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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

MAY, 1895—FEBRUARY, 1896.

T. D. CRAWFORD
REPORTER.

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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME.

HENRY G. BUNN, - - - - - - CHIEF JUSTICE.

BURRILL B. BATTLE,
SIMON P. HUGHES,
CARROLL D. WOOD,
JAMES E. RIDDICK,
} ASSOCIATE JUSTICES.

RULE VI

AS AMENDED BY THE SUPREME COURT.

ORAL ARGUMENT.

When counsel desire to make oral arguments in any case, they shall notify opposing counsel of such intention at least five days before the day for the hearing of such arguments. Only two counsel will be heard for each party, and not more than one hour will be allowed to each side for argument, without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; *Provided, always,* That a fair opening of the case shall be made by the party having the opening and closing arguments. The plaintiff in error, or appellant, shall be entitled to open and conclude the argument; but, when there are cross-appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

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ERRATA.

On page 383, fifth line from top, for "an" read *on.*

On page 420, sixth line from bottom, for "Crittenden circuit court in chancery" read *Pulaski circuit court.*

On page 420, fifth line from bottom, for "James E. Riddick" read *Robert J. Lea.*

On page 558, fourteenth line from bottom, for "38 N. J. L." read *33 N. J. L.*

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS.

STATE MUTUAL FIRE INSURANCE ASSOCIATION *v.* BRINKLEY STAVE & HEADING COMPANY.

61 e77 1 207
61 f89 1 478

Opinion delivered May 18, 1895.

CONTRACT OF INSURANCE—WHEN COMPLETE.—When an application for insurance, made to the local agent of a foreign mutual fire insurance company, is by him forwarded to the company at its domicil, at which place the application is accepted, and the policy of insurance signed and mailed to the applicant, the contract is then and there complete, and is governed by the laws of such domicil, and not by the laws of this state.

FOREIGN INSURANCE COMPANY—DOING BUSINESS ILLEGALLY—PENALTY.—Under Sandels & Hill's Digest, sec. 4138, providing that any person or corporation receiving premiums or forwarding applications, or in any other manner transacting business for any insurance company not of this state, without having complied with certain statutory prerequisites, shall forfeit and pay to the school fund a sum mentioned, *held* that a contract made with a foreign insurance company through its local agent, before it has complied with the statute, is not, on that account, void, as the penalty imposed by the statute is exclusive of any other forfeiture.

INSURANCE—RECOVERY OF UNEARNED PREMIUM.—Where the charter of a mutual insurance company provides that "any member of this company may withdraw therefrom by notice in writing to the secretary and paying all dues and liabilities," a member thereof, on withdrawing, is entitled to recover the unearned premium paid by him, after deducting the amount of his dues and liabilities as a member as soon as the amount of such dues and liabilities can be ascertained.

Appeal from Monroe Circuit Court.

JAMES S. THOMAS, Judge.

H. A. & J. R. Parker, for appellant.

1. The Foreign Corporation Act (Sandels & Hill's Digest, secs. 1322 to 1325), has no application to foreign insurance companies. 139 U. S. 223; 41 Fed. 643; 55 Ark. 163.

2. The contract was made in Illinois, and is governed by the laws of that State. 2 Kent's Com. (12th ed.), *p. 477 and note; 3 Minor, Inst. 127; 2 Pars. Cont. (7th Ed.) 712; 1 *id.* 515, 516, 562; 3 Metc. 207.

3. The statute imposes a penalty merely for violating the law, but does not avoid the contract. Sandels & Hill's Digest, sec. 4138; 1 Fed. 471; 2 Morawetz, Corp., sec. 665; 11 S. E. 37; 18 Mo. 229; 24 Oh. St. 67; 31 Mich. 346; 102 Mass. 221; 2 Beach, Priv. Corp., sec. 415.

4. Appellee not entitled to recover on his counterclaim. He has not complied with section 9 of the charter. It is bound by the contract, and must pay the dues and liabilities incurred, and yet unadjusted. 59 N. W. 250; *Ib.* 661; 56 *id.* 88, 755; 31 Pac. 327; 54 N. W. 544.

C. F. Greenlee for appellee.

1. The contract was void for non-compliance with our laws by the company. Art. 12, sec. 11 Const.; Sandels & Hill's Digest, secs. 4130 to 4136, etc.

2. Where an act is prohibited by statute, or where the statute pronounces a penalty for an act, a contract to do the act or founded on such act is void. 5 Lawson, Rights & Rem., etc., sec. 2393; 25 Ark. 306; 47 Ark. 378, 383.

3. A strict compliance with our statutory provisions is the only condition upon which foreign asso-

ciations are allowed to transact business in *this* State. 37 N. E. 834; 36 *id.* 59.

4. The contract was an Arkansas contract. There was no contract until the policies were accepted, and it is not denied that they were accepted in Brinkley, Arkansas. 60 Fed. 690, and cases cited.

HUGHES, J. The plaintiff (appellant), a mutual fire insurance company incorporated under the laws of the state of Illinois, sued the defendant (appellee) for an assessment of $225 for dues, losses and liabilities incurred as a member of plaintiff company on two policies. The defendant denied the liability; set up that the policies were canceled, that plaintiff owed it $125 for unearned premiums, and that plaintiff's contract on policies was void for non-compliance with the foreign corporation law; and prayed judgment for $125 on counterclaim.

The court found the facts to be: (1) That the insurance for which the policy was issued was solicited in the state by an agent of the plaintiff during the course of regular business herein, and that the application was made and the policy was accepted in this state. (2) That plaintiff is a foreign corporation, and has wholly failed to comply with any of the laws of this state regulating insurance, and was not entitled to transact insurance business in this state. (3) That the insurance was on the 26th of May, 1891, terminated, and defendant, on its cross-complaint, is entitled to recover from plaintiff $125, unearned premiums.

The court declared the law to be: (1) No foreign corporation shall do any business in this state, except while it maintains therein one or more known places of business, and an authorized agent in the same upon whom process may be served, and they shall exercise no greater powers, nor have any greater privileges, than

are exercised or had by like corporations of this state. (2) Before mutual fire insurance companies are permitted to do business in this state, it is required that they shall give bond to the state of Arkansas for the use of the beneficiaries of the policy holders of such companies, with security to be approved by the secretary of state, in the sum of $20,000, conditioned for the prompt payment of all assessments to the parties or beneficiaries entitled thereto, which bond shall be filed in the office of the secretary of state, and the law requires insurance corporations doing business on the assessment plan to make return to the auditor of state annually, on or before the 1st of March, a statement of the affairs of the corporation for the year ending on the 31st of December next preceding. (3) Plaintiff was not entitled to do insurance business in this state until it had complied with act 84 of the Acts of Arkansas for 1887, and received from the auditor of state a certificate to that effect; and if any person transacted any insurance business for plaintiff, until it had complied with the requirements of said act, he was guilty of a misdemeanor, and subject to a fine in the sum of $500. (4) Plaintiff cannot recover in this action unless it has complied with sec. 3832 of Mansfield's Digest, and paid the taxes therein prescribed. (5) If plaintiff has wholly failed to comply with its duties, as prescribed in secs. 3833, 3834, Mansfield's Digest, and the act of Arkansas above mentioned, and the insurance was obtained from defendant company, and the same was solicited by an agent of plaintiff while in the course of regular business in this state, then plaintiff cannot recover in this action. (6) If defendant company or its agents requested the termination of the insurance, it is entitled to recover from the plaintiff the amount of unearned premium proved by the evidence. (7) Where an act is prohibited by

statute, a contract to do the act is illegal and unenforceable; and where a statute pronounces a penalty for an act, a contract founded on such act is void.

The appellee made application to the agent of the appellant at Brinkley, Arkansas, for two policies of insurance in the appellant company. The applications were forwarded to the company at Chicago, Ill., and there passed upon, accepted, dated and signed by the proper officers of said company, which was a mutual fire insurance company, chartered under the laws of Illinois, with its domicil at the city of Chicago in said state. The policies were then sent by the company directly to the appellee at Brinkley, Ark., and the premiums were thereupon forwarded to the appellant company at Chicago.

It appears that the agent to solicit insurance for the appellant had no authority to pass upon applications to bind his company or to issue policies; nor were the policies, when issued, sent to him for delivery, or the premiums paid to him to be forwarded to his company. These contracts, for the reasons stated, were not Arkansas contracts, but Illinois contracts.

When contract of insurance complete.

When the applications of the appellee had been received, passed upon, and accepted, and the policies of insurance had been dated and signed at Chicago, and then mailed to the appellee, the contracts were then and there complete, and were Illinois contracts, and governed by the laws of that State. 2 Parsons on Contracts, 712; 2 Kent, Com. (12th Ed.) page 477, and note; *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *McIntyre* v. *Parks*, 3 Met. 207.

Though the appellant company failed to comply with the statute in not doing those things required of foreign corporations before doing business in this state,

the contracts in this case were not void on that account, as they are Illinois contracts.

Liability of foreign insurance company doing business illegally.

It is also contended that these policies are void because the appellant company failed to comply with the statute in regard to "foreign insurance companies and agents therefor," found in Sandels & Hill's Digest, from section 4137 to section 4139 inclusive; and particularly because section 4138 says that "any person or persons, or corporation, receiving premiums or forwarding applications, or in any other way transacting business for any insurance company or corporation not of this state, without having received authority agreeably to the provisions of this act, shall forfeit and pay to the school fund of the state the sum of five hundred dollars for each month or fraction thereof during which such illegal business was transacted; and any company not of this state, doing business without authority, shall forfeit a like sum for every month or fraction thereof, and be prohibited from doing business in this state, until such fines are fully paid; and every such person, or persons, or corporation, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than five hundred dollars."

It will be observed that, though penalties are imposed in this act upon the persons or cerporations doing the things therein prohibited without first complying with its requirements, it does not make void the contracts made by the insurance companies without such compliance, either as the corporations named therein, or the policy holders in such companies.

In *Toledo Tie & Lumber Company* v. *Thomas*, 11 S. E. 37, it is stated—correctly, as we think—by the supreme court of appeals of West Virginia that "a contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do

business in another state will not on that account be held absolutely void, unless the statute expressly so declares; and if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others." (See cases cited in that opinion).

The insurance contracts in this case were not void on account of the failure of the insurance company to comply with the statutory prerequisites to the right of a foreign insurance company to do business in this state. The penalty imposed by the statute was exclusive of any other forfeiture.[1] *Washburn Mill Co.* v. *Bartlett*, 54 N. W. 544; 2 Morawetz, Corp. sec. 665.

There was a provision in these policies of insurance (sec. 8) that "this insurance may be terminated at any time at the request of the assured, in which cases the association shall retain only the customary short rates for the time the policy has been in force."

Recovery of unearned premiums.

The defendant contends that, before the expiration of the first year for which it had paid premiums, to-wit, in May, 1891, and before the commencement of this suit, it requested the cancellation of its policies of insurance, and the return of the unearned premiums, amounting to $125, which amount the defendant claimed was due it, and for which it demanded judgment. It contended that its request for cancellation terminated its liability for any assessment thereafter made, and left the company indebted to it for unearned premiums, and says the company refused to cancel the policies or pay the unearned premiums till the maturity or anniversary of the policies. There was proof tending to support this contention.

The company maintains that, before it could ascertain the amount due the appellee for unearned premiums,

[1]Cf. *Railway Company* v. *Fire Association*, 60 Ark. 325. (Rep.)

it would have had to await the expiration of the year, or the anniversary of the policy, that it might be able to determine for what proportion of the expenses and liabilities, in proportion to appellees' insurance, up to the date of the request for cancellation, the appellee would be liable, and it does not appear that there was any offer by appellee to meet these in any way; but it seems that the appellee claimed that it was entitled at once to the unearned premiums at the date of its request for cancellation of its policies, without provision for, or recognition of, any obligation to bear its legitimate proportion of the liabilities of the association of which the appellant was a full member, according to the charter of the said association.

The 9th section of the charter of the appellant company provides that "any member of this company may withdraw therefrom by notice in writing to the secretary and paying all dues and liabilities." If there were dues or liabilities which the appellee was liable to pay to the company, he was entitled to recover the unearned premiums, less the amount of his dues and liabilities to the association, but not until these could be ascertained, and the balance of the unearned premiums became due and payable according to the charter and by-laws of the association, to which the appellee subscribed when it became a member of the association.

It is apparent from what has been stated herein that the circuit court in its first finding of facts erred, and that in its third finding it stated only what was conceived to be the legal effect of the evidence, and not the evidence itself. The declarations of law made by the court are inapplicable to this case, and erroneous. The court, it seems, tried the case upon a wrong theory.

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

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. STATE.

Opinion delivered June 15, 1895.

RAILWAY COMPANIES—SEPARATE DEPOT ACCOMODATIONS.—An indictment of a railway company for failure to provide separate waiting rooms for the accommodation of the white and African races at a certain depot will not be supported by evidence which shows that the alleged depot was a mere flag station without any building belonging to or used by the company as a depot, although there was on the company's right of way a storehouse not under the company's control, to which passengers, when detained, usually resorted, and at which tickets were sold for the railroad company on commission.

Error to Drew Circuit Court.

M. L. HAWKINS, Judge.

STATEMENT BY THE COURT.

The appellant company was indicted in the Drew circuit court at its February term, 1894, for an alleged violation of what is known as the "Separate Coach Act," approved February 23, 1891, amended April 1, 1893.

The indictment is as follows, to-wit: "The grand jury of Drew county, in the name and by the authority of the state of Arkansas, accuse the St. Louis, Iron Mountain & Southern Railway Company of the crime of failing to provide separate waiting rooms for the white and African races, committed as follows, to-wit: The St. Louis, Iron Mountain & Southern Railway Company, in the county and state aforesaid, on or about the 1st day of May, A. D. 1893, the said railway company being then and there a railway company carrying passengers in their coaches in said county and state, and had so been for more than twelve months prior to May 1, 1893, did then and there unlawfully, and for more

than twelve months prior thereto, fail to provide separate waiting rooms for the accommodation of the white and African races at Wilmar depot, the said Wilmar depot being then and there a passenger depot, operated and maintained by said railway company on the 1st day of May, 1893, and for each and every day for twelve months prior thereto in said county and state, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Arkansas.

H. W. WELLS,
Prosecuting Attorney."

The railway company demurred to the indictment, because the same did not set up facts sufficient to constitute a criminal offense against the laws of Arkansas. The demurrer was argued and overruled, and all proper exceptions duly saved. A plea of not guilty was then entered, and the cause proceeded to trial.

In brief, the facts were as follows, to-wit: The company had no depot building of any kind at Wilmar on the first of May, 1893, nor prior to that time, and had, of course, no waiting room of any character. It was a flag station, and passengers got off and on the cars there, as is usual at such places, and, when detained there, usually resorted to a storehouse on the company's right of way, near by, owned and occupied by one of the witnesses as a storehouse and post office, and where also he (the owner) sold passenger tickets for the railway company on commission. He had built his storehouse on the right of way, by permission of the Little Rock, Mississippi River & Texas Railway Company, the predecessor of the appellant company. and at and until the time referred to in testimony was occupying the ground by permission merely, the railway company having no interest in him or his business, other than as stated above.

The station was one of little business, as the monthly income from all sources is shown to have been between $35 and $50, say on an average, not exceeding $45. It is 8 miles from Warren, and 10 miles from Monticello, and about 1½ miles from another similar station called "Allis."

The case was submitted to the court sitting as a jury, and the court rendered a verdict of guilty against defendant, and imposed a fine of $100; and defendant, reserving exceptions, appeals to this court.

Austin & Taylor and *Dodge & Johnson* for appellant.

1. The indictment charges no offense; it does not follow the language of the statute. 47 Ark. 488; 30 *id.* 496; 1 Bish. Cr. Pr., (3d ed.), sec 618; 59 Ark. 243.

2. Under the evidence, the verdict cannot stand. Sandels & Hill's Digest, sec. 6219, only contemplates that separate waiting rooms shall be provided *at all points* where the railway company *had or maintained* a "passenger depot." It does not purport to compel railway companies to erect passenger depots at all stations along their lines. This is the only reasonable construction. Endlich, Int. St., sec. 17. For definition of "depot," see Webster's Dictionary; 37 Conn. 153. There is no law in this state compelling railroads to erect passenger depots along their lines. The law requires separate waiting rooms only where there were depots already erected. 29 A. &. E. Ry. Cases, 481; 22 *id.* 500; 28 Ark. 361–2; 48 *id.* 155; Suth. Stat. Const. secs. 390–1–2–3.

E. B. Kinsworthy, Attorney General, for appellee.

1. The indictment was good. Sandels & Hill's Digest, secs. 2073, 2076; 49 Ark. 499; 55 *id.* 532; 54 *id.* 492.

2. The evidence is sufficient, under section 6219 Sandels & Hill's Digest. Wilmar was a passenger depot. 37 Conn. 153; 21 Wis. 79; Winfield, Adj. Words, etc., 188; 128 Ill. 163. The law makes no exceptions. Suth. St. Const., pp. 427, 325.

BUNN, C. J. (after stating the facts.) Both in overruling defendant's demurrer to the indictment, and in the trial of the cause, the court below proceeded on the theory that the statute referred to requires of railroad companies that they erect passenger depot buildings at all points on their roads where passengers are allowed to get off and on their trains; or else that the storehouse referred to in evidence was a "passenger depot," as contemplated within the meaning of the act.

The proof showed Wilmar to be nothing more than a flag station, without any building whatever belonging to or under the control of defendant, or used by it as a depot building, and this mere flag station is denominated in the indictment a "passenger depot."

The statute under consideration cannot be construed so as that it requires of railroad companies to erect passenger depot buildings where they have none, but the requirement is that they provide separate waiting rooms in their depot buildings already existing or to be erected; and the expression "passenger depot," as employed in the act, means a depot building used for the reception of passengers.

If the words "passenger depot," as descriptive of the depot at Wilmar in the indictment, were intended to mean a mere place where passengers were allowed to get on and off the trains, without any reference to the buildings connected therewith, then the demurrer should have been sustained; but if the words in the indictment had reference to the storehouse mentioned in the evidence, then the verdict was not sustained by the

evidence, for the storehouse was not a depot building, and was not owned, used or occupied by defendant as such.

The judgment is therefore reversed, and the cause remanded for further proceedings in accordance herewith.

TRAYLOR *v.* ALLEN.

Opinion delivered June 15, 1895.

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JUSTICE OF THE PEACE—JURISDICTION—GARNISHMENT.—A justice of the peace has no jurisdiction of a garnishment where the amount of the garnishee's indebtedness upon any single contract exceeds $300, the limit of his jurisdiction in matters of contract.

Appeal from Pulaski Circuit Court, Second Division.

JOSEPH W. MARTIN, Judge.

Marshall & Coffman for appellants.

The want of jurisdiction was not raised by Allen, and is not involved. If it were, the schedule shows a separate debt of $250, which was within the court's jurisdiction. But we think the larger debt was subject to garnishment for the $125 due. 47 Ark. 219; 31 *id.* 652; 46 *id.* 493.

Dan W. Jones & McCain for appellee.

The justice had no jurisdiction, and the circuit court acquired none on appeal. 5 Ark. 214, 354. 47 Ark. 219 is not in conflict with the doctrine laid down in 5 Ark., *supra.*

BATTLE, J. George M. Traylor & Co. recovered a judgment against Claude Allen before a justice of the peace of Drew, and afterward filed a transcript of

the same before a justice of the peace of Pulaski county, and thereupon caused the Arkansas Fire Insurance Company to be summoned to answer "what goods, chattels, moneys, credits or effects it may have in its possession or hands belonging to" Allen to satisfy their judgment. The insurance company answered, and admitted that it was indebted to Allen upon a certain policy of insurance in the sum of one thousand dollars. Upon this answer, Traylor & Co. seek to recover a judgment against the garnishee for the amount of their judgment. The right to do so is disputed on the ground that the justice of the peace had no jurisdiction of the garnishment.

The constitution of this state limits the jurisdiction of justices of the peace in all matters of contract to cases wherein the amount in controversy does not exceed three hundred dollars, exclusive of interest. It has been held by this court that a justice of the peace has no jurisdiction in a proceeding to garnish a debtor of a defendant against whom a judgment has been rendered, if the amount of the indebtedness of the garnishee to the defendant upon any single contract exceeds the limits of his jurisdiction; and that when this appears in such a proceeding before him, it is his duty to dismiss it. *Moore* v. *Woodruff*, 5 Ark. 214; *Woodruff* v. *Griffith*, 5 Ark. 354; *Martin* v. *Foreman*, 18 Ark. 249. In this case the limit of the justice's jurisdiction was $300, exclusive of interest, as before stated; and the indebtedness of the garnishee to the defendant, Allen, was $1,000, without interest. The justice of the peace, consequently, had no jurisdiction of the garnishment, and the circuit court acquired none by appeal.

The case of *Moore* v. *Kelley*, 47 Ark. 219, does not conflict with the cases cited. The difference is pointed out in the last case.

The judgment of the circuit court is reversed, and the garnishment proceeding is dismissed without prejudice.

BRITTON *v.* STATE.

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Opinion delivered June 15, 1895.

RECEIVING STOLEN PROPERTY—VARIANCE.—One indicted for receiving a stolen hog cannot be convicted of receiving the pork into which the hog had been converted. So, under an indictment containing two counts, one for larceny of a hog, the other for receiving the hog knowing it to be stolen, where there was evidence that defendant assisted in concealing the theft of a hog, and received part of the pork into which the hog had been converted, and the court instructed the jury that if defendant received any portion of the hog, knowing it to be stolen, with intent to deprive the owner thereof, he would be guilty as chaged in the second count, a conviction upon a general verdict will be set aside, as it does not appear upon which count of the indictment defendant was convicted.

Appeal from Prairie Circuit Court, Northern District.

JAMES S. THOMAS, Judge.

The appellant, *pro se*.

The verdict in this was a general one. There was no proof that appellant stole the hog, and there is no proof that the amount of meat received was more than ten dollars. Hence there is a total failure of proof to sustain the verdict. 34 Ark. 532.

E. B. Kinsworthy, Attorney General, for appellee.

1. There is evidence to support the verdict. 46 Ark. 141; 47 *id.* 196.

2. The bill of exceptions does not set out the instructions of the court. 46 Ark. 207.

HUGHES, J. The appellant was indicted for the larceny of a hog. He was charged in the first count of the indictment with stealing the hog, and in the second count with receiving the hog knowing that it had been stolen, with the intent to deprive the true owner thereof.

The jury returned a general verdict of guilty, and he was sentenced to one year's imprisonment in the penitentiary. The evidence tended to show that the hog had been stolen, and that the appellant knew of the theft, and assisted in concealing the head and offal; and that he also ate some of the pork into which the hog had been converted, at the home of another in whose employment he was at the time, and who, he said, had killed the hog. There is no proof of the value of the pork appearing in the record.

The following instruction was given to the jury over the objection of the defendant, to which he excepted at the time: "You are further instructed that if you believe from the evidence beyond a reasonable doubt that the defendant received any portion of the hog mentioned in the indictment, knowing that it had been stolen, with the intent to deprive the true owner thereof, he would be guilty, as charged in the second count of the indictment."

Upon an indictment for receiving a stolen hog, a defendant cannot be convicted of stealing the pork.

As it does not appear upon which count of the indictment the appellant was convicted, and as he may have been convicted and sentenced for receiving the pork, knowing it to have been stolen, the instruction referred to above is erroneous.

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

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Ex parte PURCELL.

Opinion delivered June 22, 1895.

PARDON—REMISSION OF FINE—EFFECT AS TO COSTS.—A free and full remission by the governor of and from payment of a fine imposed on a misdemeanant exonerates him from the payment of the fine proper, and takes away the criminal character of the judgment for costs, and such judgment cannot be enforced by imprisonment, although his civil liability therefor remains.

Certiorari to Jefferson Chancery Court.

JAMES F. ROBINSON, Chancellor.

H. King White and *D. H. Rousseau* for petitioner.

When a defendant has been pardoned for a misdemeanor, he cannot be imprisoned for costs. 56 Miss. 164; 12 Ark. 122; S. & H. Dig. sec. 896; 46 Ark. 137.

E. B. Kinsworthy, Attorney General, and *Smith C. Martin*, Prosecuting Attorney, for the State.

Cite *contra*, 17 Am. & Eng. Enc. Law; 12 Ark. 122; 15 *id.* 129; 10 *id.* 284; 36 *id.* 74; 46 *id.* 137. In 12 Ark. 122, it was held that the governor could not pardon or remit costs. Our statutes provide expressly that a party convicted of a misdemeanor may be imprisoned for the costs. Sand. & H. Dig. secs. 896, 921.

BUNN, C. J. This is a petition for a writ of habeas corpus, originally presented to the Hon. James F. Robinson, chancellor of the second chancery district, and from his judgment of refusal to grant the same is appealed to this court, the record and all formal matters being properly presented.

The petitioner, S. G. Purcell, was indicted in the Jefferson circuit court for making an assault with a deadly weapon, was tried and convicted of a simple assault, and fined fifty dollars, and judgment rendered

to the effect that he "remain in the custody until fine and costs are paid." On his application, the governor of the State, on the 17th day of May, 1895, remitted the fine aforesaid, and the language employed is as follows, to-wit: "I, James P. Clarke, governor of Arkansas, do hereby grant to the said S. G. Purcell a free and full remission of, for and from payment of fifty dollars of the said judgment rendered as aforesaid, and hereby absolving him from the payment of the said sum of fifty dollars of the said judgment, and all the effects and consequences thereof."

Subsequently, the clerk of said circuit court issued his execution for the collection of the costs, as is provided in criminal cases, and placed the same in the hands of the sheriff of said county, and he thereupon arrested the petitioner, and placed him in jail, in accordance with the judgment of the circuit court and said execution issued thereon. Thereupon the petition herein was filed, and the same was heard and refused, as aforesaid.

A correct determination of the question involved in this proceeding depends upon a proper construction of the law defining the pardoning power of the executive, and of the language employed in the grant of the pardon itself. Section 18, article 6, of the constitution provides that "in all criminal and penal cases, except in those of treason and impeachment, the governor shall have power to grant reprieves, commutations of sentence, and pardons after conviction; and to remit fines and forfeitures, under such rules and regulations as shall be prescribed by law."

In *Baldwin* v. *Scoggin*, 15 Ark. 427, it is held that the power of the governor to remit fines exists even without an act of the legislature prescribing the method of doing so, and he can remit a fine even when the legislature has directed that it be paid into the county

treasury for the use of the common school fund, when collected. But in *Edwards* v. *State*, 12 Ark. 122, which was a felony, this court said: "Costs are neither fines nor forfeitures, nor are they imposed by way of punishment, or as amercement at common law, but by way of sequence to every judgment, whether in a civil or criminal case, as a matter of common justice to the party complainant, witnesses and officers of court, although the judgment is in favor of complainant alone. Costs, then, partaking in no respect of the nature either of punishment or of guilt, are without the sphere of the legitimate legal operation of a pardon, however general in terms." And upon this reasoning this court in that case held that a "general pardon from the governor does not discharge the criminal from the costs of the prosecution."

It is contended by the petitioner's counsel herein that there is a difference between felonies and misdemeanors in this respect, since, by section 896 of Sand. & H. Digest, the misdemeanant is imprisoned for the costs as well as for the fine. There is force in the suggestion, and yet it may be suggested on the other hand that persons interested in the costs have no vested right in the criminal remedy for their collection, or in the imposition of the penalty for failing to pay them.

Besides, it appears that one of the reasons why a general pardon cannot exonerate the criminal from the payment of costs is that they go and belong to individuals, and not the public. Logically, then, a general pardon extends to all of the judgment that the public has an interest in, but not to that part in which individuals only are interested.

Upon reason, then, we think a general pardon exonerates from the payment of the fine proper, because that is a public concern, and for the same reason it takes away the criminal character of the judgment for the

costs—the imprisonment part—leaving the civil obligation still resting upon the delinquent to be enforced as other civil obligations. In this view we are supported by the case of *Ex parte Gregory*, 56 Miss. 164, in which the supreme court of Mississippi, by Judge Chalmers, said: "When the pardon is granted before conviction, no judgment for costs can be rendered against the party. When it is granted after conviction, and after rendition of judgment for costs, the pardon does not extinguish the civil liability for costs; because it is uniformly held, both in England and America, that the pardoning power does not extend to the remission, after judgment, of any pecuniary penalty which has inured to private persons or public officers, and hence that execution may be levied on the property of the party, notwithstanding the pardon. But there can be no right in the officers or other persons to hold the party in confinement, because this would amount substantially to imprisonment for debt. The imprisonment is part of the punishment, and is remitted by the pardon; but the judgment for the costs is a debt, which, while it cannot be extinguished by the governor, must be collected, like other judgments, after the term of imprisonment has expired, or been abrogated by executive clemency." That was a case of imprisonment in the county jail, and to pay costs.

It remains now to construe the language of the pardon, as granted above.

Since the remission is as to the payment of fifty dollars—the exact amount of the fine—it is evident that the language of the pardon, in that respect, is the same as if the fine had been in terms remitted. Again, the words, "and all the effects and consequences thereof," plainly have reference, not merely to the sum remitted, for there could be no effects and consequences of a something so passive, but to the judgment in the case, and

one of the effects and consequences of it is the imprisonment not only for the remitted fine, but also for the costs, and the petitioner was relieved from the criminal effect and consequence of the judgment. Upon the whole, this amounts to a general pardon.

We conclude, therefore, that the chancellor erred in refusing the relief asked for, and the petitioner will be discharged from custody.

POWELL *v.* DURDEN.

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Opinion delivered June 22, 1895,

FEES OF COUNTY OFFICERS—FUNDS PAYABLE.—Constitution of 1874, art. 16, sec. 10, and Sand. & H. Dig., sec. 1002, simply define the funds in which it may be lawful to pay taxes levied for county purposes, and have no relation whatever to funds turned into the county treasury by a county officer as a residue of his collections after reserving his salary.

CLERK'S FEES—NOT PAYABLE IN COUNTY WARRANTS.—A circuit clerk of a county who receives a salary to be reserved out of the fees of his office, the residue of which are to be paid to the county treasurer "for county purposes," is not required to accept county warrants in payment of such fees, as the county's interest does not determine the character of the funds to be collected, but rather the law providing for the fees of officers.

CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—Act February 20, 1893, fixing the salaries of the officers of Sebastian county, is not in violation of Const. 1874, art. 5, sec. 25, providing that in all cases where a general law can be made applicable no special law shall be enacted, as the legislature is the judge of the necessity or propriety of a special law as applicable to any particular subject.

Appeal from Sebastian Circuit Court, Greenwood District.

EDGAR E. BRYANT, Judge.

R. T. Powell, for appellant.

1. The act is constitutional. The legislature is the sole judge in determining when a general law can be made applicable. See 35 Ark. 73; 36 *id.* 172; 48 *id.* 384; 50 Mo. 415; Cooley, Const. Lim. secs. 128, 168.

2. Under the act, all fees, etc., collected by officers belong to and are for the benefit of the county, and are payable in county scrip. Sand. & H. Dig. sec. 1002.

Rowe & Rowe, for appellee.

The act is special legislation, and unconstitutional. Const. 1874, art. 5, sec. 25; 24 Wis. 484; 25 *id.* 339; 28 *id.* 541; 12 Stew. (N. J. Eq.) 126; 39 *id.* 391; 42 N. J. L. 435; 51 *id.* 412; 42 N. J. L. 486; 75 Mo. 340; 88 Penn. 258; 80 Ky. 608; 83 Ga. 270; 76 *id.* 826; 1 S. W. 307; 1 Atl. 739; 5 *id.* 215; 2 *id.* 423. An act which is applicable to but a single county or city is unconstitutional, as being special and local. 3 Am. & Eng. Enc. Law, note 2, p. 696, etc.

2. The act makes no change in the fees allowed officers, nor in the kind of funds in which they are payable.

BUNN, C. J. The appellant, R. T. Powell—being indebted to the appellee, J. P. Durden, circuit clerk and recorder of Sebastian county, on the following items of account, to-wit: (1) To recording release deed, $1.35; (2) to balance on D. J. Young's deed, $2.50; (3) to filing, docketing and issuing complaint in equity, $2.95; (4) to filing, docketing and issuing complaint in equity, $2.05; total, $7.95—tendered in payment thereof, on March 6, 1895, the amount in the county scrip of the Greenwood district of Sebastian county, and, on the same being refused, filed his petition for a writ of mandamus compelling appellee to receive said scrip in full payment of said account. (It appears, however, that appellee had offered to accept said scrip in payment of so much of said account as consisted of the county tax in

said items—that is, so much as is payable to the county under laws heretofore existing). Appellee demurred to the petition, and his demurrer was sustained by the Sebastian circuit court, and the writ was refused, and appellant excepted, and appealed to this court.

At its session in 1893, the general assembly enacted a law, especially applying to Sebastian county, whereby the county officers of said county, among them the circuit clerk, are to receive stated annual salaries for their services, instead of fees as heretofore, and as is provided in general laws for other counties in the state. So much of said special act as is necessary in the discussion of this case is as follows, to-wit: Section 1 provides that the circuit clerk shall receive a salary of $3,500, out of which he shall pay his deputies. Section 2 recites "that it shall be the duty of the Sheriff, collector of taxes, clerks of the circuit and county courts, and assessor of said county, to charge and collect the same fees and commissions as are now allowed them by law, and they shall each, on the first day of each regular term of the county court of the Fort Smith district and the Greenwood district of said county, file report in said court showing amount of fees and commissions collected by them respectively, in each of said districts, and make a settlement with said court, by paying all amounts in excess of the amount of salary due each one of them to that date, into the county treasury, and file the treasurer's receipt therefor as a voucher in said settlement; and in such settlement the said officers aforesaid shall be chargeable and liable for all fees and commissions that it was the duty of said officers to charge and collect, whether the same were collected or not, and that each of said districts shall pay its proportionate share of the salaries of such officers, such proportion to be based upon the receipts of said districts respectively." Section 3: "That, at each and every settlement made

by any officer as aforesaid, he shall pay over to the treasurer in kind the funds received by him in excess of his salary, and shall file his affidavit with said court that said settlement is true, just and correct, and that he has faithfully performed his duties as prescribed in this act." Section 6: "That all money paid into the treasury arising from fees and commissions in the Fort Smith district shall be for county purposes of said district, and all money paid into the treasury arising from fees and commissions in the Greenwood district shall be for county purposes of said district."

As to funds in which officers' fees are payable.

It is evident from the language of the act, that the officer is to charge for his services the same fees as provided by the pre-existing and general law, and he is to collect these charges or fees in the same funds as heretofore; that he is to keep a strict account of his charges and collections, and make report of the same to each term of the county court, and in each report he is allowed to take out of the funds thus coming into his hands as much as will settle his salary for the quarter, and give himself credit for the amount of his salary then due, and then is required to pay the residue over, if any, into the county treasury, and this residue is to be for *county purposes*.

This expression, "county purposes," seems to have given rise to this litigation. Somehow it seems to be associated with the language of the 10th section, article 16, of the constitution, and with the language of the statute, section 1002, Sandels & Hill's Digest, enacted in accordance with the constitutional provision.

It is sufficient to say here that the constitutional provision, as well as the statute, simply defines in what funds it may be lawful to pay taxes levied for county purposes, and those provisions have no relation whatever to the funds turned into the county treasury by the

county officer as a residue of his collections after reserving out his salary.

Clekr's fees not payable in county warrants.

Moreover, the funds collected by the county officers as fees, under the act in question, are primarily for the payment of his salary, and only secondarily to go into the county treasury. He, then, primarily is interested in those fees being collected in funds as required by existing laws, and by the act itself, and the county is only secondarily interested. The county's interest does not, then, determine the character of the funds to be collected by the clerk, but rather the law providing for the fees of the officer as heretofore.

Therefore, the court did not err in refusing the writ; and this discussion would properly end here, but in argument in support of his demurrer appellee contends that the special act for Sebastian county and the two districts therein is unconstitutional, for the reason that a general law providing for the pay of such officers has almost from time immemorial proved itself applicable to the subject, and that therefore the special act is in violation of the 25th section, article 5, of the constitution. To sustain this argument, appellee contends that the legislature, according to the doctrine of this court, has only a sound discretion to determine when a special law may be better adopted to the purpose in hand than a general law. This court has said something more than that. It has said that the legislature is the judge of the necessity or propriety of a special law, as applicable to any subject, rather than a general law. *Davis* v. *Gaines*, 48 Ark. 370. In that case it is announced that, the constitutional provision is really not prohibitory, but rather cautionary, to the legislature.

Validity of special legislation.

Again, it is held in *Humphry* v. *Sadler*, 40 Ark. 100, that "when the office itself is created by the constitution, but the compensation is left to the discretion of the legislature, it may be increased or diminished so

as to affect the incumbent. And it makes no difference whether the compensation be by fees or salary." The mere discretion of the legislature is not in determining when a general or special law is applicable, but, in a case like the act under consideration, in determining the amount of the pay of these officers and the manner of paying them; and this discretion may be abused so that the courts would interfere to prevent such abuses. For instance, the legislature cannot abolish or render useless a constitutional office, or even cripple it by a reduction of the salary of the incumbent, so that it cannot be sustained or properly maintained, or by attempting to do indirectly what it cannot do directly in reference thereto. *Reid* v. *Smoulter*, 18 Atl. (Penn.) 445; *King* v. *Hunter*, 65 N. C. 603; *State* v. *Brunst*, 26 Wis. 412; Cooley on Con. Lim. page 79, sec. 332, and notes; *People* v. *Dubois*, 23 Ill. 547.

Further than this the courts generally decline to interfere in such cases, except where special laws are in effect prohibited by constitutional provisions.

The judgment of the court below is therefore affirmed, not however because the special act is unconstitutional, but because the special act properly construed does not make it the duty of the circuit clerk, the appellee, to receive county scrip for the services and fees, for which it was tendered and refused by him.

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SPARKMAN *v.* ROBERTS.

Opinion delivered June 22, 1895.

HOMESTEAD OF DECEASED—RIGHTS OF SURVIVING CHILDREN.—One who marries a widow and occupies the homestead of her deceased husband, to the exclusion of the rights of the minor children, will be liable to such children for half its rental value, under Const.

1874, art. 9, sec. 6, providing that the children shall be entitled to half the rents and profits, and Sandels & Hill's Digest, sec. 5917, providing that when a joint tenant has taken rents and profits in greater proportion than his interest he shall account to his co-tenant.

ESTATES OF MINORS—MOTHER'S CUSTODY.—Though a mother is the natural guardian of her children when their father is dead, she is not entitled to the care and custody of their estate, unless derived from her, until she gives bond and qualifies as their guardian.

MINOR'S HOMESTEAD—IMPROVEMENT BY OCCUPANT—RENTS.—Minors are not liable for permanent and valuable improvements placed by an occupant on their homestead; but, in the absence of a contract, the occupant should be allowed a reasonable compensation for necessary repairs, and charged with such rents for the premises as they would have yielded without the improvements.

Appeal from Randolph Circuit Court.

JOHN B. MCCALEB, Judge.

S. A. D. Eaton, for appellants.

1. The first instruction given for appellee was too general.

2. The second was error, for there was no evidence to support it. 24 Ark. 251; 29 *id.* 151; 36 *id.* 641; 50 *id.* 506; 2 Thompson on Trials, 2321.

3. It is error to give contradictory instructions, and the second for appellee and the seventh for appellants are wholly contradictory. 26 S. W. 591.

4. Appellee was entitled to nothing for board, clothing and tuition of the children, as they did work enough to pay for them. 16 S. W. 358. Again, there was no evidence as to the value of the board, clothing, etc.

5. Payment to the mother of the rents and profits due the children was not a payment, as she was not entitled to receive it. She was not their guardian, and, being married, could not be. Mansf. Dig. sec. 3486.

6. Appellee was not entitled to offset betterments against rents due the minors. 47 Ark. 445; 55 *id.* 369; 16 Iowa, 444; 48 Ark. 186; 3 Pom. Eq. 1241.

BATTLE, J. In 1883, D. H. Sparkman died intestate, seized and possessed of certain land, which he used and occupied as his homestead. He left surviving him a widow and five minor children, three of whom are appellants in this case. In 1885 the widow intermarried with J. C. Roberts, who immediately took possession of the homestead, and used and occupied it until he secured a divorce from his wife in 1892, a period of about seven years. In that time he made many valuable improvements on the land, and the children remained with and labored for him; the services performed by them being worth as much as their board, clothing and tuition. He may have collected rents for a part of the homestead, and paid them to his wife; but the principal part, it appears, he occupied and used, and enjoyed all the benefits arising from the same. Three of the children seek by this action to hold him liable for their portion of the rental value of the place, and he seeks, among other things, to set-off their demands with the value of his improvements.

The questions for us to determine are, what is his liability to the children for the use and occupation of the homestead, and whether the children are liable for the improvements, or any part of them.

Rights of children in deceased parent's homestead.

The constitution of this state provides: "If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half of 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 to go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death

of the widow all of said homestead shall be vested in the minor children of the testator or intestate."

Under the constitution the widow and minor children of a deceased husband and father are seized and possessed of an entire estate or interest in the lands which constitute the homestead of the deceased. This interest is set apart from the husband's estate in such lands for their joint benefit. It is like unto a joint tenancy, with right of survivorship. No partition can be made of it. The widow is the owner of the one undivided half of it for her natural life, or until she shall abandon it, and the minor children are entitled to the other half till each of them arrives at the age of twenty-one, each child's right ceasing as he or she reaches that age, and going to the younger children, until all of them become twenty-one years old, when the entire homestead vests in the widow. If she dies before they reach that age, then the whole of it vests in them, if they survive her.

On account of the entire and indivisible interest of the widow and minor children in the homestead, they are entitled to the joint use and occupation of the common property. But the constitution does not require them to reside on the land as a condition to their right to hold it. They may rent it for their support or education. In that event the widow is entitled to one half of the rents, and the minor children to the remainder. But a more difficult question arises when the widow, or husband she may marry, occupies the homestead, and derives the whole or principal benefit therefrom.

At common law, before the enactment of statute 4 & 5 Anne, each co-tenant had the right to "enter upon and hold exclusive possession of the common property, and to make such profits as he can by proper cultivation, or by other usual means of acquiring benefit therefrom, and to retain the whole of such benefits,

provided that in having such possession, and in making such profits, he has not been guilty of an ouster of his co-tenant, nor hindered the latter from entering upon the premises and enjoying them as he had a right to do." Freeman on Co-tenancy and Partition, sec. 258. But this rule was changed by section 5917 of Sandels & Hill's Digest, which apportions the benefits of the common estate more equitably among the co-tenants. It provides: "When one or more joint tenants, tenants in common, or co-parceners in any real estate, or any interest therein, shall take, use or have the profits and benefits thereof in greater proportion than his interest therein, such person, or his executor or administrator, shall account therefor to his or their co-tenant jointly or severally." Under it the liability of a tenant to his co-tenant is extended to all profits and benefits derived by him from the common property in excess of his proportionate share. He is liable as well for the benfits derived from the property by his own use and occupation of it as for the rents received for it from others.

At the time of the adoption of the constitution, the old common law rule had been abrogated, and the statutes had made joint tenants, tenants in common, and co-parceners accountable to their co-tenants for any rents, profits, and benefits derived from the common property in excess of their share. Presumably with a knowledge of this rule, the constitutional convention created a relation of tenancy between the widow and children as to the homestead, very much like that of joint tenants. Having done so with this knowledge, and undertaken to define their respective rights, it would have been natural, if they had intended that the same rule should not govern the relation of tenants established by the constitution, for them to have specified wherein it should not apply. They have not done

so, unless it was by saying that the widow should have one half of the rents and profits, and the minor children the other half. Hence there is strong reason to infer that they intended that each one should be accountable to the others for any rents, profits and benefits he or she may derive from the homestead in excess of his or her share, the widow being entitled to one-half and the children to the remainder. A careful consideration of the constitution will show that such is its intention.

In giving to the minor children the right to share the homestead equally with the widow, the constitution at the same time vested them with the right to one-half of the rents and profits. As to the use, occupancy, rents and profits, they are placed upon an equality with the widow. The conferring upon them these rights to the exclusion of the adult children, and exempting them from the duty to remain upon the homestead, is a recognition of their probable need of the assistance which can be derived therefrom for their support or education, and of their inability, without it, to make adequate provision for themselves; and is an evidence of the intention of the constitution to supply this want by the homestead, so far as it will extend. They were doubtless exempted from the duty to occupy the homestead for the purpose of maintaining their right to the same, because it was manifest, from their age, inexperience, incapacity, and lack of property, they might not make it profitable or desirable to do so. In both events, provisions are made for them. In the latter it was intended that they should have one-half of the rents or profits derived therefrom, if occupied by another. In every event they are to have the benefit of the homestead during their minority. To permit the widow, or any one in her right, to use and occupy it without liability to them for one-half of the benefits thereby enjoyed would defeat the object, in

part, of the constitution in making this provision for them. A construction that will give her the right to do so is contrary to the spirit and intention of the constitution. Hence we conclude that the widow, if she occupy and use it, is liable to the minor children for one-half of its rental value, that being the benefit derived.

Right of mother to custody of child's estate.

The payment of rents to the mother for the children by Roberts, the homestead being derived from their father, was unauthorized. It is true that the mother is the natural guardian of her children when the father is dead; but she is not entitled to the care and custody of their estate, when it is not derived from her, until she gives bond and qualifies as other guardians. Sandels & Hill's Digest, sec. 3568.

Liability of minor for improvement of homestead.

Minors are not liable for permanent and valuable improvements placed on their homestead. They cannot be improved out of their homesteads; nor can the occupants be lawfully charged an increased rent on account of their improvements. In the absence of a contract, the occupants should be allowed a reasonable compensation for necessary repairs, and charged with such rents for the premises as they would have yielded without the improvements. *McCloy* v. *Arnett*, 47 Ark. 456; *Reynolds* v. *Reynolds*, 55 Ark. 369.

Reversed and remanded for a new trial. Bunn, C. J., and Hughes, J., being absent, did not participate in the consideration of this case.

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NORMAN v. FIFE.

Opinion delivered June 22, 1895.

JURISDICTION—APPEAL FROM JUSTICE.—The circuit court cannot, upon appeal from a justice of the peace, render judgment for an amount exceeding the jurisdiction of the justice.

DISSOLUTION OF ATTACHMENT—FORM OF JUDGMENT.—Where attached property has been sold under a lawful order of court, and the attachment is afterwards dissolved, the court should not order the property returned, but should assess damages sufficient to cover the value of the property at the time it was seized, with interest thereon to the day of trial.

WRONGFUL ATTACHMENT—MEASURE OF DAMAGES for the taking and selling of property under attachment wrongfully issued is the value of such property at the time of its seizure, with interest at the legal rate to the day of trial. From this amount there should be deducted any portion of the proceeds of the attached property which had been returned to the owner, and also the amount adjudged in favor of plaintiff; and if the damages assessed are greater than the judgment rendered in favor of plaintiff, a judgment for the residue should be rendered in favor of defendant.

APPEAL—MOTION FOR NEW TRIAL IS UNNECESSARY where error is apparent from the face of the record.

Appeal from Union Circuit Court in Chancery.

CHARLES W. SMITH, Judge.

STATEMENT BY THE COURT.

This was an action brought before a justice of the peace by John Norman against Samuel L. Fife. An attachment was issued and levied upon certain personal property belonging to Fife. The justice gave judgment against Fife for $121.45, the amount claimed by Norman, and sustained the attachment. The property attached was sold under order of the court. In the meantime, Fife had taken an appeal to the circuit court. In that court judgment was again rendered against Fife for $121.45, for the debt due Norman, but the court

found that the evidence was not sufficient to sustain the attachment, and the same was dismissed. The court assessed the damages in the attachment at $40, and also gave judgment against John Norman and James Norman, his surety on the attachment bond, for the return of the attached property or its value $311.25. An appeal was taken by Norman.

Jesse B. Moore for appellants.

1. The court erred in its judgment. Norman and his surety stipulated to pay damages *only*, and it was error to render a judgment for the property or its value. Sand. & H. Dig., sec. 328; *Ib.* secs. 343, 371; 38 Ark. 528; 44 *id.* 202. In *Atkins* v. *Swope*, 38 Ark. 528, there never had been a sale of the property; but in this case the property had been sold, and was no longer *in custodia legis*, and the power of the court to deal with it had ceased. Sand. & H. Dig. sec. 1068.

2. The judgment is beyond the jurisdiction of the justice, and is void.

H. P. Smead and *B. W. Johnson* for appellee.

1. The court had the power to compel the return of the property on account of its value. 37 Ark. 537.

2. No motion for a new trial was filed in this case.

Jurisdiction on appeal from a justice.

RIDDICK, J., (after stating the facts.) The only question here relates to the validity of the judgment rendered by the circuit court upon the attachment bond. The court gave judgment not only for forty dollars damages, but also for the return of the property or its value—$311.25. This amount exceeded the jurisdiction of the justice of the peace. In *Whitesides* v. *Kershaw*, 44 Ark. 377, it was said that on appeal the jurisdiction is derived from and dependent upon the appeal; and the circuit court can render no judgment that the justice could not have rendered. The judgment of the circuit

court for $311.25 was beyond the jurisdiction of the justice, and therefore void.

Form of judgment on dissolution of attachment.

Neither was it proper for the court to render judgment for damages, and also for a return of the property or its value. Where the attached property has been sold under a lawful order of the court, and the attachment is afterwards dissolved, the court should not order it returned, but should assess damages sufficient to cover the value of the property at the time it was seized, and interest thereon to the day of trial.

Measure of damages for wrongful attachment.

When property is taken and sold under an attachment wrongfully issued, the measure of damages is the value of the property at the time it was seized under the writ, with interest at six per cent. to the date of the trial. Sutherland on Dam. sec. 512; *Porter* v. *Knight*, 63 Iowa, 365; *Blass* v. *Lee*, 55 Ark. 329; *Trentman* v. *Wiley*, 85 Ind. 33. From the amount of damages thus awarded, there should in this case be deducted any portion of the proceeds of the attached property that have been returned to the owner, and also the amount adjudged in favor of plaintiff, if the damages assessed are greater than the judgment in favor of plaintiff, and a judgment rendered in favor of defendant for the balance.

Necessity of motion for new trial.

As the error in this case is apparent from the face of the record, no motion for a new trial was necessary. *Smith* v. *Hollis*, 46 Ark. 21; *Steck* v. *Mahar*, 26 Ark. 536; *Ward* v. *Carlton*, 26 Ark. 662.

The judgment of the circuit court is reversed, and the cause remanded, with an order to assess the damages in the attachment proceeding in accordance with the rules above set forth.

If the damages claimed by defendant on account of the issuance of the attachment exceed the sum of three hundred dollars, his remedy will be by an original suit on the attachment bond in the circuit court.

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COOPER v. FREEMAN LUMBER COMPANY.

Opinion delivered June 29, 1895.

TAX SALE—EXCESSIVE COSTS.—A tax sale of land is void which includes as part of the costs of sale a clerk's fee of twenty-five cents for a certificate of purchase and of ten cents for transferring the tract on the books to the name of the purchaser.

CONSTITUTIONAL LAW—TAX SALE—MERITORIOUS DEFENSE.—That a tax sale of land was for an excessive amount, however small the excess may have been, constitutes a "meritorious defense," within former decisions; and the act of March 31, 1883, (Sandels & Hill's Digest, section 6625) in so far as it attempts to cut off such defenses, is invalid. (Battle, J., and Boone, Sp. J., dissenting.)

RECORD OF TAX SALE—CONTRADICTING.—The record of sales of delinquent lands which the clerk is required by section 6612, Sandels & Hill's Digest to make after the sale, and not the record of the notice of sale which he is required by section 6606, *ib.*, to make *before* the sale, is the evidence which must control in determining the amount and items for which each tract of land was sold; and this record, being required by law to be kept by the clerk, cannot be contracted by parol evidence.

Appeal from Ouachita Circuit Court in Chancery.

CHARLES W. SMITH, Judge.

STATEMENT BY THE COURT.

On the 12th of August, 1892, the appellant brought this suit in equity against the appellees to set aside a tax sale and cancel a tax deed of appellees to eight tracts of land, sold in the year 1887 for the taxes of 1886. The complaint alleges that each of said tracts of land was sold by the tax collector for certain amounts, as costs, not due thereon—*i. e.*, for twenty-five cents due the clerk for a certificate of purchase, and ten cents each for transferring each tract on the books to the name of the purchaser—and contends that the record of the sale shows that this was done. The answer denies

that these tracts were sold unlawfully, and avers that these amounts were not included in the amounts for which each tract was sold. The answer also sets up the statute of limitation.

The court found against the plea of limitation. But parol testimony was admitted by the court to show that the items named were not included in the amounts for which these lands were sold; allowing the clerk, who kept the record of the sale, and the sheriff, who, as collector, made the sale, to testify that they were not, over the objection of the appellant, to which he at the time excepted on the ground of incompetency.

The appellant contends that the record of the sale required by the statute to be kept by the clerk, to be made by him *after* the sale, is *the* evidence which must control in determining the amounts and items for which each tract was sold, and that this record, being required by law to be kept by the clerk, cannot be contradicted by parol evidence.

H. King White, *W. T. Wooldridge*, and *Rector & Collins*, for appellant.

1. The tax sale was void, because the amount for which the lands were sold included the twenty-five cents for certificate of purchase. 56 Ark. 93.

2. Parol testimony was not admissible to contradict the record required to be kept by law, or supply that which is required to appear of record. 34 Fed. 706; 51 Ark. 42; 55 *id.* 218; Wade on Notice, sec. 1120; 4 McLean, 138; 20 Vt. 49; 32 Wis. 394; 68 Me. 316; 37 Miss. 573; 8 Ohio, 114; Desty, Tax. 1894; Cooley, Tax. (2 ed.) 480.

3. Appellant is not barred. Meritorious defenses, fundamental and jurisdictional in their character, are not cut off by the statute. 46 Ark. 109; 49 *id.* 266; 55

Ark. 196; 13 Mich. 330; 11 Minn. 480; Cooley, Const. Lim. 449, note; 21 Ark. 9; 32 *id.* 353; 55 Ark. 550-4.

Gaughan & Sifford and *Wells & Williamson*, for appellee.

1. Parol evidence was admissible to show that the lands were sold only for the legal taxes, penalty and costs. If a record shows more than the law requires it to show, it is mere surplusage, and parol evidence is admissible to explain and show it to be surplusage. A tax deed or certificate of purchase is only *prima facie* evidence, capable of being disproved by competent evidence. 32 Ark. 131. The record made by the clerk *after the sale* is not in fact a record of what amount of taxes, penalty and costs the land sold for, and does not purport to be and is not required to be so by law. Mansf. Dig. sec. 5769. It is only the record of the amount *due* after sale, and it correctly shows the twenty-five cents and ten cents as *due* in the column of costs. *Ib.* secs. 5773, 5277, 5779.

2. The appellant is barred. Mansf. Dig. sec. 5791. Citing and reviewing: 32 Ark. 131; 46 *id.* 96; 55 *id* 192; 20 *id.* 508; *Ib.* 542; 21 *id.* 370; 53 *id.* 404.

HUGHES, J. (after stating the facts). Section 5763 of Mansfield's Digest (now section 6606 of Sandels & Hill's Digest), provides, after prescribing the notice to be attached to the delinquent list of lands to be advertised for sale, that "the clerk of the county court shall record said list and notice in a book to be kept by him for the purpose, and shall certify at the foot of said record, stating in what newspaper said list was published," etc. This section further requires that said list shall show the taxes, penalty and costs due upon each tract, and that it shall be stated in said notice that each tract, or so much thereof as will be necessary to

pay the same, will be sold for the taxes, penalty and costs due thereon, unless the same are paid before the day of sale.

Section 5769 of Mansfield's Digest (now section 6612 of Sandels & Hill's Digest) provides that "the clerk of the county court shall attend all such sales of delinquent lands, * * * made by the collector of the county, and shall make a record thereof in a substantial book, therein describing the several tracts of land * * * as the same shall be described in the advertisement aforesaid, stating what part of each tract of land * * * was sold, the amount of taxes, penalty and cost due thereon and to whom sold; and he shall record in a separate book, to be kept for that purpose, each tract of land * * sold to the state, together with the taxes, penalty and cost due thereon. Immediately after such sale, the clerk of the county court shall make out and certify to the auditor a copy of each of said sale lists as recorded in said book."

Tax sale void for excessive costs.

It is contended for the appellees that the record of the list and notice required to be kept by the section first named is the record of the sale to which we must look to determine the amount of the taxes, penalty and cost for which each tract of land was sold. But evidently this is not the case, as the record is required to be made *before* the sale, and therefore cannot be a record of what was done *at* the sale. It is only the record of the delinquent list, the notice of sale and the amount of taxes, penalty and cost, for which the collector proposes to sell each tract, unless the same are paid before the day of sale. It follows that the sales of these tracts were void, under the decision in *Goodrum* v. *Ayers*, 56 Ark. 93, where it is held that a sale for twenty-five cents too much was void. We are constrained by the record to find that these items of twenty-five cents and

ten cents were included in the amounts for which each of these tracts was sold.

Constitutionality of act cutting off meritorious defenses to tax title.

Does the act of March 31, 1883 (Sandels & Hill's Digest, sec. 6625), cut off this defense. The section is as follows: "Section 6625. In all controversies and suits involving title to real property, claimed and held under and by virtue of a deed executed substantially as aforesaid by the clerk of the county court, the party claiming title adverse to that conveyed by such deed shall be required to prove, in order to defeat the said title, either that the said real property was not subject to taxation for the year (or years) named in the deed, or that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this act, and that such redemption was had or made for the use and benefit of persons having the right of redemption, under the laws of this state; or that there had been an entire omission to list or assess the property, or to levy the taxes, or to give notice of the sale, or to sell the property. But no person shall be permitted to question the title acquired by a deed of the clerk of the county court, without first showing that he, or the person under whom he claims title to the property, had title thereto at the time of the sale, or that title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title as aforesaid. *Provided*, In any case where a person had paid his taxes, and, through mistake (or otherwise) by the collector, the land upon which the taxes were paid was afterwards sold, the deed of the clerk of the county court shall not convey the title. *Provided, further*, In all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling said lands or in the purchaser, to

defeat the same, and, if fraud is so established, such sale and title shall be void."

Under the decisions of this court in *Cairo & Fulton R. Co.* v. *Parks*, 32 Ark. 131, and in *Radcliffe* v. *Scruggs*, 46 Ark. 96, a substantial "meritorious defense" against a claimant under a purchase at tax sale cannot be denied or cut off by the legislature.

In *Radcliffe* v. *Scruggs*, the court, by Mr. Justice Smith, said: "And by 'meritorious defense' we mean any act of omission of the revenue officers in violation of law and prejudicial to his (the former owner's) rights or interests, as well as the jurisdictional and fundamental defects which affect the power to levy the tax or sell for the non-payment. * * * * * Our legislature and previous decisions have always distinguished class of defects (mere irregularities or informalities) which have no tendency to injuriously affect the tax payer, and substantial defects, such as go to the jurisdiction of the levying court to levy a particular tax or of the power of the officer to sell for non-payment or the omission of any legal duty, which is calculated to prejudice the land owner."

Can it be doubted—in fact, is it not very clear—that to sell a land owner's land for an amount not due upon it, and never levied upon it, and which, if levied, was unlawfully levied, has a direct tendency to injuriously affect his interest, and the power of the officer to sell for non-payment? It is obvious that the defenses against the tax sales in this case are "meritorious," as that term is defined in *Radcliffe* v. *Scruggs*, and by the weight of authority, and that the legislature cannot deprive the property owner of such defense without, in the language of Mr. Justice Smith, "transcending the boundaries of its power." This is substantially the language of Judge Caldwell, in *Martin* v. *Barbour*, 34 Fed. Reporter, 713, in which the court was considering

one of the provisions of this same statute, but not the exact question in this case.

The smallness of the amount of the excess over the amount due does not in a tax sale affect the question, as the maxim, "*De minimis non curat lex*," does not apply to tax sales.

The provisions of the law made for the protection and benefit of the tax payer are mandatory.

Though the act copied herein was passed since *Cairo & Fulton R. Co.* v. *Parks* and *Radcliffe* v. *Scruggs* were decided, it in no wise affects or unsettles the principle settled in these cases—that it is beyond the power of the legislature to take away from the property owner a "meritorious defense" against a substantially defective tax sale, where the defect goes to the power of the court to levy the tax, or of the officer to sell for non-payment.

As said by Judge Cockrill in *Townsend* v. *Martin*, 55 Ark. 192, after reviewing our decisions upon the principles involved in this discussion, the doctrine of "*stare decisis*" should apply in this case: "It is more important (to use his language) that such questions should be finally settled than how settled."

Conclusiveness of record of tax sale.

It was error to permit the clerk and tax collector to give oral testimony to contradict or vary the record of the sale made by the clerk after the sale. It could not be contradicted by parol testimony, being a record required by law to be kept by the clerk, and the evidence of what was done at the tax sale.

Decree reversed and cause remanded, with directions to enter decree quieting appellant's title as against these tax purchasers, with reservation of lien to tax purchasers for taxes, penalty and costs paid.

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

BATTLE, J. (dissenting). Section 6625 of Sandels & Hill's Digest is, in my opinion, a valid statute. To support an opinion to the contrary, the court cites *Cairo & Fulton Railroad Co.* v. *Parks*, 32 Ark. 131; *Radcliffe* v. *Scruggs*, 46 Ark. 96; and *Townsend* v. *Martin*, 55 Ark. 192—holding that these cases establish the principle "that it is beyond the power of the legislature to take away from the property owner a 'meritorious defense' against a substantially defective tax sale, where the defect goes to the power of the court to levy the tax, or of the officer to sell for non-payment."

As to the doctrine maintained by the decisions of this court, the opinion in this case is clearly erroneous. The rule alleged to be settled in the cases cited cannot be deduced from them in any legitimate manner.

In *Branch* v. *Mitchell*, 24 Ark. 439, in an opinion prepared by Albert Pike, Esq., it is said: "The language of the courts is always to be understood by applying it to the facts of the case decided. That which seems to be general and of universal application has, in reality, often a limited application; and so the words of truth and the utterances of the law, undeniable in the case wherein they are spoken, become the parents of error and false doctrine. That judges have often been too incautious in their language is true."

In *Marbury* v. *Madison*, 1 Cranch, 137, 174, Chief Justice Marshall said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. *If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented.* The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case

decided, but their possible bearing on all other cases is seldom completely investigated."

Courts are not vested with legislative powers. In the adjudication of the rights of parties they can declare the law only as applicable to the state of facts before them. Their duty is to determine the rights of the parties in the case under consideration. To do that, they ascertain the facts from the evidence adduced, and then the law which controls the rights of the parties under the facts so found, and render judgment accordingly. When they have done this, their whole duty in the case is discharged. What they say and do beyond this is extra judicial. They are not supposed to make laws, but to apply that already in force to the facts upon which they render judgment.

The expressions of appellate courts with reference to the validity of statutes should be read in the light of the statutes passed upon. Judges are not supposed to be gifted with the power to foresee all laws which future legislatures might enact upon any particular subject, and formulate a rule which would be a sufficient guide for the determination of their constitutionality. Their duty is to decide the questions presented in the case before them, and no others. What they say on other questions is without authority, and, for the reasons given in *Marbury* v. *Madison*, *supra*, may be respected, but is not and should not be controlling.

Guided by the rule we have stated, do the cases cited in the opinion of the court contain any authoritative declaration as to the constitutionality of statutes like section 6625? In *Cairo & Fulton Railroad Co.* v. *Parks*, the statute considered was as follows: "At any time after the lapse of two years from the time of sale of any tract or lot of land for taxes, if the same shall remain unredeemed, the county clerk, or any of his successors in office, on the production of the certificate of purchase,

shall execute and deliver to the purchaser, his heirs or assigns, a deed of conveyance for the tract or lot described in such certificate. In case the certificate of purchase has been assigned, the county clerk shall briefly recite that fact in the deed. The deed so made by the county clerk shall be acknowledged and recorded in the same manner that other deeds and conveyances of real estate are required to be acknowledged and recorded by the laws of this state, and shall vest in the grantee, his heirs and assigns, the title to the real estate therein described, and shall be received in all courts and places, where the title to the real estate thereby conveyed is involved, as *conclusive evidence that each and every act and thing required to be done by the provisions of this chapter had been complied with, and the party offering such deed in evidence shall not be required to produce the assessment, appraisement, notice of sale, nor any other matter or thing as evidence to sustain such conveyance and the title thereby acquired.* Provided, however, that the party controverting such deed and the title thereby conveyed, may, for the purpose of invalidating or defeating the same, show either one of the following facts only: First. That the land conveyed by such deed was not subject to taxation at the time of the assessment thereof, under which assessment such sale was made. Second. That the taxes due thereon had been paid according to law before the sale. Third. That such land had been duly redeemed according to law before the execution of such deed. Fourth. That such land was the property of a *feme covert*, an insane person, a minor, or a person in confinement, at the time the land was sold and the deed executed." Acts 1871, p. 107, sec. 125. The court held that so much of this statute was void as made the tax deed *conclusive* evidence, because, if valid, it would deprive the citizen of the right to protect his property by

showing that it had been illegally taken from him, and would deny to him the protection of the law. To avoid the force of this objection, the statute presented for consideration in this case was obviously enacted. It provides: "In all controversies and suits involving title to real property, claimed and held under and by virtue of a deed executed substantially as aforesaid by the clerk of the county court, the party claiming adverse to that conveyed by such deed *shall be required to prove*, in order to defeat the said title, either that the said real property was not subject to taxation for the year (or years) named in the deed, or that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this act, and that such redemption was had or made for the use and benefit of persons having the right of redemption, under the laws of this state; *or that there had been an entire omission to list or assess the property, or to levy the taxes, or to give notice of the sale, or to sell the property.*" Sand. & H. Dig. sec. 6625. In *Cairo & Fulton Railroad Co.* v. *Parks*, no statute like the last mentioned was considered. The questions presented in the two cases are different; and that presented in this was not considered or decided in the other case.

In *Radcliffe* v. *Scruggs*, *sup.* the statute considered was as follows: "All actions to test the validity of any proceeding in the appraisement, assessment or levying of taxes upon any land or lot, or part thereof, and all proceedings whereby is sought to be shown any irregularity of any officer, or defect or neglect thereof, having any duty to perform under the provisions of this chapter, in the assessment, appraisement, levying of taxes, or in the sale of land or lots delinquent for taxes, or proceedings whereby it is sought to avoid any sale under the provisions of this chapter, for irregularity or neglect of any kind, by any officer having any duty or thing to

perform under the provisions of this chapter, shall be commenced within two years from date of sale, and not afterwards." Act April 8, 1869, sec. 138. This statute did not undertake to make any requirement of the statutes directory or immaterial, or to limit the defense against a tax sale, but simply to prescribe the time in which certain actions should be brought. It is unlike the one under consideration. The court held that its effect, if the actions were not brought within the prescribed time, was to cut off all except meritorious defenses.

Townsend v. *Martin*, *supra*, was an action of ejectment based on a commissioner's deed to land forfeited to the state on account of the non-payment of taxes. It was held that section 6625 of Sandels & Hill's Digest, "which provides in substance that one who attacks a tax title claimed under a county clerk's deed shall not be allowed to prove any defect in the tax proceeding not mentioned in that section, is limited in its operation to deeds made by the clerk, and does not embrace deeds made by the commissioner of state lands." As it does not relate to commissioner's deeds, no question as to its constitutionality arose in the case, and what was said upon that subject was clearly uncalled for and extrajudicial. A better illustration of an *obiter dictum* could hardly be found. I so considered it at the time the opinion in the case was delivered, and for that reason filed no dissent.

After this review of cases, I think I can truthfully say that this court has never, by any decision binding upon it, held section 6625, or any other statute to the same effect, to be void. Is it constitutional?

Four things are essential to the exercise of the taxing power. They are, first, the listing and assessing of the property; second, the levying of the tax upon the property, according to its value, a rate not exceeding

the limits fixed by the constitution; third, a power or authority conferred upon the collector to sell the property for the payment of the taxes levied upon it; and, fourth, the sale of the property by the collector under the power. The listing is necessary in order to describe and identify the property; the assessing, in order to ascertain its value; the levy, in order to fix the proportion or rate of the tax; the power or authority, in order to authorize some person to receive the taxes and to sell in default of payment; and the sale, in order to contract the property to one who will pay the taxes due upon it. As said in *McCready* v. *Sexton*, 29 Iowa, 356: "The legislature may prescribe the time or manner in which these essential and jurisdictional acts shall be done, but it cannot, either constitutionally or in the nature of things, provide for passing the title to the property for the non-payment of taxes without them. As to the time or manner in which they shall be done, the discretion of the legislature is absolute and supreme, and cannot be judicially controlled or interfered with. Having the right to prescribe the manner, it may also rightfully provide that a failure to comply with its directions as to the manner shall not defeat the end; or that no person shall question the legality of the manner. * * * In other words, the legislature, being supreme, may prescribe the time and manner of doing the act, and may make that, or any other * * * manner which the persons doing it may adopt, legal and sufficient." *Allen* v. *Armstrong*, 16 Iowa, 508; *Parker* v. *Sexton*, 29 Iowa, 421; *Smith* v. *Cleveland*, 17 Wis. 563; *People* v. *Seymour*, 16 Cal. 332; *Gwynne* v. *Neiswanger*, 18 Ohio, 400; *Callanan* v. *Hurley*, 93 U. S. 387; *DeTreville* v. *Smalls*, 98 U. S. 517; *Keeley* v. *Sanders*, 99 U. S. 441; *Sherry* v. *McKinley*, *id.* 497; *Williams* v. *Supervisors of Albany*, 122 U. S. 154;

Thompson v. *Brackenridge*, 14 S. & R. 346; *Virden* v. *Bowers*, 55 Miss. 1, 18; *Abbott* v. *Lindenbower*, 42 Mo. 163; *Hurley* v. *Woodruff*, 30 Iowa, 260; *Powers* v. *Fuller*, *id.* 476; *Bulkley* v. *Callanan*, 32 Iowa, 461; *Huey* v. *Van Wie*, 23 Wis. 618.

The opinion of the court in this case as to the validity of section 6625 is based upon the assumption that it is beyond the power of the legislature to take from the owner of property a "meritorious defense" against a defective tax sale. But this statute does not deprive the owner of a meritorious defense, when it denies to him the right to set up defects or irregularities as a defense against a tax sale. Having the right to prescribe the manner in which acts essential to the exercise of the taxing power shall be done, the legislature had the right to make any manner adopted by the officers legal and sufficient. It did so, to some extent, by the enactment of the statute before us. After the execution of the tax deed in substantial compliance with the law, all omissions to follow the manner prescribed by the statute became immaterial—the statute prescribing the manner became directory. Hence the legislature did not take from the owner of the property sold any meritorious defense he had by reason of the noncompliance with the statutes prescribing the manner of the tax proceedings; for he had none after the execution of the tax deed.

The statute before us made a listing and assessing, the levy of taxes, a notice of the sale, and a sale necessary to vest a valid tax title. The power to receive taxes and sell was necessarily implied, for there could be no sale without it. Requiring these essential acts to be done in order to vest a valid title, the statute, there being no objection to it in other respects, is constitutional.

In this case, it seems, there were a listing and assessing, a levy of taxes, the power to sell, the taxes

being unpaid, a notice of sale, and a sale. The only alleged defect is, the land was sold for thirty-five cents more costs than was due on it. Under the statute the tax deed conveyed a good title to the land. The former owner was entitled to the thirty-five cents for excessive costs collected.

The decree of the circuit court should, in my opinion, be affirmed.

T. W. M. Boone, Special Judge, concurs with me in this opinion.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY *v.* HOLTON-WARREN LUMBER COMPANY.

Opinion delivered June 29, 1895.

TAX SALE—BILL TO ANNUL CONFIRMATION.—A petition to set aside a decree of confirmation of a tax-title alleged that the notice of the intention to apply for confirmation failed to state under what authority the lands were sold, and the nature of the title by which they were held; that six months had not elapsed between the last publication of the notice and the first day of the term of court at which the title was confirmed; and that plaintiffs had a meritorious defense, in that the delinquent list, on which the sale was based, was not published for two weeks before the sale, and the collector sold the land for a greater sum than was legally due. The petition did not make the notice in the suit for confirmation an exhibit. *Held*, that the petition was sufficient on demurrer.

Appeal from Benton Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

E. P. Watson, *E. D. Kenna* and *B. R. Davidson* for appellant.

It was error to sustain the demurrer because:

1. The notice failed to show by what authority the lands were sold. Mansf. Dig. 577.

2. It failed to state the nature of the title by which the lands were held. *Ib.* sec. 577.

3. The notice was not sworn to by any *publisher* or *proprietor* of any newspaper. *Ib.* sec. 578. The affidavit of an *editor* is not sufficient. 14 Ark. 408; 11 *id.* 120; 25 *id.* 364.

4. Six months had not elapsed from the last day of publication until the first day of court. *Ib.* sec. 577. This is fatal. 140 U. S. 634; 27 Ark. 353; 56 *Id.* 419.

5. The dates of publication were not given. Act April 14, 1891, sec. 5, p. 277.

6. The affidavit was not made before a justice of the peace. Mansf. Dig. sec. 578.

7. A good and meritorious defense was shown. 140 U. S. 635, 643; 55 Ark. 218; *Ib.* 30; *Ib.* 192; *Ib.* 549; 33 *id.* 748; 53 *id.* 204; 56 *id.* 95; 46 *id.* 96; 50 *id.* 11; 22 *id.* 118; 50 *id.* 458; 56 *id.* 544.

WOOD, J. This is a suit to annul a decree of confirmation of the Benton chancery court. The bill, after setting out the tax title which was confirmed, alleges, *inter alia*, "that said decree is null and void, and obtained without legal notice of the intention to make application for said confirmation decree at said term of court, and is a fraud on this plaintiff's rights;" "that the notice given by the defendant that application would be made at the spring term, 1891, for said decree failed to state, in the same, by what authority and under what authority said tracts of land were sold;" "that said notice failed to state the nature of the title by which said tracts were held;" "that six months had not elapsed from the last publication of said notice until the first day of the spring term, 1891, of this court," etc. The bill further alleges that the plaintiffs each have a good, valid, and meritorious defense to the petition for confirmation of the tax title, and then proceeds to set out several, and, among others, "that the said delinquent

list for said year was not published for two weeks next before the day of sale;" "because the collector sold said tract of land for a greater sum than was due on it for taxes, penalty and costs," etc.

The bill, with sufficient formality, alleged facts which, if true, should have avoided the decree of confirmation. The demurrer admitted their truth, and therefore it should have been overruled. True, the bill does not refer to and make the notice in the suit for confirmation an exhibit, but it was not fatally defective on that account, as that was a matter of proof. And the court may have had a defect in this respect, if any existed, cured upon motion. *Henry* v. *Blackburn*, 32 Ark. 450; Newman, Pl. & Pr. 257; *Nordman* v. *Craighead*, 27 Ark. 369. Reversed, with directions to overrule the demurrer.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. KELLEY.

Opinion delivered June 29, 1895.

EVIDENCE—DECLARATIONS—RES GESTAE.—A statement made by a railroad brakeman a few minutes after a child was struck and injured by a train, in response to a question as to how the injury occurred, that he signaled to the engineer in time to stop the train before hitting the child, but that the engineer was looking the other way, and did not see him until too late, is a narration of past events, and not part of *res gestae*.

WITNESS—CROSS-EXAMINATION.—The extent to which the trial judge may allow a party to cross-examine a witness of the opposing side concerning collateral facts and matters not in issue is largely a matter of discretion.

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

This is an action for an injury to Benjamin F. Kelley, an infant, brought by S. H. Kelley, as his next friend.

The appellee, Benjamin F. Kelley, an infant three years of age, while standing upon a trestle on the railway of defendant, was struck by one of its trains, and injured. It was alleged that the injury was occasioned by the negligence of the employees of defendant having charge of the train in failing to keep a lookout. This was denied by defendant, and it alleged that the boy, Benjamin F. Kelley, came upon the trestle such a short distance in front of the engine, and so suddenly, that it was impossible to avoid striking him. At the time of the accident the engine was backing, with no cars attached.

A brakeman named McFadden was stationed on the tender to keep a lookout along the railway track in the direction the engine was moving, so that he might signal the engineer to stop when necessary to avoid striking persons or property.

It was contended by plaintiff that the brakeman saw the child in time to have stopped the engine before striking him, but that the engineer was carelessly looking in another direction, and did not see the signal given by the brakeman until it was too late to stop the engine, and avoid the injury.

To show that the engineer did not keep a proper lookout, the court permitted Peter Cornelius, a witness for plaintiff, to testify that at the time of the accident he was working at the house of S. H. Kelley, father of appellee, about seventy-five or one hundred yards distant from the place of the accident. When the accident occurred his attention was attracted by the engine stopping and by a scream from a girl. He looked up, and saw McFadden, the brakeman for the defendant, com-

ing towards the house with the injured child in his arms. The child was apparently dead. He was then asked to state whether McFadden, at the time witness met him with the child in his arms, made any statement as to the cause of the injury? To which question witness answered: "Well, he told me, when I asked him how it occurred, at that time, that he gave the engineer the signal in time to have stopped before they hit the child, but he was looking back the other way, and didn't see him until it was too late; then he reversed his engine, but it hit the child." To the introduction of this testimony defendant excepted at the time.

Dodge & Johnson for appellant.

The court erred in permitting Peter Cornelius to narrate to the jury certain statements made by brakeman McFadden after the accident occurred. These statements were not part of the *res gestae*, but mere *hearsay* statements. 51 Ark. 513; 50 *id.* 397; 49 *id.* 205; 52 *id.* 80; 34 *id.* 729; 46 *id.* 141; 45 *id.* 328; *Ib.* 132, 165; 52 *id.* 345; 119 U. S. 105; 95 N. Y. 274; 12 Ore. 392; 58 Mich. 156; 26 Oh. St. 185; 2 Pac. 130; 51 N. Y. 102, 298; 41 Conn. 59; 78 N. Y. 503; 1 So. 449; 12 Pac. 101; 57 Ark. 297.

Murry & Kinsworthy for appellee.

It was within the sound discretion of the court to admit the declarations of McFadden as part of the *res gestae*. 50 Am. Dec. 729; 12 Or. 398; 55 N. W. 253; 44 Am. & Eng. R. Cases, 324; 82 Tex. 518; 79 Pa. St. 493; 79 Am. Dec. 314; 13 Am. St. 483; 57 Mo. 93; 8 Wall. 397; 25 Am. St. 702; 19 *id.* 883; 32 *id.* 843; 66 Mich. 390; 90 Am. Dec. 252; 58 *id.* 504; 80 Ky. 394; 48 Ark. 338. Words uttered so soon after the transaction as to preclude the hypothesis of concoction or premeditation are admissible as part of the *res gestae*. 43 Ark. 103; *Ib.* 289; 34 *id.* 720; 58 Ark. 180. See

also, 50 N. W. 584; 55 Pa. St. 396; 32 Ga. 672; 57 Mo. 93; 35 Cal. 49; 25 Va. 921; 25 S. W. 24.

Admissibility of declarations as part of *res gestae.*

RIDDICK, J. (after stating the facts). The question for us to determine is whether this statement of the brakeman McFadden was part of the *res gestae*, and proper to go to the jury as evidence tending to show negligence. This statement was made after the accident, in response to an inquiry by the witness Cornelius. The acts to which it referred were completely past. The injured child had been borne away from the place of the accident. It was not a spontaneous utterance called forth by the accident, but was made in response to an inquiry, and was only a narration of past transactions by which McFadden was endeavoring to show that not himself, but another, was to blame for the accident. While there are cases that support the admission of such statements as part of the *res gestae*, yet we believe the best considered cases and the weight of authority to be the other way. It was said in a recent case that the "*res gestae* are events speaking for themselves through the instinctive words and acts of participants, not the words and acts of participants when narrating the events." *Graves* v. *People*, 32 Pac. 63. See also *Vicksburg etc. R. Co.* v. *O'Brien*, 119 U. S. 105, and note; *Waldele* v. *Railway Co.* 95 N. Y. 274; *Sullivan* v. *Oregon R. & N. Co.* 12 Oregon, 392; 1 Greenl. Ev. sec. 108; *Fort Smith Oil Co.* v. *Slover*, 58 Ark. 179; 1 Wharton, Ev. secs. 258 and 259; *Barker* v. *St. L., I. M. & S. Ry. Co.* 126 Mo. 143; Wharton, Crim. Ev. sec. 262.

If, at the time of the accident, or immediately afterwards, the brakeman McFadden, moved by the excitement of the occasion, had exclaimed to the engineer "I gave you the signal in time to have stopped, but you were looking the other way," such an instinctive exclamation, made under the effect of the excitement caused

by the accident, would have been a part of the *res gestae*, and admissible. And so a spontaneous utterance of that kind, if made to bystanders immediately after accident, would be admissible, when it emanated from, and was called forth by, the excitement of the occasion. But the statement of McFadden to Cornelius did not accompany the act, nor was it an instinctive exclamation called forth by the accident, and emanating directly from it. It is difficult to lay down general rules to cover all cases, but, in our opinion, this was only a statement of an employee of defendant concerning a past transaction, and not a part of the *res gestae*. Under well known rules, it might, under some circumstances, have been used to contradict and impeach the testimony of the witness McFadden, but it was not competent as evidence to show negligence on the part of the defendant company.

This ruling, we think, is not in conflict with the case of *L. R. etc. Railway Co.* v. *Leverett*, 48 Ark. 343. In that case the evidence complained of was the statement of the injured person concerning the cause of his injuries. Mr. Justice Battle, who delivered the opinion of the court, said that "the statement of Leverett was made immediately after he was run over, and while the wrong complained of was incomplete, he being still under the car, and was a part of the *res gestae*, and fairly goes to explain the cause of the condition in which he was at the time it was made." We do not think the case here falls within the rule laid down and followed in that case.

Discretion of court as to examination of witnesses.

There were other rulings of the trial court complained of by the appellant. The court refused to allow the appellant to cross-examine witnesses concerning their family relations. The extent to which either party may be allowed to cross-examine a witness of the opposing side concerning collateral facts and matters not in issue is a question, to a large extent, within the

discretion of the trial court, and we do not see that the court abused its discretion in this regard, or committed any error, except as above noted. For that error the judgment of the circuit court is reversed, and the case remanded for a new trial.

[NOTE.—A great number of authorities on the question how near in time declarations must be to constitute a part of *res gestae* are collected in a note to *Ohio & M. R. Co.* v. *Stein*, (Ind.), 19 L. R. A. 633.—Rep.]

DODSON *v.* STATE.

Opinion delivered July 6, 1895.

MARRIAGE—STATE REGULATION—Marriage is not simply a civil contract, but is also a social and domestic relation, subject to regulation by the state.

CONSTITUTIONAL LAW—MISCEGENATION—Sand. & H. Dig., sec. 4909, providing that "all marriages of white persons with negroes or mulattoes are declared to be illegal and void," is not in conflict with the provisions of either the state or federal constitutions abolishing slavery and conferring upon the negro race equal rights and privileges with other races.

CRIMINAL LAW—IGNORANCE AS DEFENSE—It is no defense to a prosecution for violating the law against intermarriages between whites and negroes that the guilty parties were ignorant of the law.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

F. T. Vaughan, for appellant.

Section 4909, Sand. & Hill's Digest was repealed by implication by the constitutions of 1864, 1868 and 1874 and the fourteenth amendment to the constitution of the United States. See Const. 1864, sec. 1; Const. 1868, secs. 3, 18; Const. 1874, art. 2, secs. 2, 3, 27; art. 11 sec. 2 and sec. 1 to schedule; 17 Am. Rep. 34. Upon the question of repeals by implication, see 24 Ark. 92;

Ib. 480; *Ib.* 629; 52 *id.* 290; 49 *id.* 110; 46 *id.* 229; 53 *id.* 247; *Ib.* 117, 22; 34 *id.* 224; 30 *id.* 560; 31 *id.* 17. Appellant is not guilty of an offense against the *spirit* of the law. He married in good faith, believing he had the legal right to do so, there being no law on the statute books at that time forbidding marriage between the races.

E. B. Kinsworthy, Attorney General, for appellee.

Similar statutes have everywhere been upheld, as not in conflict with the fourteenth amendment or civil rights bill. The case of *Powers* v. *State*, 48 Ala. 195, cited by appellant, was overruled in 58 Ala. 190. The law has been held constitutional. 3 Tex. App. 263; 36 Ind. 389; 9 Tex. App. 144; 30 Gratt (Va.), 858; 19 How. (U. S.), 393; 1 Wood (U. S.), 537; 14 Am. & Eng. Enc. Law, 498; Stewart on Mar. & Div. sec. 157. The statute is constitutional when it renders such marriages void. Desty, Cr. Law, sec. 59; 59 Ala. 57; 3 Tex App. 263; 39 Ga. 321; 76 N. C. 251; 9 Humph. (Tenn.), 74; 34 Me. 77. Neither the adoption of a new constitution nor the abolition of slavery interrupts the operation of such prior statutes. Bish. St. Cr. (2 ed.) sec. 738; 1 Bish. Mar. Div. & Sep. sec. 689.

BUNN, C. J. This is a prosecution begun before T. W. Wilson, one of the justices of the peace of Pulaski county, upon the following affidavit, and the warrant issued thereon, to-wit: "I, T. C. Miller, do solemnly swear, that Thomas Dodson and Mrs. ——— Dodson, in said county of Pulaski, did on the first day of March, 1891, live and cohabit together as husband and wife, he being a negro man and she being a white woman, in violation of the statute laws of the State of Arkansas; and pray a warrant from T. W. Wilson, justice of the peace for said county, to apprehend and bring said Thomas Dodson before said justice, to be dealt with according to law."

The defendant, Thomas Dodson, was found guilty of the charge by the justice of the peace, and fined in the sum of twenty-five dollars, from which judgment the defendant appealed.

In the circuit court the case was submitted to the court sitting as a jury, on an agreed statement of facts, which is as follows: "That the defendant, Thomas Dodson, is a negro man, and that Mary Dodson is a white woman; that in 1874 they applied to the county clerk of Pulaski county, and obtained a license to marry; that they took said license to a minister of the gospel, and he performed the ceremony of marriage between said Thomas Dodson and Mary Dodson, since which time they have lived together as husband and wife, and have raised a family, in Pulaski county; that there was no legal objection or impediment in the way of their marrying, except that one was white and the other a negro, which was the only question submitted for the decision of the Pulaski circuit court."

The court found that the parties could not legally marry, and found the appellant guilty, and assessed his punishment at twenty-five dollars. Whereupon defendant appealed to this court.

The only questions in this case are: "Is section 4909, Sand. & H. Digest, constitutional? and was it in force at the time of the marriage, and is it still in force? That section was enacted and approved February 20, 1838, and is section 4, chapter 94, of the Revised Statutes. It was continued in all the digests of the statute laws of this state down to the Digest of 1874, in which it does not appear. It was brought forward in the Digest of 1884, and has never been repealed by any act of the legislature. The evidence shows that appellant and Mary Dodson, the one being a negro man and the other a white woman, took out license to marry from the county clerk of Pulaski county, and were mar-

ried by a minister of the gospel accordingly, sometime in the year 1874, and have been living together as husband and wife since that time.

Regulation of marriage by statute.

The first contention of appellant is, that the statute named was repealed by the several constitutions of the state, adopted in 1864, 1868 and 1874. The argument on this point develops the fact that the contention is based on the abolition of negro slavery in those constitutions, and the consequent conferring upon that race equal rights and privileges with other races enjoying the rights and privileges of citizenship theretofore; and, proceeding upon this foundation, it is contended that, as the making of contracts is one of the rights and privileges of the citizen, and marriage being in the eyes of the law only a civil contract, therefore the right and privilege of entering into such a contract cannot be lawfully abridged. The fallacy of the contention is two-fold. First, the prohibitory statute makes no reference to the condition of the races named, whether free or in slavery; and, secondly, it is not true that marriage is only a civil contract. It is more than that. It is a social and domestic relation, subject to the exercise of the highest governmental power of the sovereign state—the police power. *Green* v. *State*, 58 Ala. 190.

Nor does the continued existence of the prohibitory act depend on the rather uncertain foundation that its repeal cannot be asserted because, although in spirit repealed, yet, since this is only by implication, it must stand. The act is on a more solid foundation than that. If repealed in the way contended for, it involves a surrender by the people of one of the attributes of sovereignty. That cannot be attributed to the people, unless made by express declaration, if at all.

Validity of statute prohibiting miscegenation.

The act in question has not been repealed or affected by any of the amendments to the federal constitution, and its validity, from a constitutional standpoint, is

unquestioned. *Francois* v. *State*, 9 Tex. App. 144; Stewart on Marriage & Divorce, sec. 157; *State* v. *Gibson*, 36 Ind. 389; *Kinney* v. *Commonwealth*, 30 Grattan (Va.) 858; In re *Hobbs*, 1 Woods (U. S. C. C.) 537; Bishop on St. Cr. (2 ed.) sec. 738; 1 Bishop on Mar., Div. and Separation, sec. 689. Our statute declares all such marriages illegal and void, and, that being the case, it is constitutional. *Hoover* v. *State*, 59 Ala. 57; *Frasher* v. *State*, 3 Tex. App. 263; *Scott* v. *State*, 39 Ga. 321; *State* v. *Kennedy*, 76 N. C. 251; *State* v. *Brady*, 9 Humphreys (Tenn.), 74; *Bailey* v. *Fiske*, 34 Me. 77.

Ignorance of law no defense.

Another plea of defendant is that he married in good faith, the statute in question not then being included in the digest of the statutes. If the plea was based on the facts as claimed, it would be unavailing, since ignorance of the law can never affect the judgment of a court of justice, however much it may be addressed to other departments of the government; but the evidence is that the marriage was entered into in 1874, and the digest in which the statute does not appear appears to have been published in the same year. No special date appears as marking either event, and we cannot determine that point, even if it were important to attempt to do so.

Seeing no error, the judgment of the lower court is affirmed.

[NOTE.—The equal rights and privileges of negroes are the subject of annotation to *Louisville, S. V. & T. Co.* v. *Louisville & N. R. Co.*, (Ky.) 14 L. R. A. 579.—Rep.]

STATE v. RATCLIFFE.

Opinion delivered July 6, 1895.

INCEST—INDICTMENT—An indictment for incest which alleges that defendant did "incestuously and adulterously have carnal knowledge of the body of" a person named, being a married man and the father of the person named, sufficiently alleges that he was a married man at the time the offense was committed.

Error to Sharp Circuit Court.

JOHN B. MCCALEB, Judge.

STATEMENT BY THE COURT.

This is an indictment for incest, from the northern district of Sharp county circuit court. At the July term, 1894, of said circuit court, the appellee was indicted as follows, to-wit: "The said E. Ratcliffe, on the 10th of March, 1893, in the northern district of the county and state aforesaid, did then and there, being and knowing himself to be the father of one Bettie Ratcliffe, and knowing himself to be a person forbidden to intermarry with her, the said Bettie Ratcliffe, by reason that he, the said E. Ratcliffe, was the father of her, the said Bettie Ratcliffe, did then and there unlawfully, feloniously, incestuously and adulterously have carnal knowledge of the body of her, the said Bettie Ratcliffe, he, the said E. Ratcliffe, being a married man, the father of her, the said Bettie Ratcliffe, against the peace and dignity of the State of Arkansas."

Appellee demurred to said indictment, which demurrer is as follows: "Comes now the defendant, Elijah Ratcliffe, in his own proper person and by his attorney, and demurs to the indictment herein for insufficiency, and for cause of demurrer says: (1) Said indictment does not charge the offense to have been committed by a marriage such as is prohibited by law.

(2) Said indictment does not charge the offense to have been committed by fornication with said Bettie Ratcliffe. (3) Said indictment does not charge the offense to have been committed by committing adultery with the said Bettie Ratcliffe. (4) Said indictment does not charge that at the time of the commission of the alleged offense the defendant was then and there a married man. (5) Said indictment does not charge that at the time of the commission of the alleged offense the defendant was then and there an unmarried man. (6) Said indictment does not charge that the defendant and Bettie Ratcliffe were not married to each other. (7) Said indictment does not state facts sufficient to constitute a public offense."

The court below sustained the demurrer, and discharged appellee. Appellant excepted, had its exceptions noted of record, and appeals to this court.

E. B. Kinsworthy, Attorney General, for appellant.

1. The indictment sufficiently charges defendant to have been a married man. It does not matter to whom he was married. 80 Mich. 577; 10 *id.* 396; 58 Ark. 3.

2. The words "then and there" are not always necessary. 78 Me. 71; 80 Mass. (14 Gray), 21; 15 R. I. 539. Omission of words which are by common understanding implied, in that which is expressed, will not render an indictment invalid. 10 Am. & Eng. Enc. Law, p. 547. The indictment contains all the necessary averments. Bish. Dir. & Forms, secs. 563–4. If there are any defects, they are not prejudicial. Sand. & H. Dig. sec. 2076. No one could read the indictment, and misunderstand the charge, or be misled. 55 Ark. 532; 54 *id.* 492; *Ib.* 662–3.

Sam H. Davidson, for appellee.

Under Sand. & H. Dig. sec. 1689, and our decisions, in order to constitute the crime of incest, it must clearly appear that either there was a marriage between parties related within the prohibited degrees, and that such persons committed adultery with each other, or that they committed fornication. Sand. & H. Dig. secs. 1689, 4908; 48 Ark. 66; 58 *id.* 3. In the light of these authorities, a void marriage must be charged.

2. The omission of the words "then and there being a married man" is fatal. 42 Vt. 202; 24 Am. Rep. 124.

3. The indictment fails to allege that the parties were married "to each other." Taylor on Ev. secs. 67, 1042 (text book series.)

4. The indictment is too indefinite. 26 Ark. 323; 27 *id.* 493; Sand. & H. Dig. sec. 2074, and note to 4th subd.

5. The words "then and there" should be repeated to every material fact which is issuable. 10 Am. & Eng. Enc. Law, pp. 589, 592; 1 Bish. Cr. Pro. (3 ed.) 407 *et seq.;* 25 Am. & Eng. Enc. Law, 1056; 4 Ind. 234; 80 *id.* 148; 58 Am. Dec. 627; 35 Me. 205; 83 Mass. 6; 9 Neb. 65; 26 Vt. 765; 7 Vt. 219; *Ib.* 222; 20 Wis. 217; 26 Mo. 260.

6. The indictment merely alleges that defendant was a married man *at the time* the indictment was found, and not at the time of the commission of the offense. 1 Bish. Cr. Pr. 412, 410; 2 Am. & Eng. Enc. Law, p. 158.

BUNN, C. J. (after stating the facts). The language of the statute on the subject is as follows, to-wit: "Section 1689. 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 4908. All marriages between parents and children, including grandparents and grand children of every degree; between brothers and sisters of the half as well as the whole blood; between uncles and nieces, and between aunts and nephews, and between first cousins, are declared to be incestuous and absolutely void." Sand. & H. Dig.

In this case the indictment charges the defendant and appellee with the crime of incest committed with one Bettie Ratcliffe, knowing himself to be her father and forbidden to marry her, by having carnal knowledge of her incestuously and adulterously, he being a married man.

The only objection to the indictment which has given us any considerable trouble is the fourth and fifth grounds of demurrer.

The able counsel of defendant has contended with much ability that the language of the indictment is not sufficiently explicit, in this: that, after laying the charge of carnal knowledge incestuously and adulterously, defendant is referred to as being a married man, and that it does not thereby definitely appear when he was a married man, whether at the time of the commission of the offense or at the time of the finding of the indictment; and that the usual words "then and there," or their equivalents, should have been employed to definitely point out the time of the commission of the offense. The indictment is not artistically drawn, and the words suggested in argument of defendant's counsel would with greater propriety have been employed. But we do not think the authorities cited support the contention that their employment is essential in all cases. On the contrary, the connection in which they may with great propriety be employed may be such as to render their use not absolutely essential. In other

words, the connection, and the words and language employed in the connection, may be so explicit within themselves as to leave no room for reasonable doubt on the subject, and in such case greater particularity of expression would of course not be essential, however proper. We think the language in this indictment clearly indicates that the defendant was married at the time of the commission of the offense; and to say that it meant that he was a married man at the time of the finding of the indictment, rather than when the offense was committed, would be to say that it was objectless, if not meaningless. After all, we would lift the finger of caution to those having such matters in charge, for the line which marks the border land of uncertainty and doubt is not always too well defined.

The allegations that defendant was the father of the woman involved, and therefore within the prohibited degrees; that he was a married man, and therefore capable of committing adultery; and that he incestuously and adulterously had carnal knowledge of his daughter, clearly meaning that he committed adultery with her,—all taken together, we think, make up a good indictment for the crime of incest.

The other grounds of demurrer seem to be still more clearly untenable. Reversed and remanded.

HARDER v. SAYLE-STEGALL COMMISSION COMPANY.

Opinion delivered July 6, 1895.

PROCEEDING AGAINST BIDDER FAILING TO PAY—JURISDICTION OF EQUITY.—A proceeding by a sheriff to recover from a bidder at sheriff's sale the amount lost by his failure to comply with his bid is not a subject of equitable jurisdiction.

SAME—PARTY.—The sheriff may maintain a summary proceeding to recover the amount lost by the refusal of a bidder at sheriff's sale to comply with his bid.

SAME—CONSTRUCTION OF STATUTE—Mansf. Dig., secs. 3058, 3059, requiring persons refusing to pay the amounts bid by them at sheriff's sale to make good the amount lost by reason of such refusal, are applicable to sales under orders of attachment.

SHERIFF'S SALE—EFFECT OF CONDITIONAL BID.—A liability for loss caused by failure to comply with a bid at a sheriff's sale cannot be enforced where, with the sheriff's consent, the bid was made by an agent upon condition that his principal should subsequently ratify the bid, and the principal refused to ratify it.

Appeal from White Chancery Court.

DAVID W. CARROLL, Chancellor.

STATEMENT BY THE COURT.

Appellee Sayle-Stegall Commission Co. and sundry other creditors of Rogers & Son had instituted their several suits by attachment against said Rogers & Son, and obtained judgment in the White circuit court, against them both for their debts and attachments, and obtained an order of sale of the property attached; and the sale was made by the appellant, as sheriff, by and through his deputy, one T. B. Paschall, on the 4th day of August, 1892. At this sale, appellee S. Brundidge, bid the sum of $4,750 for the property for his co-appellee company, which was the largest of said creditors.

Subsequently, the appellee company notified appellant that it declined to be the purchaser of said property, and denied that Brundidge had any authority to bid said sum for it; and thereupon appellant had another offering and sale of said property on the 20th day of September, 1892, and Skillern & Watkins became the purchasers at this sale for the sum and price of $4,000, whereby there was a loss, as claimed by appellant, of the sum of $750, the difference between the amount bid by Brundidge at the first sale and the amount bid by the said Skillern & Watkins at the second sale.

Subsequently, appellant made report of his action in the premises, and they were approved by the said circut court, and the said second sale was in all things confirmed.

Thereupon, as alleged, the appellant, at the instance of J. M. Battle and R. C. Black, as assignees of W. D. Black, one of said creditors of Rogers & Son, filed his motion for summary judgment against appellees for said difference and loss, under sections 3058 and 3059 of Mansfield's Digest. Demurrer to this motion was sustained, and plaintiff filed an amended motion in the nature of a complaint, which, after being made more certain by order of court, was made the subject of general demurrer by defendants; and, this demurrer being overruled, the defendants answered separately, Brundidge setting up as a defense that, in making said bid at said first sale, he was not the agent of his co-defendant company, as alleged in the complaint, but that on the contrary he was authorized in writing by his co-defendant to bid the sum of $4,000 only, and that he informed the appellant's deputy, who conducted the sale, of this, immediately before the sale, and showed him the writing to that effect; that, notwithstanding this special and limited authority, for reasons appearing satisfactory at the time, it was agreed and understood between him (Brundidge) and said deputy sheriff that he would bid as much as $4,750, but that it should be conditioned on the subsequent approval and ratification of Sayle-Stegall Commission Co., if the property was struck off to it for that sum and at that bid, and not otherwise, and that in case said company should refuse to ratify said purchase for it, then said Brundidge would personally pay all the expenses to be incurred in making a second sale; and that the property in fact was worth no more at the time of the first offering than the $4,000 for which it finally sold. Sayle-Stegall Commission Co.

answered, disclaiming the agency of Brundidge to bid the $4,750, and the cause was transferred to the chancery court.

Motion by appellant to strike out certain parts of paragraph one of Brundidge's answer, and his demurrer to paragraph two and portion of paragraph three. Thereupon defendants moved the court to dismiss the cause because appellant, as sheriff, had no interest in the suit, and the motion was sustained by the chancellor, and appellant took his appeal to this court.

J. M. Battle, for appellant.

1. It was error to transfer the cause to the equity docket.

2. The sheriff had an interest in the suit. It was his duty to resell the property. Murfree on Sheriffs (new ed.), 526, sec. 996.

3. An *attachment* sale is an *execution* sale. 52 Ark. 290; 2 Bland, Chy. 637; 12 Am. & Eng. Enc. Law, p. 207, note 2.

4. The pretended agreement between Brundidge and the deputy sheriff was no defense. Such an agreement was beyond the scope or apparent scope of his authority. Nor can Brundidge take advantage of his own wrongful, collusive acts.

The appellees *pro se*.

1. This was a judicial sale. If appellant was not satisfied, his remedy was to object to the confirmation of the sale. 9 Atl. 114; 1 S. E. 688. There was no sale until confirmation by the court. 47 Ark. 413; 23 *id.* 41; 34 *id.* 346; 38 *id.* 80; 52 *id.* 446; 32 *id.* 391.

2. The sheriff was bound by the act of his deputy. It is only the cases where the sheriff sells under *execution*, and makes deed, that he has the right, under Sand. & H. Dig. secs. 3104–5, to sue. This is a penal statute,

and should be strictly construed. Brundidge made no bid. He only made an offer on a contingency.

3. The cause was properly transferred to equity. 2 Story, Eq. Jur. 1301; 38 Ark. 557, and cases cited.

Jurisdiction of equity.

BUNN, C. J. (after stating the facts). In the first place, this cause should not have been transferred to the equity court, since there is no equitable question involved, and all the relief sought is obtainable in a court of law.

Who may sue.

The court also erred in sustaining the motion to dismiss on account of the alleged want of interest of appellant in the suit.

Construction of statute.

In *Beard* v. *Wilson*, 52 Ark. 290, it was said by this court, after quoting section 3067 of Mansfield's Digest, that "it was doubtless the intention of the general assembly in passing this act (section 3067) to give the right of redemption from sales of real estate under any final process from courts of law. The justice or sound policy of a distinction between technical execution sales and sales made in execution of judgments in cases where attachments have issued is not very apparent." And we hold that a sale under a judgment and order of a court of law, in a suit in which an attachment issues, is not a judicial sale, from which there can be no redemption under our statute, but that the statute gives the right of redemption from such sales."

Effect of conditional bid at sheriff's sale.

For the same reason, we think the provisions of sections 3058 and 3059, Mansfield's Digest, are applicable to sales under orders of attachment alike as under execution sales, and that the motion or complaint states a cause of action. On the other hand, we think the answers of defendants, if true, constituted a good defense, that is to say, if the bid of Brundidge of the $4,750 was conditional, as alleged in his answer, and that he was not the unconditional agent of his co-defendant, as alleged in its answer, and these facts

were known to the plaintiff (sheriff) personally, or to his deputy making and conducting the sale, before the bid was made, and it was so made on condition, he (the said deputy) should not have received nor cried said bid, and therefore defendants were not responsible under the statute.

But the determination of these questions depends upon the facts in the case to be developed on the trial, in accordance with the pleadings.

The judgment of the circuit court is therefore reversed, and the cause remanded, with directions to transfer to the circuit court, and there proceed as herein indicated, and in accordance with this opinion.

SCHOOL DISTRICT OF FT. SMITH *v.* WILLIAMS.

Opinion delivered July 6, 1895.

FEES OF SHERIFF—DUTIES UNDER ELECTION LAW.—The only fee to which a sheriff was entitled to receive from the school district under the election act of March 4, 1891, section 42, allowing the same fees for services performed thereunder "as for similar services for which fees are fixed by law," was $2 for each polling place at which poll books were delivered.

SCHOOL DISTRICT—LIABILITY FOR SHERIFF'S FEES.—A school district is liable for the fees allowed to the sheriff, under the general law, for holding a school election, although not expressly required to pay them, upon the principle that, in the absence of specific directions on the subject, the beneficiary should pay the legitimate expense incurred.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

Charles E. Warner for appellant.

1. The election law of 1891 did not apply to and control school elections for directors. Sand. & H. Dig.

secs. 7107, 7030, 7080; Mansf. Dig. sec. 6261–2; 49 Ark. 97; Suth. on Stat. Cons. sec. 229.

2. If the law of 1891 controlled such election, the district is not liable for the fees claimed, as none of the items are allowed by law against school districts. Unless compensation is fixed by statute, officers can claim none. Throop, Pub. Off. sec. 446; 25 Ark. 236; 32 *id.* 50.

BUNN, C. J. This is an action by the appellee, John F. Williams, as sheriff of Sebastian county, against the appellant special school district, on an itemized account for official services rendered, which is as follows, to-wit:

School District, To John F. Williams, Sheriff,	Dr.
Delivering Comm's to 15 Judges of Election.....	$ 8 00
" 5 sets of poll books at $2.....	10 00
Collecting returns and ballot box.....	2 00
Attendance election day.....	3 00
Total.....	$23 00

The action was instituted in justice of the peace's court, where judgment was for defendant school district, and plaintiff appealed to the circuit court, wherein judgment was given for plaintiff, and defendant appealed to this court.

The matter in controversy is, first, whether or not the sheriff was entitled to the fees named in his account at all, and, secondly, if so entitled, is the school district bound by law to pay them?

Fees of sheriff under election law.

The election referred to was an election held within and for the special school district of Fort Smith, and was held just after the passage of the act of March 4, 1891, known as "the Australian Ballot Election Law," and it was seemingly held under that law. The school district election law of 1893 had not then been passed; and it would seem that there was no law in force at the

time under which such elections could have been held, unless it was the law of 1891; and even the provisions of this law did not seem to be as full for this purpose as might be desired.

In section 42 of the act of March 4, 1891, the expense of elections is referred to, and the last clause of that section contains this language, to-wit: "Sheriffs being allowed the same fees for services performed hereunder as for similar services for which fees are fixed by law." Now the fees then fixed by law for similar services, and really identically the same services, that is, for delivering poll books for each township, was two dollars, and of course for the five polling places in Fort Smith, amounted to the sum of $10, as set forth in the 2nd item for the account herein sued on. This is the only item in the account which covers fees for services provided by law, coming under the head of similar services within the meaning of the rulings of this court on the subject. The sheriff therefore is entitled to the fees claimed in that item; and the remaining question is, is the school district under legal obligation to pay that much, it appearing that it is not bound for the other items, for the reason stated.

Liability of school district for sheriff's fees.

Section 6261 of Mansfield's Digest, not repealed by the act of 1891, provides that elections for special school districts are to be held at the same places and conducted in the same manner as elections for municipal officers of the city or town constituting the school district, and the returns to be made to the mayor and alderman thereof; and they shall declare the result and so forth. Neither that section nor the act of 1891, provides expressly that the school district shall pay any of these expenses; but, since the sheriff by general law was entitled to the item named, and since the election was held for the benefit of the district, under the rule that in the absence of specific directions on the subject the beneficiary should pay

the legitimate expense incurred, we think the appellant is bound to the extent of the ten dollars charged in the second item. We make no ruling as to the other items, except that the *appellant* is not bound for them.

If appellee will enter remittitur within 30 days as to all except the ten dollars, the judgment will be affirmed, with cost of appeal to be paid by appellee; otherwise, the judgment is reversed, and cause remanded with directions to proceed in accordance herewith.

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WIEGEL *v.* PULASKI COUNTY.

Opinion delivered July 6, 1895.

CLAIMS AGAINST COUNTY—PLEADING.—A demurrer does not lie to a claim presented to the county court for allowance.

COUNTY CONTRACTS—VALIDITY—ACCEPTANCE OF WORK.—Under Sand. & Hill's Dig. sec. 1279, which provides that "no county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended," a contract entered into by the county court for building a county turnpike, made without a previous appropriation therefor by the levying court, is void, and cannot be ratified by the county's acceptance of the work done under it.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

S. R. Cockrill for appellant.

1. No formal pleadings are required in the county court. No question could be raised by demurrer. 30 Ark. 560; 31 Ark. 384; *Ib.* 657; 53 *id.* 378.

2. It was error to dismiss the action without giving plaintiff leave to amend. Sand. & H. Dig. sec. 5719; 30 Ark. 771; 44 *id.* 314; 27 *id.* 218.

3. The question of a valid contract was *res judicata*, and was final after the lapse of time. 24 Ark. 50; 22 *id.* 308; 55 *id.* 275; *Holmes* v. *Or. Ry. Co.*, 9 Fed. Rep.; 28 S. W. 1086; 39 Ark. 485; 47 *id.* 85. Even where a board or officer is authorized to determine whether work is completed in accordance with a contract, the determination of the board or officer is conclusive. 94 U. S. 98. Where that duty is devolved upon a judicial tribunal, every question involved in the determination is forever concluded by the judgment. 55 Ark. 275; 28 S. W. 1086; Elliott, Roads & Streets, 219; 39 Ark. 470.

4. No reason is shown against the validity of the contract. It is the exclusive function of the county court to enter into contracts for all county expenses, including the building of roads. Art. 7, sec. 28, const.; Sand. & H. Dig. sec. 1173; 57 Fed. Rep. (8 Ct. Ct. App.) 1030; 2 Dill. 253; Mansf. Dig. sec. 5953. The road overseer is merely an arm or agent of the court. 9 Ark. 320; 36 *id.* 466; 49 *id.* 490–1.

5. The affirming of the contract by allowance of claims and acceptance of the work under it by the court by orders of record were judicial acts. They adjudged that the preliminaries leading to it had been complied with. 55 Ark. 275; *Ib.* 148; 39 *id.* 485. It is only where there is fraud, or a jurisdictional defect in the county court, that a county can refuse to pay, where its constituted authorities have made a contract, and it has enjoyed the proceeds. 50 Ark. 16; 28 S. W. 1086; 57 Fed. 1030. It is presumed that the county officers acted in accordance with law. Elliott, Roads & Streets, 443; 50 Ark. 266; 147 U. S. 91.

J. M. Rose, for appellee.

1. The county court had no jurisdiction to make the contract under sec. 5953, Mansf. Digest, because: (1)

No road tax had been levied to raise a fund to pay for this work. (2.) The overseer did not let the contract as directed by the statute. (3.) This was a contract to build a turnpike, and not to open or repair a road. These are jurisdictional requirements, and unless they existed the court was acting without jurisdiction, and its judgments were absolutely void. A void judgment cannot be set up as *res judicata.* 2 Black on Judg. 513. The mere fact that the county court had jurisdiction over roads does not give it authority to act outside of the laws governing the subject. 4 Ark. 483, 489.

2. The judgments of the county court making the contract and accepting the road were both illegal and void, and cannot be *res judicata.* Freeman Judg. 363–4; 53 Ark. 476; 25 *id.* 261; 33 *id.* 740; 13 Atl. 559; 38 *id.* 157.

Pleadings in county court.

HUGHES, J. This is an appeal from the judgment of the circuit court, sustaining a demurrer to a demand presented to the county court, verified according to the statute, for allowance against the county of Pulaski, which had been disallowed by the county court, and from which disallowance an appeal was taken to the circuit court. No formal pleadings were filed in the case, and none were required. Only the account of appellant, in two items—one of $2,000, and one of $6,400, for building Arch street turnpike, under contract with the county, properly verified—was filed, and to this the demurrer was sustained. This was error. A demurrer does not lie to a claim presented to the county court for allowance. For this error the judgment is reversed, and the cause remanded for a new trial.

