of health of a city is employed by the board, without agreement as to compensation, to render necessary professional services on behalf of the city, outside of his duties as a member of the board, the city will be liable for the value of such services on a *quantum meruit.*

Appeal from Miller Circuit Court.

RUFUS D. HEARN, Judge.

Scott & Jones for appellant.

Appellant was not an *officer* of the city. He was a physician selected by the board of health to perform certain services, and was entitled to recover for his services. 26 Pac. Rep. (Kas.) 674; 45 Ill. 397; 32 Wis. 124; 2 Brock. 103; 29 Oh. St. 349. See also 50 Ark. 81; 30 Vt. 285; 1 Dill. Mun. Corp. (4th ed.) sec. 230, note 3.

W. H. Arnold and *John N. Cook* for appellee.

1. No fee was provided by law, and none can be recovered. 25 Ark. 235; 32 *id.* 45.

2. Being a member of the board of health, it was against public policy for appellant to make a contract with the board. 25 Wis. 551; 1 Dill. Mun. Corp. sec. 444, 458; Greenhood on Public Policy, 297, 305; 11 Mich. 222; 60 Ga. 221; 72 Ind. 42; 79 *id.* 42; 75 *id.* 156; 22 N. Y. 332; 37 *id.* 317; 10 Am. Rep. 5.

3. The law expressly provides that the board shall receive no pay. Mansf. Dig. sec. 486.

MANSFIELD, J. By an ordinance duly passed, the city of Texarkana established a board of health, to be composed of the mayor, the city attorney, three aldermen and one physician of the city. The board was invested with all the usual and necessary powers to effect the purpose of its organization, which was declared to be the protection of the city against "contagious, malignant and infectious diseases;" and the ordinance provides that all expenses incurred by the board shall be certified to the city council by the president and secretary for allowance and payment, as other claims against the city.

The appellant, a practicing physician of the city, and not one of its officers, was elected as the medical

member of the board, and, while serving as such, was directed by the board to make personal examination of a case of diphtheria said to exist in the city, and the alleged existence of which had caused the closing of the public schools. He examined the case in person, and made a report upon it to the board. There was no express agreement for this service, and before rendering it the appellant did not inform the board that he would expect a compensation. Several months after the service was rendered, he brought this action in a justice's court to recover for it the sum of fifty dollars. The case was taken by appeal to the circuit court, where a trial by jury resulted in a judgment for the city.

The only ground on which a recovery by the plaintiff was resisted is indicated by an instruction given to the jury at the defendant's request, and which was that if they found "that the plaintiff was a member of the board of health * * * when he was requested by said board to perform the services charged in the account sued on, and that he was a member of said board when he performed said services," their finding should be aganst him. This instruction was objected to by the plaintiff, who requested the court to charge that the verdict should be for the plaintiff if the jury found that the board had authority to employ a physician to render for the city a service similar to that charged for, and that the plaintiff performed the services sued for, under the board's employment and by its direction. The latter request was refused; and these rulings of the court upon the two instructions mentioned are the grounds relied upon to reverse the judgment.

It is of no importance to decide whether the membership of the plaintiff on the board of health made him an officer of the city, or whether he is precluded from recovering for his services on the board by the fact that the ordinance establishing it makes no provision for com-

pensating its members. The service on which his claim is based was not performed as a member of the board, and was not a duty incumbent upon the board, or either of its members. It was independent of, and not incidental to, any such duty, and if the city council itself had employed him to perform the service, the city would clearly have been liable on the contract. Mechem's Public Officers, sec. 863; *Evans* v. *Trenton*, 24 N. J. L. 764; *McBride* v. *Grand Rapids*, 7 Mich. 236; S. C. 49 *id.* 239. But, as a member of the board, he was the agent of the city to act for it, in conjunction with the other members, in taking such measures, by contract or otherwise, as it was competent and necessary to adopt in accomplishing the objects of the board; and while he stood in that relation to the city, the law, as a means of securing fidelity to his trust, and to guard against any temptation to serve his own interest to the prejudice of his principal's, disabled him from making any binding contract with the board. Mechem's Agency, secs. 713, 455, n. 3. Such a contract by an agent in his own behalf, with reference to the subject-matter of the agency, is not, however, absolutely void, but only voidable. Story, Agency, sec. 211, note 1. As stated by the Supreme Court of Wisconsin, there is "a distinction between contracts which are held to be against public policy, merely on account of the personal relations of the contractor to the other parties in interest, and those which are void because the thing contracted for is itself against public policy. In the latter class the parties acquire no rights which can be enforced either in the courts of law or equity. But in the former, the thing contracted for being in itself lawful and beneficial, it would seem unjust to allow the party who may be entitled to avoid it to accept and retain the benefit without any compensation at all." *Pickett* v. *School District*, 25 Wis. 558. A similar view is expressed in *Gardner* v.

Butler, 30 N. J. Eq. Rep. 702, where it was held that while the directors of a corporation could not make an agreement, enforceable against the company, to pay themselves a stipulated sum for their services, they could recover on the *quantum meruit* for such services as they had rendered, and the benefit of which the company had received. The court said that, although the agreement was "of no binding force as a contract," the directors had "a right to serve the company in the capacity of officers, agents or employees, and for such services the law will enable them to recover a just and reasonable compensation." To deny them this, it was said, would be "manifestly inequitable," and "would pervert a rule of law which is intended to guard against fraud and injustice." But their claim was not allowed to have any basis upon the contract they had undertaken to make with themselves, and the court declared that "it must rest exclusively upon its fairness and justice." The doctrine of these cases appears to be that, the contract of the agent being, as the Wisconsin court said, "rather voidable in equity than absolutely void at law," the principal, in avoiding it, must himself do what equity requires. *Pickett* v. *School District*, 25 Wis. 558. And it was probably on the same ground that the Supreme Court of Michigan affirmed a judgment for the actual value of professional services rendered by a lawyer to a city of which he was mayor, and under an employment by the common council of which he was a member. *Mayor of Niles* v. *Muzzy*, 33 Mich. 61; see also *Mayor of Macon* v. *Huff*, 60 Ga. 221.

The principle enforced by the authorities cited applies, we think, to the case which the testimony of the appellant here tends to make. He testified that the service charged for was strictly professional; and, if it was so, and was necessary, then, as it was one the board had authority to employ any other physician to perform, the

plaintiff is entitled to recover for it what he reasonably deserves to have. But the right to such recovery cannot result from any contract to be implied from the request or direction of the board to render the service; for, as the plaintiff could have made no express agreement with the board that would have been binding on the city, no binding agreement can arise by implication from anything that passed between him and the other members. His claim must be grounded solely on a contract created by the law in consideration of services shown to have benefited the city, and for which it ought, therefore, in justice, to pay. Bishop, Cont. sec. 188.

While it cannot be said, on the views indicated, that the instruction refused was a full and accurate statement of the law, there was positive error in giving the instruction requested by the defendant; and for that error the judgment will be reversed, and the cause remanded for a new trial.

VAUGHAN v. STATE.

Opinion delivered January 13, 1894.

1. *Examination of juror—Discretion of court.*
   The court, in its discretion, may re-examine a juror touching his qualifications, after he has been accepted as a member of the jury.

2. *Rejection of juror—No prejudice.*
   Erroneous rejection of a talesman is not sufficient cause for granting a new trial.

3. *Instruction—Defendant as witness.*
   The court charged the jury as follows: "The defendant has the right to testify in his own behalf; but his credibility, and the weight to be given to his testimony, are matters exclusively for the jury. In weighing the testimony of the defendant in this case, you have a right to take into consideration his manner of testifying, the reasonableness or unreasonableness

58 353
59 426

58 353
60 88
60 342
60 407
60 556

58 353
61 102
61 174
62 208
62 537
62 554

58 353
63 175
63 311
63 535

58 353
f69 561

58 353
e70 306
e70 307

58 353
73 410
74 258
74 288
74 358
76 280
77 336

58 353
f78 38
f78 293

58 353
84 180

58 353
90 517

of his account of transactions, and his interest in the result of your verdict, as affecting his credibility. You are not required to receive blindly the testimony of the accused as true; but you are to consider whether it is true, and made in good faith, or only for the purpose of avoiding conviction." *Held*, that the charge is objectionable, but not ground for reversal.

4. *Accomplice—Corroboration.*

The corroboration of an accomplice, required by the statute (Mansf. Dig. sec. 2259), must relate to material facts which go to the identity of defendant in connection with the crime; hence, it is proper to refuse to charge that if the testimony of a witness shows him to be an accomplice, the jury should not convict, unless his testimony is corroborated by testimony they believe to be true, beyond a reasonable doubt.

5. *Power of court to limit argument.*

While it is the better practice to advise counsel, before the argument begins, of the limit of time for argument, it is not error, where defendant's attorneys have already occupied eight hours in argument, to notify the attorney who closes for the defense, after he has spoken for three hours, that he will be limited to twenty minutes longer; it not appearing that defendant was prejudiced thereby.

6. *Remarks of prosecuting attorney—When not prejudicial.*

A remark by the prosecuting attorney, in his closing argument on a trial for murder, that "no innocent man was ever yet hung; and if the jury wrongfully convicted the defendant, he had a right to appeal to the Supreme Court, who would rectify the wrong," though improper and unwarranted, was not prejudicial, since the first part was a mere matter of opinion, and the latter part must have been known to every intelligent juror.

7. *Evidence—Former testimony of witness out of jurisdiction.*

The testimony of a witness given on a former trial may, in the discretion of the court, be admitted in evidence, although no subpœna has been issued for him, if two witnesses testify that they have been informed by his relatives that the witness has removed to another State.

8. *Evidence—Exception must be specific.*

An objection to the admission of the testimony of a witness on a former trial, on the ground that a sufficient foundation had not been laid for its admission, will not be considered on appeal where no specific objection on that ground was made in the court below.

9. *Proving former testimony of absent witness.*

A witness is competent to testify as to the testimony given by another witness on a former trial, although unable to give his exact words, if he is able to give the substance thereof.

Appeal from Washington Circuit Court.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

W. A. Gage was assassinated at his home in Madison county, September 26, 1891. He was fired upon by some one in ambush, as he was returning to his house from his horse-lot, and instantly killed. Tracks leading to and from the place of the killing were discovered. Those leading away were made by a person in sock feet. Those leading up to where the assassin stood were made with shoes having plates or irons upon the heels. The shoes of one Thomas Hamilton were compared with the tracks, and found to fit exactly; also, beggar's lice and red dirt were found upon his socks, corresponding to dirt of the same description in the field of the deceased—the way the party doing the killing had gone.

Hamilton was indicted as principal; the appellant, Vaughan, as accessory. Vaughan was suspected and arrested on account of the bitter animosity which he was known to have had against Gage growing out of a lawsuit which had been pending for years between them. Vaughan had sued Gage for something between twenty-five hundred and three thousand dollars, and had been heard, at different times and places, and by various witnesses, to express great hatred towards Gage. Had said "that Gage had treated him very bad, or very mean; that it was very hard to bear; that there were two ways a man could get him to kill him,—one, in self defense; the other, by treating him mean." Also, "that if Gage beat him in his suit, he did not know what he would do; that he thought he would leave the State; had never been fooled so badly by any man in his life."

And, again, "that he had decided in his mind that, if a man beat him out of his just rights, it would not do him any good; that there was old Andrew Gage, who owed him about twenty-five hundred dollars, and, if he beat him out of it, it should never do him any good." And, again, "that he sometimes thought that if it were not for his family, or Gage's family, before Gage should testify against him, he would take his gun and kill him." Other witnesses testified that appellant, after being arrested, and on his way to jail, when near deceased's house, fell off his mule, began crying, and said that he had just realized that he was charged with crime; that he regretted the thought of having to be taken among his old friends and neighbors, charged with killing as good a man as Mr. Gage." After Vaughan and Hamilton were lodged in jail, witnesses and letters were introduced to show that Vaughan endeavored to dissuade Hamilton from turning State's evidence, all of which will be set out fully in the opinion,

Hamilton, by an agreement with the States' attorney to the effect that he might plead to murder in the second degree, was permitted to testify. Omitting the details of the horrible crime, as given by him, his testimony was in substance: that he was in most distressed circumstances, his family sick, and he in want; that defendant Vaughan, at different times, when they were hunting together and on other occasions, talked to him about his trouble with Gage; said that Gage was going to swear him out of his money, if he was not removed, and that he wanted him, Hamilton, to do it, and would give him half Gage owed him, if he would kill Gage; said that Vaughan promised to let him have land to cultivate, furnish him a team, and give him all he could make; that he had nothing against Gage, but finally yielded to the requests of Vaughan, moved through his promises to pay him, and committed the deed, in the

manner above described, with a double-barrel shot-gun furnished him by Vaughan. Said that Vaughan planned the way for him to do the killing, and said he, Vaughan, would be suspected, but that he could prove that he was not there, and that he, Hamilton, would not be suspected.

The defendant, on his own behalf, denied all the statements of Hamilton, introduced witnesses to show his good character, and that Hamilton had made statements at different times "that he, Vaughan, had nothing to do with the killing." The above, together with the facts set out in the opinion, constitute the substance of the evidence upon which the State asked conviction.

The jury returned a verdict of guilty, and the case is here by appeal from judgment of death pronounced upon the verdict.

J. D. Walker for appellant.

1. The court erred in excusing the jurors Hailey and Dorman. Defendant's challenges were exhausted, and he should have had an opportunity of accepting these jurors.

2. No proper foundation was laid to admit the testimony of Thomas to prove what Hays had sworn to, and it was error to admit it. 33 Ark. 540.

3. It was not shown that Hays' presence could not be obtained, nor even that a subpœna was issued for him. Mansf. Dig. sec. 2149. Thomas did not testify that he could give the *substance* of the language of Hays on the former trial. It was not shown that Hays was *sworn* on the trial. See Gr. Ev. vol. 1, p. 240, and sec. 165 and notes; 42 Iowa, 574; 18 Pick. 434; 11 Serg. and R. 149; 10 Ala. 260. A witness is not competent to prove the testimony of another unless he can state that he remembers the substance of all that was said, both on examination in chief and cross-exami-

nation. 11 Ala. 260; 63 Ga. 692; 42 Iowa, 573; 43 *id.* 177; 39 Md. 149: 14 Allen (Mass.), 236; 18 N. H. 284; 4 Jones (N. C.), 526; 11 S. & R. (Pa.) 149; 97 Penn. St. 420; 30 Am. Rep. 813; 7 Baxter (Tenn.), 80; 21 Vt. 378.

4. The instructions in this case were *argumentative.* It was error to *single out* the witness Vaughan, and instruct the jury as to his credibility *especially.* See 84 Ill. 99; 85 *id.* 612; 13 Ill. App. 557; 115 Ill. 628. Nor should an instruction single out and give prominence to certain facts, ignoring other facts proved. 81 Ill. 478; 33 Mich. 143; 57 Mo. 138; 55 Mich. 139; 90 Ill. 612, 440.

5. The jurors were *coerced* into a verdict by the action of the court in directing them to retire after they had reported that they could not agree.

6. The eighth and tenth instructions given are not full enough, and were unfair to defendant. The corroboration should be as to matters *material* to the issue. Conduct that is susceptible of two opposite explanations is bound to be assumed to be moral rather than immoral. 70 Ill. 484; 32 Ark. 239; 13 Mo. 379; 123 Mass. 222; 25 Am. Rep. 81; 22 Pick. 397; 3 Rice on Ev. p. 513; 100 N. Y. 592; 44 Tex. 109; 9 Gray, 299; 10 *id.* 472; 12 Allen, 183; 110 Mass. 104; 111 Mass. 411. The instruction should have been that the accomplice must be corroborated as to *material facts* tending to connect defendant with the commission of the crime. 28 Hun, 589; *Ib.* 320; 53 N. Y. 474; 26 N. Y. 207; 55 N. Y. 645; 70 *id.* 38; 1 N. Y. Cr. Rep. 344.

7. It was error to limit counsel in his argument.

8. The prosecuting attorney's remarks in closing were prejudicial to appellant, and their effect was not removed from the minds of the jury.

9. It was error to subject the juror Dowell to another examination as to his relationship to defendant.

James P. Clarke, Attorney General, and *Chas. T. Coleman* for appellee.

1. It is within the sound discretion of the trial court to excuse a talesman for any ground deemed sufficient. A defendant has no legal right to any particular juror. 29 Ark. 7; 30 *id.* 343; 35 *id.* 639; 44 *id.* 117.

2. As a foundation for the admission of Thomas' testimony as to what Hays testified on a former trial, it was proven that Hays testified that he had since removed out of the jurisdiction, and that Thomas was present and heard his testimony. The objection that such testimony is in violation of art. 2, sec. 10, constitution, has been often overruled. 22 Ark. 372; 29 *id.* 17; 33 *id.* 539; 38 *id.* 304; 40 *id.* 461; 47 *id.* 180. In order to admit such testimony, it is not necessary that the witness should be able to state what was sworn to *in ipsissimis verbis*, but it is sufficient to state the substance. 4 T. R. 290; 18 Pick. 438; 1 Gr. Ev. (14 ed.) sec. 165; 1 Bish. Cr. Pr. sec. 1196; 10 Serg. & R. 16; 29 Ark. 17; 31 Ill. App. 394. The record states that Hays "testified," which includes the idea of an oath in legal form. Burrill, L. Dic.; Bouvier, Law Dic. No specific objection to Thomas' testimony was made on this ground below, and a general objection will not be considered as extending to any matter of form or question of regularity. 29 Ark. 17; 18 *id.* 392; 27 *id.* 377; 32 *id.* 319; 50 Mo. 126; 25 Pac. Rep. 816; 9 So. Rep. 274.

3. The instruction as to an accomplice and the corroboration necessary to convict follows the statute, and was approved in *Vaughan* v. *State*, 57 Ark. 1. Mansf. Dig. sec. 2259; 40 Ark. 484; 50 *id.* 544; 36 *id.* 117.

4. The twenty-third instruction is not objectionable on the ground that it singles out Vaughan, and instructs the jury as to his credibility. By act March 24, 1885, the defendant is made a competent witness in his own

behalf. If he takes the stand, he is on the same footing as any other witness. 56 Ark. 7; 46 *id.* 141; 95 Ill. 407; 105 *id.* 414; 42 N. Y. 265. See also 49 Ill. 400; 19 Nev. 135; 16 *id.* 310; 34 Cal. 191; 60 *id.* 142; 60 Cal. 142; 54 Ark. 498.

Wood, J., (after stating the facts.) Fully appreciating the importance of this case, and the consequences to the defendant of an affirmance of the judgment, we have given every assignment of error presented by this record our careful consideration. Some of them have been of easy solution, on account of the former adjudication of this court in this case upon the same questions, and by reason of the long and well established doctrine announced by it upon similar questions in other cases.

1. The first and last assignments, in the order presented by counsel, complain of errors in impaneling the jury.

A talesman, having no excuse to offer, and being otherwise qualified, was, upon the suggestion of the prosecuting attorney, asked by the court if he was a dealer in "hop tea," and replied that he had been employed in that business; had been tried, acquitted, and had quit the business, and was now running a restaurant.

Another talesman gave to the judge his excuse on the outside of the court-house, and when the judge went upon the bench, and this talesman's name was called, he was sworn and shown to be qualified, but, on reminding the court that he had already given his excuse, was ordered to stand aside, the court stating that the judge had heard the juror's excuse on the outside of the court-house.

After a juror had been selected, the court permitted the prosecuting attorney to again examine him as to his relationship to appellant, in the presence of six other jurors who had also been accepted, and divers talesmen who had been summoned. The district attorney was

not satisfied with his answers, and asked that he be excused for cause. The court refused. Appellant saved an exception to this re-examination of the juror.

From our standpoint of observation, looking down upon this record, we are unable to see why one who had been a dealer in "hop tea," but had quit the business, was for that reason disqualified for jury service. Repentance and reformation seem to have taken place, and it appears to us the past should have been forgotten. But the trial judge was in closer touch with the juror than we; he could look upon his face, hear his answers, and observe his general make-up and mannerism. However arbitrary such a ruling may seem to us, looking upon the "cold type," it may not in fact have had that character at all, could we have seen the talesman as he appeared and made answer in the court below. The judge alone is to receive excuses for not serving on the jury, and excusing the juror who had made known his excuse on the outside of the court house does not appear so irregular.

1. Discretion of court as to examination of juror.

The examination of the juror who had already been accepted was eminently proper, at that stage of the proceedings. Upon suggestion from any proper source that the juror had not understood, or was mistaken in his examination, it was the duty of the court to have him re-examined. If appellant conceived that he was prejudiced by such proceedings, he should have objected to the juror. He did not join in the protest of the prosecuting officer to this juror's remaining in the panel, and we presume he was satisfied with him.

2. Rejection of juror not prejudicial.

As to the rejection by the court of the talesmen in the above manner, we deem it most conducive to the ends of justice to adhere to the rule, long ago announced by this court, that "the erroneous rejection of a talesman is no sufficient cause for granting the appellant a new trial. He had no legal right to any particular person as

a juror." *Hurley* v. *State*, 29 Ark. 17; *Benton* v. *State*, 30 Ark. 343; *Wright* v. *State*, 35 *ib.* 639; *Lavender* v. *Hudgens*, 32 *ib.* 763; *Maclin* v. *State*, 44 *ib.* 115. But while it would be almost a travesty upon our criminal jurisprudence not to have the circuit court vested with some such power to purge the jury box from designing and incompetent persons; yet the very fact that they do have such unlimited judicial discretion calls for the utmost caution in its exercise, that all things may be in fact, as they are presumed in law, rightly and solemnly done in courts of justice.

3. Instruction relating to defendant's testimony considered.

2. The second, third, fourth, fifth, sixth and seventh grounds of the motion for a new trial relate to alleged errors in instructions given, and requests for same refused. This instruction was asked: "I charge you that the defendant is a competent witness in his own behalf, and his testimony is subject to the same rules and tests as that of any other witness." The court refused this, and gave the following: "The court instructs the jury that, under the law, the defendant, Samuel Vaughan, has the right to testify in his own behalf; but his credibility, and the weight to be given to his testimony, are matters exclusively for the jury. In weighing the testimony of the defendant in this case, you have a right to take into consideration his manner of testifying, the reasonableness or unreasonableness of his account of transactions, and his interest in the result of your verdict, as affecting his credibility. You are not required to receive blindly the testimony of the accused as true; but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction." Counsel contend that this instruction was objectionable, as argumentative; that, in naming the defendant, it gave undue prominence to the interest he had in the cause, and was couched in such language as tended to discredit him before the jury. In the consid-

eration of this instruction, fairness to the court below requires that we state the following, which was also given: "The court tells the jury that nowhere in these instructions does the court mean that you are to disregard the testimony given by any witness in this case. That is a matter solely with the jury, and it is not within the province of the court to tell the jury what weight you should give to the testimony of any witness."

The court also gave the usual general charge on the credibility of witnesses. This was sufficient to cover the case of the defendant, and all the other witnesses, except the accomplice; a special instruction being necessary in his case, because the statute requires that his testimony be corroborated.

It was not error to refuse the instruction, in the form asked by appellant. It was not necessary to tell the jury that the defendant was a competent witness. The court would not otherwise have permitted him to testify, and when he went on the stand and testified, that fact informed the jury that he was a witness. But, since the court embodied the idea asked by appellant in the first part of the instruction it gave, it was also proper to add the succeeding part. The instruction, when standing alone, cannot be reasonably and fairly construed as tending to discredit the defendant's testimony before the jury. But, when taken in connection with the one following it, every possible or imaginary objection is removed. The law, as announced in this instruction, has been approved by the supreme courts of other States. In some States, instructions on the defendant's testimony, by reason of their peculiar phraseology, are open to much stronger objection than the one we are now considering. For example, the Supreme Court of Michigan approved this: "Now, I am asked to charge you, gentleman, that you are to consider the

testimony of this defendant just as you would the testimony of any other witness—give it the same consideration. I cannot charge you, gentlemen, that you are bound to give the same weight to it that you are to that of a disinterested person. This man testifies as defendant, himself deeply interested, and has a motive for committing perjury or perverting facts which the other witnesses have not. It does not follow, therefore, that you must give the same weight to his testimony that you do to the testimony of any other witness, whether corroborated or uncorroborated."

Justice Morse, commenting upon this said: "The remarks of the court in relation to the weight of this testimony, as compared with witnesses not so deeply interested as the respondent in the issue of the trial, and his statement that it did not follow that the jury must give the same weight to respondent's testimony that they might to other witnesses, was, in effect, nothing more than calling their attention to the fact that in weighing his testimony they should consider his interest in the case, and the motive he might have for not telling the truth. It was just and proper, in view of the request he had given, in which no distinction was made between respondent's testimony and that of any other witness, that the jury should be instructed that in weighing and determining its truth they should take into consideration the interest he must necessarily have in the result of the trial." We do not quote the above instruction of the Michigan court with the view of approving it in the language in which it is drawn, but only to show what courts of high authority have laid down as the law upon this subject. A comparison of the instruction in this case with the one given in the Michigan case, and with those given in other States, will show, how much less susceptible it is to the objections urged against it than some on same subject approved

by courts of highest respectability. See the following as supporting the view of the law we have taken. *People* v. *Calvin*, 60 Mich. 123; *State* v. *Hing*, 16 Nev. 310; *People* v. *Cronin*, 34 Cal. 191; *People* v. *Morrow*, 60 *ib.* 142; *People* v. *Petmecky*, 99 N. Y. 422; *People* v. *O'Neal*, 67 Cal. 378; *Rider* v. *People*, 110 Ill. 11; *People* v. *Wheeler*, 65 Cal. 77; *Hirschman* v. *People*, 101 Ill. 568; *State* v. *Sterrett*, 71 Iowa, 386; *People* v. *Knapp*, 71 Cal. 1; *State* v. *McGuire*, 69 Mo. 197; *State* v. *Wisdom*, 84 *ib.* 190; *State* v. *Elliott*, 2 S. W. 411; *State* v. *McGinnis*, 76 Mo. 326; *Creed* v. *People*, 81 Ill. 565; *Haines* v. *Territory*, 13 Pac. Rep. 8; 2 Thompson on Trials, sec. 2445, *et seq.*; *Bulliner* v. *People*, 95 Ill. 406.

It is proper for the jury, in considering the weight to be given to the testimony of the defendant, to consider the interest he has in the result of the suit. Nor should they receive it blindly as true, but consider whether it is true and made in good faith, etc. Because of the difficulty, however, in so framing an instruction, where the defendant's name is mentioned at all, as not to give his testimony undue prominence, either for or against him, it would be better for trial judges to let him pass, with all the other witnesses, under the purview of a general charge as to the credibility of all the witnesses, leaving to the attorneys in argument to call the attention of the jury to any peculiar facts applicable to any particular witness.

4. As to corroboration of accomplices.

The eighth instruction, in reference to the corroboration of an accomplice, follows the statute (Mansfield's Digest, sec. 2259), and is in the form approved by this court in other cases. *Hudspeth* v. *State*, 50 Ark. 544; *Polk* v. *State*, 40 Ark. 484; S. C. 36 *id.* 117; *Vaughan* v. *State*, 57 Ark. 1. The corroboration must be something more than "to merely show that the offense was committed, and the circumstances thereof." He must be corroborated by other evidence *tending to connect the*

defendant with the offense. Facts that go to the identity of the defendant in connection with the crime—that tend to connect him with it—would be *material*, and if the accomplice is corroborated as to these, it is sufficient. That is all the instruction says, and it is correct. *People* v. *Courtney*, 28 Hun, 589.

The appellant complains, also, that the court did not give this: "If the testimony of a witness shows him to be an accomplice, the jury should not convict unless his testimony is corroborated by testimony they believe to be true, beyond a reasonable doubt." This was not only incomplete, but radically wrong, and, had it been given, would have been inconsistent with the one we have just considered, and highly prejudicial to the defendant. The converse of it would be that if the testimony of a witness shows him to be an accomplice, the jury *should convict*, if his testimony was corroborated by evidence which they believed to be true beyond a reasonable doubt. To have given this would have been ignoring the statute which requires the corroboration to be of matters *tending to connect the defendant with the commission of the crime.* The accomplice may have been corroborated as to many other things, and in many other ways, but this was the all important thing—the "*sine qua non*" to conviction.

The refusal of the court to give instructions on circumstantial evidence was not error. This was not a case depending upon circumstantial evidence. The State was not asking for a conviction upon circumstantial evidence. Nor was it asking conviction upon the testimony of Thomas Hamilton alone, but upon *his testimony in connection with all the other evidence.* The court did right in not leading the jury away into a maze of confused issues.

The refusal to charge the jury "that, before they were authorized to convict, *each* juror must be sat-

isfied beyond a reasonable doubt, as explained in the instructions, of the guilt of accused, etc.," was not error. The oath the jurors took required that "*each* should well and truly try," etc. If appellant's counsel were not satisfied that the verdict was the verdict of each juror, it was their province, under the statute, to assure themselves of that fact by having the jury polled. Mansf. Dig. sec. 2294.

Likewise, it was not error to refuse to tell the jury "that if they believed the statements of a witness to be wholly untrue, such statements should be considered as though not made before them." The court had already fully charged the jury on the "credibility of witnesses and the weight to be given to their testimony."

5. Discretion of court to limit argument.

3. One of the appellant's counsel, while making the closing argument, after having spoken three hours, was by the court interrupted, and told that he must conclude his argument in twenty minutes, which he did. Eight hours were consumed by himself and associates in the argument for appellant.

It is not shown that, by reason of this interruption, the counsel was precluded from covering the whole case. What particular points he was prevented from making do not appear. The court may, in its discretion, limit the argument; but, in capital cases especially, it is a discretion which circuit judges generally hesitate to exercise. When counsel are limited, we suggest the better practice is to have them advised of that fact before the argument begins, and of the time which they will be allowed to consume, in order that they may the more easily arrange the line of their argument in a systematic way. In this case, however, after three hours had been taken by counsel, it may fairly be presumed that the court saw that twenty minutes would be ample time in which to say everything necessary for his client's cause that had not already been said. In the absence

of any affirmative showing as to *how* appellant was prejudiced, we hold that the trial judge did not abuse his discretion. *Dobbins* v. *Oswalt*, 20 Ark. 619; *Edwards* v. *State*, 22 *id.* 253; *Ford* v. *State*, 34 *ib.* 650; *Winter* v. *Bandel*, 30 *id.* 362.

6. When prosecuting attorney's remarks not prejudicial.

4. The prosecuting attorney in his closing argument used this language: "No innocent man was ever yet hung; and if the jury wrongfully convict the defendant, he has a right to appeal to the Supreme Court who will rectify the wrong." A bridle should be put upon the tongue of an attorney, promptly and firmly, by the court, and upon its own motion, whenever he makes the first break across the record boundary. The court, in its sound discretion, should suit the character of restraint to the exigencies of each particular case as it arises, using mild admonition, harsh rebuke, or fine and imprisonment as for contempt, according as the transgressor may be submissive or recalcitrant; but in no case should the court fail to act at once. If something has been said before the judge had the opportunity to check its utterance, then the statement should be challenged by the court, and removed from the jury with such comment as the circumstances demand. If zealous counsel cannot find sweep for their genius or eloquence within the record, they should not be permitted to enjoy that privilege, to the prejudice of the rights of the opposite party, by going beyond it. This court has already strongly inveighed against such conduct, when indulged by counsel and permitted by the court, in *L. R. & Ft. S. Ry. Co.* v. *Cavanesse*, 48 Ark. 106; and whenever it occurs to us that any prejudice has most likely resulted therefrom, we shall not hesitate to reverse on that account. The remarks of the prosecuting attorney, while improper and unwarranted, were not prejudicial, as we take it, since the first part of it was mere matter of opinion, and the latter part, as to the right of appeal,

must have been already known to every intelligent juror. The right of appeal, as a part of the procedure under our judicial system, is a matter of common knowledge. The judge, moreover, very properly told the jury that even this right was not a proper subject for discussion before them. We can not conceive that any man with sufficient intelligence to be a competent juror could have been influenced by such a remark to do injustice to the appellant.

7. Admissibility of proof of testimony of absent witness.

5. The only remaining question for our consideration is presented by the twelfth ground of the motion for a new trial: "That the court erred in permitting the testimony of W. W. Thomas, stating as to the testimony of one James Hays." The bill of exceptions shows that one Lee Elliott testified: "I am clerk of the circuit court of Madison county, and reside at Huntsville. Jim Hays is in Texas, his relations say. I don't know where he is. He used to live in Huntsville, or near there. He has a mother there. Think he has a family. My understanding is that he moved with his family to Texas. I went to Huntsville in October last. Think he was gone before I got there." Also William Brooks testified: "I knew Jim Hays. He resided in Huntsville, Arkansas, until he moved away, since the last trial. My understanding is he is in Texas. He had a wife and child. They have moved away. His mother, sister and brother live in Huntsville. I live just across the street from where his mother lives. They say he is in Texas. He left after the other trial in this cause, and I have never seen him since he moved away." Plaintiff then introduced one W. W. Thomas, who, over the objection of defendant, testified that he was on the jury that tried Vaughan in the trial in this court a year ago. Jim Hays on the trial testified that he had guarded Vaughan and Hamilton during two terms of the Huntsville court. Went in one night, and asked if they were all asleep. Vaughan said 'No, Hamilton is sick.' He had previously

stated that he had asked if they were all dead. That he, (Hays,) said to Vaughan: "If he is dead, you are flying." That he (Vaughan) told him to seek a private interview with Hamilton, and tell him not to give anything away; that it would be better for both of them. And, on cross-examination, witness Thomas testified that Hays, in his cross-examination, said *that he had the thing tangled up in his testimony; said he had guarded at two courts, Spring and September terms.* Thereupon, defendant's counsel read from the bill of exceptions in the cause on the former trial, from Hays' testimony, the following words: "You have got me bothered. I don't know whether I guarded him at the September term or not," and asked the witness Thomas if Hays did not so testify on said trial, and witness Thomas answered: "I do not remember all that was said. He might have said so." (To all of the testimony of witness Thomas as to the testimony of Hays on the former trial, defendant objected, and asked that same be excluded from the jury; but the court overruled his motion, and he at the time excepted.")

The questions raised by this assignment have been strongly pressed upon the court, and ably argued by counsel, both orally and in their briefs. While appreciating the great force in what is said about such testimony being in violation of art. 2, sec. 10, of the constitution, giving to the accused the right "to be confronted with the witnesses against him," we hold that former decisions of this court correctly declare the doctrine upon that subject. It is an old question, and has been often passed upon. The settled law of this State is that where the adverse witness is dead, beyond the jurisdiction of the court, or, upon diligent inquiry, can not be found, what such witness testified on a former occasion on the same issue, and between the same parties, may be given in evidence, provided the accused was present

having the right of cross-examination. 1 Greenleaf on Ev. sec. 163. This doctrine was announced by this court long before the constitutional provision cited *supra* was engrafted, and has been several times followed since. *Pope* v. *State*, 22 Ark. 372; *Hurley* v. *State*, 29 *id.* 17; *Shackelford* v. *State*, 33 *id.* 539; *Green* v. *State*, 38 *id.* 304; *Dolan* v. *State*, 40 *id.* 461; *Sneed* v. *State*, 47 *id.* 180; 1 Gr. Ev. sec. 163 and authorities cited.

Did the State lay a sufficient foundation for the introduction of this secondary evidence? In the case of *Railway Co.* v. *Henderson*, 57 Ark. 402, Mr. Justice Mansfield, delivering the opinion of the court, said that "some discretion must be allowed to the trial court in deciding whether proof offered as preliminary to the introduction of such evidence is sufficient to admit it as in case of the witness' death." We think the court evidently intended to announce that the trial court had discretion, which was only limited to the extent that it should not be abused. It is absolutely essential that circuit courts be vested with such discretion. The judge is acquainted with the surroundings, sees and hears the witnesses, and is *the one* to be satisfied as to whether the conditions exist calling for the introduction of secondary evidence. Since its admission under any circumstances, however, is an exception to the rule rejecting hearsay evidence, and has its origin *ex necessitate* in the administration of justice, the court should proceed cautiously, and avoid capricious conclusions. Its judgment should be based upon investigations reasonable and satisfactory. It should have diligent inquiry made, or be satisfied from competent proof that inquiry would do no good. When it appears to us that such has been the course of the trial judge, we will not review his discretion to disturb his findings upon the facts before him. If the law requires certain fixed and unbending rules to be observed by the circuit judge in laying foun-

dation for the admission of secondary evidence, then he has no discretion in the matter, and in no case is authorized to admit it until these rules have been complied with. The trial judge should base his conclusions upon competent and relevant testimony, but its sufficiency is within his discretion, subject to be reviewed and corrected when abused.

Did the court abuse its discretion? We think not. It had the county clerk called, living in the town where the witness Hays last resided, acquainted with Hays and his family. The clerk went to Huntsville in October, and Hays, he thought, was gone before he got there. Something about nine months he had been gone from his old home, according to this witness. His understanding was that Hays was in Texas. His relatives said he was in Texas. Did not know where he was. The court also called Mr. Brooks, his neighbor, living just across the street from his mother, who swore that Hays moved away since last trial. That occurred at the spring term, 1892, and the present trial at the spring term, 1893. So, according to this witness, Hays had been gone about a year. His wife and child had moved. His relatives said he was in Texas. The understanding of this witness was that Hays was in Texas. The answers of these witnesses indicate that they had made inquiry, or received information which made inquiry unnecessary. What was the necessity for stopping the proceedings and sending the sheriff or others to inquire of Hays' relatives at his old home? Here were credible witnesses who had already inquired, or been informed by those most likely to know, of the witness Hays' whereabouts. It will not be contended that inquiry on a subject like this—the efforts made to ascertain the whereabouts of a witness—is not original evidence. 1 Greenleaf, Ev. sec. 163, note 2. If the sheriff, with a subpœna, for instance, did not know where the witness was, how would he

ascertain without inquiry, and what would be the use of inquiry unless he were permitted to report the result of his investigation? True, the issuance of a subpœna and the return of the sheriff's "*non est*" would have been more convincing, perhaps, and if the court had not been already satisfied from the testimony of these neighbors of Hays, and the surroundings, that it would have been a useless consumption of time, it would doubtless have suspended the trial, and sent a subpœna to the sheriff of Madison county. But the judge evidently concluded that he would only get the same information he already had from the clerk of that county. The court had the discretion to pass upon the sufficiency of this evidence, and we can not say that there was an abuse of it. Rice on Evidence, sec. 226.

8. Exception to evidence must be specific.

But if the foundation, as thus laid, was not sufficient, appellant interposed no specific objection to it in the court below. Had the court's attention been called to it at the time as insufficient, it might have been an easy matter to have had additional evidence on the subject. This court has often ruled that a general objection is not sufficient except as to competency or relevancy. The appellant's counsel made a general objection to Thomas testifying. Under this general objection, the court would not know whether appellant was objecting (1) for the constitutional reason above vigorously insisted upon, that he had the right to confront; or (2) for the reason that the witness had not first stated that he could give the substance of all the witness Hays testified to on the former trial, which is also insisted upon here, and which some of the authorities hold is necessary to lay the foundation; or (3) for the reason we have just been discussing, that the witnesses called had not laid sufficient foundation. These three objections would be included in a general objection of that kind, and, no special objection being taken at the time to the

sufficiency of the foundation, the court may well have concluded that all objection on that point was waived, and that appellant was relying upon one or both of the others. Appellant should have been ingenuous and fair to the court, "laying his finger" upon the particular point in the court below which he is insisting upon here. *People* v. *Manning*, 48 Cal. 335. For the same reason, the objection that it is not shown that Hays was sworn on the former trial can not avail him here. (But Thomas says Hays "*testified*," which would seem to indicate that he was sworn.) See *Hurley* v. *State*, 29 Ark. 17; *Blackburn* v. *Morton*, 18 *id.* 392; *Blunt* v. *Williams*, 27 *id.* 374; *Coughlin* v. *Haeussler*, 50 Mo. 126; *Rush* v. *French*, 25 Pac. Rep. 816; *Giddens* v. *Bolling*, 9 So. Rep. 274; *Camden* v. *Doremus*, 3 How. (U. S.) 515.

But, for a still stronger reason, we do not think this case should be reversed, because of the introduction of the testimony of Hays through Thomas. There was ample proof in the same trend and to the same effect. The object of this testimony, of course, was to show that Hamilton and Vaughan were coadjutors, conspirators in crime, and that the controlling spirit who had planned the murder was now attempting to close the mouth of his pliant tool, and thus suppress most damaging testimony against himself.

What means the following testimony on behalf of the State? W. B. Pope: "I am the United States jailor at Fort Smith. The defendant and Hamilton have been in my custody for some time. I saw the letters in the custody of Hamilton one morning, and after that I was informed that the defendant wanted to see me. In the evening of the same day I saw him, and he asked me if I was working for a fee. I said "No," and he told me that if I was I could get one; that I could get those letters from Hamilton; that all I would have to do would be to ask Hamilton for them, and he would pay me to get them.

He said that Hamilton had written him letters, and he had either destroyed them or sent them back. I told him that he was the biggest fool I ever saw, and he said that he had made a mistake."

W. V. D. Hamilton: "I am the father of Thomas Hamilton. On the morning after the killing, about ten o'clock, and before I had heard of it, I met a little son of Thomas Hamilton, who said that his father had been arrested and taken to Huntsville, and his mother wanted me to come to her house. I stopped at the defendant's until the boy could get my horse. The defendant called me to one side, and asked me if I was going to Huntsville. I replied affirmatively, and he took me out by the side of the smoke-house and told me to tell Tom not to tell anything; that they would try to get him to turn State's evidence, but not to do it. He told me to try to get a private conversation with him, and said that if I could not do that, we would have to try some other plan. I did not know that the defendant was suspicioned at the time. He had not been arrested, and I had not told him that Tom had been arrested and carried to town, or that Gage had been killed. Miss Mollie Stringfield was boat-riding on the creek with one of the defendant's boys as I went to the defendant's house. She came in after the conversation alluded to."

The following letters, written by the defendant to Thomas Hamilton while in the United States jail at Fort Smith, were given in evidence: "Tom: Bill Roberts, of Huntsville, told me that he would be down here the first of next week, and Wythe Walker said that he would come whenever I wrote to him to come. He lives at Fayetteville. You said that you were not able to hire a lawyer. Now, you know that it will not do for me to hire a lawyer for you; but if I can get out, I can see your father, and have him to hire one for you, and me and him can fix that. But if you was to indict me, I

would have to hire a lawyer for myself; but if you clear me, then I can get out and work for you. And now I want to know for certain if you are going to clear me, for my lawyers are afraid to talk to you until they know for certain what you are going to do. They don't want to talk to you very much while I am here; it would look like we were working a trick. The statement that you give is very good, but it would have been best for you to write it like it was the first writing that passed between us after we got here, and just said: 'Sam, I heard that you sed that you did not want to ever speak to me any more, but I am getting sorter over my scare now, and I am sorry that I told what I did, but they had me scared and I don't know what I did say. I node you did not hire me to kill Gage, and I did not think that you had anything to do with it, but I node that you and Gage was at outs, and I thought it was the best thing that I could tell to save my life.' Now, Tom, if you will write something like this, and then go on just like you did in the other, and tell that they was around you with their guns, and you thought they would kill you, and tell me all that Lowery and the others said, just like you did in the other statement, and when this is done, you need not be uneasy but what you will get a lawyer. If you write this statement, sign your name to it, and it will be only used for our good. Be sure and send this back. Everything will work right if we will keep things still. So be careful. Write the statement on a piece of paper to itself."

"NOVEMBER 2nd, 1891.

"T. E. HAMILTON,

"*Sir:*—I am looking for Bill Roberts here to-day, and I want to know if you are willing to go to Fayetteville, and testify that if I had anything to do with the killing of Gage, that you don't know it, and that you made the statement that you did to save your life, and I

have got to believing it, and I think others will believe it. Write me at once and be careful. Send this back.

"S. F. VAUGHAN."

It may, with truth, be said that the testimony of W. V. D. Hamilton is under a cloud. But the testimony of the Fort Smith jailor is not. The testimony of Hays and the testimony of the Fort Smith jailor are denied by the defendant. The letters he wrote were admitted by him. His denials and explanations were all for the jury. But we cannot see how it can be contended that the testimony of Hays was prejudicial, when there was so much here *of his own, admitted*, from which the jury were justified in coming to the same conclusion that Hays' testimony was calculated to produce.

9. Mode of proving former testimony of absent witness.

Thomas did not say he could give the substance of all Hays' testimony in so many words, but that is not necessary where the witness shows *he is giving it in substance*. The record shows that Thomas testified: "I was on the jury that tried Vaughan in this court a year ago. Jim Hays on the trial *testified*," (then proceeding to give his testimony). This seems to indicate that he was giving the testimony at least in substance, if not almost *in ipsissimis verbis*. Appellant does not show that Thomas did not give it in substance, while the subject-matter and manner of his testifying indicate that he did. On cross-examination, in answer to the question, "If Hays did not say, 'I don't know whether I guarded him at the September term or not?'" Thomas answered "that he did not remember all that was said by Hays; that he might have said so." From this, appellant argues that the witness shows that he did not remember the substance of Hays' testimony. We do not so consider it. He had already stated, in his examination in chief, that Hays testified "that he had the thing tangled up in his testimony; said he had guarded at two terms of court, Spring and September terms." We

think the answer he gave to appellant's counsel indicates that he meant to say that he did not remember what Hays said, in his exact words, about the particular matter of which counsel was inquiring, and not that he did not remember the substance of his whole testimony in the case. Mr. Greenleaf states the correct rule, supported by nearly all the American courts, as to what a witness called to testify as to what another witness said on a former trial, must be required to state, namely: "It seems, therefore, to be generally considered sufficient, if the witness is able to state the *substance of what was sworn on the former trial.*" 1 Greenleaf, sec. 165, and authorities cited in note; *Wade* v. *State*, 7 Baxter (Tenn.), 80; *Hepler* v. *Bank*, 97 Pa. St. 420; 2 Whart. Ev. sec. 1109; *Graffenried* v. *Kundert*, 31 Ill. App. 394. The testimony of Thomas in the manner given does not contravene this principle.

For the reasons given, to hold the testimony of Thomas as to Hays' evidence on the former trial inadmissible or prejudicial, in our opinion, would be hampering the trial judge in the exercise of a sound discretion by the refinements of judicial criticism, and preventing the application of a most excellent provision of the law in many cases by the merest technicality. This disposes of all the points raised and argued by counsel.

We think the ægis of the law has been held over every right of the appellant with a firm but impartial hand. The charge of the trial judge is too voluminous to copy into this opinion; but it covers every phase of the evidence, and is remarkably fair to appellant. It clothes him with the presumption of innocence; gives him the benefit of his good character; hedges him round with the reasonable doubt, in several of the separate charges. It lays down proper criteria for the judging of his conduct; tells the jury, in considering the weight and effect to be given to his acts, they should be mindful

of his mental and physical condition. It lays the testimony of the accomplice upon the most crucial ordeal known to the law, and defines proper rules for weighing the testimony of all the witnesses. The court below has held out a clean balance, perfectly poised. Appellant's case has been weighed, and he must abide the verdict of his peers and the judgment of the law.

Affirmed.

BATTLE, J., dissenting. The objection of the appellant to the introduction of the testimony of W. W. Thomas is attributable to the insufficiency of the foundation laid for its admission. This is the only ground in the record upon which it can be fairly based. In other words, the legal effect of the objection is that it was not shown that Jim Hays was absent from the State, or, after diligent inquiry, could not be found. I think it ought to have been sustained. Such testimony should be admitted with great caution, only from necessity, and to prevent a failure of justice. The necessity, whatever it be, should be clearly shown. *Harris* v. *State*, 73 Ala. 495. Allowing to the evidence which was adduced to show the admissibility of the testimony of Thomas the greatest weight which can be reasonably claimed for it, it proves no more than the removal of Hays from Huntsville, the place of his former residence, and that his relatives said that he had gone to Texas. The record fails to show that any subpœna was issued for him, that his whereabouts were unknown, or that he was out of the jurisdiction of the court. The statements of the relatives were incompetent evidence, and proved nothing; and should have been disregarded by the court. They were competent to testify as to what they knew about his place of residence, and could not testify by proxy.

The material portion of the testimony of Thomas was that Hays testified in a former trial "that

Vaughan told him to seek a private interview with Hamilton, and tell him not to give anything away; that it would be better for both of them." The father of Hamilton had testified to the same effect. But Vaughan testified that he made no such statement to the father. The testimony of Thomas strengthened the testimony of old man Hamilton, and tended to weaken that of Vaughan, and in this way was prejudicial to appellant.

As to the letters, Vaughan admitted that he wrote them, but testified that he did not write them until after Hamilton had written to him that he (Hamilton) knew that Vaughan had nothing to do with the killing of Gage; and that the object of writing the letters was to get a statement for publication; and that he, appellant, did not attempt to hire Pope to get the letters from Hamilton.

In this conflict of evidence I cannot find that the testimony of Thomas was not prejudicial to the cause of appellant. It appears in the bill of exceptions that the jury did not readily agree as to the effect of the evidence. They retired to consider of their verdict between four and five o'clock P. M. on May 13, 1893, and between ten A. M. and two P. M. on the 15th of the same month reported to the court that they were unable to agree upon a verdict, and that they did not disagree as to the instructions of the court or the testimony of witnesses, but as to the effect of the evidence. They were directed to retire and consider of their verdict, and thereafter, between four and five o'clock, returned a verdict of guilty. Under these circumstances, it seems to me that the introduction of the testimony of Thomas ought to be treated as prejudicial to the appellant.

I do not think that a reversible error was committed by giving the separate instruction as to the credibility of Vaughan as a witness, and as to the weight of his testimony, especially when taken in connection with other

instructions. But I do think the singling a defendant out and making his credibility the subject of a separate instruction may, in some cases, be highly prejudicial; and that the instruction as a precedent deserves severe condemnation, and that its repetition in the future should be avoided.

I concur with the court in the conclusions it has reached upon the questions decided, except as stated.

For the error indicated, I think that the judgment of the court below ought to be reversed, and a new trial granted.

MANSFIELD, J., concurs with me in this opinion.

RAILWAY COMPANY *v.* HACKETT.

Opinion delivered January 20, 1894.

58 381
63 394
58 381
67 55
67 117
67 121
58 381
75 585
58 381
88 587

1. *Deputy sheriff—Powers.*

   A railroad company cannot escape liability for the wrongful act of a night watchman engaged to guard its property, on the ground that such watchman was also a deputy sheriff; since an officer of the law cannot engage, as such, to guard the property of a private individual or corporation, not in the custody of the law.

2. *Liability of master for servant's torts.*

   A railroad company is liable for the wilful and malicious act of a night watchman in its employ, in shooting another, if he was acting in the course of his employment, although he exceeded his authority.

3. *Evidence—General reputation.*

   A master is charged with knowledge of the general reputation of a watchman as to recklessness and unfitness for his position, where it is a matter of common knowledge in the county, and he has held the position for several years.

4. *Evidence—Objections.*

   Where specific objections are made to testimony, all objections not specified are waived.

5. *Irrelevant evidence—When not prejudicial.*

Plaintiff's deposition was read in his behalf. Over defendant's objection, testimony explaining plaintiff's absence at the trial was introduced. *Held*, that under the circumstances, the testimony, while improper, was not prejudicial.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

Action by Thomas Hackett against the St. Louis, Iron Mountain & Southern Railway Company to recover for personal injuries. The facts appear in the following statement by the court:

The evidence tended to show that the appellant railway company had in its employment, as night watchman, Pat Gallagher, who had served the company in that capacity for about nine years before the occurrence which is the foundation of this action, and, that, at the time of the occurrence, he was on duty as night watchman for the company; that it was the duty of the watchman to protect the company's depot, warehouse, buildings and cars at the foot of Rock street, in the city of Little Rock. That Gallagher, the watchman, might have authority to make arrests, he had been duly appointed, and was, a deputy sheriff of Pulaski county, in said State, at the time the shooting occurred which is referred to in the complaint.

On the night of April 7th, 1890, while Gallagher was on duty as night watchman for the company, at about 10 o'clock P. M., and while he was in a room upstairs near the railroad track, he heard a noise which he thought was on one of the company's tracks, which he supposed proceeded from the rattling of chains, when a clerk said, "Somebody is breaking into the cars." Gallagher, with his lantern, hurried down stairs, and saw two men standing off on one side. Proceeding to the point whence the noise came, he found the appellee, Hackett, standing up, and said to him, "What are you

doing here?" The appellee had gone in between some cars, at the freight depot at the foot of Rock street, to attend to a call of nature, and had just got through, when Gallagher said, "G—d— you, I have been looking for you some time," when the appellee asked what was the matter, and Gallagher replied: "You fellows have been doing this thing long enough, and I want you to come with me." Appellee replied, "All right; wait till I button up my clothes, and I will go any place with you you want me to go." Gallagher then said "Come on," and appellee replied, "All right; I will go," and took a step toward Gallagher, when Gallagher fired a pistol at the appellee, and inflicted upon him a severe injury, the ball from the pistol taking effect in the appellee's neck, from which appellee fell over against a car, and exclaimed, "Good God! What did you do that for?" Gallagher replied, "Come on, G—d— you, or I will blow the top of your head off." About this time two policemen arrested the parties. Gallagher had on, when arrested, two derringers and a navy-six pistol. The cars where appellee was found by Gallagher were loaded with citizens' merchandise; and the seals of cars had sometimes been broken at the depot, and arrests had been frequently made there of persons for interfering with the seals and cars. The evidence tended to show that Gallagher was appointed deputy sheriff because he was night watchman for the railroad company, and that he never reported to the sheriff, or performed any duties generally, as deputy sheriff; that his salary of $50 per month was paid by the railroad company; and that he gave no bond as deputy sheriff, and was never ordered on duty by the sheriff; and that, in issuing his commission, the sheriff did not expect to control him, or have him subject to his orders, but that the commission was given him to authorize him to make arrests, if necessary.

Dodge & Johnson for appellant.

1. The appointing and commissioning of a deputy sheriff in accordance with the law, and assigning the same to duty for the purpose of maintaining order on the premises of a railway corporation, and for the protection of its property, makes said deputy a State officer, and the corporation is not liable for the wrongful arrest or for any injuries inflicted while such officer is making an arrest in pursuance of his duties as an officer of the law. Mansf. Dig. secs. 6318, 6319, 6320 to 6325; 20 Atl. Rep. (Md.) 189; 16 S. W. Rep. 444; 34 A. & E. R. Cases, 309; 51 Md. 295, 298; 59 Iowa, 59.

2. Each sheriff in Arkansas may appoint one or more deputies for whose official conduct he shall be liable. Gallagher was a State officer, for whose acts as such the defendant was not liable. Mansf. Dig. sec. 6318. The sheriff alone is liable. 42 Vt. 332; 56 Me. 211; 2 N. H. 184; 15 Mass. 200; 1 Pick. 271; 42 Vt. 341; 17 Mass. 246; 12 *id.* 449; 1 Mass. 534.

3. The testimony of Newland and Sam Davis as to Gallagher's reputation was incompetent. No foundation was laid by showing that the railroad company knew Gallagher's reputation. 1 Greenleaf, Ev. sec. 54; 3 Bibb, 192; 2 Bibb, 286; 2 B. & P. 532; 5 S. & R. 352; 10 *id.* 55; 23 Pa. St. 424; 24 *id.* 408. G. W. Shinn's testimony and Hackett's letter should not have been admitted.

4. Hackett was guilty of a misdemeanor in trespassing upon the grounds of defendant for such a purpose. It may not be a statutory offense, but it is a common law offense. Mansf. Dig. secs. 566–7; 48 Ark. 59; 2 Am. Crim. Law, sec. 2002; *Ib.* sec. 2003. It was not necessary to have a warrant. Mansf. Dig. sec. 2412; 1 Am. & Eng. Enc. Law, p. 734 and notes; 1 Russell Crimes (9 Am. ed.), 808.

5. A principal is not liable for the malicious and wilful acts of his servant, done without his knowledge or assent, though while in his employ. 43 N. Y. 569; 47 *id.* 128; 51 *id.* 298; 73 N. Y. 548; 92 Ind. 462; 61 Iowa, 574.

Sam W. Williams and *Geo. W. Shinn* for appellee.

1. Gallagher was the watchman of defendant, and his commission was merely given him to enable him to bear arms. He was not an officer of the State, nor was the sheriff responsible for his acts. The facts of this case differ from 20 Atl. Rep. 189. The distinction between independent trespasses and the acts done in the line of duty by servants is settled by 3 Clif. 416. See Thomps. on Carriers of Passengers, p. 363; 69 Miss. 245; 13 Fed. Rep. 116. The allegations of the complaint put in issue the character of Gallagher for competency, soberness and civility, and testimony as to his general charactor was competent. 1 Gr. Ev. secs. 50, 54, etc.; 38 Pa. St. 104. Whether Gallagher acted in his *ostensible* capacity as a deputy sheriff, or in his real capacity as watchman for appellant, was a question of fact for the jury. 48 Ark. 177. An agent may be an officer, and also be one for whose acts the company is liable. 28 A. & E. R. Cases, 138; Cooley on Torts, p. 397; 22 S. W. Rep. 488. Corporations are liable for the torts of their agents or servants while in their employment and in the performance of their duty, or within the scope of their duties or employment. See Cooley on Torts, p. 120; Redfield on Railways (3d ed.), 510; 14 How. 468, 483; 27 Vt. 110; 104 Mass. 117; 32 N. J. 328; 19 Ohio (N. S.), 162; 21 *id.* 518; S. C. 8 Am. Rep. 78; 27 Md. 277; 57 Me. 202; 2 Am. Rep. 39; 16 *id.* 409; 19 Ill. 353.

HUGHES, J., (after stating the facts). We have endeavored to fully examine and consider each of the

instructions given by the court in this case, and it is our opinion that, taken together, they correctly state the law applicable to this case; that they contain no reversible error.

1. Authority of deputy sheriff to guard property.

The counsel for the appellant state, in their brief, in substance, that they base the chief ground of their objection to the verdict upon the court's refusal to declare the law as stated by them in instruction numbered five, which the court refused.* This instruction is erroneous, in that it assumes that a deputy sheriff, as such, might engage to guard the property of the railroad company. An officer of the law cannot engage, as such officer, to guard the property of a private individual or corporation not in the custody of the law. The duties of a sheriff are prescribed by law. Such part of this instruction as correctly states the law is covered by the instructions given by the court. There was no error therefore in refusing this instruction.