Several questions are raised and discussed in the brief of counsel, which will arise for determination on the trial in the circuit court, and as a desire is intimated that these be considered now, we proceed to express our views upon them.

Validity of county contracts.

Can the county court authorize the letting of a contract to construct a turnpike road without an appropriation first made therefor? The statute itself answers this question in the negative, in section 1279, Sandels & Hill's Digest, which provides that "no county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended." This is the act of March 19th, 1879.

Construing this act, this court held, in the case of *Fones Hardware Co.* v. *Erb*, 54 Ark. 645, that the county court could not make a contract for the building of a bridge across the Arkansas river, at the city of Little Rock, without an appropriation having been first made therefor. In this case the court said: "It is the policy of the act to require the concurring judgment of the levying court and of the county judge that a bridge should be built, before a contract for building it can be made. When the levying court makes an appropriation to pay for one, that signifies its favorable judgment; and the county judge may afterwards signify his by letting the contract. * * * * While we think that a contract cannot be made before there has been an appropriation for it, we do not think that when an appropriation has been made, the contract will be limited to the amount appropriated. When the levying court appropriates any sum for the work, that signifies their judgment that the work should be done; and the county judge may then proceed to contract for it without further consulting them, the only limitation upon his power being found in other directions."

We hold, upon this statute, and the authority of this case, that, without some appropriation made therefor by the quorum or levying court, the county judge has no power to let a contract to construct a turnpike road. Though he has jurisdiction to let such a contract, he

must do so, if at all, within the limitations imposed by law upon the exercise of such jurisdiction. Otherwise there would be no restraint upon the extent of his power to contract, based upon the fact simply that he is invested with jurisdiction to make the contract. Such unlimited exercise of his jurisdiction to make such contracts might involve the county in hopeless bankruptcy, and the limitation is but a wholesome safeguard against the abuse of the power to make contracts binding the county.

While the county court is invested with jurisdiction of roads and highways, to have them "laid out, opened and repaired," by sec. 28, art. 7, of the constitution, and by sec. 1173 of Sandels & Hill's Digest, conferring upon the county court exclusive original jurisdiction in "all matters relating to county taxes, in all matters relating to roads," etc., and by sec. 6746 of Sandels & Hill's Digest, still the extent and exercise of this jurisdiction is limited and controlled by law.

The counsel for appellant contends that the validity of the contract with the county is *res judicata*, because the work under it was accepted and approved by the county, and allowances were made the contractor upon the work. But we think otherwise. There was no jurisdiction, without an appropriation first made, to make the contract upon the part of the county, and without such an appropriation it was void, and no adjudication could make it valid. If there was no power to make the contract, it was not, and could not be, ratified by the county's acceptance of the work done under it, so as to estop the county from asserting that it was void. "A subsequent ratification cannot make valid an unlawful act, without the scope of corporate authority." 1 Dillon, Mun. Corp. sec. 463.

In the case of *Newport* v. *Railway Co.*, 58 Ark. 270, it is held that an incorporated town has no power to

contract for the construction of a levee, nor to bind itself to pay therefor, and that it will not be held to have ratified such a contract by accepting the benefit of work done under it.

In 1 Dillon on Municipal Corporations, section 463, quoted in the opinion in the above case, it is said: "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." *Watkins* v. *Griffith*, 59 Ark. 344. If this were not true, the county court would be above the law, and could make contracts without the authority of law, and then ratify them and bind the county, and thus the law would be set at defiance. "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 words of the act, or derived therefrom by necessary implication." *Minturn* v. *Larue*, 23 Howard, 435; *Leonard* v. *Canton*, 35 Miss. 189; *Thomson* v. *Lee County*, 3 Wallace, 327.

There is not only no express or implied power in the county court to make such a contract without an appropriation first made for the work to be done, but, as we have seen, there is a positive inhibition against it in the statute quoted above.

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

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LUMPKINS v. JOHNSON.

Opinion delivered July 15, 1895.

GUARDIAN'S SALE—CONFIRMATION of a guardian's sale by the probate court is necessary to pass title.

JUDICIAL SALES—LIMITATION—The five years statute of limitations as to judicial sales does not apply to unconfirmed probate sales.

Appeal from Randolph Circuit Court.

JOHN B. MCCALEB, Judge.

STATEMENT BY THE COURT.

The appellant brought suit in ejectment to recover of appellee one-fifth of the E. ½ of the S. W. ¼ of section 12, township 19 north, range 2 east, and claimed title by inheritance from her grandfather.

The answer admitted that appellant inherited the land from her grandfather, but claimed title by purchase of appellant's one-fifth at sale of same by her guardian, under order of the probate court of Randolph county, and exhibits his deed made by appellant's guardian, duly acknowledged and recorded; also exhibits petition to the probate court, and order of the court for sale of the land mentioned therein. The petition, the order of the court and the guardian's deed, all describe the land as the S. ½ of the S. W. ¼ of section 12, township 19 north, range 2 east, which includes only the south forty of the E. ½ of said quarter, for which E. ½ the appellant sues.

The sale by the guardian was never reported to, nor confirmed by the probate court.

The appellee relies upon the seven years statute of limitation. Finding and judgment for appellee, upon seven years statute of limitation. Appeal to this court.

S. A. D. Eaton for appellant.

1. The guardian's sale by the probate court never having been confirmed, it was incomplete, and no title passed. 46 Ark. 38; 47 *id.* 419; 54 *id.* 642; 55 *id.* 309. The five years statute of limitation never commenced to run, as the sale was not confirmed by the court. 53 Ark. 400.

2. The evidence is not sufficient to support the plea of limitation of seven years. 42 Ark. 300; 55 *id.* 109. Appellant and appellee were tenants in common, and the possession by one is the possession of all. 42 Ark. 300. Permissive possession cannot ripen into title. 42 Ark. 120; 33 *id.* 633.

HUGHES, J., (after stating the facts.) The guardian's sale, without confirmation by the probate court, passed no title. There is no evidence of open, notorious, adverse and uninterrupted possession for the period of seven years. The five years statute does not apply, as there was no sale, until the same was approved by the probate court. Reversed, and remanded for a new trial.

THOMPSON *v.* LOVE.

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Opinion delivered July 15, 1895.

PROMISSORY NOTE—PAROL AGREEMENT.—The effect of a negotiable note in the hands of an innocent purchaser for value cannot be varied by proof of a contemporaneous oral agreement between the original parties that it should not be negotiated.

NEGOTIABLE PAPER—BONA FIDE HOLDER.—The *bona fide* character of a holder of negotiable paper can be destroyed only by proof of his participation in a fraudulent transfer of the instrument, or of bad faith on his part in the purchase of it.

Appeal from Yell Circuit Court, Dardanelle District.

JEREMIAH G. WALLACE, Judge.

Rose, Hemingway & Rose and *W. D. Jacoway*, for appellant.

1. Parol evidence is not admissible to show that by a parol contemporaneous agreement it was contracted that the note should not be negotiable, for this would be to allow the written contract to be directly contradicted by oral testimony. 4 Ark. 154; 13 *id.* 125; *Ib.* 593; 45 *id.* 178, 153 U. S. 233; 73 Pa. St. 286; 15 Ind. 508.

2. Mere knowledge of facts that would raise a suspicion of the validity of the paper, or gross negligence on the part of the taker at the time of the transfer, is not sufficient to impair the buyer's title. That result can be produced only by bad faith. Tied. Com. Paper, sec. 289; 1 Dan. Neg. Inst. sec. 775; 2 Wall. 121; 102 U. S. 444; 21 Wall. 354; 46 Mo. App. 440; 52 N. W. 339; 31 N. E. 419; 27 Oh. St. 374; 26 N. E. 979; 38 N. W. 901; 13 Atl. 336; 7 *id.* 488; 12 Pac. 728; 84 Am. Dec. 401; 23 Fed. Rep. 710.

3. A purchaser of negotiable paper is not bound to make inquiry. In order to defeat his claim as an innocent purchaser, it must be made to appear that he acted in bad faith. 5 B. & A. 909, overruling 2 B. & C. 466; 1 Dan. Neg. Inst. secs. 771–775; 42 Ark. 24; 103 N. C. 191; 9 S. E. 283.

M. L. Davis, *L. C. Hall* and *R. C. Bullock* for appellee.

1. The agreement not to transfer the notes was a part of the consideration for their execution. Where the consideration is not set forth in the written evidence of it, parol evidence is admissible. 53 Ark. 4. The evidence shows that the agreement not to transfer the notes was a part of the consideration for the execution of the notes. No rule of law protects a purchaser who wilfully closes his ears to information, or refuses to

make inquiry when circumstances of grave suspicion imperatively demand it. 147 U. S. 70; Law Co-op. Ed. Book 37, pp. 78–84. Notice that a note was not to be transferred is sufficient. 1 Dan. Neg. Inst. (4 ed.) par. 795 *a*.

2. There can be no innocent holder of paper issued by a corporation, or transferred by it in violation of law. 32 Ark. 634; 41 Am. Rep. 223. Parties dealing with a corporation must take notice of its powers. *Ib.* 224, and cases cited; 24 Barb. 199; 28 Am. Rep. 12; 1 Am. & Eng. Corp. Cases, 670; 5 L. R. A. 100; 46 Oh. St. 44; 4 Pet. 152; 13 Am. Dec. 100; Sand. & H. Dig. sec. 1328, subd. II; 62 U. S. 441.

3. Giving notes for stock is not authorized by our law. Money or property must be actually received. Art. 12, sec. 8, const.; 12 Pac. 49.

4. Appellant bought the notes with full knowledge of all the material facts, and was not an innocent holder.

HUGHES, J. The appellant sued the appellee upon a negotiable promissory note, executed by appellee, payable to the order of the Southern Hedge Company for five hundred dollars, "for value received," dated June 17, 1889; which was, by endorsement thereon before maturity, assigned to the appellant for value without recourse.

The appellee in his answer admits the execution of the note, but says that the execution of the same was obtained by the Southern Hedge Company by fraud, misrepresentation and deceit, by Duval, president, and Marriatt, agent of said company, in payment for stock in a certain corporation, commonly known as the Western Arkansas Hedge & Wire Fence Company, whose assets were merely nominal, and whose stock was almost, if not entirely worthless, of which fact said Southern Hedge Company was well aware, and said defendant unaware. The answer charges that the

Southern Hedge Company caused false and misleading reports to be circulated in regard to the value of its stock, and the prospects of the corporation; and made and caused such statements to be made to the defendant; and that it represented that it was the owner of certain patents, which were valuable improvements in the growing and plashing of hedge fences; and that large sums of money could be made in the hedge fence business; and that said Southern Hedge Company had contracted for the planting of about forty miles of hedge fence, which was to be transferred to the said Western Arkansas Hedge & Wire Fence Company, which alone would nearly bring profit enough on the stock to liquidate the notes given for it; that these representations were made by Duval, president and general manager for said company, and were false, and known by them to be so when made, and that, by means of these representations, the defendant was induced to execute the note sued on in this case. The answer avers that said patents were void for the want of novelty, etc.; that defendant, having no experience in such matters, relied upon these representations made to him; that he offered to rescind as soon as he discovered the fraud, and demanded his note, which the said Southern Hedge Company refused to deliver up, whereby defendant was cheated and defrauded, said stock being utterly worthless. The answer denies that the plaintiff is an innocent holder of said note, and says that he had full knowledge of all the facts and circumstances at the time he bought said note, and that he knew, at the time he purchased the same, that said Southern Hedge Company had agreed, as a part of the consideration for the execution of said note, that it would not negotiate the same.

The cause was submitted to the court sitting as a jury, and it found for the defendant, and gave judgment

in his favor. The appellant moved for a new trial, which was refused, and he excepted and appealed to this court.

On the trial a large amount of evidence was introduced tending to prove the representations by Duval and Marriatt, as set out in the complaint, and that the stock of the Southern Hedge Fence Company was worthless; but as to the value of this stock the evidence was conflicting.

All the evidence tending in any way to bring home to appellant knowledge of the alleged agreement by the Southern Hedge Fence Company that it would not negotiate the notes given for its stock is the testimony of W. H. Gee, who says: "Before he (plaintiff) bought said notes, he conferred with me, and made special inquiries in regard to the solvency and financial standing of the parties who had executed said notes. I informed him that the notes were good, and that I considered the parties all good for their contracts. I did tell him, however, that the Southern Hedge Company ought not to sell the notes; that they had agreed not to sell them, and I asked him not to buy any notes given for stock in said company, and said if there was any money in it, I wanted to make it myself."

It does not appear from this testimony that there was any agreement, which was part of the consideration for the execution of the notes, that the Southern Hedge Company would not sell or negotiate them.

The note sued on in this case with the notes of many others was given as part of the purchase price of the patent right of the Southern Hedge Company in twelve counties in Western Arkansas. The appellee was one of the incorporators of the Western Arkansas Hedge & Wire Fence Company of Dardanelle. The business authorized to be transacted by the Southern Hedge Company under its patent was the planting, growing

and plashing of hedges, buying or selling territory rights or patents for the construction of hedges, with the right to buy or sell real estate. This patent right to the Southern Hedge Company was sold and transferred to the incorporators of the local company, in consideration for which these incorporators of the local company individually gave in payment their notes.

We cannot conceive how the doctrine of *ultra vires*, contended for by appellee, has any application in this case. The appellee certainly had the power and the right to execute the negotiable promissory note he gave, and the only question is, did the appellant by the endorsement of it to him, become a *bona fide* holder thereof? If so, he is protected by the law merchant, notwithstanding any fraud of the original payees inducing its execution.

Parol agreement inadmissible to vary note.

In *Burke* v. *Dulaney*, 153 U. S. 233, the Supreme Court of the United States say: "The rule is settled that a negotiable instrument in the hands of an innocent purchaser for value cannot be contradicted to his prejudice by an oral agreement or understanding between the original parties variant from the terms of their written contract."

As to who is *bona fide* holder of negotiable paper.

To protect a holder of a commercial instrument against defenses that do not appear on the face of the instrument, it must be shown that he took it in good faith. "If he is guilty of bad faith, *mala fides*, he cannot claim to be a *bona fide* holder. It is therefore necessary to determine what constitutes such good faith as to make one a *bona fide* holder. The earlier English authorities maintained that *mala fides* in this case, as in any other legal transaction, meant participation in some fraud or other wrong. In a later case, Lord Tenterden so far modified the existing rule as to hold that one is not a *bona fide* holder who took the paper under circumstances which ought to have excited the suspicion of a

prudent and careful man. This ruling was subjected to the universal criticism of both the legal and mercantile world, and the complaint of the merchants and bankers induced the court, under the lead of Lord Denman, C. J., to require proof of gross negligence to take away from one the character of a *bona fide* holder." Tiedeman on Commercial Paper, sec. 289. Lord Tenterden's rule was followed by Chancellor Kent, and is still the rule in some of the states, says Mr. Tiedeman. "But (he says) the great weight of authority in this country, as well as reason, supports the contrary doctrine, that the *bona fide* character of a holder can only be destroyed by proof of his participation in a fraudulent transfer of the instrument." *Id.* and cases cited in note 2; *Hamilton* v. *Vought*, 34 N. J. L., 187; *Buchanan* v. *Wren*, 30 S. W. 1077.

In our opinion, there is no evidence in this case that the appellant participated in a fraudulent transfer of the note sued on, or of bad faith on his part in the purchase of it, that deprives him of the character of an innocent holder. *Morton* v. *Noble*, 15 Ind. 508; *Heist* v. *Hart*, 73 Pa. St. 286.

In the case last cited it is held that a parol agreement, although made at the time of making negotiable paper, that the payee will not negotiate it, and would renew it, is inadmissible to vary the effect of the paper. 1 Daniel on Negotiable Instruments, secs. 771–775.

Reversed and remanded for a new trial.

Riddick, J., absent and not participating.

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JONES v. STATE.

Opinion delivered July 15, 1895.

CONTINUANCE—DISCRETION OF COURT.—An application for a continuance in a murder case upon the ground that defendant had already at the same term of court been convicted of another and different murder, which was calculated to prejudice him on the trial, is addressed to the sound discretion of the trial court.

MURDER—INDICTMENT.—An indictment for murder is sufficient which alleges that defendant "unlawfully, wilfully, feloniously and of his malice aforethought, and with premeditation, and after deliberation, did kill and murder one H. with a certain gun," etc.

JUDGE—PREJUDICE AS DISQUALIFICATION.—An application for a special judge, upon the ground that the regular judge was so prejudiced against defendant that he could not obtain a fair and impartial trial before him, was properly denied.

FORMER CONVICTION—SUFFICIENCY OF PLEA.—On a trial for the murder of one J., a plea of former conviction is demurrable which alleges a former conviction of the murder of C., and that his murder was so closely connected in point of time with the act of killing J. as to render it impossible to separate the evidence relating to each of them. To constitute a good defense, the plea should state that C. and J. were both killed by the same act and volition.

TRIAL—HOLDING NIGHT SESSION.—The trial court did not abuse its discretion in refusing defendant's request not to hold a night session of court for the reason that his leading counsel was sick and unable to attend, if appellant was represented at such session by other competent counsel.

INSTRUCTION—ASSUMPTION OF FACTS.—An instruction in a prosecution for murder that if the jury find from the evidence that defendant had made any false, improbable and contradictory statements explaining suspicious circumstances against him it may be considered by them, is not erroneous as assuming as a fact that such statements were made.

CREDIBILITY OF ACCUSED—INSTRUCTION.—It is not error to instruct the jury that the credibility and weight to be given to defendant's testimony is for the jury; that his manner of testifying, the reasonableness or unreasonableness of his account of transactions, and his interest in the result are to be considered; and that

"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."

CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.—It is not error to refuse an instruction that, before defendant can be convicted of murder upon circumstantial testimony, the jury must find that the circumstances proved establish the guilt of defendant to the exclusion of every other reasonable hypothesis, if the jury were properly instructed as to the burden of proof resting upon the state and as to reasonable doubt.

Appeal from Franklin Circuit Court, Ozark District.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

Appellant was indicted April 2, 1894, at a special term of the Logan circuit court, for murder in the first degree.

The indictment, omitting the caption, reads as follows: "The grand jury of Logan county, in the name and by the authority of the State of Arkansas, accuse J. H. Jones of the crime of murder in the first degree, committed as follows, to-wit: The said J. H. Jones, on the 18th day of February, 1894, in the county aforesaid, unlawfully, wilfully, feloniously, and of his malice aforethought, and with premeditation and after deliberation, did kill and murder one Jesse Hibdon, with a certain gun which he, the said J. H. Jones, then and there had and held in his hands, the said gun being then and there loaded with gunpowder and leaden bullets, with intent him, the said Jesse Hibdon, to kill and murder, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Arkansas.

"And the grand jury aforesaid, in the name and by the authority aforesaid, do further accuse J. H. Jones of the crime of murder in the first degree, committed as follows, to-wit: The said J. H. Jones, on the 18th day of February, 1894, in the county aforesaid, unlawfully,

wilfully, feloniously, and of his malice aforethought, and with premeditation and after deliberation, did kill and murder one Jesse Hibdon with a certain hammer, which he, the said J. H. Jones, then and there held in his hands, by striking and by beating and bruising him, the said Jesse Hibdon, with the said hammer, with intent him, the said Jesse Hibdon, to kill and murder, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Arkansas.

"And the grand jury aforesaid, in the name and by the authority aforesaid, accuse J. H. Jones of the crime of murder in the first degree, committed as follows, to-wit: The said J. H. Jones, on the 18th day of February, 1894, in the county aforesaid, unlawfully, wilfully, feloniously, and of his malice aforethought, and with premeditation and after deliberation, did kill and murder one Jesse Hibdon in some way and manner and by some means, instruments and weapons to the grand jurors unknown, with intent him, the said Jesse Hibdon, then and there to kill and murder, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Arkansas."

To the indictment, appellant files the following pleadings: (1) Motion to set aside indictment; (2) Demurrer; (3) Motion to quash. All of said motions were by the court overruled, and appellant excepted. Appellant then moved for a change of venue, which was by the court granted, and the case was sent to the Ozark district of the Franklin circuit court.

When this case was called for trial in the Franklin circuit court, appellant filed the following pleadings: (1) Application for special judge; to this application appellee filed a response. (2) Motion for continuance. Each of said motions was by the court overruled, and appellant excepted. Appellant here entered a plea of

former conviction. To this plea appellee demurred, and said demurrer was by the court sustained. Appellant then entered a plea of not guilty.

The evidence in this case was circumstantial. It shows in substance, that Charles Hibdon, Jesse Hibdon, for the murder of whom the appellant in this case was convicted, and the appellant, acting in the capacity of a cook for the Hibdons, on the 18th day of February, 1894, camped together in a house in Logan county in this state, and that on the day following the house in which they had stopped—a heavy log house—was entirely consumed by fire; that the Hibdons were missing, and have never been seen or heard of since by any of the witnesses who testified, among whom was the wife and mother of Charles Hibdon, from Paoli, in the Indian Territory, whence the Hibdons came to Arkansas with a lot of ponies to sell or trade for cattle, and where the Hibdons lived and were well known, and where the appellant, a stranger, engaged to accompany them to Arkansas as a cook for the sum of twenty dollars per month. After the house was burned, the appellant took possession of the property of the Hibdons, consisting of the horses, a wagon, a saddle, the gun of Charles Hibdon, the gloves and leather cuffs of Jesse Hibdon, the red pocketbook of Charles Hibdon with his name written in it, and various other articles of property, identified by the evidence on the trial as the property of Charles and Jesse Hibdon. The appellant also had in his possession a plain gold ring, which he admitted belonged to Charles Hibdon.

In accounting for the disappearance of the Hibdons, the appellant made several inconsistent and conflicting statements. He first told that they had gone down into Scott county to sell some ponies. He afterwards told that they had fled from the United States marshal, who was after them for selling whisky in the Indian Terri-

tory. In his testimony on the trial in this case, the theory advanced by him as to their disappearance was that Charles Hibdon had killed Jesse, and had fled, having burned the house over his body.

After the arrest of the appellant, there were found in the ashes where the house was burned charred bones, some of which, the evidence tended to show, were the bones of a human body. Charred bones were also found in a creek near the burned house, and some between the house and the creek. When the appellant was arrested he had, on his person, in the pocketbook of Charles Hibdon, $360.35, which he said consisted of money Charles Hibdon gave him when he left, and amounts for which he had sold some of his property after he left; and that Charles Hibdon had left all his property, that he had there, in his possession and under his control, with directions to sell off everything except the saddle horse, and meet him in Dardanelle about the 13th or 14th of March. He stated that when he was asked about the ring, he supposed it was Charles Hibdon's, as he had seen him wear one like it, and had seen him pull it off, and put it in a box in the house. He admitted that he had told lies, in his former statements, as to the whereabouts of the Hibdons; that he found he was in a bad fix, and, having lied about these matters, it seemed like he had to keep telling lies.

The court gave to the jury ten instructions, and refused one asked by defendant, to all of which rulings exceptions were properly saved. The jury returned a verdict of guilty of murder in the first degree. The appellant moved to set aside the verdict and for a new trial, which was refused by the court, to which the appellant excepted, tendered his bill of exceptions, and appealed to this court.

Oscar L. Miles for appellant.

1. The indictment only charges murder in the second degree. There must be *premeditation* and *deliberation* to constitute murder in the first degree.

2. By the common law a conviction of one felony was a bar to all other felonies not capital. Martin & Yerger (Tenn.), 477; Clark's Cr. Law, 373, etc.

3. Defendant had the right to a special judge. 2 Metc. (Ky.), 619; 78 Mo. 263; 12 Kas. 407; Const. Kas., art. 3, sec. 20.

4. Naming the offense murder in the first degree in the introductory and concluding portions of the indictment is not sufficient, unless the facts charged constitute it such. 27 Iowa, 402; 8 Oh. St. 98 and 306. See also 2 Bish. Cr. Pro. 574 *et seq.;* 51 Ark. 189.

E. B. Kinsworthy, Attorney General, for appellee.

1. It was not error to refuse to allow a special judge. In the absence of constitutional or statutory provisions, prejudice not based on property interest in the judge is not assignable as a legal cause of disqualification. 76 Me. 502; 2 Black. Com. 361; 26 Fla. 77; 92 Ala. 113; 12 Cal. 500; 1 Minn. 94; 43 Ark. 324; Const. 1874, art. 7, secs. 20, 21; *Ib.* art. 2, sec. 10; Mansf. Dig. secs. 1136, 2164; 31 Ark. 35-39; 24 Cal. 31; 1 Thomps. Trials, sec. 215; 12 Am. & Eng. Enc. Law, p. 52.

2. The demurrer was properly sustained to the plea of former conviction. The plea shows on its face that it was a distinct and different crime. 109 Ill. 572; 92 Ky. 522; 65 Ala. 94, 98; 52 N. W. 775; 71 Ala. 315; 108 Mass. 433; 11 Am. & Eng. Enc. Law, 436; 36 Pac. 815; 30 Tex. App. 412; 155 Mass. 455; 65 Cal. 139; 46 Ark. 141; 1 Bish. Cr. L. secs. 1051-2; 8 So. 445.

3. The continuance was properly refused. Defendant was ably represented by other counsel. 34 Ark. 725; 13 Tex. App. 645; 112 Mo. 277; 30 N. E. 927.

4. There is no error in the instructions. 59 Ark. 417; 54 *id.* 489. The tenth instruction cures any seeming error in the others. 46 Ark. 141; 52 *id.* 180; 53 *id.* 117; 50 *id.* 545.

HUGHES, J., (after stating the facts). The motion for a new trial sets out twenty grounds, but not all of these are seriously relied upon in argument here for reversal, and we will discuss such only as we understand counsel to urge here as grounds for reversal.

Discretion of court as to continuances.

The application for continuance upon the ground that, at the same term of the court at which appellant was put upon his trial for the murder of Jesse Hibdon, he had been convicted of the murder of Charles Hibdon, which was calculated to prejudice him on his trial at the same term of the court for the murder of Jesse Hibdon, was denied by the court. Applications for continuance are so largely in the sound discretion of the circuit court that this court will not control it, unless there has been a flagrant abuse of the court's discretion that amounts to a denial of justice. *Thompson* v. *State*, 26 Ark. 323; *Price* v. *State*, 57 Ark. 167. We are unable to say that there was such abuse of discretion in refusing the continuance in this case as manifestly operates as a denial of justice, and for which the judgment should be reversed. *Loftin* v. *State*, 41 Ark. 153.

Sufficiency of indictment for murder.

The court overruled the appellant's demurrer to the indictment, and this is urged as error. We have examined carefully the indictment, and think it sufficiently charges the crime of murder in the first degree, though not in the most artistic and approved form. It fully advises the defendant of the charge he is called upon to answer, and fulfills, in substance, the requirements of our statute in reference to the sufficiency of indictments. Section 2075 Sandels & Hill's Digest provides: "The indictment is sufficient if it can be understood

therefrom: *First.* That it was found by a grand jury of a county impaneled in a court having authority to receive it, though the name of the court is not accurately stated. *Second*, that the offense was committed within the jurisdiction of the court, and at some time prior to the finding of the indictment. *Third*, that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case."

Section 2076 provides: "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."

Section 2090 provides: "The indictment must contain * * * * ; *second*, 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."

Section 2074 of Sandels & Hill's Digest provides that: "The indictment must be direct and certain as regards, first, the party charged; second, the offense charged; third, the county in which the offense was committed; fourth, the particular circumstances of the offense charged, where they are necessary to constitute a complete offense."

The indictment is substantially in the form prescribed by the statute. Section 2091, Sandels & Hill's Digest. It is substantially the very same as the indictment in the case of *Dixon* v. *State*, 29 Ark. 165. There was no error in overruling the demurrer to the indictment, and the motion in arrest of judgment, they being in substance the same.

Predjudice as disqualifying a judge.

The court overruled the defendant's application for a special judge to try the cause, and this is assigned as

error. Section 20 of article 7 of the constitution provides that: "No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law; or in which he may have been of counsel or have presided in any inferior court." None of the matters mentioned in this provision as disqualifying a judge to preside in a cause are alleged in the application of appellant, which was based upon the ground, first, that the regular judge was a material witness in the cause, to which the attorney for the state responded that the judge knew no material facts in the case, and that he had no intention to use him as a witness. The judge himself in passing upon the motion stated that he knew no material facts in the case. He did not testify in the case. The second ground of the motion was that the judge was so prejudiced against the defendant that said defendant could not obtain a fair and impartial trial before said judge. In passing upon the last ground of the motion, the judge stated that he had a fixed opinion as to the guilt or innocence of the defendant, but that it was not true that he was prejudiced against him. There is no provision of our constitution or statutes that disqualifies a judge for prejudice. If having formed an opinion as to the guilt or innocence of a defendant on trial in a criminal case was a disqualification of a judge presiding at the trial, it would often be a difficult matter to find a judge that would not be disqualified.

In the case of the *State* v. *Flynn*, 31 Ark. 35, 39, Judge English, delivering the opinion of the court, said: "Where a circuit judge labors under none of the causes of disqualification prescribed by the constitution, he has the right to preside, and is bound by his official oath, and by honor, to decide impar-

tially, regardless of his social relation to parties," etc. In that case an affidavit was filed stating that "the defendant, Frank Flynn, who is indicted for murder, states on oath that he verily believes that his honor, J. M. Smith, judge of this court, will not give the said defendant a fair and impartial trial." Upon this the venue was changed from Garland to Pulaski county. In the Pulaski circuit court the prosecuting attorney moved that the cause be stricken from the docket for want of jurisdiction, and remanded to the Garland circuit court, which motion was overruled, and the state appealed. The supreme court reversed the judgment, with directions that the cause be remanded to the Garland circuit court, and there proceed according to law.

It is the province of the jury solely to determine the facts of the case, and of the judge to determine questions of law that arise in the case. If he err, his judgment may be reversed on appeal. It is not to be supposed that the judge will exhibit partisan feeling or prejudice in the trial of a cause, which would be indecorous and reprehensible, and bring into contempt the administration of justice. *McCauley* v. *Weller*, 12 Cal. 523. The court did not err in overruling the application for a special judge.

Sufficiency of plea of former conviction.

It is insisted upon as error that the court sustained a demurrer to the appellant's plea of former conviction. The plea is as follows:

State of Arkansas *v.* Jesse H. Jones.	"In the Franklin Circuit Court For Ozark District, February Term, 1895.

Comes the defendant, Jesse H. Jones, in person and by his counsel, and says that he was on the 2d day of March, 1895, in this court convicted of this identical offense by a jury previously empaneled to try him upon the same, and that the verdict in that case still stands

undisturbed against defendant. See copy of indictment and record to this date in No. 57 hereto attached, and marked exhibit 'A.' And defendant says that the testimony in the case in which he, defendant, has as aforesaid been convicted is precisely the same throughout as in this case, and defendant says that the same facts, circumstances and matters urged against the defendant in the former trial will in every respect be the same facts, circumstances and matters that will be urged against him, the defendant, upon this trial.

Whereupon defendant in person and by his counsel alleges that for the above and foregoing reasons this prosecution ought to abate and cease, and ought not to be further urged against this defendant.

ROBT. J. WHITE,
E. HINER,
EVANS & COCKRAN,
MILES & MILES."

This plea fails to state that by the same act and volition both Charles and Jesse Hibdon were killed, and the exhibit to the plea, *i. e.*, the indictment against appellant for the murder of Charles Hibdon, and upon which appellant had been convicted of murder in the first degree, before he was tried in this case for the murder of Jesse Hibdon, at or about the same time he is charged to have murdered Charles Hibdon, shows that the parties charged to have been murdered were not the same in both cases.

In the case of *People* v. *Majors*, 65 Cal. 138 to 150, it is held, in an opinion reviewing the cases upon the question delivered by Morrison, C. J., that the murder of two persons by the same act constitutes two offenses for each of which a separate prosecution will lie, and a conviction or acquittal in one case does not bar a prosecution in the other. In that opinion the court quoted the following passage from the opinion in *Clem* v. *State*,

42 Ind. 420, to-wit: "It does not follow because one of the indictments was for the murder of Nancy Jane Young and the other for the murder of Jacob Young, that the crime is not the same." And the court admitted that this was an authority in favor of defendant, if the death of the two persons murdered resulted from one and the same act.

In the case of the *State* v. *Elder*, 65 Ind. 282, the rule on this question is stated as follows: "When the same facts constitute two or more offenses, wherein the lesser offense is not necessarily included in the greater, and when the facts necessary to convict in the second prosecution would not necessarily have convicted in the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act."

In the *State* v. *Hattabaugh*, 66 Ind., 223, the court said: "The usual test by which to determine whether the former conviction or acquittal was for the same offense, as that charged in the second prosecution, and therefore whether the former is a bar to the latter, is to inquire, whether the evidence necessary to sustain the latter would have justified a conviction in the former case." The California court, in *People* v. *Majors*, say: "Testing the case of *Clem* v. *State*, *supra*, by the rule laid down in the latter cases referred to (65 and 66 Ind.), it would be difficult to sustain the authority of the former."

Jones, the appellant, on an indictment for the murder of Jesse Hibdon, could not be convicted for the murder of Charles Hibdon, nor *vice versa*. In the case of *Teat* v. *State*, 53 Miss. 439, the court said: "A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time, that it is impossible to separate the evidence relating to them on the trial

for one of them first had." And the court expressed the belief that no well considered case could be found, "where a putting in jeopardy for one act was held to bar a prosecution for another separate and distinct one, because they were so closely connected in point of time, that it was impossible to separate the evidence relating to them."

Many other cases are cited to support the judgment of the court on this point. It is said by some authorities, that where the same act and volition results in the death of two persons, there is but one offense. We do not understand that the plea in this case states that Charles and Jesse Hibdon were killed by one and the same act. The fact that the act of killing Jesse Hibdon, and the act of killing Chas. Hibdon were so closely connected in point of time, that it was impossible to separate the evidence relating to each of them, would not necessarily make the killing of the two one act, or one offense.

Section 2148 of Sandels & Hill's Digest provides, that: "Neither a joinder in demurrer nor a reply to the plea of former acquittal or conviction shall be necessary, but the demurrer shall be heard and decided, and the plea shall be considered as controverted by denial, and by any matter of avoidance, that may be shown in evidence." It does not appear that any evidence was heard in determining the demurrer to the plea, and we presume that only the plea and the exhibit thereto (the indictment against Charles Hibdon) were considered by the court.

We think there was no error in sustaining the demurrer to the plea.

Discretion of court to hold night sessions.

The court on two different occasions refused the request of the appellant not to hold a night session of court for the reason that Oscar L. Miles, his leading counsel, was sick and unable to attend at such night

session. This is assigned as error. It appears from the transcript that at these night sessions the defendant was ably represented by Mr. Hiner, Mr. White, Jas. Cockran and A. F. Miles—all competent counsel. It therefore does not appear that the appellant was prejudiced by the refusal of his request. Such motions are addressed largely to the sound discretion of the court, and, unless there is abuse of that discretion, this court will not interfere. *Edmonds* v. *State*, 34 Ark. 725; *State* v. *Dusenberry*, 112 Mo. 289.

Instruction held not to assume facts.

It is assigned as error that the court gave to the jury instructions numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9, and that 4 and 9 particularly are erroneous. For error adjudged to exist in the latter part of instruction 4, as given on the trial of appellant for the murder of Charles Hibdon, the judgment in that case was reversed. *Jones* v. *State*, 59 Ark. 417. The instruction as given in this case, however, is not obnoxious to the error for which it was held bad in the other case. In the case in 59 Ark. it read thus: "The false, improbable and contradictory statements, of the accused, if made, in explaining suspicious circumstances against him, are evidence to be considered by the jury," etc. As given in this case it reads: "If you find from the evidence that the defendant has made any false, improbable and contradictory statements explaining suspicious circumstances against him, then this may be considered by you," etc. The first is obnoxious to the objection that it assumes facts, the other does not, but leaves it to the jury to determine upon the evidence whether they exist or not. It seems that there is a material difference between them. We find no reversible error in this instruction as given in this case.

Instruction as to accused's credibility approved.

Instruction numbered nine is as follows: "The court instructs the jury that, under the law, the defendant, Jesse Jones, 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."

Number 10 is as follows: "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 ninth instruction given in this case is an exact copy of the one given in the case of *Vaughan* v. *State*, 58 Ark. 362, which was approved by the court.

Following *Vaughan* v. *State*, *supra*, and the many cases cited to support it, we find no error in instruction numbered nine. We find no reversible error in the instructions, taken together, as given by the court.

Instructions as to circumstantial evidence.

The instruction asked by the defendant and refused by the court is as follows: "If the jury find that this is a case dependant entirely upon circumstantial testimony, then the court charges you that, before the defendant can be convicted, you must find that the circumstances proved establish the guilt of the defendant to the exclusion of every other reasonable hypothesis; and if you do not so find, it is your duty to acquit the defendant." It appears from instruction numbered three, given by the court, that the court said to the jury: "This is a case of circumstantial evidence, and if it

satisfies the minds of the jury beyond a reasonable doubt, they should convict, the same as they would upon direct evidence, which satisfies them beyond a reasonable doubt." The instruction numbered six, given by the court, is as follows: "The burden is upon the state to prove to the satisfaction of the jury beyond a reasonable doubt every material allegation in the indictment, and unless that has been done, the jury should find the defendant not guilty." In the case of *Green* v. *State*, 38 Ark. 316, the appellant asked the following instruction, which was refused, to-wit: "That in cases of circumstantial evidence, before the jury can convict, the guilt of the defendant should be made out, not only beyond a reasonable doubt, but to the exclusion of every other reasonable hypothesis." In delivering the opinion of the court, Chief Justice English said: "It was putting it very strong to require the state not only to prove the guilt of the accused beyond a reasonable doubt, but to go further and prove it to the exclusion of every other reasonable hypothesis. Either would be sufficient." There was no error in refusing the instruction asked by the appellant.

Finding no substantial error in the other matters assigned for reversal, we pass them without comment.

Lastly, it is objected that the verdict of the jury is not supported by sufficient evidence. It is possible that a defendant might be the victim of such a remarkable concatenation of circumstances, as exist and were proved in this case, and be innocent, but it is not at all probable. The evidence was amply sufficient to warrant the verdict of guilty of murder in the first degree, as found by the jury.

The judgment is affirmed.

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SMITH v. SCARBROUGH.

Opinion delivered October 12, 1895.

DEED—TIME OF DELIVERY—PRESUMPTION.—The date of a deed, and not the date of its acknowledgment, is *prima facie* the date of its delivery. So, evidence that land was a homestead at the date of the acknowledgment of a mortgage thereon made ten days after date of the mortgage is not evidence that it was a homestead when the mortgage was executed.

Appeal from Logan Circuit Court in Chancery.

OSCAR L. MILES, special judge.

Beardsley, Gregory & Flannelly for appellants.

1. The Jarvis-Conklin Mortgage Trust Co. was a necessary party.

2. There was no proof to sustain the decree. The only proof was that Scarbrough owned and occupied, as a homestead, the land on the 11th day of January, 1889. The notes and mortgage were dated January 1, 1889, and were presumptively delivered on that day. 14 Ark. 29; 62 Wis. 380. This presumption holds good, although the instrument was acknowledged at a later date. 15 N. E. 674; 41. Ill. 439; 33 Me. 446; 42 Ill. 413; 10 B. Mon. 175; 10 Gray, 66.

A. S. McKennon for appellee.

BUNN, C. J. This is an action determined in the Logan circuit court, in chancery, wherein the appellant, as plaintiff in the court below, filed his bill to foreclose a mortgage of record, on the failure of the mortgagor to pay off two detached interest coupons; the principal bond and other coupons being outstanding and in the hands of other parties referred to in the complaint. The mortgage, bond and coupons, are dated 1st January, 1889, and the mortgage was acknowledged 11th of January, 1889, and subsequently recorded. The

mortgagor, Thomas C. Scarbrough, and his wife, Nannie L. Scarbrough, subsequently to the execution of said mortgage or deed of trust, on the 17th day of November, 1890, made their deed to defendant Leroy Hickson, conveying to him the lands conveyed in said mortgage. The mortgagees were not made parties, but Samuel M. Jarvis, the trustee holding the legal title, was made a party, and answered, and one of the contentions of plaintiff is that all parties in interest should have been brought in; otherwise the chancellor should not have rendered a decree cancelling the deed of trust, as he did, and thus the only decree he could have rendered would be to the effect that the complaint be dismissed for want of equity.

The principal question in the case, and the only one apparently considered, grows out of the allegation in the answer of Hickson and wife, that the deed of trust is invalid for the reason that, at the time of its execution, the lands conveyed therein constituted the homestead of Scarbrough and wife,—the wife not having joined in the conveyance of the homestead under the act of the general assembly, approved March 18th, 1887 (the deed of trust and certificate of acknowledgment in fact showing only that the wife had relinquished her right of dower),—and that Hickson had purchased from them, and held under a deed executed in accordance with the act referred to, and therefore, having vested rights, was not affected by the curative act of April 13th, 1893, as construed by this court in *Sidway* v. *Lawson*, 58 Ark. 124. The argument is not thus made, for defendants file no brief, but we take it that such is the theory of Hickson's contention.

If it be true that the grantors in the deed of trust occupied the lands as a homestead at the time of the execution of the deed of trust, or at the time when the same took effect as a conveyance, if otherwise valid, and

assuming that the act of 18th March, 1887, was a valid act, and that the deed to Hickson was a valid deed under that and the curative act mentioned, it follows that the decree against plaintiff is proper.

But the question really is, does the record and the proof show that Scarbrough occupied the lands as a homestead, or even owned the same at the time he conveyed the same in said deed of trust? It is alleged, in the answer of Hickson and wife, that Scarbrough was the owner of, and occupied the lands on the 1st January, 1889, the date of the deed of trust, as well as on the 11th January, 1889, the date of the acknowledgment of the execution of the same. The reply of plaintiff puts in issue all these allegations of the answer, and the only evidence adduced in the case was by the defendant Hickson, in the deposition of J. R. Scarbrough, a brother of S. C. Scarbrough; and he testifies that his brother was the owner of and occupied the lands as a homestead on the 11th day of January, 1889, the date of the acknowledgment of the deed of trust. There is no proof that he was the owner of the homestead prior to that date. We are thus left to determine at what date the deed of trust took effect as a conveyance to the trustee, by the rules of construction which the courts have applied in such cases.

In *Welch* v. *Fowler*, 14 Ark. 29, and *Wheeler* v. *Single*, 62 Wis. 380 (cited by appellant's counsel), it is held that the date of the deed is *prima facie* proof of the execution of the same at that time.

It is further said in *Scobey* v. *Walker*, 15 N. E. Rep. 674, *Sweetser* v. *Lowell*, 33 Me. 446, *Jayne* v. *Gregg*, 42 Ill. 413, *Ford* v. *Gregory*, 10 B. Mon. 175, also cited by appellant's counsel, that the acknowledgment is *prima facie* evidence of delivery on the day of the date of the deed, at least of some date prior to the date of the acknowledgment.

"The rule is well established that, where a document purporting to be a duly acknowledged deed, with regular evidence of its execution upon its face, is found in the hands of the grantee, or if such deed is found upon the proper records, a presumption arises that it was delivered at the time it bears date, or at some time prior to the date of its acknowledgement." *Scobey* v. *Walker*, *supra; Vaughan* v. *Godman*, 94 Ind. 191; *Wheeler* v. *Single*, *supra; Wallace* v. *Berdell*, 97 N. Y. 13; *People* v. *Snyder*, 41 N. Y. 397; *Trustees* v. *McKechnie*, 90 N. Y. 618; *McCurdy's Appeal*, 65 Penn. St. 290.

We have been unable to find any case wherein a different doctrine is announced. It would seem, according to the usual custom of dealing in such matters, that, as the acknowledgment is the act of a grantor which fits the instrument for record, this would naturally precede the delivery, ordinarily looked upon as the grantor's last act in respect to the deed, but it is agreed, in the cases which have become authorities on the subject, that there is no necessary inference that the act of acknowledging precedes the act of delivery, but rather that the contrary is true.

The decree of the court below canceling the deed of trust was erroneous, for the foregoing reason.

Decree reversed, and cause remanded for further proceedings in accordance herewith.

BATTLE, J., absent.

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BURLINGTON INSURANCE CO. v. LOWERY.

Opinion delivered October 12, 1895.

FIRE INSURANCE—NOTICE OF LOSS under a fire policy given by a local agent of the insurance company on information communicated to him by the assured is sufficient.

SAME—PROOF OF LOSS.—A provision in an insurance policy requiring proof of loss to be made within thirty days is waived by the company where it sends a blank form for such proof after lapse of the thirty days, and receives the proof without objection.

SAME—WAIVER OF FORFEITURE.—Proof of loss under a fire policy may be waived by parol, though the policy requires a waiver to be in writing.

FORFEITURE OF POLICY—TEMPORARY ABSENCE of a tenant from the house at the time of a fire will not work a forfeiture of the policy, where the policy provided that it should be forfeited if the house was allowed to become unoccupied.

ACTION ON POLICY PAYABLE TO MORTGAGEE—PARTIES.—The assured cannot sue alone on a policy payable absolutely to the mortgagee without the express consent of the latter, unless he has paid or extinguished the mortgage debt before suit.

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

This is an appeal from a judgment for one thousand dollars against the appellant upon a policy of fire insurance upon a dwelling house of the appellee which was consumed by fire, while the policy was in force. The defenses to the action are: (1) Failure of the appellee to give notice of the loss. (2) Failure of the appellee to make proof of loss within thirty days next after said loss, as required by the policy of insurance. (3) Vacancy of the house at the time it was burned. (4) Conveyance of the property, by mortgage, after the policy was issued. (5) That the insured could not maintain an action for the loss in his own right and name.

By the terms of the policy the loss, if any, was made payable to the Jarvis-Conklin Mortgage Company, which was not a party to this suit. There was evidence tending to show that John J. Sumpter & Son were the general agents of the company at Hot Springs; that they issued the policy sued on; that the assured notified them of the loss a day or so after it occurred, and requested them to notify the company; that John J. Sumpter immediately thereafter did notify it in writing, and that the company acknowledged the receipt of the notice, which was sent through the mail. As to proof of loss, the evidence shows that proof of loss was made after the expiration of thirty days, within which time it was required to be made by the policy.

The evidence further tends to show that after notice of the loss had been given to the company as stated, and the thirty days within which proof of loss was required by the policy to be made, the company sent a special agent to Hot Springs to examine the loss; and after he had done so, and conferred with Sumpter & Son in regard to it, and returned home, the company sent to Sumpter & Son a blank form for proof of loss, and instructed them to turn it over to the appellee, that he might make his proof of loss, which he made and sent to the company; that the company returned it for correction; that it was corrected and returned to the company; and that appellee never saw it afterwards, until he saw it at the trial, in possession of an attorney for appellant.

As to the house being unoccupied at the time of the fire, the evidence tends to show that at the time of the fire the house was occupied by a Mr. Cole, tenant of the appellee, who had made arrangements to move into another house, and who, a day or two before the fire, had gone to Malvern to meet his wife, leaving his two daughters in the house, with instructions to remain un-

til he returned; that his wife was sick at Malvern, and on that account he did not return until Monday, when he had expected to return on the Saturday before. That he arranged to have a man come on Sunday with a wagon to move him; that the man came, and moved a small portion of his furniture; but that nearly all his furniture was consumed by the fire Sunday night when the house burned.

As to the mortgage, the proof shows that it was made before the policy of insurance was issued, and that the mortgage clause was attached to the policy when it was delivered. The mortgage clause is as follows: "Loss, if any, payable to Jarvis-Conklin Mortgage Company or its assignees," etc.

Clayton & Brizzolara for appellant.

1. The loss was payable to the Jarvis-Conklin Mortgage Trust Co., and it is not alleged that their mortgage had been paid by, or assigned to, appellee, nor that its express consent to sue had been obtained. 1 May on Ins. 449; 58 Md. 172; 67 Barb. 507; 3 Bosw. (N. Y. Superior) 516; 2 Wood, Fire Ins. 1123; Beach, Ins. sec. 1285; 22 Ark. 54; 48 Kas. 450; 65 N. Y. 6; Barbour on Parties, 61; 44 Mich. 420; 46 Wis. 23; 29 Me. 337; Sand. & Hill's Dig. sec. 5623; 14 Col. 259; 17 How. (N. Y.) 444; 73 N. Y. 114. The letter was not competent to show the mortgagee's consent, as there was no showing that it was genuine, or had been received in due course of mail. 130 Pa. 193; 77 Mich. 265.

2. No proof of loss was made within the period prescribed, nor was notice given *immediately*. No waiver could be made, except as prescribed in the policy. 31 N. E. 265; 95 Penn. St. 45; 122 N. Y. 578; 10 Wall. (U. S.) 33; 17 Iowa, 176; 31 N. E. 31; 36 Minn. 433; 9 Md. 1; 40 Pa. 311; 4 Bradw. (Ill.) 145; 67 Barb.

595; 106 Pa. 20; 66 Pa. St. p. 6; 57 Barb. 521; 38 Md. 400; 4 Wis. 25. An agent has no power to change the conditions in a policy, or dispense with their performance, and the insured is estopped, by the acceptance of the policy, from relying on any powers in the agent in opposition to the restrictions and limitations contained therein. 65 Mich. 527; 63 *id.* 90; 11 Am. & E. Enc. Law, 322; 134 N. Y. 28; 31 N. E. 31; 35 Ark. 75; 17 Am. St. 233, note to p. 248; 9 *id.* 229–238; 75 Wis. 198; 71 Mich. 414; 60 Vt. 682; 127 Ill. 364; 55 Cal. 198; 55 Cal. 408; 49 Mo. App. 423; 8 Wait, Ac. & Def. (supp.) 781. The acceptance of the policy was an assent to all its conditions, and he is estopped to deny that he has assented thereto. 1 Wood, Fire Ins., 10 and note 2; 47 N. Y. 114; 68 Wis. 298; 36 Wis. 599; 15 N. Y. Sup. 317; 133 N. Y. 356. Sumpter & Son, as local agents, could not bind the company by a waiver, unless it was endorsed on the policy. 2 Biddle, Ins. sec. 1074, note 2; 144 Mass. 43; 11 Rep. (N. Y.) 780; 64 N. Y. 469; 63 N. Y. 531; 121 Mass. 439; 16 Ins. L. J. 305; 36 Minn. 433; 60 Vt. 682. A waiver cannot be inferred from silence. 8 Wait, Ac. & Def. 343; 84 N. Y. 410; 87 Pa. St. 388; 56 Vt. 374. When notice is required to be given to the president or secretary, notice to the agent is not sufficient. 2 Wood, Fire Ins., 935, and note 1. Knowledge of the loss by the company does not excuse written notice *Ib.*, sec. 939. Conditions must be strictly complied with. 58 Ark. 565; 1 Wood, Fire Ins., 342; 2 *id.* 927-8. One dealing with a local agent must be acquainted with his powers. 1 Biddle, Ins., sec. 121-2; 2 *id.* secs. 1072, note 2, and 1074; 54 Ark. 78; Ostrander, Ins. 140; 3 Col. 422; 69 Iowa, 658; 75 *id.* 544; 86 Ala. 424; 32 N. Y. 619. *Immediate* notice was a condition *precedent.* 2 May, Ins. sec. 463; 43 N. H. 621; 33 Pa. St. 397; 33 Ohio St. 555; 7 Am. & Eng. Enc. Law, 1043, note 12; 8 Wait, Ac. &

Def. 795. A local agent has no authority to receive notice of loss. 75 Pa. 378. A *written* waiver was required by the policy, and even a general agent could not give an *oral* waiver. 2 May, Ins. 469 *(d);* Ostrander, Ins. 556; 2 Biddle, Ins. sec. 1147, note 7; 144 Mass. 43; 30 Neb. 288; 145 Mass. 265; 144 *id.* 43; 105 *id.* 570; 60 N. Y. 274; 57 Ill. 180; 19 N. Y. Sup. 990; 65 Hun. 621; 48 Kas. 239; 59 Fed. Rep. 732; 84 Wis. 80, 208.

E. W. Rector, for appellee.

1. Written notice from the local agent from information communicated by the assured is sufficient. 2 Wood, Ins. (2 ed.), pp. 938–9; 47 Me. 379; 40 Pa. St. 289.

2. When the company sends an agent to examine the loss, and he says or does anything that indicates that notice is unnecessary, it is a waiver of notice. *Any* notice that induces the company to examine the loss is enough. 2 Wood, Ins. p. 940 and notes.

3. Proof of loss was made, but not within the thirty days. Forfeitures are not favored in law. 96 U. S. 557. Any agreement or declaration or course of action on part of the company which leads the assured honestly to believe that by conforming thereto a forfeiture will not be incurred, followed by due conformity on his part, will estop the company from insisting on the forfeiture. *Ib*; 53 Ark. 494; 96 U. S. 234; 106 *id.* 30, 34; 55 Mich. 141–6; 33 Mich. 143–151. Notice and proof of loss may be waived by parol. 53 Ark. 494; 60 *id.* 532; Wood, Ins. (2 ed.), p. 866. sec. 419.

4. The company by its acts ratified the acts of Sumpter & Son, who were its *general* agents. 53 Ark. 494; 60 *id.* 532; 52 *id.* 11.

5. There was no vacancy. The tenant was only temporarily absent. Wood, Fire Ins. p. 215, sec. 91.

6. The proof shows that the mortgage was executed *before* the policy was issued, not *after*, and the mortgage clause was *attached to the policy when issued.*

7. The action was properly brought in Lowery's name. 2 Wood, Fire Ins. pp. 1122, etc. sec. 514; Wood, Fire Ins. 1123; 58 Md. 172.

How notice of loss given.

HUGHES, J., (after stating the facts). The notice of loss given by John J. Sumpter at the instance of the assured was acknowledged by the company to have been received, and was sufficient. Notice by a local agent of the company, upon information communicated to him by the assured, is sufficient. *West Branch Ins. Co.* v. *Helfenstein*, 40 Pa. St. 289; Wood on Ins. (2 ed.), pp. 938, 939.

Notice in four days has been held "immediate," and the policy of insurance in this case required immediate notice of loss. *Hoffecker* v. *N. C. C. M. Ins. Co.* 5 Houston (Del.), 101.

Sufficiency of proof of loss.

By its action in sending to the appellee a blank form for proof of loss after the thirty days in which pooof was to be made, and receiving the proof when made, without objection, so far as appears from the proof, the company waived the failure to make proof within the thirty days, and cannot be heard now to object on that account. "Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, upon which the party has relied and acted." The company is estopped from enforcing the forfeiture. *Insurance Co.* v. *Eggleston*, 96 U. S. 572; *German Ins. Co.* v. *Gibson*, 53 Ark. 494; *Burlington Ins. Co.* v. *Kennerly*, 60 Ark. 532.

Waiver of forfeiture by proof.

Proof of loss may be waived by parol, though policy requires it to be in writing. *Ib.*

Temporary absence works no forfeiture.

The temporary absence of the tenant at the time of the fire did not work a forfeiture, the policy having provided that if the house was allowed to become unoc-

cupied, the policy should be forfeited. May on Ins. secs. 248, 249 *d*; Wood on Fire Ins. 215, sec. 91.

Who may sue on policy.

Was it competent for the appellee to maintain this action alone? We think not. The policy provides that the loss, if any, shall be paid to the Jarvis-Conklin Mortgage Company, absolutely; not as its interests may appear, as is frequently provided in such cases, but the whole amount of the loss is made payable to it. The policy is, in effect, assigned to it, and the legal title is in it.

It, therefore, or its assignee, is the party entitled to sue and recover for the loss on this policy. While the Mortgage Company is entitled to sue and recover the entire loss, the assured (the appellee) may properly be made a party to protect his interest in the policy.

If the policy had been made payable to the mortgagee as its interest might appear, and it did not appear that its interest was greater or as great as the loss, the assured would be the proper party to sue; but if the policy is payable absolutely to the mortgagee, then the assured can sue only with the express consent of the mortgagee (*Coates* v. *Penn. F. Ins. Co.* 58 Md. 172), unless the assured had paid or extinguished the mortgage debt before suit. *Baltis* v. *Dobin*, 67 Barbour, 507; 2 May on Ins. sec. 449; *Ennis* v. *Harmony Fire Ins. Co.* 3 Bosw. (N. Y. Superior Court) 516.

The policy of insurance in this case is for one thousand dollars; the mortgage on the property is for five hundred dollars, as shown by the proof in the case; and it is apparent that the assured has an interest to the extent of the surplus, after the mortgage debt shall have been satisfied.

The judgment is reversed, and the cause is remanded with leave to the appellee to make the holder of the mortgage a party, and for a new trial.

Battle, J., absent.

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HOLIMAN v. HANCE.

Opinion delivered October 19, 1895.

LIMITATION OF ACTION—MORTGAGE DEBT.—A mortgage securing a debt not witnessed by separate writing, reciting a conveyance of land in consideration of a sum named, the receipt of which was acknowledged, and conditioned that if the amount specified be paid the mortgage shall be void, is barred by the three years statute of limitation applicable to open accounts, under the act of March 31, 1887, providing that the right to foreclose a mortgage is barred when the debt secured thereby is barred.

Appeal from Grant Circuit Court in Chancery.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

On the 5th day of January, 1883, appellants executed under seal, acknowledged and delivered to Nancy Hance, appellee's intestate, an instrument expressed in the following language, to-wit:

"This indenture, made and entered into on this 5th day of January, A. D. 1883, between Elijah Holiman and Nancy Holiman, his wife, of the county of Grant and State of Arkansas, of the first part and Mrs. Nancy Hance, of the State of Arkansas and county of Grant, of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of five hundred and ninety-four dollars ($594), the receipt whereof is here acknowledged, do grant, bargain, sell and convey, and by these presents do grant, bargain, sell and convey unto the second party, her heirs, executors or administrators forever, the following land lying in the State of Arkansas and Grant county, to-wit: The north-east quarter of section 15, township 4 south, range 14 west, containing 160 acres more or less, together with all and singular the hereditaments and

appurtenances thereunto belonging. And I, Nancy Holiman, wife of said Elijah Holiman, for and in consideration of the said sum of money, do release and relinquish unto the second party all my right of dower in and to said lands. To have and to hold the said granted premises unto the said party of the second part, her heirs and assigns, to her (their) only proper use. Conditioned, however, that if the first party should pay or cause to be paid to the second party $594, with ten per cent. interest per annum on the same, twenty-four months from date, then this mortgage to be void, otherwise to remain in full force and effect. In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written."

This mortgage was, from time to time, credited with the following amounts, to-wit: December 29, 1883, $4.20; December 16, 1884, $80; December 14, 1885, $130; October 20, 1887, $75—aggregating $289.20, leaving a balance due and unpaid on said mortgage the sum of $665.85, with legal interest thereon from judgment, or August 20, 1892, until paid. Said mortgage was filed for record 21st March, 1883. The mortgagee, Nancy Hance, died July 12, 1889, and appellee was duly appointed administrator of her estate, and, as such, instituted this proceeding to foreclose said mortgage, July 23, 1892.

The defendants filed the following answer, to-wit: That plaintiffs ought not to have and maintain their action herein, because they say that the same was to secure an account for five hundred and ninety-four dollars ($594) due twenty-four months after date, from the 5th day of January, 1883, and they have not brought their action to foreclose the said mortgage within the period of limitation prescribed by law for a suit on the debt or liability for the security for which it was given, and they plead the statute of limitation of three years

thereto, under the provisions of an act of the general assembly of Arkansas entitled 'an act to limit the time for bringing suits on mortgages,' approved March 25, 1889. And for further pleas and answer herein the defendants state that the land described and set forth in said mortgage was at the time of the execution of said mortgage, and is now, the homestead of said defendants, and that they are husband and wife, and resided on said lands as a homestead at the time of the execution of said mortgage, have ever since so resided, and do now so reside on the same, and neither the said mortgage nor the acknowledgment contain any alienation or statement of alienation as to said lands as a homestead; and they state that no decree can be entered herein, or should be entered, against them so as to deprive them of the use of said lands as a homestead, and they do now claim the same as a homestead, as exempt to them from the operation of said mortgage or any decree under it. And, further, said defendant says that, in or about 1886, he delivered to the said N. C. Hance, the mortgagee, one horse at the price of $75, which has never been credited, a credit to which he is entitled, and defendants further state that said suit to foreclose said mortgage had not been brought on the 31st of March, 1887, and plead that bar under an act of the general assembly entitled 'an act to limit the time for bringing suits on mortgages,' approved March 31, 1887."

Plaintiff demurred to this answer, on the ground that it does not state facts sufficient to constitute a defense; and because it is otherwise insufficient, and is no bar to plaintiff's right of recovery. The demurrer was sustained, decree of foreclosure rendered (the defendants declining to plead further), and this appeal was taken.

Chas. T. Coleman and *Met. L. Jones* for appellants.

There was no covenant in the mortgage, nor even a promise to pay the debt. A mere recital of the debt in the mortgage does not raise the note or other evidence from a simple contract to a specialty, or in any wise affect or change the operation of the statute of limitations. Wood on Lim. par. 322; Augell on Lim. par 92; 7 Wend. (N. Y.) 101; 2 Starkie, 234; 3 Com. Law Rep. 391; 28 Ill. 46; 4 Ad. & E. 195. The legislature has power to shorten the period of limitation upon existing causes of action, if a reasonable time is allowed the creditor to sue for and recover his debt. 95 U. S. 628; 104 *id.* 668; 105 Ill. 326; 2 Ind. 486; 13 Am. & Eng. Enc. Law, 695; 1 Wood on Lim. 38; Cooley, Const. Lim. 449.

Wood & Henderson and *E. H. Vance, Jr.*, for appellee.

The mortgage merely alleges that it was given to secure an *account*, for definition of which see Anderson's and Bouvier's dictionaries. The contract was in writing under seal, and the limitation was ten years. Mansf. Dig. sec. 4478 and Sand. & H. Dig. sec. 4822 do not apply, as the debt is evidenced by a writing under seal. 32 Ark. 410; 43 *id.* 464; 44 *id.* 102. The acts of 1887 and 1889 do not affect appellee's right to sue, as the mortgage contract is *the debt*, and it could not be barred before ten years. The last payment was October 20, 1887, and this formed a new period from which the statute began to run, and three years from that date was October 20, 1890, so the debt was not barred on the 25th of March, 1889, the date of the passage of the act, even if three years is the limitation. Nor would it have been barred in less than a year from the date of said act. Hence sec. 2 of said act does not apply, and the act stands, as against us, as having

made no allowance of time to bring suit, and is unconstitutional as to our client. 95 U. S. 628; 104 *id.* 668.

BUNN, C. J., (after stating the facts). The determination of this case turns on the application of the statute of limitations to the facts. These facts show that there is no separate writing evidencing the debt secured by the mortgage, and also that, by reason of the payments and credits made by and given to the mortgagor on the debt secured, the statute of limitations, as from a new point, began to run on the 20th October, 1887; and this suit to foreclose was instituted on the 23d July, 1892,—the statute having run during the intervening time, to-wit: five years, four months and three days.

Under our statute, approved March 31, 1887, the right of action to foreclose a mortgage is barred after the same length of time as is the action on the debt secured thereby, and therefore it follows that the only inquiry in this case is, what is the limitation on the debt? and to answer this inquiry, what, if any, is the evidence of the debt sued for? If the recitals in the mortgage, above and beyond those merely identifying the debt secured, are not sufficient to support a promise to pay, then it follows that the debt rests on no better foundation than as being a mere item of open account, and is barred in three years, and the plaintiff's action fails.

The general rule is that a mortgage is not the evidence of the debt, and for that reason, ordinarily, its recitals are not such as make a *prima facie* case of indebtedness on the part of the mortagor, upon which alone a personal judgment might be rendered against him. *Scott* v. *Fields*, 7 Watts, 360; *Fidelity Ins. & Trust Co.* v. *Miller*, 89 Pa. St. 26; *Drummond's adm'rs.* v. *Richards*, 2 Munford (Va.), 337; *Tonkin* v. *Baum*, 114 Pa.

St. 414; *Smith* v. *Stewart*, 6 Blackford (Ind.), 162; *Weil* v. *Churchman*, 52 Ia. 253; *Shelden* v. *Erskine*, 78 Mich. 627; *Brown* v. *Cascaden*, 43 Ia. 103; *Newbury* v. *Rutter*, 38 Ia. 179; *Saunders* v. *Milsome*, L. R. 2 Eq. 573; *Marryatt* v. *Marryatt*, 28 Beav. 224; 1 Jones on Mortgages, sec. 70; 2 *id.* sec. 1225; 1 Pingrey on Mortgages, sec. 205; 2 *id.* secs. 1530, 2030; *Kimball* v. *Huntington*, 10 Wend. 675; and *Elder* v. *Rouse*, 15 Wend. 218.

The recitals in a mortgage, however, may be sufficient to support a promise, and if that were so in the case under consideration, the statute bar would be ten years, the same as that of the mortgage, and the decree should be affirmed; but a majority of the court are of the opinion that the recitals are not sufficient to support a promise, and that the mortgage is not the evidence of the debt, and, therefore, that the statute bar is three years. Other questions raised it is unnecessary to consider.

Reversed and remanded, with instructions to overrule the demurrer.

DRAKE *v.* EUBANKS.

Opinion delivered October 19, 1895.

SALE OF LAND—MISTAKE IN QUANTITY—ABATEMENT OF PRICE.—A purchaser of land who relies upon the vendor's representation that it contains 219 acres, when in fact it contains 40 acres less, is entitled merely to a proportionate abatement of the purchase price, if the only damage proved was his failure to receive the amount of land represented.

Appeal from Madison Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

Dan W. Jones & McCain for appellants.

There is no conflict in the testimony. Eubanks admits he told defendants there were 209 or 219 acres. The facts in this case are not unlike those in 25 Ark. 102.

BATTLE, J. Peter Eubanks instituted this action against J. J. Drake and B. A. Drake to foreclose a lien for purchase money. He alleged, in his complaint, that he sold his farm, containing 177½ acres, to the defendant's for $700, of which they paid, at the time of the purchase, $565, and agreed to give their promissory note for the remaining $135, and had failed to do so, or pay it; and asked that the land be sold to pay the same.

The defendants answered, and admitted the purchase for the sum stated, but alleged that plaintiff, in selling the farm, falsely and fraudulently represented, and induced them to believe, that it contained 219 acres, and conveyed it to them by deed as containing that number of acres, when in fact it contained only 177½ acres, and that the deficiency in quantity made a difference in value of $200, which they set up as a counter-claim, and asked for judgment against the plaintiff for it.

The trial court rendered a decree against the defendants for the $135, and $8.10 for interest thereon, and ordered that the land be sold to pay the same.

We find the facts, as shown by the evidence, substantially as follows: Some time in January, 1893, Eubanks represented to the defendants that a farm owned by him, and composed in part of tracts which could only be described by metes and bounds, contained 219 acres, and offered to sell it to them for $700. He showed them a part of the boundary lines of the land, but not all. The part shown included the lines between his and the lands belonging to David Eady and James McChristian. They made no further investigation, but,

believing his representation, they received it as true, accepted his offer, and paid of the purchase money, $565, and agreed to execute their note to him for the other $135. He executed to them a deed purporting to convey certain lands, including the farm, giving the number of acres contained in each tract, but not the aggregate, and covenanting with them that he "will forever warrant and defend the title to said lands against all lawful claims whatever." And they took possession of the farm. Upon a demand for the promissory note, it was found that the lands which plaintiff undertook to convey by the deed contained in the aggregate 259 acres, and that two of the tracts belonged, respectively, to David Eady and James McChristian, and had been previously conveyed to them by Eubanks; that they were in their possession at the time of the purchase; and that these tracts contained 81½ acres, leaving 177½ acres actually conveyed by the deed. And the defendants refused to execute the note.

Plaintiff was illiterate, could not read, and of course was compelled to rely on another to prepare his deed. The result was, two tracts which he had sold to other persons, and did not belong to him, were included in the deed. This was obviously a mistake. He had shown to the defendants the boundary lines between these tracts and the land he sold to them. They knew that Eady and McChristian were in possession of the two tracts, and do not contend that they purchased any land other than that to which they acquired title; but they do insist that which was actually sold to them did not contain as many acres as was represented. Plaintiff represented to them, and they believed, that it contained 219 acres, and it contained only 177½ acres; a difference of forty-one and a half acres, which is material. Having relied upon the representation, they have a right to hold what was actually conveyed, and to an abatement of the

purchase money to the extent the quantity falls short of the representation; and this abatement is shown by the basis upon which the farm was sold. Both parties, in fixing the price, believed that it contained 219 acres. There is no competent evidence to show that it would have been worth more than the price agreed on, had it contained the quantity estimated. Upon this state of facts, as it does not appear that they were damaged except in failing to get as much as 219 acres, the abatement ought to be in proportion to the price agreed to be given for the land as represented. *Harrell* v. *Hill*, 19 Ark. 102. According to this rule, the defendants are entitled to a reduction for forty-one and a half acres at the rate of $\$3.19\frac{139}{219}$ an acre, which, not including a fraction of a cent, equals $132.42. This, taken from $135, the amount of purchase money remaining unpaid, leaves $2.58 still due to plaintiff, with interest thereon, to secure the payment of which he is entitled to a vendor's lien.

The decree of the circuit court is, therefore, reversed, and the cause is remanded, with instructions to the court to enter a decree in accordance with this opinion.

FORT SMITH MILLING COMPANY *v.* MIKLES.

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Opinion delivered October 19, 1895.

REFORMATION OF MORTGAGE—PRIORITIES.—The rule that, in the absence of a statute, equity will reform a mortgage after record so as properly to describe land which by mistake had been misdescribed therein, and thereby render it superior to a judgment lien or to the title of a purchaser with notice at execution sale thereunder, although the judgment was rendered and the sale made after the mortgage was recorded and before it was reformed, is not changed by Sand. & H. Dig., sec. 5090, providing that every mortgage shall be a lien only from the time it is filed in the recorder's office.

Appeal from Logan Circuit Court in Chancery.

OSCAR L. MILES, Special Judge.

Action by J. N. Mikles, trustee in a deed of trust, against R. Garner and the Fort Smith Milling Company, to reform the deed of trust.

The complaint states that defendant Garner, to secure certain debts named, executed the deed of trust to plaintiff, and it was duly recorded; that, by mistake of the draftsman, there was a misdescription of the land conveyed; that subsequently the Fort Smith Milling Company obtained judgment against said Garner, and caused execution thereon to be levied upon the land intended to be conveyed by the deed of trust, and bought in the land under such execution; that, at and before its said purchase at sheriff's sale, the Fort Smith Milling Company was informed of the existence of said trust deed, and of the fact of the misdescription of the property, and of the rights of plaintiff and the said beneficiaries in said deed. And said defendant also well knew, at and before said purchase, of the pendency of a suit of J. N. Mikles, trustee, against R. Garner for the purpose of reforming said deed of trust, so as to make it properly describe the land according to the agreement and intention of the parties. Prayer was that the deed of trust be reformed, so as to describe properly the land intended to be conveyed, and that the purchase of the Fort Smith Milling Company be canceled.

The court overruled a demurrer to the complaint, and defendant appealed.

Humphry & Warner for appellant.

1. A mortgage constitutes no lien as against strangers, unless acknowledged and recorded, even though they have actual notice. Sand. & H. Dig. sec. 5091; 9 Ark. 116; 20 *id.* 193; 25 *id.* 158; 49 *id.* 461; 37 *id.* 94; 40 *id.* 540; 22 *id.* 136; 51 *id.* 419; 54 *id.* 179; 12 S. W.

496. The same doctrine is held by many courts. 120 Ill. 308; 1 Metc. (Mass.) 212; 32 N. J. Eq. 65; 14 Oh. 428; 84 Pa. St. 36; 46 Tex. 416; 105 U. S. 703; 17 S. E. 13; 35 Miss. 506; 22 S. C. 146, and many others. To hold that filing for record is essential, as against creditors, and that, since it was in fact filed for record, although it did not describe nor convey, nor purport to convey, the property in controversy, nor refer to or mention it, it is nevertheless valid as against creditors, involves a contradiction utterly illogical and wholly inconsistent with law and reason, and cannot be upheld. Pom. Eq. Jur. secs. 653–4–5; 63 Ind. 576; 44 Mo. 309; 12 Iowa, 19; 31 *id.* 524; 49 *id.* 538; 20 Oh. 261; 1 Johns. Chy. 297. The registry is only notice to purchasers of the *amount* of the mortgage only. 9 Mich. 213; 24 Ill. 583; 62 Tex. 393; 10 Vt. 555; 92 Ill. 385; 39 Fed. 243. See also 48 Ark. 419.

2. It follows then that a mortgage cannot be reformed so as to cut off vested liens acquired by third parties subsequent to the mortgage but before notice of the defect, or of any attempt to reform. 26 Ohio St. 471, 474; 16 Ill. App. 316; 7 Cal. 294; 29 Mich. 162; 2 Humph. 116.

D. B. Granger, for appellee.

The authorities cited by counsel refer alone to registration of mortgages, and they overlook the fact as to *prior equities*. Appellant was not a purchaser for value, nor was he a prior creditor. He *knew* a suit was pending to reform when he purchased. This court has settled the controversy. 33 Ark. 119; 35 *id.* 127; 28 *id.* 82; 51 *id.* 390; 28 *id.* 372.

James B. McDonough, amicus curiae.

1. The statute requires all mortgages to be recorded, to constitute a lien as against strangers, even with notice. This mortgage is an equitable mortgage,

or nothing. If not recorded, it is not valid. 76 Me. 551; 1 Jones, Mortg. sec. 469; 1 Pingrey, Mortg. sec. 649. Land omitted from a mortgage occupies the status of an *unrecorded* mortgage. Jones, Mortg. sec. 167, p. 135, note 3; 4 S. W. 503; 7 Neb. 285; 21 Minn. 336; 20 N. W. 161; 40 Iowa, 659: 18 *id.* 150. The case in 11 Oh. St. 289 is the only case holding *contra*, and there the facts are materially different. All the cases hold that property omitted from a mortgage occupies the status of property in an unrecorded mortgage.

2. The lien of an unrecorded mortgage is inferior to the lien of a judgment. 21 Minn. 336; 67 Tex. 457; 61 *id.* 325; 5 Hemp. 26; 32 Pa. St. 121; 77 N. Y. 628; 68 *id.* 629; 43 Oh. St. 436; 58 Miss. 853; 24 *id.* 106; 52 *id.* 92; *Ib.* 546; 5 Minn. 258; 13 *id.* 210; 40 *id.* 324; 47 Tex. 165; 13 Ark. 543; 58 Am. Dec. 338, note; 50 *id.* 109; 43 N. J. Eq. 642; 2 N. E. 501; 7 Cal. 294; 13 Ga. 443. The mortgage was not notice. 47 Am. Dec. 455; 20 Am. & Eng. Enc. Law, 599.

3. The lien of an execution is superior to prior unrecorded mortgage. 9 Ark. 117; 51 *id.* 419; 54 Ark. 179.

4. *Allen* v. *McGaughey*, 31 Ark. and *Byers* v. *Engles*, 16 Ark. 547, and *Blackburn* v. *Randolph*, 33 Ark. are not conclusive, for *sales* of lands and *deeds* are governed by a different statute and rule as to notice. These cases apply only to rights not required to be recorded.

5. Appellee's equities are not superior to those of appellant. Appellee was not a *bona fide* mortgagee for a valuable consideration. 73 Pa. St. 153; 12 Am. Dec. 121; 18 *id.* 177; 56 Cal. 370; 36 N. J. 128; 36 Tex. 511; 23 N. J. Eq. 315; 28 N. E. 695; 24 N. J. Eq. 552; 24 Atl. 233; 52 N. Y. 138; 66 N. Y. 157.

Clendening, Mechem & Youmans, amici curiae.

1. Cite and review the Arkansas cases on the subject of mortgages from 9 Ark. 116 to 56 *id.* 88.

2. 31 Ark. 252 and 33 *id.* 120 are conclusive of this case. See also 11 Oh. St. 283; 44 *id.* 177; 15 Iowa, 495; 42 Ark. 66.

BATTLE, J. Is the lien of a mortgage, which was properly signed, sealed, acknowledged and recorded, after it has been reformed by a court of equity so as to embrace land omitted therefrom by mistake of the parties, superior to a lien of a judgment on the land which was recovered against the mortgagor after the recording, but before the mortgage was reformed or a suit for that purpose was instituted; or will it defeat a sale of the land, made after the institution of the suit to reform, the vendee having notice of the mistake before he purchased?

That courts of equity can correct mistakes in contracts of all descriptions by reforming them so as to carry out the intention of the parties is beyond question. In the absence of a statute, they will interfere to correct mistakes between the original parties, even against a judgment lien, or purchasers at sheriff's sales under executions with notice of the facts, notwithstanding the judgment under which the lien was acquired, or upon which the executions were issued, were rendered subsequent to the execution of the contracts, but prior to the reformation. In such cases the equities are *dehors* the contracts, and the judgment liens attach subject to them; and parties purchasing with notice cannot defeat them. *Simmons* v. *North*, 3 S. & M. 67; *Gouverneur* v. *Titus*, 6 Paige, 347; *Ellis* v. *Tousley*, 1 Paige, 280; *Blackburn* v. *Randolph*, 33 Ark. 119; 1 Story's Eq. Jur. secs. 164 to 167.

But have the statutes of this state changed this rule? Section 5090 of Sandels & Hill's Digest provides: "All mortgages, whether for real or personal estate, shall be proven and acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proven or acknowledged; and when so proven or acknowledged shall be recorded, if for lands, in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides," etc. And the following section then says: "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property *from the time the same is filed in the recorder's office for record, and not before;* which filing shall be notice to all persons of the existence of such mortgage." Under these statutes, this court has held, in a number of cases, and for a long period of time, that a mortgage "constitutes no lien upon the mortgaged property as against strangers, unless it is acknowledged or proved in the manner prescribed by the statutes, and filed for record, even though they have actual notice of its existence." *Main* v. *Alexander*, 9 Ark. 112; *Hannah* v. *Carrington*, 18 *id.* 105; *Jacoway* v. *Gault*, 20 *id.* 190.

The rule thus established in this state is entirely statutory. This court in following it has yielded obedience to what it deemed the "unbending and imperious requirements of a legislative enactment." But the statutes upon which it is based relate solely to the acknowledgment, proof, and recording of mortgages. Further than this they do not undertake to regulate the execution of mortgages, and require only that class to be filed for record which are required to be acknowledged or proved. Equities which exist *dehors* the mortgage cannot be filed or made a matter of record, and of course do not belong to that class of rights to which the statutes relate. As to them, they are silent, and the gen-

eral doctrines of equity jurisprudence are left in full force.

This court has held that certain equitable mortgages do not belong to the class controlled by the statutes, need not be recorded, and can be enforced against parties purchasing with notice of them. *Martin* v. *Schichtl*, 60 Ark. 595; *Stephens* v. *Shannon*, 43 Ark. 464; *Talieferro* v. *Barnett*, 37 Ark. 511. Upon the same principle cases like that before us depend.

In Ohio statutes substantially like ours were in force. The courts of that state construed them in like manner. In *Strang* v. *Beach*, 11 Ohio St. 283, which was a case very much like the one before us, the court, after speaking of the construction placed upon the statutes by the courts of that state, said: "Now, for these reasons, we will not disturb the rule thus established. It has the merit, at least, of simplicity, and of being well known and understood. But the question before us is, not whether we will disturb the rule thus established, but whether we shall enlarge the rule, and extend its operations to a case not within the letter of the statutes, and clearly distinguishable from any which have heretofore been held to be within these statutes. The rule is a statutory rule; and the cases referred to proceed in obedience to what were deemed the unbending and imperious requirements of a legislative enactment. These statutes relate solely to the mode of execution, and the recording of the mortgage; a mistake in these respects, it is settled, cannot be corrected; but, as to all mistakes and defects of the instrument, in other respects, the statutes are entirely silent, and upon them the decisions which have been made upon questions arising under these statutes have no bearing. As to the due and formal execution and recording of the mortgage in the case before us, no exception is taken; in these respects it is admitted to be perfect. And it seems to us, there-

fore, that we are not only at liberty, but are required, to stop where the statutes stop; and as to a mistake in an attempted description of mortgaged premises—which is a matter not covered by the statutes—to resort again to the general doctrines of equity jurisprudence, on which our statutes are an admitted innovation."

And so we hold in this case. The decree against the appellant is affirmed.

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KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD COMPANY *v.* SOKAL.

Opinion delivered October 19, 1895.

TRIAL—REMARKS OF COUNSEL.—In a trial of a case on change of venue taken by defendant on the ground of local prejudice, plaintiff's counsel in his argument to the jury proposed to read the motion for change of venue. On defendant's objecting, counsel said: "I have no doubt they will interrupt me. It is the hit dog that always howls." The court said: "I expect that is an improper argument." Whereupon counsel said that he had "a right to read the record in this case," but that he did not "want to travel out of the record." The court replied: "It is not outside the record, but it is not a matter that the jury have anything to do with." Counsel then said: "I submit this, that if the record shows that this case was removed on the affidavit of these parties that they could not get a fair trial, that the feeling in that county is so strongly against them, I submit that is a matter of record which can be read to the jury." *Held*, that the remarks of counsel constituted prejudicial error.

REMARKS OF COUNSEL—STATEMENTS NOT SUPPORTED BY EVIDENCE.—In an action against a railroad company for unlawfully ejecting plaintiff from its train, a statement by plaintiff's counsel in his argument that there were a great many passengers on board defendant's train at the time of plaintiff's ejection, and that defendant kept a record showing where everybody got off the train, and could have had them all testify, and that it probably found that it would not do any good to bring them, is improper, where such statements are not supported by evidence.

Appeal from Mississippi Circuit Court.

JAMES E. RIDDICK, Judge.

Adams & Trimble for appellant. *Wallace Pratt* of counsel.

1. The judgment should be reversed for improper argument and conduct of plaintiff's counsel. 48 Ark. 106; 30 N. W. 630; 5 Atl. 838; 1 So. 202; 61 Wis. 114; 14 S. W. 566; 11 *id.* 127; 18 *id.* 583; 15 Neb. 20; 61 Iowa, 559; 79 N. C. 589; 4 N. E. 911; 8 S. W. 63; 44 Wis. 282; 70 Tex. 67; 52 N. W. 873. Even a withdrawal by counsel of the objectionable argument will not in all cases save him. 14 S. W. 566.

2. The court erred in refusing defendant's request. Sand. & H. Dig. sec. 6192; 49 Ark. 357; 43 Ill. 420; 54 Ark. 354.

3. It was error to modify defendant's two requests by submitting to them the two questions, first, whether plaintiff was put off at an unsafe or dangerous place, and second, whether more force was used than was necessary. There was no evidence on either point to go to the jury. Furthermore, they were misleading. 57 Ark. 615.

4. The damages were excessive.

5. The question of punitive damages should not have been submitted to the jury. 147 U. S. 101; 53 Ark. 7.

W. A. Percy and *St. John Waddill* for appellee.

1. The verdict is not excessive. There were elements of physical suffering, of great indignity, of reckless negligence. For such plaintiff was entitled to recover. 5 Am. & Eng. R. Cases, 560; 64 Miss. 80; 1 Rorer, Railroads, 735; 11 A. & E. R. Cases, 114; 5 Ark. 407; 26 Ark. 314; 37 *id.* 632; 42 *id.* 527; 35 *id.* 496; Suth. on Dam. vol. 1, pp. 710, 729, 755, 810; 3 *id.*

p. 260. The verdict is conclusive, there being evidence to support it. 25 Ark. 380; 39 *id.* 491; 56 *id.* 314.

2. This was a case for punitive damages. 56 Ark. 51; 53 *id.* 10. But actual damages only were allowed by the jury.

3. The argument of counsel was harmless, and was made in reply to a bitter speech by opposing counsel, in the warmth of debate.

BATTLE, J. John Sokal brought this action against the Kansas City, Fort Scott and Memphis Railroad Company, in the Crittenden circuit court, to recover damages sustained by him through the unlawful acts of the defendant. He alleged that, having purchased of the defendant a ticket on the 24th of December, 1890, which entitled him to transportation over its road from West Memphis to Jericho, in this state, he entered a passenger train of the defendant going to Jericho, at West Memphis, and delivered his ticket to the conductor; and that thereafter, before he reached Jericho, without any fault or misconduct on his part, the employees of the defendant, with force and arms, seized him, and wantonly ejected him, with great indignity, from the train to the ground below, whereby he was damaged in the sum of $10,000.

The defendant answered, and denied the allegations of the plaintiff, and alleged that he was drunk and disorderly on the train, and guilty of using profane and vulgar language in the presence of lady passengers, and otherwise so misconducted himself as to make it the duty of the conductor to eject him.

The venue in the case was changed, on the application of defendant, from Crittenden to Mississippi county.

The issues were tried by a jury. The evidence adduced in the trial was conflicting. It was proved that Sokal entered a train of the defendant at West Memphis, and was put off by the conductor before he reached

Jericho, the place of his destination, at a place which was not a station. But as to the delivery of a ticket, or payment of fare by him to the conductor, witnesses were not agreed. The conductor and a brakeman testified that he did not, while he swore that he purchased a ticket from the defendant, which entitled him to transportation in a passenger train over its road from West Memphis to Jericho, and delivered it to the conductor after entering the train, and introduced evidence corroborating his statement. As to the place he was put off, evidence was adduced tending to show it was a short distance beyond the station of Marion, near a trestle, and where the road bed was four or five feet high, and a ditch filled with water was at the foot of the embankment. It was raining or sleeting at the time he was ejected.

Evidence was also adduced tending to show that Sokal was intoxicated and noisy at the time he was put off the train; that he used profane language in the presence of ladies; and that he attempted to sit in the lap of a colored woman, and, when she remonstrated, cursed. But this evidence was contradicted by other testimony. It does not appear, however, that he was ejected on account of his noise, profane language, or improper conduct, but because he failed to pay fare, or deliver a ticket showing that he had done so.

Witnesses do not agree as to the manner in which he was ejected. Some testified that he was put off in a rude manner; was pitched off while the train was moving with such force that he fell down the embankment, and lay prostrate in the mud and water. Others testified that no violence was used, and that he alighted on his feet, and fell after the men who put him off had left him standing.

The conductor testified that he made a report to the defendant showing how many tickets he received from

West Memphis to Jericho on the day Sokal was ejected, which was sent to Kansas City, but he did not know whether it was then in existence, and did not remember what it showed. There was no evidence that any record was kept of the names of those who purchased tickets or delivered them to the conductor.

Upon the last argument of the case before the jury, Mr. Percy, counsel for plaintiff, who was making it, said:

"Now, gentlemen of the jury, why is this case here, and why are the people of Mississippi county called upon to try a railroad company running through another county for an offense committed in that county? The case is here on a change of venue from the good county of Crittenden, and who got it? Gentlemen of the jury, how did it come here? We find the papers of this case after the trial of it at Marion—"

Mr. Trimble, counsel for the defendant, interrupting, said: "If the court please, we think that it is an improper argument."

Mr. Percy said: "I have no doubt they will try to interrupt me. It is the hit dog that always howls."

The court said: "I expect that is an improper argument."

Mr. Percy said: "I am not going to read any of the evidence in that case."

The court: "I think it is improper to refer to the change of venue."

Mr. Percy: "I have a right to read the record in this case."

The court: "I do not think the jury has anything to do with the change of venue."

Mr. Percy: "Your honor will not let me state to the jury why this case was brought from Crittenden county."

The court: "No, sir, because that might defeat the object the defendant had in bringing it from one county to another."

Mr. Percy said: "Very well, sir, I don't blame them for wanting to keep that fact away from the jury."

Mr. Trimble: "Now, we except to that. We think it is an improper statement to make to the jury."

The court: "I think our supreme court has passed upon the question, and has properly held that it is entirely foreign to the case, and the jury should not consider and counsel should not argue it. I am satisfied Mr. Percy overlooked that at the time."

Mr. Percy: "I do not want to travel out of the record."

The court: "It is not outside of the record, but it is not proper to comment on it, because it is not a matter that the jury have anything to do with."

Mr. Percy: "I submit this, that if the record shows that this case was removed from Crittenden county upon the affidavits of these parties that they could not get a fair trial, that the feeling in Crittenden county is so strongly against them there, I submit that is a matter of record which can be read to the jury."

The Court: "No sir. It is not a matter you can read or the jury can consider in arriving at their verdict in the case."

Mr. Percy: "Very well, sir," etc.

Again, in the concluding portion of his argument Mr. Percy said: "A great many passengers were on board that train, some going to Kansas City. This railroad knows of everybody on there, where all those passengers are, and where they can be found, and they could have been brought here to testify."

Mr. Trimble: "That is not in evidence, and not the truth."

The court said that counsel must confine himself to the evidence.

Mr. Percy: "That is all right. I say this, that they have a record showing where everybody got off that train, and they could, had they so desired, have made an investigation, and found where everybody got off that train. It is probably true that they made an investigation, and found out it would not do them any good to bring them here."

Later in his argument Mr. Percy said: "Now gentlemen, taking their own theory of this law suit, that they put him off because he was too drunk to behave himself, could they sit there and see him fall down—a man in that condition in that sort of weather? They knew that ten, fifteen or twenty trains a day were running on that track, and the last that they saw of him was while he was falling down the side of the track. They did not know, and, in the language of Mr. Vanderbilt, they didn't give a damn, whether the next train that came along ran over him or not."

Mr. Trimble: "If the court please, we object to that as an improper argument."

Mr. Percy: "Let the hit dog howl always. But these men know that what I am saying is so."

The Court: "I hardly think the expression used is in keeping with the dignity of the court, and counsel should not use such expressions."

Mr. Percy: "I used it in quotation. I have heard it spoken in that way. I say the inhumanity of putting a man off in that condition, in that sort of weather, is something these people should be made to smart for."

The jury returned a verdict in favor of the plaintiff for $500; and the court rendered judgment accordingly; and the defendant appealed.

The remarks of counsel as to the change of venue and the record kept by the appellant were unquestion-

ably improper. The question is, should the judgment of the trial court be reversed on account of them?

When argument of counsel prejudicial.

Courts are instituted for the purpose of enforcing the right, and redressing wrongs, according to the laws. In jury trials, evidence is adduced for the purpose of ascertaining the truth, and instructions are given by the court to inform the jury as to the law applicable to the facts. Jurors should ascertain the truth from the evidence, and apply the law as given by the court to the facts as they find them, and return a verdict accordingly. Except as to those facts of which courts take judicial notice, juries should consider only the evidence adduced. Arguments by counsel of the evidence adduced and the law as given by the court are allowed only to aid them in the discharge of their duty. Within these limits counsel may present their client's case in the most favorable light they can. When they go beyond them, and undertake to supply the deficiencies of their client's case by assertions as to facts which are unsupported by the evidence, or by appeals to prejudices foreign to the case, they travel outside of their duty and right, and abuse the privilege of addressing the jury by using it for a purpose it was never intended to accomplish; for such assertions or appeals can serve no purpose except to mislead the jury and defeat the ends of the law in requiring them to confine their consideration to the evidence adduced and the law embodied in the instructions of the court. Hence it is the obvious duty of courts, in furtherance of the object of their creation, to prevent such assertions or appeals or, when made, to remove their evil effects, so far as they can; and attorneys, in the making of them, if they are calculated to prejudice the rights of parties, are guilty of a violation of the law, of an abuse of their privileges, of conduct unfair and unbecoming to their profession, and should be promptly and sternly rebuked by the court,

and, if need be, punished. *L. R. & F. S. Ry. Co.* v. *Cavenesse*, 48 Ark. 131, 132; *Brown* v. *Swineford*, 44 Wis. 282; *Holder* v. *State*, 58 Ark. 473; *Ferguson* v. *State*, 49 Ind. 34; *Shular* v. *State*, 105 Ind. 304; and *Waldron* v. *Waldron*, 156 U. S. 361.

While it is the duty of trial courts to confine counsel within the limits of legitimate debate, an omission to do this duty, while it may be a good reason for criticism, will not always entitle the appellant to a reversal of the judgment of the court below. A failure in this respect, which is not calculated to prejudice the cause of the appellant in the minds of honest men of fair intelligence, is not a ground for reversal. But material statements made by counsel of appellee outside the evidence, which were likely to injure appellant, and were excepted to by him at the time, and were not cured by the court, do constitute a good cause for reversal. Ordinarily, "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 instances sometimes occur in which it is not sufficient, as *Holder* v *State*, 58 Ark. 473. *Combs* v. *State*, 75 Ind. 220.

The remarks of appellee's counsel in this case in respect to the change of venue were unquestionably improper, for the jury had nothing to do with that subject. The mild and doubting way in which the court sustained the objection to the remarks, and the positive manner in which counsel insisted upon his right to make them, were calculated to render the ruling of the court of no effect. When counsel for appellee sought to convert the objection of appellant's counsel into a confession that the record referred to was evidence damaging to the cause of appellant, the court said: "I expect that is an improper argument;" and counsel for

appellee, emboldened by the doubting manner in which the court expressed his opinion, positively and unqualifiedly asserted that he had "a right to read the record in this case." When counsel said, "I don't want to travel out of the record," the court replied, "It is not outside of the record, but it is not proper to comment on it, because it is not a matter that the jury have anything to do with." Encouraged by this remark, counsel again insisted on his right to read to the jury the record showing the proceedings in court in respect to the change of venue, by saying: "I submit this, that if the record shows that this cause was removed from Crittenden county upon the affidavit of these parties that they could not get a fair trial, that the feeling in Crittenden county is so strongly against them there, I submit that is a matter of record which can be read to the jury." And when the record as to the change of venue was in this manner brought before the jury, the court virtually bearing witness to the fact that counsel's statements were sustained by the record, counsel for appellee ceased to contend that it was proper for the jury to consider it. These statements, admitted by the court to be true, had then made impressions upon the minds of the jury which could not be easily removed. The apparent doubt of the court, and the positive, unqualified, and repeated assertions of counsel, were not likely to accomplish that effect. We think the statements were prejudicial to appellant. The liberal verdict of the jury tends to confirm us in that conclusion.

Argument not supported by evidence is prejudicial.

The statements made by counsel to the effect that appellant kept a record of the passengers on the train from which appellee was ejected, and knows where they are, and can produce their testimony, were unsustained by the evidence, and likewise improper, and should have been excluded from the jury. The other remarks objected to were based on evidence, except as

to the ten, fifteen or twenty trains passing daily over the track of appellant's railroad.

Appellant asked the court to instruct the jury as follows: "If the plaintiff had a ticket entitling him to ride from Memphis to Jericho, but failed or refused to exhibit or surrender his ticket, claiming that he had surrendered it to the conductor, when he had not, the conductor had a right to put him off anywhere; and if he did put him off under these circumstances, your verdict should be for the defendant." And the court amended it by adding: "Unless the jury find from the proof that he was put off at an unsafe or dangerous place, and that he was thereby injured, or unless the employees of defendant's train used more force than was necessary in ejecting plaintiff from the train;" and gave it as amended. Another instruction as to the right of appellant to eject appellee from the train for disorderly conduct was requested by appellant, and was amended by the court in the same manner and given. Appellant insists that these amendments were erroneous, "because there was no evidence whatever that appellee was put off at an unsafe or dangerous place and was thereby injured, or that more force was used than was necessary." We do not find any evidence to show that the place was unsafe or dangerous, but there was to prove that more force was used to put him off than was necessary. As the judgment in the case will be reversed, it is unnecessary to say more about these amendments. The defect indicated can be corrected in the next trial.

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

Riddick, J., being disqualified, did not sit in this case.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* AVEN.

Opinion delivered October 19, 1895.

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RAILROAD COMPANIES—DUTY AS TO HIGHWAY CROSSING.—A railroad company, in building and maintaining a bridge across a ditch dug by it at a highway crossing, is bound to use reasonable skill and diligence in providing against the ordinary dangers of travel; and if rails, guards or barriers be reasonably necessary for that purpose, and practicable, it is its duty to construct and maintain them in the places needed.

RAILROAD COMPANIES—DEFECTIVE CROSSING—LIABILITY.—One who was injured at a railroad crossing will be entitled to recover from the railroad company, although the horse which he was driving had become frightened and unmanageable, if the accident would not have happened but for the company's negligence in failing to keep the crossing in repair.

RAILWAY CROSSING—MAINTENANCE OF BRIDGE—INSTRUCTION.—An instruction that if, in the construction of a railway at and across a public highway, "the railroad company cuts a ditch along the side of the track and across the highway, it is its duty to construct and maintain a safe and suitable bridge across and over said ditch," is erroneous in making the railroad company a guarantor of the safety of travelers.

RAILWAY CROSSING—DEGREE OF DILIGENCE REQUIRED.—An instruction that if the construction of defendant's railroad made it necessary to erect a bridge at a public crossing to make the highway available, it was the railroad's duty to so erect the bridge that the highway should be restored to and kept in as passable a condition as was consistent with the use of the railroad, and if guard rails were required for such purpose to place them on the bridge, is erroneous in making the company liable for an accident thereon, although it had exercised ordinary care and diligence in maintaining the bridge.

Appeal from Saint Francis Circuit Court.

GRANT GREEN, JR., Judge.

Dodge & Johnson for appellant.

1. The verdict is contrary to the evidence and to the law. The frightening of the horse was the *prox-*

imate cause of the injury, and not the absence of guard rails. Defendant was not in law compelled to anticipate the unreasonable scaring of any horse; the unusual is not to be guarded against, only the common and usual events of life. 5 Exch. 248; 29 Wis. 144; 56 Ark. 390; *Ib.* 521; 139 U. S. 237; 95 *id.* 130; 2 Thomps. Neg. 1084; Addison on Torts, 5; 29 S. W. 980; 4 Gray (Mass.), 397; 57 Ark. 414; 99 Mass. 605; Wills, Cir. Ev. p. 157; 50 N. W. 365; 65 Fed. 628; 115 Mass. 307; 34 A. & E. R. Cases, 551; 97 Mass. 258, 267; 98 *id.* 580; 148 *id.* 486. The liability of defendant is the same as that of a municipality, and it is held that it is not liable when the horse takes fright at some object for which the municipality is not responsible, etc. 29 Wis. 296; 57 Mo. 156; 68 Me. 152; 97 Mass. 258. As to concurring faults, see 1 Suth. Dam. p. 57; 70 Pa. St. 86; and as to *proximate* cause, 56 N. W. 19; 57 *id.* 117; 45 *id.* 1015.

2. It was error to refuse to instruct the jury to return a verdict for defendants. 57 Ark. 468; 34 A. & E. R. Cases, 551; 112 Pa. St. 574. The 1st, 2d, 3d, 4th instructions for plaintiff were erroneous, and it was error to refuse defendants 6th, 7th and 8th. See cases *supra*.

3. The verdict is excessive.

S. R. Cockrill, for appellee.

1. The exceptions of defendant were in gross. 114 N. Y. 399–405; 140 U. S. 238; 2 Wall. 339; 121 Ind. 387; Elliott, App. Pro. sec. 791; 10 U. S. Ct. App. (8 Ct.), 497; *Ib.* 630–1; 118 N. Y. 224–231; 88 N. Y. 13.

2. It was for the jury to say, upon the facts, whether the accident would have happened but for the absence of guard rails. The jury settled that fact in plaintiff's favor, and that ends the controversy. It is so held everywhere in such cases. The only divergence is

found in Masssachusetts and Maine, where it is held that if plaintiff loses control of his horse, he cannot recover. 29 Wis. 296; 71 *id.* 558; 68 Md. 389; 117 Pa. St. 353; 9 Ill. Ct. App. 229; 54 N. W. 693; 145 Pa. St. 220; 1 Suth. Dam. p. 262 *n*; 40 Conn. 238; 43 *id.* 148; 54 Mo. 598; 9 Vt. 411; 42 N. H. 197; 81 Pa. St. 44; 68 Md. 389; 116 N. Y. 476; 77 *id.* 83; 47 Hun, 439; 127 N. Y. 659; 79 Iowa, 204; 25 *id.* 108; 32 Minn. 308. Against this array stand Massachusetts and Maine alone. But even in Massachusetts the facts in this case justify a recovery. 145 Mass. 333–336. 56 Ark. 387 is consistent with appellee's theory.

3. The fact that plaintiff went upon the bridge when it had no guard rails was not evidence of contributory negligence. 52 Ark. 368; 54 *id.* 389; 59 Fed. 237.

4. The verdict is not excessive. 56 Ark. 594, 603; 13 Hun, 1; 18 Ark. 398; 48 *id.* 407; 57 *id.* 320; 11 How. (U. S.) 587; 2 Story, 661; 3 Sedg. Dam. sec. 1320; 18 S. E. 278; 31 Abb. N. C. 56; 57 Mich. 107, 119; 57 Tex. 105; 70 Iowa, 188; 61 Iowa, 452; 29 N. Y. Supp. 391; 76 Hun, 233; 12 Mo. App. 466; 71 Tex. 470; 33 Ill. App. 450; 5 Mont. 257; 4 Utah, 215; 79 Tex. 643; 31 Kas. 197; 33 *id.* 298; 87 Ky. 327; 6 Utah, 357; 16 Daly, 130; 76 Wis. 120; 69 Tex. 556; 87 Ill. 94; 24 Hun, 184; 39 *id.* 5; 62 Tex. 118; 14 N. Y. Sup. 336; 25 S. W. 1087; 11 *id.* 333.

BATTLE, J. John W. Aven brought this action against the St. Louis, Iron Mountain and Southern Railway Company to recover damages for a personal injury which he alleges was received by him through the negligent construction and maintenance of a bridge and the approaches thereto, which constituted the highway crossing of the defendant's railway track.

In 1882 the defendant constructed a railway over a public road in St. Francis county. It erected an embankment 6 feet high, and dug a ditch on east side

thereof 10 feet deep, 18 feet wide at the top, and 5 feet and 4 inches at the bottom, and thereby rendered the road impassable. In order to restore the road to use, and make a crossing for it over the railway, it made an inclined embankment to its track on the west, and placed a bridge across the ditch on the east, and approaches to the same. The bridge was 25½ feet long, and from 12 to 16 feet wide. One witness said that the principal part of the flooring of the bridge was 16 feet long, and that there were two or three planks near the center 12 feet in length; and another said about one-half were 12 feet long, and the other half 16 feet, and that the short planks began about the center of the bridge, and extended to the east end of it. "The fall of the approach to the bridge was about 21 inches to 10 feet, on the west side of the bridge, the side upon which the plaintiff approached at the time" the injury was received. The incline on the west side of the embankment was very steep. There were no railings or banisters on the bridge at the time of the injury.

On the morning of the 17th of September, 1892, the plaintiff approached the bridge from the west, driving a horse and cart or buggy. What followed he relates as follows: "I drove off, and my mare trotted on up to the railroad dump, and walked on the railroad track, and just about the time the cart got in the center of the track, the horse took a scare from something, I never have known what, but she made a fearful lunge, and jumped just as far as she could, and partially fell right at the edge of the bridge; and as she came up I made an effort to jump out of the cart, and as I did that she came up, and went right over the bridge. The shafts of my cart struck the bridge, and she jumped square down on her head, and I and the cart and all pitched right over into the ditch and struck the bottom." The evidence shows that she jumped off about the center of the

bridge. In the fall the plaintiff's right leg was broken just above the ankle joint; both bones were broken; one pierced through the skin at the ankle. The joint was opened; the membranes around it were ruptured; and the synovial fluid escaped. He was confined to his bed many weeks, and suffered excruciating pain.

Plaintiff considered his mare safe; and testified that he never knew her to become frightened before she leaped from the bridge, but she was a "high-headed animal." His wife constantly refused to cross the bridge with him, in his buggy, while driving the mare, and would get out and walk across, but she did ride over with him when he was driving another horse, which died prior to the time he purchased the mare. He further testified that he never knew that the mare was partially blind, but she had a white speck in one eye. He traded her about four weeks after he was injured, and while he was confined to the house. One witness testified that she was blind in one eye; and another that he knew that she was a "fiery and high-headed animal." One witness testified that he asked the plaintiff, on the day of the accident, how it happened, and he replied, "I can't tell, but she must have had a fit."

The court instructed the jury, in part, over the objections of the defendant, as follows:

1. "The court instructs the jury that where a railroad is built across a public highway, it is the duty of the railroad company to construct and maintain proper crossings for the benefit of the traveling public; and if, in the construction of the railway at and across the public highway, the railroad company cuts a ditch along the side of the track, and across the highway, it is its duty to construct and maintain a *safe* and suitable bridge across and over said ditch, so that the highway may be restored to a *safe* condition for travel."

2. "If the jury find from the evidence that the defendant cut a ditch across the public highway, as alleged in the complaint, and failed and neglected to erect and maintain a *safe* and suitable bridge across the same, and that the failure and neglect of the defendant railroad company to construct and maintain a *safe* and suitable bridge across the said ditch was the proximate cause of the injury to plaintiff, then you should find for the plaintiff."

3. "If the jury find from the evidence that the defendant railroad company cut a ditch across the public highway, as alleged in the complaint, and that it constructed a bridge across the same, then it is a question of fact for you to determine whether or not the same was sustained and maintained in a *safe* and suitable manner, and whether or not it was *necessary* that guard rails should have been constructed and maintained on said bridge; and if you find that it was *necessary*, and that the defendant failed and neglected to construct and maintain such guard rails, and that its negligence and failure in this behalf was the *proximate* cause of the injury and damage to plaintiff, then you should find for the plaintiff."

4. "If the jury find from the evidence that the construction of the said railway made it necessary for a bridge to be erected at the crossing of the railroad and public highway, in order to make this highway available to the public, the court instructs you that it was the duty of the railroad to erect and maintain such bridge so that the highway should be restored to *as passable a condition, and so kept, as was consistent with the use of the railroad company*, and if guard rails were required for that purpose, then it was the duty of the railroad company to place guard rails or banisters upon the bridge; and if you find that such was necessary, and that the railroad failed and neglected to provide and

maintain the same, and that the absence of the said guard rails or banisters was the proximate cause of the injury to plaintiff, then you will find for the plaintiff."

And instructed the jury as follows, at the request of the defendant:

"You are instructed, if you find from the evidence that the plaintiff's horse had a fit upon him, and was thereby rendered uncontrollable at the time of the accident, and that without such fit, and the consequent escape from control, the accident would not have happened, you will find for the defendant."

"If the jury believe from the evidence that plaintiff's horse was, at the time of the accident, blind, in one eye, and that this fact was known to plaintiff, and further believe from the evidence that a reasonable and prudent man would not have attempted to drive such a horse across such a bridge as this is described to be, in the manner that plaintiff attempted to drive his horse, then you are instructed that the plaintiff was guilty of negligence in so attempting to drive over said bridge, and if you find that such act on his part contributed to the injury, you will find for the defendant."

And refused to give the following at the request of the defendant:

"(You are instructed that there is no statute in this state prescribing that bridges of the character of this one should be provided with banisters or side rails), and unless you find from the evidence that the bridge in question was constructed and maintained as to banisters and side rails in a manner different from what a reasonable and prudent man would have done under the circumstances, then you will find that there was no negligence on the part of the railway company with reference to the construction and maintenance thereof, and you will find for the defendant." But modified it by

striking out the words in brackets, and gave it as amended over the objections of the defendant.

And the defendant asked, and the court refused to give, the following:

"You are instructed that if you find from the evidence that the plaintiff's horse became frightened, and by reason thereof plaintiff was unable to control him, and that without such fright the accident would not have happened, you will find for the defendant."

The jury returned a verdict in favor of plaintiff for $10,000. A motion for a new trial was filed by the defendant, and was overruled by the court. Exceptions were duly saved, and the defendant appealed.

In returning a verdict in favor of the plaintiff, the jury necessarily found that the evidence was insufficient to authorize them to return a verdict in favor of the appellant under the instructions given at its request. There being evidence to sustain them in that respect, we are concluded by the verdict to that extent; and the appellee stands acquitted of contributory negligence as to this appeal.

The main questions for our consideration are presented by the instructions given and refused by the court, and they are: (1) What was the duty of appellant as to the construction of the highway crossing over its railway track? and (2) what is its liability for the injuries received by the appellee, they being results of a leap of his horse from the bridge which (leap) was caused by fright?

Duty of railroads as to highway crossings.

As to the duty of railroad companies, the statutes provide that whenever they shall build a railway across any public road or highway in this state, they shall so construct the crossing, or so alter the roadbed of such public road or highway, that the approaches to the railroad bed, on either side, shall be made and kept in good repair, "at no greater elevation or depression than

one perpendicular foot for every five feet of horizontal distance, such elevation or depression being caused by reason of the construction of said railroad." Except as to the elevation or depression, the same duties rest upon them as are imposed on municipal corporations, which are bound to keep their streets in repair. In neither case is there any exact legal standard of care to be exercised in the construction or maintenance of public streets, roads, or crossings. They are only bound to use reasonable skill and diligence in constructing and maintaining in repair these highways, according to circumstances. They are not insurers of the safety of travelers, and are not bound to provide against everything that may happen on the highway, "but only for such things as ordinarily exist, or such as may be reasonably expected to occur." Where no danger may be anticipated, on account of the peculiar location of the highway, no vigilance is required for protection against liability for injuries; but where the road, bridge, or other public highway, by reason of its proximity to or construction over excavations, declivities, streams of water, or other places of peril, is manifestly so unsafe as to imperil the life or body of the traveler, it is the duty of the corporations or persons whose duty it is to keep it in repair to do whatever is practicable and reasonable to avert the threatened danger. If rails, guards or barriers be reasonably necessary for that purpose, and practicable, it is their duty to construct and maintain them in the places needed. *Ring* v. *City of Cohoes*, 77 N. Y. 83; *Plymouth Tp.* v. *Graver*, 125 Pa. St. 24; *Hey* v. *Philadelphia*, 81 Pa. St. 44; *Horstick* v. *Dunkle*, 145 Pa. St. 220; *Hunt* v. *Mayor*, 109 N. Y. 134; Wharton on Negligence (2 ed.), secs. 103, 104; 2 Dillon on Municipal Corporations (4 ed.), secs. 1005, 1007, 1015, 1019, 1020.

Corporations bound to build, or keep in repair, highways (bridges included) are not required to construct or maintain them in such a condition "that a traveler thereon may with safety run his horse at a furious rate of speed, or drive thereon unmanageable horses, nor are they bound to keep them in such condition that damage may not be caused thereon by horses which have escaped from the control of their driver and are running away." Highways are not built for such purposes. They are extraordinary incidents, out of the usual course of travel, for which no provision is required to be made. But, as all horses are, more or less, prone to shy and deflect from the beaten track, all public highways should be built and maintained in such a manner as to provide for the ordinary shying or starting of horses, and consequent deviations. Where practicable, the highway should be sufficiently wide and reasonably safe for that purpose, and guard rails or barriers should be constructed and maintained where necessary to protect the traveler against injuries from accidents which may be reasonably anticipated from such shying. To this end, the corporations charged with the duty of constructing or maintaining the highway are only bound to the exercise of ordinary care and diligence. *Baltimore, etc. Turnpike Co.* v. *Bateman*, 68 Md. 389, and see other authorities above cited.

Liability for injury at defective crossing.

As to the limits of liability in cases where an unruly or frightened horse is one of the causes of an accident on a public highway, there is a diversity of opinion, and some difficulty. In *Titus* v. *Northbridge*, 97 Mass. 258, the court said: "When a horse, while being driven with due care upon a highway, which a town is bound to keep in repair, becomes, by reason of fright, disease, or viciousness, actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this con-

dition comes upon a defect in the highway, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable in this sense, if he merely shies or starts or is momentarily not controlled by his driver." *Fogg* v. *Nahant*, 98 Mass. 578; S. C. 106 Mass. 278. In Maine the courts take the same view. *Aldrich* v. *Gorham*, 77 Me. 287. "In such cases," says Earl, J., "it is said that the conduct of the horse is the primary cause of the accident; that there are two efficient, independent proximate causes, the primary cause being one for which the corporation is not liable, and as to which the traveler himself is in no fault, and the other being a defect in the highway; and hence, that it is impossible to determine that the accident would have happened but for the primary cause. But, within the rule laid down in those states, a horse is not to be considered uncontrollable that merely shies, or starts, or is momentarily not controlled by his driver." *Ring* v. *City of Cohoes*, 77 N. Y. 83.

In *Hinckley* v. *Somerset*, 145 Mass. 333, 336, the following rule was approved: "When the horse shies, and comes upon something which is claimed to be a defect, and which it is claimed the vehicle would not have come in contact with, except for the want of a suitable railing, the question for the jury is this: Can we say that, if there had been a suitable railing there, the control of the horse would have been regained by his driver, and the accident and injury would not have happened? If the plaintiff makes it appear, by a fair preponderance of all the evidence, that that was the state of things, then he cannot recover."

In *Baldwin* v. *Turnpike Co.* 40 Conn. 238, Minor, J., said: "The failure of a traveler to be continually present

with his team up to the time and place of injury, when that failure proceeds from some cause entirely beyond his control, and not from any negligence on his part, ought not to impose upon him the loss from such injury, particularly when the direct cause of the same is the negligence of some other party; the loss should be charged upon the party guilty of the first and only negligence with reference to the matter." And in the same case the rule is said to be this: "If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendants are liable. Nor will the fact that the horse of plaintiff was uncontrolled some distance before the injury change or in any way affect the liability of the defendants."

After stating the rule laid down in this case, the court, in *Ring* v. *City of Cohoes*, 77 N. Y. 83, said: "This appears to us to be the reasonable rule. It exacts no duty from municipalities which has not always rested upon them. They must use proper care and vigilance to keep their streets and highways in a reasonably safe and convenient condition for travel. This is an absolute duty which they owe to all travelers; and when that duty is not discharged, and, in consequence thereof, a traveler is injured, without any fault on his part, they incur liability. They are not bound to furnish roads upon which it will be safe for horses to run away, but they are bound to furnish reasonably safe roads; and if they do not, and a traveler is injured by culpable defects in the road, it is no defense that his horse was at the time running away, or was beyond his control."

The rule laid down and followed in the New York and Connecticut cases was adopted and enforced in the following and other causes: *Plymouth Tp.* v. *Graver*, 125 Pa. St. 24; *Burrell Tp.* v. *Uncapher*, 117 Pa. St.

353; *Horstick* v. *Dunkle*, 145 Pa. St. 220; *Hull* v. *City of Kansas*, 54 Mo. 598; *Hunt* v. *Pownall*, 9 Vt. 411; *Baltimore, etc., Turnpike Co.* v. *Bateman*, 68 Md. 389; *Byerly* v. *Anamosa*, 79 Iowa, 204.

The rule maintained by the New York and Connecticut courts, it seems to us, is reasonable, and sustained by the weight of authority. We see no good and sufficient reason for holding a municipality or corporation, which is bound to keep a highway in repair, liable for damages occasioned by a horse shying, starting or backing, and coming, or bringing a vehicle, in contact with a culpable defect in the highway, when at the time he was momentarily not controlled or uncontrollable, and that it is not liable if the horse had escaped control and was running away. In neither case is the corporation liable if it had done its duty in keeping the highway in repair, or the accident would not have happened if the rider or driver had exercised ordinary care, or would have occurred although the corporation had discharged its duties. In the former case the corporation is liable because it is its duty to use reasonable diligence to so construct and maintain the highway as to avoid accidents from the shying, starting, or backing of horses; in the latter case it should be liable, because it had not done its duty, and the accident would not have happened if it had. *Palmer* v. *Andover*, 2 Cush. 600; *Houfe* v. *Town of Fulton*, 29 Wis. 296; 2 Dillon on Municipal Corporations (4 ed.), sec. 1005. In both cases the damage was occasioned by the neglect of the corporation to discharge its duties. Why should it not be liable in the latter as in the former case? In the latter case the running away or action of the horse was an accidental occurrence for which the rider or driver was not responsible. *Ring* v. *City of Cohoes*, 77 N. Y. 83. In both cases the action of the horse and the neglect of the corporation were proximate and efficient causes of

the accident, and the injury is attributable to the latter; and the corporation should be liable, if at all, in either, on the ground it failed to perform its duty to the injured party. *Plymouth Tp.* v. *Graver*, 125 Pa. St. 24; *Ring* v. *City of Cohoes*, *supra;* Shearman & Redfield on Negligence, 10; 2 Thompson on Negligence, p. 1085; 2 Dillon on Municipal Corporations, (4 ed.), sec. 1007, 1020.

Something was said in *Railway Co.* v. *Roberts*, 56 Ark. 387, which is, at least apparently, inconsistent with the view we have taken in this case. In that case the team of plaintiff's intestate ran away and carried him, without his will, over the public highway crossing of the railway track, where he was thrown from the wagon in which he was riding, and killed by a passing train. "There was testimony that the crossing was defective; also that a wagon could have been driven over it safely at an ordinary rate of speed." In speaking of an instruction given to the jury by the trial court, this court said: "The effect of that instruction was to direct a verdict for the plaintiff if the jury found that the injury to his intestate was caused by the defendant's negligence, either in blowing off steam, or in failing to keep the crossing in repair. It made the defendant's liability the same in either case; and the plaintiff was thus allowed to recover if the jury found there was negligence as to the crossing, although they were unable to find that there was any whatever in frightening the team. *But all the evidence shows that the proximate cause of the injury was the frightening of the team.* Billman *v.* Railway Co. *76 Ind. 166. If that was due to the company's negligence, it was liable for all the consequences resulting directly from it; otherwise it was liable for none of them. The deceased was not injured in driving or attempting to drive over the crossing. He was carried there involuntarily by the frightened team,*

and the defendant was not responsible for his being there if its negligence was not the cause of the fright to the team. The question as to the company's liability would not be changed if it were shown that the condition of the crossing was perfect, and that the deceased would have been carried safely over it but for a defect in the wagon. The condition of the crossing was not, therefore, material to the issue."

From this it appears that the court found that "*all* the evidence shows that the proximate cause of the injury was the frightening of the team;" that the deceased was carried to the crossing against his will; that the defendant was not responsible for his being there; and hence the instruction as to the crossing was improper. It does not appear from the report of the case that there was any evidence showing that the accident was directly or indirectly occasioned through the failure of the defendant to perform its duty in keeping the crossing in repair. At all events, it does not appear that the question in the present case was much considered, if at all, in *Railway Co.* v. *Roberts*. What, therefore, was said in that case should not be controlling as to the question in this.

Instruction as to maintenance of bridge disapproved.

Were the instructions given in the case under consideration correct? The trial court told the jury that it was the duty of appellant to erect and maintain a *safe* and suitable bridge across and over the ditch cut by it along the side of its railway track. That is not true. The appellant did not guaranty the safety of travelers in passing over the bridge. The same duty rested upon it as upon municipal corporations bound to keep streets in repair, and it is subject to liability for a failure to perform them. It was simply bound to exercise common prudence and ordinary care and diligence in making the bridge safe.

Degree of diligence required in maintaining a crossing.

It is true that the court instructed the jury that, unless they found from the evidence that the bridge was "constructed and maintained, as to banisters and side rails, in a manner different from what a reasonable and prudent man would have done under the circumstances," then they should find "that there was no negligence on the part of the railway company with reference to the construction and maintenance thereof;" but it is also true that it instructed the jury that if "the construction of the railway made it necessary for a bridge to be erected at the crossing of the railroad and public way, in order to make this highway available to the public, then "it was the duty of the railroad to erect and maintain such bridge so that the highway should be restored to *as passable a condition, and so kept, as was consistent with the use of the railroad company*, and if guard rails were required for that purpose, then it was the duty of the railroad company to place guard rails or banisters upon the bridge." These instructions are not explanatory, but contradictory, of each other. If the latter had stopped at saying that it was the duty of the railroad company to erect and maintain a bridge in a passable condition, it would have meant that the bridge should have been placed and kept in such a condition that travelers could go over it, but it did not stop there. It meant more. It said that the bridge must be in "as passable a condition, and so kept, as was *consistent* with the use of the railroad company," implying that the bridge must be made and kept as safe as it could be consistently with the right of the company to use its railway track. If it did not mean this, why add, "and if guard rails were required for that purpose, then it was the duty of the railroad company to place guard rails or banisters upon the bridge?" The crossing would have been passable without guard rails or banisters. Construed in the manner indicated, the jury

were virtually informed by it that it was the absolute duty of the railroad company to place the guard rails upon the bridge, because they would unquestionably have added to the safety of the bridge, and would not have interfered with the use of the railway track by the appellant; and the two instructions are in conflict.

The latter instruction is objectionable for another reason. Construed in the manner indicated, it made it the duty of the jury to return a verdict in favor of the plaintiff on the conditions named therein, notwithstanding it had appeared to them that the accident would have happened if the defendant had exercised ordinary care and diligence in constructing and maintaining the bridge, and made the appellant liable when appellee was injured through no default of duty on its part.

As the judgment of the trial court will be reversed, we express no opinion as to the amount of the verdict.

Reversed and remanded for a new trial.

WOODRUFF v. STATE.

61 157
63 204
61 157
70 478
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73 294
74 258

Opinion delivered July 15, 1895.

FALSE PRETENSES—OBTAINING SIGNATURES TO WRITTEN INSTRUMENT.—Act April 5, 1887, creating the state debt board, as amended by act April 9, 1889, authorized the state treasurer, under direction of such board, to exchange certificates of indebtedness for valid bonds and matured coupons of the state provided, however, that coupons, not attached to bonds should not be exchanged unless the bonds had been redeemed. Under a rule of the board, bonds and coupons tendered for exchange were required to be filed with the treasurer, and, at the next meeting of the board, the treasurer was required to present such bonds and coupons for inspection by the board, whereupon, if found correct, a written order was made and signed by the members of the board, authorizing and directing the treasurer to make the exchange. *Held*, that an indictment charging the state treasurer with obtaining

the signatures of all the members of the board to such an order by falsely pretending that the bonds to which the coupons tendered in exchange belonged had been redeemed, and that thereupon the order was delivered to the defendant, charges the offense of false pretenses, under Sand. & H. Dig. sec. 1573, providing that "every person who * * shall, * * by any false pretense, obtain a signature of any person to any written instrument, * * shall be deemed guilty of larceny and punished accordingly."

EVIDENCE—PROOF OF GENERAL BALANCE OF ACCOUNT.—It is competent for witnesses who have in an official capacity inspected the accounts of a state treasurer in his dealings with the state, and made written reports of their investigations, to testify as to a general balance of his accounts with the state, especially where their evidence is the result of voluminous facts, and of the inspection of many books and papers, the examination of which could not conveniently take place in court, and where, too, the treasurer was party to the proceedings in which the investigations was made, and had ample time to inspect the reports, and might by cross-examination have tested the accuracy of the statements made by the witnesses.

WITNESS—REFRESHING MEMORY.—A witness may testify as to facts disclosed by memoranda made by him at the time the transactions to which they referred took place, if they truly represent the transactions, although he relies upon such memoranda for his statements, and not on present recollection.

PUBLIC DOCUMENT—LOSS—SECONDARY EVIDENCE.—Upon proof that a report of the state debt board has been lost, a copy of it, embodied in the original journal of the senate, may be read in evidence.

EVIDENCE—DEPOSITION IN ANOTHER CASE.—A deposition taken in a civil cause between the same parties is not admissible on behalf of the defendant in a criminal cause by reason of the fact that deponent was summoned as a witness in the latter cause, and is dead.

REMARKS OF COUNSEL—WHEN NOT PREJUDICIAL.—A statement by the prosecuting attorney, made in the prosecution of a state treasurer for an offense connected with public revenues, that he had requested the attorney general to assist him in the trial because the case was one of special interest to every taxpayer is not prejudicial.

SAME—PRESUMPTION AS TO ACTION OF LOWER COURT.—Where a remark of the attorney general, to which objection was taken, as copied into the record, is incomplete and unintelligible, it will be presumed that the objection was properly overruled.

FALSE PRETENSES—INSTRUCTION.—On a prosecution of a state treasurer for obtaining an order of the state debt board for exchange of state certificates of indebtedness for coupons by falsely pretending that the bonds from which the coupons were clipped had been redeemed, an instruction that defendant was not guilty if he owned the coupons or held them for another was properly refused. (BATTLE, J., dissenting.)

SAME—SUFFICIENCY OF PROOF.—On an indictment for obtaining certificates of indebtedness by falsely representing that the coupons exchanged for them were clipped from bonds which had been redeemed, proof that the representations were false as to any one of the coupons so exchanged was sufficient.

SAME—INTENT TO DEFRAUD.—Where an indictment charged that defendant, with intent to defraud the state, procured an order from the state debt board for the exchange of coupons for state certificates of indebtedness by falsely pretending that the bonds from which the coupons were cut had been redeemed, an instruction which made defendant's knowledge that such bonds had not been redeemed proof of his intent to defraud the state is erroneous.

Appeal from Perry Circuit Court.

ROBERT J. LEA, Judge.

Dan W. Jones, *J. E. London*, *J. F. Sellers*, *G. W. Murphy* and *T. M. Seawell*, for appellant.

1. The indictment is insufficient, because (*a*) it is not in the words of the statute, or their equivalent. The statute uses the words *designedly obtain;* the indictment charges "did *fraudulently and feloniously obtain*," etc. The obtaining must be *designedly* and not fraudulently and feloniously. 2 Whart. Cr. Law, p. 631; 26 Am. St. 789. (*b*) The indictment should allege that the coupons or receipt were delivered to the board, and that the order was delivered to defendant in exchange for said coupons or receipts. 90 Ind. 504; 103 Ind. 235; 71 Mich. 296; 63 Mo. 484; 10 Metc. 521; 31 Me. 401. (*c*) The indictment does not allege the duty of defendant to receive the coupons to be exchanged for certificates, nor did it allege his duty to present them to the board for exchange. 64 Ind. 498. It must contain all facts and

circumstances necessary to be proved. 13 Wend. (N. Y.), 311. (*d.*) The order, as described, is an instrument unknown to the law. It does not show on its face its validity from a commercial or legal standpoint. 34 Vt. 502; 109 Ind. 407.

2. It was error to refuse the 2d prayer for defendant. 76 Mo. 180. If defendant was the owner of coupons, he could not be convicted, no matter what representations he made. 3 Hill (N. Y.), 179. The signatures of *all* the members of the board were necessary to make the order valid. A majority could not act. There is no law authorizing such an order. The order was not the subject of forgery, and was of no validity. 75 Ind. 553; 20 Atl. 753; 13 S. W. 827; 5 Neb. 174; 25 Ark. 263; 34 Mich. 80; 34 Vt. 502; 109 Ind. 407; 29 Am. Rep. 25; 55 *id.* 475. The writing should have been set out in the indictment. 7 S. W. 534; 24 Tex. App. 132; 25 *id.* 451–74. The name of Johnson L. Jones cuts no figure, even if fictitious, as the coupons were payable to bearer. Wash. Man. Cr. Law, p. 39. The indictment did not charge that Johnson L. Jones, and John L. Jones were the same party, and it could not be proved. 32 Ark. 609; 65 Mo. 490; 61 Ala. 448; 14 Tex. 332. A *specific intent* to defraud was necessary. 76 Mo. 180; 54 Ark. 489. The materiality and influence of the pretense was a question for the jury. 34 N. Y. 351; 14 Ill. 348. The status of defendant's account was not admissible, and the evidence of such was incompetent and tended to prejudice the jury. 13 Wend. (N. Y.), 311. The representations must be false as to *all* the coupons, and not one or more. 7 Allen, 548; 33 Tex. 162; 31 Ind. 514; 30 Ala. 9; 31 Ind. 519. The court erred in presuming an intent to defraud. 54 Ark. 497; 76 Mo. 180.

3. Eagle's testimony was improperly admitted; also Chism's. The report of the board was the best evidence. 55 Ark. 221; 33 *id.* 833. The opinions of wit-

nesses not admissible. 29 Ark. 448; 58 *id.* 396. The record is the best and only evidence as to the status of defendant's accounts.

4. Hudson's and DeWoody's evidence should have been excluded. 1 Gr. Ev. (Redf. ed.) sec. 436.

5. The testimony of Simms was not competent. The record was the best evidence. 55 Ark 221; 33 Ark. 833.

6. The deposition of Bell was competent. 42 Ark. 285-8; Gr. Ev. vol. 1, sec. 154; 45 Mo. 267; 60 *id.* 365.

7. The statements of the prosecuting attorney were prejudicial. 16 U. S. 119; 58 Ark. 474; 150 U. S. 76.

8. The evidence does not sustain the verdict.

9. A cheating by which a party only gets a different kind of security, or the satisfaction of indebtedness, is not a violation of law, no matter what pretense is made. 3 Hill, 769; 37 Ark. 445; 7 Am. & Eng. Enc. Law, p. 712, note 8, p. 713.

10. A falsehood does not necessarily imply an intent to defraud. 2 Bish. Cr. Law, sec. 380; 14 Iowa, 412; 6 Mich. 496. In this case no injury was done. 55 Ark. 244; 15 N. W. 298.

E. B. Kinsworthy, Attorney General, for appellee.

1. The demurrer was properly overruled. 115 Mass. 481; 35 N. J. L. 445; 9 Col. 470; 101 N. C. 741; 83 N. Y. 436. The act provides that *every person who obtains a signature * * to any written instrument*, etc., shall be guilty, etc. The order was of value. Sand. & H. Dig. secs. 1573, 1697. It was assignable. *Ib.* secs. 489, 5623. Being assignable, it was of value. 35 N. J. L. 449, 454; 3 Hill, 211. The order could have been forged. Sand. & H. Dig. 1595, 1610; 18 S. W. 833; 12 *id.* 264; 1 *id.* 886; 12 *id.* 595; 26 *id.* 78; 5 Ark. 349; 51 *id.* 88.

2. Some of the instructions asked by appellant correctly state the law; but the court covered these in others given, and it was needless to repeat them. 46 Ark. 11; 52 *id.* 180; 53 *id.* 117; 50 *id.* 545. As each coupon was for an amount greater than $10, there could be no petit larceny. 50 Ark. 506. It was as much a crime to secure the signature of one member of the board as it was to falsely secure the signature of all. 7 S. E. 723; 69 N. C. 313; Sand. & H. Dig. sec. 2276; 45 Ark. 452. When sec. 1573, Sand. & H. Dig., was passed, larceny was a misdemeanor, but the law was afterwards amended, making two grades; and the acts on this subject are to be construed together, as if passed at the same time. Suth. St. Const. sec. 142; 23 Am. & Eng. Enc. Law, p. 311; 4 Ark. 410; 45 *id.* 391; Bish. St. Cr. 113*b*.

3. Any writings used by the defendant for the purpose of effecting the fraud, or connected with it in any way, were admissible in evidence. 7 Am. & Eng. Enc. Law, 784, and authorities cited.

4. The testimony of Eagle and Chism was admissible to show how they were misled and induced to sign the order. 83 N. Y. 447; Underhill on Ev. p. 209; 7 A. & E. Enc. Law, 786, and authorities.

5. Appellant testified that he was not short in his coupon account, and introduced evidence to sustain him, and it was proper for the state to show that he was short, for two reasons: (1) To rebut appellant's evidence, and (2) to show that the coupons exchanged were the property of the state.

6. The testimony of Dewoody and Hudson was competent and admissible to show that the coupons belonged to the state, and were clipped from bonds not redeemed.

7. Bell's deposition not admissible. 47 Hun, 18; 80 Cal. 82; 36 Pac. 73; 40 N. W. 228; 33 N. W. 657;

1 Gr. Ev. secs. 163–4; 3 *id.* sec. 11; 5 Am. & Eng. Enc. Law, 621; 60 Ark. 503.

8. Remarks of counsel not reversible error. 24 S. W. 420; 20 *id.* 547; 23 *id.* 793; 36 Pac. 472; 25 S. W. 634; 34 Ark. 650. Appellant was not injured. 32 N. E. 431; 25 S. W. 634; 22 *id.* 157; Thomps. Trials, sec. 951.

9. The judge was not absent during the trial. No harm is shown, and there is no error. 18 S. E. 536; 81 Ga. 301.

10. The evidence is ample to sustain the verdict. 9 Col. 458; 70 Cal. 116. A false pretense may be made by act as well as word. Clark's Cr. Law, pp. 280 to 283; 22 S. W. 217; 98 N. C. 696; 2 Whart. Cr. Law, sec. 2113; 60 Ind. 447; 36 Mass. 179. The false pretenses need not be the sole cause for signing the order. 59 Ark. 375; 69 Ala. 242; 14 Wend. (N. Y.), 546, 555; 49 Mich. 12. The intent can be inferred from the acts of the accused. 66 Iowa, 634; 6 Mich. 496. False pretenses to an agent are sufficient. 48 Mass. 463; 9 Col. 458. Where the signatures were obtained with intent to defraud, the offense was complete. 30 Ind. 350; 7 A. & E. Enc. Law, 742. The proving of *one* false pretense is enough. 35 Ark. 396.

WINCHESTER, Special J. The record discloses that at the ——— term, 1893, of the Pulaski circuit court, W. E. Woodruff was indicted for the crime of false pretenses, said indictment containing two counts. A demurrer was interposed by the defendant on the ground that more than one offense was charged in the indictment, and, the state electing to stand on the first count in the indictment, the demurrer was overruled. The defendant entered a plea of not guilty, and filed a motion for a change of venue, and the case was sent to Perry county. Here the defendant entered a demurrer in short on the record, which was overruled. The case was

tried, the jury returning a verdict of guilty, and assessing defendant's punishment at imprisonment for one year in the state penitentiary. A motion was filed in arrest of judgment, which was overruled, and defendant was sentenced in accordance with the verdict. He filed a motion for new trial, which was overruled, took his bill of exceptions, and prayed an appeal to this court, which was granted by the chief justice. All of the instructions to the jury asked by the defendant were refused, and the only instructions given were given of the court's own motion.

The appellant was indicted under section 1573, Sandels & Hill's Digest, which is as follows: "Every person who, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain a signature of any person to any written instrument, or obtain from any person any money, personal property, right in action, or other valuable thing or effects whatever, upon conviction thereof shall be deemed guilty of larceny, and punished accordingly.

Sufficiency of indictment for false pretenses.

The indictment charges: "The said William E. Woodruff, in the county and state aforesaid, on the 6th day of January, 1891, being then and there the duly qualified and acting treasurer of the state of Arkansas, unlawfully and feloniously intending and devising to cheat and defraud the state of Arkansas, and James P. Eagle, and W. S. Dunlop, and Ben. B. Chism, who, together with the said William E. Woodruff, constituted the state debt board of Arkansas, falsely, fraudulently and designedly did pretend and represent to the said James P. Eagle, W. S. Dunlop and Ben B. Chism, members of the state debt board of Arkansas as aforesaid, that he, the said William E. Woodruff, who, at the time aforesaid, was the duly qualified and acting treasurer of the state of Arkansas, had on the 12th day of Decem-

ber, 1890, received of and from one Johnson L. Jones certain coupons and bonds of the state of Arkansas, to-wit: (description omitted), being a total of 171 coupons of the value of $30 each, and that the said Johnson L. Jones desired to exchange the same for state certificates of indebtedness, commonly called bond scrip, and that said coupons were a valid and outstanding charge against the state of Arkansas, and that the bonds from which said coupons had been clipped had been redeemed, and which coupons he, the said William E. Woodruff, then and there exhibited and presented to the said James P. Eagle, W. S. Dunlop and Ben B. Chism, members of the state debt board of Arkansas as aforesaid, by means of which false pretenses and representations, he, said William E. Woodruff, did then and there fraudulently and feloniously obtain the signatures of James P. Eagle, governor of Arkansas, and president of the state debt board, W. S. Dunlop, auditor of the state of Arkansas, and member of the state debt board, and of Ben B. Chism, secretary of the state of Arkansas, and secretary of the state debt board of Arkansas, to a written instrument, to-wit, to order No. 126 of the state debt board of Arkansas, authorizing him, the said William E. Woodruff, treasurer of the state of Arkansas as aforesaid, to issue state certificates of indebtedness, commonly called bond scrip, to John L. Jones, to the amount of $5,130, in exchange for the said 171 coupons, as above described and set forth, which said written instrument was in words and figures as follows, to-wit (Order omitted): and which said written instrument, with the signature of the said above named James P. Eagle, governor of Arkansas, and president of the state debt board, and W. E. Woodruff, treasurer, and W. S. Dunlop, auditor of the state of Arkansas, and a member of said state debt board, and Ben B. Chism, secretary of the state of Arkansas, and secretary of said

state debt board, signed thereto, was then and there delivered to the said Wm. E. Woodruff, treasurer as aforesaid, it being of the value of $5,130." Then follows a negation of the alleged false pretenses and representations, and the following: "And the bonds from which said coupons had been clipped had not been redeemed, but said coupons had been received at some date previous to December 12th, 1890, into the treasury of the state of Arkansas, in payment of debts due the state of Arkansas; all of which, he, the said Wm. E. Woodruff, then and there well knew, against the peace and dignity of the state of Arkansas."

The appellant questions the sufficiency of the indictment by demurrer, in his motion in arrest of judgment, and by apt instructions, saying that it charges no public offense. His main contention is that the *order* upon which the indictment is predicated is an instrument unknown to the law.

The indictment under our statute sufficiently charges the crime of false pretenses. Sandels & Hill's Dig. sec. 1573; *Ib.* secs. 2075–2076; *Wood* v. *State*, 47 Ark. 488. By the acts of 1887 (approved April 5, 1887), the state debt board was created, composed of the governor, secretary and auditor of state, having certain duties, and clothed with certain powers, as therein set out. This act was amended by an act, approved April 9, 1889, which by its terms was to take effect and be in force from and after its passage. By the first section of the latter act the treasurer of state was made a member of the state debt board. By the third section of both acts it is provided "that the entire state debt board shall be necessary for the transaction of business." Sections six (6), nine (9) and eleven (11) of the act of 1889 will be noticed particularly in this connection. These sections read as follows:

"Sec. 6. The treasurer shall, under and by direction of the state debt board, pay out the money now in or hereafter to be paid into the sinking fund by redeeming, under such regulations as the state debt board may adopt under the provisions of this act, all of the five and six per cent. bonds of the State Bank and Real Estate Bank of Arkansas, and the bonds and past due coupons of the six per cent. funding bonds of 1869 and 1870, and the overdue interest on the same, now outstanding, excepting those now belonging to the United States, and those held in trust by the United States, and those that have been declared illegal by amendment to the constitution of this state, numbered one (1), and such of the refunded bonds of the state as may be found to have been issued in lieu of the bonds of the state which were illegally disposed of by the officers, agents or commissioners of the Real Estate Bank of Arkansas, or of the State Bank of Arkansas."

"Sec. 9. Said board shall not accept any proposal for sale at a greater price than the par value and accrued interest of any such bonds. Nor shall said board accept a proposal for sale of less than the whole of any bond, including interest, nor at any time make a partial payment on any bond, and no coupons shall be paid unless attached to and surrendered with the bond. *Provided*, that where interest coupons may be outstanding, and the principal of the bond from which they were taken has been paid in full, such coupons may be treated as though they were original bonds. *Provided* further, that said state debt board may reject any and all bids under the provisions of this act."

"Sec. 11. That said board may from time to time direct the treasurer to cause to be engraved and printed, in denominations of 1, 2, 5, 10, 20, 50, or 100 dollars, state certificates of indebtedness, to be signed by the treasurer, and exchanged by him, upon the order of the

board, for any of the outstanding, valid and undisputed bonds and matured coupons of the state, under the same restrictions and limitations and upon the same terms and conditions as prescribed for the purchase of bonds in sections six (6) and nine (9) of this act. And the sum of two thousand dollars, payable out of the sinking fund, is hereby appropriated to pay for the engraving and printing of said certificates, for the two years commencing on and after the date of passage of this act."

In pursuance of the powers granted it in these sections the state debt board adopted the following rules and regulations:

"LITTLE ROCK, May 8, 1889.

"The state debt board met. Present, J. P. Eagle, governor; W. S. Dunlop, auditor; W. E. Woodruff, treasurer, and B. B. Chism, secretary of state. On motion, the following regulations were adopted. Additional regulations for transacting of business of the state debt board.

"4th. Holders desiring to convert bonds into certificates of indebtedness shall file the same with the treasurer of state for examination and safe keeping. If receivable, the treasurer shall give an official receipt therefor, describing the bonds and coupons by numbers and dates, and the holder shall present the same to the secretary of the board, who shall enter in the record a memorandum authorizing the exchange after the order shall have been signed by the board, also describing the bonds and coupons by numbers and dates. At the next meeting of the board the treasurer shall present all the bonds filed for exchange since the last meeting, for inspection and examination by the board. If found correct, an order shall be made directing the treasurer to issue and deliver to the proper holder of the bonds filed the correct amount in certificates to which each of them is entitled. And all bonds so presented for exchange

into certificates shall be immediately canceled by the board, and returned to the treasurer, who shall keep the same as vouchers, and make all proper entries upon his books.

"On motion the board adjourned.

JAMES P. EAGLE, Governor,
W. S. DUNLOP,
BEN. B. CHISM, Sec'y State.
W. E. WOODRUFF."

It will be seen that the treasurer was authorized by section 11 of this act to exchange the state certificates of indebtedness *upon the order of the board* for any outstanding, valid and undisputed bonds and matured coupons of the state, *under the same restrictions and limitations, and upon the same terms and conditions, as prescribed for the purchase of bonds in sections six (6) and nine (9) of this act.*

Hence this *order* was essential to the exchange of coupons for state certificates of indebtedness, and the treasurer had no authority to act without it. It was as much a part of the transaction of exchanging the coupons for state certificates of indebtedness as was the treasurer's receipt to the person who deposited the coupons with him for exchange.

By the regulations of the board this *order* was delivered to the party who presented the treasurer's official receipt for the coupons, and the holder could get the state certificate of indebtedness from the treasurer only upon this order. It is a paper, a "written instrument," such as was contemplated in the section under which the indictment was found, and it is alleged that it was signed by all the members of the state debt board, and delivered to the appellant. 2 Bish. Cr. Law, sec. 460, sub. 4; *People* v. *Genung*, 11 Wend. 18; *People* v. *Gates*, 13 Wend. 311.

The appellant presents for our consideration sixty-six exceptions to as many alleged erroneous rulings of the court in the progress of the trial. We shall notice only such of these as seem to the court essential to a proper disposition of this case.

Proving general balance of account.

The appellant excepted to the introduction of the testimony of James P. Eagle and Thomas H. Simms, who were called by the state, as the record recites, "in rebuttal," and who testified as to the state of appellant's coupon account, and who were allowed to state, over his objection, the one as to the result of the investigations of the "burning board," which commenced its work in 1891, of which he was a member, and the other as to the result of his investigations as special master in the case of the *State of Arkansas* v. *W. E. Woodruff, et al.*, pending in the Pulaski chancery court, which investigation was made in 1892. We discuss these objections together, because the same principle controls in both of them. Each witness states that a report was made showing the result of the investigations, and appellant contends that the reports were the best evidence.

The investigations of the "burning board," as the record discloses, occupied six months, and the investigation of Special Master Simms sixteen weeks. Each was allowed to state the *balance* found against appellant on his coupon account. It is proper to say here that these investigations were of the accounts and affairs of appellant's office as treasurer of state.

It is held that a witness who has inspected the accounts between the parties may be permitted to testify as to a *general balance*, but will not be permitted to give evidence of the particular contents of the books. 1 Greenl. Ev. (15 ed.), sec. 93; *Leeser* v. *Boekhoff*, 38 Mo. App. 453.

And especially is this proper where, as in this case, the evidence is the result of voluminous facts, and the

inspection of many books and papers, the examination of which could not conveniently take place in court, and where, too, the appellant was a party to these proceedings, and has had ample time to inspect these reports, and might by cross-examination have tested the accuracy of the statements made by these witnesses. 1 Greenl. Ev. sec. 93; 1 Rice, Ev. sec. 151.

The majority of the court is of opinion that the testimony was properly admitted.

Right of witness to refresh memory.

Appellant insists that the testimony of Hudson and Dewoody, witnesses introduced by the state, should have been excluded, because they were allowed to testify as to facts disclosed by memoranda, which appeared upon envelopes which each held in his hands, which memoranda each stated were made by him at the time of the transactions to which they referred, and truly represented the transaction; each stating that he relied upon the memoranda for his statements, and not upon present recollections. The evidence was admissible. 1 Greenl. Ev. secs. 436, 437 and 440.

Proving lost document by secondary evidence.

Appellant also insists that J. B. Moore's testimony was improperly admitted. This witness testified that he was employed in the office of the secretary of state; that he had searched in that office for the original report made by the state debt board to the legislature of 1887, but could not find it. He stated further, "I have here the original senate journal for that year." He was allowed to read from said journal extracts from said report with reference to certain bonds from which some of the coupons named in the indictment had been clipped —these extracts tending to prove that the bonds were outstanding, that they had not been redeemed. This testimony was properly admitted. The report was signed by the appellant as a member of the state debt board. The secretary of state was the proper custodian of the original report and of the senate journal.

Sandels & Hill's Dig. sec. 3171 (act Jan. 4, 1849); *Ib.* sec. 3547 (act Dec. 14, 1875). The original not having been found where it ought to be, the original senate journal was admissible. Sandels & Hill's Dig. sec. 2880 (act Jan. 4, 1849); 1 Greenl. Ev. secs. 483, 484 and 491.

Admissibility of deposition taken in another case.

Appellant offered in evidence the deposition of M. L. Bell, taken June 12th, 1893, by which the state, in a case then pending in the Pulaski chancery court wherein the state of Arkansas was plaintiff, and the appellant, and the sureties on his official bond were defendants. It was admitted by the state that this witness had been duly summoned to testify for defendant on the trial of this case, and that he had since died.

The testimony of a deceased witness can be used in the trial of a cause, when admissible at all, only upon conditions well known to every practitioner. 1 Greenl. Ev. secs. 163, 164 and 165.

It is stated by Mr. Weeks that, as a general rule, depositions are in no case admissible in criminal proceedings unless by force of *express statutes*, or possibly by consent of the prisoner in open court. Weeks, Dep. sec. 558; 3 Greenl. Ev. sec. 11; *McLane* v. *Georgia*, 4 Ga. 335, and *Dominges* v. *State*, 15 Miss. 475. And in section 540, the same author (Weeks, Dep.), says: "In criminal proceedings, the latitude allowed in some civil cases at common law, in allowing depositions of witnesses who cannot be found after diligent search, does not obtain, whether the depositions be taken before a magistrate or coroner * * * This rule obtains both in England and America. In the latter country it has been held that both where the witness could not be found within the jurisdiction, but was reported to have gone to an adjoining state, and where he was proved to have left the state after being summoned to attend at the trial, his deposition was equally inadmissi-

ble." *Wilbur* v. *Selden*, 6 Cow. 162; *Finn's Case*, 5 Rand. 701; 1 Taylor, Ev. sec. 442.

"Under statutes, or by consent of the prosecuting officer, evidence may be taken by the defendant by ordinary deposition." Bish. Crim. Pro. (3 ed.), sec 1206; 3 Rice, Ev. p. 381.

"The state, therefore, cannot authorize the taking and using of depositions against him (defendant), but he may use the depositions of witnesses in his behalf under any state of case that the legislature may allow." *Kaelin* v. *Com.*, 84 Ky. 354.

In offering this deposition appellant made no showing except that the witness had been summoned, (and was dead). Without deciding whether the deposition was admissible, had a proper showing been made, the majority of the court is of opinion that it was properly excluded.

When counsel's remarks not prejudicial.

The appellant insists that he was prejudiced by certain remarks of the prosecuting attorney, who, in the course of his argument, stated "that this was a case of special interest to every taxpayer in the state, and to everyone of the jury, and that in consequence of its special interest, and the concern that all the people felt in the result of it, he had asked the attorney general of the state to assist him in the prosecution, and the attorney general had done and was doing so, because it was his duty under the law, relating as it did to the revenue raised by taxes paid by the people." While we do not find it in the record, yet we gathered it from the oral argument before us, as an *admitted fact*, that one of the learned attorneys for the appellant had sharply questioned the active participation of the attorney general in the prosecution, and that these remarks of the prosecuting attorney were made in explanation of his presence in the case. We find no prejudicial error in these remarks.

Presumption is in favor of trial court's action.

Appellant urges as a ground of reversal that the attorney general, in the closing argument in the case, was guilty of misconduct. The record states that the attorney general "was permitted by the court in said closing argument, and over and against the objection of defendant, for the reason that if the conviction was wrong the governor would pardon him." The transcript is evidently incomplete, but this court must consider it as it finds it, as to the remarks objected to, and must conclude that the trial judge properly overruled the objection. Every person accused of a public offense is entitled to a fair and impartial trial, and, if convicted, should be convicted because the law and the testimony justify it. This court has heretofore, on more occasions than one, set the seal of its disapproval upon a practice sometimes resorted to by zealous advocates of injecting into their speeches matters outside the record and outside the scope of legitimate argument. And, while the great weight of authority seems to be that a direction from the trial judge to the jury to disregard such remarks cures the harm, yet it is possible that even an admonition from the judge to the jury to disregard the objectionable remarks may not always remove from their minds the impressions made, and it results that harm may come to the accused. Hence the duty of judges and the attorneys representing the state to guard carefully and jealously the constitutional and statutory rights of the accused. *Vaughan* v. *State*, 58 Ark. 353; *Little Rock, etc., R. Co.* v. *Cavenesse*, 48 Ark. 106; *Holder* v. *State*, 58 Ark. 473.

Instruction as to false pretenses disapproved.

We do not deem it necessary to discuss all the instructions asked by the appellant, nor all of his objections to the instructions given by the court. We notice, however, his instruction No. 4, refused by the court. "If you find from the evidence that the defendant was the holder of the coupons mentioned in the indictment,

and if they did not belong to the state, but belonged to the defendant himself, or to some other person for whom he held them, he cannot be convicted for obtaining the signature of the members of the state debt board to an order to exchange these for state certificates, it matters not what representations be made for that purpose."

In the opinion of a majority of the court this instruction was properly refused. It is true that the writers upon criminal law state the proposition that a false representation tending merely to induce one to pay a debt previously due from him is not within the statute against obtaining money by false pretenses, though payment be thereby obtained (2 Bish. Crim. Law, sec. 466); or, as Mr. Wharton states it, "that the pretence used *honestly* (the italics ours) to collect a just debt has been ruled to be a defense." 2 Whart. Crim. Law, sec. 1184*a*. See also Colby's Crim. Law, p. 566. These authors quote the same cases as sustaining the text. We have carefully examined all these cases, and find they are decided upon the theory that the accused gets only what is due him, and hence no wrong is done; following *Rex* v. *Williams*, 7 Carr. & P. 354. In this case the servant of a creditor went to the debtor's wife and got from her two sacks of malt, saying his master had purchased them of her husband, which was false. It was ruled by Coleridge, J., on an indictment against the servant, that if his object was not to *defraud*, but merely to enable his master to compel payment of the debt, he must be acquitted. The cases cited by the text writers in support of this contention can be numbered upon the fingers of the two hands.

It has been held, however, to be no defense to a charge of obtaining money by false pretenses that the person from whom the money was obtained by the prisoner was at the time indebted to the prisoner to an amount equal to said sum obtained by the false repre-

sentation, and that it was the intention of the prisoner to apply such money on such debt. *People* v. *Smith*, 5 Parker, 490, cited in Colby's Crim. Law, p. 566.

This decision seems really more in consonance with *Rex* v. *Williams*, *supra*, than the others cited *contra;* and, even applying the law as stated in the opinion of Coleridge, J., to the instruction under consideration, it would seem that it should be qualified by his statement "if the object was not to defraud," but merely to collect his debt.

But not one of the text writers, as far as we have been able to discover, and none of the cases cited, presents such a state of facts as we have here. In those cases one *individual* had practiced his deceptions upon another *individual.* Here the contention is that the treasurer of the state, and a member of the state debt board, undertakes by false pretenses to obtain advantage of the state, not *to collect a debt*, but to obtain in exchange for coupons, which can be used for one purpose only,—"in payment of the purchase money of lands whereof the state has title by reason of the foreclosure of mortgages executed to the said bank," (Real Estate Bank, Acts 1879, p. 10) and for the payment of which no provision is made, and the collection of which he cannot enforce,—more valuable evidences of indebtedness, to-wit: "state certificates of indebtedness," which are receivable, not only for the same purpose for which coupons are receivable, but also for sinking fund tax, for the state's *pro rata* of the purchase money paid for lands forfeited to the state for non-payment of taxes, and for liquor licenses collected on the part of the state (Acts 1889, p. 161), and for the payment of which an annual tax is levied "as an inviolable condition" of the contract. And, besides, in the indictment, the appellant is charged with obtaining the signatures of the members of the state debt board to an order authorizing

the treasurer to exchange coupons clipped from bonds which had *not been redeemed* for state certificates of indebtedness, which exchange was forbidden by law, Acts 1889, p. 161. The instruction asked wholly ignores this provision. But, aside from these reasons, we hold that it is against public policy, subversive of sound morals, and injurious to the best interests of the state —a thing not to be tolerated—that an officer of the state shall, in violation of express enactment, in violation of his trust, and by false pretenses obtain and enjoy an advantage, the fruits of his deception, and not be liable to punishment, even though a different rule might prevail as to similar transactions between individuals.

The court is of the opinion that the other instructions asked by the appellant were properly refused; for, while some of them, no doubt, correctly state the law, yet these, we think, were covered by the instructions given.

Sufficiency of proof of false pretense.

We come now to consider appellant's objections to the instructions given by the court, only two of which we will notice. He contends that there was error in the third proposition of the first instruction: "The court instructs the jury that it is not necessary that the state should show that the representations made were false as to all the coupons mentioned in the indictment; but it is sufficient if they were false, and known by defendant to be so, as to any one or more of said coupons, of the value of more than ten dollars." The contention is that the pretenses must be proved as laid in the indictment as to *all* the coupons. The law seems well settled against this contention. In presenting these 171 coupons as exchangeable under the law for state certificates of indebtedness, it is as though he had said of each coupon, this is a valid outstanding obligation of the state, and the bond from which it was clipped has been

redeemed. The holder is entitled to the exchange. The authorities are conclusive. *State* v. *Vandimark*, 35 Ark. 396; Rapalje on Larceny, secs. 433, 434; 2 Bish. Crim. Law, sec. 418, and cases cited.

Necessity of specific intent to defraud.

Appellant challenges the court's second instruction, which contains the following statement of the law: "The jury are instructed that coupons clipped from bonds that have not been redeemed cannot be exchanged for bond scrip, and such an exchange is a fraud upon the state, and an intention to have such exchange made, knowing the bonds from which the coupons were clipped had not been redeemed, is an intention to defraud the state." This statement of the law to the effect that an intention knowingly to exchange coupons clipped from unredeemed bonds is in law an intention to defraud the state, is nowhere modified in the charge of the court. On the contrary, the court returned to it, and emphasized it in another portion of his charge. After having properly told the jury that if the defendant, by inadvertance or mistake, took from the treasury coupons, honestly believing that they were his own, and not the property of the state, leaving in their stead others of same kind and value belonging to him, this would show an absence of intention to defraud, without which intention defendant would not be guilty, he adds these words, "provided he did not know that said coupons so taken were clipped from bonds that had not been redeemed."

Thus it is apparent that the court announces that, while ordinarily it is necessary, in order to convict, that a *fraudulent* intent to defraud be shown, yet that such actual intent to defraud need not be shown if the defendant attempted to exchange coupons known to have been clipped from bonds which were unredeemed. "Such an exchange," said the court, "is a fraud upon the state, and an intention to have such an exchange made, knowing the bonds from which the coupons were clipped had

not been redeemed, is an intention to defraud the state." We do not think this was a correct statement of the law in this case. A material allegation in this indictment was that the defendant designedly, and with the intention to defraud the state, made certain false representations to the board. In order to convict, it must be shown by the evidence that the defendant made these representations to the board with an actual intent to defraud the state. Whether such an intention exists on his part is a question for the jury, and the court cannot take it from them by telling them that if certain facts be proved, they constitute an intention to defraud the state. The defendant may have known that the coupons which he asked to exchange were clipped from unredeemed bonds, and yet intended no fraud upon the state. He testified that he did not intend to defraud the state, nor to make any false representations to the board, and, however unreasonable this statement may have appeared to the court, it was the constitutional right of the defendant to have that question submitted to the jury. He may have known that the coupons which he asked to exchange for state certificates of indebtedness were clipped from bonds which had not been redeemed, and yet as a fact intended no violation of the law. Ordinarily, one cannot set up ignorance of the law as an excuse for a violation of the law, but there is an exception when, to constitute the offense, a particular intent must exist on the part of the defendant at the commission of the act; in such case ignorance of the law, like any other fact, may be shown in explanation and extenuation of the act.

"When the act done is *malum in se*, or where the law which has been infringed was settled and plain, the maxim, *Ignorantia legis neminem excusat*, in its vigor will be applied, but where the law is not settled, or is obscure, and where guilty intention, being a necessary constituent of the particular offense, is dependent upon

a knowledge of the law, this rule, if enforced, would be misapplied." *Cutler* v. *State*, 36 N. J. L. 127; Rapalje, Larceny, sec. 229; *Felker* v. *State*, 54 Ark. 497; *State* v. *Norton*, 76 Mo. 180.

We have, in view of the official relation which appellant bore to the state, and in view of the many serious questions presented, given this case careful study. We have considered every one of the many assignments of error presented in the record, and we find that only the one last discussed, to a majority of the court, seems well taken.

For the error indicated above, the judgment is reversed, and the case remanded, with instructions to grant appellant a new trial.

BATTLE, J., (dissenting.) I dissent from that part of the opinion of the court in which it holds that the fourth prayer of the appellant for instructions to the jury was properly refused by the circuit court. In my opinion it should have been granted. The prayer referred to is as follows: "If you find from the evidence that the defendant was the holder of the coupons mentioned in the indictment, and if they did not belong to the state, but belonged to the defendant himself, or to some other person for whom he held them, he cannot be convicted for obtaining the signatures of the state debt board to an order to exchange them for state certificates, it matters not what representations he made for that purpose."

To constitute the offense of which the appellant was accused, four things must concur: (1) There must be an intent to defraud; (2) there must be actual fraud; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for the purpose."

A false representation by which one is induced to pay what he justly owes, or perform his duty, is not a false pretense within the meaning of the statute creating the offense, because no legal injury is suffered.

In *Rex* v. *Williams*, 7 C. & P. 354, 32 Eng. C. L. R. 653, "It appeared that the prosecutor, Peter Williams, owed John Williams, the prisoner's master, a sum of money, of which John Williams *could not procure payment;* and that the prisoner, in order *to secure to his master the means of paying himself*, had gone to prosecutor's wife in her husband's absence, and told her that his master had bought of her husband two sacks of malt, and had sent him to fetch them away; and that thereupon the prosecutor's wife delivered the two sacks of malt to the prisoner, who carried them to his master. It further appeared that the *pretense was false*, and that *the prisoner knew it to be false at the time he used it.*" Judge Coleridge, in summing up, charged the jury as follows: "Although *prima facie* everyone must be taken to have intended the natural consequence of his own act, yet if, in this case, you are satisfied that the prisoner did not intend to defraud Peter Williams, *but only to put it in his master's power to compel him to pay a just debt*, it will be your duty to find him not guilty. It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the malt; you must be satisfied that the prisoner at the time intended to defraud Peter Williams."

In *People* v. *Thomas*, 3 Hill, 169, the indictment charged substantially the following facts: "Jones, having executed his negotiable note to Thomas for $28.28, dated 19th February, 1838, and payable one day after date, the latter, in March afterwards, called for payment, falsely pretending to Jones that the note had either been lost or burned up; by which false pretenses Thomas unlawfully, etc., obtained from Jones the sum

of $28.28, with intent to cheat and defraud Jones; whereas in truth, etc., the note had not been lost or burned up, all of which the said Thomas, when he made the false pretense and obtained the money, well knew," etc. Of this indictment the court said: "*Non constat* from the indictment that Jones sustained any damage by the false representation, nor that there was an intent on the part of Thomas, at the time of the representation, to work any damage. The note was due, and payment made. This was the only consequence—a thing which Jones was bound to do. A false representation, by which a man may be cheated into his duty is not within the statute."

In *People* v. *Getchell*, 6 Mich. 496, the defendant was indicted for procuring the indorsement of the prosecutor on a promissory note by falsely pretending that a former note for the same amount and indorsed in like manner was destroyed. After proof of the facts charged, the defendant offered and the trial court refused to allow him to show that he was a partner with the prosecutor; that the latter was bound by an agreement with him to endorse for him to an amount considerably larger than the two notes, but had refused to do so, and that the money obtained on the notes was used in their business for their joint benefit. It was held that the evidence should have been received as tending to disprove the presumption of an intent to defraud. The court said: "The object of the defense in this case, in offering the rejected evidence, was to show that there was no intent to cheat or defraud—the untruth of the pretense being admitted. A falsehood does not necessarily imply an intent to defraud, for it may be uttered to secure a right, and, however much and severely it may be reprobated in ethics, the law does not assume to punish moral delinquencies as such. *To defraud is to deprive another of a right, of property or of money*, and

this may be accomplished by falsehood, by withholding the right of property, or by force."

In *Com.* v. *McDuffy*, 126 Mass. 467, it appeared that the defendant was to build a house, and was to pay all bills for materials used in the house with money which was to be given for that purpose, from time to time, upon the presentation of the bills for the materials; and that upon false reprsentations he obtained more money than was necessary to pay for the materials. He was indicted for obtaining money by false pretenses. He "contended that he could not be convicted upon the indictment, because, upon the settlement at which it was alleged he made the false representations set forth, he had been allowed nothing for his services in building the house; that he was entitled to receive for his services the sum of $650; and that, if the sum he received in fact was not more than enough to pay him for the bills actually paid, and for his services, then he was not guilty of false pretenses, even if he made untrue statements, because he had defrauded no one." The court held that upon proof of these facts he was entitled to an acquittal. *Com.* v. *Hawkins*, 128 Mass. 79.

In *State* v. *Hurst*, 11 W. Va. 54, the court held that "the procuring of the payment of a just debt, already due, by false pretenses," is not an indictable offense. It said: "It is doubtless immoral for a person by false pretenses to obtain the payment of a just debt. The end sought may be just but such an end will not, by a correct code of morals, justify the use of improper means; but the law does not, in many instances, attempt the enforcement of good morals, and the question is, whether the use of false pretenses to obtain a claim justly due is, within the true meaning of this criminal statute, a fraud. To so construe this statute would in my judgment, consign to the penitentiary as thieves

many persons who cannot be classed with common thieves, without breaking down all our ideas of distinctions in degrees of immorality. I think, therefore, that, within the true meaning of this statute, a man cannot be held guilty of procuring money by false pretenses, *with intent to defraud, who has merely collected a debt, justly due him*, though in making the collection he has used false pretenses." And in *Com.* v. *Henry*, 22 Pa. St. 253, Woodward, J., said: "A false representation by which a man may be cheated into the performance of a duty is not within the statute."

Mr. Bishop and Mr. Wharton say: "Under the statute against false pretenses, it is not indictable to induce one by the pretenses to pay what he justly owes, because he is not thereby legally injured. 1 Bishop's New Cr. L. sec. 438; 2 *Ib.* sec. 466; 2 Wharton, Criminal Law (9th, 3d.), sec. 1184*a*, 1197.

The principle on which the foregoing authorities rest is not confined to cases in which a creditor has induced his debtor, by false representations, to pay a debt. It is applicable to such cases because an intent to defraud and an actual fraud committed are essential to the commission of the crime of false pretenses, and these elements were lacking in those cases. Where they are absent, the crime cannot exist. Hence in every case where the false representation is made by one for the sole purpose of inducing another to discharge a duty, and it has that effect, the crime is not committed. So where a creditor, by false representations, induces his debtor to accept one of his (debtor's) obligations to pay money, and to execute another of more available form in lieu thereof, the same being equal in every respect, he is not guilty of the offense. *Rex* v. *Williams*, *supra*, is another illustration of the rule. In that case the accused procured, by falsehood, two sacks of malt, in order to secure to his master the means of collecting a debt; and

yet he was acquitted of false pretenses, because in so doing he did not defraud the prosecutor.

After a diligent search, I have been able to find only one case in which this rule is denied, and that is *People* v. *Smith*, 5 Park. Cr. Rep. 490. In that case it was held that it was "no defense to a charge of obtaining money by false pretenses that the person from whom the money was obtained by the prisoner was, at the time, indebted to the prisoner to an amount equal to the sum obtained by the false representation, and that it was the intention of the prisoner 'to apply the money to the payment of the debt.'" This decision was based, in part, on the impolicy of allowing any one the right of self-redress. This right, it is said, is allowed only in the "well known instances of self-defense, recaption or reprisals, entry on lands and tenements when another person has without any right taken possession thereof, and abatement of nuisances;" and in those cases only when it can be exercised without force or terror or any breach of the peace. But, if this be true, does the wrongful exercise of the power of self-redress supply any of the elements necessary to constitute false pretenses? The debtor was deprived of no right. He suffered no loss, but simply did his duty. How was he defrauded?

But it is said in *People* v. *Smith*, *supra*, that the collection of debts by the employment of fraud or falsehood may lead to strife, and is pernicious in its consequences. It is true that this mode of collection is immoral, and deserves the severest condemnation; but the law was never intended to be a complete code of morals. The fact that any act may be immoral, or evil in its consequences, does not prove that it is a public offense. Many moral delinquences may and do lead to crime and strife, but the law does not make them penal, and punish those guilty of them, for that reason. It is

only when they amount to crimes that the guilty are punishable as criminals.

Again, in *People v. Smith*, *supra*, it is said that the intent of the creditor who takes money furtively out of the desk of his debtor and applies it to the payment of his debt is the same as the intent of him who obtains the money from his debtor by false pretenses for the same purpose. But, with deference to the learned judge who delivered the opinion of the court in that case, I do not think so. In the former case the intent is to deprive the owner of his money without his knowledge or consent, and in the latter to obtain it openly, with his knowledge and consent, by deception. There is only one thing in common in both cases, and that is the intent to appropriate the money in the same manner. But, be that as it may, standing alone in either case, or in any other case, without acts there is nothing criminal in the intent. In both cases it is immoral. According to the acts which accompany it, it is a trespass, obtaining money by false pretenses, no crime, or, according to the opinion in *People* v. *Smith*, a larceny. In the latter case it is not a trespass, because the money was procured by consent; it was not obtaining money by false pretenses, because there was no intent to perpetrate a legal fraud; and it was not a larceny, because it was procured with the knowledge and consent of the owner.

In the opinion of the court in this case it is said: "In order to convict, it must be shown by the evidence that the defendant made these representations to the board *with an actual intent to defraud the state.*" Why? The court say: "The defendant may have known that the coupons which he asked to exchange were clipped from unredeemed bonds, and yet *intended no fraud on the state.*" But the court, nevertheless, held that the fourth prayer of the defendant for an instruction was properly refused. Why? Because the state of Arkan-

sas was the party affected by the false pretenses? How does that affect the guilt of the defendant? Does it not require an actual intent to defraud the state to constitute the offense in this case? The court has said so. That is true. There must not only be an intent to defraud, but an actual fraud committed. How, then, can the fact that the state is the party affected by the false pretense change the constituent elements of the offense? There is only one statute defining the offense, and it does not have one meaning when the state is affected, and another in all other cases. But it has been said that appellant was treasurer of Arkansas at the time the offense is alleged to have been committed, and should not be allowed to hold an advantage gained in his official position by false representations. How does that affect the offense? No one ought to take an undue advantage of the state, let his position be what it may. He ought not to take such an advantage of anyone. But he, nevertheless, committed no indictable offense when he induced the state by false representations to pay its just debts in its own paper; because, if that be all he has done, he has not defrauded the state of one cent, and done no legal injury.

In his fourth prayer, the appellant asked the court to instruct the jury that he could not be convicted of the offense of which he is accused if they find that the coupons described in the indictment did not belong to the state, but to himself, or were held by him for some other person, and that he procured an order of the state board on the treasurer to exchange "state certificates of indebtedness" for them, notwithstanding he procured the order by false representations. The certificates were for no greater amount than the coupons, and there was evidence upon which to base the instruction; and yet this court holds that the prayer was properly refused. Why? Because, among other reasons, he

undertook by false pretenses to obtain an advantage of the state by exchanging coupons, which are receivable for one purpose, and for the payment of which no provision is made, and the collection of which he cannot enforce, for certificates which are more valuable, and receivable for many purposes. What advantage did he get? The state was not liable for any greater amount on account of the certificates than it was on the coupons. He did not receive in the former more than the amount of the latter. Neither were at par. Both were valid, but neither could be collected by process of law. But it is said that, in procuring the certificates, he did not attempt to collect a debt. If the evidence referred to by the fourth prayer be true he did, or attempted to do so, by accepting the certificates in payment or exchange for the coupons. It was not necessary that money be received or paid in satisfaction of the coupons to constitute a collection or payment. If he was the legal holder of the coupons, he had the right to accept the certificates, if tendered, in payment of them.

The instructions given by the circuit court are defective in failing to state fully what the jury should find as to the intention of the appellant before they could lawfully convict. This defect is fully shown in the opinion of the court. Nothing need be said in this behalf, further than I have already stated.

In other respects I concur in the opinion of this court, and in reversing the judgment of the circuit court.

SENTER v. WILLIAMS.

61 189
67 328

Opinion delivered October 19, 1895.

CREDITOR'S BILL—INTERVENTION—PRIORITY.—Where a bill is filed by several creditors to set aside a fraudulent conveyance by the debtor, and a decree rendered annulling the conveyance, and directing the assets to be distributed among plaintiffs, other creditors will not subsequently be permitted to intervene and share ratably in the distribution, but will be postponed to the prior rights of plaintiffs.

CREDITOR'S BILL—PARTIES.—Where, in a creditor's bill to set aside a fraudulent conveyance by an insolent debtor, a receiver is appointed to take charge of the debtor's estate, creditors to whom the debtor had assigned the purchase money notes for lands sold by him before execution of such conveyance, as well as the purchasers of such lands, are necessary parties to a distribution of rents collected therefrom by the receiver.

Appeal from Hempstead Circuit Court in Chanrery.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

Baird & Caruth, merchants at Washington, Hempstead county, failed in business, and made a general assignment. Virginia J. Williams, one of the preferred creditors, filed, in behalf of herself and all other creditors, a suit setting up that the assignee had been unable to make bond, and praying for the appointment of a receiver. The assignee was appointed receiver.

Barbara Hubbard, and two other creditors of Baird & Carruth, filed in the suit their cross complaint, in the nature of a creditors' bill, on behalf of themselves and all other creditors of the assignors who might wish to join them, alleging that the assignment was fraudulent, because the assignors had intentionally withheld a part of their property, and for other reasons. Several creditors, including the original plaintiff, came in and adopted the allegations of the cross-complaint.

Upon a hearing the assignment was adjudged to be fraudulent, and was set aside, and it was ordered that the receiver distribute the proceeds of the property among the creditors who had intervened.

After the decree, and before the fund had been distributed, Senter & Co. intervened, setting up that they had a claim upon which they had recovered judgment in the sum of $50,000 against Baird & Caruth, and praying that they be allowed to share in the distribution. Their petition was disallowed. On the same day they filed another intervention, alleging that, as security for their indebtedness, and before the failure, Baird & Caruth had transferred to them a note of one Phillips, secured by mortgage, and that the receiver had collected the rent on the mortgaged land, amounting to $140, when the land had never belonged to Baird & Caruth, and said moneys should go to Senter & Co.; that Baird & Caruth, before the failure, sold another tract to one Faucette, and transferred the purchase lien money notes to Senter & Co. as security, but that the receiver had taken possession of the land, rented it to Faucette, and collected the rents, amounting to $40; that Baird & Caruth had sold some land to Parker & Rike, and transferred the purchase money lien notes to Senter & Co., and that the receiver had taken possession of said land, rented it to Parker & Rike, and collected the rents, amounting to $90; that Baird & Caruth sold one Sexton another tract, and transferred the purchase money lien notes to Senter & Co. before their failure, but that the receiver had taken possession of the land, and collected the rents, amounting to $250; that Baird & Caruth had sold another tract to one Mitchell, and had transferred the purchase money lien notes to Senter & Co. before their failure, but that the receiver had taken possession of said land, rented it to said Mitchell, and collected the rent, amounting to $50; that

Baird & Caruth are insolvent; that said lands and the other securities of Senter & Co. are inadequate to protect them; that the money was collected by the receiver without their knowledge or consent; and they pray that the amounts of rents collected, whether in money or notes, be turned over to them. This intervention likewise was denied, and Senter & Co. have appealed from both decrees.

Rose, *Hemingway & Rose* and *J. H. Arnold*, for appellants.

1. The court erred in refusing to allow Senter & Co. to participate in the distribution. 2 Dan. Ch. Pl. & Pr. 1205; 1 Beach, Mod. Eq. Pr. sec. 576; 111 U. S. 641; 4 Johns. Ch. 617; 45 N. J. Eq. 77; 46 *id.* 237; 19 Atl. 22; 25 *id.* 885; 44 Fed. 117; 56 *id.* 7, 10. This was a creditor's bill on behalf of herself and all other creditors, and not alone for the benefit of the creditor alone. Other creditors could come in and share with him, on payment of their share of costs, *at any time before distribution*. Cases *supra*.

2. It was error to refuse the second intervention of appellant. Baird & Caruth had no interest in the land, and the receiver no right to possession or rents. The debt was assigned, and the lien went with it. 29 Ark. 218; 26 *id.* 506; 31 *id.* 140. When the security is inadequate, the holder is entitled to the rents. High on Receivers, sec. 666.

J. W. House, for Barbara Hubbard; *J. D. Conway* and *W. S. Eakin*, for the other apellees.

1. This was not a bill for all creditors, but only for those who *may wish to join herein, and ask to be made parties, etc.*; that is, for all creditors who desired to defeat the assignment, and who joined *for that purpose*. Those who first file a bill have a lien on the funds uncovered. 130 Ill. 102; 31 W. Va. 156; 27 Mo.

App. 642; 2 Paige, N. Y. Ch. 567; 1 *id* 308; 7 Dana (Ky.), 110; 9 Paige, Chy. (N. Y.) 74; 3 *id.* 365; 10 *id.* 9; 9 *id* 512; 2 Sandf. Ch. (N. Y.) 520; 25 Barb. 662; 30 W. Va. 443; 27 Gratt (Va.) 479; 4 Johns. (N. Y.) Chy. 687; 46 Ill. 277; 93 *id* 396; 22 W. Va. 443; 2 Beach, Mod. Eq. Pr. 913; Wait, Fr. Conv. sec. 68; 38 Ark. 28; 55 Ark. 116; 40 Ill. App. 319; 30 W. Va. 455; 26 Mo. 193; 2 Beach, Mod. Eq. Pr. sec. 900; 31 W. Va. 156; 29 Ill. 24; 2 Freem. Judg. sec. 350–394; 55 Ark. 116; 50 *id.* 108; 57 *id.* 579; Bump, Fr. Conv. (2 ed.) p. 465; 1 Black, Judg. secs. 401–2–3, 419, 420; 79 Ala. 590.

2. Prior liens at law are preferred in equity in the distribution. 10 Johns. 522; 3 How. Pr. 185; 14 How. 67; 49 Ark. 117; 27 Gratt. 487. Mr. Hubbard and other intervening creditors could have proceeded to sell the property assigned under execution, but the better practice is first to uncover the fraud by bill in equity. 42 Ark. 305; 33 *id.* 762; 39 Am. Dec. 453; Drake, Att. (4 ed.) sec. 225. When lands have been conveyed in fraud of creditors, a judgment afterwards acquired is a lien, and the creditor has three remedies. 36 Minn. 494; 19 N. Y. 396; 10 N. J. Eq. 437; 13 Wis. 324; 2 Cal. 524; 19 Fed. 589; 96 Mo. 216. The cases cited by counsel refer to case where assets in the hands of an administrator were sought to be reached. The rule is different then, for the law settles the distribution. 39 Ark. 117; 16 *id.* 474; 4 Am. & Eng. Enc. Law, 580; Story, Eq. Pl. sec. 99; 2 Story, Eq. Jur. sec. 890; 4 Johns. Ch. 620; *Ib.* 643. Beach, Eq. Pr. sec. 577, states the rule in this case.

3. The court properly refused the second intervention. Senter & Co. had a lien on the lands, but they were not entitled to possession of the real estate, nor to the rents. Before they could have a receiver to take charge of the lands, they would have to allege, (1) that the lands were inadequate security, and (2) that the

mortgagor or lienor was insolvent. They allege inadequacy, but not the insolvency; this is fatal. High on Receivers, sec. 611–666. Ware, the assignee, was the legal owner of the lands, and it was his duty to take charge of them, Senter & Co.'s remedy being by bill to foreclose their lien. 33 Ark. 377; 29 *id.* 358; 43 *id.* 464.

4. The decree was final, so far as the intervening creditors were concerned, and the court had no power to open it up to allow Senter & Co. to participate. 1 Black, Judgm. secs. 41–2–3–4, etc., and note 101, and sec. 48; 6 How. 201; 109 U. S. 180; 7 Wall. 342; 7 Paige, Ch. 18; 4 *id.* 261; 11 *id.* 189; 52 Ark. 224; 34 *id.* 117.

5. Senter & Co. could not stand by with folded hands, and let others fight the battle at their own cost, and, when the battle was won, come in and share the fruits. They should have joined, and helped, and taken their chances. Wait, Fr. Conv. sec. 392; 2 Freeman, Judgm. sec. 350; High, Receivers, sec. 461; 11 Biss. 340; 1 Paige, 639; 31 W. Va. 156, 161.

Right of creditor to intervene in creditor's bill.

HUGHES, J., (after stating the facts.) Though it is the favorite policy of a court of equity to distribute assets equally among creditors *pari passu*, yet, whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by the court. *McDermutt* v. *Strong*, 4 Johns. Ch. 687. Here the appellees, to whom the reward of diligence was granted, filed their bill to set aside the assignment for fraud, and succeeded. The appellants contented themselves with standing by and seeing the appellees carry on the contest at their own labor and expense. This seems to come within the maxim, "*Vigilantibus, non domientibus, jura subveniunt.*" "The creditor who first files his bill obtains thereby a priority, and is entitled to be first paid out of the proceeds of the assets, if

there are no valid prior liens. *Clark* v. *Figgins*, 31 West Va. 157, and cases there cited.

Section 577, Beach, Mod. Eq. Pr., lays down the rule as follows: "A creditor, who delays asking to be admitted as a complainant until after the case has been finally heard, should be admitted, unless his admission is by consent, only on condition that those who have expended their labor and incurred the risk of trying the case be first paid." In the case of *Smith* v. *Craft*, 11 Biss. 340, Judge Gresham maintained that, "after the announcement of the finding of the court in favor of the complainants attacking the fraudulent preference, if other creditors come in and ask to be made parties to the suit as co-complainants, this may be done, but their claims will be postponed in favor of the original complainants." "It is clear that creditors filing a bill to set aside a fraudulent conveyance acquire a specific lien, and are entitled to priority over other creditors at large." *Wallace* v. *Treakle*, 27 Gratt. 487.

The intervening creditors here obtained judgments on their claims at the April term of the circuit court for 1893, and caused executions to be issued thereon and placed in the hands of the sheriff of the county, and they were held by the sheriff at the time of the final decree in this cause. They thus obtained liens on all the assigned property, subject to be seized on execution, and they thereby obtained priority over Senter & Co., who did not obtain judgment till the October term of court next thereafter.

A fraudulent conveyance, though good between the parties, passes nothing as against creditors. 2 Bump on Fraudulent Conveyances, 465; Freeman on Judgments, 350, 394; *Stix* v. *Chaytor*, 55 Ark. 116; *McNeill* v. *Carter*, 57 Ark. 579.

When the law gives priority, equity will follow it. *Codwise* v. *Gelston*, 10 Johns. 522; *Wiswall* v. *Sampson*,

14 How. 67; *Wormser* v. *Merchants National Bank*, 49 Ark. 117; *Wallace* v. *Treakle*, 27 Gratt. 487.

"When a bill is filed by judgment creditors, in behalf of all judgment creditors, to reach property which could not be effectively reached at law, as in suits against an administrator to reach assets fraudulently conveyed by the deceased in his lifetime, and where the statute provides that the assets in the hands of the administrator shall be held subject to the payment of debts in the order prescribed by statute, * * * * * it is well settled that no preference can be obtained by filing a creditor's bill first. Upon the death of a person, his estate is at once charged with the payment of all debts, to be paid under the statute, according to class, *pro rata*." *Clark* v. *Shelton*, 16 Ark. 474; *Jackson* v. *McNabb*, 39 Ark. 117; 2 Story, Eq. Jur. sec. 890; *Thompson* v. *Brown*, 4 Johns, Ch. 620. Several cases of the kind last mentioned are cited by counsel for the appellant, but they are not applicable to the case at bar.

The complaint to set aside the assignment for fraud in this case was brought by the intervenors named therein as plaintiffs, and in behalf of all other creditors of the assignors who might wish to join therein. The appellants did not propose to become parties, or to intervene, until after final decree setting aside the assignment as fraudulent, and ordering the assets distributed to the original complainants in the bill to set aside the assignment. They were therefore properly refused the privilege of sharing *pro rata* in the distribution of the assets uncovered by the suit of the original intervenors without their assistance. There is no error in the court's decree on this ground.

As to parties to creditor's bill.

We are of opinion that, upon the offer of Senter & Co. to intervene and contest the distribution of the rents of lands, which had been sold by Baird & Caruth

before the assignment, and for which they had made bonds for title, and the purchase money notes for which they had assigned to Senter & Co., the purchasers of these lands, and Senter & Co. should have been made parties, that their respective equities might be determined by the court. It is apparent that neither Baird & Caruth, nor Ware, the assignee, had interest in these lands, as they were sold by Baird & Caruth before the assignment, and the notes for the purchase money had been assigned by Baird & Caruth, before the assignment, to Senter & Co. After they were sold by Baird & Caruth, they held merely the legal title in trust, to be conveyed to the purchasers when the purchase money should be paid. When the notes for the purchase money were assigned to Senter & Co., they became thereby entitled to the vendor's lien for the payment of the notes. It is clear, therefore, that the equities as to those lands were between the purchasers and Senter & Co. It was not equity to distribute these rents to Baird & Caruth's general creditors. This part of the decree is reversed, with directions that the purchasers of these lands be made parties. Otherwise the decree is affirmed.

BRISCOE v. ALFREY.

Opinion delivered October 19, 1895.

ANIMAL RUNNING AT LARGE—LIABILITY OF OWNER.—Under Sand. & H. Dig., sec. 7301, making the owner of any seed horse or unaltered mule or jack liable "for all damages that may be sustained by the running at large of any such seed horse, jack or mule," the owner of an unaltered mule is not liable to the owner of a filly killed by the mule while at large, where the mule was kept confined in a strong stable surrounded by a strong, high fence, but had broken out during the night without the owner's knowledge.

Appeal from Woodruff Circuit Court.

GRANT GREEN, JR., Judge.

STATEMENT BY THE COURT.

This action is to recover damages for the killing of a filly by an unaltered mule. It was brought under section 7301, Sand. &. H. Dig., which is as follows: "If any seed horse or any unaltered mule or jack, over the age of two years, be found running at large, the owner shall be fined, for the first offense, three dollars, and for every subsequent offense not exceeding ten dollars, to be recovered by civil action in the name of any person who shall sue therefor, one-half to his own use and the other to the use of the county; and the owner shall also be liable for all damages that may be sustained by the running at large of any such seed horse, jack or mule."

The proof tended to show that a mule, the property of the defendant, was an unaltered mule over two years old, which, while at large, killed a filly, the property of the plaintiff. Also that defendant kept the mule in a strong stable surrounded by a strong, high fence, and that the mule had broken out during the night without defendant's knowledge. The judgment below was for the defendant.

N. W. Norton, for appellant.

Defendant kept the animal at his risk. No *scienter* is necessary. The statute makes the owner liable for the injury, when the injury is proved. Sand. & H. Dig. sec. 7301; 52 Me. 178; 51 N. H. 110; 3 Allen (N. H.), 191; 31 Conn. 121; 63 Pa. St. 341; 23 Mich. 252; 13 Oh. St, 485; 24 *Ib.* 329; 64 Wis. 323.

M. T. Sanders for appellee.

The owner is not expected to keep such animals at his peril. They are useful, domestic animals; and, when

they escape from an enclosure, and the owner endeavors to recover them on learning of their escape, they cannot be regarded as running at large. 27 N. E. 505; 46 Oh. St. 272; 124 Ind. 499; 24 N. E. 755. Owner of hogs not liable when hogs escape without fault. 37 Kas. 448. Nor when horse becomes frightened and escapes. 27 S. W. 200; 12 R. I. 518. See as to *scienter*, 25 N. E. 596; and as to fault of owner, 100 Pa. St. 586. Prudence and care only are required. Bish. Non-Cont. Law, sec. 439; 16 Ark. 314. The *dog* cases cited by appellant are predicated on the peculiar statutes of the several states. Several were sheep-killing dogs, and, as to vicious animals and sheep-killers, the rule is different from that of useful, domestic animals.

WOOD, J., (after stating the facts.) The statute does not place owners of the animals named beyond the protection of that universal rule which exempts men from liability for inevitable accidents. This is plain when all the provisions of the section quoted are considered together. It is not to be supposed that the legislature demanded an impossibility, and imposed a penalty for inability to avoid the inevitable. No human prescience could forestall the various contingencies of escape to which such animals are liable. Yet if the unfortunate owner is to be held responsible at all hazards, the anomalous result would be to inflict upon him a penalty for something which might be impossible for him to avoid.

The ownership of the animals named is not forbidden, but expressly recognized, and the imposition of such burdens as would tend directly or indirectly to prevent or discourage the ownership and use of such animals was never contemplated. By the somewhat rigorous results to follow to the owner in case of his failure to use proper care in restraining the animals designated, the legislature evidently only designed to

enforce upon him the strict observance of that ancient maxim, "*Sic utere tuo ut alienum non laedas.*" What degree of care is required? Only that which a prudent man under similar circumstances would exercise to prevent animals of the kind mentioned from running at large, taking into consideration their natural habits and propensities. It is the intentional or negligent permission of the owner for his animal to run at large, which subjects him to the civil and penal consequences prescribed by the statute. Whether the owner has exercised such care as the law requires, if the facts are disputed, is a question for the jury. The following authorities are cited to support the views we have expressed. Bish. Non-Cont. Law, sec. 1220 *et seq.; Wolf* v. *Nicholson*, 27 N. E. 505; *McBride* v. *Hicklin*, 124 Ind. 499; *Rutter* v. *Henry*, 46 Ohio St. 272; *Leavenworth, etc., R. Co.* v. *Forbes*, 37 Kas. 448; *Fallon* v. *O'Brien*, 12 R. I. 518; *Presnall* v. *Raley*, 27 S. W. 200; *Klenberg* v. *Russell*, 25 N. E. 596; *McIlvaine* v. *Lantz*, 100 Penn. St. 586,—all cited by appellee's counsel.

Counsel for appellant has called our attention to statutes and decisions of other states in which the owner of dogs are made liable absolutely for damages done by them. The status of the dog before the law is *sui generis*. Bish. Non-Cont. Law, sec. 1233. The vicious dog in general, and the odious sheep killer in particular (to which several of the cases cited refer), are under the law's especial condemnation. Without entering upon a discussion of the reasons therefor, it suffices to say that no legislation or decision with reference to injuries by dogs do we regard as analogous to that of the other purely domestic animals of the kind enumerated in our statute.

The instructions of the trial court were in accord with this opinion, and there was no error in its ruling admitting certain testimony to which objection was made. Its judgment is therefore affirmed.

SAINT LOUIS & SAN FRANCISCO RAILROAD COMPANY *v.* KIMMONS.

Opinion delivered October 19, 1895.

JUSTICE'S COURT—VARIANCE BETWEEN PLEADING AND PROOF.—In an action in a justice's court to recover damages for killing an animal, evidence that the company failed to post notice of its killing, as required by the statute making it liable for double the value of the animal killed in case of such failure, is inadmissible where the "written statement of the facts" contains no reference to such failure.

Appeal from Benton Circuit Court.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

This was an action for damages for killing a cow. The suit was brought before a justice of the peace. Omitting the caption, the statement of the plaintiff's cause of action is as follows: "The plaintiff, R. D. Trout, states that on the 8th day of July, 1892, the said company's train killed a cow of his, valued by bystanders at the time to be worth twenty-five dollars or more; and claim sent into the company for the amount of twenty-five dollars at the time, on 16th day of July, 1892, and, no notice being taken of it, nor any part thereof being paid, he prays that he may have process issued for double that amount, fifty dollars, and judgment rendered as the law directs, and all his costs and damages that may accrue in this action."

The defendant company did not appear, and a judgment was rendered by the justice of the peace in favor of plaintiff for the sum of fifty dollars. On a trial *de novo* in the circuit court on appeal, the plaintiff offered to introduce proof tending to show that the employees of the company had failed to post notice of the animal

killed, to which testimony the defendant objected, on the ground that the plaintiff's statement of his cause of action contained no allegation that there had been a failure to post, and that it had no notice of such a claim. The court overruled the objection, and admitted the testimony, and further instructed the jury that a failure to post the notice required by the statute would render defendant liable for double damages. The proof showed the value of the cow to be from eighteen to twenty-five dollars.

E. D. Kenna and *B. R. Davidson*, for appellant.

1. The action was clearly brought under the act of March 13, 1885, and was tried on this theory, but the court allowed proof of double damages. Sand. &. H. Dig. sec. 6350. It is necessary to allege that the animal was not posted. 45 Ark. 295, 297–8.

2. An engineer is not required to look for stock off the track. 48 Ark. 366, 370.

3. The evidence overcame the *prima facie* case, and the verdict should have been for defendant. 47 Ark. 321; 41 *id.* 161; 40 *id.* 336.

L. H. McGill, for appellee.

1. The action was not based upon Sand. & H. Dig. sec. 6350.

2. To obtain a continuance appellant should have shown that the animal had been posted or that he *believed* such proof could be made by affidavits. Sand. & H. Dig. secs. 5839, 5842; 16 A. & E. Enc. Law, pp. 532, 535, and notes.

3. There is no error in the charge, and the evidence supports the verdict.

RIDDICK, J., (after stating the facts.) We think that the evidence was sufficient to support the verdict. Without discussing that point, we pass to the question whether the court properly admitted testimony tending

to show that the appellant failed to post notice of the animal killed. If the failure to post such a notice was a question at issue in the case, the evidence was proper; otherwise, not. "Of all the rules of evidence," says Mr. Best, "the most universal and the most obvious is this—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation. The theoretical propriety of this rule," he adds, "never can be matter of doubt, whatever difficulties may arise in its application." Chamberlayne's Best on Ev. sec. 251.

There was no written pleading filed by appellant, and we must, to determine the facts in dispute, look to the statement filed by plaintiff. As a rule, no formal pleadings are required in actions before justices of the peace; but the plaintiff, in obedience to the statute, filed "a short written statement of the facts" on which his action was founded. In this statement there is no reference to a failure to post a notice of the animal killed. No such fact is alleged, and it was therefore not in issue. No such question was under investigation, and the testimony was irrelevant and improper, and should not have been admitted over the objection of the appellant.

The introduction of this evidence, and the charge of the court in reference thereto, caused the jury to assess double damages against the appellant. The judgment will therefore be reversed, and the cause remanded for a new trial, unless the appellee shall within thirty days enter a remittitur of eighteen dollars, under the rule in such cases.

HILL v. BRYANT.

Opinion delivered October 19, 1895.

ACTION—ABATEMENT AND REVIVAL.—An action commenced by an administrator and abated because of the subsequent revocation of his letters may be revived and proceed in his name as administrator upon his subsequent reinstatement as administrator, under Sand. & H. Dig., sec. 5925, providing that where the powers of one of the parties as a personal representative cease before judgment, the action may be revived and proceed in the name of his successor.

Petition for Prohibition to Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

This is an application for a writ of prohibition. The petitioner, Joseph M. Hill, as administrator of the estate of L. P. Sandels, deceased, seeks by it to restrain and prohibit the respondent, Edgar E. Bryant, as judge of the Sebastian circuit court for the Fort Smith district, from proceeding further with an action pending in said court wherein one T. R. Pipkin, as administrator of the estate of H. C. Ernest, is plaintiff, and the petitioner, Joseph M. Hill, as administrator of the estate of L. P. Sandels, is defendant.

The facts of that case, so far as it is necessary to state them, are as follows: T. R. Pipkin, as administrator of the estate of H. C. Ernest, on the 14th of April, 1893, instituted suit against L. P. Sandels in the Sebastian circuit court for the Fort Smith district. Pipkin claimed to be administrator of said estate by virtue of an appointment made by the United States court in the Indian Territory. Pending the suit, Sandels died, and it was revived against the petitioner, Joseph

M. Hill, as administrator of said Sandels. Said Hill filed his answer, setting up, among other things, the defense that the plaintiff was not the administrator of the estate of H. C. Ernest; that the letters issued to him as such administrator by the United States court were void; that they were procured through fraud, and had been revoked and declared void.

Upon the issues made by the complaint and said answer, the cause went to trial. After hearing the evidence, the jury, under the direction of the court, returned the following verdict: "We the jury find that the letters of administration granted plaintiff on the estate of H. C. Ernest, deceased, by the United States court, in the Indian Territory, for the second judicial district thereof, on April 11, 1893, have been revoked by said court since the commencement of this action, and on that issue we find for the defendant. (Signed) H. Stone, foreman." Upon such verdict the court gave judgment that "the cause stand abated, subject to be revived in the name of a duly appointed administrator for the estate of H. C. Ernest, deceased," etc.

Afterwards the United States court set aside and annulled the order revoking the letters of administration granted said Pipkin, and reinstated him as administrator of the estate of said Ernest. Thereupon Pipkin filed his petition in the Sebastian circuit court, asking that the action against Jos. M. Hill, as administrator of L. P. Sandels, which, by the order of the court, had been abated, be revived in his name as the administrator of Ernest. To this petition, Hill, as administrator, filed a demurrer; also a response setting up, in substance, that the verdict of the jury and the judgment of the court thereon was a judgment in bar, and that the action could not be revived.

Upon consideration of the same, the court overruled said demurrer and response, and ordered the action re-

vived in the name of H. C. Ernest, to which ruling said Hill, as administrator, excepted, and now files his petition for a writ of prohibition to prevent the circuit court from further proceeding in said cause.

Jos. M. Hill and *W. E. Hemingway*, for petitioner.

1. Petitioner in the court below pleaded *ne unques* administrator, and that the pretended administration had been revoked. This plea, formerly called *Ne unques administrator*, was always a plea in bar. 7 Blackf. (Ind.) 470; 11 So. 436; 7 Blackf. (Ind.) 593; 4 Denio (N. Y.), 85; 1 Werner on Adm. p. 586; 1 Ark. 361. The effect of it, if sustained, was to end the suit.

2. Prohibition is the proper remedy. 23 Atl. 878; 2 S. W. 843; 20 N. Y. 540; 2 Spelling, Ext. Leg. Rem. secs. 1725, 1726.

3. The practice of granting an ancilliary injunction in aid of its appellate jurisdiction is settled by this court. 55 Ark. 112. But the remedy by injunction is incomplete, expensive, long and tedious. The remedy by prohibition is the correct proceeding, and speedily ends the contest.

4. The statutes of revivor in this state do not apply to revivor *after* judgment, but solely to actions which have not become *res adjudicata*.

Jo Johnson for respondent.

Injunction does not lie against a non-resident, out of the jurisdiction of the court. This court will not issue an injunction or an original application therefor. Title, "Injunction." 1 H. & M. Dig. par. 1, 2, 14, 15, 37 and 73; Sand. & H. Dig. sec. 3777. Prohibition never issues, unless the inferior court has clearly exceeded its authority, and the applicant has no other remedy. 33 Ark. 191.

RIDDICK, J., (after stating the facts.) It is contended by petitioner that the verdict of the jury and the

judgment of the circuit court ordering the suit first brought by Pipkin, as administrator, abated, must be treated as in effect a judgment at bar. We do not agree with this contention. It may be true, as contended, that petitioner, to defeat that action, set up in effect the ancient plea of *ne unques administrator*, and we may even concede such a plea to be a plea in bar, but the finding of the jury does not sustain it.

An essential part of such a defense to defeat an action like the one brought by Pipkin, as administrator, is the allegation that the plaintiff "is not now and was not at the commencement of this suit administrator," etc. 3 Chitty's Pleadings, 941.

The answer of Hill alleged that the letters of administration granted Pipkin were void, and had been so declared by the court that issued them, and that he had never been legally appointed administrator. It, in effect, alleged that Pipkin was not administrator then, nor such at the commencement of the action. But the finding of the jury does not support the allegation that Pipkin was not administrator at the time the suit commenced. On the contrary, they found that he was such administrator, but that his letters had since been revoked. In other words, that his powers as such representative had ceased. This finding of the jury and judgment of the court that Pipkin's powers as a personal representative had ceased after the commencement of the action, brought the case squarely within the scope of sec. 5925 of Sand. & H. Digest. That section is as follows: "When one of the parties to an action dies, or his powers as a personal representative cease before the judgment, if the right of action survives in favor of or against his representatives or successors, the action may be revived and proceed in their names."

Pipkin, being afterwards reinstated as such administrator, became his own successor; and we think the

court properly held that the action might be revived, and proceed in his name as administrator of Ernest.

We have not considered the question whether, even had the order of revivor been improperly made, the writ of prohibition would have been the proper remedy. For the reasons above stated, the petition for such writ must be denied.

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SOUTHERN INSURANCE COMPANY *v.* PARKER.

Opinion delivered October 19, 1895.

FIRE INSURANCE—IRON-SAFE CLAUSE.—Where the assured in a policy insuring a saloon business against fire agrees to keep his books in a fireproof safe at night, and at all times when the saloon is not open for business, or to keep them in some secure place not exposed to a fire which would destroy the house, he cannot recover on the policy for a loss incurred if the books were destroyed at night while kept under a counter in the saloon, instead of in the safe, although the saloon was kept open day and night, and assured kept a record of his hotel business in the same books, making it inconvenient to open the safe if a guest wished to pay his bill at night.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

STATEMENT BY THE COURT.

This is an action at law upon a policy of insurance upon certain personal property against loss by fire. The portions of such policy material for us to consider are as follows: "The Southern Insurance Company of New Orleans, in consideration of the stipulations herein named, and of fifty dollars premium, does insure J. M. Parker for the term of one year from the 4th of January, 1892, to the 4th of January, 1893, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding two thousand dollars, to the following described property, while located as described

herein, to-wit: One thousand dollars on his stock of wines, liquors, tobaccos, etc.; one thousand dollars on his bar furniture and fixtures, glassware in chests, tables, chairs and carpets. * * * * * * This insurance is subject to the condition of the iron safe and three-fourth value clause as per printed form attached to and made part of this policy." The iron safe clause referred to is as follows: "The assured under this policy hereby covenants and warrants to keep a set of books showing a complete record of business transacted, including all purchases and sales (cash sales need not be itemized except by daily totals), together with the last inventory of said business; and further consents and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where said business is carried on; and, in case of loss, whether the store be open for business or not, the assured warrants 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 answer of the defendant admitted the execution of the policy, and the loss of the property by fire, but it denied that the plaintiff had duly fulfilled the conditions of said policy, and specially pleaded a failure to comply with the conditions above set out, and alleged that, by reason of such failure, the policy was void. It also denied that the plaintiff was the sole and unconditional owner of the property, alleged that it was encumbered by mortgage, contrary to the conditions of the policy, and that the same was void for that reason also.

On the trial of the case the appellee, Parker, and his bookkeeper, testified, in substance, that appellee was engaged in the hotel business, and "ran" a saloon in connection therewith. That the property insured was the stock of wines, liquors, etc., kept in the saloon, and also the furniture and fixtures therein. That a complete set of books were kept, as required by the policy, but that the accounts of the hotel and saloon were kept in the same books. The hotel was kept open night and day, and the saloon also kept open all the time except on Sundays. The books were not kept in a safe, but under the counter. They were not placed in the safe oftener than about once a month.

The books were posted each night by the bookkeeper, and were then left underneath the counter. The reason given for not placing them in the safe was that they were needed that customers might settle their accounts. The hotel, saloon, furniture and stock of wines and liquors were destroyed by fire on the 16th of August, 1892, about 11 o'clock at night. On the night of the fire the bookkeeper had posted the books and gone to bed, leaving the books as usual under the counter. A night clerk was left in charge of the hotel and saloon. In the confusion caused by the fire, and because his first duty was to arouse the sleeping inmates of the hotel, he overlooked the books, and they were destroyed by the fire that burned the hotel.

There was a verdict and judgment in favor of plaintiff. A motion for new trial being overruled, an appeal was taken.

Austin & Taylor, for appellant.

1. The "iron safe" clause was binding on appellee as a condition precedent. 41 U. S. 510; 18 S. E. 194. It was an express promissory warranty, and a strict compliance was necessary. 58 Ark. 565; 1 Wood, Ins.

secs. 179, 436; 2 *id.* 156, 167; Angell on Ins. 144; 1 Arnold, Ins. 213; 58 Ark. 277; 13 Conn. 533. The clause in this case differs from that in 54 Ark. 376. Inability or impossibility to comply with the clause offers no excuse, unless the insurers are in some way responsible for the omission. Richard on Ins. sec. 54; 52 N. W. 649; 6 Term Rep. 710; 2 Pet. 25; 13 N. J. Law, 119; 13 Me. 265; 112 Mass. 49. This is the rule, except a suggestion in 5 Sneed, 139 and a dictum 109 Pa. St. 535, repeated in 138 Pa. St. 838. For the general rule, see 2 May, Ins. 466; 2 Phill. Ins. 472; Wood, Fire Ins. 710; 48 Iowa, 644; 21 Mo. 81; 87 N. Y. 626; 50 Conn. 55. The custom of hotel keepers cannot be pleaded, for the custom was well known and expressly stipulated against. Greenl. Ev. 295; 54 Ark. 223; 68 Am. Dec. 145; 36 *id.* 242; 39 *id.* 611; 50 Mich. 434; 77 U. S. 383.

2. Appellee was bound by the stipulation that he was the sole and unconditional owner of the property, and the agreement with Miller was a chattel mortgage, and avoided the policy. 33 Ark. 387; May, Ins. sec. 291*a*; 122 Pa. St. 128; 61 Iowa, 577; 30 Pa. St. 311; 12 Vt. 366; 3 Seld. 370; 6 Vroom, 366; 60 Am. Rep. 780; 13 Conn. 533; 88 Mich. 94; 71 Iowa, 119; 40 Md. 620; 5 *id.* 165; 48 Wis. 26; 25 Barb. 497; 47 Md. 403. This was an affirmative warranty as to ownership and incumbrance, and cannot be changed without an express waiver. 32 L. R. A. 325; 58 Fed. 723; 47 N. Y. 114; 13 Mass. 96; 6 Vroom, 366; 10 Fed. 232; 120 U. S. 189; 57 N. W. 833; 98 Mich. 621; 89 U. S. 853. The contract was an entirety, and a mortgage of a part would invalidate the whole. May on Ins. secs. 189, 277; Flanders on Ins. 231; 29 Am. St. Rep. 905; 74 Am. Dec. 494; 46 Me. 394; 11 Cush. 290; 40 Md. 620; 36 Wis. 159; 56 Pa. St. 210.

3. The cause should be reversed for irrelevant and incompetent testimony. The question was grossly lead-

ing, and elicited a legal conclusion. Sand. & H. Dig. sec. 2957; 1 Gr. Ev. sec, 434. It was an attempt to vary a written agreement by parol testimony. 1 Gr. Ev. sec. 275. The property was in the hotel at the time of the execution of the policy, and, the lease having provided for the lien, it became complete as soon as the property was so placed in the hotel. 30 Ark. 56; 35 *id.* 323; Jones on Chat. Mortg. sec. 156.

N. T. White, for appellee.

1. The iron safe clause is almost identical with the clause mentioned in cases 54 Ark. 376, and 38 Fed. 19, and these cases are conclusive. The words of a policy are to be taken more strongly against the insurer, and in cases of doubt are to be construed against the insurer. Wood, Fire Ins. (2 ed.) sec. 58; 2 Whart. Cont. sec. 670; 54 Ark. 383; 38 Fed. Rep. 22. The most reasonable construction of the clause would be that the assured would produce his books and inventory *if possible* to do so. The law does not demand unreasonable things or exact an impossibility. 38 Fed. 22; 54 Ark. 376; 2 Wood, Ins. sec. 449; 7 A. & E. Enc. Law, p. 1045 and note 4; 63 N. Y. 108. See 12 N. Y. 92.

2. The Miller lease was not an incumbrance, within the meaning of the policy. 1 Wood, Ins. sec. 172, p. 402, p. 720, sec. 645 (2 ed.); 73 N. Y. 452; 1 May on Ins. secs. 265, 292; 47 Conn. 553. But none of the property insured was covered by the lease. The testimony on this point was clearly admissible to show what property was covered by the mortgage. 51 Ark. 410; 52 *id.* 278; 54 *id.* 158.

3. The objections to testimony are not tenable.

RIDDICK, J., (after stating the facts.) We do not find that there was a mortgage on the property insured. The ruling of the circuit court in regard to the contention of appellant on that point seems to us correct, and

we pass it without discussion. The main question to consider is whether the appellee, Parker, violated the clause in his policy by which he agreed to keep a set of books showing a complete record of all business transacted, and to keep such books "in a fireproof safe at night, and at all times when the store mentioned in the policy was not actually open for business," or in some secure place not exposed to a fire which would destroy the house where the business was carried on, and, in case of loss, to produce such books. The proof shows that he kept the books mentioned in the policy, but he admits that he did not keep them in a fireproof safe, either by day or night, nor in any secure place not exposed to fire. As a result of this failure to keep the books in a fireproof safe at night, they were destroyed by the fire that burned the house in which the business was carried on. Appellee attempts to avoid the effect of failing to keep the books in a safe at night, as required by the policy, by showing that the saloon was kept open for business both night and day, and only closed on Sundays. His contention is that he was only required to keep the books in a safe when the store was closed, and that, as the store was open for business both day and night, therefore he was not required to keep the books in a safe either day or night. In support of this contention, he cites *Sun Insurance Co.* v. *Jones*, 38 Fed. Rep. 19; and *Sun Insurance Co.* v. *Jones*, 54 Ark. 376.

While we agree with the appellee that the clause in this policy is substantially the same as that construed in those cases, we do not think we have in this case the state of facts found in those cases. It is true that some of the expressions of the court in one of those cases may seem to support the contention of appellee, yet, when we consider the facts there, we must conclude that those cases can have little weight here, for it is an established rule that "the language of a court must always

be construed in reference to, and in connection with, the facts before it." *Bell* v. *Tombigbee Railroad Co.*, 4 Smedes & M. 549; Ram's Legal Judgments, 250.

The plaintiffs there had a fireproof safe in their storehouse, in which their mercantile books were kept when not in use. It was their custom to take the books out in the morning, and lay them on the desk for *use* during business hours. They were kept out until the business of the day was closed, and the books were posted and written up, when they were put in the safe and locked up. Both of those cases rested on the same facts, and in both of them it was held that the insured had not violated his covenant to keep the books in a "safe at night," etc., and the insured was held liable on his policy. It was said that "the covenant to keep books, and the covenant to keep them in a safe, must be construed together, and, in the absence of an express stipulation to the contrary, the covenant to keep books will be construed to mean that the books shall be kept in the time and manner usual and customary with merchants." *Sun Insurance Co.* v. *Jones*, 38 Fed. 19.

The covenant to keep the books in a fireproof safe at night, or in some place secure from fire, was recognized as valid and binding, but it was said that the proper construction of that clause was, "not that the books shall be kept in a safe from sunset to sunrise, but that they should be so kept from the time the business of the day is ended, and the store closed for the night."

This construction did no violence to that clause of the policy by which the assured obligated himself to keep his books "in a fire proof safe at night, etc." It only gave it a reasonable interpretation. But this would not be true if we should adopt the construction contended for by appellee in this case. If we should hold that the fact that the store of appellee was kept open night and day, except on Sundays, excused him

from keeping his books in a safe, or some other place secure from fire, what would become of that clause of the policy by which he expressly obligated himself to keep his books "securely locked in a fireproof safe at night," etc. Manifestly, it would be abrogated, and we would, in effect, be making, by construction, a new contract for the parties. The rule in construing the language of an insurance policy is to resolve all doubts concerning its meaning in favor of the assured. But the courts cannot override the plain letter of the contract, or resort to strained constructions, in order to relieve a party from the effects of a failure to comply with his contract.

The object and meaning of the clause of the policy under consideration is, we think, free from doubt. It in effect stipulates that the insured shall keep his books in a fireproof safe, not only at night, but at all other times when the store is not actually open for business. The object in requiring a set of books to be kept, showing a record of the business transacted, and of the changes taking place from day to day in the stock of goods insured, is very apparent. Without such a record, the insurer has no means of ascertaining the amount or value of the goods destroyed, and for which he is liable. Making such a record is of no value unless it can be preserved from the fire that destroys the property. To guard against this, the appellee in this case covenanted that he would "keep such books securely locked in a fire proof safe at night, and at all times when the store mentioned in the policy was 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," that he would produce the books.

This court, in *Western Assurance Co.* v. *Altheimer*, 58 Ark. 575, said of a similar provision, that "the stipu-

lations of the 'iron safe' clause constituted an express promissory warranty in the nature of a condition precedent," and that a strict compliance with it was necessary. In his work on insurance, Mr. Wood also says that such promissory warranties must be strictly performed, "and that, too, without reference to the question whether they were material to the risk. The insurer is permitted to judge for himself upon what conditions he will assure a risk, and what is material thereto, and if he sees fit to insert immaterial conditions in the policy, the assured cannot defend against a breach thereof upon that ground. * * * * * * The assured has no election, but must stand upon his performance of them." 1 Wood on Fire Insurance, p. 448.

There is no pretense here that the assured complied with this condition in his policy. Though his saloon was closed on Sundays, yet he says that the books were kept under the counter when not in use, and were not placed in the safe oftener than once a month. In other words, he neither kept his books in a safe at night, nor during those days on which his saloon was closed.

The books were posted by the bookkeeper each night after the close of the business day. They were thus posted on the night of the fire. After that, instead of placing them in a safe, they were put under the counter. We see no valid reason why, after the books were posted, they could not have been kept in the safe during the remainder of the night; at least that book into which the items for each day had been copied might have been thus kept.

Construing the policy in reference to the necessities of the business, we think there is nothing in it that would prevent the night clerk from having access to the books in the event a customer should offer to settle his account, or if for any other reason they were actually needed during the night. The necessity for consulting

the books during the night would have been much lessened had the appellee kept his saloon business separate from that of his hotel. He obligated himself to keep books showing a complete record of his saloon business, and to keep them in a safe at night. It was his own fault that he kept this record in the same books in which the business of the hotel was recorded; and to show that it would have been inconvenient to open his safe whenever a guest wished to pay his bill is no excuse for a failure to comply with his contract.

However inconvenient it may have been, he had expressly agreed that the saloon books should be kept in a fireproof safe at night, or in some place secure from a fire that might destroy the house where the insured goods were kept, and he should have complied with his contract. He failed to do so, and as a result of that failure the books were destroyed by the fire that burned the house. For this reason the judgment against the appellant company cannot be sustained. It is therefore reversed, and the cause remanded for a new trial.

SHIPLEY v. STATE.

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Opinion delivered October 19, 1895.

SABBATH BREAKING—BURDEN OF PROOF.—One charged with Sabbath-breaking, who is shown by the state to have labored on Sunday in operating the pumps and fan of a coal mine to prevent the accumulation of water and gas in the mine, has the burden of proving that such work was one "of necessity."

WORK OF NECESSITY—SUFFICIENCY OF EVIDENCE.—A conviction of Sabbath breaking in operating the pumps and fan of a coal mine on Sunday will not be disturbed where the evidence was that the work was necessary to keep the mine from flooding and from being filled with gas, but it did not appear that the operation of the mine might not have been made practicable and remunerative, at a reasonable cost, without laboring on Sunday, by a different construction of the mine and by the use of improved appliances.

Appeal from Logan Circuit Court.

JEPHTHA H. EVANS, Judge.

John H. Rogers and *Ira D. Oglesby* for appellants.

1. The facts in this cause differ from those in 56 Ark. 124 in every particular, and falls within the doctrine announced in 33 Ind. 416, approved in the former case. The court correctly held in 56 Ark. 124 that the statute did not mean to prohibit the doing of every kind of work except household work of daily necessity, but "*that such labor, not in the discharge of household duties, as is a necessary incident to the accomplishment of a lawful purpose is not a violation of the statute.*" The operating of the pumps and fan was a necssary incident to a lawful purpose, without which the mine could not be operated at all. 56 Ark. 124; 33 Ind. 416; 31 Ind. 187; 31 Ark. 518; 8 S. W. 926; *Ib.* 927; 41 Am. Rep. 64; 26 *id.* 84. The word "necessity" has never received a very strict construction, and it has been said to cover everything which is morally fit and proper to be done under the peculiar circumstances of the case. 108 Mass. 195; 145 *id.* 353.

E. B. Kinsworthy, Attorney General, for appellee.

1. There was no testimony to show that this mine could not be so arranged that there would be no necessity for Sunday labor. The indictment is good. 56 Ark. 124; 97 Mass. 407.

2. The burden was on appellants to show the necessity. 56 Ark. 127; 27 N. Y. 334; 88 Ga. 787; 23 Ark. 393.

3. One cannot create a necessity for Sunday labor, and then plead the necessity. The burden was on appellants to show this work could not be avoided. When work is done on Sunday to save a week day, the courts hold that it is not a work of necessity. 62 N. H. 575; 112 Mass. 467; 58 N. H. 248; 79 Mass. 407; 30 Ind.

476. The necessity must be an unforseen one, or one that could not reasonably have been provided against. 76 Ind. 310; 34 Mo. App. 124.

Rogers & Oglesby, for appellant, on motion for rehearing.

1. It was error to refuse the fourth instruction. The defendants were entitled to an acquittal if, from the whole evidence, there arose a reasonable doubt as to whether or not the work done by them was a work of necessity. The defendants fully met the *prima facie* case made by the state, and overcame the burden which the law imposed on them, whenever they introduced evidence sufficient to raise a reasonable doubt in the minds of the jury as to whether or not the work done was a work of necessity. 59 Ark. 391; 58 Miss. 778; 29 *id.* 267; 53 Miss. 423–4; 20 Ark. 166; 19 *id.* 143; 59 *id.* 391; Thompson, Trials, vol. 2, 1791 *et seq.* The cases in 27 N. Y. 334 and 56 Ark. 124 are not in conflict with this doctrine.

2. The doctrine announced by the court on the *burden of proof* is not sustained by principle or the adjudications of our courts. It is only where the negative averment is particularly within the knowledge of defendant that he is required to prove it. 19 Ark. 146; 45 *id.* 298; 1 Gr. Ev. (12 ed.) 95, note 81 b and c; 67 Mass. 61.

WOOD, J. Appellants were convicted of the crime of Sabbath breaking. The proof for the state was that appellants labored, operating the pumps and fan of the Western Coal & Mining Company at their mine in Franklin county, Arkansas. The defense was that the work alleged was of necessity. The proof on behalf of appellants was, in substance, that the pumps and fan were adapted to the mine in which they were used; that it was necessary to operate them on Sunday to prevent the

probable destruction of the mine, and to protect the lives of the miners; that the suspension of the pumps and fan on Sunday would involve serious loss, delay and inconvenience. The testimony in detail explained how these consequences would follow upon a failure to operate the pumps and fan on Sunday.

Burden of proof.

The state having shown that appellants labored on the Sabbath day operating the pumps and fan, it then devolved upon the defendants to show that such work was of necessity, unless the state by its own proof had shown such to be the case. Whether the work proved was a necessity, was a matter peculiarly within the knowledge of defendants. *Cleary* v. *State*, 56 Ark. 124; *Fleming* v. *People*, 27 N. Y. 334. The proof on behalf of the state showed that the work done was necessary to keep the mine from flooding with water, and from becoming dangerous by filling up with gas; but it did not show that defendants could not have reasonably employed some other device, in the then condition of the mine, that would have answered the same purpose. Nor did the state's proof show that by no ordinary prudence could this mine have been constructed in a way to avoid this Sabbath day labor. Hence the burden was left (after the state had shown that the work was done) upon the defendants to make good their special defense. Have they done so?

As to what is a "work of necessity."

Courts in construing the term "necessity," as employed in these Sunday statutes, have generally given it a liberal, rather than a literal, interpretation. It is not an absolute, unavoidable, physical necessity, that is meant, but rather an economic and moral necessity. 2 Bish. Cr. Law, sec. 959; *Edgerton* v. *State*, 67 Ind. 588; *Hennersdorf* v. *State*, 25 Tex. App. 597; *McGatrick* v. *Wason*, 4 Ohio St. 566; *Commonwealth* v. *Knox*, 6 Mass. 76; *Flagg* v. *Inhabitants of Millbury*, 4 Cush. 243; *Wilkinson* v. *State*, 59 Ind. 416.

If there is a moral fitness or propriety for the work done in the accomplishment of a lawful object, under the circumstances of any case, such work may be regarded a necessity, in the sense of the statute. *Commonwealth* v. *Knox*, 6 Mass. 76; *Stone* v. *Graves*, 145 Mass. 353. But work on the Sabbath, which is apparently in violation of the law, is not morally fit or proper in any case, unless it appears that by no ordinary discretion or reasonable expense could such labor have been avoided.

Now, coal mining is among the most important and useful of all industries. It is a necessity in the manufacturing and commercial progress of the world. The legislature could not have contemplated the imposition of any restrictions upon this or any other lawful occupation; which would render it impossible or even impracticable. Nevertheless, it is the duty of those engaged in this or any other lawful enterprise to select and arrange the means and appliances incident thereto so as not to violate the law in their practical operation.

The proof nowhere shows that this mine was properly constructed. Nor does it show, either on behalf of the state or the defendants, that this Sabbath day labor of operating the pumps and fan might not have been avoided by a different construction of the mine, or by other appliances just as effectual; and that, too, without any unreasonable expenditure of time or money. One cannot negligently or willfully create the necessity which he pleads in his defense. The law declared by the lower court was as liberal to appellants as they could expect, and was in line with the opinion of this court in *Cleary* v. *State*, *supra*.

The *prima facie* case for the state was not overcome by proof on behalf of appellants, and the verdict of the jury was correct.

Affirm the judgment.

BATTLE, J. Among the alleged errors enumerated by appellants in their motion for a rehearing is that part of the opinion in this case in which it is said that, if the labor performed by them on the Sabbath was necessary, the necessity of its performance on that day was within their peculiar knowledge, and the burden was on them to show it. They contend that, if this labor was not a work of necessity on Sunday, the state ought to prove it, because the evidence necessary for that purpose was not peculiarly within their knowledge. The work done by them was performed in the operation of machinery to propel fans and pumps for the purpose of keeping a mine free from gas and water. They say that the state could have used the inspector, or superintendent of the mine, or any of its employees, "or indeed anyone familiar with the operation and necessity of a coal mine," to show whether or not this work was one of necessity, and hence this fact was not within their peculiar knowledge. To test the correctness of this contention it is necessary to refer to the rule upon this subject.

Mr. Greenleaf says: "Where the subject matter of a negative averment lies *peculiarly within the knowledge* of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it, without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great." 1 Greenleaf on Evidence, sec. 79.

As to negative averments Mr. Wharton says: "Where, in a statute, an exception or proviso qualifies the description of the offense, the general rule is that

the indictment should negative the exception or proviso. In such cases, when the subject of the exception is peculiarly within the defendant's knowledge, and the negative cannot be proved by the prosecutor, the burden of proving the affirmative may be on the defendant, as a matter of defence. But another distinction is to be kept in mind. It may be that the negative to be established is something which virtually imputes certain positive conditions to the defendant, as on indictments for false pretences, where the charge of untruth is equivalent to a charge of falsity, in which case the burden of proving the negative is on the prosecution; and on an indictment for perjury, where to charge a defendant with swearing to a fact, not knowing it to be true, is equivalent to a charge of rash and false swearing, in which case the defendant's want of knowledge must also be shown by the prosecution. On the other hand, where the negative involves no criminality on the part of the defendant, then the burden may be on him to prove the affirmative. Thus the burden of proving the defendant to be a 'traveler,' under the statutes prohibiting wearing of concealed weapons, is on the defence." Wharton's Cr. Ev. (8 ed.) sec. 128.

In cases in which the defendants are indicted for selling liquor without license, Mr. Bishop explains the rule as follows: "Must the negative averment, that the defendant was not licensed or otherwise authorized to make the sales be proved? Now, in principle, as this negative matter is a part of the government's case against the defendant, it must in some way be made *prima facie* to appear at the trial. But not all of every case is established by oral testimony, depositions and other documents. Much is derived from presumption. One of the presumptions is that what is common in general prevails in the particular; another, that a fact, the existence of which is once shown, continues. There-

fore, where the general law withholds from the mass of the people the right to make the particular sale in controversy, and permits it only to exceptional persons, of everyone of whom it is certainly true that at some time he was not allowed to do it, the *prima facie* presumption is double: first, that the instance in controversy accords with what is general; and secondly, that, as at one time the defendant had no license, he has none now. Hence, if he has a license, he must show it. And this doctrine promotes alike convenience and justice; for it is troublesome, and it may be even impossible, to prove a negative, while, if the defendant has a license, he can readily produce it." Bishop's Statutory Crimes (2 ed.), sec. 1051.

The reason given by Mr. Bishop for the rule in the cases he was discussing is really the reason why the matter to be proved was in the peculiar knowledge of the defendant. As he is an exception in the mass of the people, it is to be presumed that the fact to be proved is more peculiarily within his knowledge. An illustration of this is the licensed liquor dealer. Another is *Wiley* v. *State*, 52 Ind. 516. In that case the defendant was indicted for carrying a concealed weapon, he not being a traveler. The court held that the burden was on him to prove that he was a traveler, and said: "We think the exception relates to the appellant personally, and is particularly within his knowledge. Besides, a majority of persons are not travelers. The presumption was, that the appellant was not a traveler, and if he desired to take himself out of the operation of the general rule, it was incumbent on him to make the proof." *United States* v. *Hayward*, 2 Gall. 485; *Rex* v. *Turner*, 5 Maule & S. 205.

In the case before us, the appellants claimed to be an exception to a rule. The statute makes it a public offense for anyone to labor on the Sabbath, unless the

labor performed is a work of charity or necessity. They claimed to be within the exception, because their labor was necessary to keep the mine in which they were working free from gas and water on Sunday, and thereby to preserve the mine, and make it a safe and fit place in which to work on Monday and succeeding days. Whether this be true or not depends on the locality of the mine, the extent it is subject to be filled by water and gas, the time and expense required to free it from the gas and water, and to preserve the walls. Without a knowledge of these facts, no one can tell whether it be necessary to work in or on the mines on the Sabbath in order to operate them at a profit on other days. These facts are peculiarly, not exclusively, within the knowledge of the appellants. Their observation, experience, and knowledge as to the mine, its construction, the extent to which it is exposed to gas and water, the use and capacity of machinery usually employed in operating it, presumably enabled them to prove with more facility than the state can whether their work on Sunday was a necessity. It imposed on them no hardship, and exposed them to no penalty to do so. In fact, they should not violate the Sabbath unless it appeared to them to be a necessity, and, when they do, ought to be able to prove that they come within the exception.