2. Liability of master for servant's torts.

The fourth instruction asked for by the appellant railway company, and refused by the court, is erroneous, as it assumes that, if Gallagher inflicted the injury wilfully and maliciously, the company is not liable for damages resulting from the injury. Such, in our opinion, is not the law, according to the weight of authority. The intention with which Gallagher acted cannot affect

---

* The fifth instruction asked by plaintiff, and refused by the court, is as follows:— "5. If the jury find from the evidence that Pat Gallagher was a deputy sheriff duly appointed; that, as such, he was engaged in guarding the property of defendant railway company at its depot in Little Rock; that the injury complained of was inflicted upon plaintiff by said Gallagher, while in the discharge of his duties as such deputy sheriff, then you are instructed that the railway company cannot be held liable therefor, even though you should further find from the evidence that said Gallagher overstepped the bounds of his authority as such deputy sheriff, and that the railway company was paying, and had agreed to pay, the wages of said Gallagher as deputy sheriff."

the liability of the railway company, though it might affect the amount of the damages. *Cleghorn* v. *N. Y. Cent. & H. Ry. Co.* 56 N. Y. 47. The question is, was Gallagher, at the time he fired the pistol shot, acting in the course of his employment as night watchman for the railway company? If he was, the company is liable in damages for any wrongful act of his in the course of his employment, resulting in injury to another, though he exceeded his authority as such night watchman. If the act was done by him in the service of the company, in the course of his employment, and injury resulted therefrom, the company is liable in damages resulting from the injury, if the act was wrongful, or performed in such a negligent manner that its negligent performance caused the injury.*

Of course, if the act causing the injury was outside of the course of the servant's employment—disconnected with the service of the company—then the company would not be liable. The fact that Gallagher had been appointed a deputy sheriff, to enable him to make arrests, because he was watchman for the railroad company, could not exempt the company from liability for his acts as such watchman. If the act had been committed in the discharge of, or in the endeavor to discharge, his duties as deputy sheriff, though wrongful and in excess of his authority as deputy sheriff, the railroad company would not have been liable, though the deputy sheriff and his principal, the sheriff, might have been. But this case presents no such aspect. *Ward* v. *Young*, 42 Ark. 542; *Brill* v. *Eddy*, 115 Mo. 596, 22 S. W. 488; Cooley on Torts, p. 307; *Krulevitz* v. *Eastern R. Co.* 28 A. & E. R. Cases, 138; *Priester* v. *Augley*, 5 Rich. S. C. 44; Wood's Master and Servant, secs. 279, 280,

*On the question of the liability of a master for assaults by a servant, see note to *Davis* v. *Houghtelin* (Neb.), 14 L. R. A. 737. (Rep.)

and p. 543, *et seq; Chapman* v. *N. Y. etc. R. Co.* 33 N. Y. 369; Wood's Master and Servant, p.p. 303, 568 and 571; *Weed* v. *Panama R. Co.* 17 N. Y. 362; Wood, Master and Servant, sec. 299; *King* v. *Railroad Co.* 69 Miss. 245; 2 Wood, Ry. Law, p. 1206; *Green* v. *Omnibus Co.* 7 C. B. (N. S.) 290; *Garretzen* v. *Duenckel*, 50 Mo. 104; *Nashville etc. R. Co.* v. *Starnes*, 9 Heisk. 52.

While we do not intend to enter upon an extended discussion of the principles stated, we think that a careful examination of the authorities will sustain fully the conclusions we have reached as to the law of this case.

It is true that there has been a difference of opinion in the courts upon the question, whether a master is liable at all for the willful and malicious acts of his servant, resulting in injury, under any circumstances whatever, unless where they were in violation of a contract of carriage, or done by the master's express command; yet the better reason and weight of authority seem to be that where such acts are performed about the master's business, in the course of the servant's employment, the servant and master are both liable.

The principal case relied upon by counsel for appellant, *Tolchester Beach Improvement Co.* v. *Steinmeier*, 20 Atlantic (Md.), 189, is not like the case at bar, and does not contravene the principles announced. In that case it clearly appeared that the officer who did the injury was not acting in the line of his employment, but was seeking only to enforce the criminal law, as he believed; and as he was an officer, though he had accepted private employment from the company, the company was not liable for his official acts. There is a correct line of distinction in these case, which the circuit court seems to have followed in its instructions, leaving the questions of fact properly to the jury. It was not for the court to tell the jury that Gallagher, when he fired the shot, was or was not acting in his capacity of deputy sheriff,

or that he was or was not acting in the course of his employment by the company as night watchman. These are questions of fact for the jury to determine, and we think the evidence warrants their verdict. The instructions asked on the part of Gallagher, and refused by the court, we have not considered, as Gallagher has not appealed.

3. Notice of general reputation.

The objection to the testimony in regard to the character of Pat Gallagher, the watchman, as to recklessness and unfitness for his position, was based solely upon the ground that it was not shown that the railway company ever had any knowledge of Gallagher's reputation. It was shown that he had been in the employment of the railway company as watchman about nine years, and that his reputation was generally known, a matter of common knowledge in the county. This is sufficient to show that the company ought to have known his reputation, and to charge it with knowledge of it. 1 Whart. on Evidence, sec. 48.

4. When objections to evidence waived.

Where specific objections are made to testimony, all objections not specified are waived. *Evanston* v. *Gunn*, 99 U. S. 665. The testimony was clearly incompetent, but all objections to its competency were waived, other than the specific objection stated. *Dunham* v. *Rackliff*, 71 Me. 349; *Porter* v. *Seiler*, 23 Pa. St. 424.

5. Irrelevant evidence held not prejudicial.

The testimony of G. W. Shinn as to the absence of Hackett from the trial, and the introduction of the letter of Hackett, were irregular,* but Hackett's deposition

---

*Plaintiff's deposition was read at the hearing of the case. G. W. Shinn, one of plaintiff's attorneys, was placed upon the stand, and asked the following question, viz:

Q. "Why is Hackett not here to-day?

A. "He wrote me, and I wrote back to Mr. Hackett it was not necessary for him to come, that his deposition was here. This is what he wrote me:

"PINE BLUFF, ARK., December 9, 1891.

"Yours of December 7th received, and I would like to know if it is necessary for me to be there at the trial. If it is not, let me know by Monday, or as near after as you can. I think it will be impossible

had been taken, and was read to the jury, and there was no proof that Hackett was in the employment of the defendant company at the time the letter was written. We cannot see that the company could have been prejudiced by this testimony and letters, and we think that, though improper, the admission of them was not reversible error.

The judgment is affirmed.

JONES v. STATE.

58 390
77 20

Opinion delivered January 27, 1894.

1. *Murder—Indictment of accessory.*

   An indictment of an accessory for murder, which, in appropriate terms, alleges that the principals committed the murder "unlawfully, wilfully, feloniously, with malice aforethought, with deliberation and premeditation," and charges that defendant "unlawfully, wilfully and feloniously" did advise and encourage the principals to commit the murder "in manner and form aforesaid," is sufficient, without alleging that the advising and encouraging was done "with malice aforethought, with deliberation and premeditation."

2. *Necessity of proof of venue.*

   A verdict is against the evidence where there is an utter want of proof of the venue.

3. *Evidence—Opinion of witness.*

   On trial of an accessory, testimony of one of the principals, consisting of his opinions as to defendant's participation in the crime, is inadmissible.

4. *Accessory—Evidence.*

   On trial of a woman as accessory to the murder of her husband, the jury could not, without connecting proof, consider as proof of her guilt the facts that the principal, six months before he

---

for me to come without getting discharged, as I spoke about it to-day to see. If it is not really necessary that I should come, let me know and oblige."

To the admission of the above testimony defendant objected.

shot and killed defendant's husband, asked a physician for an emetic for deceased, and that defendant's photograph and a package of "white powder," alleged to be strychnine, were found in the principal's trunk.

5. *Examination of juror—Capital case.*

On trial of a capital case, the prosecuting attorney may ask jurors upon their *voir dire* if they have any conscientious scruples that would preclude them from bringing in a verdict of guilty in a case where the punishment is death, if the law and evidence justified them in doing so.

Appeal from Lonoke Circuit Court.

JAMES S. THOMAS, Judge.

STATEMENT BY THE COURT.

The appellant, Harriett Jones, was indicted in the Lonoke circuit court, on the 7th day of January, 1893, for the crime of being accessory to the murder in the first degree of her husband, Lafayette Jones; the indictment being as follows, to-wit: "The grand jury of Lonoke county, in the name and by the authority of the State of Arkansas, accuse Harriett Jones of the crime of 'accessory before the fact' to murder in the first degree, committed as follows, to-wit: That Millege Mitchell, Green Brewer and William Brooks, in the county and State aforesaid, on the 5th day of December, A. D. 1892, unlawfully, wilfully, feloniously, with malice aforethought, with deliberation and premeditation, did kill and murder one Lafayette Jones, with a gun then and there loaded with gun powder and leaden balls and shot; and that the said Harriett Jones, in the county and State aforesaid, on the 1st day of December, 1892, before the said murder was committed in form aforesaid, unlawfully, wilfully and feloniously did advise and encourage the said Millege Mitchell, Green Brewer and William Brooks, to do and commit the murder, in manner and form aforesaid, against the peace and dignity of the State of Arkansas." On the 18th of August, 1893, appellant was tried and convicted on said

charge and sentenced to imprisonment in the penitentiary for a term of five years. Exceptions were duly taken and reserved to all points insisted upon.

Motion in arrest of judgment, "because the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court," was filed and overruled. Motion for new trial was filed and overruled, the same being in words and figures as follows, to-wit: "1st. Because the verdict is against the law. 2nd. Because the verdict is against the evidence. 3rd. Because the verdict is against the law and evidence. 4th. Because the court erred in admitting the testimony of Green Brewer. 5th. Because the court erred in admitting certain portions of the testimony of Dr. J. M. King. 6th. Because the court erred in admitting certain portions of the testimony of Maria Mitchell. 7th. Because the court erred in admitting certain portions of the testimony of Millege Mitchell. 8th. Because the court erred in excluding the testimony of Eugene Lankford. 9th. The court erred in permitting the prosecuting attorney, after the jury had been sworn to make true and perfect answers to such questions touching their qualifications as jurors in this case, to examine said jurors as to their qualifications in a case where the punishment was death, and as to their conscientious scruples in bringing in a verdict of guilty if the law and evidence justified them in doing so in such a case. 10th. The court erred in excluding Jack Clemens and W. N. Bransford, jurors, who had been sworn to make true and perfect answers to such questions as may be asked them touching their qualifications as jurors in the case, and who had been examined by the prosecuting attorney, and found to be qualified jurors, except upon the questions propounded by the prosecuting attorney, to-wit, if they had any conscientious scruples that would preclude them from bringing in a verdict of guilty in a case where the

punishment was death, if the law and evidence justified them in doing so, and the said jurors said that they had; thereupon the court excused them respectively, peremptorily, alone for the cause above stated. 11th. Because the prosecuting attorney in his closing argument was permitted (to) and did state and present to the jury that Maria Mitchell, the wife of Millege Mitchell, found in his trunk some "white stuff" which was proved to be strychnine, and urged that as one of the circumstances upon which the jury should base a conviction in the case against defendant, and because said prosecuting attorney was permitted (to) and did state and present that Millege Mitchell went to one Dr. King and told him that the defendant had sent him, Mitchell, to him, the said King, to get a "puke," for Lafayette Jones, and also urged and insisted upon the jury to take that fact and circumstance in connection with other facts and circumstances, as proof of defendant's guilt. 12th. Because of newly discovered evidence, as appears from the affidavit of Green Brewer, hereto attached and marked "A" and made a part of this motion."

The affidavit of Green Brewer, made a part of the motion for new trial, appears to have been made on the 21st August, 1893, and is to the effect that his testimony given on the trial of Harriett Jones, in so far as it implicated her in any manner in the murder of Lafeyette Jones, or to the effect that she had knowledge that the same was going to be committed, was in fact false, and was given as it was because he thought, and because he was told, that it thereby would go easier with him; Brooks, his co-defendant having been turned loose because he testified against him (affiant). Other necessary facts are stated in the opinion.

Thos. C. Trimble for appellant.

1. The indictment does not charge a capital crime, and it was error to allow the prosecuting attorney to

examine jurors as to their scruples as to capital punishment. If the indictment *did* charge a capital offense, defendant was entitled to a copy of the indictment before trial. Mansf. Dig. sec. 2152.

2. The jury was not selected as provided by law. *Ib.* secs. 2222–3.

3. The indictment is defective in failing to charge that defendant "unlawfully, wilfully, feloniously and with malice aforethought, and with premeditation and deliberation," did advise and encourage the perpetration of the crime. *Ib.* sec. 1521; 24 Ark. 347.

4. The verdict is defective, and at variance with the indictment.

5. It was error to admit the testimony of Dr. King as to two private conversations with Millege Mitchell. They were hearsay and irrelevant.

6. Maria Mitchell's testimony as to defendants picture and the "white stuff" in her husband's trunk should have been excluded. 45 Ark. 132.

7. Eugene Lankford's testimony was admissible—it was not privileged. 13 Johnson (N. Y.) 492; 42 N. W. Rep. 1063; 65 Miss. 179.

8. The venue was not proven. The verdict is not supported by the evidence.

James P. Clarke, Attorney General, and *Chas. T. Coleman* for appellee.

1. In the absence of a demand for a copy of the indictment, and any affirmative showing that defendant was not so served, it will be presumed that it was done or waived. 29 Ark. 116; 42 *id.* 94; 43 *id.* 391; 46 *id.* 141.

2. *Milan* v. *State*, 24 Ark. 347 has been overruled. 54 Ark. 493.

The indictment sufficiently charges the crime. Bishop, Dir. and Forms, sec. 539; 1 Starkie, Cr. Pl. etc., 87; 1 Arch. Cr. Pr. and Pl. 16.

3. The declarations and conduct of Mitchell pending the criminal enterprise and tending to its accomplishment were admissible. 20 S. W. Rep. 588; 2 Bish. Cr. Pr. sec. 13; 4 Car. & P. 377.

4. No foundation was laid for the admission of Lankford's testimony. 9 Am. Dec. 137; Mansf. Dig. sec. 2903; 37 Ark. 324; 21 S. W. Rep. 587; 25 Wend. 259; 16 How. 47.

1. Form of indictment of an accessory to a murder.

BUNN, C. J., (after stating the facts.) The motion in arrest of judgment was properly overruled, the indictment properly charging a crime within the jurisdiction of the court, and which, if sustained by proof, would have been sufficient to base the judgment of the court upon. The objection to the indictment is that it fails to charge that defendant, before the murder was committed, unlawfully, wilfully, feloniously, "*and with malice aforethought, and with premeditation and deliberation,*" did advise and encourage the perpetration of the crime; the contention of appellant being that the italicized words were necessary to the validity of the indictment, and, the same not having been employed, the indictment failed to charge an offense within the jurisdiction of the court. This is answered by the attorney general that, these appropriate words having been employed in that part of the indictment which charges the crime of murder as having been committed by the principals, Mitchell, Brewer and Brooks, the part charging the crime of being accessory before the fact to the murder upon the appellant, in terms that she unlawfully, wilfully and feloniously advised and encouraged the principals to commit the murder *in manner and form as aforesaid*, meets all the requirements of good pleading, because the charge as to the accessory, by apt and appropriate words, relates back to and adopts the words used in the principal charge; and this is sustained by Bishop, Starkie and Archbold. Bishop's Directions and Forms,

sec. 539; 1 Starkie, Cr. Pl. 87; 1 Archb. Cr. Pr. & Pl. 16. While the indictment, in this respect, is held to be good, yet the admonition from the best authorities is to the effect that it would be best in all cases to use the more extended form.

There being no objection to the instructions of the court, the first ground of motion for new trial is probably intended as formal merely.

2. As to failure to prove venue.

The second ground, to the effect that the verdict is against the evidence, is well taken in one respect at least, and that is that there is an utter want of proof of venue—a failure which, according to the uniform ruling of the court, can but result in a reversal of the judgment. *Frazier* v. *State*, 56 Ark. 242.

The same of course is to be said of the third ground, in part.

3. Inadmissibility of opinion evidence.

The fourth ground, is based upon the court's admission of the testimony of Green Brewer, one of the principals. Much and most of his testimony consisted of opinions of his own as to the participation of defendant in the perpetration of the crime, and in so far was clearly inadmissible.

4. Evidence against an accessory considered.

The objection made in the 5th, 6th, 7th and 11th grounds of the motion for new trial all have reference to the testimony of J. M. King, Maria Mitchell and Millege Mitchell concerning the discovery in the latter's trunk, with the photograph of defendant, of a certain "white powder" said by Millege Mitchell to have been strychnine. It seems that some five or six months before the killing, at the instance of the defendant, Mitchell applied to Dr. King for an emetic for the deceased. This was given by King as requested. What connection this had with the strychnine in Mitchell's trunk, or what connection the strychnine had, or was intended to have, with the commission of the crime, no where appears. Hence, in the absence of such connecting proof, this evi-

dence could have no other effect than to show an intimacy between the defendant and Mitchell, and was otherwise irrelevant.

The motion for new trial on the eighth ground was properly overruled, as no predicate was laid upon which to impeach the testimony of Brewer by the testimony of Lankford, which the court refused to admit for this purpose.

5. Examination of juror in capital case.

The ninth and tenth grounds of motion for new trial, were not well taken. The defendant is charged with a capital offense. Sections 1505–6 Mansfield's Digest. This being true, it was altogether proper for the prosecuting attorney to ask the jurymen on their *voir dire* if they had any conscientious scruples that would preclude them from returning a verdict of guilty when the law and evidence would justify the same; and, on their answering the question in the affirmative, it was not error in the court to excuse them.

We deem it unnecessary, and even improper, to discuss the twelfth ground of the motion for new trial.

For the error mentioned, the judgment of the court is reversed, and the case is remanded for further proceedings.

RAILWAY COMPANY *v.* MAYES.

Opinion delivered January 27, 1894.

Contributory negligence—Alighting from moving train.

A passenger of sound mind who, under no emergency or constraint, jumps off in the dark at his station from a train moving at a rate not less than twelve miles per hour cannot recover for his resulting injuries.

Appeal from Sharp Circuit Court.

JOHN B. MCCALEB, Judge.

Ned Mayes brought this action against the Kansas City, Fort Scott & Memphis Railroad Company, to recover damages for personal injuries. The facts are stated by the court as follows:

Appellee sought to recover of appellant $1500 damages, caused, he says, by the negligence of its employees in refusing and failing to stop its train at appellee's destination, a station on appellant's road, and by slowing up at the platform, thus *inducing* appellee to alight from the train while it was moving, causing him to receive severe injuries. Appellee was a passenger. Appellant denies, and says whatever injuries appellee received were the result of his own negligence. Appellee testified "that the train whistled about half a mile from depot, he heard the air brake go on, the train slowed up to about twelve miles per hour, he jumped off, and the frost on platform caused him to slip," etc.

One of his companions (who attempted to get off the same way, and who, marvelously, escaped unhurt) says, "the rapid motion of the train when I jumped sent me *spinning through the air like a wheel.*" The train was due at 7:27 A. M., and a witness said it was not light yet, "kind of dark."

The testimony of all the witnesses shows that the train was moving between twelve and eighteen miles per hour; none place the speed below twelve, and one as high as eighteen. The verdict and judgment were for $250.00.

Wallace Pratt and *Olden & Orr* for appellant.

There was an entire failure of proof of the material allegations of the complaint. On the plaintiff's own testimony, the cause should be reversed. *Rosenberry* v. *Ry. Co.* 45 Ark. 256; *Catlett* v. *Ry. Co.* 57 Ark. 461; 43 Mo. App. 353; 23 Pa. St. 147; 9 La. An. 441; 41 *id.* 795; 45 Ga. 289; 26 Ill. 373; 2 Wood, Ry. Law, 1126; Thomps. on Carriers, 267. No recovery can be had, if

the cars were in such motion as to render it obviously dangerous for a person to attempt to leave them. Cases *supra*. 14 S. W. Rep. 1099; 49 N. Y. 44.

Sam H. Davidson for appellee.

It was a question for the jury to determine whether the danger was obvious to a reasonable man, and thereby to judge whether or not he was negligent under the circumstances. 46 Ark. 438. See also 46 Ark. 423, 437; 54 *id.* 29; 26 Ind. 459; 2 Wood, Ry. Law, 1131.

WOOD J., (after stating the facts). It is not negligence "per se" to jump from a moving train. But where one, *compos mentis*, under no circumstances of emergency or constraint, takes "a leap in the dark" from a train moving at the rate shown in this case, his conduct is reckless and foolhardy. *St. Louis, etc., R. Co.* v. *Rosenberry*, 45 Ark. 256; *Catlett* v. *Railway Company*, 57 Ark. 461.

The learned circuit judge, upon appellee's own statement and the undisputed facts, might very properly have directed a verdict for appellant.

Reversed and dismissed.

BASSHAM *v.* RAILWAY COMPANY.

Opinion delivered January 27, 1894.

Appeal—Presumption.

Where a judgment is valid upon its face, and the evidence is not brought up for review, it will be presumed on appeal that the judgment was based on sufficient evidence.

Appeal from Fulton Circuit Court.

JOHN B. MCCALEB, Judge.

Mandamus by Kansas City, Fort Scott & Memphis Railway Company against Bassham, collector of Fulton

county. The facts are stated by the court as follows:

This appeal is from an order of the Fulton circuit court granting a writ of mandamus directed to appellant, who was the collector, commanding him to receive certain county warrants belonging to appellee, which had been barred by an order of the county court calling in county warrants for cancellation and re-issue, in payment of the taxes assessed against appellee. The record of the judgment of the circuit court granting the writ recites: "On this day this cause came on to be heard on its regular call, and both parties having announced ready for trial, and the defendant having filed his answer and exhibits, the motion heretofore filed by petitioner, as well as the petition praying this court to issue a writ of mandamus, etc., * * * and also the answer and exhibits of the defendant, together with all evidence introduced by both parties, being seen, heard and fully considered by the court, together with the argument of counsel for both parties, it is found by the court, from the pleadings and evidence in the cause, that the order of the county court barring said county warrants in said petition numbered and dated as follows, etc., * * * is insufficient and void. * * * * It is therefore ordered, considered and adjudged by the court that a writ of mandamus be issued as prayed for by petitioner, etc., * * * to which finding and ruling the defendant at the time excepted, and, to save said exceptions, asked that the same be made of record, which is accordingly done, and thereupon the defendant prayed an appeal to the Supreme Court of the State of Arkansas which is granted."

Sam H. Davidson for appellant.

Wallace Pratt and *Olden & Orr* for appellee.

WOOD, J., (after stating the facts). There is nothing in the record proper to show error in the judgment

of the circuit court. The record recites that the court found from the "pleadings and the *evidence* in the cause." There was no motion for new trial, no bill of exceptions, no record of the evidence, no agreed statement of facts certified by the judge as the evidence upon which the court based its findings and judgment—none of the methods required by numerous decisions of this court for preserving and bringing before us matters *dehors* the record. The presumption, in the absence of a showing to the contrary, is in favor of the judgment. *McStea* v. *Mason*, 27 Ark. 395; *Worthington* v. *Welch*, 27 *id.* 464; *Fort Smith* v. *Yantis*, 35 *id.* 438; *Turner* v. *Collier*, 37 *id.* 528; *State* v. *Johnson*, 38 *id.* 568; *Wigley* v. *State*, 41 *id.* 225; *Bell* v. *Welch*, 38 *id.* 139; *Reid* v. *Hart*, 45 *id.* 41; *Riggan* v. *Wolf*, 53 *id.* 537; *Newton* v. *Askew*, 53 *id.* 476; *St. Francis County* v. *Lee County*, 46 *id.* 67; *Hershy* v. *Baer*, 45 *id.* 240; *Baltimore &c. R. Co.* v. *Trustees*, 91 U. S. 130.

Affirmed.

RAILWAY COMPANY *v.* GOOLSBY.

Opinion delivered January 27, 1894.

1. *Negligence—Permitting infected cattle to run at large.*

   A cattle owner who sues a railroad company for turning loose in the range cattle infected with Texas fever, and thereby causing his cattle to become infected and die, cannot recover damages therefor without proving that the company knew, or ought to have known, that the cattle which it turned loose were infected.

2. *Contributory negligence.*

   Where the only evidence to show that the company knew that the cattle were infected was its knowledge that they were from infected territory, plaintiff cannot recover if he knew that fact, and yet permitted the infected cattle to enter his enclosure and mingle with his cattle, whereby they became infected.

Appeal from Clay Circuit Court, Western District.

JAMES E. RIDDICK, Judge.

Action by J. W. Goolsby against the St. Louis, Iron Mountain & Southern Railway Company. The case is stated by the court as follows:—

Appellee says the railroad company, through the negligence of its employees, wrecked a train-load of cattle which it was transporting from Texas to St. Louis, and negligently permitted said cattle to escape into the range, said cattle being infected with Texas fever, or some other infectious disease, which fact was known to appellant and unknown to appellee; that said infected cattle, commingling with his own, communicated to them the disease which killed four and rendered eight more worthless. For loss of cattle, time, attention and feed, he says he was damaged in the sum of $750. The appellant denies the several allegations of the complaint, as laid, and alleges that whatever damages plaintiff (appellee) sustained were the result of his own negligence in taking care of and herding his stock.

The appellee, among other things, said that the cattle which were found among his, from the wrecked train, were Texas cattle. While in Texas, he had seen "cattle dying and dead all over the prairies, and asked what the matter was, and they said 'Texas fever.'" He left the bars down at his lot so that the two (which he claims were infected) "could go in and out when they wanted to;" allowed them to go in his lot, and eat up the feed which his cattle had left—green corn, etc. The cattle ranged around the mill, and were with his cattle about ten days. When he heard that there was a reward of five dollars per head offered for them, he left word with Mr. Miller, if any one came for the cattle, to show them, but to make the company pay for it. He

heard of the reward being offered some three or four days after the cattle had been with his; and when they came for the cattle, a few days after, he showed them the cattle, and got the reward. This is enough of the evidence to make intelligible the opinion.

The court declared the law of the case to be as follows, to which no objection was made by the defendant:

"4. You are instructed, that before the plaintiff can recover in this action, he must prove by a preponderance of the evidence each and all of the following facts: (1) That the cattle being transported on defendant's train were infected with Texas fever, or some other infectious disease. (2) That said cattle so infected, or some of them, by the negligence of defendant, were allowed to escape and run at large in Clay county. (3) That said cattle, so having escaped, came in contact with the cattle of plaintiff. (4) That by reason thereof such infectious disease was communicated to plaintiff's cattle. (5) That, by reason of such disease being communicated, plaintiff sustained loss and damage. (6) That defendant's servants in charge of the cattle at the place of wreck knew, or had notice, at the time, that the cattle being transported were infected with such disease, or that they were from a section infected with such disease, and were liable to communicate the disease to other cattle in the neighborhood of the wreck, in case they were allowed to escape and run at large. If all these facts are proved, the finding should be for plaintiff."

"5. You are instructed that it is not negligence to allow cattle, or other domestic animals, to run at large, nor can the owner, possessor, or bailee be held liable for damages resulting therefrom by reason of said animals communicating an infectious disease to other cattle, unless it be shown that the fact that the animals were infected and liable to communicate the disease to

other animals was known to the person suffering them to run at large."

The court gave the following prayers over defendant's objection:

"3. While the burden is upon the plaintiff to prove his own case, yet, if the plaintiff makes out a case, and the defendant relies upon contributory negligence on part of plaintiff to defeat his action, the burden to prove such contributory negligence is on the defendant, unless it appears from evidence on the part of plaintiff.

"6. Even if you believe, from the evidence, that the disease with which plaintiff's cattle were affected was communicated to them from the stray cattle which escaped from the wrecked train, and that defendant was guilty of negligence in permitting such cattle to go at large, yet, if you further find that plaintiff knew or had notice that such stray cattle were from the wrecked train, and that they were Texas cattle, and from a district infected with Texas fever, and liable to communicate disease, and that, with this knowledge, he negligently permitted such cattle to frequent the pen in which his own cattle stayed, and this contributed in any respect to his own injury, you will find for defendant—for the reason that, when the wrong of both parties contributed to the injury, the law declines to apportion the damages, and leaves the injured party without any compensation."

Dodge & Johnson for appellant.

1. *Scienter* on part of defendant was charged in the complaint, but not shown nor attempted to be shown on the trial by any testimony whatever. 37 Kas. 133; 38 *id.* 550; 80 Mo. 207; 35 Mo. App. 494; 37 *id.* 593; 24 Mo. 199–202; 2 Robertson, 326; 45 Ill. 12; 2 Exch. Rep. 331–338; 139 Mass. 208.

2. Knowledge or notice was a prerequisite. 16 Pac. Rep. 955.

G. B. Oliver for appellee.

1. The cattle were from Texas—from an infected district. If they were not from Texas, and not from an infected district, it would have been very easy for defendant to have shown it. It was a matter peculiarly within the knowledge of its employees, and the non-production of evidence clearly within the power of the party creates a strong presumption that, if produced, it would be against him. 32 Ark. 337; 48 *ib.* 498.

2. It was not necessary to prove the acts of Congress, the proclamations of the President, or the boundaries of the infected districts. Courts take judicial knowledge of these facts. 12 Am. & Eng. Enc. Law, p. 154; 46 N. W. 1005; 3 So. Rep. 793; 83 Ky. 606. If defendants shipped cattle from an infected district, it is not required to prove absolute knowledge that they were in fact infected. 25 Pac. Rep. 992.

3. The evidence supports the verdict.

WOOD, J., (after stating the facts.) The court declared the law correctly. *Scienter* was averred and denied. Hence the *onus* was upon appellee to show that appellant knew, or had notice of such facts as would make it chargeable with knowledge, that the cattle were infected, and liable to communicate the disease.

1. As to permitting infected cattle to run at large.

No actual knowledge of the infected condition of the cattle is brought home to the company. But appellee contends that, it being shown that these were Texas cattle, and that Texas is infected territory, these facts were sufficient to charge appellant with knowledge that the cattle being transported by it on this occasion were infected, and of a kind to communicate their infection to other cattle upon the range where they escaped.

In its last instruction the court told the jury that if plaintiff (appellee) "knew or had notice that such stray cattle were from the wrecked train, and that they were Texas cattle, and from a district infected with

2. Contributory negligence.

Texas fever, and liable to communicate disease, and that with this knowledge he negligently permitted such cattle to frequent the pen in which his own cattle stayed, and this contributed in any respect to his own injury, you will find for the defendant, for the reason that when the wrong of both parties contributed to the injury the law declines to apportion the damages, and leaves the injured party without compensation." If the theory contended for by counsel be correct (which it is unnecessary to decide) the same rule which charges the railroad company with knowledge charges appellee with knowledge; and the above instruction, when applied to the facts, makes the verdict of the jury clearly erroneous. For the case which appellee has made for himself by his own evidence is this: He knew these were Texas cattle; he knew Texas was infected territory; he had been forewarned of the great danger from Texas fever, for "*he had seen lots of it, had seen cattle* dying and dead all over the prairies" in Texas. Yet, knowing the dread consequences of this pestilential fever, it appears that he provoked two of the train-wrecked and bruised brutes, with luscious provender, to take up at his lot, and permitted them to consociate with his own herd, until they inoculated the whole range round about the mill with the deadly germ from their droppings.

With the knowledge he had of Texas fever, and the knowledge he ought to have had (applying to him the same rule his counsel would have us apply to the railroad) of infected animals, ordinary prudence, even the slightest consideration for the safety of his own cattle, would have suggested the urgent necessity, upon the first discovery of these infected cattle with his own, of isolating them, or driving them to the nearest station, a short distance away, or else to have immediately notified the railroad officials, who, it appears, were anxious to

have information concerning them. Instead of doing this, he waited for the reward.

If the learned counsel be correct in his theory with reference to the appellant being charged with knowledge of the infection, his client, being also charged with such knowledge, has certainly contributed to his own hurt.

If this theory be not correct, and he depends upon the actual knowledge of the company, without any knowledge of his own, as he alleges in the complaint, then is the verdict entirely without evidence to support it.

Upon any view presented by this record, the verdict and judgment is erroneous.

Reversed and remanded.

LEEP *v.* RAILWAY COMPANY.

Opinion delivered February 3, 1894.

58 407
59 528

58 407
64 85
64 95

58 407
f66 413

58 407
69 528
d69 535

58 407
e70 228

58 407
75 139
75 335
75 545
77 386

58 407
80 137

58 407
e85 354

58 407
f86 149
87 592

58 407
f89 423
89 471

1. *Constitutional law—Act prohibiting withholding of employee's wages.*

The act of March 25, 1889, which provides (sec. 1) that "whenever any railroad company or any company, corporation or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or sub-contractor engaged in the construction of any such road or bridge, shall discharge with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid," is, as to natural persons, an invasion of the right, secured by sec. 3 of art. 2 of the constitution, "of acquiring, possessing and protecting property;" but as to corporations the act is a valid exercise of the right reserved by the constitution (art. 12, sec. 6, Const. 1874) "to alter, revoke or annul any charter of incorporation."

2. *Construction—Payment "without abatement or discount."*
The requirement of the act of March 25, 1889, that wages earned shall be paid "without abatement or discount" means without discount on account of the payment thereof before they were due under the contract, and does not prevent the employer from offsetting any damages sustained by the employee's failure to perform his contract.

3. *Constitutional law—Special legislation.*
The act of March 25, 1889, being general and uniform in its operation upon all persons coming within the class to which it applies, does not, (if amendments to charters can) come within the inhibition of the constitution (art. 5, sec. 25) against special legislation.

4. *Jurisdiction—Justice of the peace.*
In providing that if the wages of a discharged servant or employee be not paid to him on the day of his discharge, "then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid," the act of March 25, 1889, contemplates the payment of the additional sum not as a penalty but as compensation for the delay and punishment for the failure to pay, and in a proper case a justice of the peace has jurisdiction of a suit for recovery of the amount due under the statute.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

Marshall & Coffman for appellant.

The act of March 25, 1889, is not unconstitutional. If it is a legitimate exercise of the police power, there is nothing in the Constitution of the United States, or any of its amendments, to interfere. 123 U. S. 623; 140 *ib.* 545. Nor is there in the State constitution, for no State or people can part with this power by contract or otherwise. 18 A. & E. Enc. Law, 745-6; 101 U. S. 814. This power extends to the prohibition of all things hurtful to society, so reasonably exercised as not to invade constitutional rights, as defined by the courts. 10 L. R. A. 135 and note; 18 A. & E. Enc. L. 740; 3 *ib.* 689; 67 Ill. 37; 70 *id.* 192; Tied. Lim. Police Power, secs. 1, 2, 3. Railroads, engaged in business affecting the public interest, are subject to police regulations as

to charges and many other things. The test is whether the act is designed and does tend to protect some public or private right from some injurious act. Tied. Lim. Pol. Power, 561, 590, 594–9; 63 Me. 269; 27 Vt. 140; 94 U. S. 113; *Ib.* 155; 143 U. S. *(Budd* v. *People);* 120 Mass. 283. The relation of employer and employee, when connected with a public interest, safety and welfare, are the subject of police regulation. Tied. Lim. of Police Powers, sec. 179. The legislative opinion that police regulation in this regard is necessary is final. The responsibility is purely political, no appeal lying except to the people at the polls. 123 U. S. 623; 127 *id.* 678; 18 A. & E. Enc. Law, 746–7. The act was passed to correct an evil—the discharge of employees without warning. The efficiency of the public service depends upon prompt payment and proper employment and discharge of employees. It does not attempt to fix the wages of laborers, or control the right to contract, but to render the discharge ineffectual until his wages are paid, nor does it injure the company. If the business of *constructing* railroads and bridges is not affected with a public interest, that part of the act may be stricken out, and the rest allowed to stand. 37 Ark. 356 and subsequent cases. It may be held to extend to *corporations* only which are the subject of legislative control. Our constitution gives the power "to correct *abuses*, prevent discriminations and *unjust charges*," etc., and to "alter, revoke or annul any charter * * whenever *in their opinion* it may be injurious to citizens," so that no injustice be done to corporators. This gives the legislature power to recall every right, privilege or immunity derived directly from the State. 99 U. S. 700; 95 *id.* 319; 8 A. & E. Enc. Law, 628. The only limit is that property or rights which have become vested cannot be taken away. *Ib.* 629, 633; 111 N. Y. 46, and cases *supra*; 15 Wall. 459. Corporations have no inherent

right to make contracts, and the act does not invade the right of the laborer. It does not impair any obligation. It is prospective in its operation. 121 U. S. 388. See the following cases illustrative of the principle contended for. 6 Atl. Rep. 354; 10 S. E. Rep. 285; 9 West. Jur. 347; 16 Wall. 678; 19 A. & E. Enc. Law, 780–5; 8 *ib.* 628–9; 7 N. E. Rep. 631; 110 Ill. 590; 23 N. E. Rep. 253; 55 Md. 79; 2 Q. B. 281; 20 S. W. Rep. 332; 22 S. W. Rep. 350; 31 N. E. Rep. 395; 32 *id.* 364; 25 Atl. 246; 32 N. E. Rep. 978; 19 S. W. Rep. 910. The act does not deny defendant its day in court, or take its property without due process of law. 115 U. S. 512; 129 *id.* 26; Cooley, Const. Lim. 353–8; 96 U. S. 97. The freight act was sustained in 49 Ark. 291, and the passenger rate act in 49 *id.* 455. The stock law in 49 Ark. 492 stands on different grounds. See *Baty* v. *Railway*, 6 Neb. The act is not special, unequal or class legislation within the fourteenth amendment, or any provision of our State constitution. It treats all alike, under similar circumstances and conditions. 35 Ark. 69; 49 *id.* 167, 291, 455; 48 *id.* 371; 52 *id.* 529; 33 *id.* 816; 15 *id.* 16; Cooley, Const. L. 390–3; 3 A. & E. Enc. L. 595–8; 8 *ib.* 623, note 1; 101 U. S. 22; 113 *id.* 27, 703; 115 *id.* 321, 512; 127 *id.* 205; 114 *id.* 606; 40 Minn. 117.

Dodge & Johnson for appellee.

The act of March 25, 1889, is unconstitutional and void.

1. It is violative of the bill of rights. Const. art. 2. secs. 3, 21; art. 19, sec. 13. The right to make contracts is inalienable. Three classes of citizens are singled out, and a special law enacted for them alone. Such legislation is discountenanced in 49 Ark. 493. See also 65 Ala. 199.

2. The act violates sec. 7, art. 2, and sec. 13, *ib.* const. It destroys the right of trial by jury. 28 Ark. 461; 8 *id.* 446; 16 *id.* 384.

3. It violates art. 2, secs. 3, 18 and 29, const. It is *class* legislation of the boldest and baldest character—an unjust discrimination in favor of a certain class of employees against a certain class of employers. 6 Neb. 37; 60 Miss. 641; 20 A. & E. R. Cases, 555.

4. The act is *special* legislation, and violative of secs. 25 and 26, art. 5, const. 38 N. W. Rep. 660; *Ib.* 201; Cooley, Const. Lim. marg. p. 391; 100 U. S. 303; 89 Ill. 60; 3 Mo. 326; 4 *id.* 140; 11 Mass. 396; 5 Pick. 65; 3 Humph. 433; 2 Yerg. 260; 20 Cal. 135; 21 Wis. 492; 25 *id.* 560; 4 Heisk. 357; 2 Yerg. 554; 24 Am. Dec. 511.

5. It violates sec. 1, 14th amend. Const. U. S.; 101 U. S. 30; 5 Cr. 61; 20 Wall. 455; 3 Biss. 481; 2 Gall. 135; 37 Barb. 455; 19 Cal. 246; 67 *id.* 594; 4 Otto, 544; 3 Sawyer, 157; 100 U. S. 318; *Ib.* 339-46; 48 Cal. 50; 5 *id.* 74; 100 U. S. 345; 74 N. Y. 191; 17 Alb. L. J. 225; 4 Wheat. 519; 12 N. Y. 209; Cooley, Const. Lim. p. 355; 4 Conn. 209.

6. It is a special and not a general act, and is violative of Federal and State constitutional prohibitions. 6 Atl. Rep. 354; 127 Ill. 294; 7 N. H. 631; 4 Pac. Rep. 801; 55 Cal. 555; 6 Neb. 37; 8 Rep. 195; 28 Grat. 840; 57 Cal. 604; 6 Am. Law Reg. (N. S.) 378; 6 Law Rep. 359; 113 Pa. St. 431; 4 Cent. Rep. 887; 33 W. Va. 179; 115 Pa. St. 131; 117 Ill. 294.

7. It is an act of paternalism, contrary to our form of government, and violative of the spirit and intention of our organic law. 19 S. W. Rep. 910; 143 U. S. 551; 33 Cent. L. J. 237; 26 Pac. Rep. 824; 119 Ill. 294; 34 Cent. L. J. 78; 90 N. Y. 52. The act is class legislation, and an unjust interference with the rights, privileges and property both of employer and employee, and

places upon both the badge of slavery, by denying to one the right to manage his own business, and assuming that the other has so little capacity and manhood as to be unable to protect himself and manage his own private affairs. Every one has a right to adopt and follow any lawful pursuit not injurious to the community. He has the right to labor, and employ labor, and make contracts in respect thereto; to enforce all lawful contracts; to sue and give evidence; and to own, purchase and sell property. The deprivation of these rights is slavery and oppression.

BATTLE, J. The St. Louis, Iron Mountain and Southern Railway Company is a corporation duly organized according to the laws of Arkansas, and is engaged in operating a railroad in this State. S. P. Leep was employed to work for it at the rate of $35 per month of thirty days, and labored under his contract until the 9th of September, 1890, when he was discharged. On the same day he demanded of the company his unpaid wages that were then due, amounting at the contract rate to the sum of $27.90. The company failed to pay then, but promised that it would on the 18th of September, 1890. Leep refused to wait until the day of the promised payment, and brought suit before a justice of the peace for the amount due to him, the $27.90, and also for a penalty for the non-payment of the same on the day he was discharged, at the contract rate from the time of such discharge to the day of bringing the suit. He recovered a judgment for $36.61 and costs. The defendant then appealed to the Pulaski circuit court. He recovered judgment in that court against the defendant for $27.90 and costs, but no penalty or damages; and, failing to recover the penalty, he appealed to this court.

He bases his claim to a penalty or damages upon the act of the general assembly, which is in the following words:

"SECTION 1. Whenever any railroad company or any company, corporation or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or sub-contractor engaged in the construction of any such road or bridge, shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be, and become due and payable on the day of such discharge, or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid. *Provided*, Such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time.

"SEC. 2. That no such servant or employee who secretes or absents himself to avoid payment to him, or refuses to receive the same when fully tendered, shall be entitled to any benefit under this act for such time as he so avoids payment.

"SEC. 3. That any such servant or employee whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time, may, in addition to the penalties prescribed by this act, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty." (Acts, 1889, ch. 61.)

1. Act of March 25, 1889, held constitutional in part.

This act applies to corporations, companies and persons engaged in the business of operating or constructing railroads or railroad bridges, and to contractors and sub-contractors engaged in the construction of any such road or bridge, and requires them to pay their

employees, on the day of discharge or of the refusal to further employ them, the unpaid wages then earned by them at the contract rate, without abatement or deduction. The object of the act is to make it unlawful for such companies, corporations, persons, contractors, or sub-contractors to contract to pay the wages of those employed by them in the operating of railroads or in the construction of such roads or bridges at any time subsequent to the day on which the employees may be discharged, or on which such employer may refuse to longer employ them. In other words, it declares the wages shall be paid on such day, notwithstanding they may not be due according to the contract until a day subsequent. In this respect the act attempts to limit the right to contract. Is it constitutional?

The constitutionality of a legislative act is to be determined solely by reference to those limitations which the constitution imposes. No court ought to "declare a statute unconstitutional and void," says Judge Cooley, "solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizen, unless it can be shown such injustice is prohibited or such rights are guaranteed or protected by the constitution." The judiciary and the legislature are co-ordinate departments of the government; neither of which has a right to invade the province of the other. In determining the validity of a statute, the sole question for the courts to decide is one of power, not of expediency, justice or wisdom. In deciding such questions, they should, in the spirit of the comity and good will that should prevail between the different departments of the government, resolve all doubts in favor of the constitutionality of the acts of the legislature; and, if any act be reasonably susceptible of two constructions, one of which would render it unconstitutional and the other valid, should

give to it the latter, on the presumption that the legislature did not intend to exceed its power. Cooley on Con. Lim. (6th ed.) pp. 157, 200, 203, 208; *Sinking Fund Cases*, 99 U. S. 700, 718; *Munn* v. *Illinois*, 94 U. S. 113; *Powell* v. *Commonwealth*, 114 Pa. St. 292; *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 520.

According to the foregoing test, is the act under consideration constitutional? Section 3 of article 2 of the constitution of this State declares: "All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." Section 8 of the same article ordains that no person shall "be deprived of life, liberty or property, without due process of law." Section 1 of the 14th amendment to the Constitution of the United States provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The right to acquire and possess property necessarily includes the right to contract; for it is the principal mode of acquisition, and is the only way by which a person can rightly acquire property by his own exertion. Of all the "rights of persons" it is the most essential to human happiness.

But the right to contract is not unlimited. The conflicting interests of individuals make this impossible. Rights in conflict with each other cannot be unlimited. Duties to persons, to society, the public and the govern-

ment are imposed on every individual. Every man, when he enters into society, undertakes to perform these duties; and necessarily surrenders some rights or privileges on account of his relation to others. His right to contract becomes subject to these duties; among which is the duty to so conduct himself and use his own property as to not unnecessarily injure another. He submits himself to such restraints and burdens as may conduce to the general comfort, health and prosperity of the State. To conserve and enforce these rights and duties the government can impose such restrictions upon his actions as may be appropriate for that purpose. "This power inheres in every sovereignty, and is essential to the maintenance of public order and the preservation of mutual rights from the disturbing conflicts which would arise in the absence of any controlling, regulating authority."

The legislature can control, to some extent, the right to contract in reference to property "clothed with a public interest, when used in a manner to make it of public consequence, and affect the community at large." "By devoting his property to a use in which the public has an interest, the owner, in effect, grants to the public an interest in that use, and subjects himself to the control of the legislature for the common good, to the extent of the interest he has thus created. Upon this principle, the legislature can fix the maximum of charges for the storage of grain in public warehouses, and for carriage of freight and passengers by common carriers. From the same source comes the power to regulate millers. bakers, hackmen, ferries, wharfingers, inn-keepers, and the like; "and in so doing to fix the maximum of charge to be made for services rendered, accommodations furnished, and articles sold." *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Dow* v. *Beidelman*, 125 U. S. 680; S. C. 49 Ark. 325; *Mobile* v. *Yuille*,

3 Ala. (N. S.) 140. Upon the same principle it was held in *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, "that it is within the power of the government to regulate the price at which water shall be sold by one who enjoys a virtual monopoly of the sale."

It has been held by the courts that the legislature can regulate or prohibit the sale or manufacture of olemargarine, for the purpose of protecting the public against fraud. *Powell* v. *Com.* 114 Pa. St. 265; S. C. 127 U. S. 678; *State* v. *Addington*, 12 Mo. App. 214; S. C. 77 Mo. 110. Common carriers and telegraph companies cannot lawfully stipulate for exemption from responsibility for the negligence of themselves or their servants. *Railway* v. *Lesser*, 46 Ark. 236; *Liverpool Steam Co.* v. *Phœnix Ins. Co.* 129 U. S. 397; *Western Union Telegraph Co.* v. *Short*, 53 Ark. 434. No one can bind himself by an agreement not to engage in any particular business at any time or place. *Taylor* v. *Saurman*, 110 Pa. St. 3. Such contracts are void, because they are injurious to the public, contrary to public policy.

An act which made it unlawful for any person to transport or move, after sunset and before sunrise of the succeeding day, within certain counties, any cotton in the seed, but permitted the owner or producer to remove it from the field to his gin-house, or other place of storage, was held by the Supreme Court of Alabama to be constitutional. The court held that "its object was to regulate traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which, in the opinion of the law-making power, may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory. *Davis* v. *State*, 68 Ala. 58; *Mangan* v. *State*, 76 Ala. 60. Similar statutes have been held to be constitutional by other

courts. *State* v. *Moore*, 104 N. C. 714; *Butcher, etc. Co.* v. *Crescent, etc. Co.* 111 U. S. 746; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Herdic* v. *Roessler*, 109 N. Y. 127; *Brechbill* v. *Randall*, 102 Ind. 528.

There can be no violation of the constitution in the denial of the right to contract to those who are incapable of binding themselves thereby. The term "contract" implies "the existence of a physical and moral power of assenting, as well as a deliberate and free exercise of such power. The absence of any of these capacities in either of the parties to a contract renders the person laboring under it incapable of binding himself thereby." Hence restrictions were thrown around the exercise of this right by seamen. They sustained to the master of a ship a servile relation. At common law they owed to him obedience and respect; and in case of disobedience or disorderly conduct the master could punish them, because discipline is necessary, and "without it the ship would always be in great peril, and no voyage could be successfully conducted." The authority of the master over them was like unto that of a parent over his child, or of a master over his apprentice. This employment, and the usages and customs regulating it, constituted them a servile class, as helpless and dependent in many respects as that of an infant, and demanded the protection accorded to them.

The legislature has the power to prohibit the making of contracts, when it becomes necessary to protect the rights of others. As for example, it can provide by statute, as it did in Pennsylvania, that when the debtor and creditor, and a person or corporation owing money to the debtor, are residents of the State, it shall be unlawful for any citizen to send out of the State, by assignment or otherwise, for or without value, any claim against such debtor, with the intent to deprive him of his exemptions from execution by having collections out

of such money made in the courts of another State; and that the assignor, in such a case, shall be liable in an action of debt, to the person from whom any such claim shall have been collected, by attachment or otherwise, outside of the courts of the State of his residence, for the full amount collected. *Sweeny* v. *Hunter*, 145 Pa. St. 363.

Another illustration of the power of the legislature to restrict the right to contract when it becomes necessary to protect others is furnished by the statutes of this State. It is the duty of every husband to take care of, support and protect his wife and children, and provide them with a home. To aid him in the discharge of this duty, the constitution of this State declares "that the homestead of any resident of this State, who is married or the head of a family, shall not," except in certain specified cases, "be subject to the lien of any judgment or decree of any court, or to sale under execution or other process thereon." The obvious intent of this provision was to secure to every resident, who is married or the head of a family, a home, which he may improve and make comfortable, where his wife and children "may be sheltered and live beyond the reach of misfortunes which even the most prudent and sagacious cannot always avoid." For the purpose of protecting the wife in the enjoyment of this right, the statutes of this State provide "that no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity, * * * * * unless his wife joins in the execution of such instrument and acknowledges the same."

Other instances of statutory regulations of the right to contract may be found in the statutes of many States prohibiting the taking of usury. They rest upon a traditional policy antedating constitutions. They "proceed," says Mr. Justice Scholfield, in *Frorer* v. *People*,

141 Ill. 171, "upon the theory that the lender and borrower of money do not occupy towards each other the same relations of equality that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that the borrower's necessities deprive him of freedom in contracting, and place him at the mercy of the lender." Lord Chief Justice Best, in 1825, in delivering the unanimous opinion of the twelve judges in the House of Lords upon a question submitted to them under the English usury laws, said: "The supposed policy of the usury laws in modern times is to protect necessity against avarice, to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and increase national wealth, and to enable the State to borrow on better terms than could be made if speculators could meet the minister in the money market on equal terms." (*House of Lords*, 3 Bing. 193). So at last they can be based on the right of the legislature to protect the public welfare.

The statutes of fraud are sometimes referred to for the purpose of showing the power of the legislature to control the right to contract. The object of these statutes was to prevent fraud and perjuries. For this purpose some of them provide that certain contracts shall be in writing, in order to prevent controversies, litigation, and false swearing as to the terms of the contract. Others declare that certain deeds, conveyances and transactions shall be void, because they defraud or tend to defraud innocent persons. They are based on the maxim, *Sic utere tuo ut alienum non lædas*. None of them limit the right to contract, but regulate the exercise of it. Mansfield's Digest, secs. 3371–3384. They clearly come within the power of the legislature to protect the rights of persons, prevent wrongs, and enforce honesty and fair dealing in the transactions of individuals.

We have thus far spoken of the limitations that can be imposed on the right to contract. We have seen that the power of the legislature to do so is based in every case on some condition, and not on the absolute right to control. We think it is obvious that the right to contract cannot be limited by arbitrary legislation which rests on no reason upon which it can be defended; for, if it could, the right would cease to exist, and become a license revocable at the will of the legislature, and the government would become a despotism in theory, if not in fact. Such a power cannot exist, for, if it could, it would be subversive of the right to enjoy and defend liberty, to acquire and possess property, and to pursue happiness, declared to be inalienable by the constitution of this State.

When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof. In *State* v. *Goodwill*, 33 W. Va. 179, the Supreme Court considered the constitutionality of a statute of West Virginia, which declared "that it shall not be lawful for any person, firm, company, corporation, or association engaged in mining coal, ore, or other minerals, or mining and manufacturing them or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing, * * * to issue for the payment of labor any order or other paper whatsoever unless the same purports to be redeemable for its face value in lawful money of the United States, bearing interest at a legal rate, made payable to employee or bearer, and redeemable within a period of thirty days by the person, firm, company, corporation or association giving, making or issuing the same." The court held that the statute

was unconstitutional and void, and said: "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit; and, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell or convey property of any kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression."

A Missouri statute made it unlawful "for any corporation, person or firm engaged in manufacturing or mining to issue for the payment of wages, any order, check, or other token of indebtedness, payable otherwise than in lawful money, unless the same is negotiable and redeemable at its face value, in cash, or in goods, at the option of the holder, at the store or other place of business of the corporation, person or firm;" and provided that the order, check, memorandum, or other evidence of indebtedness so issued should, upon presentation and

demand, within thirty days from date or delivery thereof, be redeemed by the person or corporation issuing the same, in goods, at the current cash market price for like goods, or lawful money, as may be demanded by the holder. In *State* v. *Loomis*, 22 S. W. Rep. 350, the Supreme Court of Missouri (Barclay, J., dissenting) held this statute unconstitutional. Similar statues were held unconstitutional in *Godcharles* v. *Wigeman*, 113 Pa. St. 431; *State* v. *Fire Creek Coal & Coke Co.* 33 W. Va. 118; *Ramsey* v. *People*, 142 Ill. 380; and *Braceville Coal Co.* v. *People*, (Ill.), 35 N. E. Rep. 62.

In *Com.* v. *Perry*, 155 Mass. 117, the statute under consideration provided that "no employer shall impose a fine upon or withhold the wages or any part of the wages of an employee engaged at weaving for imperfections that may arise during the process of weaving." The court held that the statute was unconstitutional, and in doing so said: "Article 1 of the declaration of rights of the constitution of Massachusetts enumerates among the natural inalienable rights of men the right of acquiring, possessing, and protecting property. * * * The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is therefore protected by our Constitution, and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our Constitution. If the statute is held to permit a manufacturer to hire weavers, and

agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employee does his work negligently, and fails to perform his contract. For it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to everyone when it declares that he has a natural, inalienable right of 'acquiring, possessing and protecting property.' Whichever interpretation be given to this part of the act, we are of opinion that it is unconstitutional."

In *San Antonio & Aransas Pass Railway* v. *Wilson*, 19 S. W. Rep. 910, it appears that the legislature of Texas passed an act providing that, in the event a railroad company shall refuse to pay, under certain circumstances, its indebtedness to an employee, within fifteen days after demand thereof, it shall be liable to pay such employee twenty per cent on the amount due him for damages, in addition to the amount due, and that such damages shall not be less than five nor more than one hundred dollars. The Supreme Court of Texas held the act unconstitutional; and, among other things, said: "Article 10, sec. 2 of the State constitution declares that all railroads are public highways, and railroad companies common carriers; that the legislature shall pass laws to regulate freight and passenger tariffs; to correct abuses and prevent unjust discrimination and extortion in

the rates of freight and passenger tariffs on the different railroads in this State, and enforce the same by adequate penalties; and, to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable. * * * There is no question as to the scope of this section of our constitution. Its provisions necessarily refer to and contemplate all injuries to the public arising out of a violation of duties due by the railway company to the public as a common carrier. Within this broad field, it rests with the legislature to determine what are those duties to the public, and what constitute abuses and injuries, and also what remedies are necessary to prevent them; and to decide whether the abuses shall be corrected through statutes which declare the act or acts to be a crime punishable as such, or whether the act or acts shall be corrected through a civil action, with punitive damages. * * * But when we consider the relation of railway companies to their own servants, both as to acts of employment and payment, we find a field in which special legislation has no right ordinarily to enter, and in which railways stand on the same footing with all other corporations or persons, and which cannot be contemplated or included within the scope of section 2, art. 10. * * * * * We think the position taken by appellant is correct, and section 2, art. 10, contemplates only the public duties of railways, and excludes all right of interference with the employment or payment of their servants."

The Texas act, as it appears from the quotation we have made, was held to be unconstitutional, because the constitution of Texas confined legislation in respect to railroads to the duties they owe to the public as common carriers, and excludes all right of interference by the legislature with the employment or payment of their

servants. Article 10, section 2, of the Texas constitution, so far as it is set out in the last case referred to, is substantially incorporated into our constitution, except there is no provision in ours expressly authorizing the establishment of means and agencies with power to enforce it as to railroads; and it does not appear in the opinion in that case that there is any power reserved in Texas to the legislature to amend or repeal charters.

An Indiana statute "forbade the execution of contracts waiving the payment of wages in money." This statute was held to be constitutional in *Hancock* v. *Yaden*, 121 Ind. 366, on the ground that it "protected and maintained the medium of payment established by the sovereign power of the nation."

A statute of West Virginia prohibited the payment of employees in paper redeemable otherwise than in lawful money; and another provided that coal should be weighed and measured, before it is screened, in a certain way, and that all coal paid for by weight, shall be paid for according to such weight, at the price agreed on, and that all coal paid for by measure shall be paid for according to such measure at the contract rate. The court, in *Peel Splint Coal Co.* v. *State*, 15 S. E. Rep. 1000, held that these statutes were constitutional, two judges dissenting. The court said: "We base this decision in this case, *first*, upon the ground that the defendant is a corporation in the enjoyment of unusual and extraordinary privileges, which enables it and similar associations to surround themselves with a vast retinue of laborers, who need to be protected against all fraudulent or suspicious devices in the weighing of coal or in the payment of labor; *secondly*, the defendant is a licensee, pursuing an avocation which the State has taken under its general supervision for the purpose of securing the safety of employees, by ventilation, inspection, and governmental report, and the defendant, there-

fore, must submit to such regulations as the sovereign thinks conducive to public health, public morals, or public security."

Hancock v. *Yaden*, *supra*, and *Peel Splint Coal Co.* v. *State*, *supra*, are against the weight of authority, but they do not hold that the legislature has the absolute power to limit the right to contract.