Appellants complain of this court misunderstanding an instruction to the jury which was asked for by them, and refused by the circuit court. It was as follows: "It is not necessary, in order for the defendants to be acquitted, that the evidence should satisfy the jury that the work done by the defendants was a work of necessity, but the jury should acquit them if there arises out of the whole evidence a reasonable doubt as to whether or not the work done by them was a work of necessity, as defined in the foregoing instructions." Under the evidence we deemed it unnecessary to notice it, as, under

the undisputed facts in the case, we thought the refusal to give it was not prejudicial to appellants.

Witnesses testified that the mine at which appellants labored on a Sunday was what is known as a "wet mine," and was exposed to gas; that it was necessary to use a pump and fan all the time in order to keep it in a safe condition; that, if the pump was not operated on Sunday, the inflow of water would be so great as to require the whole of Monday, and probably Tuesday, to pump it out, and the roof in some portions of the mine would be liable to fall in on account of the accumulation and effect of the water; and that, unless the fan was continually kept in motion, gas would accumulate, and it would be dangerous for laborers to enter the mine. And they further testified that a pump of sufficient capacity to pump out on Monday all the water accumulating on Sunday, and a fan capable of expelling all the gas on Monday by noon, could be procured, but the pump and fan already in use were sufficient for that purpose if operated on the Sabbath. But no witness testified that the walls and roof of the mine could not have been so constructed at a reasonable expense as to prevent them caving or falling in after being exposed to the water.

The whole effect of this evidence was to show that it was more profitable to use, on the Lord's day, the fan and pump already in operation, than to construct the walls and roof of the mine in such a manner as to prevent them falling in on account of the effects of the water, and to procure and to use a pump and fan of sufficient capacity to expel on Monday all the gas and water accumulating on the preceding Sunday. But this was not sufficient. If true, it does not prove that the labor performed by appellants was a work of necessity on Sunday. For, if the operation of the mine might have been made practicable and remunerative, at a reasonable cost, without laboring on Sunday, by the structure of

its walls and roofs, and use of improved appliances, then there was no necessity for work on the Sabbath. Labor cannot be lawfully performed on the Lord's day merely for the purpose of adding profit to the accumulation of a business already lucrative; for, if it could, all kinds of work might be a necessity, and it would be a sufficient excuse for labor on Sunday to say that it was convenient and profitable; and all barriers to the desecration of the Sabbath would be thereby broken down.

We deem it unnecessary to add anything further to what has been said in the opinion heretofore delivered in this case.

The motion of appellants is denied.

[As to what constitutes Sunday labor, see note to *Quarles* v. *State*, (Ark.) 14 L. R. A. 192.—Rep.]

STATE *v.* CORBETT.

Opinion delivered Nov. 2, 1895.

STATUTES—PASSAGE—YEA AND NAY VOTE.—The constitutional provision that "no bill shall become a law unless, on its final passage, the vote be taken by yeas and nays; the names of the persons voting for and against the same be entered on the journal; and a majority of each house be recorded thereon as voting in its favor" (Const. 1874, art. 5, sec. 25), is not violated where one branch of the legislature, after regularly passing a bill with certain amendments, subsequently recedes from one of their amendments, without taking a vote thereon by yeas and nays.

STATUTES—VALIDITY OF AMENDATORY ACT.—If section 2, of the act of March 31, 1891, grading the offense and fixing the punishment for prize fighting, were invalid (it being conceded that section 1, of such act, creating the offense, was valid), the act of April 13, 1893, amending the former act is not invalid, though its title states that it is an act to amend section 2, of the former act, and not the entire act.

Certiorari to Garland Chancery Court.

Leland Leatherman, Chancellor.

STATEMENT BY THE COURT.

On the 17th October, 1895, C. V. Teague, prosecuting attorney for the seventh judicial circuit, made and filed his affidavit before W. A. Kirk, one of the justices of the peace within and for Garland county, in substance alleging and charging that one James J. Corbett, in said county, had threatened to engage in a prize fight or glove contest with one Robert Fitzsimmons, and that said Corbett threatens and is about to commit an assault and battery upon the person of said Fitzsimmons, the same being of a character calculated to endanger human life. Therefore, he prayed a warrant of arrest to be issued for said Corbett, that he might be dealt with according to law. The warrant was issued, and the sheriff proceeded to execute the same, and arrested Corbett, and produced him before said justice of the peace.

At this stage of the proceedings, the sheriff received a writ from the Hon. Leland Leatherman to produce said Corbett before the chancery court of the third district, over which he presided, at 1:30 o'clock in the afternoon of that day, and this was accordingly done.

The petition for the writ of habeas corpus was demurred to by the respondent sheriff, setting up the facts aforesaid.

Upon hearing the petition, demurrer and response thereto, and testimony adduced in the case, the chancellor discharged the petitioner, holding sections 1842–3 of Sandels & Hill's Digest to be void, by reason of the failure of the legislature to observe constitutional requirements in the passage of the second section of the original act of 31st March, 1891, of which the sections of the digest are amendatory; and, further, that the testimony showed that the contest or fight contemplated by Corbett with Fitzsimmons was not such as necessarily to endanger life, and so forth.

The attorney general, on behalf of the state, sued out from this court the writ of certiorari, to have the proceedings before said chancellor brought to this court for review and proper judgment and order. All formalities were waived, and the cause heard at once.

E. B. Kinsworthy, Attorney General, and *Rose, Hemingway & Rose*, for petitioner.

1. If the warrant of the justice showed that Corbett was held to answer a charge, preferred by affidavit, that he was about to commit an offense against the person or property of another, or to commit violence endangering human life, then he was lawfully in custody (Sand. & H. Dig. secs. 2380 *et seq.*); and when the sheriff's return showed that Corbett was so held, the chancery court should have remanded him, without inquiring into the truth or justice of the charge preferred. The judgment that he be discharged was not only not warranted, but was prohibited by statute. Sand. & H. Dig. secs. 3676, *et seq.*

2. The warrant showed that Corbett was held upon an affidavit charging that he was about to commit an offense against the person or property of another by fighting a prize fight that endangered human life. The facts charged would constitute an offense, (*a*) under the law of 1891 prohibiting prize fighting, (*b*) under the law punishing assault and battery.

(a.) The act of 1891, prohibiting prize-fighting, was constitutionally passed. There is no question that it passed the senate regularly. The point made is that it was amended in the house so as to make prize-fighting a misdemeanor, and that, when it subsequently passed the house as it came from the senate, the ayes and noes were not called and recorded. This was not required by the constitution. The ayes and noes were recorded when it passed the house with the amendment, and when

the house receded from its amendment, it was not necessary that they be again recorded. In 40 Ark. 200, a question arose where the legislative journals showed a similar state of facts, and Judge Smith said: "*The court would presume that the house receded from its amendments.*" *Idem*, p. 214. A similar construction of a similar provision is found in 8 N. Y. 317.

But if it be conceded that the second section of the act of 1891 was not properly passed, and is therefore void, the first section, having been properly passed, is valid. The first section contains a complete definition of the crime, and this was the primary and controlling purpose of the legislature; the second section only prescribes the punishment, and was obviously of secondary consideration. The first can stand without the second, and there is no reason to suppose that its passage was at all dependent upon the passage of the second. But when part of an act is valid, it will stand, though other parts be invalid, whether such invalidity arise from the subject-matter of the provision, or the manner of its passage. Cooley's Con. Lim. p. 209; 24 Neb. 586; 24 Fla. 293. We then have a statute defining a crime, but fixing no punishment. The code of criminal procedure provides for such cases, and makes the act complete. Sand. & H. Dig., secs. 2293, 2294.

(*b*) But if the act of 1893 were wholly void, the affidavit and warrant show a proper case to bind Corbett to keep the peace, on the ground that he was about to commit a battery upon Fitzsimmons, endangering his life. It is said that prize-fighting does not endanger life. But the affidavit alleges that it would. Besides, the common knowledge of the world is that it does, and this court knows whatever is a matter of common knowledge. Upon such an issue of fact, the supreme court of Louisiana refused to be deceived. 17 So. Rep. 519. And if this court should go back of the allegation in the

affidavit to inquire into the facts, it will be satisfied by the circumstances that the allegation is true. It is not bound to accept the opposite conclusion, merely because witnesses swear to it whom the court does not really believe.

Greaves & Martin and *G. W. Murphy*, for respondent.

30 S. W. 426 does not apply. In that case the court held that when the journals were silent it might be presumed that the bill was properly enrolled and signed by the governor, in the absence of proof to the contrary. Art. 5, sec. 22 provides that "no bill shall become a law unless, on its final passage, the vote be taken by yeas and nays; the names of the persons voting for and against the same be *entered on the journal;* and a majority vote of each house be *recorded* as voting in its favor." This is *mandatory*, and no presumption can be indulged in. Cooley, Const. Lim. 135, 136; Story on Const. p. 590, 591; 27 Ark. 279; 33 Ark. 17; 31 S. W. 924. All laws passed under rules not conforming with the constitution are void. See also the opinion of the chancellor and authorities cited.

Validity of passage of statute.

BUNN, C. J., (after stating the facts.) The principal question in this case arises from the contention of the appellee, and the decision of the chancellor, that the statute digested as sections 1842 and 1843, and commonly known as the "Anti-Prize-Fighting Law," is invalid. The argument by which it has been sought to be shown to be invalid is this: The original act entitled "An act to punish and prevent prize fighting in Arkansas" approved March 31, 1891, was invalid as to its second section; and that renders the corresponding section of the act of April 13, 1893, also invalid, the latter being but an amendment of the former; and, if the former be invalid, the latter cannot be valid, since there was

nothing to amend to, when the amendment was made in 1893.

The history of the act may be briefly stated as follows: During the session of the general assembly in 1891, a bill was introduced and passed in the senate, entitled a bill for an "Act to punish and prevent prize-fighting in the state of Arkansas." It contained but two sections,—one, the declaratory section, denouncing prize-fighting with or without gloves as an offense; and the other simply fixing the grade of the crime as a felony, and the punishment accordingly. The bill thus went to the house of representatives, and was there regularly amended and passed, the yeas and nays being called and entered in the journal as amended, and returned in that shape to the senate. The amendments by the house were three in number. Only one of them (the second) it is necessary to notice particularly. The second amendment changed the grade of the offense, as fixed in the original bill, so as to make it a misdemeanor, instead of a felony, and fixed the punishment accordingly different, that is, by fine and imprisonment in the county jail. When the senate received back for its consideration the bill as amended, it declined to concur in any of the three amendments adopted by the house, and requested the appointment of a committee of conference, appointing and naming at the same time its members of such committee, and the matter was then referred again to the house, which acceded to the request of the senate, and named the members of the conference committee to act on its part; and so the matter was by both houses referred to this conference committee, which some time afterwards reported to the two houses unanimously recommending that the senate adopt amendments numbers 1 and 3 of the house, and that the house recede from number 2. This report was re-

ceived and adopted in the house, and presumably in the senate, as no question is raised as to its disposition there.

The constitutional provision which, it is contended by the petitioner, was not observed in the recession of the house from its amendment number 2, is section 22, article 5 of the constitution, and is as follows, to-wit: "Every bill shall be read at length, on three different days, in each house, unless the rules be suspended by two-thirds of the house, when the same may be read a second or third time on the same day; and no bill shall become a law unless, on its final passage, the vote be taken by yeas and nays; the names of the persons voting for and against the same be entered on the journal; and a majority of each house be recorded thereon as voting in its favor." The only objection seriously made to this procedure is that, in its recession from the second amendment, the house did not vote by yeas and nays, as required to be done on the final passage of every bill.

Adhering to the doctrine laid down by this court, notably in *Vinsant* v. *Knox*, 27 Ark. 279 and *Smithee*, v. *Garth*, 33 Ark. 17, we hold that the provision of the constitution referred to is mandatory, and we would emphasize the doctrine with all the force that language can give. This, as we understand it, is all that the petitioner contends for, and all that the chancellor found necessary for a basis for his opinion.

But, while the provision is thus mandatory, it must be confined in its application to cases and phases of cases plainly within the scope of its meaning. It is not expected, nor desired, that a constitution should enter into details, or to provide for every contingency and exigency that may arise in the course and progress of legislation. A fundamental law must, of necessity, be more or less a general law, and, in construing any of its provisions, we are never to lose sight of the

manifest object of the same, whether that be in the shape of a permission or prohibition. Although learned jurists, authors, statesmen, politicians and courts have attributed to like provisions almost countless objects, yet the common meaning of it is that it is a precaution against mistake in the number of votes for and against the bill, and, secondarily, that it places a personal responsibility on each voter in the body, so that his constituency may know how he voted on the particular measure.

If, in the details of legislation, it becomes impossible, or even inconvenient, to rigidly adhere to the letter, and yet accomplish the desired end, by acting in the spirit of the constitution, the latter is preferable, because, while the letter killeth, the spirit maketh alive.

Narrowed down, the question is, is the disposition of *amendments*, either by vote of adoption, rejection or recession, a voting on the final passage of the bill? And, to reduce it down to the last analysis, is the vote on the appointment of a conference committee, or on the adoption of its report, a vote on the final passage of the bill? The more important of these two votes is the one agreeing to the appointment of the committee, for a conference committee is a sort of legalized arbitrator to whom is committed the function of settling differences between the two houses, each house, by its vote appointing the committee, agreeing that the legislation forming the subject-matter of the bill is of more importance than adherence to any differences; and, when this committee can agree and recommend a course of action, it is practically adopted as a matter of course. There is no question as to the majority vote, nor as to how anyone may have voted, for all are voting now on the propriety of yielding something, rather than needful legislation should fail. These instances of voting are generally

held as not coming within the constitutional provision on the subject of voting on the final passage of bills.

To illustrate this point, we will take the case of *Hull* v. *Miller*, 4 Neb. 503, referred to by counsel, wherein a similar constitutional provision was construed. The supreme court of Nebraska in that case said: "It is disclosed that the bill for the act in question originated in the senate, where it was passed by the constitutional majority, the yeas and nays being duly called, and entered on the journal. In the house, the bill was amended, and then duly passed. Upon its return to the senate, all that the journal discloses with respect to it is that the amendments of the house were adopted, but by what majority, or in what manner the vote was taken, the journal of the senate is silent. It is contended by counsel for the plaintiff in error, that the constitution requires the observance of the same formality in the vote by which the amendments of the house were concurred in, as was required on the final passage of the bill before it left the senate, and that the journal of that body should show an observance of this requirement. As to the final passage of the bill, in either house, the position of counsel is clearly correct. Section 11, article 2, of the constitution of 1867, declares that 'On the passage of every bill in either house, the vote shall be taken by yeas and nays, and entered on the journal; and no law shall be passed in either house without the concurrence of a majority of all the members elected thereto.' This provision is most clearly mandatory, and its non-observance in the passage of any bill would render the act absolutely void." * * * But it will be observed that the provision of the constitution above quoted refers only to the vote on the passage of bills. There are numerous other votes necessary during the progress of a bill to its third reading, to which it has no sort of reference whatever.

These are left to the control of the house, under its usual parliamentary rules." The law was sustained, notwithstanding the concurrence of the senate in the house amendments did not appear to have been obtained by a yea and nay vote.

To the same effect is the decision of *McCulloch* v. *State*, 11 Ind. 424, where the precise question was under consideration.

In the case of *People* v. *Supervisors*, 8 N. Y. 317, also cited in argument, the identical question presented in the case at bar was under consideration in the court of appeals of New York. The constitution of that state, adopted in 1846, and under which the case arose, contained this provision: "No bill shall be passed unless by the assent of a majority of all the members to each branch of the legislature, and the question upon the final passage shall be taken immediately upon its last reading, and the ayes and nays entered on the journal." That case is thus stated and disposed of by that court: "On looking into the senate journal of 1851, it appears that the bill in question originated in that body, and that on its final passage the yeas and nays were taken and entered in the journal, and were 21 to 2. The assembly (the house) returned the bill to the senate with divers amendments. The senate had these amendments under consideration, and proposed certain amendments thereto, and then agreed to the amendments as amended by a vote of 23 to 1, the yeas and nays being taken and entered in the journal. The amendments thus amended were returned by the senate to the house. The latter body non-concurred in the amendments of the senate, and a joint committee of conference was appointed, which recommended that the senate should recede from two of its amendments, and that the house should adopt the residue. This was agreed to by the house by a unanimous vote, eighty-six voting by yeas

and nays, which are entered in their journal. The senate receded from the two amendments as recommended by the joint committee, without a vote by yeas and nays, and without entering the names of those voting in the journal. The omission to call the yeas and nays, on receding from these amendments, and recording the names of those voting, is the only fact objected to as a departure from the constitution.

"I think the requirement of the constitution was fully satisfied by the senate on the final passage of the bill before it was sent to the house, and on the final passage of the amendments. The course and practice of the legislature did not require that the whole bill should be again read on receding from the two amendments recommended to be abandoned by the joint committee of conference. There is nothing in the constitution which requires the yeas and nays to be taken in receding from an amendment which the senate had once adopted by the required vote and in the prescribed form. In point of fact, every part of the law as it stands has received the requisite majority in both houses, the yeas and nays in both were taken on its final passage and entered on the journal. The law, therefore, was passed without violating any of the forms of the constitution.

"Again; the provision of the constitution requiring the question upon final passage of a bill to be taken immediately upon its last reading, and the yeas and nays to be entered on the journal, is only directory to the legislature."

This last statement, it is contended by counsel for the petitioner, destroys the force of the decision as an authority with us, as we hold the provision to be mandatory, and not directory merely. This contention of counsel is, however, not well founded, for it will be observed that the argument preceding is to the effect that the constitutional provision was not violated, but that all

its required formalities were observed, and, besides, the word "again," as an introductory word in the statement, simply means that, even if what has already been said be not sound and conclusive, the act is good anyway, since the constitutional provision is only directory.

As to the application of the strict mandatory rule regulating the method of voting on the final passage of bills to the methods of dealing with amendments, this court has spoken in no uncertain language.

The case of *Chicot County* v. *Davies*, 40 Ark. 200, presented this state of facts: An original bill, in the house, for an act to authorize county subscriptions for stock in railroads provided that the county court, upon application of the president and directors of the company, *and* one hundred of the voters of the county, should submit the question to a popular vote. The house journal showed that the bill was amended in that body by substituting the word "or" for "and," so as to authorize the county court to submit the question on the application of either the said company officers, *or* of the one hundred voters. The bill passed the house as amended, and was transmitted to the senate, and there passed, and sent to the governor, and by him approved. The enrolled bill, so approved by the governor, however, contained the word "and," as did the original bill, instead of the word "or," as did the bill when amended by the house and sent to the senate. Then arose the contention that the bill enrolled and signed by the governor was not the same bill passed by the house and senate. Certainly it it was not the same as was passed by the house, for the change made by the substitution of "and" for "or" was a marked and radical one. There was no affirmative showing in the journal of the senate that the change had been made by a yea and nay vote, nor in fact was there any showing whatever as to the manner in which the change was made. This court, in effect, held that

the strict mandatory rule did not apply to such a case, saying: "Now the constitution of 1868 (the same as the present constitution as to this subject) did not require amendments to bill to be entered on the journal; consequently, in order to uphold the act, we will presume that the house receded from its amendment substituting "or" for "and." Citing *Blessing* v. *Galveston*, 42 Tex. 641; *Miller* v. *State*, 3 Ohio St. 475; *McCulloch* v. *State*, 11 Ind. 424; *Supervisors* v. *People*, 25 Ill. 182; *Commissioners* v. *Higginbotham*, 17 Kas. 62. In that case there was an entire absence of recitals in the journal as to any vote being taken upon the recession by the house. In the case at bar there is a recital, in effect, that the vote on the recession was had, but a failure to state how, although inferentially we conclude that it was taken in the usual method of adopting agreements made by conference committees. This makes little difference, for the contention is that the journal should affirmatively show a vote by yeas and nays, and the names of those voting for and against to be entered in the journal. This showing was not made. The court's ruling was that it was not necessary, for it might be presumed that the house did not really recede from its amendment. The principle of that case is not materially different from the one involved in this case, so far as we are able to see.

Section 12, article 5 of the constitution provides that "each house shall have the power to determine the rules of its proceedings." Now, just at what point the strict mandatory rule of section 22, same article, may cease to be applicable in any given case, for reasons of systematic and convenient procedure, and at what point the parliamentary rules each house is empowered to make, by constitutional provision, may begin to be applied, is often a question of much difficulty of solution; and something doubtless may be properly left to the

wisdom and sound discretion of the law-making department, to determine such a question as it may arise in each case. We are favored with no proof on the subject, but according to common knowledge and the authorities, these parliamentary rules seem to have much to do with the procedure through committees.

After all, the proposition before us is not that there is doubt as to the validity of the section of the statute thus called in question, but rather that the same is void beyond a reasonable doubt, for we are now proceeding under the familiar, yet none the less rigid and inflexible, rule that all doubts must be resolved in favor of the legislative action. Entertaining the views above expressed, we are unwilling to say the section is invalid.

Validity of amendatory act.

There is another theory upon which the validity of the statute should be maintained. The first or declaratory section of the original act of 1891 was admitted to be valid. Admitting, then, for the sake of argument, that the second section, or the section grading the offence and fixing the punishment, was void as contended, the question arises, how does that affect the whole act of 1893?

The declaratory part of the original act, or that part denouncing certain acts as a crime, truly expresses the legislative will in so far. Now, in anticipation that, peradventure, at some time some bill might be passed, in which by oversight, neglect or ignorance, no punishment was fixed for the crime, the legislature at the outset enacted that, when just such a state of things should at any time exist, then rather than that legislation should fail altogether of its purpose, the punishment should be as at common law, with certain limitations. See sections 601, 2293 and 2294 of the digest. Thus the act was a valid law on the statute books, with declaratory part undisputed, and punitive or enforcing

part derived from the general statutes, and thus remained until amended in 1893.

When the legislature in 1893 undertook to amend the prize-fighting law, it evidently regarded the act of 1891 as valid in its entirety, and therefore denominated the amendment made then as an amendment of the second section, the one now called in question. This amendment, it is contended, is void for the reason that, the original section being void, there was therefore nothing to amend to. Such is a rule applicable to pleadings in court, but by what authority we are compelled to apply it to the law-making department in enacting laws we are not advised. The rule for the guidance of the courts is to ascertain the intention of the legislature, and not the mistakes of the legislature, either of law or fact. Now, the manifest intention of the legislature was to change the law as it appeared on the statute books by simply making prize-fighting a misdemeanor, instead of a felony, and to change the punishment for a violation of the law accordingly. The amendment, which in fact is a substitution for the original second section, and not an amendment, properly speaking, was properly passed, with all proper reference to the whole act, as matter of identification.

Again, if it be true that the original second section was void, and the rule that an amendment of a void thing is also void should be considered as in any way affecting the legislative action, that still does not extend so far as to make void the amendment. By reference to the amendatory act of 1893, which is now the law on the subject, we see that it is entitled "An act to amend section 2 of 'An act to punish and prevent prize-fighting in the state of Arkansas,' approved March 31st, 1891." If the title had been to amend the act of 1891, instead of the second section, there would have been no objection to the act as amended. We are thus called

upon to declare a law void, because, by mistake, neglect or ignorance, the legislature has identified and named its action by wrong words and inappropriate language; that it has done a vain thing. Sutherland on Statutory Construction, sec. 331.

The rule adopted by all the courts, so far as we know, is: "Any act which manifests a design that any particular provision shall be the law is a sufficient enactment." *Wood* v. *Wood*, 54 Ark. 172; *Postmaster General* v. *Early*, 12 Wheaton, 136; End. Int. of Statutes, secs. 372–76; *State* v. *Miller*, 23 Wis. 634. And when the legislature has power to enact a law, and its intention is manifest, effect will be given to the intention, rather than to a mere failure of its language to express or describe what was intended.

We are of the opinion that the statutes in question are valid laws of the state, and, as the supposed invalidity of those statutes seem to have been the sole ground upon which the proceedings of the chancellor were had, the writ of habeas corpus is quashed, the proceedings thereunder annulled, and the respondent sheriff will proceed to execute his warrant, as the law directs and his duty may require.

SHAEFFER v. STATE.

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Opinion delivered November 2, 1895.

INSANITY—EVIDENCE that defendant, charged with burglary, had a brother, who was an imbecile all of his life, is admissible, in connection with other evidence bearing upon the same subject, to sustain the defense of mental irresponsibility.

INSANITY—TESTIMONY OF NON-EXPERT—FOUNDATION.—A non-expert who testifies that he has for many years known defendant charged with burglary, and what he knows of his condition, and that he does not think defendant can distinguish between right and

wrong, so as to know it is wrong to commit burglary, does not show himself competent to give his opinion that defendant would not have sufficient mental power to keep from committing the crime, if he could distinguish between right and wrong.

INSANITY—OPINION OF NON-EXPERT.—Witnesses who testify to having seen defendant often on the street for several years do not show themselves competent to testify their opinions as to his sanity.

BURGLARY—INTENT—INSTRUCTION.—The error of refusing to instruct that "if the jury find from the evidence that the defendant did in fact break and enter the house of B. C. Black, with intent to commit petit larceny only, he would not be guilty as charged" is not prejudicial, where the law is covered by another instruction.

Appeal from White Circuit Court.

H. N. HUTTON, Judge.

J. N. Cypert and *Grant Green, Jr.*, for appellant.

1. It was error to refuse the continuance. Const. Ark. art. 2, sec. 10; Sand. & H. Dig. sec. 5797; 50 Ark. 165, 167; 60 Ark. 577.

2. The evidence of the mother to show the imbecility of another son is admissible as corroborative evidence. 20 S. W. 750.

3. It was error to exclude evidence as to appellant's power to control his actions, if he knew right from wrong as to the particular act with which he is charged. 60 Am. Rep. 210; 16 *id.* 408; 1 S. W. 729; 50 Ark. 518.

4. Instruction two asked was a proper one. 49 Ark. 516. The refusal was not cured by giving number one.

5. A non-expert or non-professional can testify as to sanity only after giving the facts upon which his opinion is based. 1 Rice, Ev. p. 350 (*d*), 355 (*b*); 2 Bishop, Cr. Pro. secs. 678–9; 1 Greenl. Ev. sec. 440; 13 Barb. 550; 11 Am. & Eng. Enc. Law, p. 162, note 1, and cases cited; 20 S. W. 94; 15 Ark. 601; 17 *id.* 322; 54 *id.* 598; 20 S. W. 749.

6. The presumption that a party found in possession of stolen property is the thief is not one of law, and a weak one of fact. It is not conclusive, and of itself not sufficient to warrant a conviction. 34 Ark. 443; 42 *id.* 74; 44 *id.* 39.

E. B. Kinsworthy, Attorney General, for appellee.

1. The court properly overruled the motion for a continuance; its discretion was not an abuse. 41 Ark. 153; 15 S. E. 982. But the refusal was not made ground of motion for a new trial. 46 Ark. 524; 51 *id.* 212; 57 N. W. 986; 12 So. 846; Sand. & H. Dig. sec. 5797.

2. The evidence of Mrs. Shaeffer was incompetent: (1) Because no effort was made to show that the insanity, if any, was hereditary. 88 Mich. 567. (2) Because it was not shown that she was an expert. 117 Ind. 284. (3) Because weak-mindedness is no defense to crime. 12 A. 163.

3. The court correctly refused to admit the evidence of Cargwill and others. 35 Pac. 856; 15 S. E. 982; 1 Greenl. sec. 440; 3 *id.* sec. 5; 95 N. Y. 316.

4. Instruction 2 asked by defendant was abstract. The testimony shows the goods taken were worth over $10. Sand. & H. Dig. sec. 1494.

5. The court properly amended the first instruction asked by defendant by adding, "or was present aiding and abetting the act." Sand. & H. Dig. sec. 1452.

6. Witnesses who are not experts may give their opinions as to mental condition, when they speak from acquaintance and actual knowledge, in support of their views. 17 S. W. 149; 10 S. E. 442; 20 N. E. 257; 6 S. W. 102; 68 Mass. 233; 22 Pac. 241, 132; 17 S. W. 172.

7. After the state has closed in rebuttal, the court properly refused to permit the defence to ask witnesses

whether defendant could distinguish between right and wrong. 15 S. E. 982; 3 Gr. Ev. sec. 5.

8. Insanity as a defence to crime must be established by a preponderance of the evidence. 32 Pac. 241; 50 Ark. 511; 14 Atl. 550; 41 N. W. 357; 30 S. C. 74; 46 Ark. 141; 47 *id.* 196.

BATTLE, J. Houston Raley and Barry Shaeffer were jointly indicted for burglary. They were charged with breaking open the store house of B. C. Black, in the night time, with the intent "unlawfully, willfully, maliciously, feloniously and burglariously to steal, take, and carry away" goods, wares and merchandise of B. C. Black, of the value of fifteen dollars. They were tried separately, and Shaeffer was convicted.

Evidence held competent to prove insanity.

1. One of Shaeffer's defenses was that he was laboring under such a defect of mind as not to know the nature and quality of the act with which he was charged; or, if he did know, that he was ignorant of doing wrong in committing it. In connection with other evidence tending to sustain this defense, he offered to prove by his mother that "she had another son, just two years older than the defendant, who lived to be eight years of age, and was all of his life an imbecile, not knowing either his father or mother, and not being able to walk or talk;" and the court refused to admit the evidence. In this it erred. Such evidence is cumulative, and is only admissible in connection with other evidence bearing upon the same subject. *People* v. *Garbutt*, 17 Mich. 9; Wharton & Stille's Medical Jurisprudence, secs. 375, 377.

Admissibility of testimony of non-expert.

2. Appellant introduced John Cargwill and others as witnesses, who testified that they had known him for many years and what they knew of his condition; and that they did not think that he was able to distinguish between right and wrong to such an extent as to be able to know that it was wrong to commit burglary or

larceny. After this his attorneys asked him the following question: "From your observation of the defendant during your acquaintance with him, and from the acts you have detailed, do you think, if he could distinguish between right and wrong as to a crime like he is charged with, he would have sufficient mental power to keep from committing the crime?" They were not permitted to answer it, and no error was committed in the refusal.

When a person's mental condition or capacity is in question, the opinions of witnesses, who are not experts, as to such capacity are only admissible in evidence, when taken in connection with the facts upon which such opinions are based. Before such evidence can be admissible, "the specific facts upon which the opinions are based must first be stated by the witnesses, or their testimony must show that such intimate and close relations have existed between the party alleged to be insane and themselves as fairly to lead to the conclusion that their opinions will be justified by their opportunities for observing the party." In other words, the opinion of such a witness is not admissible in evidence until it be first shown by his own testimony that he has information upon which it can reasonably be based. Whether the information is sufficient for that purpose is a question for the court to decide before it can be admitted. After its admission, the weight to be given it is determined by the jury. Buswell on Insanity, secs, 240, 241, and cases cited.

In the case under consideration, the foundation laid was not sufficient to render the opinion sought admissible as evidence. The witnesses did not show that they had opportunities to know what capacity the appellant had to resist any propensity or temptation to commit what constitutes burglary or larceny, if done by a sane person. The facts within their knowledge

convinced them that he could not distinguish between right and wrong as to such crimes. In their opinion, the opportunity never had offered itself for them to determine whether he could abstain from the commission of the crime of burglary, when he knew or believed such crimes were wrong, and he had an opportunity to commit any of them. Never having seen him tested under such circumstances, they could form no opinion as to his capacity to refrain from the commission of the crime charged against him, which would be admissible as evidence. How could they? Upon what could they base it?

No foundation having been laid for the introduction of the opinion sought by the question propounded, which the court refused to allow witnesses to answer, there is no occasion for us to consider the admissibility of evidence to show that appellant was incapable of resisting an impulse to commit the acts with which he was charged. As to the admissibility of such evidence, there is a conflict of authority, and we express no opinion.

Opinions of non-experts as evidence.

3. To rebut the evidence adduced by the appellant to show that he did not have the capacity to distinguish between right and wrong as to the acts with which he was charged, the state introduced J. L. Moore, B. C. Black, and others as witnesses. Moore testified as follows: "I have known the defendant for five or six years. During that time I have seen him on the street very often. I have never had him working around me. From what I have seen of him during that time and observed, I don't think there is anything wrong with him." Black said: "I have seen the defendant on the street for several years. I never noticed anything peculiar about him. From what I have seen of him, I never thought but that he was all right." All this testimony was admitted over the objection of the appellant. In

this the court erred. They did not show that they were possessed of information sufficient to form an opinion entitled to be adduced as evidence.

When error not prejudicial.

4. The appellant asked and the court refused to give the following instruction: "If the jury find from the evidence that the defendant did in fact break and enter the house of B. C. Black with the intent to commit petit larceny only, he would not be guilty as charged, and the jury should acquit him."

While this instruction was covered by one given, and no reversible error was committed in refusing it, the court would have done well if it had granted the request. Had it done so, the jury would more certainly have understood their duty in the premises.

There are other questions in the case, which we deem unnecessary to notice in this opinion.

For the errors indicated, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

FREEMAN *v.* LAZARUS.

Opinion delivered November 2, 1895.

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JURISDICTION OF COUNTY COURTS—ELECTION CONTESTS.—The county court has jurisdiction to determine a contest of the vote upon the question of liquor license, and, if fraud be shown, to purge the polls, under Sand. & H. Dig. secs. 4868, 4869, directing all returns from such elections to be laid before the county court, and that if the majority of the votes cast in the county be not for license, it shall be unlawful for the county court to grant a license, but if a majority of votes be for license, then it shall be lawful for the county court to grant license.

ELECTIONS—RECOUNT BY COMMISSIONERS—CONCLUSIVENESS.—The recount of the votes of a township by the election commissioners in an election on the license question does not preclude a contest of the election in the courts.

INTERVENTION—NOTICE.—One who is allowed to intervene and resist a petition for license to sell liquors cannot afterwards object on the ground that he had no notice of the proceeding.

APPEAL FROM COUNTY COURT—AMENDMENT.—On appeal from the county court, the circuit court may permit amendments to be made to the petition or statement of the plaintiff's cause of action, so as to make it more definite and certain, provided that such amendments do not change the cause of action.

ELECTION—MISCONDUCT OF JUDGES.—A finding that the judges of an election in a designated township were guilty of fraud invalidating the election is sustained by uncontradicted evidence that the judges electioneered with the voters in the booths, and urged them to allow such judges to prepare their ballots, that a large number of ballots were prepared by one judge, instead of by two as required by the statute, and that they were prepared directly contrary to the expressed wishes of the voters.

ELECTION CONTEST—EVIDENCE—CONTRADICTING BALLOT.—A voter may be permitted to contradict his ballot, in an election contest, where it is shown that the ballot was prepared for him by one judge instead of by two, as required by Sand. &. H. Dig. sec. 2652.

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

STATEMENT BY THE COURT.

This was a contest before the county court of Ouachita county to determine whether a majority of the votes cast in said county at the election in September, 1894, were cast "for license" or "against license." It was begun by the appellees, Lazarus & Levy, who filed an application for license, alleging that a majority of the qualified electors voting at said election had voted "for license," but that, through the willful misconduct of the judges of said election in Bragg township in said county, the ballots cast in that township had been prepared so as to show a different result. They asked that the court inquire into the election in said township, and declare that a majority of the votes cast in said county were cast "for license."

After the filing of the petition by Lazarus & Levy, the appellants, J. A. Freeman and other citizens of that

county, came in, and asked and obtained leave to become parties defendant, and resisted the petition of appellees.

The county court found in favor of petitioners that a majority of the votes cast were "for license," and an appeal was taken to the circuit court. On the trial *de novo* in the circuit court, the returns of the election were introduced, and showed that the vote of the county, excluding Bragg township, was 945 for license, and 929 against license,—a majority of 16 for license. The returns from Bragg township showed 12 votes for license and 99 against license. The other facts sufficiently appear in the opinion.

After hearing all the evidence the circuit court found that "by reason of fraud practiced by the judges of the election held on the first Monday in September, 1894, in Bragg township, Ouachita county, Arkansas, the returns of said election prepared and certified by them were unreliable and worthless, and that the court was unable to determine the true vote of the qualified electors of said township upon the question of "for license" or "against license."

The court therefore cast out and rejected the returns from said township, and found that, excluding Bragg township, the vote in the remainder of the county of Ouachita stood 16 majority "for license," and gave judgment accordingly.

Thornton & Thornton and *Met. L. Jones* for appellants.

1. A voter is not allowed, after the returns of an election have been perfected, and a contest inaugurated, to dispute the contents of his ballot, as returned by the election officers. Cooley, Const. Lim. (6 ed.) pp. 788, 78, 790; 5 Den. (N. Y.) 409; 33 Kas. 202; 31 *id.* 435; 16 Mich. 283; 41 Ark. 111.

2. Fraud is not presumed, but must be proved. 6 Am. & Eng. Enc. Law, 354, sec. 4. The returns, when regular, are conclusive on the canvassing officers, and are *prima facie* evidence, and the burden is on the contestant to assail their correctness. 11 N. Y. 539; 5 Neb. 509. See also, 94 Ill. 515; 64 Tex. 500; 79 N. Y. 279; 26 Minn. 529; 28 Cal. 123; 11 Wheat. 408; 4 S. W. 351; 5 Cong. El. Cases, 124.

3. After deducting illegal votes, there was still a majority against license. As to the question of residence and abandonment, temporary absence, etc., see 81 Ill. 541; 44 *id.* 16; 32 Ala. 793; 8 *id.* 159; 7 Fla. 81; 11 Mass. 350; 29 Ala. 793; 33 Mich. 241.

4. It is only when the voter cannot read or write, or is physically disabled, that he *may* have the aid of two judges. The word *may* is not potential here, as against the election officers. If the party offering to vote wanted the judges to make out his ballot, and he could not make it out himself, then the word *may* becomes, as to the election officers, equivalent to *shall;* but where they are not by the statutes allowed to have an officer to make out their ticket, as a strict legal right, but he performs the duty as a mere accommodation, he becomes the agent of the voter, for which the principal is responsible, and he and all persons interested in his acts must abide the consequences. There is nothing immoral in this agency, for any agency may be created for the transaction of any lawful business, and whatever a person might lawfully do, if acting in his own right, and in his own behalf, he may lawfully delegate to an agent. Mechem on Agency, sec. 18; Story on Agency, sec. 6. See also 22 How. 434; 1 Pet. 64.

Smead & Powell and *T. J. Gaughan* for appellees.

1. The question of license is a matter of local concern. 33 Ark. 191; 43 *id.* 62. The county court prop-

erly assumed jurisdiction. Const. art. 19, sec. 24; Acts Jan. 23, 1875; 51 Ark. 558; Art. 3, sec. 11, const.

2. The ballots, if carefully preserved, and not tampered with, are the best evidence; but fraud can always be enquired into, especially when the ballot *is not prepared* by the voter. 8 Cow. (N. Y.) 102; 5 Denio (N. Y.), 410; 20 Wend. 12. Upon a charge of fraud against the *officers*, ballots may be impeached. 13 N. E. 700; 26 *id.* 704; McCrary on Elections (2 ed.), sec. 386; 2 Parsons, 584. A voter can testify as to whom he voted for. 2 Bartlett, 822; 1 *id.* 522. Where the attack is made for fraud, the court will proceed without reference to what appears on the face of the returns. McCrary on Elections (2 ed.), p. 309. The returns, etc., though conclusive upon the canvassers, may be impeached, and it is the duty of the tribunal to ascertain who was in fact elected. McCrary on El. (2 ed.) sec. 290; 5 Rawle, 77; McCrary, El. p. 137, 99, 100.

3. When returns are shown to be untrustworthy by reason of fraud of the judges, they are cast aside, and the true vote ascertained by other evidence. 41 Ark. 62; 54 *id.* 174; McCrary, El. (2 ed.) par. 441; *Ib.* secs. 184, 304, 305, 442.

4. The declarations asked by appellants were erroneous. By sec. 34, art. 29, Acts 1891, it is the duty of the judges to prepare ballots for electors who cannot read or write. If he can read or write, the judges *are not permitted* to prepare the ballot. And *two* judges *must* be present, not one.

Jurisdiction of county courts over election contests.

RIDDICK, J., (after stating the facts). The first contention of the appellants is that the county court had no right to hear and decide a contest concerning the result of an election upon the question of granting or refusing liquor license. The object in holding such an election is to determine whether or not the county court may grant such license in the county where the election

is held. The statute directs that all returns from such elections "shall be sealed up and forwarded to the clerk of the proper county, and by him laid before the county court. * * * * * If at such election the majority of the votes cast in any county upon the question be not 'for license,' then it shall be unlawful for the county court of such county to grant license. * * * But if a majority of the votes cast in any county upon the question be 'for license,' then it shall be lawful for the county court of such county to grant license, etc." Secs. 4868 & 4869, Sand. & H. Dig.

Under this statute, it is the duty of the county court, before granting license for the sale of liquor, to determine whether a majority of the votes of the county have been cast for or against license. This, we think, gives that court the power, in a proper proceeding, to inquire whether the vote has been fairly taken, and, if fraud be shown, the right to purge the polls.

It is now well settled that the county courts of this state have the right to determine contests concerning the result of elections for the location or removal of county seats, on the ground that it is a matter of local concern, over which the county court have jurisdiction. The issuance of license to sell liquors is a matter of local concern, as much so as the removal of a county seat; and the circuit court correctly held that the jurisdiction to determine a contest of the vote upon the question of liquor license is in the county court. *Russell* v. *Jacoway*, 33 Ark. 191; *Williford* v. *State*, 43 Ark. 62; Const. 1874, art. 7, sec. 21; *Glidewell* v. *Martin*, 51 Ark. 558.

Conclusiveness of recount of votes by commissioners.

It is also contended that the recount of the votes of Bragg township by the election commissioners is conclusive upon appellees, and precludes a contest of the election in the courts, but we hold that this is not so. The commissioners, in making this recount, had only the

power the judges of the election had in the first instance. Their findings, while conclusive in collateral proceedings, and *prima facie* evidence when directly assailed, may yet be inquired into, and corrected by proper proceedings in the courts. Cooley's Const. Lim. (6 ed.) 788; Sand. & H. Dig. sec 2670.

Right of intervener to notice.

Neither do we think that the appellants can rightly object to want of notice. They came forward of their own motion, were made parties defendant, and allowed to respond to and resist the petition of appellees. As every citizen of the county was interested in the question at issue, and, as it was impracticable to bring all of them before the court, the appellants were properly allowed to appear and defend for all. Sand. & H. Dig. sec. 5632. But, having thus voluntarily appeared, they could not afterwards be allowed to say they had no notice. *St. Louis, etc., R. Co.* v. *Barnes*, 35 Ark. 95; *Murphy* v. *Williams*, 1 Ark. 384, and note to annotated edition.

Amendments in circuit court on appeal.

Before hearing the cause on appeal, the circuit court granted leave to the contestants to make certain amendments to their petition. It is asserted that this was beyond its power; but we do not think so. The circuit court, on appeals from the county courts or other courts, may permit amendments to be made to the petition or statement of the plaintiffs' cause of action, so as to make it more definite and certain, provided that such amendment does not change the cause of action. Such amendments are within the discretion of the circuit court, and no abuse of that discretion has been shown in this case. *Railway Co.* v. *Lindsay*, 55 Ark. 282.

Effect of misconduct of election judges.

After hearing the evidence, the circuit court found that, by reason of fraud practiced by the judges of said election in Bragg township of Ouachita county, the returns of election prepared and certified by them were unreliable and worthless, and that the court was unable

to determine from the evidence the true vote of said township upon the question of license.

Before considering the evidence bearing on this point, we will notice the statute under which the election was held. The act of March 4th, 1891, entitled "An act to regulate elections in the state of Arkansas," was an effort on the part of the legislature to protect the voter against undue influences of all kinds at the polls, and to secure, through the ballot-box, a genuine expression of the will of the electors of the county and state. To effect this end, there are stringent regulations for the protection of the voter against interference or influence while at the polls. The act provides that no person whomsover shall do any electioneering in any polling room, or within one hundred feet of any polling room, on election day; and it especially prohibits officers of the election from electioneering on election day. A violation of this prohibition is made a felony, punishable by imprisonment in the penitentiary not less than one nor more than three years. Sand. & H. Dig. sec. 2656.

To insure the elector against interference or influence while preparing and depositing his ballot, the statute directs that booths shall be prepared and furnished with table, shelf, or desk for the convenience of the electors in preparing their ballots. It provides that the walls of the booths shall be "so constructed as to enable each elector to enter therein, and prepare his ballot free from the interference of any person whomsoever." It directs that, except as the electors are admitted and pass in one at a time to vote, no person shall, under any pretext whatever, be permitted in the polling room, from the opening of the polls until the completion of the count of the ballots. With above exceptions, no person is permitted to come nearer than fifty feet of any door or window of a polling room. Sand. & H. Dig. sec. 2629.

From these and other provisions of the statute is plainly evident the intention of the legislature to free the voter from all extraneous influence, and to make his ballot an expression of his own will. The act designates certain officers whose duty it is to see that elections are conducted as required by the statute. But the legislature, by language which can admit of neither controversy or doubt, has forbidden these officials from doing anything whatever that should in any way influence the elector in casting his ballot.

To guard against this as carefully as possible, and to omit no reasonable safe-guard, it provides, in the case of those electors who cannot read or write, or who, from physical disability, are unable to prepare their ballots, that they may call upon the judges to assist in the preparation of their ballots; but the act expressly provides that this shall be done by two of the judges, who, "in the presence of the elector and in the presence of each other, shall prepare his ballot as he wishes to vote." The language of the statute on this point is noteworthy, for it requires that not one but two judges shall assist in the preparation of the ballot, and that, in the presence of the elector and in the presence of each other, they "shall prepare his ballot as he wishes to vote." Sand. & H. Dig. sec. 2652. We do not understand by this that two judges shall perform the manual labor of writing the ballot, but that the legislature intended by this language to make clear the injunction that, whenever a voter requires assistance in the preparation of his ballot, two judges must not only be present with the elector while preparing the ballot, but that both must be actively engaged in seeing that the ballot is prepared as the elector directs it to be prepared, without solicitation or influence of any kind whatever.

In the light of this statute we will now look at the evidence upon which the circuit judge based his findings

and judgment. There was evidence at the trial that one of the judges of the election distributed tracts on election day for the purpose of influencing the voters to vote against license; that the judges of the election electioneered with the voters in the election booths, and used their influence to control votes against license. Many of the voters were unable to read, but the judges did not wait to be requested by the voter to prepare the ballot, but at times solicited the voters to allow them to prepare their ballots. By this means they were permitted to prepare the ballots for many voters who were entirely able to prepare their own ballots. Over half of the ballots cast in the township were prepared by the judges. The judge preparing the ballot did not do so in the presence of another judge, as required by the statute. The ballots, after being prepared by the judge, were folded by him, and returned to the voter, who then delivered it to another judge to be placed in the ballot-box. Over forty voters, only a few of whom could read, testified that they directed the judges to prepare their ballots "for license," and supposed at the time they cast their ballots that they were voting for license. The testimony of these witnesses is corroborated by the testimony of one of the clerks of the election, who testified that he overheard several of these witnesses direct the judges to prepare their ballots for license. But the ballots of these voters were written "against license." If this testimony was true, these electors, through the fraud of the judges preparing their ballots, were led ignorantly to vote contrary to their own wishes. But not one of the judges of the election was placed upon the stand to testify and rebut this array of testimony tending to show irregularities and official misconduct on their part.

"There is," says Judge McCrary in his work on elections, "a difference between fraud committed by offi-

cers, or with their knowledge and connivance, and a fraud committed by other persons, in this: the former is ordinarily fatal to the return, while the latter is not fatal, unless it appear that it rendered doubtful or changed the result. "If an officer is detected in a willful and deliberate fraud upon the ballot-box, the better opinion is that this will destroy the integrity of his official acts, even though the fraud discovered is not of itself sufficient to affect the result. The reason of the rule is that an officer who betrays his trust in one instance is shown to be capable of defrauding the electors, and his certificate is good for nothing." McCrary on Elections, sec. 539; *Judkins* v. *Hill*, 50 N. H. 140; *Patton* v. *Coates*, 41 Ark. 123; *Jones* v. *Glidewell*, 53 Ark. 174.

When we consider the evidence that the officers of election in Bragg township, in violation of the express statutory provision, electioneered with voters, and urged the voters to allow them to prepare their ballots; that these ballots were not prepared by two judges in the presence of each other, as required by the statute, and that a large number of voters testified that the judge who prepared their ballots prepared them on the question of license directly contrary to their expressed wishes,—when these facts are considered along with the fact that no judge of the election was placed on the stand to rebut this testimony, nor any excuse shown why they were not made to testify, we can come to no other conclusion than that the evidence was sufficient to support the finding of the circuit court. It is not for us to speculate whether this testimony was true or not. The circuit judge who heard it, and who saw and observed the witnesses upon the stand, has based his findings upon it, and we must assume that it is true. The rule is that if the facts given in evidence, admitting them to be true, and the reasonable inferences therefrom,

support the finding of the circuit court, the appellate court should not reverse for want of evidence.

When voter may contradict his ballot.

It is strenuously contended that a voter should not be heard to contradict his own ballot. When the ballot has been prepared by the voter himself, and afterwards securely kept by the lawful custodians thereof, this would, doubtless, be the true rule. In such a case the ballot would be the best evidence. *Hudson* v. *Solomon*, 19 Kas. 177; McCrary on Elections, sec. 44*e*.

There might even be force in the argument when the ballot is prepared by two judges in accordance with the statute, and there are not strong circumstances, apart from the testimony of the voter, tending to show fraud on the part of the judges. When the ballot has been thus lawfully prepared and safely kept, there is certainly a strong presumption in favor of its correctness, whether it be conclusive or not.

But we need not pass on that question, for it is not before us in this case. The judges in Bragg township did not comply with the statute in the preparation of the ballots. The ballots should have been prepared by two judges in the presence of the elector, and in the presence of each other, for such is the requirement of the statute,—to prevent just such a controversy as we have here. The failure of the judges to obey this mandate of the statute cast discredit upon the ballots thus prepared; and when a large number of the electors testified that these ballots were not prepared in accordance with their directions, the circuit court was justified in considering the testimony in connection with other evidence, and in giving it such weight as he deemed proper.

As there was evidence to support the finding of the circuit court that the judges of the election in Bragg township were guilty of fraud in the conduct of the election, that finding must stand. *Jones* v. *Glidewell*, 53 Ark. 174. In the absence of other evidence showing

the true vote of that township, such finding justified the circuit court in rejecting the vote of that township.

There were other questions discussed by counsel, but, as our conclusion on this point compels us to uphold the judgment rendered by the circuit court, we need not discuss them. The judgment of the circuit court is affirmed.

CRUDUP *v.* RICHARDSON.

61 259
65 143

Opinion delivered November 9, 1895.

COUNTY WARRANTS—VALIDITY OF ORDER DEBARRING.—An order of the county court debarring county warrants issued prior to a certain date and not presented for cancellation and reissuance, as required by its previous order, is invalid, where it does not appear, either from the recitals of the judgment record or from the sheriff's return of service of the court's order, that one of the newspapers in which notice of the order calling in such warrants was given was published in the county, as required by the statute (Act February 15, 1875).

SAME—FIXING SUNDAY AS DAY FOR PRESENTATION—The fact that an order calling in the warrants of a county for cancellation and reissuance fixes Sunday as the day for the presentation of such warrants does not materially affect the validity of the proceedings.

Appeal from Franklin Circuit Court, Ozark District.

JEPHTHA H. EVANS, Judge.

Virgil Bourland for appellant.

1. The sheriff's return is not upon a true copy of the order. It does not show: (1) Posting at the court house door; (2) printing in newspapers *published in Arkansas;* (3) that the posting and publishing was thirty days before the time fixed for presentations of warrants; and (4) no proof of publication of publishers was filed as part of, or with, the returns. Sand. & H. Dig. sec. 1004.

2. The amended return fails to show that the posting and publishing was at least thirty days before the day fixed. 48 Ark. 238; 51 Ark. 34; 33 *id.* 740; 37 *id.* 110. The affidavit of a publisher should be made and filed before judgment, and while he is publisher. After the suit it is *ex parte*, and inadmissible. Mansf. Dig. sec. 4359–60; 51 Ark. 34.

3. The jurisdiction of the county court in these matters is *special*, and no presumptions can be indulged; all necessary facts *must* be shown. 51 Ark. 34; 10 Fed. Rep. 891; 9 S. W. 309; 3 Ark. 537; 16 S. W. 197; 48 Ark. 239; 25 *id.* 261; 57 *id.* 649.

4. Even if the notice was lawful, the time fixed for presentation was Sunday, and the call was void.

5. The warrants are not barred, but are still receivable for taxes. Sand. & H. Dig. sec. 1243; 36 Ark. 487; 39 *id.* 139; 37 *id.* 110; 57 *id.* 400; 54 *id.* 168.

Geo. A. Mansfield for appellee.

1. The record shows every jurisdictional fact. Every requirement of the statute was strictly complied with, and the judgment cannot be collaterally attacked. 57 Ark. 49; *Ib.* 628; 53 *id.* 476. The cases cited (48 Ark. 238; 51 *id.* 34) are not applicable here, for in those cases the record was *silent* as to jurisdictional facts. Freem. Judg. secs. 123–4, 127; 5 Wend. 148; Hawes on Jur. sec. 8, 234; Newm. Pl. & Pr. pp. 55, 56; Wells on Jur. p. 28. When the record recites the jurisdictional facts, the parties whom it concludes cannot deny or disprove them. 11 Ark. 130; 25 *id.* 60; 2 S. W. 707; 48 Ark. 151; 2 S. W. 847; 48 Ark. 238; 57 *id.* 649; *Ib.* 628.

2. It was not necessary to specifically set out the return of the sheriff, or the proof of publication in the record, and where the record recites that proper legal notice was given, the presumption *does* exist that the

recital was made upon proper facts, and the judgment cannot be collaterally attacked. 57 Ark. 49.

3. But it was competent for appellee to prove that proper notice was given, and this was done.

4. Fixing Sunday as the day of presentation was a mere *clerical* error; but if not, parties could present warrants at any time up to that day, or on the *day following*. 6 Johns. 326; 3 Pa. 200; 33 Ga. 146. For, when the time expires on Sunday, a party has all next day to do what is required. But holders had the *full* three months, excluding Sunday, to present their warrants. 56 Ark. 45.

5. The warrants were barred by limitation. 54 Ark. 168.

BUNN, C. J. The appellant, being the holder of two certain warrants on the treasury of Franklin county, presented and tendered the same to the appellee, as collector of revenue of said county, in payment of certain county taxes assessed and charged against him, and appellee refused to accept the same. Appellant then sued out his writ in the Franklin circuit court to compel the acceptance of his said warrants in payment of said taxes. The appellee filed his response, setting up the previous order of the county court of said county debarring the holder of said warrants from any benefit therefrom.

Validity of order debarring county warrants.

The sole issue in the case is as to the validity of the order of the county court mentioned in the response; and the facts will more definitely appear from the following history of the proceedings in that court: On the first day of May, 1884, the same being a day of its regular April term, the said county court made the following order, to-wit: "In the Matter of Calling in the Outstanding Warrants of Franklin County, Ark. Whereas, it appearing to the court that, on the 27th day of October, 1880, there was a call made by the court

for the bringing in and producing all the then outstanding Franklin county scrip or warrants that had been issued prior to the first day of January, 1880, for reissuance; and it further appearing to the court that three years and upwards have transpired and passed since that time; and it further appearing to the court, for the purpose of ascertaining the present indebtedness of the county, it is necessary, under the law authorizing each county in the state every three years to call in her outstanding scrip or warrants for reissuance, that the same be ordered in,—it is therefore ordered that all holders of Franklin county scrip or warrants issued prior to the first day of May, A. D. 1884, shall present the same to the clerk of the county court of said county of Franklin, at Ozark, in said county, at the next July term, on the 10th day of August, 1884, of said court, for reissuance; and it is further ordered that all persons who shall hold any warrants of said county, and neglect and refuse to present the same at the time and place aforesaid, as required by this order, shall thereafter be forever debarred from deriving any benefit from their claims; and it is further ordered that the sheriff of Franklin county notify the holders of said county warrants to present the same to the county court at the time and place fixed as aforesaid for reissuance, by putting up at the court house door, and at the election precincts in each township in said county, at least thirty days before the time appointed by the order of the said county court for the presentation of said warrants, a true copy of this order, and by publishing the same in newspapers printed and published in the state of Arkansas for two weeks in succession, the last insertion to be at least thirty days before the time fixed by said county court for presentation of said warrants."

The return of the sheriff, showing in what manner he gave the notice thus directed to be given, was ex-

pressed in general terms, to the effect that the notice had been given as directed in said order, by "posting, as required, in each township, and advertising in two newspapers,—Ozark Democrat and the Weekly Sun,—this July 11th, 1884." And on October 2d, 1889, during the pendency of the present proceedings, said sheriff, then out of office, on motion, and by leave of the court, and over the objection of appellant, filed the following amended return, to-wit: "State of Arkansas, County of Franklin: I hereby certify that I have before this, the 10th day of July, 1884, executed the within order, as therein commanded, by posting notices as required at the courthouse door, and at each election precinct in each township in said county, and published the same, as therein commanded, in two newspapers printed and published in the State of Arkansas, and having a *bona fide* circulation therein, at least thirty days before the first insertion of said notice. Returned by me on this 11th day of July, 1884."

On the 11th day of August, 1884, the day after the day fixed in said original order, the exact day being Sunday, the county court proceeded to an examination, reissuance and cancellation of warrants, as provided by said original order, and entered the following final order to-wit: "In the Matter of Calling in the Warrants Outstanding, Issued Prior to May 1, 1884. And now on this, the 11th day of August, A. D. 1884, being the day after the time stated in the order for calling in the outstanding county scrip of Franklin county, Arkansas, it appearing to the satisfaction of the court that the order was made by the county court, fixing the time for the presentation of the above named county scrip or warrants, and that the full time of three months was given for the presentation of the same as required by law, and it appearing that the said order has been duly published, as required by law, for two consecutive weeks in two

newspapers, published and printed in the state of Arkansas, to-wit: The Ozark Sun and the Ozark Democrat, and that the last insertion was at least thirty days before the time set by said order for the presentation of said scrip or warrants; and it further appearing that the clerk of said court furnished A. H. Sadler, sheriff of said county, with a true copy of said order within ten days after the adjournment of said court; and it further appearing that the sheriff, above named, did notify the holders of the aforesaid county scrip or warrants to present the same to the county court, at Ozark, in Franklin county, Arkansas, on the 10th day of August, 1884, for examination and reissuance, by putting up at the court house door and at the election precincts in each township of said county, at least thirty days before the time appointed by the order of said court for the presentation of said scrip or warrants, a true copy of the order of said court in the premises; and it further appearing that full publication has been made, and all legal notice has been given,—it is, therefore, ordered and adjudged that all persons who hold scrip or warrants on Franklin county, Arkansas, issued prior to the 1st day of May, 1884, who have neglected or refused to present the same as required by the order of this court and notice aforesaid, shall hereafter be forever barred from deriving any benefit from such scrip or warrants, and that they shall hereafter be declared null and void."

It is unnecessary to consider the effect of the amendment of the sheriff's return made after so long a time and for use in a different jurisdiction from that in which the original proceedings were had, and after the term of the county court had expired, and he himself had gone out of office, except to suggest that in this proceeding we are considering what was before the county court, when it made its final order, not what has been certified

to since then. The uniform holding of this court has been that, in proceedings under the statute authorizing and directing the calling in of county warrants for cancellation and reissuance, "no presumption can be indulged in favor of the legality of the notice of an order of the county court for calling in county warrants." In the present case, then, we are to inquire if sufficient appears, affirmatively, either expressly or by implication, from the record, to constitute the service of notice required by statute.

We may treat the return of the sheriff, (since it is general in its terms, and shows that the notice was given as commanded,) in connection with the original order of the county court, there being no conflict between the two, so that it is sufficient if from both it may be ascertained that all the essentials of the notice were given and proved to the court proceeding thereon. *Lusk* v. *Perkins*, 48 Ark. 238.

We do not find that it is recited in the order of the court, or certified in the return, that one of the newspapers in which the publications were alleged to have been made was published in the county where the proceedings were had; nor do we find this essential fact recited in the final order. Section 1, act approved 15th February, 1875 (Acts 1874–5 p. 152).

We find, further, that, notwithstanding the recital in the final order of the county court that it appeared that notice had been given as required by law, yet, in specifying, in the same recitals, how and in what manner the said notice appeared to have been given, it is not recited that one or the other of said newspapers was such as the law designates for such publication; in other words, the recitals in this respect contradict themselves, and the defect is not cured by anything else contained in the record. The general recital seems to have been a mere conclusion of law, upon the part of the county court,

drawn from what follows in the way of particular and specific recitals.

We deem it unnecessary to call attention to other irregularities and differences in the record, since, for the particular error pointed out, a majority of us are of the opinion that the judgment of the court below should be reversed.

Fixing Sunday as the day of presentation of warrants.

We do not regard the fact that the day fixed by the county court for the presentation of the warrants was Sunday, as materially affecting the validity of the proceedings.

Adhering to former rulings of this court, we do not consider the statute of limitations applicable in this kind of case. Reversed and remanded.

BLOCK v. SMITH.

61 266
75 412

61 266
f79 52

Opinion delivered November 16, 1895.

SALE OF LAND—ENFORCING CONTRACT IN EQUITY.—Where a vendee of land agrees to execute certain notes to the vendor, and through inadvertance fails to do so, he will be liable in equity as if they had been executed.

CONSTRUCTION OF CONTRACT—ELECTION OF VENDEE TO BECOME TENANT.—Where a bond for title provides that, on default in payment of either of the purchase money notes, the vendee will pay certain rent notes, the vendee, by making default in the payment of any one of the purchase money notes, elects to become a tenant of the vendor, and liable on the notes.

LANDLORD'S LIEN—ASSIGNMENT of a rent note does not carry with it the landlord's lien.

Appeal from Cross Circuit Court in Chancery.

JAMES E. RIDDICK, Judge.

STATEMENT BY THE COURT.

In 1889, appellees, R. M. Smith and C. M. Hamilton, then engaged as a partnership in a mercantile business, and being the owners of the north part of the southwest quarter of section 33 in township 7 north, of range 4 east, and the north half of private survey 494, township 6 north, and of range 4 east, in Cross county, Arkansas, bargained and sold the same to appellant, Sam Benson, for the sum and price of $2,000, to be paid in five equal installments, due and payable on the 15th days of December, 1889, 1890, 1891, 1892 and 1893, respectively, and executed and delivered their bond for title on the payment of the purchase money. Five (5) notes were executed and delivered to Smith & Hamilton in pursuance of said bargain and sale.

The contract of sale is as follows, to-wit: "Know all men by these presents, that we, C. M. Hamilton and R. M. Smith, are held and firmly bound unto Sam Benson in the sum of $4,000, for the payment of which we bind ourselves, our heirs and assigns, firmly by these presents. Witness our hands and seals, this 2d day of February, 1889. Whereas, the said Sam Benson this day purchased of the said C. M. Hamilton and R. M. Smith the following tract of land in the county of Cross, and state of Arkansas: [described as in appellee's complaint] and agreed to pay therefor the sum of $2,000 in the following manner: $400 December 15, 1889; $400, with 10 per cent. interest, December 15, 1890; $400, with 10 per cent. interest, December 15, 1891; $400, with 10 per cent. interest, December 15, 1892; and $400, with 10 per cent. interest, December 15, 1893,—which several amounts are evidenced by five promissory notes, due and payable as above stated. In default of the payment of either of said notes, when due, the said Sam Benson this day executes five rent notes of even date herewith,

and due and payable on or before January 1st, 1890, January 1st, 1891, January 1st, 1892, January 1st, 1893, and January 1st, 1894, with interest on same at the rate of 10 per cent. per annum from date. Now, if the said C. M. Hamilton and R. M. Smith shall, on the punctual payment of said notes, and of all the taxes legally assessed against said land, and the surrender of this instrument, convey or cause to be conveyed to the said Sam Benson, his heirs or assigns, the above described premises, then this obligation to be void; otherwise not. In witness whereof we have hereunto set our hands and seals the day and year above mentioned. R. M. Smith. (Seal.) C. M. Hamilton. (Seal.)"

The contract of sale was delivered to Benson, and, it appears, continued in his possession, and that of his co-appellant, Block, up to the trial of the cause in the court below. The principal of each of the rent notes referred to appears to have been $150. Benson paid the first vendor's note of $400 in due time, but paid no other, and continued in possession. Some time afterwards appellants, Smith, Graham and Jones, bought out the firm of Smith & Hamilton, and, the testimony is, "succeeded them in business, and were the owners of all rights under the contract with Benson." There does not appear any deed, however, from Smith & Hamilton to Smith, Graham and Jones, conveying their real estate. R. M. Smith appears to be the person named as a member of the old firm, and as a member of the succeeding firm. Smith, Graham & Jones, claiming to occupy the place of Smith & Hamilton, and to be the landlord of Benson, instituted this suit on the lost rent note of 1892, calling for the sum of $150, claiming that Benson had abandoned his purchase under the terms of the contract, and was obligated thereby to pay said rent. This proceeding was instituted on the equity side of the docket, for the reason, as alleged, that appellant

Block had purchased of Benson eight or ten bales of cotton of that year, produced on said land. Smith & Hamilton, by consent, were made parties plaintiff. Decree for plaintiffs, and defendants appealed.

J. D. Block, for appellant.

1. Benson did not contract to pay rent for the year 1892 in any event, or upon any contingency. In equity cases, this court considers the evidence, and makes such findings as the chancellor should have made. 34 Ark. 212; 41 *id.* 292; 43 *id.* 307. The burden is on appellees to show a tenancy on the part of Benson for the year 1892, thereby obligating him to pay rent. There is no proof to this effect, unless it be in the recital of the bond for title, and of Smith. The clear preponderance is against the contention.

2. The landlord's lien is purely statutory, and *personal* only. Sand. & H. Dig. sec. 4794; 39 Ark. 560. The relation in this case was that of vendor and vendee. 54 Ark. 16; 27 *id.* 61.

3. A mere default in paying the purchase notes could not change the relations of the parties. It must be that the forfeiture provided for in the bond is for appellees' benefit, to be claimed or waived at their election. 65 Cal. 596; 52 Am. Rep. 310. There must be a clear election by some substantive act, or the right is waived. There is a marked distinction between a *precedent* condition to the vesting of an estate and a subsequent condition going to defeat an estate already vested. It is this which distinguishes this case from 54 Ark. 16 and 48 *id.* 413. The vendor's *election* to defeat the sale was not considered in these cases, for it did not arise. In this case, there is no proof whatever of such election, and the relation of vendor and vendee continued, and there could be no lien. See 90 Am. Dec. 230; 20 N. W. 393; 24 N. W. 378; 29 *id.* 152.

4. The vendee is entitled to notice that the vendor intends to claim a forfeiture of the sale and a tenancy thereafter. There can be no summary declaration of forfeiture. A mere failure of the vendee to make payments is not enough. 30 N. W. 413; 16 *id.* 153; 3 Oh. 335; 56 Ark. 107; 96 N. Y. 477, and cases *supra.*

N. W. Norton, for appellees.

1. The provisions as to rent are as much a part of the contract as those relating to purchase and making a deed. Benson took possession *under the contract*, and it is only necessary to construe the contract in the light of what the proof shows the parties have done under it. The contract cannot be distinguished from that in 48 Ark. 413. In that case the purchaser was to pay the first purchase note. In this case the purchaser is to pay $150 rent upon failure to pay *either* purchase note when due. There is no question of *forfeiture* here. Benson was entitled to five years' possession as tenant or purchaser. As he failed to pay the purchase notes, he elected to hold possession subsequently as tenant, under the terms of his contract.

2. The bond recites the execution of five rent notes. Benson is estopped to deny that he executed them. But equity treats that as done which should have been done, and this court will consider the case as if the five notes were executed.

BUNN, C. J., (after stating the facts). The first question that presents itself for our consideration is, was there an abandonment of the purchase, and an election to stand on the alternative part of the contract, to-wit, the lease? By their suit plaintiffs elected to proceed under the lease or rent clause of the contract. The appellants, by their contention, deny that plaintiffs below (and appellees here) had any election in the matter, and from that standpoint contend that "the burden is on appel-

lees to show, by a preponderance of the testimony, some sort of contract whereby Benson became their tenant of the premises for the year 1892, and obligated himself to pay rent therefor."

Equity regards that as done which ought to be done.

In the first place, as to the four absent rent notes, we think that all of the notes for the rent were either given to Smith & Hamilton by Benson, and afterwards all except the one were lost or mislaid by them, so that they could not be produced on the trial; or else that, by inadvertence, they were not actually executed and delivered, as was agreed upon, and as was intended, by the terms of the contract, to be executed. In either case, it is but just and equitable that the appellant should be held bound just as if the note of 1892, as well as the other absent notes, had been produced in court, because in equity that which was agreed to be done, and ought to have been done, as a part of the contract, is to be considered as done.

Vendee held to have elected to become tenant.

It was said in *Ish* v. *Morgan*, 48 Ark. 415: "If the contract shows that the defendant was in under an agreement to purchase, the idea of a tenancy was rebutted, and neither Hampton, nor those succeeding to his rights, could evict him by the summary process of unlawful detainer, although he had not strictly complied with the contract of purchase. But if, on the other hand, the meaning of it is, that he is to pay rent, or a compensation for the use of the land, then he was a tenant, and as he held over after the expiration of his term, he could be evicted by the remedy here adopted. The first stipulation of the contract is one of purchase and sale. It binds the vendor to convey to the defendant; but to the terms of this agreement there is annexed the condition that, in case of failure in the performance of the agreement to pay the first installment of purchase money, the intended vendee shall thereafter pay rent for the use of the land. It was certainly com-

petent for the parties to enter into a binding agreement of this nature. The vendor, being unwilling to take the hazard of losing both principal and interest of the purchase price, and the rent of the land as well, may make a sale upon condition, and give the vendee an option to hold as purchaser or as tenant after a given day. The vendee here has in effect agreed that his rights shall depend upon the scrupulous adherence to the engagement he made to pay the purchase price, and that time should be a material consideration in the contract." The vendee in that case, having failed to pay the first installment of purchase money when due, was held in effect to have, by his failure, elected to become the tenant of the vendor, under the rent clause of the contract, and was subjected to the burden of a mere tenant. It is apparent that a contract may be drawn in which the vendor might have the option to stand on either clause after default by the vendee. But it is unnecessary to do more than suggest this here, since we hold that by the absolute terms of the contract now under consideration the option was with the vendee, and by his default in payment of either of his purchase money notes when due, he has made his election. So, then, it required no evidence on the part of the plaintiffs to establish their right of action on the rent note, except that default in payment of some one of the purchase money notes had been made, and that they were the legal owners of the note sued on. That default in the purchase money had been made by appellants is shown without controversy, and, that being the case, the right of action in the owners of the rent notes follows as a conclusion upon a proper construction of the contract.

The doctrine of the case of *Ish* v. *Morgan*, *supra*, is in effect re-affirmed in *Quertermous* v. *Hatfield*, 54 Ark. 16, for the doctrine in both cases is simply that men are bound by the terms of their contracts, which

they may lawfully make, and that these contracts are such as they lawfully may make.

It is contended, under this head, that "the mere failure of the defendant (Benson), therefore, to make payment at the time named did not extinguish his equitable rights." That is true, at least in most cases, where the defeasance is absolute, and no alternative contractual relation is created or provided in the contract itself; and this distinction will appear by a close examination of nearly all, if not quite all, the authorities cited by them in support of the contention. Thus, differently from those in the case at bar, do the facts appear in the following cases cited by appellant: *Converse* v. *Blumrich*, 14 Mich. 109; (90 Am. Dec. 230) *Sornborger* v. *Berggren*, 30 N. W. (Neb.) 413; *Coles* v. *Shepard*, 16 N. W. 153 (Minn.); *Orr* v. *State*, 56 Ark. 107; *Gibbs* v. *Champion*, 3 Ohio, 335; *O'Connor* v. *Hughes*, 29 N. W. (Minn.) 152; and *Duryee* v. *Mayor*, 96 N. Y. 477.

In *C. B. & Q. Ry. Co.* v. *Skupa*, 20 N. W. (Neb.), 393, and *Robinson* v. *Cheney*, 24 N. W. (Neb.), 378, there are apparent likenesses to the case at bar, but each of them seems to have gone off on the manner in which the vendor declared the forfeiture, rather than the existence of an alternative contract that should or should not have been acted upon. In the first of the two cases, the court merely construed a peculiar statute of Nebraska on the subject of unlawful detainer; and in the second case, the equities rendered a forfeiture of the contract of purchase unconscionable under the peculiar state of facts.

Much of the discussion, in those cases where it is provided that on failure of the vendee to pay installments of the purchase money the vendor may treat the contract of sale as at an end, is with reference to the effect of a provision that time shall be of the essence of the contract, always designed for the purpose of giving

an option to the vendor to declare a forfeiture of the contract of purchase on default of performance on the part of the vendee. We have no occasion to enter into such a discussion, for it is altogether foreign to the case under consideration.

Landlord's lien is not assignable.

The more difficult question for us to determine grows out of the fact that the rent note sued on, and which is sought to be made a lien on certain cotton raised by Benson on the lands in question during the year 1892, was purchased by appellees, Smith, Graham & Jones, from their co-appellees, before the institution of this suit. It is contended by appellants that the landlord's lien for rent on the crop of the tenant is personal to himself, and is not assignable, so as to vest the right of action as to the lien in the assignee. This is certainly true, and is the doctrine of *Varner* v. *Rice*, 39 Ark. 344, *Nolen* v. *Royston*, 36 Ark. 561, and *Roberts* v. *Jacks*, 31 Ark. 597. That is to say, it goes without question or controversy, in this state, that the assignee of a rent note has his action at law for recovery on the note, but has no right at law or in equity to have the landlord's lien enforced in his favor; for, as has been said, the lien is personal to the landlord himself, and is not assignable; or, as stated by this court in *Nolen* v. *Royston*, *supra*, "is not assignable, so as to give a right of action in the assignee."

The only evidence of the transfer of these rent notes, or rent claim, by Smith & Hamilton to Smith, Graham & Jones, is the testimony of Smith, a member of each of the firms and partnerships, who simply states "that, under the terms of this contract, they (he and Hamilton) claimed that Benson was their tenant of the premises described in the complaint in the year 1892; that the land they were seeking to recover rent for is the same land they had sold Benson under this contract; that Smith, Graham & Jones succeeded

Hamilton and himself in business, and were the owners of all rights under the contract with Benson." Now, whether this language is to be construed to mean that the firm of Smith, Graham & Jones are the assignees and absolute owners of the rent notes; or "are the owners of all rights (of Smith & Hamilton) under the contract with Benson," as the witness has it, is a question of fact about which we have had some difficulty in coming to a conclusion. If the one is true, the other cannot be true, because if the note has been absolutely assigned, the legal and equitable right, once united in Smith & Hamilton, have been separated, and in that case Smith, Graham & Jones have the sole and exclusive right to the remedy to recover the debt, and nothing more; the court holding that the evidence shows there has been an absolute assignment or transfor of the debt.

The decree is affirmed as to the debt against Benson, and reversed as to the lien, and also as to the debt against Block.

TALPEY v. WRIGHT.

Opinion delivered November 16, 1895.

ABSTRACTER OF TITLE—LIABILITY FOR MISTAKES.—One employed by a landowner to prepare an abstract of title for the purpose of procuring a loan upon mortgage is not liable to an assignee of the notes secured by the mortgage, who takes the notes in reliance upon the abstract, for loss occasioned by mistake therein, there being no privity of contract between such assignee, and the abstracter.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

The appellant, Charles W. Talpey, brought suit against the appellees, Joe R. Wright and M. F. Robinson, in the Sebastian circuit court for the Fort Smith district. For a cause of action against them he alleged the following facts, to-wit:

"That said Wright and Robinson were partners, engaged in business at Fort Smith as abstracters of title to real estate in Sebastian county; that one Alex Rhea, desiring to borrow money, applied to H. H. Hoover, a loan broker of Fort Smith, for the loan, offering as security therefor land in said county of Sebastian; that said Hoover, as a condition precedent to the making of the loan, required of Rhea that he furnish an abstract of the title to such land; that Rhea thereupon employed said Wright and Robinson to furnish an abstract of title for Hoover, and that Wright and Robinson did afterwards furnish an abstract of title to said land, certifying that it exhibited a complete abstract of all conveyances and other instruments of writing pertaining to the title of said property, as shown by the records of Sebastian county; that said abstract and certificate of attorney was forwarded to Topeka Investment & Loan Company by H. H. Hoover, and said company, acting upon the title therein shown, loaned to said Rhea said sum, taking notes for said sum, and interest thereon to accrue at the rate of seven per cent. per annum, payable semi-annually, to said company, and securing said sum by a deed of trust duly executed by said Alex Rhea and his wife to C. S. Gleed, trustee for said company, or the legal holder of the note, which deed of trust was duly recorded with the recorder of Sebastian county for the Greenwood district; that said Topeka Investment & Loan Company relied wholly upon the certificate of defendants that said abstract exhibited a complete abstract of title to said property; that on November 15,

1890, the same being before the maturity of the note, the Topeka Investment & Loan Company, in the due course of trade, sold said note to this plaintiff for the consideration of $2,100, and accrued interest thereon, paid by this plaintiff to said company, for the assignment of said note, and the security therefor; that the plaintiff required of said Topeka Investment & Loan Company, as a condition precedent to the purchase of said note and security, that it furnish him a complete abstract of title; that said company furnished to this pliaintiff the abstract of title prepared by these defendants, and this plaintiff relied wholly upon this abstract as furnishing a true and complete abstract of the title to said property, and, so relying upon it, purchased said note and security thereon, the deed of trust upon said real estate; that said defendants, when employed to prepare said abstract, knew that the said abstract was to be used by the said Rhea as an evidence of his title, which he was offering as security for a loan to be procured by said Hoover; that said defendants, after said loan had been accepted, completed the abstract of title to said land by noting in their abstract the deed of trust made by said Rhea to C. S. Gleed, as trustee for Topeka Investment & Loan Company, or the legal holder of the note of Alex Rhea; that the purpose and intention of said Rhea in furnishing said abstract to H. H. Hoover to negotiate, through his brokerage business, said loan upon said security were well known to the defendants, and it was prepared for the purpose of being used as an evidence of the title of said Rhea to anyone to whom the said H. H. Hoover would offer said proposed loan; that, upon the final completion of said abstract, the defendants knew that said loan was placed with the Topeka Investment & Loan Company, and negotiable notes given it or order, and said deed of trust was made to secure the holder of said notes; that said abstract of

title shows that Alex Rhea and Sallie V. Rhea, his wife, had a clear, unincumbered title to said property which they conveyed on September 1, 1890, to C. S. Gleed, as trustee, to secure the payment of said loan from said company; that said abstract did not exhibit a complete abstract of all the conveyances and other instruments of writing pertaining to said land, the same failing to show the following, to-wit:" * * * The complaint then sets out certain defects in the title which are alleged to have been negligently omitted from the abstract by said Wright and Robinson, to the injury of plaintiff. Plaintiff asked judgment for damages, etc.

A demurrer to the complaint was filed by Wright and Robinson, and, upon hearing the same, it was adjudged by the circuit court that the complaint did not state facts sufficient to constitute a cause of action, and, the plaintiff declining to amend, and electing to stand upon his complaint, the action was dismissed. To this judgment of the court the plaintiff excepted, and appealed.

Jos. M. Hill and *Preston C. West*, for appellants.

An action lies against an abstracter, or an attorney performing duties as such, for negligence in his duties, whereby damage is occasioned. 14 S. W. 896, S. C. 89 Tenn. 431, a case directly in point; 4 Mo. App. 108; 3 *id*, 278; 26 Mo. 280; 34 *id.* 429; 70 Ill. 268; 45 N. W. 539; 53 *id.* 633; 15 Cent. Law J. 482. But some of the decisions and text writers limit the liability to the one employing the abstracter. This limitation is not sound in principle; but if so, the allegations in the complaint take this case without the rule. Citing and reviewing 3 Cent. Law J. 559; 45 N. W. 539; 15 Cent. L. J. 482; 81 Pa. St. 256; Bish. Non-Cont. Law, secs. 700, 702. The old rule which defeated all actions unless the plaintiff was a party to the contract or in privity has

been much relaxed. 31 Ark. 433; *Ib.* 162; 45 *id.* 136; 33 *id.* 120; 20 N. Y. 268; 1 Johns. 139; 100 U. S. 195; 20 Fed. 39.

Clendening, Mechem & Youmans for appellee.

1. The contract of the abstracter is to ascertain and report the condition of the title; the certificate he gives is mere evidence of how he performed his duty. 95 Cal. 317; 122 Ill. 607; 87 Wis. 472; 51 Minn. 282.

2. A stranger to the contract cannot sue the abstracter. Tennessee alone holds that he can. See 16 Phil. 90; 81 Pa. St. 256; 100 U. S. 195; 2 Bond, 267; 17 C. B. (N. S.) 194; 7 C. & P. 288; 37 N. J. L. 5; 21 Picke, 140. Judge Turney's position is clearly overcome by the weight of authority. The general rule is that only a privy can complain of the breach of a contract, and the exceptions are clearly defined. 45 Ark. 136; 20 N. Y. 268; 47 *id.* 233; 68 *id.* 355; 69 *id.* 280; 1 Gray, 317; 107 Mass. 37; 36 Kas. 246; 2 N. Dak. 473; 98 U. S. 123; 53 Minn. 446; 23 Fla. 160; 16 Nev. 4; 119 Mo. 304; 37 Pac. 712; 122 Ill. 601.

RIDDICK, J., (after stating the facts). It is contended that the facts set up in the complaint are sufficient to constitute a cause of action in favor of appellants. The contention is that "the abstract was prepared by the appellees, Wright and Robinson, as the basis of a loan to be negotiated through Hoover's agency; that Hoover placed it with the Topeka Investment & Loan Company; that afterwards the appellees noted in the abstract the conveyance to Gleed, as trustee for this company, and its assignees; that the appellees then knew that it was placed in a given channel, and was in form designed to pass to the assignees; and that the abstract was made as much for the assignee of the Loan Company as for the Loan Company itself." This is the argument of appellant. It is not alleged or con-

tended that the abstracters knew that the note and security would be sold, or that, if sold, the purchaser would rely upon the abstract of title prepared by them for Hoover and the Loan Company; but it is said that, as the notes were negotiable, and the conveyances made to secure the Loan Company and its assignees, the abstracters were liable for an injury to any purchaser of these notes who relied upon such abstract. To support this contention the case of *Dickle* v. *Abstract Co.*, 89 Tenn. 431, is cited. In that case Dickle, before purchasing land from Bowman, required that an abstract of the title be furnished. Bowman applied to the Abstract Company, who, at his instance, prepared the abstract for the use of Dickle. The abstract showed title in Bowman, and Dickle relied upon it, and agreed to purchase. Thereupon a deed from Bowman to Dickle was prepared by the Abstract Company. Dickle afterwards brought suit against the Abstract Company, alleging that he was injured through its negligence in failing to note a defect in the title. The case went off on demurrer, and the facts alleged are very meagerly set out in the report, but there is no intimation, in the opinion or elsewhere, that there was any want of knowledge on the part of the Abstract Company in regard either to the purpose or the person for whose information and benefit the abstract was intended. So far as we can ascertain, the action was based on a contract made by the Abstract Company with Bowman to prepare an abstract for the use, benefit and information of Dickle. That being the case, it was held that Dickle had a right of action for injury to him occasioned by the negligence of the Abstract Company in preparing such abstract.

This case has been criticised by counsel for appellees as being in conflict with the leading case of *Savings Bank* v. *Ward*, 100 U. S. 195. In that case Mr. Justice

Clifford, who delivered the opinion of the court, said: "It is conceded that the certificates were made by the defendant at the request of the applicant for the loan, without any knowledge on the part of the defendant what use was to be made of the same, or to whom they were to be presented. None of those matters are controverted; but the plaintiffs contend that an attorney in such a case is liable to the immediate sufferer for negligence in the examination of such a title, although he, the sufferer, did not employ the defendant, and the case shows that the service was performed for a third person without any knowledge that the certificate was to be used to procure a loan from the injured party." In other words, in that case the defendant did not know that the abstract was intended for the use and benefit of the plaintiff, nor the purpose for which it was to be used; he did not contract to make an abstract for the information of plaintiff, and it was held that the plaintiff had no right of action. On the contrary, in *Dickle* v. *Abstract Co.*, the defendant not only made the abstract, but prepared the deed from the grantor to the purchaser, and we infer from the opinion that he knew the person for whose use and benefit it was wanted, and the purpose of it, and the court held that the plaintiff had a right of action. Apart from the rather broad expressions of the judge who delivered the opinion in *Dickle* v. *Abstract Co.*, there does not seem to be any irreconcilable conflict in the points actually decided in the two cases.

But, whether conflicting or not, we do not see that either of those cases support the contention of the appellant in this case. There is no allegation in this complaint from which we can infer that the appellees contracted with Rhea to prepare an abstract for the use and benefit of the appellant, Talpey. They furnished an abstract to Rhea, for the use and information of

Hoover and the Topeka Investment & Loan Company. Upon the abstract so furnished, a loan was made to Rhea by such company. If we concede that Hoover, or the Topeka Investment & Loan Company would, under the circumstances, have a right of action against the makers of the abstract for an injury to them occasioned by defects therein, still it would not follow that appellant had a right of action. After the loan had been made, and the abstract had served the purpose for which it was prepared, the appellant purchased the notes executed by Rhea, which were secured by a trust deed on land. The appellant alleges that, before making such purchase, he required of the company that it furnish him an abstract of title, and that the company furnished him the abstract prepared by the appellees, upon which he relied. This action of the Topeka Investment & Loan Company might make it liable for defects in the abstract furnished by them to appellant, but, in the absence of any allegation that they were acting as the agent of appellees in furnishing such abstract, it would not affect the liability of said appellees. The appellees did not contract to furnish the abstracts to appellant, nor to anyone for his use and benefit. We think it clear that he has no right of action against them. The judgment of the circuit court is therefore affirmed.

NEAL v. STATE.

Opinion delivered November 23, 1895.

FORFEITURE OF BAIL—PROCEEDINGS.—No complaint is necessary for the issuance of a summons upon a forfeited bail bond, under the statutes providing that the bond indorsed by the justice of the peace as "forfeited," and filed with the clerk of the circuit court, is a sufficient basis upon which the latter may issue his summons to the bondsmen. (Sand. & H. Dig., secs. 1994, 2034.)

BAIL BOND—FORFEITURE.—Failure of the principal in a bail bond to remain all day personally present at the door of the closed office of a justice of the peace is not a breach of the bond, where her attorney was present all the day, and such principal was close at hand to appear whenever called, and the office was not opened because of the justice's illness.

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

This is a controversy over the forfeiture of a bail bond, and a judgment thereon against the appellant as surety. One Mrs. George Burns was arrested and brought before H. H. Dill, a justice of the peace of Van Buren township, in Crawford county, on the 6th day of October, 1892, under a warrant issued by him on the affidavit of one Mattie Harvey, charging her with the crime of grand larceny, in having stolen goods and effects to the value of thirty-five dollars. The docket entry of said justice of the peace, for that day is as follows: "OCTOBER 6, 1892. State of Arkansas *v.* Mrs. George Burns. Grand Larceny. On the 6th day of October, 1892, comes Mrs. Mattie Harvey, and makes affidavit that one Mrs. George Burns did, on or about the 6th day of October, 1892, commit grand larceny, by stealing, taking and carrying away goods and effects to the value of $35, and prays a warrant, which was issued; and on the same day the officer brought said Mrs. George Burns into court, who pleaded not guilty to the charge, and not ready for trial, and the 10th day of October, 1892, was set for trial." For the 10th of October, the following entry was made: "On this the 10th day of October, 1892, comes W. H. Neal, attorney for defendant, and asked for a continuance of this cause on the ground that defendant was too sick to attend trial. Continuance granted until the 13th day of October, 1892, at 10 o'clock a. m., and

defendant gives bail in the amount of $300, and J. Neal taken as security on bail bond." And for the 13th October the following entry was made: "On this 13th day of October, 1892, the court, after waiting three hours, and defendant nor her attorney appearing for trial, it is considered and adjudged that said bail is forfeited, and so endorsed and filed with the circuit clerk of Crawford county."

The bail bond thus being endorsed "forfeited," and filed with the clerk of the circuit court by the justice of the peace, under 2028, Mansfield's, and 1994 of Sandels & Hill's Digest, summons was issued thereon against the appellant as surety, under section 2068 of Mansfield's, and 2034 of Sandels & Hill's Digest, and the appellant answered in substance as follows: "That, on the 13th day of October, Mrs. George Burns was in Van Buren, and could and would have been present for examination if the court had been ready to hear the same, but the court was on that day sick, and did not attend his office during the day; that the cause of Mrs. George Burns was not called for examination in the court of H. H. Dill; that said court was never opened for the transaction of business on that or any other day, for the hearing of said cause, nor was the defendant ever called or given an opportunity to produce the body of Mrs. George Burns in said court, which he was at all times willing to do; and defendant never made any effort to have said forfeiture set aside, because he was not informed of it until by the service of the summons herein; and that the forfeiture was taken less than twenty days from the filing of the bond by the justice of the peace, or the last day set for the hearing of the case before him."

Defendant filed a motion to dismiss the cause because there was no complaint, and the same was overruled.

The cause was heard, and judgment against appellant, and he excepted and appealed.

Jesse London, for appellant.

1. The suit should have been brought in the justice's court. Sand. & H. Dig. secs. 2030–2036; 43 Ark. 128.

2. The circuit court had no jurisdiction. No complaint was filed. 43 Ark. 128.

3. The court erred in refusing to admit parol testimony to contradict the entries in the justice's docket. 42 Ark. 315; 58 *id.* 181.

4. The forfeiture was illegally taken. Sand. & H. Dig. sec. 2017.

E. B. Kinsworthy, Attorney General, for appellee.

The bond sued on was executed as provided by section 1989 of Sandels & Hill's Digest. The continuance before the justice of the peace was warranted by section 1993. The forfeiture was regularly taken by the justice of the peace, as required by the statutes. Sand. & H. Dig. sec. 1994. No pleadings or complaint was necessary. The suit was brought as directed by our statutes. Sand. & H. Dig. sec. 2034. We agree with appellant that parol evidence can be used to contradict entries in a justice's docket. A judgment will not be set aside unless injustice has been done. 49 Ark. 397. If there is no valid defense, it will not be set aside. 54 *id.* 539. The excluded evidence shows no valid defense.

Proceedings on forfeiture of bail.

BUNN, C. J., (after stating the facts). The proceedings, as regard form, appear to have been substantially in accordance with the statute on the subject, and that provides that the bail bond endorsed by the justice of the peace as "forfeited," and filed with the clerk of the circuit court, is a sufficient basis upon which the latter may issue his summons to the bondsmen in pursuance of the other section of the statute cited

above. The objection that there was no complaint in the circuit court upon which the summons should issue is not well founded.

When forfeiture set aside.

If the allegations of the answer were true, the appellant had a good defense. Therefore he should have been permitted to show by his witnesses, which he offered to do, that the allegations of his answer were true. The court, however, over his objections, excluded this testimony, and in that erred, and fatally so.

This case is nearly on all fours with the case of *Flynn* v. *State*, 42 Ark. 315, the only difference being, so far as we can discern, that in the latter case the defendant Flynn actually appeared at the justice's office, and, on account of the press of business, the case could not be heard on that day, and another time for hearing was set, but of which the justice failed to notify the defendant, and the forfeiture was taken, notwithstanding this want of notice; whereas, in the present case, while the defendant did not actually appear, according to the very letter of her bond, yet her attorney and representative was present all the day, and the defendant was close at hand to appear whenever called. It follows that, in order to make the difference material, we would necessarily hold that the defendant, Burns, having failed to go through with the useless and reasonless performance of remaining all day personally present at the door of the closed office, was therefore guilty of a breach of her bond. We think that would be a too rigid construction of her obligation, in view of the explanatory circumstances offered to be shown as really existing at the time.

Reversed and remanded, with instructions to proceed according to this opinion.

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64 488

AVEN v. WILSON.

Opinion delivered November 23, 1895.

NEW TRIAL—COUNTY COURT has power to grant a new trial in an election contest.

CERTIORARI—CURING IRREGULARITY.—Certiorari will not lie to quash an order of the county court granting a new trial in a case in which it has such power, though the power was irregularly exercised.

Appeal from St. Francis Circuit Court.

GRANT GREEN, JR., Judge.

N. W. Norton for appellant.

1. The county court had jurisdiction to grant the new trial. This power is granted by the code. Sand. & H. Dig. sec. 5600. See also *Ib.* sec. 5839. Courts have control of their judgments during the term. 27 Ark. 295. The cases of 44 N. W. 892 and 24 Cal. 452, are based on the question of notice, and the peculiar statute of California. In the latter case also *the term had expired.*

2. If the county court had the power to grant the new trial, then the cause stood in court for trial, and there was no final judgment reviewable either by appeal or by certiorari. 11 Atl. 317; 33 Pac. 387. Certiorari does not lie to correct mere errors. 52 Ark. 213; 55 *id.* 205. It only lies to correct erroneous proceedings where the right of appeal *did not exist* or was *unavoidably lost.* 12 S. W. 559. Nor does it lie to review interlocutory orders. 3 Am. & Eng. Enc. Law, 64; 27 S. W. 379. Certiorari cannot be made a substitute for an appeal. 13 S. E. 681; 24 Pac. 721; Const. 1874, art. 7, sec. 52.

Sanders & Fink for appellee.

1. The county court had no power to grant a new trial. The power is not granted to it. When special powers are conferred on a court, they can do nothing not especially authorized by the granting power. Act January 2, 1892; Const. art. 6, sec. 4, Art. 19, sec. 24; 32 Ark. 553. The intention of the act was that such contests should be speedily and *summarily* determined. Sand. & H. Dig. secs. 2698–9; 32 Ark. 556; 41 *id.* 111. Election contests belong to the class of special and summary proceedings, in which the court must look alone to the statute for its authority, and can exercise no powers not expressly granted. Our statutes have no application to special proceeding or election cases. 24 Cal. 449; *id.* 457; 41 Hun, 9; Hayne, New Trials, sec. 6; 2 Thomps. New Tr. sec. 2724; 44 Mo. 141; 60 Ark. 194; 27 S. W. 123; 30 Ark. 487. Where a new right is created, the remedy provided is exclusive. 29 Ark. 173; Sedgw. St. & Const. Law, 343; 2 Thomps. Trials, sec. 2724. When proceedings are special, the provisions of statutes which regulate suits within the ordinary jurisdiction of the courts do not apply. 12 S. W. 841.

2. The court could not grant the new trial except within three days. The statute is mandatory. Sand. & H. Dig. sec. 5841; 6 Neb. 53; 24 *id.* 286; 1 Duv. (Ky.) 387; 83 Ky. 468; 29 Kas. 1; 25 Pac. 853; 79 Mo. 318; 73 *id.* 400; 36 *id.* 400; 92 *id.* 542; 26 S. W. 702; 62 Iowa, 212; 1 Cal. 437; 2 Thomps. Trials, sec. 2736; 49 Ark. 79; 42 *id.* 114; 26 *id.* 282; 52 *id.* 515. Judgments in summary proceedings must show on their face everything necessary to sustain the jurisdiction of the court. 51 Ark. 34; 54 *id.* 627; 59 id. 483; 1 Black Judgm. secs. 279, 280.

3. Certiorari may be used to correct erroneous proceedings, as well as defects or excess of jurisdiction.

Sand. & H. Dig. secs. 1125–6; 52 Ark. 213; 108 Ill. 137; 9 Wend. 61; 44 N. W. 892.

4. A judge who did not preside at the trial ought not to be allowed to annul the orders of his predecessor. 6 Ark. 100. The granting a new trial is not an arbitrary exercise of power, but is a duty to be performed for adequate cause. 44 N. W. 864. Courts may perhaps extend the term for motions for new trial, but application should be made within the time the law allows. The court has no power to open a default. 2 Nev. 34; 4 *id.* 358; 57 Cal. 629.

BATTLE, J. This is a proceeding by certiorari to set aside an order of the St. Francis county court granting a new trial in a proceeding instituted by John B. Wilson to contest the election of John W. Aven to the office of treasurer of the county of St. Francis.

The proceeding to contest the election was commenced in the St. Francis county court some time in the month of September, 1892; and at the October term of the court, on the 25th of October, 1892, Wilson was adjudged to be elected county treasurer, and the certificate issued by the commissioners to Aven, showing that he was elected such treasurer, was cancelled by an order of the county court. After this the court adjourned until the 28th of October, 1892, and on that day again adjourned until the 31st of the same month. In the meantime, the term of the judge who presided on the 25th and 28th of October expired, and C. F. Hinton, his successor, qualified, and entered upon the discharge of the duties of the office. On the 31st of October, the day to which the court adjourned, Aven filed a motion for a new trial, setting out the grounds on which the same was based, and on the same day the order made on the 25th of October was set aside, and a new trial was granted by the court, C. F. Hinton being the judge presiding.

On the hearing of the petition for the writ of certiorari, the circuit court set aside the order of the county court, which was made on the 31st of October, for the following reasons: "1. None of the grounds or statements in said motion of J. W. Aven for a new trial were supported by any evidence. 2. The application for a new trial, and the order made thereon, were made without any notice to Wilson, and without allowing him or his counsel any opportunity to be heard. 3. C. F. Hinton, the county judge who granted the motion and order for a new trial, did not preside in the trial of said contested election, was not present at the trial, and had no legal information concerning it, nor was evidence of any kind introduced to show that the statements or grounds of the motion for a new trial, or any of them, were true."

These findings of facts are not sufficient to sustain the judgment of the circuit court. If the county court had the power to grant the new trial, certiorari did not lie to set aside the order granting it. Did it have the power?

Power of county court to grant new trial.

The Code of Practice in civil cases in this state provides as follows: "Section 23. Probate courts, county and justices' courts shall have jurisdiction as is now, or may hereafter, be conferred upon them respectively by law." "Section 24. Each of said courts shall conform to the provisions of this Code as far as the same is applicable to them, *or to any proceedings of which they have jurisdiction.*" "Section 780. This Code of Practice shall regulate the proceedings in all civil actions and proceedings in the courts of this state, and all laws coming in the purview of its provisions shall be repealed." "Section 796. The provisions of this Code shall apply to and regulate the proceedings of all the courts of this state, though not expressly enumerated, and of all that may hereafter be created."

From these sections it is apparent that the code was intended to regulate the pleading and practice in all the courts of this state, then or thereafter created. Among its provisions is the following: "A new trial is a re-examination in the same court of an issue of fact, after a verdict by a jury or a decision by the court. The former verdict or decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following *causes*, affecting materially the substantial rights of such party:

"*First.* Irregularity in the proceedings of the court, jury or prevailing party, or any order of court or abuse of discretion by which the party was prevented from having a fair trial.

"*Second.* Misconduct of the jury or prevailing party.

"*Third.* Accident or surprise which ordinary prudence could not have guarded against.

"*Fourth.* Excessive damages, appearing to have been given under the influence of passion or prejudice.

"*Fifth.* Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract for the injury or detention of property.

"*Sixth.* The verdict or decision is not sustained by sufficient evidence, or is contrary to law.

"*Seventh.* Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

"*Eighth.* Error of law occurring at the trial, and excepted to by the party making the application." Code, sec. 371.

After repeatedly saying that it shall regulate the pleadings and practice in all courts in this state, the Code undertakes to say wherein it shall not govern the proceedings in such courts. Sec. 806–836. Among

these exceptions is section 817, which says: "A new trial or rehearing may be granted in courts of justices of the peace, upon motion made within ten days after a judgment or final order has been made or rendered, of which motion notice shall be given to the opposite party." And this appears to be the only section of the Code which provides that the regulation of the practice in respect to motions for new trials by preceding sections shall not, as a whole, govern any court. From this we infer that all courts of original jurisdiction were vested with the power to grant new trials in the cases authorized by the Code.

The code expressly provides that the county courts of this state shall conform to it, so far as the same is applicable to them, "*or to any proceedings of which they have jurisdiction.*" Its object in allowing new trials, as shown by the causes for which they may be granted, is to secure a fair trial; to protect against "accidents or surprise which ordinary prudence could not have guarded against;" to correct errors which materially affect the substantial rights of parties; to prevent a failure of justice; and to protect the rights of all parties concerned. That county courts should be enabled, so far as practicable, to accomplish these objects there is no room for question. Many of these causes, abuses, evils or errors, for which a new trial is allowed for the purpose of correcting or remedying, may occur in them. As they may, so much of the Code as provides the remedy for their correction is unquestionably applicable to that court. It is true, they may be corrected by an appeal to the circuit court. But that does not render the remedy for their correction in the court in which they occur inapplicable to the county court. The terms of that court are more numerous than those of the circuit, and for that reason they may be more promptly corrected in the former court. The remedy

by a new trial may be more expeditious and less expensive than an appeal to the latter court, and for that reason, and because it is an appropriate remedy, should be allowed in the county court.

Appellee contends that the power to grant new trials should not be extended to contests of elections, because the legislature has "prescribed in express terms the manner in which a contest over the fairness and result of an election should be conducted, and conferred upon the county court special powers, distinct from and independent of its constitutional jurisdiction, to be exercised in the summary way pointed out by the statute." This contention is based on sections 2697, 2698 and 2699 of Sandel's & Hill's Digest. But these sections do not provide a complete remedy for such contests. The proceedings prescribed by them are incomplete. For instance, section 2697 provides that the contests of the elections of the couuty treasurer, and of other officers named, shall be before the county court, and the person contesting "shall give the opposite party notice in writing ten days before the term of the court at which such election shall be contested." But it does not say by whom and in what manner the notice shall be served; and it says "the parties shall be allowed process for witnesses," but does not say by whom and in what manner the process shall be served, or how the witnesses shall be compelled to attend. And section 2698 says that "either party may, on giving notice thereof to the other, take depositions to be read in evidence on the trial," but does not provide by whom and in what manner they shall be taken. In none of the contests provided by these statutes is there anything said about an appeal, notwithstanding the constitution of the state ordains that "in all cases of contest for any county, township or municipal office, an appeal shall lie at the instance of the party aggrieved, from any inferior board,

council or tribunal, to the circuit court, on the same terms and conditions on which appeals may be granted to the circuit court in other cases, and on such appeals the case shall be tried *de novo*." These omissions clearly show that the statutes relied on were never intended to prescribe the only proceeding that shall be followed in contests for elections, but left other statutes consistent with them, and appropriate to govern in such cases.

In contests of elections the same object is to be gained, and the same purposes are to be subserved, by a new trial as in other cases in the county court. It is true that, in election as in all other cases, the parties "ought to obtain a speedy trial, conformably to the laws;" but in no case should the forms of law be made subservient to the purposes of injustice.

Practice as to certiorari.

In the motion filed by Aven in the county court he stated, among other things, that on the 24th of October, 1892, the day when the contest of his election by Wilson was heard, he "was unable to attend court by reason of his bodily infirmities, and that, while he was so disabled, * * * the attorneys to whom he had entrusted his defence in his cause were likewise unable to attend the court by reason of sickness and other unavoidable circumstances, all of which was properly brought to the knowledge of the court by proper motion; yet, notwithstanding these facts thus known to the court, the hearing of this cause was proceeded with, which contestee says was an abuse of the power and the discretion of the court; * * * that he was legally elected to the office of county treasurer, and that, if given an opportunity, he can establish his right and title to said office." Upon this statement, which was sworn to, the motion was granted. In this the appellee says the court erred, because the motion was not filed within three days after the hearing; that no notice was given

to the contestant of the filing; and the presiding judge, not having heard the contest, granted the motion without evidence of its contents. But this can avail nothing in this proceeding. If the county court had the jurisdiction to grant the new trial, as it did, and the statement of appellee as to the time of the filing of the motion, the failure to give notice, and the granting of it without evidence, be true, and the action of the court in that respect be irregular or illegal, it merely committed an error, and certiorari did not lie to correct it. If appellee had been aggrieved by the final judgment in the case, his remedy was by appeal. *Gibson* v. *Superior Court*, 24 Pac. (Cal.) 721; *State* v. *City of Duluth*, 60 N. W. (Minn.) 546.

The judgment of the circuit court is reversed, and the petition is dismissed.

WOOD AND HUGHES, JJ., dissent.

WOOD, J. (dissenting.) The provisions of the code are not applicable to the election contest proceedings mentioned in sec. 2697 of Sand. & H. Dig. In the absence of statutory proceedings, the remedy for contesting an election is by an information in the nature of quo warranto. Paine on Elections, 856; *People* v. *Stevens*, 5 Hill, 616; *Gass* v. *State*, 34 Ind. 425; *People* v. *Matteson*, 17 Ill. 167; *Wheat* v. *Smith*, 50 Ark. 266; McCrary on Elections, sec. 346. Our constitution has required the legislature to designate the tribunal having jurisdiction of election contests of the kind under consideration. The legislature has named the county court as the proper tribunal. They might just as well have created a board, council, or any other tribunal for the purpose. Art. 7, sec. 52, and art. 19, sec. 24, const. Ark. The only jurisdiction conferred upon county courts by the constitution is over matters

"that may be necessary to the internal improvement and local concerns of the respective counties. Const. art. 7, sec. 28. So, the county court in determining an election contest is exercising a jurisdiction not conferred by the constitution, and not according to the course of the common law. The proceedings are summary, and the statute conferring such jurisdiction must be strictly construed and pursued. *Files* v. *Robinson*, 30 Ark. 487; Sedg. on Const. Stat. & Con. secs. 299–302; Endlich on Int. of Stat. sec. 158; *Wilson* v. *Fussell*, 60 Ark. 194. Had the legislature simply conferred upon the county courts jurisdiction to determine such contests, without prescribing any method of procedure, then these courts would have had the power to adopt their own rules and methods for the disposition of such cases; and they might have adopted such Code provisions as they deemed applicable, or any other rules of practice, taking care, of course, not to violate fundamental principles. *Boring* v. *Griffith*, 1 Heisk. 456. But, the legislature having prescribed a method of procedure amply sufficient for the determination of such cases in a summary way, the courts must look alone to the special statute conferring the jurisdiction and prescribing the procedure.

It is contended, however, that there is no complete Code, and that therefore the general Code provisions should apply. An examination of the constitution and the election contest statute will discover that this contention is not well founded. Sec. 2697, Sand. & H. Dig., provides for notice in writing to the opposite party, specifying when it shall be given, and what it shall contain; which notice serves the double purpose of a writ and declaration, as held in *Vance* v. *Gaylor*, 25 Ark. 32, and *Swepston* v. *Barton*, 39 *id.* 549. It also provides for process for witnesses. True, it does not specify who shall serve the notice and process, nor in what manner it shall be served, nor how the witnesses may be

compelled to attend. But the fact that the legislature required the notice to be given, and specified that it should be in writing, and what it should contain, and when it should be given, without mentioning *how it should be served*, indicates clearly that no set formulæ or fixed rules were to be observed in this latter particular. In other words, the legislature intended that if the notice mentioned was given at the time required, and served in any other manner than that prescribed by the Code, it would meet the requirements of the law, and be just as good as if served in the way pointed out by the Code. When the legislature provided that the parties "shall be allowed *process* for witnesses," it was unnecessary for them to go further, and prescribe who should serve it, and the manner in which it should be served, and how the attendance of the witnesses should be compelled. Nor is their failure to mention these things specifically in the act any indication that they intended the general code provisions to apply to election contest proceedings. "Process" is a term of broad, but of definite legal, import, and its meaning was well understood long before the Code had an existence. It comprehends all mandates of the court issued to its officer, "commanding him to perform certain services within his official cognizance;" and embraces every writ that "may be necessary to institute, or to carry on an action or suit, and to execute the judgment of the court." Am. & Eng. Enc. Law, 222, 224; Anderson's Law Dict.; Bouvier's Law Dict., *subverbo*, "Process;" 3 Bouvier's Inst. 187.

Again, section 2698, Sand. & H. Dig. provides for taking depositions "on notice thereof to be read in evidence on the trial." But it is not specified when, where, and how, they shall be taken, and this omission is also urged as a reason why the general Code provisions should apply to these proceedings. "Deposition" like

"process" is a legal term, the meaning of which was well fixed before the Code, and is as follows: "The testimony of a witness given or taken down in writing under oath or affirmation, before a commissioner, examiner, or other judicial officer, in answer to interrogatories and cross-interrogatories, and usually subscribed by the witness." Weeks Law of Dep. 3. The statute provides for notice to the other party, and the use of the term "deposition" carried with it all that was necessary to get the evidence desired before the court. The legislature never expressed more, doubtless for the very reason that they did not intend that the general Code provisions in reference to the taking and use of depositions should apply to election contest cases.

Now, let us see what would be the anomalous result if the Code provision in reference to the use of depositions applied to these cases; for if the provision of the Code in reference to "new trials" applies, the provision in reference to the use of depositions, and all other provisions not inapplicable, must be given their full force and meaning. Then we have section 2698, Sand. & H. Digest, of the contested election statute, providing that "either party may, on giving notice thereof to the other, take depositions to be read in evidence on the trial," and section 2978, Sand. & H. Digest (of the Code) providing "that depositions may be used on the trial of all issues in any action in the following cases: 'First, where the witness does not reside in the county where the action is pending, or in an adjoining county, or is absent from the state,' etc. * * * * * 'Fourth, where the witness resides thirty or more miles from the place where the court sits in which the action is pending, unless the witness is in attendance on the court.'"

The statute (secs. 2702, 2704 Sand. & H. Dig.) expressly designates an election contest suit as an "action," and it is so called in *Gaylor* v. *Vance*, 25 Ark.

32, and *Swepston* v. *Barton*, 39 *id.* 549. There is no repugnance between sec. 2698 of the contested election statute and 2978, Sand. & H. (of the Code.) Then, construing them together, as we must do if the Code applies to contest cases, we have: "Either party may, on giving notice thereof to the other, take depositions to be read in evidence on the trial" (sec. 2698, Sand. & H. Dig.), to be used "where the witness does not reside in the county where the action is pending, or in an adjoining county, or is absent from the state," * * * or "where the witness resides thirty or more miles from the place where the court sits in which the action is pending, unless the witness is in attendance upon the court. (Sec. 2987, Sand. & H. Dig.) So, the curious, but inevitable, result to follow, if the code provisions apply to contest cases, is to exclude the evidence of all persons living in the county under thirty miles, etc., unless it can be said that the evidence at the trial may be taken *ore tenus*. But, by expressing that depositions might be taken to be read at the trial, the legislature evidently intended to exclude other methods of taking evidence.

Sections 2702–3–4, Sand. & H. Dig., provide for the costs "in the action." Article 7, sec. 52, of the constitution provides for an appeal on the "same terms and conditions on which appeals may be granted to the circuit court in other cases, and that on such appeals the case shall be tried *de novo*." This section of the constitution expressly makes all the provisions of the law with reference to appeals to the circuit court in other cases applicable to election contest cases. Ample provision, therefore, is made for appeals in election contest cases. This art. 7, sec. 52, of the constitution, and secs. 2697 to 2704 of Sand. & H. Dig, inclusive, we hold, constitute a complete code for the determination of election contest cases of the character therein mentioned in the

summary way required. It will be observed that no provision is anywhere made for a re-examination of the issues of fact by new trial.

The supreme court of California, under a statute similar to ours (and, in my judgment, no more complete than ours), in a special case to contest an election, said: "The proceedings authorized by article 6 of the act to regulate elections are special and summary, and no remedy can be had under the provisions of that article, except such as is therein expressly or by necessary implication provided. A *new trial* is not authorized by the provisions of the article in question, and the remedy of a party who is dissatisfied with the judgment of the county court is by appeal only." *Casgrave* v. *Howland*, 24 Cal. 457; *Dorsey* v. *Barry*, *Ib.* 449. In the latter case it is said, speaking of election contest proceedings: "We regard them in every sense as special proceedings and subject to the well settled rule that, in adjudicating upon them, the tribunal exercising jurisdiction must resort to the statute alone to ascertain its powers and mode of procedure." This doctrine accords exactly with our views. We have not been able to find any case to the contrary. None is cited in the brief of counsel, or in the opinion of the court, and we apprehend none can be found. See, also, *Carpenter's Case*, 14 Penn. St. 486.

In *Wise* v. *Martin*, 36 Ark. 305, this court said: "In a suit of this character, he (contestant) was not entitled to a trial by jury. It was a summary proceeding under the statute to be tried by the court." and in *Govan* v. *Jackson*, 32 Ark. 553 it said: "The law has made no provision for juries in the county court." * * * "The requirement that it" (election contest case) "shall be determined in a summary way is that it shall be tried without a jury. Yet we have a general Code provision as follows: 'All other issues of fact, whether arising in proceedings at law or equitable pro-

ceedings, shall be tried by the court, subject to its power to order any issue or issues to be tried by jury.'" Sec. 5795, Sand. & H. Dig. Could the county court, under this section of the Code, order an issue of fact in an election contest case to be tried by a jury? I think not, and for the reason that the special statute on election contests does not provide for it. But if the Code provisions apply, the above section shows that the court would have that power.

Our conclusion is that section 5600, Sand. &H. Dig., providing "that the Code of Practice in civil cases shall regulate the procedure in all civil actions and proceedings in all the courts of this state," etc., had reference only to those actions and proceedings where the court was pursuing the jurisdiction conferred by the constitution, or exercising its jurisdiction according to the course of the common law. *Odell* v. *Wharton*, 27 S. W. 123.

In *Patton* v. *Coates*, 41 Ark. 111, this court said: "It is evident that in this peculiar class of cases the public has an interest in their speedy settlement, and that the object of the contest would be defeated by delay irremediably." But if the court has the power to grant a new trial for some mistake of law or fact one time, it would have the power to do so a second and third time, and to what extent might not these contest proceedings, under such a power, be prolonged? It serves a wise public policy, which we think the legislature had in view, when the county court has once passed upon the issues presented, not to allow it the power to pass upon them again and again by a new trial but to correct the mistakes, if any, by appeal to the circuit court and a trial there *de novo* as provided by the constitution, and, thus, speed the cause on its way to the *final arbiter*.

This is the only remedy for the party aggrieved. Of course, the county court would have the inherent

power, if it should change its opinion as to the facts or the law at any time before the term closed, to set aside its judgment, and have one entered reflecting its last opinion. This, however, upon the facts as they had already been presented, and not upon a reopening of the issues by new trial.

The only question here is the power of the court to grant a new trial. If it has that power, the other irregularities complained of could have been corrected by appeal.

We think the judgment of the circuit court is correct, and should be affirmed.

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* HENSON.

Opinion delivered November 23, 1895.

LIABILITY OF MASTER—NEGLIGENCE OF FELLOW SERVANT.—A bridge foreman and a locomotive engineer though employed in different departments of the railway company's service, are fellow servants, so as to prevent a recovery by one for personal injuries caused by the other's negligence.

DAMAGES TO PROPERTY—DEGREE OF CARE.—An instruction, in an action against a railroad company by a bridge foreman for the loss in a collision of his property carried in a boarding car furnished by the company for its convenience, that the company is liable only for gross or reckless negligence is not prejudicial to the company.

RAILWAY COLLISION—DAMAGES RECOVERABLE.—Items for personal expenses and for a diamond ring cannot be recovered in an action by a bridge foreman for property lost through collision between the car furnished by the company for his transportation and another train.

Appeal from Craighead Circuit Court, Jonesboro, District.

JAMES E. RIDDICK, Judge.

Sam H. West and *J. C. Hawthorne* for appellant.

1. Appellant was not a bailee, nor a carrier of the property. 2 Kent, 558. Appellant could only be held for a willful destruction. 17 Mass. 479. But the loss was the result of the negligence of appellee's fellow servants, for which appellant is not liable. 46 Ark. 555; 51 *id.* 467; 10 S. W. 529. Nor was appellant liable for articles other than those necessary to be used in boarding cars, such as jewelry, merchandise, etc. 29 Minn. 160; 73 Ill. 348; 23 Am. St. 126. The verdict, as to the items of ring, gun, sewing machine, curtains, watches, and personal expenses, was excessive. 118 Mass. 275. The car was under plaintiff's control, and he was guilty of contributory negligence in permitting his fellow servants to violate the known rules of the company. 7 Hill, 47; 25 Wend. 459.

2. On the cross appeal, contend that the engineer and conductor were fellow servants of the plaintiff. 39 Ark. 17; 42 *id*, 417; 44 *id.* 527; 45 *id.* 319; 46 *id.* 388; *Ib.* 555; 51 *id.* 468; 54 *id.* 289; 58 *id.* 206; *Ib.* 217; 18 S. W. 219; 45 Mass. 49; 84 N. Y. 77; 81 *id.* 516; Whittaker, Smith, Neg. 139, and note; McKinney on Fellow Servants, sec. 18; 6 Cush. 75; 3 *id.* 270.

E. F. Brown for appellee.

Appellee was not a fellow servant with the conductor and engineer, and the question whether the conductor and engineer were not guilty of gross negligence were questions which should have been submitted to the jury. 84 N. Y. 77; McKinney on Fellow Servants, 310, 46 Ark. 477; 75 Mo. 653; 24 Oh. St. 654; 4 Cal. 30; 11 A. & E. R. Cases, 421; 4 Metc. 49; 45 Ill. 179;

6 A. & E. R. Cases, 149; 5 Ind. 339; 60 Ill. 171; 93 *id.* 302; 83 Ky. 129.

WOOD, J. The plaintiff seeks to recover for injuries to person and for loss of property which he says were caused by defendant's negligence. Defendant admitted the negligence, but says it was the negligence of fellow servants; and, furthermore, as to the loss of property, that defendant was in no sense plaintiff's bailee, and in no sense liable.

The plaintiff was foreman of a bridge and building gang, whose business was to repair bridges, culverts and trestles. As a part of the necessary and customary equipment for such work, plaintiff was furnished with boarding cars, in which he lived, and boarded the crew of men working under him. These cars, upon the order of the superintendent of bridge and building, were moved from place to place on defendant's road, wherever the occasion demanded.

Plaintiff and his property, the necessary appointments of a boarding car, and the men under him, were carried by the company to places of work without charge to plaintiff. The rules of the compaay required boarding cars, when moving, to be attached to the caboose. In this instance they were next to the engine. But the plaintiff had no control over the placing of cars. The conductor performed that duty. A list of the property alleged to have been destroyed is attached to the complaint, and marked "Exhibit A." On this list is a sewing machine, valued at forty-five dollars, two pairs of lace curtains and poles, valued at six dollars, one diamond ring, valued at one hundred and ten dollars, one shot gun, valued at fourteen dollars. As a part of the same exhibit was also an account for personal expenses, amounting to eleven dollars and eighty-five cents, and a charge "for repairs on two watches, eighteen dollars."

The value of the articles listed, and the account for expenses and repairs, were shown to be as stated. The total amount of damages claimed was six hundred and six dollars and eighty-five cents.

Through the negligence of an engineer, one of defendant's trains collided with the train carrying plaintiff and his property, on a bridge over Crooked Bayou. Plaintiff's car was thrown into the bayou, and he sustained severe personal injuries, besides the loss of property above mentioned. The verdict was for six hundred and six dollars and twenty-four cents, damages for loss of property. Judgment was entered accordingly. Both parties have appealed.

The court instructed the jury as follows: "(1). The jury are instructed that, under the facts in the case, which are not disputed, the plaintiff was a fellow servant with the engineers and other employees of the defendant company in charge of the colliding trains, and he cannot recover for the personal injuries sustained through the negligence of such employees, and the jury will allow him nothing for such injuries. (2). Although the plaintiff cannot recover for his personal injuries, yet, if he was the owner of the property described in his complaint, and the jury find from the evidence that the same was destroyed through the gross or reckless negligence of the employees in charge of the defendant's trains, he can recover for the same, and the measure of damages will be the fair cash value of such property. (3). If the jury find that the property of the plaintiff was destroyed through the negligence of the employees of the defendant, they will find specially as to whether any portion of said property was unnecessary for the purpose of running the boarding car occupied by the plaintiff." The appellants at the time objected separately to the giving of instructions num-

bers two and three. The objections were overruled, and exceptions saved.

As to who are fellow servants.

The plaintiff and the engineer, whose negligence caused the collision, were in different departments of the company's service. The former belonged to the bridge and building department, and the latter to the transportation department. Neither was under the control of the other. But the fact that they belonged to separate departments is of no consequence, further than it may tend to show whether or not the injury complained of was within the risks "ordinarily incident to the service undertaken." The danger of the collision of trains growing out of the negligence of engineers is open and palpable, and was reasonably to be anticipated by the plaintiff in the business in which he was engaged. It was certainly but a normal and natural risk for a bridge foreman to assume when he entered upon the service of the company; for these boarding cars in which he lived were constantly on the move, and they were pulled about over the road by engineers on the various trains. The plaintiff had every opportunity to, and doubtless did, know the manner and method of the movements of these trains. His work necessarily brought him in close contact with these engineers, and he knew that they manipulated the motive power. There was nothing of the master's duty in the work of running the engine. The doctrine announced by this court in *Triplett* v. *Railway Co.* 54 Ark. 289, applied to the facts of this record, determines the relation of the plaintiff and the defaulting engineer as that of fellow servants. That was a well considered case. The patient research and assiduous care of Judge Fletcher in that case has greatly lessened our labors in this. We would add nothing to that opinion, but, in addition to the authorities there cited, see the following: *Abend* v. *Terre Haute & Ind. Ry Co.* 17 Am. & Eng. R. Cases,

614, and authorities cited in note, p. 620; *N. Y. Cent. etc. R. Co.* v. *Vick*, *id.* 609; *St. Louis, etc. R. Co.* v. *Welch*, 10 S. W. 529, and authorities cited.

The railroad is not shown to have been negligent in employing an incompetent engineer, nor in retaining him after becoming aware of his incompetency. The facts upon which the relation of fellow servants was predicated were not controverted, and the court was correct in its first instruction.

Degree of care exacted of master.

2. In instructing the jury that the defendant was liable for the loss of plaintiff's property only in case of "gross or reckless negligence," the court took the most favorable view of the law and the evidence for the defendant, and it cannot complain. The second instruction, *supra*, fixed the status of the company to the plaintiff with reference to his property as that of a gratuitous bailee, or what is termed in the law of bailments as a "mandatary." Hutch. on Car. sec. 2; Schouler on Bail, secs. 14–16. If the property of plaintiff was carried solely for the carrier's benefit, then the carrier was liable for *slight* negligence. If the plaintiff and the defendant derived a reciprocal benefit from the carriage, the defendant carrier was liable for *ordinary* negligence; if the transportation was exclusively for the benefit of the plaintiff, then the defendant was liable for gross negligence. Schouler's Bail. secs. 14–16 *supra*. The latter was the view adopted by the court. The proof tended to show that the company usually furnished boarding cars to their bridge foreman, and carried what was necessary for the boarding of a bridge crew, and that this was done for the convenience of the company. So the court might have exacted a higher degree of care than that announced.

For what damages a railway is responsible.

But the carrier only undertook to carry such property of the plaintiff as was necessary for the work in which he was engaged. The company deemed it neces-

sary that he should board the gang of men working under him, and to that end they furnished him a car especially adapted for that purpose. This boarding car was a home on wheels. In it plaintiff and his men were expected to live, and to be ready at any moment to go whenever and wherever ordered. Without going over the items *seriatim*, it suffices to say that the jury were justified from the evidence in their finding as to what items were necessary for a boarding car, except the item for personal expenses. This had nothing to do with the property lost, and only had reference to the personal injury of plaintiff, for which, as we have shown, he could not recover. The diamond ring the jury found to be unnecessary for a boarding car, and in this they were correct. But the court overruled the motion of the defendant to have a remittitur entered for one hundred and ten dollars, the value of the ring, and overruled the motion for new trial. The cause must therefore be reversed and remanded for a new trial, unless the plaintiff shall, within thirty days, enter a remittitur for one hundred and twenty-one dollars and eighty-five cents. If the remittitur is entered, the judgment will be affirmed.

BUNN, C. J., and RIDDICK, J., did not participate, being disqualified.

JEFFRIES *v.* STATE,

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Opinion delivered November 23, 1895.

INSTRUCTION—ASSUMING FACTS.—An instruction, on a trial for keeping a slot machine alleged to be a gambling device, that the law does not tolerate any subterfuge in violation of its penal laws, and that if defendant employed any person to watch such a

machine, and there was money lost and won upon it, a conviction may be had, is not objectionable, as assuming that the machine in question was a subterfuge.

CRIMINAL LAW—EXHIBITING GAMBLING DEVICE.—The employment of another to watch a slot machine upon which money is lost or won is a keeping of a gambling device within the statutes (Sand. & H. Dig. secs. 1613, 1614).

Error to Jackson Circuit Court.

RICHARD H. POWELL, Judge.

Joseph W. Phillips and *M. M. Stuckey* for appellant.

1. The charge of keeping and exhibiting a gaming device is not sustained by any evidence. There is no evidence that he set up, kept or exhibited the machine or had any interest in it.

2. The court, in its instruction, assumed as a fact there was a *subterfuge* in violating the laws of the state, and thus violated art. 7, sec. 23, const.

E. B. Kinsworthy, Attorney General, for appellee.

1. The evidence shows that appellant furnished the machine, and was interested therein. Sand. & H. Dig. secs. 1613, 1614.

2. The facts were not denied, and the court properly instructed the jury; for where there is any evidence to sustain the proper theory of a case, the court should properly instruct the jury as to such theory. 50 Ark. 545.

3. The law does not tolerate any subterfuge in violating its gaming laws. 43 Ark. 389.

WOOD, J. The appellant was convicted before a justice of the peace on an information charging him with "keeping and exhibiting a gaming device." He appealed to the circuit court, was again convicted, and appeals to this court. The proof was that the defendant employed one Charles Mason "to look after" a machine in the Underwood saloon in Newport, Jackson county, Arkansas, called a "slot machine," upon which money "was won

and lost;" within twelve months prior to the filing of the information. The machine stood in John Underwood's saloon. The witness came up to the saloon in the mornings, and "just looked after the machine to keep any person from breaking it." Persons would slip a nickle in the slot; and if the machine opened, the person putting in the nickle would get all in the box; if the machine did not open, the person putting in lost his nickle.

The appellant complains that the verdict was contrary to the law and the evidence. The court instructed the jury "that the law does not tolerate any subterfuge in violation of its penal and gaming laws; and in this case, if you believe from the evidence that the defendant employed any person to watch a machine of the description charged in the information, and that there was money lost and won upon it, you will be authorized to convict the defendant."

Section 1613 of Sand. & H. Digest is as follows: "Every person who shall set up, keep or exhibit any gaming table or gambling device * * * * * * at which any money or property may be won or lost shall be deemed guilty of a misdemeanor," etc. Section 1614. "If any person shall in any way, either directly or indirectly, be interested or concerned in any gaming prohibited by section 1613, either by furnishing money or other articles for carrying on gaming, etc., such person shall be deemed guilty of a misdemeanor." It is insisted that the court, in its instruction, violated art. 7, sec. 23, of the constitution prohibiting judges from charging juries upon matters of fact.

The majority of us are of the opinion that the instruction is correct, and not open to the objection urged. The court did not tell the jury, as assumed by counsel, that the defendant was using a subterfuge to violate the law, but simply declared that the law

"would not tolerate any subterfuge," and left the jury to say whether the defendant used a subterfuge. There was no dispute about the facts. The defendant, it is conceded, "employed a witness to look after the machine." It is not disputed that the machine was one upon which money might be and "was lost and won"; *i. e.*, a gambling device. So the only question was whether "employing one to watch" a gambling device was "keeping" such device in the meaning of the statute. The language of the witness was, "employed to look after the machine to '*keep*' any person from breaking it." The court used in its instruction the words "to watch" instead of the words "to look after, to keep." "To look after" means "to watch after" (Webster), and "to watch" means "to tend," "to guard," "to have in keeping." The defendant employed another "to look after a gambling device to keep same from being broken." This was in a saloon, where the public came and went *ad libitum*. To employ another to look after property indicates that the employer has an interest of some kind in that property. The law does not say what or how much the interest must be. "Directly or indirectly interested" is the language of the statute *supra*. The instruction does not assume a single fact. The court, in the instruction, declared what the law was upon a given state of facts, and left the jury to find what the facts were.

The jury, by this instruction, were left to find whether the defendant employed anyone "to watch" a machine upon which money might be lost or won, and whether money was lost or won upon such a machine. In case they found such to be the facts, the instruction announced what the law was applicable to them.

Affirm the judgment.

JOHNSON v. BRYANT.

Opinion delivered November 23, 1895.

LANDLORD AND TENANT—RENT —A tenant who agrees to pay as rent one-fourth part of the cotton raised by him on the land, or its value, cannot refuse to account for part of the cotton raised because such portion could not be gathered without much inconvenience and unusual expense. To excuse a failure to perform the contract, the tenant must show that it was caused by the act of God, of the landlord, or of the public enemy.

Appeal from Crawford Circuit Court.

NIMROD TURMAN, Special Judge.

STATEMENT BY THE COURT.

This action was brought in the court of a justice of the peace to recover a balance of fifty dollars for rent of land. The case came to the circuit court on appeal, and was decided against the plaintiff, who is appellant here. The facts are that appellant rented to appellee twenty acres of land, that was planted by appellee in cotton, under a verbal contract that appellee should pay to appellant for the rent of same one fourth part of the cotton, or its cash value, raised on the land. The appellee deposited thirty dollars in bank, to the credit of appellant to cover the rent, and refused to pay more. There was evidence tending to show that appellee raised eight bales of cotton of 500 pounds each on the land, worth eight cents per pound, and some of it was not gathered, one and one-half bales being left in the field. The evidence tended to show that the appellee offered to pay ten cents per hundred pounds more than others were paying in the neighborhood to get the cotton picked, but could not get it all gathered, and that he did not raise as much cotton as the plaintiff's evidence tended to show he did raise, and that his cotton was so

poor he could not get hands to pick it out. There was evidence, also, tending to show that there was no difficulty in that neighborhood in getting hands to pick cotton on the "Rector" farm, where appellee's cotton was grown.

After the evidence was all heard, plaintiff asked the court to give the jury the following instructions and declarations of law:

"1. The court declares the law to be that, if it appears from the evidence that the defendant was by the terms of the contract to pay plaintiff one-fourth part of the cotton raised on said twenty acres of land cultivated by him in cotton, or its value in cash, then it was the duty of the defendant to gather the cotton and pay the plaintiff her rent in good and apt time after the cotton matured.

"2. The court further declares the law to be that, if it appears from the evidence that the defendant failed to gather and save a part of the crop of cotton which he raised on said land, or through negligence permitted it to be wasted or lost, or converted any part of said cotton to his own use, he, the defendant, is nevertheless bound to pay plaintiff her rent the same as if said cotton had been gathered by defendant and accounted for in apt and proper time.

"3. The court instructs the jury that, if it appears from the evidence that the one-fourth part of the cotton raised by the defendant on said twenty acres of land exceeds in cash value the thirty dollars deposited by defendant in the Crawford County Bank to plaintiff's credit, they will find for the plaintiff for the amount above said thirty dollars."

The defendant excepted to these declarations of law and instructions, and the court refused to give any of them, to which refusal plaintiff excepted at the time.

The following instruction was given by the court:

"5. If you find that the defendant raised cotton which he did not gather, you will find for the plaintiff the one-fourth of the value of the cotton not gathered, unless you further find that defendant could not with due diligence have gathered the same, and the burden to show that such cotton could not have been gathered with due diligence rests upon the defendant."

To the giving of the fifth instruction, plaintiff objected at the time.

The jury having returned into court a verdict for the defendant, plaintiff filed her motion praying for a new trial and assigning the following causes therefor: "(1) Because the verdict of the jury is contrary to law and evidence. (2) Because the court erred in refusing to give the jury the declarations of law numbers one and two, and instruction number three, asked for by the plaintiff. (3) Because the court further erred in giving to the jury the fifth instruction asked for by defendant, which rulings and action of the court had a tendency to mystify and mislead the jury, greatly to the prejudice of plaintiff's rights."

The motion for a new trial was overruled, to the overruling of which motion plaintiff at the time excepted, and appealed to this court.

Turner & Turner for appellant.

1. Taking the defendant's own testimony, he failed to pay the amount due by $6.34. As to this amount, the mixim "*De minimis, etc.*," does not apply, as it constitutes a *considerable* portion of the whole. 57 Ark. 304. Taking the plaintiff's testimony as true, there was still due about $50.

2. Appellee was bound by the terms of his contract to pay one-fourth of the cotton raised, or its equivalent; and there is no escape from its binding force, unless

he was prevented from gathering the crop and accounting for the rent by the act of God or the public enemy, or of the appellant, and the burden of proving these, or any of them, was on the appellee. Bish. on Cont. secs. 372-3-4-5; 3 Kent, 465-6-7-8 and note; 7 Ark. 130; 25 *id.* 441; 2 Wall. (U. S.) 1.

HUGHES, J., (after stating the facts). A majority of the court are of the opinion that the proper construction of the contract between appellant and appellee is that appellee was bound, by its terms, to gather and deliver to appellant one-fourth of the cotton raised on the twenty acres; and that only the act of God, or the public enemy, or the act of the appellant, could excuse him from a compliance with this contract; that inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. Parties *sui juris* bind themselves by their lawful contracts, and courts cannot alter them, because they work hardships. The parties must take care of themselves, and must be held to the performance of their undertakings, when it is possible to perform them, and they are not unlawful. "But, to make the act of God a defense, it must amount to an impossibility of performance by the promisors. Mere hardship or difficulty will not suffice." 2 Parsons on Cont. (8 ed.) p. 672. It was not pretended that the cotton raised on the twenty acres *could not* be gathered; only, that it could not be gathered without much inconvenience and great and unusual expense. This would not excuse the appellee from performance of his contract to gather, which is included in his agreement to pay appellant one-fourth the cotton grown or its cash value. If he made this contract, and it proved a hard one, by the performance of which he

would evidently be at great inconvenience and suffer much loss, nevertheless, if possible of performance, he was bound to perform it unless excused as indicated.

The circuit court erred in refusing the instructions asked by plaintiff, and giving the one (number five) above, for which the judgment is reversed and remanded for a new trial.

RIDDICK, J., (dissenting.) I concur in the judgment, but do not agree to so much of the opinion as holds that nothing but the act of God or the public enemy can excuse the tenant from gathering his crop. When the tenant agrees to give a fixed sum of money or a certain quantity of cotton or other produce for rent, this rule would apply; but it is different when, as in this case, the tenant agrees to cultivate and gather the crop, and give the landlord a certain portion of the crop raised. The amount of the rent then depends upon the quantity of the crop raised, and this depends not only upon the labor and skill of the tenant and the fertility of the soil, but also upon the many contingencies that may beset even the most prudent husbandman.

The tenant must use due diligence both in cultivating and in gathering the crop, and the landlord is entitled to a share in such a crop as the tenant by labor and diligence can harvest, but to no more. The landlord may sue the tenant for the value of his share of the crop. In such a suit I agree that it would not be a valid defense for the tenant to say that the cost of gathering the crop would be greater than its value, for he must comply with his contract. But if a thief should enter the field at night, and steal a portion of the crop, or if, without fault of the tenant, a herd of breachy cattle should break in and destroy a portion of the crop, the landlord should, under a contract such as we have here, lose proportionately with the tenant; for the

agreement of the tenant, as I understand it, is not that he will give a fixed amount of rent, but only such a share in such a crop as he may be able to culivate and gather by due diligence. He is not an insurer of the crop, nor liable for its loss by causes against which he could not have guarded by the use of care and diligence.

For these reasons, it seems to me that the expression that nothing but the act of God or the public enemy can excuse the tenant, when applied to the facts of this case, is not an accurate statement of the law.

BUNN, C. J., concurs.

REYNOLDS v. ROTH.

Opinion delivered November 23, 1895.

ACTION ON NOTE—PLEADING.—A complaint in an action by the indorsee of a note against the maker need not set out a description of the payee where the note was indorsed before maturity.

NEGOTIABLE NOTE—DEFENSES—PARTIES.—The fact that the payee of a note was a fraudulent association is no defense to a suit by an innocent holder of the note, and in such action it is proper to refuse to make the organizers of the association parties.

NEGOTIABLE NOTE—JURISDICTION.—Refusal to transfer to equity an action on a note is not error.

NEGOTIABLE NOTE—CORPORATION AS PAYEE.—In an action by an innocent holder of a note payable to a corporation, the maker is estopped to deny the payee's corporate existence.

NEGOTIABLE NOTE—DEFENSE.—Failure of consideration for a note is no defense in an action by a transferee for value without notice before maturity.

NEGOTIABLE NOTE—TRANSFER.—That a negotiable note was not transferred to plaintiff by one authorized to transfer the same is a good defense.

PLEADING—CONSTRUCTION.—A general demurrer to an answer containing a good defense, but without proper definiteness and detail, should be treated as a motion to make more definite and certain.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

STATEMENT BY THE COURT.

The appellee sued the appellant upon a negotiable promissory note for $300, payable to the order of the Southern Hedge Company, and signed by appellant, upon which is the following endorsement: "For a valuable consideration, we hereby assign the within note to ———— without recourse in law or equity. The Southern Hedge Company, per C. C. Caldwell." The court sustained a demurrer to the complaint, which was amended. The defendant filed his motion to make the complaint more definite and certain by inserting "a full and proper description of the payee of the note," which was overruled by the court, to which the appellant excepted. Appellant then answered that the payee of said note, the Southern Hedge Company, was a fraudulent association; that appellant received no consideration for said note; and asked that the organizers of said association be made parties defendant, and that the cause be transferred to the Pulaski chancery court. Upon motion of the appellee, the court struck out that part of the answer relating to the formation of the Southern Hedge Company, and making other persons parties, and denied the motion to transfer, to which appellant excepted. Appellant then filed an amended answer, stating: "(1) That there was no such corporation as the Southern Hedge Company; (2) that he received no consideration for the note sued on; (3) that the note was not transferred to appellee by anyone authorized to transfer the same." A general demurrer to this answer was sustained by the court, whereupon the appellant asked for time to file a further amended answer, which was refused by the court, the cause having been reached for trial upon the calendar. The note was read in evidence, and judg-

ment rendered for plaintiff, to all of which appellant excepted, and appealed to this court.

Mark Valentine for appellant.

1. The motion to make the complaint more definite and certain should have been sustained. Sand. & H. Dig. sec. 492.

2. The note was assigned in blank, and without date, and the conclusion is that it was *not* assigned before maturity. Sand. & H. Dig. sec. 500.

3. The motion to transfer to equity should have been granted, on the ground of fraud in the forming of this pretended association.

4. The demurrer should have been overruled as to the defense that the note was not assigned by anyone having authority.

Morris M. Cohn for appellee.

1. The defense of no consideration could not be pleaded against a *bona fide* holder before maturity for value, nor could a failure of consideration affect the holder's right. Tied. Com. Pap. ch. xiv; 49 Ark. 465; 48 *id.* 454; 42 *id.* 22, 24; Benj. Chalmer's Bills & Notes, arts. 92 to 97.

2. Corporations may issue negotiable paper. Tied. Com. Pap. sec. 115. And they are bound to *bona fide* holders, even if the paper is *ultra vires*. *Ib.* sec. 118. The appellant, having executed the paper, is estopped to question the corporation's power to receive it. *Ib.* sec. 118; Benj. Ch. Bills & Notes, art. 287; Bigelow, Est. (2 ed.) 424. To admit evidence to contradict the existence of the payee would be to vary the contract. 50 Ark. 393; 55 *id.* 347.

3. Appellant had no right to introduce new parties and new issues by answer and cross bill in chancery. Dan. Ch. Pl. & Pr. vol. 2 (4 ed.), 1548, note; 17 How. 130, 145; 31 Ark. 345, 359–60.

4. The act of April 9, 1891, was not retroactive. Cooley, Const. Lim. (3 ed.) *370; 6 Ark. 484; 7 Conn. 550; 51 Ark. 56, 60.

5. The Act of 1873 (Acts 1873, p. 215) takes negotiable paper out of the provisions of Sand. & H. Dig. sec. 500; 42 Ark. 22, 24; Byles on Bills, *172.

6. The amended answer set up no defense not relied upon in the original answer.

Sufficiency of complaint in action on note.

HUGHES, J., (after stating the facts). The motion to make the complaint more definite and certain by inserting a full and proper description of the payee of the note sued on was properly overruled by the court. The note was made payable to the Southern Hedge Company, and the complaint alleged that it was endorsed before maturity, and this was not denied in the answer. The holder was not bound to set out a description of the payee.

Parties to suit on note.

The fact that the Southern Hedge Company was a fraudulent association was no defence to the suit by an innocent holder upon this note; and the appellant was not entitled to have the organizers of said association made parties; and there was no error prejudicial to appellant in striking out these allegations and requests from the answer. *Thompson* v. *Love*, 61 Ark. 81.

Jurisdiction of action on note.

There does not appear any reason for transferring the cause to equity, and there was no error in the court's refusal to do so.

Maker estopped to deny payee's existence.

Having executed his note payable to the Southern Hedge Company, the appellant could not deny its existence in a suit upon the note by an assignee thereof for value and without notice before maturity. Tiedeman on Commercial Paper, sec. 118.

Plea of "no consideration."

The plea of "no consideration" in the amended answer could not be urged to the note in the hands of an assignee for value and without notice before maturity.

Cagle v. *Lane*, 49 Ark. 465; *Tabor* v. *Bank*, 48 Ark. 454; Tiedeman on Commercial Paper, sec. 288.

Validity of transfer of note.

The allegation in the amended answer that the note was not transferred to appellee by any one authorized to transfer the same was a good defence, though not stated with proper definiteness and detail. It should have set out the facts, rather than a conclusion. But the demurrer should have been treated as a motion to make more definite and certain, and the appellant should have been allowed to amend.

Construction of pleading.

For the error in sustaining a demurrer to the third ground of the amended answer, and refusing appellant leave to amend his answer, the judgment is reversed, and the cause is remanded, with instructions to overrule the demurrer as to the third defense in the amended answer, and that the appellant be granted leave to make same more definite and certain.

EX PARTE HAWKINS.

Opinion delivered November 23, 1895.

CONSTITUTIONAL LAW—CONDITIONAL PARDON.—The statute authorizing the governor to grant pardons on condition that the convicted person "shall leave the state and never again return to it" (Sand. & H. Dig. sec. 2412) is not in conflict with Const. 1874, art. 2, sec. 21, providing that no person shall, "under any circumstances, be exiled from the state."

Appeal from Pulaski Chancery Court.

THOMAS B. MARTIN, Chancellor.

STATEMENT BY THE COURT.

S. D. Hawkins filed a petition in the Pulaski chancery court for a writ of *habeas corpus*. He alleged that in the year 1881 he was convicted of a felony in the

Lonoke circuit court, and sentenced by that court to be imprisoned in the state penitentiary for the period of four years. That afterwards, on the 7th day of June, 1881, and while he was serving his sentence of imprisonment, the governor of the state granted him a pardon upon the express condition following: "That the said Hawkins should immediately depart from and remain without the borders of the state of Arkansas, said pardon to be void if the said Hawkins was found within the borders of the state after the 12th day of June, 1881." He further alleged that, by virtue of said pardon, he was set at liberty, and left the state before the 12th day of June, 1881, and remained out of the state for several years; that he then returned, and was re-arrested and confined in the penitentiary. He alleged that the condition attached to said pardon was null and void, that his imprisonment was illegal, and prayed that a writ of *habeas corpus* be directed to E. T. McConnell, superintendent of the state penitentiary, etc. All formalities were waived, McConnell appeared, and filed a demurrer to the petition, which demurrer was sustained by the court, the petition dissmissed, and writ refused. From this order of the court an appeal was taken.

Dan W. Jones & McCain for appellant.

Exile or banishment is not allowed in this state. Const. Art. 2, sec. 21. On conditional pardons, see 17 Am. & Eng. Enc. Law, p. 238. If the condition subsequent is void, the grant is absolute. Tiedeman on Real Prop. sec. 274. Where the condition is void, the pardon is absolute. 4 Call (Va.), 35; *State* v. *Smith*, 1 Bailey (S. C.) A pardon must be taken most beneficially for the subject, and most strongly against the King. 4 Blackstone, 401. See also 1 Bish. Cr. Law, sec. 915; 2 Parsons, Cont. 506, note *n*; 22 Gratt (Va.), 801; 10 Ark. 284; 18 How. 310; 4 Kent's Com. 130.

E. B. Kinsworthy, Attorney General, for appellee.

Where there is no restriction laid upon the governor's pardoning power, he may exercise it upon such conditions as he may see proper. 10 Ark. 284; 10 S. E. 611. This is the rule, without exception. Section 18, article 6, of the constitution gives the governor the right to grant pardons, under such restrictions as may be prescribed by law. Under sections 2412 to 2416, Sand. & H. Dig., the legislature has expressly stated that the governor may pardon a criminal upon the condition that he leave the state. It is contended in this case that section 21, article 2, of the constitution, which prohibits any person from being exiled from the state, so restricts the governor's pardoning power that he cannot grant a pardon on the condition that the party pardoned shall leave the state and not return. There is no conflict in these two sections of the constitution. If the members of the constitutional convention had intended to abridge the governor's power in the matter of pardons, they would have done so in the section defining his powers and placing certain limitations therein, and would not have undertaken to do so in a section devoted more to limitations upon the legislative and judicial departments of the state. Banishment is a punishment inflicted upon criminals by compelling them to quit a city, place or county. Bouvier's Law Dictionary, page 227. Our constitution does not say that a man shall not expatriate himself, but that he shall not be exiled. In other words, no authority in this state shall force him into exile, but there is nothing in the constitution which denies him the right as a subsequent condition of pardon for a grave crime. 1 Parker, N. Y. 57–8.

Although the king, under the common law, could not banish a subject, he could pardon him on condition that he should be sent from the kingdom. 1 Blackst.

Com. p. 137, and authorities cited. A conditional pardon is a contract between the governor and the criminal, and when the criminal accepts the pardon, he agrees to perform whatever condition it may contain; so he may agree to any condition that it would not be unlawful or immoral for him to do. It would neither be unlawful nor immoral for one to leave the state forever, if he so desired; so such a condition to a pardon is valid. 1 Parker (N. Y.), 47; 28 Pac. 108. The condition is precedent, and, if void, the pardon is void. 1 Parker (N. Y.), 61; see 48 Ia. 264.

RIDDICK, J., (after stating the facts.) The first question for us to determine is whether the condition upon which the pardon was granted was valid or not. In other words, did the governor have power to annex to his pardon the condition that the petitioner should "depart from and remain without the borders of the state?" It is said, in Bacon's Abridgment, that "it seems agreed that the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend." Bacon's Abridgement, vol. 7, p. 412; 4 Blackstone, Com. p. 401.

It is now well settled that when the constitution gives an unrestricted power of pardon to the governor of the state, he has the right to annex to his pardon any condition, precedent or subsequent, provided it be not illegal, immoral, or impossible to be performed. *Ex parte Hunt*, 10 Ark. 284; *United States* v. *Wilson*, 7 Pet. 150; *Ex parte Wells*, 18 How. 307; *Arthur* v. *Craig*, 48 Iowa, 264; *State* v. *McIntire*, 59 Am. Dec. 576; 1 Bish. Crim. Law, sec. 914.

Our constitution provides that the governor shall have power to grant pardons "under such rules and

regulations as shall be prescribed by law," and a statute expressly authorizes him to grant pardons on condition that the convicted person "shall leave the state and never again return to it." Sec. 18, Art. 6 Const. 1874; sec. 2412, Sand. & H. Digest.

But it is said that this statute is in conflict with section 21 of article 2 of the constitution, which provides that under no circumstances shall any person be exiled from the state. We do not agree with this contention. That provision of the constitution forbidding exile was intended as a protection to citizens and inhabitants of the state. Any statute of the legislature, or order of the courts, or executive, inflicting upon a person banishment from the state would, under that section, be void. It forbids exile or compulsory banishment, but it does not say that a person may not, of his own volition, leave the state to escape punishment, or that the governor may not, by his pardon, permit him to do so. To hold that it did would be to construe a provision that was intended to protect the inhabitants of the state into one restricting the power of the governor when exercised in their behalf. Who can doubt that it would be esteemed a great boon by most of those unfortunates, against whom a sentence of imprisonment in the penitentiary for a long term of years has been rendered, to be allowed to escape it by leaving the state? When a citizen of another state or country commits a crime in this state, it might, under some circumstances, be to the best interest of all concerned that a pardon be granted on condition that he leave the state and never return. One can readily conceive of other instances when, to prevent the possibility of future strife between the convicted person and those against whose persons or property he had committed a crime, it would be proper to impose this as a condition of the pardon.

We think the constitution does not deprive the governor of the power to grant pardons on such conditions. As Hawkins accepted his pardon on this condition, and afterwards violated it, the pardon by its own terms became void. His subsequent arrest and imprisonment were therefore legal. The judgment of the court dismissing his petition was, in our opinion, right, and is affirmed.

BUNN, C. J., concurred in the judgment on the ground only that, if the condition was void, the pardon was also void.

[NOTE.—For conditions in pardons generally, see note to *People* v. *Cummings* (Mich.), 14 L. R. A. 285.—Rep.]

BACH v. STATE.

Opinion delivered November 30, 1895.

LIQUOR—ILLEGAL SALE—QUANTITY.—One licensed to sell liquors in quantities not less than one quart will not be liable for selling two pints of whisky in separate flasks, delivered at the same time.

Appeal from Jackson Circuit Court.

RICHARD H. POWELL, Judge.

M. M. Stuckey and *Joseph W. Phillips*, for appellant.

Section 4856, Sand. & H. Dig., does not prohibit the sale by a licensed dealer of *one quart* of liquor in *two bottles*. The act does not say it shall be sold in *one vessel* only. Such acts are strictly construed. There was only *one* sale, *one* price, *one* purchase, *one* delivery to *one* person. No subterfuge was shown, nor any attempt to evade the law. 11 Am. St. Rep. 260; 10 *id.* 30; 49 Mich. 384.

E. B. Kinsworthy, Attorney General, for appellee.

A quart in quantity means *one quart* in quantity. The legislature did not say less than *two pints*. If the liquor was sold in two pints, or other less quantities, with intent to violate the law, then it was a violation of the law. 37 Miss. 353; 69 Ind. 271; 1 Ired. (N. C.) L. 384, 386; 1 Ind. 366. The meaning of the statute is *one package* containing *not less* than a quart.

PER CURIAM. The appellant, Adam Bach, was indicted and convicted in the Jackson circuit court, after trial by the court sitting as a jury, for selling liquor in quantities less than one quart, without a license, and appealed to this court.

The only question in the case is as to the sufficiency of the evidence to warrant the conviction, which, as taken from the abstract of the attorney general, was as follows, to-wit: "The defendant, Bach, obtained from the Jackson county court a license to sell vinous, spirituous and malt liquors for the year 1895, in the town of Newport, Jackson county, Arkansas, a place where it was lawful for said county court to grant a license, and there is no question raised in this case as to the regularity of the said liquor license, or that the defendant had the right to sell liquors in said town during said year in quantities not less than one quart. That, within one year of the finding of the indictment herein, the said defendant did sell to one Jake Phillips two pints of whisky, the same amounting to one quart, and that the said sale of the said two pints was made to the same person at the price per quart, and at the time of sale the whole quart was delivered to the purchaser; in fact there was only one sale, one price, one purchaser of two pints, amounting to one quart, delivered at one and the same time. And this was all the evidence."

There being no evidence to show that this putting of the quart of whisky into two pint flasks was a subterfuge or mere device resorted to to evade the law forbidding the sale of whiskey in quantities less than one quart without a license, and the circumstances detailed in evidence not being such as to show that an evasion of the law was intended, the court is constrained to regard the circumstance of putting the quart of whisky into two bottles or flasks as a mere manner of delivery of the whole amount for the sake of convenience, or, at least, might have been the case; and a majority of the court, taking this view of the matter, are of opinion that the circuit court erred in its judgment of conviction.

The cases cited by the attorney general in support of the judgment of the court below do not seem to this court to be altogether applicable. Thus, in each of the cases of *Thomas* v. *State*, 37 Miss. 353, *State* v. *Kirkham*, 1 Iredell L. (N. C.), 384, and *Murphy* v. *State*, 1 Ind. 366, there was no delivery, at the time of the sale, of the whole quantity making up the quart, but substantially, in each case, the purchaser was permitted to take a portion of the whole amount, leaving the remainder to be doled out by portions in the same way, from time to time, as he (the purchaser) should call for it. In those cases it was held that the sale was in quantities less than one quart. The particular point in each was that, while there was a theoretical or pretended sale of the whole amount at one time, there was in fact no delivery at once, except in a quantity less than one quart. The conditions do not answer to the conditions in the case at bar. In the case of *Weireter* v. *State*, 69 Ind. 269, and in *State* v. *Zeitler*, 63 Ind. 441, upon which the former is based, the court was construing a special statute of that state prohibiting the sale of intoxicants in less quantities than one quart to an habitual drunkard. In each of the two cases the delivery

was to several others, as well as to the drunkard, although all the smaller quantities were sold to him. He drank one of them only, and the court held, under the peculiar statute, that the seller sold to the drunkard in a quantity less than one quart. The gravamen of the crime in those cases was the selling to the drunkard, and, as he consumed but the drink,—a quantity less than a quart,—the seller was held guilty.

Reversed and remanded.

TENNY v. PORTER.

61 329
66 79

Opinion delivered November 30, 1895.

LIMITATION—RECOVERY OF LAND SOLD AT JUDICIAL SALE.—An action to foreclose a mortgage of land purchased by the mortgagor at judicial sale is not an action "for the recovery of land sold at judicial sales", within the five years' statute of limitation (Sand. & H. Dig. sec. 4818).

TRUST FUNDS—LIABILITY OF DEPOSITARY.—Where a trustee deposits trust funds with a business firm in his own name in the usual course of business, the firm will not be liable to the beneficiaries of the trust where it had no notice that the money did not belong to the trustee until after the deposit had been withdrawn from its control, and it had settled with the trustee.

COMPETENCY OF WITNESSES—TRANSACTIONS WITH DECEASED.—The testimony of a plaintiff as to transactions with a deceased person, made in a civil action wherein the guardian of minors was a defendant, is competent, where he was called to testify by the opposite party.

USURY—RENEWAL NOTE.—Where a surety in a note, for a valuable consideration received from the principal, assumes the debt, and gives a new note in renewal of the old one, neither he nor his heirs can defeat the collection of the new note on the ground of usury in the old one.

CONFLICT OF LAWS—VALIDITY OF LIEN.—The validity of a note and mortgage will be determined by the law of the state in which it is executed, although the mortgage is upon land situated in another state.

Appeal from St. Francis Circuit Court in Chancery.

MATTHEW T. SANDERS, Judge.

W. G. Weatherford for appellant.

1. In 36 Ark. 591, 606, this court expressed an opinion regarding the construction of the writing called the assignment, but it was clearly *obiter dictum.* It does not bind appellants, and, with all deference, the views expressed therein were erroneous. A power to sell, coupled with an interest *in the thing to be sold*, survives the grantor; otherwise, where the interest is in the *proceeds only* of the thing. To constitute a power coupled with an interest, the interest must be in the subject matter, not in that which is *produced* by the exercise of the power. 8 Wheat. 174–5; 70 Cal. 296; 45 Ind. 183; 6 Conn. 559; 53 Pa. St. 214; 28 Ga. 511; 59 Tex. 397; 5 Howard, 233.

2. Appellees are barred by the statute of limitation. Mansf. Dig. sec. 4474; 53 Ark. 400, 410; 52 *id.* 171.

3. The courts of this state will not enforce usurious contracts made in another state. It is against the public policy of the *lex fori.* 4 Pet. 230; *Ib.* 376; 3 Dall. 374; 111 U. S. 252; 101 *id.* 108; 54 Ark. 187; 47 *id.* 378; 46 *id.* 420; 41 Ark. 340.

4. Even in Tennessee, the surety is entitled to have the usury abated. 9 Heisk. 491; 6 Lea, 351.

5. Appellees, holding the equitable title, are seeking to establish their claim against the holders of the legal title. They should be required to do equity, and restore the money appropriated by them to the payment of a *past due* indebtedness of their father. They should do equity. 57 Ark. 536; 53 *id.* 69; 9 Lea, 415; 2 Head, 85; 10 Yerg. 105; 6 Cold. 509; 6 Humph. 438; Story, Eq. Jur. sec. 64; 4 Dall. 284; 5 How. 192; 46 N. Y. 615; 50 Mo. 603; 79 N. Y. 183; 54 Iowa, 86. An ante-

cedent debt does not constitute a valuable consideration, so as to make the creditor a *bona fide* purchaser. 2 Pom. Eq. sec. 1048 and note, and sec. 1047.

N. W. Norton, for appellees.

1. The assignment passed on in 36 Ark. 576 was an equitable mortgage to appellees. 6 Am. & Eng. Enc. Law, 680, 681; 2 Dessaussure, 552; 2 Am. Dec. 696; 1 Jones, Mortg. sec. 162. This question is now *res judicata*. 1 Black. Judgm. sec. 148; 2 *id.* sec. 524.

2. The cross-bill by appellees was not an action "for recovery of lands," and was not barred by the five years' statute. 31 Ark. 272; 56 *id.* 485; 43 *id.* 569; *Ib.* 504.

3. This was a Tennessee contract, and is governed by the usury laws of that state. 35 Ark. 52.

4. The insurance money was deposited by J. M. Farrow and withdrawn by him, and appellees had no notice of any trust.

5. J. M. Farrow assumed for a consideration the J. J. Farrow debt, and cannot plead usury. Tyler on Usury, p. 403; 32 Ark. 362.

BATTLE, J. This is the second time this action has been in this court on appeal. It appears the first time as *Porter, Taylor & Co.* v. *Hanson*, 36 Ark. 591.

J. M. Farrow brought an action in the St. Francis circuit court against John Parham to foreclose a vendor's lien on certain lands, and obtained a decree against him for $6,037, which was declared a lien on the lands, and they were sold by a commissioner of the court, and purchased by Farrow at the price of $4,800. The court confirmed the sale, but postponed the execution of the deed, holding that Parham was entitled to one year in which to redeem.

Farrow, being indebted to Porter, Taylor & Co. in the sum of $3,188, and to Newton, Ford & Co. in the

sum of $3,050.20, and thinking that Parham might redeem the lands, executed to them an instrument of writing, empowering them to collect and receive the redemption money from Parham, and apply it to the payment of their debts *pro rata*, and providing that, if Parham failed to redeem, one John B. Cummins should, as trustee, sell the lands, and appropriate the proceeds to the payment of the debts.

Before the expiration of one year after the sale under the decree of the court, Farrow died, and the lands, not having been redeemed, were conveyed by a commissioner, under an order of the court, to his heirs.

In August, 1877, Hanson, Weatherford & Estes, a firm of lawyers, instituted an action in the St. Francis circuit court against the heirs of Farrow, and D. T. Porter, W. F. Taylor and G. W. McCrae, as partners composing the firm of Porter, Taylor & Co. and the first two as surviving partners of the late firm of Newton, Ford & Co., to enforce a lien upon the lands for professional services rendered by them in the suit instituted by Farrow against Parham. The lands were again sold, the last time under a decree rendered in the last mentioned suit, and were purchased by the creditors, who were parties thereto. But they refused to comply with their bid, and tendered an answer and cross-bill instead, in which they asserted rights in the lands, or the proceeds of the last sale, under the instrument of writing executed to them by Farrow, superior to all others, and appealed from an adverse decree.

This court held that they were bound by their purchase, and that Hanson, Weatherford & Estes had the superior lien, but expressed the opinion that the instrument of writing created a lien in their favor, and remanded the cause with the direction that the heirs of Farrow be brought in by new service "for all matters connected with the cross bill, and have day in court."

The attorney's lien was subsequently discharged, and the creditors, Porter, Taylor & Co. (now Porter & McCrae), and the Farrow heirs, the appellants, were left to litigate.

At the October term, 1881, the St. Francis circuit court directed a warning order to be published, requiring the Farrow heirs to answer Porter, Taylor & Co.'s cross-bill. On the 18th of February, 1882, they filed an answer, and alleged that, within the year allowed for the redemption of the lands from the first sale, J. M. Farrow died, and the St. Francis circuit court, at its October term, 1876, vested the title to the lands in them, and that more than five years had elapsed before the cross action was commenced against them.

They denied that the creditors were entitled to any relief under the instrument of writing executed by J. M. Farrow, and averred that the debts secured thereby were illegal and usurious; that, on the 1st of April, 1871, J. J. Farrow executed to said creditors a note for $3,951.94, which was due on the 1st of December, 1871, and on the 19th of December, 1871, together with J. M. Farrow, their father, executed a note in renewal of the first, which was due on the 1st of January, 1873, for $4,428.72, including $474.52 interest for thirteen months, —more than 12 per cent. per annum,—and this was part of the note secured by the instrument of writing sued on.

By the way of counter claim, they alleged that their father, J. M. Farrow, had, on the 20th of June, 1871, in his possession, as their trustee, $9,500, belonging to them, which he, on that day, delivered to said creditors, he being individually indebted to them as Newton, Ford & Co. in the sum of $1,838.69, which they retained out of the $9,500, and appropriated the remainder, according to his directions, to the payment of his individual account with them.

And they filed with their answer interrogatories which they propounded to the cross-complainants, and asked that they be required to answer them, which was done.

Upon a final hearing upon the merits the court found that the cross-action was not barred by the statutes of limitation; that J. M. Farrow, the father of the defendants in the cross-complaint, collected in 1871 $10,000 of the St. Louis Mutual Life Insurance Company, which was a trust fund in his hands for them; that on the 20th of June, 1871, he deposited of this fund $9,500 with Porter, Taylor & Co., which they received, and credited him therewith as his fund, and on the same day appropriated $1,838.69 thereof to the payment of an indebtedness of J. M. Farrow to them, but that it does not appear that they had notice of the trust at the time of the deposit and appropriation; that the indebtedness of J. M. Farrow to the cross-complainants, as evidenced by his notes to them, was contracted in Tennessee, and was usurious, but that in Tennessee a usurious contract may be purged of usury, and the principal and six per cent. per annum interest thereon can be collected; that the note executed by J. M. Farrow in payment of the indebtedness of J. J. Farrow was based on a valuable consideration received by the former from the latter, and was, therefore, valid as to principal and interest; and that, purging the indebtedness of J. M. Farrow, except the last mentioned note, of usury, he was indebted to cross-complainants in a sum larger than the amount of the proceeds of the second sale under the decree of the St. Francis circuit court and interest thereon; and decreed that they retain in their hands such proceeds, they having purchased the lands at the second sale, and still owing for the purchase money at the rendition of the decree.

As to limitation of action.

The finding of the court as to the statute of limitation is correct. The cross-action of Porter & McCrae was not an action to recover lands within the meaning of the five years' statute pleaded by the defendants; and the plaintiffs and defendants therein claimed under the same judicial sale. *Duke* v. *State*, 56 Ark. 485; and *Phelps* v. *Jackson*, 31 Ark. 272.

Liability of depositary of trust funds.

The allegations of the Farrow heirs as to the $9,500 were denied by the plaintiffs in the cross-action. No evidence as to their truth or falsity appears in the record, except an answer filed by them in an action instituted by the Farrow heirs, or a part of them, against the plaintiffs in this action in a Tennessee court. In that answer they admitted that J. M. Farrow deposited with Ford, Porter & Co. $9,500, but denied that there was paid out of that sum an indebtedness of J. M. Farrow to the late firm of Newton, Ford & Co. of which they had been members, and in which they were then interested; and alleged that, three days before the receipt of the $9,500, J. M. Farrow was charged with cash paid Newton, Ford & Co., $1,464.99," but this occurred before the credit of the $9,500, and had no connection whatever with that money; that, after the deposit was made, the account of Farrow was continued as usual, and "small amounts of merchandise were from time to time sold him, and charged on the account;" that "these items for merchandise for the month of June, 1871, amounted to $93.60, for July about $66, for August $69, for September $95.24, for October $29.46, and the full amount of such debts, after the date of such deposit and to the closing of the account, aggregated less than $400;" that "the balance of the debit items of the account were cash paid to the said Farrow in person or on his order;" that the deposit of this money was in the usual course of business, and without any notice that it was not his own, until an action for the settlement

of the estate of Farrow had been commenced, long after the money had been withdrawn from their hands and control, and when, it appears, repeated settlements had been made by them and Farrow—Farrow had died—and they had, many years prior to the notice, probated their claims against his estate. Under these circumstances, they were not liable to the heirs for the deposits.

As to the note given by J. M. Farrow in the payment of the indebtedness of J. J. Farrow to Newton, Ford & Co. it appears that J. J. Farrow executed a note to Newton, Ford & Co., for $3,951.94 on the 1st of April, 1871; that on the 19th of December, 1871, J. J. and J. M. Farrow paid this note by executing another for $4,428.71, payable on the 1st of January, 1875, adding for interest $474.52, and for stamps $2.25; and that on the 21st of February, 1876, they executed to Newton, Ford & Co. another note for $3,050.20 in renewal of the note for $4,428.71, and this is one of the notes secured by the instrument of writing in question. These facts appear in an answer of plaintiffs to an interrogatory propounded to them by the defendants. It further appears in the same answer that J. M. Farrow did not become a principal in said notes "until long afterwards, when, for a consideration moving from J. J. Farrow to J. M. Farrow, the latter assumed the balance of said indebtedness then due."

Competency of testimony.

But appellants, the defendants, say that the portion of the answer as to the consideration was not responsive to the interrogatory, and for that reason, and because it related to transactions with a deceased person, and was made in an action wherein the guardian of minors was a defendant, it was not competent testimony. The question propounded is as follows: "Please examine the paper marked 'X No. 1' attached to our answer hereto, which is referred to in paragraph 6, and state if it is not genuine, and if it was not furnished by the house of

Newton, Ford & Co., and if the indebtedness therein referred to is not the same that is evidenced by the note of James M. Farrow to Newton, Ford & Co., dated February 21, 1876, for $3,050.20, and included in the writing which is referred to in your cross-complaint." It will be seen from this question that its object was to ascertain the consideration of the note for $3,050.20. To it the appellees (plaintiffs) answered as follows: "The paper marked 'X No. 1,' filed with the answer, is genuine, and was furnished by the house of Newton, Ford & Co. The indebtedness of [to] Newton, Ford & Co. of $3,050.20, referred to, is part of the original indebtedness of J. J. Farrow mentioned in the exhibit. J. M. Farrow was the surety on the note credited in said exhibit, and the interest charged therein was in fact a charge against J. J. Farrow; and J. M. Farrow did not become the principal debtor on said indebtedness until long afterwards, when, for a consideration moving from J. J. Farrow to J. M. Farrow, the latter assumed the balance of said indebtedness then due." The answer was fairly responsive to the question. An answer in the affirmative would have made it appear that the note for $3,050.20 was executed by J. J. Farrow as principal and J. M. Farrow as surety, and was usurious. That would have been false. Hence, to give a true answer, it was necessary for appellees to respond as they did. As they were called to testify by the opposite party, their answer was competent evidence. Schedule of Constitution, sec. 2.

When renewal note not usurious.

The note of J. M. Farrow for $3,050.20 being based on a valuable consideration received by him from J. J. Farrow, it is a valid obligation. Neither he nor his heirs can defeat the collection of it by pleading usury. *Pickett* v. *Merchants National Bank*, 32 Ark. 346, 374; Tyler on Usury, 403.

The last mentioned note being a valid note, and the other purged of usury according to the laws of Tennessee, where the contracts in controversy were made, J. M. Farrow was indebted to appellees in an amount exceeding the purchase money of the second sale of the lands and interest thereon.

Validity of mortgage lien.

But it is contended by appellants that, inasmuch as the constitution of this state declares that all contracts for a greater rate of interest than 10 per cent. per annum shall be void, and the notes executed by Farrow to appellees bear a greater rate than 10 per cent. per annum, and the lands on which the lien is charged by the instrument of writing in question lie in this state, the writing creating it is void. But this contention is not correct. The law of the place which determines the validity of a contract secured by a mortgage determines whether the mortgage be valid or usurious, irrespective of the place where the land which is the subject of the mortgage is situated. Contracts for a greater rate of interest than is allowed by the laws of this state, when valid according to the laws of the place which determine their validity, have been frequently upheld and enforced by our courts. There is no good reason why a mortgage or lien on lands in this state securing such interests should not also be enforced. 1 Jones on Mortgages (5 ed.), secs. 657–661, and cases cited; and Pingrey on Mortgages, secs. 795–798, and cases cited.

The validity of the contracts secured by the lien in this case is determined by the laws of Tennessee. One being valid as to the principal and interest, and the other except as to all interest in excess of six per cent. per annum, the lien securing them is valid to the same extent.

It is further contended by appellants that the power conferred on John B. Cummins by the instrument of writing executed by Farrow to secure creditors, not be-

ing coupled with an interest in the lands thereby encumbered, did not survive Farrow. But this is immaterial. No one is seeking to exercise the power. The instrument of writing is an equitable mortgage, and appellees have brought their action to foreclose it, which they had the right to do.

The decree of the circuit court is affirmed.

KANSAS & ARKANSAS VALLEY RAILWAY COMPANY *v.* FITZHUGH.

Opinion delivered November 30, 1895.

BILL OF EXCEPTIONS—DEATH OF JUDGE—MANDAMUS TO CLERK.—Mandamus will not lie to compel the clerk of the circuit court to sign the name of the trial judge, who died since the trial, to the bill of exceptions, as it is not his duty under any circumstances to do so.

Petition for mandamus to Crawford Circuit Court.

HUGH F. THOMASON, Judge.

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

The bill of exceptions must be signed by the judge presiding at the trial. 40 Ark. 172; 37 *id.* 370; 42 *id.* 278; 34 *id.* 627; 37 *id.* 528; 51 *id.* 279; Mansf. Dig. sec. 5160. We have no statute settling the practice, in case of the death of the presiding judge. Equity, doubtless, has power to grant relief (35 Ark. 124; 40 *id.* 339; 40 *id.* 551); but this court has general superintending power over all inferior courts, and, in aid of its appellate and supervisory jurisdiction, may issue remedial writs, and, we think, has power to compel the clerk to sign the judge's name to the bill of exceptions, etc. See 34 Ark. 177; 35 *id.* 298; 48 *id.* 283; 45 *id.* 158; 39 *id.* 129; 1 *id.* 280; 2 Duer (N. Y.), 607; 11 N. Y. 343; 1 Kernan, 345; 3

S. & Marsh. 119; 6 How. Pr, 445; 6 Cowen, 746; Art. 7, sec. 4, const. 1874; 35 Ark. 301. See, also, as to power of supreme court to grant relief in such cases, 41 Mich. 726; 20 Wis. 215; 25 Cal. 365; 35 Mo. App. 39; 7 So. 383; 35 N. E. 604.

Chew & Fitzhugh and *Williams & Bradshaw.*

Mandamus lies only to compel the performance of a legal duty. Merrill on Mandamus, sec. 78; 34 N. J. 254; 18 Fla. 17. It will not lie to compel a man to do that which the law does not make his duty to perform. *Ib.* 79. It is not the duty of a clerk to sign his own name, or that of a judge to a bill of exceptions.

RIDDICK, J. Henry L. Fitzhugh, as administrator of the estate of John Franklin, deceased, brought suit and recovered a judgment in the Crawford circuit court against the defendants, Kansas & Arkansas Valley Railway and Little Rock & Fort Smith Railway, for the sum of three thousand and fifty dollars. On the same day that the judgment was rendered, a motion for a new trial was filed, overruled, exceptions noted, appeal prayed, and sixty days granted defendants to prepare and file their bill of exceptions. Eight days afterwards, and before the bill of exceptions was prepared and submitted to the judge who presided at the trial, he died. Thereupon said defendants filed their petition in this court, asking that the clerk of the Crawford circuit court be compelled by a writ of mandamus to sign the name of the presiding judge to said bill of exceptions.

The application for the writ must be denied. It is not the duty of the clerk of the circuit court, under any circumstances, to sign the name of the judge thereof to a bill of exceptions, and the writ of mandamus cannot be invoked to compel an officer to do that which the law does not make it his duty to do. It

lies only to compel the performance of legal duties. *Chicot Co.* v. *Kruse*, 47 Ark. 85; *Fitch* v. *McDiarmid*, 26 Ark. 482; *Brownsville* v. *Loague*, 129 U. S. 493; Merrill on Mandamus, sec. 50.

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KANSAS & ARKANSAS VALLEY RAILROAD COMPANY *v.* FITZHUGH.

Opinion delivered November 30, 1895.

NEW TRIAL—JURISDICTION OF EQUITY TO GRANT.—When a party who is himself free from fault, and against whom an unjust and inequitable judgment at law has been rendered, has lost his right of appeal by unavoidable accident, as by the death of the presiding judge before signing the bill of exceptions, a court of equity has power to grant relief by compelling the successful party to submit to a new trial at law. (BUNN, C. J., dissenting.)

MASTER AND SERVANT—NEGLIGENCE.—A railroad company is liable for the killing of an employee on its track by an engine, although he was guilty of contributory negligence, when its employees in charge of the engine knew of his danger in time to have avoided the injury by the use of ordinary care, and failed to do so.

SOLEMN ADMISSION—ESTOPPEL.—Where, in an action against a railroad company for the death of an employee caused by the negligence of an engineer, defendant admits on the trial that deceased and such engineer were not fellow servants, it cannot on appeal claim that such employees were fellow servants.

Appeal from Crawford Circuit Court in Chancery.

JEPHTHA H. EVANS, Judge.

Complaint by the Kansas & Arkansas Valley Railway Company and the Little Rock & Fort Smith Railway Company against H. L. Fitzhugh, administrator of the estate of John Franklin, deceased. The facts are stated by the court as follows: This is a proceeding in equity to procure a new trial in an action at law. It is the same case in which an application for a writ of mandamus was presented to this

court, asking that the clerk of the Crawford circuit court be compelled to sign the bill of exceptions. The presiding judge died before signing the bill of exceptions. As the proper course to pursue was a matter of doubt, counsel for appellant not only presented a petition for mandamus, but filed a complaint in equity for a new trial. The complaint alleged that on May 4, 1893, H. L. Fitzhugh, as administrator of the estate of John Franklin, deceased, had sued the defendants at law in the Crawford circuit court for the benefit of the wife and next of kin of said deceased; that said administrator, for a cause of action, alleged that said Franklin had been killed by the negligence of the employees of said railway companies while operating and running one of their engines; that said action at law had been tried before a jury in said court, the Hon. Hugh F. Thomason, judge, presiding; that a verdict and judgment for $3,050 had been rendered against complainants; that on the same day a motion for new trial had been filed, overruled, exceptions saved, and appeal prayed; that sixty days had been granted complainants in which to prepare and file their bill of exceptions; that, eight days afterwards, and before the bill of exeptions could be prepared and filed, the judge who had presided at the trial was stricken down while on the bench, and died shortly afterwards; that the death of the judge left no one who could sign the bill of exceptions, and that their right of appeal was thus cut off, working complainants great and irreparable wrong. The complaint set out the facts of the trial in the case at law. A bill of exceptions, containing the evidence, the rulings, and instructions of the court on the trial at law, was made an exhibit to the complaint. The bill of exceptions had been prepared and agreed to by the counsel for both parties as a correct bill of exceptions, but had not been signed by the judge. The complaint further alleged

that the circuit court had committed errors prejudicial to the rights of complainants, and that the verdict of the jury was without evidence to support it, and the judgment unjust and inequitable. The complaint prayed that the cause be heard, and that the appellee be compelled to submit to a new trial at law, or that his judgment be enjoined, and for other proper relief.

Appellee filed an answer, admitting most of the facts alleged, but denying that the court committed any errors in the trial at law, or that the judgment was without evidence to support it, and denying that complainants were entitled to the relief prayed.

The cause was heard on the complaint, answer and exhibits thereto. The bill of exceptions prepared by counsel, and containing the evidence as taken down by a stenographer, was by consent read in evidence, it being agreed that it contained a full and correct statement of the evidence and rulings of the court in the trial at law.

The chancellor dismissed the complaint for want of equity, from which decree an appeal was taken.

Dodge & Johnson for appellant.

1. A chancery court has power to grant the relief prayed. When from fraud, accident or mistake, one litigant obtains an unfair advantage of another, before or *after* judgment, courts of equity are bound in equity and good conscience to grant relief. In this cause, it was *accident*—the death of the judge presiding. Rapalje & Lawrence, Law Dict. p. 10; 1 Bouv. Law Dict. 45; Story, Eq. Jur. vol. 1, sec. 78; 1 Am. & Eng. Enc. Law, p. 824; 3 Blackst. Com. p. 43; Bisph. Eq. sec. 174; 1 Pom. Eq. Jur. 446; 15 Fla. 396; 1 Ark. 43, 195; 5 *id.* 501; 6 *id.* 84, 360; 11 *id.* 443, 583; 13 *id.* 604; 14 *id.* 36; 25 *id.* 372; 35 *id.* 107; *Ib.* 124; 38 *id.* 283; 40 *id.* 338; 40 *id.* 552; 38 *id.* 283; 48 *id.* 536; 51 *id.* 343.

2. The court should restrain defendants from enforcing the judgment at law, and compel them to submit to a new trial at law. See cases cited *supra*.

3. Upon the merits of the case, the proof shows that Franklin was guilty of *contributory negligence*, and he cannot recover. 36 Ark. 371; 36 *id.* 41; *Ib.* 451; 46 *id.* 513; 49 *id.* 257; 46 *id.* 555; *Ib.* 388; 51 *id.* 467; 56 *id.* 271.

4. When one takes employment in the service of a railroad, he assumes all the risks and hazards incident to his employment. 35 Ark. 613; 46 *id.* 396; *Ib.* 569; 51 *id.* 467; 56 *id.* 271; 145 U. S. 418; 41 Ark. 549; 53 A. & E. R. Cas. 421; 94 Cal. 326; 53 Fed. 61; 17 *id.* 882–6; 156 Mass. 503; 75 Ill. 106; 27 Minn. 137; 47 Miss. 420; 2 Mees. & W. 244; 4 Bing. 142; 14 S. W. 243; 30 A. & E. R. Cas. 163; 13 N. W. 508; Wood on Mast. & Serv. sec. 382; Sh. & Redf. Negl. sec. 99. In view of the evidence, the verdict was contrary to law and the evidence.

5. The deceased was fellow servant of the engineer, and the company is not liable. Underhill, Torts, 52; 85 Ill. 500; McKinney on Fellow Servants, p. 28, and note; 3 Atl. 11; 35 N. W. 582; 14 Minn. 360; 32 *id.* 54; 29 *id.* 162; 33 Fed. Rep. 801; 141 Mass. 565. The fellow servant act is unconstitutional; but if not, the engineer and deceased were fellow servants, under the act.

Chew & Fitzhugh and *Williams & Bradshaw*, for appellee.

1. It was admitted in open court that deceased and the fireman and engineer *were not fellow servants*. The case was tried on that theory. Appellant is bound by that admission.

2. It is conceded that courts of equity may grant relief against judgments at law, where the unsuccessful party was prevented from making a meritorious defence

at law by fraud, accident or mistake, where he himself has been free from negligence. 35 Ark. 107; 40 *id.* 338; 51 *id.* 343; *State* v. *Hill*, 50 *id.* In these cases, it was held that when one had lost his right to have the court pass on his motion for a new trial, and could show that he was free from negligence, and had a meritorious defence, and that the judgment was unjust and unequitable, the chancellor had jurisdiction to grant a new trial. All these things must concur. But this court has never held that chancery could relieve against a judgment where a party had made his defense at law, has presented his motion for a new trial, and the same has been overruled, and he has then lost his appeal by accident. 40 Ark. 535; 51 Ark. 343; 48 *id.* 539.

3. Courts of equity will not grant a new trial if there is any evidence to support the verdict. 40 Ark. 555; 50 *id.* 458; 13 *id.* 604. The judgment *must* be unjust and unconscionable, and it must appear that the result would be different. 3 Pom. Eq. sec. 1364; High on Inj. 114, 116; 6 Johns. Ch. 479; 1 Eden, Ch. 14; 9 N. J. Eq. 585; 31 N. J. L. 329; 42 Tex. 258.

4. The trial judge having overruled the motion for a new trial, the chancellor has no jurisdiction to entertain another application for the same purpose. It is *res judicata.* Cases *supra*; 16 Am. &. Eng. Enc. Law, 621; 4 Bibb, 168; 4 Ind. 313; Herm. Est. p. 569; 1 Johns. Ch. 91; 2 Black, Judg. 691–2; 4 Bibb, 168; 11 Fed. Rep. 104; 15 *id.* 299; 10 Mo. 100; High on Inj. 115; 20 Wis. 42, 205; 35 N. E. 615; 147 Ill. 410.

5. Appellants were guilty of negligence in not presenting the bill of exceptions to the judge before his death. 51 Ark. 278; 79 Ky. 477; 38 Ark. 283; 2 Story, Eq. 174–80; 5 Ark. 502; 3 Pom. Eq. 1364, and note; 6 Johns. Ch. 89; 18 Vt. 45; 2 Paige, 321; 4 Ga. 175; 31 N. J. Eq. 318; 60 Ind. 203; 73 Ill. 205.

6. Upon the merits of the case, it is shown that appellants were grossly negligent in not furnishing deceased a safe place to work, and in not providing reasonable rules and regulations for the management of their yard and the control of their engines. 39 Ark. 29; 54 *id.* 289; 48 *id.* 345; 8 Am. & Eng. R. Cases, 105; 15 S W. 108; 23 *id.* 1056; Wood on Railways, 1488; 28 Am. & Eng. R. Cases, 538; 17 S. W. 185; 10 Am. & Eng. R. Cases, 658; 59 N. W. 192; 2 Am. & Eng. R. Cases, 70; 12 *id.* 108; 5 *id.* 590.

7. The jury found there was no contributory negligence, and this finding is sustained by ample evidence. 8 S. W. 129, and note; 16 *id.* 335; 54 Ark. 289; 114 U. S. 617; 46 Ark. 403; 128 U. S. 91; 76 Wis. 130; Bailey on Master's Liability, p. 445; 139 U. S. 558; 10 Am. & Eng. R. Cases, 662; 36 Ark. 50; 46 *id.* 394.

Jurisdiction of equity to grant new trials.

RIDDICK, J., (after stating the facts.) The first question presented is whether, in a case where there has been a trial and judgment at law, and the right of appeal has been cut off by the death of the presiding judge before signing the bill of exceptions, a court of equity has power to grant relief against such a judgment, however unjust and oppressive it may be. The practice in such cases is not uniform in the different states of the Union. In some of them it seems to be held that there is no relief. *Davis* v. *President of Menasha Village*, 20 Wis. 42. In other states, the appellate courts grant a new trial as a matter of right, without regard to the merits of the controversy, where a party has, by the death of the presiding judge, lost the power to file a bill of exceptions. *State* v. *Weiskittle*, 61 Md. 49; *Wright* v. *Judge of Superior Court*, 41 Mich. 726; *Commissioners* v. *Steamship Co.* 98 N. C. 163. The exact point has never been before this court, though in one case it was said that, "courts of chan-

cery are competent to relieve against any hardships arising from accident, or mistake, or fraud, if from any such cause the bill could not be presented in the time allowed." *Carroll* v. *Pryor*, 38 Ark. 283. And the power of courts of equity to grant relief against fraud, accident or mistake has always been recognized. In the case of *Leigh* v. *Armor*, 35 Ark. 123, the court said: "It is well settled that when a judgment is obtained in a court of law by fraud, accident or mistake, unmixed with negligence on the part of the party against whom it is rendered, a court of equity has jurisdiction, on a showing of a meritorious defense or cause of action, to compel the party obtaining the judgment to submit to a new trial. But it is agreed that this power should be exercised with great caution, and the application of the doctrine is generally restricted, and is confined to cases which present peculiar circumstances, under the maxim that there must be an end of litigation." In that case it was held that when a judge of the circuit court was prevented by sudden sickness from disposing of a motion for new trial during the term at which the judgment was rendered, the party filing the motion might, upon showing that he has a meritorious defense or cause of action, and that he has been guilty of no negligence, obtain relief in a court of equity. The reason given was that the party had no remedy at law. The doctrine of this case has been several times approved. *Vallentine* v. *Holland*, 40 Ark. 338; *Harkey* v. *Tillman*, *Ib.* 551; *Johnson* v. *Branch*, 48 Ark. 535; *State* v. *Hill*, 50 Ark. 458; *Whitehill* v. *Butler*, 51 Ark. 341; *Jackson* v. *Woodruff*, 57 Ark. 599.

The circuit court in *Leigh* v. *Armor* had not passed upon the motion for a new trial. In this case the motion for a new trial was presented to and determined by the circuit court, and the party lost his right of appeal by the death of the circuit judge before signing the bill of

exceptions. But, while the facts are different, the principle seems to us the same, and, after considering the matter, we have concluded that when a party who is himself free from fault, and against whom an unjust and inequitable judgment has been rendered, has lost his right of appeal by unavoidable accident, a court of equity in this state has the power to grant relief. *Carroll* v. *Pryor*, 38 Ark. 283; *Oliver* v. *Pray*, 19 Am. Dec. 595, and note; Black on Judg. 1 vol. 356; Freeman on Judg. 2 vol. 484–485. While the enlarged powers of law courts, under modern procedure, to grant new trials after the expiration of the term has dispensed with the frequent exercise of this ancient jurisdiction of courts of equity, yet in this state it still exists, to be used in peculiar cases where the party is without remedy at law. *Leigh* v. *Armor*, 35 Ark. 126; *Jacks* v. *Adair*, 33 Ark. 161.

In assuming jurisdiction in such cases, courts of equity do not undertake to exercise supervisory or appellate power over the circuit courts. They have no right to interfere in any way with the judgments or other proceedings of a court at law. They assume only the right to act upon the parties to the suits at law. *Pelham* v. *Moreland*, 11 Ark. 442; *Yancey* v. *Downer*, 15 Am. Dec. 38; Pomeroy's Equity, vol. 3, sec. 136; Black on Judgments, 1 vol. 356.

When a case of hardship in the judgment of a court at law is alleged, against which the party has lost his remedy at law by unavoidable accident, fraud, or mistake, a court of equity, though proceeding with great caution, will inquire into the facts, and, if deemed proper, will compel the successful party to submit to a new trial at law, or, in default thereof, will restrain him by injunction. But, as has been frequently said, a court of equity will not interfere in such cases, unless "justice imperatively demands it." "It must clearly

appear that it would be contrary to equity and good conscience to allow the judgment to be enforced, else it declines to impose terms upon the prevailing party." *Whitehill* v. *Butler*, 51 Ark. 343; *Johnson* v. *Brande*, 48 Ark. 535; *Jackson* v. *Woodruff*, 57 *ib.* 599.

Liability of master for killing of servant.

We will now consider whether the case made here is one calling for the interference of a court of equity. John Franklin, an employee of the appellants, while working in their yards at Van Buren, was struck and killed by an engine owned by them and operated by their employees. H. L. Fitzhugh, the administrator of his estate, brought suit against appellants, alleging that the death of Franklin was occasioned by the negligence of appellants and their employees while operating said engine. The answer of appellants denied negligence, and set up contributory negligence, and, further, that the injury was occasioned by the act of a fellow servant, for which they were not liable. The evidence at the trial showed that Franklin, at the time of the injury, was working in the yards of appellants at Van Buren. He was clearing under a switch rod, stooping over at his work, with his back towards a switch engine, which was approaching along the same track upon which he was working. Within eight or ten feet of him, on a different track, was another engine which, to use the language of the witness, was "popping off steam." The noise of this escaping steam deadened the sound made by the approaching switch engine. The testimony of several witnesses show that Franklin's position and actions indicated that he was unaware of the approach of the switch engine and of the danger that threatened him. So apparent was his danger, and the fact that he was ignorant of it, that several of these witnesses hallooed at him, but the noise of the steam from the other engine was so great that he did not hear. Both the en-

gineer and fireman in charge of the switch engine testify that they saw Franklin as they approached the place where he was working. The engine was backing, but it had no cars attached, and the tank was wedge shaped, and offered no obstruction to the sight of the engineer until he came within a few feet of Franklin. He was in plain view for some distance before they reached him. They noticed that he was stooping over at work, his back to the engine, apparently unaware of its approach. When about forty yards from him, the fireman hallooed at him, and again endeavored to attract his attention when he was within twenty-five or thirty steps of him. The fireman testified that he did not signal the engineer, because the engineer saw Franklin as well as he did. Before reaching Franklin, the engineer applied the air brakes, and checked the speed of the engine, but when within seven or eight feet of him he released the brakes, and the engine rolled on, and Franklin was struck and killed. The engineer says that he saw Franklin step off the track before he released the brakes, but in this he is plainly mistaken. Franklin became aware of the approach of the engine, and endeavored to escape, but the engine struck either his leg or the handle of his shovel, and he was thrown on the track and killed. There was also evidence tending to show that no sufficient effort was made to stop the engine, and that the engineer was guilty of carelessness.

But it is said that Franklin was himself guilty of negligence. This may be true, yet the finding of the jury is justified on the ground that the employees of defendants in charge of the engine became aware of his danger in time to have avoided the injury by the use of ordinary care. It is well established that when a defendant, after having become aware of the plaintiff's negligence, and the danger to which it exposes him, fails to exercise ordinary care in avoiding it, he is liable for

the injury. *St. L. I. M. & So. Ry.* v. *Wilkerson*, 46 Ark. 523; *St. L. I. M. & So. Ry. Co.* v. *Monday*, 49 *ib.* 263; Whittaker's Smith on Neg. 375; Thompson on Neg. 2 vol. 1157; Wharton on Neg. secs. 334 and 335; Sherman & Redfield on Neg. sec. 493.

Estoppel by admission.

It is further said that if the engineer was guilty of negligence causing the injury, it was the act of a fellow servant, for which defendants are not liable. But the evidence shows that on the trial at law the defendants expressly admitted that the deceased, John Franklin, and the engineer were not fellow servants. The bill of exceptions, which was agreed to be correct, and introduced as evidence by appellant, after setting out the evidence introduced by the plaintiff, proceeds as follows: "Defendants here admitted that the deceased, John Franklin, and the engineer and fireman were not fellow servants, and told plaintiff that they so admitted to the jury. The plaintiff then rested." This is what is called in the books a "solemn admission," made in the course of a judicial proceeding for the purpose of dispensing with evidence or argument touching the matter admitted. Having solemnly admitted on the trial that the deceased John Franklin and the engineer and fireman were not fellow servants, the defendant cannot now dispute it, or assume a position inconsistent with the admission. If the circuit court committed an error on that point, it was one invited by the defendants, and of which they cannot complain. 1 Greenleaf on Ev. 186; 1 Taylor on Ev. 676; Elliott's Appellate Pro. sec. 630.

Our conclusion is that the facts of this case are not sufficient to warrant the interference of a court of equity, and the decree of the chancellor dismissing the complaint for the want of equity is affirmed.

BUNN, C. J., (dissenting). This is a bill in chancery for an order granting a new trial in the Crawford

circuit court, and the majority of the court holds, over the objection of the defendant and appellee, that the chancery court had jurisdiction, but denies to plaintiff the relief sought because there is not merit in the bill. From this opinion I dissent, not on account of the merit that may or may not be in the original cause of action or defence, but because I think, first, that equity has no jurisdiction to hear and determine the precise question involved in this case; and, second, because, if it has such jurisdiction, it can only inquire as to whether or not the right of appeal has been lost by accident, as alleged, and, having ascertained such to be the fact, it must grant the new trial without reference to the merit or demerits of the judgment appealed from, because the right of appeal is absolute and unconditional, and should be conceded without any other ascertainment than that some one of the known causes of equitable jurisdiction has occurred and been presented.

I do not, at all events, think there is any jurisdiction in equity to give the relief to be desired in a case like this—to secure the opportunity to be heard in the appellate court, directly or by circumlocution; for the law court has passed on that question, and equity has no reviewing or appellate powers.

This court has frequently held that the person who has presided as judge in the trial court is the person to certify the bill of exceptions. But this is as far as this court has ever gone, or ever had occasion to go. No case like this has ever been presented to this court for its consideration, and therefore whatever may be done today has not the sanction of precedents here.

This proceeding is, perhaps, not such as will necessarily call forth any expression of opinion as to what the proceeding should be, but I am of the opinion that when the presiding judge has died, and it becomes impossible, therefore, to obtain the bill of exceptions ac-

cording to the very letter of the law, the successor of the deceased judge should determine and certify the bill of exceptions. This is, of course, not the mode of securing a bill of exceptions according to the best evidence, but only according to the best obtainable. As long as the person who tried the case lives, he should certify the bill of exceptions whether in or out of office, for his is the best evidence. Some of the states have made provision by statute for such a contingency as that which now confronts us. In others, where there is no statutory provision, the courts, under the head of their inherent powers to regulate judicial procedure in the absence of statutory provision, have adopted the method suggested, as being the only one that can possibly preserve the integrity of common law judgments on the one hand; and secure the perfect right of appeal on the other.

Whatever may theoretically be imagined, practically there never could be any great difficulty or inconvenience to the succeeding judge to determine what is a proper bill of exceptions, for it is rare that any great number or important points of difference present themselves, and to settle these the few necessary witnesses could readily be recalled to repeat what was said by them on the trial. The case at bar is a fair sample of what generally occurs in such cases—an agreement between counsel as to the facts.

LITTLE ROCK & FORT SMITH RAILWAY COMPANY v. WELLS.

Opinion delivered November 30, 1895.

EQUITY—NEW TRIAL.—Equity will grant relief against a judgment at law which is unjust and inequitable, if the right of appeal was lost by the death of the trial judge before the bill of exceptions was signed.

SUFFICIENCY OF EVIDENCE—DISTANCE BETWEEN RAILWAY STATIONS.—A judgment against a railroad company enforcing a penalty for an overcharge of passenger fare between two stations is not supported by evidence merely that the mile posts between such stations showed the distance to be so many miles, it not appearing that the company had any connection with such mile posts, or that they were located on its right of way.

TRIAL—INCOMPETENCY OF JUROR.—A challenge to a juror should be sustained where it appears that, at the previous term, a suit by him against defendant to collect a penalty for an overcharge of passenger fare between the same stations for which plaintiff brings suit was tried, and that he holds an opinion upon a material issue in the case.

Appeal from Crawford Circuit Court in Chancery.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

In this case we have another application to a court of equity to grant relief against a judgment at law. The action at law was brought by Thomas H. Wells against the appellant railway company for the purpose of collecting a penalty for overcharges alleged to have been made by the railway company for the carriage of said Wells as a passenger on its trains between the stations of Van Buren and Dyer, and Alma and Dyer. He alleged that on four different trips an overcharge of about five cents was made on each trip. The verdict was in favor of plaintiff, and the penalties assessed for the four overcharges amounted to seven hundred dollars,

of which amount three hundred dollars was remitted by the plaintiff. A motion for a new trial was filed and overruled, and sixty days allowed to file bill of exceptions. The death of the presiding judge, which happened shortly afterwards, and before the bill of exceptions was signed, prevented the appeal from being taken. The appellant then brought his suit in equity. The cause was submitted to the chancellor upon the pleadings, exhibits and agreed statement of facts. The evidence at the trial at law had been taken down by a stenographer, and a bill of exceptions prepared by counsel containing that evidence was by consent read as evidence in the equity suit; it being agreed by counsel for the respective parties that it was "correct in every particular." The complaint was dismissed for want of equity, and an appeal was taken.

Dodge & Johnson, for appellants.

1. The chancellor erred in refusing a new trial. The circuit court erred in giving the second instruction to the jury because (1) it is an instruction to the jury that the evidence showing the number of mile posts is conclusive of the distance. (2) It is an expression of an opinion on the facts, which is forbidden by the constitution. 22 S. W. 584; 14 Ark. 295, 537; 16 *id.* 593; 45 *id.* 166; 49 *id.* 439; 43 *id.* 295; 44 *id.* 702.

2. There was no evidence proving the distance.

3. Manuel and Leah were disqualified as jurors. 31 Ark. 306; 60 *id.* 244.

Jurisdiction of equity to grant new trials.

RIDDICK, J. (after stating the facts.) There are two questions in this case: First, has a court of equity the power to grant the relief prayed for? and, second, if the power be conceded, is this such a case as calls for its exercise? The first question has been considered and answered in the affirmative by our ruling in the case

of *Kansas, etc. R. Co.* v. *Fitzhugh, ante*, p. 341, and we need only consider the second question.

Evidence held insufficient.

It is said that the trial court committed error in impaneling, and also in charging, the jury. But errors alone are not sufficient to warrant the interposition of a court of equity. "It must clearly appear that it would be contrary to equity and good conscience to allow the judgment to be enforced, else equity declines to impose terms upon the prevailing party." *Whitehill* v. *Butler*, 51 Ark. 343; *Kansas, etc. R. Co.* v. *Fitzhugh, ante*, p. 341. But a consideration of the evidence introduced in the action at law leads us to the conclusion that the verdict and judgment against the appellant were without evidence to support it. To warrant a judgment for the penalty imposed against appellant in the action at law, it was essential that there should be some evidence tending to show that the amount charged the appellee was greater than three cents per mile for the distance he was carried as a passenger. Sand. & H. Dig. secs. 6211, 6217. Now, an examination of the evidence shows that there was no competent evidence introduced to show the distance between the stations of Van Buren and Dyer and Alma and Dyer. The only witnesses that testified were the appellee and his attorney. Neither of them told, or pretended to know, what the distances between these stations were. They gave the number of the nearest milepost to each station, and stated that the mileposts showed the distances between the stations to be a certain number of miles, but there is nothing to show that the appellant had any connection with these mileposts. We cannot tell from the evidence whether the mileposts referred to are located on the railway right of way, or along the public road; nor whether they were erected by the county, or the appellant, or some other railway company. The attention of the court and counsel was called to this defect in the proof

on the trial of the case, and the court was asked to direct a verdict for appellant for want of evidence showing the distances between the stations named. The court refused to do so, and assumed in his instructions that the mileposts had been put up by appellant. He commenced the second paragraph of his instruction as follows: "In regard to those mileposts, the company has put up mileposts along the road, as the proof shows here, and put consecutive numbers on them. I suppose, when they began, they commenced one mile from the starting point, then two, and then three, the same as a proclamation, as to the distance, etc."

The circuit judge in giving this instruction no doubt labored under the impression that there was no dispute concerning the question as to whether or not the appellant had put up the mileposts. But we are bound by the record, and it shows that the question as to the distances between the stations was the principal point in issue, and that no admissions were made, the attorney for appellant contending that the proof on this very point was insufficient.

Competency of jurors.

In addition to this instruction, which was calculated to mislead the jury on a material point, two of the jurors admitted on their examination that each of them had brought suit against appellant to collect a penalty for an overcharge for passenger carriage between the same stations of Alma and Dyer, that these suits had been tried the term before, and that each of them held an opinion as to the distance between these stations. For this cause they were challenged by defendant, but the court held that they were competent, and, the defendant having exhausted its peremptory challenges, they sat in the trial of the case. These jurors having only a short time before been plaintiffs in an action against appellant, in which the same issues were involved, the chal-

lenge of defendant should have been sustained. *Railway Co.* v. *Smith*, 60 Ark. 222.

When we consider these rulings of the court in connection with the fact that the verdict and judgment is not supported by the evidence, we must conclude that the appellant was entitled to a new trial, and that he would have obtained it, but for the fact that his appeal was cut off by an inevitable accident, which left him without remedy at law. It seems unjust and inequitable that the appellee should be allowed to retain the advantage given him by the sudden death of the presiding judge. As the appellant is remediless at law, we believe that this is a proper case for a court of equity to exercise its restraining power, to the end that justice may be done. *Kansas, etc., R. Co.* v. *Fitzhugh*, *ante*, p. 341; *Carroll* v. *Pryor*, 38 Ark. 283; *Leigh* v. *Armor*, 35 Ark. 128; *Oliver* v. *Peay*, 19 Am. Dec. 595, and note; 1 Black on Judg. 386; 2 Freeman on Judg. 484 and 485.

It is therefore ordered that the decree of the chancellor be reversed, and that, unless the appellee, Thos. H. Wells, shall elect to submit to a new trial at law on the issue involved in his action against appellant for a penalty, he be forever enjoined from enforcing, or attempting to enforce, the judgment recovered by him in said action.

[NOTE.—As to injunctions against judgments for matters arising subsequent to their rendition, see note to the above case in 30 L. R. A. 560.—Rep.]

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TURNER *v.* STATE.

Opinion delivered December 7, 1895.

MURDER—INDICTMENT.—An indictment alleging that defendant did unlawfully, willfully and of malice aforethought, and after premeditation and deliberation, kill and murder a person named by shooting him with a certain gun loaded with gunpowder and leaden bullets "with the felonious intent to then and there kill and murder him," is a good indictment for murder in the first degree.

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

J. E. London, for appellant.

1. The indictment is not good. The word "feloniously" must be used to charge a felony. 25 Ark. 444; 29 *id.* 147; 2 Dev. & Bat. 297.

2. The word "felonious" is not used in the charging part of the indictment. 60 Ark. 564. The indictment must charge the *killing*, and not merely the act which results in the killing, to have been done wilfully, deliberately and premeditatedly. 21 Kas. 43; 27 Iowa, 412, 415.

E. B. Kinsworthy, Attorney General, for appellee.

1. Murder is the *unlawful* killing. Section 1639, Sand. & H. Dig. Murder in the first degree is defined by Sand. & H. Dig. sec. 1644. Neither of these sections uses the word "felonious." Under these statutes, murder in the first degree is the willful, deliberate, malicious and premeditated killing of a human being. All these adjectives are used in the indictment, which concludes "with the *felonious intent*," etc. The gist of the crime is the intent. 4 Bl. Com. 306; 29 Ark. 264. This is sufficiently charged. 40 Pac. 63; 24 Kas. 445; 7 Cal. 403; 14 Lea (Tenn.), 424.

2. There is no prejudicial defect in the indictment. Sand. & H. Dig. secs. 2075–6. The variance, if any, is only in form, not misleading, and therefore no basis for objection. 54 Ark. 494; 55 *id.* 439. In 25 Ark. 444, 29 *id.* 147, and 32 *id.* 193, the word "feloniously" was not used in charging the act or intent. All the essentials of a good indictment are found in the one under consideration.

BATTLE, J. The defendant, Pruitt Turner, was accused of murder in the first degree. The indictment against him, omitting the caption, was as follows:

"The grand jury of Franklin county, in and for the Ozark district thereof, in the name and by the authority of the State of Arkansas, accuse P. Turner of the crime of murder in first degree, committed as follows, to-wit: The said P. Turner on the 17th day of February, 1895, in the county and district aforesaid, did unlawfully, willfully, and of his malice aforethought, and after premeditation and deliberation, kill and murder one Bob Hawkins, by shooting him, the said Bob Hawkins, with a certain gun which he, the said P. Turner, had and held in his hands, the said gun being then and there loaded with gunpowder and leaden bullets, with the felonious intent to then and there kill and murder him, the said Bob Hawkins, in manner and form aforesaid, against the peace and dignity of the state of Arkansas."

He was tried, and convicted of murder in the first degree. Having filed a motion for a new trial, which was overruled, and a bill of exceptions, he appealed to this court.

Is the indictment sufficient? This is the only question necessary for us to notice in this opinion. He is entitled to no relief on account of the other grounds set forth in his motion for a new trial.

The statutes upon which the indictment was based define murder to be "the unlawful killing of a human being, in the peace of the state, *with malice aforethought*, either express or implied;" and define murder in the first degree to be "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of *willful*, *deliberate*, *malicious*, *and premeditated killing*, or which shall be committed in the perpetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary, or larceny." Sand. & H. Dig. secs. 1639, 1644. All the acts necessary to constitute murder in the first degree, as defined by the statutes, are stated in the indictment in question. It is alleged that appellant killed Bob Hawkins by shooting him with a gun loaded with gunpowder and leaden bullets; that he shot him with the felonious intent to kill him, that is, he willfully, unlawfully, and feloniously killed him; and that he did so with malice aforethought, and after deliberation and premeditation. It is true it is not alleged that the "accused feloniously, willfully, and of his deliberately premeditated malice aforethought, did make an assault upon the deceased, and, a certain gun, which then and there was loaded with gunpowder and one leaden bullet, and by him, the said Pruitt Turner, held in both his hands, he, the said Turner, did then and there feloniously and of his deliberately premeditated malice aforethought shoot off and discharge at and upon the said Bob Hawkins, thereby, and by thus striking the said Bob Hawkins with the said leaden bullet, inflicting on and in the left side of his head one mortal wound, of which mortal wound the said Hawkins instantly died," according to the form recommended by Mr. Bishop, but all these allegations are substantially contained in the indictment. The allegations as to the assault, and the manner thereof, are virtually stated in it, because the

appellant could not have killed Hawkins in the manner alleged without committing an assault in the same manner. It is virtually alleged that he unlawfully, willfully, feloniously, and with malice aforethought, and after deliberation and premeditation, shot Hawkins, because it said that he unlawfully, willfully, and with malice aforethought, and after premeditation and deliberation, killed him by shooting him with a gun with the "felonious intent to then and there kill and murder him." The killing having been willfully committed by shooting, the shooting was done in the manner the killing was alleged to have been perpetrated. It is not alleged that Turner shot off and discharged the gun at and upon Hawkins, but the same allegation is in effect made by the statement that the gun was loaded with gunpowder and leaden bullets, and that he killed Hawkins by shooting him with the gun thus loaded. All the essentials of the approved forms for indictments for murder in the first degree are substantially set out in the indictment in question, "in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended."

But appellant contends that the indictment is fatally defective because the word "feloniously" is not used in charging the offense, and cites *Edwards* v. *State*, 25 Ark. 444, and *Mott* v. *State*, 29 Ark. 147, to sustain his contention. In neither of them was the crime of which the defendant was accused alleged to have been committed with a felonious intent, as in the indictment before us. The question we have under consideration was not presented for determination. While, according to them, it is necessary for indictments for felonies to show that the crime charged was feloniously committed, we think that is done when it is alleged to have been perpetrated with a felonious intent. There is no magic in words. Ideas are important. When they are conveyed in lan-

guage sufficient to enable a person of common understanding to fully comprehend them, as a general rule, the whole mission of words is accomplished.

The indictment in this case is unskillfully drawn, but we think it is sufficient.

Judgment affirmed.

STATE v. PASSMORE.

Opinion delivered December 7, 1895.

CANCELLATION OF LEASE—LIEN FOR IMPROVEMENTS—RENTS.—One who, on the cancellation of a lease, is decreed to have a lien on the land for a specified amount for improvements made thereon by him, and is given possession thereof until such sum is paid, should be charged with the rental value of the land with the improvements.

Appeal from Garland Chancery Court.

LELAND LEATHERMAN, Chancellor.

STATEMENT BY THE COURT.

The question in this case arose out of a lease of land, made by Garland county to George W. Baxter and Walter A. Moore, for the period of ninety-nine years. Baxter and Moore sublet portions of the land to other persons, who made improvements thereon. The appellee, Passmore, became the owner of one of the lots with the improvements. A complaint in equity was afterwards filed by the state for the use of Garland county, and the original lease to Baxter and Moore was set aside and declared void. See *State* v. *Baxter*, 50 Ark. 455. The lessees of Baxter and Moore were charged with such rents and profits as the lots occupied by them would have yielded without the improvements, and allowed the value of the improvements at the time of

the decree. The appellee, Passmore, recovered a judgment against the county for the sum of $1,271.92, that being the excess of the value of his improvements over the rent with which he was charged. It was also ordered and decreed that he should retain possession of the lots until such sum was paid, or until such time as the rental value thereof should be equal to said sum.

After this decree, Passmore remained in possession of the lot, collecting rent at the rate of twenty-five dollars a month, until June 23, 1893, a period of over three years. He then delivered possession to the county, and brought this suit in equity to have his rights declared, and to recover from the county the amount due him under the said decree. He received rents at the rate of $300 a year, but he claims that he should be charged with only fifty dollars a year, the rental value of the lot without the improvements. A decree having been rendered in his favor, the state, for the use of the county, appealed.

Wood & Henderson and *C. D. Greaves*, for appellant.

The appellee was chargeable with the rents actually received by him since the decree in the case on the former appeal. 50 Ark, 455; 56 *id.* 312. The former decree was not prospective, except in so far as it contemplated that the county of Garland should pay appellee $1,271.92 for his improvements less ground rents *then accrued*, and that he should not be dispossessed until this amount due him was paid. The decree was a recovery of both land and improvements, and from that time appellee was chargeable with the rental value of both.

E. W. Rector, for appellee.

A careful reading of the former decree and the opinion of this court (56 Ark. 312) convinces us that

this court never intended that appellee should be charged with anything but *ground rent.* 145 U. S. 141; 148 *id.* 228.

RIDDICK, J., (after stating the facts.) The only question in this case is whether, in the settlement between Passmore and the county, he should be charged with the actual rents received by him after the decree fixing the value of the improvements, or with only the rental value of the lot as it would be without the improvements. Passmore contends that he should only be charged with ground rents, or the rental value of the lot apart from the improvements, and to support that contention he relies upon the opinion of this court in *State* v. *Baxter*, 50 Ark. 455, and the decree made by the circuit court in obedience to said opinion. The following direction for a decree was given by this court in that case: "In charging the appellees with the rental value of the block, they should be charged with such rents and profits as it would have yielded without the improvements, and credited with the value of the improvements at the time of their recovery for the use of the county. If anything be due any one of the appellees for improvements, after deducting the rents for which he is charged, he should not be dispossessed until the amount so due is paid."

The decree that was made in obedience to this opinion adjudged that the lot and the improvements thereon belonged to Garland county, settled the matter of rents and improvements between Passmore and the county on the basis directed by this court as set out above, and declared that Passmore had a lien on the lot for a certain amount due him for improvements. Passmore then had only a lien and a right to hold possession of the lot and the improvements thereon until he was paid for the improvements, or until the rental value thereof should

equal the amount due him for improvements. His position after the decree was similar to that of a mortgagee who takes possession of the mortgaged premises before foreclosure. The rents received by him after the decree belonged to the county, and should be applied to the payment of his lien for the improvements.

Passmore, after remaining in possession for some years, brought this suit in equity to enforce his lien. This he had the right to do, but the statute provides that "in any such equitable proceedings the court may allow to the owner of the lands, as a set off against *the value of such improvements and taxes, the value of all rents accruing after the date of the judgment in which it has been allowed.*" Sand. & H. Dig. sec. 2593. As the county had been charged with the value of the improvements, we see no reason why Passmore should not be charged with all rents received by him after the decree fixing the value of his improvements, and we find nothing in that decree, or in the opinion in *State* v. *Baxter*, that seems to us in conflict with this view.

We conclude, therefore, that the chancellor erred in holding that Passmore should be charged with only the rental value of the lot apart from the improvements. The decree of the chancery court is reversed, and cause remanded, with an order that Passmore be charged with all rents received by him after the decree.

BYRNE *v.* WELLER.

Opinion delivered December 14, 1895.

WILLS—CONSTRUCTION—A testator devised all of his property, real and personal, to his wife for life, and in a subsequent clause of the will, after devising certain land to other relatives to take effect upon the wife's death, gave the remainder of his property, real

and personal, to his wife to dispose of as she might desire at her death. *Held*, that by the latter clause the wife took a fee in the remainder in the land.

Appeal from Crittenden Circuit Court in Chancery.

JAMES E. RIDDICK, Judge.

Watson & Fitzhugh for appellants.

Mrs. Maddox took the absolute interest in the real property by the will, and the power given her to dispose of it at her death accords with said interest being in her, and the intention of the testator is evidenced by the expression used in the fifth clause of the will. It was manifestly the intention to vest his wife with an *absolute* title to the residue of his property not otherwise specifically devised. The words "at her death" in the fifth clause should be treated as surplusage, and do not limit in any way the power of disposition. The great weight of authority is, even where one is given only a life estate, and the fee is "to be disposed of as she sees fit at her death," that the power is executed, and disposition may be made at any time. 49 Md. 497; 10 S. C. 45. See 2 Wils. 6; 2 Atk. 102; 2 Ver. 181; 3 Ves. 7; 1 Wash. 266. 51 Ark. 61, and 52 *id.* 113, are not in conflict with this doctrine. In those cases the intention was clear, and the remainder was in express terms vested in others, as was also the case in *Giles* v. *Settle*, 104 U. S. ——, and 93 U. S. 326. In 2 Yerger, 558, almost identical language was construed to carry the fee. See, also, 94 Tenn. 27. In this case no remainder was vested in anyone, except the wife; but if it had been attempted, it would have been ineffective, as it would have been inconsistent with the absolute interest vested in the wife, and contradictory.

Henry Craft for appellee.

The will vested a life estate in Mrs. Maddox, with the power of disposition *during life*, and, she having

died without having exercised the power, the property reverted to the heirs of the testator. 51 Ark. 61; 93 U. S. 326; 52 Ark. 113; 104 U. S. 291. This is the settled law of Arkansas.

S. R. Cockrill, in reply, for appellants.

The gist of the cases relied on by appellees, 51 Ark. 61; 52 *id.* 113; 93 U. S. 326, and 104 *id.* 291, is: Where a power of disposal accompanies a bequest or devise for life, *the power is limited to such a disposition as a tenant for life* can make, unless there are other words clearly indicating that a larger power was intended." In this case the will contains other words *clearly indicating* that the widow should not only have power to dispose of the life estate *but the fee.* We look to the whole will for the testator's intention, and if these are inconsistent provisions, the last one governs, which here is the fifth clause.

(a.) The language of the 5th clause embraces *all* the real estate, as well as the personalty not otherwise devised. "Real and personal effects" embrace the whole estate. Schouler on Wills, sec. 509; 3 Watts. 471-3; Cowper, 308.

(b.) It is true the testator uses no words of inheritance, but by will a fee may vest without words of inheritance. 3 Ark. 147–193; Sand. & H. Dig. sec. 698; 2 Redf. Wills. p. *335; 107 Mass. 590; Schouler, Wills, sec. 509; 2 Redf. Wills. p. *327.

(c.) The authorities are against the position that the grant of a life estate to the widow in the second clause of the will shows the intention to limit her estate throughout. 68 Pa. St. 84; 3 Atk. 486; 3 Watts, 473; 39 Pa. St. 469; 6 Simmons, 568; 58 Pa. St. 429; 144 *id.* 278–285.

(d.) The argument that the power of disposal by will is a power of appointment merely, and, as it was not

exercised, that the property goes to the heirs of the testator, is not sustained by the authorities. In this case the power of disposition is broad enough to create a fee, and emphasizes the intention that the fee shall pass. A general devise with power to dispose of the corpus of the estate creates the fee. 109 U. S. 725; 2 Redf. Wills, p. *326, sec. 11; 58 Pa. St., and other cases cited in my associates' brief; 144 Pa. St. 278-285; 3 Ad & El. 128; 23 Ark. 359.

BUNN, C. J. Appellees, the only surviving heirs at law of one J. W. Maddox, deceased, filed the complaint in this cause in the Crittenden circuit court, on the chancery side, against the appellants, the only surviving heirs at law of one Julia A. Waldron, deceased, formerly the wife and widow of said J. W. Maddox, she having died intestate. The subject matter of the litigation is certain property of the estate of said J. W. Maddox, and, to determine the ownership of the same and for partition, the court was asked to construe the will of said J. W. Maddox. Appellants, defendants in the court below, demurred to the complaint; and, the same having fully set forth the provisions of the will and plaintiffs' claim thereunder, the only issue in the case was properly raised by the demurrer. The chancellor overruled the demurrer, and, defendants declining to plead over, decree went against them, and they appealed to this court.

The said J. W. Maddox made the following last will and testament [leaving out all that is not essential to this discussion], to-wit: "Second. After the payment of my funeral expenses as well as my just debts, I give and bequeath to my beloved wife, Julia A. Maddox, my entire property and effects of every character and kind, both real and personal, during her natural life, to use and enjoy any and all the rents and profits of every character and kind lawfully arising therefrom. Third.

It is my will that my lot, being a certain parcel or piece of ground situate, lying and being in the city of Memphis, on the south side of Market street, being a part of lot known and designated on the original plan or plat of Memphis as lot number four hundred and seventy (470), [then follows a particular description of said part of said lot, by metes and bounds] shall, at the death of my beloved wife, Julia A. Maddox, be by her, the said Julia A. Maddox, given to such of the then living children of my brother Henry S. Maddox and my sister Sophia Cole Graves as she, the said Julia A., in the exercise of her judgment, may deem best; it is my express wish that my wife, the said Julia A. Maddox, shall so dispose of this lot of ground among said children as she may desire. Fourth. It is my will that at the death of my beloved wife, Julia A. Maddox, my lot being part of lot No. 123 on Main street (west side) upon which a two-story brick house now stands, shall go and descend jointly to George R. Byrne, the youngest brother of my wife, Julia A. Maddox, and Wesly Edmond Moore, son of George and Londora Moore, each to have and own an undivided one-half interest in the same; and in the event that either the said George R. Byrne or Wesly Edmond Moore, or both of them, should depart this life before arriving at the age of twenty-one years, then and in that event I wish my wife, Julia A. Maddox, to dispose of the interest of the children so dying, in this property, among the living children of my brother, Henry S. Maddox, and of my sister, Sophia Cole Graves, in such parts and portions as she may desire. * * * * * Fifth. The remainder of my goods, chattels and effects of every character and kind, both real and personal, I will and bequeath to my beloved wife, Julia A. Maddox, to dispose of as she may choose and desire at her death. Sixth. I do hereby appoint my brother, Henry S. Maddox, and my wife,

Julia A. Maddox, my executor and executrix, to qualify without giving bond or security."

The particular question raised by the demurrer to the complaint is, was the estate of Julia A. Maddox in the "remainder" mentioned in the fifth clause of her husband's will an estate in fee, or for life only?

In regard to the disposition of real estate, and of course of personal property, by will, no technical or particular words of conveyance are necessary, and any words denoting the real intention of the testator will be sufficient, unless they contravene some positive and established rule of construction; and in this state the liberal rule in favor of wills is much emphasized by the statute which does away with the use of many technical words of the common law, even in conveyances by deed. We may also remark, as preliminary to this discussion, that the case of the appellants is somewhat aided by the fact that, under our conveyance laws, *prima facie* every conveyance is to be regarded as carrying the fee, unless express words of limitation to a less estate are used.

The testator, in the second clause of his will, gave to his wife, Julia A. Maddox, a life estate in all of his property, real and personal. The reason of this is made apparent in the clauses following. The testator evidently intended that his wife should enjoy the use of his entire estate during her natural life, and, being childless, and making certain special devises to the children of a brother and sister, he arranged that they should be postponed in enjoyment until the death of his wife. When making these special provisions for the children of his brother and sister, it occurred to him that these special legacies would not cover or take up all the estate, or might not, at all events. So he makes a disposition of this residue, or "remainder," as he calls it, in the fifth clause of his will. The contention of ap-

pellees, in effect, is that the devising words of this fifth clause amount to a reiteration of the general devise for life contained in the second clause, in so far as concerns this residue; and that the grant of the power to dispose of it at her death is but a grant to dispose of by will; and that the disposition to take effect only after her death is a power or privilege in addition to the devise,—a mere power of appointment; and, this being so, that it necessarily follows that the whole clause, taken together, gives the wife but a life estate in the residue. But, according to the contention of the appellant, the testator here in this fifth clause makes a new disposition of this residue part of his entire estate; that the power of disposal is not in addition to the devise of the residue, nor cumulative of it, but confers nothing upon her which she did not already have by the terms of the devise, and only emphasizes one of her rights as the devisee of the fee,—the power to dispose as such. If the doctrine of the appellees be the correct one, it may be pertinently asked, why the necessity or even propriety of this reiteration? Why make use of any additional words or language denoting a disposition to the wife of this residue, since a life estate in it had already been given her in the second clause of the will, for it was only a part of the whole therein devised to her for life? Why not simply have said, "This remainder or residue to be disposed of by her at her death as she may choose," or words to that effect?

Useless and unnecessary expressions are sometimes employed, but expressions are not to be construed as surplusage when, by another reasonable and consistent construction, they have a use. Furthermore, if the devising words in the fifth clause of the will enlarge or diminish the estate devised from what is devised in the preceding clauses, it follows that the two are in so far inconsistent,—at least there is a difference,—in which

case the latter controls, and from it we are to gather the true intention of the testator as to the property therein disposed of. If there is any truth in this course of reasing, it follows that we are to determine what estate the wife had in the remainder of the whole estate after the special legacies, not by the language of the second clause of the will, but by that of the fifth—the clause which makes special and particular reference to this remainder. The words of devise of the remainder mentioned in the fifth clause are simple and direct, and there are none expressive of a less estate in the devisee than that of the fee. In such case, even in the case of a conveyance by deed, under the statute, the estate conveyed would be a fee simple; and the statute only, in effect, makes application to conveyances by deed, that which virtually had always been the rule in the case of wills.

It is contended, in effect, by the appellees, that the words expressive of the power of appointment in the fifth clause are themselves words of limitation upon the estate in the remainder therein devised; and this raises the real question at last.

In *Benesch* v. *Clark*, 49 Md. 497, the supreme court lays down the rule on this subject thus: (1) "That where an estate is given to a person generally or indefinitely, with power of disposition, such gift carries the entire estate; and the devisee or legatee takes, not a simple power, but the property absolutely. (2) That when the property is given to a person expressly for life, and there be annexed to such gift a power of disposition of the reversion, then the rule is different, and the first taker takes but an estate for life, with the power annexed." The word "reversion" contained in the second rule, thus announced, is a word of the very greatest importance in its connections, in its influence upon rules of construction. It implies that the devising clause has left something to revert to the testator after

the estate given to the devisee. In the case at bar, as we have seen, no words denoting a reversion to the donor appear; and hence the second rule is not apparently applicable to this case, and therefore the first rule must be. In that case, the words of devise were: "The two houses and lots on Monument street [city of Baltimore] to be disposed with as my wife sees fit, at her decease." And following was the general devise, to-wit: "And also I give and bequeath unto my said wife all my property, real, personal and mixed, of every description, to have and to hold for her benefit, maintenance and comfort, *during life.*" The widow having conveyed one of the lots on Monument street, and then died without attempting to dispose of said lots by will, the administrator of the testator sold the lots as part of his estate, and the sale was approved by the orphans' court. Thus arose the controversy as to the widow's title. Held, that she had a life estate only in the lots. The turning point in the case was, or seems to have been, that, while the first clause gave an estate in the lots generally, the later clause expressly confined it to a life estate, and this was the controlling clause.

In *Fullenwider* v. *Watson*, 113 Ind. 18, the words of devise were "to have, use and enjoy the same as she may choose, and to dispose of the same in such manner as she may desire," and this was coupled with a request that all the property not disposed of by the wife at her death be given to certain named grandchildren of the testator. Now, ordinarily, where the power of disposition or appointment is restricted to go to certain persons or to go in a certain channel, it is considered as a limitation upon the estate of the first, clearly indicating the intention of the testator. However, in that case, it was held that the wife took the fee.

In *Jackson* v. *Robins*, 16 Johnson (N. Y.), 588, it was said that it is laid down "as an incontrovertible

rule that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the *reversion.*" The word "reversion" here, as was said concerning another case, denotes an intention to reserve the fee, which shall revert to the donor's estate. In that case, the husband had devised to the wife all his real and personal estate to hold the same to her, her executors, administrators and assigns. The subsequent clause was as follows: In case of the death of his wife, without giving, devising or bequeathing by will, or otherwise selling or assigning the estate, or any part thereof, he doth give and devise all such estate as should so remain unsold, undevised or unbequeathed, to his daughter, Katherine Duer. *Held*, that the wife had the fee by virtue of the devise to her, and that the subsequent restriction was void.