The legislature cannot regulate or restrain the right of individuals to contract by making it unlawful for them to agree with each other that wages shall be paid at any specified time subsequent to the day on which the labor by which they are earned shall be completed, or that the price of property sold shall be paid on a day subsequent to the sale. Such a contract as to the time of performance is necessarily harmless, of purely and exclusively private concern, and cannot affect any one except the parties. It is an important means used in the acquisition of property, which sells for more on time than for cash. Labor commands higher wages when they are payable in the future than it does when they are paid at the time of performance. A large proportion of the business of the world is transacted on a credit. Nations, states, counties, towns and persons contract debts payable in the future. Property is sold on time under executions, judgments and decrees of courts. The right of persons to sell or labor on a credit is everywhere and by all recognized as legitimate, and is protected by the constitution in the declaration that the right to acquire and possess property is inalienable.

But what is true of persons is not always true of corporations. Natural persons do not derive the right to contract from the legislature. Corporations do. They possess only those powers or properties which the charters of their creation confer upon them, either expressly, or as incidental to their existence; and these

may be modified or diminished by amendment or extinguished by the repeal of the charters.

The constitution of 1874 (art. 12, sec. 6.) ordains: "Corporations may be formed under general laws; which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State; in such manner, however, that no injustice shall be done to the corporations." The constitution of 1868 (art. 5, sec. 48) declared: "The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed." Under these constitutions the general assembly has enacted statutes providing for the organization of corporations; and from them the corporations of this State derive their powers subject to the power of the legislature to change them by amending the laws under which they were organized.

As said by Mr. Justice Miller, in *Greenwood* v. *Freight Co.* 105 U. S. 13, 19: "A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power." Continuing, he said, in the same case: "As early as 1806, in the case of *Wales* v. *Stetson*, (2 Mass. 143,) the Supreme Court of that State made the declaration 'that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation.' In *Trustees of Dartmouth College* v. *Woodward* (4 Wheat. 518), decided in

1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the Federal constitution against impairing the obligation of contracts, which, though received at the time with dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher* v. *Peck* (6 Cranch, 87) and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the State could not impair. It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the State legislatures could retain in a large measure this important power, without violating the provision of the Federal constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the con-

tract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation."

In order to avoid the consequences of the rule laid down in the Dartmouth College case, many States have availed themselves of Judge Story's suggestion. In chartering the Union Mining Company the legislature of Maryland reserved the right to amend or repeal its charter at pleasure. Afterwards it passed an act providing "that every corporation engaged in mining or manufacfacturing, or operating a railroad in Allegany county, and employing ten hands or more, shall pay its employees the full amount of their wages in legal tender money of the United States," and "that every such employee shall be entitled to receive from any such corporation employing him, the whole or so much of the wages earned by him as shall not have been actually paid to him in legal tender money of the United States without set-off or deduction of his demand in respect of any account or claim whatever." The Union Mining Company was sued after the enactment of this act by Shaffer & Munn for wages due to its employees. Mr. Justice Irving, in commenting on this act, in that case, said: "It being conceded that the legislature, when it incorporated the Union Mining Company, reserved the right to alter or amend its charter at pleasure, there can be no doubt that the legislature could enact a law prohibiting the corporation from paying its employees otherwise than in money, and that it could forbid the corporation from making contracts with them for payment in anything but money. * * * The acceptance by the corporation of a charter, with the reservation of the right to alter and amend, made that provision a part of the contract, which, as between the legislature and it, as a private corporation, it must be understood to be. A corporation has no inherent or natural rights like a

citizen. It has no rights but those which are expressly conferred upon it, or are necessarily inferrible from the powers actually granted, or such as may be indispensable to the exercise of such as are granted. A private corporation is only a *quasi* individual, the pure creation of the legislative will, with just such powers as are conferred expressly or by necessary implication and none others. Whatever, therefore, may have been the mischief intended to be reached and prevented by this law, by restrictions imposed on the corporation, it was competent for the legislature by this law, which operates as an amendment of its charter, to accomplish." *Shaffer & Munn* v. *Union Mining Co.* 55 Md. 74.

A statute of Rhode Island provides: "All acts of incorporation hereafter granted may be amended or repealed at the will of the general assembly, unless express provision be made therein to the contrary." The Brown & Sharpe Manufacturing Company was incorporated by the general assembly of Rhode Island for the purpose of manufacturing machinery, subject to a chapter of which this statute was a part. After the incorporation of it, the legislature passed an act requiring corporations to pay weekly the employees engaged in its business the wages earned by them to within nine days of the date of such payment, unless prevented by inevitable casualty. In *State* v. *Brown & Sharpe Manufacturing Company*, 25 Atl. Rep. 246, which was an action for the violation of this act, the Supreme Court of Rhode Island held that the act was constitutional, and that it operated as an amendment to the charter of the corporation sued, as it was a reasonable exercise of the power to amend.

In the *Sinking Fund Cases*, 99 U. S. 700, "the question was whether Congress had the constitutional power to enact a law compelling the Union Pacific and Central Pacific Railroad Companies to set aside a por-

tion of their current earnings as a sinking fund for the purpose of meeting a very large indebtedness secured by mortgage upon the roads, and payable at a future day. The majority of the court held that the legislation was valid as an exercise of the general legislative powers of the government, and also because the right to alter or amend the charters of the companies had been expressly reserved to Congress."

In commenting on the reserved power to amend or repeal the charters of corporations, in that case, Chief Justice Waite, in delivering the opinion of the court, said: "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in *Miller* v. *The State* (15 Wall. 498), 'it may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;' and again, in *Holyoke Company* v. *Lyman* (*id.* 519), 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.' Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson* v. *Jessup* (*id.* 459), he said 'the reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State;' and again, as late as *Railroad Company* v. *Maine* (96 U. S. 510), 'by the reservation * * * the State retained the power to alter it (the charter) in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and im-

munities. 'Mr. Justice Swayne, in *Shields* v. *Ohio* (95 U. S. 324), says, by way of limitation, 'The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of an amendment or alteration.' The rules as here laid down are fully sustained by authority."

In speaking of the reserved power to amend or repeal the charters of corporations, Mr. Justice Gray, in delivering the opinion of the court in *Commissioners, etc.* v. *Holyoke Water Power Company*, 104 Mass. 451, said: "It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights. Under such a clause, for instance, the legislature may make the stockholders of an incorporated bank liable for the future debts of the corporation. *Sherman* v. *Smith*, 1 Black, 587; S. C. *nom. In re Lee & Co.'s Bank*, 21 N. Y. 9. It may vary the measure, and thus enlarge the proportion of the profits which a mutual life insurance company is required by the terms of its charter to pay to a charitable institution. *Massachusetts General Hospital* v. *State Assurance Co.* 4 Gray, 227. Railroad corporations may be compelled, by general or special laws, to make changes in the level, grade and surface of the road-bed, new structures at crossings of other railroads or of highways, or station-houses at particular places, in a manner, and to be enforced by forms of process, different from those provided for or contem-

plated by the original charter, or the general laws in force when that charter was granted. *Roxbury* v. *Boston & Providence Railroad Co.* 6 Cush. 434; *Fitchburg Railroad Co.* v. *Grand Junction Railroad & Depot Co.* 4 Allen, 198; *Commonwealth* v. *Eastern Railroad Co.* 103 Mass. 254; *Albany Northern Railroad Co.* v. *Brownell*, 24 N. Y. 345, overruling *Miller* v. *New York & Erie Railroad Co.* 21 Barb. 513."

In *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, it appears that the constitution of the State of California "provided that corporations might be formed under general laws, and should not be created by special act, except for municipal purposes; and that all laws, general and special, passed pursuant to that provision, might be, from time to time, altered and repealed. A general law was enacted by the legislature for the formation of corporations for supplying cities, counties and towns with water, which provided that the rates to be charged for water should be fixed by a board of commissioners, to be appointed in part by the corporation and in part by the municipal authorities. The constitution and laws of the State were subsequently changed so as to take away from corporations which had been organized and put into operation under the old constitution and laws the power to name members of the boards of commissioners, and so as to place in the municipal authorities the sole power of fixing rates for water." The court held that "these changes violated no provisions of the constitution of the United States." Chief Justice Waite, speaking for the court, said: "The Spring Valley Company is an artificial being, created by or under the authority of the legislature of California. The people of the State, when they first established their government, provided in express terms that corporations, other than for municipal purposes, should not be formed except under general laws, subject at all

times to alteration or repeal. * * * In California the constitution put this reservation into every charter, and consequently this company was from the moment of its creation subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body." See *State* v. *Brown & Sharpe Manf'g Co.* 25 Atl. Rep. 246.

It is obvious that the legislature cannot, under the power to amend, take from corporations the right to contract; for it is essential to their existence. It can regulate it when the interest of the public demand it, but not to such an extent as to render it ineffectual, or substantially impair the object of incorporation. The constitution of this State, in reserving the power to amend or repeal, expressly provides that it may be exercised whenever, in the opinion of the legislature, the charter "may be injurious to the citizens of this State; in such manner, however, that no injustice shall be done to the corporators." Article 12, section 6.

Whenever the charters of railroad companies become obstacles in the way of the legislature so regulating their roads as to make them subserve the public interest to the fullest extent practicable, their charters are, in that respect, injurious to the citizens of the State, and can be amended as to defects in such manner as will be just to the corporators. For they are organized for a public purpose, and their roads are declared by the constitution to be public highways, and they are made common carriers. They are clothed with a public trust, and in many respects are expressly subjected by the constitution to the control of the legislature. There is no enterprise in which the public is so largely interested as it is in the successful and efficient operation of railroads. With the trust with which they are clothed is imposed the duty to serve the public as common carriers in the most efficient manner practicable. For this reason

the legislature may impose on them such duties as may be reasonably calculated to secure such results. Being created by statute, the legislature may so change them by amendment as to make them subserve the purpose for which they were created. If the legislature, in its wisdom, seeing that their employees are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employees when the same is fully performed, at the end of their employment. If it be true that in doing so it would interfere with contracts which are purely and exclusively private, and thereby limit their right to contract with individuals, it would nevertheless, under such circumstances, have the right to do so under the reserved power to amend.

But we do not mean, by holding as we do, to intimate that the legislature can, by way of amendment, fix or limit the compensation of employees of railroad companies. That might seriously affect one of the principal charter rights of the companies, and thereby substantially impair the object of their incorporation. Such a power would be subversive of the right, and, when exercised to its fullest extent, would leave to the corporation the privilege of selecting its employees without the right of contracting with them. An amendment to that extent would be, manifestly, unjust to the companies, and violative of the constitution, which, while it grants the right to amend when in the opinion of the legislature the charter is injurious to the citizens, limits the right to do so to amendments that are just to the corporators. The act in question is not subject to that imputation. It is prospective in its operation, and leaves

to the corporations the right of making contracts with their employees on advantageous terms.

2. Meaning of phrase "without abatement or deduction."

Is the act before us a proper amendment? It provides, among other things, that whenever any corporation "engaged in the business of operating or constructing any railroad or railroad bridge" shall discharge *with cause* any servant or employee thereof, "the *unpaid* wages of any such servant or employee, then *earned* at the contract rate, *without abatement or deduction*, shall be and become due and payable on the day of such discharge;" "and if the same be not paid on such day, then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid." This provision is susceptible of two constructions, one of which makes the act require the corporation to pay the employee all the wages to which he would have been entitled had he fully performed his contract up to the time of his discharge, notwithstanding he had failed to do so, and had damaged the corporation thereby. If this be its intention, it is unconstitutional, because its enforcement might take property from the corporation without due process of law. For the employee is not entitled to the stipulated wages until he has performed the contract. He may have damaged his employer, by the failure to do so, in a sum larger than the wages he would have been entitled to receive in the event he had complied with his agreement. To compel the corporation, in such a case, to pay any sum whatever, would be a deprivation of property without due process of law. The same would be equally true if the corporation should be compelled to pay full wages when the damage caused by the non-performance of the contract does not exceed them. (*Com.* v. *Perry*, 155 Mass. 117.) Such an amendment of the charters of corporations is clearly unjust to the corporators.

The other construction is more reasonable. It makes the words "without abatement or deduction" mean "without discount." The legislature evidently thought that the employee might receive money or property in the course of his employment in part payment for his labor, and evidently intended that the wages thus paid should not be repaid. A strict construction of the words "without abatement or deduction" would deprive the corporation of a credit for the money or property in a settlement with its employee for his services. Then, again, the act requires the corporation to pay only the unpaid wages earned, at the contract rate, at the time of his discharge. Stipulated wages cannot be earned except by the performance of the contract by which the employer agrees to pay them. Obviously, then, the act means, by the words "without abatement or deduction," that the unpaid wages earned at the contract rate at the time of the discharge shall be paid without discount on account of the payment thereof before the time they were payable according to the terms of the contract of employment. When construed in this manner, this provision of the act is constitutional, and it is our duty to so construe it.

Tested by the principles of law we have indicated, the act under consideration is unconstitutional so far as it effects natural persons. As to corporations, it is a valid statute. It does not seriously impair their right to contract, but leaves them to contract with their employees on profitable terms.

So much of the act as is unconstitutional can be eliminated, and the remainder stand. (*State* v. *Marsh*, 37 Ark. 356; *L. R. & F. S. Ry.* v. *Worthen*, 46 Ark. 312; *State* v. *Deschamp*, 53 Ark. 490; *Davis* v. *Gaines*, 48 Ark. 370, 383.) After this elimination, so much of the first section of the act as remains in force reads as follows:

"Sec. 1. Whenever any corporation, engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge with or without cause, or refuse to further employ, any servant or employee thereof, the unpaid wages of such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable, on the day of such discharge or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid. *Provided*, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time."

It cannot be truthfully said that so much of the act as we find to be in force is unconstitutional, because it interferes with the rights of employees to make such contracts with corporations as they see fit. As said in *State* v. *Brown & Sharpe Manufacturing Co.* 25 Atl. Rep. 253, "No inhibition is placed upon employees to make such contracts as they choose, with any person or body, natural or artificial, that is authorized to contract with them. But corporations are artificial bodies, and possess only such powers as are granted to them, and natural persons dealing with them have no right to demand that greater power should be granted to corporations in order that they may make other contracts with such corporations than the corporations are authorized to enter into."

3. The act not special legislation.

The "act being general and uniform in its operation upon all persons coming within the class to which it applies, it does not (if amendments to charters can) come within that special legislation prohibited by the constitution. For it applies to and embraces all persons 'who are or may come into certain situations and circumstances,' and is general and uniform; not because it op-

erates upon every person in the State, for it does not, but because every person who is brought within the relations and circumstances provided for is affected by the law." *L. R. & F. S. Ry. Co.* v. *Hanniford*, 49 Ark. 291; *McAunich* v. *Mississippi & Missouri Railroad Co.* 20 Iowa, 342; *Missouri Railway Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis Railway Co.* v. *Beckwith*, 129 U. S. 27; *In re Fred Oberg*, 21 Oregon, 406; *Hawthorn* v. *People*, 109 Ill. 311; *Youngblood* v. *Birmingham Trust & Sav. Co.* 12 So. Rep. 579; Cooley on Const. Lim. (6th Ed.) 480, 481.

4. Jurisdiction of magistrate.

This action was brought before a justice of the peace for the recovery of wages earned, and the penalty or damages allowed by the act on account of the non-payment thereof from the time the wages were due to the day of bringing the suit. The question arises, did the justice of the peace have jurisdiction? We have held that a justice of the peace did not have jurisdiction in an action for the recovery of a statutory penalty. *B. & O. Tel. Co.* v. *Lovejoy*, 48 Ark. 301. On the other hand, the jurisdiction of justices of the peace in actions for the recovery of punitive or exemplary damages has been sustained. The question, then, is, is the amount allowed to the employee, in addition to the wages earned, a penalty or exemplary damages? The answer depends on the interpretation of so much of the act as is in the following words: "And if the same (wages) be not paid on such day, then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid." According to the act, the wages earned become due when the employee is discharged, or the employer refuses to longer employ him. The additional amount is allowed on account of the failure to pay the wages when due, and is regulated according to the length of the delay of payment. It is allowed for a double purpose, as a compensation for the delay,

and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages. *Day* v. *Woodworth*, 13 How. 363; *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512; *Minneapolis Railway Co.* v. *Beckwith*, 129 U. S. 34-36; Sedgwick on Damages (6th Ed.), page 35. The name given to it by the act cannot change it. Our conclusion is, the additional amount is allowed as exemplary damages, and that the justice of the peace had jurisdiction in this action.

The judgment of the circuit court is, therefore, reversed, and judgment will be rendered by this court in favor of appellant against appellee for $27.90, and $3.50 as exemplary damages, the amount sued for, and all his costs.

BUNN, C. J., dissenting. The constitutionality of the act entitled "An act to provide for the protection of servants and employees of railroads," approved March 25, 1889, is called in question by the plea of the appellee company, which was sustained in the court below, and the appellant appeals to this court.

The majority of the court holds that the act in question, in so far as it affects private individuals, is unconstitutional, but that in so far as it affects corporations, it is constitutional; and, furthermore, that it is divisible, so that the unconstitutional part may be eliminated and the valid part may stand. The court also holds that the act, in fact, does not interfere with the right to contract, but only affects some of its incidents, if I fully comprehend its meaning. From the decision of the majority of the judges, I feel constrained to dissent, for reasons that follow.

Since the court, in its well considered opinion, holds that the act in question, according to the weight of authority, cannot stand upon the ground that is a legitimate expression of the police or of any of the other great

powers said to be inherent in government, I am relieved of the necessity of discussing the question involved from that standpoint, and therefore address myself directly to the consideration of the constitutional provision subjecting incorporation statutes to the legislative power of alteration and repeal on the one hand, and of alteration, revocation and amendment of charters on the other, to be found in section 6, article 12 of the constitution, from which, and from which alone, the court derives the authority to enact the act in question and similar acts.

The act is as follows: "Section 1. Whenever any railroad company or any company, corporation or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or subcontractor engaged in the construction of any such road or bridge, shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be, and become due and payable on the day of such discharge, or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid. *Provided*, Such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time.

"Sec. 2. That no such servant or employee who secretes or absents himself to avoid payment to him, or refuses to receive the same when fully tendered, shall be entitled to any benefit under this act for such time as he so avoids payment.

"Sec. 3. That any such servant or employee whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time, may, in addition to the penalties prescribed by this

act, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty.

"Sec. 4. That this act shall take effect and be in force from and after its passage."

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

It is stated in the opinion of the court that the act would be treated as amendatory of our incorporation laws; and thus it was thought to give it the effect of accomplishing what is thought to be provided for in the section of the constitution quoted above. At the threshold of the discussion, therefore, we are confronted with a question of the most serious character. It is this: Can this court arbitrarily treat one statute as amendatory of another? That is to say, is it not a legal proposition of itself, whether any statute is amendatory of another, aside from the idea of both dealing with the same or kindred subjects? It will be observed that the act in question does not in terms refer to any other statutes, and, this being so, can any other statute be said to be amended by it?

Section 23, article 5, of the constitution is in these words, viz: "No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived,

amended, extended or conferred, shall be reinstated and published at length." Now, if a law referring to a previous law by title only is not to be considered as amendatory of it, how much more true is it that a subsequent law, which does not refer even to the title of a former law, is not amendatory of the existing or former law?

The prohibition contained in this section of the constitution was not meant as an idle saying, a mere flourish of high sounding words, but was intended to subserve a great purpose—the protection of the citizen against surreptitious legislation. Nor has this court, nor the courts of other States, treated this and similar provisions as light and meaningless things. *Beard* v. *Wilson*, 52 Ark. 290; *Havis* v. *Jefferson*, 14 S. W. Rep. (Ark.) 1101; *Watkins* v. *Eureka Springs*, 49 Ark. 131; *Judson* v. *Bessemer*, 6 So. Rep. 267; *State* v. *City of Trenton*, 22 Atl. Rep. 731; *Board of Comr's.* v. *Aspen Mining Co.* 32 Pac. Rep. 717.

From the decisions on the subject, we gather this principle, that an act, as an independant law, may not be objectionable on constitutional grounds, and yet, as an amendment of some existing law, it may be invalid. The rule is a reasonable one, because no law should be altered or amended without something appears in the amendatory act to give notice to the public of a change in the original law, while if the new act is intended as an independent act, the original act is not affected, and there is nothing to take notice of.

This, perhaps, is enough to say on this part of the subject. The majority of the court, treating the act in question as an independent act, would hold it unconstitutional for reasons assigned in the opinion, which reasons we think sound and incontrovertible. But the majority of the court, treating the act in question as amendatory of our general incorporation laws, (the court does not say which one, for there are two or more,) holds it

to be constitutional under the power reserved to the legislature in the last sentence, (section 6, art. 12, of the constitution,) and I have endeavored to show that the act can have no place as an amendment, because it does not show a compliance with the constitution in the manner of its enactment as such amendment.

The last sentence of the sixth section of article twelve of the constitution manifestly refers to corporations created and to be created by special acts of the legislature, judging from the words employed and the context. Each charter is then made the subject of legislative alteration, revocation, and amendment, in case it becomes injurious to the citizens of the State, and provided it was revocable at the adoption of the constitution, if already in existence. The charters "hereafter to exist" were doubtless those special charters conferred by legislation to be expressed in special acts.

Now, it does not appear in this case what kind of a corporation the appellee company is, whether it was created under our general incorporation laws, or by special act of the legislature. As a matter of common knowledge, it may be assumed, however, that it was created by a special act, since it is now forty or more years since it became a matter of public concern, and since it had its origin at a time when there was no general incorporation law in this State. There could then be no grant of corporate powers for strictly private purposes. All such were considered in conflict with the constitutional prohibition of monopolies. Strictly public, or municipal, and *quasi* public, such as railroad corporations, were all that were allowable. The former were strictly at the will and pleasure of the legislature; the latter were the result of contract between the State and corporators, and by their contracts were both State and corporations to be governed. *The State* v. *Curran*, 12 Ark. 321. Of this latter class, presumably, was the

appellant company, and to show that its charter is the subject of legislative alteration, revocation or amendment we must look to the language of the contract—the charter—which does not appear in evidence in this cause.

---

58 446
65 469
58 446
74 323
446
58 206
87

ROSEWATER v. SCHWAB CLOTHING CO.

Opinion delivered February 3, 1894.

1. *Attachment—Intervention—Oral pleading.*

Since the code requires all pleadings in the circuit court to be in writing, it is error to refuse to require an attaching creditor to file a written answer to an interplea; but the error of permitting an oral answer is not prejudicial if the single issue tendered is such that it could not be misunderstood by the jury.

2. *Attorney and client—Privileged communications.*

On the issue whether a purchase of a stock of goods was *bona fide*, the evidence of an attorney that he informed the purchaser, a few days before the sale, that he held claims against the seller is not objectionable as a communication from attorney to client, although the purchaser had sought advice from such attorney and thereby caused him to suspect that he contemplated purchasing the goods.

3. *When admission of incompetent evidence not prejudicial.*

The admission of evidence which is immaterial as well as incompetent is not prejudicial where there was other and competent evidence amply sufficient to sustain the finding of the jury.

4. *Fraudulent sale—Notice to purchaser.*

One who purchases a stock of goods with actual knowledge of his vendor's fraudulent intent, or with notice of such facts and circumstances as would put a prudent man upon inquiry and would lead to knowledge of such fraudulent intent, takes no title as against the vendor's creditors.

Appeal from Carroll Circuit Court, Western District.

EDWARD S. MCDANIEL, Judge.

Pittman & Stuckey for appellants.

1. There was no issue made by the pleadings. The interpleaders were claimants of the goods, and filed their complaint under section 356, Mansfield's Digest, and the court should have required plaintiff to answer, so as to make an issue of fact. Pleadings must be written. Mansfield's Digest, secs. 4124, 5020, 5024–5.

2. Mrs. Thornton could not testify, for her husband was a party. 34 Ark. 675.

3. The testimony of A. Davis should not have been admitted. He was the attorney of Pendergrass. 21 Ark. 387.

4. The court erred in its instructions. 31 Ark. 554; 18 *id.* 123.

Crump & Watkins and *A. Davis* for appellees.

1. It was not error to refuse to require plaintiff to answer the interplea. Mansf. Dig. secs. 356, 358; Waples, Att. 481–2; 53 Ark. 133; 47 *id.* 31.

2. If Gadd's testimony was inadmissible, appellants should have specifically referred to the facts constituting the error. 39 Ark. 420; 44 *id.* 213; Thompson on Trials, sec. 2756.

3. The admission of the testimony was harmless, and not a reversible error. 55 Ark. 163.

4. The testimony of Davis was admissible; he was not the attorney of Pendergrass. 12 Pa. St. 304; 1 Gr. Ev. (14th ed.) sec. 244; Mechem, Ag. sec. 883.

5. There is no error in the charge of the court. 55 Ark. 244; 49 *id.* 147.

6. The evidence makes a clear case of a fraudulent sale. 45 Ark. 520; 50 *id.* 314; 55 *id.* 579; 3 McCrary, 638; 6 Wall. 299; 101 U. S. 141; Bump, Fr. Conv. (3d ed.) pp. 201–2–3.

MANSFIELD, J. The Schwab Clothing Company brought an action in the Carroll circuit court against K.

B. Thornton to recover the amount of a debt due to that company from Thornton, and obtained an attachment against his property, on the alleged ground that he had sold and conveyed it with the fraudulent intent to cheat, hinder, or delay his creditors. The attachment was levied upon a stock of merchandise found in the possession of B. J. Rosewater and H. T. Pendergrass, who had purchased the same from Thornton before the attachment issued. Rosewater and Pendergrass having filed an interplea claiming the attached property, and no answer thereto having been filed, they moved the court to require the plaintiff to file such answer. The motion was denied; but, the plaintiff company having stated to the court that it admitted that the goods were purchased by the interpleaders for a valuable consideration, and were delivered to them before the issuance of the attachment, and that they would undertake to defeat the sale solely on the ground that it was made by Thornton to defraud his creditors, and that the interpleaders purchased with knowledge of such intent, the court treated this statement as forming an issue as to the validity of the sale, and ruled that the burden of proof was upon the plaintiff, and that it was entitled to open and conclude the case. The issue thus formed was submitted for trial to a jury, and their verdict was for the plaintiff.

The abstract of the appellant contains neither the instructions given and refused nor the motion for a new trial. The appellees' brief, however, has copied the instructions, and stated three assignments of error, taken, as we suppose, from the motion. We have considered these assignments, but have not gone beyond them to consider points made upon matters not found in the record as abstracted by either of the parties. *Ruble* v. *Helm*, 57 Ark. 304; 21 S. W. Rep. 470.

1. Pleadings in circuit court should be in writing.

1. The first of the assignments thus presented is upon the refusal of the court to require a written answer to the interplea. The code requires all pleadings in the circuit court to be in writing. Mansf. Dig. sec. 5020. If, therefore, it was necessary to answer the interplea at all, the answer could not properly be an oral one, except by consent; and if the interplea was an independent pleading by one occupying the position of a party plaintiff, then it follows that an answer was necessary.

The code provides that "any person may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, * * * * present his complaint, verified by oath, to the court, * * * * stating a claim to the property, or an interest in it, * * * and setting forth the facts upon which such claim is founded, and his claim shall be investigated." Where the claimant is a non-resident, he is required to give the security for costs required of all non-resident plaintiffs before bringing their actions; and it is further provided that "the court may hear the proof, * * * or may impanel a jury to inquire into the facts." Mansf. Dig. secs. 356, 358.

If the facts stated in the claimants' complaint are not sufficient to constitute a title to, or an interest in, the property, it is certainly not made the duty of the court to proceed with the investigation; and it is equally plain that the plaintiff in the attachment cannot be denied the privilege of questioning the sufficiency of the complaint by demurrer, before being subjected to the delay and expense of an inquiry as to the existence of the facts it alleges. Nor can we think that the statute intends that the claimants, after making oath to their complaint, shall prove the facts on which they rely, although they are undisputed. If they are to be denied, or matter in avoidance is to be set up, we are unable to see why it is not as important in this as it is in other proceedings that the

ground on which the attaching creditor resists the claim should be stated in writing. Thus to have it stated, and by a pleading offering a material and certain issue, would not only facilitate an investigation by the court, but seems to be as essential as it would be in ordinary cases to a proper trial of the claim by a jury. Such appears to have been the view entertained by this court in *Neal* v. *Newland*, 4 Ark. 459, and *Hershy* v. *Clarksville Institute*, 15 Ark. 130. These cases arose under a statute not substantially different from the code provision to which we have referred. In the former case it was held that the interplea of one claiming attached property must be in writing, and embody matter sufficient to support a judgment. In the case last above cited it was held that the claimant could prosecute his claim as an independent proceeding ; and it was said by Chief Justice Watkins that the interplea "proceeds upon the ground of a wrongful injury" to the claimant's "right of possession," and that it was allowed as a "summary," but not, when prosecuted in the circuit court, "informal, substitute" for replevin.

Under a statute very similar to that in force here at the time of the decisions just cited, the Supreme Court of Illinois held that where an interplea claiming attached property remains unanswered, it will be taken to be true; thus placing the interplea, as do other authorities, upon the same footing as any other pleading in the nature of a complaint or petition. *Williams* v. *Vanmetre*, 19 Ill. 293; Boone's Code Pleading, sec. 159a; Waples, Attachment, sec. 7, p. 481. And why should it not be so regarded, since there seems to be no reason for dispensing with an answer to the interplea that is not equally applicable to an action of replevin?

In *Berlin* v. *Cantrell*, 33 Ark. 611, the opinion of the court treats an interplea filed under sec. 5583 of Mansf. Digest, as a proceeding similar to the interplea

filed under the attachment law in force before the adoption of the code. Speaking of the interplea in that case, Chief Justice English said it was in the nature of a cross-action for the property claimed by Mrs. Cantrell, and "was her suit, in which, in legal effect, she was the plaintiff." In two later cases a similar view is taken of the remedy afforded in attachment proceedings by the code provision quoted above. *Sannoner* v. *Jacobson*, 47 Ark. 31; *Rice* v. *Dorrian*, 57 Ark. 545. Commenting on that provision in *Sannoner* v. *Jacobson*, Chief Justice Cockrill says that the "intervening suit is a separate and distinct one." As such is its nature, we think the pleadings in it must be governed by the rules applicable to similar pleadings in other actions. Boone, Code Pleading, sec. 159.

Our conclusion, therefore, on this point is that the court erred in refusing to require a written answer to the interplea of the appellants. But in the present case the error was obviously a harmless one. The oral answer which the appellee was permitted to make appears to have been concisely stated, and the single issue it tendered was such as the jury could not have failed to understand when submitted to them by the court's charge. And, as the answer undertook to avoid the sale of the goods solely on the ground that it was fraudulent, the appellee assumed the burden of proof, and was properly allowed to open and conclude the argument.

2. When communications of attorney not privileged.

2. The second assignment is that the court erred in admitting the testimony of A. Davis and John Gadd. The court permitted Davis, one of appellee's attorneys, to testify that he informed Pendergrass, on the day of the sale to the appellants, or a few days before the sale, that he (Davis) had claims for collection against Thornton. The objection made to this evidence seems

to be that the occasion of the notice it tended to prove was a communication made by Pendergrass to Davis as an attorney, and in asking the latter's advice as to the purchase of a stock of merchandise from a person in debt. But the communication itself was not given to the jury, and it appears from Davis' statement to the court, in the absence of the jury, that Pendergrass, in making the communication, declared that it had no reference to the Thornton stock. The mere fact that the advice requested by Pendergrass caused Davis to suspect that he contemplated the purchase of Thornton's stock, and to give the notice testified to, did not make the fact of the notice inadmissible, and, as Davis' statement before the jury embraced nothing that was said by Pendergrass, and no advice given by Davis, it was clearly competent. *

3. As to admission of incompetent evidence.

3. The witness Gadd, after stating that he was Thornton's clerk, and, during the latter's absence, had charge of his business, was permitted to testify that Thornton's wife had informed the witness that her husband had written to her, directing that no more money be paid out on his debts until he returned. There was no proof of facts sufficient to make this declaration of Mrs. Thornton admissible; for it was not shown that she acted as the agent of her husband in the management of his business, nor that the declaration was made in the course of such an agency, and with reference thereto. *Watkins* v. *Turner*, 34 Ark. 663; *Shields* v. *Smith*, 37 Ark. 47. But there is nothing in the record to indicate that the evidence thus improperly admitted was prejudicial to the appellants. The date of the husband's communication to the wife is not given, and, for aught that appears to the contrary, he may have had reasons for sending it which

*See Mansf. Dig. sec. 2859; *Andrews* v. *Simms*, 33 Ark. 771.

were entirely consistent with an existing purpose to deal honestly and justly with his creditors. It does not appear to have had any connection with the sale, and we cannot suppose that the jury regarded it as a circumstance of much weight or importance. There was other evidence abundantly sufficient to justify the finding of the jury, and the admission of Gadd's testimony was not, therefore, an error for which the verdict should be disturbed. *Greer* v. *Laws*, 56 Ark. 37; *Sharp* v. *Johnson*, 22 Ark. 79, 86.

4. As to notice of fraud.

4. The remaining assignment is upon certain instructions given to the jury against the appellants' objection, and upon the court's refusal to give other instructions which they requested.* The questions raised by this assignment are settled by previous decisions; and it is only necessary to say that we discover no material error in the court's charge, and think that none was committed in rejecting the appellants' requests. *Dyer* v. *Taylor*, 50 Ark. 314; *Adler-Goldman Com. Co.* v. *Hathcock*, 55 Ark. 579, 582.

Affirmed.

---

*The instructions given to the jury over appellants' objections were based upon the theory that a purchaser would be bound by *constructive* notice of his vendor's fraudulent intent, appellants insisting that the purchaser must have *actual* notice. One of the instructions given by the court and objected to by appellants was as follows:

"If you find from the evidence, and by a preponderance thereof, that the defendant, Thornton, at the time of making the sale to the interpleader, Rosewater, made the same with the fraudulent intent to cheat, hinder or delay his creditors, and you further find, by a preponderance of the evidence, that said Rosewater, at the time of purchasing, had knowledge of such fraudulent intent, or had notice of such facts and circumstances as would put him as a prudent man upon inquiry, and which would lead to a knowledge of such fraudulent intent of Thornton, and purchased with such knowledge or notice, then such sale would be void as to creditors of said defendant, Thornton."

RAILWAY COMPANY v. HARRELL.

58 454
65 141
58 454
77 12
58 454
181 597

Opinion delivered February 10, 1894.

1. *Evidence—Previous acts of negligence.*

In an action for the killing of a passenger on a street-car, caused by a collision between the street-car and a railroad train, evidence that the driver of the street-car had been guilty of other and previous acts of negligence at times and places near the time and place of the act complained of is inadmissible to prove his negligence on that particular occasion.

2. *Collision between railway train and street-car—Instruction.*

A charge that if the trainmen "discovered the street-car without a driver, or with a driver who was negligent in his duty, approaching and near the track and in danger of a collision with the railroad train, it became their duty to do all in their power to prevent such a collison," is not open to the objection that it required of the trainmen the highest degree of care toward one not a passenger; since to do all that they could, in the case stated, to prevent a collision was but ordinary and reasonable care under the circumstances.

3. *Imputed negligence.*

Where a passenger upon a street-car is killed in a collision with a railroad train, the negligence of the driver of the street-car will not be imputed to the passenger.

4. *Collision—Negligence of trainmen.*

The court properly charged the jury, in effect, that if the railway company's fireman and engineer, engaged in pushing a train of cars ahead of the engine, on approaching the street-car crossing, were signalled to stop in time to have avoided the collision, but, by reason of negligence, failed to catch the signal, the railway company would be liable.

5. *Collision—Presumption of negligence.*

In an action for a killing caused by collision between a street-car on which deceased was a passenger and a railroad train, the court properly charged the jury that negligence on the part of the street-car company could be presumed from the mere fact of the collision, but that, to justify a verdict against the railway company, a preponderance of the evidence must show that it was guilty of negligence contributing to the injury.

6. *Instruction—Duties of street-car driver.*

In an action for the death of a street-car passenger caused by a collision between the car upon which he was riding and a railway train, if there was no evidence as to the duties of the street-car driver, a charge detailing a set of duties and rules for his guidance was properly refused.

7. *Railway—Negligence of trainmen.*

It was proper to refuse to charge that the railroad men were justified in supposing that the street-car driver would stop before getting upon the track in front of an approaching train, and that, unless they were guilty of negligence in not stopping their train quick enough after discovering the peril of the street-car, the jury could not find a verdict against the railroad company; since the railroad men, before seeing the street-car, might have been guilty of some act of negligence which rendered them incapable of preventing the accident.

Appeal from Lonoke Circuit Court.

ROBERT J. LEA, Judge.

Wallace M. Harrell, as administrator of the estate of J. C. Gist, deceased, brought this action against the Little Rock & Memphis Railway Company and the Little Rock & Argenta Street Railway Company to recover damages for the negligent killing of his intestate. The facts are stated by the court as follows:

This action was instituted in the Lonoke circuit court, at its January term, 1892, by the appellee, administrator, for the benefit of the widow and children of his intestate, J. C. Gist, against both the appellants, for the negligent killing of said Gist, in a collision between their cars in the town of Argenta, on the 26th day of November, 1890, laying his damages at the sum of twenty-five thousand dollars.

There was a trial; verdict and judgment for the full amount claimed; motion for new trial, made by each of appellants, overruled; exceptions taken; bill of exceptions tendered and signed, and appeal taken to this court.

Abstract of the Evidence.

On the day named, the deceased took passage at the "Little Rock & Fort Smith Railroad Crossing" on one of the cars of the defendant street-car company, en route to the city of Little Rock, and for some time rode standing on the rear platform of the car, when the street car driver, according to his testimony, finding that deceased had gone as far as he (the driver) was permitted to carry a passenger who has not paid his fare, left the front platform, and went back to demand his fare of deceased. They seem to have had some conversation as to the payment of the fare to the opposite side of the river, rather than to the river only, and the driver returned to his post on the front platform, the mule attached to the car in the meantime moving on at a trot. Afterwards, the deceased went into the car, and towards the front, and proposed to the driver to pay his fare if he could make the change for him, and the driver stepped back just inside the car to make the change, when they both seemed to have seen a freight train of the defendant railroad company backing across their track, and a collision impending, and the driver jumped off his car at the front and the deceased jumped off at the rear, the backing train striking the street-car, turning it around and upon the deceased, killing him almost instantly.

It appears from the testimony that the track of the defendant street-car company runs on Newton avenue, one of the principal streets of Argenta, and the track of the defendant railroad company runs parallel to Newton avenue, and about fifteen or twenty feet from the street car track, some distance along the east side of the avenue, and then turns west and across it, going on in the direction of the "Oil Mills." The train of the defendant railroad company involved in the collision was composed of a switch engine and three freight or box cars, the engine moving forward, and pushing the three box

cars in front of it. On the engine was an engineer at his post on the right side of the cab, a fireman on the left side, the manager of the train on the front end of the farthest box car from the engine, and a brakeman on the next box to the front one. The proof shows that they were required to station themselves substantially as they were, so that the one on the front could observe obstacles on the track and transmit signals back to the engineer, so as to control the movements of the train, and avoid accidents. The foreman of the train on the front car, when unable to give his signals direct, made them to the intermediate brakeman, who repeated them to the engineer, either directly or to the fireman, and he in turn to the engineer, according as the circumstances might dictate.

The following extracts from the statements of witnesses will perhaps best describe the incidents and actions of parties immediately preceding and leading up to the accident.

John D. Adams says: "I was foreman of the engine pushing the train when this accident happened. It was my duty to have controlled this train. I was on top of the furthest car from the engine, and controlled the movements of the train. There was another switchman with me, who was on the first car behind me, I think. I cannot say how far the street car was from the crossing when I first saw it. It was moving, and so were we. I gave no signal to stop until I saw the street-car. We may have been one hundred yards from the crossing then, or not so far, and the street-car was going about as fast as our train. The mule was trotting. We were perhaps running eight miles an hour. I saw nobody on the street-car at all. I could see nobody on the front platform. I gave the stop signal as soon as I saw the street-car. I did not run back on the car toward the engine, but stood still and holloed to stop the street-car. There

was a man on the car between me and the engine, and he took my signal. I turned my head to see if the man next me had caught my signal. I saw that he had and commenced repeating it. I do not know whether he was standing up or sitting on the side of the car. I think the other man ran back to the engine, and I think he holloed. The other man on the car was a switchman. It was my duty to give signals to him when I saw obstructions, and his to repeat them to the engineer." And again he says: "I was foreman of the engine at the time of the accident. I was on the box car furthest from the engine. The engine was pushing three box cars ahead of it. I was on the right hand side of the car. We had got from the main line, and were carrying these empty cars to the oil mill. I think the engineer blew his whistle. He always blows when he wants to run the crossing. About opposite the lumber yard there, I gave a slow signal to indicate to the engineer to be careful in going to the crossing. At that time I had not seen the street car. We had gone a short distance when the street-car showed up, and I could see no one on the front of it. As soon as I saw the street-car I gave the danger signal to stop, and holloed to the switchman. I also holloed at the engineer, and to the street-car driver. I cannot say exactly how far I was away. I was on a moving train, and had my eyes on the street-car. After I saw the street-car, and gave the danger signal, I threw my head around to see if the other switchman had caught the signal, to give it to the engineer. I saw he had, and kept my eye on the street-car. Neither our train nor the street-car was far from the crossing. I think we were just entering the curve, but I cannot be certain. The train stopped almost immediately after striking the street-car. The car that struck the street-car stopped on the crossing. When I gave the slow signal, it was for a caution, and not for

the street car. I believe the cars were running eight or ten miles an hour. I think they had checked up some at the time I gave the danger signal. It is customary to give a slow signal at this point in switching on that track. When I first gave the slow signal, we may have been 150 yards from the crossing. We may have been fifty yards from the crossing when I gave the danger signal, but I cannot be positive. If the engineer had got the signal at the time I gave it, he might have stopped the train. It appears that when I was before the coroner's jury, on the day after the accident, I testified that the train was 200 feet from the street car when I gave the danger signal. I also testified that the train did not slow up as soon as it usually did. I gave the danger signal, and holloed to the driver at the same time. In the Byers case I testified that I supposed we were in a hundred yards of the street-car crossing. I was holloing at the street-car, and signaling to the engineer. I could not see the engineer from where I was, nor could he have seen me, so that there was no chance of his taking the signal as soon as I gave it. It had to be repeated by the man behind me to the engineer. I looked back, and saw this man had taken my signal and started to the engine with it. The fireman was on the inside of the curve, and could have a better chance to see me, though I do not know whether he could or not."

Henry Diebert says: "I was a switchman on the second car from the engine. In approaching the crossing, Adams, who was on the car farthest from the engine, gave me a slow signal some seven or eight hundred feet from the crossing, up by the lumber yard. He gave a quick signal to stop about at the point of the curve. I took it, and repeated it to the engineer as soon as possible. I got up and ran to the next car to the engine. I got a glimpse of the street-car as I turned around. There was some steam escaping from a brake

between me and the engineer, on the engineer's side. We generally give a slow signal down by the lumber yard. That was two or three blocks from the crossing. I do not know whether the engineer could see me when I repeated the signal, as the cars were between us, but the fireman probably could. When the danger signal was given, the first part of the car was on the curve."

W. R. Johnson says: "I was the engineer on the train that had the accident. The train was going north to the oil mill, carrying some empty cars. We were probably running about four miles an hour. I blew for the crossing about the lumber yard, or, maybe, a little on the other side. This is where we ordinarily blow for the crossing. The fireman was ringing the bell along the avenue. That is his business. The engine was headed north, and was pushing the cars in front of it toward the north, and I was on the right side. The first thing I knew of danger ahead was that the fireman told me there was a car on the track. I then reversed the engine, put on the brakes, and stopped the engine as soon as I could. I did not see Diebert. The first I saw of him was when we were about stopped. He was then coming back to the engine on top of the train. I had then already got the signal from the fireman, and did all I could to check the train. I do not think the train went over a car length after I got the signal. The front trucks of the head car were just on the crossing. I did not see Adams when he was giving the wild signals. The fireman might have seen him, as he was on the inside of the curve. The grade there is about level."

J. S. Staples says: "I was the fireman on this engine. We were running north on the track on Newton avenue with three cars ahead of us. We blew four short whistles for a signal. I was ringing the bell all the time as we got toward the crossing. The enginee

shut off the steam, and we began to roll. As we got within fifteen feet of the crossing I saw the mule's nose, and told him to shut off and do what he could, for a street-car was on the track. He shut off and struck the street-car, and we did not go over the crossing. We were not going more than three or four miles an hour. At the time I gave the signal to stop we were going five or six miles an hour, an ordinary speed. It was my business to ring the bell. I had the bell cord in my hand. I spoke to the engineer to give him the signal to stop. He reversed the engine, pulled the throttle, and put on sand, and used the vacuum brake. He hauled the reverse lever over, and put the wheels in a back motion. There was nothing else he could have done. When I first saw the mule it was within ten feet of our track. I saw the mule's nose, and signaled to stop at the same time. I did not see the street-car, for our car was ahead of me on the curve. Harry Diebert, who was on the second car, gave me the signal to stop. I was looking forward. The car that struck the street-car was just barely across the track about two and a half inches. The engineer could not see the switchmen on the cars, for the train was on the curve. I could see one of them. I could not see the man on the furthest car. The car next the engine would be between him and me. It was my duty to look out on one side, and the engineer's on the other. When I gave the signal the engineer stopped in about a car's length. I did not hear anybody hollo to stop. The man standing on the car gave the signal to stop immediately."

C. E. Byers says: "I was the driver of the street-car. I had been driving in Little Rock for some time before I hired to the Argenta company. Gist got on my car at the Fort Smith crossing, at the north end of my road. I then started toward Little Rock, and drove until I came to the Fort Smith crossing. After I crossed

that I looked back, and Gist was still on the back steps, and he did not come in. He had ridden as far as the rules of the company allow without paying his fare, and I went back and asked him for his fare, and he said he would not pay fare until he got to the bridge, and if the bridge car was there, then he would pay his fare. I told him to pay five cents, and if the bridge car was there he could pay the other five cents. I went to the front and took up the lines, and Gist came to the front and asked for change. I reached my hand in my pocket to get some change, and heard somebody hollo, and looked up, and the train was right on us. I said "Run!" and supposed he got clear. I think I was fifty or sixty yards from the track when I took up the lines, and the mule was trotting along. I had one foot on the platform and one in the car. I was facing to the west. When he spoke to me about the change I dropped the lines over the brake handle. The first I heard of the train was the holloing. I did not hear any bell or whistle. I jumped off the front platform. The mule broke loose. I think if they had rung the bell or whistled I should have heard it. Gist did not pay any fare, for I had not changed his money."

Such is the testimony of all the persons engaged in the running of the train and street car. There were a great number of other witnesses (bystanders) who, making all proper allowances for the usual conflicts as to time, distance, locality and speed, do not materially differ from the train and car men. At all events, the statements of these latter, above given, are all that is essential to a discussion of the legal propositions that arise in this case.

Instructions.

The instructions which become the subject of discussion are as follows, to-wit:

Instructions given by the court at the instance of the plaintiff, objected to by defendants, and objections insisted upon.

"6. If you believe from the evidence that the defendant, the Little Rock & Memphis Railroad Company, had voluntarily stationed an employee on top of the cars they were switching in front of the engine that collided with the street-car that deceased (Gist) was a passenger on, whose duty it was to give signals to the engineer and fireman, and thereby control the train's movements by the signals so given, it would be the duty of the employee so stationed, at all times while the train was moving backward along and through a public street or near the crossing of the street-car track, when street-cars were frequently crossing the railroad track, to be at a place on top of the moving cars where he could be seen by either the engineer or fireman, and could promptly communicate with one of them by his signal; and if the evidence in this case shows that the employee so stationed on top of the cars was not in such a place where he could be seen and communicate with the engineer and fireman by his signals, and he discovered the danger and gave the danger signals in time to have averted the collision by having the train stopped if the engineer or firemen had caught his signals, and they failed to catch them because he was not in a proper place, this would be such negligence upon the part of the Little Rock & Memphis Railroad as to charge them with the death of Gist if he was killed in the collision."

"7. If you believe from the evidence that the defendant, the Little Rock & Memphis Railroad Company, voluntarily stationed an employee on top of the cars that were then being switched in front of the engine, whose duty it was to keep a lookout and give signals to the engineer and fireman, by which the movement of the train was governed, and the train was backing

along and through a public street used for travel, and that the switch track of the railroad crossed the track of the defendant street-car company, where street-cars were being operated all the time, then, under such circumstances, it would be the duty of the engineer or fireman to keep a lookout at all times, while so backing, for signals from the employees on top of the cars. And if you believe from the evidence that the employee on top of the cars was in a proper place where he could be seen by the engineer or fireman, and that he gave the danger signal to them, and thereby ordered them to stop at once, in time for them to have stopped the train and averted the collision, and that the engineer and fireman, by reason of their not being on the lookout for signals, or by reason of their carelessness and negligence in not catching the signals when first given, if you find that they were given in time to stop the train, they would be guilty of such negligence as to charge the Little Rock & Memphis Railroad Company with the death of Gist, if you believe he was killed in the collision while a passenger on the street-car."

Instructions on the court's own motion given and objected to by defendants, and objections insisted upon in argument:—

"You are instructed that the persons in charge of the train had the right to presume that the street-car driver would use reasonable care in ascertaining whether or not there was danger before attempting to cross the railroad track. They were under no obligations to anticipate that a street-car would approach the crossing without a driver controlling its movements and watching for danger; but, if they discovered the street-car without a driver, or with a driver who was negligent in his duty, approaching and near the track and in danger of a collision with the railroad train, it became their duty to do all in their power to prevent such a collision,

and if, after discovering such danger and negligence of such street-car driver, they could have stopped the train and prevented the collision, but failed to do so, the railroad company is liable for the injury that resulted therefrom to the plaintiff's intestate."

Instructions asked by the defendant railroad company, refused by the court, and made the subject of contention in argument:—

"5. Before the plaintiff can recover of the railroad company, he must show that the street-car company was not guilty of any negligence. The deceased was a passenger upon the street-car, and if the street-car driver negligently left the front platform while approaching, or failed to look and listen before starting across, the railroad track, the plaintiff cannot recover of the railroad company, though he may still recover of the street-car company."

"1. You are instructed that the mere fact of the accident raises a presumption of negligence against the street-car company because the deceased was a passenger upon its car, but the mere fact of the accident raises no presumption of negligence against the railroad company. You are therefore justified in finding a verdict against the street-car company from the mere fact of the accident (unless the evidence in the whole case rebuts the presumption of negligence on the part of the street railway company), but before a verdict can be found against the railroad company you must be satisfied by the preponderance of testimony that it was guilty of negligence contributing to the injury."

"3. It is the duty of the street-car driver to remain upon the front platform of his car while it is in motion. If it becomes necessary to leave the platform, he should stop the car, and not put it in motion until he returns to the platform and takes the reins. He should never allow the car to move except when he has the

reins in his hands, and particularly is this true when he approaches a railroad crossing or other place where there is danger of a collision. If you find that, in approaching the crossing, the street-car driver was not at his post on the front platform, you will find that the accident was occasioned by the negligence of the street-car company; but, in order to make the railroad company responsible, it must appear from the preponderance of the evidence that the railroad men, after seeing the perilous condition of the street-car, failed to use reasonable exertions to prevent the injury."

"4. It was the duty of the street-car driver, before attempting to cross a railroad track, to look and listen for approaching trains; and if the street-car driver in this instance failed to do that, the street-car company is responsible for his negligence; but the railroad men were justified in supposing that he would stop before getting upon the track in front of an approaching train, and, unless they were guilty of negligence in not stopping their train quick enough after discovering the peril of the street-car, you cannot find a verdict against the railroad."

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

1. Evidence as to other acts of negligence on the part of Byers, the street-car driver, at times and places near the time and place of the act complained of, should have been admitted. 48 Ala. 15; 14 N. Y. 218; 32 *id.* 346; 49 *id.* 421; 42 Vt. 450; 42 Ill. 358; 46 N. H. 23.

2. The court erred in the instruction given on its own motion. It was not the duty of a *non-carrier* to do *all in its power* to prevent a collision. That only applies to carriers of passengers. 2 A. & E. R. Cases, 172; 26 *id.* 393; 32 *id.* 16; 18 *id.* 144.

3. The fifth instruction for the railroad should have been given. A passenger in case of a collision

cannot recover against the other party, if his own carrier was at fault. 8 C. B. 115, followed by 46 Pa. St. 151; 43 Wis. 513; 39 Iowa, 523; Patterson, Railway Acc. Law, 86; 2 A. & E. R. Cases, 172; 37 *id.* 505; 15 Ark. 118.

4. The sixth and seventh instructions for plaintiff are instructions upon facts, and usurp the province of the jury. 37 Ark. 581; 49 *id.* 148; 55 *id.* 248.

5. It was error to modify the first instruction asked by the railroad company.

6. The refusal of the third for the railroad company was erroneous. They should have been instructed as to the duties of street-car drivers. 18 Am. St. Rep. 525; 42 Minn. 490.

7. It was error to refuse the fourth instruction. 54 Ark. 431.

8. The judgment should have been declared a lien on the property of the Street Railway Company.

9. The verdict was excessive. 57 Ark. 377; 47 N. J. Law, 28.

J. H. Harrod and *E. A. Bolton* for appellee.

1. Evidence of specific acts of negligence at other times was properly excluded. The rule is, it is proper to prove the general character for carelessness or the contrary, and not to give examples of either. But the exclusion did not prejudice the railroad company. 31 Ark. 364; 43 *id.* 219; *Ib.* 535; 44 *id.* 556.

2. The court did not instruct the jury that it was the duty of those in charge of the train to do all in their power to prevent a collision. It *was* the duty of the company to do all in their power *after they saw the danger.* Where a street-car crosses a railway track, the greatest care and prudence, every practicable precaution that human foresight can devise, should be taken to avoid collision. 8 So. Rep. 586; 20 S. W. Rep. 392; 86 Ky. 578.

3. It is now well settled in this country that a passenger can recover for an injury sustained through the negligence of another company than that carrying him, whether his own carrier be negligent or not. 116 U. S. 366; Bishop, Non-Contract Law, sec. 1070-1; 30 Minn. 328; 98 Ind. 186; Beach, Cont. Neg. secs. 65, 108, 118; Thompson, Carriers, 281; 36 N. J. 225.

4. There was no error in the sixth and seventh requests. 8 So. Rep. 586; Pierce on Railroads, p. 356.

5. It was not error to refuse the third and fourth prayers by the railroad company.

6. The verdict is not excessive. Mansf. Dig. sec. 5226.

J. M. Rose for the Street-Car Company, contends that the Act of 1887 does not apply to street railways.

M. M. Cohn also for the Street-Car Company.

The court properly refused to declare the judgment a lien on the property of the Street Railway Company. The railroad company saved no exceptions to the ruling of the court on this point, and is not interested in it.

BUNN, C. J., (after stating the facts). The appellant street-car company in argument is made to defend mostly against the contention of plaintiff in the court below that a lien can be fixed upon its property for any judgment rendered in this action, under the act approved March 19, 1889; and its counsel in their briefs do not make any specific objection to the instructions and admission of testimony.

1. Evidence of previous negligence inadmissible.

The first contention of the appellant railroad company is that the court below erred in not permitting it to introduce other and previous acts of negligence of the street-car driver, Byers, at times and places near the time and place of the act complained of.

There are several different states of case in which the proposition of appellant's counsel is correct. Thus,

where one uses defective machinery or appliances, and an accident occurs of which, in the very nature of things, it is impossible or impracticable to obtain any direct or positive proof of the particular fact—in such a case, evidence of accidents and instances similar to those in question, that have previously occurred, is admissible to show that the person using the machinery or appliances had previous knowledge, or should have had, of the defects by and through which the injury had been done; also the probability that the injury was the result thereof. The most frequent illustration of this rule is in the case of locomotive engines emitting an unusual amount of sparks by reason of imperfect spark arresters, and so forth. This, as is known, is the fruitful source of fires along railroad tracks; and, in all these cases, evidence of previous operations of the engines has been held admissible, not only as fixing notice, but under the doctrine of probabilities, as in the case of *Cleaveland* v. *Grand Trunk Railway Company*, 42 Vermont, 449, cited by counsel. So, also, does that rule hold good in regard to injuries occasioned by defective railroad track, as in the case of *Mobile Railroad* v. *Aschraft*, 48 Ala. 15, also cited by counsel. This kind of evidence is also admissible to prove the habits of a horse, when the question is whether he was injured through his fright or viciousness, there being no other way to determine the question; as in the case of *Whittier* v. *Franklin*, 46 N. H. 23.

But the rule in cases like the one under consideration, where the question is simply one of negligence or non-negligence on the part of a person on a particular occasion, is that such evidence is not admissible. See *Christensen* v. *Union Trunk Line*, (Wash.) 32 Pac. Rep. 1018; *Towle* v. *Pac. Imp. Co.* 33 Pac. Rep. 207; *McDonald* v. *Savoy*, 110 Mass. 49; *Hays* v. *Millar*, 77 Pa. St. 238; *Boick* v. *Bissell*, (Mich.) 45 N. W. Rep.

55; *Atlanta, etc. Railroad Co.* v. *Newton*, 85 Ga. 517, also reported in 11 S. E. Rep. 776.

2. Instruction as to negligence approved.

The second contention is that the instruction given by the court on its motion is erroneous, in that it instructs the jury that it was the duty of those in charge of the train "*to do all in their power to prevent the collision*;" whereas, as is contended, the trainmen were not held to the highest degree of care in respect to the deceased, he not being their passenger at the time. That position is correct in a sense, and yet it is misleading in the manner in which it is here stated. In the first place, the court below did not instruct the jury that the trainmen owed deceased, as a passenger on the street-car or otherwise, the *highest degree of care*, nor words to that effect, as the contention seems to imply, but the language of the court was that they should have done all in their power to prevent the collision "*when they discovered the street-car without a driver, or with a driver who was negligent in his duty, approaching and near the track, and in danger of a collision with the railroad train; and if, under such circumstances, they could have stopped the train in time to avoid the collision, and failed to do so, the railroad company is liable.*" To do all they could in the exigency stated by the court was nothing but ordinary and reasonable care and diligence under the circumstances; and the ordinary care to which non-carriers are bound is a care that varies with the circumstances of each case.

3. Doctrine of imputed negligence disapproved.

The third contention is that the court erred in refusing to give the fifth instruction asked by the defendant railroad company, which was to the effect that a passenger, in case of a collision, cannot recover for injuries occasioned thereby against the other party, if his own carrier is at fault. This doctrine had its origin in the English case of *Thorogood* v. *Bryan*, 8 C. B. 115, and all the American cases in which it has prevailed have

been decided upon the authority of that case. It, however, has perhaps never received anything more than a minority support in this country. That case has in recent years (1888) been brought on appeal to the House of Lords, and each and every one of the grounds upon which it rested has there been held to be unsound, and the case, consequently, has been overruled.

We do not regard the case of *Duggins* v. *Watson*, 15 Ark. 118, cited by counsel, as being strictly in point, although it does in a manner refer to the then English rule as announced in *Thorogood* v. *Bryan* as the law applicable to that case. However that may be, the law now is that where a passenger is injured in a collision, the non-carrier may be sued, notwithstanding the carrier is also at fault.

4. As to negligence resulting in a collision.

The fourth contention is that the court erred in giving the sixth and seventh instructions asked by the plaintiff. The majority of the court are of the opinion that the sixth instruction is abstract, but that the error is not prejudicial. The seventh instruction was properly given.

5. Presumption of negligence from collision.

The fifth contention is that it was error in the court to modify the first instruction asked by the defendant railroad company by the insertion of the words included in the brackets. The court, in the first part of the instruction, had declared the law to be that the mere fact of the accident raises a presumption of the negligence of the street-car company, because deceased was its passenger at the time, but there is no such presumption against the railroad company. The court then said to the jury that they would be justified in finding against the street-car company from the mere fact of the accident, with the qualification in the brackets, "(unless the presumption is rebutted by the evidence in the whole case);" and then proceeds to instruct them that they cannot find against the railroad company unless its neg-

ligence is shown by a preponderance of evidence, as there is no presumption of its negligence in the case. We cannot see the error in this modification; and if there be such, it is, we think, harmless.

6. As to duties of street-car drivers.

The answer to the sixth contention is that there is no evidence as to what were the duties of the street-car driver, and it would be manifestly improper for the court to detail a set of duties and rules for his guidance in the way of instructions. There was no error in refusing the third instruction asked by the defendant railroad company. Besides, the law on the point was sufficiently declared in other instructions given.

7. As to negligence of trainmen.

We do not think the court erred in refusing the railroad company's fourth instruction. While it is doubtless true that the street-car driver should have kept a lookout for trains crossing his track, yet, if he did not, that fact alone might not exonorate the railroad trainmen, even though they did everything they could to prevent the accident after they saw the street-car. Something they did or neglected to do before seeing the street-car might have placed them in a position which rendered it impossible—more difficult, at least—to prevent the accident. The instruction was misleading, and should have been refused.

The question whether or not the property of the street-car company is the subject of the statutory lien for the judgment rendered in cases like this is presented to us only by the pleadings of the plaintiff, and he abandons that contention in his argument. We have not, therefore, that question before us.

This is a suit for compensatory damages only. By the first instruction given to the jury at the instance of the plaintiff, which is a copy of the statute on the subject, they were told, in effect, that if they should find for the plaintiff they "should give such damages as they shall deem a fair and just compensation to the wife and

next of kin (in this case to the administrator) with reference to pecuniary injuries resulting from the death of deceased." There was not evidence to justify the jury in fixing the amount they did in this case. They simply gave the plaintiff the exact and full amount he claimed in his complaint, and apparently failed to consider very carefully the evidence as to that part of the case. We are unable to find from the testimony, viewing it in the most favorable light to the plaintiff, from any standpoint, that the damages could have much exceeded the sum of twenty thousand dollars, and in so far the verdict was without evidence to sustain it, and the judgment will be reversed for that cause unless the plaintiff will, within fifteen days, enter a remittitur down to the sum of $20,000, in which case the judgment for that amount will be affirmed.

HOLDER v. STATE.

Opinion delivered February 17, 1894.

58 473
58 523
58 473
60 89
60 451
58 473
61 138
61 174
62 537
58 473
63 175
58 473
72 432
72 468
58 473
74 258
74 300
74 400
58 473
84 135

1. *Homicide—Motive.*

   Where one is indicted for killing his wife, it is admissible to prove, as a motive for the crime, that he had been improperly intimate with another woman.

2. *Cross-examination of defendant—Impeachment.*

   Where defendant testifies in his own behalf, he may, on cross-examination, be asked whether he had been confined in the penitentiary of another State, and what caused him to leave this State about two years previously, provided the answer to the latter question does not criminate him; but he may not be asked whether he had committed rape in one State five years previously or left another on account of debt—the first question tending to incriminate and the second relating to a matter not affecting his credibility.

3. *Instruction—When contradictory.*

An instruction, in effect, that, though the facts proved are consistent with defendant's innocence, the jury are not bound to acquit unless they have a reasonable doubt of his guilt, is erroneous.

4. *Misconduct of prosecuting attorney in argument.*

The prosecuting attorney asked the defendant on cross-examination whether he had committed rape in another State, and left there for that reason; to which defendant replied in the negative. In his argument before the jury, the prosecuting attorney persisted in repeating that he had reliable information on which he asked the question, after the court had mildly reproved him for making the statement, and had told the jury that "they should consider only the law as given them, and the evidence of the witnesses, in arriving at a verdict." *Held*, that the conduct of the prosecuting attorney was prejudicial error.

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

John E. Bradley and *Dan W. Jones & McCain* for appellant.

1. The evidence does not support the verdict. If two theories are equal in soundness, then the doubt and presumption of innocence must prevail. Guilt must be established by sufficient evidence. Wills, Circ. Ev. 194. Appellant's declarations in evidence satisfactorily explain all his conduct. 85 Cal. 39; 38 Mich. 125. There was a reasonable doubt of defendant's guilt. 38 Mich. 482. Strong probabilities of guilt are not sufficient. *Ib.* The utmost strictness of construction prevails in favor of life and liberty. 41 Wis. 299; *Com.* v. *Webster*, 5 Cush. 320; 89 Mo. 282. Malice and motive for the crime are utterly lacking. 49 N. Y. 137. If the facts be consistent with innocence, they are no proof of guilt. 53 N. Y. 475; 28 Hun, 593; 54 Barb. 309; 127 Mass. 424; 34 Am. Rep. 491; 32 Ark. 238.

2. The evidence of Bromlett, Foster and Duff was irrelevant.

3. It was error to allow the State's attorney to ask improper questions on cross-examination of defendant. 78 Ala. 474; 79 *id.* 21; 87 *id.* 103; 87 Ill. 210; 96 Ill. 492; 79 Mich. 110; 50 N. Y. 240; 72 N. Y. 571; 76 N. Y. 288; 66 Me. 116; 67 Miss. 333; 68 Cal. 101; 76 Mo. 350; 14 Ore. 300; 88 Mo. 88; 81 *Id.* 231; 12 Ore. 99; 75 Mo. 171; Whart. on Hom. secs. 736, 737, 738. The comments of the State's attorney were prejudicial. 76 N. Y. 288 and cases *supra.* It was not enough to mildly admonish the State's attorney, but the court should have charged the jury specifically upon the improper remarks. 78 Ga. 596; 54 Vt. 83; 88 Mich. 456; 51 *id.* 227; 62 *id.* 643; *Ib.* 356; 57 *id.* 506; 49 Ind. 33; 59 Mich. 552; 44 Mo. 238; 24 Kas. 252; 65 N. C. 563; 65 N. C. 505; *Ib.* 369; 79 Cal. 415; 56 Ind. 186; 62 Iowa, 108; 19 Or. 397; 4 Am. & E. Enc. Law, p. 876 and notes; 17 S. W. Rep. 402; 18 *ib.* 1003; *Ib.* 583.

4. It was error to modify instruction No. 5 asked for defendant. As modified it was erroneous.

James P. Clarke, Attorney General, and *Chas. T. Coleman*, for appellee.

The questions asked by the State's attorney were not improper. The answers thereto affected the witness' credibility. The defendant takes the stand on the same footing as any other witness. 56 Ark. 7; 46 *id.* 141; 95 Ill. 407; 105 *ib.* 414; 37 Oh. St. 178; 42 N. Y. 265; 97 Mass. 588; Whart. Cr. Ev. sec. 474; 1 Bish. Cr. Pro. sec. 1185; 53 Ark. 387; 26 Pac. Rep. 749; 19 Mich. 170; 100 Mo. 606. A witness, on cross-examination, in order to discredit him, may be asked if he had not committed perjury in another State. 1 Jones, (N. C.) 526. Or convicted of felony. Busbee, (N. C.) 358; 42 N. Y. 270. Or if he had been in the penitentiary. 100 Mo. 606; 24 S. W. Rep. 100. See also 20 Oh. St. 460; 97 Mass. 588; 36 Kas. 92; 16 Mich. 43.

BATTLE, J. Appellant was indicted for and convicted of murder in the first degree, alleged to have been committed by killing his wife, Mary Holder, by means of poison, on the 24th of February, 1893; and was sentenced to be hung on the 16th of November following.

He brings the record of his trial and conviction to this court, and asks that the judgment which was rendered against him be reversed.

1. Motive of homicide may be proved.

One of the grounds upon which he asks for a reversal is the admission of the testimony of Gilbert Bromlett and Henry Foster, which tended to prove that an improper intimacy existed between himself and a woman named Frances Carter, alias Daus Ball. The testimony was properly admitted, as it tended to show that he had ceased, at the time of his wife's death, to be a loyal and devoted husband, and that he was induced to kill his wife in order to prevent any disturbance of the illicit relations existing between him and his paramour. The testimony of Agnes Duff, to which the appellant lant objected, was also admissible because it tended to strengthen that of Gilbert Bromlett and Henry Foster. She testified that she had often seen appellant, in the year previous to the 6th of September, 1893, the day of the trial of this cause, visiting the house occupied by Daus Ball and her mother.

2. As to the cross-examination of defendant.

Appellant insists that the trial court erred in allowing the State to propound to him improper questions while he was testifying. The appellant, among other things, testified in his own behalf that he "ran away from home in the summer of 1891, and went back to Mississippi, where he stayed several months; that Mississippi was his old home, and he was there among his 'kin people'; and that he moved from Mississippi to Texas in 1884, stayed in Texas four years, and then moved to this State." On cross-examination, the State,

over the objections of appellant, asked him these questions, and he answered them as follows:

"1. Question. How came you to leave Texas?

"Answer. I left there because I thought I could make more money in Arkansas.

"2. Q. Did you not run away from there when you came to this State?

"A. No, I did not.

"3. Q. Is it not a fact that you left there because there was a mob after you?

"A. No, there was no mob after me.

"4. Q. Is it not a fact that you were in the penitentiary in Texas?

"A. It is not a fact.

"5. Q. Is it not a fact that you had committed rape in Texas, and left there for that reason?

"A. It is not a fact.

(The court instructed the jury not to consider the last named question and answer as evidence in the case.)

"6. Q. Why did you leave Mississippi.

"A. Because I became involved in a security debt which took all I had to pay out, and I wanted to go somewhere else, where I could take a new start.

"7. Q. Did you leave there because you were in debt?

"A. No, I left there because it took all I had to pay my security debts.

"8. Q. What had you done when you left this State in 1891?

"A. I left because I had got into trouble with another colored man. He came onto me with a piece of scantling, and crowded me so close that I had to cut him, and I left because I was advised by the friends of the other man to do so. I went to Mississippi, and stayed there several months; then came back, stood my trial, and was acquitted."

When a defendant in a criminal case becomes a witness in his own behalf, he is subject to cross-examination and impeachment like any other witness. *McCoy* v. *State*, 46 Ark. 141; *Lee* v. *State*, 56 Ark. 7.

In *Wilbur* v. *Flood*, 16 Mich. 43, Mr. Justice Campbell, in delivering the opinion of the court, said: "It has always been held that within reasonable limits a witness may, on cross-examination, be very thoroughly sifted upon his character and antecedents. The court has a discretion as to how far propriety will allow this to be done in a given case, and will or should prevent any needless or wanton abuse of the power. But within this discretion we think a witness may be asked concerning all antecedents which are really significant, and which will explain his credibility, and it is certain that proof of punishment in a State prison may be an important fact for this purpose."

In *Hollingsworth* v. *State*, 53 Ark. 390, Mr. Justice Hemingway, speaking for the court, said: "It is always competent to interrogate a witness on cross-examination touching his present or recent residence, occupation and associations; and if, in answer to such questions, the witness discloses that he has no residence or lawful occupation, but drifts about in idleness from place to place, associating with the low and vicious, these circumstances are proper for the jury to consider in determining his credibility. That such a life tends to discredit the testimony of the witness, no one can deny; when disclosed on cross-examination, it is exclusively for the jury to determine whether any truth can come from such source, and, if so, how much."

As a general rule, a witness is not compellable to answer a question when the answer to it will tend to expose him to a penal liability, or to any kind of punishment, or to a criminal charge. When such questions are asked it is the duty of the court to inform the wit-

ness of his right to decline to answer, but it should not prevent him from answering if he chooses. 1 Greenleaf on Evidence, sec. 451; *Pleasant* v. *State*, 13 Ark. 378; S. C. 15 Ark. 649. But this rule does not apply to defendants in criminal cases, as to accusations against them, when testifying in their own behalf. In such cases they are required to testify as to the charge in the same manner as other witnesses.

The statutes of this State permit the impeachment of a witness by showing by his own examination that he has been convicted of a felony. Mansfield's Digest, sec. 2902.

The first, second, third and fifth questions seemed to have been asked with the view of showing that the appellant had left Texas because he had committed rape, and because he was afraid to remain. They were not admissible for that purpose. He could not be compelled to criminate himself in such a manner. His removal from Texas to Arkansas occurred about five years before he testified, and was too remote in time to form the subject of a cross-examination. 1 Greenleaf on Evidence, section 459. The fact that a mob was in pursuit of him at the time he left could not legally affect his credibility unless it could be shown that some criminal act of his own had caused the mob, and that could not be shown by his own testimony without criminating himself. It was proper to ask him if he had been confined in the penitentiary of Texas, as that tended to show that he had been convicted of an infamous crime, had been disgraced, and had not the inducement to tell the truth that he would have if he had not been made infamous. The sixth and seventh questions, asked for the purpose of showing that he left the State of Mississippi on account of debt, were improper. The fact he was in debt did not affect his credibility. The eighth was proper, provided the answer to the same did not criminate, and, it

appears, it did not. But he was not prejudiced by the questions objected to; and no reversible error was committed by requiring him to answer.

3. Instructions should not be contradictory.

The appellant asked the court to instruct the jury as follows: "The court instructs the jury that the facts relied upon to show the defendant's guilt must not only be consistent with and point to his guilt, but they must be inconsistent with his innocence; and if such facts are susceptible of two interpretations, one of innocence and one of guilt, the interpretation of innocence must be accepted in the defendant's behalf." And the court amended it by adding the following words: "Provided you have a reasonable doubt of defendant's guilt," and gave it as amended. The court thereby virtually told the jury that, although the facts proved were consistent with defendant's innocence, they were not bound to acquit unless they had a reasonable doubt of his guilt; in other words, that this state of facts did not necessarily leave room for a reasonable doubt. This was error. The instruction as amended was inconsistent with and contradictory to other instructions which were given, and is nowhere explained, and was calculated to mislead the jury to the prejudice of the appellant.

4. Misconduct of prosecuting attorney.

In his argument before the jury the attorney for the defendant called the attention of the jury to the fact that while the attorney for the State was asking the questions we have set forth in this opinion, he held in his hand in plain view of the jury what appeared to be a letter, and referred to it, when he was asking the questions, as if reading it, and said that this act of the State's attorney was "an artful effort" to impress the jury with the idea that the questions were based on facts, and warned them against being misled. The attorney for the State, in his reply, began to comment on these questions and the answers to them, when the

defendant objected, and the court informed him that his remarks were improper, and instructed the jury not to consider them; "whereupon the State's attorney informed the jury that he had not asked these questions with the paper in his hands for mere buncombe, but that he had reliable information from other sources for asking the questions, or he would not have done so." To which the defendant objected, and the court instructed the jury "that they should consider only the law as given them, and the evidence of the witnesses, in arriving at a verdict." Appellant insists that he was prejudiced by the remarks of the State's attorney, and the judgment of the trial court should, therefore, be reversed.

The action of the attorney for the State was highly reprehensible. A prosecuting attorney is a public officer "acting in a *quasi* judicial capacity." It is his duty to use all fair, honorable, reasonable and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case and the conclusions legitimately deducible from the law applicable to the same. To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man. The forms of law should never be prostituted to such a purpose.

In the case before us the prosecuting attorney was provoked by the attorney of the defendant to defend his examination of the defendant while he was on the wit-

ness stand. The court admonished him that his remarks were improper, and instructed the jury not to take them into consideration. This, under the circumstances, might have been sufficient, if he had heeded the admonition of the court, and refrained from making further remarks of like character. But he still persisted in the course he had taken; and the court, for the second time, instructed the jury "that they should consider only the law as given them, and the evidence of the witnesses, in arriving at a verdict." The prosecuting attorney, doubtless, did not intend to commit a wrong, but upon the impulse of the moment sought to defend himself against the attack of opposing counsel. He did wrong. He should have desisted from continuing the objectionable remarks when the court admonished him that they were improper. But he did not. Under such circumstances, the administration of justice, the enforcement of the laws, the dignity and authority of the court demanded a severer penalty for the wrong than a mild rebuke. The provocation was no excuse or justification. A punishment sufficient to impress the jury with the fact that the remarks were improper, and should not be considered by them; to command respect, and to maintain the dignity and authority of the court, and to prevent a repetition of the offense, however unpleasant to the court, should have been imposed.

The appellant was accused of having caused his wife to take the poison which caused her death, and the evidence adduced at the trial tended to prove the accusation. His testimony offered the only explanation, consistent with his innocence, as to how she was poisoned; and his acquittal depended in a large measure, if not solely, on his credibility. The remarks of the prosecuting attorney, if believed, tended to discredit him. How far they did so depended on the credence the jury gave to them. Coming from a person occupying the position

of prosecuting attorney, and apparently founded on the letter to which he referred when he cross-examined the defendant, they were well calculated to prejudice the appellant in his trial before the jury. The persistence of the State's attorney in defending his action by the assertion that he had reliable information, from sources other than the letter, as to the subject matter of his cross interrogatories increased the prejudice by causing the jury to give less weight to appellant's testimony. They might have thought he was warranted in doing so on account of reliable information he had received, from the fact he earnestly insisted, in defiance of the court, that he had been reliably informed that that which his interrogatories implied was true.

As a general rule, "an objection by the opposing counsel, promptly interposed, followed by a rebuke from the bench, and an admonition from the presiding judge to the jury to disregard prejudicial statements," is sufficient to cure the prejudice. But when we consider the earnest, persistent and vigorous manner in which the prosecuting attorney attacked the credibility of the defendant by assertions and means unsupported by the evidence, and the mild reproof of the court, we are not prepared to say that the prejudice was cured in this case. In view of the fact that the court in an instruction told the jury that they were the "illimitable judges" of the credibility of the witnesses, it is probable it was not. Upon a view of the whole case, we think that the appellant is entitled to a new trial.

The judgment of the circuit court is, therefore, reversed, and the cause is remanded for a new trial.

58 484
c78 520
79 200

RICHARDSON v. MATTHEWS.

Opinion delivered February 17, 1894.

Judgment against married woman—Proceeding to vacate.

Under Mansfield's Digest, sec. 8909, which requires that a court in which a judgment has been rendered shall have power to vacate it, after the expiration of the term, "for erroneous proceedings against an infant, married woman or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings," a complaint in a suit to vacate a judgment against a married woman is sufficient which alleges that a judgment was recovered against plaintiff, a married woman, during coverture, on a note executed by her during coverture, that she executed the note as surety and without consideration or benefit to her separate estate, that she made no defense to the action in which the judgment was recovered, that the fact of her recovery did not appear on the face of the note nor in the proceedings thereon, and that her condition at the date of such judgment did not appear in the judgment nor in the proceedings on which the judgment was based.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

W. P. & A. B. Grace and *Bell & Bridges* for appellant.

Appellant brings herself within the letter of secs. 3909, 3911, Mansf. Dig. A married woman's contract is void. 5 Ark. 668; 17 *id.* 190. Her acts are void. 92 Ill. 566; 18 Fla. 342; 11 Bush, (Ky.) 174–9; 63 Ill. 58; 43 Ark. 166. There is no law in Arkansas authorizing a married woman to contract generally. 43 Ark. 166; 39 *id.* 242; 35 *id.* 372. See cases 18 Md. 457; 75 Ill. 574; 29 W. Va. 385; 56 Miss, 314; 18 Pa. St. 79; 67 *id.* 436; 49 Mo. 152; 3 Gray (Mass.), 411; 30 La. An. part 2, 1021; 2 Harr. (Del.) 74; 12 Iowa, 459; 24 N. Y. 72; 41 N. J. L. 469; 8 Dowl. P. C. 126; 11 C. B. (N. S.) 783; 2 F. & F. 371; Freeman, Judg. sec. 94; 18

Md. 130; 43 Ark. 427; 1 Black, Judg. secs. 190–196; *Ib.* sec. 327.

MANSFIELD, J. This action was brought under the fifth subdivision of section 571 of the civil code, which provides that the court in which a judgment has been rendered shall have power to vacate it, after the expiration of the term, "for erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings." Mansf. Dig. sec. 3909.

A subsequent section provides that proceedings to vacate a judgment on the grounds mentioned in the subdivision quoted above shall be by complaint, setting forth the judgment, the grounds for vacating it, and the defense to the action in which it was obtained. (*Ib.* sec. 3911.)

The appellant's complaint was dismissed on demurrer; and whether the facts it states are sufficient to constitute a cause of action is the only question we have for decision.

The facts alleged are that the judgment which the plaintiff seeks to vacate, and which is recited in and exhibited with her pleading, was recovered against her upon a note executed by her during coverture; that she executed the note as the surety of her husband and son, and without any consideration received by herself, or any benefit to her separate estate; that at the time the judgment was rendered her condition of coverture continued to exist, and that, acting under the advice of her husband, she made no defense to the action in which the recovery was had; that the fact of her coverture at the time of making the note does not appear on the face thereof, nor in the proceedings against her in which the judgment complained of was rendered; and that her

condition at the date of such judgment appears neither in the record, nor in any part of such proceedings.

These allegations, taking them to be true, meet all the conditions essential to the relief sought. They show that the action against the appellant was founded on a promissory note which, as to her, the law holds to be absolutely void, for the reason that, being a married woman, she could not bind herself by a contract not made for "her personal benefit or that of her separate property." *Connor* v. *Abbott*, 35 Ark. 365. The note being void as to her, the recovery against her based upon it cannot be treated as correct when questioned in this proceeding, however regular and proper it may appear to be upon its face. Her disability to make the note not appearing in the proceedings against her, the error with which the judgment is affected by that fact would be of no avail on appeal. But the "erroneous proceedings" to which the statute by its terms applies are such as do not of themselves disclose the error committed. They must, therefore, be such proceedings as appear to be correct except when viewed in the light of extraneous facts adduced to avoid them. In this case it is clear that if the matters of defense set up in the complaint had been pleaded in the original action, it would have been error to adjudge them insufficient. This being so, it follows that, in connection with the other facts alleged, they constitute grounds sufficient to vacate the judgment. The court erred, therefore, in sustaining the demurrer; and for this the judgment will be reversed, and the cause remanded for further proceedings.*

*See Mansfield's Digest, 3912, 3913; *Chambliss* v *Reppy*, 54 Ark. 539; *Richards* v. *Richards*, 10 Bush, (Ky.) 617; *Adams* v. *Jett*, 6 Bush, 585; *Spalding* v. *Wathen*, 7 Bush, 663; *Bagby* v. *Champ*, 83 Ky. 13.

CANTWELL v. PACIFIC EXPRESS CO.

Opinion delivered February 17, 1894.

1. *Carrier—Right of shipper to sue.*
   A person in whose name a bill of lading is taken for the benefit of himself and others may sue the carrier for breach of the contract of carriage.
2. *Express company's contract of carriage—When broken.*
   If an express company agreed to ship perishable goods by a certain train, and failed to do so, but shipped by a later train, and the goods were lost because of the delay, the company is liable.

Appeal from Clay Circuit Court, Eastern District.

JAMES E. RIDDICK, Judge.

STATEMENT BY THE COURT.

This suit was to recover the sum of $10.00, the value of what appellant designates "a venison saddle," which was received by appellee company for transportation to St. Louis, Mo., and which appellant claims was lost through the negligence of the express company in not shipping as per contract.

The appellant exhibits the receipt of the express company which reads. "Received from R. H. Cantwell the following articles which we undertake to forward, etc." The venison was delivered to the express agent by one Dollins who says he had a one-third interest in it. The receipt, however, was made out in the name of Cantwell alone, and Dollins says he delivered receipt to Cantwell. He expected Cantwell to give him a part of the proceeds. The venison was delivered to the agent in the afternoon of the 26th of October, upon promise that he would ship the same that night on the 10 o'clock train. The train upon which the agent expected to ship was the regular mail, and rarely failed to stop at the station. On this occasion, however, it did not stop, and they were not permitted to flag it for the purpose of

shipping express matter. It was flagged that night, but did not stop. Appellant testified that the venison was in excellent condition, properly packed, etc., for transportation, when appellee received it. Appellee shipped on the first train going north, which was next morning. According to the proof, appellant was to bear the loss if the venison was not sold by consignee before it spoiled. Appellant states that, had the venison been shipped at night, as per contract, the same would have reached consignee and been sold before it spoiled. His consignee at St. Louis states that had the venison been in good condition when received by the express company, it would not have spoiled before its delivery to him. It was full of worms and worthless when he received it. Appellant admits that others were interested with him in the venison.

The court, at the request of appellee, and over objections of appellant, instructed the jury as follows:

"1. Before you can find for the plaintiff in this suit, you must find from the evidence that, had the venison been forwarded on the first train, it would have been in good condition upon its arrival at its destination, that it would have been sold before spoiling, and that the plaintiff would have suffered no loss—and the proof on this point must be clear; and if you do not so find, your verdict will be for the defendant.

"2. If the defendant forwarded the venison on the first regular train for carrying express matter from the station at which it was offered, and delivered it in reasonable time at its destination, then you will find for defendant.

"3. You are instructed that defendant is bound to receive and forward to its destination, in a reasonable time, all freight tendered it for that purpose; that what is a reasonable time within which goods should be forwarded depends upon the character of the article to be

forwarded, the season of the year, and the length of time such article would ordinarily keep; and if you find that the venison in controversy in this suit was forwarded within a reasonable time (within) which it could reasonably be expected to keep sound, then you will find for the defendant.

"4. If the jury find from the evidence that other parties than the plaintiff were part owners of the venison in controversy in this suit, you will find for the defendant."

The court, of its own motion, over the objection of the appellant, gave the following instruction:

"It was the duty of the agent of the express company to give to shippers correct information about trains upon which he was allowed to forward express matter; and, if the jury believe from the evidence that said agent, at the time the venison was brought to him for shipment, agreed with plaintiff that he would forward the same by the night train of the same day the venison was received, and by such promise induced plaintiff to deliver the venison to the defendant for shipment, and that he (the agent) did not ship on that train, but afterward, without further notice to the plaintiff, shipped on a train of the next day, several hours later than one by which he had agreed to forward the venison, and that, by this delay in shipment, the venison was spoiled and lost, they should find for the plaintiff."

The verdict of the jury was for the defendant. Plaintiff filed a motion for a new trial, which was overruled; exceptions saved, and appeal granted.

F. G. Taylor for appellant.

1. The instructions of the court are erroneous. Proof of delivery to a carrier and injury to them while in the carrier's hands makes a *prima facie* case. Suth. on Dam. p. 236.

2. There is no proof to support the second and third instructions.

3. Defects of parties must be pointed out by demurrer or answer; and if no objection is taken by either, they are waived. Mansf. Dig. secs. 5028, 5031; Pom. Rem. sec. 206.

G. B. Oliver for appellee.

1. The instructions embody the law. 3 Suth. Damages, p. 235; Wood's Browne on Car. p. 181, sec. 104, etc.

2. There was a defect of parties. Mansf. Dig. sec. 4941; Bliss, Code Pl. secs. 61, 77; Pom. Rem. etc., secs. 221–2–3, 225.

1. Person in whose name contract is made may sue.

WOOD, J., (after stating the facts.) The court erred in giving the fourth instruction. The contract was made with appellant, as evidenced by the receipt to him, and he had the right to sue. Mansf. Dig. sec. 4936; Pomeroy, Rem. & Remed. Rights, sec. 223.

2. When express company liable for delay.

In view of further proceedings, it is proper to say that the instruction given by the court upon its own motion correctly declared the law applicable to the facts, and instructions 1, 2 and 3 should not have been given.

For the errors indicated, the judgment is reversed, and cause remanded.

RAILWAY COMPANY *v.* CLARK.

Opinion delivered February 17, 1894.

1. *Carriers—Penalty for overcharge in fare.*

Under the act of April 4, 1887, fixing the maximum fare of passengers on railroads in this State over seventy-five miles in length at three cents per mile, and providing that any person or corporation that "shall charge, demand, take, or receive

any greater compensation" therefor than is prescribed in the act shall forfeit for every such offense any sum not less than fifty dollars nor more than two hundred dollars, an honest mistake by the conductor of a train in making change for a passenger, without the intention of taking an amount greater than is lawful, will not make the company liable.

2. *Evidence—Withdrawn answer.*

An answer that has been withdrawn is not admissible in evidence on plaintiff's behalf.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

Action by Clark against the Little Rock & Fort Smith Railway Company. The facts are stated by the court as follows:

The appellee recovered judgment in the Sebastian circuit court for $125, under the statute of 1887 (Acts 1887, p. 227.), to regulate the rates of charges for the carriage of passengers, and providing, among other things, "that the maximum sum which any corporation operating a line of railroad in this State shall be authorized to charge on lines over seventy-five miles in length is three cents per mile."

Section 3 of said act provides: "Any of the persons or corporations mentioned in section one that shall charge, demand, take, or receive from any person or persons aforesaid any greater compensation for the transportation of passengers than is in this act allowed or prescribed, shall forfeit and pay for every such offense any sum not less than fifty dollars, nor more than three hundred dollars, and costs of suit, including a reasonable attorney's fee, to be taxed by the court where the same is heard on original action, by appeal or otherwise, to be recovered in a suit at law by the party aggrieved in any court of competent jurisdiction. And any officer, agent or employee of any such person or corporation, who shall knowingly and wilfully violate the

provisions of this act, shall be liable to the penalties prescribed in this section, to be recovered in the same manner."

The appellee testified that he boarded appellants' train at Van Buren to go to Fort Smith; that he did not buy a ticket. The conductor demanded his fare, and he paid the conductor twenty cents; did not know whether he handed him exact change, or a quarter, or fifty cents. The conductor testified that he was positive that he did not charge any passenger more than fifteen cents, on the day named by appellee, for fare from Van Buren to Fort Smith; that he would not undertake to say that he did not, in any instance, on that day, receive more than fifteen cents from a passenger for fare between the two points, but was positive, if he did, it was a mistake in making change, which might possibly have occurred; he did not intentionally charge or receive more than fifteen cents for such fare.

The appellant asked the following instruction, which was refused: "1. The language of the statute is 'charge, demand, take or receive.' This means a reception or demanding of an amount that is in excess of what is lawful, knowing that he is receiving that amount. An honest mistake by a conductor in making change, without the knowledge or intention of taking an amount greater than he intended to charge, or than was lawful, and without his attention being called to it by the passenger, will not make the defendant liable."

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

1. The court erred in refusing to declare the law as asked in prayer No. 1 by defendant.

2. It was error to permit plaintiff to introduce in evidence defendant's answer, after it had been stricken out. 27 S. C. 150; 3 S. E. Rep. 63; 77 Cal. 340; 19 Pac. Rep. 579; 71 Cal. 126; 11 Pac. Rep. 871; 41 Fed. Rep. 172.

3. Without the answer there was no evidence as to the distance between Van Buren and Fort Smith, and the verdict is not supported by any evidence.

1. Liability of carrier for overcharge made by mistake.

WOOD, J., (after stating the facts.) Construing the first clause of the section of the act above quoted in its own terms, and with reference to the language employed in the second, we conclude that the legislature did not intend to hold corporations liable under the act for an amount above the maximum fare received by their agents unintentionally. Should the conductor, in any case, demand, charge, or receive more than the lawful fare, the presumption would be that he intended what he did. The corporation, of course, must be held to know the distances over its line between different points; and whenever an excessive amount is received, it is *prima facie* liable. The presumption of intention which follows the mere act of taking or receiving may be overcome by proof to the contrary. Hence, the above instruction was the law applicable under the facts, and should have been given. In view of a rehearing, we suggest that it would be in better form to make the latter clause read: "An honest mistake by a conductor in making change, without the intention of taking an amount greater than was lawful, will not make defendant liable;" eliminating, "and without his attention being called to it by the passenger." If the conductor intends to receive the excess, the company is liable, whether the passenger calls his attention to it or not. Under the facts of this case however, this clause was merely surplusage, and not prejudicial.

2. After withdrawal a pleading is not evidence.

The court also erred in permitting the appellee to read the original answer of appellant as an admission after same had been withdrawn. *Holland* v. *Rogers*, 33 Ark. 251; Greenleaf on Ev. Vol. 1, sec. 171, note 1

(*a*), and authorities there cited; also authorities cited in brief for appellant.

Reversed and remanded.

---

58 494
c74 199

FITZGERALD v. SAXTON.

Opinion delivered February 2, 1894.

1. *Highways—Jurisdiction of municipal corporations.*
   Where the limits of a city are extended so as to take in outlying territory, the control of the county over the public highways in such territory ceases, and the city immediately becomes possessed thereof.
2. *Highway—Change of route—Prescription.*
   Where the original route of a highway is changed, and a new route substituted by the invitation or acquiescence of the owner of the land over which it lies, the use of the same for the statutory period, without objection by the owner, will be considered a valid substitution of the new location for the old.

Cross-Appeals from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

STATEMENT BY THE COURT.

This is a proceeding instituted by the appellant, as plaintiff, in the Pulaski chancery court, against appellees, as commissioners and collector of Improvement District No. 25, in the city of Little Rock, on the 16th July, 1890, to enjoin them from entering upon and appropriating plaintiff's land as a street, and improving the same, and also from collecting the taxes levied on his said land for the purpose of said improvements. Sundry other questions were raised by the original complaint, but the two suggested above are all that are presented for our consideration.

The defendants answered, making their answer a cross-bill with prayer for the enforcement and collection

of said taxes, amounting for the years 1890 and 1891, to the sum of $135.00, and also for the statutory penalty and allowance of attorney's fee.

A temporary restraining order was made, in answer to the prayer of plaintiff, by the county judge, in the absence of the chancellor from the county.

The cause was heard on the 9th day of May, 1892, by the chancellor and decree rendered to the effect that the injunction be perpetual as to the taking of plaintiff's land for a street, and the improvement thereof as such; but dissolved as to the collection of the taxes, which were held to have been properly and lawfully levied. Neither penalty, attorney's fees, nor interest were allowed. Both parties appealed from that decree to this court.

It appears from the agreed statement of facts, that the ten acres in controversy are part of a quarter section of land owned originally by Lemuel R. Lincoln, who sold the same by deed to Augustus Marchand March 24, 1851, Augustus Marchand to Bishop Byrne, December 29, 1851, and that plaintiff (Edward Fitzgerald) bought same from Thomas J. Riley as commissioner in chancery, December 16, 1879. It does not appear how the title passed from Augustus Byrne to Riley as commissioner in chancery. The description of the ten acre tract in all these deeds and conveyances is substantially the same, and is as follows, to-wit:

"That part of a tract of land surveyed by Dr. Samuel H. Webb, December 23, 1851, being part of the southeast quarter of section four (4), township one (1) north, range twelve (12) west, 5th p. m. beginning at a point at the south-east corner of block No. 410, agreeable to survey made by I. M. Moore for Lemuel R. Lincoln in laying out lots adjoining the city of Little Rock, and known as Lincoln's Addition, and running thence west (40) forty rods; thence north (40) forty rods;

thence east (40) forty rods to the northeast corner of block 411, in Lincoln's Addition aforesaid; thence south (40) forty rods to the place of beginning."

It appears that the only plat or bill of assurance of Lincoln's Addition of record is the one recorded in "A" 2, p. 113, in the recorder's office of Pulaski county, filed February 19, 1857, by Peter T. Crutchfield, administrator of the estate of Lemuel R. Lincoln, then deceased; and a copy of this is stated to have been filed in the papers in the case of *Webster* v. *City of Little Rock*, 44 Ark. 537. A plat of the S. E. ¼ Sec. 4 T. 1 N. R. 12 W., the quarter section mentioned above as laid off in blocks and lots and sold by said administrator in obedience to an order of the chancery court, on February 2, 1857, is attached to and is a part of the transcript herein, showing the location of the ten acres in controversy, and also the location of the Lincoln House, frequently referred to in the testimony herein, as well as of a part of Tenth (formerly Caroline) street as extended into this tract from the east, and some adjacent blocks.

It appears that, on December 19, 1879, appellant conveyed by deed the northeast quarter of said block 410, and to the center of Bishop and Tenth streets adjoining same on the west and north respectively, concluding with the words "together with the one-half of said streets bounding the same, the said streets subject to the right of way for the public." And that this was re-conveyed afterwards to appellant by same description.

It appears, also, that, for many years, the city street named "Bishop street" has been left open and extends through the center of said ten acre tract from north to south, and that the street now known as "Tenth street," formerly Caroline street, passes through the center of said tract from east to west, the two streets dividing the tract into four blocks of equal size, the said blocks

No. 410 and 411, being the eastern blocks of the four, the two west of Bishop street having no numbers.

It appears that these two streets and four blocks, making up the whole ten acres, are thus laid off in exact conformity with the corresponding streets and blocks in the city of Little Rock, the two streets being parts of Bishop and Tenth streets respectively, the one extending from the north to the center of the north line of the tract, and passing out south from the center of the south line; and the other to the center of the east line and passing out from the center of the west line of the tract —the city of Little Rock being on all sides and in all directions from it. It also appears from the plat exhibited that this ten acre tract is laid off altogether without reference to the lines and boundaries of governmental surveys of the land; and that this conformity to the city admeasurements dates back to the said platting of the same while owned by said Lincoln.

It appears that, at various times during his ownership, appellant has leased various lots and parcels of ground in this tract to various and sundry persons, recognizing the streets through and blocks on said tract in making descriptions in general conformity to them.

Among the items of the agreed statement of facts is one expressed in these words, to-wit: "That if the ten acres in controversy is in the city limits of the city of Little Rock, it is there by virtue alone of the act of the legislature of Arkansas, April 28, 1873, as construed by the Supreme Court of Arkansas, in the case of *Webster* v. *City*, 44 Ark. 537, unless it be by acquiescence or use."

It further appears from the agreed statement of facts that city taxes were collected on said tract for the years 1874–1877 inclusive, and for the years 1880–1884 inclusive, in the name of plaintiff, as blocks 410 and 411, Lincoln's addition to the city of Little Rock, except for the year 1880, the west half of said tract not being as-

sessed by any other description, either as city or county property. (In brief of appellees' counsel, we find a reason suggested why the city taxes on these lots were not collected for the intervening years.) From 1884 the taxes for the city have been continued to be collected on this property up to the trial of this cause.

The testimony of witnesses will be referred to in the opinion as occasion may demand.

Blackwood & Williams for appellant, Fitzgerald.

1. There is no street through this property, either by dedication, limitation or prescription, and said property has never been platted into lots or blocks. 47 Ark. 71; *Ib.* 431; 50 *id.* 53; 15 Ill. 235; 108 *id.* 467; 87 *id.* 65; 41 Wis. 501; 11 N. E. Rep. 484; 55 Am. Rep. 618; 49 Wis. 697; Mansf. Dig. sec. 738; 44 Vt. 239, 243; 32 Mich. 279; 67 Tex. 345; 103 Ind. 349; 12 Atl. Rep. 667; 9 *id.* 63; 70 Pa. St. 125.

2. The property is not in the city, and hence not subject to taxes. It was not laid off into lots and blocks (44 Ark. 537), and hence did not become a part of the city, under the act of April 28, 1873. If not in the city, the council had no power over it. Mansf. Dig. secs. 825, 826.

Ratcliffe & Fletcher for appellees.

1. There has been a public highway through this property for more than twenty-five years. Tenth street has been used by the public as a highway, openly and adversely, for more than seven years, and long before it was incorporated in the city limits. When the property became a part of the city, the public highways became subject to the jurisdiction of the city. Elliott, Roads and Streets, 312 *et seq.* 329. By obstructing or abandoning the use of old roads and adopting the course of streets in lieu thereof and the use of said streets by the public, these streets were dedicated to public use.

19 Pick. 405; 50 Ark. 57. Seven years open and adverse use gave the public the right to continue to use the street. 50 Ark. 53; 51 *id.* 271; 47 *id.* 437; *Ib.* 66; 34 Ind. 497; 3 Zabriskie, (23 N. J. L.) 712.

2. But whether the street goes *through* the property or not, it goes *up to* the property on both sides, and thus *benefits* it. 2 Dill. Mun. Corp. (2nd ed.) sec. 634; 52 Ark. 107. Whether benefitted or not, it was for the city council to say what property should be embraced in the district, and the action of the council cannot now be questioned. Mansf. Dig. sec. 839; 42 Ark. 152.

3. The property is in the city. 44 Ark. 537; 34 Iowa, 194; 13 Gratt. 389; 2 Dill. Mun. Corp. (2nd ed.) secs. 491–495; 38 Ark. 87; 54 *id.* 372.

4. Interest, penalty and attorney's fees should have been allowed. Mansf. Dig. secs. 843–847.

BUNN, C. J., (after stating the facts.) The first question that confronts us is that submitted to us by the paragraph of the agreed statement of facts quoted above.

It seems that the main reliance of the appellant in the case of *Webster* v. *Little Rock*, 44 Ark. 537, was that this court would declare the act of April 28, 1873, unconstitutional, since it was by virtue of that act, if at all, his property and that of his co-plaintiffs, including the property herein involved, had been placed in the city of Little Rock, as being property coming under the description set forth in that act. This court, in the case of *Webster* v. *Little Rock*, *supra*, having under consideration the constitutionality of that act, and also the question as to whether or not, by its provisions, Marshall & Wolf's and Faust's additions to the city of Little Rock were not included in the city, held the act to be constitutional, and that said additions were all by its provisions included in the city, and say: "Lincoln's addition

is not named in his (the chancellor's) finding, but the effect of the decree is the same upon it as the others."

Elswhere in the opinion in that case, the court, by Judge Eakin, makes it appear that the inclusion of Marshall & Wolf's and Faust's additions in the city limits is dependent upon the inclusion of Lincoln's addition, for the patent reason that otherwise the first named additions, without Lincoln's addition, were not contiguous to the city, Hide street being the west boundary line theretofore. The court certainly held Lincoln's addition (including the Catholic property, or that in controversy) to have been placed in the city by the act. We think also that, aside from questions springing up from the force and effect of that and perhaps other acts of the legislature, the property in controversy has been regarded as, and in fact has been, a part of the city of Little Rock since the passage of that act, to-wit, April 28, 1873.

Without going into the inquiry whether or not Bishop street through and over this land (by reason of former acts of dedication by any of the owners of the ten acres, and of acceptance by the city,) has in fact become a street and highway of the city for public use, we leave that question to be solved in some more appropriate proceeding, and turn our whole attention to the status of Tenth street, as projected through this property, as this is the question at last.

It appears from the testimony of the witnesses in the case that a road over and across the land in controversy has been used by the public as far back in the past as the oldest person now living can remember; and, from the testimony of witnesses best and longest acquainted with the locality, that this was a public county road until the land became a part of the city of Little Rock, about twenty years ago, by virtue of the act of the legislature referred to; and that since that

time the travel has continued, first by roads changing for convenience and availability (always over the tract however) and gradually concentrating upon the location known as "Tenth Street," as obstruction would be placed in the other tracks and roads; and that Tenth street over said land has been opened to travel since its inclusion in the city, and some say before that time. Some of the witnesses say that the public road, which was known as the "Mt. Ida Road," was on the same ground, substantially, as Tenth street, as it extends over this property; others say that the original public road going west, after leaving the city at the intersection of Tenth and High streets, inclined as much as forty-five degrees south of west, but finally got back on the line of Tenth street extended westward in front of the "Lincoln House," three or four hundred feet west of the west boundary of the land in controversy, as appears from the plat which is a part of the transcript herein. The evidence is overwhelming and conclusive that the road aforesaid, from a time many years antedating plaintiff's ownership of the land, has run over and across the same, and has been substituted by Tenth street, if not indeed always of the same location as that street. It further appears that the streets, blocks and lines, as claimed by appellees, into which the tract is divided, are in exact conformity with the plat of the city, and that they have furnished the data and basis upon which all descriptions in conveyances made by plaintiff and his agent have been predicated, and that all parties, seemingly, have treated and dealt with the property as if it were city property containing the subdivisions and streets aforesaid. On the other hand, the plaintiff says, in effect, that whatever in this direction has been done by him, was done for convenience, and not to dedicate said street to the public, as such; that no such dedication has ever been made, to his knowledge; that, about the time he first heard of

the movement to create this improvement district, he built some houses on the northeast block of this property on High street, thereby stopping the public travel over said block, and compelling it to go down to Tenth street and along said street to where it intersects Bishop street, and thence southwest out of the city.

1. Jurisdiction of city over highways.

It is the law, now settled and recognized everywhere, that, as a city is extended so as to take in territory, the jurisdiction and control of the county over the highways in such territory is determined, and the city immediately becomes possessed of the same. Thus, when the land in controversy became a part of the city of Little Rock, the public road then leading over and through the same fell under the jurisdiction and control of the city, and the city became at once responsible for the condition of this road as a public highway. This is an easement which the public have, and the owner of the fee has no right to permanently and materially disturb it, and the easement continues in all its force when the road has become the highway of the city. Elliott on Roads and Streets, pp. 311–318, and authorities therein cited.

2. Effect of change of route of highway.

Again, it appears that there is some conflict in the testimony of witnesses as to the exact location of the county public road over the property before it was taken into the city; some saying that it was substantially the same as that of Tenth street, and others that it ran across the blocks as laid off in the plat. This, of itself, really makes no difference. In behalf of the city, to substitute Tenth street, as laid off and left open by the owner and his predecessors, for the public road, wherever it may have run, was more in harmony with its general plan, and therefore more convenient and desirable in many respects. In behalf of the owner, it is eventually more to his interest to concede the ground occupied by Tenth street than that the public should continue to cut up his lots and blocks by an irregular highway.

The long continued use by the public, before the institution of this suit, of Tenth street, as extended over the land, as a highway, in substitution for the original road, and the long acquiescence of the owner of the soil, amounts to a new dedication. *Hobbs* v. *Inhabitants of Lowell*, 19 Mass. 410; *Almy* v. *Church*, 26 Atl. Rep. (R. I.) 58; *Wyman* v. *State*, 13 Wis. 663; *Howard* v. *State*, 47 Ark. 437; *Patton* v. *State*, 50 Ark. 53.

In all such cases as this, it is considered that the public, primarily, has a right in the original road, but the public, at the invitation or by the acquiescence of the owner of the land, may adopt a new route, and its use of the same for the statutory period, without objection on the part of the owner, will be considered a valid substitution of the new location for the old. Any other rule would leave the owner in the attitude of a violator of the law when he has obstructed the old route in any way, for the public is entitled to the use of the one or the other.

We are of the opinion, therefore, that the chancellor erred in perpetuating the injunction against the appellee commissioners, their employees and agents, and that he did not err in decreeing the taxes levied by them to be a valid lien on the land designated.

The decree of the chancellor is reversed as to the perpetuation of the injunction, and affirmed as to said taxes and refusal to assess penalty and attorney's fee, and the cause is remanded for further proceedings in accordance herewith.

58 504
64 257

58 504
88 186

McMURRAY v. BOYD.

Opinion delivered February 24, 1894.

1. *Master and servant.—Discharge for misconduct.*
Where a bookkeeper, employed for a stated period, so demeans himself toward the customers of his employers as to injure their business, his misconduct is a sufficient reason for his discharge.

2. *Pleading—Amendment.*
Defendant should be permitted to amend his answer to conform to evidence which has been admitted without objection if there is nothing to indicate that plaintiff would be surprised or his cause injuriously affected by it.

3. *Master and servant—Breach of contract—Condonation.*
Retention of a servant by the master after knowledge of a breach of the contract is, *prima facie*, a waiver; but if there are circumstances shown that tend to establish a reasonable or proper excuse for delay in dismissing him, it is for the jury to say whether in fact the breach has been condoned.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

Sandels & Hill for appellants.

1. The court erred in not giving judgment on the special verdict. The two verdicts being inconsistent, the special verdict controls, and displaces the general verdict. 40 Ark. 327.

2. Appellants were clearly entitled to amend their answer. 42 Ark. 57; *Ib.* 503.

3. The mere fact of retaining Boyd after his incompetency was discovered does not estop appellants from discharging him. The question whether the breach was waived or not should have been left to the jury. 3 So. Rep. 893; 17 Pac. 292; 7 Fed. Rep. 642; Wood on Master and Servant, (2d ed.) sec. 123; 33 N. Y. Sup. Ct. 195; 63 Ga. 755; 64 Ga. 737; 3 Rich.

(S. C.) 161; 21 S. W. Rep. 430; Wood, Mast. and Serv. pp. 168–170, and sec. 121.

T. P. Winchester for appellee.

1. The general verdict is entirely consistent with the special findings under the instructions of the court.

2. It was within the court's discretion to allow the amendment asked.

3. There was no error in the court's instructions. What is a *waiver*, is a question of law, and the court left it to the jury to find whether the necessary facts existed. Wood, Master and Servant, sec. 121; 3 So. Rep. 893.

MANSFIELD, J. The appellants employed the appellee, Boyd, to serve as their book-keeper for the period of one year at a salary of $50 per month. They discharged him at the end of four months, and, after the term of service contracted for had expired, he brought this action to recover the amount of his salary for the eight months following the date of his dismissal. The answer to the complaint justified his discharge on the ground that he kept the books in a careless, unskillful and incompetent manner; and this defense was supported on the trial by the testimony of several witnesses. Evidence which tended to show that the plaintiff was rude and discourteous to the defendant's customers, and that his conduct in that respect injured their business, was also given to the jury without objection; and when all the evidence had been concluded, they asked leave to amend the answer so as to set up, as an additional defense, the facts just mentioned—their counsel stating that such defense was unknown to them before it was disclosed by the evidence. But the court refused to permit the amendment, and confined its charge to the facts originally relied upon.

1. Right of master to discharge servant.

If the plaintiff so demeaned himself towards the customers of the defendants as to injure their business, this was a sufficient reason for his discharge; and whether it was, or was not, in fact, one of the grounds on which the defendants acted in dismissing him, they had the right to avail themselves of it as a matter of defense to his action. Wood's Master and Servant, pp. 166, 167, 210, 211, 232.

2. As to amendment of pleading.

And as the proposed amendment was based on evidence not objected to, and there is nothing to indicate that the plaintiff would have been surprised, or his cause otherwise unjustly affected by it, we think the court should have allowed it. Mansf. Dig. secs. 5075, 5080; *Burke* v. *Snell*, 42 Ark. 57.

3. When servant's breach of contract condoned by master.

The plaintiff entered the service of defendants about the first of September, 1889, and was discharged about the first of January, 1890. The busy season of the defendant's trade opened, it seems, the middle of November; and Reynolds, one of the defendants, testified that he was pleased with the plaintiff's work up to the latter date, and then discovered he was incompetent. Reynolds also states that he complained to McMurray of the plaintiff's incompetency, and that, during the month of December, McMurray began to look for another bookkeeper; and it was shown that, soon after the dismissal of the plaintiff, a person was employed to take his place at a salary of seventy-five dollars per month. McMurray, who acted for his firm both in employing and dismissing the plaintiff, testified that members of the firm complained to him of the plaintiff's incompetency and offensive manner towards customers, and that he discharged him on these grounds, but did not at any time inform him of the complaints made. McMurray admitted that, two months after the plaintiff's work began, he expressed his satisfaction with it, and also admitted that he knew the plaintiff was incompetent a month before he was discharged. He stated, however, that his

reason for delaying the dismissal was that it would have injured his business if it had occurred during the busy season, when, to use his own language, "all good book-keepers had places."

As applicable to this testimony, and to other evidence bearing on the question whether the defendants had waived their right to discharge the plaintiff for the cause alleged in the answer, the following instruction was given to the jury, the same being the second paragraph of the court's charge: "If you find that the defendants, during the busy season, found out that the plaintiff was not keeping the books in the manner contemplated by the employment, but said nothing to the plaintiff about it, and did not rescind the contract after finding out such facts, but retained and accepted plaintiff's services, such as they were, under the contract, without any objection in any way made thereto, until after the busy season was over and they could dispense with his services, and then discharged him, then, and in such case, the defendants are estopped to allege the manner of keeping the books as grounds of discharge; for, after defendants had become aware of plaintiff's manner of book-keeping, they should have rescinded the contract, or at least stated their objections to Boyd, so that he might have corrected it; and if they accepted his services, without objection, until they had no further need of Boyd's services, they waived their right to discharge him."

We may judge of the correctness of this instruction by considering whether it is consistent with the law as stated by Mr. Wood in his work on Master and Servant. On this subject he says: "The question as to whether the master has waived a breach of contract by the servant by retaining him in service after knowledge of such breach is a question of fact for the jury. *Prima facie*, it is a waiver, and condonation is presumed; but, if there

are circumstances shown that tend to establish a reasonable or proper excuse for delay, it is for the jury to say whether *in fact* the breach was condoned." (Wood's Master and Servant, sec. 123.)

Under this rule, the main fact to be found by the jury was whether the plaintiff's alleged breach of the contract had been condoned. If that fact was shown, its legal effect was a waiver of the right to discharge the plaintiff. But what the rule of law makes only *prima facie* evidence of condonation the instruction makes conclusive by declaring that the defendants were estopped to allege the plaintiff's incompetency as cause for dismissing him, if the jury found that, after discovering his manner of keeping the books, they retained him, without objection, until the close of the busy season, when they could dispense with his services. From his retention after knowledge of his incompetency, the law presumes a waiver of the breach; but this presumption may be rebutted by facts sufficient to show a reasonable excuse for the failure to dismiss him at an earlier day. (*Jones* v. *Vestry*, 19 Fed. Rep. 59). Facts were in evidence tending to prove such an excuse, and it was for the jury to say whether they established it. Wood, Master and Servant, sec. 121 and sec. 123, note 2; *Leatherberry* v. *Odell*, 7 Fed. Rep. 648; *Jones* v. *Vestry*, 19 Fed. Rep. 62. The second instruction states hypothetically certain facts from which, as evidence, the jury might have found that the breach of contract was waived. But it was not the province of the court to deduce from such facts, or any others, the conclusion that the breach was in fact waived. That, according to the rule quoted above, and conceded to be correct, was a deduction which the jury alone could make; and it was not proper that they should make it without considering circumstances from which they might have concluded that the delay in discharging the plaintiff was excusa-

ble. The instruction makes no mention of these circumstances, and was erroneous because it did not therefore leave it to the jury to say, from all the evidence, "whether in fact the breach was condoned."

The court, of its own motion, required the jury to make special findings on the following questions: "First. Did plaintiff render defendants such service as was contemplated under the employment?" "Second. Did defendants, with knowledge of plaintiff's manner and method of keeping the books, retain him, without objection thereto, until they could dispense with his services?" To the first question a negative answer was returned, and the second was answered affirmatively. The general verdict being for the plaintiff, the defendants moved for judgment on the first special finding, and the motion was denied. The court set aside the first special finding on the ground that it was "against the weight of the evidence," and gave judgment for the plaintiff on the general verdict. The answer to the second question, although unfavorable to the defendants, was not conclusive, for reasons already stated.

If the answer to the first question had been inconsistent with the general verdict, it would have controlled, and in that case it would have been error to set it aside, leaving the general verdict to stand. (*L. R. & Ft. S. Ry.* v. *Miles*, 40 Ark. 298; *Ark. Midland Ry.* v. *Canman*, 52 Ark. 517.) But there is no inconsistency between the first special finding and the general verdict, since the jury might have found, as a basis for the latter, a waiver of the plaintiff's breach of the contract. On the special verdict the defendants were not therefore entitled to a judgment.

For the error in the court's charge the judgment is reversed, and the cause remanded for a new trial.

MOORE v. CHILDRESS.

58 510
74 87

Opinion delivered March 10, 1894.

Adverse possession—Life-tenant and remainderman.

The possession of a life-tenant, or of his grantee, is not adverse to the remainderman during the existence of the life estate.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

Austin & Taylor for appellants.

1. During the life of the tenant by curtesy the appellants only had a remainder interest, and the statute of limitations does not run against the remainderman during the existence of the tenancy by curtesy. 15 Am. Dec. 433; 33 *id.* 157; 39 *id.* 165; 55 N. Y. 451; 4 Johns. 390; 6 Cush. 34; 2 Cush. 269; 31 Pa. St. 94; 35 Ark. 84.

2. There can be no possession adverse to the remainderman until the death of the tenant by curtesy. 16 So. Car. 226; 29 Mo. 176; 30 N. J. 21; Shars. & Budd. L. C. Real Prop. vol. 2, p. 396; 43 Ark. 427; Tiedeman, Real Property, sec. 715.

W. P. and *A. P. Grace* for appellee.

BUNN, C. J. This is an action of ejectment, instituted in the Jefferson circuit court by the appellee against appellants, on July 16, 1889, and trial by the court, sitting as a jury by consent, on the 19th day of June, 1891, and judgment for plaintiff for the lands in controversy, and for rents for the years 1887, 1888, 1889 and 1890 at the rate of $120 per year, and in the aggregate in the sum of $480. Exceptions reserved. Bill of exceptions tendered and certified, and appeal taken.

Terrence Farrelly, Sr., was the owner in fee, from the State and Federal governments, of the following lands, to-wit: The northwest quarter of the northwest

quarter of section thirty (30) in township six (6) south, range nine (9) west, in Jefferson county, Arkansas, and died intestate seized and possessed thereof in Arkansas county, Arkansas, in 1860, leaving him surviving the following children and heirs at law, to-wit: Eliza Langtree, C. C. Farrelly, J. P. Farrelly, Terrence Farrelly, Jr., Nancy Brunson, and *Adeline J. Moore.* Subsequently the said Terrence Farrelly, Jr., died, without issue and intestate. The said Adeline J. intermarried with J. H. Moore on the 12th February, 1850, and died in the year 1867, and the said J. H. Moore died in October, 1885. Both died intestate, leaving surviving each of them, the appellants, their children and grandchildren (as stated in the pleadings), and heirs at law of each of them, to-wit: Charles F. Moore, Eliza Langtree, Charles Farrelly, John Farrelly, Terrence Brunson, Sallie Austin, Mary Brooks and Fannie Pendleton, who claim in this action as heirs of their mother and grandmother, the said Adeline J. Moore; and through her as one of the six children and heirs at law of her father, the said Terrence Farrelly, Sr.