In the case of *Grove's Estate*, 58 Pa. St. 429, a testator gave to his wife as follows: "All my property and estate, real and personal rights and credits, whatsoever may belong to me at the time of my decease, to be absolutely her own for and during her life, giving her full power to collect and receive all debts due me, or to become due, at her pleasure. * * * * * * And all or any residue of my estate, over and above the special legacies hereinafter bequeathed, she may dispose of by her will. * * * * She may sell the real estate or any part thereof, and execute the necessary title therefor, which shall be as good to the purchaser as if made by myself in my lifetime; but shall always keep as much secure as will pay the legacies hereinafter

bequeathed, and her estate shall be liable for the amount, to be paid after her death." After giving the special legacies referred to, he continues: "By this I mean that, if my wife should not have enough over the amount of the legacies to live comfortably, she may take or appropriate as much of my estate as she may, from time to time, deem necessary for her comfortable living, and in that case my legatees hereinbefore named shall be satisfied with their proportion of what may be left; or, if she should require the whole of said amount of legacies for her comfortable living, said legatees must be satisfied without receiving any portion thereof. But she cannot by her will bequeath to others any portion or all of said amount of legacies by me herein bequeathed; she can only use said amount of legacies, or such part thereof as she may need for her comfortable living during life." Held (Judge Agnew delivering the opinion of the court), to be an absolute gift of all the estate, real and personal, to the wife except the special legacies, in which she had a life estate. The limitation for her life was inserted but as a means for securing the payment of the pecuniary legacies. That case, in all essential features, was very much like the case now under consideration, and the argument and reasoning of the learned judge is expressly based upon principles and ideas underlying this case in almost every particular.

In *Musselman's Estate*, 39 Pa. St. 469, a testator devised his real and personal property to his wife, "so long as she lives, for her maintenance;" adding: "She shall have her choice to sell it or not, as she believes best for her." And in a subsequent clause, this: "With the third part of his estate she could do and bequeath to whom she pleases." Held, that her interest in the whole estate was a freehold for life, and in the one-third thereof absolutely. The same principle is announced in *Snyder* v. *Baer*, 144 Pa. St. 278, and such seems to be

the tenor of all the authorities we have been able to examine on the subject.

Our conclusion is that the devise of the whole estate for life, in the second clause of the will, was merely for convenience in effecting the more readily the special legacies; and that the meaning and extent of the disposition of the residue of the estate must be found solely in the language of the devise contained in the fifth clause of the will; and, since this language is without words expressly limiting the devise to a less estate than the fee, that the same carries the fee, and the words of disposition therein contained, to take effect after the death of the wife, are surplusage, as the owner of the fee already had the right there attempted to be conferred. Reversed, and decree for appellants with costs.

RIDDICK, J., being disqualified, did not participate.

BELDING v. TEXAS PRODUCE COMPANY.

Opinion delivered December 14, 1895.

LANDLORD AND TENANT—HOLDING OVER AFTER EXPIRATION OF LEASE.—Where, after the expiration of a lease for two years, the lessee holds over without any new agreement, paying rent according to the terms of the original lease, the tenancy becomes one from year to year, subject to the terms of the original lease.

Appeal from Garland Circuit Court.

Alexander M. Duffie, Judge.

J. W. Harriss and others, doing business under the name and style of the Texas Produce Company, brought suit in the common pleas court against George Belding to recover the sum of $86.66, which they claimed to be due under the terms of a written lease, being two-thirds

of the appraised value of a certain building erected by them on land leased from defendant.

On August 27, 1890, defendant, as party of the first part, leased to the Texas Produce Company, as party of the second part, a lot in the city of Hot Springs by a written lease, the material part of which is as follows: "Said first party agrees that said second party may erect thereon a house, not to exceed in value $160, to be used as a stable; and said first party hereby grants to said second party an easement over his adjoining land, leading from said portion of said lot fifteen in said block to some street or thoroughfare, but granting only such an easement over said lot as is necessary for the transfer of a wagon and team to and from said stable to said street or thoroughfare, for the term of two years from above date (August 27, 1890), if said first party does not sell or lease said land within two years, and provided said second party keeps said premises clean and in good order during the time specified, at the rental of three dollars per month to be paid by the party of the second part to the party of the first part in advance on the first day of each and every month, that is to say, $3 on the 1st day of September, 1890, and $3 on the first day of each and every month thereafter until the expiration of the term. And it is understood and agreed by and between the parties hereunto that, should the said first party desire to sell said lot, he hereby grants the privilege to said second party of removing said stable on an adjoining lot owned by him; and, if the said first party desires within two years from date hereof to dispose of all the land now owned by him adjoining said lot, he is hereby privileged to do so, and in that event it is hereby agreed that he shall pay to the party of the second part two-thirds of the appraised value of said building. And it is further agreed that, if said second party desires to relinquish said lease at the expiration of two

years, said first party agrees to pay two-thirds of the appraised value of said buildings."

After the two years' lease expired in August, 1892, plaintiffs continued to hold over, without any new or different agreement with defendant, paying the same rent as under the lease, until February, 1893, when defendant sold the leased lot and his adjacent property to another. Thereupon plaintiffs delivered possession to defendant's vendee, and brought this suit against defendant to recover two-thirds of the value of the stable erected by them on the leased premises.

At the trial, against defendant's objection, the court instructed the jury as follows: "If you find from the evidence that, after the expiration of the original lease sued on in this action, plaintiffs paid and defendant received rent for the demised premises at the same rate mentioned in said lease, and that no new agreement was entered into by the parties different from that contained in the original lease, then that operated as a renewal of the lease under the same terms as contained in the original lease; and if you further find that said lease was renewed in said manner, and afterwards, and within two years after such renewal, defendant sold said premises, together with all his land adjoining it, then plaintiffs thereby acquired a lawful demand against defendant for two-thirds of the value of said stable, and your verdict will be for plaintiffs in two-thirds of the appraised value thereof, as shown by the evidence."

The jury returned a verdict in favor of plaintiffs for two-thirds of the value of the stable. Defendant has appealed.

Charles D. Greaves, for appellant.

1. This case was tried on the erroneous theory that, by appellee holding over after the term expired, and paying the agreed rate of rent, the lease was re-

newed by operation of law for another term of two years. But the law is, where a demise is for a term of years at an annual rental, and the tenant holds over, paying the agreed rate, he is a tenant from year to year. 20 W. Va. 46; 69 Ala. 549; 21 Neb. 178; 60 Wis. 1; Taylor, Land. & Ten. sec. 22; 12 Am. & Eng. Enc. Law, p. 675; 36 Ark. 518; Taylor, Land. & Ten. sec. 525.

2. The law imposes no obligation on the landlord to pay for improvements on demised premises, and the right of the tenant to claim for improvements depends upon the express or implied agreement of the landlord to pay for same. 18 Ill. 386; 2 Wall. 491; 51 Ark. 46; 32 Mich. 65. The mere holding over did not bind appellant to pay for improvements. See 92 N. Y. 172; 8 Daly (N. Y.), 35; 47 Wis. 581; 99 Pa. St. 611; 138 Mass. 81; 33 Wis. 185; 11 Cal. 298; 4 J. J. Marsh (Ky.), 229; 1 Cr. & M. 113; Taylor, Land. & Ten. sec. 543.

BATTLE, J. When the Texas Produce Company held the demised premises after the expiration of the term of two years, and thereafter paid, and Belding received, rent for the same according to the terms of the first tenancy, without any new or different agreement, it thereby became a tenant from year to year upon the terms of the original lease. Belding had the right to terminate the tenancy by selling the premises. When he did so, and at the same time sold his adjoining property, he became liable to the Texas Produce Company for two-thirds of the appraised value of the stable erected on the demised premises, according to the terms of the original lease. *Schuyler* v. *Smith*, 51 N. Y. 309, and cases cited.

There is no material or prejudicial error in the instructions of the trial court to the jury, and its judgment is affirmed.

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CITY ELECTRIC STREET RAILWAY CO. *v.* CONERY.

Opinion delivered December 14, 1895.

ELECTRICITY—EVIDENCE OF NEGLIGENCE.—In an action for injuries received by coming in contact with a telephone wire charged with electricity, a finding that the current was communicated from a trolley wire to the telephone wire which had hung over it and become broken will be sustained, without any positive proof as to their contact, where there is no other reasonable theory to explain how the telephone wire became charged with electricity.

ELECTRIC COMPANIES—DUTY TO PREVENT ESCAPE OF ELECTRICITY.—It is the duty of an electric street railway company to use reasonable care to prevent injury by the escape of electricity from its wires suspended over streets through any other wires that may come in contact with them.

NEGLIGENCE—ELECTRIC WIRES IN CITIES.—The care exercised to prevent the escape of a dangerous current of electricity from wires suspended over streets in populous cities or towns must be commensurate with the great danger that exists, although the owners of such wires are not insurers against accidents.

NEGLIGENCE—JOINT LIABILITY.—The concurring negligence of two parties makes both liable to a third party injured thereby, if the injury would not have occurred from the negligence of one of them only.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

J. M. Rose and *J. F. Loughborough*, for appellant.

1. He who seeks recovery for an injury caused by the alleged negligence of defendant must prove, not only that he has suffered loss by defendant's act or omission, but also that the act or omission was a violation of a duty required of him. 36 Ark. 607. There is no proof that White's wire touched the wire of the street railway company at all, or that a current was communicated to it from the company's wire. But, if injured by a current from the company's wire, no

negligence was proved. An electric railway is not bound, in the absence of statutory requirement, to maintain guard wires, so as to prevent telegraph wires from falling on the trolleys. Keasby on El. Wires, p. 167. The happening of an accident is not evidence of negligence to go to a jury. Whart. Negl. sec. 421. No contact of wires was shown; no negligence was shown; no evidence that the telephone wire was in dangerous condition.

2. Even admitting White's negligence, his negligence was the *proximate* cause of the injury, and there is no *causal connection* between his negligence and that of the street car company. Whart. Negl. sec. 139; *Ib.* sec 143; *Ib.* sec. 155; Booth, St. Ry. Law, sec. 134; 56 Ark. 271; 55 *id.* 521; Whart. Negl. 134; 33 Pac. 403.

3. The court erred in its instructions. Cases *supra.* 24 Ark. 251.

H. F. Auten for appellee.

1. The evidence amply supports the verdict. Failure to maintain guard wires was negligence *per se.* 89 Tenn. 421; 14 S. W. 863.

3. There is no error in the instructions.

4. The doctrine of primary and proximate cause does not apply; but, if it does, appellant did not ask a charge to the jury on this point, and cannot now complain.

BATTLE, J. The City Electric Street Railway Company is a corporation, and operates a street railway in the city of Little Rock, in this state, by means of electricity. Its railway traverses an extensive territory, and extends through many streets. One of the appliances used in its operation is a trolley wire, suspended by means of poles and charged with strong currents of electricity. A part of the railway was constructed in Fourth street. Above it were suspended the trolley

wires. Intersecting Fourth street at right angles is Cross street, running north and south, while Fourth runs east and west. At the southwest corner of Fourth and Cross, O. E. White resided. Three blocks distant, an the corner of Markham and Cross streets, was a drug store, which he owned and occupied. The residence and store were connected by a private telephone wire, which was suspended by passing it through loops of wire attached to insulators on poles, and was extended over the trolley wire of the street railway at Fourth and Cross streets, its distance above it, at the lowest point, being between six and twelve feet. In the course of time the telephone wire began to sag, sagged two or three feet between poles, and was finally broken near the corner of Markam and Cross by two electricians attempting to make it straight. The broken end was tied to a post, and in a few days became untied, or was again broken at or near the same place, and hung suspended in the street, the north end resting upon the ground. Two days afterwards, Arthur Conery, a lad of about ten years,—playing, perhaps, in the street in front of the home of his father and mother,—stepped upon it, and was shocked, thrown down, and burned. His mother, hearing his cries, went to his rescue, and, attempting to relieve him, was likewise thrown down. A workman, laboring near by, next went to his assistance, and cut the wire and relieved him. After this he sued White and the railway company for damages, recovered a judgment for $300, and the company appealed.

Sufficiency of evidence of negligence.

The appellant denies that the evidence shows that the trolley communicated to the telephone wire the electricity with which it was charged when appellee was shocked and burned. It says that it was not proved "that there was any contact between the two wires." It is true that there was no positive evidence to that effect, but there was only one other electric wire in that

vicinity, and it was an "electric light wire," which was suspended above the telephone, and there is no evidence that it ever sagged or fell sufficiently low to come in contact with any wire below it. According to the evidence, there is only one reasonable theory upon which the condition of the telephone wire at the time appellee was injured by it can be accounted for, and that is that it came in contact with the trolley wire, while down, and received the electricity with which it was charged at the time. This fact is sufficient to sustain the verdict in that respect.

Duty of electric companies to prevent escape of electricity.

This fact being established, the next question is, upon what duty of the appellant to the appellee can this action be based? The answer to it is, upon the duty enjoined by the rule which requires every one to so use his property as not to injure another. The applicability of this rule may be shown by many illustrations. One is where an owner of a vicious animal accustomed to do hurt, knowing his habits, negligently allows him to escape. He is responsible for the mischief the animal does, because it was the duty of the owner to keep him secure. So it is lawful for any person to gather water on his own premises for useful and ornamental purposes, but it is his duty to construct the reservoirs for that purpose with sufficient strength to retain the water under all circumstances which can reasonably be anticipated, and afterwards to preserve and guard them with due care. "For any negligence, either in construction or in subsequent attention, from which injury results, parties maintaining such reservoirs must be responsible." It is the duty of railway companies to keep their tracks and rights of way free from inflammable matter, so as to prevent the communication of fire from their locomotives to adjoining property, and for a failure to discharge this duty they are liable for injuries occasioned by the neglect.

This rule applies with equal force to electric companies. They are bound to use reasonable care in the construction and maintenance of their poles, cross-arms and wires, and other apparatus, along streets and other highways. They are required to do so for the protection of persons and property. If they negligently allow their wires to fall or sag, or poles or other apparatus to fall, to the injury of another, they are responsible in damage for the wrong done, if the party injured is guilty of no culpable negligence contributing to the injury. *Uggla* v. *West End Street Railway*, 160 Mass. 351; *Haynes* v. *Raleigh Gas Co.* (N. C.), 48 Am. & Eng. Corp. Cases, 225; *Western Union Telegraph Co.* v. *Eyser*, 91 U. S. 495.

In *Texarkana Gas & Electric Light Co.* v. *Orr*, 59 Ark. 215, it appeared that the defendant owned, maintained and operated in the city of Texarkana a system of electric lights. During the night of the 22d of August, 1891, or early in the morning of the next day, its wires became disabled and out of repair, and, being either broken or disengaged from their fastenings, fell to the ground or sidewalks of the city, and lay there from 12:30 o'clock a. m. until after daylight in the morning, when the street on which they lay was thronged with people. The company ascertained that the wires were down about 2 o'clock a. m. of the same day, but not the exact locality. Ed Walker, a boy, walking along the street about 6 o'clock in the morning of the day the wires had fallen, after some conversation with a bystander about the danger of the wires, picked up a dead wire. Being told to throw it down, he obeyed, but "flipped" it, as a witness said, into the air as he did so, and the wire struck a live wire before he let it go, and thereby transmitted through him an electric current which killed him instantly. The company was held responsible for damages on account of the injury.

The main difference between the case last cited and this is, the electricity was communicated to the party injured in the former by the electric company's own wire, and in the latter by the wire of another, but the principle upon which the liability is based is the same in both cases. All persons have the right to use the streets, in or over which the wires were suspended, as public highways. Subjecting the dangerous element of electricity to their control, and using it for their own purposes, by means of wires suspended over the streets, it is their duty to maintain it in such a manner as to protect such persons against injury by it to the extent they can do so by the exercise of reasonable care and diligence. This duty is not limited to keeping their own wires out of the streets, or other public highways, but extends to the prevention of the escape of the dangerous force in their service through any wires brought in contact with their own, and of its transmission thereby to any one using the streets. Only in this way can the public receive that protection due it while exercising its rights in the highways in or over which electric wires are suspended. *Electric Ry. Co.* v. *Shelton*, 89 Tenn. 423 (14 S. W. Rep. 863); *Block* v. *Milwaukee St. Ry. Co.* (Wis.), 61 N. W. Rep. 1101.

Duty as to electric wires in cities.

Electric companies are bound to use "reasonable care in the construction and maintenance of their lines and apparatus,—that is, such care as a reasonable man would use under the circumstances,—and will be responsible for any conduct falling short of this standard." This care varies with the danger which will be incurred by negligence. In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death, or most serious accidents, the highest degree of care is required. This is especially true of electric railway wires suspended over the streets of populous cities or towns. Here the

danger is great, and the care exercised must be commensurate with it. But this duty does not make them insurers against accidents; for they are not responsible for accidents which a reasonable man in the exercise of the greatest prudence would not, under the circumstances, have guarded against. *Haynes* v. *Raleigh Gas Co.* (N. C.), 48 Am. & Eng. Corp. Cases, 225; *Uggla* v. *West End Street Railway Co.* 160 Mass. 351.

As to joint liability of tort feasors.

In this case the cause of the accident was the falling of White's telephone wire and the contact of the same with the trolley wire of the appellant. The jury found both of them guilty of negligence—White, in permitting his wire to fall and remain down until appellee was hurt, and the appellant, in allowing the same to become charged with electricity by contact with its wire at the time of the injury. If this be true, the injury was the result of the concurring negligence of the two parties, and would not have occurred in the absence of either. In that case the negligence of the two was the proximate cause of the same, and both parties are liable. Shear. & Redf. on Neg. (4 ed.), sec. 31; Thompson on Negligence, p. 1088.

We have examined the evidence in this case, and the instructions of the trial court based on the same. Without setting out either, it is sufficient to say that, tested by what we have said in this opinion as to the law, we find no reversible error in the instructions, taken as a whole, and that the evidence is sufficient to sustain the verdict of the jury in this court. Judgment affirmed.

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BRANCH v. POLK.

Opinion delivered December 14, 1895.

HUSBAND AND WIFE—ESTATE IN ENTIRETY.—A conveyance of land to husband and wife jointly vests in them an estate in entirety.

ESTATE IN ENTIRETY—POWER OF HUSBAND TO CONVEY.—A conveyance by the husband of an undivided half interest in an estate in entirety, without joinder by the wife, does not, after his death, affect the wife's right of survivorship.

SAME—POWER OF WIFE TO CONVEY.—A married woman may convey an undivided half interest in land held in entirety, subject to the husband's right of survivorship.

Appeal from Phillips Circuit Court in Chancery.

GRANT GREEN, JR., Judge.

STATEMENT BY THE COURT.

Mary P. Branch brought suit in the Phillips circuit court against Sallie M. Polk, and the heirs of Lucius E. Polk, Sr. For cause of action she alleged that Lucius E. Polk, Sr., executed to her, on the first day of March, 1891, several promissory notes, amounting in the aggregate to between six and seven thousand dollars; that, to secure the payment of these notes, he executed to her a mortgage on an undivided half interest in certain lands in Phillips county, Arksansas; that the defendant, Sallie M. Polk, at that time the wife of said Lucius E. Polk, in order to further secure the payment of said notes, did, on said first day of March, 1891, also execute a mortgage upon an undivided half interest in said lands owned by her; that Lucius E. Polk had died since the execution of the notes and mortgage, and that said notes were due and unpaid. She prayed that the mortgage be foreclosed, etc.

Mrs. Polk filed her separate answer to the complaint, wherein she admits the execution of the notes and

mortgages as alleged, and that, at the time of the execution of the same, she was the wife of L. E. Polk, that he has since died, and that said notes are past due and unpaid; but, to quote the language of the answer, "she denies that the deed of trust so executed by the said husband and delivered to the said plaintiff is a lien upon said lands described in said complaint, or an undivided half interest in the same, or upon any part or any interest therein, or that the deed of trust so executed by herself and delivered to said plaintiff is a lien upon said lands, or any interest therein, or any part thereof, because she says that the sole and only title which she or her said husband had or held to said land, or any part thereof, was the title derived through a deed executed by Clarence Quarles, as commissioner in chancery of the circuit court of Phillips county, Arkansas, dated the 10th day of December, 1877, wherein and whereby he conveyed the whole of said several tracts of land to her said husband and herself. * * * * And so she says that, for the reasons aforesaid, said mortgages or deeds of trust executed as aforesaid by herself and husband are no lien upon the said hereinbefore described lands." There was a demurrer to this paragraph of the answer, which was overruled by the court. Plaintiff electing to stand on her complaint and demurrer, the complaint was dismissed, and plaintiff appealed.

Rose, *Hemingway & Rose* and *Tappan & Porter*, for appellant.

1. Although it may be true that the mortgage by the wife could not operate during the husband's lifetime, so as to disturb his and her joint possession, yet, on his death, it became immediately operative, under our statute. 29 Ark. 202; 47 *id.* 116; *Id.* 179; 4 Sneed, 693; 53 N. Y. 93; 55 Ark. 85; 1 Spencer, N. J. 556; 45 Am. Dec. 388. The wife owned the rest of the estate not vested

in her husband; and that estate might be "conveyed by her the same as if she were a *feme sole.*" Const. Ark. 1874. art. 9, sec. 7; 36 Ark. 356; 41 *id.* 421; 47 *id.* 235; 43 *id.* 160; 53 *id.* 565. Mansf. Dig. sec 642 applies to mortgages as well as to deeds. 47 Ark 112; 57 *id.* 107. So, if the wife's conveyance was inoperative during her husband's life, it bound her on his death. The old rule has been changed by statute. 19 Wis. 392; 88 Am. Dec. 692; 5 *id.* 95; 68 *id.* 49; 1 Bish. Mar. Wom. sec. 621; 1 Ballard, Real Pr. secs. 240–1; 8 Cow. 277; 30 Ind. 305.

2. As in this case, both of the tenants by entireties conveyed the lands upon the same consideration, to the same person, upon the same uses, the result is precisely the same as if they had both joined in the same conveyance. 45 Ark. 17; 4 *id.* 278; 48 *id.* 415; 138 U. S. 2. Both instruments need not be of the same date. 18 Johns. 421; Lawson on Cont. sec. 389. An estate by entireties may be conveyed by joint action of both tenants. Either may convey with the consent of the other. 29 Ark. 205.

John J. & E. C. Hornor for appellees.

This was a case of tenancy by entirety, and neither husband nor wife can dispose of any part without the consent of the other, but the whole must remain to the survivor. 2 Bl. Com. 182. Our Rev. St. ch. 31, sec. 9, and art. 12, sec. 6, const. 1868, did not destroy this common law right. 29 Ark. 202. Nor did the constitution of 1874, art. 9, sec. 7, transform an estate by entirety into a *separate* estate. 14 Dillon, 198; 12 *id.* 329; 2 Bush, 115; 50 Miss. 535; 52 Mo. 71; 73 Mich. 38; 26 Pa. St. 401; 56 *id.* 106; 92 N. Y. 158; 100 *id.* 15; 25 Mich. 347; 40 Kas. 442; 90 Ind. 222; 141 Mass. 219; 49 Md. 402; 42 N. J. Eq. 651; 55 N. W. 664. Our constitution and statute only dealt with the *sepa-*

rate estates of married women. Therefore, to divest the wife in lands held by entirety, she *must join her husband* in the conveyance. 8 Cow. 277; 108 Mass. 258. While the policy of our law has been to free married women from the disabilities of coverture, yet this class of legislation is in derogation of the common law, and can be extended no further than the plain provision of the statutes permit. 29 Ark. 202; *Ib.* 346; 30 *id.* 385; 53 *id.* 545. A married woman can bind herself only by executing a deed in the form prescribed by law. 30 Ark. 628. No estoppel can accrue against a married woman in regard to lands not held as her separate estate. 30 Ark. 385.

Tappan & Porter and *Rose*, *Hemingway & Rose*, for appellees, in reply.

The interest of a wife in an estate by entirety is identical with her separate estate in respect of her power to convey it. She can convey her estate by entirety in the same manner she can her separate estate. Const. art. 9, sec. 7; 1 Bish. Mar. Wom. sec. 613; 36 Ark. 588; 1 Dev. Deeds, sec. 101. She may mortgage it to pay her husband's debts. 35 Ark. 480; 34 *id.* 17.

When estate in entirety created.

RIDDICK, J., (after stating the facts.) The lands upon which appellant claims a lien were held by Lucius E. Polk and his wife, Sallie M. Polk, under a joint conveyance executed to them by Clarence Quarles, commissioner. This joint conveyance to husband and wife vested in them an estate in entirety. *Robinson* v. *Eagle*, 29 Ark. 202; *Kline* v. *Ragland*, 47 *id.* 116; *Den* v. *Hardenbergh*, 18 Am. Dec. 377; *Bertles* v. *Nunan*, 92 N. Y. 152.

After receiving this conveyance, each of the grantees gave to Mary P. Branch a mortgage on an undivided half interest in said land to secure notes executed

to her by Lucius E. Polk. These mortgages were executed at different places and at different times. The one by Lucius E. Polk was executed on the 4th day of April, 1892, and his wife executed one on the 31st day of May, 1892. Neither of them joined in the mortgage executed by the other. Now, the right of survivorship is a distinctive characteristic of an estate of entirety, and neither of the tenants holding by entireties can by a separate deed affect the right of survivorship existing in the other. *Ames* v. *Norman*, 4 Sneed (Tenn.), 683; S. C. 70 Am. Dec. 269; *Den* v. *Hardenbergh*, 18 Am. Dec. 371, and note; Kerr on Real Property, vol. 3, sec. 1975.

Power of husband to convey estate in entirety.

In order to convey the entire estate in land held by entirety, the husband and wife must convey by a joint deed, or the deeds, if separate, must each purport to convey the entire estate. Neither of the mortgages set up by the appellant purport to convey more than an undivided half interest in the land. It is contended by appellant that these two mortgages, being executed for the same purpose, must be taken and construed as one deed. If this be conceded as correct, it would not strengthen the position of appellant for it would still be a deed conveying an undivided half interest only. When persons owning lands as tenants in common each convey an undivided half interest therein, they have conveyed the title to the whole, for neither of them held more than an undivided half interest, and the deed of each conveys his entire interest; but the entire estate is vested in each of the tenants by the entireties, for they hold, not by moieties, but by entireties, and a conveyance of an undivided half interest by one tenant does not purport to convey his whole interest. The deed of the husband can have no effect after his death. When that happened, Mrs. Polk became the sole owner, his interest passing to her by right of survivorship. If appellant has any

lien upon Mrs. Polk's land, it must be by force of her own deed, for she did not join in the deed of her husband, and is not affected by it.

As the mortgage executed by Mrs. Polk only purported to convey an undivided half interest in the land, we think it clear that in no event can appellant claim a lien beyond this undivided half interest.

Power of married woman to convey her interest in estate in entirety.

But the most serious question for us to determine is whether Mrs. Polk, during coverture, had the power by a separate deed to mortgage her interest in the lands held by herself and husband as tenants of the entirety. Whether a wife may, in this state, convey an interest held by her as such a tenant, as she may her interest in other real property, has not been determined by this court. The question decided in *Robinson* v. *Eagle*, 29 Ark. *supra*, was that estates of entirety were not abolished by the constitution of 1868. This ruling was approved in *Kline* v. *Ragland*, 47 Ark. 116. In neither of those cases was any question concerning the power of the wife to convey her interest in such an estate by a separate deed considered by the court. At common law the husband had, during marriage, the exclusive control of such estate. *Fairchild* v. *Chastelleux*, 1 Pa. St. 176, S. C. 44 Am. Dec. 117; *Barber* v. *Harris*, 15 Wend. 615; *French* v. *Mehan*, 56 Pa. St. 287. But the authority of the husband to dispose of the rents and profits of land held in entirety did not arise from any peculiarity of this estate or from any special powers conferred upon him as a tenant of the entirety, but arose out of the rule at common law that, during coverture, the husband had the control of the real estate of the wife. 2 Kent's Com. 130; *Hiles* v. *Fisher*, 144 N. Y. 306; S. C. 43 Am. St. Rep. 766. Hence we find that, in many of the states where the wife has been clothed with the power to manage, control and use her separate property, "the courts, following the logic of

the situation, have extended this right to estates by entireties, to the extent of denying the right of the husband or his creditors to deprive her of the use and enjoyment of her interest in such an estate during the life of her husband." 1 Ballard's Real Prop. sec. 241; *Hiles* v. *Fisher*, 144 N. Y. 306; S. C. 43 Am. State Rep. 766; *Buttlar* v. *Rosenblath*, 42 N. J. Eq. 651; S. C. 59 Am. Rep. 52; *McCurdy* v. *Canning*, 64 Pa. St. 41; *Chandler* v. *Cheney*, 37 Ind. 391; *Shinn* v. *Shinn*, 42 Kas. 1.

In this state a married woman has full control of her separate property, and may convey and dispose of it as if she were a *feme sole*. Our constitution and statute have excluded the marital rights of the husband therefrom during the life of the wife. Const. 1874, art. 9, sec. 7; Sand. & H. Dig., sec. 4945; *Neelly* v. *Lancaster*, 47 Ark. 175; *Roberts* v. *Wilcoxson*, 36 Ark. 355. We think that the effect of these provisions was to give the wife control of all the property owned by her, including her interest in an estate by entirety as well as other real estate. To say that it did not apply to an estate by entirety would be to deprive her of a share in the rents and profits of such an estate during the life of her husband, and would establish an exception to the operation of the constitution and statute resting on no valid principle or reason. *Hiles* v. *Fisher*, *supra*. On the other hand, to say that neither she nor her husband could convey any interest in such an estate except by a joint deed would tie up the estate, and prevent either of them from controlling or disposing of his or her interest without the consent of the other. It would also result in placing it beyond the reach of the creditors of either of them, and such is the rule followed in several of the states. *McCurdy* v. *Canning*, 64 Pa. St. 39; *Chandler* v. *Cheney*, 37 Ind. 391; *Naylor* v. *Minock*, 96 Mich. 182, S. C. 35 Am. St. Rep. 595, and note.

But it would seem that this rule is to a certain extent illogical, for under it the effect of the statutes giving married women control of their own property is also in this instance to curtail the power of the husband over his own interest in real estate. The object of these laws was not to affect in any way the control of the husband over his own property. Their sole purpose was to give to the wife what she did not have at common law, the right to control and convey her own property as if she were unmarried. *Bertles* v. *Nunan*, 92 N. Y. 152; S. C. 44 Am. Rep. 361.

While such legislation has taken away the control of the husband over the interest of the wife in estates of entireties, as it has removed his control from her other property, yet it does not seem reasonable to hold that it also affected his right to control his own interest in such an estate, or that it exempted such interest from seizure by his creditors. As was said in *Buttlar* v. *Rosenblath*, 42 N. J. Eq. *supra*: "Any device of this character for the protection of the husband's property from his creditors is unknown to the common law, and so contrary to public policy that it ought not to be engrafted upon our system of laws, by interpretation of the statute, unless the intent to do so is clearly expressed."

The rational construction of these provisions of our constitution and statute, which "uprooted principles of the common law hoary with age," swept away the marital rights of the husband during the life of the wife, and gave enlarged powers to married women, is, not that they lessen the power of the husband over his own interest in an estate by entirety, but that they deprive him of the control over the interest of the wife which he formerly exercised *jure uxoris*, and confer upon the wife the control of her own interest. The right of the wife to control and convey her interest, we

think, is now equal to the right of the husband over his interest. They each are entitled to one-half of the rents and profits during coverture, with power to each to dispose of or to charge his or her interest, subject to the right of survivorship existing in the other. *Hiles* v. *Fisher*, 144 N. Y. 306; S. C. 43 Am. St. Rep. 762; *Buttlar* v. *Rosenblath*, 42 N. J. Eq. 651; S. C. 59 Am. Rep. 52.

This rule, as was said by Chief Justice Andrews, in the recent case of *Hiles* v. *Fisher*, "best reconciles the difficulties surrounding the subject. The estate granted is not thereby changed. It leaves it untouched, with all its common-law incidents; * * * * and gives to each party equal rights so long as the question of survivorship is in abeyance, thereby conforming to the intention of the new legislation to take away the husband's rights *jure uxoris* in his wife's property, and to enable the wife to have and enjoy whatever estate she gets by any conveyance made to her or to her and others jointly, and does not enlarge or diminish that estate."

Our conclusion is that, Mrs. Polk having survived her husband, and become the sole owner of the land, her mortgage deed is valid and binding as to the undivided one-half interest in said land conveyed by her as security for the notes executed by her husband. The court erred, therefore, in not sustaining the demurrer to that extent. The decree is reversed, with an order that the demurrer be sustained to the answer so far as it undertakes to set up a defense to the mortgage executed by Mrs. Polk for said undivided half interest; otherwise, the decree is affirmed.

[NOTE.—This case is annotated in 30 L. R. A. 324. Rep.]

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FRICK v. BRINKLEY.

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Opinion delivered December 21, 1895.

MUNICIPAL CORPORATION—CONTRACT WITH MEMBER OF COUNCIL—A municipal corporation which has purchased drain tiles for a necessary public improvement from a member of its council for a fair price, and paid for them, cannot retain the tiles and at the same time recover from the seller the amount of his profits realized from the sale, although the contract was not made in the manner required by law.

Appeal from Monroe Circuit Court.

GRANT GREEN, JR., Judge.

H. A. & J. R. Parker, for appellant.

To enter into a contract, the ayes and nays must be called and recorded. Sand. & H. Dig. sec. 5157. But, to appropriate money for any purpose, the ayes and nays are not necessary. *Ib.* sec. 5165. A contract with an alderman is not *void*, the only inhibition being that they shall not be allowed to make a profit. *Ib.* sec. 5166. A town council *has power* to dig ditches and put in tiling to drain the town, and the contract was not *ultra vires*. 58 Ark. 270; 40 *id.* 105. The vote delegating the power to the improvement committee to put in the tiling was by ayes and nays; and the committee was the agent of the town to put down the tiling. 96 U. S. 341; 1 Dillon, Mun. Corp. sec. 96 (3 ed.); Herman on Estoppel, sec. 1225. This was a simple sale of tiling, and not a "job" or "contract," within the statute. The town having paid with full knowledge, although illegal, it was a voluntary payment, and cannot be recovered. 2 Herm. Est. sec. 1053, p. 1182; *Ib.* sec. 1165, p. 1299.

2. The town, having received the benefit, cannot repudiate it, or plead *ultra vires*. 2 Herman, Estoppel, sec. 1178, 1222-3-4-5, etc.; 36 Ark. 577; 48 *id.* 254;

Beach, Pub. Corp. secs. 224 to 227 and 629. The town must do justice. *Ib.* sec. 226, etc.; 58 Ark. 348.

3. There is no question of profit in the case, as the tiling was sold at *actual cost.*

4. There is a clear distinction between executory contracts and those executed. 28 S. W. 1053; 9 Cal. 453; 80 Tex. 578; 38 N. E. 238. As to when unauthorized contracts are ratified, see 1 Dill. Mun. Corp. secs. 463–4–5, and notes. A contract not *ultra vires* may be ratified. 19 Pick. 487; 37 Conn. 578; Mansf. Dig. sec. 760.

5. The first and second declarations of law are objectionable, because (1) not applicable, and (2) not the law. Mansf. Dig. sec. 924, which limits sec. 774 *id.*

6. The court's finding of facts was without any evidence to support it.

W. T. Tucker and *M. J. Manning* for appellee.

1. Sand. & H. Dig. sec. 5166 is simply declaratory of the law as it existed before its passage. 61 N. Y. 444; Dillon, Mun. Corp. sec. 444; 91 Ind. 478; 44 Cal. 106; 87 *id.* 597; 25 Wis. 551; 74 *id.* 295. The contract was void.

2. The resolution was not passed by a majority of the council. Sand. & H. Dig. sec. 5157. Nor were the ayes and nays called and recorded. 40 Ark. 105; Dillon, Mun. Corp. sec. 291; Sand. & H. Dig. sec. 5165.

3. When money is illegally appropriated, the courts will give restitution. 52 Ark. 541.

4. The town is not estopped by the unauthorized acts of its agents. 39 Ark. 580; 42 *id.* 118. Nor is it responsible for the mistakes or unlawful acts of its officers. 40 Ark. 251.

5. A void contract cannot be ratified.

BUNN, C. J. The town council of Brinkley resolved, in the regular way, by a yea and nay vote, and

by a majority of all the members elected to the council, to lay sewer piping along its streets for the purpose of drainage. Subsequently, it resolved to lay this piping along certain streets and certain blocks, presumably as an installment of the general work. This resolution does not seem to have been adopted by a majority of all the members elected to the council, nor by a yea and nay vote. The mayor, however, as authorized by the last named resolution, proceeded to advertise for bids to furnish the piping or tiling necessary to accomplish the object in hand; and, receiving no bids from any one, a number of citizens interested appealed to the council to purchase the necessary tiling and have the work done at once. At this juncture, the appellant, who was an alderman and chairman of the council improvement committee, and who was a dealer in tiling, but who seems not to have taken any part in the council's proceedings, offered to sell the necessary porous tiling, at the rate of $1.10 per foot, worth, as he afterwards testified, 95 cents per foot actual value, at that place. Under the circumstances the mayor accepted this offer, and the appellant laid the tiling, and made the openings and connections, and made no charge for his labor in the matter. The evidence is to the effect, that the kind of tiling thus sold to the town was worth 95 cents, actual value delivered at Brinkley, and $1.10 mercantile value. for this tiling the town council ratified the payment of the sum of $840 to appellant, being according to the price per foot agreed upon as aforesaid, by approving the account of the treasurer to that effect.

Subsequently, after a change in the composition of the council had been made, the town instituted this action against appellant to recover back the whole amount thus paid him, on the ground that the purchase was made without authority on the part of the town, and because appellant, as a member of the council and

chairman of its improvement committee, could not contract with the town.

The evidence adduced to show that the price given for the tiling was excessive seems to have had reference altogether to a different class of tiling, and therefore was not contradictory of appellant's testimony as to the value of the tiling actually sold and laid. Some effort was made to show that the piping, as laid, did not properly answer the ends designed, but the testimony as to that is not satisfactory enough to be seriously considered in determining the particular issue made in this proceeding.

The court below made three declarations of law bearing on the subject, as follows, to-wit: (1) "That in all contracts for payment of money, votes must be taken by yeas and nays, and that a member of council cannot make a contract with town and share in the profits. (2) That a town may ratify the act of its agent by accepting property purchased, if the corporation has the power to make the contract. (3) That a town has the right to contract to drain its streets." With proper explanations, there does not seem to be any substantial error in these declarations of law.

As to the first, the last clause of section 5166, Sandels & Hill's Digest reads as follows: "Nor shall any alderman or member (of council) be interested, directly or indirectly, in the profits of any contract or job for work or services to be performed for the corporation." Presumably, this declaration of law was based upon this clause of the statute. If so, it is not certain that it was not erroneous, for the sale made by the appellant to the town, is not necessarily or even reasonably to be considered a "contract or job for work or services to be performed," as is contemplated by the statute. In enacting this clause, the legislature evidently had in mind an abuse that had grown up, whereby public

officials became the recipients of the unusually large profits made on public contracts for work and services to be performed as a fulfillment of the contracts. Sales were not generally the subject of such abuses, for unfairness of price, as well as inferiority of quality, are of too easy detection to encourage such. But since, by the common law, a trustee or agent is not permitted to enjoy profits which rightfully belong to his *cestui qui trust* or principal, the court's declaration of law, looking at it from that standpoint, may not be materially wrong.

There is no serious objection to the second declaration, except that ratification, as a principle, may not be exactly applicable to the case in hand, because, generally speaking, ratification of a contract must be after the same formalities as are requisite in making it in the first instance. Another doctrine may, however, cure any defects of this declaration in this regard.

The third declaration is indisputably correct, for to deny a town the right or power to drain its streets would be to denude it of the very privilege of decent existence.

Upon these declarations of law, and the testimony, the court below refused to adjudge a repayment of the actual value of the piping, but rendered judgment against defendant, Frick, for what it found to be the profits, to-wit: the sum of $219.50. We do not think the evidence supports the findings of the court as to the amount of the profits. The piping was shown to be of the actual value of 95 cents per foot, and the fair selling price of $1.10. The difference, 15 cents per foot, therefore, represents the profit, and for the 784 feet the sum of $117.60.

It may be conceded that, while the council had power to purchase the piping, its method of making or authorizing the contract of purchase was irregular, and

not in accordance with a statute which is mandatory on the subject. We need not discuss the question as if the town was without power to purchase and lay the tiling, or inquire what would be the consequences to appellant, were there no such power in the town.

Our concern now is to determine what must be the consequences to the parties in the case as made and presented to us; that is, where there is a failure to comply with the forms of law in an attempt to exercise a power which the town possessed. In other words, where the contract made is not void in the strict sense, but only voidable, and where it has been fully executed by both parties, and the object of the litigation, is, in effect, to annul and rescind it.

In *Town of Searcy* v. *Yarnell*, 47 Ark. 269, a similar question, in many of its aspects, was presented and determined by this court. There the town of Searcy, a stockholder and principal owner of the stock in a corporation owning and operating a horse car wooden tramway connecting that town with the Iron Mountain railroad, three or four miles in length, sold the same to the two Yarnell brothers, one of whom was, at the time the sale to them was first suggested, a member of the town council, but who resigned immediately, presumably that he might be free to consummate the purchase with his brother from the town. No question of profits arose in that case, except, perhaps, by inference, and no such question was discussed, for the very good reason, doubtless, that whatever profits there might have been in the transaction were the direct and legitimate results of the expenditure of money and labor and exercise of intelligent foresight and management of the Yarnells subsequently to the purchase and delivery of possession to them, and in no true sense belonged to the town. In that case, the sale having been shown to be fair to the town, the Yarnells having shown that they had

fully and honestly complied with their part of the contract, and it appearing that a restoration was impossible, at least impracticable, and the whole matter executed, the court declined to interfere when such interference could have done nothing more than to commit a great injustice and that too for the sole and only purpose of asserting and putting in force a mere technical rule. In that case the private persons were the purchasers from the town, and the question of *ultra vires* could only arise on the proposition of the right of the town council to sell, not to buy. Otherwise that case and this one are not materially different.

It appears to us that the sale of the piping in this case was fair as to price and quality, that there was at least an urgent demand for the improvement to be made at the time, that it fairly answered the ends designed, and that the town is still enjoying its use and benefits; and, therefore, we think it cannot, in good conscience, be allowed to receive the value back, while at the same time it is enjoying the benefits of its purchase,—at all events, when it does not even offer to restore that which it claims could not have been its property, and consequently is not now its own.

This is not the assertion of any right which the appellant has, nor any obligation resting upon the appellee, under the contract of purchase, but it is a rule of justice and right growing out of an implied contract and obligation of every one, whether natural or artificial person, to restore to another that which belongs to him, and that is in the possession of the former or in his power to restore; and when the power to restore does not exist, or when the restoration, in the nature of things, becomes impracticable, then to be precluded from recovering back the fair price paid. Beach, Pub. Corp. sec. 217. In such cases as this, the sole duty of the courts seems to be to see that the public corporation suffers no

material loss nor injustice, but further than this they could but inflict burdens upon others more or less disastrous, where no resulting good can follow—a thing courts of justice ought not to indulge in.

As to the common law rule that an agent ought not to take unto himself the profits of a contract or transaction which properly belongs to his principal, while, by a strained construction, it may be made to apply to this case, yet we cannot see that the town has lost anything whatever by making the purchase from appellant, or that it could have got the same class of piping elsewhere, or from any one else, at a less cost. He seems to have acted in good faith, and it does not appear that he can be placed in *statu quo*, or that it is the intention of the town to attempt it. Under the circumstances, any judgment against him would be in the nature of a penalty for a seeming breach of his relationship to the town. Such a penalty might be inflicted in a proper case, but not upon one who has acted in good faith.

We make no ruling as to what might be the judgment here, were this contract executory; but, as it has been fully executed, and its annulment is now all that is called for, we simply hold that we cannot grant the relief sought, except on the principles of right and justice, and these are not with the plaintiff in this case.

The judgment is reversed, and judgment will be entered here for appellant.

COLE *v.* STATE.

Opinion delivered December 21, 1895.

CRIMINAL LAW—OFFENSES AGAINST PROPERTY.—An indictment simply alleging that defendant unlawfully and wilfully took away a horse, without the knowledge or consent of the owner, against the peace and dignity of the state, charges no offense.

Appeal from Woodruff Circuit Court.

H. N. HUTTON, Judge.

N. W. Norton for appellant.

The indictment is not based upon any statute, and charges no common law offense. 2 Wharton, Cr. Law, sec. 2003, 2004, 2055; 1 Bish. Cr. L. sec. 536, 538; 2 Bish. Cr. L. secs. 517-18; 13 Vt. 344; 23 Am. Dec. 212; 30 Ark. 433; 35 *id.* 345.

E. B. Kinsworthy, Attorney General, for appellee.

The offense should be punished under the common law, as provided by sec. 601, Sand. & H. Dig. See 37, Ark. 261; 48 *id.* 56; 1 Bish. Cr. Law, secs. 569, 570 625 and note. 30 N. E. 1118; 5 Cow. (N. Y.) 258; 19 Wend, (N. Y.) 419. It is not necessary that the owner be put in fear. 14 S. E. 55; 9 Pick. (Mass.) 1. See Clark's Crim. Cases, Annotated, pp. 5 to 7.

BUNN, C. J. The defendant, Bill Cole, was indicted for trespass, in the Woodruff circuit court, and the indictment, omitting the formal parts, is as follows, to-wit: "The said Bill Cole, on the 1st day of August, 1895, in the county of Woodruff aforesaid, then and there, unlawfully and willfully, one horse, the property of O. C. Dillard, did ride, drive, take and carry away, without the knowledge or consent of him, the said O. C. Dillard, against the peace and dignity of the state of Arkansas." A demurrer to this indictment, to the effect

that it charged no offense known to the law, was interposed by the defendant, and the same was, by the court, overruled; exceptions taken and reserved, and defendant was convicted, and appealed.

It is conceded by the state that there is no statute making the particular act a crime in this state, but it is contended that the act alleged was a crime at common law, and, therefore, punishable in this state; and the defendant contends to the contrary.

It is difficult to discuss the subject of trespass to personal property without considering it either as an element of larceny or of malicious mischief; for, when not considered in connection with one or the other of these crimes, it was rarely the subject of indictment at common law. The modern state of the law, it would seem, is to restrict the scope even of malicious mischief, as an indictable offense, from what it was at common law. Thus Mr. Wharton, in his work on Criminal Law, (9th edition), section 1068, says: "The recent inclination, however, so far as the common law is concerned, is to restrict the party injured to his civil remedies, except where the offense is committed secretly, in the night time, or in such other way as to inflict peculiarly wanton injury, so as to imply malice to the owner; or where it is accompanied with a breach of the peace." And elsewhere it is added, where the act is marked with malignant cruelty to animals.

The act complained of is not charged to have been done secretly, or in the night time; nor in the presence of the owner, in such a manner as to cause a breach of the peace; nor is it alleged that any injury was done to the animal or to the owner thereof, nor that the act was committed in a manner and under circumstances indicating malice or ill will toward the owner, or malignant cruelty to the animal, nor in a mere spirit of wantonness. In fact, the indictment fails to contain any of

the elements of a criminal offense, except it be that the act was without the knowledge and consent of the owner, and that it was done against the peace and dignity of the state; and these of themselves are not sufficient to charge a crime to any one.

The demurrer should have been sustained, and, for this error in overruling the same, the judgment is reversed, and the cause is remanded, with instructions to sustain the demurrer.

STATE v. BLACKBURN.

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Opinion delivered December 21, 1895.

BASTARDY—ACQUITTAL—COSTS.—The costs in a bastardy proceeding cannot be charged against the county, where the defendant is acquitted.

Appeal from Johnson Circuit Court.

JEREMIAH G. WALLACE, Judge.

E. B. Kinsworthy, Attorney General, for appellant.

The county is not liable for costs in bastardy cases. Sand. & H. Dig. sec. 474. When justices had jurisdiction, this court held that such cases had the principal features of criminal cases *less than a felony*, where no indictments were required. 29 Ark. 62-68. The liability of counties in criminal prosecutions rests alone on the statute (Sand. & H. Dig. sec 2316), and under that statute the county is not liable. Counties are not liable in misdemeanors. *Ib.* sec. 2315. Nor are they liable unless the statute expressly makes them so. 32 Ark. 45. Statutes regulating costs are strictly construed, and all doubts are decided in favor of the county. Suth. on Stat. Constr. sec. 371.

BUNN, C. J. Appellee was arrested on affidavit before the county court of Johnson county on the charge of bastardy. He was convicted in the county court, appealed to the circuit court, and was acquitted. The court gave judgment against the state for costs, and ordered the circuit clerk to make out a certified list of the cost in the case, which was done. The circuit court approved the same, and ordered the county court to allow and pay the same. To this order of the court in taxing the cost against Johnson county, the state at the time excepted, and prayed an appeal to this court.

This raises the question, whether or not, in bastardy cases, in cases of failure in the prosecution, the costs of the procedure can be taxed against the county. It is well to state in the outset, that the statutes nowhere provide, in terms, who shall pay the costs in such cases. Under the constitution of 1868, when justices of the peace had jurisdiction of bastardy, it was treated in so far at least as a criminal matter that the costs were paid by the county as in misdemeanors, when the prosecution failed. At least we infer as much from decisions reported. *Jackson* v. *State*, 29 Ark. 62.

The county court now has, by the constitution, exclusive original jurisdiction of the subject; and this court, under the new order of things, holds that bastardy is the subject of civil proceeding. The costs, therefore, cannot be assessed against the county, as in case of criminal proceedings. It was said in *Cole* v. *White County*, 32 Ark. 45, that "it is an established rule of law that, where the compensation of an officer is regulated by fees, he can only demand such fees as are fixed and authorized for the performance of his official duties, and he cannot charge for a particular service, for which no special fee is given, unless its payment is allowed by some general provision * * * to the effect that, in all cases where an officer or other person is required to

perform any duty for which no fees are allowed by any law, he shall be entitled to receive such pay as would be allowed for similar services." So much for the amount of the compensation or fees, and this is regulated by statute. See section 474, Sand. & H. Digest. But the court in *Cole* v. *White County*, *supra*, continuing, said: "Such general provision, however, does not embrace services required to be performed for the state, or county; for it is also another well settled rule that, in the construction of statutes declaring or affecting rights and interests, general words do not include the state, or affect its rights, unless it be especially named, or it be clear, by necessary implication, that the state was intended to be included." And counties have the benefit of the same strict construction of statutes affecting them as has the state in like circumstances; for, continues this court in the same case: "Counties are civil divisions of the state, for political purposes, and are its auxiliaries and instrumentalities in the administration of its government." And: "It follows, then, that counties, which are component and essential parts of the state, and are necessary agencies of its government, embodiments of the public, are no more embraced in the general words of the statute than the state itself."

Statutes regulating costs are to be strictly construed in favor of the party sought to be charged, and this even in cases where private persons alone are affected. Sutherland on Statutory Construction, sec. 371.

In *Eagan* v. *Bergen*, 56 Vt. 589, Bergen was before the appropriate court on a charge of bastardy. During the pendency of the proceedings, there was a miscarriage of the expected illegitimate child, and it became necessary to permit the proceedings to abate. The defendant demanded a trial on the issues made,—that is, as to his guilt or innocence,—and trial was had, and de-

fendant discharged. Court awarded costs to the defendant. *Held* that, as no costs were provided by statute, none could be awarded to defendant. The difference between that case and the one at bar is this: In the former the costs were not regulated by statute, while in the latter they are regulated, or rather fixed, by statute, and yet the statute fails to make any one bound for the same in case of adverse judgment.

Our conclusion is that no one is bound for costs, unless rendered so by some positive provision of law, or as a necessary implication from provision of law, and that neither the state nor the county is bound even by legal provisions, unless it is specifically or by necessary implication named or referred to therein, and that the judgment of costs against the county in this case is erroneous, and the same is reversed as to said costs.

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TUCKER v. GRACE.

Opinion delivered December 21, 1895.

ADMINISTRATION—CLAIM AGAINST ESTATE—ATTORNEY'S FEE.—An attorney employed by an administrator of an estate has no claim against the estate, although his services may have inured to its benefit. He must look for compensation to the administrator who employed him.

SAME—LIABILITY OF ADMINISTRATOR FOR ATTORNEY'S FEE.—An agreement that an administrator was not to pay anything out of his own pocket for services rendered by attorneys in the prosecution of an action in behalf of the estate, but that they were to get their fee out of the amount recovered, does not relieve the administrator from personal liability in the event of recovery, but merely protects him against liability for any amount beyond the recovery.

SAME—COMPENSATION OF ATTORNEY.—The fee for which an administrator is personally liable for an attorney's services in the successful prosecution of an action for the negligent killing of his

intestate is not controlled by Sand. & H. Dig., sec. 217, fixing the compensation of an attorney employed by the administrator under direction of the probate court.

ADMINISTRATOR—LIABILITY FOR ATTORNEY'S FEE.—It is no defense to an action against an administrator for attorney's fees for prosecuting an action for the benefit of the estate that the administrator was not authorized by the probate court to bring such action, the statute (Sand & H. Dig., sec. 219), which provides that "no attorney's fee shall be allowed any executor or administrator unless for the prosecuting or defending a suit under the direction of the court," being intended for the protection of the estate.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

STATEMENT BY THE COURT.

John W. Tucker, administrator of the estate of S. D. Morrow, employed W. P. & A. B. Grace, attorneys at law, to commence and prosecute an action for damages against a railway company for causing the death of said Morrow. The result of the action thus brought was a judgment against the railway company for the sum of twenty-five hundred dollars. The company paid the amount of the judgment to Tucker, and this action was afterwards brought by said attorneys to recover of Tucker five hundred dollars as a fee for their services in the action against the railway company. There was a verdict and judgment in favor of the plaintiffs for the sum of three hundred and ninety-five dollars. A motion for new trial was filed, overruled, and appeal taken.

Bridges & Wooldridge, for appellant.

1. There was no allegation in the complaint that the services were rendered under an order of the probate court. Without such order plaintiffs could not sue defendant as administrator. 30 Ark. 322; Sand. &. H. Dig. sec. 219.

2. If defendant was liable at all, it was only for the fees fixed by statute. Sand. & H. Dig. sec. 217.

3. Under the proof appellant was not *individually* liable.

4. Plaintiffs should have presented their claim to the probate court. 34 Ark. 204.

Austin & Taylor, for appellee.

1. The suit was properly brought in the circuit court to settle the disputed claim. 1 Woerner, Am. Law of Adm. p. 346–7–8.

2. The personal liability of appellant is well settled. 2 *id.* p. 576; 34 Ark. 204; 39 *id.* 257; 40 *id.* 187; 48 *id.* 390; 56 *id.* 161.

Power of administrator to bind estate by contract.

RIDDICK, J., (after stating the facts). It is contended by the appellant that he is not personally liable upon his contract employing appellees to prosecute the action against the railway company. But an administrator has no power to enlarge, by his contract, the liability of the estate that he represents. Whether he contracts as an administrator or not, it is his own undertaking, and not that of the decedent, and he incurs a personal liability. An attorney employed by the administrator of an estate has no claim against the estate, although his services may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him. *Underwood* v. *Milligan*, 10 Ark. 254; *Bomford* v. *Grimes*, 17 Ark. 567; *Yarborough* v. *Ward*, 34 Ark. 208; *Devane* v. *Royal*, 7 Jones, L. (N. C.), 426; *Bowman* v. *Tallman*, 2 Robertson (N. Y.), 385; *Estate of Page*, 57 Cal. 238; Schouler, Ex'ors & Adm'rs. sec. 256; 2 Woerner, Administration, p. 756. It follows that the proper practice, when the administrator refuses to pay for such services, is for the attorney to bring suit against him individually, and not in his representative capacity.

Liability of administrator for attorney's fee.

This is conceded by appellant to be correct, as a general rule, but it is argued that in this case there

was an agreement that the appellant should not be personally liable, except for costs. The testimony on this point, to quote the language of one of the appellees, who testified as a witness, is as follows: "He was not to pay us anything out of his own pocket. We were to have our fee out of what we recovered." We do not understand from this testimony that appellant was in no event to be liable. On the contrary, it seems plain that the intention was that he should not be liable beyond the amount recovered in the action against the railway company. Had nothing been recovered, he would have been liable in no amount; but, as he recovered twenty-five hundred dollars, he becomes liable for a reasonable fee. For such reasonable expenses necessarily incurred by the administrator in the discharge of his duties, he has, in common with other trustees, a lien on the assets in his hands, and, upon a proper showing, will be allowed credit therefor in the settlement of his account with the estate. When the appellant has paid the fee due appellees, he will be entitled to a credit therefor in his settlement as administrator, and the result will be, as stipulated in his contract, that he has "paid nothing out of his own pocket."

As to amount of attorney's compensation.

Neither do we think that the amount of the fee in this case is controlled by section 217 of Sand. & H. Digest.[1] That section, as was said in *Turner* v. *Tapscott*, 30 Ark. 320, has reference mainly to the collection of debts due estates, and fixes the compensation to be

1 Sec. 217, Sand. & H. Dig. provides: "When it shall become necessary, in the opinion of the court, for any executor or administrator to employ an attorney to prosecute any suit brought by or against such executor or administrator, the attorney so employed shall receive, as a compensation for his services, eight per centum on all sums less than three hundred dollars, and on all sums over three hundred and less than eight hundred dollars, four per centum, and on all sums over eight hundred, two and a half per centum."

allowed attorneys for such suits, but does not apply in a case such as we have here.

Personal liability of administrator employing attorney.

Nor does it avail the appellant anything in this action that he failed to obtain the order of the probate court before employing an attorney. Even without such an order it would still be within the discretion of the court to allow the administrator credit for fees paid an attorney for the prosecution of a suit which resulted to the benefit of the estate. *Reynolds* v. *Canal & Banking Co.*, 30 Ark. 520. But that question is not before us; for whether the administrator is entitled to a credit for the fee which he has paid an attorney is a different question from the one as to whether he is personally liable to the attorney whom he employs. The statute referred to (sec. 219, Sand. & H. Dig.[2]) was intended to protect estates, not administrators, and, as this is an action against Tucker individually, and not against him as representative of the estate of Morrow, it has no application.

The verdict of the jury has evidence to support it. Finding no error, the judgment of the circuit court is affirmed.

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2 Sec. 219, Sand. & H. Dig. provides: "Such attorney's fees shall be paid as expenses of administration; but no attorney's fees shall be allowed any executor or administrator unless for the prosecuting or defending a suit under the direction of the court."

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SALINGER *v.* GUNN.

Opinion delivered December 21, 1895.

TAX-SALE—VALIDITY—EXCESSIVE COSTS.—A sale of delinquent land which includes the sum of 85 cents as costs, being 25 cents more than is allowed by law, is invalid.

TAX-SALE—SEVERAL LOTS EN MASSE.—A sale in a body, and for a gross sum, of several lots of land separately assessed is void.

TAX-SALE—CONCLUSIVENESS OF RECORD.—The record of tax sales which the clerk is required to make after the sales (Sand. & H. Dig. sec. 6612) is conclusive of the amount of taxes, penalty and costs for which each tract of land was sold. (Following *Cooper* v. *Freeman Lumber Co.*, *ante*, p. 36.)

FORCIBLE ENTRY—COSTS.—It is error to adjudge the costs in an action of forcible entry and detainer against defendant where the only evidence of possession by plaintiff was the fact that she placed some lumber on the land, which was removed by defendant.

PARTIES—SPECIFIC PERFORMANCE.—The heirs of a deceased vendor of land are necessary parties to a suit by the grantee to enforce specific performance of a contract of sale.

Appeal from Monroe Circuit Court in Chancery.

A. F. MABERRY, Special Judge.

John Gunn and William Black, doing business under the name of Gunn & Black, brought a suit in equity against Lena Salinger and Louis Salinger, her husband, to cancel a tax deed to certain town lots and other land executed to Lena Salinger. Afterwards, Lena Salinger instituted an action of forcible entry and unlawful detainer against the St. Louis, Arkansas & Texas Railroad Company for possession of the lots in controversy. On motion of the railroad company, this action was consolidated with the former suit.

Subsequently, the railroad company, on its own motion, was made a party defendant in the original suit of Gunn & Black against the Salingers, and filed its answer and cross complaint against both parties, alleging that Gunn & Black had donated the lots to it conditionally, and that it had complied with the conditions of the donation, attacked the tax title of Mrs. Salinger, assigning a number of reasons why it was void, claimed the lots on the ground of seven years' adverse possession, and asked that the title to Lena Salinger be set aside and cancelled, and that Gunn & Black be required to execute to it a deed to the property.

Louis Salinger and William Black died pending the suit, and the heirs of Black were not made parties.

The court decreed title in favor of the railroad company, as to the lots in controversy, but adjudged against it the costs of the forcible entry and detainer suit; decreed title in favor of Gunn and the heirs of Black as to the other land; and cancelled the tax title of Mrs. Salinger. From the judgment, Lena Salinger appealed, and all the other parties have prosecuted cross appeals.

H. A. Parker and *J. E. Gatewood, Sr.*, for appellant.

1. It was error to decree to Gunn & Black blocks P and Q. Salinger answered the cross-complaint, but Gunn & Black did not. On the pleadings, then, the railroad was entitled to a decree for a deed to the property. Gunn & Black having failed to answer the cross-complaint of the railroad company, its allegations were confessed. Sand. & H. Dig. sec. 5761, and notes jjj. There is no proof that Salinger sustained any trust relation to the railroad company, nor is there any evidence sufficient to overturn the denials under oath of the answer, sustained as they are by the evidence of Louis Salinger. 8 Ark. 10; 19 *id.* 166.

2. There was no trust in favor of Gunn & Black. They both knew of the purchase before the time for redemption expired. 40 Ark. 62; *Ib.* 503. If Louis Salinger had purchased and taken the deed in his own name, a trust would have resulted to appellant, who furnished the money. 47 Ark. 111; 42 *id.* 503; Gunn & Black not having furnished the money, even if Salinger had agreed to purchase for them, it would only be a violation of a *parol* agreement, and no trust would result. 41 Ark. 393; Bisph. Eq. sec. 80; 55 Ark. 414; Sand. & H. Dig. sec. 3469, and note *c*.

3. The tax sale is not void. Blocks P and Q were not in the corporate limits of Brinkley. The levy being for indebtedness due prior to the adoption of the constitution, the county court had power to make the levy. 32 Ark. 676; 37 *id.* 649. This was a *county* tax. The provision as to uniformity applies only to state taxes. 13 Ark. 752; 21 *id.* 625. The rate of taxation was uniform as to all the territory upon which it was levied. Rock Roe township was exempt. The legislature had power to enact the exemption. 28 Ark. 317; 37 *id.* 339; 33 *id.* 497. The levy of the school tax was made according to law. 36 Ark. 446; 49 *id.* 276; 56 *id.* 260. 56 Ark. 88 is not applicable here, for *no* costs were charged against their blocks, nor were they sold for any illegal costs. The cost of certificate of purchase and printer's fee, etc., were added *after* the sale.

Geo. Gillham, for Gunn & Black.

1. The firm was not made party defendant to the cross-complaint, and its allegations are not confessed.

2. The description in the bond for title to blocks P and Q is too indefinite. 30 Ark. 640; 34 *id.* 534; 41 *id.* 495; 48 *id.* 425.

2. The tax sale is void for fraud and collusion of Salinger and Black. 7 C. C. A. 105; 58 Fed. Rep. 101; 129 U. S. 512–527; 4 How. 503, 554–5; 24 Vt. 149; Dunlap's Paley's Agency (4 Am. ed.), 25.

3. The tax sale was irregular and void. A tax sale for more than one tax is void, if either tax is invalid. 21 Ark. 145; 1 Greenleaf (Me), 339; Cooley, Tax. 498. The property was sold for too much costs. 56 Ark. 88. The sale was *en masse*. 29 Ark. 476; 30 *id.* 579; 31 *id.* 314; *Ib.* 491; 60 *id.* 166; 6 Coldw. (Tenn.), 328.

Sam H. West and *J. C. Hawthorne*, for the railroad company.

1. A sale of lots for taxes *en masse* is void. Sand. & H. Dig. sec. 6502, 6607; 31 Ark. 491; 29 *id.* 476; *ib.* 489; 2 Dill. 256. The fact that the lots were assessed *en masse* will not cure the defect, as the statutes require them to be assessed separately. 13 Rich. 491; 3 Nev. 341; 13 Wall. 506.

2. The lands were sold for excessive costs. 56 Ark. 93.

3. Salinger was a mere trespasser when he entered upon the premises with a view of erecting a house thereon. 40 Ark. 192; 41 *id* 536; 38 *id.* 257; 38 *id.* 584.

Rose, Hemingway & Rose, for appellant in reply.

1. The tax sale was not void because excessive costs were charged against the land. No costs at all were charged against the land. 1 Blackwell, Tax Titles, sec. 317.

2. The bond for title to blocks P & Q is void. The description is too indefinite. 50 Ark. 484; 30 *id.* 640; *Ib.* 657; 35 *id.* 477; 48 *id.* 477; 48 *id.* 425; 34 *id.* 534; 41 *id.* 495.

Tax sale void for excessive costs.

HUGHES, J. We find, from the record of the tax sale made by the clerk after the sale of the lots and land in controversy in this suit, and to which the appellant claims title by virtue of her purchase of the same at said sale, that it appears that the lots of land sold were sold for taxes, penalty and costs, and that the costs for which *each* tract was sold exceeded the amount for which the same could have been lawfully sold by twenty-five cents. It appears from said record that the costs for which each of said lots was sold amounted to eighty-five cents, whereas the greatest amount of costs for which each could have been lawfully sold was sixty cents, to-wit: To clerk, "for furnishing copy of delinquent lands to printer for each tract 5c." (Sand. & H. Dig. sec. 3310); "for attending sales of

delinquent lands and making record thereof, for each tract aforesaid, 10c." (*Id.* sec. 3310); "for transfer on tax-books of land sold for taxes to name of purchaser 10c." (*Id.* sec. 6614); "for each tract of land sold, 10c." (*Id.* sec. 6608); "printer's fee 25c." (*Id.* sec. 4683); total, 60 cents.

Sale of lots *en masse* is illegal.

The law allows 25 cents for certificate of purchase, and this must have been included in the costs for which each tract was sold. At any rate, it appears that each tract was sold for the 25 cents too much costs. Under the decision in *Goodrum* v. *Ayers*, 56 Ark. 93, this is fatal to the tax sale. It is contended that, as a block of lots was sold as one tract, 85 cents would not exceed the lawful costs. But in such case the sale is void, as held by the circuit court, because the lots were sold *en masse*, and not separately. *Cocks* v. *Simmons*, 55 Ark. 104; Sub. 2 of sec. 6499, Sand. & H. Digest, and secs. 6502, 6540, 6582, 6607, *id.*; *Montgomery* v. *Birge*, 31 Ark. 491.

Conclusiveness of record of tax sale.

In *Cooper* v. *Freeman Lumber Co.*, *ante*, p. 36, this court held that the clerk's record, made after sale, under section 6612, Sandels & Hill's Digest (5769 Mansfield's Dig.), and not that made before the sale, under section 6606, Sandels & Hill's Digest (sec. 5763, Mansfield's Dig.), is the record which furnishes the evidence of the amount of taxes, penalty and costs for which each tract of land was sold, and that the showing made by that record cannot be contradicted by parol evidence.

It follows therefore that the tax title of Lena Salinger is void, and the decree of the court so holding is affirmed.

As to costs in forcible entry.

The court adjudged the costs of the suit of forcible entry and detainer against the railroad company. As Mrs. Salinger had no possession of the property, and, without having had possession, could not maintain forcible entry and detainer, this is error. Her possession

would hardly amount to a "scrambling possession." She had only placed some lumber on the lot, which was moved by the railroad company. *Anderson* v. *Mills*, 40 Ark. 192. The decree in this behalf is reversed, with directions to render decree for costs against Lena Salinger in favor of the railroad company in the suit of forcible entry and detainer.

Parties to suit for specific performance.

The heirs of William Black, deceased, were not served with process in the suit after his death, and were not made parties, so as to give the court jurisdiction to adjudicate their rights, though there was an order that the cross suit by the railroad company be revived against the administrator of the estate and the heirs of William Black, deceased, naming the heirs.

The decree is reversed, as to specific performance, for the want of proper parties, and the cause is remanded, as to this, with leave to the railroad company to bring in the heirs of William Black as defendants to their cross complaint against Gunn & Black for specific performance.

RECTOR *v.* MCCARTHY.

Opinion delivered January 4, 1896.

PROMISSORY NOTE—GUARANTY OF INTEREST.—One who guaranties payment of the interest on a note becomes liable for interest only until the maturity of the note.

Appeal from Crittenden Circuit Court in Chancery.

JAMES E. RIDDICK, Judge.

Messrs. Rose, Hemingway & Rose, for appellant.

The guaranty in this case was a continuing one, running until the notes were paid. The contract was that the appellees should pay the interest on the notes,

which by terms was interest from date until paid. 31 Ark. 626; 40 *id.* 120; 32 *id.* 572; *Ib.* 616; *Id.* 165; 36 *id.* 480; 49 *id.* 427; 51 *id.* 204. The court below misconceived the effect of 43 N. Y. 194 and 44 *id.* 677. In those cases there was no contract to pay interest after maturity. Guarantors are liable for the interest on notes the same as the makers. Perley on Interest, 15; 2 Col. 596; 1 Brandt, Suretyship & Guaranty, secs. 157, 158, 159, 160.

Messrs. S. R. Cockrill and *Ashley Cockrill*, for appellees.

A guaranty is construed strictly in favor of the guarantor, and must be construed so as to give effect to the intention of the parties as gathered from the surrounding circumstances. 48 Ark. 442; Brandt, Suretyship & Guaranty, sec. 93; 42 U. S. 169, 11 L. ed. 89; 35 U. S. 493, 9 L. ed. 507; 41 U. S. 528. 10 L. ed. 1056; Baylies, Sureties & Guarantors, pp. 6, 124; 73 N. Y. 335. If the guaranty extends beyond the date of the maturity of the notes, it extends forever. The guarantors would not have even the poor privilege of discharging their obligation by the payment of the principal, for they are not parties to the note, and a creditor is not bound to accept his debt from a stranger to the contract. Can it be possible that the parties contemplated that interest should thus run on forever? 54 Ark. 229; 1 Brandt, Suretyship & Guaranty, secs. 167–179. The legal presumption was that the maker would discharge the notes when they became due. The guarantors contracted with reference to that fact. 43 N. Y. 244; 1 Brandt, Suretyship & Guaranty, secs. 166-175; 12 Mich. 297. Every person is supposed to have some regard for his own interest; and it is not reasonable to presume that any man of ordinary prudence would become surety for another,

without limitation as to time or amount, unless he has done so in express terms or by clear implication. 24 Wend. 82; 2 Watts & S. 237; 13 Barb. 158; 76 Me. 345; 32 S. C. 354; 32 Ohio St. 324; 30. Am. Rep. 572; 39 Ohio St. 324; 48 Am. Rep. 454; 107 N. Y. 565.

BUNN, C. J. Sam J. Churchill executed to appellant his two promissory notes, in the following form: "[$1083.33]—Little Rock, Ark., Jan. 1, 1890. On or before the 1st day of January, 1892, for value received, I promise to pay H. M. Rector one thousand and eighty-three dollars and thirty-three cents, with interest at the rate of ten per cent. per annum from date until paid; interest payable annually. As witness my hand, the date above written. Sam J. Churchill." Upon this note the appellees made the following guaranty: "We guaranty the payment of the interest on the above note. [Signed] McCarthy & Joyce."

"It is agreed that the two notes were given by Sam J. Churchill for a lot of stock and farming implements on what was known as the plaintiff's farm, in Pulaski county, Arkansas, which he had leased from the plaintiff for three years from date of notes, and that the said Sam J. Churchill also executed a mortgage on said stock and property to secure the said notes; that the said Sam J. Churchill abandoned the Rector farm, which he had leased, and failed to pay the first note due for said stock, and thereupon the plaintiff, H. M. Rector, through the trustee in the deed of trust securing said notes, took possession of the said stock and farm property, and sold it, and appropriated the proceeds in part payment of the mortgage debt. This sale was had in February, 1891, and by said sale $173.78 was paid on the note in suit first maturing, such payment being credited as of February 17, 1891.

"It is further agreed that the guaranty of interest, as written upon said notes, was written by the defend-

ants in due course of their business as merchants, and for the purpose of enabling Sam J. Churchill to obtain the stock and farm implements for the purpose of farming, in order that he might have an opportunity thereby to pay certain prior indebtedness which he owed the guarantors.

"It is further agreed that no action has been taken by the plaintiff, H. M. Rector, to enforce the collection by law of the said notes against Sam J. Churchill since their maturity, and that the said Churchill has been entirely insolvent, and without visible property, since the maturity of said notes and since said mortgage sale."

Appellant sued the appellees for installments of interest accruing before and after the maturity of the notes, and on the trial before the court, sitting as a jury, asked the following declarations of law: "The guaranty in suit is a continuing guaranty, and running until the notes are paid." The court refused this, and declared that the guaranty ran only until the maturity of the notes, and gave judgment only for the interest accruing before maturity. The plaintiff saved proper exceptions to the ruling, filed a motion for a new trial, saving all points, and, this being overruled, excepted, filed his bill of exceptions, and appealed.

Thus it will appear that the only controversy in this case is, whether or not one who guaranties the payment of the interest on a promissory note is bound for the payment of the interest that may accrue after the maturity of the note. There are few cases in the books that bear directly upon this point, although there is no want of authorities that indirectly influence the discussion of it. And from these we gather that the courts have adopted certain rules by which the contracts of sureties and guarantors are to be construed; and some of these rules briefly stated are: that a surety or guarantor is, first of all, a favored suitor; that the

obligation of his contract will not be extended beyond its plain and obvious meaning; and when there is a doubt and uncertainty as to the meaning, growing out of an ambiguity of language that makes construction necessary, the doubt will be resolved in favor of the surety or guarantor, for the reason that he is not, and can never be, the full recipient of the consideration which has accrued or may accrue to the principal debtor, and, further, because his situation is comparatively a dependent one, since he does not enjoy the opportunity of protecting himself that belongs to the other parties to the contract.

We take it, therefore, that courts are to construe the contracts of these favored suitors, not exactly by the same rule as they would construe the contracts of the principal parties to the contracts. Thus while, as between these principals, the contract is to be construed so as to express the meaning and intention of both parties to it, in the case of the surety or guarantor that construction is to be given to his contract which will cause it to express *his* meaning and intention, and this intention to be such as the guarantied party should have reasonably attributed to the guarantor in making the contract, judging from the circumstance surrounding and the object to be attained. 1 Brandt, Suretyship & Guaranty, sec. 122, 123, 156.

The principle announced is more readily understood by illustration than by mere general definition of the obligation. It would lengthen out this opinion too much, of course, to pursue the argument by that method. Cases wherein the contracts were held to be continuing are cited and commented upon in Brandt, Suretyship & Guaranty, from section 157 to 161, inclusive; and, when not continuing, from section 161 to 165. In section 166 of the same book, this general principle is announced: "When the words of the con-

dition of a bond are general and indefinite as to the time during which the surety shall remain liable, if there is a recital in the bond, specifying the time during which the prescribed duty is to be performed by the principal, the general words will be limited by the recital, and the surety will only be liable for the time therein specified." Thus it is said when an officer lawfully holds beyond the term for which he was elected or appointed, the surety on his official bond will not be bound for his acts or defaults after the expiration of the term for which he was elected or appointed. Of course the recitals of the bond itself might be made to cover the additional time.

In *Hamilton* v. *Van Rensselaer*, 43 N. Y. 244, where, Waddington and two others being indebted to the plaintiff's assignor in the sum of $10,000, it was agreed, in July, 1854, that he would be released from this joint obligation upon executing and delivering his bond for one-third of said amount, payable in January, 1861, with semi-annual interest, and defendant's guaranty of payment of the interest, which was done. The guaranty by defendant was as follows, endorsed on the bond given: "For value received, I guaranty the punctual payment of the interest on demand in default of its payment by Mr. Waddington."

The question was whether defendant was bound for the interest beyond the date of the maturity of the bond. *Held*, that he was not. After adverting to the strict legal doctrine that it is only interest accruing before maturity of the obligation that is denominated *interest* in the true sense, and that that which accrues afterwards is, strictly speaking, damages for breach of the contract of payment, and also to the contention of plaintiff "that in construing the contract it is not to be supposed that the parties had knowledge of or reference to these legal distinctions when the contract was made,

and that business men regard the sum recoverable after the principal is due, in their dealings with each other, as interest in the ordinary sense of the term, and not as compensation by way of damages," Chief Justice Church, in delivering the opinion of the court said: "Conceding the soundness of this position (of plaintiff's counsel) these recognized distinctions may be resorted to by the defendant to prevent a technical or arbitrary construction against him. The true rule of construction undoubtedly is that the intent of the parties, to be gathered from the language and surrounding circumstances, is to prevail. The intent of the defendant, ascertained by legal rules, was to agree to pay the interest expressly provided for in the bond only; but when the plaintiff urges that the defendant has employed general words guarantying the payment of interest upon the bond without limitation, and that these words include interest after as well as before default, and claims to enforce the rigid rule of liability therefor, it is pertinent to answer that, by strict legal rules, interest, as such, cannot be recovered after default in the payment of the principal, and that such interest is not, therefore, within the language of the contract." The learned judge continues: "We do not place the decision upon this narrow ground, but prefer to rest it upon the position that, by the plain and ordinary meaning of language used in the contract, when applied to the facts existing at the time it was made, the interest recoverable after the principal became due, whether it is regarded as interest upon a continuing contract or as damages for its *non-performance*, was not in the contemplation of the parties at the time, and was not interest specified and provided for in defendant's contract. The construction contended for by plaintiff might render the contract as burdensome as if it had been a guaranty of the payment of the principal itself. The

defendant might never be able to discharge the obligation, except by the payment of the principal, and in that case the result would be to compel him substantially to perform a contract which, it is conceded, he never entered into." The same argument, we think, is applicable to the case now under consideration. We cannot conceive the idea that, if, at the time of making the guaranty, the appellee had even had an intimation that his obligation would be sought to be extended in the end, he would ever have entered into it. It follows, therefore, that, if bound at all, it is not because he so intended when he entered into the contract, but because of a contingency which some technical rule required him to anticipate and provide against.

It seems to us that a guarantor of the payment of interest only,—a mere incident of the debt,—as in this case, is entitled to even greater consideration at the hands of the creditor than one who has guarantied the whole debt; and the reason is not far to seek. Such a guarantor cannot (if the theory of plaintiff be correct) protect himself by the usual statutory provisions, and is at the mercy of both creditor and debtor—wholly subjected to the consequences of the neglect of the one, and the failure of the other.

The principle announced in the case of *Hamilton* v. *Van Rensselaer*, *supra*, was re-asserted in *Melick* v. *Knox*, 44 N. Y. 676, except that in the latter case the theory that interest accruing after maturity is not in fact interest, but damages, which seems to have been in effect discarded as a vital principle in *Hamilton* v. *Van Rensselaer*, is maintained. If that theory be true, of course it is an additional ground for the affirmance of the judgment in the case now under consideration. However, as we understand it, to break the force of this theory, appellant's counsel call our attention to the fact that, as a settlement of a controversy once pending

here, this court has in several cases declared it settled law with us that, where the conventional rate of interest merely is stipulated, and no words employed to indicate the co-existence of the rate of interest with the debt, the conventional rate ceases at the maturity of the debt, and the legal rate then begins; but that, on the contrary, when words are employed indicating the intention of the parties to have been that the conventional should be the rate until the debt should be paid, the interest accruing after maturity is in fact interest, and not damages, because it is so declared by express contract. There is force in this argument, but we are inclined, after all, to the opinion, in view of the peculiar language of our constitution, and the object sought to be attained in the cases referred to, that the decisions of this court therein were intended to extend no further than to determine what should be the percentage before and after maturity in any given case; and that the court in none of these cases had in contemplation the distinction between the name and meaning of this percentage before and the same after maturity of the debt; and consequently, the theory existing before the decisions as to this distinction remains the same with us, whatever that may have been. But this is only one of the grounds suggested by the courts as a basis for the rule contended for by appellee.

The case is not altogether free from doubt, but, from all the authorities directly in point we are able to present on the subject, and from reason equally as cogent for the position of the court below, if not more so, than for the opposite one, we are of opinion that there is no error in the judgment of the court below, and the same is therefore affirmed.

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WALLACE v. DRIVER.

Opinion delivered January 4, 1896.

RIPARIAN RIGHTS—ACCRETION AND AVULSION.—Where land of a riparian owner on a navigable stream is washed away, such owner is not entitled to recover land formed many years afterward within his original boundaries, unless the washing away was sudden and perceptible, and the limits of the change of channel or banks can be determined, or the newly formed land was made by accretions beginning at the high water mark of such owner's remaining land.

Appeal from Mississippi Circuit Court.

JAMES E. RIDDICK, Judge.

This was an action in ejectment, brought by the appellee, James D. Driver, against the appellant, D. W. Wallace, for recovery of a portion of the lands situated in a fractional quarter section of land lying along the banks of the Mississippi river. The answer set up a general denial; also the special plea that the land held by defendant was the property of the State of Arkansas, by reason of having been formed in the bed of the Mississippi river.

The agreed statement of facts is as follows: "The NW. fr. ¼ section 30, in T. 13 N. and R. 11 E., Mississippi county, state of Arkansas, was entered from the U. S. government by Harrison Phillips, in November, 1848, and contained, at that time, one hundred and fifty-four (154) acres; which land was afterwards conveyed by Phillips to the plaintiff, Driver, and James H. Edrington; and the said Edrington conveyed his undivided interest to the said Driver, who now claims to be the sole owner of said NW. fr. ¼ section. Subsequently to the entry of said land from the government, a large portion thereof caved into the Mississippi river,

and where said caving took place became a portion of the bed of the river, and so remained for some twenty-five years before said island formed in the bed of said river. After this an island was formed out in front of the main shore, and of the residue of the quarter section not washed away, within the metes and bounds of said quarter section as originally entered from the government, and in the place where was a portion of said quarter section before the same washed away. Between the island so formed and the main shore, there is a chute through which the water flows when the Mississippi river is high, but such chute, during low water, is dry, with the exception of a few water holes, and is not now a part of the bed of the river, having been filled by deposit of the river. The defendant, D. W. Wallace, is now in possession of thirty-five acres of the land made by the formation of said island within the original boundaries of said fractional quarter section, at the time of its entry from the government. The tax books show taxes to have been paid by the plaintiff on 80 acres only, in said fractional NW. ¼ section from the date of his purchase up to the year 1891."

The jury found that the defendant was in the unlawful possession of 35 acres of the land sued for, and the court rendered judgment accordingly.

Charles P. Harnwell, for appellant.

The title to the bed of navigable streams belongs to the state, and the riparian owner takes only to "high water mark," and not "*ad medium filum aquae.*" 53 Ark. 314, 315; 54 *id.* 517; Woolrych on Waters, 40–44; Angell on Tide Waters, 22, 24; 94 U. S. 325; 9 Conn. 40; 3 Iowa, 1, 54; 33 N. Y. 461; 3 Howard, 27, 220; 9 *id.* 471; 29 S. W. 681–2; 25 Ark. 120; 1 Am. & Eng. Enc. Law, 137; 21 S. W. 592.

S. S. Semmes, for appellee.

The facts in this case are different from those in 53 Ark. 314. Here the land claimed is *within* the metes and bounds of the United States survey. Where one's lands are eroded or washed away, and are made back again or uncovered, they become his property, if he can locate them. 28 S. W. 746; 86 Mo. 209; 61 How. Pr. 197.

BATTLE, J. The water boundaries of land on running streams, whatever they may be in the beginning, whether the thread of the stream, the water's edge, ordinary high or low water mark, always remain the same when they change gradually, as by the process of accretion or attrition. They gradually shift as the water recedes or encroaches; and the area of the riparian owner's possession varies as they change by this process. Whatever constituted them at first still constitutes them so long as it remains permanent or shifts gradually and imperceptibly. Hence, land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made. This rule has been vindicated by some one on the principle "that he who sustains the burden of losses and of repairs, imposed by the contiguity of water, ought to receive whatever benefits they may bring by accretion. By others it is derived from the principle of public policy that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself." *New Orleans* v. *United States*, 10 Pet. 662, 717; *Jefferis* v. *East Omaha Land Co.* 134 U. S. 178; *Nebraska* v.

Iowa, 143 U. S. 359; Gould on Waters, sec. 155; 2 Blackstone, 262.

In order to constitute an accretion, it is not necessary that the formation be indiscernible by comparison at two distinct points of time. It is true that it is an addition to riparian land, "gradually and imperceptibly made by the water to which the land is contiguous;" but the true test "as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." *Rex* v. *Lord Yarborough*, 3 B. & C. 91, is a good illustration. In that case the court held that 450 acres of land formed by the gradual deposit of ooze, sand and soil from the sea belonged to the owner of the adjoining land as an accretion. Other cases to the same effect may be cited. *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178.

What has been said of accretions is equally true of the loss suffered from the gradual encroachments of running streams. As their beds change imperceptibly by the gradual washing away of the banks, the boundary lines of contiguous lands change with them; and the owner, having, in the beginning, acquired no fixed freehold in them, but one that shifted with the changes, is limited and confined, in the extent of his rights and possession, by the new boundaries. *St. Louis* v. *Rutz*, 138 U. S. 226, 245; *Camden & Atlantic Land Co.* v. *Lippincott*, 45 N. J. L. 405; *Welles* v. *Bailey*, 55 Conn. 202; *Steele* v. *Sanchez*, 72 Iowa, 65; *Niehaus* v. *Shepherd*, 26 Ohio St. 40; *Wilson* v. *Shiveley*, 11 Oregon, 215; *Dunlap* v. *Stetson*, 4 Mason, 349; *In re Hull & Selby Ry.* 5 M. & W. 327; *Scratton* v. *Brown*, 4 B. & C. 485, 10 E. C. L. 670; *Foster* v. *Wright*, L. R. 4 C. P. D. 438; Gould on Waters (2 ed.) sec. 155.

In *Welles* v. *Bailey*, 55 Conn. 292, in speaking of rights acquired by changes gradually made by rivers, it is said: "If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be *gradually* washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had been originally such. This follows necessarily from the ordinary application of the principle. All original lines submerged by the river have ceased to exist; the river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation, and is not affected in any manner by the relation of the river and the land at any former period. If, after washing away the intervening lot, it should encroach upon the remoter lot, and should then begin to change its movements in the other direction, *gradually* restoring what it had taken from the remoter lot, and finally all that it had taken from the intervening lot, the whole, by the law of accretion, would belong to the remoter but now proximate lot. Having become riparian, it has all riparian rights. This general principle is recognized by all the text writers, and by numerous decisions of the English and American courts. The river boundary is treated in all cases as a natural boundary, and the rights of the parties as changing with the change of its bed."

In *Foster* v. *Wright*, L. R. 4 C. P. Div. 438, "the plaintiff was lord of a manor held under grants giving him the rights of fishery in all the waters of the manor, and, consequently, in a river (Lune) running through it. Some manor land on one side, and near, but not adjoining, the river, was enfranchised, and became the property of the defendant. The river, which then ran wholly within lands belonging to the plaintiff, afterwards wore away

its bank, and by gradual progress, not visible, but periodically ascertained during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river bed. The extent of the encroachment could be defined. The defendant went upon the strip and fished there." The court held "that an action of trespass against him for so doing could be maintained by the plaintiff, who had the exclusive right of fishery which extended over the whole bed of the river, notwithstanding the gradual deviation of the stream on to the defendant's land." Judge Lindley said: "Supposing, therefore, that the plaintiff's right to fish in the Lune depends on his ownership of the soil of the river bed, I am of the opinion that the plaintiff has that right; for, if he was the owner of the old bed of the river, he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed; and the title so gradually acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his successor in title."

In *Cox* v. *Arnold*, 31 S. W. Rep. 592 (which was decided by the supreme court of Missouri), it appeared that "a portion of a fractional section bordering on a navigable stream was washed away by the current;" and that "an accretion formed from an island in the river, and extended within the boundaries of the section, but did not connect with the new shore line." The court held that the owner of the section had no title to any part of the accretion. Justice Burgess, in delivering the opinion of the court, said: "It is well settled in this state, by an unbroken line of decisions, that a riparian proprietor on a navigable stream only owns to the water's edge. * * * * When a riparian owner becomes the owner of land, he acquires, as incident

thereto, without price, whatever may be added to it by gradual and imperceptible accretion, while, at the same time, he assumes the risk of losing it all by its being gradually washed away by the waters of the river; but his line always remains at the water's edge, wherever that may be. His line expands as the waters recede and accretions form to his land, and contracts as the waters encroach upon and wash away his land. The only way that plaintiff could have regained what land he had lost by its being washed away, and its *situs* submerged by the waters of the river, was by gradual and imperceptible accretion, beginning at his line, at the water's edge. In this way he would become the owner, and entitled to the possession, of all land accreted to his original tract, or that portion of it which had not been washed away. Plaintiff's line being at the water's edge, he was not entitled to recover in this action, notwithstanding the land began to re-form within the original survey of said quarter section, at a place where the land was, at the time of said survey, uncovered by water; and it makes no difference that defendant Naylor may not be the legal owner, or that he may be in its wrongful possession."

In *St. Louis, &c. Railway Co.* v. *Ramsey*, 53 Ark. 314, it was held by this court that "a riparian owner upon a navigable stream, deriving title from the United States" to lands in this state, "takes only to high-water mark, and not to the middle of the stream, the title to the bed of the stream being in the state;" and that this high-water mark "is to be found by ascertaining where the presence and action of water are so usual and long continued in ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation and the nature of the soil." According to the cases we have cited, the high-water mark, as thus defined,

being the boundary line of the riparian owner in this state, is the point at which the formation of all lands acquired by him by accretion must begin. A formation of alluvion beginning at any other point would belong to the state or other party. In that case the gradual and imperceptible addition, which is necessary to constitute an accretion, would be lacking.

The reverse of what has been said of accretions and erosions is true of avulsions. Where a stream which forms a boundary line of lands from any cause suddenly abandons its old, and seeks a new, bed, or suddenly and perceptibly washes away its banks, such change of channel or banks (if its limits can be determined) works no change of boundary. The owner still holds his title to the submerged land. If an island or dry land afterwards forms upon it, the same belongs to him. *St. Louis* v. *Rutz*, 138 U. S. 226; Gould, Waters, (2 ed.) sec. 158, 159, and cases cited.

The burden in this case was on the plaintiff to prove that he was entitled to the land in controversy. The evidence showed that it was entered in November, 1848, and contained at that time 154 acres; and after that a large portion of it "caved" into the Mississippi river. There was no satisfactory evidence as to how large this portion was in excess of 35 acres, or any evidence as to how long it was in caving, or whether it caved gradually and imperceptibly, or *vice versa*, or that the land in controversy was added to his own by accretion, beginning at his line, at high-water mark. He failed to sustain his claim.

The instructions given to the jury were fatally defective. It is unnecessary to point out the defects, as we have already said what the law governing the case is.

Reversed and remanded.

Riddick, J., disqualified.

BUNN, C. J. (dissenting). I do not deem it necessary to reiterate the familiar rules of the common law governing the rights of riparian owners, and the prerogatives of the crown and sovereign power, as to tide-water streams, and the lands beneath and bordering thereon. The great difficulty with Americans has always been, not to understand these rules, as applied to the condition of things existing in England, but rather to make them applicable in any reasonable sense, under the circumstances which surround us, especially in the newer or western and southwestern states of the Union. Our system of surveying, admeasurement and conveyance of lands, the great magnitude of our lakes and rivers, and our dual form of government, all conspire together to create difficulties in the way at every step in our efforts to conform to the principles of the common law. That a riparian owner, as such, under the common law, owns to the middle thread of the fresh-water river on his border, and to the upper margin or high-tide mark of the tide-water river, which forms his boundary, and in the latter case is subjected to the results of erosion, and is entitled to all gains by accretion and relliction, are truisms, that all are expected to be familiar with; but how far we may be able to adopt these venerable rules to our changed conditions, is not without the greatest difficulty in any given case.

It is altogether probable that a case just like the one we have under consideration could never have arisen under the strict common-law system. In the first place, in England, rivers and other bodies of water were the natural boundaries of lands, and that idea entered into the description contained in all their conveyances. To speak of one's land as being bounded on the north or south, east or west, by the Thames, the English would readily understand the nature of the landed estate sought to be described. If it was above tide

water, they would readily know that the owner owned to the middle thread of the stream, and his peculiar boundary was therefore as varying and as variable as the stream itself. On the other hand, if the domain lay below the point where the stream was affected by the ebb and flow of the tide, they understood readily that the riparian owner was subjected to loss by erosion, and at the same time, was entitled to whatever might be added to his land by accretion or reliction; and this was so, not on account of the rule of the gambler's justice, where the possibility of gain was one's due for the mere risk of loss, which some have attempted to assign as a reason for the rule, nor, as others say, because public policy demands that there shall be no unappropriated public lands, but because the boundary, being the bank of the river, will be the same, in name, a hundred years hence, though that bank has moved very far laterally, the one way or the other. It will still be the bank of the river, though the owner's domain has diminished in size by erosion, a fourth or a half; or has increased, by accretion, to the same extent. At the end of the century from the date of the grant, the sheriff, armed with his writ of ouster, would still be enabled to find the land, so far as the river front is concerned, because he finds the line of the high tide, and that is the "metes and bounds," although it has actually changed much since the original grant was made. It is still written in that same language and form in the deed.

Now, our system is imaginary parallel and perpendicular lines, forming parallelograms, and the fractions of such as occasion may make necessary. But they are fixed lines, permanently located, and a hundred years from the date of the grant will include exactly and definitely the same portion of the earth's surface, although that may then be wholly or in part in the river, whereas it was all dry land at first, and the

sheriff armed with his writ, wherein the description, as in the other case, is in the exact language as when first written, locates the land by it, and not by any extraneous evidence whatever, though he finds the lines on the water instead of the dry land. This is the portion of the earth's surface sold to the individual by the federal government, which, in its acts of cession to the state, reserved to itself the title to all lands and the absolute and unconditional right to dispose of them with the fair understanding that its grants to the individual must never be molested or interfered with, whatever may be the assumed rights of the state as against all others, even as against the federal government.

Outside the boundary lines within which the land belongs to the individual by federal grant, the state disposes by whatever rule or law she may choose to make on the subject, but she cannot curtail the right of the owner by any arbitrary rule, although it may have the sanction of judicial accommodation of the common-law principle to the circumstances of the case. It must be born in mind that when the land involved, was purchased from the government, the common law was in force in all its plenitude in both federal and state government. Even the modified rule announced in the case of The Gennessee Chief,[1] had not then been announced; but the old English rule was still in force, and the purchaser purchased with that rule as a part of his contract. That rule regarded the riparian owners on the Mississippi river as owning to the middle thread, it not being a tide-water stream. Such was the common law, and Arkansas had adopted the common law, and has never adopted any other rule unto this day, unless we are to regard the court-made law of legal decisions of recent date as a change of the rule. There is not a

1 *Propeller Gennessee Chief* v. *Fitzhugh*, 12 How. (U. S.) 443.

word in our statutes going to show us what the state has accepted as her interest in the bed of the Mississippi or any land or island that may form therein. This court may say that the common law rules are not applicable in our case, but that does not mean that the court can arbitrarily make other rules that will be applicable, for it is the right of property we are now dealing with.

The decision of the court in the case at bar is based mainly upon *Cox* v. *Arnold*, 31 S. W. Rep. 592, and *Naylor* v. *Cox*, 21 S. W. Rep. 589, both Missouri cases, in which the suggestion of the point I have endeavored to make was passed over by a mere repetition of the common law rule, as if the very point was not the inapplicability of the common law rule. Besides, the description there was very nearly as a common-law description of riparian lands.

In *St. Louis, &c., Railway Co.* v. *Ramsey*, 53 Ark. 314, the point was neither raised nor discussed. The sand bar or gravel bed in that case had not as yet risen high enough to be denominated land, and was held still to be the property of the state, as the bed of the river over which steam-boats plied in trade and commerce. The farcical part of that case was that Ramsey would have gained title to something he never pretended to buy, had he not been in such a hurry to bring his suit, for presumably the bar would have raised its head out of the water after awhile.

In *Cox* v. *Arnold*, *supra*, Chief Justice Brace dissented; and while he did not file a written opinion, we may conclude that his dissent was on similar grounds as his dissenting opinion in another case.

Gould, in his work on Waters, (sec. 155, p. 313,) says: "But when the line along the shore is clearly and rigidly fixed by a deed or survey, it is not so certain that it will afterwards be changed because of its accretions

[and of its erosions], although, as a general rule, the right to alluvion passed as a riparian right." Referring to *Fulton* v. *Frandolig*, 63 Tex. 330; *James* v. *Howell*, 41 Ohio St. 696, and *Buras* v. *O'Brien*, 42 La. Ann. 527, and to which may be added *Cook* v. *McClure*, 58 N. Y. 437; *Minton* v. *Steele*, 28 S. W. Rep. (Mo.), 748; *Butler* v. *Grand Rapids & I. R. Co.* 48 N. W. Rep. (Mich.), 571, and authorities there cited.

In the New York case cited, the court said: "In an action of ejectment plaintiff claimed under a deed conveying the premises upon which was a mill and pond. The boundary line along the pond commenced 'at a stake near high-water mark of the pond, running thence along the high-water mark of said pond to the upper end of said pond.'" *Held*, that the line thus given was a fixed and permanent one, and did not follow the changes in high-water mark of the pond; and that defendant, who owned the bank bounded by said line, could not claim any accretions or land left dry in consequence of the water of the pond receding, although the gradual and imperceptible result of natural causes. It seems that this pond was a river dammed up, and that to such ponds the courts in New York apply the common law rules. In *Mulry* v. *Norton*, 100 N. Y. 424, the court said: "No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land reclaimed and assert his proprietorship when the identity can be established by reasonable marks, or by situation, extent of quantity and boundary on the firm land." And further: "And so, if an island forms upon the land submerged [as in this case], it belongs to the original owner. The sovereign [the state] succeeds to the ownership of such islands and formations only as are originally created and located in tideways outside of the boundaries of property which has been the subject of individual ownership."

In the Missouri cases, the island was not within the metes and bounds of the riparian owner, but belonged to another. In a contest between this islander and the main shore owner, the court held that the accretions were to the former land. I think the court was probably correct in that, only the islander's right should have stopped at the nearest boundary of the shore owner; otherwise, his grant from the federal government would be interfered with, which cannot be. In the case at bar the island rose up within plaintiff's boundary, and the only possible claimant is the state, and she makes no claim. In this state of things, I think the plaintiff has title superior to all others, if not superior to the state, who holds, if at all, not as an individual, but as a sovereign. The judgment in my opinion should be affirmed.

RICE v. WOOD.

Opinion delivered January 4, 1896.

WRONGFUL LEVY—LIABILITY OF INDEMNITOR.—Parties executing a bond of indemnity to induce a levy of certain goods under attachment become participants in the trespass, where the goods are wrongfully taken thereby.

TRIAL—DIRECTING VERDICT.—It is not error to refuse to direct a verdict for the plaintiff if there is some evidence tending to support a contrary finding.

FRAUD—CONCEALMENT.—It is not a fraud for one creditor to keep another creditor from finding out about a trade with the debtor that the former is seeking to make for no other purpose than his own protection.

FRAUDULENT CONVEYANCE—PURCHASER'S LIABILITY.—The fact that a creditor, in taking a bill of sale of his debtor's property in satisfaction of his claim, is aware that the debtor intends to defraud

other creditors by appropriating to his own use certain money and accounts not affected by the bill of sale, will not render the transaction fraudulent.

ASSIGNMENT FOR CREDITORS—WHAT IS NOT.—A bill of sale by an insolvent debtor to creditors who are to pay other debts mentioned does not constitute an assigment where the liability to such other creditors, when accepted, is absolute, and does not depend on the disposition of the goods.

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

On the 15th day of December, 1890, Jones & Fulton, a firm of merchants in Hot Springs, Arkansas, executed the following instrument: "Know all men by these presents, that, for and in consideration of the sum of $8,000.00, to be paid as follows: $4,392.86 credited on the debt we owe Rice, Stix & Co. of St. Louis, Mo.; $1,804.73 credited on the debt which we owe the Clark Shoe Company, of St. Louis, Mo.; $278.58 credited on the debt we owe Pratt, Simmons & Co. of St. Louis, Mo.; $147.00 to be paid by the purchasers to J. R. Jones, Sr., being the amount of our debt to him for borrowed money; to N. L. Cathran, of Norman, Oklahoma Territory, said purchasers are to pay $104 for borrowed money due him; $65 to Maurice Ran, to be paid by the purchasers, being the amount we owe him for clerk hire; $300 to be paid by the purchasers on the debt we owe Levi Newberg & Co. of Louisville, Ky.; $400 to be paid by the purchasers to Voorhees, Miller & Rupel, of Cincinnati, Ohio, on the debt we owe them; $325 to be paid by the purchasers to M. Wolf & Sons, of Cincinnati, Ohio, on the debt we owe them; $182.83 to be paid by the purchasers to Rothschild Brothers, of St. Louis, Mo., on the debt we owe them. Now, in consideration of said sum of $8,000 to be credited and paid as aforesaid, we hereby sell and transfer and de-

liver to Rice, Stix & Co., Clark Shoe Company and Pratt, Simmons & Co., all our stock of goods, wares and merchandise contained in our store house in the city of Hot Springs, Ark., Nos. 613 and 615 Central avenue, together with all the store fixtures and fixtures therein, and hereby assign to them our lease on said store house. Witness our hands, this 15th day of December, 1890, Jones & Fulton. J. E. Jones, Jr. Jeff. Fulton."

Possession of the property was delivered immediately to the agents of the vendees. Two days later one James McGuire sued out an attachment against the property of Jones & Fulton; and when the writ of attachment came to the sheriff's hands, before levying it, he demanded an indemnity bond. Thereupon the appellees, Wood & Henderson, executed and delivered to the sheriff the following instrument: "Common Pleas Court of Garland County. John M. McGuire & Co. *v.* Jones & Fulton. We undertake to indemnify the sheriff of Garland county against all damages which he may sustain by reason of the levy of the attachment herein. [Signed] James B. Wood. J. P. Henderson. December 17, 1890."

After receiving the indemnity bond, the sheriff levied the order of attachment upon part of the goods mentioned in the bill of sale, of the value of $260.12.

On the 20th day of February, 1891, Rice, Stix & Company and the other vendees mentioned in the bill of sale, brought suit in the Garland circuit court against Wood & Henderson, to recover the value of the goods levied upon and sold by the sheriff in the McGuire case. The complaint alleged that the plaintiffs were the owners of the goods, and that, when McGuire sued out his attachment, the sheriff demanded an indemnity bond before serving it, and that the defendants executed the bond, and that thereafter the goods were taken; that

they were of the value of $260.12; and asked judgment for that sum. The defendants, demurring to the complaint, and the demurrer being overruled, saved their exceptions and afterwards answered, denying the allegations of the complaint, and setting up further that the McGuire attachment was sustained, and alleging as a further defense that the sale by which Rice, Stix & Company *et al.* claimed the goods was fraudulent.

Upon the trial of the case, it appeared from the evidence that early in December, 1890, Jones & Fulton wrote to their creditors, asking an extension of time in which to pay their indebtedness. Among other creditors to whom they wrote, were Rice, Stix & Company, Clark Shoe Company, and Pratt, Simmons & Company, all of St. Louis. When the letters reached St. Louis, these three firms consulted in regard to the best course to pursue in the matter. The agents of the last two named firms were in Hot Springs at the time, and Rice, Stix & Company sent their agent to Hot Springs. When he arrived there on the 13th of December, he went to the store of Jones & Fulton, and shortly afterwards met the representatives of the Clark Shoe Company and Pratt, Simmons & Company. These parties entered into an extensive investigation of the financial standing of Jones & Fulton, as they say, to determine whether the extension should be granted. After looking into the condition of the affairs of Jones & Fulton, they determined to refuse the extension asked for, and began immediately trying to secure a settlement of their debts. The making of an assignment and the giving of a mortgage were both discussed. Jones & Fulton wanted to make that disposition of their property that would realize most for their creditors, and the other parties wanted that done which would most certainly result in their protection. The

representatives of these St. Louis houses acted in perfect concert for their own protection.

While negotiations were pending between these parties, a representative of another firm, to whom Jones & Fulton were indebted, was in Hot Springs, and Armstrong, who represented the Clark Shoe Company, told Jones & Fulton that, if they wanted to, they could go over and look at his goods, to keep him from finding out what was going on. Mr. Fulton testified that Brown and Armstrong, who represented Rice, Stix & Company, and Clark Shoe Company, when they were trying to get them to make the bill of sale, told them (Jones & Fulton) that they would always be their friends, and assist them in any way they could, but that this promise had nothing to do with their making the trade. He also testified that the parties said for them to keep the money they had in bank, about $850, and their accounts. Col. E. W. Rector, who represented some of the attaching creditors, (among others Voorhees, Miller & Rupel, who were to be paid $400 by the terms of the bill of sale), states that he went to see Brown, who was in charge of the store, and told him that he wanted to get the $400, and see the bill of sale. He says that Brown told him that he wanted to see Col. Murphy before paying the money, and that on the next day Murphy and Brown came to his office, and said they were ready to pay the money, but wanted him to recognize the bill of sale, and that he declined to do so. Judge Leatherman, who represented M. Wolf & Sons, who were to be paid $325 by the terms of the bill of sale, testified that he went to Brown, and asked him when he was going to pay the $325, and Brown told him that he would do so when he returned to St. Louis, and, upon being asked when he expected to return, said: "When I dispose of this stock here."

There was a difference in the testimony as to the amount of goods Jones & Fulton had in stock at the time of the sale. The inventory taken by the purchasers showed $10,129. Jones & Fulton testified that the stock amounted to $13,000 or $14,000. The defendants attacked the inventory taken by the purchasers, claiming that in certain particulars it was fraudulent, and not a true statement of the actual assets. It seems to be conceded by all parties that all the debts mentioned in the bill of sale were *bona fide.*

It was shown upon the trial that the attachment in the McGuire case was sustained, and that the goods attached sold for $115, several months after they were seized under the attachment.

The court gave eighteen instructions at the request of the plaintiffs, and refused the following, asked by them: "(18) In this case no evidence has been adduced upon which you would be legally justified in finding a verdict for the defendants. You are therefore instructed to find a verdict for the plaintiffs, assessing their damages at the value of the goods seized under the attachment of J. M. McGuire & Co. *v.* Jones & Fulton at the time of their seizure. (19) You are instructed that a fraud that would vitiate a sale of goods must be in the sale itself, and not in some mere device for putting other creditors off their guard, and preventing them from investigating the doings of the debtor. Though plaintiff's agents may have advised Jones & Fulton to throw the agent of Voorhees, Miller & Rupel off his guard intentionally, by ordering from him a bill of goods, that was not a fraud that entered into the bill of sale or affected it; and this is particularly so if the advice was not acted on. (20) Fraud must consist in acts done with a fraudulent intent, not in mere intent which is not carried out; and the secret motives of a debtor, however fraudulent, do

not vitiate the disposition of his property, provided such property is applied to the payment of debts at a rate which the law deems reasonable; and when property is applied to the payment of debts at a rate equal to what it would bring at a fair public sale to the highest bidder, that rate is reasonable. (21) If the plaintiffs took the goods at such a price as they would have brought at a fair public sale to the highest bidder, the transaction would not be invalidated because they advised Jones & Fulton to put their money into their pockets, and not to pay it to their creditors, if you find that such advice was given. Fraud consists in acts, and bad advice touching other property cannot vitiate a sale." Plaintiffs excepted to the refusal of these instructions.

The court at the instance of the defendants gave eleven instructions to the jury, two of which are as follows: "(9) If you believe from the evidence in this case that the plaintiffs, by their transactions with Jones & Fulton in the purchase of the goods, acquired all the property of Jones & Fulton except the amount which the evidence in the case shows that the said Jones & Fulton had in the bank and their accounts, and that said plaintiffs counseled or advised the said Jones & Fulton to keep the said money themselves, and not to pay the same to their creditors, and that such advice or counseling entered into said transactions between said plaintiffs and the said Jones & Fulton as an inducement for said Jones & Fulton to make said transaction with said plaintiffs, and that said Jones & Fulton, acting upon such advice of said plaintiffs, did appropriate said money to themselves, and thus deprived their creditors of it, and that said Jones & Fulton were at the time insolvent, you should find for the defendants in this case. (11) If the jury believe from the evidence that, at the time of the conveyance made by the firm of Jones & Fulton to Rice, Stix & Company, Pratt,

Simmons & Company, and the Clark Shoe Company, of the stock of goods mentioned in the conveyance, that it was the understanding and agreement between the parties to said conveyance that the said grantees therein, to-wit: Rice, Stix & Company, Pratt, Simmons & Company and the Clark Shoe Company, or their agent or agents, were to sell the goods therein conveyed for the purpose of raising money out of which to pay their debts, and to pay the other debts mentioned in the conveyance, and, in pursuance of said agreement, possession of the said goods was delivered to their agents, then the effect of said conveyance would be an assignment and void, notwithstanding the fact that it purported to be a bill of sale on its face."

The plaintiffs excepted to the giving of each of said instructions. There was a verdict and judgment for the defendants. The plaintiffs filed a motion for a new trial, took a bill of exceptions, and appealed to this court.

George W. Murphy and *Rose, Hemingway & Rose*, for appellants.

1. It was error to refuse the 18th instruction asked for plaintiffs. There is not a scintilla of testimony to impeach the good faith of the plaintiffs' purchase. The debts were genuine, the price was largely in excess of the true value of the goods, and no fraud is shown. A debtor has the absolute right to turn his property over to his creditor at a fair price in satisfaction of his demand. 21 Pa. St. 495; 60 Am. Dec. 57; 23 Ark. 264; 56 *id.* 417; 42 *id.* 525; Bump, Fr. Conv. (3 ed.) 189, 45.

2. The price paid for the goods was adequate. To affect a sale with fraud, the inadequacy must be so great as to shock the conscience. Bump, Fr. Conv. (3 ed.) 45; Wait, Fr. Conv. sec. 232; 47 Ark. 515. If

the goods bring as much as they would at a fair public sale, the price is adequate. 41 Ark. 325.

3. The 19th instruction asked by plaintiff should have been given. The fraud must be in the sale, and not merely in some device to put off creditors. Bump, Fr. Conv. (3 ed.) 357; Wait, Fr. Conv. sec. 341; 21 Me. 286.

4. It was error to refuse the 20th asked by plaintiffs. See authorities cited on point No. 1.

5. Also in refusing the 21st, and in giving the 9th asked by the defendants. Mansf. Dig. secs. 3373–4–5; 31 Ark. 556; Bump, Fr. Conv. (3 ed.) 18–19; 4 U. S. C. C. A. 69; *Id.* 403; Burrill on Assignments, sec. 351; Wait, Fr. Conv. sec. 3.

6. This was a plain sale, and not an assignment. 53 Ark. 101; *Id.* 538; 56 *id.* 315; 36 Neb. 45; 53 N. W. 1034.

7. This case is settled by 59 Ark. 270, 303; 60 *id.* 425.

E. W. Rector, *C. V. Teague* and *Wood & Henderson*, for appellees.

1. The sale was made with intent to cheat, hinder and delay creditors, and is void. To show this, all circumstances surrounding the sale may be considered in evidence. Bigelow on Fraud, p. 146; 50 Ark. 319; 17 Wall. 532; 31 Ark. 666; 65 Am. Dec. 154, and note. There are many circumstances to show fraud in this case: the combination of appellants, the secrecy and haste, the sale in a lump without inventory, the advice to keep their money and accounts and divide them between themselves, etc., all tend to show fraud, and the jury so found.