After the death of his wife, the said J. H. Moore, being in possession of the land in controversy, sold and conveyed the same, by deed purporting to be a deed in fee, to the appellee, W. J. Childress, dated May 5, 1873, in pursuance of sale made and possession given in 1871, the consideration being as if for the land in fee simple; and under this title and adverse possession for the statutory period and longer said Childress holds and claims in this action, his possession continuing until the fall of 1887, when he was ousted of the same by appellants.

The appellants, as heirs at law, of Adeline J. Moore, claim to be the owners of the one-fifth undivided interest in the land in controversy—the extent of her interest at the time of her death—that is to say, one-sixth as one of the six children and heirs of Terrence Far-

relly, Sr., and one-fifth of the one-sixth interest of Terrence Farrelly, Jr., who died intestate and without issue as aforesaid, which two interests make one-fifth interest in the property. The appellants claim right of possession of their said interest after the death of their father, J. H. Moore, in October, 1885, claiming that he could convey to appellee no greater estate or interest than that he had, which was a life estate, and denying appellee's right by adverse possession.

It is too well settled to require argument that the possession of a life time tenant—an intermediate holding—is not adverse to the rights of a remainderman, until after termination of the life estate; and of course those holding under him alone are affected by the same rule. *Banks* v. *Green*, 35 Ark. 84; *Jackson* v. *Johnson*, 15 Am. Dec. 433; *McCorry* v. *King's Heirs*, 39 *ib.* 165; *Morris* v. *Edmonds*, 43 Ark. 427.

It follows, therefore, that, as to the one-fifth interest in the lands in controversy claimed by appellants as heirs at law of Adeline J. Moore, the statute bar had not attached when appellee was ousted of his possession by them in 1887, and that the judgment of the circuit court in so far was erroneous.

The four remaining children and heirs of Terrence Farrelly, to-wit: Eliza Langtree; C. C. Farrelly; Nancy Brunson and J. P. Farrelly, are not made parties in this suit, and of course their interests are not affected by any thing here determined. Save and except as affected by the claim of appellee, their interests would amount to the remaining four-fifths in the land in controversy. The claim of the appellee to this four-fifths interest is not controverted here. As to that, therefore, we express no opinion, except that appellee makes a sufficient showing for the purpose of this suit. Therefore, as to this four-fifths interest, the judgment of the court was correct, and to that extent the writ should go.

The appellee is entitled to four-fifths of the rents and profits from the death of J. H. Moore in October, 1885, and the appellants are entitled to one-fifth of the same from that time; that is to say, appellee should pay to appellants one-fourth of the rents and profits from the time of the death of J. H. Moore until they ousted him of his possession, and appellants should pay to him four-fifths of the same from the time they ousted appellee in 1887, and their respective rights as tenants in common should be restored to their condition at the death of J. H. Moore.

Reversed and remanded with directions to the Jefferson circuit court for such further proceedings as may be necessary, not inconsistent with the foregoing opinion. The appellee will pay all costs.

BAKER v. STATE.

Opinion delivered March 3, 1894.

1. *Grand jury—Competency—Right to object.*
   It is only one who is held to answer a criminal charge who is authorized, by sec. 2098 of Mansf. Dig., to object to the competency of one summoned to serve as a grand juror, upon the ground that he is the prosecutor or complainant in the charge against such person, or that he is a witness on the part of the prosecution.
2. *Continuance—When properly denied.*
   A motion for continuance for the testimony of an absent witness for the defense was properly denied where the State admitted the truth of what the motion stated the witness would testify.
3. *Incompetent evidence—Party producing cannot complain.*
   Defendant cannot complain of incompetent evidence brought out by his counsel on cross-examination of one of the State's witnesses.

4. *Erroneous instruction not prejudicial, when.*
Error in giving instructions is not prejudicial if it appears that the jury found a state of facts to which they were inapplicable.

5. *Right of accused to be present by counsel.*
The fact that the verdict was returned in the absence of defendant's counsel is not ground for reversal, in the absence of a request that such counsel should be present.

6. *Receiving stolen property—Venue.*
On an indictment for receiving stolen property, the venue is sufficiently proved by evidence that the property was received by defendant in another county and brought by him to the county of the venue with the purpose to conceal it and to exact of the owner a reward for its return.

7. *Impeachment of witness—Cross-examination.*
It is proper to ask the defendant on cross-examination if he had not been confined in the penitentiary of another State for receiving stolen goods.

Appeal from Phillips Circuit Court.

GRANT GREEN, JR., Judge.

Gilbert Baker has appealed from a conviction of the crime of receiving stolen goods under an indictment containing two counts,—the first for grand larceny, the second for receiving stolen goods.

Defendant moved to set aside the indictment upon the following grounds: "(1) The said indictment was not found or presented by sixteen good and lawful, fair and impartial, jurors. (2) E. S. Ready, the injured party named in the indictment herein, was a grand juror and member of the grand jury by whom said indictment was preferred, and had prejudged the charge therein against the defendant. (3) The said E. S. Ready, the prosecutor in the case, was the only witness examined by the grand jury, of which he was then a member, concerning the commission of the crime alleged in said indictment. (4) The said defendant was not held to answer said criminal charge, or any other public offense, before said grand jury, and had no opportunity to object to the competency of said E. S. Ready as a member of said

grand jury before he was sworn. (5) That the prosecuting attorney was present while the grand jury was deliberating on the charge contained in said indictment. (6) The proceedings of said jury in finding said indictment were otherwise irregular and contrary to law." The motion was overruled by the court.

Defendant asked for a continuance on account of the absence of Cora Dixon, a witness, by whom he expected to prove that he was at her house during the entire night in which the larceny was committed. The State admitted the truth of the matters set forth in the motion for continuance, and the motion was therefore overruled.

On the cross-examination of E. S. Ready, a witness for the State, certain testimony was elicited, tending to show that defendant committed the larceny. The court charged the jury as follows:

"1. The jury are instructed that where the possession of stolen property is shown to be in the defendant, it devolves on him to explain the possession, and his statements made in relation to such possession are all facts to be considered by the jury in arriving at a verdict."

"2. The ownership of property alleged to have been stolen is a material allegation in the indictment, and to convict the defendant as charged you must be satisfied from the evidence, beyond a reasonable doubt, that the watch alleged to have been stolen was the property of E. S. Ready, or that it was in his possession or control at the time of the taking."

"3. The jury are instructed that, before they can find the defendant guilty of grand larceny, it must be proved that he obtained the watch from E. S. Ready on the occasion alleged and in the manner described, or that he was present aiding and abetting another in the taking."

"4. The possession by a party of stolen goods is a fact from which his complicity in the larceny may be in-

ferred, but this fact, standing alone, is not sufficient to sustain a conviction. It must be made to appear that the property was recently stolen, the possession must be unexplained, and in some form involve an assertion of property in the possessor."

"5. If the jury believe from the evidence that the defendant in good faith, for the purpose of restoring it to the owner, purchased said watch, knowing it to be stolen, and did so return it, he would not be guilty as charged."

The court further instructed the jury that the facts stated as the evidence of Cora Dixon were admitted by the State, and were to be taken as true; and that all the material allegations in the indictment must be proven beyond a reasonable doubt; and gave the usual charge upon reasonable doubt.

The following instructions were asked for by the defendant and refused by the court:

"1. The State must prove every allegation in the indictment beyond a reasonable doubt, and if the jury believe that the watch alleged to have been stolen was not the property of E. S. Ready, and that it was the property of some other person, you will acquit the defendant."

"2. If the jury believe that the defendant did obtain the watch from other parties, and returned it as early as convenient after he received the description of the watch, you will acquit him."

"3. If the jury believe that the defendant did, in good faith, purchase said watch, although he might at the time have believed it to be stolen, and that he returned it to the owner upon information to whom it belonged, then you will acquit the defendant."

The jury returned the following verdict: "We, the jury, find the defendant guilty as charged in the

second count, and fix his punishment at three years in the penitentiary." The errors assigned by the defendant are stated in the opinion of the court.

Sanders & Fink for appellant.

1. The court erred in overruling the motion for a continuance. The practice of allowing the State to admit facts which a defendant expects to prove by an absent witness deprives the accused of a substantial right—to have the witness before the jury under sanction of an oath. 50 Ark. 161.

2. It was error to sustain the demurrer to the second, third and fourth grounds of the motion to quash. Mansf. Dig. sec. 2098. 50 Ark. 534 is not in point.

3. The verdict is not supported by the evidence. There is no evidence that defendant received the watch with the felonious intent to deprive the owner of it. All the testimony shows that his purpose was to secure the watch, secure the reward and make reputation as a detective. This is not a crime. 50 Ark. 427; Mansf. Dig. secs. 1645, 1631.

4. The venue was not proved. If a crime was committed, it was in Monroe or Jefferson county, and sec. 1974 Mansf. Dig. was not applicable.

5. The State abandoned the charge of larceny, and it was error to charge the jury as to larceny.

6. The first instruction of the court is palpably erroneous. 37 Ark. 580; 43 *id.* 294; 45 *id.* 173; 45 *id.* 492; 49 *id.* 448; 50 *id.* 477; 52 *id.* 263. Mere possession of stolen goods is not presumptive evidence of guilt. *Boykin* v. *State*, 34 Ark. 443.

7. It was error to allow the State to ask defendant if he had been convicted for receiving stolen property in Texas. Mansf. Dig. sec. 2902; 52 Ark. 309, 310; 54 *id.* 626.

8. The court received the verdict in the absence of the attorney for defendant, and without having him called.

James P. Clarke, Attorney General, and *Chas. T. Coleman* for appellee.

1. Even if it were error to overrule defendant's motion for a continuance, there was no prejudice, as the jury virtually acquitted him of the larceny.

2. The motion to quash was properly overruled. 50 Ark. 542.

3. The instructions as to larceny were harmless, as the defendant was found not guilty of the theft. 54 Ark. 4.

4. The first instruction may be verbally inaccurate, but, taken in connection with the fourth, states substantially the law. 34 Ark. 444; 44 *id.* 41.

5. The right of one on trial for felony to be present at every substantial step in the progress of the trial is personal to the defendant, and does not extend to his counsel.

6. The question as to whether defendant had not been confined in the penitentiary of Texas, was not improper. *Holder* v. *State*, *ante*, and cases cited in that case.

7. From the proof the jury could have found that defendant was in collusion with the parties who stole it, and that he received it in Phillips county.

1. When objection taken to competency of grand jurors.

HUGHES, J. The demurrer of the appellee to the second, third and fourth grounds of appellant's motion to quash the indictment was properly sustained. There was no evidence to sustain the first and fifth grounds of the motion. The sixth ground was merely formal.

"Sec. 2098, Mansf. Dig., which provides that 'every person held to answer a criminal charge may object to the competency of any one summoned to serve as a grand juror, before he is sworn, on the ground that he is the

prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution,' applies only to persons held to answer criminal charges which have not been previously investigated and acted upon by a grand jury, and not to a person already indicted." *Hudspeth* v. *State*, 50 Ark. 534.

2. When continuance properly denied.

The appellant's motion for a continuance that he might procure the testimony of Cora Dixon was properly denied, as the appellee admitted that what the motion stated she would testify to was true, which related only to the question of guilt upon the first count of the indictment, upon which appellee was acquitted. He was not prejudiced by the refusal of the court to continue the cause for this witness' testimony.

3. As to incompetent evidence.

The evidence of E. S. Ready tending to show that the appellant committed the burglary and larceny, after the admission by the appellee that what the motion for continuance stated Cora Dixon would swear was true, was, as the record shows, brought out on cross-examination by appellant's counsel, and he cannot be heard to complain of this.

4. When erroneous instruction not prejudicial.

It is urged that the court erred in giving the second, third and fourth instructions, which related to the count in the indictment for larceny. "An error in rejecting a a prayer for an instruction is not prejudicial if it appears that the jury found a state of facts to which it would have been inapplicable." *Farris* v. *State*, 54 Ark. 4.

The court told the jury that the facts stated as the evidence of Cora Dixon were admitted by the State, and must be taken as true. This admission by the State was a virtual abandonment of the first count of the indictment.

The appellant contends that the first instruction for the State is erroneous, because it stated to the jury that the statements of the defendant in relation to his

possession of the stolen property were all "facts to be considered by the jury in arriving at their verdict." If there was any error in this instruction, it was cured by the fourth instruction given. Perhaps it would have been better if the court had stated in the first instruction that the statements of the defendant in relation to his possession of the stolen property should be considered by them in arriving at a verdict. Standing alone, we see no substantial error in it.

The proof showed that the property had been recently stolen before it was found in the possession of the defendant. We think there was no error in refusing the several instructions asked by the appellant.

5. Right of defendant to be present by counsel.

It is assigned as error that the verdict of the jury was returned in the absence of appellant's counsel, and that he was not called. He did not ask that his counsel should be present. He could waive his presence. There was no reversible error in this. A defendant on trial for a felony "must be present whenever any substantive step is taken in his case, unless it appears that no prejudice could by any possibility result from his absence." *Mabry* v. *State*, 50 Ark. 492; *Bearden* v. *State*, 44 Ark. 331. "He has no right to abscond, and then to complain of his own absence." Sec. 2213 Mansf. Dig.; *Gore* v. *State*, 52 Ark. 285. It is a constitutional right of a defendant on trial for felony "to be heard by himself or counsel." Sec. 10, art. 2, const. 1874. If the absence of defendant's counsel when a verdict is returned against him in a felony would in any case be a ground for reversal, we think it sufficiently appears in this case that the appellant could not have been prejudiced by the absence of his counsel when the verdict was returned into court.

6. As to proof of venue.

The appellant insists that the venue was not proved as laid in the indictment. This is the most difficult and troublesome question in the case. There does not seem

to be any evidence that the appellant had the stolen watch in his possession in Phillips county, where he was indicted and tried, prior to the time he carried it back from Pine Bluff to Ready, the owner, in Helena in said county. According to Ready's testimony, which the jury might have believed, and doubtless did believe, the appellant told him, when he brought the watch back to Helena and received the reward of $25, and his expenses, $7.50, that he had recovered the watch at Clarendon, Monroe county, at the depot of the Cotton Belt railroad, on the 24th of February, having borrowed from the depot agent $20, which he paid for information which enabled him to recover it; that he had not then had any description of the watch. Ready says that, on the 1st day of March following, the appellant telegraphed him from Pine Bluff, Ark., as follows: "Will try and get watch and man for fifty dollars." "That, after Baker was arrested, he told me that he was very much surprised at being indicted for burglary, and for stealing my watch; that he got the watch in Pine Bluff with some other things—some diamonds, three or four silver watches and other jewelry—from the thieves; and that he borrowed $30 and got a quart of whiskey, which he gave for the jewelry. I reminded him that he told me in March that he got the watch in Clarendon. He became very much confused, and said that I was mistaken; that he told me he got it at Pine Bluff." From this evidence the jury might have believed that appellant received the watch in Clarendon on the 24th of February, and concealed the fact until after the 1st of March following, and until after he sent the telegram to Ready, on the 1st of March, seeking to have Ready offer a reward for the watch before he disclosed that it was in his possession.

It is contended by the appellant that "the existence of the felonious intent to deprive the owner of the

specific stolen property received by him must be proved;" that the "fact that appellant sought an advantage for himself, or to gain money as a condition of the return of the watch, does not constitute the crime charged."

In *Regina* v. *O'Donnell*, 7 Cox, Cr. Cas. 337, it was held that if property be taken with the intention of holding it until the rightful owner should pay a certain sum, and obliging such payment, the offense of larceny was complete. In *Commonwealth* v. *Mason*, 105 Mass. 163, Morton, J., said: "We think when a person takes property of another with the intent to deprive the owner of the property taken, or of its value, such intent is felonious, and the taking is larceny." In *Berry* v. *State*, 31 Ohio St., 227, in which the cases cited above are cited, it is said: "In an exact sense, it is not true that an intent to appropriate permanently the property taken is a necessary ingredient in the crime of larceny, if by permanent appropriation is meant keeping the specific property from the possession of the owner." And in the syllabus of that case it is laid down that "the wrongful taking and carrying away of the property of another, without his consent, with intent to conceal it, until the owner offers a reward for its return, and for the purpose of obtaining the reward, is larceny." The immediate and unconditional possession of stolen goods is the right of the owner. *State* v. *Pardee*, 37 Ohio St. 66.

The section of the statute under which the defendant in this case was convicted reads as follows: "Whoever shall receive or buy any stolen goods, moneys or chattels, knowing them to be stolen, with intent to deprive the true owner thereof, shall, upon conviction, be punished as is, or may be, by law prescribed for the larceny of such goods or chattels in cases of larceny.

In the syllabus of the case of *People* v. *Wiley*, 3 Hill (N. Y.), 194, it is said: "So, though the purpose

be, not to deprive him of the specific goods, but of some other portion of his property; e. g., to defraud him into the payment of money by way of reward for the restoration of the goods." Bishop and Wharton have both stated the rule substantially as above stated.

Under the authorities quoted, if the jury believed from the evidence in this case—and they might have believed—that the appellant received the stolen watch at Clarendon on 24th February, and concealed the fact from Ready, the owner, knowing the property to be Ready's, with the intention of defrauding Ready into the payment of money to him by way of reward for the restoration of the watch, the offense of receiving stolen property was made out under the statute. And if the appellant returned to Phillips county with the stolen watch, with a purpose to exact of Ready a reward for its return, and had the watch in Phillips county, with the intention of requiring Ready, as a condition of its return, to pay him money therefor, he was guilty, under the statute, the venue being thus proved. We are of the opinion that there was evidence from which these facts might have been found by the jury. This court will not reverse upon the weight of evidence, or where there is evidence upon which the verdict of the jury might have been found.

7. Impeaching witness on cross-examination.

On cross-examination the appellant was asked, if he had not been confined in the penitentiary of Texas for receiving stolen goods, and answered that he had. This is assigned as error. It was held recently in *Holder* v. *State*, *ante*, p. 473, that such a question on cross-examination was proper, as affecting the credibility of the defendant when a witness in his own trial.

The questions of fact were all for the jury, and we cannot say there is not evidence to support the verdict.

Affirmed.

BAKER v. AYERS.

Opinion delivered March 10, 1894.

1. *Attachment—Irregularity—Right of junior attacher to object.*
Failure to incorporate in a complaint in attachment matters which should appear therein, but which sufficiently appear in the affidavit, is a mere irregularity of which a junior attaching creditor can take no advantage.

2. *Attachment—Claim not due—Issuance of writ.*
A writ of attachment issued by the clerk upon a claim not due, under sec. 362, Mansf. Dig., in the absence of an order of the court or judge, is conclusive evidence that the clerk granted it, and of the amount for which it was allowed; and an order in writing, made by the clerk, directing himself to issue the writ, is unnecessary.

Appeal from Sebastian Circuit Court, Greenwood District.

EDGAR E. BRYANT, Judge.

Rowe & Rowe for appellants.

1. An intervenor is not allowed to step in and defend the suit, or dispute the grounds of attachment, in lieu of the defendant. 47 Ark. 41.

2. The affidavit for attachment followed the statute. Mansf. Dig. secs. 361-2-3-4, 309; 44 Ark. 404.

3. The Clerk had authority to issue the attachment. No written order was necessary. 4 U. S. Ct. App. p. 1; Mansf. Dig. sec. 362.

T. P. Winchester for appellee.

1. Appellants did not bring themselves within the statute, the note not being due. Mansf. Dig. secs. 361-364.

2. A failure to make the order for the attachment is fatal.

BATTLE, J. On the second day of December, 1891, E. Baker & Co. commenced an action in the Sebastian

circuit court against W. J. Forbes, and sued out an order of attachment therein, and caused it to be levied on the goods and chattels of the defendant. They stated in their complaint, which was verified by oath, that the defendant was indebted to them in the sum of $348, and ten per cent. per annum interest thereon from the first of December, 1891, until paid, as evidenced by his promissory note thereto attached. The note so attached is a promise of the defendant to pay to the plaintiff on the first day of December, 1891, $368 and ten per cent. per annum interest thereon "from due until paid." It is alleged in the complaint that twenty dollars has been paid on the note, thereby leaving $348 and interest still remaining unpaid. An affidavit was filed with the complaint, in which it is stated that the claim in the action is for money due on a note; that the claim is just; that, "he ought to, as he believes, recover thereon the sum of $348; that the defendant had sold, conveyed or otherwise disposed of his property, or suffered or permitted it to be sold with the fraudulent intent to cheat, hinder and delay his creditors, and is about to sell, convey or otherwise dispose of his property with such intent." The affidavit closes with a prayer for an order of attachment, and judgment, and other proper relief.

After E. Baker & Co. had sued out an order of attachment, W. N. Ayers & Co. commenced an action in the Sebastian circuit court against the same defendant, and sued out an order of attachment therein, and caused the same to be levied on the property attached in the first action, but after it had been seized under the first order of attachment. After this, they (W. N. Ayers & Co.) filed, by leave of the court, a motion in the first action to discharge the attachment therein for the following reasons:

(1) Because the action was brought before the note sued on was due.

(2) "Because the plaintiff made and filed no affidavit of debt not due as required by law, (or) as to when the claim would become due."

(3) Because "said attachment was not granted by the court, or the clerk or judge thereof in vacation."

The motion was sustained by the court, and E. Baker & Co. appealed.

The statutes of this State, which are contained in Mansfield's Digest, provide as follows:

"Sec. 361. In an action brought by a creditor against his debtor, the plaintiff may, before his claim is due, have an attachment against the property of the debtor, where—

First. He has sold, conveyed or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or

Second. Is about to make such fraudulent sale, conveyance or disposition of his property with such intent. * * * * * * *

Sec. 362. The attachment authorized by the last section may be *granted* by the court in which the action is brought, or the clerk or judge thereof, or any circuit judge, in vacation, where the complaint, verified by oath of the plaintiff, his agent or attorney, shows any of the grounds for attachment enumerated in that section, and the nature and amount of the plaintiff's claim, and when the same will become due.

Sec. 363. The order of the court, or the clerk or judge, granting the attachment shall specify the amount for which it is allowed, not exceeding a sum sufficient to satisfy the plaintiff's claim and the probable costs of the action.

Sec. 364. The order of the attachment, as granted by the court, or the clerk or judge, shall not be issued

by the clerk until there has been executed in his office such bond on the part of the plaintiff as is directed in cases of attachment, and the provisions of this chapter, as far as they are applicable, shall apply to attachments for debts not due."

The words "or the clerk" do not appear in sections 363-4 as enacted, but were inserted by the digester to make them conform to section 362, which is section 438 of Gantt's Digest, as amended by the act of March 18, 1881.

1. Who may object to irregularities in attachments.

The complaint, the note thereto attached (which is a part of it) and the affidavit, filed in this action, allege what is required to be shown in the complaint by section 362. They are a substantial compliance with that section. The failure to incorporate in the complaint all that is said in the affidavit is a mere irregularity, of which the junior attaching creditor can take no advantage. *Sannoner* v. *Jackson*, 47 Ark. 31; *Rice* v. *Dorrian*, 57 Ark. 545.

2. As to issuance of writs on claims not due.

Section 362 of Mansfield's Digest does not confer upon the clerk the authority to issue an order of attachment, but merely authorizes him, upon the conditions therein named, to grant it, as it does the court or judge thereof. If it should be so interpreted as to give him the right to issue the order of attachment, then, by the same rule of construction, it would authorize the court, or the judge thereof, to issue the same—a construction forbidden by the sections which follow. The order of the court or judge granting it must necessarily be made in writing; for the authority of the clerk to issue it in pursuance thereof could not appear unless the order of the court or judge was in writing. This is not true as to the clerk. The order of attachment issued by him, in the absence of an order of the court or judge, is conclusive evidence that he granted it, and the amount for which it was allowed. An order in writing made by the clerk

directing himself to issue the order of attachment for a specified amount would be a superfluous proceeding, and is wholly unnecessary. *People's Saving Bank and Trust Co.* v. *Balchelder Egg Case Co.* 4 U. S. Appeals, 603.

The judgment of the circuit court discharging the first attachment is reversed; and the cause is remanded for proceedings not inconsistent with this opinion.

---

58 528
63 211

58 528
64 258
a65 592
65 593

58 528
e71 298
72 623

58 528
80 57
82 402

58 528
84 59

58 528
f89 234

PROVIDENCE LIFE ASSURANCE SOCIETY *v.* REUTLINGER.

Opinion delivered March 10, 1894.

1. *Life insurance—Warranty.*

The answer of the insured to a question asked by the medical examiner is a warranty if the policy of insurance expressly so stipulates.

2. *When warranty broken.*

In a policy of life insurance the answers to questions asked by the medical examiner were made warranties; and among such questions and answers were the following: "Have you ever had any serious illness or personal injury, or ever undergone any surgical operation?" to which the applicant answered, "No." He was then asked, "When and by what physician were you last attended, and for what complaint?" and answered that he had never called a doctor in his life. *Held*, that proof of previous attendance on him by a physician upon six successive days, about three weeks before the application was made, would establish a breach of warranty, though his complaint was not of a serious nature, and did not affect his general health.

3. *Agent's fraud—Estoppel.*

Where a medical examiner has authority, express or apparent, from an insurance company to fill up blanks for answers to questions, and does so by writing false answers, and thereafter procures the signature of the applicant thereto, after he had given correct answers to the questions, and the company afterwards receives the premiums and issues a policy, the company will, upon the death of the insured, be estopped from

insisting on the falsity of the answers, although warranted to be true; but if the applicant discovers that a fraud has been perpetrated on him and the company, he cannot hold the policy without approving the action of the agent.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

Rose, Hemingway & Rose for appellant.

1. The statement, by the terms of the application and of the policy, was made a *warranty*, and, unless literally true, the policy was void. 22 Wall. 47; 91 U. S. 510; Cook, Life Insurance, sec. 15; Bliss, Life Ins. secs. 34, 63-4-5, 126, 128, 129, 132; 13 Atl. Rep. 4; 50 N. J. Law. 287; 3 Gray, 580; 4 H. of L. Cases, 484; 2 Cromp. & M. 348; 6 C. B. (N. S.) 437; 6 Jur. (N. S.) 826; 39 Ind. 475; 1 McA. 41; 1 Cent. L. J. 597; 3 Dill. 217; 4 Daly, 296; 2 N. Y. Sup. Ct. 247; 61 N. Y. 571; 50 How. Pr. 367; 2 Hun, 402. See the following cases, which deal especially with false statements relative to attendance by physicians: 5 Bing. 503; 38 L. J. Chy. 132; 3 Bigelow L. Ins. Rep. 264; 3 *id.* 199; 1 Foster & F. 735; 25 Hun, 442; 54 Hun, 294; 17 Minn. 491; 10 Am. Rep. 166; 49 N. J. Law. 587; 153 Mass. 176; 2 Rob. 455; 8 Ont. App. 716; Berryman, Ins. Dig. 802. Against this array counsel oppose nothing except 32 N. W. 610, where it is held that, in order to vitiate the policy, it must appear that a physician had been called for *a serious illness.*

2. It was error to tell the jury that they might find, from the mere fact that Reutlinger spoke English with a foreign accent, that he was not bound by his written contract. There was no proof of imposition or fraud. 2 Whart. Ev. sec. 1028; 117 U. S. 519; 78 Ind. 136; 6 Black. 380; 29 Ind. 580; 82 Pa. St. 202; 3 Ind. 449; 18 Kas. 529; 100 Ill. 298; 79 Ind. 604; 56 N. Y. 137; 70 Ind. 19; 55 N. H. 593; 54 Ill. 196; 72 Ind. 533; 29 Iowa, 498; 12 Neb. 433; 118 Mass. 109; 117 U. S. 534.

3. If the facts contended for by counsel were true, their position would not be improved, save they might recover the premium. If Reutlinger was so ignorant of English that he did not understand the doctor, and the doctor did not understand him, then there was no *aggregatio mentium*, and no contract. 117 U. S. 534; 50 Pa. St. 299; 88 Am. Dec. 544; 146 U. S. 483.

Caruth & Erb and *Morris M. Cohn* for appellee.

1. Insurance contracts, printed to suit the insurance companies, using terms chosen by them, and full of dangerous pitfalls, are *reasonably* construed in favor of the assured. 32 N. W. 610; 111 U. S. 335; 10 N. E. 242, 247; Parson's Cont. vol. 2, ch. xv, sec. 471; Bacon Ben. Soc. sec. 203; 12 Wall. 404; 54 Ark. 376; 104 U. S. 197; 21 Atl. Rep. 680. Taking the terms used by the application and the assured's answer, and construing them together, they *mean* simply that assured had never called a doctor for a *serious* complaint in his life. Conceding the answer to be a warranty, there was no breach. 2 Parson's Cont. p. 468, note; 2 So. Rep. 125, 131; 59 Wis. 162; Bac. Ben. Soc. p. 268; 104 U. S. 197, 204; 32 N. W. 610; 24 Fed. Rep. 670; 41 *id.* 506; 1 Atl. Rep. 340; 110 Pa. St. 84; 23 N. E. Rep. 997; 2 Dill. 570; 13 Wall. 222; 112 U. S. 250. Mere temporary disorders, which have no bearing upon the general health, do not come within the warranty. Berryman's Dig. p. 1483, *et seq.;* 73 Ill. 586; 93 Ind. 24; 70 N. Y. 72; 85 Ill. 537; 20 Fed. Rep. 596 and note; 3 Cent. L. J. 302; 2 So. 125; 59 Wis. 162; 73 Ill, 586. Great array of authority sustains the position that when an insurance company asks about complaints one has had, and in the same connection by what physician one has been attended, the physician referred to means one who has attended for some serious complaint, going to man's constitution, or seriously affecting his health.

2. The assured's answer was not a warranty, but a representation, and his belief and good faith are elements which might have been considered. 95 U. S. 673; 111 U. S. 335; 2 So. Rep. 125; 80 Ala. 467; 88 Cal. 497; 119 Ill. 474; 25 N. E. Rep. 299.

3. There was no error in the third instruction. 104 U. S. 197; 32 N. W. 610, 614: 52 Ark. 11.

BATTLE, J. Appellee commenced this action against the Providence Savings Life Assurance Society of New York upon a policy of insurance which was issued by it to her for $7,000 upon the life of her husband, Solomon Reutlinger, he having died. It resulted in a verdict and judgment in her favor. The defendant appealed.

The policy begins as follows: "In consideration of the stipulations and agreements in the application herefor, and upon the next page of this policy, all of which are a part of this contract," etc. The application which is referred to in the policy was signed by the appellee and her husband, and contains the following language: "We further declare and warrant jointly and severally that all the foregoing statements and representations, as well as those made or to be made to the medical examiner, or in any certificate of health hereafter given to the society by me, are and shall be true and shall be the basis of the contract with the society if a policy be issued or renewed thereon, and that, if any untrue or fraudulent statement or representation shall have been made, or if at any time any covenant, condition or agreement herein shall be violated, said policy and insurance shall be null, void and of no effect."

Among the questions propounded by the medical examiner to the insured was the following: "When and by what physician were you last attended, and for what complaint?" To which he replied: "Never called a doctor in his life." Following the questions

and answers in the medical examination, which were reduced to writing, are the following words in large type: "I hereby declare that I have read and understand all the above questions put to me by the medical examiner, and the answers thereto, and that the same are warranted by me to be true, and that I am the same person described as above." And just beneath these words is the signature of Solomon Reutlinger, the insured.

The appellant, in its answer, among other things, set out the warranties contained in the application, and the aforementioned question and answer, and stated that about three weeks before the application was made the insured had been attended by a regular physician upon six successive days, and that, by reason of the false answer, the policy was void. The evidence adduced at the trial tended to prove these allegations.

The main questions in the case are: Was the answer to the question an absolute warranty, or in the nature of a representation? If a warranty, was there a breach of it?

1. As to warranty in policy of life insurance.

As a general rule, a warranty is a stipulation expressly set out, or by inference incorporated, in the policy, whereby the assured agrees "that certain facts relating to the risk are or shall be true, or certain acts relating to the same subject have been or shall be done." Its purpose is to define the limits of the obligation assumed by the insurer, and it is a condition which must be strictly complied with, or literally fulfilled, before the right to recover on the policy can accrue. It is not necessary that the fact or act warranted should be material to the risk; for the parties by their agreement have made it so. Lord Eldon says: "It is a first principle in the law of insurance that, if there is a warranty, it is a part of the contract that the matter is such as it is represented to be. The materiality or im-

materiality signifies nothing. The only question is as to the mere fact."

On the other hand, representations are no part of the contract of insurance, but are collateral or preliminary to it. When made to the insurer at or before the contract is entered into, they form a basis upon which the risks proposed to be assumed can be estimated. They operate as the inducement to the contract. Unlike a false warranty, they will not invalidate the contract, because they are untrue, unless they are material to the risks, and need only be substantially true. They render the policy void on the ground of *fraud*, "while a non-compliance with a warranty operates as an express *breach* of the contract."

Statements or agreements of the insured which are inserted or referred to in a policy are not always warranties. Whether they be warranties or representations depends upon the language in which they are expressed, the apparent purpose of the insertion or reference, and sometimes upon the relation they bear to other parts of the policy or application. All reasonable doubts as to whether they be warranties or not should be resolved in favor of the assured. *Continental Life Ins. Co.* v. *Rogers*, 119 Ill. 474; *Fitch* v. *American Popular Life Ins. Co.* 59 N. Y. 557; *Moulor* v. *American Life Ins. Co.* 111 U. S. 335; *Campbell* v. *New England Life Ins. Co.* 98 Mass. 389; *Alabama Gold Life Ins. Co.* v. *Johnston*, 80 Ala. 467; *National Bank* v. *Ins. Co.* 95 U. S. 678.

Parties to contracts for life insurance have the right to stipulate that the idemnity shall be recoverable only on the conditions or contingencies agreed upon by them. When entered into, they should be construed and enforced according to the intent of the parties. In arriving at that intention, the nature of the contract and the object to be attained should be considered. Doubtful

words should be so construed as to give to each its due force in the furtherance of the main purpose of the contract. If any interpretation of the contract is so absurd and unreasonable as to raise the presumption that such a result could not have been within the intention of the parties, it should be discarded, and one adopted more consistent with reason and probability.

The Supreme Court of Pennsylvania expresses our view as to the construction of contracts of insurance in *Home Mutual Life Association* v. *Gillespie*, 110 Pa. St. 84, in this language: "Whilst, however, the insured is held for the exact truth of his warranty as a condition of his recovery, it must first be ascertained, under the ordinary rules of construction, what the thing is that is warranted; and, this being ascertained, the insured is held to a full and literal performance of it. But the words of a warranty, or of a contract of insurance, must receive a reasonable interpretation. When the words of any contract have a clear meaning, consistent with, and relevant to, its object and purpose, the intention of the parties, in the absence of fraud or mistake, cannot be shown to override the meaning. But if the words employed, in their liberal or unrestricted sense, are inconsistent with the main and obvious purpose of the instrument, or are foreign to the purpose of its provisions, they may, if reasonably susceptible, receive such interpretation as accords with the object in view and the clear intent of the parties. If the natural interpretation, looking to the other provisions of the contract, and to its general object and scope, would lead to an absurd or unreasonable conclusion, as such a result cannot be presumed to have been within the intention of the parties, such interpretation must be abandoned, and that adopted which will be more consistent with reason and probability."

Where questions propounded to an applicant for insurance upon his life as to his physical condition are in such terms as include the most trivial ailments or injuries, they should be interpreted as referring only to such illness or injuries as affect the risk to be assumed, unless they are in words which exclude such interpretation. The presumption is that trivial ailments or injuries are not within the contemplation of the parties, and that the questions, in the absence of words directing attention to them, are not asked with the view or purpose of ascertaining the existence of the same. The answers of the applicant should be interpreted in the same manner as the questions eliciting them, that is to say, as responsive to the questions in the sense in which they are asked. *Home Mutual Life Association* v. *Gillespie*, 110 Pa. St. 84; *Cushman* v. *U. S. Life Ins. Co.* 70 N. Y. 72; *Wilkinson* v. *Connecticut Mutual Life Ins. Co.* 30 Iowa, 119; *Insurance Co.* v. *Wilkinson*, 13 Wall, 222; *Connecticut Life Ins. Co.* v. *Union Trust Co.* 112 U. S. 250; *Bancroft* v. *Home Benefit Association*, 120 N. Y. 14.

In *Cushman* v. *U. S. Life Ins. Co.* 70 N. Y. 72, "it was decided that the application for the insurance was a part of the policy, and that the answers to the questions therein contained were therefore warranties." It was claimed that there was a breach of warranty in answering "No" to the question in the application, "whether the applicant had ever had disease of the liver." In speaking of this question, the court said: "In construing contracts, words must have the sense in which the parties used them, and, to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. By the questions inserted in the application, the defendant was seeking for information bearing upon the risk which it was to take, the prob-

able duration of the life to be insured. It was not seeking for information as to merely temporary disorders or functional disturbances, having no bearing upon general health or continuance of life. Colds are generally accompanied with more or less congestion of the lungs, and yet in such a case there is no disease of the lungs which an applicant for insurance would be bound to state. So most, if not all, persons will have at times congestion of the liver, causing slight functional derangement and temporary illness, and yet in the contemplation of parties entering into contracts of life insurance, and having regard to general health and the continuance of life, it may safely be said that in such cases there is no disease of the liver."

In *Wilkinson* v. *Connecticut Mutual Life Ins. Co.* 30 Iowa, 119, the assured, in reply to the question, "Has the party ever met with *any* accidental or serious personal injury," answered "No." She had, about four years before that, fallen from a tree, but received no serious injury. In commenting on this question and answer, the court said: "The defendant claims that if the insured 'ever met with *any accidental* * * *injury*,' that will bar a recovery, because the application is a warranty that she never did. In this construction we do not concur. The language of the question is to have a reasonable construction, in view of the purposes for which the question was asked, It must have reference to such an accidental injury as probably would or might possibly have influenced the subsequent health or longevity of the insured. It could not refer, and could not be understood by any person reading the question for a personal answer to refer, to a simple burn upon the hand or arm, in infancy; to a cut upon the thumb or finger, in youth; to a stumble and falling, or the sprain of a joint, in a more advanced age. The idea is, that such a construction is to be put by the courts upon the

language as an ordinary person of common understanding would put upon it when addressed to him for answer. The strict construction or hypercriticism of the language which would make the word 'any' an indefinite term, so as to include all injuries, even the most trifling, would bring a just reproach upon the courts, the law, the defendant itself and its business. The language of the question must have a fair construction, and, in the words of our statute, * * 'that sense is to prevail against either party in which he had reason to suppose the other understood it.'"

In *Insurance Co.* v. *Wilkinson*, 13 Wall. 222, Mr. Justice Miller, in construing the same question and answer in a policy of life insurance, said: "The court said to the jury that, if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect Mrs. Wilkinson's health or shorten her life, then the non-disclosure of the fall was no defense to the action. On the other hand, if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health, or was so serious that it might affect the health or shorten life, then the non-disclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent. * * * * When the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this, are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength, and other similar considerations? This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw most light on the nature of the injury, with reference to its influence on the insurable character of the life proposed. Looking, then, to the purpose for which the information is sought by

the question, and to the difficulty of answering whether an injury was serious, in any other manner than by reference to its permanent or temporary influence on the health, strength and longevity of the party, we are of opinion that the court did not err in the criterion by which it directed the jury to decide the interrogatory propounded to them."

The answer to the question propounded to the applicant for insurance in the case before us was clearly made a warranty. Was there a breach of warranty? Upon this question the trial court instructed the jury as follows:

2. When warranty broken.

"That the answers of Solomon Reutlinger in the application were warranties, and that if they believed the statement that he had never called a doctor in his life was untrue, they would find for defendant; but, in determining the meaning of the question to which said answer was made, they will have to find, in order to find a verdict for the defendant, that said Solomon Reutlinger had called a physician, or some one had called a physician for him, for some complaint that was serious in its nature, and affected his constitution or general health.

"The jury are instructed that the question, 'When and by what physician were you last attended, and for what complaint?' as used in the application, had reference to a serious sickness, or disease such as affected seriously his constitution or general health; and that if they believe from the evidence that the deceased had not been, prior to the application, attended by a physician for such a serious illness, but had been attended for some temporary ailment, the jury should find for the plaintiff.

"If the jury believe from the evidence that, prior to the time of the application for the policy herein sued upon, the assured, now deceased, was not waited upon

by a physician for a sickness or a disease of a serious nature, such as indicated in the first instruction, then his answer to the question, 'When and by what physician were you last attended, and for what complaint?' 'that he never called a doctor in his life,' is not untrue within the legal meaning of the said application; and the plaintiff is entitled to recover, although said deceased may have been called upon by a physician for some temporary ailment or indisposition, not functional or organic in its nature, or affecting his general health."

The court evidently attempted to enforce the rule we have stated, but erred as to the purpose and meaning of the question, and, in so doing, misapplied the rule. In the application of Reutlinger the following clause appears: "All provisions of law forbidding any physician who may have attended me from disclosing any or all information which he acquired by such attendance are hereby expressly waived." In his examination by the medical examiner he was asked the question: "Have you ever had any serious illness or personal injury, or ever undergone any surgical operation?" He answered "No." He was asked if he ever had any one of forty-seven different diseases, and he answered "No." After this he was asked to give the name and residence of his medical attendant, and he answered that he had no physician. He was then asked, "When and by what physician were you last attended, and for what complaint?" To which he answered, "Never called a doctor in his life." In the last mentioned interrogatory two questions were combined in one. (1) He was asked, "When and by what physician were you last attended?" (2) If so, "for what complaint?" The object of asking "for what complaint" was not to ascertain if he ever had any serious illnes or personal injury. He had already answered a question propounded for that purpose in the negative. If such had been the object, it was wholly un-

necessary to ask, in connection with it, "When and by what physician were you last attended?" The question takes for granted that if he had been attended by a physician, it was in a case of sickness; and the words, "for what complaint," were added to ascertain what the sicknes was, without regard to its being serious or trivial, and to show what kind of attendance of a physician was referred to. The obvious purpose of it was to ascertain the name of a person from whom information affecting the risk of insuring the life of Reutlinger could be derived. In furtherance of this purpose, he had agreed in his application that any physician who had attended him might disclose any or all information which he acquired by such attendance. The answer given, if it be correetly written, clearly indicates that Reutlinger so understood the question. It did not aver a condition of health, or that it was not requisite or proper to request the attendance of a physician. It averred that he had never called a physician to attend him in sickness. He warranted this statement to be true, and the evidence adduced at the trial of this case tended to prove that it was untrue —a breach of warranty.

In *Cobb* v. *Covenant Mutual Benefit Association*, 153 Mass. 176, the court held that "an applicant for benefit insurance, agreeing that the contract shall be avoided if the answers made by him in his application are not true, makes their truth the basis of the contract." In the application two questions were propounded to the applicant, as follows: (1) "Have you personally consulted a physician, been prescribed for, or specifically treated, within the last ten years?" (2) "If so, give dates, and for what disease?" To the first he answered "No," and to the the second no answer was made. The court said: "While the question whether the insured had a fixed disease, and what the disease was, might be an inquiry involved in considerable em-

barrassment, the question whether he had consulted a physician, or had been professionally treated by one, was simple, and one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries. Indeed, the question which follows, which remains unanswered, is: 'If so, give dates, and for what disease.' It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that the insured had some distinct disease permanently affecting his general health before it could be said that he had answered this question untruthfully. But the scope of the question cannot be thus narrowed. Even if the insured had only visited a physician from time to time for temporary disturbances proceeding from accidental causes, the defendant had a right to know this, in order that it might make such further investigation as it deemed necessary. By answering the question in the negative, the applicant induced the defendant to refrain from doing this."

"In *Metropolitan Ins. Co.* v. *McTague*, 20 Vroom, 587, it was held that where the applicant stated that he had not consulted a physician or been prescribed for by one, and such statement was shown to have been false by proof of a prescription received, there could be no recovery, although it appeared to have been given for a cold. The court say: 'That representation did not aver a condition of health, or that it was requsite or proper to consult a physician. It averred that he had not consulted a physician or been prescribed for by a physician. The fact found contradicted the averment, whether the consultation and prescription related to a real disease or an apprehension of disease.' "

Insurance Co. v. *Trefz*, 104 U. S. 197, is cited by appellee to sustain the instructions of the trial court, but it does not. In that case the following question was

propounded to the applicant for life insurance: "Whether now or formerly, when and how long, and to what degree, subject to or at all affected by any of the following diseases and infirmities:" (Here followed a long list, in alphabetical order, of disorders, beginning with "apoplexy" and ending with "yellow fever," and including "diseases of the brain, diseases of the heart"). The answer was, "Never sick." The court said: "It is matter of law that the answer 'Never sick,' in the connection in which it was used in the application, must be taken to mean, not that the party was never sick at all of any disorder, but only that he never had had any of the enumerated diseases so as to constitute an attack of sickness. The generality of the language of the answer must be restrained to the particulars to which alone it was meant to be applied, and the surplusage does not fall within the agreement which warrants the answer to be true." And it further said: "It is unquestionable law that in such a case as the present the answer must be true, to justify a recovery, without regard to these considerations; and for a lack of substantial truth, it is no valid excuse that the party giving the answer did not understand, from ignorance or otherwise, the scope of the question. And so, in the present case, the court below distinctly charged the jury. The language used was: 'But if you believe from the testimony that the insured, whether wilfully or otherwise, made a statement in his application which amounted to an untruth, it will not do to refuse to enforce the contract which the husband and wife entered into, on the ground that it would be a hardship to the widow.' And in another part of the charge the court said: 'If they are in any respect untrue, they avoid the contract, and prevent a recovery upon the policies.' The question, then, for the jury was this: Was the answer of Trefz to the question whether he had ever had any of the enumerated diseases

—'Never sick'—true or untrue? And undoubtedly it was material, and even necessary, to enquire what was the meaning of that answer. And to ascertain its meaning—the meaning the law will affix to it—it is perfectly proper to determine the sense in which the words were used by the speaker; the sense in which he intended they should be understood by the person spoken to, and in which they were actually understood by both. As was well said by Mr. Justice Swayne, in *Insurance Company* v. *Gridley*, (100 U. S. 614), 'The object of all symbols is to convey the meaning of those who use them, and when that can be ascertained it is conclusive."

3. As to estoppel.

The trial court instructed the jury as to what they might consider in determining whether the answer of Reutlinger was correctly written down by the medical examiner. Upon this branch of the case we deem it sufficient to say: When a medical examiner, authorized by an insurance company to fill up blanks for answers to questions to be propounded to applicants for insurance in a medical examination, or who is apparently authorized to fill them up, does so by writing false answers, and thereafter procures the signature of the applicant thereto, after he had given correct answers to the questions, and the company afterwards receives the premiums and issues a policy, the company will, upon the death of the insured, be estopped from insisting on the falsity of the answers, although warranted to be true. *Insurance Co.* v. *Brodie*, 52 Ark. 11; *Flynn* v. *Equitable Life Ins. Co.* 78 N. Y. 568; *Grattan* v. *Metropolitan Life Ins. Co.* 80 N. Y. 281; S. C. 92 N. Y. 274; *Connecticut General Life Ins. Co.* v. *McMurdy*, 89 Pa. St. 363; *Pudritzky* v. *Knights of Honor*, 76 Mich. 428; *Equitable Life Ins. Co.* v. *Hazlewood*, *75 Texas*, 348; 1 May on Insurance, (3d Ed.) sec. 303; Cook on Life Insurance, sec. 21, and cases cited. "This rule is, however, subject to the obvious limitation that if the applicant,

knowing the presence of the untrue answer by having read it or otherwise, afterward certifies to its truth, the insurer may set up the untruth." *Grattan* v. *Metropolitan Life Ins. Co.* 92 N. Y. 274, 283. If, after the delivery of the policy, he discovers that a fraud has been perpetrated on him and the company, by means of the false answers, it would be his duty to make the fact known to the company. "He could not hold the policy without approving the action of the agent and thus becoming a participant in the fraud committed. * * * The consequences of that approval cannot after his death be avoided." *New York Life Ins. Co.* v. *Fletcher*, 117 U. S. 519.

Reverse and remanded for a new trial.

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

AIKIN v. STATE.

Opinion delivered March 10, 1894.

1. *Constitutional law—Right to compulsory process.*
   While a rule of the circuit court which forbids the clerk to issue subpœnas for more than five witnesses in a felony case, unless application is made to the court showing their materiality, is unconstitutional as depriving defendant of the right to have compulsory process for obtaining witnesses in his favor, the enforcement of such rule in a felony case will not be ground for reversal if it does not appear that defendant was prejudiced thereby.
2. *Homicide—Self-defense—Right of assailant to withdraw.*
   Where an assailant in a combat, in order to abandon the conflict, and not to gain fresh strength or a new advantage, withdraws as far as he can, but the other will pursue him, if the taking of life becomes inevitable to save life, he may lawfully kill his pursuer; but a mere colorable withdrawal avails nothing.

Error to Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

Appellant was indicted on the 22nd, arraigned on the 24th, and his trial set for the 28th of November. On the day of arraignment he made the following application to the clerk of the court to-wit:

"APPLICATION TO CLERK.

"In the Crawford Circuit Court,
November Term, 1893.

H. S. Lewers—Please issue subpœna in behalf of defendant in the case of the State of Arkansas against Geo. Aikin, charged with murder, returnable on Tuesday, the 28th day of November, 1893, for the following witnesses, who are material in this cause: M. M. Renegar, W. L. Purchman, E. J. Crider, Marion James, Moses Dow, Rosie Fens, Sam Shadell, Willis Hurst, Felix Driver, Onie Ross, John Owens, W. T. Flippin, John F. King, Henry Howell, Wm. Jones—these are residents of Crawford county; Henry Aikin, Fred Aikin, Emma Aikin, who are residents of Franklin county. And I certify that each of said witnesses are material and important witnesses for the defendant, in the trial of said cause, and in my opinion the defendant cannot safely go to trial without each and all of them.

[Signed.] J. E. LONDON,
Attorney for Defendant."

Endorsement by clerk:

"The defendant having had process for five witnesses in this behalf, the same being the number of witnesses prescribed by the rule of court heretofore announced, and entered upon the record of this court, in felony cases, in the absence of a written application to the court for a greater number, I decline to issue subpœna

for the foregoing list of witnesses, unless so ordered by the court. This November 24th, 1893.

[Signed] H. S. LEWERS, Clerk
By W. P. SADLER, D. C."

Counsel for appellant filed his application as follows: "Comes the defendant and makes known to the court that on the 24th day of November, 1893, he made application to H. S. Lewers, the clerk of this court, requesting him to issue a subpœna for eighteen witnesses for defendant; said application is herewith filed, and made a part of this motion; that said witnesses are material witnesses for him in the trial of this cause, and he cannot safely go to trial without their attendance; that said witnesses reside within the jurisdiction of this court; that the clerk aforesaid arbitrarily refused to issue a subpœna for any and all of said witnesses. He therefore asks the court to make an order compelling the clerk to issue the same, to the end that he may have a fair and impartial trial."

[Signed] J. E. LONDON,
Attorney for Defendant."

The court refused this application in the following order to-wit: Now on this day comes the defendant herein by his attorneys, and files his application for an order of the court directing the clerk of this court to issue process for certain witnesses named in said application to appear in this court and testify on the part of the defendant upon the trial of this cause. And it appearing to the court, upon the hearing of said application, that said defendant has heretofore procured to be issued process for the attendance of five witnesses to testify in his behalf on the trial of this cause, the same being the number for whom the clerk is allowed to issue process in felony cases under rule 1 of the rules amended by the court on the first day of the present term, and entered upon the records of this court of that day; and

it further appearing that said defendant declines to make his application under oath showing the necessity and materiality of such witnesses, as required by rule 2 of said rules; wherefore said application is by the court denied, and to the action of the court in denying said application the defendant at the time excepts.

The bill of exceptions recites that: "At the beginning of the November, 1893, term of the Crawford circuit court, the court made, published and entered of record certain rules of court among these the following:

"1. The clerk of the court is prohibited from issuing subpœnas for more than three witnesses on a side, and more than five witnesses on a side in felony cases, without the order of the court or judge.

"2. The order of the court or judge for more than the number of witnesses mentioned in rule 1 may be procured by presenting a written application, made under oath to the court or judge, showing the necessity and materiality of such witnesses."

The first assignment of error in appellant's motion for new trial is as follows: "The court erred in refusing him due process of law in procuring the attendance of his witnesses, and to which refusal defendant at the time excepted."

J. E. London for appellant.

1. The rules of the court deprived appellant of a constitutional right. Art. 2, sec. 10, const.; 50 Ark. 161. The legislature cannot deprive the accused of this right, nor can the courts. 41 Am. Dec. 305; 5 So. Rep. 30; 18 Atl. Rep. 763; 12 West. Rep. 588; 23 Tex. App. 212.

2. The court erred in its instructions to the jury. 51 Ark. 88; 54 *id.* 489; 52 *id.* 589; 52 *id.* 45; *ib.* 273, 345.

3. It was error to limit the argument of counsel.

Jas. P. Clarke, Attorney General, and *Chas. T. Coleman* for appellee.

1. No prejudice is shown by the action of the clerk in refusing the additional subpœnas. It is not shown that appellant expected to prove anything by the absent witnesses, nor did he make this a ground of his motion for a continuance.

2. The instructions are not erroneous.

HUGHES, J., (after stating the facts.) The appellant was indicted for murder in the first degree, and convicted of murder in the second degree, in Crawford circuit court, for the killing of one Dank Davis. Several motions were made for continuance of the cause, which were denied, and which we do not and need not discuss.

1. Right of defendant to compulsory process.

At the beginning of the November term, 1893, of the Crawford circuit court, the judge made, published and had entered of record the following, among other, rules:

"1. The clerk of the court is prohibited from issuing subœnas for more than three witnesses on a side, and more than five witnesses on a side in felony cases, without the order of the court or judge.

"2. The order of the court, or judge for more than the number of witnesses mentioned in rule 1 may be procured by presenting a written application, made under oath, to the court or judge, showing the necessity and materiality of such witnesses."

The appellant applied to the clerk of the court for subpœnas for eighteen witnesses, which were refused by the clerk upon the ground that the appellant had had subpœnas for five witnesses, the number allowed under the rule of the court, without written application for a greater number, and order of the court or judge. The appellant then made a written application to the court, stating the facts, and that the witnesses were material, but not stating how they were material, and

praying an order directing the clerk to issue the subpœnas, which was denied by the court, to which the appellant excepted, the court finding that the application was made for the purpose of testing the validity of the rule. The action of the court in this behalf is assigned as error in the motion for a new trial.

It does not appear that the appellant was prejudiced by the absence of these witnesses. He made no application for continuance to obtain their testimony, and a majority of the court are of the opinion that the case should not, on this ground, be reversed. But we are of the opinion that such rules cannot be approved, and that there is neither authority or precedent for them to be found in the history of the jurisprudence of this State. Dispatch in business and economy in the administration of the law are desirable and commendable; but the constitutional right of a defendant on trial for felony is made inviolable by the constitution, sec. 10, art. 2, of which provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, * * * and to have compulsory process for obtaining witnesses in his favor."

We know of no authority that would warrant the incumbering of the free enjoyment of this right by the condition imposed under the above mentioned rules of the court.

Upon the trial the appellant testified that, at the time of the killing, the deceased "started toward me, saying, 'Keep your hand out of your pocket.' I backed, but he followed, and struck me with a round piece of iron, and cut a hole in my shirt, and cut my shoulder. I backed again, and he still followed, when I shot him."

There was other testimony that an iron was found on the ground near the body of the deceased after the killing.

2. Right of assailant to withdraw from combat.

The court gave to the jury, among others, the following instructions: If defendant sought, intentionally provoked, or voluntarily and wilfully engaged in a difficulty with deceased at the time of the killing, then defendant cannot invoke the law of self defense, no matter who made the first assault in the difficulty that resulted in the death of Davis, and defendant would be guilty of some grade of criminal homicide; and this would amount to murder if defendant sought, provoked, or voluntarily and willingly engaged in the difficulty with the intention of killing deceased in the difficulty, and would be murder in the first degree if done after deliberation and premeditation, as explained in these instructions"—to the giving of which the defendant excepted.

"It is true, as a legal proposition, that where a defendant brings upon himself a difficulty in which he continues until he brings upon himself a necessity to kill, the law would not hold him guiltless; yet it is not to be doubted that a person accused of crime may show in justification that, although he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind and conduct, and honestly endeavored to escape from it, but could not without striking the mortal blow. There should always be left room for repentance and the abandonment of an evil and unlawful purpose. *People* v. *Simons*, 60 Cal. 72. 'This space for repentance is always open,' says 1 Bishop, Cr. Law, sec. 871. When, therefore, a combatant, to abandon the conflict, and not to gain fresh strength or a new advantage, withdraws as far as he can, but the other will pursue him, if the taking of life becomes inevitable to save life, he may lawfully kill his pursuer. But a mere colorable withdrawal avails nothing. *Id.* n. 1.; Hale's P. C. 479, 480." *Johnson* v. *State*, *ante*, p. 57.

The idea here expressed should have been embodied in this instruction. The instruction, without it, was not full enough, and was erroneous in this case.

For the error in this instruction, as indicated, the judgment is reversed, and the cause is remanded for a new trial.

WOOD, J. (dissenting). It will be observed that the defendant has brought himself fully within the requirements of the law to have this court pass upon the rules of the Crawford circuit court, in so far as they were enforced by said court in his case. These rules, in our judgment, are in plain derogation of most sacred constitutional rights. While we concur with the majority as to the error in the instruction, we think the other error, in denying the defendant process for his witnesses, by far the more egregious and hurtful. Therefore, while agreeing with the majority in all they say in condemnation of the rules mentioned, we can not yield assent to that part which holds that the defendant was not prejudiced, and that the judgment should not be reversed on that account.

Nothing short of a reversal may secure the defendant against a repetition of the same error on a rehearing. We do not know to what extent the circuit judge may be attached to these rules. He may find them so useful in the dispatch of the business of his court, and be so wedded to them, as to refuse to give them up, although this court has pronounced them "unconstitutional and unprecedented in the history of the jurisprudence of the State." He may differ with this court about that; yet, if he should, and invokes them the same way upon a second trial, this court could not consistently, in view of this opinion, reverse for that reason. It is not a question of propriety, but of substantive right. What the defendant is entitled to, in our judgment, is a decision from this tribunal, which is authori-

tative and binding upon the lower court, to the effect that any rule which denies the defendant the right to a speedy trial and compulsory process for witnesses is an infringment of his constitutional rights, for which this court will promptly reverse. The learned circuit judge doubtless considers, however, that imposing conditions upon the defendant, a compliance with which will secure to him process, is not denying it to him, because he has the option to comply and obtain it. Suppose the judge had said: "I will make a rule that, before the defendant can have process for *any witnesses*, he shall be required to show to the court or judge, by affidavit, that they are material." That would strike the most "nascent intelligence" of the profession as unwarranted. Yet, if it is a privilege to be hampered with a condition, why not say *none, or one, or any other number* as well as five? Why fix arbitrarily upon the number *five* as the constitutional limit to be called for without complying with a condition precedent?

Art. 2, sec. 10, of the constitution of Arkansas provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury; * * * * * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be heard by himself and his counsel." This is almost an exact copy of amendment 6, constitution of the United States. Similar provision is found in most, if not all, the States of the Union.

Our statute providing the method for invoking this process is as follows: "The clerk of the court upon the request of the prosecuting attorney, *or of the defendant, or his attorney*, shall issue subpœnas for witnesses," Mansf. Dig. sec. 2143. Also: "The provisions of law in civil actions shall apply to and govern the summoning and coercing the attendance of witnesses, and com-

pelling them to testify in all prosecutions, criminal or penal actions or proceedings, except that the attendance of witnesses residing in any part of the State may be coerced, and it shall never be necessary to tender to the witnesses any compensation for expenses or otherwise before process of contempt shall issue." Mansf. Dig. sec. 2144.

The provisions of the constitution of the United States, and of the constitutions and statutes of the States, granting process do not imply that the government must defray the expenses of the witnesses. That matter is regulated by statute. Under a statute of the United States (9 Stat. c. 98), where the defendant is too poor to pay for the attendance of his witnesses, and desires to have the government bear that expense, as a condition of availing himself of the gratuity of the government, some such condition as to showing materiality, etc., of the testimony is required, similar to the above rules. But in no case is the defendant to be denied the right to process. Judge Miller, in speaking of the provision of the Constitution of the United States, says: "He (the defendant) is also to have compulsory process for obtaining witnesses in his favor; that is to say, that, however poor he may be, or however unable to pay expenses of such witnesses as *he may deem necessary*, the court shall issue its process to compel their attendance for examination upon the trial. Miller on Const. U. S. p. 510. But our statute is far more liberal than the statute of United States and that of some other States. It says: "The attendance of witnesses may be coerced, and it shall never be necessary to tender fees," etc. It will be seen that there are no limitations to the enjoyment of the right to process, in the constitution or the statutes upon the subject. In *State* v. *Roark*, 23 Kas. 153, Chief Justice Horton said: "No court has the right to limit or deny this constitutional guaranty

against the protest of the accused." Judge Story, in speaking of this provision in reference to counsel and compulsory process, said: "The wisdom of both of these provisions is therefore manifest, since they make matter of constitutional right what the common law had left in a most imperfect and questionable state. They are scarcely less important than the right of a trial by jury." 2 Story on Const. p. 572. Mr. Rice, in his work on Evidence, (vol. 3, p. 267), says: "He has the same right to this process that he has to appear and defend in person and with counsel." And as was said by a learned judge of California in speaking of these rights: "They are of the great muniments of personal liberty. Some of them are included in the provisions of section 29 of the act of Parliament known as 'Magna Charta.' They are of too much value to be impaired by legislation or frittered away by interpretation. They should stand and be accorded in their entirety, unabridged and undiminished." Then, our constitution itself containing no restrictions or conditions to the enjoyment of the right to a "speedy trial" and "compulsory process," the legislature could make none, much less the courts. The legislature has never attempted it, and the courts *should not.*

Circuit courts have the power "to make and establish all proper rules which may be necessary for the dispatch of business." Mansf. Dig. sec. 1377. But this, of course, was only intended to empower them to make rules which would enable them to conduct the business of their courts in an orderly and expeditious way within the law. While heartily commending all rules looking to that end, we feel that it is the duty of this court to see that such rules are circumscribed by the constitution and statutes. The only way, in our opinion, to do that is to reverse for just such errors as has been committed in this case.

The majority hold that the defendant was denied his constitutional right to process, and criticise and condemn the action of the court in strong language. But they say defendant was not prejudiced by it, because it does not appear that he afterwards made a motion for continuance on account of the absence of these witnesses for which he had asked process, showing the materiality of their testimony, etc. The defendant was not asking for a continuance. But, immediately upon arraignment and the setting of his case for trial, he asked for the process of the court to obtain his witnesses. The presumption is, he did this in order that he might get ready for a "speedy trial," which was his right. How could he properly prepare for his trial without an opportunity to have his witnesses brought to court, in order that he and his counsel might consult with them? If accused persons, in order to avail themselves of the right to reversal where process is denied, must follow up their application for process with a motion for a continuance setting up the very things which the rules require to be done, then the effect of the decision in our opinion is to allow the circuit court to do *indirectly* what this court has said could not be done *directly*, namely, to force the defendant to make a showing by affidavit of the materiality of the testimony of his witnesses before granting him process for them. This is all wrong. The defendant has the right to his process when *he or his attorney asks the clerk for it.* Neither the circuit judge nor the circuit court has any right to inquire about materiality until the defendant asks for a continuance. Then the court has the right under the statute to know whether the witnesses are material, but not before. Acts of 1887, p. 19. The court has no right to compel the defendant, in advance of the call for trial, to reveal what he expects to prove by his witnesses; nor has the court that right at any time, so long as the defendant is asking a speedy trial.

The ruling of the court was equivalent to forcing him to a motion for continuance, when the presumption is, from asking process, that he wanted a speedy trial.

Sec. 13, art 2, of the constitution also provides: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely and without denial, promptly and without delay, conformably to the laws." The rules of the Crawford court were also manifestly repugnant to this provision.

With all proper deference to the opinion of our brother judges, being unable to see how a defendant can be denied constitutional rights without at the same time being prejudiced thereby, for the reasons stated, we dissent from so much of the opinion as holds that the defendant was not prejudiced by this error, and think the cause should be reversed for this also.

Bunn, C. J., concurred in the dissenting opinion.

EXCELSIOR MANUFACTURING CO. *v.* OWENS.

Opinion delivered March 10, 1894.

58 556
59 509
59 571
58 556
63 24
58 556
180 330

1. *Evidence—Unrecorded deed of assignment.*

A deed of assignment which has not been acknowledged or recorded may be introduced in evidence in a contest between the assignee and an attaching creditor concerning possession of chattels conveyed by it.

2. *Assignment for benefit of creditors—Fraud.*

Where a vendor of merchandise affirms the sale by suing to collect his debt, he cannot attack the validity of an assignment executed by his vendee upon the ground that the latter had made false representations as to his financial standing upon the faith of which the goods were sold, that the goods so sold were among the assigned assets, and that the deed of

assignment directed the proceeds of the sale of such assets to be paid to preferred creditors other than himself.

3. *Conflicting presumptions—Rule.*

In the case of conflicting presumtions, the presumption of innocence is stronger than the presumption of payment. As, where an insolvent merchant, after assigning all of his property, except his exemptions, to secure a note to his sister-in-law for a sum largely exceeding his exemptions, was shown to have subsequently had the note in his possession after its maturity, and it does not appear that, after the assignment, he had acquired means to pay the note, the presumption is, not that he fraudulently withheld assets enough to pay the note, but that his possession of it was consistent with good faith in the execution of the assignment.

4. *Interplea—Right to open and conclude.*

On the trial of an interplea in an attachment suit the burden of proof is upon the interpleader, and he is entitled to open and conclude the argument.

Appeal from Sebastian Circuit Court, Greenwood District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

Appellant sued W. H. Owens on notes due and not due, aggregating $1,385.96, and attached a stock of hardware as his property. Appellee Kendall filed an interplea, claiming this property under an assignment from Owens. Upon this issue was joined. The cause was submitted to a jury upon evidence substantially as follows:

Appellee introduced the assignment; proved its execution, the taking inventory, making bond, possession; and rested. Appellants proved the insolvency of appellee; that, when he began business, January, 1890, he borrowed one thousand dollars from his sister-in-law, and gave her a note due January, 1891. He had paid only the interest for one year, was to pay interest and keep principal as long as he desired. She was preferred in the assignment. Appellee was correspondent for Dun's

agency; in June, 1891, made statement of his financial condition, in which he largely overestimated assets, and underestimated liabilities. About three weeks before assigning, he received from appellant a car-load of stoves, which were not paid for, were nearly all on hand at the time of the assignment, and were included in it. About this time he represented to an attorney, having claims against him for collection, that his liabilities were some two thousand five hundred dollars less than they really were. All his property was transferred by the assignment, except such as was named therein as exempt. Reports made to Dun's agency were used by wholesale merchants as a basis of credit. One of the attaching creditors, whose suit on attachment was by agreement to abide the decision on this interplea, had sold him goods on the rating which Dun's agency gave him, which was between two and four thousand dollars. Some time after the assignment, one of the preferred creditors received the note given his sister-in-law in a letter from Owens. The verdict was for appellee; motion to set it aside overruled; judgment rendered, and this appeal perfected, asking its reversal for the following alleged errors:

First. In allowing the assignment to be read in evidence without acknowledgment or registration, when it purported to convey real estate.

Second. In instructing the jury that the assignment was valid on its face.

Third. In instructions, two, three, four, five, six, seven, ten, each, as modified.

Fourth. In refusing instructions one, two, three, four, each, asked by plaintiff.

Fifth. In allowing interpleader the opening and closing argument to the jury.

Sixth. In verbally explaining the written instructions after argument of the case.

Sandels and Hill for appellant. *F. P. Winchester* of counsel.

1. Plaintiff was entitled to open and conclude the argument. Mansf. Dig. sec. 5131, 2871; 20 S. W. 1083; 41 N. W. 254; 43 Id. 108; Bump. Fr. Conv. p. 365; 29 Ark. 151.

2. It was error to admit the assignment to be introduced in evidence. It was not attested by witnesses nor acknowledged. Mansf. Dig. sec. 657; Devlin on Deeds, secs. 66, 465.

3. The assignment is not good on its face. 54 Ark. 471; 53 *id.* 88; Mansf. Dig. sec. 305.

4. The court erred in orally explaining its instructions. Const., art. 7, sec. 23; Mansf. Dig. sec. 5131, subd. 5; 51 Ark. 185; 47 *Id.* 407; 18 S. W. Rep. 121; Thomps. Trials, sec. 2377.

5. There is error in instructions 11 and 12, and in refusing 1 and 3 on the question of the Eliza Turpin preference. 8 Ark. 109; 11 *id.* 249; 2 Herm. Estop. p. 873; *Ib.* p. 893; Bump, Fr. Conv. p. 182; 63 Hun, (N. Y.) 267. It was a fraud on the rights of creditors to prefor Miss Turpin. Bump, Fr. Conv. pp. 383–4.

6. The refusal to give instruction 4 asked by appellants was palpable error. 47 Ark. 394; Thompson, Trials, sec. 2317. Speer received the note from Owens after the assignment. It was then nearly a year past due. Owens' possession of it meant, *prima facie*, that it had been paid. If paid before the assignment, then it was a preference of a fictitious debt, and avoided the assignment, 40 N. Y. 383; 20 S. W. 719.

7. It was error to refuse instruction No. 2 asked by appellant. The false statements by Owens of his financial condition, made knowingly as a basis of credit, whereby he was enabled to buy goods, a material part of which was among the assigned assets, were fraudulent, as to the creditors misled. 47 Ark. 253; 52 *id.*

30; 51 Iowa, 663; 13 S. E. 509; 30 Mo. App. 2; 11 So. Rep. 186; 4 Denio, (N. Y.) 217.

Humphy & Warner for appellee.

1. The *onus* was on the interpleader, and he had the opening and closing. Mansf. Dig. secs. 356–358; 11 Iowa, 516; 7 Pick. 99; 8 Blackf. 194; 35 Ind. 31; 25 N. H. 478; 5 Ark. 141; 32 *id.* 470; Thomps. Trials, secs. 228–9.

2. Deeds of assignment are not required to be acknowledged. Mansf. Dig. ch. 8; 25 Ark. 562; 38 *id.* 181; 40 *id.* 237; 16 *id.* 543.

3. The court did not *orally* explain its instructions. It *began* to do so, but, upon objection, *desisted.*

4. There is no error in the instructions complained of. 11 Ark. *Prater* v. *Frazier;* 2 Herm. Est. p. 893; Bump, Fr. Conv., p. 384; 52 *id.* 125; 50 *id.* 382; 20 Ill. 485; 52 Ill. 420; 2 Ark. 143; 24 Barb. 120; 27 Tex. 438; 6 B. Mon. 256; 88 Pa. St. 173; 9 N. W. Rep. 550; 51 N. Y. 174.

WOOD, J., (after stating the facts.)

1. Unrecorded deed admissible in evidence, when.

1. The deed of assignment was properly admitted in evidence. Appellant is not claiming by priority of attachment over the assignment, and the question of notice has no place in the case. Assignments are not required to be recorded as a prerequisite to their admissibility in evidence. The only purpose to be effected by their registration in any case would be to give notice. Besides, the property involved in this controversy is a *stock of hardware* as appears from the judgment.

2. The court told the jury "the assignment was good on its face."

The deed contains the following clause, which appellant contends invalidates it, to-wit: "That he, the said grantee, shall make an inventory of said property and give bond in the manner provided by the laws of

Arkansas governing in cases of assignment for the benefit of creditors, and, after first having given bond, he shall take possession of said property and dispose of the same in the time and manner provided by law." No ingenious transposition of words or artifices of construction should be indulged in by courts in order to give meaning to words in an instrument which in themselves are unambiguous. Such is the clause above, when the words are read in the order in which they are placed in the sentence, and are given their logical, or even grammatical, construction. The case of *Lincoln* v. *Field*, 54 Ark. 471, is not at all analogous. There the direction to the assignee was to "*forthwith*" take possession, and nothing was contained in the deed to indicate that the taking possession was not the *first thing to be done*, as plainly implied by the word "*forthwith.*" The language of the above clause as unequivocally expresses (taking the words in the connection used) that the taking an inventory was the first thing to be done, under the direction of this assignment; then the making of the bond, and after that the taking possession. The words in the deed of assignment follow the order prescribed by the statute, in expressing the respective duties to be performed by the assignee before possession is taken. The taking of the inventory properly precedes the making of the bond, because it furnishes the estimate for the amount of the bond. The court did right in pronouncing this assignment good on its face.

2. When assignment not avoided for fraud.

3. The third and fourth grounds relate to alleged errors in modifying, giving and refusing instructions.

After telling the jury the assignment was good on its face, the court proceeded in a lengthy charge to declare the law applicable to the facts in evidence, as to what might be considered, and what was really necessary, in order to avoid such an assignment. We epitomize it as follows: (1.) Material part (meaning a por-

tion that is not insignificant) must not be withheld. (2.) Right to prefer one just debt over another. (3.) The fraud that will vitiate an assignment must be in the assignment itself. (4.) Conduct of assignor in making purchases, false representations, etc., are all matters proper to be considered in determining what the real intent was in making the assignment, the real question being, was the assignment itself executed with the fraudulent purpose to cheat, hinder, or delay any creditor? If so, void; if not, good, notwithstanding prior or subsequent dishonest conduct. (5.) A debtor has the right to prefer his attorneys for drafting the assignment. (6.) The preference of a sham or pretended debt is a fraud which vitiates the assignment. (7.) A gift is not a debt; to advance a party money to be repaid, even at the pleasure of the debtor, is not a gift.

The first and third instructions asked by appellant related to the alleged debt of assignor to his sister-in-law, which appellant claimed was a simulated debt, or gift; or, if a real debt, that same had been paid. It was not error to refuse these, as the court had already sufficiently charged upon that point.

In instruction numbered two, refused, the appellant asked the court to charge "that, if defendant Owens made false representations to Dun's Agency, and goods were sold him upon the faith of such representations, and the goods so sold were among the assigned assets, and the assignment directed the proceeds of the sale of assigned assets to other creditors than the ones misled, this would be a fraud which would vitate the assignment."

This was an action of debt, with the provisional remedy for its enforcement. Appellant was not seeking to rescind the contract, nor to recover the specific property, but, on the contrary, was suing upon the notes.

The instruction was not proper in an action of this kind. The title to the assigned property being in the assignor, he had the right to include it in an assignment for the benefit of any creditors he chose to prefer. But this conduct, like any other fact, was proper to be considered by the jury in arriving at the intent of the assignor in making the assignment, as the court told them in other instructions.

3. Rule as to conflicting presumptions.

The court refused to instruct "that possession of a promissory note after maturity by the maker is *prima facie* evidence of payment, and this presumption must stand until overcome by competent testimony."

The possession of a note by the maker after maturity is *prima facie* evidence of payment. This presumption is based upon the fact that it is the common practice of persons owning notes not to deliver them to the maker except on payment, as was held by this court in *Hollenberg* v. *Lane*, 47 Ark. 394. That presumption may be rebutted by a fact inconsistent with it. The deed of assignment conveys to the assignee all the property of the assignor except his exemptions. The deed is valid on its face. It is presumed to have been executed in good faith until the contrary is made to appear. Now, can the possession of a note soon after the deed was executed raise the presumption of payment, where the amount of it is larger than the value of the property reserved by the assignor, unless it be shown that the assignor, subsequent to the execution of the deed, acquired the means to pay it? We think not, where it is shown, as in this case, that all of his property except his exemptions went into the assignment. To indulge such a presumption would be equivalent to presuming that the assignor withheld assets which he pretended to convey, and that the deed was fraudulent. By sec. 1649, Mansf. Dig., it is made a misdemeanor to make a fraudulent assignment. Hence, it would also be tanta-

mount to presuming that the assignor was guilty of a crime. Thus, we would be allowing the presumption of innocence and good faith to be overcome by the presumption of payment, while the reverse is the law. Lawson on Presumptive Evidence, 582. The possession of the note is consistent with good faith in the execution of the assignment. His sister-in-law doubtless believed the assignor honest. She was willing to trust him. He preferred her, and it was consistent with good faith for her to trust him with the note for the purpose of collecting it from the assignee. In view of these facts, the court did not err in refusing the instruction. The fact was given to the jury to consider with all the other facts.

4. Right of interpleader to open and conclude.

5. The burden of proof was upon the interpleader, and he was entitled to open and conclude the argument. Had no evidence been introduced in this case on either side, appellee would have been defeated.* Mansf. Dig. sec. 2871. The parties seem to have gone to trial upon the general issue on the interplea. Appellee, according to the records, was put to his proofs, and required to introduce the deed of assignment, and to prove that its requirements had been met by assignee taking inventory, filing bond, and going into possession. Appellant then introduced its proof, and "after the conclusion of the testimony, and before the argument began," appellant's counsel admitted that all the necessary steps had been taken under the assignment. This had already been proven by appellee, and required no admission, as there was no evidence to contradict or rebut it.

6. Sec. 23, art. 7, of the constitution provides: "And in jury trials (circuit judges) shall reduce their charge or instructions to writing on the request of either party." No such request was made to the judge in this case. Nor does it appear from the record that the judge

* Compare *Norton* v. *McNutt*, 55 Ark. 59 (Rep.).

made any oral explanations of his instructions. The record recites that he "began," and "immediately desisted" upon objection being made by counsel. There was no error in this.

No question is made as to the sufficiency of the evidence to support the verdict, and, finding no error of law in the proceedings, the judgment of the Sebastian circuit court is affirmed.

WESTERN ASSURANCE COMPANY *v.* ALTHEIMER.

58 565
61 214
62 47
58 565
e74 79
58 565
e81 94
82 402
f82 481
58 565
83 130
58 565
e85 30

Opinion delivered March 24, 1894.

1. *Fire insurance—Warranty as to keeping books.*

   In an action upon a policy of fire insurance, which stipulated that assured should "keep a set of books showing a complete record of all business transacted, including all purchases and sales both for cash and credit," where the evidence showed that assured kept no other record of sales for cash than a daily entry upon the books showing the aggregate amount of cash sales, without giving the items of merchandise sold, or the separate amounts for which such merchandise was sold, and where expert bookkeepers testified that the record of cash sales as kept on assured's books was complete, the court properly left it to the jury to determine whether assured had complied with the condition of the policy.

2. *Assured must show strict compliance with warranty.*

   Stipulations in a policy of fire insurance that the assured will keep his books of account in a fire-proof safe, and that he is the entire, unconditional and sole owner of the property insured, constitute warranties, and a strict compliance with their terms is necessary. While it is error to instruct the jury that *substantial* compliance with such warranties is sufficient, the error is not prejudicial if strict compliance is shown by uncontradicted evidence.

Appeal from Jefferson and Lincoln circuit courts. JOHN M. ELLIOTT, Judge.

Altheimer Bros. brought suits against the Western Assurance Company and the Imperial Fire Insurance

Company and recovered judgment in both suits. The cases were consolidated on appeal. The facts are stated in the opinion of the court.

Austin & Taylor for appellants.

1. The court admitted incompetent testimony. The question to Kaufman and his answer thereto are objectionable, because the question was leading, and required a legal opinion of the witness. 1 Gr. Ev. (14 ed.) sec. 434. The answer usurped the province of the jury. 24 Ark. 251; Thomps. Trials, sec. 377; 63 Tex. 334.

2. It was error to allow Henry Walstein to testify to what was told him. The evidence was hearsay.

3. The question asked Rosenberg was not competent. It seeks an opinion of the witness on an issue that was submitted for decision to the jury. 1 May, Insurance, sec. 156.

4. Plaintiff's first prayer was error. A *substantial* compliance with *affirmative* and *promissory* warranties is not sufficient. They must be *strictly* and *literally* complied with. May on Ins. secs. 156–7; Angell on Fire Ins. sec. 145; 57 Ark. 279; 61 Am. Dec. 81; 30 N. Y. 136; 21 Conn. 19, 32; 7 Wall. 386; 1 Blatch. 280; 2 Pars. Mar. Law, 401; 55 Vt. 308; 23 Wend. (N. Y.) 525.

5. The second prayer for plaintiff is erroneous. It is in conflict with the real facts, and invades the province of the jury. 53 Ark. 381; 45 *id.* 165; *ib.* 472; *ib.* 256; 52 *id.* 517.

6. The court erred in refusing defendants' third prayer. The manner of keeping the books was not in compliance with the "Iron Safe" clause. 53 Ark. 353; 2 Wood, Ins. sec. 449; 1 Sumner, C. C. 434; 63 N. Y. 111-113; May, Ins. 156; 98 Mass. 381; 57 Ark. 279.

7. The verdict is contrary to the law and the evidence. The books and the evidence show that Altheimer

Bros. were not the owners of the stock. 4 Gray, 451. Mrs. Altheimer and Kaufman were partners in the concern, as to third parties. 14 Ala. 306; 58 *id.* 230; 52 Ga. 567; 53 *id.* 160; 26 N. J. L. 293; 18 Wend. (N. Y.) 183; 54 Ark. 384. A "community of interest in the profits" is clearly shown. 37 Conn. 258; 6 Halst. 181; Parsons, Cont. 132, 150; 2 Harr. & G. 171; 30 U. S. 529, 8 Law Ed. 216; 36 Mo. 38; 88 Am. Dec. 129; 15 *id.* 369; 5 *id.* 142. If not the sole owners, plaintiffs can not recover. 54 N. W. Rep. 326. The court should have set aside the verdict. 47 Ark. 567; 57 Ark. 461; 39 *id.* 393; Moak's Underhill on Torts. 74.

Bell & Bridges for appellees.

1. The objections as to incompetent testimony are not well taken. Rosenberg was an expert. 7 Am. & Eng. Enc. Law, p. 494.

2. The first instruction is not objectionable. The word *substantial* only applies to a compliance with the *promissory* clauses, a *substantial* breach of which avoids the policy. 51 Wis. 37; 11 Am. & Eng. Enc. Law, p. 293; *ib.* p. 299, sec. 3; 54 Ark. 376. But appellants had the full benefit of a strict construction as to proof of loss in their fourth prayer, so they were not prejudiced.

3. Instruction 2 does not invade the province of the jury. 54 Ark. 384; *ib.* 346. The third instruction properly refused. The *Pelican Case*, 53 Ark. 353, is not in point. In that case there was an utter *failure* to comply with the clause. In this case *experts* say the books were kept in the usual and customary method, and show a complete record of all sales, etc. 63 N. Y. 111; 7 Am. & Eng. Enc. Law, p. 494; 36 Iowa, 472; 9 N. Y. 183; 39 N. Y. 245; 58 Miss. 368; 43 Oh. St. 270; 54 Ark. 376; 38 Fed. Rep. 19; Wood on Ins. (2nd ed.) p. 174; *ib.* 433-4; May on Ins. (3d ed.) sec. 173.

5. The arrangement with Kaufman and Mrs. Altheimer did not constitute a partnership. 54 Ark. 346; *ib.* 384; May, Ins. sec. 287c. The question was fairly submitted to the jury on proper instructions, and they found for plaintiffs. 48 Ark. 495; 49 *id.* 122; 46 *id.* 524; 54 *id.* 289, etc.

J. M. & J. G. Taylor, amici curial.

The mere fact of receiving a portion of the profits of the business for their services did not make Mrs. Altheimer and Kaufman partners. 28 Fla. 209; 10 So. Rep. 298; 1 Lindley on Part. p. 329; Parson's Part. sec. 366; 76 Ind. 157; Bates on Part. secs. 259–60; 42 Ark. 390; 22 Pick. 151; 54 Ark. 387; 24 How. 543; 95 U. S. 293; 5 Gray, 58; 45 Mich. 188; 130 U. S. 472; 76 N. Y. 55; 87 *Id.* 33; 71 Ill. 148; 7 Iowa, 435; 13 R. I. 27; 145 U. S. 623; Story, Part. sec. 38.

2. Conditions avoiding a policy are construed strictly in favor of assured. Barbour, Ins. sec. 17; 17 Iowa, 176; 4 R. I. 156.

WOOD, J. These suits were to recover upon policies of fire insurance, on a stock of merchandise, dry goods, etc., executed by appellants to appellees in September, 1890. The policy in the Western called for one thousand dollars; and in the Imperial, for fifteen hundred dollars. The fire and loss occurred on the 22nd of January, 1891. Suits were begun in Jefferson county circuit court, April 20, 1891. The first suit was tried there; the second was tried, on a change of venue, in Lincoln county. On the issues joined the causes were submitted to a jury. Verdict and judgment for appellees. On appeal here the cases were consolidated, on their motion.

1. The third, fourth, fifth and sixth assignments of error relate to irregularities in eliciting the testimony of witnesses before the jury, both as to questions propounded by counsel, and the answers of the witnesses.

Trial judges should see that counsel violate none of the rules prescribed for the examination of witnesses. A due regard for the legal production of evidence, and an orderly dispatch of the business, should cause the trial court to act promptly in suppressing leading questions and excluding irrelevant or impertinent answers. We realize, however, the impracticability, if not the impossibility, in many instances, of an adherence to rigid rules, and much must necessarily be left to the good judgment of the judge under whose eye the proceedings are had, to see that no unfair advantage is taken, and that no prejudice results to parties litigant by irregularities of the character complained of here. Taking the whole record of the examination of the witnesses, we find no reversible error in these assignments.

1. Warranty as to keeping books not broken, when.

2. The seventh, eighth and ninth assignments are that the verdict was contrary to the law and evidence. These will be disposed of in our discussion of the first and second assignments, which present the only important questions for our determination.

In each of the policies sued on was the following clause: "The assured, under this policy, hereby covenants to keep a set of books showing a complete record of business transacted, including all purchases and sales both for cash and on credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fire proof safe at night, and at all times when the store mentioned is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where said business is carried on; and in case of loss the assured agrees and covenants to produce such books and inventory, and, in the event of a failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

The plaintiffs (appellees) alleged a compliance with this condition of the policy; the defendants (appellants) denied. Was there a compliance?

The only breach of this condition assigned by appellants was a failure by appellees to keep a set of books showing a complete record of the cash sales. The evidence upon this issue was substantially as follows: "It is hereby agreed that the following is a fair sample of the manner in which plaintiffs kept a record of daily sales for cash, as appears on their book of daily sales for cash on page 241 and page 300:

"SATURDAY, NOVEMBER 8TH, 1891.

Altheimer.	Kaufman.	Theresa.	Oliver.	Nora.	Lena.	Maria.	Smith.	Young.	John.	Ligna.	Raphael.	Spears.	O'Leary.	Leon.
25	500	25	125	15	40	20	315	210	10		100	145	10	25
20	185	130	150	50	275	425	395	250	125		50	15	75	15
55	100	200	125	35	375	175	10	150	815		310	240	55	125
135	125	20	75	50	25	35	130	350	125		815	15	30	75
75	190	210	...	...	300	55	75	605	5		100	150	30	15
10	10	75	475	150	200	25	25	100	170		50	160	...	100
75	25	110		170	100	25	50	50	....		350	5	200	15
65	100	75		...	200	5	15	50	1350		50	220		125
50	75	15		320	25	10	40	120			100	135		475"

The book-keeper explained the above as follows: "The items of sales made by each clerk for cash are added up, and the total of his sales is put down under his name on the daily cash memorandum book. If a clerk should sell a pair of gloves for one dollar and fifty cents, the cashier would simply put down one dollar and fifty cents under the initial or name of the clerk who made the sale, which would show that the clerk had sold some kind and quality of goods, not mentioned, for one dollar and fifty cents. At night the cashier and the wrapper check off and compare their checks, so as to

see if they correspond, and if any error is detected the clerk is called upon to explain. If everything tallies, the cashier then turns over to me the daily cash memorandum book, and I then go over the additions, and put down under the proper date, in the cash book, the total cash sales for that day. At the end of each month, the aggregate of the daily cash sales for that month was transferred from the cash book to the ledger, and entered to the credit of merchandise account." The book-keeper kept a "*double entry*" set of books, had had ten years experience as such, and, after qualifying himself as an expert, further testified "that the business system of the store secured an *accurate record of the daily cash sales, a complete record.*" Another witness was called, and, after qualifying himself as an expert book-keeper, testified "that he had examined the books of appellees, and that they were kept in the usual and customary method of keeping books, showing a *complete record of all sales for cash* and on credit, and all other business transactions." In answer to a question propounded by appellant's counsel on cross-examination, this expert stated "that the record of the cash sales as they were kept on the books of appellees, *was a complete record.*"

The appellant asked, and the court gave, the following instruction: "The plaintiffs, exhibiting the policy of insurance sued on in this action, contracted with defendant that they would keep a set of books showing a complete record of all business transacted, including all purchases and sales, both for cash and on a credit; and, applying the said contract of insurance to this case, you are instructed that the plaintiffs are bound by this agreement. So, if the jury believe from the evidence that the plaintiffs did not keep a set of books showing a complete record of all business done, including all purchases and sales, both for cash and on a credit, then the said policy

of insurance is null and void, and the jury will return their verdict for defendant." This instruction was on the specific condition in the "iron safe" clause, which appellant claimed had not been complied with; it was in the very language of the contract, and properly declared the law.

The appellant also asked the following, which was refused: "Third. The policy of insurance sued on in this case provides that the insured should 'keep a set of books showing a complete record of all business transacted, including all purchases and sales, both for cash and credit.' The court instructs you, as a matter of law to govern you, that if you find from the evidence that the plaintiffs kept no other record of their sales for cash than an entry made upon their books daily in words, in substance, cash sales, so many dollars (naming the amount), without giving any items of merchandise sold, or the separate amounts for which merchandise was sold, it was not a compliance with that provision of the policy, and it is of no consequence that separate amounts were set down or entered as the result of sales by different salesmen without proof by an entry on the books of what certain merchandise was actually sold, and the jury will find for the defendant."

The learned counsel for appellants, in a vigorous and able argument, insist strenuously that the refusal of this was error, upon the authority of the doctrine announced by this court in *Pelican Insurance Co.* v. *Wilkerson*, 53 Ark. 353. There was no proof in that case by expert book-keepers showing that the system of book-keeping there adopted, as to the cash sales, etc., *was a complete record;* no proof of the custom of merchants as to the method of keeping books; nothing but an imperfect record for the court to construe, without the aid of any testimony by those skilled in the art of book-keeping. True, it is the duty of the courts to con-

strue policies of insurance according to their terms, and in the very language used by the parties, and without any extraneous aids, where the intent of the parties, and the meaning of the terms of the instruments, can be thus ascertained. But where the parties have engrafted into their contract terminology peculiar to a particular trade, art, business, or science, it is always proper, where there is a dispute as to the terms employed, and the true meaning of the instrument, to call in those who are best equipped to give the desired explanation. Such is the case here. May on Ins. sec. 173, p. 174; 1 Greenleaf, Ev. sec. 280; *Brown* v. *Brown*, 8 Met. 576; 7 A. & E. Enc. Law, p. 494, note and authorities. The insurers have stipulated for the keeping of a "*set of books, showing a complete record of all business transacted, including all sales and purchases for cash and credit.*"

Book-keeping is defined as "the art of recording, in a systematic manner, the transactions of merchants, traders and other persons engaged in pursuits connected with money; the art of keeping accounts." In the commercial world, book-keeping has come to be a distinct profession—we might say, an exact science—requiring peculiar adaptation and thorough training on the part of those who would master the subject. We conclude from the evidence, one, to keep a *set of books* such as is required by the "iron safe clause" in a business such as appellees were engaged in, must have acquired by a course of study a knowledge of the system and rules of book-keeping, and by a course of practice have been able to apply them in the varied complications of mercantile relations. Neither courts nor jurors are presumed to be book-keepers. The parties had not stipulated as to the particular kind or system of book-keeping required, to show a complete record, etc. They had stipulated for a "set of books," but the plaintiffs affirming, and the defendants denying, that a "set of books" had been kept

as required by the policy, the court very properly, upon this state of the contention, instructed the jury what the terms of the contract imposed, leaving them to determine from the testimony of the experts, the books themselves, and other evidence, as to whether the conditions had been fulfilled.

In the absence of an express provision to the contrary, the insurers must be held to have contracted with reference to the usages of the trade and custom of merchants, and must have intended only such a *set of books*, showing a complete record, as good bookkeeping prescribed, and such as generally obtained among merchants engaged in business similar to that of appellees. *Sun Ins. Co.* v. *Jones*, 54 Ark. 376; *Jones* v. *Southern Ins. Co.* 38 Fed. Rep. 19; May on Ins. secs. 179, 179*a*, 179*b*; Angell, F. & L. Ins. sec. 25, pp. 64–65; 1 Wood on Ins. p. 433, secs. 184–185; *May* v. *Buckeye Ins. Co.* 25 Wis. 291.

The court did right in not inaugurating a system of bookkeeping which, according to the proof, was not contemplated by the parties when they entered upon their contract.

3. The policy also contained this clause: "This policy shall be void, and of no effect, if the interest of the assured be other than the entire, unconditional and sole ownership." The question of ownership was submitted to the jury upon instructions from the court (most of them at the instance of appellants) which covered every phase of the evidence. We find no error in the second given for appellees, nor in the refusal to give the eleventh on behalf of appellants. The second required the jury first to determine whether appellees were the owners. This was the real question, and the latter clause might well be treated as surplusage. All the evidence as to partnership in the profits, profits for services, etc., were only incidental to the main issue—

who were the owners of the stock—and germane in so far only as they threw light upon that issue. The court fully declared the law upon these points, and the verdict of the jury is conclusive upon appellants, for there was ample proof to support it.

2. Warranties must be strictly complied with.

4. The stipulations of the "iron safe" clause constituted an express promissory warranty, and of the clause as to ownership, an affirmative warranty; they were in the nature of conditions precedent to recovery, and a strict compliance with their terms was necessary, according to the intent and understanding of the parties. 1 Wood on Ins. sec. 179; 2 do. sec. 449; 1 May on Ins. secs. 156, 167; Angell, 140; Ellis, Law of Fire and Life Ins. p. 28; 1 Arnould on Ins. sec. 213, p. 557; 3 Kent (12 Ed.), p. 289; *Wood* v. *Hartford Fire Ins. Co.* 13 Conn. 533; 1 Wood, Ins. p. 436.

It follows that the first instruction of the court which told the jury "that if plaintiffs have substantially complied with the terms of the policy" they should recover, was erroneous. This instruction, if taken in its literal sense, was not incorrect, because "substantially" means "in a substantial manner; really; solidly; truly; competently." Webster, Dict. But the sense in which it is understood by the profession, and treated by authors upon insurance, and the sense, doubtless, in which it was intended to be applied here, was in contradistincton to a strict or exact compliance. *Aurora Fire Ins. Co.* v. *Eddy*, 55 Ill. 213; *Taylor* v. *Beck*, 13 Ill. 376; 1 May on Ins. p. 184, sec. 183, 184; 1 Wood on Ins. sec. 207.

We do not find, however, that this error could have possibly resulted to the prejudice of appellants, for the court had charged specifically upon both the above clauses, and the proof as to the books being a complete record, according to the most approved methods as practiced usually among merchants, was uncontradicted, This was a fact which appellants might have rebutted,

had it not been true, and had they been inclined to do so. Under the state of case presented by this record, we do not see how the jury could have come to any other conclusion than that there had been a compliance with the conditions of the policy.

The judgments of the Jefferson and Lincoln circuit courts are, therefore, in all things affirmed.

DENMARK v. STATE.

Opinion delivered March 17, 1894.

1. *Larceny—Possession of stolen property—Instruction.*

   On trial of one indicted for larceny, it is error to charge the jury that possession of the stolen property by one under indictment as his accomplice, recently after it was stolen and without explanation, is "a strong circumstance" tending to prove the guilt of the alleged accomplice.

2. *Larceny—Receipt of proceeds of stolen property.*

   Proof that defendant received from an alleged accomplice the proceeds of stolen property cannot, as matter of law, be said to be a circumstance which, unexplained, tends to show defendant's guilt, unless it further appears that defendant knew the source from which such proceeds came.

Appeal from Johnson Circuit Court.

JEREMIAH G. WALLACE, Judge.

The appellant, *pro se.*

1. The court erred in instruction No. 1 on its own motion. 34 Ark. 443; 72 N. C. 482. It also invades the province of the jury. Art. 7, sec. 23, const.; 49 Ark. 117; *Ib.* 439; 52 *id.* 262; 39 *id.* 585; 45 *id.* 172.

2. It was error to give instruction No. 2. It is only in cases where the possession is so recent after the theft that it is unlikely that possession could have been obtained legally that there is a presumption, and this is a presumption of fact, not of law. No presumption of

any kind arises from the possession of the proceeds of stolen property. It also invades the province of the jury.

James P. Clarke, Attorney General, and *Chas. T. Coleman*, for appellee.

1. The first instruction substantially states the law. 34 Ark. 444; 44 *id.* 41.

2. Under the circumstances of this case the second was not erroneous.

BUNN, C. J. Defendant was indicted and tried at the December term, 1893, of the Johnson circuit court, for the crime of stealing a grey mare from one Rowland Crawford of that county, on the 15th July, 1893. He was convicted and sentenced to five years imprisonment. Motion for new trial overruled, and appeal taken.

It seems that one Johnson Townly, and probably others, were at the same time under indictment in the same court for the same offense; and he was made State's witness against defendant. His testimony, therefore, is treated as that of an accomplice. He claims to have been an agent of defendant in selling horses and mules for him, and that, among others, he received the mare in controversy from defendant, and traded her off for him, not knowing she had been stolen, and, after several successive exchanges and swaps of animals and other property, turned the proceeds over to defendant. This is enough of the evidence perhaps to enable us to understand the purport of the two instructions complained of by defendant in the fourth ground of motion for new trial.

These instructions are as follows, to wit: (1.) "If the jury believe from the evidence that Townly was proved to have had possession of the mare recently after she was stolen, and such possession is unexplained by his own testimony, or other testimony in the case, this is a strong circumstance tending to show that

Townly stole the mare, and they will acquit the defendant, unless the evidence tends to connect him with the commission of the offense." (2.) "If the jury believe from the evidence that Townly took the mare to Sebastian county recently after she was stolen, and swapped her for a mule, and then sold the mule to O. B. Donalson, and they further believe that Townly paid the proceeds of the sale of the mule, or any part thereof, over to the defendant, that would be a circumstance, if unexplained, to be considered by the jury as tending to prove his guilt; and if such circumstance, considered in connection with all other facts and circumstances in proof in the whole case, satisfies the minds of the jury of defendant's guilt, it would be their duty to convict."

1. Possession of stolen property as evidence of guilt.

"Possession of property recently stolen, without reasonable explanation of that possession," it is said in *Boykin* v. *State*, 34 Ark. 443, "is evidence of guilt to go to a jury for their consideration. In this sense, it is *prima facie* evidence, but not in the sense that it is such evidence as must compel the jury to convict, unless it be rebutted." In the sense that it may authorize the verdict of guilty, it seems to be of very doubtful force. Its character, perhaps, is to be weighed in the light of the circumstances surrounding each case. At all events, that case cannot be made authority for the court to say to the jury in any case that such possession, unexplained, is a *strong circumstance tending to show that the defendant or his accomplice* is guilty of the crime charged against them, as is done in the first of these instructions, because the court must not say how much weight should be given to any state of facts.

This error of the court might seem unimportant, since that part of the instruction apparently has reference altogether to the connection of the accomplice and not of the defendant, with the crime charged, although it

heaps an improper burden upon the accomplice, and in so far relieves the defendant. That theory would hold good if the charge was that *the one or the other* was the *guilty party;* for in such a case, the one being found guilty, the other would certainly be innocent. But that theory does not apply to this case. Here they are charged as having jointly committed the crime. In such a case the erroneous instruction which is prejudicial to Townly is also necessarily prejudicial to the defendant.

2. Receipt of proceeds of theft as evidence of guilt

The second instruction complained of tells the jury, in effect, that if they find that Townly paid the proceeds of the sale of this mare (which "he took to Sebastian county recently after being stolen") over to defendant, such would be a circumstance, if unexplained, to be considered by the jury as tending to prove his guilt; and if such circumstance, in connection with other facts and circumstances in proof in the whole case, satisfies the jury of defendant's guilt, it would be their duty to convict.

The guilty knowledge of defendant concerning the source from which came these proceeds seems to have been considered immaterial. We are unable to see that the instruction recites a state of facts upon which the defendant's guilt could certainly be predicated. The receipt of the ill-gotten proceeds, of itself, certainly would not amount to a crime. What the other circumstances referred to (except on the uncorroborated statement of Johnson Townly) are, we do not know.

We think these instructions were calculated to mislead the jury, and should not have been given.

Reversed and remanded.

JOHNSON v. PECK.

Opinion delivered March 17, 1894.

1. *Contribution between partners—Accounting—Burden of proof.*
The firm of J., G. & Co., of which J. and G. were members, was dissolved in 1854. J. undertook to pay the firm's debts with assets of the firm in his hands, the amount of which does not appear. G. died in 1868, and J. in 1870. Prior to July, 1869, J. had settled the outstanding partnership debts, except a judgment which was compromised and paid in 1886 by his administratrix. It was not shown that any demand was ever made of J., or of his administratrix, for an accounting of firm assets in his hands, or that there were such assets still undisbursed. In a subsequent suit by J.'s administratrix to enforce contribution from G.'s heir of G.'s proportion of the judgment paid by J.'s estate, *held*, that, after the lapse of so much time, the burden was on defendant to show that J.'s estate, which paid the judgment, had partnership assets not disbursed in settlement of partnership debts.

2. *Enforcement of judgment against decedent's land—Laches.*
Delay of thirteen years in enforcing a judgment against the estate of a decedent will bar its enforcement as to lands of the estate subsequently purchased by another from decedent's heir for value and without notice of such judgment.

Appeal from Sebastian Circuit Court in Chancery, Fort Smith District.

C. J. FREDERICK, Special Judge.

STATEMENT BY THE COURT.

This suit was commenced November 9th, 1886, by complaint in equity in the Sebastian circuit court, by the appellants, the widow and administratrix of Chas. B. Johnson, and his heirs at law, to obtain a decree for contribution against Lizzie Grimes, only heir of Marshall Grimes, deceased.

Charles B. Johnson, Marshall Grimes and C. Adolphus Meyer were partners at Fort Smith, in 1852, in the mercantile business, and failed in 1854, and, for

aught that appears, went out of business, and the partnership seems to have been thereby dissolved, except as to the unsettled partnership business, though it does not appear that there was any formal dissolution of the partnership. C. Adolphus Meyer moved away, became and remained insolvent. Charles B. Johnson undertook to compromise and settle the indebtedness of the firm, nearly if not quite all of which he settled before his death, except a judgment in favor of the estate of Marcellus Duval, which was probated on the 22nd day of September, 1871, against the estate of Marshall Grimes, deceased, in Sebastian county, Arkansas, and which judgment Margaret A. Johnson was compelled to pay as administratrix of the estate of Charles B. Johnson, deceased. To compel contribution from the estate of Marshall Grimes of one half of the amount so paid, this suit is prosecuted.

After going out of the mercantile business at Fort Smith, Johnson and Grimes, who were brothers-in-law, were associated together in filling contracts to feed the Indians, under the government of the United States, and afterwards under the government of the Confederate States.

Sometime after the close of the war between the States, Johnson and Grimes entered into partnership with J. C. D. Blackburn, at Sherman, Texas, to carry on a mercantile business in connection with government contracts to feed the Indians. Grimes died January 2nd, 1868, and soon after his death Johnson arranged to carry on the business with Blackburn till 1870. By arrangement between Johnson and Blackburn, Johnson was to represent and manage Grimes' interest in the firm of J. C. D. Blackburn & Co. Johnson administered upon Grimes' estate in Texas, November 30th, 1868, and filed an inventory of Grimes' personal property, consisting of about $390 in value of personal chattels and

"one account on J. C. D. Blackburn & Co., the definite amount not ascertained, supposed to be $5000." Johnson took no further steps in this administration. On January 7th, 1870, he was appointed administrator of Grimes' estate in Arkansas by the probate court of Sebastian county, but took no steps therein, and died on the 20th of January, 1870.

Margaret A. Johnson, one of the appellants, administered upon his estate, and filed an inventory showing lands in Texas and Arkansas of considerable value, bonds of the nominal value of $50,000, and, among others, the following item: "Half interest in the late mercantile firm of Blackburn & Co. composed of deceased and J. C. D. Blackburn. Account stated between administratrix of deceased and surviving partner; balance to be coming to deceased's estate $12,688, to secure the payment of which said Blackburn executed to administratrix four several promissory notes, each for the payment of $3172, dated April 26th, 1870, and payable, respectively, in three, six, nine and twelve months after date." Of this amount it appears Mrs. Johnson, as administratrix, collected only $3170, but never received the other.

Defendant also offered to prove that, on May 15, 1875, Lizzie Grimes obtained judgment, by probate of a claim, for $5900, with eight per cent. per annum interest from that date, in the county court of Grayson county, Texas, against the estate of Johnson, that certain lands of Johnson in Texas had been sold and credited on same, and that the balance due on the judgment is over $10,000—being $8,505.28, on March 19, 1888, by the statement of the adminstrator; but the court excluded the evidence, and the defendant excepted.

Mrs. Johnson testified that she "had nothing to do with Grimes' interest;" that when she sold Johnson's interest to Blackburn, there was no statement made to

her of Grimes' interest; that all she "had anything to do with was with Mr. Johnson's interest."

The applicees in their answer alleged, in substance, that, at the time Johnson agreed to compromise and settle the debts of the firm of Johnson, Grimes & Co., he had in his hands all of the joint and copartnership funds of himself and Grimes, which he expected to use for that purpose; "that the amount of said funds held by him was largely in excess of the debts, and that the amount due said Grimes in excess of a sum sufficient to pay said debts amounted to $40,000;" that, as administrator of the estate of Grimes in Texas, "he came into possession of other property of Grimes; that none of said joint funds so held by Johnson ever came to the defendant." They deny that there had been any settlement of the partnership affairs of Johnson and Grimes, or that lapse of time had barred a settlement of the same. They charge that all Grimes' interest held by Johnson at his death went into the hands of Margaret A. Johnson, as administratrix.

The lands of Grimes' estate were attached upon the institution of the suit, and Nicholas Gacking filed an interplea, showing that he had purchased of John Carnall, as agent of Lizzie Grimes, forty acres of the land, before the payment by Mrs. Johnson of the Duval judgment, but after the same had been probated against the estate of Grimes. And it is contended that he took it subject to the payment of the debts of Grimes' estate; that he was bound to take notice of the course of business in the probate court, and was not an innocent purchaser; that the creditors of Grimes' estate had a lien upon the lands of the estate for the payment of their debts; that he took the land, as Lizzie Grimes took it, charged with the debts against her father's estate; that Gacking could stand in no better attitude than she did when she conveyed the land to him.

There were other questions raised by objections to testimony, and to the introduction of copies of records from Texas, which we do not here consider.

The court dismissed the complaint, on the grounds, as we understand, that partnership assets went into Johnson's hands, if not from the partnership of Johnson, Grimes & Co., from the partnership of J. C. D. Blackburn & Co. in Texas, and that it is not shown that there was ever any settlement of partnership accounts between Johnson and Grimes.

To reverse the decree the cause is here on appeal.

John H. Rogers for appellant. *J. L. Hendrick* of counsel.

1. The evidence does not support the findings of fact. The evidence fails to show that Johnson had enough of Grimes' property to pay his share of the firm debts, and the burden was on appellee to show this. Mansf. Dig. sec. 5072. Blackburn as surviving partner had the sole right to wind up the partnership of Blackburn & Co., in Texas. 2 Bates, Part. sec. 715 and cases cited in notes 2 and 3; *ib.* sec. 714 and notes; 38 Oh. St. 357; 45 Ark. 299. The probate of the claim against Johnson's estate in Texas, was a nullity, so far as these plaintiffs are concerned. 29 Ark 437–8; 16 *id.* 258; 34 *id.* 132; 6 How. (U. S.) 44; 18 *id.* 16; Story, Confl. Laws, secs. 513 to 518 and notes, etc.; 1 Woerner on Adm. sec. 158; 54 Ark. 33. At Johnson's death, he ceased, *as administrator of Grimes*, to be a trustee. 39 Ark. 557. See also 14 Ark. 254; 53 Am. Dec. 711 and note. At Johnson's death the estate of Grimes had no claim which could be probated againt Johnson's estate, but if it did, it is a stale claim now, and barred by nonclaim. 39 Ark. 578; 18 *id.* 334; 33 *id.* 658; 113 U. S. 449.

2. Even if the proof showed that Johnson at his

death had property belonging to Grimes not accounted for, still, after the long lapse of time and the intervention of the statute of non-claim, it could not avail defendant. 19 Ark. 329; 23 *id.* 604; 14 *id.* 252; 143 U. S. 224; 55 *id.* 93; 17 Fed. Rep. 36; 51 *id.* 487. On this principle it will be presumed that the old firms have long since been closed and settled. 3 Johns. Ch. 578; 1 Edw. Ch. 343; 14 Ark. 62. The right to a settlement of any of these partnerships is long since barred. 1 Edw. Ch. 343; *ib.* 417; 2 *id.* 636; 1 Johns. Ch. 46; 2 *id.* 193. While it is true that there can be no contribution between partners while the partnership matters remain *unsettled*, yet the law will presume, in the absence of proof, that the old firm of Johnson, Grimes & Co. has long since been settled. 2 Johns. Ch. 394.

3. A summons was not necessary a warning order is sufficient. 36 Ark. 217; 31 *id.* 493. The effect of Carnall's power of attorney is decided in 5 Pet. Cond. U. S. Rep. top p. 401; 8 Wheat. 174. His deed was executed after the attachment was levied. 41 Ark. 371. When Mrs. Johnson paid off the Duval judgment she as administratrix, was subrogated in equity to all the rights and lien of the judgment creditor for contribution. 40 Ark. 433; 45 Miss. 183; Bisph. Eq. secs. 27, 335; 2 Wait, Act. and Def. p. 299. If Grimes' estate had been closed, she could pursue the assets in the hands of the heir. 48 Ark. 237. See also 40 Ark. 103 and 433. Meyer, one of the parties, was dead and insolvent, and Miss Grimes was liable for one half the debt. 44 Ark. 359; 27 Mo. 501; 20 Am. Dec. 562 and note.

Winchester & Bryant for appelles.

1. Contribution is not an absolute but an equitable right, and will not be allowed if ineqitable. 62 Am. Dec. 747; 59 *Id.* 631; *Id.* 283; 2 Wait, Ac. & Def. 288, 291, 295–9, 300. As between partners, it is *never* allowed until there has been a final account and balance struck.

2 Lindley on Part. p. 941, sec. 567, n. 100; 2 Bates, Law of Part. 849 *et seq* 851–2, 859; 2 Wait, Ac. & Def. 300. The evidence shows that no final accounting or settlement of the partnerships of Johnson & Grimes, or Johnson, Grimes & Co., has ever been had, and the burden is on the plaintiffs. Hempst. (U. S.) 560; 88 Am. Dec. 667; 6 Ark. 191, 23 *id.* 333; 9 *id.* 518. The dissolution of a firm does not affect a settlement, nor does a failure or insolvency necessarily dissolve a firm or settle the accounts between the members. 27 Am. Dec. 618; 135 U. S. 621; 48 Am. Dec. 546; 40 *id.* 497; 38 *id.* 768; 53 *id.* 711. See also 137 Mass. 510; 31 Ala. 230; 90 N. Y. 580; 10 Gray, 405. On the question of time as having settled the firm affairs, see 135 U. S. 621, 628.

2. Johnson had joint funds or property in his hands, of Grimes and himself, which should have been applied to the Duval debt, and it would be inequitable to enforce contribution without an accounting. 5 Dana, 384; 13 Mo. 470; 6 B. Mon. 236; 62 Am. Dec. 747; 43 *id.* 382. The evidence shows that Johnson had such joint funds. 13 Mo. 470; 53 Am. Dec. 711; 48 *id.* 546; 38 *id.* 768; 27 *id.* 618.

3. The defense is not barred by non-claim or lapse of time. 10 Am. St. Rep. 646; 5 Dana, 389; 55 Conn. 419; 9 N. J. Eq. 44; 12 La. An. 297; 9 Ga. 398; 8 B. Mon. 580; 8 Rich. 113; Wood on Lim. 602–3; 22 Ark. 375; 63 Iowa, 477; 68 *id.* 633; 36 Ohio St. 153; 26 Miss. 302. Matters in defense purely are never barred in equity.

4. As to the Gacking interplea, he bought and paid the consideration long before this suit. The lien of the Duval judgment is barred. 37 Ark. 155; Mansf. Dig. sec. 4487.

HUGHES, J. (after stating the facts). The complaint in this case alleges in substance that the partnership accounts of Johnson, Grimes & Co. were fully set-

tled, and the partnership dissolved, many years before the institution of this suit, and that the judgment in favor of Marcellus Duval, paid by Mrs. Johnson, was the only remaining unsettled matter of that partnership, and that that judgment was paid out of assets of Johnson's estate; and prays for contribution from the estate of Grimes, the only partner of the firm save Johnson who, or whose estate, was solvent. It does not pray for a settlement of partnership accounts.

The answer denies that the partnership accounts of this firm were ever settled, and avers, in substance, that Johnson had a large balance in his hands, at his death, belonging to the firm, which went into the hands of his administratrix, none of which ever came to the hands of Lizzie Grimes, the only heir of Marshall Grimes, deceased, and that this amount was more than enough to have settled Grimes' share of the Duval judgment, and that the administratrix and heirs of Johnson are not entitled to contribution; that, before it could be had, there must be a settlement of the partnership accounts, and a balance between Johnson's estate and Grimes' estate struck, when, if the balance is in favor of Johnson's estate, he might be entitled to contribution. No affirmative relief is asked in the answer.

1. Right of contribution among partners.

It is a general rule that one partner cannot recover, either in a suit at law or in equity, for contribution for advances or loans made by him to the firm nor for money paid or debts settled by him for the firm out of his private estate, apart from a general accounting and settlement. 2 Bates, Part. secs. 849, 851, 852, 859; 2 Lindley, Part. p. * 567; *Bailey* v. *Starke*, 6 Ark. 192; *Houston* v. *Brown*, 23 Ark. 333.

In *Lang* v. *Oppenheim*, 96 Ind. 47, a paragraph in a complaint for contribution, filed after dissolution of the partnership, was held insufficient because it did not state that there were no partnership assets in the hands of the

plaintiff, or that there had been a final settlement of partnership accounts, and that there was nothing due to the firm from plaintiff, which ought to go in satisfaction of the debt paid by plaintiff for the firm, and on account of which he claimed contribution. In *Houston* v. *Brown*, 23 Ark. 333, it was held that "an action would not lie upon an instrument of writing acknowledging the receipt of money by the defendant of the plaintiff, specifying its payment on account of a partnership concern, unless the plaintiff prove that there was not an existing or unsettled partnership." So it seems, according to those cases, that, before a plaintiff can have contribution on account of a partnership debt paid by him, he must show that there is not an existing or unsettled partnership. The complaint alleged that the partnership of Johnson, Grimes & Co. was dissolved in 1854; that Johnson died in January, 1870; and the proof is that the firm went out of busines in 1854, and tends to show that the partnership was then dissolved, except for the purpose of settling the partnership business. Grimes died in 1868. Johnson died in January, 1870. On the 26th of March, 1886, Mrs. Johnson, as administratrix of Chas. B. Johnson, with the consent of his heirs, compromised the Duval judgment and satisfied it by payment of $10,487.45, and, after requesting Lizzie Grimes to pay one half the amount, brought her suit for contribution, in which the heirs of Johnson joined on November 9th, 1886, Miss Grimes having refused to contribute. Miss Grimes having died, the suit was revived against her administratrix.

Did it devolve upon the appellants to prove that there were not unsettled partnership accounts, between Johnson and Grimes, as members of the firm of Johnson, Grimes & Co., which went out of business in 1854, more than thirty years before the payment of the Duval judgment by Johnson's administratrix and heirs, more than

fourteen years before Grimes' death, and about sixteen years before Johnson's death?

In *Brown* v. *Agnew*, 6 Watts & S. 238, it is held that "if, however, the partnership has been dissolved, and the partnership accounts have been adjusted, and one partner is afterwards obliged to pay an outstanding claim unprovided for, the action of assumpsit would seem to be the proper remedy to recover the proportion of it which the defendant ought to pay by reason of the joint liability. A contract on his part to do so would arise from the fact of payment, as money paid to his use for his proportion, and on ordinary principles the action would lie for contribution. The transaction would then come within the class which are termed insulated or cut off from the general partnership concerns, and would be the payment by a mere joint contractor on the common account. * * In the present case the payment was made in 1840, * * * more than six years having elapsed from the dissolution till the payment of the claim and institution of this suit. These circumstances, we think, raise a fair presumption that the partnership accounts had been settled or terminated in some way, till it is overthrown by some evidence on the part of the defendant that the general partnership accounts yet continued open and current. This burden lies on him who seeks to avoid the plea of the statute of limitations to an action of account render or assumpsit. * * * By analogy, therefore, after the lapse of six years it lies on the party setting up an account to aver and prove that it remains open and current; and as the defendant here relies on the existence of unsettled accounts to defeat this action, the burden of making it out is thrown on him; and not having done so, there is no ground to defeat the action of assumpsit."