2. The 1st, 3d and 4th instructions given for appellants, and the 5th and 6th for appellees, show that the jury were charged correctly on the subject of fraud.

23 Ark. 258; 60 *id.* 431; 31 *id.* 666. While it is true that the law allows a creditor to buy from his debtor, who is in failing circumstances, property for the purpose of collecting his claim, without being chargeable with fraud for so doing, although he may know that other creditors will not be able to collect their demands by reason of such purchase, and that the rule applicable to such cases is different from the rule applying to one who purchases upon a new or cash consideration, yet the creditor who thus buys must act with good faith in the matter, and must not take more of his debtor's property than is necessary to pay his claim at a fair price. He must do nothing, beyond collecting his own demand, that will hinder or delay other creditors. *Twyne's Case*, 3 Rep. 81; 2 So. Rep. 737.

3. The mere inadequacy of price might not alone avoid the sale, but that, with the other things proved, is sufficient. 47 Ark. 515; 41 *id.* 325; 48 *id.* 219. The bill of sale did not express the entire contract, but there was a secret reservation for the benefit of Jones & Fulton, which hindered and delayed creditors. 31 Ark. 670; Burrill on Assignments (5 ed.), p. 255; 6 Wall. 78, 80.

4. The division and appropriation to their own *separate* and *individual* use by Jones & Fulton of the money in bank and the accounts, property of the firm, by the advice of appellants, was a fraud on the other creditors. 16 Fed. 316; 12 Pet. 221–9; 17 N. W. 353; 2 So. 735; 21 N. Y. 587; 52 *id.* 146; 47 Ill. 272; 34 Barb. 31; 32 *id.* 126; 12 N. H. 458; Burrill on Assignments (5 ed.) 307, *et seq.*; 4 Barb. 571; 41 *id.* 307. Another fact tending to hinder and delay creditors was that the sums assumed by appellants to be paid other creditors were to be paid in St. Louis. Bigelow on Fraud, vol 2, 375 *et seq.* and note.

5. The sale was in fact an assignment, and void for failure to comply with our laws.

6. Appellants had no cause of action on the bond against appellees. If appellants were the owners of the property, the sheriff was a trespasser, and was liable to them, as were also the plaintiffs in the attachment suit. It is doubtful whether appellees, by signing the bond, were participants in the trespass; but, if so, their liability would have to be fixed by a suit for trespass, and not by suit on the bond. There is no statute authorizing the sheriff to require an indemnity bond in attachment proceedings. If the sheriff was guilty of a tort, and appellees by signing the bond are equally guilty with him, then appellants might have sued for the tort, but they have elected to sue on contract and are bound by their complaint. The law does permit a joinder in the same suit of actions *ex contractu* and *ex delicto*. The evidence did not authorize a verdict in favor of appellants; and if one had been rendered for them, the court should have set it aside. Pom. Rem. sec. 558, 564, and notes; 2 S. W. 476; 1 Enc. Pl. & Pr. p. 194. The bond sued on is personal to the sheriff, and was made to indemnify him against all damages he might sustain by levying the attachment. If he sustained no damages, then no liability attached to the bond. 43 N. W. 795; 57 Fed. 567; 10 Am. & E. Enc. Law, p. 413.

Rose, Hemingway & Rose, for appellants, in reply.

Appellees contend that there is no liability on the bond because the statute requiring an indemnity bond is a part of the chapter on executions, and not of that on attachments.

(*a.*) An attachment is a preliminary execution. 23 Ark. 287; 52 *id.* 290.

(*b.*) One who gives an officer a bond of indemnity, and thereby induces him to levy, is a party to the trespass. 5 Denio, 94; 117 Mass. 459; 3 Wall. 9; 15 N. Y. 413; 81 Tex., 108; 18 Mo. 396; 30 Minn. 329; 48 Ala. 628; 1 Mo. App. 393; 34 Cal. 629; 2 Freeman, Ex. sec. 273, p. 882; 2 Brandt on Suretyship & Guar. sec. 490.

Liability of indemnitor for wrongful levy.

HARROD, Sp. J., (after stating the facts). The appellees contend that the judgment should be affirmed, without regard to whether there were errors committed against the appellants at the trial, because, as they claim, the suit instituted by the plaintiffs cannot be maintained under the law. They claim that the bond was personal to the sheriff, and that he alone can sue on it, and that he cannot sue until he has been damaged. It is also said that the statute makes no provisions for an indemnity bond in attachment cases. And it is further urged as a defense against the action of the plaintiffs that it is doubtful whether the defendants, by signing the bond, became participants in the trespass, and if they did become so, it is claimed that they could only be sued in trespass, and not on the bond.

If this suit was by the sheriff against the defendants on the bond, it would be necessary for him to show how and in what respect he had been damaged; and in such a case it might be necessary to determine whether the statute contemplates the indemnity bond mentioned, although it is questionable, even in that case, whether the defendants, having executed the bond under the circumstances, would be heard at all to contest its legality. But there is no such case here, for this is not a suit on the bond, but a suit against the defendants to recover the value of the plaintiffs' goods, which it is claimed were taken to pay the debt of another, and for which taking it is alleged the defendants were responsible.

The contention of appellees that it is doubtful whether they became participants in the trespass by making the bond, in our opinion, is not well taken. It seems to us that that act made them the real principals in the transaction. In order to maintain the action, it is only necessary for plaintiffs to show,—First, that they owned the goods taken; second, their value; and third, that the defendants participated in the taking, or caused the same. And the right to maintain the suit cannot be made to depend upon the existence or non-existence of any statute. It is simply the common right that every one has to recover the value of his property, when wrongfully taken. The plaintiffs, if they owned the goods, could have sued McGuire and the sheriff and the defendants jointly, if they desired, or either of them separately. *Lovejoy* v. *Murray*, 3 Wall. 19.

The only issue in this controversy that was really contested is whether plaintiffs owned the goods levied on under the McGuire attachment. Their claim rests upon the instrument executed by Jones & Fulton, and their title depends upon its integrity.

The different instructions given at the request of both parties, that appear in the record, but are not copied in our statement of the case, seem to state fairly the different propositions of law to which they relate, and to be free from error.

As to directing a verdict.

We do not find any reversible error in the refusal of the eighteenth instruction asked by the plaintiffs, which directed a verdict for them. We see but little, if anything, in the evidence that even tends to establish fraud; but, at the same time, we do not undertake to say that there is absolutely no evidence of that kind.

When concealment not fraudulent.

The nineteenth instruction by the plaintiffs should have been given. It is not a fraud for one creditor to try to keep another from finding out about a trade that

he is seeking to make, for no other purpose than his own protection.

In regard to the twentieth instruction asked by the appellants, and refused by the court, we deem it sufficient to say that, in our opinion, its refusal was not error of which the appellants can complain.

A proper disposition of this case can be arrived at by fairly construing the acts of the parties, without stopping to discuss the legal consequences of secret motives or mere intent not acted upon or carried out.

As to liability of purchaser in a fraudulent conveyance.

The twenty-first instruction asked by the plaintiffs, and the ninth given by the court at the request of the defendants, both relate to the effect of the statement that Jones & Fulton claim that the representatives of the plaintiffs made in regard to their money in bank and their accounts. Without discussing either of these instructions in detail, we are of the opinion that the purchasers were under no obligation whatever to take the money in bank on their debts instead of the goods; nor did the future disposition of the money or accounts concern them. If their debts were *bona fide*, they had a right, under the law, to collect them either in money or property, however disastrous the consequences might be to others. Although Jones & Fulton, at the time they sold to the plaintiffs, may have intended to defraud their other creditors by appropriating to their own use the money and accounts, and although the purchasers may have known of this intention, their purchase could not be defeated on that account alone. Such was the decision of this court in *Wood* v. *Keith*, 60 Ark. 425. If the purchasing creditor's debt is honest, and his only object is to secure the payment of his own debt, he is not affected by any motive or design that the debtor may have or entertain as to his other creditors. But he will not be permitted to protect himself by any fraud to which he is a party. Fraud cuts down every-

thing, and no claim or title can rest upon any such foundation. So, in this case, if the disposition of the money in bank, and the accounts, or either of them, came up for discussion while negotiations were pending, the plaintiffs or their representatives might well have said to the vendors: "We are not concerned with that property. We care nothing about it, and your disposition of it is not material to us." The law would not attach any fraud to such words, or to any expressions of similar import.

Transaction held not an assignment.

The eleventh instruction given at the request of the defendants was clearly erroneous. There is nothing in any part of the record, either in the bill of sale or in the oral evidence, disclosing any feature of an assignment. When the appellants accepted the bill of sale, they were bound by its terms, and were liable to every creditor whose debt was assumed, and that liability was in no manner dependent upon the disposition of the stock of goods.

For the errors indicated, the cause is reversed, and remanded for a new trial.

Wood, J., being disqualified, did not sit.

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BURGETT v. McCRAY.

Opinion delivered January 4, 1896.

TAX-SALE—REDEMPTION.—A suit by an infant to redeem land from a tax sale is not an action for the recovery of land or for the possession thereof, within the statute (Sand. & H. Dig., secs. 2595-6) requiring an affidavit of tender of taxes.

Appeal from Crittenden Circuit Court in Chancery.

JAMES E. RIDDICK, Judge.

W. G. Weatherford, for appellant.

The affidavit required under sections 2595–6–7 Sand. & H. Digest is required only in actions for the *recovery of land* or its possession. This was not a suit of that character. 21 Ark. 323; 29 *id.* 487; 43 *id.* 399; 41 *id.* 63; 43 *id.* 306; 49 *id.* 552; 53 *id.* 418; *Ib.* 423. It was error to dismiss the bill.

BOURLAND, Sp. J. This was a suit on the chancery side of the Crittenden circuit court by appellant, Pearl Burgett, as a child and only heir at law of I. W. Burgett, deceased, to redeem from tax sale certain lands described in her complaint, which were sold for the non-payment of the taxes for 1876 and 1877. It is alleged in the complaint that appellee is in possession of the lands, claiming title under a deed executed by the commissioner of state lands by virtue of the act of March 14th, 1879. It is alleged that appellant's father, I. W. Burgett, died in 1872 in possession of and claiming to own several tracts; that appellant reached the age of eighteen years on the 7th day of February, 1888, and in the year 1889 she applied to appellee to redeem the property. It is also alleged, in substance, that appellee, under frivolous pretext, denied her right to redeem, and continued to hold the possession. In her complaint appellant offers to bring into court the requisite amount due, and prays that it be ascertained, and for such relief as the facts will warrant.

Appellee answered, in substance, denying appellant's alleged offer and right to redeem, denying her ancestor's possession and claim, but admitting her age and heirship as alleged. It is also alleged in the answer that valuable improvements have been made and taxes paid on the lands, but the value is not stated. And, among much redundant matter, there is a prayer for affirmative relief as to improvements and taxes, in the event redemption be decreed.

Appellee's answer was filed on the 6th day of November, 1891. Thereafter, as the record discloses, depositions were taken on both sides relating to the alleged possession and offer to redeem. In 1892, at the April term of the court, the cause, on motion of appellee, was continued to the succeeding term. No further action appears to have been taken until the November term 1893, when a motion was filed by appellee to dismiss, under section 2595 and 2596, Sandels & Hill's Digest. The court sustained the motion, for failure of appellant to file the affidavit required by the section first named, and entered judgment accordingly, from which this appeal was prayed and granted.

Section 2595, Sandels & Hill's Digest, which is part of the act of January 10, 1857, is as follows: "No person shall maintain an 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 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, unless the person so claiming such lands shall, before the issuing of any writ, file in the office of the clerk of the court in which suit is brought an affidavit setting forth that such claimant hath tendered to the person holding such lands in the manner aforesaid, his agent or legal representative, the amount of taxes and costs first paid for said lands, with interest thereon from the date of payment thereof, and the amount of taxes paid thereon by the purchaser subsequent to such sale, with interest thereon, and the value of all improvements made on such lands by the purchaser, his heirs, assigns or tenants, after the expiration of the period allowed by law

for the redemption of land sold for taxes, and that the same hath been refused." Ought appellant's cause to have been dismissed on appellee's motion, under this section? After mature consideration, we are of the opinion that it ought not to have been so dismissed. The purpose of the statute, which must be considered, was (1) to reduce to the minimum the non-payment of lawfully assessed taxes, by rendering procrastination in that regard at once exceptionally expensive and vexatious to the land owner; and, upon the other hand, (2) to encourage persons to become purchasers at tax sales, by the assurance, found in the terms of the act, that, despite the dangers to their permanent possession of the land consequent upon irregularities in the tax proceeding, *that possession cannot be disturbed by litigation founded upon such irregularities, until the ligitimate expenditures of the tax purchaser, with unusual profits, shall have been tendered, and an affidavit to that effect filed in the clerk's office.* Redemption belongs to a different class of remedies. It assumes the validity of the tax and the regularity of the tax proceeding; and while redemption is, of course, preceded by dereliction upon the part of the land owner, that dereliction finds its penalties in the general revenue laws, and not in the act of 1857.

We are not unmindful of a very early case,—*Craig* v. *Flanagin*, 21 Ark. 319. There, as it appears, the tax purchaser had regularly obtained a tax deed, and in due time, by a proceeding in chancery, obtained a decree of confirmation, the effect of which was to bar any action to recover the land on account of any irregularity in the tax proceeding, and to complete the title in the purchaser; and it was to avoid the effect of this decree that Craig, the appellant, filed his bill in equity attacking the decree as well as the tax deed. He failed to file the affidavit prescribed by the act under consideration, and

a dismissal for this failure was affirmed. That was not a suit to redeem; but it is to be presumed that the court treated it as, in effect, an "action for the recovery of land or the possession thereof," against a person "holding it under a collector's deed." However, if such a suit in chancery may be held to be "an action for the recovery of land or the possession thereof," or if the tax purchaser may be said longer to "*hold under a tax deed*," *after decree of confirmation*, it is well to observe that the terms of the act, being penal, should not be extended beyond its letter.

As early as 1872, in *Chaplin* v. *Holmes*, 27 Ark. 414, which was a suit by a married woman, brought in equity, to remove a tax deed as a cloud upon her title, it was held that the filing of the affidavit was unnecessary, upon the ground that the act makes such affidavit a prerequisite only in "actions for the recovery of land or the possession thereof." In *Douglass* v. *Flynn*, 43 Ark. 398, which was ejectment against a person holding under "a donation deed," the affidavit was not required because "no one claiming as assignee or vendee of a donation claim, on which the donee has made no improvements at the time of his sale, can be said to be holding under it, inasmuch as the statute re-vests the land in the state upon such attempt to sell; and therefore the act of January 10, 1857, 'to quiet land titles' has no application, either as to the tender of taxes or limitation of the action expressed in the act." And so in *Kelso* v. *Robertson*, 51 Ark. 397, opinion by Hemingway, J. There it appeared that the taxes for which the lands were sold had been previously paid by the land owner, and for this reason "the deed" under which the purchaser held was void, and the affidavit, consequently, unnecessary. The case of *Anthony* v. *Manlove*, 53 Ark. 423, was a suit in ejectment by a minor, who, it appears, filed the affidavit, and without,

of course, questioning the essentiality of it, the defendant below sought to traverse its allegations. To this the court said: "The statute does not, in terms, provide that any issue may be made upon the allegations of the affidavit. There is no wise and beneficial object to be accomplished by the act which would justify the extension of its operation beyond its letter; besides, being penal in its nature, it should be strictly construed." Still a stronger, though an earlier, case is *Hare* v. *Carnall*, 39 Ark. 196. It was a suit in equity by certain landowners to enjoin the execution of a tax deed, and thus to avert a cloud upon the title. *The bill was filed before the period for redemption had expired;* and amongst other defenses interposed, it was sought to invoke the terms of the act of 1857. To that, however, this court in that case said: "This case does not come within the purview of the act of January, 1857. The effect of that act is that, before any suit for the recovery of land or its possession, shall be brought against any person holding it by virtue of a purchase at tax sale, etc., * * * * * * an affidavit to the effect, etc., shall be first filed." * * * * Continuing, the court in that case said: "This is neither an action for the recovery nor possession of land. The provisions of the law are severe, and will not be extended beyond the letter."

There are many points of similitude to the case at bar in *Carroll* v. *Johnson*, 41 Ark. 59. The plaintiff's land had been sold for taxes in 1876, while he was an infant. In due time they were conveyed to the state, and by the state deeded to a person who conveyed them to the defendant, and the latter went into possession. The plaintiff was still a minor when his suit was instituted, and he had previously tendered to the defendant the price paid by his grantor to the state, the value of all improvements, taxes, interest, etc., and brought the

money into court. And in that case this court, by Smith, J., delivering the opinion, after adverting to the act providing the manner in which minors and others laboring under disabilities shall redeem their forfeited lands, which is by sworn petition filed in the office of the commissioner of state lands, before the state has disposed of them, used this language: "No statute with which we are acquainted has prescribed the mode by which redemption is to be effected after a deed has been made to an individual, either upon purchase at the original tax sale, or upon purchase from the state after the land has come into the office of the land commissioner. Under such circumstances it becomes the duty of the courts to mould the remedy so as to give effect to the right. And no better course for the purpose of accomplishing justice to all parties in interest occurs to us than the course which was pursued here." And, while the statute which we are considering was not directly passed upon in that case, apparently for the reason that all parties treated it as having no application, what would have been held, however, we think, is equally as apparent, had the question been there directly presented, as it is here.

It may be conceded that in the case at bar, under the pleadings and general prayer for relief, appellant will be entitled, if the proof warrants it, to a decree as well for possession of the land as for redemption from the tax title; but it does not follow from this concession that the suit is "an action for the recovery of land or the possession thereof." The incidental granting by chancery courts of relief peculiar to courts of law is a practice well established. The language "actions for the recovery of land or the possession thereof" had a fixed legal meaning at the date of the act of 1857, and this meaning must be attributed to the legislature. Actions for the recovery of land were common law

actions. They tried the title and the right to possession. And it is in the light of the law at the date of the act in question that its terms are to be construed. The right according to which appellant in this case was proceeding was granted long after the passage of the act of 1857. At that time there was no exception in the redemption statutes in favor of infants. *Smith* v. *Macon*, 20 Ark. 17; Acts of 1875, page 227; Gantt's Digest, secs. 5195, 5197 and 5266. See, also, *Bender* v. *Bean*, 52 Ark. 132.

And, while now, as it was at the date of the act of 1857, a deed will be executed to the tax purchaser, at the end of two years allowed to persons, generally, for redemption, such deed is not now, as it was then, unqualified; but the extension of the right of redemption to minors until two years after they reached their majority had the effect of making such right a condition subsequent to the tax deed executed to purchasers of their lands, and the right is qualified only by the laws of its creation and those enacted to govern its just and proper exercise.

It follows, therefore, that for the error indicated, this cause must be reversed.

We are unable to determine, however, from the transcript, that the cause was prepared in the court below for final submission. It is accordingly remanded, with directions to set aside the decree of dismissal, to overrule the motion to dismiss filed by the appellee, and to further proceed in the action according to the rules and practice in equity, not inconsistent with this opinion.

Riddick, J., being disqualified, did not participate.

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McCONNELL v. DAY.

Opinion delivered January 4, 1896.

TAX-DEED—DAY OF SALE.—As the revenue act of March 17, 1873, extended for thirty days the time for the collection of taxes, without making provision for the sale of lands found delinquent, such lands could not be legally sold until the regular time for tax sales in the succeeding year.

JUDGMENT—CONCLUSIVENESS.—A judgment in ejectment binding upon a husband is binding upon his widow claiming as such, but such a judgment against a husband does not bind his wife claiming the land under a former husband.

MORTGAGE—POWER TO SUBSTITUTE TRUSTEE—REVOCATION.—The power to substitute a new trustee, given to the beneficiary in a deed of trust, is not revoked by the execution of a subsequent "extension" of the deed, which does not in terms provide for a substituted trustee, where it particularly refers to the trust deed, and makes all of its provisions a part of the extension.

TRUSTEE'S DEED—BURDEN OF PROOF.—The recitals in a deed executed by the trustee in a deed of trust, showing substantial conformity to the requirements of the deed of trust, are *prima facie* true, and the burden of showing their falsity is upon the party assailing the deed.

JUDGMENTS—PRESUMPTION.—Judgments of domestic courts of general jurisdiction are presumed, in a collateral inquiry, to be within jurisdiction, unless, from an inspection of the record itself, it can be seen that they are without.

SAME—WHEN PRESUMPTION NOT OVERCOME.—The presumption, on collateral attack, that a judgment of a federal circuit court was within its jurisdiction is not overcome by the fact that the transcript of the record, certified by the clerk to be a true copy of the record remaining in his office, does not include a summons to defendant, nor recite jurisdiction of his person.

BURDEN OF PROOF—ADVERSE POSSESSION.—The burden of proving adverse possession is upon the party who asserts title based thereon against the holder of the legal title.

Appeal from Crittenden Circuit Court in Chancery.

JAMES E. RIDDICK, Judge.

Ejectment by Day & Proudfit against Ella G. McConnell and others. The facts are stated in the opinion of the court.

W. G. Weatherford, for appellants.

1. Mrs. McConnell is not barred by the U. S. court judgment. It was void for want of jurisdiction, apparent upon the record. Mansf. Dig. sec. 5201; 49 Ark. 413; 34 Cal. 391; 57 Ark. 49, 628; 56 *id.* 338. No case can be found where a judgment record, shown by proper evidence to be a *complete* record, containing no process, no docket entry, and no order nor recital to raise the presumption of appearance has been held a valid judgment. The clerk's certificate is evidence, and the best, that this was the entire record of the case. 55 Ark. 36; 7 *id.* 369; 7 Cranch, 408; 95 U. S. 418. The presumption as to validity of a judgment of a superior court is always rebuttable by the record itself. 1 Black, Judg. sec. 270. The presumption is overthrown when the record of the *entire* case discloses no service. 12 Am. & Eng. Enc. Law, p. 273, note 2; 8 Cal. 569.

2. Mrs. McConnell was not a party to that suit, nor does she claim title through B. F. McConnell.

3. The tax sale was void. 33 Ark. 478.

4. There was no authority for the appointment of Metcalfe, the substituted trustee, and the sale by him was void. Hill on Trustees, *p. 177; 1 Perry, Trusts, sec. 289; 2 *id.* sec. 602 *g*; 55 Ark. 326.

5. No evidence was introduced to prove that the sale by Metcalfe was made according to the terms of the trust deed. 2 Perry, Trusts, sec. 602 *t*. The recitals are not sufficient. 4 Wheat. 77; 51 Ark. 452; 134 U. S. 241; I Devlin, Deeds, sec. 425; 2 Perry, Trusts, sec. 782; 62 Ala. 499.

6. Appellees are barred by the statute of limitation of seven years. When this statute is set up, the

burden is on plaintiff to show both a cause of action and the suing out of process within the period. 145 Mass. 370; 48 Ark. 282; 43 *id.* 136; 27 *id.* 343; 2 Gr. Ev. sec. 341; 16 S. E. 683; 40 N. W. 10; 51 Vt. 106.

W. B. Edrington, for appellees.

1. The burden of proof is upon the party who relies upon the fact of possession. 57 Ark. 97.

2. In the first deed of trust Fitzgerald & Co. had power to appoint a substituted trustee. There was no *new* instrument, but merely an extension of time of payment stipulated for in the original.

3. Recitals in trust deeds to the purchaser are, at law, generally held to be *prima facie* evidence of the facts stated, even where the power itself does not provide that such recitals shall have that effect. 43 Iowa, 286; 33 Ind. 318; 67 Miss. 169; 109 Ill. 579.

4. It will be presumed, not only against the mortgagor, but against all persons claiming under him, that a sale under a mortgage was advertised as required by the terms of the power, and the burden of proof rests upon the party attacking the sale to rebut this presumption. 26 Am. & Eng. Enc. Law, p. 902; Caine's Cases (N. Y.), 1; 2 Am. Dec. 281.

5. In collateral attacks, it will be presumed that courts of general jurisdiction have acted correctly and with due authority, and their judgments are as valid as though every fact necessary to jurisdiction affirmatively appeared. Where jurisdiction of the subject matter appears, jurisdiction of the person is presumed where the record is silent. 18 Wall. 365; Freeman on Judgments, secs. 124–132; 49 Ark. 413; 53 N. Y. 600; 11 Ark. 519, 572, 731; 13 *id.* 414, 433, 505; 14 *id.* 124; 12 *id.* 86, 272; 19 *id.* 185; 18 *id.* 294; 20 *id.* 78; 21 *id.* 367; 44 *id.* 426, 270; 33 *id.* 828; 37 *id.* 540; 47 *id.* 419; 32 *id.* 691; 18 How. 164; 117 U. S. 269.

BOURLAND, Sp. J. This was an action in ejectment in the Crittenden circuit court, brought by appellees to recover from the appellant a large quantity of land, being portions of sections 14, 22, 23 and 24, in township 5 north, of range 8 east, of which it is alleged that appellant is in the unlawful possession. The pleadings are lengthy, and the whole record suggests the propriety of an attempt at condensation of treatment. It is believed, therefore, that a substantial statement of the facts disclosed by the record will afford a sufficiently favorable view of the issues and points of contention between the parties.

Appellees' deraignment of title appears to have a double aspect. It seems that one John G. Rieves had owned the land in controversy, and that Ella G., the appellant, was then his wife. In the spring of 1875, Rieves died in possession, childless, and widowing Ella G., who, left in possession, inter-married in 1877, with B. F. McConnell, who has since died. From exhibits in evidence, it appears that in 1871 Rieves and his wife, Ella G., conveyed the land in trust to one Jefferson, for Fitzgerald & Company, with power in the trustee to sell in the event of default. The instrument also contains a power in the *cestui que trust* to substitute in writing a new trustee upon conditions specified. Jefferson, the trustee, in January, 1876, by a written declination, renounced the trusteeship, and on the same day the *cestui que trust* in like manner substituted and appointed in his stead one Metcalf. The new trustee, Metcalf, in March of the same year, executed and delivered to Fitzgerald & Company, in apparently regular form, a deed containing recitals as to default, advertisement, sale and purchase of the land by Fitzgerald & Company; and the latter, in July, 1882, by deed without warranty, conveyed the land to B. F. McConnell. From a tax deed in evidence, however, it is made to ap-

pear that, for the year succeeding the execution of the trust deed by Rieves and wife, namely, for the year 1872, the lands were forfeited for taxes. They, on that account, were sold by the collector, and one Hardin became the purchaser, and received a certificate. It appears that the collector's sale took place on the 11th day of June, 1873. Thereafter, and when more than two years had expired from the date of the tax sale, appellees, Day & Proudfit, became purchasers from Hardin, taking an assignment of his certificate, upon which the county clerk issued to them this tax deed.

In this connection, it is appropriate to advert to another trust deed offered and read in evidence by appellant, apparently without objection, in conjunction with other evidence, for the obvious purpose of destroying the alleged tax deed as a link in the chain of appellees' title. This trust deed was executed in March, 1873, two years after the execution of the Fitzgerald deed. It was executed by Rieves and wife to one Oliver, trustee for Day & Proudfit, appellees in this action; and at the time of their purchase from Hardin, and of the execution of the tax deed to them, Oliver, the trustee, was in possession of the premises, at their instance, appropriating the rents and profits to the trust debt. It is not amiss to observe here that the Oliver deed does not embrace the land lying in section 22; and if the trust was ever finally executed, the fact does not appear in the record. In any event, appellees do not, it seems, rely upon this deed in their deraignment of title.

And again, recurring to McConnell, who, we have seen, purchased under the Rieves-Jefferson deed, it appears that, four years after his purchase, McConnell was in possession of the land, and it is made to appear that, during a portion of that period, at least, he rented from Day & Proudfit. It may be inferred, we think, from the circumstances, that McConnell rented under the

belief that the title of Day & Proudfit, under the tax deed, was superior to his own under the Jefferson trust deed; but, after a time, changing his mind, he asserted title to the land, and refused to give up the possession. In any event, it appears from a transcript of the record of the federal circuit court, sitting at Little Rock, that Day & Proudfit sued him in March, 1886, they being citizens of Tennessee, and he a citizen of Crittenden county, Arkansas. This transcript of the record of the federal court is duly certified, under the official seal of the clerk of that court, to be "a true, correct and compared copy of the *record remaining in my office*, and constitutes a complete transcript of the record in the above entitled cause." There is contained in the transcript a complaint in ejectment by Day & Proudfit against B. F. McConnell, with exhibits, setting up title under the tax deed already mentioned, and alleging that the plaintiffs own the land, and are entitled to the possession, and that McConnell unlawfully withholds the same, with prayer for possession. There is also a copy of the judgment, finding that Day & Proudfit owned the land and were entitled to the possession as against McConnell, and writ of possession was accordingly adjudged, with cost. There is, likewise, transcribed a return, certified to have been made on a writ of possession, showing that the lands were delivered to Day & Proudfit by the marshal of the eastern district of Arkansas, on the 17th day of November, 1886. If McConnell was summoned in the action, however, or if a summons was issued, or if he in any way appeared, the record is silent as to the fact.

To each link in appellee's title, thus offered in evidence, appellant filed exceptions before the trial: (1) To the tax deed, because it shows a sale on the 11th day of June, 1873, which, it is alleged, renders the deed void; (2) to the transcript of the federal court, be-

cause appellant, not being a party to the suit, is not, it is alleged, bound by the judgment, and because McConnell, it is alleged, was not summoned, and did not in any manner appear in the suit; and (3) to the Metcalf deed, because he was not rightfully appointed, it is alleged, nor did his deed show lawful sale. The exceptions were severally overruled, and properly reserved for adjudication here. But their consideration will be more convenient in another connection.

Appellant's view of the law, as indicated, was embodied in several instructions asked, but refused; and, having set up in her answer the plea of adverse possession in bar of the action, she also asked an instruction to the effect that as to this plea the onus of proof was on the plaintiffs. This instrument was likewise refused, and her exceptions reserved. The court thereupon instructed the jury, in effect, that the chain of title in evidence upon the part of appellees, in connection with the transcript of the federal court, showed ownership in them, and their right to the possession as against appellant, unless the jury believed, from the evidence, that appellant's plea of adverse possession had been established. And upon the plea of adverse possession the jury were instructed, in substance, that such possession must have been continuously in appellant for seven years at least; that it must appear from the evidence to have been open, notorious and adverse; that any break in the continuity of her possession, if she had it, would work a loss of the time prior to, and during the break, and if she resumed the possession, the time must be reckoned from that event.

The evidence as to adverse possession was in sharp conflict. From the foregoing, it is sufficiently clear that the appellant relied not solely upon her plea of adverse possession, but that she stood upon her rights,

real or supposed, as the relict of John G. Rieves, disputing the strength of appellees' title to divest her.

The first question, then, is: Does appellees' chain of title, in connection with the transcript of the federal court, show ownership in the lands, or the right to the possession, as against appellant, waiving, for the present, the consideration of her plea of adverse possession.

Tax sale on wrong day is void.

And first, as to the tax deed. It is of course clearly void. The time of the sale of the lands by the collector, the 11th day of July, 1873, was not the time prescribed by law for the sale of delinquent lands. The legislature, in that year, by act of March 17, extended for thirty days, the time for the collection of taxes, but no provision was made for the sale of lands found delinquent at the end of the extension. So that the general revenue law in force must have governed. The effect of this was that the lands could not have been legally sold until the regular time for such sales in the succeeding years. *Vernon* v. *Nelson*, 33 Ark. 748; *Allen* v. *Ozark Land Company*, 55 Ark. 549.

When judgment against husband conclusive against wife.

And it is to be borne in mind that it was upon this tax deed, void though it be, that appellees founded their action against McConnell, and obtained a judgment for the lands, in the federal court. It is insisted, however, that this judgment is void also; at least, that it does not conclude appellant, who was not a party to it. The contention here, it must be declared, has given the court most serious concern; but a definite conclusion has been reached, and that conclusion, hereafter to be expressed, in its proper connection, is thought to be supported by sound reason, a wise public policy and the clear weight of authorities. It is not a question, of course, whether appellant, if she had been a party of record to the suit in the federal court, would be concluded by its judgment. The suit was against B. F. McConnell, and the judgment was against him. At

that time, certainly, appellant was his wife. And what will conclude him in this regard must, then, it seems, also conclude *her;* but only, it is to be observed, as to the rights which, but for the judgment, she might, as the widow of McConnell, assert to the subject-matter of that suit. Now, if the judgment, in its collateral relation here, must be held to be valid, as against McConnell, the doctrines of *res judicata* and *estoppel* effectually close his mouth, as well as a denial of the validity of the tax deed, as to the assertion of any rights under the Fitzgerald conveyance, which he held at the date of the judgment. The same may be said, of course, of his widow, as such. In other words, assuming the validity of the judgment, she is concluded, as the widow of McConnell, from disputing the tax deed, and from taking any claim to the land, or taking any benefit on account of the Fitzgerald deed to McConnell.

But it is not as the widow of McConnell only that we are to pass upon the asserted rights of appellant. What rights had she as the widow of Rieves? If any, can it be said that, as to them also, she is concluded by the federal court judgment? We think not, but at the same time we are unable to find favorably to her contention that she has such rights. Her contention is that, the tax deed being void, her rights as Rieves' widow remain, as to that, intact; and, appellees not relying on the Oliver deed, her further contention is that the Fitzgerald conveyance to McConnell is void, so that her right to the possession, which she has, is clear, at least as against appellees.

As to power to substitute a trustee.

And this brings us to the question of the validity of the Fitzgerald deed. It is insisted by appellant, as to this, that Metcalf, who assumed to sell the land as trustee, had no authority, because, it is claimed, Jefferson only is mentioned in the deed as trustee, and there was no power of substitution. It is conceded by

appellant that such power was provided for in the original deed, but it is contended by her also that there was a new deed, and that in it, which, she maintains, took the place of the old, there is no provision for a substituted trustee. If this were the legal effect of the instruments in evidence, her contention would not be without merit. Hill on Trustees, 177; 2 Perry, Trusts, sec. 602*g*; *Stallings* v. *Thomas*, 55 Ark. 326. But, instead of there being a new deed, there was an instrument, executed by the parties, in which it is substantially declared that it is not intended to be a new deed, but an "extension." And while the "extension" does not in terms provide for a new or substituted trustee, it expressly and particularly refers to the trust deed, and makes all of its provisions a part of the extension.

Burden of proof to overthrow trustee's deed.

Metcalf, then, as we have seen, being properly appointed, was his sale according to the terms of the deed? He was appointed in writing, as provided. There are, in the deed, provisions for the manner of sale in case of default; and an examination of the deed executed by Metcalf shows recitals in substantial conformity to the requirements of the deed; and if the recitals are not true in any particular, it devolved on appellant to overturn them by competent evidence, which was not attempted. It follows that the deed is valid. *Dryden* v. *Stephens*, 19 W. Va. 1; *Hess* v. *Dean*, 66 Tex. 663; *Bergen* v. *Bennett*, 2 Am. Dec. 281; *Minuse* v. *Cox*, 9 Am. Dec. 313; *Graham* v. *Fitts*, 53 Miss. 307; *Turner* v. *Watkins*, 31 Ark. 429; *Tyler* v. *Herring*, 67 Miss. 169. As a result, it follows, too, *that, the Rieves title having passed to McConnell*, appellant, *as the widow of Rieves*, has no interest in the land.

Moreover, it is apparent from the foregoing that appellees must recover on the strength of their title in this action, as against her, unless, as has been remarked, she can either maintain her plea of adverse possession,

or defeat appellees' tax deed; and the latter she is estopped from doing unless the judgment of the federal court against McConnell, her last husband, be void. 1 Herman, Estoppel, p. 561; *Poorman* v. *Mitchell*, 48 Mo. 45; *Pollard* v. *Railroad Co.* 101 U. S. 223.

Presumption as to judgment of superior court.

After mature deliberation we are not prepared to declare the judgment void in this collateral inquiry. The clear weight of the authorities state the rule to be that, in a collateral proceeding, the judgments of domestic courts of general jurisdiction are presumed to be within jurisdiction, unless, from an inspection of the record itself, it can be clearly seen that they are without. *Culley* v. *Edwards*, 44 Ark. 426; *Adams* v. *Thomas*, 44 Ark. 270; *Apel* v. *Kelsey*, 47 Ark. 419; *Bosworth* v. *Vandewalker*, 53 N. Y. 600; *Galpin* v. *Page*, 18 Wall. (U. S.) 365.

When such presumption not overcome.

It is insisted by appellant that the record, being certified to be "true copies of the record *remaining in the clerk's office*," and that the "transcript is complete," it is a showing by the record itself, no summons appearing, that there was no summons, and that the defendant was never brought into court. The argument possesses plausibility, nor is it to be denied that it is supported by eminent authorities; but the decided weight of the authorities is, we think, the other way.

The judgment under consideration, according to the best reason that we have been able to bring to bear, is properly said to be silent as to the means whereby the defendant was brought into court. The clerk, it is true, certifies all of the records of that case, *remaining in his office:* but whether there ever was on file a summons with a return of service thereon, which has since been lost; or whether the defendant irregularly appeared corporally, without formal summons, and consented to judgment which was deemed by the court sufficient, without reciting the fact in the record, the

clerk probably did not know; or if he had so known, it is not within the scope of his duties to put such facts on record by his certificate. This court judicially knows that, while the clerks of the courts are, as a rule, careful to preserve the official files, and are, generally, painstaking in the discharge of official duties, they are, at the same time, far from infallibility. This judgment of the federal court was solemnly rendered. It recites that the court heard proof on the part of the plaintiff, and, moreover, that "the court was well and sufficiently advised as to what judgment to render." There is a further recital, which is not without significance, which is: "And, the defendant *failing* to introduce any proof, it is, etc.," from which it may be fairly implied that the court understood, from evidence before it, that the defendant had *knowingly refused to appear*, after service upon him, as such is one of the accepted meanings of the word "failed." At all events, it is not at all probable that the court would have rendered the judgment in the terms it is, unless there had been legal evidence before the court in some form that the defendant had been duly summoned, or had appeared in some manner deemed sufficient. 1 Black on Judgments, sec. 270, and authorities there cited; Freeman on Judgments, secs. 124–132; *Mitchell* v. *Meuley*, 32 Tex. 460; *Goar* v. *Maranda*, 57 Ind. 339; *Evans* v. *Young*, 10 Col. 316; *Herrick* v. *Butler*, 30 Minn. 156, 14 N. W. Rep. 794; *Sloan* v. *McKinstry*, 18 Pa. St. 120; *Wilcher* v. *Robertson*, 78 Va. 602.

When the jurisdiction of a court of general jurisdiction depends upon facts not appearing in the record, they will be presumed in a collateral proceeding. *Applegate* v. *Lexington, etc. Mining Co.*, 117 U. S. 269; *Weaver* v. *Brown*, 87 Ala. 533; *Taggert* v. *Muse*, 60 Miss. 870. To affirmatively establish the jurisdiction of a superior court, it is not necessary that the

facts, evidence or circumstances conferring it should be set out in the record; and, should the record disclose nothing, jurisdiction over the person will be presumed upon collateral attack of the judgment. *Grignon's Lessee* v. *Astor*, 2 How. (U. S.) 319; *Bush* v. *Lindsey*, 24 Ga. 245. And when such court *exercises jurisdiction*, and the record is silent, it will be presumed that it had jurisdiction, upon collateral attack. The presumption in such case is that *the court decided, upon facts before it*, that it had jurisdiction; and this presumption, we think, is not overturned by the fact that the clerk has certified that a transcript is complete which does not contain a summons. The summons may have been lost, but he has certified the judgment. That we have before us. And the very rendition of it being presumed to have been preceded by a finding of jurisdiction by a high judicial functionary, who must have known when the facts showed jurisdiction, a wise public policy forbids that a clerical certificate to a transcript not containing a summons shall contradict a contrary presumption flowing from the judgment itself. *Clary* v. *Hoagland*, 6 Cal. 685.

It is our opinion, therefore, that the lower court did not err in the instructions as to the effect of appellee's "chain of title," in connection with the judgment of the federal court.

Appellant had no right as the widow of Rieves. The jury found against her plea of adverse possession, under proper instruction, or at least that were not unfavorable to her; and, while the title of appellees has the defects which have been pointed out, the judgment of the federal court against McConnell confronts his widow with the doctrines of estoppel and *res judicata*, which cut her off from any means of attack, or defeat her in any assault upon appellees' title.

We have, finally, to say that the *onus* of proof as to adverse possession, set up by appellant, was on her, and the court properly refused her request to instruct that the *onus* in such case was on appellees; and if there were any errors in the court's instructions on this subject, they were, we think, in appellant's favor.

Burden of proof as to adverse possession.

There are some further exceptions reserved, but not of any practical importance. Finding, therefore, no error in the record to the prejudice of appellant, the judgment of the lower court is affirmed.

BUTLER *v.* MILLS.

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Opinion delivered January 4, 1896.

COUNTY SEAT—PETITION FOR REMOVAL.—Under the statute providing that when a third of the qualified electors of any county shall join in the petition for removal of the county seat, the county court shall order an election to be held, and the question submitted to the voters (Sand. & H. Dig. sec. 945), it is not necessary that any one petition contain the requisite number of names, but it is sufficient that all of the petitions contain in the aggregate the requisite number of voters, and it is immaterial that the petitions ask for removal to different places.

Appeal from Little River Circuit Court.

WILLIAM P. FEAZEL, Judge.

J. C. Head, for appellants.

The number of voters necessary to give the court jurisdiction to order the election was 674. Neither of the petitions for the four designated places contained the requisite number, *i. e.* one-third of the qualified voters. Sand. & H. Dig. secs. 943, 945; 15 L. R. A. 503-4. The names on the different petitions designating different places cannot be joined to give the requisite

one-third. Sand. & H. Dig. secs. 943–5. No one place can be designated or put in nomination to be voted for, unless it is put in nomination by one-third of the qualified voters.

L. A. Byrne and *Dan W. Jones & McCain*, for appellees.

The county court had jurisdiction. More than one-third of the qualified voters signed the three petitions for removal. All the names are to be counted as for removal. Sand. & H. Dig. secs. 943–5–9. This practice has been sanctioned by this court. 53 Ark. 533; 54 *id.* 409; 22 Fla. 29.

BUNN, C. J. This is an appeal from the Little River circuit court, from a judgment therein rendered affirming the judgment of the county court on appeal therefrom, ordering an election on the subject of a removal of the county seat of that county.

There were, at the time of the presentations for removal under the statute, as shown by the return of the assessor made next before that time, to-wit: on the 15th August, 1894, 2030 voters in Little River county; and the four petitions presented to the county for removal, in behalf of Millkin, Rocky Comfort, Ashdown and the Younse Place, contained 450, 125, 175 and 19 names of unchallenged voters, respectively, making in the aggregate the number of 769 undisputed names of voters, asking for removal, but for the different places as aforesaid. One-third of the legal voters was 677. Thus the aggregate number of petitioners for removal to the four several places from the existing county seat, was 92 voters in excess of the requisite one-third named in the statue.

The only question before us is, was the county court authorized to order the election, under section 945, Sandels & Hill's Digest, on the petition of more than

one-third of the voters of the county, expressed in four several petitions for removal, but each to its own place, where no one of said petitions contained the names of the requisite one-third of the voters of the county?

Section 945, Sand. & H. Dig., is in the following language, to-wit: "Whenever the qualified voters of any county in this state to the number of one-third thereof shall join in the petition to the county court of such county for the change or removal of the county seat, embodying in the petition the designation and abstract of title and the terms and conditions of the sale or donation, as provided for and required by section 943, the county court shall order an election to be held at the several voting places in the county, directing that the proposition of the petitioners for the change or removal shall be submitted to the qualified voters."

It will be observed that the word "petition" is used in the singular number in this section, and from that circumstance it might reasonably be inferred, and is in fact contended, that the *one* petition,—that is to say, *some one* of the petitions, if there be more than one,—should of itself contain the names of the requisite one-third of the qualified electors of the county, ascertained as aforesaid; but the language of the section referring to the property conditions and stipulations to be attached to and accompanying it make reference to section 943, which reads as follows, to-wit: "Unless for the purpose of the temporary location of county seats in the formation of new counties, it shall be unlawful to establish or change any county seat in the state without the consent of a majority of the qualified voters of the county to be affected by such change, nor until the place or places at which it is proposed to establish or change any county seat shall be fully designated, such designation embracing a complete and intelligible description of the proposed locations, together with an abstract of the

title thereto and the terms and conditions upon which the same can be purchased or donated by or to the county"; thus clearly providing that more than one place, and any number of places, may be entered as candidates for the contemplated location, if the change or removal is voted for.

In section 948 it is provided that the ballots shall be so formed that each voter will be privileged to vote on two separate and distinct propositions, namely, the removal, and the place to which he desires the removal to be. And in the next section it is provided that if the first proposition—that is, the removal—is sustained by a majority of the voters in the county, then that proposition is eliminated from the contest, and the same is narrowed down to a settlement of the second proposition, namely, the place to which the removal shall be made. This contest is determined by the same election at which the removal is settled, if a majority of the voters of the county, at that election vote for any one of the designated places, no votes being counted on this proposition except those for places put in nomination, so to speak, by the county court; but, if no one place shall receive the requisite majority at this first election, then the court must order another election, to determine which one of the two places receiving the highest number of votes at the first election shall be the location of the county seat.

It is contended, with sound reasoning, that, if the petition referred to in section 945 must contain the names of one-third of the voters of the county, the same requirements should be made of all the petitions, and that, since any number of petitions may be presented, it follows that, when there should be as many as three petitions, some one of them must necessarily fail to contain the one-third, and therefore the object of the law would be defeated. Again, it is suggested that, in view of

former conditions attached to removal of county seats, acting with abundance of caution, the legislature really intended that at least one of the petitions should contain the names of the required one-third of the voters of the county, and that, without this precaution, elections on the subject could be too easily procured. This would appear to be true, at first sight; but, looking at it more closely, such a precaution would really amount to nothing, because the petitioners for the various places could and would combine, and so distribute their names on the several petitions as to give one the requisite one-third, and thus attain the end reached in case the requisite one-third may be counted from the aggregation of the names on all the petitions. So, in either case named, no good could come to the public, and both of the two contentions are without any good reason to support them, and therefore we are not to attribute such an intention to the legislature.

We are clearly of the opinion that if all the petitions asking for removal, taken together, amount to one-third of the voters of the county, the county court is authorized and required to order the election, and that it makes no difference how many different papers or petitions contain these names, the only requisite being that they all ask for removal, or enough of them to constitute the one-third, and this without regard as to how any of them may stand on the other proposition, namely, the place of location of the county seat. We are therefore of the opinion that the judgment should be affirmed, and the cause is remanded, with directions to proceed according to law. This makes it unnecessary for us to rule on the other questions raised.

HUBMAN v. STATE.

Opinion delivered January 11, 1896.

SALE OF WINE—STATUTES—REPEAL.—The wine act of April 3, 1889, providing "that it shall be unlawful for any person to sell wine at any place in this state, except as authorized in this act," and authorizing its sale, "in quantities not less than one quart, in any place where the sale of intoxicating liquors is licensed and authorized by law," impliedly repealed so much of Sand. & H. Dig. sec. 4851, as authorized the sale, without license, of vinous liquors in original packages of not less than five gallons. (HUGHES and RIDDICK, JJ., dissenting.)

WINE—RIGHT TO SELL.—One who manufactures wine from grapes or berries grown by himself cannot lawfully sell it without license, under the act of 1889, except in places where the sale of intoxicating liquors can be licensed according to law.

Appeal from Lonoke Circuit Court.

JAMES S. THOMAS, Judge.

John Hubman was indicted for selling five gallons of wine "in a territory where the sale of wine was not licensed by the county court." The cause was tried upon an agreed statement of facts, which recites as follows:

"That defendant, John Hubman, did in Lonoke county, Arkansas, on the first day of November, 1894, sell G. W. Scott five gallons of wine, made from grapes grown and raised by said defendant, John Hubman, in Saline county, Arkansas; the said wine, so sold, was defendant's own make; that the sale was in the original package, and contained not less than five gallons in quantity; that, at the time of said sale, the sale of liquor was not licensed in Lonoke county; a majority of the votes at a previous election having voted against license in said county, the court could not issue license; that the sale of liquor is not prohibited in the place

where above sale was made, either by special act of the legislature, or by order of the county court."

The defendant asked the court to declare the law as follows: "(1) Any person who grows or raises grapes or berries may make wine thereof, and sell the same in quantities not less than five gallons anywhere in the state, except in localities where the sale is prohibited, either by special act of the legislature, or by an order of the county court, as provided in section 4877 of Sandels & Hill's Digest. (2) Any person who grows or raises grapes or berries may make wine thereof, and sell the same in quantities not less than one quart, anywhere in the state, where the sale of liquor is not prohibited by special act of the legislature or by the county court, under section 4877 of Sandels & Hill's Digest."

The court refused to declare the law as asked by defendant, and upon its own motion declared the law as follows: "Where a majority of the vote is against license in any county, it is unlawful for any person to sell wine in any quantity in such county."

Appellant was found guilty, and appeals to this court.

Tom M. Mehaffy, for appellant.

The proof in this case shows that defendant was the manufacturer of the wine sold, and he had the right to sell in original packages in quantities not less than five gallons. Sand. & H. Dig. sec. 4851; 60 Ark. 247; 37 *id.* 356. Section 4851 was not repealed by the wine act of April 3, 1889. All acts *in pari materia* should be construed and taken together. 3 Ark. 552; 40 *id.* 148. The act was passed to *encourage* the native wine industry. 37 Ark. 356; 60 Ark. 362. It would be an absurdity to suppose that the legislature intended to permit the sale of all other intoxicating liquors in original packages, and prohibit the sale of wine. See the

act as construed in 53 Ark. 490, and Sand. &. H. Dig. sec. 4853. This point was not settled in 60 Ark. 600. The intention of the act should be presumed, although such construction seems contrary to the letter. 3 Ark. 285.

E. B. Kinsworthy, Attorney General, for appellee.

1. In 53 Ark. 490, and 60 *id.* 600, this court held that wine made of grapes and berries grown by the maker of the wine can be sold in quantities not less than one quart *only when the sale of intoxicating liquors is licensed and authorized by law.*

2. Sec. 4852, Sand. & H. Dig., repeals all laws permitting the sale of native wine in this state, except as provided in sections 4853–4.

BATTLE, J. The sale of wine in this state without license is regulated by an act entitled "An act to regulate the sale of wine in the state of Arkansas," approved April 3, 1889, which, as enacted, is, in part, as follows:

"Section 1. That it shall be unlawful for *any person* to sell wine at *any place* in this state *except as authorized in this act.*

"Section 2. Any person who grows or raises grapes or berries may make wine thereof, and sell the same upon the premises where such grapes or berries are grown and the wine made, in quantities not less than one quart; such person may also sell the wine of his own make in any place where the sale of intoxicating liquors is *licensed* and authorized by law, in quantities not less than one quart. *Provided*, This act shall not authorize the sale of wine in any district or locality where its sale is prohibited under special act of the general assembly.

"Section 3. Nothing in this act shall prevent regularly licensed liquor dealers from selling wine at the same places they are authorized to sell liquors."

Under this act any person who grows or raises grapes or berries, and makes wine thereof, is permitted to sell the same in any quantities not less than one quart, without license, upon the premises where the grapes or berries are grown and the wine made, and in any place where the sale of intoxicating liquors is *licensed and authorized by law.*

The constitutionality of the act was contested in *State* v. *Deschamp*, 53 Ark. 490. The indictment against Deschamp in that case, omitting caption, was as follows: "The grand jury of Scott county, in the name and by authority of the State of Arkansas, accuse Linc Deschamp of the crime of selling wine unlawfully, committed as follows, viz: The said Linc Deschamp on the 3d day of August, 1889, in the county of Scott aforesaid, unlawfully did sell one quart of wine, the said sale not being made upon the premises where the grapes and berries were grown and the wine made, and said sale not being made in any place where the sale of intoxicating liquors are [is] licensed and authorized by law, against the peace and dignity of the state of Arkansas." A demurrer to the indictment was filed and sustained, and the defendant was discharged.

The indictment was based upon the act of April 3, 1889. In passing upon its sufficiency, it became necessary to determine whether the act upon which it was based was constitutional. The court held that the effect of it was to allow any person growing or raising grapes or berries, and making wine thereof, to sell the same within the three-mile districts formed under section 4524 of Mansfield's Digest, if the premises upon which such grapes or berries were grown and the wine made were in such districts, and to prohibit the sale in the same districts of wine made of grapes or berries grown out of this state. This was the joint effect of the act and section 4524, which prohibited the sale of

wines, spirituous or intoxicating liquors by any one within such districts.

The result was, we found the act was unconstitutional, to the extent the joint effect of it and section 4524 was as stated, and eliminated so much of the act as produced this effect by striking out the words, "at any place," in the first section, and the words, "upon the premises where such grapes or berries are grown and the wine made," in the second section, and held the remainder of the act constitutional.

The judgment of the circuit court sustaining the demurrer to the indictment was affirmed by this court, but upon what grounds was not stated. But they are apparent. In the first place, the indictment was based on the second section of the act, and did not show that the wine sold was not made out of grapes or berries grown by the defendant, or, if it was, that the sale of intoxicating liquors were not licensed and authorized by law at the time and place it was sold. *Wilson* v. *State*, 35 Ark. 414, 416. In other words, it failed to show that he was affected by the second section; and, in the second place, did not allege that he sold the wine without license, and, therefore, was not entitled to the benefit of the third section of the act. *State* v. *Keith*, 37 Ark. 96.

Repeal of statutes relating to sale of wine.

In *Galloway* v. *State*, 60 Ark. 362, Chief Justice Bunn, in delivering the opinion of the court, said: "The case really turns upon the construction to be given to the act entitled, 'An act to regulate the sale of wine in the state of Arkansas,' approved April 3, 1889. * * * Certain words have been eliminated from the first and second sections of the act, to conform to the decisions of this court in the case of *State* v. *Deschamp*, 53 Ark. 490, the eliminated words having a reference solely to the place of sale, and therefore not affecting the issues in this case. The state contends that this act of 1889

repeals, or takes the place of, all other acts on the special subject of wine-selling in this state, especially the 15th section of the special act approved March 8, 1879, and its contention seems to us to be well founded, notwithstanding the repealing act contains no repealing clause."

In *Boldt* v. *State*, 60 Ark. 600, Mr. Justice Hughes, in delivering the opinion of the court, said: "If the act of April 3, 1889, had not been repealed, as above shown [that is to say, so far as it relates to the sale of wine in local option districts], still this case is settled by the decision in *State* v. *Deschamp;* for the effect of that decision is that wine made of grapes and berries grown by the maker of the wine can be sold, in quantities not less than one quart, only where the sale of intoxicating liquors is licensed and authorized by law."

The opinions in these three cases, it seems, ought to decide the question as to the places in which a manufacturer can sell, without license, wine made from grapes or berries grown by himself, and to restrict this right to places where the sale of intoxicating liquors is licensed and authorized by law. But it is contended that he has the right to sell such wine "anywhere in this state, except in localities where the sale of intoxicants is prohibited, either by special act of the legislature or by the three-mile law." This contention is based on section 4851 of Sandels & Hill's Digest, which reads as follows: "It shall not be lawful for any person to sell alcohol or any spirituous, ardent, vinous, malt or fermented liquors in this state, or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors, or intoxicating spirits of any character which are used and drank as a beverage in any quantity or for any purpose whatever, without first procuring a license from the county court of the county in which such sale is to be made, authorizing such person to exercise such privilege. *Provided*, manufacturers of alcohol, vinous,

ardent, malt or fermented liquors can sell in original packages without license. *Provided, further*, such original packages shall not contain less than five gallons." Under this statute, and section 4868 of the digest, it is said the manufacturers mentioned in section 4851 can sell in original packages containing not less than five gallons, without license, in any place in this state, except in local option districts, and localities where the sale of intoxicating liquors is prohibited by a special act of the legislature. How can this be true as to the manufacturers of wine? The act of April 3, 1889, was enacted subsequently to both the statutes named. The first section of it is explicit and comprehensive. As enacted it says: "It shall be unlawful for *any person* to sell wine at *any place* in this state except as authorized in this act." The persons who can sell without license are those who grow grapes or berries, and make wine thereof, and they were authorized to sell only in quantities not less than a quart, and upon the premises where the grapes or berries were grown and the wine made, and in places where the sale of intoxicating liquors is licensed and authorized by law. The act declares it shall be unlawful for them to sell wine without license, except in the quantities and at the places named. When amended to conform to the opinion of the court in *State* v. *Deschamp*, no change is made except to restrict the right to sell to places where "the sale of intoxicating liquors is *licensed* and authorized by law."

The word "licensed" has a well settled meaning: "Black on Intoxicating Liquors" says: "A license is essentially the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or at least, not enjoyed by a class of citizens to which the license belongs. A common right is not the creature of a license law. In a general sense, a license is permission granted by some competent authority to do an act

which, without such permission would be illegal. The popular understanding of the word 'license' is undoubtedly a permission to do something which without the license would not be allowable. This is also the legal meaning. The object of a license is to confer a right which does not exist without a license. A license is a privilege granted by the state, usually on payment of a valuable consideration, though this is not essential. To constitute a privilege, the grant must confer authority to do something which, without the grant, would be illegal; for, if what is to be done under the license is open to every one without it, the grant would be merely idle and nugatory, conferring no privilege whatever. But the thing to be done may be something lawful in itself, and only prohibited for the purposes of the license; that is to say, prohibited in order to compel the taking out of a license. From these definitions, which are among the best to be found in the books, it will be apparent that three leading ideas are involved in the definition of a license under the liquor laws. First, it confers a special privilege or franchise, upon selected persons, to pursue a calling not open to all. Second, it legalizes acts which, if done without its protection, would be offenses against the state. Third, it is a privilege granted as part of a system of police regulations, and herein is distinguishable from taxation." Sec. 117.

As to right to sell wine.

As used in the liquor laws of this state, a license is a privilege granted by the county court, or other competent authority, to sell liquor. In this sense it was doubtless used in the act of April 3. Construed in this sense, in the connection it is used in the act, the manufacturer cannot sell wine made out of grapes or berries grown by himself, without license, under the act regulating the sale of wine in this state, except in places

where the county court, or other competent authority, can, in conformity with "the statutes in such cases made and provided," grant the privilege of selling intoxicating liquors.

But it is said that it has been the policy of the legislature to encourage the manufacture of native wine, and that "it would be absurd to suppose that the legislature intended to permit the sale of all other intoxicating liquors in original packages, and prohibit the sale of wine." While the supposition may be absurd, the truth is it has not been done. The manufacturer of native wine can sell in quantities of not less than one quart. The legislature probably thought it was favoring him when it authorized him to sell in such quantities when other manufacturers were prohibited from selling their liquors, without license, except in original packages containing not less than five gallons.

The language of the act of April 3d is plain and unambiguous. We cannot give it a meaning different from that it clearly conveys, to subserve some particular policy. As said by Mr. Justice Hughes in *Railway Co.* v. *B'Shears*, 59 Ark. 244, "it might be very just and reasonable and right that the statute should make an exception, such as is contended it does make, or ought to be construed to make, but this was within the power of the legislature, and its exercise of the power cannot be restrained or varied by the courts to subserve convenience, to relieve from hardships or from requirements that seem unreasonable, or even absurd, when the language is plain and unambiguous."

Our conclusion is, the manufacturer cannot lawfully sell wine made out of grapes or berries grown by himself, without license, except in places where the sale of intoxicating liquors can be licensed according to law.

This opinion, of course, has no reference or application to special acts of the legislature governing the sale of wine in particular localities.

Judgment affirmed.

BUNN, C. J., and WOOD, J., concur.

HUGHES, J., (dissenting). I am unable to yield my assent to the opinion just delivered by Mr. Justice BATTLE in this case, for the following reasons: It is conceded, and cannot be denied, that the act of March 8th, 1879 (Sec. 4851 of Sandels & Hill's Digest), provides that manufacturers of alcohol, vinous, malt or fermented liquors can sell the same in original packages without license, provided such original packages do not contain less than five gallons. So far as the sale of all such liquors as alcohol, ardent, malt or fermented liquors are concerned, this act is still in force, and they may be sold in original packages of five gallons without license. It cannot be reasonably supposed that the legislature would allow the sale of alcohol, whisky, and brandy in original packages of five gallons without license, and require that manufacturers of wine should pay a license tax before they can sell. Though there may be dicta to the contrary, I am of the opinion that, when the acts of the legislature governing the sale of liquors and wines in this state are construed together, as they should be, it will be found that the act above referred to was not intended to be, and was not, repealed, so far as the sale of wine is concerned. Different statutes upon the same subject must be construed *in pari materia*. The repeal of statutes by implication is not favored.

In *Bowen* v. *Lease*, 5 Hill (N. Y.), 221, it is held that "where two statutes are passed, inconsistent with and repugnant to each other, the one last enacted will operate as a repeal of the other by implication. Other-

wise, if they be not plainly repugnant, unless in the one last enacted some notice is taken of the other indicating an intent to repeal it; for the law does not favor the repeal of statutes by implication."

In *Chesapeake & O. Canal Co.* v. *Railroad Co.* 4 Gill & Johnson, (Md.) 1, it is said: "Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them as best to answer that intention, which may be collected from the cause or necessity of making the act, or from foreign circumstances; and, when discovered, ought to be followed, although such construction may seem to be contrary to the letter of the statute. That, therefore, which is in the letter of the statute, is sometimes not within the statute, not being within the intention of the makers." "If laws and statutes seem contrary to one another, yet, if, by interpretation, they may stand together, they shall stand;" and where two laws so far disagree, or differ, as that, by any other construction, they may both stand together, the rule, "*Leges posteriores priores contrarias abrogant*," does not apply, and the latter is no repeal of the former. It is laid down as an established rule, in 19 Vin. Abr. 525, Pl. 132, that "repeals by implication are things disfavored by law, and never allowed of, but when the inconsistency and repugnancy are plain and unavoidable, for these repeals carry along with them a tacit reflection upon the legislators, that they should ignorantly, and without knowing it, make one act repugnant to and inconsistent with another; and such repeals have ever been interpreted to repeal as little of the preceding law as is possible," etc.

In *Brown* v. *County Commissioners*, 21 Pa. St. 42, 43, the rule is laid down thus: "When two statutes are so flatly repugnant that both cannot be executed,

and we are obliged to choose between them, the later is always deemed a repeal of the earlier. * * * * * But whenever two acts can be made to stand together, it is the duty of a judge to give both of them full effect. Even where they are seemingly repugnant, they must, if possible, have such a construction that one may not be a repeal of the other, unless the latter one contains negative words, or the intention to repeal is made manifest by some intelligible form of expression. That the law does not favor repeals by implication is a very old rule."

It is manifest that the policy of our legislation has been, and is, to encourage the growth of grapes, and the manufacture of wine therefrom. It is preposterous and inconsistent to suppose that the general assembly have discriminated against wine, and encouraged the manufacture and sale of ardent spirits. Of the two, it is the consensus of opinion that the manufacture and sale of ardent spirits is a much greater evil than the manufacture and sale of wine. I am of the opinion that the laws of this state allows the sale of wine in original packages of five gallons without license.

In no former case in this court has the question of the right to sell wine in five-gallon original packages, without license, been considered, and the opinions heretofore delivered do not cover, or conclude the court upon, this question.

RIDDICK, J., concurs in the dissent.

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LEE v. HUFF.

Opinion delivered January 11, 1896.

SCHOOL EXAMINER—REVOCATION OF TEACHER'S LICENSE—LIABILITY.—A school examiner will not be liable for damages for an error of judgment in revoking the license of a school teacher for an inadequate cause if he acted in good faith and without malice.

SAME—REVOKING LICENSE WITHOUT NOTICE.—A school examiner, authorized by statute to cite any teacher to re-examination, and to revoke his license for certain causes mentioned, will be personally liable for revoking the license of a teacher without giving him any notice.

NOTICE—WAIVER.—A request by a school teacher that an order of the school examiner revoking his license, made without notice to him, shall be set aside is not a waiver of notice, and does not validate the order, so as to relieve the examiner from personal liability, where the request is refused.

Appeal from Hempstead Circuit Court.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

The appellant, W. F. Lee, being the county examiner of Hempstead county, held a teachers' institute at Washington, in that county. The appellee, J. B. Huff, a teacher in one of the public schools of the county, was notified that such institute would be held, but failed to attend the same. For this reason the appellant revoked the license which had been granted to Huff to teach in the public schools of the county. Afterwards Huff brought this action against Lee, alleging that his license had been revoked by the defendant "wrongfully, maliciously and without right;" that, by reason thereof, he was unable to comply with his contract which he had made to teach a school in said county; and he asked judgment for damages. Defendant, in his answer, denied that he had revoked the license wrongfully or

maliciously, but alleged that, after having been duly notified, the plaintiff had unlawfully, negligently and wilfully refused and failed to attend a teachers' institute, and that for this reason he revoked his license, believing that it was his duty so to do.

On the trial there was little dispute about the facts. It was shown that, after being notified, Huff had failed to attend a teachers' institute, and that for this reason his license to teach was revoked. The defendant testified that he had no malice, but that his action was dictated solely by what he supposed the law and his duty required that he should do. The court, among other instructions, told the jury that "there were only two causes for which the defendant, as county examiner, would have the right to revoke the license of the plaintiff, which were immorality and incompetency." The court refused to instruct for the defendant that if the license of plaintiff had been revoked on account of his failure after due notice to attend the teachers' institute, the jury should find for the defendant, if they believed "from the evidence that, in revoking the license of plaintiff as a public school teacher, he (the defendant) acted in good faith, and in the honest discharge of his duty, as he understood and construed it under the law."

There was a verdict and judgment against defendant for the sum of one hundred dollars.

Dan W. Jones & McCain and *R. B. Williams*, for appellant.

1. No civil liability attaches to an officer, acting within his jurisdiction, on account of the manner in which he discharges the duties of his office, unless it be shown that he acted maliciously or corruptly. Sand. & H. Dig. sec. 7000 to 7026; Bish. Non-Cont. Law, sec. 788; 20 Am. Rep. 431; Cooley, Torts, pp. 411, 412, and notes; 19 Am. & Eng. Enc. Law, pp. 486–489, and

notes; Hilliard on Torts, 186; 3 How. 87, 98; 44 Mo. 491; 6 W. Va. 486; Duvall (Ky.), 66; 18 B. Mon. 711; 27 Am. Rep. 343; 95 Ill. 263; 35 Am. Rep. 163; 21 Am. & Eng. Enc. Law, 760–1–2 and notes; 39 Oh. St. 346; 51 Ind. 206. But, if the powers of county examiners are not even *quasi* judicial, the same conclusion is reached. 104 Ind. 548.

2. Disobedience of constituted authority is incompetency of the most flagrant type, and is an adequate cause of removal under our laws. Sand. & H. Dig. secs. 7073, etc.; 53 Ark. 473.

3. The court's charge was inconsistent and erroneous.

D. B. Sain, for appellee.

1. The statute provides no penalty for failure to attend a county institute. Sand. & H. Dig. sec. 7073. The county examiner has no power to revoke a license for such failure to attend.

2. But if he had, non-attendance is not an "adequate" cause for removal, under sec. 7013.

3. A county examiner is liable for revoking a teacher's license in any other manner and for any other cause than that prescribed by statute. 6 Neb. 539; 81 Ill. 597; 104 Ind. 548; 21 Am. & Eng. Enc. Law, p. 820, and note 2. Even if he was a *quasi* judicial officer, if he acted from prejudice, or ill-will, or negligently, he is liable. Bishop, Non-Cont. Law, secs. 3, 115, 116, 786, 789, 790. He is neither a judicial nor *quasi* judicial officer, but he is an executive and administrative officer; and if he exceeds his jurisdiction, he is liable for damages, whether there be malice or not. 4 N. E. 197; 2 Addison on Torts, p. 682; Bish. Non-Cont. Law, secs. 791 to 798; 19 A. & E. Enc, Law, pp. 492–3, and note. A mistake as to duty, *but with honest intentions*, will not excuse the offender. 11 Wall. (U. S.), 136; 67 N. Y. 379.

4. A county examiner cannot revoke a license for any other cause than that prescribed by statute. 46 N. W. 1053; 21 A. & E. Enc. Law, p. 820: 6 Neb. 539; 81 Ill. 597. Even if he had the right to revoke, he should have reinstated the teacher after hearing his excuse. Cooley, Torts, p. 411.

Liability of examiner for revoking teacher's license.

RIDDICK, J., (after stating the facts.) Under our statute a county examiner has power to revoke the license of a teacher for immorality, incompetency, and for "other adequate causes." That portion of the statute defining the powers of such examiner, material for us to consider, is as follows: "He may cite to re-examination any person holding a license and under contract to teach any free school in his county; and, on being satisfied, by re-examination or by other means, that such person does not sustain a good moral character, or that he has not sufficient learning and ability to render him a competent teacher, he may, for these and other adequate causes, revoke the license of such person."

When, under this statute, a teacher has been cited to appear and answer charges preferred against him, and, when, after a fair investigation, the examiner honestly concludes that the teacher has been guilty of such conduct as, under the statute, justifies a revocation of his license, we agree with counsel for appellant that he is not liable for damages, whether his decision be correct or not. He must follow the statute from which he receives his authority, but whether the evidence is sufficient to make out a proper case under the statute, is for him to determine. The law reposes this discretion in him, and will protect him when he acts honestly and in the faithful attempt to discharge his duties. To render him liable, it must be shown, not only that he acted erroneously, but also maliciously. Were the law otherwise, it would be hazardous to undertake to discharge

the duties of such an office, for an erroneous decision, however honestly made, would expose the officer to an action for damages.

Judge Appleton, of the Supreme Court of Maine, discussing this question in a case where the members of a school committee were sued for wrongfully expelling a student from a public school, said: "The general principle is established by an almost uniform course of decision that a public officer, when acting in good faith, is never to be held liable for an erroneous judgment in a matter submitted to his determination. All he undertakes to do is to discharge his duty to the best of his ability and with integrity. That he may never err in his judgment, or that he may never decide differently from what some other person may think would be just, is no part of his official undertaking." *Donahoe* v. *Richards*, 38 Me. 392. See also the following authorities: *Chamberlain* v. *Clayton*, 56 Iowa, 331; S. C. 41 Am. Rep. 101; *Burton* v. *Fulton*, 49 Pa. St. 154; *Gregory* v. *Small*, 39 Ohio St. 346; *Elmore* v. *Overton*, 104 Ind. 552; *Fausler* v. *Parsons*, 20 Am. Rep. 431; *Pike* v. *Megoun*, 44 Mo. 491; *Kendall* v. *Stokes*, 3 How. (U. S.) 98; Cooley on Torts, (2 ed.) 479–483; Mechem, Public Officers, secs. 638 and 639; 19 Am. & Eng. Enc. Law. 486–489; Bishop, Non-Contract Law, sec. 785.

Liability for revoking teacher's license without giving notice.

But the officer must act within his jurisdiction. Before he can claim the protection of the law he must do that which the law directs that he shall do before exercising his discretion.

A fair construction of the statute under consideration compels the conclusion that the examiner, before revoking the license of a teacher, must cite or summon him for examination upon the charges preferred against him. This citation is for the purpose of notifying the teacher of the charges made against him, in order that he may have an opportunity to disprove them, or to

render any reasonable excuse in justification of his conduct. This was not done in this case. The license was revoked without notice to the teacher, and before he was given an opportunity to defend or excuse his conduct. The giving of this notice was not a matter left to the discretion of the examiner; for, until it was given, he had no power to pass upon the conduct of the teacher. As he undertook to do this,—to pass judgment and revoke the license without notice,—he acted in violation of the statute, and without authority, and he is liable for the consequences of his acts. *Fausler* v. *Parsons*, 6 W. Va. 486, S. C. 20 Am. Rep. 431; 2 Cooley, Torts, 486.

When want of notice not waived.

Some days after the order revoking the license had been made, appellee came forward, and requested the appellant to set the order aside, which appellant refused to do. It is now said that this action of appellee was a waiver of notice, but a majority of the court hold that this is not so, for two reasons: First, all reference to this application was, upon motion of the appellant himself, stricken from the complaint; second, the application to set aside could not make valid a previous void order. Had the order revoking the license been set aside at request of appellee, and the matter heard anew, a subsequent decision or order would not have been void for want of notice; but this was not done. Appellant refused to vacate or modify his order revoking the license in any respect, and his liability for damages must be tested by his authority to make that order. The invalidity of that order is not in anyway affected or cured by the ineffectual attempt to have it set aside. Works, Courts and their Jurisdiction, p. 105; *Mills* v. *State*, 10 Ind. 114; *Briggs* v. *Sneghan*, 45 Ind. 14.

Our conclusion is that the judgment of the circuit court must be affirmed, without regard to whether the court erred in its instructions or not; and it is so ordered.

BATTLE, J., (dissenting.) I think the judgment of the court in this case is correct, but the reasons upon which it is based are insufficient.

Appellant, the county examiner of Hempstead county, revoked appellee's license to teach in the public schools, because he failed to attend a meeting of the teachers' institute after being duly notified, or to render an excuse for not having done so. After this, he appeared before appellant, and rendered an excuse for such failure. Appellant, in his capacity of county examiner, heard it, but adjudged it insufficient, and refused to reinstate him. There was no controversy as to the facts. All of them were before the examiner, and were considered by him. Under the circumstances, a citation to show cause why appellee's license should not be revoked could have served no useful purpose. If there ever had been any necessity for it, it had been supplied by appellee's appearance before the examiner, and the hearing of the excuse and the facts. A formal citation and hearing could have accomplished nothing more, and would have been an idle ceremony.

A county examiner, in my opinion, has no authority to revoke the license of a teacher in the public schools, because of his failure to attend a teachers' institute. The statutes regulating public schools, in imposing duties upon officers and teachers, in many cases affix penalties to the failure to discharge some of these duties, as in sections 7016, 7023, 7024, 7038, 7039, 7058, 7070, 7076, 7082, and 7110 of Sandels & Hill's Digest. Section 7016 makes it the duty of the teacher to instruct "in the method of designating and reading the survey of the lands of this state by ranges, townships and sections and parts of sections as surveyed, platted and designated by the government of the United States." A wilful neglect or failure to discharge this duty is made a sufficient cause for the revocation of his license.

For a failure to make out and return the daily register which he is required to keep, he forfeits his last month's pay. It is made his duty to become a member and attend the regular sessions of the teachers' institute, but no penalty is annexed to the failure to do so by the statutes imposing the same. Why, I know not. The legislature may have thought that the statutes which provide that where the performance of any act is required by a statute, and no penalty for the violation of such statute is imposed, the neglect of such required act shall be deemed a misdemeanor, punishable by fine or imprisonment, or both, were sufficient for that purpose, and for that reason annexed no penalty. (Sand. & H. Dig. secs. 2293, 2294.) Whatever the reason for the omission may be, the county examiner cannot supply it.

The act which vested county examiners with authority to revoke a teacher's license for any cause except as before stated, and which constitutes sections 7010–7014 of Sandels & Hill's Digest, reads as follows: "He shall, at the time and place appointed for holding public examinations, examine in Orthography, Reading, Penmanship, Mental and Written Arithmetic, English Grammar, Modern Geography, History of the United States, and in the Theory and Practice of Teaching, and Physiology and Hygiene. All persons present and applying for an examination, with the intention of teaching, and if convinced that such persons are of good moral character, and are competent to teach successfully the foregoing branches, he shall give such persons certificates, ranking in grades to correspond with the relative qualifications of the applicants, according to the standard adopted; but he shall not license any person to teach who is given to profanity, drunkenness, gambling, licentiousness or other demoralizing vices, or who does not believe in the existence of a Supreme Being; nor shall he be required to grant

private examinations. He may *cite to re-examine any person* holding a license and under contract to teach any free school within his county, and, on being satisfied by a re-examination, *or by other means*, that such person does not sustain a *good moral character*, or *that he has not sufficient learning and ability to render him a competent teacher*, he may, for these and *other adequate causes*, revoke the license of such person," etc. Acts of the General Assembly of 1893, p. 335.

Under this act, an examiner may revoke the license of a teacher in the public schools for the following causes only: (1) When he is satisfied that he does not sustain a good moral character; (2) that he has not sufficient learning and ability to render him a competent teacher; (3) "and for other adequate causes." The correct decision of the question in this case depends on the proper interpretation of the words "and for other adequate causes." What do they mean?

It is a rule of statutory construction that general words following specific terms *ejusdem generis* should be limited by reference to the specific words, and should be construed as including only all other persons, articles, things, or whatever they may be, of the like nature and quality as those designated by the particular words. Sedgwick on Statutory Construction, (2 Ed.), pp. 360, 361; Endlich on Interpretation of Statutes, secs. 400–407; Sutherland on Statutory Construction, secs. 268–276. As for example, "the Sunday Act (29 Car. 2, c. 7), which enacts that 'no tradesman, artificer, workman, laborer, or *other person* whatsoever, shall do or exercise any labor, business or work of their ordinary callings upon the Lord's day' has been held not to include a coach proprietor, or a farmer, or, no doubt, an attorney; the word 'person' being confined to those of callings like those specified by the preceding words. For a similar reason, the 20 Geo. 2, c. 19, which empowers justices to

determine differences between masters and servants in husbandry, artificers, handicraftsmen, and persons in some other specific employments, and 'all *other laborers*,' does not include a domestic servant, or a man employed to take care of goods seized under a writ; for though, in the abstract, they may be 'laborers,' their employments have no analogy with those specified." And it was held that "11 Geo. II, c. 19, which authorizes the distress for rent of corn, grass, or *other product* growing on the demised lands, includes only products similar to grass and corn, but not young trees, which, though unquestionably products of the land, are of a different character from the products specified by the earlier terms." It was held that, in a statute which provides that "any married woman whose husband, either from drunkenness, profligacy, or any *other cause*, shall neglect or refuse to provide for her support, shall have the right in her own name to transact business, and to receive and collect her own earnings," the words "any other cause" "must be understood as referring to causes of a kind with those previously specified, and not to include mere physical and mental incapacity, nor any temporary inability of the husband, in consequence of sickness, to support his wife." *King* v. *Thompson*, 87 Pa. St. 365. So, "in a grant of power to remove for incompetency, improper conduct, or *other cause satisfactory to the board*, the words 'other cause' were construed to mean 'other like cause'; *i. e.*, one affecting the officer's fitness for the office." *State* v. *McGarry*, 21 Wis. 496.

The act under consideration is devoted almost exclusively to the prescribing of the qualifications of a teacher. He must be competent to teach certain branches of learning. To prove his competency, he must stand an examination. He must be a person of good moral character, not given to profanity, drunkenness, gambling, licentiousness, or other demoralizing vices, and

must believe in the existence of a Supreme Being. To such persons the examiner is required to grant license. Immediately after prescribing these qualifications, the act says: "He (examiner) may cite to re-examine any person holding a license and under contract to teach any free school within his county, and on being satisfied by a re-examination, or by other means, that such person does not sustain a good moral character, or that he has not sufficient learning and ability to render him a competent teacher, he may, for these *and other adequate causes*, revoke the license of such person." By "other causes" I clearly understand kindred causes are meant; that is to say, causes affecting the teacher's fitness for the place he fills. According to the rule stated, this is the only interpretation which can be legitimately given to them in the connection they stand in the act.

For the reasons indicated, I think the revocation of appellee's license to teach for the cause stated was without authority. As there is no question about the damages that resulted from this act, I think the judgment of the circuit court should be affirmed.

POWERS v. ARKADELPHIA LUMBER COMPANY.

Opinion delivered January 18, 1896.

SERVICE OF PROCESS—PRIVILEGE OF WITNESS.—A resident of the state, while attending the taking of depositions in a cause to which he is a party in a county not of his residence, is privileged from service of summons in another action there pending.

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

Blackwood & Williams, for appellant.

Public policy demands that, while attending the trial, or incidental and auxiliary proceedings, parties

shall be privileged from arrest or service of summons in other suits. 46 Ohio St. 41; 136 N. Y. 585; 11 L. R. A. 101; 53 Mich. 541; 7 Fed. Rep. 42-45; 12 *id.* 590; 68 *id.* 439; 23 Am. Rep. 35; 4 Pa. Dist. Rep. 119; 58 N. W. 376; 55 *id.* 961; 20 Atl. 788; 39 N. W. 308; 74 Hun, 130; 1 Rich. Law, (S. C.) 196; 37 Minn. 118; 1 Bin. (Pa.) 77; 2 Yeates (Pa.) 222; 45 N. J. L. 119; 16 Gray (Mass.), 86; 122 Mass. 428; 29 Ga. 217; 72 N. C. 596. It makes no difference whether the party claiming the privilege has come into the state from another state, or has simply come from one county into another county, both in the same state. 1 Binn. (Pa.) 77; 136 N. Y. 585; 2 Yeates (Pa.) 222; 53 Mich. 541; 73 Mich. 500; 74 Hun, 130; 66 N. Y. 124; 87 *id.* 568; 118 Ind. 357. The same rule applies whether the party is a witness or suitor. 117 Ind. 361; 66 N. Y. 124; 87 *id.* 568; 58 N. W. 376; 55 *id.* 962; 12 Mass. 429. The rule has been repeatedly applied to suitors attending before referees, notaries, masters, etc., in vacation. 1 Rich. Law, 195; 9 Phila. 95; 9 Ves. Jr. 69; 122 Mass. 428; 58 Hun, 604; 12 Fed. 590; 19 N. Y. Sup. 470; 9 Phila. 65; 39 Minn. 179.

C. V. Murry, for appellee.

The rule does not extend to service of ordinary summons in a civil case. It is limited to cases of arrest. 3 Blackst. *p. 289; 1 Gr. Ev. sec. 316; 6 Cal. 32; 27 Conn. 1; 120 Ill. 184; 1 Tidd. (1 Am. Ed.) 174; 1 H. Bl. 636; 4 Term R. 378; 8 *id.* 534; 3 East, 89; 3 Ves. 350; 4 *id.* 691; 7 *id.* 313; 9 *id.* 69; 15 *id.* 117, 120; 29 Atl. 522; 23 *id.* 14; 29 N. Y. S. 567; 78 Hun, 500; 24 Atl. 579; 15 *id.* 83; 23 *id.* 14. Our statute settles the question (Sand. & H. Dig. sec. 5696). See, also, upon a similar statute, 53 Ill. App. 419; also 20 S. W. 96,—a case very much like this.

BUNN, C. J. A suit in chancery was pending in the Clark circuit court, wherein the appellant, Powers,

was plaintiff and the Arkadelphia College was defendant, for a balance of $7,000 or $8,000 claimed by Powers to be still due him on his contract for erecting the college buildings. By agreement of counsel representing the respective parties, they met at Arkadelphia, and took depositions in the case on the 17th day of August, 1893. On the same day the complaint in this cause was filed by counsel for plaintiff herein, who were also counsel for defendant in the chancery cause in which the depositions were being taken, as stated ; and summons at once issued, and was served upon appellant, to be and appear in the Clark circuit court to defend herein.

At the following term of said circuit court, defendant, Powers, appeared for the sole purpose of moving the court to quash the summons served upon him as aforesaid, showing by affidavit that he was, at the time of the service of said summons, and continued to be, a resident of the city of Little Rock, in Pulaski county, as he had been for a long time previously, and that he was present in Arkadelphia on the 17th day of August, 1893, for the sole purpose of attending the taking of the depositions aforesaid, and that the same was necessary, and that advantage of attendance was taken to compel him to defend his said suit in another jurisdiction than that of his residence. He therefore prayed that the summons be quashed. His motion to that effect, however, was overruled, he saved exceptions, judgment was rendered against him, and he appealed.

There is really no controversy as to the facts,—at least none that could affect the issue. We think the judgment ought to be reversed. After several sections immediately preceding, designating where civil actions are to be brought, according to the nature of the subject-matter and the relative situation of the parties, section 5696 of Sandels & Hill's Digest, reads thus: "Every other action may be brought

in any county in which the defendant, or one of several defendants, resides, or is summoned." Similar statutes are found in all, or nearly all, the states. The appellee contends that the privilege of defendant should be restricted to the rule held by some of the courts, as in Illinois, for example,—that is to cases of arrest on civil process,—and that the exemption does not extend to a non-resident suitor in ordinary cases, temporarily present in the state and county, or in the county, for the mere purpose of attending a suit to which he is a party, unless his presence has been procured by some artifice, trick or fraud of plaintiff or of his counsel." Citing *Greer* v. *Young*, 120 Ill. 184. We think, however, that the weight of authority is against that view of the subject. See Works, Courts and their Jurisdiction, pages 258, 259 and 260.

One line of authorities rests the privilege solely on the familiar constitutional ground of freedom from arrest on civil process, but we prefer to rest it also on the ground of a sound public policy, so aptly expressed by the supreme court of Ohio in the case of *Andrews* v. *Lembeck*, 46 Ohio St. 40, thus: "The question is one which profoundly concerns the free and unhampered administration of justice in the courts. That suitors should feel free and safe at all times to attend, within any jurisdiction outside of their own, upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer to some other adverse judicial proceeding against them, is so far a rule of public policy, that it has received almost universal recognition wherever the common law is known and administered," [citing many authorities]. And, continuing, say that court: "The contention that the application of this principle should be or is confined to cases where the suitor is served with process while attending

upon judicial proceedings without his state is not supported by sufficient force of reason to justify the distinction." The statute of that state is similar to ours. In *Lamkin* v. *Starkey*, 7 Hun, 479, the supreme court of New York said: "The court has power, independently of the statute, to protect its suitors, officers and witnesses." And the same substantially is said by the same court in *Matthews* v. *Tufts*, 87 N. Y. 568. And it further appears, from the great weight of authorities, that the privilege is not only assured while one is attending upon strictly judicial proceedings, but upon any tribunal whose business has reference to or is intended to affect judicial proceedings.

In *Larned* v. *Griffin*, 12 Fed. Rep. 590, the court said: "It has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during attendance, and for a reasonable time in going and coming;" and, further, "that this protection extends to attendance of parties and witnesses before arbitrators, commissioners and examiners." That was a case of arrest, it is true; but it is cited to show the nature of the tribunal, an attendance upon which will come under the rule.

In the case of *Mulhearn* v. *Press Pub. Co.* 11 L. R. A. 101, the supreme court of New Jersey said that the vice-president of a foreign corporation attending as a witness before a commissioner of that court, which testimony is to be used in a cause therein pending, is privileged from service of summons to appear in another action against said corporation.

The weight of authority is decidedly with the appellant, and the judgment is reversed, and the case is dismissed, without prejudice.

[NOTE.—As to immunity from process, see note to the above case by W. C. Rodgers, Esq., in 42 C. L. J. 397.]

PHOENIX INSURANCE CO. *v.* GREER.

Opinion delivered January 18, 1896.

FIRE INSURANCE—DAMAGES BY EXPLOSION.—Where an insurance policy provides that the insurer shall not be liable for any loss caused "by explosion, from any cause, unless fire ensues, and then only for the loss or damage by fire," damages resulting immediately from the explosion of dynamite cannot be recovered under the policy, though the explosive was ignited by fire.

Appeal from White Circuit Court.

GRANT GREEN, JR., Judge.

D. McRae for appellant.

1. Where there is no exemption of a loss by explosion stipulated in the policy, the fire producing the explosion is a cause of the loss, so as to come within the meaning of the policy, even though it be the remote, and not the proximate, cause. The rule is otherwise, where there is an exemption against loss by explosion. 103 Mo. 595; 11 S. W. 945.

2. Where the policy contains an exemption from liability for loss or damage caused by an explosion of any kind unless fire ensues, and then for the loss by fire only, this stipulation of exemption is a part of the contract between the parties, and is entitled to as much weight and force as any other part. The exemption, being general, includes explosives whose destructive forces are set in motion by ignition, as well as others. 41 Ill. App. 395; 144 Ills. App. 393; 33 N. E. Rep. 411; 22 Ohio St. 340; 53 N. Y. 446; 11 N. Y. 516; 1 Wood on Fire Ins. (2 ed.), sec. 104, p. 139.

3. Where a policy insuring against loss or damage by fire contains a clause exempting from liability for loss or damage caused by explosions of any kind, a lighted match or burning lamp or fuse is not a "fire,"

within the meaning of the policy. The expression "loss or damage by fire" is to be construed as ordinary people construe it, and means loss or damage either by ignition of the article insured, or ignition of part of the premises. 144 Ill. App. 393; 33 N. E. Rep. 411; 19 C. B. (N. S.), 126; 22 Ohio St. 340.

4. Where there is an exemption from loss or damage from explosion of any kind stipulated in a policy insuring against loss or damage by fire, if the damage or loss is due to explosion or concussion alone, and the explosion was not produced by a precedent conflagration, but the explosive was ignited by a match or fuse, the insurer would not be liable, the explosion being the efficient or proximate cause of the loss, and the fire the incident. 144 Ill. App. 393; 33 N. E. Rep. 411; 53 N. Y. 446; 22 Oh. St. 340. Applying these principles, it appears that the damage sustained was caused by *concussion* alone, and that the explosion was not preceded nor followed by fire, within the meaning of the policy, and the company is not liable. 1 Wood, Fire Ins. (2 ed.), sec. 104; 53 Wis. 129; 11 N. Y. 516; 3 Bennett, Fire Ins. Cas. 761; 10 Cush. 356; 144 Ill. 393; 33 N. E. 411; 19 C. B. (N. S.), 126; 15 La. An. 127; 43 N. Y. 447; 22 Oh. St. 340; 17 Mo. 301; 16 B. Mon. 427; 7 Wall. 44; 103 Mo. 595.

S. Brundidge, Jr., for appellee.

1. If the fire that lighted the fuse was the *proximate* cause of the loss, the company is liable. Wood on Fire Ins. (2 ed.), secs. 106, 265; 11 Pet. 225; 95 U. S. 391; 94 *id.* 258; 15 S. W. 946; 2 Fed. 304, 633.

2. Where the effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion or explosion, or both combined. In either case the damage

accruing is by the action of fire and covered by the ordinary terms of a policy against loss by fire. 10 Cushman, 357; 21 Wend. 367; 4 La. An. 15; 22 Ohio St. 340; 11 Mich. 425; 48 Fed. 198; 6 U. S. C. C. A. 343; 7 A. & E. Enc. Law. p. 1041; 2 Pars. Cont. (7 ed.) p. 571–2.

BUNN, C. J. Appellant company insured three store-houses in the town of Searcy, belonging to the appellee. The policy was written in the usual form, and, among other things, contained the following stipulation, to-wit: "This company shall not be liable, by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid; nor for any loss by theft at or after a fire, of which the burden of proof shall be on the assured; nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind; nor for any loss or damage by fire which may happen by means of or during an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for any loss in or on buildings unprovided with good and substantial stone or brick chimneys, nor in consequence of any neglect or deviation from the law or regulation of police, where such exists; nor by lightning unless specifically mentioned; nor for any loss caused by the bursting of a boiler, or *by explosion from any cause, unless fire ensues, and then only for the loss or damage by fire.* * * * * * *." The latter part, referring to loss by explosion and its consequences, is the only part of the stipulation necessary to be considered here.

The plaintiff introduced the policy as the contract under which he claimed, and the proof of his damages is substantially as follows: On a night in November, 1892, while this policy was in full force, one of the buildings insured therein was damaged, the door-sill

being broken and shattered, and smoked and discolored, as if by burnt gunpowder, and the windows to some extent damaged, as we infer. One witness testified that things seemed torn up generally, but, giving no particulars, it is impossible to know what he meant. Others state the damage to be as stated above. From the testimony of all of them, we gather that the accident, if such it might be called, was produced by some person setting off a fuse connected with dynamite or other explosive on the sidewalk in front of the building. The claim was for $100, and judgment was accordingly against the company, and it excepted and appealed.

There are two grounds presented in the testimony and the argument upon which the claim of recovery is based,—the one that the injury to the building was caused by fire following the explosion; and the other that it was caused by fire, indirectly at least, in this way, that while it is true it was the direct result of the explosion, yet, as the explosion itself must have been caused by fire, in the shape of a lighted match, or the like, the injury must therefore be attributed to fire. There are two lines of decisions on the subject of loss by fire which is the result of explosion, under stipulations such as the one contained in this policy, and they seem to be somewhat irreconcilable.

Thus in *Com. Ins. Co.* v. *Robinson*, 64 Ill. 265, where the policy provided that the company should not be liable for any loss or damage caused by the explosion of gunpowder, camphine or any explosive substance, or explosion of any kind, it was held that, "by a proper construction of the latter clause, the company was not thereby exempted from liability for losses by fire caused by explosion, but only [exempted] from liability for losses caused by the explosion." That is to say, the company

is exempt from liability only when the explosion itself is shown to be the proximate cause of the damage, and not the remote cause, as when the loss is by fire, which itself was caused by the explosion.

On the other hand, in *United Life & Fire Ins. Co.* v. *Foote*, 22 Ohio St. 340, where the policy excepted any risk by explosion, the court said: "In an action upon the policy, it appeared that an explosive mixture of whisky, vapor and atmosphere had come in contact with the flame of a gas jet, from which it ignited, and immediately exploded, whereby a fire was set in motion, which destroyed the injured property. *Held*, that in such case it cannot be said that the destruction was caused by a fire, within the meaning of the policy, but, on the contrary, that the loss was by fire occasioned by an explosion." And, continuing, the court said: "In construing such policies, wherever the exception embraces any loss or damage occasioned by or resulting from any explosion whatever, the exemption must be taken to embrace all loss or damage occasioned by any fire of which an explosion was the efficient cause."

There is an apparent conflict between the two, or, if not so, the distinguishing features of the facts causing the difference are too shadowy to be appreciated by the ordinary mind, and therefore of little use practically. But these cases are cited more to show the run of decisions on the subject than to conclude the matter in hand; for we think that the stipulations in the exemption clause of the policy under consideration make it plain that if the loss was directly caused by fire, the company is liable, although the fire may have been the mere result of the explosion, for the language is plainly to that effect. But the controversy here in this respect goes off on a question of fact only, for this consequent fire does not appear to have been a fire at all, except

such as is confined to the ignition of gunpowder,—a mere flash, that leaves only discoloration, and can in no sense be denominated the destructive force capable of doing damage to any building. The damage does not appear to have been done by the slower process of fire, but rather by the undue exertion of force such as is the undue accompaniment of an explosion.

The contention that fire, in the shape of a lighted match, brought in contact with the explosive, was the cause of the injury, is equally without foundation, in the light of reason and of the authorities. In such case the fire may be the first cause in the train of causes, but that might receive attention among some philosophers, and in some departments of thought, but the law is more practical, and for that reason attributes injuries to proximate, and not to remote, causes.

To illustrate the trend of the authorities on this subject, we cite one or two. In *Heuer* v. *National Ins. Co.* 33 N. E. Rep. 411, the court said (quoting from the syllabus): "Where an insurance policy provides that the insurer shall not be liable for loss caused by explosion of any kind, unless fire ensues, and then for the loss or damage by fire only [just as in this case stipulated], no liability exists for damages done by an explosion produced by the ignition of a match in a room filled with illuminating gas, since the explosion of the gas, and not the lighting of the match, is the proximate cause of the loss." In the *Transatlantic Ins. Co.* v. *Dorsey*, 56 Md. 70, the court said: "A lighted match coming in contact with a keg of powder would certainly produce an explosion, and, as the explosion would be produced by fire, all the injury caused thereby might well be said to be directly caused by fire, or be the result thereof [exactly appellee's contention here], and yet the burning match could no more be said to be the fire insured against, than the burning lamp or gas jet in the cases

to which we have referred." This, we think, is sufficient to show the trend of the authorities, and they seem to be in accord with the better reason on the subject also.

The judgment of the court below is therefore reversed, and judgment here for defendant.

BATTLE, J., did not participate in the consideration of this cause.

SMITH *v.* MABERRY.

Opinion delivered January 18, 1896.

SALE OF LAND—LANDLORD'S LIEN.—Where a vendee of land, as part of the purchase price, agrees to pay a debt of the vendor, and at his request executes a note to the creditor reciting that it is given for rent of the land, the creditor is not entitled to a landlord's lien for its payment on crops raised on the land by the vendee.

REPLEVIN—TITLE.—A creditor who takes possession of property of his debtor under an agreement to sell it, and, after paying his debt and the expenses of sale, to deliver the residue to the debtor, has such a right of possession as entitles him to maintain replevin against an officer seizing it under process against the debtor.

APPEAL—OBJECTION NOT RAISED BELOW.—The objection that the record fails to show a judgment and affidavit for appeal from a justice of the peace to the circuit court will not be entertained on appeal from the circuit court where the latter court had original, as well as appellate, jurisdiction of the subject-matter, and exercised such jurisdiction without objection.

Appeal from Logan Circuit Court.

JEPHTHA H. EVANS, Judge.

D. B. Granger, for appellant.

1. The mere statement in a note that the consideration is for *rent* does not create a landlord's lien. Calling purchase money *rent* does not create a landlord's lien. 54 Ark. 16; 51 *id.* 218.

2. The sale of the cotton to Smith was complete. 31 Ark. 155; 21 Am. & Eng. Enc. Law, p. 514; Tiedeman on Sales, sec. 3.

3. There was no abandonment, even if the cotton was delivered to Smith as a mere pledge. 59 Fed. 249; 47 Ill. App. 87; 18 Am. & Eng. Enc. Law, p. 726, and note 4, etc.; 18 Fed. 677; 57 Iowa, 651.

S. R. Allen, for appellee.

BUNN, C. J. Appellant, Smith, brought this suit before a justice of the peace against appellee, as constable, having the custody of a certain bale of cotton, by virtue of a writ of attachment in another suit between Ike Oppenheimer & Co., as plaintiffs, and one J. S. Sanderson, for the sum of fifty dollars alleged to be due as rent, and for which plaintiffs claimed a landlord's lien upon said bale of cotton. In the circuit court the case was tried by the court, by consent, upon the evidence adduced, and the court declared its conclusions on the law and the facts as follows, to-wit: "The plaintiff did not purchase the property in such a way as to pass title. Defendant had no right to hold the property under the landlord's attachment by Oppenheimer, because Oppenheimer had no lien. The plaintiff, by virtue of his contract with Sanderson, acquired a lien, by way of pledge, upon the cotton, but lost his lien as pledgee by abandoning the same to Huey; and plaintiff does not show his right to possession by a preponderance of the evidence." Upon this the court rendered judgment in favor of the defendant, and the plaintiff excepted, and appealed to this court.

The evidence in the case shows that, a few days before the institution of this suit, plaintiff, Smith, having a debt of fifteen dollars against Sanderson, called to see him for the purpose of collecting the same. In their conversation and negotiation on the subject, it was finally

agreed that Sanderson should sell the cotton in controversy to Smith for the said fifteen dollars, and as much more as Smith could sell it for in the Paris or home market. The cotton was then in the seed. Smith was to take it, haul it to the gin, have it ginned and packed, and then take it to Paris, the county town, put it on the market, and sell it, and with the proceeds to pay the expenses of hauling and ginning and packing, the fifteen dollars, and the residue, if any, over to Sanderson. All this was accordingly done, and Smith hired his son to carry the cotton to market as agreed. Young Smith having hauled the cotton to the public square in Paris, preparatory to offering it for sale on the market, as directed by Smith, Sr., Ike oppenheimer, (one of the firm of Oppenheimer & Co., the plaintiffs), upon inquiring of him, ascertained that the cotton was raised by Sanderson, and thereupon informed young Smith that he had a lien on it, and threatened to attach it, under his lien, if young Smith did not or would not turn it over to him. After some parleying, Ike Oppenheimer proposed to young Smith that, if he would leave the cotton on the platform (Adler, Goldman & Co.'s platform), he would be responsible for it until he could return home and inform his father of the condition of things, so that he (the father) could come in town the following morning; and Oppenheimer said he was sure they could arrange it satisfactorily. During this coversation, Huey, the business manager for Adler, Goldman & Co. in Paris, came up, and, hearing the proposition of Oppenheimer, told the young man to leave the cotton on the platform, and he would be responsible for it until the elder Smith could come in and arrange the matter with Oppenheimer. Whereupon the young man, not knowing what else to do, acted upon the suggestion of Huey, went home, informed his father of the condition of things, The elder Smith went to Paris the following morning, and saw and

had a conversation with Oppenheimer on the subject, but they failed to settle the matter, each one claiming the cotton,—Smith upon the ground just stated, and Oppenheimer, upon grounds to be stated hereinafter. A short time after they had separated, Smith learned that Oppenheimer & Co. had attached the cotton, claiming a landlord's lien thereon, which they had claimed when conversing with him on the subject. Smith then instituted this suit against Maberry, the constable, who had served the writ of attachment in favor of Oppenheimer, and held the cotton under and by virtue of the same.

The defendant answered the complaint of Smith, which contained a statement of facts substantially as stated above, as a basis of his claim, and in his answer the constable set forth, and in his testimony showed, the facts upon which Oppenheimer & Co. claimed their landlord's lien and their debt, which are substantially as follows: Ike Oppenheimer testified that he was a member of the firm of Oppenheimer & Co., the plaintiffs in the attachment suit against Sanderson, and that in the fall of 1891, one T. B. Walker was indebted to the firm in the sum of fifty dollars, and was making arrangements to leave the country; that Walker came to the store of Oppenheimer & Co. with Sanderson, and wanted them (Oppenheimer & Co.) to buy his land. This offer not having been accepted, Walker then proposed to rent the land to Oppenheimer, and the latter said they did not wish to rent unless Walker could procure them a tenant, and they said they would rent the land from him (Walker) if he would procure them a tenant. Some days afterwards, Walker went to Oppenheimer & Co.'s store, with a promissory note for fifty dollars, which Sanderson had executed and delivered to him, which he tendered to them in payment of his indebtedness to them,

and the same was accepted as such, they (Oppenheimer & Co.) knowing that he had sold his land to Sanderson.

In his testimony, Sanderson said, he purchased the land from Walker for six hundred dollars, payable as follows, to-wit, $350 to the loan company, which had a mortgage on the land, and $200 to Walker; that he made a $50 note to Oppenheimer & Co., which Walker delivered to them as stated, and two notes to Walker of $100 each; that the $50 note was the amount owing to the firm by Walker, and that he (Walker) said that Oppenheimer & Co. wanted a rental note for the amount, and that such was agreed and acted upon; that he never had any contract with Oppenheimer & Co., or Ike Oppenheimer, to rent the land from them or him, nor with Walker to rent from him; and that he did not owe them or him, or either of them, for rent of the land, or any part thereof, and never had any conversation with either of them about renting the land."

The $50 note delivered by Walker to Oppenheimer & Co. in payment of his indebtedness as stated, and put in evidence, is as follows, to-wit: "Know all men by these [presents] that I, John Sanderson, promise to pay to Oppenheimer & Co. of Paris, Ark., the sum of fifty dollars with ten per cent interest per annum from date until paid, consideration for said fifty dollars to be rent on the entire farm known as the T. B. Walker farm, situated near Burnett Springs, Logan county, Arkansas. This 9th day of November, 1891. (Signed) John S. Sanderson."

Landlord's lien not reserved in sale of land.

The evidence fails to show that Oppenheimer & Co. were the owners of, or had under control, the Walker farm, or that Sanderson had rented the same, or any portion of it, from them, or from Ike Oppenheimer, or from Walker; but it does conclusively show that no such relation existed between Oppenheimer & Co. and Sanderson as that of landlord and tenant, and that the recital in the

note to that effect was not true in point of fact, and that Oppenheimer & Co. were not entitled to a landlord's lien on the cotton in controversy, grown upon said farm by Sanderson; and therefore the constable was not entitled to hold said cotton under the attachment for rent at their instance, as against any one having and showing a right of ownership or of possession.

Sufficiency of title to maintain replevin.

The evidence further shows that the plaintiff, Smith, purchased the cotton from the owner, Sanderson, for value, and, without stopping to discuss the question whether or not the sale was fully consummated, in all respects, he had such right of possession, at all events, as that he was entitled to maintain and sustain his action for the cotton; and the conduct of his son in intrusting the cotton for the time being to Huey for safe keeping, until plaintiff could be informed of its condition, was no waiver by plaintiff of his right to the same.

When objection to jurisdiction not sustained on appeal.

It is suggested,—apparently for the first time,—in the argument before us that the record does not show a judgment and affidavit for an appeal from the justice of the peace to the circuit court, and that, therefore, the circuit court was without jurisdiction to hear and determine the cause, and our attention is called to the defective record, in support of this contention. It is true that such are the defects in the record, but it is also true that no objection to it was made in the court below; and, besides, the matter seems to have been heard by consent of the parties. It is also true that consent cannot give jurisdiction of the subject-matter, but it is also a fact that the circuit court had original, as well as appellate, jurisdiction of the subject-matter of this litigation; and its exercise of jurisdiction, under the circumstances, without objection, cannot be questioned here for the first time, and is, besides, within the purview of

the statute, which enables the trial courts to proceed, notwithstanding such defects of record.

The judgment is reversed.

EVINS v. BATCHELOR.

Opinion delivered January, 1896.

SCHOOL DISTRICT—ORGANIZATION.—An agreed statement, in an action to enjoin persons from acting as directors of a school district, that the district had been organized in the manner provided by law is conclusive as to the legal formation of the district.

NEW DISTRICT—APPORTIONMENT OF FUNDS.—The fact that an apportionment of school funds of the original district was made to a new school district before its organization was complete does not affect its right to such apportionment, it being provided by Sand. & H. Dig., sec. 6992, that, on the formation of a new school district, any surplus funds shall be apportioned between the old and new districts.

Appeal from Yell Circuit Court in Chancery, Dardanelle District.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

Appellees filed their complaint in the court below on the 21st day of February, 1894, against the appellants, alleging that the plaintiffs were directors of school district 54, within which lay a part of the incorporated town of Mt. Nebo; that H. C. Cunningham, mayor of that town, had in 1893, in compliance with a petition signed by twenty persons, ordered an election as to the formation of a single school district in the town; which election was held in the same year; that, in consequence of this proceeding, Mt. Nebo was always afterwards held to be a single school district, the appellants having been elected as directors thereof; that in this

way two sections of land had been taken from school district 54, and had been made a part of the Mt. Nebo district; that the organization of the latter district was illegal, because Cunningham, the mayor, did not live in Mt. Nebo, but lived in Dardanelle; and that neither he, nor the persons signing the petition, nor the persons voting at the election were electors or residents of Mt. Nebo; that there were not twenty persons living there, nor were there in this single district the number of persons of scholastic age required by law for the formation of a new district; that the school tax collected from the two sections named had been appropriated to the Mt. Nebo district; and that a part of it had been used in buying a school house. Prayer that defendants be enjoined from acting as directors; that the sections of land be restored to district No. 54; that the title to the property bought by the defendants be vested in that district, or that the money with which it was bought be repaid.

To this complaint a demurrer was sustained. Plaintiffs then filed a second petition, setting up the same facts, and saying that the county court granted the order of incorporation of Mt. Nebo prayed for, through ignorance of the facts thus alleged; that the election for directors was held in July, 1893; that the petitioners, electors and directors of Mt. Nebo, not being residents or electors of the Mt. Nebo territory, acted fraudulently in getting up the pretended corporation for the purpose of avoiding the payment of the school tax in district 54; that the petition for incorporation was filed in the county court at its October term, 1892, and that the prayer of the petition was granted by the court at its January term, 1893; that the petition did not contain the number of names required by law; that the order, and the petition on which it should have been endorsed, were never recorded, nor were

certified copies thereof furnished to the agent of the petitioners and to the secretary of state nor was the original petition on file with the recorder at the time of the formation of the new school district; that the money received by the Mt. Nebo district was apportioned June 30, 1893, whereas that district was not formed until July, 1893; that, after the order of the county court was made, the plaintiffs appealed from it, but that they dismissed their appeal in consideration of a promise made by Evins, the agent of the petitioners, that the incorporation should not interfere with district 54, which should have all the funds then in the hands of the directors, which promise had not been kept. Prayer as before. A temporary injunction was issued, restraining the appellants from acting as directors.

The defendant answered, denying that the petition and order of incorporation were not recorded as required by law; that certified copies thereof were not furnished to the agent of the petitioners, and filed with the secretary of state. They file copies of these, and plead them as *res judicata*. They also assert that more than one month elapsed from the time that the two certified transcripts of the record of the incorporation of Mt. Nebo were made out,—one of which was forwarded to the secretary of state, and the other delivered to the agent or agents of the petitioners,—and the commencement of this suit.

The amended petition also alleges that petitioners to the county court for the order incorporating the town of Mt. Nebo perpetrated a fraud on the court when they represented themselves to be residents of the territory to be incorporated, when, as a matter of fact, a large majority of said petitioners were residents and qualified electors of the town of Dardanelle, and therefore the town of Mt. Nebo has never had any legal existence. It also alleges that the persons who peti-

tioned the mayor of the town of Mt. Nebo to hold an election for the purpose of organizing a single school district were not electors residing in said town, but were voters and residents of Dardanelle, Little Rock and other places; that there were not at the time said district was formed, are not now, nor have there ever been, twenty voters residing in said town of Mt. Nebo, nor thirty-five persons of scholastic age residing in said district, as the law requires; that, after the pretended incorporation of said town, and before the pretended formation of said school district, W. R. Hayden, county clerk of Yell county, at the request of the agent of said incorporation, apportioned to said school district of Mt. Nebo the special school tax collected upon section 29 and 32, amounting to about $228; and that after the formation of the district the directors purchased a house, etc.

The petition for incorporation, (describing the territory, accompanied by a map), appointing appellant Evins to act as agent for petitioners, is signed by twenty-two persons, described as citizens and electors of the county and inhabitants of the territory thus described. The order granting the petition is dated January 3, 1893, and recites that due and lawful notice of the time of the hearing of the petition had been given by the petitioners. The certificate of the clerk and the recorder shows that the petition and the order were filed in his office on the 8th day of February, 1893.

There was an agreed statement of facts, to this effect: That the petition was made and filed as above stated, and that the order of incorporation was made; that on the 17th day of October, 1892, Evins, as agent of the petitioners, published in a newspaper published in the county a notice containing the substance of the petition, and stating the time and place for the hearing thereof; that at the January term, 1893, the county court granted the prayer of the petition, making the

order for the incorporation of Mt. Nebo, which was indorsed on the petition; that the petition, order and map were by the county court delivered to the recorder of the county of Yell in the Danville district on the 8th day of February, 1893, and were duly recorded, the originals being filed and preserved by him in his office; that said recorder, from his office at Danville, in said county, certified two copies of these records, one of which he mailed to the secretary of state on the 10th day of February, 1893, which arrived at his office by due course of mail, and is now on file in the office of said secretary of state, and that the recorder delivered the other copy to said Evins, agent as aforesaid, with his certificate thereon that a like copy had been by him forwarded to the secretary of state; that a certified copy of the same record was filed in the recorder's office at Dardanelle, in the Dardanelle district, on the 14th day of February, 1893, and was there recorded; but that in recording it the recorder omitted the names of three of the persons who signed the petition, and omitted to send a copy of the record to the secretary of state; that in June, 1893, Evins, as agent as aforesaid, gave due and lawful notice of the time and place of holding the first election in the incorporated town, and that officers were duly elected; that on the 20th day of July, 1893, the town organized itself into a single school district, in the manner provided by law; that the plaintiffs have never been residents of Mt. Nebo; that most of the petitioners for its incorporation only live in Mt. Nebo during the summer, it being a summer resort; that during the summer it has a population of from 400 to 1,000, and that during the rest of the year not more than twelve persons reside in the town; that only two of the petitioners resided permanently in Mt. Nebo, but the others had summer residences there; that since its incorporation the place has never had

more than twenty permanent residents; that only one of the defendants was a permanent resident; but that, when the petition was signed, there were more than 100 visitors living at Mt. Nebo; that the new school district assumed jurisdiction over a part of the territory of district 54, and appropriated funds amounting to $225; that Mt. Nebo is in Dardanelle district in Yell county. This was all the evidence in the case.