"Laches and neglect are always to be discountenanced in equity. A party must not sleep upon his

rights here, any more than at law. He must use all reasonable diligence to assert his claim, or the court will not help him. This principle is found in a great variety of cases; * * * * and it is more particularly applicable to stale demands, brought forward and attempted to be supported for the first time after the death of the original party to the transaction." *Powell* v. *Murray*, 2 Edward's Ch. 644. "Calling for accounts is not to be encouraged, after the death of the accounting party, provided he lived long enough to have accounted, and there was no impediment." *Bertine* v. *Varian*, 1 Edward's Ch. 343.

It is not claimed that there was ignorance of his rights upon the part of Grimes in his life-time, or of his heir, Lizzie Grimes, after his death; and if Johnson had the large amount of assets in his hands that it is charged in the answer here he did have, he could have been called to account by Grimes before his death, or by his administratrix or heir after the death of Grimes. No reason is assigned why it was not done. Nor was there, in our opinion, any evidence sufficient to show that Johnson had in his hands or possession at the time of his death, or that his administratrix or heirs received, any effects of Grimes, or of Johnson, Grimes & Co., not disbursed in the settlement of the firm debts or accounted for.

After the 27th day of July, 1869, by which time, according to the evidence of the Hon. Jesse Turner, Johnson had compromised and settled all the claims in his hands against the firms of Johnson & Grimes, and Johnson, Grimes & Co., it is not shown that there were any outstanding unsettled claims against the firm of Johnson, Grimes & Co., or Johnson & Grimes, except the Duval debt, nor is it shown any where that, after that date, Johnson paid, or promised to pay, anything on account of Johnson & Grimes or Johnson, Grimes & Co. to any one, or that he made any promise, or ac-

knowledged any obligation, to make any payment, or to account, except that it is shown that he afterwards sought to compromise the Duval judgment, which his administratrix and heirs did compromise and settle after his death. Here is a period of over sixteen years, when there is nothing to show an acknowledgment, either expressly or by implication, of accountability.

It cannot fairly be presumed, after the lapse of so great a length of time, that Johnson had in his possession assets of the partnership not disbursed in settlement of the debts or accounted for in some way. What he had in his hands originally for the purpose of settling their debts does not appear from the evidence. If we were to support the appellees' contention that it must be presumed he had assets of the firm more than sufficient to pay the debts, from the fact that he undertook to settle the debts of the firm, and that he should be held to account, and the right to contribution be denied without an account, we would be called upon to presume, in the first place, that he had such assets; second, that he had not disbursed them, and, third, that he had a balance in his hands for which he was liable to account. This would be presuming too much against one who died several years before this suit was brought.

We are of the opinion that the matters arising out of the partnership of J. C. D. Blackburn & Co. in Sherman, Texas, after the close of the war, ought not to affect the question of the right to contribution, as between the members of the firm of Johnson, Grimes & Co. dissolved in Arkansas in 1854; that they are separate and independant matters. But if it were legitimate to consider matters growing out of the Texas partnership of J. C. D. Blackburn, Johnson & Grimes, we are unable to find that Johnson received anything from that source, belonging to the estate of Grimes, for which he has not accounted. We think there was error in the

decree of the chancellor in this case in dismissing the complaint, and that the appellants are entitled to contribution.

2. As to laches in enforcing probate judgments.

In regard to the interplea of Nicholas Gacking, it is sufficient to say he appears to have been an innocent purchaser of the forty acres of land claimed by him. Johnson's estate was entitled to contribution, as against Grimes' estate, out of this forty acres, only by right of subrogation to the equity and right of Marcellus Duval to have it sold for the satisfaction of his judgment. This judgment was rendered in 1871. Gacking bought the land in 1884, about thirteen years after the judgment was rendered.

In *Mays* v. *Rodgers*, 37 Ark. 155, it is held that "the lands and tenements of which an intestate has died siezed are, by the statutes, made assets in the hands of his adminstrator for the payment of his debts, and, in case of a deficiency of the personal estate, may, under an order of the court, be sold for that purpose. But this charge upon the real estate is not a perpetual one, which may be enforced by the administrator after any lapse of time. The heirs should not be forever deterred from making improvements on the property, or prevented from selling it, by the possibility that it may be sold for the debts of the estate. The power of the administrator must be exercised in a reasonable time, and will be lost by gross laches or unreasonable delay." See authorities cited in the case. Ten years delay was held unreasonable in that case; and so we think that thirteen years was an unreasonable delay in the case at bar, and that, when Gacking bought the forty acres, the lien of Duval's estate had been lost by lapse of time and unreasonable delay, and that Gacking's title is good against the claim of appellants for contribution. (See also *Berton* v. *Anderson*, 56 Ark. 470.)

The decree is reversed, and the cause is remanded, with instructions to sustain the interplea of Gacking, and to discharge from the attachment the forty acres of land claimed in his interplea, and to re-instate the attachment as to the other lands attached in this cause, and to enter a decree for contribution, as prayed for in the appellants' complaint.

WOOD, J., dissents on the question of contribution.

WILSON v. YOUNG.

Opinion delivered March 17, 1894.

1. *Execution—Sheriff's liability for non-return.*
   The mere endorsement of his return upon an execution by a sheriff within sixty days will not avoid his liability for failure to make actual return of the writ to the clerk within that time.
2. *Statutes—Repeal by implication.*
   Sections 3061-2, Mans. Dig., which provide, in substance, that if an officer receiving an execution shall not return it "on or before the return day therein specified," he shall be liable to a penalty, to be collected in an action upon his official bond, were not impliedly repealed by the provisions of the civil code relating to the issuance and return of executions. (Civil Code, secs. 672-9.
3. *Execution—Sheriff's failure to return.—Liability of sureties.*
   Under secs. 3061-2, Mansf. Dig. providing that if the officer receiving an execution shall not return it "on or before the return day therein specified" he "shall be liable and bound to pay the whole amount of money in such execution specified," and that any person aggrieved by the non-payment of such amount "may have his action against the officer and his sureties upon his official bond," the sureties on a sheriff's bond are liable for the amount of money specified in an execution which the sheriff failed to return within the time prescribed by law.
4. *Survival of action—Statutory penalty.*
   An action against a sheriff and his sureties to recover the statutory penalty for his failure to return an execution within the

time prescribed by law is an action *ex contractu*, on his official bond, and, upon the sheriff's death, survives against his personal representative.

Appeal from Saint Francis Circuit Court.

MATTHEW T. SANDERS, Judge.

Geo. Sibly for appellants.

1. The demurrer should have been sustained to the complaint. Secs. 3061 and 3062, Mansf. Dig., are taken from the Rev. St. ch. 60, secs. 62, 63, and there must have been loss or damage to the execution creditor before he can recover. Murfree on Off. Bonds, sec. 494.

2. The action did not survive. *Ib.* sec. 654. It did not survive at common law, and is not made to survive by statute. 96 N. Y. 323; 13 Sup. Ct. Rep. 232.

3. Secs. 62, 63, ch. 60, Rev. St. are repealed by the Code. 10 Ark. 591; 31 *id.* 17; 46 *id.* 438, 448; 47 *id.* 491.

4. The return was made in due time, though not filed in time.

James P. Brown for appellees.

1. The complaint was framed after the one approved in 40 Ark. 377, in 44 *id.* 175, and in 47 *id.* 373. The liability of a sheriff for failing to return an execution is fixed.

2. That the action survived is plain from a reading of the statute. Mans. Dig. secs. 5223-4.

3. The case of *Huntington* v. *Attrill*, 13 Sup. Ct. Rep. 232, does not support the appellant's contention. Its reasoning is conclusive that the action does survive under our statute.

MANSFIELD, J.

This was an action against the administrator of D. M. Wilson, late sheriff of St. Francis county, and the sureties on his official bond, for his failure to return,

according to law, an execution issued on a judgment of the circuit court of that county in favor of the appellees. The complaint was filed under section 3061, Mansf. Digest; and, after alleging the facts necessary to a recovery under that statute, as against a sheriff and his sureties, it shows that Wilson died after the return day of the execution, and that administration upon his estate was granted to the person sued as his personal representative.

The section of the digest mentioned above provides that if the officer receiving an execution shall not return it "on or before the return day therein specified," he "shall be liable and bound to pay the whole amount of money in such execution specified;" and the next succeeding section (3062) provides that any person aggrieved by the non-payment of such amount "may have his action against the officer and his sureties upon his official bond." (Mansf. Dig., 3062.)

A demurrer to the complaint, on the special ground that it stated no cause of action against the administrator of the deceased sheriff, was overruled, and, the defendants having answered denying the failure complained of, the cause was tried by the court without a jury. The finding being for the plaintiffs, they recovered the amount specified in the execution, with interest at the rate borne by the original judgment.

1. Liability of sheriff for non-return of execution.

It is conceded that the execution was not filed in the clerk's office within the time in which the law required it to be returned;[1] and the only fact urged as showing error in the court's finding is that a return dated before the return day was indorsed upon the execution. But this court has held that the mere indorsement of a return upon the execution does not avoid the liability of the sheriff for a failure to make an actual return to the

1. "All executions shall be returnable in sixty days from their date." Mansf. Dig. sec. 2971.

clerk of the execution itself. *Atkinson* v. *Heer*, 44 Ark. 174. And in the present case it is not contended that an actual return was either made or attempted within sixty days from the date of the execution.

The correctness of the judgment is denied here, not only on the ground stated in the demurrer, but on two additional grounds. The first of the latter is that the statute on which the action is based was by implication repealed by the enactment of the Civil Code; and, in the second place, it is argued that, conceding the statute to be in force, the sureties of a sheriff cannot be made liable under it except where the execution plaintiff has sustained an actual damage.

2. As to repeal of statute by implication.

The statute embraced in the sections referred to (Mansf. Dig. secs. 3061, 3062) has been treated as an existing law of this State, and its penalty enforced in cases determined here since the adoption of the Code; and it does not appear to us that there is any repugnancy whatever between it and the Code provisions cited as having accomplished its repeal.[1] *Jett* v. *Shinn*, 47 Ark. 373; *Hawkins* v. *Taylor*, 56 Ark. 45.

3. Liability of sureties on sheriff's bond.

In *Hawkins* v. *Taylor*, just cited (56 Ark. 45), the proceeding was by motion, under sections 3963–4, and appears to have been against the sheriff alone. The latter sections are from an act of the general assembly imposing upon the officer and his sureties a greater penalty than the act from which sections 3061–2 are taken, and provide for its recovery by summary judgment. As pointed out in Hawkins' case, the penalty recoverable under sections 3963–4 is for a failure to make any return at all of an execution; while that of section 3061 is recoverable by an ordinary action at law prosecuted upon complaint and summons, and is for a failure to return an execution on or before "the return day therein specified." Hawkins incurred the penalty in-

1. Sections 672–679, Civil Code.

flicted by section 3061, and on his appeal a judgment was entered against him here for the amount of the execution he failed to return, and interest, but not for the damages claimed under sections 3963–4. The court ruled that the motion of Taylor contained all the allegations essential to a complaint under section 3061, and that the defendant had waived the issue and service of a summons by entering his appearance. There was no suggestion in the opinion of the court that Hawkins' sureties would not have been held equally liable for the penalty with himself if they had been made parties. And in *Atkinson* v. *Herr*, 44 Ark. 174, S. C., 40 Ark. 377, the severer penalty inflicted by sections 3063–4 was recovered alike against the sheriff and the sureties on his official bond. Although the proceeding in Atkinson's case was summary, it was, as to the creditor, remedial[1]; and being, like this, upon the bond of the officer, we are unable to see how the mode by which jurisdiction was acquired over the persons of the defendants can affect either of the questions we are considering.

But *Norris* v. *State*, 22 Ark. 524, and *Jett* v. *Shinn*, 47 Ark. 373, were actions, in the usual form, against the sheriff upon his official bond, and, like this suit, were brought under section 3061 for failure to return an execution within the time prescribed by law; and in both those cases the penalty of the statute was enforced as well against the sureties as against their principals. This was done in obedience to a plain and express requirement of the law; and, if further authority is needed to show that the rule contended for by the appellants cannot prevail in a proceeding such as this upon the official bond of the sheriff, we may cite the case of *Christian* v. *Ashley Co.* 24 Ark. 142–147. There the action was against Norris, a delinquent collector, and the sureties on his bond, to recover the amount of

1. *Huntington* v. *Attrill*, 146 U. S. 657.

certain revenue due to the county, together with a heavy penalty imposed by statute for his delinquency in failing to pay it over[1]; and it was contended that the sureties were not liable for the penalty. In holding that they were liable, the court said: "The condition of the collector's bond is for the faithful performance of the duties of his office, and for the well and truly paying over all moneys collected by him by virtue of his office. It is true that the condition of the bond does not recite that either the collector or his sureties shall be liable for any penalties for his failure to pay over moneys collected by him, but the parties must be understood to contract in reference to the law in force at the time the bond is executed. The law clearly imposes penalties upon the delinquent collector, and we think it was the intention of the legislature to make the sureties liable for the amount of penalties imposed upon him for his delinquencies."

4. As to survival of action to recover penalty.

This decision is also directly opposed to the position of the appellants here as to the survival of the cause of action. They contend that it did not survive against Wilson's administrator because it was for a *tort*. But the default of Wilson was certainly not more tortious than that of Norris; nor did the bond on which Norris and his sureties were sued embrace any element or characteristic of a contract that is not also found in the bond executed by these sureties and their principal. It will be noticed that the court regarded Norris' delinquency as the breach of a contract; and for the same reason the failure of Wilson to perform an official duty, although treated as a tort by the statute imposing the penalty in question, was a breach of the contract he and his sureties entered into when they executed the bond on which this suit was brought.[2] The condition of his bond was

1. Gould's Dig. ch. 147, secs. 37–45.

2. See Cooley on Torts, 103–106; *Rich* v. *New York, etc. R. Co.* 87 N. Y. 382; *Dean* v. *McLean*, 21 Am. Rep. 130.

that he would "well, truly and faithfully discharge and perform the duties of his office."[1] The laws defining those duties were, in legal contemplation, as much a part of his contract as if they had been recited in the bond;[2] and he and his sureties must therefore be held to have bound themselves, not only that he would perform the duty which the complaint charges he neglected, but that they would pay the penalty incurred by its non-performance. It is therefore not improper to consider the statute as if it were a stipulation of the parties liquidating the damages recoverable for the breach complained of.

Such is the effect given to a similar statute by the Supreme Court of Illinois in *Robertson* v. *County Commissioners* (5 Gilman, 559, 569) which was an action upon the official bond of a constable for his failure to return an execution. With reference to the contention made in that case that, in the absence of any real injury, the damages recoverable were only nominal, Judge Trumbull, in delivering the opinion of the court, said: "The statute requires an execution to be returned within a certain time, and, lest this requirement should be disregarded, provides that if a constable will continue to violate his duty by failing to return an execution for ten days after its return day, both he and his securities shall be liable to the party aggrieved for the full amount of the execution, and interest upon the judgment on which it issued. It was undoubtedly competent for the legislature to impose such a liability for a failure by the constable to perform his duty, and the numerous cases cited to show that, as a general rule, the obligors upon a bond are only liable to respond in damages to the

1. Mansfield's Digest, sec. 6314.

2. *McCracken* v. *Hayward*, 2 How. (U. S.) 612; *Christian* v. *Ashley Co.* 24 Ark. 147; *Wycough* v. *State*, 50 Ark. 107; *Hecht* v. *Skaggs*, 53 Ark. 293; *Robertson* v. *County Commissioners*, 10 Ill. 565; Throop's Public Officers, sec 292.

amount of the real injury occasioned by the breach complained of, can have no application to this case, because the legislature has declared what the measure of damages shall be."

And so we may say in this case that the rule stated by the authorities cited by the appellants is not the rule in Arkansas; and the fact that it does not apply here in suits like this is noted by Mr. Sutherland in his treatise on Damages. 2 Suth. Dam. sec. 488, n. 3.

In his work on Torts, Judge Cooley, after saying that in some instances "they seem to be mere breaches of contract," and that "in many cases an action as for a tort or an action as for a breach of contract may be brought by the same party on the same state of facts," speaks further on the subject in the following language: "There are also in certain relations duties imposed by law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by contract covering the same ground. The case of the common carrier furnishes us with a conspicuous illustration. The law requires him to carry with impartiality and safety for those who offer. If he fails to do so, he is chargeable with a tort. But when goods are delivered to him for carriage, there is also a contract, express or by operation of law, that he will carry with impartiality and safety, and if he fails in this there is a breach of contract. Thus for the breach of the general duty imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought." Cooley on Torts, 103–106.

"A tort," says another writer on the same branch of the law, "may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded on contract, so that an action *ex contractu* for the breach

of contract, or an action *ex delicto* for the breach of duty, may be brought, at the option of the plaintiff." Addison on Torts.[1]

We have no adjudications contravening the doctrine of these authorities.[2] *Bagley* v. *Shoppach*, 43 Ark. 375, was a suit in the circuit court against an officer for the amount of fees illegally exacted, and for a penalty recoverable for exacting them, under section 1760 of Mansf. Digest. That statute provides for no proceeding upon the officer's bond, and the suit was not so brought. It was urged that the court had no jurisdiction because the amount in controversy was under $100. That "would be true," the court said, "if the suit were based on contract. * * * Appellant has not declared upon an implied promise of the appellee to repay what he had no right to receive, but he sues for the official tort, and goes for the forfeiture and penalty which are the damages awarded by the statute for the tort." And it was therefore held that the action was *ex delicto*. The distinction thus recognized was observed in the subsequent case of the *B. & O. Telegraph Co.* v. *Lovejoy*, 48 Ark. 301, where it was decided that an action against a telegraph company to recover a penalty for the non-delivery of a message was not within the jurisdinction of a justice of the peace, for the reason that it was not *ex contractu*, but arose on the statute inflicting the penalty. Mansf. Dig. sec. 6419.

A case more recently decided was a proceeding against a constable to recover the penalty imposed by section 4128 of Mansf. Digest for a false return. The action was not upon the constable's bond, and the question was whether it was *ex contractu* or *ex delicto;* and the court held that it was the latter, for the reason that it was

1. Cited in *Dean* v. *McLean*, 48 Vt. 412; S. C. 21 Am. Rep. 132; see also *Lee* v. *Hill*, 24 Am. State Rep. 666.

2. See *Johnson* v. *McDaniel*, 15 Ark. 110.

based upon no contract, either express or implied. *Merfield* v. *Burkett*, 56 Ark. 592.

There is nothing, then, in either of these three cases that conflicts with the view we have indicated as to the nature of the present case. They were actions not founded in any sense upon contracts; while this action, as we hold, is founded upon a contract, namely, upon the bond executed by the defendants; and, if we are correct in treating the cause of action as one that arises *ex contractu*, its survival against the administrator of Wilson will not, we suppose, be questioned. On this point, however, we cite the case of *Lee's Adm'r* v. *Hill*, 87 Va. 497; S. C. 24 Am. Rep. 666. See also *Hecht* v. *Skaggs*, 53 Ark. 293; Mansf. Dig. secs. 3898–3901, 4944.

Under our laws, a suit will abate on the death of the defendant where the cause of action for which it is brought would not itself have survived. (Mansf. Dig. secs. 5234–5236.) We have statutory provisions making it equally undeniable that the surety of a sheriff, forced to pay a liability on his bond, has a right of action against the sheriff, and, in case of the latter's death, against his administrator, to recover back the sum thus paid. (Mansf. Dig. secs. 6405, 6414, 6415.) But if the rule as to the survival of actions be that insisted upon by the appellants, it would in many cases subject the sureties to an injustice which the statutes cited in this connection do not allow us to believe the legislature has intended. Thus, for illustration, this action, according to the view of the appellants, would have abated as to Wilson on his death, if it had been then pending against him, although it would have continued against his sureties. Mansf. Dig. secs. 3900, 4944, 5234. And thus they would have been compelled to bear the burden of satisfying the execution creditor's demand, however solvent Wilson's estate may have been; and in seeking

re-imbursement it is easy to see that they would suffer, not only delay, but in many instances actual loss, under our system of administration, if the estate proved to be insolvent. (Mansf. Dig. secs. 96, 99.) Besides, we think the law has not intended an injustice so manifest as to abate the action against the sheriff in the case supposed, and not abate it under like circumstances as against one of his sureties. Nor could the law justly permit the suit to abate as to one surety, and allow it to proceed to judgment against his co-surety.

Our conclusion is that the action was maintainable against all the defendants as if upon a contract broken by an act or omission not constituting a tort; and we express no opinion as to whether, if the cause of action had been for the tort merely, and as a wrong not involving any breach of the bond, it would have survived under our statute. (Mansf. Dig. sec. 5223.)

Affirmed.

BUNN, C. J., (dissenting.) The question in this case is whether or not the plaintiffs' cause of action against the late D. M. Wilson, as sheriff of St. Francis county, for failure to return an execution—for summary judgment for the full amount of plaintiffs' original judgment, cost and interest—survives after his death against his administrator and his sureties.

The plaintiffs' suit is apparently a substitution for the motion provided for in the first subdivision of section 3964, Mansfield's Digest, in the chapter denominated "Judgments Summary"—a chapter made of portions of the Civil Code and the act approved February 15, 1887.

It is also contended that the proceeding is based upon the provisions of Mansfield's Digest, sections 3061–3064 inclusive—sections that come down to us from the Revised Statutes of 1837–8. The offenses and penalties, however, are different in the two statutes.

Whether the act of 1857, repeals the corresponding section of the Revised Statutes, or not, I will not now stop to discuss, as it really makes little difference in our present inquiry.

It is evident, moreover, that this statute gives two remedies, one by motion for summary judgment, and the other by suit on the bond of the sheriff. If by motion, the judgment against the sheriff and his sureties must be a sum certain—the amount of the judgment upon which the execution was issued, the costs of that proceeding, and ten per centum thereon. Being a summary proceeding, it is not a trial by jury, but by the court. There being no defense to the proceeding except a denial of the failure to return, there is not, at least not necessarily, any consideration to the plaintiff for his claim. The object of the procedure is not to pay him anything owing to him, or to indemnify him for any loss, but the sole object is one of governmental policy, to compel a rigid and strict performance of duty on the part of this public officer. In other words, the amount so recovered of the sheriff and sureties is a statutory penalty assessed upon the defaulting officer, and given to the private individual most nearly connected with the transaction, most interested in it, and therefore the one most likely to pursue the sheriff with most vigilance and tenacity. On the other hand, the remedy by suit on the official bond of the sheriff must be in the name of the State for the use and benefit of the plaintiff, or the person aggrieved, and can result at farthest only in the recovery of a sum equal to the loss and damage claimed. Murfree on Official Bonds, sec. 654. It is plain that the one is an action (if a distinct action at all) *ex delicto*, and the other an action *ex contractu*, by the person aggrieved or injured. The one is a suit for a penalty imposed by law upon a sheriff for the commission of a tort; the other is a waiver of the tort, and a suit on a contract of indemnity. The

one must be instituted within two years from the time the cause of action accrued, as provided by sections 4481 and 4482, Mansfield's Digest; and the other within four years, as provided by section 4485. It is evident, therefore, that the two procedures are not interchangeable, and the one cannot be made to answer the purpose of the other without the greatest confusion and an unnecessary destruction of all system. The case of *Hawkins* v. *Taylor*, 56 Ark. 45, is not in conflict with the view we here express.

It is proper, at this stage of the discussion, to inquire as to what actions survive against the legal representative of a deceased person, according to the laws of this State. It may be said that all actions upon contract survive. Section 5223, Mansfield's Digest, provides that actions for wrongs done to the person or property of another shall survive. The next section excepts actions for slander and libel. These two sections are taken from the Revised Statutes, and were originally taken substantially, if not literally, from the New York statutes, as we gather from the history of our earliest State legislation. In the absence of adjudications of our own, the construction put upon its identical or similar statute by the highest courts of that State are something more than persuasive, if, indeed, they be less than authoritative. The courts of that State have never considered acts of non-feasance of sheriffs and other public officers, like that under consideration, as being within the purview of that statute. *People* v. *Gibbs*, 9 Wend. 29; *Stokes* v. *Stickney*, 96 N. Y. 323. It is admitted everywhere that the rule thus adhered to in New York is the rule of the common law. *Lynn's Adm'r* v. *Sisk*, 9 B. Monroe, 135. The courts of the United States, wherein the common law procedure prevails, will not enforce a penal statute against a deceased person, even when sitting in a State where the action is expressly made to survive.

All suits for penalties abate in the Federal courts on the death of the persons sought to be made subject to them. *Schreiber* v. *Sharpless*, 110 U. S. 76.

The person authorized to sue has no vested right in the suit for a penalty, because at common law a repeal of the statute took away the right of action. *Union Pac. Ry. Co.* v. *Proctor*, 12 Col. 194; *State* v. *Mason*, 108 Ind. 48; *Western Union Tel. Co.* v. *Brown*, *ib.* 538; *Mix* v. *Ill. Central Ry. Co.* 116 Ill. 502; Endlich, Int. St., sec. 479.

Persons aggrieved or damaged have their actions against sheriffs on their official bonds, and these survive as do all other actions on contract. They also have their actions for wrongs done to their persons or their property, and these survive. Pains, penalties and punishments, which are imposed and inflicted at the instance and through the power of the sovereign, have their purpose, which ceases to be useful, humane or reasonable, if the subjects of them have gone off the stage of action. There is no vested right in the fruits of these penal proceedings and prosecutions, which the private individual can lay claim to; and the sovereign cannot stoop to visit the pains and penalties, from which death has shielded the delinquent, upon the widow and the orphan.

There is a class of penalties which are the subjects of contracts between individuals, and suits for their enforcement survive against the legal representatives of the delinquent obligors. Such are penalties agreed upon by the parties in case of breaches of these contracts. These, however, are in reality not penalties, but liquidated damages. They are parts and parcels of contracts. The sums fixed are but the sums constituting the measure of damages agreed upon in cases of breaches of the contracts. This is to avoid disputes over the amounts to be recovered in case obligors fail to keep their covenants. The amounts are usually above actual

damages, it is true, but this is to cover such consequential damages as cannot be ascertained and recovered by suit otherwise. There are these distinguishing features in these liquidated damages which are not found in penalties imposed, namely: They are matters of agreement between contracting parties, and not impositions by the sovereign power. They are always final, and not cumulative; whereas penalties may be, and often are, in addition to damages, accordingly as the will of the sovereign may dictate. Liquidated damages always go to the obligees who have been injured by the breach of the contract, while penalties may go to the State, to the complainant, or to any other person or object, which the will of the sovereign may designate in its laws. Liquidated damages are always indemnities; penalties are seldom such. The one, being purely a matter of contract, survives against the estate of those who fail to perform its obligations.

It is argued that the sheriff and his sureties are not only bound by the stipulations of the official bond, but by all the provisions of law pertaining to the subject which are in force at the time of the execution of the bond. That is true, but what were the provisions of the law in force in this State at the time the bond in this case was executed? That question is easily answered. Section 3061, Mansfield's Digest, was in force then, but that provided no remedy against the sureties. Section 3062 was also in force, but that only authorizes a suit on the bond by the person aggrieved—that is, injured. Section 3063 was in force at the time, but every instance therein mentioned is one in which the officer has either levied upon property sold, received the money for it, or should have so received it, and is virtually guilty of either embezzlement or negligent waste; and yet that section for these positive malfeasances only authorizes a suit on the bond, so far as the sureties are concerned,

while it authorizes summary proceeding by motion against the sheriff himself, but that only for the actual amount that ought to have been paid over. Section 3064 simply provides that proceedings against the officer by motion shall not exempt the sureties from liability on the bond.

So much for the sections of the Digest which have come down to us from the Revised Statutes. It would seem that appellant's contention that summary motions against sureties were not authorized by those old statutes is correct.

The authority for penalty judgments against officers and *sureties* is the act approved February 15, 1857, and digested as sections 3963–3966, inclusive, codified with the paragraphs of the Civil Code, under the head of "Judgments Summary," and digested as sections 3957–3962 inclusive. The first sub-division of section 3964 is the only law authorizing summary judgments against sheriffs and their sureties for his failing to return executions; and that fixes the amount of the penalty in each case at the amount of the judgment upon which the execution was issued, all the costs, and ten per cent. thereon, not a cent of which the plaintiff may be entitled to because of any loss or damage he may have suffered by reason of the failure to return the execution. Not a word is said in all these statutes that actions, or rather motions, for the recovery of these penalties survive after the death of the delinquents; not a word to indicate to us that the common law on the subject has been repealed, or in any wise changed; and yet there is not a court in all the land, so far as I can find, unless directed by express statute, that does not maintain the integrity of the common law rule; and this rule, up to this hour, has been the law, which is part and parcel of every official bond ever made in this State, as I view it; and I think the rule should still prevail, and for this reason

I am constrained, although reluctantly, to dissent from the opinion of the majority of the court in this case.

My brother WOOD concurs in this dissenting opinion.

STATE v. WASHMOOD.

Opinion delivered March 31, 1894.

Constitutional law—Tax on traveling insurance agents.

Mansfield's Digest, section 5591, which provides that "there shall be levied and collected as a State tax the sum of one hundred dollars upon each and every traveling agent for any life insurance, mutual endowment, matrimonial, mutual aid, nuptial association or company doing business in the State for the term of one year or less," imposes an occupation tax upon the agent, and is unconstitutional.

Appeal from Pulaski Circuit Court.

WILBUR F. HILL, Special Judge.

James P. Clarke, Attorney General, and *Chas. T. Coleman* for appellant.

1. The State may prescribe the terms on which foreign corporations may do business within its limits. They are not citizens, in the sense of the clause of the constitution of the United States (except for the purpose of giving jurisdiction to the federal courts) securing to citizens of each State all privileges and immunities of citizens of the several States. The object of the act was to levy a tax upon the company, and not upon the agent, and it is not obnoxious to any constitutional inhibition. Burroughs, Tax. sec. 79; 8 Wall. 168; 10 *id.* 410; 94 U. S. 535; 125 *id.* 181; 44 Ark. 138; *ib.* 139; 33 *id.* 442; 13 *id.* 752; 143 U. S. 305.

2. Where a statute is susceptible of two constructions, one of which would make it unconstitutional, the

other constitutional, the latter is adopted. Endlich, Int. St. sec. 178; Bishop, Written Laws, sec. 90; Sedgw. Const. St. & Const. Law. 409; 6 Engl. 481; 32 Ark. 131; 39 *id.* 355.

3. In cases like this, the courts hold that a tax upon an agent is a tax upon the company he represents. 120 U. S. 489; 127 *ib.* 640; 128 *id.* 129; 129 *id.* 141; 136 *id.* 104.

Dan W. Jones & McCain for appellees.

Sec. 5591, Mansfield's Digest, contains nothing to show that it is to be restricted to *foreign* corporations. The statute clearly imposes a tax upon the *agent*, making it a *State* tax upon occupations, and it is void. 34 Ark. 609; 44 *id.* 138; Const. art. 12, sec. 6; *ib.* art. 16, sec. 5; 13 Ark. 752; 21 *id.* 40; 27 *id.* 625; 33 *id.* 442; 42 *id.* 160; 41 Fed. Rep. 468.

BUNN, C. J. The defendant, Andrew Washmood, was tried before one of the justices of the peace of Pulaski county, upon an information filed against him by the prosecuting attorney of the circuit, charging him with a violation of sections 5591 and 5594, Mansfield's Digest, and fined in the sum of two hundred dollars, as provided by the latter section. From this judgment the defendant appealed to the Pulaski circuit court, wherein he was tried by the court sitting as a jury, by consent of parties, and upon the following agreed statement of facts, to-wit: "The defendant in this case admits that in Pulaski county, Arkansas, during the year 1893, and before this prosecution was commenced, he acted as a traveling life insurance agent for and on behalf of the Equitable Life Assurance Association, and that said Equitable Life Assurance Association is a corporation created and existing under the laws of the State of New York; and that, as such agent, in said county, and during the time above mentioned, he solicited W. S. McCain and divers other persons to take

out policies of insurance in said company; and that he never paid the State license ($100) required of him by sections 5591 and 5594 of Mansfield's Digest."

The court held the sections of the Digest numbered 5591 and 5594 to be unconstitutional, and rendered judgment of acquittal for the defendant, and the State appealed to this court.

The section of the digest (Mansf. Dig. sec. 5591) involved is as follows: "There shall be levied and collected as a State tax the sum of one hundred dollars upon each and every traveling agent for any life insurance, mutual endowment, matrimonial, mutual aid, nuptial association or company doing business in this State for the term of one year or less." Section 5594 fixes a penalty of double the amount of said license fee upon any one engaged in the business referred to in the other section without paying the license.

If the tax was intended to be a tax levied upon the association or companies represented by the agents named, the question of the validity of the section would, at least, be an open one, but one which it is unnecessary for us to discuss in this connection. If, however, the intention of the legislature, in enacting said section 5591, was to impose a tax upon the agent therein named, the tax would be an occupation tax, and, being a State tax, as expressed, it would be in violation of the constitution of the State, as has been settled by numerous decisions of this court. *McGehee* v. *Mathes*, 21 Ark. 40; *Straub* v. *Gordon*, 27 Ark. 625; *Little Rock* v. *Barton*, 33 Ark. 442; *Little Rock* v. *Board*, 42 Ark. 160; and *Baker* v. *State*, 44 Ark. 134. So, the main question in this case is, what was the legislative intent in enacting section 5591? Was it to impose the tax named therein upon the associations and companies for the privilege of carrying on their business in the State; or was it intended as a tax

upon the traveling agents of such associations and companies?

If, by one construction to be put upon an act, it may be held as valid, while by another construction it would be invalid, we must adopt the construction that would make the act of the legislature valid, if we can reasonably do so. Had the qualifying word "*traveling*" not been used, there might have been good grounds, under the rule above stated, to hold that the tax was intended as an imposition upon the associations and companies represented by the agents. But the employment of that qualifying word, restricting the tax to cases where these associations and companies have *traveling* agents only, and not imposing it by and through other classes of agents, however many they be, renders it unreasonable to conclude that the intention was to tax the associations and companies. It was, therefore, an occupation tax, and being a State tax also, the section authorizing it is in conflict with the constitution.

We make no ruling as to whether or not the associations and companies named in section 5591, under consideration, are corporations. For the purpose of this discussion we have treated them as such.

For the reasons given above, the judgment of the circuit court is affirmed.

---

58 612
78 350

FRIZZELL v. DUFFER.

Opinion delivered March 31, 1894.

1. *Pleading—Amendment.*

A complaint alleging that defendant, a constable, took and held possession of plaintiff's premises under a writ of attachment directing the seizure of the goods and chattels of plaintiff's tenant, which were situated on the premises, may be amended

on the trial so as to allege that the premises were taken "unlawfully and without the consent of plaintiff," under Mansf. Dig. sec. 5080, providing that the court may at any time amend the pleadings by inserting allegations material to the case.

2. *Constable—Liability for acts of deputy.*

A constable is responsible for the acts, defaults, torts and other misconduct done or committed by his deputy *colore officii.*

3. *Trespass—Damages.*

Where a tenant holds premises under an agreement to surrender after one day's notice, and permits a deputy constable to take possession of the premises in his official capacity, the wrongful act of the deputy in holding over longer than one day after notice to vacate constitutes a trespass for which the constable will be liable in damages for an amount equal to the fair rental value of the premises during the time of the unlawful detention.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

Mattie Duffer brought suit in trespass in the circuit court against Jas. G. Frizzell, constable, and L. L. Meek, his deputy. The complaint, as originally filed, contained the following (after stating the ownership and description of the premises): "That, on the 6th day of June, 1890, defendant Jas. G. Frizzell, constable of Upper Township—by and through his deputy, defendant L. L. Meek—in his official capacity as such constable, under a writ of attachment against one Cheatham, seized certain goods and chattels, the property of the said Cheatham, which property was at the time of seizure situated in the above described tenement of plaintiff; that the said Jas. G. Frizzell, by and through his deputy as aforesaid, took charge of the said premises of plaintiff, and held possession of the same in his official capacity as aforesaid, holding said attached property therein and continued to hold such possession, using and occupying said premises from the said 6th day of June, 1890, until the 18th of August of the same year. That

the said defendants, though often requested, have refused and still refuse to pay for the use and occupancy of the premises." The prayer was for $81 damages for the unlawful detention. Defendants' answer denied that they took possession of or held the premises. Defendants also demurred to the complaint upon the ground that, as the cause of action was for use and occupation, and the amount sued for was under one hundred dollars, the circuit court had no jurisdiction. The demurrer was overruled, and the plaintiff was permitted to amend her complaint by interlineation so as to show that defendants took possession "unlawfully and without the consent of plaintiff."

The evidence tended to establish the following facts: Cheatham was in possession of a house belonging to plaintiff, under agreement to pay rent at the rate of one dollar per day, and to vacate upon one day's notice. As deputy of Frizzell, Meek levied upon certain chattels situated in the above house, under attachment against Cheatham. To secure his possession under the levy, Meek obtained possession of the keys under agreement with Cheatham, and retained possession for some weeks after he had received notice from plaintiff to vacate.

The court charged the jury as follows:

"1. Plaintiff sues defendant in trespass for damages for the unlawful detention and occupation of a house. If you find that in 1890 defendant was constable of Upper Township, and that his deputy, Meek, had in his possession a writ of attachment against Cheatham, which he levied upon goods in plaintiff's house, and kept the goods he had attached therein, and that Cheatham was tenant of plaintiff by the day, and that plaintiff's agent demanded the house of Meek, then and in such case the detention of the house was unlawful

from one day after the demand was made, and the defendant would be liable therefor.

"2. Taking the possession of the key of the house and holding it, with attached goods in the house, is a possession of the house.

"3. If you find that defendant's deputy detained plaintiff's house after demand, then the measure of plaintiff's damages would be the fair rental value of the premises for the time of the detention from one day after demand was made."

There was verdict and judgment for plaintiff. Frizzell has appealed.

Duval & Pitchford for appellant.

1. It was error to permit plaintiff to amend her complaint for rents to one for trespass, thus changing the whole nature of the case. 5 Cal. 222; 34 Wis. 378; 57 Cal. 335; 19 Barb. 51.

2. Appellant should not be held liable for the acts of his deputy outside the scope of his duty as such deputy. Addison, Torts, secs. 441, 889; 39 N. Y. 381; 6 Cowen, 467; 8 Barb. 517; 17 Am. Dec. 549; Cooley, Torts (2 ed.), p. 465; 3 Caines, 261.

3. The court erred in its charge to the jury. If Meek was acting as the agent of Cheatham, Frizzell was not liable. 15 Am. Rep. 681; 29 *id.* 635.

4. Taking possession of the key of the house and holding it, with the attached goods in the house, was not a possession of the house. 7 Mo. 162.

5. Appellee's remedy was against the plaintiff in the attachment. 9 N. Y. Supplement, 65.

6. No demand was made in writing. Mansf. Dig. sec. 3348; 41 Ark. 533; 23 Am. Dec. 701.

7. There was no contract, express or implied, between appellant and appellee, and the relation of land-

lord and tenant never existed between them. 31 Ark. 296; 33 *id.* 682; 36 *id.* 518.

Jo. Johnson for appellee.

1. The amendment was in the sound discretion of the court. Mansf. Dig. sec. 5080.

2. The evidence supports the verdict.

3. There was no tenancy, and no notice in writing was necessary.

4. The constable is liable for the acts of his deputy *colore officii.*

1. Amendment of pleading.

BATTLE, J. The circuit court did not err in permitting the plaintiff to amend her complaint. Mansfield's Digest, sec. 5080.

2. Liability of constable for deputy's acts.

The constable was responsible for the acts, defaults, torts and other misconduct done or committed by his deputy *colore officii.* *Lucas* v. *Locke*, 11 W. Va. 81; *Knowlton* v. *Bartlett*, 1 Pick. 273; *Mosby* v. *Mosby*, 9 Gratt. 584; *Cotton* v. *Marsh*, 3 Wis. 221; Crocker on Sheriffs (3 ed.), sec. 869. For all civil purposes the acts of the deputy were the acts of the constable. *Mosby* v. *Mosby*, 9 Grattan, 602. The taking of possession and holding of the house of the plaintiff, under the agreement of the parties to the attachment, were, in law, the acts of the constable. Holding as he did, it was his duty to surrender the house to the plaintiff when the one day after the notice to vacate had expired. The holding of the house after that time was a trespass (*Clinton Wire Cloth Co.* v. *Gardner*, 99 Ill. 151), and the act of the constable; and he was liable for damages in an amount equal to the fair rental value of the premises during the time of the unlawful detention, no other wrong having been committed.

3. Damages for trespass.

Judgment affirmed.

58 617
c70 511
58 617
78 92
c78 342

VAN WINKLE *v.* SATTERFIELD.

Opinion delivered March 31, 1894.

1. *Master and servant—Sunday labor.*
   An agreement of an employee to perform all the duties as salesman connected with a book and stationery store for the period of one year, containing no express stipulation that he shall labor on Sunday, will not bind him to work on that day, in the absence of a necessity therefor.
2. *Damages—Wrongful discharge of servant.*
   An employee who has been wrongfully discharged before expiration of his term of employment and brings suit at once for breach of the contract is entitled to recover compensation for the injury suffered by the loss of wages down to the day of trial.
3. *Mitigation of damages—Other earnings.*
   In estimating the damages for the wrongful discharge of a servant, such sums as he, by reasonable diligence, might have earned in a similar business, making allowance for the expense of obtaining employment, should be deducted from the wages he might have earned under the broken contract; but in such case the burden of proof is on the employer to show that the servant might have obtained similar employment.
4. *Reduction of servant's damages by work done for himself.*
   To entitle an employer to reduce the damages recoverable for wrongful discharge of his servant by showing that the servant has performed work on his own account, he must prove that the work was incompatible with the performance of the service stipulated to be performed under the violated contract.

Appeal from Washington Circuit Court.

EDWARD S. MCDANIEL, Judge.

B. R. Davidson for appellant.

1. If Satterfield was wrongfully discharged he had two remedies. (1.) He had a right to hold himself in readiness to perform his contract, wait to the end of his term, and sue for the amount due. (2.) He could treat the contract as rescinded, and sue on a *quantum meruit* for the time he had served. 9 Ark. 394; 39 *id.*

288; 14 Abb. Pr. (N. S.) 156; Wood, Master and Servant, pp. 239–40, and notes. If he treated the contract as subsisting, his time was his employer's, and it was his duty to reduce the amount of his damages as much as possible by engaging in similar business at the best wages he could obtain. Cases *supra*.

2. The refusal to perform the duties required of him, and which he had hitherto for a long time performed under the contract, was good ground for his discharge. 2 Stark. 256.

3. In view of these authorities the court's charge was erroneous.

4. It is clear that the contract contemplated the discharge of all duties connected with the business, and to arrive at what the contract contemplated, the facts that Satterfield knew at the time that the store was to open on Sundays, and that he did, under the contract, open the store on Sundays continuously until November, should have been considered, and they show conclusively the understanding of the parties.

BATTLE, J. This action is based upon a written contract, in the following words and figures: "This contract, made and entered into this first day of January, 1890, by and between J. D. Van Winkle, party of the first part, and W. T. Satterfield, party of the second part, witnesseth: That whereas, the said J. D. Van Winkle has this day employed the said W. T. Satterfield to work as salesman, and do all other duties connected with the said J. D. Van Winkle's book and stationery store, now situated in the postoffice building on the south side of the public square in the city of Fayetteville, Ark., for a special period of time, beginning with January 1, 1890, and extending one year from that date, at a salary of $60 per month, payable at the end of each month. And I, the said J. D. Van Winkle, do hereby grant the said W. T. Satterfield the privilege

of continuing to work in the same capacity above stated, and for the same salary above stated, until January 1, 1893, if he so desires. And I, the said W. T. Satterfield, do agree that for the above considerations, I will well and truly perform all duties connected with the book and stationery store to the best of my ability, all things being subject to the direction or management of the said J. D. Van Winkle.

J. D. VAN WINKLE,
W. T. SATTERFIELD."

Satterfield worked for Van Winkle, as a clerk and salesman, in a book and stationery store, in the performance of his part of this contract, until the 10th of November, 1890, when Van Winkle discharged him. The following facts show how the discharge occurred: A postoffice was in the rear end of the store. The entrance to it was the front door of the store, which was kept open on Sundays, from 8 to 9 a. m., from 12 to 1 p. m., and from 4 to 5 p. m., to enable citizens to get their mails. Satterfield was in the employ of Van Winkle before the written contract was entered into, and had been in the habit of remaining in the store and watching the goods while it was open on Sundays. Van Winkle undertook to make railings to protect the goods, so that it would not be necessary for Satterfield to remain on Sundays. They were to be made so that they could be put up and taken down at will. In the event they had been made and used, it would have been necessary to put them up on Saturday nights and carry them to the cellar on Monday mornings. Upon his undertaking to make them, Satterfield proposed to remain in the store while it was open on Sundays, saying that he preferred doing so to putting them up and carrying them in and out of the store. They were not made, and Satterfield continued to watch the goods on Sundays, with few exceptions, until he was discharged on his refusal to do so any longer.

At the time of his discharge he offered to perform his contract, insisting, however, that it was no part of his duty to remain in the store on Sundays; and notified Van Winkle in writing that he elected to work for him under his contract until the first of January, 1893, and thereby offered to do so, but Van Winkle refused to allow him to remain in his employment, unless he would stay in the store on the Sabbath and take care of the goods, as he had been doing, which Satterfield declined to do; and he was, thereupon, discharged.

On the 7th of January, 1891, Satterfield commenced this action against Van Winkle, on their contract, to recover the damages caused by its breach. Van Winkle admitted the discharge, but denied that it was wrongful.

In April, 1891, the issues in the cause were tried by a jury. The foregoing facts were proved, and evidence tending to prove that Satterfield was out of employment, after he was discharged and before the trial, for fifty-two days, and that he was in business on his own account for the remainder of the time, was adduced. What the value of his labors in his own business which were performed after his discharge was, does not appear.

The jury returned a verdict in favor of the plaintiff for $104; the court rendered judgment accordingly; and the defendant appealed.

Two questions are presented for our consideration: (1) Was the discharge wrongful; and (2) if so, what damages were recoverable?

1. Was Satterfield wrongfully discharged?

1. Duty of salesman to labor on Sunday.

In general, a contract to labor by the month or year does not bind the laborer to work on Sunday. The presumption is, men do not intend to violate the law, until the contrary appears. *Johnson* v. *Commonwealth*, 22 Pa. St. 109. Where an instrument of writing is susceptible of two conflicting constructions, one of which

would render the contract unlawful, and the other lawful, to carry this presumption into effect, the latter should be adopted. *Gauss Sons* v. *Orr & Lindsey*, 46 Ark. 129.

Necessity which can be avoided by the exercise of reasonable precaution cannot excuse or justify labors on the Sabbath which are forbidden by the statutes. *State* v. *Goff*, 20 Ark. 289.

The contract sued on did not require the parties to labor on Sunday. Satterfield only bound himself by it to discharge the duties of a salesman or clerk. The violation of the Sabbath was not among those duties. The work which the appellant demanded of him could not be lawfully done on the Sabbath. The evidence does not show that there was any necessity for it, or that it could not be avoided by means which would have subserved the purpose for which it was required. On the contrary, it does show that railings would have served the same purpose. Satterfield was consequently wrongfully discharged.

(2). What damages are recoverable?

2. Damages for wrongful discharge of servant.

A servant who has been wrongfully discharged by his employer before the time for which he was hired has expired has these remedies: "First, he may consider the contract as rescinded, and recover on a *quantum meruit* what his services were worth, deducting what he had received for the time during which he had worked. Second, he may wait until the end of the term, and then sue for the whole amount, less any sum which the defendant may have a right to recoup. Third, he may sue at once for breach of the contract of employment." He, however, can adopt only one. *Colburn* v. *Woodworth*, 31 Barb. 381; 2 Sedgwick on Damages (8th Ed.) sec. 665, and cases cited.

If he adopts the third remedy, he can recover the damages which he has sustained down to the day of the

trial, which is limited to a compensation for the injury suffered by the breach of the contract. The loss of the wages which his employer agreed to pay him constitutes the injury. What, therefore, he has suffered by reason of the loss of the wages, as a rule, is the amount of the damages he is entitled to recover. 2 Sedgwick on Damages (8 ed.), sec. 667, and cases cited; 2 Sutherland on Damages (2 ed.), secs. 692–695 and cases cited; Wood on Master and Servant (2 ed.), p. 246.

It is the breach, and not the time of the discharge, or when the action was brought, that gives the damage. If the consequences for which the law renders the employer responsible developes so as to create an absolute injury at the time of the trial, he is entitled to a compensation for such injury. He cannot recover the damages he might suffer after the trial, for the obvious reason, they cannot be assessed in advance. For he might, after the recovery of the judgment, obtain employment from other persons, and receive, for the residue of the term for which he was hired in the first instance, as much as, or more than, he would have been entitled to, under the broken contract, had he served his time out; or he might die before his term of service expires; and in either event recover more than the law allows, which simply intends to save him from actual loss by the employer's breach of the contract. *Gordon* v. *Brewster*, 7 Wis. 355; *Fowler* v. *Armour*, 24 Ala. 194; *Everson* v. *Powers*, 89 N. Y. 527; *McDaniel* v. *Parks*, 19 Ark. 671; Wood on Master and Servant, p. 260; 2 Sutherland on Damages, secs. 692, 693; 1 Sedgwick on Damages, sec. 85.

3. Reduction of damages by proof of other earnings.

When a servant is wrongfully discharged by his employer, it is his duty to use "reasonable efforts to avoid loss by securing employment elsewhere." It is not, however, his duty, if he was employed in any special service, as in this case, to engage in a business different from that in which he was employed. In estimating his

damages, therefore, such sums as he, by reasonable diligence, might have earned in a similar business, making allowance for the expense of obtaining employment, should be deducted from the wages he might have earned under the broken contract. *Walworth* v. *Pool*, 9 Ark. 394; *Gillis* v. *Space*, 63 Barb. 177; *Costigan* v. *Railroad Co.* 2 Denio, 609; Wood on Master and Servant, p. 250; 2 Sutherland on Damages, sec. 693.

The burden of proof is on the employer to show that the servant might have obtained similar employment; for the failure of the servant to obtain other employment does not affect the right of action, but only goes in reduction of damages, and, if nothing else is shown, "the servant is entitled to recover the contract price upon proving the employer's violation of the contract, and his own willingness to perform." The fact that the servant might have obtained new employment does not constitute a defense. It is one of the facts to be considered in estimating the servant's loss. *Howard* v. *Daly*, 61 N. Y. 362; *Gillis* v. *Space*, 63 Barb. 177; *Costigan* v. *Railroad Co.* 2 Denio, 659; *Sutherland* v. *Wyer*, 67 Me. 64; 2 Sutherland on Damages, sec. 693; Wood on Master and Servant, p. 245.

4. Reduction of damages by work done.

To entitle the employer to reduce the damages recoverable by showing that the servant has performed work on his own account, he must prove that the work was incompatible with the performance of the service stipulated to be performed under the violated contract. *Gates* v. *School District*, 57 Ark. 370; 1 Sedgwick on Damages, sec. 667.

In *Gardenhire* v. *Smith*, 39 Ark. 280, cited by appellant, the court held "that where a servant is employed for a particular term, at stipulated wages, and his employer discharges him without cause, before the expiration of the term, he may elect to treat the contract as continuing, keep himself in readiness to perform

it on his part, and, after the expiration of the term," sue and recover of "his employer on the contract * * * the whole of the wages due him by its terms," less what he had an opportunity to make by like service after his dismissal; or he may treat "his dismissal as a rescission of the contract," and sue immediately, and recover the value of his services to that time, as upon a *quantum meruit*. The court did not undertake to say in that case what relief he would be entitled to in the event he elected to treat the contract as continuing, and sued upon it for damages before the expiration of his term of service. But it did in *McDaniel* v. *Parks*, 19 Ark. 671. In that case the servant was employed to oversee for the year 1854, was discharged without cause on the 22nd of April, and sued on the 28th of August, in the same year, and recovered a reasonable sum for the whole of the term for which he was employed, there being no evidence as to the wages agreed to be paid or that he received other employment during his term of service. In the report of the case it is not stated when the trial occurred, but it is manifest, from the instructions of the court to the jury, that it took place after the time for which he was hired had expired. The opinion in these two cases are in harmony with the views we have expressed.

Judgment affirmed.

APPENDIX.

OPINIONS NOT REPORTED.

Dardanelle Pontoon Bridge and Turnpike Co. *v.* Shinn; appeal from Conway circuit court; Jeremiah G. Wallace, judge; affirmed Oct. 14, 1893; per Hughes, J.—Bunn, C. J., dissenting.

Hill, Fontaine & Co. *v.* Draper; appeal from Sevier circuit court in chancery; William S. Curran, special judge; reversed Jan. 27, 1894; per Hughes, J. [58b 625 / 63 143]

Townsly-Myrick Dry Goods Co. *v.* Greenfield; appeal from Sebastian circuit court, Ft. Smith district; Edgar E. Bryant, judge; reversed February 17, 1894; per Hughes, J.

Elias Baker *v.* State; appeal from Crawford circuit court; Jephtha H. Evans, judge; reversed March 31, 1894; per Bunn, C. J.

CASES DISPOSED OF ORALLY.

St. L., Ark. & Tex Ry. Co. *v.* Nathaniel Weston Lumber Co.; appeal from Jefferson circuit court; Jno. M. Elliott, judge; reversed and dismissed by consent, Oct. 21, 1893; *per curiam.*

Meadors *v.* Wallace; appeal from Crawford circuit court; Nimrod Turman, special judge; dismissed Dec. 4, 1893, for non-compliance with rule nine; *per curiam.*

Schweitzer *v.* Sharpe; appeal from Boone circuit court; B. B. Hudgins, judge; dismissed Dec. 1, 1893, for non-compliance with rule nine; *per curiam.*

Schweitzer *v.* Allen; appeal from Boone circuit court; B. B. Hudgins, judge; dismissed Dec. 11, 1893, for non-compliance with rule nine; *per curiam.*

Gate City Nat. Bank *v.* De Morse; appeal from Miller circuit court; Rufus D. Hearn, judge; affirmed Feb. 17, 1894; *per* Wood, J.

McNutt *v.* Allen; appeal from Hot Spring circuit court; Alexander M. Duffie, judge; affirmed March 10, 1894; *per curiam.*

St. L. & S. F. Ry. Co. *v.* Meeker; appeal from Benton circuit court; R. T. Powell, special judge; affirmed Feb. 10, 1894; *per* Hughes, J.

Brogan *v.* Hess; appeal from Sebastian chancery court; John S. Little, judge; affirmed Feb. 24, 1894; *per* Wood, J.

Smelser *v.* Adam; appeal from Miller circuit court; Rufus D. Hearn, judge; dismissed by consent Oct. 16, 1893; *per curiam.*

Metz *v.* Newton; appeal from Pulaski chancery court; David W. Carroll, judge; modified Feb. 3, 1894; *per* Wood, J.

McKneely *v.* Pickett; appeal from Miller circuit court; Rufus D. Hearn, judge; affirmed March 24, 1894; *per* Mansfield, J.

Simon-Gregory Co. *v.* Carden; appeal from Perry circuit court; Alexander M. Duffie, judge; dismissed Oct. 14, 1893; *per* Mansfield, J.

Glasscock *v.* Tomlinson; appeal from Greene circuit court; Francis Johnson, special judge; affirmed Oct. 14, 1893; *per* Mansfield, J.

Orr *v.* Scroggin; appeal from Miller chancery court; Rufus D. Hearn, judge: affirmed Oct. 14, 1893; *per* Wood. J.

Cravens *v.* School District; appeal from Sebastian chancery court; Edgar E. Bryant, judge; dismissed Oct. 9, 1893, by consent; *per curiam.*

McCarthy & Joyce *v.* H. M. Rector; appeal from Pulaski chancery court; David W. Carroll, chancellor; affirmed March 31, 1894; *per* Wood, J.

Ritter *v.* Wheelock; appeal from Monroe circuit court; James C. Tappan, special judge; affirmed March 10, 1894; *per* Battle, J.

K. C., Ft. S. & M. R. Co. *v.* Patton; appeal from Craighead circuit court; James E. Riddick, judge; affirmed Dec. 23, 1893; *per* Hughes, J.

Insurance Co. *v.* Altheimer Bros.; appeal from Jefferson circuit court; John M. Elliott, judge; affirmed March 24, 1894; *per* Wood, J.

Texarkana Water Co. *v.* Southern Express Co.; appeal from Miller circuit court; Rufus D. Hearn, judge; affirmed Jan. 13, 1894; *per* Mansfield, J.

Hodge & Zinn *v.* Young; appeal from Sebastian circuit court; Edgar E. Bryant, judge; dismissed Jan. 1, 1894, for non-compliance with rule nine; *per curiam.*

Harrison Bros. *v.* Wilson Bros.; appeal from Conway circuit court; Jeremiah G. Wallace, judge; affirmed Feb. 17, 1894; *per* Mansfield, J.

McDowell *v.* Dowzelatt; appeal from Madison chancery court; Edward S. McDaniel, judge; dismissed on motion Jan. 16, 1894; *per curiam.*

Terrell *v.* Clark, adm'r; appeal from Ashley chancery court; Carroll D. Wood, judge; affirmed March 10, 1894; *per* Mansfield, J.

Taylor *v.* Smithwick; appeal from Clay circuit court; James E. Riddick, judge; affirmed Jan. 13, 1894; *per* Hughes, J.

Cohn & Co. *v.* Wayne & Brady; appeal from Pulaski chancery court; David W. Carroll, chancellor; dismissed Oct. 14, 1893; *per curiam.*

Jones *v.* Boseley ; appeal from Pulaski circuit court; Robt. J. Lea, judge; affirmed June 17, 1893; *per* Hughes, J.

Gill, adm'r, *v.* Marquardt; appeal from Sebastian circuit court; Edgar E. Bryant, judge; affirmed Oct. 5, 893; *per curiam.*

Churchill *v.* Drake; appeal from Madison chancery court; Edward S. McDaniel, judge; affirmed June 24, 1893; *per curiam.*

Wear-Boogher Dry Goods Co. *v.* Weber; appeal from Clark circuit court; Rufus D. Hearn, judge; affirmed Jan. 6, 1893; *per curiam.*

Yancey *v.* Coleman; appeal from Independence circuit court; James W. Butler, judge; affirmed Nov. 18, 1893; *per curiam.*

Gershner *v.* Block; appeal from Pulasi chancery court; David W . Carroll, chancellor; affirmed Dec. 2, 1893; *per curiam.*

Nelson *v.* Trimble; appeal from Lonoke chancery court; David W. Carroll, chancellor; dismissed March 10, 1894; *per curiam.*

Smith *v.* Lumpkin; appeal from Lee circuit court; Grant Green, Jr., judge; affirmed Nov. 20, 1893; *per curiam.*

Littell *v.* Gatling, ex'or; appeal from St. Francis circuit court; Grant Green, Jr., judge; affirmed March 10, 1894; *per curiam.*

Gage *v.* Butler; appeal from Greene circuit court; James E. Riddick, judge; dismissed by consent Feb. 3, 1894; *per curiam.*

Hanger *v.* Britton; appeal from Pulaski chancery court; David W. Carroll, chancellor; dismissed March 24, 1894; *per curiam.*

Nunnally *v.* White Sewing Machine Co.; appeal from Carroll circuit court; Edward S. McDaniel, judge; affirmed Feb. 3, 1894; *per curiam.*

Easley *v.* Coulter; appeal from Saline circuit court; Alexander M. Duffie, judge; affirmed under rule seven March 3, 1894; *per curiam.*

INDEX.

ACCOMPLICE:

testimony of, must be corroborated as to material facts. *Vaughan* v. *State*, 353.

indictment of, for murder held sufficient. *Jones* v. *State*, 390.

ACCOUNT:

after lapse of sixteen years partnership accounts presumed to have been closed, when. *Johnson* v. *Peck*, 580.

ACKNOWLEDGMENT: SEE DEED.

ACTION:

nature of, whether *ex contractu* or *ex delicto*, determined by character of grievance. *Fordyce* v. *Nix*, 136.

person in whose name bill of lading is taken may sue carrier for breach of contract. *Cantwell* v. *Pac. Exp. Co.* 487.

action on sheriff's bond to recover penalty for failure to return execution is *ex contractu*. *Wilson* v. *Young*, 593.

such action survives sheriff's death. *Ib.*

ADMINISTRATION:

purchase by administrator at his own sale is fraudulent. *Bland* v. *Fleeman*, 84.

so as to purchase by him from his vendee before the sale has been confirmed. *Ib.*

so as to purchase of land by him under execution in favor of the estate. *Ib*

judgment against decedent's estate barred by laches, when. *Johnson* v. *Peck*. 580.

ADULTERY: SEE INCEST.

ADVERSE POSSESSION:

possession of land dedicated to street purposes not adverse to public, when. *Little Rock* v. *Wright*, 142.

possession of life tenant, or of his assignee, not adverse to remainderman during the existence of the life estate. *Moore* v. *Childress*, 510.

AGENCY:

declarations of agent not binding on principal, when. *Ft. Smith Oil Co.* v. *Slover*, 168.

when railway conductor authorized to employ special help. *Railroad Co.* v. *Dial*, 318.

agent cannot bind principal by contract made with himself. *Spearman* v. *Texarkana*, 351.

AGENCY—*Continued*:
when principal estopped by agent's fraud. *Prov. Life Assurance Soc.* v. *Reutlinger*, 528.

AMENDMENT:
amendment of complaint held to be proper. *McFadden* v. *Stark*, 7.
reserved right of legislature to amend charter of corporations considered. *Leep* v. *Railway Co.* 407.
answer amended to conform to proof. *McMurray* v. *Boyd*, 504.
complaint held properly amended by inserting material allegations. *Frizzell* v. *Duffer*, 612.

ANIMALS:
liability of carrier for permitting infected cattle to run at large. *Railway Co.* v. *Goolsby*, 401.
when owner of exposed cattle guilty of contributory negligence. *Ib.*

APPEAL AND ERROR: SEE ERROR CORAM NOBIS.
verdict not set aside for evidence incompetent but not prejudicial. *Jones* v. *Malvern Lumber Co.* 125.
where oral evidence was heard which is not brought up, presumption is that there was evidence to support decree. *Carpenter* v. *Ellenbrook*, 134.
exception to evidence not considered unless specific objection was made below. *Vaughan* v. *State*, 353.
specific objection to evidence waives other objections. *Railway Co.* v. *Hackett*, 381.
judgment apparently valid not set aside if evidence is not brought up. *Bassham* v. *Railway Co.* 399.

ASSIGNMENT FOR CREDITORS:
withholding assets of no value to creditors not fraudulent. *Burks* v. *Goodbar*, 283.
when mortgage in form not construed to be in effect an assignment. *Marquese* v. *Felsenthal*, 293.
unacknowledged and unrecorded deed of, admissible in evidence, when. *Excelsior Mfg. Co.* v. *Owens*, 556.
deed of, held valid on its face. *Ib.*
deed of, not invalidated by previous unconnected fraud of assignor. *Ib.*
presumption of assignor's innocence stronger than presumption that he paid note found in his possession, when. *Ib.*

ATTACHMENT:
lien of, does not affect prior rights of third persons. *Tennant* v. *Watson*, 252.
object of lien is to prevent *subsequent* alienation. *Ib.*
not issued in suit to compel marshaling of assets. *Buck* v. *Bransford*, 289.

ATTACHMENT—*Continued:*
answer to interplea in circuit court should be written. *Rosewater* v. *Schwab Clothing Co.* 446.
junior attacher cannot object to irregularity in senior attachment. *Baker* v. *Ayers*, 524.
e. g. that matters stated in the affidavit should have been stated in complaint. *Ib.*
clerk not required to make order directing himself to issue writ on claim not yet due. *Ib.*
burden of proof on interpleader. *Excelsior Mfg. Co.* v. *Owens*, 556.
interpleader entitled to open and conclude. *Ib.*

ATTORNEY AND CLIENT:
discretion of court to limit counsel's argument. *Vaughan* v. *State.* 353.
certain remarks of prosecuting attorney held not prejudicial. *Ib.*
communications between, held not privileged. *Rosewater* v. *Schwab Clothing Co.* 446.
right of accused to be present by counsel may be waived. *Baker* v. *State*, 513.

BASEBALL:
is "a game of skill" within the statute prohibiting betting. *Mace* v. *State*, 79.

BILL OF EXCEPTIONS:
must be signed and filed before expiration of time allowed after term. *Stinson* v. *Shafer*, 110.

BILL OF LADING: SEE CARRIER.

BOARD OF HEALTH: SEE MUNICIPAL CORPORATION.

BONA FIDE PURCHASER:
one who purchases at sale under his own execution is not. *Tennant* v. *Watson*, 252.
one who purchases with actual or constructive notice of his vendor's fraud is not. *Rosewater* v. *Schwab Clothing Co.* 446.

BURDEN OF PROOF:
is on defendant to prove contributory negligence on plaintiff's part. *Jones* v. *Malvern Lumber Co.* 125.
is on the interpleader in an attachment suit. *Excelsior Mfg. Co.* v. *Owens*, 556.
after delay of sixteen years in asking for accounting of partnership assets burden is on party alleging that there are such assets undisbursed. *Johnson* v. *Peck*, 580.

CARRIERS:
verdict for punitive damages for failure to stop at passenger's station held supported by the evidence. *Fordyce* v. *Nix*, 136.

CARRIERS—*Continued:*

person in whose name bill of lading is taken may sue for breach of contract of carriage. *Cantwell* v. *Pacific Express Co.* 487.

express company liable for delay in shipping perishable goods, when. *Ib.*

not liable to penalty for overcharge where conductor made mistake in making change for passenger. *Railway Co.* v. *Clark*, 490.

CASES OVERRULED, ETC.:

Fanning v. *State*, 47 Ark. 442, overruled by *Hempstead Co.* v. *McCollum*, 159.

Duggins v. *Watson*, 15 Ark. 118, distinguished in *Railway Co.* v. *Harrell*, 471.

CERTIORARI:

clerk should return transcript of record with his response. *Phillips* v. *Desha*, 250.

writ of, must issue unless waived. *Ib.*

employed to review action of circuit court in refusing writ of *habeas corpus*. *Ex parte Perdue*, 285.

CIRCUIT COURTS: SEE COURTS.

COMMON LAW: SEE SHELLEY'S CASE.

not presumed in force in Texas. *Brown* v. *Wright*, 20.

CONFLICT OF LAWS:

common law not presumed in force in Texas. *Brown* v. *Wright*, 20.

in absence of proof of the laws of that State, the law of the forum will be enforced. *Ib.*

whether a deceit practiced in another State is so purely a tort that, to maintain an action here, it is necessary to prove that it is actionable there, *quære*. *Ib.*

CONSTABLE:

liable for misconduct of deputy done *colore officii*. *Frizzell* v. *Duffer*, 612.

liable in damages for unlawfully holding another's premises. *Ib.*

CONSTITUTIONAL LAW:

power of legislature to pass curing acts considered. *Sidway* v. *Lawson*, 117.

when such acts may operate upon pending suits. *Ib.*

act March 25, 1889, prohibiting corporations or persons from withholding employee's wages is valid as to corporations but void as to natural persons. *Leep* v. *Railway Co.* 407.

power of legislature to alter, revoke or annul corporate charters considered. *Ib.*

must not do injustice to corporators. *Ib.*

duty of court to construe statutes to conform to constitution if possible. *Ib.*

CONSTITUTIONAL LAW—*Continued:*
where unconstitutional part of statute may be eliminated, rest will stand. *Ib.*
clause providing for payment of employee's wages "without abatement or deduction" construed. *Ib.*
act March 25, 1889, held not special legislation. *Ib.*
justices of the peace have jurisdiction to enforce such act. *Ib.*
right of accused to be present by counsel may be waived. *Baker* v. *State*, 513.
right of accused to have compulsory process for witnesses violated by rule of court requiring application to court for subpœnas for witnesses. *Aikin* v. *State*, 544.
tax on traveling insurance agents is an occupation tax and unconstitutional. *State* v. *Washmood*, 609.

CONTINUANCE:
properly denied in criminal case where State admits truth of matters alleged. *Baker* v. *State*, 513.

CONTRACT:
incorporated town cannot contract for construction of levee. *Newport* v. *Railway*, 270.
nor bind itself to pay therefor. *Ib.*
nor ratify such contract by accepting benefit thereof. *Ib.*
board of health of city cannot make binding contract to pay given sum for extra-official services of a member. *Spearman* v. *Texarkana*, 348.
but such member may recover therefor on a *quantum meruit*. *Ib.*
power of legislature to restrict power to contract, (1) of corporations, and (2) of natural persons, considered. *Leep* v. *Railway*, 407.
remedies of employee for breach of contract of employment by wrongful discharge. *Van Winkle* v. *Satterfield*, 617.

CONTRIBUTION:
as to right of contribution between partners. *Johnson* v. *Peck*, 580.

CONTRIBUTORY NEGLIGENCE: SEE NEGLIGENCE.

CORPORATION:
corporate existence proved by general reputation. *Fleener* v. *State*, 98.
power of legislature to "alter, revoke, or amend" charters considered. *Leep* v. *Railway Co.* 407.
legislature may restrict corporation's right to contract. *Ib.*
act March 25, 1889, prohibiting corporations from withholding employee's wages held constitutional. *Ib.*

COSTS:
liability of initial county for expenses and costs of trial where change of venue has been taken. *Hempstead Co.* v. *Royston*, 113.

COUNTY: SEE COSTS.

COURTS:
circuit judges may exchange circuits. *Evans* v. *State*, 47.
rule of circuit court limiting accused's right to compulsory process for witnesses held unconstitutional. *Evans* v. *State*, 47.

CRIMINAL LAW: SEE CONTINUANCE.
(1) GENERALLY:
keeping open butcher shop and selling meats, etc., on Sunday is violation of Mansf. Dig. sec. 1887, as amended by act March 2, 1885. *Petty* v. *State*, 1.
as to right of assailant to commit homicide in self-defense. *Johnson* v. *State*, 57; *Aikin* v. *State*, 544.
when officer's protection forfeited by his wrongful acts. *Johnson* v. *State*, 57.
betting on base ball is gaming. *Mace* v. *State*, 79.
no defense to an embezzler that his bondsmen have settled his civil liability. *Fleener* v. *State*, 98.
(2) INDICTMENTS:
indictment of father for incest committed by adultery with his daughter must allege that he was married. *Martin* v. *State*, 3.
indictment charging larceny of goods the property of "W. L. C. & Co." held insufficient. *McCowan* v. *State*, 17.
indictment for robbery must allege ownership of property. *Boles* v. *State*, 35.
indictment for false pretenses describing the money obtained disjunctively in six different ways held bad. *Cain* v. *State*, 43.
clerical misprision in using "defendant" for "defendants" immaterial. *Evans* v. *State*, 47.
indictment charging two persons with murder by shooting with gun held in their hands held good. *Ib.*
allegation of agency in indictment for embezzlement held sufficient. *Fleener* v. *State*, 98.
failure to describe particularly the money embezzled not fatal, when. *Ib.*
ownership of property embezzled may be laid in any one other than defendant. *Ib.*
indictment for "forging, counterfeiting and altering" an instrument held good. *McDonnell* v. *State*, 242.
in indictment for forgery the phrase, "In words and figures as follows, to-wit:" imports an exact copy. *Ib.*
form of indictment of accessory to murder held sufficient. *Jones* v. *State*, 390.

CRIMINAL LAW—*Continued:*

(3) PROCEDURE:

where grand jury list contained name of "Swafford John," and record showed that "John Swafford" was sworn, presumption is that they were identical. *Boles* v. *State*, 35.

verdict of guilty of murder in second degree not affected by omission of words "in manner and form," etc. *Evans* v. *State*, 47.

instruction as to right of self defense disapproved. *Johnson* v. *State*, 57.

one convicted of a misdemeanor who gives security for fine and costs cannot be retaken if security prove worthless. *State* v. *Piggues*, 132.

writ of error *coram nobis* not employed to obtain new trial for newly discovered evidence. *Howard* v. *State*, 229.

no new trial in criminal cases after expiration of term. *Ib.*

Mansf. Dig., sec. 2284, requiring jury to specify degree of murder, not repealed by code. *Carpenter* v. *State*, 233.

grounds of commitment by justice of the peace in a felony case not inquired into on application for habeas corpus. *Ex parte Perdue*, 285.

court may re-examine juror touching his qualifications. *Vaughan* v. *State*, 353.

defendant not prejudiced by erroneous rejection of talesman. *Ib.*

instruction calling especial attention to defendant's testimony disapproved. *Ib.*

court may limit time of counsel's argument. *Ib.*

when remarks of prosecuting attorney not prejudicial. *Ib.*

juror in capital case may be examined as to conscientious scruples. *Jones* v. *State*, 390.

instruction that though the facts are consistent with innocence the jury may acquit unless they have reasonable doubt of guilt disapproved. *Holder* v. *State*, 473.

remarks of prosecuting attorney in argument held prejudicial. *Ib.*

when accused entitled to object to competency of grand juror. *Baker* v. *State*, 513.

accused may waive right to be present by counsel. *Ib.*

right of accused to compulsory process for witnesses considered. *Aikin* v. *State*, 544.

rule of court requiring accused to apply to court for subpœnas held invalid. *Ib.*

enforcement of such rule not reversible error if no prejudice appears. *Ib.*

instructions as to presumption of guilt from possession of stolen property and from receipt of proceeds thereof disapproved. *Denmark* v. *State*, 576.

CRIMINAL LAW—*Continued:*

(4) EVIDENCE:

statement of person injured admissible as dying declaration, when. *Evans* v. *State*, 47.

when defendant's statement not part of *res gestæ*. *Ib.*

defendant not permitted to prove uncommunicated threats, when. *Ib.*

existence of corporation proved by general reputation. *Fleener* v. *State*, 98.

as to proving felonious intent in embezzlement. *Ib.*

deposition of deceased witness inadmissible for State if defendant had no opportunity to cross-examine. *Carpenter* v. *State*, 233.

former statements of defendant proved only where he has been impeached. *Ib.*

in murder case conversations of co-defendant with deceased admissible, when. *Ib.*

variance between indictment and evidence as to description of instrument forged is fatal. *McDonnell* v. *State*, 242.

allegation of intent to defraud several supported by proof as to one. *Ib.*

expert testimony admissible in comparison of handwritings. *Ib.*

corroboration of accomplice must relate to material facts. *Vaughan* v. *State*, 353.

witness competent to prove testimony of absent witness if able to give substance of it. *Ib.*

necessity of proof of venue. *Jones* v. *State*, 390.

opinion of principal as to accessory's complicity inadmissible. *Ib.*

evidence not connecting defendant with crime held irrelevant. *Ib.*

as motive for killing wife husband's intimacy with another woman may be shown. *Holder* v. *State*, 473.

latitude of prosecution in cross-examination of defendant. *Ib.*

party eliciting incompetent evidence cannot complain. *Baker* v. *State*, 513.

venue on trial for receiving stolen property held proved. *Ib.*

CURING ACTS:

power of legislature to pass curing acts considered. *Sidway* v. *Lawson*, 117.

curing acts operate on pending suits, when. *Ib.*

act April 13, 1893, curing defective conveyances of homesteads, held valid. *Ib.*

CUSTOM:

to employ "hammer test" in testing boilers may be proved. *Jones* v. *Malvern Lumber Co.*, 125.

not proved by a single instance. *Ib.*

parties presumed to contract with reference to usages of trade. *Western Assurance Co.* v. *Altheimer*, 574.

DAMAGES:
damages recoverable for failure of telegraph company to deliver message. *Western Union Telegraph Co.* v. *Fellner*, 29.
must be proximate, not remote. *Ib.*
railway liable for punitive damages for refusal to stop train at passenger's station, when. *Fordyce* v. *Nix*, 136.
jury should not be instructed to allow damages not exceeding amount sued for. *Ib.*
nor to allow damages for expenses of sickness when none were proved. *Ib.*
liquidated damages distinguished from penalty. *Leep* v. *Railway Co.* 407.
damages for detaining another's premises measured by fair rental value. *Frizzell* v. *Duffer*, 612.
damages recoverable for wrongful discharge of servant before term of employment expires. *Van Winkle* v. *Satterfield*, 617.
such damages mitigated by proof of other earnings. *Ib.*
also by value of work done by servant for himself. *Ib.*

DEDICATION: SEE ROADS AND HIGHWAYS.

DEEDS: SEE CURING ACTS; HOMESTEAD.
Mansf. Dig. sec. 671, requiring registration of conveyances, applies only to instruments in writing affecting real estate—not to parol equities. *Tennant* v. *Watson*, 252.
rule in Shelley's case defined and applied. *Hardage* v. *Stroope*, 303.
unacknowledged and unrecorded deed of assignment admissible in evidence, when. *Excelsior Mfg. Co.* v. *Owens*, 556.

DEFAULT: SEE JUDGMENT AND DECREE.

DEFINITION:
"shop" and "store" defined. *Hardage* v. *Stroope*, 303.
"land" defined to include town-lots. *Helena* v. *Hornor*, 151.
rule in Shelley's Case defined. *Hardage* v. *Stroope*, 303.
"book-keeping." *Western Assurance Co.* v. *Altheimer*, 573.
"substantially." *Western Assurance Co.* v. *Altheimer*, 575.

DEPOSITION:
of deceased witness not admissible against accused where there was no opportunity to cross-examine. *Carpenter* v. *State*, 233.

DEPUTY: SEE CONSTABLE; SHERIFF.

DOWER:
commissioners appointed to assign dower must take notice of homestead. *Horton* v. *Hilliard*, 298.
dower and homestead are distinct rights. *Ib.*
widow entitled to one-third of entire realty including homestead, and may have it laid off elsewhere than upon homestead. *Ib.*

EMBEZZLEMENT:
allegations of agency in indictment held sufficient. *Fleener* v. *State*, 98.
sufficient to allege that particular description of money cannot be given. *Ib.*
ownership of money embezzled laid in any person other than defendant—Mansf. Dig. sec. 1638 construed. *Ib.*
corporate existence of injured party proved by general reputation. *Ib.*
instruction as to proving felonious intent approved. *Ib.*
fact that guaranty company made good defendant's defalcation is no defense. *Ib.*

EQUITY: SEE MARSHALING ASSETS; INJUNCTION.
statutes of limitation binding in equity as well as at law. *Bland* v. *Fleeman*, 84.

ERROR CORAM NOBIS:
does not lie in criminal case to secure new trial on account of evidence discovered after expiration of the term. *Howard* v. *State*, 229.

ESTOPPEL:
married woman not estopped to claim her land by having permitted it to remain in husband's name. *Brown* v. *Wright*, 20.
party eliciting incompetent evidence cannot complain. *Baker* v. *State*, 513.
insurance company estopped by agent's fraud in writing false answers to application. *Providence L. Ass. Soc.* v. *Reutlinger*, 528.
but if applicant discovers the fraud, he cannot hold the policy without approving the agent's action. *Ib.*

EVIDENCE: SEE WITNESS; DEPOSITION; EXPERT EVIDENCE; EXCEPTIONS.
as to admissibility of dying declaration. *Evans* v. *State*, 47.
defendant's statement three hours after killing not part of *res gestæ*. *Ib.*
uncommunicated threats held inadmissible. *Ib.*
existence of corporation proved by general reputation. *Fleener* v. *State*, 98.
intent in embezzlement proved how. *Ib.*
evidence of usage in testing steam boilers admissible. *Jones* v. *Malvern Lumber Co.* 125.
custom not proved by single instance. *Ib.*
previous acts of negligence not admissible in proof. *Ib.*
incompetent evidence not prejudicial, when. *Ib.*
when declarations of agent not admissible against principal. *Ft. Smith Oil Co.* v. *Slover*, 168.
statements of deceased not part of *res gestae*, when. *Ib.*

EVIDENCE—*Continued:*
only after witness has been impeached can he be bolstered up by proof of his former statements. *Carpenter* v. *State*, 233.
upon State's theory of a joint crime, evidence as to a conversation of co-defendant with deceased had a day before the killing is admissible. *Ib.*
admissions of party admissible. *So. Ins. Co.* v. *White*, 277.
to impeach witness record of infamy should be produced. *Ib.*
instruction as to credibility of defendant as witness disapproved. *Vaughan* v. *State*, 353.
corroboration of accomplice must relate to material facts, etc. *Ib.*
when former testimony of absent witness may be proved. *Ib.*
exception to evidence must be specific. *Ib.*
witness held competent to prove testimony of absent witness, when. *Ib.*
railway charged with notice of general reputation of watchman. *Railway Co.* v. *Hackett*, 381.
making specific objection to, waives other objections. *Ib.*
evidence as to general reputation of watchman for recklessness incompetent. *Ib.*
when irrelevant evidence not prejudicial. *Ib.*
venue must be proved in criminal case. *Jones* v. *State*, 390.
witness' opinion inadmissible, when. *Ib.*
evidence not connecting defendant with crime held irrelevant. *Ib.*
communications between attorney and client not privileged, when. *Rosewater* v. *Schwab Clothing Co.* 446.
communications between husband and wife privileged. *Ib.*
when admission of incompetent evidence not prejudicial. *Ib.*
negligence of street car driver can not be shown by proving previous acts of negligence. *Railway Co.* v. *Harrell*, 454.
on trial of husband for killing wife his criminal intimacy with another woman may be proved. *Holder* v. *State*, 473.
withdrawn answer not evidence on plaintiff's behalf. *Railway Co.* v. *Clark*, 490.
party eliciting incompetent evidence cannot complain. *Baker* v. *State*, 513.
unrecorded and unacknowledged deed of assignment admissible in evidence, when. *Excelsior Mfg. Co.* v. *Owens*, 556.

EXCEPTIONS:
exception to evidence should be specific. *Vaughan* v. *State*, 353.
where specific objection to evidence is made, other objections waived. *Railway Co.* v. *Hackett*, 381.
party cannot object to evidence elicited by himself. *Baker* v. *State*, 513.

EXECUTIONS: SEE ATTACHMENT.
sheriff cannot justify seizure of property under execution based on void judgment. *Townsly-Myrick Dry Goods Co.* v. *Fuller*, 181.
bona fide purchaser at execution sale protected against parol equities. *Tennant* v. *Watson*, 252.
but one who purchases under his own execution is not an innocent purchaser. *Ib.*
equity of redemption in mortgaged chattel not subject to execution. *Buck* v. *Bransford*, 291.
sheriff's liability for non-return of execution. *Wilson* v. *Young*, 593.
Mansf. Dig. secs. 3061–2, not repealed by civil code. *Ib.*
sureties on sheriff's bond liable for his failure to return. *Ib.*
action against sheriff and his sureties survives his death. *Ib.*
EXPERT EVIDENCE:
admissibility of expert evidence on comparison of handwritings. *McDonnell* v. *State*, 242.
expert bookkeepers may testify as to sufficiency of a method of bookkeeping. *Western Assurance Co.* v. *Altheimer*, 565.
EXPRESS COMPANIES: SEE CARRIERS.
FALSE PRETENSES:
indictment describing money obtained disjunctively in six different ways held bad. *Cain* v. *State*, 43.
FEES:
upon securing joint conviction of burglary and larceny prosecuting attorney entitled to double fees. *Hempstead Co.* v. *McCollum*, 159.
FINE:
effect of giving security for. *State* v. *Piggues*, 132.
FORGERY:
indictment alleging the forging, counterfeiting and altering of an instrument not demurrable as charging more than one offense. *McDonnell* v. *State*, 242.
phrase "in words and figures as follows, to-wit" imports exact copy. *Ib.*
variance between indictment and evidence as to description of forged instrument is fatal. *Ib.*
charge of intent to defraud several sustained by proof of intent to defraud any one of them. *Ib.*
FRAUD: SEE ASSIGNMENT FOR CREDITORS.
husband's fraud in sale of wife's land held not ratified by her. *Brown* v. *Wright*, 20.
whether deceit practiced in Texas is actionable here, *quaere?* *Ib.*
purchase by administrator of land of the estate from his vendee before his sale had been confirmed is fraudulent. *Bland* v. *Fleeman*, 84.

FRAUD—*Continued:*

such sale is voidable, not void. *Ib.*

purchase of land by administrator under execution in favor of the estate is a fraud. *Ib.*

who may attack a mortgage for fraud. *Townsly-Myrick Dry Goods Co.* v. *Fuller*, 186.

withholding from assignment assets of no value to creditors no fraud. *Burks* v. *Goodbar*, 283.

mortgage executed in pursuance of previous promise to give security is valid. *Marquese* v. *Felsenthal*, 293.

purchase with notice, actual or constructive, of vendor's fraud is not innocent. *Rosewater* v. *Schwab Clothing Co.* 446.

when assignor's fraud will not affect assignment. *Excelsior Mfg. Co.* v. *Owens*, 556.

GAMING:

base-ball a game of skill, within the statute against betting. *Mace* v. *State*, 79.

GRAND JURY:

when jury list contained name of "Swafford John," and record showed that "John Swafford" served, presumption is that they were identical. *Boles* v. *State*, 35.

when accused entitled to object to competency of grand juror. *Baker* v. *State*, 513.

HABEAS CORPUS;

on *habeas corpus* to ascertain validity of commitment by magistrate, the sufficiency of the evidence will not be inquired into. Ex parte *Perdue*, 285.

HIGHWAYS: SEE ROADS AND HIGHWAYS.

HOMESTEAD:

act April 13, 1893, curing defects in execution of conveyances of homesteads held valid. *Sidway* v. *Lawson*, 117.

such act operated on pending suits. *Ib.*

dedication of part of homestead for street purposes not an encumbrance, within sec. 2, art. 12, const. 1868. *Little Rock* v. *Wright*, 142.

in assigning dower commissioners should take notice of homestead. *Horton* v. *Hilliard*, 298.

dower distinct from homestead. *Ib.*

widow entitled to dower in one-third of realty including homestead, and may have it laid off elsewhere than upon homestead. *Ib.*

HOMICIDE:

indictment of two persons for murder committed by shooting with guns held in their hands sustained. *Evans* v. *State*, 47.

form of verdict approved. *Ib.*

HOMICIDE—*Continued:*

to justify killing in self defense danger must be so pressing and urgent as to render killing necessary. *Johnson* v. *State*, 57.

when officer's protection forfeited by his wrongful conduct. *Ib.*

when assailant justified in committing, in self defense. *Ib.; Aikin* v. *State*, 544.

Mansf. Dig. sec. 2284, requiring jury to find degree of murder not repealed by code. *Carpenter* v. *State*, 233.

form of indictment of accessory approved. *Jones* v. *State*, 390.

irrelevant evidence held incompetent. *Ib.*

jurors may on *voir dire* be asked if they have conscientious scruples against bringing in verdict of guilty. *Ib.*

on trial of husband for killing wife his criminal intimacy with another woman may be shown. *Holder* v. *State*, 473.

IMPEACHMENT: SEE WITNESSES.

INCEST:

indictment of father for incest committed by adultery with daughter must allege that he was married. *Martin* v. *State*, 3.

INDICTMENTS: SEE CRIMINAL LAW (2).

INJUNCTION:

judgment at law not restrained unless it appears that there is no remedy at law. *Fuller* v. *Townsly-Myrick Dry Goods Co.* 314.

INSTRUCTIONS:

as to self-defense and the right of assailant to withdraw from a conflict disapproved. *Johnson* v. *State*, 57.

as to felonious intent in embezzlement approved. *Fleener* v. *State*, 98.

instruction held to invade jury's province. *Railway Co.* v. *Byars.* 108.

jury not required to be "satisfied" in civil cases. *Jones* v. *Malvern Lumber Co.* 125.

instruction that jury may allow damages not exceeding amount sued for held erroneous. *Fordyce* v. *Nix*, 136.

instructing jury to allow expenses of sickness is error where no such expenses proved. *Railroad Co.* v. *Barry*, 198.

one cannot complain of instruction in his favor. *Fordyce* v. *Briney*, 206.

instructions as to liability of master to servant considered. *Railway Co.* v. *Torrey*, 217.

error to instruct, "If you can't each get exactly what you want, get the next best thing to it." *Southern Ins. Co.* v. *White*, 277.

instruction as to credibility of defendant in criminal case considered. *Vaughan* v. *State*, 353.

INSTRUCTIONS—*Continued:*
instruction as to duty of trainmen to avoid collision with street car approved. *Railway Co.* v. *Harrall*, 454.
instruction as to duty of trainmen to catch and obey signals to stop approved. *Ib.*
instruction as to presumption of negligence from fact of collision considered. *Ib.*
instruction as to negligence of trainmen disapproved. *Ib.*
instruction should not be contradictory. *Holder* v. *State*, 473.
instruction though erroneous is not prejudicial, when. *Baker* v. *State*, 513.
instruction as to presumption of guilt from possession of stolen property, and from receipt of proceeds thereof, disapproved. *Denmark* v. *State*, 576.

INSURANCE:
(1) LIFE:
answer of assured to question by medical examiner a warranty, when. *Providence etc. Society* v. *Reutlinger*, 528.
where assured's answers are made warranties, a false answer that he had never called a doctor in his life held a breach of warranty *Ib.*
insurance company estopped from insisting on falsity of assured's answers where its agent alone was responsible for their falsity. *Ib.*
but if assured discovered the fraud, and remained silent, he will be held to have approved the agent's action. *Ib.*
tax on traveling life insurance agents is unconstitutional. *State* v. *Washmood*, 609.
(2) FIRE:
admission by assured that he had sold the property insured provable where he represented that he had not. *Southern Ins. Co.* v. *White*, 277.
breach of warranty not excused because insurer's agent told insured it was matter of form. *Ib.*
interest on loss runs from day the loss is made payable. *Ib.*
experts may testify as to meaning of terms employed in policy. *Western Assurance Co.* v. *Altheimer*, 565.
meaning of stipulation that assured will keep a set of books showing complete record of business done. *Ib.*
parties held to have contracted with reference to usages of trade. *Ib.*
assured must show strict, and not substantial, compliance with warranties. *Ib.*
stipulations that assured will keep books in fire-proof safe and that he is sole owner held warranties. *Ib.*

INTERVENTION: SEE ATTACHMENT.

INTEREST:

on loss under insurance policy begins to run from date the loss is made payable. *Southern Ins. Co.* v. *White*, 277.

JUDGES:

authority of, to exchange circuits. *Evans* v. *State*, 47.

successor of judge disqualified in a case is not likewise disqualified. *Ib.*

JUDGMENT AND DECREE:

judgment by default on defective complaint reversed on appeal. *Railway Co.* v. *State*, 39.

void judgment no protection to officer executing process under it. *Townsly-Myrick Dry Goods Co.* v. *Fuller*, 181.

sheriff cannot justify under execution based on void judgment. *Ib.*

judgment rendered before magistrate without notice to defendant is void. *Ib.*

judgment at law not restrained unless it appears that there is no remedy at law. *Fuller* v. *Townsly-Myrick Dry Goods Co.* 314.

complaint in proceeding to vacate judgment against married woman held sufficient. *Richardson* v. *Matthews*, 484.

JUDICIAL SALE: SEE ADMINISTRATION.

statute of five years limitation to recover land sold at judicial sale binding in equity as well as at law. *Bland* v. *Fleeman*, 84.

JURISDICTION: SEE JUSTICES OF THE PEACE.

JURY: SEE GRAND JURY.

court has discretion to re-examine juror touching his qualifications after he has been accepted. *Vaughan* v. *State*, 353.

erroneous rejection of talesman not ground for new trial. *Ib.*

in capital case juror may, on *voir dire*, be examined as to his conscientious scruples. *Jones* v. *State*, 390.

JUSTICE OF THE PEACE:

judgment rendered by, without notice to defendant is void. *Townsly-Myrick Dry Goods Co.* v. *Fuller*, 181.

grounds of commitment by, in felony case not inquired into on *habeas corpus*. Ex parte *Perdue*, 285.

has jurisdiction of suit for the "penalty" for non-payment of employee's wages, under act of March 25, 1889. *Leep* v. *Railway Co.* 407.

LACHES:

knowledge of facts leading to inquiry equivalent to knowledge of what inquiry would lead to. *Bland* v. *Fleeman*, 84.

city's right to open up street not lost by laches, when. *Little Rock* v. *Wright*, 142.

LACHES—*Continued:*

delay in asking for accounting of partnership assets shifts the burden of proof, when. *Johnson* v. *Peck*, 580.

probate judgments not enforced against decedent's lands after thirteen years' delay, when. *Ib.*

LANDS:

term includes town lots. *Helena* v. *Hornor*, 151.

LARCENY:

indictment describing things stolen as the property of "W. L. C. & Co." held insufficient. *McCowan* v. *State*, 17.

taking another's property with intent to exact reward for its return is. *Baker* v. *State*, 522.

instructions as to presumption of guilt from possession of stolen property, and from receipt of proceeds thereof, disapproved. *Denmark* v. *State*, 576.

LAW AND EQUITY:

judgment at law not restrained in equity, when. *Fuller* v. *Townsly-Myrick Dry Goods Co.* 314.

LEGISLATURE:

power to pass curing acts considered. *Sidway* v. *Lawson*, 117.

LEVEES:

incorporated town cannot build nor pay for levees. *Newport* v. *Railway Co.* 270.

LIMITATION OF ACTIONS: SEE ADVERSE POSSESSION.

begins to run in favor of administrator purchasing at his own sale from time parties interested are apprised of its confirmation *Bland* v. *Fleeman*, 84.

statute of limitations binding in equity as well as at law. *Ib.*

constructive trust barred by statute of limitations. *Ib.*

two years' statute relating to recovery of tax-lands applies to lands sold by commissioner of state lands. *Helena* v. *Hornor*, 151.

statute may be pleaded against municipal corporation. *Ib.*

LIMITATION OF ESTATES: SEE SHELLEY'S CASE.

possession of life-tenant not adverse to remainderman, when. *Moore* v. *Childress*, 510.

MARRIED WOMEN:

at common law money of wife delivered to husband for investment became his. *Brown* v. *Wright*, 20.

contra in Arkansas by statute. *Ib.*

common law not presumed in force in Texas. *Ib.*

wife not estopped to claim land standing in husband's name, when. *Ib.*

MARRIED WOMEN—*Continued:*
husband's fraud in sale of wife's land not ratified by her, when. *Ib.*
sufficiency of complaint in proceeding under Mansf. Dig., sec. 3909 to vacate judgment against married woman. *Richardson* v. *Matthews*, 484.

MARSHALING ASSETS:
creditor's right to, not enforced if its operation would work injustice to stranger. *Buck* v. *Bransford*, 289.

MASTER AND SERVANT: SEE AGENCY.
when foreman of bridge-gang is vice-principal. *Bloyd* v. *Railway Co.* 66.
liability of master for vice-principal's negligence. *Ib.*
servant held to assume patent risks. *Jones* v. *Malvern Lumber Co.* 125.
servant's assumption of risk not confined to the particular class of work for which he was employed. *Fort Smith Oil Co.* v. *Slover*, 168.
master liable for failure to instruct servant as to latent dangers. *Ib.*
foreman with power to employ and discharge is vice-principal. *Ib.*
train-dispatcher a vice-principal as to foreman. *Railroad Co.* v. *Barry*, 198.
car-repairer and car-inspector are fellow-servants. *Fordyce v. Briney*, 206.
duty of master to protect car-repairer working under car. *Ib.*
duty of servant to obey rules adopted by master. *Ib.*
car-repairer's duty to take precautions to protect himself. *Ib.*
master not liable to servant for negligence of vice-principal while acting as fellow-servant *Railway Co.* v. *Torrey*, 217.
when master liable for negligence of vice-principal. *Ib.*
as to master's duty to warn servant of dangers incident to service. *Ib.*
authority of railway conductor to employ special help considered. *Railroad Co.* v. *Dial*, 318.
reasonableness of rule adopted by railway to protect employees a question of law. *Railway Co.* v. *Hammond*, 324.
as to what risks are assumed by servant. *Ib.*
whether foreman of quarry-gang is vice-principal is question for jury. *Ib.*
liability of master for servants' torts. *Railway Co.* v. *Hackett*, 381.
railway liable where night watchman while engaged as such shoots another maliciously, though the watchman was commissioned as deputy sheriff. *Ib.*
act March 25, 1889, prohibiting withholding of employee's wages by corporation or natural person construed. *Leep* v. *Railway Co.* 407.

MASTER AND SERVANT—*Continued:*
merchant may discharge bookkeeper for misconduct towards customers. *McMurray* v. *Boyd*, 504.
retention of servant after knowledge of breach of contract is *prima facie* a waiver of the breach. *Ib.*
whether breach of contract has been condoned is question for jury. *Ib.*
contract to work as salesman does not bind employer to labor on Sunday. *VanWinkle* v. *Satterfield*, 617.
remedies of servant for wrongful discharge. *Ib.*
damage recoverable for such wrongful discharge. *Ib.*
when servant's damages reduced by his other earnings and by work done for himself. *Ib.*

MAXIMS:
stare decisis et non quieta movere. *Stinson* v. *Shafer*, 115.
substantia prior et dignior est forma. *Fordyce* v. *Nix*, 138.
causa proxima, non remota, spectatur. *James* v. *James*, 158.
sic utere tuo ut alienum non laedas. *Leep* v. *Railway Co.* 420.

MECHANIC'S LIEN:
complaint to enforce, held properly amended. *McFadden* v. *Stark*, 7.
complaint to enforce sub-contractor's lien held sufficient. *Ib.*
where suit is brought within ninety days, it is immaterial that the account is not filed with the affidavit if complaint is sufficient. *Ib.*
defect in affidavit for, not reached by demurrer. *Ib.*

MISPRISION:
in indictment immaterial, when. *Evans* v. *State*, 47.

MISTAKE:
of conductor in making change will not render railway liable for penalty for overcharge. *Railway Co.* v. *Clark*, 490.

MORTGAGE:
instrument in form a mortgage not construed to be an assignment, when. *Marquese* v. *Felsenthal*, 293.

MUNICIPAL CORPORATIONS: SEE ROADS AND HIGHWAYS.
statute of limitations may be pleaded against. *Helena* v. *Hornor*, 151.
incorporated town cannot bind itself to pay for levee. *Newport* v. *Railway Co.* 270.
not ratify such contract by acceptance of benefit under it. *Ib.*
board of health cannot make binding contract with member thereof. *Spearman* v. *Texarkana*, 348.
but if member perform extra-official services for city, he may recover on *quantum meruit.* *Ib.*

MUNICIPAL CORPORATIONS—*Continued:*
has control over public highways in newly acquired territory. *Fitzgerald* v. *Saxton*, 494.
certain territory held acquired by Little Rock by virtue of act April 28, 1873. *Ib.*
route of highway may be changed and new route substituted by prescription. *Ib.*

NEGLIGENCE: SEE MASTER AND SERVANT.
railway liable for negligence of foreman of bridge-carpenters in giving inconsistent orders to men. *Bloyd* v. *Railway Co.* 66.
in suit for injury from explosion of boiler it may be shown that the "hammer test" employed was customary. *Jones* v. *Malvern Lumber Co.* 125.
negligence on particular occasion not proved by previous acts of negligence. *Ib.*
burden of proof as to contributory negligence is on defendant. *Ib.*
ginner neglecting to gin cotton within agreed time is not liable for its subsequent destruction by fire, when. *James* v. *James*, 157.
railway owes no duty to one assisting trainmen, when. *Railroad Co.* v. *Dial*, 318.
railway not negligent in failing to give its quarrymen working beside its track notice of approach of trains. *Railway Co.* v. *Hammond*, 324.
engineer failing to give notice of approach of train not negligent unless he was required to do so by rules of company. *Ib.*
passenger alighting from moving train guilty of contributory negligence. *Railway Co.* v. *Mayes*, 397.
one who knowingly permits infected cattle to run at large is guilty of. *Railway Co.* v. *Goolsby*, 401.
one who knowingly permits another's infected cattle to mingle with his is guilty of. *Ib.*
negligence of street-car driver on particular occasion not proved by showing previous acts of negligence. *Railway Co.* v. *Harrell*, 454.
instruction as to duty of trainmen to avoid impending collision approved. *Ib.*
doctrine of imputed negligence disapproved. *Ib.*
when trainmen responsible for collision by failing to catch signals. *Ib.*
where street car passenger is injured in collision with railway train, presumption is that street car company was negligent. *Ib.*
but no such presumption as to the railway company. *Ib.*
duty of trainmen to keep lookout. *Ib.*
instruction as to duties of trainmen to avoid collision disapproved. *Ib.*

NEW TRIAL: SEE CRIMINAL LAW; PRACTICE; APPEAL AND ERROR.

NOTICE:

knowledge of facts leading to inquiry equivalent to actual notice, when. *Bland* v. *Fleeman*, 84.

master charged with notice of servant's general reputation. *Railway Co.* v. *Hackett*, 381.

purchaser with notice of vendor's fraud acquires no title as against the latter's creditors. *Rosewater* v. *Schwab Clothing Co.* 446.

OFFICE AND OFFICER: SEE CONSTABLE; SHERIFF.

protection of peace officer forfeited by wrongful conduct, when. *Johnson* v. *State*, 57.

duties of auditor in regard to tax-lands transferred to land commissioner. *Helena* v. *Hornor*, 151.

as to validity of contract of board of health with member thereof. *Spearman* v. *Texarkana*, 348.

PARTNERSHIP:

as to right of contribution among partners. *Johnson* v. *Peck*, 580.

after delay of sixteen years in asking for settlement of partnership accounts, burden is on plaintiff to show that defendant had undisbursed firm assets. *Ib.*

PENALTY:

magistrates have no jurisdiction of suit to recover statutory penalty. *Leep* v. *Railway Co.* 407.

penalty distinguished from exemplary damages. *Ib.*

act March 25, 1889, construed not to fix a penalty but to impose exemplary damages. *Ib.*

carrier not liable to penalty for overcharge of fare where conductor made mistake in change. *Railway Co.* v. *Clark*, 490.

sheriff and his sureties liable to penalty for his failure to make actual return of execution within the required time. *Wilson* v. *Young*, 593.

action to recover such penalty survives sheriff's death. *Ib.*

PLEADING: SEE AMENDMENT; CRIMINAL LAW (2).

indefiniteness in, reached by motion to make more definite. *McFadden* v. *Stark*, 7.

complaint to enforce mechanic's lien held sufficient on demurrer. *Ib.*

defect in affidavit not reached by demurrer. *Ib.*

complaint alleging railway's neglect to ring bell *and* sound whistle at crossing held insufficient. *Railway Co.* v. *State*, 39.

character of action determined rather by nature of grievance than by form of complaint. *Fordyce* v. *Nix*, 136.

complaint held not demurrable for misjoinder of causes. *Ib.*

all pleadings in circuit court should be written. *Rosewater* v. *Schwab Clothing Co.* 446.

PLEADING—*Continued:*

so held in regard to answer to interplea in attachment suit. *Ib.*

withdrawn answer not evidence in plaintiff's behalf. *Railway Co.* v. *Clark*, 490.

PRACTICE: SEE APPEAL AND ERROR; EXCEPTIONS; CRIMINAL LAW; JURY.

jury not required to be "satisfied" by preponderance of evidence in civil cases. *Jones* v. *Malvern Lumber Co.* 125.

as to vacating judgment against married woman after term. *Richardson* v. *Matthews*, 484.

interpleader entitled to open and conclude. *Excelsior Mfg. Co.* v. *Owens*, 556.

PRESCRIPTION: SEE ROADS AND HIGHWAYS.

PRESUMPTION:

none that common law is in force in Texas. *Brown* v. *Wright*, 20.

in action against railway for penalty for overcharge of fare error to instruct jury that mile posts are *prima facie* evidence of the distance. *Railway Co.* v. *Byars*, 108.

in favor of decree of lower court where oral evidence was not brought up. *Bassham* v. *Railway Co.* 399.

presumption of innocence stronger than presumption of payment. *Excelsior Mfg. Co.* v. *Owens*, 556.

instructions as to presumption of guilt from possession of stolen property and from receipt of proceeds thereof disapproved. *Denmark* v. *State*, 576.

PROCESS: SEE EXECUTION.

right of accused to compulsory process for witnesses considered. *Aikin* v. *State*, 544.

rule of court requiring accused to apply to court for subpœnas disapproved. *Ib.*

PROSECUTING ATTORNEY:

entitled to dual fees upon joint conviction of burglary and larceny. *Hempstead Co.* v. *McCollum*, 159.

PUBLIC LANDS: SEE TAXATION.

PUBLIC POLICY:

city not bound by contract of board of health with member. *Spearman* v. *Texarkana*, 348.

but will be liable on a *quantum meruit* for services rendered. *Ib.*

QUESTIONS OF LAW AND FACT:

reasonableness of rules adopted by railway for protection of employee is question of law. *Railway Co.* v. *Hammond*, 324.

whether foreman of quarrymen is vice-principal is question of fact. *Ib.*

QUESTIONS OF LAW AND FACT—*Continued.*
whether breach of contract has been condoned is question of fact. *McMurray* v. *Boyd*, 504.
whether assured properly kept his books is question for jury. *Western Ass. Co.* v. *Altheimer*, 565.

RAILWAYS: SEE STREET RAILWAYS.
complaint alleging railway's failure to ring bell and sound whistle at crossing held defective. *Railway Co.* v. *State*, 39.
when foreman of bridge-carpenters a vice-principal. *Bloyd* v. *Railway Co.* 66.
liability of railway for vice-principal's negligence in giving inconsistent orders. *Ib.*
in action for penalty for overcharge of fare mile-posts are not *prima facie* evidence of distance. *Railway Co.* v. *Byars*, 108.
when railway liable for punitive damages for failure to stop train. *Fordyce* v. *Nix*, 136.
train-dispatcher a vice-principal as to fireman. *Railroad Co.* v. *Barry*, 198.
car-inspector and car-repairer held fellow-servants. *Fordyce* v. *Briney*, 206.
duty of railway to adopt regulations to protect car-repairer. *Ib.*
duty of car-repairer to obey rules adopted by railway. *Ib.*
car-repairer going under car negligent in failing to put out signals, when. *Ib.*
railway liable for negligence of vice-principal acting as such. *Railway Co.* v. *Torrey*, 217.
but not where he was acting as fellow-servant. *Ib.*
when railway liable for failure to warn servant of dangers. *Ib.*
owes no positive duty of care toward one assisting an employee if latter had no authority to employ. *Railroad Co.* v. *Dial*, 318.
conductor has no implied authority, in absence of emergency, to call in additional aid. *Ib.*
reasonableness of rules for protection of employees a question of law. *Railway Co.* v. *Hammond*, 324.
no duty on part of railway to give notice of approach of trains to employees working alongside its track. *Ib.*
instruction as to railway's negligence in placing employee on hand-car disapproved. *Ib.*
whether foreman of quarry-gang is vice-principal is question for jury. *Ib.*
railway liable for malicious act of night-watchman in shooting another. *Railway Co.* v. *Hackett*, 381.
though such watchman also held commission as deputy sheriff. *Ib.*
passenger alighting from moving train guilty of contributory negligence, when. *Railway Co.* v. *Mayes*, 397.

RAILWAYS—*Continued:*

not liable for permitting infected cattle to run at large, not knowing their condition. *Railway Co.* v. *Goolsby*, 401.

cattle-owner guilty of contributory negligence in exposing his cattle, when. *Ib.*

liable to exemplary damages for withholding employee's wages after discharge. *Leep* v. *Railway Co.* 407.

act March 25, 1889, construed. *Ib.*

where passenger on street-car is injured in collision of street-car with railway train, no presumption that railway was negligent. *Railway Co.* v. *Harrell.* 454.

doctrine of imputed negligence disapproved. *Ib,*

failure of trainmen to catch signal to stop held negligence. *Ib.*

instruction as to negligence of trainmen disapproved. *Ib.*

duty of trainmen to avoid collision if possible. *Ib.*

not liable for penalty for overcharge of fare if conductor made mistake in giving change. *Railway Co.* v. *Clark*, 490.

RATIFICATION:

acceptance by married woman of purchase money of her land sold by her husband is not a ratification of his fraud in the sale. *Brown* v. *Wright*, 20.

incorporated town cannot ratify illegal contract by accepting benefit under it. *Newport* v. *Railway Co.* 270.

REALTY: SEE LAND; SHELLEY'S CASE; DEED.

RECEIVING STOLEN PROPERTY:

venue held proved in *Baker* v. *State*, 513.

RECORD: SEE DEED.

REMAINDERS: SEE SHELLEY'S CASE; LIMITATION OF ESTATES.

ROADS AND HIGHWAYS:

complaint alleging failure of railway to ring bell *and* sound whistle at crossing held bad. *Railway Co.* v. *State*, 39.

dedication of part of homestead for street not an encumbrance within sec. 2 art. 12 of const. 1868. *Little Rock* v. *Wright*, 142.

streets previously dedicated in cities of first class were accepted by act April 28, 1873. *Ib.*

continued use by the dedicator of land so dedicated not adverse to city, when. *Ib.*

act April 28, 1873, construed to give Little Rock control of certain highways. *Fitzgerald* v. *Saxton*, 494.

control of city over public highways in newly acquired territory. *Ib.*

after change of route without objection its continued use by the public for seven years amounts to a valid substitution. *Ib.*

ROBBERY:
indictment for, must allege ownership—not sufficient to follow statute. *Boles* v. *State*, 35.

RULES OF COURT: SEE PROCESS.

SHELLEY'S CASE:
rule in, defined. *Hardage* v. *Stroope*, 303.
rule is in force in this State save as to fees tail. *Ib.*
rule applied. *Ib.*

SHERIFF:
seizure by, of property under execution based on void judgment not justifiable. *Townsly-Myrick Dry Goods Co.* 181.
deputy of, cannot as such engage to guard private property not in custody of law. *Railway Co.* v. *Hackett*, 381.
railway liable for wrongful acts of its watchman, though he held commission as deputy sheriff. *Ib.*
liable for failure to make actual return of execution within required time. *Wilson* v. *Young*, 593.
his sureties liable for the penalty for such failure. *Ib.*
action against sheriff and his sureties to recover penalty for non-return of execution survives his death. *Ib.*

STATUTES:
Mansf. Dig. sec. 1835 prohibiting betting on "any game of hazard or skill," construed. *Mace* v. *State*, 79.
statutes of limitation binding in equity as at law. *Bland* v. *Fleeman*, 96.
"belonging to another person" in the statute of embezzlement construed. *Fleener* v. *State*, 101.
the word "costs" in act of April 6, 1889 (p. 120) construed to mean *expenses*. *Hempstead Co.* v. *Royston*, 115.
power of legislature to cure defects in conveyances. *Sidway* v. *Lawson*, 117.
curing acts operate on pending suits, when. *Ib.*
statutes should be construed *in pari materia*. *Helena* v. *Hornor*, 156.
statutes construed to avoid conflict with constitution. *Leep* v. *Railway Co.* 438.

STATUTES CITED, CONSTRUED, ETC:

CONSTITUTION OF UNITED STATES:
Amendment 14, 31 415
Amendment 6 552

ACTS CONGRESS:
9 Stat. at L. ch. 98 553

GOULD'S DIGEST:
c. 147, secs. 37–45 598

GOULD'S DIGEST:
c. 148, secs. 151, 155, 159 154
c. 148, secs. 163–4 155

CIVIL CODE:
secs. 672–9 596
254–5, 259–260 239

STATUTES CITED, CONSTRUED, ETC.—*Continued:*

CONST. 1868:
art. 5, sec. 48 428
GANTT'S DIGEST:
secs. 3209, 3210 149
CONST. 1874:
art. 2, secs. 3, 8 415
2, sec. 10 .....370, 520, 552
2, sec. 13 556
4 121
5, sec. 23 443
7, sec. 23 564
9, sec. 6 301
12, sec. 6 ..... 428, 435, 442–3
MANSFIELD'S DIGEST:
secs. 96, 99 603
309, 325 255
356 256
358 .....256, 449
361–4 526–7
566 307
643 310
670–1 .....256, 258
738 149
740 274
1213 132–4
1214 134
1377 554
1578–9 4
1599 37
1621 166
1638 101
1649 563
1760 601
1827–9 80–1
1834 81
1835 80
1887 2
2098 518
2107 19
2111 20
2121 19
2143 552
2144 553
2157 36
2216–8 164
2259 365
2284 239
2294 367
2295–7 232
MANSFIELD'S DIGEST:
secs. 2317 165–6
2339 164
2590 301
2859 452
2871 564
2971 595
3061 ..... 595–7, 603, 607
3062 .....595–6, 603, 607
3063 603
3064 .....603, 608
3233 .....160, 162
3371–84 420
3572 287
3898–3899 602
3900 602
3901 602
3909 .....232, 485
3911 485
3912–3 486
3957–62 608
3963 .....597, 608
3964 .....597, 603, 608
3965–6 608
4128 601
4177 154
4183, 4185 154
4405 14
4406 16
4421, 4424 14
4471, 4474 93–5
4475 154
4637 27
4936 15
4944 602
5082 15
5151 185
5155 232
5157 112
5233 .....603, 605
5234–6 602
5475–6 140
5480 140
5591, 5594 611
6314 599
6405 602
6414–5 602
6419 601

STREET RAILWAY:

negligence of street-car driver not imputed to passenger in collision with railway train. *Railway Co.* v. *Harrell*, 454.
in case of collision with railway train street-car company is, as to its passengers, presumed negligent. *Ib.*
not proper to instruct jury as to duties of street-car driver, when. *Ib.*

SUNDAY:
keeping open butcher shop on, and selling meats and vegetables held a public offense. *Petty* v. *State*, 1.
agreement of employee to perform duties as salesman for one year does not bind him to labor on Sunday. *Van Winkle* v. *Satterfield*, 617.

SUPREME COURT: SEE APPEAL, ERROR.
practice on review of action of circuit court in denying petition for *habeas corpus*. Ex parte *Perdue*, 285.

SURETYSHIP:
effect of giving bond and security for fine and costs. *State* v. *Piggues*, 132.
sureties on sheriff's bond liable to penalty for his failure to make actual return of execution within required time. *Wilson* v. *Young*, 593.
action against sheriff and sureties for such failure survives sheriff's death. *Ib.*

SURVIVAL OF ACTIONS: SEE ACTIONS.

TAXATION:
two years' statute of limitation to actions to recover tax-lands applies to tax-deeds executed by the land commissioner. *Helena* v. *Hornor*, 151.
the term "lands" as there used includes town lots. *Ib.*
Mansf. Dig., sec. 5591, imposing occupation tax on insurance agents, is unconstitutional. *State* v. *Washmood*, 609.

TELEGRAPH COMPANIES:
damages for failure to deliver messages. *Western Union Tel. Co.* v. *Fellner*, 29.

TORT: SEE TRESPASS.
whether action lies here for deceit practiced in Texas, *quære*. *Brown* v. *Wright*, 20.

TRESPASS:
one assisting railway conductor by throwing off a brake is a technical trespasser, when. *Railroad Co.* v. *Dial*, 318.
unlawful detention of premises after expiration of lease a trespass, when. *Frizzell* v. *Duffer*, 612.

TRUST:
husband held a trustee of wife's money, when. *Brown* v. *Wright*, 20.
purchase of trust property by trustee held a trust. *Bland* v. *Fleeman*, 84.
as where administrator purchases land sold by him from his vendee before confirmation. *Ib.*
or where he purchases land under an execution in favor of the estate. *Ib.*

7122 007

VARIANCE:
between indictment and proof as to description of forged instrument is fatal. *McDonnell* v. *State*, 242.

VENUE:
liability of initial county for expenses of trial in cases on change of venue. *Hempstead Co.* v. *Royston*, 113.
must be proved in criminal cases. *Jones* v. *State*, 390.
held proved on trial for receiving stolen property. *Baker* v. *State*, 513.

VERDICT:
omitting the words "in manner and form as charged," etc., immaterial. *Evans* v. *State*, 47.
Mansf. Dig. sec. 2284, requiring jury to find degree of murder not repealed. *Carpenter* v. *State*, 233.
when proper to direct verdict for defendant. *Railway Co.* v. *Mays*, 397.

VOID AND VOIDABLE:
purchase by administrator at his own sale held voidable. *Bland* v. *Fleeman*, 84.
so as to purchase by him of land under execution in favor of estate. *Ib.*
judgment before magistrate without notice to or appearance by defendant is void. *Ib.*
contract of board of health with member voidable. *Spearman* v. *Texarkana*, 348.

WAIVER:
breach of contract of employment waived by retention of employee, when. *McMurray* v. *Boyd*, 504.
accused may waive right to be present by counsel. *Baker* v. *State*, 513.

WITNESSES: SEE EVIDENCE; DEPOSITION.
witness not impeachable with reference to immaterial matter. *Jones* v. *Malvern Lumber Co.* 125.
witness bolstered up by proving his previous statements, when. *Carpenter* v. *State*, 233.
to impeach, record of infamy should be produced. *Southern Ins. Co.* v. *White*, 277.
instruction as to credibility of accused disapproved. *Vaughan* v. *State*, 353.
defendant testifying *pro se* may be asked whether he had been confined in penitentiary of another State. *Holder* v. *State*, 473. (See also *Baker* v. *State*, 513.)
also what caused him to leave State two years previously. *Ib.*
but not whether he had committed rape in one State or left another on account of debt. *Ib.*

WORDS: SEE DEFINITIONS.