On final hearing the court made the injunction perpetual, and gave plaintiffs a decree for $225. Defendants appealed.

Bullock & Hart and *Rose, Hemingway & Rose*, for appellant.

The existence of the Mt. Nebo school district, or corporation, cannot be collaterally attacked in this way, or any other way. The only remedy is by *quo warranto* in name of the state. 2 High, Inj. sec. 1261; 1 Dill. Mun. Corp. sec. 43 *a;* Cooley, Const. Lim. 309; 47–269; Sand. & H. Dig. sec. 7107; 32 Ark. 137. But the agreed statement of facts stipulates that the district was organized "in the manner provided by law," and this eliminates all question as to the legality of the district.

Robert Toomer, for appellees.

1. The act of the clerk in apportioning funds to a district not in existence was illegal. Sand. & H. Dig. secs. 6991, 6992.

2. The order of incorporation was procured by fraud, and can be attacked collaterally. Freeman, Judg. (3 ed.) secs. 336, 489, 491; 36 Ark. 533; 8 Am. & Eng. Enc. Law, 642, and note; 12 *id.* 147 *s*, 148 *g*.

3. Sand. & H. Dig. sec. 5247 was never complied with. *Id.* sec. 7089.

Validity of organization of school district.

HUGHES, J., (after stating the facts). The agreed statement of facts in this case states "that on the 20th

day of July, 1893, the town organized itself into a single school district, in the manner provided by law." This is conclusive in this case that the Mt. Nebo school district was legally formed. The fact that, after the incorporation of the town, and before the formation of the Mt. Nebo single school district, the clerk apportioned to it $225, though irregular, will not deprive that district of the apportionment, as it is provided by section 3, act of April 8th, 1887, now section 6992, Sandels & Hill's Digest, that "in case there be a surplus fund on hand at the time of the formation of said district [a new district], it shall be entitled to a proportionate part of said fund, the same to be ascertained and determined by the county court of the county in which said new district may be created, as in the judgment of said court may be right and proper."

Apportionment of funds to new school district.

The district, when formed, was entitled to the apportionment, and it was not proper to deprive it of it because it was made before the district was formed.

The decree is reversed, and the cause is dismissed.

McKNEELY v. TERRY.

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Opinion delivered January 18, 1896.

LACHES—WHAT CONSTITUTES.—Where, after conveying an interest in land, the grantor retained possession of the land for sixteen years, having fraudulently secreted the deed to the grantee, and during that time appropriated all of the rents and profits, and sold part of the property, retaining the proceeds, and refused numerous requests of the grantee to be allowed to enjoy his interest, delay on the grantee's part for that length of time before bringing suit is such laches as will bar relief, although there was evidence tending to show that the grantor had verbally recognized the grantee's interest; the grantor's actions being entitled to more weight than his promises.

ADVERSE POSSESSION—HUSBAND AND WIFE.—Where a husband is under obligation to convey land to his wife, the presumption is that his possession is in subordination to her title, legal or equitable.

ADVERSE POSSESSION—CO-TENANTS.—The mere taking of rents by a co-tenant, although continued for the entire statutory period, is insufficient of itself to show an ouster of his co-tenants, so as to make his possession adverse. In order to set the statute in motion, he must have absolutely denied the title of his co-tenants, or by other notorious acts have indicated his intention to claim and hold the estate exclusively.

DEED—NECESSITY OF ACKNOWLEDGMENT.—A deed made and delivered to the grantee passes the title as between the parties and their heirs, though it is not acknowledged.

LACHES—EFFECT OF FRAUD.—The heir of a grantee of land is not guilty of laches in delaying for 16 years before bringing suit in equity for its recovery against the grantor where the latter fraudulently abstracted and secreted the deed, and the heir had no knowledge of its existence, or of facts which, with reasonable diligence, would have led to its discovery.

SPECIFIC PERFORMANCE—WHEN DENIED.—An alleged agreement by a husband to convey an interest in certain land to his wife will not be specifically enforced in favor of the wife's heirs 20 years after its execution and 13 years after her death, where it does not appear that she ever claimed any interest in the land.

DOWER—TRUST LAND.—No right of dower can be set up by the widow of the holder of the legal title to land against the holder of the equitable title.

CLAIM AGAINST DECEASED CO-TENANT—LIEN.—A claim by one tenant in common for rents collected by his deceased co-tenant is a claim against such co-tenant's estate, and not against his heirs, and should be exhibited to the administrator, and on failure to do so equity will not decree a lien therefor on the interest of such heirs.

Appeal from Miller Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

Plaintiffs, Mollie C. Terry and John D. Trigg, as the only heirs of John P. Dickson, deceased, seek to cancel a deed executed by him to Samuel W. McKneely to what is known as the "John Dickson place" in Miller county, Ark. They say that said deed was procured

through fraud and undue influence of McKneely, and that he, on being charged with the fraud, entered into a written obligation in 1869 with David H. Dickson, by which he was to convey said place to the heirs of John P. Dickson, to-wit: David H. Dickson, John D. Trigg and Lavinia McKneely, wife of him, the said S. W. McKneely, and that by said agreement he was to retain possession of the lands, having the exclusive enjoyment of the rents and profits for three years, when he was to surrender same to said heirs; that, in pursuance of said contract, in 1873 he surrendered said place to David H. Dickson, the father of plaintiff, Mollie C. Terry, and guardian of plaintiff, John D. Trigg; that David H. Dickson died in 1873 in possession; and that, soon thereafter, McKneely secretly abstracted said written obligation from Mrs. Sallie Dickson, widow of the said David H. Dickson, and fraudulently repossessed himself of said lands. The bill alleges the death of Mrs. Lavinia McKneely, and that plaintiffs, Mollie C. Terry and John D. Trigg, are her sole heirs. Reasons for delaying suit are then set forth at length, plaintiffs W. L. and Mollie C. Terry claiming that they had been kept in ignorance of their rights by the fraud of McKneely in taking and concealing the instrument which was the evidence of their title, and John D. Trigg claiming that delay on his part, was occasioned by the repeated promises of McKneely to let him [John D. Trigg] in to enjoy his interest, which, it is alleged, he, McKneely, always recognized. It is alleged also that Mollie C. Terry was protected in her rights by infancy and coverture from the statute of limitation. The bill concludes with a prayer for a receiver, a restraining order, cancellation of the deed, decree of ownership in plaintiffs, possession, rents, and all proper relief. This bill was filed in March, 1889. In December, 1890, plaintiffs filed an

amendment to the original bill, alleging that Samuel W. McKneely and his wife, Lavinia, at the time of the execution of the written obligation mentioned in the original, also executed deeds to David H. Dickson and John D. Trigg, which were delivered to David H. Dickson for himself and for John D. Trigg, his ward. They charge that these deeds were also secretly abstracted from the possession of the widow of David H. Dickson, but that the one made to David H. Dickson for himself, had been discovered since the commencement of the suit, and the other, if not destroyed by Samuel W. McKneely, had been burned, with other papers, in the house of Mrs. Dickson in 1875. The amendment in detail explains why the deed to David H. Dickson was not discovered and produced before, and makes same an exhibit. Then, after alleging that McKneely had appropriated the entire rents for many years, amounting to several thousand dollars, it concludes with prayer for an accounting, and as in the original.

Mrs. Mattie McKneely, widow of Samuel W., demurred to the bill, which was overruled. She then answered separately, denying any ownership of plaintiffs in the lands sued for, and alleging a lack of information sufficient to form a belief as to the alleged fraud and undue influence of McKneely in procuring the deed; also a lack of information sufficient to form a belief as to the alleged written agreement between McKneely and David H. Dickson for conveyances, possession, etc., as set forth in the bill. She pleaded staleness of plaintiffs' claim, and the statute of limitation, and set up affirmatively that she was entitled to dower as an innocent purchaser for value. For answer to the amendment to plaintiffs' bill, she alleged a want of information, etc., as to the execution of the deeds mentioned therein, and as to knowledge of W. L. Terry and wife concerning same. She demurs to the

claim for rents and profits, as being no cause of action against her, and suggests that there was an administration, and that the administratrix was a necessary party. The heirs of McKneely answered, denying any ownership of plaintiffs in the lands in controversy, also the alleged fraud and undue influence in procuring the deed thereto, and the alleged written agreement of Samuel W. McKneely and his wife to convey to the heirs of John P. Dickson, their alleged undivided interest, and to yield to them possession after three years. They adopt the answer of Mattie McKneely, except as to the dower of Mrs. Sallie Hayden (formerly Mrs. Sallie Dickson), which they deny she has; and, by an amendment to their answer, in answer to the amendment to the original bill, they say that the instrument purporting to be a deed from Samuel W. McKneely to David H. Dickson was never acknowledged or perfected as a deed, and that no possession was ever taken under it; that the possession of David H. Dickson in 1873 was by the sufferance of McKneely; and that, after David H. Dickson died, McKneely again took possession in 1873, and held same continuously till his death.

The court appointed a receiver to take charge of the property when suit was begun, and a special master to state an account for rents, improvements, taxes, etc. from the time McKneely took possession till the institution of this suit; decreed to Mrs. Terry an undivided one-third interest in the lands sued for; gave judgment in her favor in the sum of $8,857.10, the amount of rents for her share of the land, and decreed same to be a lien upon the undivided two-thirds residue. Both parties appealed.

Scott & Jones, for appellant, Mattie McKneely.

1. The statute in this case commenced to run prior to April, 1876, as McKneely openly asserted *that the place*

was his, and he intended to keep it. A married woman is chargeable with laches with respect to her separate property, the same as if she were discovert. Her disabilities having been removed, she is, to the same extent, relieved of the consequences of coverture. 55 Ark. 85; 56 *id.* 497; Freeman, Co-Tenancy, sec. 373.

2. McKneely was in possession, and declared it was his, and that he would keep it. Of this Mrs. Terry had knowledge, or by the exercise of ordinary diligence could have obtained knowledge. If the facts were concealed by John D. Trigg, this was not the fraud or concealment of McKneely. The fraudulent concealment must be that of the party sought to be charged. 39 Mich. 160; 16 Ark. 672; 17 *id.* 199. 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 led. When one has sufficient information to lead him to a fact, he shall be deemed conversant of it. 3 Mylne & K. 722; Angell, Lim. sec. 187 *n;* 11 Otto, 135. A party seeking to avoid the statute bar must show that he used due diligence to detect the fraud, and, if he had the means in his power to discover it, he will be held to have known it. 28 Miss. 432; 11 Otto, 135; 28 Fed. 275; 13 *id.* 159; 21 Wall. 503; 6 Wheat. 481; 146 U. S. 88; 152 *id.* 412. When the seal of death has closed the lips of him whose character is assailed, and lapse of time has impaired the recollection of transactions, and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. 6 Wheat. 481; 143 U. S. 224. The claim is stale, and barred by laches.

E. F. Friedell and *Dan W. Jones & McCain*, for appellants, the heirs of McKneely.

1. The claim is stale, and barred by laches. 143 U. S. 224, 274.

2. The possession of one tenant in common is the possession of all; but if one ousts the other, or denies his tenure, his possession becomes adverse. 16 Pet. 455; 3 *id.* 51; 23 Cal. 245. Courts of equity invariably discountenance laches and neglect, especially where death intervenes. 41 Ark. 301; 43 *id.* 469, 483. Equity follows the law in matters of limitation. 41 *id.* 484. Even in trusts the rule applies. 2 Wall. 87; 41 *id.* 301, 484. There is no pretense of concealment by McKneely. Arkansas is one of the few states in which the statute grants no indulgence where the cause of action has been concealed by defendant. Wood on Lim. sec. 274; 13 Ark. 291; 16 *id.* 694; 32 Miss. 233; 101 U. S. 135. Mrs. Terry cannot tack her disability of coverture to that of infancy. Sand. & H. Dig. sec. 4815; 47 Ark. 301.

3. The decree for rents is erroneous, for several reasons. The occupation by one co-tenant never raises an implied promise, or creates an obligation to pay rent to the others. 48 Ark. 13; 4 Kent. Com. 369; Freeman, Co-ten. sec. 258; 31 Mich. 136; 30 Md. 120; 72 Ala. 567; 29 Minn. 252; 45 Iowa, 639; 12 Cal. 414; 23 La. An. 150. The decree must of course proceed on the theory of *adverse* holding. But three years is the limitation against the right to recover rent, both at law and in equity. As to the common law rule, see Bouv. Law Dict. "*Mesne Profits;*" 46 Penn. St. 15; 3 Yeates (Pa.), 13; 5 Vesey, Jr. 743; 10 *id.* 469; Freeman, on Co-Ten. sec. 272; 48 Ark. 135. But see our statute. Sand. & H. Dig. sec. 2592. But the heirs are not liable for rents accrued before McKneely's death at all. Plaintiffs' only remedy was to probate the claim against his estate. 18 Ark. 334; 39 *id.* 577; 28 *id.* 267; 43 *id.* 457. But if they were, it was error to adjudge it a lien on the other co-tenants' share in the land. 52 Ark. 492; 56 *id.* 624.

4. The administrative of McKneely was a necessary party, and should have been joined as defendant.

W. L. Terry and *L. A. Byrne*, for appellees.

1. The declarations of McKneely to Mrs. Hayden were not notice to Mrs. Terry, for she was not *the ancestor* of Mrs. Terry. 25 Mich. 188; 46 N. W. 533. But, had the declaration been made to Mrs. Terry, she was then covert, and her action would have been preserved by the statute.

2. The deed from John P. Dickson to McKneely was obtained through fraud and undue influence upon an *inexperienced man* towards whom he occupied *a relation of trust and confidence.* 1 Story, Eq. Jur. p. 333 and note; 26 Ark. 604; 42 Md. 513; 6 Fla. 104; 6 Gill, 41; 6 Mich. 111; 3 Jones, Eq. (N. C.) 496; 73 N. Y. 498; 41 Barb. 326; 60 Miss. 1025; 16 N. Y. *Ford* v. *Harrington*; 77 Mo. 396; Wait, Ac. & Def. p. 478; 1 Perry on Trusts, secs. 166, 204, 210, 227; 35 Fed. Rep. 246. Upon the death of John P. Dickson, his equitable estate descended to David H. Dickson, Lavinia McKneely and John D. Trigg. Mansf. Dig. sec. 2540. They became tenants in common. Mansf. Dig. secs. 2535, 2541. When McKneely entered into possession, the law will presume his possession to have been in right of his wife. Wood on Lim. p. 578; 32 N. J. L. 251; 2 Seld. 342; 35 Ark. 89; 1 Am. & Eng. Enc. Law, p. 250. Thus, on Lavinia C.'s death, her one-third interest passed to Mrs. Terry and John D. Trigg. Mrs. Terry's rights were saved by Mansf. Dig. sec. 4471 as construed in 42 Ark. 305; 44 *id.* 398. John D. Trigg's right was preserved by the *continued recognition of McKneely himself.*

3. The proof is clear that McKneely executed the conveyance in question in 1869, and in accordance therewith held possession until the close of 1872; that

David H. Dickson then *took possession, and died in such possession*, holding a deed from McKneely and wife for his undivided third interest. No right of action thus accrued in David H. Dickson's lifetime. At his death his title passed to his heirs. 77 Tex. 629. The mere possession by McKneely was not notice of an adverse holding. 46 Ark. 25; 48 *id.* 248; 52 *id.* 76; 52 *id.* 168. Notice must be given of an adverse holding. Wood, Lim. sec. 266. The collection of rents for 1874 or 1875 was not sufficient to put Mrs. Terry on notice. But in 1874 she was a minor, and in October, 1875, she became covert, and no subsequent acts could change her. Wood on Lim. p. 559; *Todd* v. *Todd* (Ill.), 4 West.; 1 Washburn, Real Prop. (5 ed.), p. 691. If Mrs. Terry was not put upon notice *before* her marriage, the statute did not run. 42 Ark. 301; Sand. & H. Dig. sec. 4815. The deed of 1867 was only notice to those who are bound to search the records, such as a subsequent purchaser or incumbrancer. Martindale on Conv. sec. 276.

4. Whether McKneely actually executed a deed or not for John D. Trigg's interest, the effect of the "short paper," as described by Mrs. Hayden, was to make McKneely a trustee under an *express* trust, and any subsequent repudiation of that trust would have to be clearly brought home to the knowledge of the equitable owners before the statute would begin to run. 46 Ark. 25; 48 *id.* 248; 52 *id.* 76; *Ib.* 168; Story, Eq. Jur. (13 ed.), vol. 2. p. 283; 44 Ark. 456. McKneely *never* denied the right and claim of Trigg.

5. In view of the fraudulent act of McKneely in making away with and concealing the papers, and the *want of knowledge* by Mrs. Terry of this fact, the statute will not run until there is a discovery. 101 U. S. 135; 2 Wall. (U. S.), 458; 120 U. S. 136; 21 Wall. 342–7; 3 Mass. 201; 5 Mason, 163; 12 Ga. 371; 35 *id.* 40; 1 Pom. Eq. Jur. p. 415; 41 Ark. 305; 46 *id.* 35;

26 Wis. 622; 21 N. W. 639. If this discovery is made during infancy or coverture, the statute only runs from the removal of the disability. Sand. & H. Dig. sec. 4815; 12 S. W. 1058; 79 Mo. 540; 21 N. W. 639; 46 Iowa, 655.

6. But, laying aside the question of infancy and coverture, under the peculiar circumstances of this case, the *obscurity* of the transaction, the relationship of parties, etc., Mrs. Terry was not guilty of laches. 2 Sch. & Lef. 474–487; 12 Pa. St. 49; 2 Story, Eq., sec. 1520; 78 N. Y. 159, 187; 9 H. L. Cas. 360, 383; 3 Wait, Ac. & Def. 472; 152 U. S. 416; 56 Ark. 497.

7. Mrs. McKneely was not entitled to dower. 2 Oh. St. 417; 1 Washb. Real Prop. 228; Tiedeman on Real Prop. sec. 129; 1 Bishop, Mar. W. sec. 328; Scribner on Dower, vol. 1 pp. 267, 290, 369.

8. As to John D. Trigg, McKneely's possession was never adverse, as he always recognized his claim. 22 Ga. 288; Wood on Lim. p. 576; 12 Am. & Eng. Enc. Law, 559, 560; 56 Ark. 497.

9. McKneely was liable for rents *received* by him, and the three-years statute is not applicable to him. Sand. & H. Dig. sec. 5917, 2592; 47 Ark. 531; 48 *id.* 187. The court properly decreed them a lien on the land. 55 Ark. 100; Knapp on Partition, 385; Story, Eq. Jur. p. 663.

WOOD, J., (after stating the facts). The questions are: First. Was the deed from John P. Dickson to McKneely void for fraud and undue influence? Second. Did Samuel W. McKneely, in 1869, execute deeds to David H. Dickson and John D. Trigg to an undivided one-third in the lands in controversy? And did he enter into a written obligation with David H. Dickson, at the same time, by which he (McKneely) was to retain possession of the entire place for three years, and at the end of which time he was to surrender to the heirs; and

was this agreement fulfilled? Third. If plaintiffs, Mollie C. Terry and John D. Trigg, have the legal title to an undivided interest in the whole or a portion of the lands in controversy, are they barred from recovery by laches or limitations? Fourth. Are plaintiffs, Mollie C. Terry and John D. Trigg, entitled to an undivided one-sixth, each, in the lands sued for, as the only heirs of Mrs. Lavinia McKneely. Fifth. Is Mrs. Mattie McKneely entitled to dower as an innocent purchaser for value? Sixth. Can plaintiffs, if they are decreed the owners of an undivided interest, recover rents for their share collected by McKneely in his lifetime; and can they have a lien for rents declared upon the undivided interest remaining in the heirs of McKneely?

1. Was the deed void?

The circuit court, in an elaborate decree, in which we think the facts are accurately discussed and the law correctly applied, found that there was no evidence to justify setting aside the deed. We are of the same opinion. A discussion of the facts leading to this conclusion could only be of interest to the parties litigant, and would serve no useful purpose as a precedent. The law is too well settled for discussion. The plaintiffs, therefore, cannot recover as to the heirs of John P. Dickson.

2. The chancellor found that in 1869 McKneely executed conveyances to David H. Dickson and John D. Trigg, securing to them, respectively, the interest they claimed in the lands, and also executed an agreement by which he was to hold the land for three years, after which he was to surrender the same; that McKneely did hold the lands for three years, and then gave possession to David H. Dickson, father of Mollie C. Terry, who held until he died in 1873; that, after David H. Dickson's death, McKneely again took possession, and collected and appropriated to his own use the rents and

profits until his death in 1889. These also are purely questions of fact, and the evidence fully supports the court's conclusion. This answers the second proposition, and determines the right of Mollie C. Terry, as the only heir of David H. Dickson, and of John D. Trigg, to recover under their deeds, unless they are barred by laches or limitation.

What constitutes laches.

3. Are they barred? As to John D. Trigg, the court found that he was present when the settlement was had between McKneely and David H. Dickson, guardian of John D. Trigg, whereby the interest of John D. Trigg in the land was conveyed to him; that he was eighteen years old, and understood the agreement for McKneely to hold the land for three years, and for David H. Dickson to take possession at the end of that time; that he knew that McKneely repossessed himself of the land in 1873, after David H. Dickson's death; that at this time John D. Trigg was of age, and knew that McKneely had been accused of fraudulently taking and secreting the deeds to this land in the same year, 1873. And the court found that, for sixteen years, McKneely held the land, collected and appropriated the rents of the entire place to his own use; that the rents amounted to a large sum, the place being valuable; that, at various times before McKneely's marriage with the defendant Mattie, in ————, John D. Trigg applied to him to be let in to enjoy his interest, and was always refused; that plaintiff John D. Trigg had labored under no disability since 1873; that, about four years before the bringing of this suit, he had been informed by McKneely that he (McKneely) had leased the lands for five years, and therefore could not let him (John D.) in to enjoy his interest. The court found that McKneely in 1878 had sold a valuable portion of the land, and had appropriated the purchase money to his own use, and that John D. Trigg knew this. These

findings are supported by the evidence. There was testimony by John D. Trigg and others to show that McKneely had repeatedly recognized John D. Trigg's interest in the land,—in fact, had never denied it,—and had often promised to let him in to enjoy his interest. John D. Trigg claimed and testified that his neglect to sue earlier was by reason of these promises, and because of McKneely's continued recognition of his interest. But the court found that John D. Trigg must have known that McKneely's possession, was adverse, and concluded that his delay in bringing suit was "unreasonable and unjustifiable." This conclusion was certainly correct, if McKneely's actions, as disclosed by the record, were of more weight and significance than his promises and professions. The learned chancellor thought they were, and the preponderance, we think, sustains his findings. There was no error in dismissing the bill as to plaintiff, John D. Trigg.

When husband's possession subordinate to wife's rights.

As to the plaintiff, Mrs. Terry, it appears that her ancestor, David H. Dickson, died in possession of the land in controversy in 1873. At that time, she was sixteen years of age. Two years after, she intermarried with W. L. Terry, when she was something over eighteen. The deeds to David H. Dickson and John D. Trigg conveyed to each an undivided one-third interest in the lands sued for, McKneely retaining an undivided one-third. It is not contended that McKneely ever executed any deed to his wife for an undivided one-third, but only that he agreed to do so. Be that as it may, if McKneely was under any obligation to convey the land to his wife in 1873, when he repossessed himself, the presumption would be that his possession was in subordination to her title, legal or equitable. 1 Am. & Eng. Enc. Law, 250 and cases cited; *Corwin* v. *Corwin*, 2 Seld. 342, cases; 1 Wood, Lim. 578; *Banks* v. *Green*, 35 Ark. 89.

When possession of co-tenant not adverse.

If the title to the undivided one-third remaining was not in his wife, it was in him, and, in either case, his possession was that of a tenant in common with Mollie C. Terry and John D. Trigg, and continued so to be until some act so open, notorious and unequivocal as to operate as notice to his co-tenants that his holding was adverse. 2 Wood, Lim. 258. See, also, *Bryan* v. *City of East St. Louis*, 12 Ill. App. 397. "It is," says Mr. Angell, "from the nature of the estate that a tenant in common of land, in the enjoyment of his rights, must necessarily, *prima facie*, be in possession of the whole." Angell, Lim. 429. "The possession, therefore, of one tenant in common is the possession of all." 2 Wood, Lim. 266. Prior to an interview which Mrs. Hayden had with McKneely in 1876, in which he stated that the place was his, and he intended to keep it, there is nothing to show that his possession was adverse to his co-tenants. There is no proof that he entered upon the land in 1873 as sole owner. There was evidence tending to show that McKneely in 1875 had abstracted the deed, which was the only evidence of title in the heirs of David H. Dickson, and, while this might have indicated a purpose to claim the land as his own, yet, if so, it was a secret purpose, for the abstraction was secret, and would not operate as notice of an adverse holding. And, although Mrs. Dickson may have discovered the same a short time thereafter, there is no evidence that she communicated the fact to Mrs. Terry at a time when she was under no disability. There was also proof that McKneely had collected and appropriated the rents for the year 1874, and had rented the place for the year 1875, though it is doubtful if he had collected the rents for 1875 before the marriage of plaintiff Mollie C. Terry in Oct. 1875. But the pernancy of the rents, although for the whole statutory period, would not, of itself, be conclusive evidence of an

ouster of his co-tenants by McKneely, because that is susceptible of explanation consistent with his rights as co-tenant. In order to set the statute in motion, he must have absolutely denied the title of his co-tenants, or by other notorious acts have indicated his intention to claim and hold the estate exclusively. 2 Wood, Lim. 266, and cases cited; *Ricard* v. *Williams*, 7 Wheat. 121; *Prescott* v. *Nevers*, 4 Mason (U. S. Cir.), 326; *Jackson* v. *Tibbits*, 9 Cow. 241; *Parker* v. *Proprietors of Locks, etc.* 3 Met. (Mass.) 91; Angell, Lim. 429; *M'Clung* v. *Ross*, 5 Wheat. 116; *Todd* v. *Todd*, 117 Ill. 92. See also *Sydnor* v. *Palmer*, 29 Wis. 226.

The first unequivocal act, indicating an intention on the part of McKneely to hold adversely to his co-tenants, was his declaration to that effect made to Mrs. Dickson in 1876. The second was the sale in his own name of a valuable portion of the place in 1878 to Elias Pickett, and the appropriation of the money received therefor to his own use. *Clapp* v. *Bromagham*, 9 Cow. (N. Y.) 530. Mollie C. Terry, however, was a *feme* covert when both these occurred, and expressly protected by the statute of limitation. Sec. 4815, Sand. & H. Dig. True, this court in *Gibson* v. *Herriott*, 55 Ark. 85, said: "The disabilities of coverture in respect to her separate property having been removed, she is to the same extent relieved of its consequences." But this language is only applicable to the assertion of her rights, as to her separate property, in all cases where the statute has not made an exception protecting her. It is applicable, of course, to the statute pertaining to judicial sales, for she is not excepted from its operation. Sec. 4818, Sand. & H. Dig; *Batte* v. *McCaa*, 44 Ark. 398; *McGaughey* v. *Brown*, 46 *Ib.* 25.

Plaintiff Mollie C. Terry was not barred by the statute of limitation. *Is she barred by laches?* As was held in *Gibson* v. *Herriott*, *supra*, a married

woman, with reference to her separate property, may be guilty of laches, as though she were discovert. It is alleged, in the amendment to the original bill, that the deed to David H. Dickson was secretly abstracted and made way with by McKneely, and that they (plaintiffs) had no knowledge or information of the existence of such deed until after the commencement of this suit, and that the commencement of the suit was prevented by the wrongful conduct of McKneely in taking and carrying away said deed, and fraudulently concealing from said plaintiffs any and all knowledge of its existence. This was a sufficient replication to the plea of laches.

Acknowledgment not necessary to pass title.

The heirs of McKneely, in the amendment to their answer, say "that the deed was not acknowledged and perfected as an instrument of conveyance and no possession was ever held under it by David H. Dickson." It is clear from the proof that the deed was made and delivered to David H. Dickson as alleged. It therefore passed the title, between the parties to it and their heirs, whether acknowledged or not. *Floyd* v. *Ricks*, 14 Ark. 294.

Fraud as affecting the question of laches.

In the language of the learned chancellor below, "the deed was the best evidence of Mrs. Terry's rights, and the most effective instrument to enforce them." The court found that the deed under which Mrs. Terry claimed was "fraudulently taken away and kept concealed by McKneely." The proof justifies this finding. How does it affect the question of laches? It is contended by appellants that, as the statute (sec. 4815 Sand. & H. Dig.), makes no exception as to a cause of action fraudulently concealed, the courts can make none, and that this holds good as to both courts of law and equity, as the statute in express terms is made applicable to both.

Section 4846, Sand. & H. Dig., provides "that if any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the terms respectively limited after the commencement of such action shall have ceased to be prevented." The words "any other improper act of his own" would seem to be broad enough to cover cases of fraud. But, aside from this statute, the result would be the same. "It is the established rule of equity, as administered in the courts of the United States, that where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered." *Kirby* v. *Lake Shore, etc. Railroad*, 120 U. S. 130; *Meador* v. *Norton*, 11 Wall, 442; *Prevost* v. *Gratz*, 6 Wheat. 481; *Rosenthal* v. *Walker*, 111 U. S. 185; 2 Story Eq. Jur. sec. 1521 *a*; *Veazie* v. *Williams*, 8 How. 134. See also *Jones* v. *Van Doren*, 130 U. S. 684. And while it is true that the U. S. courts, possessing the same equity jurisdiction as the high court of chancery in England, have a uniform system of equity rules and practice which they administer in each state untrammelled by local laws (*Kirby* v. *Railroad*, *supra*), yet the above announces the correct doctrine in equity, as applied by the state courts generally, although their statutes, like ours, may contain no exception in favor of one whose cause of action has been concealed by fraud. Angell, Lim. sec. 183; Buswell, Lim. sec. 385; 2 Wood, Lim. sec. 275; *First Mass. T. Co.* v. *Field*, 3 Mass. 201; *Bland* v. *Fleeman*, 58 Ark. 84. See also *McGaughey* v. *Brown*, 46 Ark. 35. The reason of the rule is that one shall not be permitted to take advantage of his own wilful wrong. In

a court of conscience, as Lord Redesdale expresses it, "the statute ought not to run; the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time." *Hovenden* v. *Lord Annesley*, 2 Sch. Lef. 634; Bus. Lim. sec. 22; *Evans* v. *Bacon*, 99 Mass. 213; *Traer* v. *Clews*, 115 U. S. 528; *Troup* v. *Smith*, 20 Johns. (N. Y.) 33; *Callis* v. *Waddy*, 2 Munf. (Va.) 511.

Our statute is, in express terms, made applicable to suits in equity, as well as law. Sec. 4815, Sand. & H. Dig. It follows, from the language employed, that no exception could be made in equity that would not also be applicable at law. But, even at law, while there is decided conflict, the weight of authority and the better reason is in favor of the view that a cause of action, kept fraudulently concealed, will stop the bar of the statute in favor of the one against whom the fraud is perpetrated, until the fraud is or should have been discovered. As is said by Mr. Justice Miller in *Bailey* v. *Glover*, 21 Wall. 342: "To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law, which was designed to prevent fraud, the means by which it is made successful and secure." Angell, Lim. sec. 186; *First Mass. Turnpike Co.* v. *Field*, 3 Mass. 201; *Homer* v. *Fish*, 1 Pick. 435; *Welles* v. *Fish*, 3 *Ib.* 74; *Farnam* v. *Brooks*, 9 *Ib.* 212; *Sherwood* v. *Sutton*, 5 Mason (Cir. Ct.) 143; *Mitchell* v. *Thompson*, 1 McLean, (Cir. Ct.) 96; Buswell, Lim. sec. 390; *Duffitt* v. *Tuhan*, 28 Kas. 292; *Yniestra* v. *Tarleton*, 67 Ala. 126; *Cole* v. *McGlathry*, 9 Me. 131; *Bishop* v. *Litte*, 5 *Ib.* 362; *Douglas* v. *Elkins*, 28 N. H. 26; *Harrisburg Bank* v. *Forster*, 8 Watts, 12; *Andrews* v. *Smithwick*, 34 Tex. 544; *Miles* v. *Berry*, 1 Hill, (S. C.) Law, 296.

No mere ignorance on the part of plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. And if the plaintiff, by reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it. Buswell, Lim. sec. 385; Story, Eq. Jur. sec. 152; *Piper* v. *Hoard*, 65 How. Prac. 228; *Underhill* v. *Mobile Fire Ins. Co.* 67 Ala. 45; *Ramsey* v. *Quillen*, 5 Lea, 184; *Adams* v. *Ipswich*, 116 Mass. 570; *Wood* v. *Carpenter*, 101 U. S. 129; *Tyler* v. *Angevine*, 15 Blatchf. 536–41. See, also, *McAlpine* v. *Hedges*, 21 Fed. Rep. 690; *Eiffert* v. *Craps*, 58 Fed. 470.

Had Samuel W. McKneely surrendered the deed, which he had taken away, to Mrs. W. L. Terry, or some one for her, instead of giving it to one of his own relatives, with instructions "to take good care of it," as the proof shows he did, doubtless we would not now have been discussing the question of laches. That deed would have made her title clear. Without it, her rights were involved in such a tangled web as to preclude the idea of laches for not attempting to assert them. She did not know of the existence of the deed, and by no reasonable inquiry could she have ascertained any facts that could lead to its discovery. The same purpose which caused its removal in the first place doubtless controlled in its concealment, and it was only a mere chance that brought it to plaintiffs' possession. There is evidence that, on one occasion, plaintiff, Mollie C. Terry, had heard her mother say that "her uncle, Sam. W. McKneely, had come to her house after her husband's death, and made way with some paper or written

obligation relating to the John Dickson land." But there is also evidence to the effect that she did not believe what she heard. If the deed was fraudulently taken away and kept concealed by the machinations of McKneely, as the court below found, and the evidence tends to show, is Mrs. Terry to be charged, by those who stand in his shoes, with laches, for refusing to suspect him of dishonesty and fraud? We think not. *Kilbourn* v. *Sunderland*, 130 U. S. 505. And, even if her suspicions had been aroused, by what she had heard, suspicion is not discovery. *Marbourg* v. *McCormick*, 23 Kas. 43. But, if she should have suspected, and if her suspicions should have led to inquiry, then, even, the proof shows she has met every requirement that could have been reasonably expected in that particular, through her husband, W. L. Terry. The testimony is voluminous, but our conclusion from a careful consideration of it, is that the court was correct in holding that Mrs. Terry was not barred by laches, and in decreeing to her an undivided one-third interest in the lands sued for, as the heir of David H. Dickson.

When specific performance denied.

4. As to whether plaintiffs, Mollie C. Terry and John D. Trigg, were each entitled to an undivided one-sixth interest in the lands sued for, as the heirs of Mrs. Lavinia McKneely, the court made no special finding, but found generally that there was nothing in their contention in this particular. This was correct. It is exceedingly doubtful whether McKneely ever entered into a contract to convey to his wife an undivided one-third interest in the lands sued for. There is nothing to show that she was asking or insisting upon anything of the kind herself, or that David H. Dickson, who is said to have procured such a contract, was ever authorized or empowered to act for her. She lived almost seven years after said contract is alleged to have

been made, and it appears she died perfectly satisfied, and there is nothing to show that she ever claimed any interest in the land. It had been twenty years since the alleged agreement was said to have been made, and thirteen years since Mrs. Lavinia's death. After such a great length of time, her heirs should not be granted a decree in the nature of specific performance of an alleged executory contract, except upon proof most clear and convincing. In this case it is too vague and uncertain to warrant such a decree. The plaintiffs, therefore, as the heirs of Lavinia McKneely, take nothing by their cross-appeal.

No dower in trust lands.

5. Mrs. Mattie McKneely could not assert a claim for dower as an innocent purchaser for value, against the plaintiffs, McKneely, her husband, was not seized at his death of an estate of inheritance in the lands of which Mrs. Terry has been adjudged the owner. Sand. & H. Dig. sec. 2520. The legal estate was in McKneely, but the equitable estate was in her, and no right of dower can be set up against such a title. 1 Wash. Real Prop. p. 228.

Liability of deceased co-tenant's estate for rents.

6. Was Mrs. Terry entitled to rents and to a lien for same upon the share of co-tenants? Section 5917 of Sand. & H. Dig. makes a tenant in common liable to his co-tenants for rents, where he has "taken, used, or had the benefit thereof in greater proportion than his interest." There can be no doubt that a court of equity, according to the principles above discussed, will extend the time for recovery, where the cause of action has been fraudulently concealed, to the statutory period after the fraud has been, or by ordinary diligence should have been, discovered. Sand. & H. Dig. sec. 4846. Samuel McKneely died February 17, 1889. This suit was begun the 6th of March following. There was an administration upon the estate of Samuel W. McKneely, as was alleged in the amend-

ment to Mrs. McKneely's separate answer, and which was nowhere denied. The claim of Mrs. Terry for rents collected by McKneely, during his life, was a demand against his estate, and not against his heirs. No judgment could be legally rendered against them for such a demand. But her claim was a subsisting demand against the estate of McKneely at the time of his death, and, under the plain letter of our statute, and decisions, the demand should have been duly authenticated and exhibited to the administratrix. Sand. & H. Dig. sec. 110, subd. 5; secs. 113, 114, 115; *Walker* v. *Byers*, 14 Ark. 253.

But, if it be said that the cause of action as to rents did not accrue until after the discovery of the deed by plaintiff, Mrs. Terry, still that would not relieve her, for the deed was discovered in less than a year after McKneely's death, according to the allegations of her bill. The claim, nevertheless, should have been properly exhibited. *Walker* v. *Byers*, *supra; Bennett* v. *Dawson*, 18 Ark. 334. See, also, *Patterson* v. *McCann*, 39 Ark. 577; *Morgan* v. *Hamlet*, 113 U. S. 449.

Mrs. Terry has not established her claim for rents in the manner prescribed by our statutes. Until she has done so, plainly, she could not go into a court of equity and ask that a lien be declared upon the share of a co-tenant for such claim or demand. If there be a lien (which, in the view we have taken, it becomes unnecessary to decide) she has no standing in a court of equity to enforce it; for the lien in such a case would be the pure creation of a court of equity, growing out of no legal or contractual estate,—not a right of property, but a mere remedy, bottomed solely upon the debt or demand, and having no independent form and foundation for its enforcement. So it was held by this court in the case of a vendor's lien, and, by analogy, and with even greater reason, is the principle applicable here. *Linthi-*

cum v. *Tapscott*, 28 Ark. 267. See, also, *Stephens* v. *Shannon*, 43 *id.* 464; *Waddell* v. *Carlock*, 41 *id.* 523.

The decree in favor of Mrs. Terry for an undivided one-third interest in the land was correct. The decree as to rents accruing prior to McKneely's death was erroneous. The cause is therefore reversed, and remanded with directions to enter a decree in accordance with this opinion, and for further proceedings.

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

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* MARTIN.

Opinion delivered January 18, 1896.

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ACCIDENT AT RAILWAY CROSSING—CONTRIBUTORY NEGLIGENCE.—One who voluntarily goes upon a railroad track at a crossing upon a dark night, without stopping or listening for the approach of a train, and stands there a moment talking, until he is struck and killed by a train backing on the track, is, as a matter of law, guilty of contributory negligence precluding a recovery for his death.

BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.—The burden on a defendant of showing contributory negligence is removed where it is affirmatively shown by plaintiff's evidence.

Appeal from Cross Circuit Court.

JAMES E. RIDDICK, Judge.

Dodge & Johnson, for appellants.

1. The verdict was without evidence to sustain it. The evidence is that deceased never looked or listened before or after going on the tracks.

2. The verdict is contrary to law. A person going upon the tracks of a railway company must use due

precautions by looking and listening. No neglect of the company will excuse this duty of using both eyes and ears. 54 Ark. 434; 24 A. & E. R. Cas. 124; 56 Ark. 459; 29 Mich. 274; 2 Binney (Pa.) 159. He must make vigilant use of his senses to detect the approach of trains. 57 N. Y. S. R. 7; 47 N. Y. 400; 105 Mo. 371; 113 Mo. 1; 105 N. C. 140. He is not excused by the assumption that the train men will give proper signals of approach. 86 N. Y. 616; 33 Kas. 427; 51 Mo. App. 562; 42 N. J. L. 180; 61 Tex. 503; 46 Fed. 343; 39 A. & E. R. Cas. 612; 102 Pa. St. 425; 81 Ala. 185; 70 Wis. 216; 69 Mich. 109; 81 Ala. 177; 103 Ind. 31; 128 *id.* 138; 16 N. Y. 909; 34 W. Va. 538; 17 Or. 5; 57 Fed. 921.

Block & Sullivan, for appellee.

1. The verdict is supported by the evidence. When certain witnesses testify that signals were given, and certain others that they did not hear them, and could have heard them had they been given, the question as to whether or not they were given is one for the jury. 101 N. Y. 419; 75 *id.* 320; 36 *id.* 132; 57 Wis. 59. Even to concede that the statutory signals were given, they were certainly rendered nugatory and of no avail by the proximity of other moving trains, which is equal negligence on part of appellant. 101 Ind. 522; 51 Am. Rep. 761. The evidence shows that appellant's employees backed a train over the principal crossing of a populous town on a dark night, without the customary signals and with no light on the forward end of the train. This will support a finding of want of ordinary care. 52 N. Y. 215; 88 *id.* 13; 20 N. W. 93.

2. The burden of proving contributory negligence was on the appellant, and, if there is no proof at all on the subject, the presumption of due care obtains. 46 Ark. 423; *Ib.* 182; 46 *id.* 460.

3. A foot passenger is not required to stop before going upon the tracks, except when it will better enable him to use his senses of sight or hearing. 54 Ark. 431; 79 N. Y. 73; 71 *id.* 285; 9 N. W. 575.

4. The track, if visible, may have been a warning to deceased to look and listen for approaching trains, and, having thus discovered nothing, he had the right to proceed, on the theory that the railway company would use the ordinary precautions to show the approach of their trains. 56 Ark. 459; 17 Or. 5; 47 Pa. 51, 244; 86 Am. Dec. 541.

5. Contributory negligence is a question of fact for the jury to determine from all the circumstances and surroundings. 52 Ark. 368; 57 *id.* 429; 88 N. Y. 13; 79 *id.* 72; 58 *id.* 451; 92 Mass. 189; 149 U. S. 43–5; 17 Wall. 657; 135 U. S. 554; 139 *id.* 469; 144 *id.* 408; 29 Fed. 489; 60 *id.* 999.

6. It is true that a traveler on a highway will not be excused from due diligence by the assumption that the trainmen will give the proper signals, but it is also true that where looking and listening can and does discover nothing, the traveler has a right to expect that the company would perform its duty. 56 Ark. 49; 17 Ore. 5.

7. Instruction 3 is approved by this court, and sustained by authority. 42 Ark. 321; 36 *id.* 41; 35 *id.* 614; 11 N. W. 67; 9 *id.* 475; 52 N. Y. 215; 20 N. W. 93; 70 Tex. 126; 8 Am. St. 582.

8. The fourth instruction is simply a statement of the duty enjoined upon the appellant by statute. 53 Ark. 201; Sand. & H. Dig. sec. 6196.

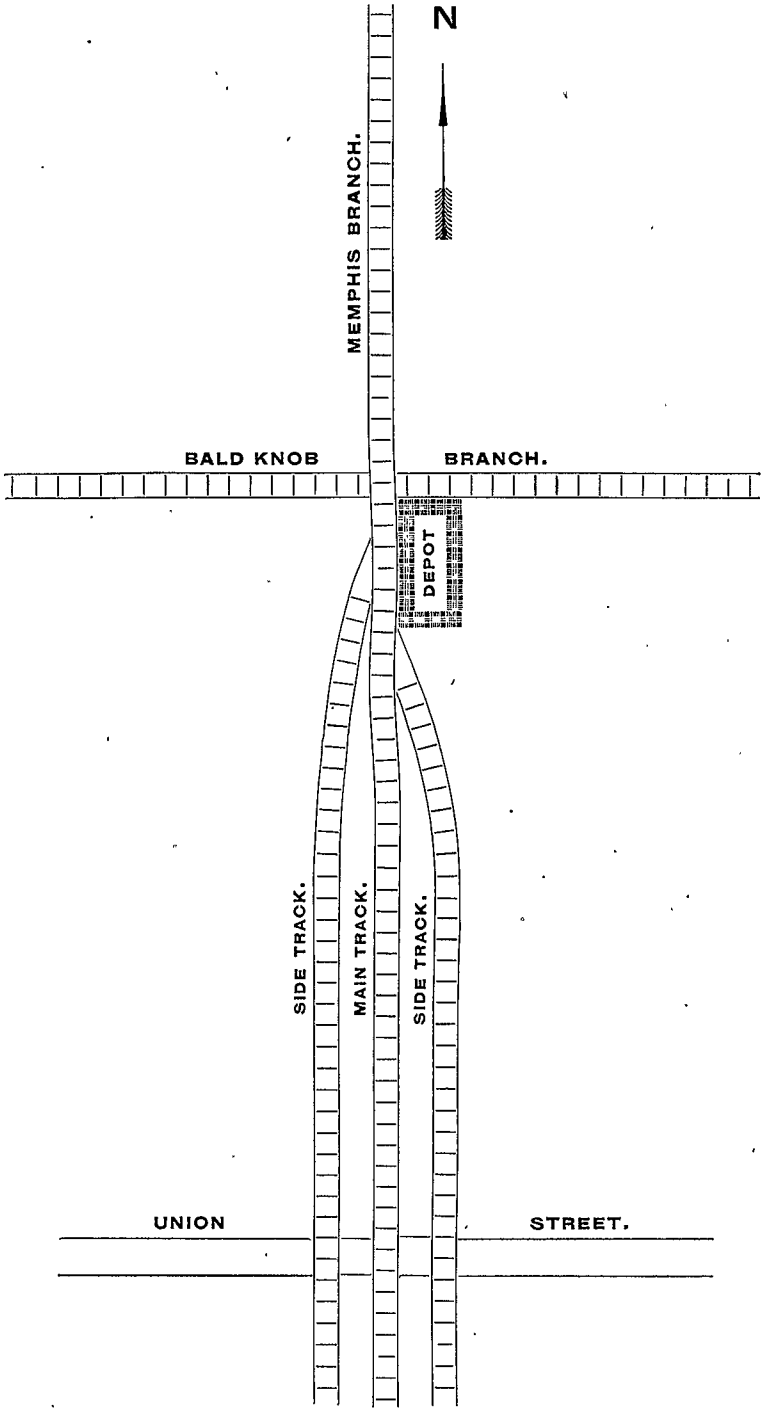
9. Instruction 8 is sustained by 54 Ark. 431; 88 N. Y. 13; 79 *id.* 72; 78 *id.* 518; 92 Mass. 189; 20 N. W. 93; 10 *id.* 268; 7 N. E. 801.

WOOD, J. This suit is for damages resultant it is alleged, from the negligent killing of A. S. Martin

by the appellant. The suit was brought for the benefit of the estate, and of the widow and next of kin. The defense was a denial of negligence, and a plea of contributory negligence. The trial resulted in a judgment for seven thousand dollars, which this appeal seeks to reverse.

The negligence of appellant is established by proof which is sufficient, and the judgment must be affirmed, unless the deceased was guilty of contributory negligence, which is the only question we need discuss. Deceased was killed where the railway crosses Union street in the town of Wynne, as shown by a rude plat, which we clip from brief of counsel and append, to make the testimony as to location more intelligible.

The three tracks at Union street were six or eight feet apart. Deceased and the witness, his companion, were crossing over the main line at about seven or eight o'clock at night. The road was rough, and the night very dark. The witness said to deceased, just before he came to a stand, "If you are not acquainted with the road, let me take your arm;" and witness took deceased's left arm with his right. A local going south was on the east track and lacked about a box car, or half a box car and caboose, of passing the crossing when they walked upon the track of the main line. They "halted a second or moment," until the train passed the crossing; and, "while standing there talking," the train backing from the south knocked witness and deceased from the track, running over and injuring deceased, from which injuries he died about three o'clock next morning, after suffering intensely. Witness was looking toward the south, the direction whence the train that struck them was coming, and whither the passing train was going. Witness says he did not see the train that struck them until just a moment before, and for the reason that it was so dark, and that there was no light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on the caboose. Witness was asked, "Did you listen for any trains while you were there?" and replied, "I do not know that we listened, and the train was passing right in front of us. I do not know that we particularly listened for the train. I do not recollect about our listening for the approach of a train." He further said: "Had we listened, I do not think we could have heard the train that was coming from the south, because of the one moving right in front of us. The train that struck us was approaching very stealthily. It made very little noise." Witness was then asked, "How was the one that was going south?" and replied, "I do not know. It was just making ordinary noise. It was not running at a very high rate of speed; probably three or four miles an hour. They were pulling out of the switch." Witness did not hear any bell ringing on the train that was pulling out. Witness was then asked at what rate the train was moving that struck them, and replied: "I do not know that. I should judge from the distance it knocked me, it must have been going at least eight miles an hour. I do not know, of course. I could not tell anything about that, because it just bumped up against us. I should think, though, about six or eight miles an hour." Witness indicated, by the distance to a certain object which he pointed out, that the train knocked them about fifteen feet.

It was shown by this witness, who was a physician, that he had examined the deceased, Dr. Martin, that day, for life insurance, and that deceased's hearing was good, while witness' hearing was defective, both ears being affected. The crossing where Dr. Martin was killed was in the main part of the city, and people were constantly passing over it. Two locals, running from Knoble to Wynne, did all their switching at Wynne. This occurred every day. The train had been doing

switching about two hours when the accident took place.

This was all the evidence bearing upon the question of contributory negligence. A dispassionate view of it, we think, can lead to but one conclusion, viz., had the deceased made that use of his senses which the law requires of one before going upon, or while crossing over, a railway track, his death would not have occurred, notwithstanding the negligence of the company.

As to contributory negligence.

We make this statement, knowing the settled law to be that the question of whether there is negligence or contributory negligence is always for the jury, unless the facts are undisputed, and susceptible of but one conclusion. *Richmond, etc., R. Co.* v. *Powers*, 149 U. S. 43; *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408; *Delaware, etc., R. Co.* v. *Converse*, 139 U. S. 469; *Washington, etc., R. Co.* v. *McDade*, 135 U. S. 554; *Kansas City, etc., R. Co.* v. *Kirksey*, 60 Fed. Rep. 999; *Hathaway* v. *East Tenn., etc., R. Co.*, 29 Fed. 489; *Seefeld* v. *Ry. Co.* 70 Wis. 216; *Hendricken* v. *Meadows*, 154 Mass. 599; *Detroit, etc., R. Co.* v. *Van Steinburg*, 17 Mich. 992; 2 Wood on Railroads, 1458, and cases cited; Beach, Contrib. Neg. 450–51; Thompson, Neg. 1239; *Artz* v. *Ry. Co.* 34 Iowa, 153.

It is equally as well settled, where the facts are undisputed, and there could not, in reason and fairness, be any difference of opinion as to the conclusion to be drawn from them, that the question of negligence or contributory negligence is one of law. *Grand Trunk R. Co.* v. *Ives*, *supra*; *Seefeld* v. *Ry. Co. supra; Mann* v. *Belt Ry. Co.* 128 Ind. 138; *Mynning* v. *Ry. Co.* 28 A. & E. Ry. Cases, 665; *Reading, etc., R. Co.* v. *Ritchie*, 102 Pa. St. 425; *Apsey* v. *Ry. Co.* 83 Mich. 440; *Emry* v. *Ry. Co.* 109 N. C. 589; 2 Wood, Railroads, 1458, and cases cited; *Straugh* v. *Ry. Co.* 65 Mich. 706; *Chicago, etc., Ry. Co.* v. *White*, 46 Ill. App. 446; *Gardner* v. *Ry.*

Co. 97 Mich. 240; *Grippen* v. *Ry. Co.* 40 N. Y. 34; *Grostick* v. *Ry. Co.* 90 Mich. 594; *Atchison, etc., R. Co.* v. *Priest*, 50 Kas. 16; *Laverenz*, v. *Ry. Co.* 10 N. W. Rep. 268; *Artz* v. *Ry. Co.* 34 Iowa, *supra*, and numerous cases there cited; Beach, Cont. Neg. secs. 447, 453; *Abend* v. *Ry. Co.* 111 Ill. 202; *Fernandes* v. *Ry. Co.* 52 Cal. 45; Thompson, Neg. sec. 1236.

The latter proposition finds practical application in the facts of this record. The uncontroverted proof is that deceased and his companion *walked over the west track and upon the main line, where they stopped and stood for a "second or moment," talking, waiting for the train on the east track to pass out, when the backing train struck them.* The language of the witness was: "*when we walked upon the track of the main line.*" This language shows conclusively that they knew, not only that they were upon the railway track, but the particular track upon which they were standing. True, there was some evidence that deceased was a stranger in the town, and not familiar with the location; but it was also shown that he had, but a short while before, passed over the same crossing, and the language of the witness quoted above indicates affirmatively that they knew where they were. There is no proof that they stopped, nor that they listened for the approach of a train before they walked upon the track of the main line. But it is contended by the appellee that there is also an absence of direct proof that they did not take these precautions, and that, as the burden is upon the appellant to show contributory negligence, he must fail for want of proof to overcome the presumption of due care.

Burden of proof of contributory negligence.

The burden of proof, as the court correctly told the jury, was upon the railroad to show contributory negligence, unless it was shown by evidence for the plaintiff. It would be difficult, if not impossible, for the railway company to show by direct testimony that deceased and

his companion did not use their senses of sight and hearing. Whether they did or not was a fact which might be said to be peculiarly within their knowledge. But every requirement of the law, as to the appellant, concerning the burden of proof has been met by the proof for appellee. This shows that a witness, whose hearing was and had been defective for three or four years, heard, at the distance of about twelve feet, the noise of the train that was passing out. This train was ringing no bell, and only making ordinary noise. Does it not follow, as an undisputable inference, that deceased, whose hearing was shown to be unimpaired, would also have heard at the same, or even greater distance, the noise of the train that struck him, had he listened? This is the only reasonable conclusion. For, although the witness says that the train which struck deceased was approaching stealthily, and gave it as his opinion that it could not have been heard, had they listened, yet he says he thought it was going six or eight miles an hour, which was about twice as fast as he thought the other train was going, which he did hear. His opinion, therefore, as to what he *could not have heard* had he listened, is shown to have been fallacious by what he actually did hear. Besides, the deceased could not depend upon another's senses to warn him of danger. His hearing was better than that of the witness, his companion. *Wiwirowski* v. *Lake Shore, etc. R. Co.* 124 N. Y. 420.

It is not negligence, *per se*, to be or go upon a railway track. That depends entirely upon the circumstances, having in view the dangers to be apprehended, and the precautions which are, or should be, used to avoid them. A railway track must always be regarded as a dangerous place. Although trains usually have their stated times, and come and go with more or less precision, still accidents and various contingencies cause delays and irregularity in the running of trains, so that

no one has the right to expect that a track may not be used by a passing train at any time. Hence, the track itself is a perpetual reminder of danger. *Mo. Pac. R. Co.* v. *Moseley*, 57 Fed. Rep. 921; *Little Rock, &c. R. Co.* v. *Cavenesse*, 48 Ark. 106; *Penn. R. Co.* v. *Matthews*, 7 Vroom, 531.

This is not the case of one who is suddenly and unexpectedly placed in a situation of danger which is calculated to bewilder the understanding and distract the senses. There was no danger from the train in front of deceased, for he could see that it was just passing out, and almost over the crossing. The noise it was making was but ordinary, and there is no reason why it should have prevented his listening for a train on the intervening tracks, for there was his only danger. True, the witness said that the night was so dark that they could not see more than three feet from them. But, if one sense was impaired, or rendered useless, the other should have been used with the greater diligence. *Fletcher* v. *Ry. Co.* 149 Mass. 127; *Wheelwright* v. *Boston, &c. R. Co.* 135 Mass. 225; *Cleveland Ry. Co.* v. *Terry*, 8 Oh. St. 570; *Central R. Co.* v. *Feller*, 84 Penn. St. 226; *Ry.* v. *Haslan*, 38 N. J. L. 147; *Steves* v. *Ry. Co.* 18 N. Y. 422; Thompson, Neg. secs. 431, 59, 1203, 51.

The case we have under consideration is that of one who voluntarily went upon a railway track without stopping, and without listening for the approach of a train, and stood there for a "second or moment, talking," until he was killed. The failure to take one or both of these precautions was the proximate cause of his death, and there was nothing in the proof to justify or excuse such failure. 2 Wood, sec. 319.

Some authorities hold that it is the duty of a traveler approaching a railroad crossing to stop, and look, and listen for the approach of a train before proceeding over. *Mo. Pac. R. Co.* v. *Moseley*, 57 Fed. Rep. 921;

Wilds v. *Ry. Co.* 29 N. Y. 315; *Schultz* v. *Ry. Co.* 5 Reporter, 376; *Penn. Canal Co.* v. *Bentley*, 66 Pa. St. 30; *Penn. R. Co.* v. *Beale*, 73 Pa. St. 507; *Philadelphia, &c., R. Co.* v. *Stinger*, 78 *id.* 219; *Penn. R. Co.* v. *Barnett*, 59 *id.* 259.

We have not laid down the rule thus strictly, but a person who would pass over a railroad at a crossing, or elsewhere, must do all that a man of ordinary care would do under similar circumstances to avoid any probable or possible danger from a passing train. Whether that requires stopping, as well as looking and listening, depends upon whether, without it, the danger to be apprehended could be so well ascertained and averted. *Railway Co.* v. *Cullen*, 54 Ark. 431; *Railway Co.* v. *Johnson*, 59 Ark. 122; *Railway Co.* v. *Tippett*, 56 Ark. 457. The law has fixed the above as the measure of duty, and a failure to exercise one or all of these precautions, as the occasion may demand, without any contravening circumstances, is negligence, pure and simple. Beach, Contrib. Neg. sec. 452; Whittaker's Smith, Neg. 401, note; Thompson on Neg. pp. 426, 1238.

A "second or moment" of time often costs a man his life. If the deceased, Dr. Martin, had but stopped for a moment before passing over the west track, or before going upon the main track, instead of after he had gone upon it, or had he but listened before going and stopping upon the same, doubtless he would have escaped; for, if he had stopped but a "second or moment" before going on the track, the train would have passed, or, if he had listened, he would have heard it. This was a sad and deplorable catastrophe, to be sure; but we are convinced that the proof for appellee raises such a presumption of negligence on the part of her intestate that, in the absence of any direct testimony to the contrary, it should be taken as conclusive, and so declared as a matter of law. *Baltimore, &c.,*

R. Co. v. *Whitacre*, 35 Ohio St. 627; Beach, Contrib. Neg. secs. 449–452; *Cotton* v. *Wood*, 8 C. B. 568; *Cornman* v. *Ry. Co.* 4 Hurl. & N. 781; Thompson on Neg. pp. 426, 1237; *Greenleaf* v. *Ry. Co.* 29 Io. 22; *Hathaway* v. *E. Tenn., &c., R. Co.* 29 Fed. Rep. 489; Shearman & Red. on Neg. sec. 56, and cases cited; *Penn. R. Co.* v. *Matthews*, 7 Vroom. 531.

We find no error in any of the instructions, except that those leaving the jury to determine whether the deceased was guilty of contributory negligence were abstract, and in that sense erroneous. *Railway Co.* v. *Tippett*, 56 Ark. 457.

Reversed and remanded.

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LITTLE ROCK & FT. SMITH RAILWAY COMPANY *v.* CONATSER.

Opinion delivered January 18, 1896.

CARRIER—LIABILITY FOR NON-SHIPMENT OF FREIGHT—To hold a railway company liable for failure to ship a certain lot of cotton, it must appear that the specific cotton was offered to the carrier for shipment, and that it refused to receive and ship the same.

DAMAGES—PROXIMATE CAUSE.—A common carrier is not liable for loss from inability to sell cotton in a certain market resulting from its failure or refusal to ship cotton from such market.

Appeal from Franklin Circuit Court, Ozark District.

JEPHTHA H. EVANS, Judge.

Dodge & Johnson, for appellants.

1. There is no evidence that appellee ever offered this cotton for shipment, and was refused.

2. The court erred in refusing to give the declarations of law numbered 1, 2 and 3 asked by defendants.

3. Lack of facilities for shipment was not the proximate cause of appellee's alleged damage. On the

contrary, the proximate cause was his failure or inability to sell the cotton. 95 U. S. 130; 139 *id.* 237; 56 Ark. 521; 2 Thomps. Negl. 1084; 99 Mass. 605; 50 N. W. 365; 29 Wis. 144.

4. Defendant's third instruction should have been given. 26 A. & E. R. Cas. 287; 12 N. Y. 245; 20 *id.* 48; 31 Ark. 476; 49 Oh. St. 489; 46 Miss. 458; 28 A. & E. R. Cas. 66; 79 Mo. 296; 33 Mich. 6; 40 Mo. 491; 1 Coldw. 272; 51 Mo. 11; 3 Tex. App. 8; 4 McCrary, 405; 99 Mass. 508. These cases show that unforeseen and unusual circumstances excuse delay. See, also, 87 Pa. St. 234.

5. The verdict is excessive.

Chew & Fitzhugh and *J. V. Bourland*, for appellee.

1. At common law carriers assume and are bound to do what is required of them in the course of their employment, and if they refuse, without some just ground, they are liable. 2 Kent, Com. p. 599. But their duties are now regulated by statute. Sand. & H. Dig. secs. 6193-4. If the pressure of traffic is such that the company might reasonably have anticipated and provided for, it is assumed they would not be released from the liability to *receive* goods on the ground of want of convenience. *Wallace* v. *Railway Co.* 17 W. R.; 1 Bosw. 77.

2. The verdict is not excessive. The failure to receive and ship was the cause of the loss,—the difference between the market price of the cotton at the time he purchased it and the market price for which he sold it at the time he was enabled to sell it in the same market. 1 Suth. Dam. p. 23.

3. Appellant was chargeable with the common and general knowledge that the price of cotton fluctuates, and that appellee would sustain loss from its failure of duty as carrier. Sand. & H. Dig. secs.

6193-4; 56 Ark. 288-9; 57 *id.* 117, 118; 58 *id.* 140. They were bound to receive this cotton. (3 Wood, Railroads, p. 1579), and liable for failure to furnish sufficient transportation. 25 S. W. 452. The instructions clearly state the law.

WOOD, J. The appellee alleges in his complaint that he had bought 192 bales of cotton in the town of Ozark, for which he paid the current market price, and that this cotton was bought for the express purpose of selling same to cotton buyers in said town, who were, in the months of November and December, buying cotton in said town, and paying the current market price. He alleges that he failed to sell to these cotton buyers because the appellant negligently refused and failed to receive said cotton, and to provide transportation for same, notwithstanding appellee had at divers times requested appellant so to do, and had offered and tendered said cotton, and had been ready and willing to pay to appellant any sum they might legally demand for receiving and transporting the same; and that, by reason of said failure and refusal of the appellant to furnish transportation for said cotton, appellee had been unable to sell the same, to his damage, as he alleged, in the sum of $375.89, for which he asks judgment. The appellant answered, denying all the material allegations, and set up matters in defense, which it becomes unnecessary to set out in the view we take of the case.

The appellee must fail for two reasons.

Liability of carrier for non-shipment of freight.

First. It is nowhere shown in the proof that the relation of carrier and shipper ever existed, or was intended or attempted to be created, between the appellant and appellee as to this 192 bales of cotton. Neither the appellee for himself, nor any witness on his behalf, states that this cotton was offered to the carrier for shipment, and that he refused to receive and ship same.

The most definite proof on that point is from the plaintiff himself, who says: "I would not undertake to say that we went down there, and tendered these 192 bales, and asked them to ship them; but I undertake to say we tried to ship cotton all along, and could not, and these 192 bales were on hand then." Again, the plaintiff says, with reference to this particular lot of cotton: "I don't remember whether I tried to ship this or not, but I remember I tried to ship some other. I don't remember whether this was in it or not, but we did finally ship that." True, there was proof that the railway had failed to furnish transportation for cotton, and that same had accumulated on the yards; but to hold the carrier liable for damages growing out of the failure to ship a specific lot of cotton, it should have been made to appear that the contractual relation of shipper and carrier existed, or was sought to be established, with reference to that specific cotton. On this proposition the proof is too vague and uncertain to be the basis of a judgment. The liability of common carriers of freight for a failure to furnish sufficient accommodation for the transportation of such property as they may be legally called upon to carry, (Sand. & H. Dig. secs. 6193–4; *Fordyce* v. *Nix*, 58 Ark. 140), attaches only in favor of those who come, or offer to come, into contractual relation with the carrier as shippers. This the appellee failed to do with reference to this particular cotton. The company, therefore, owed him no duty, and was subject to no liability.

Proximate cause of damages.

Second. But the real gravamen of appellee's grievance, as he has stated it in his complaint, is that, as the carrier failed to ship, he failed to sell, and, in failing to sell, his damage accrued. The complaint states, and the proof shows, that he bought the cotton for the express purpose of selling in Ozark, and not to ship away from Ozark. In other words, he states and shows that he

was a seller of cotton, not a shipper. Then how could he hold the carrier liable for a failure to ship when he not only did not ship, but never expected or intended to ship the cotton he bought? A plainer case for the application of the ancient maxim, "*Causa proxima, non remota, spectatur*," could hardly be stated or imagined.

Reversed and dismissed.

NEALE v. SMITH.

Opinion delivered January 18, 1896.

JURISDICTION—CIRCUIT COURT—An allegation in a complaint that plaintiff was damaged in a sum within the jurisdiction of the circuit court is *prima facie* sufficient to give that court jurisdiction, in the absence of any special plea of want of jurisdiction, or of any charge in the answer that the allegation of the amount of damage was not made in good faith.

DAMAGES—SCHOLARSHIP CONTRACT.—The measure of damages for failure to give the entire course of instruction called for by a scholarship contract, in the absence of any special damage, is the difference between the amount paid for the instruction received and that for which it was offered to give the whole course.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

The appellee alleged that for thirty-five dollars he procured from appellant a "scholarship" in the bookkeeping department of the Fort Smith Commercial College, with the express understanding that appellee could not attend said college longer than the term of three months from the 6th day of October, 1891, and that he should have the privilege, after the expiration of that time, of returning to said college at any future time

and completing the course of bookkeeping without any additional expense; that on the —— day of February, 1893, appellee did return to said college for the purpose of completing said course, and informed appellant of that fact, who refused to allow appellee to enter the school, unless appellee would take the additional course of shorthand, or pay an additional sum. Appellee alleges that this refusal was a breach of contract on the part of appellant, to appellee's damage in the sum of two hundred dollars. The complaint was filed in the Sebastian circuit court. The answer denied each allegation of the complaint, and set up that appellee entered the college on or about the 17th day of September, 1891, with the understanding that he was to have the privilege of attending the college until the end of that term, to-wit, until the 24th day of December, 1891. And that, in consideration of tuition covering said period, and books and stationery for his use, he paid the appellant thirty-five dollars; that appellee entered said college with the express agreement that he was not to attend longer than that term, and with no understanding that he should have the right to return and finish this bookkeeping course at any time thereafter. The appellant further says that appellee entered the college on the 17th day of September, 1891, and pursued his studies until the 24th of December, 1891, and that appellant furnished the necessary books and stationery for the use of appellee, as per contract with him.

On behalf of appellee, the evidence tended to show that the regular price for a scholarship in bookkeeping in the Fort Smith Commercial College was forty dollars for the course; that appellee was offered the term (whatever that may mean) for thirty-five dollars, including books and stationery, etc.; that he paid the thirty-five dollars, and received a receipt which read as follows: "Received of A. F. Smith thirty-five dollars

for tuition and necessary books and stationery to the bookkeeping department. (Signed) G. M. Neale." That appellee thought, when he paid the thirty-five dollars, that he was getting the scholarship, though he did not know that anything was said about the scholarship. A paragraph from the catalogue of the college for 1890-91 was read in evidence as follows: "*Bookkeeping Department. A complete business course, embracing spelling, grammar, arithmetic, business writing correspondence, commercial paper, commercial calculation, mercantile law, business ethics, commission, banking, double and single entry bookkeeping. Terms, payable on entering, giving the student the privilege of attending until he completes the course, $40.00. Books and stationery necessary to complete the course, $10.00. * * * * * * * Should a pupil not finish the course in the average time of sixteen weeks, his only additional expense would be $3.00 per week board.*" And on behalf of the appellant the evidence tended to show that the appellee paid appellant twenty-five dollars for being taught bookkeeping by appellant from September 17th until December 25, 1891, and that appellee paid appellant ten dollars for books and stationery; that appellee completed the course in book-keeping, except banking, and left just before Christmas, 1891, stating that he had learned all of the course he desired, and that he could not return to finish; that in the spring of 1893 he returned, and asked to be permitted to finish the course without paying more money. The sum of fifteen dollars was demanded as an additional charge for completing the course, which appellee refused to give, and went away, and brought this suit. It was shown that forty dollars was the usual price for the scholarship, exclusive of stationery, books, etc.; that appellee was not sold a scholarship, but was given reduced rates, because he was a teacher. It was shown

that a scholarship did not permit any student to go away and return at will. This privilege was granted for sufficient reasons, as a matter of grace, in some cases, but in this case appellant testified it was not asked, and that there was no agreement between himself and appellee that the latter might return and complete his course.

The appellant asked the court to instruct the jury that the amount in controversy was below the jurisdiction of the court, which was refused; and also asked that the jury be instructed that appellee had not made a case, and to return a verdict for defendant, which was refused,—to which proper exceptions were saved. The court of its own motion gave four instructions, and the last was as follows: "If plaintiff recovers, his measure of damages is the $35.00 paid for the scholarship."

John H. Rogers, for appellant.

1. This suit is in the nature of a common law action of assumpsit, and seeks to recover damages for a breach of a verbal contract. 42 Ark. 214; 55 *id.* 547. The court had no jurisdiction, the damages recoverable being under no circumstances more than $35.00. Const. Art. 7, sec. 40; 2 Ark, 170; *Ib.* 450; 5 *id.* 197; 45 *id.* 515; 3 *id.* 494; 33 *id.* 31; 12 Am. & E. Enc. Law, p. 301, note 2; 1 Elliott, Gen. Pr. sec. 2631, note 3. Jurisdiction can be raised by motion or instructions at any time, or by the court on its own motion. 1 Ark. 252; *Ib.* 275; 3 *id.* 495; *Ib.* 37; 18 *id.* 249; 35 *id.* 287; 12 Am. & E. Enc. Law, p. 306, note 5, and p. 307, note 1.

2. The amount alleged as damages is not the test of jurisdiction, but the real sum recoverable is. 1 Ark. 252; *Ib.* 275; 3 *id.* 494; 9 *id.* 466; 1 Sedg. Dam. (8 ed.) par. 370; 24 S. W. 1124; 10 Ark. 328; 25 *id.* 570; 63 Miss. 121; 7 Ark. 76; 12 Am. & E. Enc. Law, p. 309, note 1.

3. Plaintiff failed to make out a case, and the court should have given the second prayer asked by defendant. The allegation of the complaint, which is the *gist* of the action, is utterly without evidence to support it. 57 Ark. 402–461; 59 *id.* 66.

4. The finding of the jury is squarely against the first paragraph of instruction number three given by the court.

Jurisdiction of circuit court.

WOOD, J., (after stating the facts). The first question is, did the court have jurisdiction, and was the question of jurisdiction properly raised? The majority of the court is of the opinion that the allegation in the complaint that the appellee was damaged by the alleged breach of contract in the sum of two hundred dollars was a *prima facie* showing of jurisdiction, and that, in the absence of any special plea to the want of jurisdiction, or any charge in the answer that said allegation of the complaint was illusive, and made merely for the purpose of giving jurisdiction in fraud of the constitutional jurisdiction, the court was correct in not dismissing the cause for the want of jurisdiction. *Heilman* v. *Martin*, 2 Ark. 158; *Dillard* v. *Noel*, *id.* 449; *Watkins* v. *Brown*, 5 *id.* 197. I do not, however, concur in this view, under the allegations of the complaint. See authorities in note.

Measure of damages for breach of contract.

2. The court erred in instructing the jury that appellee's measure of damages in case of recovery was thirty-five dollars. Even if the proof sustained the finding of the jury that the contract was for a scholarship which embraced the whole course in bookkeeping, and even if it justified the finding that a scholarship gave to its owner the privilege of returning, *ad libitum*

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2 Am. & E. Enc. Law, p. 309, note 1; *Berry* v. *Linton*, 1 Ark. 252; *Fisher* v. *Hall*, *id.* 275; *Wilson* v. *Mason*, 3 *id.* 494; *Crabtree* v. *Moore*, 7 *id.* 74; *Collins* v. *Woodruff*, 9 *id.* 466.

et in invitum, to finish the course, still the contract, in that view, had been already partly performed by the appellant, in furnishing to appellee instruction in the whole course of bookkeeping except banking, and in furnishing him books and stationery. The appellee had already received the larger part of what his contract called for. Then, what was the proper measure of its breach? Clearly, the difference between what he had paid and what he would have had to pay to have the contract fulfilled as he understood it, *i. e.*, the difference between thirty-five and fifty dollars. According to the undisputed proof, when appellee returned to the college in the spring of 1893, and asked to be permitted to finish the course, by paying fifteen dollars he could have received all that he asked for, and all that he says he thought he was getting under the contract. This is his measure of damages, if he is damaged at all; for, while he alleged damages in the sum of two hundred dollars, there was no proof to show any special damages, and none were asked on the trial. But there is nothing in this record to show that appellee was damaged at all. We have been unable to discover the proof that the contract was really made as the appellee says he "thought" it was. Contracts cannot be established by suppositions. The appellee does not sustain the allegation of his complaint that, at the time the contract was made, "there was an express agreement that he should have the privilege of re-entering said college at any time after the expiration of three months, and completing the course of bookkeeping without additional expense." On the contrary, he shows that he and appellant had no conversation about the scholarship, and the positive proof on behalf of appellant is that he never sold appellee a scholarship, and never had an agreement with him "that he might return and complete this course at any time." It was in evi-

dence that the appellant said "his regular price for scholarship in bookkeeping was forty dollars for the course, but he offered the term for thirty-five dollars, including books and stationery." If it could be inferred from this that appellee purchased a scholarship, or that "term" and "scholarship," as used here, meant the same thing, still, there is no proof that a scholarship or term conferred upon its holder the right to come and go at will. On the contrary, it appears that the "average time" for a bookkeeping course was sixteen weeks, and the positive proof of the appellant was that "a scholarship did not permit any student to go away and return at his will." There was evidence that "the life scholarship" gave the privilege of attending "until he mastered his chosen department," but not that he could come and go just as it suited him. It conferred upon the owner "the privilege of returning and reviewing at any time," but not to complete an unfinished course at any time. The appellee sues for a breach of contract. His proof should not have come short of showing every essential element to constitute the breach. It should have shown both the terms of the contract and the manner of its breach. The burden was upon him on all these points, and he failed to meet it with evidence which is legally sufficient.

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

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SPARKS *v.* DAY.

Opinion delivered January 18, 1896.

URBAN HOMESTEAD—ARBITRARY SELECTION.—Where one entitled to a homestead in a part of his property situated within a town so selects it as almost to surround the residue of his property, completely shutting it off from any opening on the public street, to the injury of his creditors and without corresponding benefit to himself, such selection will be set aside.

Appeal from Cross Circuit Court.

JAMES E. RIDDICK, Judge.

N. W. Norton, for appellant.

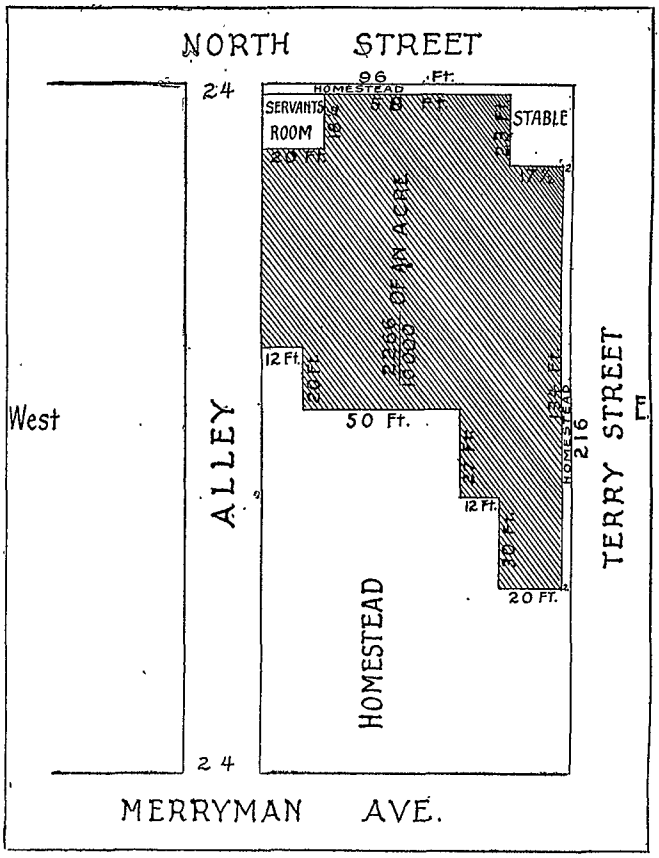
The law gives the debtor the right to select his homestead. There is no evidence that the selection in this case was capricious. Exemption laws are liberally construed, and courts should stand by the letter of the law. In 7 So. 333 and 63 N. W. 632 the selection by the debtor was set aside for irregularity and as being arbitrary. The law intends to protect the home and appurtenances; and, where some meandering is necessary to include these, it should be allowed. 44 Tex. 597. Governmental lines need not be followed. 22 Wis. 150. Courts will allow a departure from the line of lots in order to save the outbuildings and means of communication with them.

T. E. Hare, for appellee.

The selection in this case was injurious to creditors, leaving the remainder of merely nominal value. The selection of a homestead must be governed by some rule including the home and *contiguous* lands. 22 Ark. 401; 31 *id.* 468; 47 *id.* 453; Smyth on Homesteads & Ex. sec. 138; 70 Am. Dec. 352, note; 15 Minn. 116. Gerrymandering is not allowed (7 So. 333), nor irregular and capricious shapes. The disposition is to follow public surveys. Thompson, Homesteads & Ex. sec. 120; 77 Ill. 500; 12 Kas. 260; 9 *id.* 453, 461; 10 *id.* 552.

WOOD, J. The appellant, Sparks, filed a schedule before the clerk of the circuit court, claiming his homestead, and selecting it by metes and bounds. It is situated in the town of Wynne, and is of a value that required the area to be reduced to one-quarter of an acre.

In selecting his quarter of an acre, he took, as a part of it, a walk two feet wide to his stable, and a walk two feet wide from the stable to the servants' house. The parcel left after he made his selection abutted on an alley, but nowhere on a street. The following plat shows the shape of the homestead selected, and the residue after the homestead was laid off:



The part claimed as a homestead and the residue all belonged to Sparks, and constituted the entire east half of block five in the town of Wynne. The description

of his homestead as contained in his schedule is as follows: "Commencing at the southwest corner of the east half of block five, thence east 96 feet, thence north 216 feet, thence west 96 feet, thence south 20 feet, thence east 20 feet, thence north 18 feet and 6 inches, thence east 58 feet, thence south 23 feet, thence east 17 feet and 6 inches, thence south 134 feet, thence west 20 feet, thence north 30 feet, thence west 12 feet, thence north 27 feet, thence west 50 feet, thence south 134 feet to point of beginning, all in the town of Wynne, Arkansas." The homestead, as thus selected, almost surrounds the residue, cutting it off from access to any street, and leaving only an outlet of sixty-two feet on an alley on the west side thereof. It was in proof that this manner of the selection and the peculiar shape in which it left the residue, making it inaccessible to the street, would make it of little value; that in this shape it would probably be worth one hundred and forty or fifty dollars, but that, if the homestead had been selected so as to give a street front to the remainder, it would be worth two or three times that amount, and would not reduce the value of the homestead. The appellant said that he would not have had much objection to laying off his homestead so as to give a street front of fifty-eight feet on the north to the parcel left, but preferred, if the law would allow him, to take it the way it had been designated.

The court below found that the homestead was "selected and laid off in an arbitrary, capricious and unreasonable shape, to the injury of plaintiffs, and without any corresponding benefit to the defendant," and declared such selection of no effect and void, and thereupon set aside and quashed the supersedeas, and gave leave to defendant to file another schedule. The appellant seeks to reverse the judgment.

The supreme court of Alabama, in *Jaffrey* v. *McGough*, 88 Ala. 648, uses this language, which applies to this case, and exactly expresses our views: "An inspection of the remarkable diagram of the homestead attempted to be selected in this case,—running, as its boundaries do, in a zigzag direction, and shifting towards every possible point of the compass; shapeless in its capricious irregularity, and without apparent design except to take unjust advantage—a most casual inspection of it, we repeat, is the surest demonstration, that such a thing cannot he tolerated by the law." Mr. Thompson, in his work on Homesteads and Exemptions, says there is a "growing disposition on the part of the courts, in determining what is to be included in the homestead, to take into consideration the legal sub-divisions of land, such as public surveys and recorded town plats." Thompson, Homest. & Ex. sec. 120. And Mr. Waples, we think, announces the just and correct doctrine, when he says "that, in the absence of any statute prescribing the form of the homestead, courts ought never to permit a selection manifestly made in disregard of the rights of others;" and he continues: "Creditors are interested in the parts of a tract which are not exempt; and it never was the intent of the legislature to cut them off from their remedy against non-exempt property, while protecting a limited quantity as a homestead. While the confinement of a homestead to the regular shape of * * * city lots is not a rule, because not everywhere practicable, it may be laid down as a rule that one authorized to select, declare, and record a homestead with a quantitative limitation cannot be permitted to carve it out of his land in such form as to leave the remainder worthless, or to impair its value, so that creditors shall be injured." And we add, es-

pecially would that be the case where it is shown, as here, that the meandering was of no benefit to the homestead claimant. Waples, Homest. & Ex. pp. 158, 160.

It follows that the judgment of the lower court is correct, and must be affirmed. So ordered.

THOMAS *v.* SYPERT.

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Opinion delivered January 18, 1896.

TRUST—PURCHASE BY ADMINISTRATOR OF DECEDENT'S LANDS.—Where an administrator purchased land of his decedent's estate at a commissioner's sale, he will be held a trustee in favor of decedent's minor heir, toward whom he stood *in loco parentis* by reason of his marriage to the latter's mother, and of his receiving the latter into his family.

LACHES—ENFORCEMENT OF TRUST.—Delay on the part of an heir for the period of 15 years after attaining his majority before suing to set aside a purchase of his ancestor's land by the administrator will bar relief where the administrator during that time was openly and continuously in adverse possession, within the knowledge of the heir.

Appeal from Howard Circuit Court in Chancery.

JOHN H. CRAWFORD, Special Judge.

James Y. Thomas brought suit in equity against R. T. Sypert and others to quiet title to certain land. From a judgment dismissing the complaint, plaintiff has appealed.

The facts in this case are stated in the opinion of the circuit court, which is as follows:

"Francis M. Thomas died in 1863, seized and possessed of an undivided two-thirds interest in the lands in controversy in this action. By his last will he devised said lands to Lydia R. Thomas, his wife, and to James Y. Thomas, the plaintiff, his son, in joint tenancy. The remaining one-third interest in said lands belonged to Wm. C. Sypert, who, in 1865, married the said Lydia R. Thomas, and in 1866 was, by the probate court of Hempstead county, Arkansas, duly appointed as administrator *de bonis non* with the will annexed of the estate of the Francis M. Thomas, deceased, and he duly qualified and acted as such, until he died,—at any rate he never made any final settlement, and was never finally discharged, so far as the probate records show.

The lands sued for, or a part of them, were at the time of the death of the said Francis M. Thomas, occupied by him as a homestead, and after his death continued to be occupied by his family, up to the time of the marriage of his widow to the said Wm. C. Sypert, and after that time were occupied by the family of Wm. C. Sypert as a homestead until his death, which occurred in 1891. From the time of the marriage of the plaintiff's mother, until about 1877, the plaintiff lived with his mother and step-father, as a member of the family, and was treated in all respects as one of their own children. The defendants to this action are the children and grandchildren of the said Wm. C. and Lydia R. Sypert, except the Central Fair Association, which is a corporation. At the time of the death of the said Francis M. Thomas, the lands in controversy were situated in Hempstead county, Arkansas. Since the formation of Howard county, in 1873, they have been in that county.

"In 1872, in a cause then pending in chancery in the circuit court of Hempstead county, wherein the said Wm. C. Sypert, *in propria persona*, and as administrator of Francis M. Thomas, deceased, with the will annexed, and Lydia R. Sypert, were plaintiffs, and the plaintiff in this action (then a minor), by his guardian *ad litem*, and others were defendants, it was ordered and decreed by said court that the interest of the estate of the said Francis M. Thomas, deceased, in and to the lands in controversy in this action, be sold for partition, and to pay the debts of said estate, and Simon T. Sanders was appointed as a commissioner to sell, not only the interest of said estate, but also the interest of said Wm. C. Sypert in said lands. At the sale, under and by virtue of said decree, the said Wm. C. Sypert became the purchaser, and in 1873 the said sale was confirmed by the circuit court, and a deed was properly executed, delivered and recorded. After his purchase, the said Wm. C. Sypert treated the lands in controversy in all respects as his own, paying taxes, making improvements, and executing sales, openly and above board, and, in other words, holding the same adversely to all the world. On the 3d day of December, 1890, he sold a portion of the said lands to the Central Fair Association, executing a warranty deed therefor, and holding a vendor's lien for the purchase money, a part of which remains still unpaid. The other defendants claim an interest in the said lands by deed from said Wm. C. Sypert. Some of them are minors, and defend here by guardian *ad litem*. It is conceded that none of the defendants have held any of said lands long enough to have title by adverse possession, unless their possession can be tacked to that of Wm. C. Sypert. In other words, the statute must have been set in motion in favor of said Wm. C. Sypert. Wm.

C. Sypert died in 1891, and Lydia R. Sypert in 1875, about 18 years before the beginning of this suit.

"First. The first question presented arises on the intervention of certain probate judgment creditors of said Francis M. Thomas, deceased, who have been granted leave to intervene in this cause. They maintain their right to subject the land in controversy to the payment of their probated claims. Have they exercised such diligence as will now entitle them to insist upon such relief? Lands in the hands of an administrator are assets only for the payment of debts. Before they can be sold, the personal property must first be exhausted. (Mansfield's Digest, secs. 170, 171.) It seems to be admitted that there was a large amount of probated debts against said estate, and that a considerable part of it, at least, was compromised and paid off by said Wm. C. Sypert at from 10 to 25 cents on the dollar. The creditors whose claims remained unsettled should have required the administrator to account for the personal property that should have been in his hands. They then might have proceeded against the landed interest of the estate. They claim that they are not barred by limitation or laches for the reason that the lands in controversy were, at the death of said Francis M. Thomas, deceased, his homestead, and afterwards the homestead of his family; that, upon the marriage of his widow to the said Wm. C. Sypert, who himself owned the remaining one-third interest in said lands, thereafter his (Sypert's) homestead interest was impressed, not only upon his one-third interest, but upon the entire interest in said land, including the two-thirds interest in said land in controversy, and that the same was not subject to sale for the payment of the debts of the estate of said Francis M. Thomas, deceased, until after the death of the said Wm. C. Sypert. The act of 1852 (Gould's Digest p. 504, secs. 29, 30)

governs the homestead rights of the family of said Francis M. Thomas, deceased. That act exempted the homestead from sale, not exceeding 160 acres, "during the time it shall be occupied by the widow, or child or children of any deceased person," who was then living, entitled to the benefits of that act. See *Johnston* v. *Turner*, 29 Ark. 280–281.

"I hold that the words 'child or children' in said act should be construed to mean 'minor child or minor children.' It is not very clear, from the evidence, how many acres the two-thirds interest of the Francis M. Thomas estate covered at the time of his death. It must, however, have been some 400 or 500 acres. The excess over 160 acres could clearly have been sold to pay the debts of the said estate over a quarter of a century ago. The homestead rights as to all of the lands terminated on the death of the widow and the majority of the plaintiff, both of which events occurred over fifteen years before this action was commenced. All of the said lands then were subject to sale to pay the debts of said estate. The interest in said lands belonging to the estate of said Francis M. Thomas, deceased, could not in any case be held by said Wm. C. Sypert as a homestead against the claims of the creditors of said estate. It was held in *Mays* v. *Rodgers*, 37 Ark. 155 (quoting the syllabus), "that a delay for ten years after the grant of administration, without showing any hindrance or proper cause for it, is unreasonable, and discharges the lien upon the real estate." See, also, *Stewart* v. *Smiley*, 46 Ark. 373; *Graves* v. *Pinchback*, 47 Ark. 470.

"In my opinion no sufficient excuse for the delay is shown to exist in this case, and the rights of the interveners are consequently barred by the lapse of time.

"2. The next question involves the right of the plaintiff, under the evidence in this case, to recover. I hold that Wm. C. Sypert, having married the plaintiff's

mother, administered upon his father's estate, and received the plaintiff into his family as one of his own children (he then being a minor of tender years), stood, as to him, *in loco parentis*. *Hindman* v. *O'Connor*, 54 Ark. 627, 639; *Gillespie* v. *Holland*, 40 Ark. 28, 32; *Million* v. *Taylor*, 38 Ark. 428. He was a trustee, and not permitted to traffic and speculate in his step-son's patrimony. He was, by law, forbidden to purchase property, and hold it for his own benefit, where he had a duty to perform to the owner of said property which was inconsistent with the character of a purchaser on his own account, and for his own use. *Imboden* v. *Hunter*, 23 Ark. 622, 626; *Mock* v. *Pleasants*, 34 Ark. 63, 72; *McNeil* v. *Gates*, 41 Ark. 264, 269; *Culberhouse* v. *Shirey*, 42 Ark. 28; *Graves* v. *Pinchback*, 47 Ark. 470; *Woodard* v. *Jaggers*, 48 Ark. 248; *Clements* v. *Cates*, 49 Ark. 242, 245; *Gibson* v. *Herriott*, 55 Ark. 85, 91. And this is true, regardless of the good faith of the transaction. *Imboden* v. *Hunter*, 23 Ark. 622; *McGaughey* v. *Brown*, 46 Ark. 25; *Hindman* v. *O'Connor*, 54 Ark. 627; *Gibson* v. *Herriott*, 55 Ark. 85, 91. The fact that Wm. C. Sypert bought from the commissioner, under a decree of court in a case brought by himself, will not make his attitude different from that of any other trustee purchasing property, towards the owner of which he stands *in loco parentis*. See *Marchbanks* v. *Banks*, 44 Ark. 54. I hold that this sale of Wm. C. Sypert was voidable, not void. *Town of Searcy* v. *Yarnell*, 47 Ark. 269; *Jones* v. *Ark. etc. Co.* 38 Ark. 17.

"Did the statute of limitations run against the plaintiff's cause of action prior to the commencement of this suit? It is a general rule that the statute will not run against the trustee of an express trust. There is, however, an exception to that rule, equally as well established as the rule itself, that where the trustee openly renounces his trust, and holds the trust property notori-

ously and adversely against the *cestui que trust* and all the world, and does so without successful fraud and concealment, and the beneficiary in the trust is *sui juris*, and in possession of facts sufficient to put him upon inquiry as to his rights, then the law will presume that he has full knowledge of all facts that proper inquiry would disclose affecting his interests, and from that time the statute will run against his right of action. "Actual notice of the facts upon which an action may be sustained is not necssary to put the statute in motion," as was held in the late case of *Bland* v. *Fleeman*, 58 Ark. 84. As was said by the United State circuit court of appeals for the eighth circuit, in the case of *Percy* v. *Cockrill*, in the 53 Fed. Rep. 872, 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 led. Where a person has sufficient information to lead him to a fact, he shall be deemed conversant with it." Plaintiff testified that he lived with Wm. C. Sypert from the time he was eight years old until his (plaintiff's) marriage in 1877; that he knew nothing of any sale or anything else about his father's estate until about that time. He was then informed by said Wm. C. Sypert that his father's estate was insolvent, and did not pay 25 cents on the dollar, and had been sold and purchased by him (Sypert). Plaintiff states further that he had heard people say that the land around Nashville was once known as the "Thomas Place," but he did not know what title his father held, the amount, nor the numbers, nor anything else about it. He did not state when he heard these rumors. We are therefore left to presume

that he heard them all along, from the time he reached his majority. This information shows plaintiff to have been in possession of facts with reference to his father's estate sufficient to have put him upon inquiry. The will was regularly probated, and was a public record. His ignorance of its existence amounts to nothing. He was an only child. If his father died intestate, he was the heir to all that he possessed. After the payment of his debts, his position was just as strong without the will as with it. It was held in *Gibson* v. *Herriott*, 55 Ark. 85, 92, that, 'while a purchase by a trustee may be avoided, it may be cured by unreasonable and unexplained delay after the heirs became of age. Courts of equity have always discouraged laches and delay. The door of equity cannot forever remain open.'

"The fact that the administration on the estate of Francis M. Thomas, deceased, remained unclosed in the hands of the said Wm. C. Sypert will not necessarily suspend the operation of the statute of limitations in plaintiff's favor. It seems that each particular case must stand or fall upon its own facts. In the case of *Bland* v. *Fleeman*, already cited, our supreme court say: "The fact that the administration had not been closed was no impediment to the plaintiff's right of action. We can see no reason why they (the heirs) could not, and should not, have sued before as well as after the 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."

"I hold that the commissioner's deed to said Wm. C. Sypert was color of title, showing the hostile character of his holding, and would in time ripen into a perfect title. It was 'a deed which upon its face shows treason to the lord of the fee.' It was a proclamation to all the world, as from the housetops, that Wm. C. Sypert claimed to own in his own right the land described in

his deed. The plaintiff reached his majority June 4, 1878, and the statute of limitation would then commence to run against his right to recover the land, unless the concealment of his trustee, and his want of knowledge of his rights, were sufficient to suspend its operation. I am unable so to find. The plaintiff's complaint will be dismissed at his costs."

Tompkins & Greeson and *D. B. Sain*, for appellant.

1. By his purchase at his own sale, the administrator became a trustee. Such sales are against public policy. 4 How. 599; 23 Ark. 623; 46 *id.* 25; 34 *id.* 72; 55 *id.* 91; 38 *id.* 17; 33 *id.* 587; 30 *id.* 44; 27 *id.* 643; 54 *id.* 539. The rule applies to partition sales. 49 Ark. 242; 57 Ill. 389; 41 *id.* 269. And to sales made under decree of court. Bigelow on Fraud, p. 244; Story, Eq. (12 ed.), secs. 321, 323. It is not necessary to show fraud or concealment, in order to avoid the sale, except in so far as it may affect the question of laches. 55 Ark. 92; 33 *id.* 802.

2. An administrator is the trustee of an express trust, and, until he closes the administration, or renounces the trust, the statute of limitations does not run. 28 Ark. 20; 46 *id.* 45; 48 *id.* 248. If *Bland* v. *Fleeman*, 58 Ark. 84, correctly states the law, the judgment in this case should be reversed, for here *actual* fraud and concealment are shown. No time bars a direct trust between trustee and *cestui que trust.* 3 Johns. Ch. 216; 130 U. S. 505. When relief is asked upon the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of defendant until the discovery of the fraud. 120 U. S. 136; Wait, Fr. Conv. secs. 290–1; 21 Wall. 349; 15 Blatch. 541. If the fraud is concealed, the statute will not run. 46 Ark. 35; 20 Johns. N. Y. 33; 2 Munf. Va. 511; 1 Mills, (S. C. Law), 296; 4 Humph. (Tenn.),

212; 15 Blatch. 541. Where the party remains in ignorance of the fraud, without any fault or want of diligence or care on his part, the statute does not run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. 120 U. S. 130; *Ib.* 684. Where there is a relationship of confidence between the parties, the party relying upon adverse possession or the statute of limitation must show that the *cestui que trust had notice of all the facts. It is the trustee's duty to disclose fully.* 118 Mass. 153; 8 Watts, 12; 28 Miss. 597; 1 Bigelow, Fraud, 27 to 31 and 321–3; 20 N. H. 187; 11 Oh. St. 194; 89 Am. Dec. 274; 18 Ark. 507. Thomas must not only have known the facts, but how a court of equity would deal with them. 1 Bigelow, Fraud, 322; Perry, Trusts, 851; 4 Lawson, Rem. sec. 2036. Where parties occupy a relation of trust and confidence, and the circumstances show that one has reaped undue advantage, it is fraudulent. 30 N. Y. S. R. 478; 1 Rice, Civ. Ev. p. 140.

3. The record of the deed to Sypert was not notice to Thomas. 26 Wis. 614; 14 Am. St. 235; 28 Kas. 298; 55 Ark. 104; 74 Ala. 546.

4. The possession by Sypert was lawful, not adverse. 18 Ark. 507; 9 Am. St. 528.

5. The defendants being volunteers no question of *bona fide* purchasers arises. 38 Ark. 26; Bigelow, Fraud, p. 401; 7 Johns. Chy. 65; 44 Ark. 53; 3 *id.* 104. The Fair Association had not paid the purchase money, and took with notice of the trust. Devlin on Deeds, sec. 1000; 87 Mich. 140; 303 Mo. 414; 29 Ark. 650; 50 *id.* 322; 2 Pom. Eq. secs. 627–8.

W. C. Rodgers, for appellees.

1. Sypert had an interest in the land, and purchased to save his interest from being sacrificed. The sale was not void. It was merely voidable. 143 U. S. 214; 55 Ark. 85; 54 *id.* 627; 58 *id.* 84; 46 *id.* 25, 32; 48 *id.* 248, 250. Sypert expressly repudiated the trust in the most effective way known to the law. 46 Ark. 25, 34; 50 *id.* 141, 152. Having bought the land, and held possession more than twenty years under his deed, he must be held only a constructive or implied trustee, and trusts arising by operation of law, or constructive trusts, are subject to the operation of the statute. 46 Ark. 25, 35; 54 *id.* 627; 10 Pet. 177; 23 How. 190; 58 Ark. 84, 97; 23 *id.* 363.

2. Concealment by mere silence is not enough. There must be some trick or connivance intended to exclude suspicion and prevent inquiry to avoid the statute. The party must use diligence to detect the fraud and unearth it, especially where the records proclaim every fact of which he claims to be in ignorance. Thomas is barred by laches. 58 Fed. 470; 136 U. S. 392; 28 Fed. 275; 101 U. S. 129; 57 N. W. 1121; 70 Iowa, 86; 143 U. S. 224; 21 Neb. 413; 28 *id.* 479; 149 U. S. 231; 136 U. S. 386; 55 N. W. 302; 40 Fed. 774; 2 Wall. 95; 51 Fed. 774; 14 *id.* 753; 50 Ark. 141; 53 Fed. 872; 95 U. S. 157; 158 *id.* 172. A party cannot be wilfully blind, nor wantonly ignorant, and then reap the fruits of ignorance. 53 Fed. 415, 418. Having notice of facts sufficient to put him on inquiry, he cannot remain in studied ignorance of what inquiry would lead up to. 11 Fed. 563; 53 *id.* 415, 521.

3. Creditors might have asserted their rights, if aggrieved, in due time, but not after ten years. 37 Ark. 155; 46 *id.* 373-6. For twenty years Thomas was *sui juris*, and after long lapse of time the law presumes a

grant. 120 U. S. 120; 50 Ark. 141, 155; 21 Wall. 147.

4. It is not necessary that possession, to be adverse, must be rightful. The term implies *hostile* possession. 34 Ark. 534; 13 How. 472; 50 Ark. 141; Tyler, Eject. 863. Sypert held under color of title for more than the full period of limitation. 53 Ark. 547; 50 *id.* 141; 13 How. 472; 20 S. E. 831; 34 *id.* 219.

5. Where one co-tenant is in possession of the whole estate, claiming under a deed purporting to convey the entire estate, he will be deemed to have ousted his co-tenants. Freeman Co-ten. sec. 223; 119 Ind. 95; 104 *id.* 227; Wood, Lim. sec. 266; 3 How. 974; 118 Ill. 459; 85 Ky. 155; 27 S. W. 190.

6. Courts of equity always discourage laches and delay. 3 Brown, Ch. 640. And after the lapse of years, and the death of the party assaulted, they refuse, for the sake of peace and stability of titles and property, to open up questions long acquiesced in, and enforce a claim which is stale. 46 Ark. 25; 7 How. 234; 40 Fed. 774; 7 *id.* 179; 124 U. S. 188; 15 Fed. 753; 17 Wall. 366; 127 U. S. 388; 85 Ky. 572; 21 Wall. 178; 105 U. S. 391; 136 *id.* 386; 138 *id.* 486; 8 How. 231; 18 Wall. 509; 10 Pet. 248; 10 Wheat. 173; 102 U. S. 465; 19 Ark. 16; 8 Utah, 380; 41 Mich. 583, and many others.

7. Our statute makes no exception in favor of infants. 6 Ark. 14; 16 *id.* 671; 104 Ind. 223; Wood on Lim. sec. 252; 4 Humph. (Tenn.) 312; 51 Ark. 453; 13 *id.* 291.

As to purchase of decedent's lands by administrator.

RIDDICK, J., (after stating the facts). We agree with the circuit court in holding that the right of action of appellant is barred by the statute of limitation and the lapse of time. Wm. C. Sypert, the ancestor of appellees, purchased the land in controversy at a sale ordered by a court for partition, in the year 1873. The sale was duly confirmed, and a deed made in pursuance

thereto. Under this sale and conveyance, Sypert took possession of the lands, and held the same openly, adversely and continuously under a claim of title from the year 1873 till the time of his death, in 1891, and this action was not commenced until 1893, twenty years after Sypert took possession of the land. This open, notorious and adverse possession of the land was, in law, notice to all the world of Sypert's possession and claim of ownership, but the appellant had also actual notice of these facts. He also knew that his father had at one time owned or claimed the land, for, when questioned on this point, he said: "I had heard people say that the land around Nashville was once known as the "Thomas Place," but I did not know what title my father held, the amount, or the numbers," etc. Again, referring to this matter, he said: "In my former deposition I said all I knew about the land in controversy being sold was what Wm. C. Sypert told me, just before I was married, that he had bought all the property. I did not know what kind of a sale was made, nor when it was made, nor how the sale was made." This conversation with Sypert, in which he told plaintiff of the purchase, occurred before plaintiff was married, and plaintiff was married before he became of age. The testimony of plaintiff himself, we think, shows that, before he became of age, he knew that the land in controversy had been a portion of his father's estate, and that afterwards it had been purchased by Sypert at a judicial sale of some kind. But, apart from this testimony, it would be strange if appellant, a man of fair intelligence, who was nearly nine years of age at the time of the marriage of his mother with the ancestor of appellees, and who lived till grown on the land in controversy, in the midst of neighbors and acquaintances, most, if not all, of whom knew, for it was a matter of common knowledge in the neighborhood that the land had been the home-

stead and a part of the estate left by his father,—it would be exceedingly strange if he remained ignorant of that fact till long after he became of age. But if he knew that this land had belonged to the estate of his father, and we think there can be no doubt that he had this knowledge, this was sufficient to put him on an inquiry which, if properly pursued, would have led to the discovery of all the other matters essential to the establishment of his rights. That he did not know the exact nature of his father's title, or the numbers of the land, was a matter of no consequence, for this could have been ascertained from the public records of the county. These records would also have fully informed him of the nature of the title under which Sypert claimed the land. He must have known of these facts before he became of age, and yet, with nothing to prevent him from bringing suit, he waited fifteen years after becoming of age, and until Sypert was dead, before commencing his action.

The evidence impresses us with the belief that this long delay in asserting his rights was occasioned, not by reason of any concealment on the part of Sypert, or from ignorance of the facts on the part of appellant, but that it was due, either to ignorance of the law,—which, according to an old maxim, excuses no one,—or, what is more probable, to the natural repugnance felt by appellant against harassing, by a law suit, the old age of a man who had adopted him as a son, had long stood towards him in the relation of a parent, and in whom, to use his own language, he "had the greatest confidence." While this delay was not discreditable to appellant, attesting as it does a due regard for his adopted father, it was yet fatal to his right to recover.

The defects, whatever they may have been, that existed in the title of appellees are now cured by lapse of time, and covered by the mantle of repose which the

statute places over rights long openly, adversely and peaceably asserted. "The law wisely holds that there shall come a time when even the wrongful possessor shall have peace." *Cunningham* v. *Brumback*, 23 Ark. 338.

When enforcement of trust barred by laches.

The fact that Sypert was the administrator of the estate of appellant's father, and also stood *in loco parentis* towards appellant, can now avail nothing, after so great a lapse of time; for, by the purchase and adverse possession of the land; Sypert had, so far as it was concerned, openly repudiated the trust. The rule is that "the statute begins to run from the time that the trust is openly repudiated or disclaimed by the trustee." Lawson's Rights & Rem. sec. 2036; *Bland* v. *Fleeman*, 58 Ark. 90; *Gibson* v. *Herriott*, 55 Ark. 92; *Hindman* v. *O'Connor*, 54 Ark. 645; *McGaughey* v. *Brown*, 46 Ark. 34; *Merriam* v. *Hassam*, 14 Allen, 516; S. C. 92 Am. Dec. 795; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; S. C. 11 Am. Dec. 172; *Wood* v. *Carpenter*, 101 U. S. 139.

The learned special judge who heard this cause in the circuit court having favored us with an opinion correctly stating the facts and the law of the case, we concur in the same, and refer to it for a fuller discussion of the questions arising in this case. For the reasons stated in that opinion, as well for those given above, the judgment of the circuit court is affirmed.

BATTLE, J., took no part in the determination of this cause.

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APPLETON v. STATE.

Opinion delivered January 25, 1896.

HOMICIDE—JUSTIFICATION.—The attempt of an officer to arrest one without first informing him that he held a warrant, and of his intention to arrest him, does not justify the latter in killing the officer, where he knew that he had the warrant, and that his purpose was to arrest him.

EVIDENCE—DECLARATIONS—RES GESTAE.—Declarations of the prisoner's wife at the time of the homicide, begging him not to shoot any more, and calling upon another to interfere, are admissible, in connection with the prisoner's warning against interference with him, as throwing light upon the motives and conduct of the prisoner.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

STATEMENT BY THE COURT.

Fisher Appleton was indicted and tried for the murder of one Louis Richardson. Richardson was a deputy constable, and had in his possession a warrant for the arrest of Appleton on a charge of grand larceny. At the time he was shot, Richardson was attempting to execute this warrant. The defendant claimed that the killing was done in self defense. He testified that Richardson, without provocation, shot at him, and that, to protect himself, he fired upon and killed Richardson. The jury returned a verdict of guilty of murder in the second degree, and assessed the punishment at twenty-one years' imprisonment in the state penitentiary.

R. D. Campbell and *F. T. Vaughan*, for appellant.

1. Appellant's wife was not a competent witness against him, and her declarations, though made in his presence, were not admissible. 13 Ind. 91; Rapalje on Law of Witnesses, sec. 157, p. 271; 3 Coldw. 414; 19

Cal. 275; 1 Gr. Ev. (13 ed.) 334, note *a*; 39 Ark. 221. The wife being incompetent, her declarations were inadmissible. Wharton, Cr. Ev. 294; 30 Mich, 431; 26 *id.* 113.

2. The court in its charge called the attention of the jury too prominently to the "safety of the officer." 59 Ark. 417.

3. The court erred in refusing to charge the jury that "when one is charged with having committed a crime, and a warrant is issued for his arrest, it is the duty of the officer serving the warrant to inform the party about to be arrested of his intention to arrest him." Also in refusing to charge that "an officer making the arrest shall use no unnecessary force or violence, and an arrest may be made in such a wanton and unnecessary manner as to justify the accused in resisting the arrest." This is statutory law, and there was evidence upon which they could have been based.

4. There was testimony that Richardson fired the first shot, and the following instruction should have been given: "If you believe that, at the time defendant caused the death of Richardson, he (defendant) was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from deceased, and that it was necessary for him to fire the shot which caused Richardson's death, in order to avoid the death or great bodily harm, which was apparently imminent, you will find the defendant not guilty," etc. 50 Ark. 139.

5. The court erred in refusing other instructions asked by defendant.

E. B. Kinsworthy, Attorney General, for appellee.

1. The declarations of the wife in the presence of defendant were admissible as part of the *res gestæ*. Rice on Ev. vol. 3, pp. 126–7; 1 Gr. Ev. sec. 108; 45 Cal. 137; 30 Ala. 24.

2. Defendant knew that deceased had come to arrest him, and had a warrant. In a case like this it was unnecessary for the officer to show his warrant. 27 Cal. 572.

3. The court fully declared the law, and the instructions asked by defendant were properly refused.

4. The law of self-defense was properly given the jury.

R. D. Campbell and *F. T. Vaughan*, in reply.

3 Rice, Ev. pp. 106–7 and 1 Gr. Ev. sec. 108 merely lay down the general, abstract principles of law governing *res gestae*. "When a wife's communication to her husband is overheard, and it elicits a reply from him which is admissible in evidence, her declaration can be proved," on the theory of shedding light on his reply. But, except for this purpose, her declarations are of no effect. 1 Coldw. (Tenn.), 130; 3 *id.* 414; see Whart. Cr. Ev. 270; 60 Ark. 450; 3 Rice, Ev. 123.

As to justification of homicide.

RIDDICK, J., (after stating the facts.) We do not discover any error, either in giving or refusing instructions, that would justify us in reversing the judgment of the circuit court. Although Richardson attempted to make the arrest without first informing the appellant of the warrant and the intention to arrest him, yet this did not justify the defendant in shooting the officer. The testimony of the appellant himself shows that he knew that Richardson had a warrant for him, and that his purpose was to arrest him. He should therefore have submitted to the arrest. Appellant testified that he intended to do this, but that Richardson, without attempting to arrest him, commenced at once, and without provocation, to shoot at him, and that, to protect himself, he returned the shot, and killed Richardson. If this testimony was true, the killing was justifiable; for one may defend himself against the wrongful assault of

an officer, as well as against the assault of a person who is not an officer. But this question was fairly submitted to the jury, and their finding was against appellant. There was evidence amply sufficient to support the verdict, and we cannot disturb it.

When declarations of defendant's wife part of *res gestae.*

During the progress of the conflict, which resulted in the death of Richardson, there were several shots fired by the appellant, and two shots fired either by Richardson or his assistant, Simms. A witness was allowed to testify that, while these shots were being fired, the wife of appellant, who was present, called to witness "to come there, and not let Fish shoot any more;" that she also said to appellant, "Quit! Don't shoot!" That, thereupon appellant ordered witness "to let him alone, and fired one more shot.". It is contended that it was error to admit these declarations of the wife. At the time they were uttered she was endeavoring to stop the conflict, and to prevent further shooting. They were uttered in the presence and hearing of the appellant, had reference to him and his conduct, and were in part addressed to him. They tended to throw light upon his motives and conduct, and to explain his subsequent words when he said to this witness, to whom his wife had appealed, "Let me alone! Don't touch me!" That these declarations were uttered by the wife of appellant is no valid objection to their introduction, for they were not admitted to prove certain facts, and to supply the place of other testimony, as dying declarations are sometimes admitted, but only to explain and throw light upon the subsequent words and conduct of appellant. *People* v. *Murphy*, 45 Cal. 137; *Liles* v. *State*, 30 Ala. 24. Our conclusion is that the evidence was properly admitted, and that, on the whole case, the judgment of the circuit court must be affirmed.

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ROUTT v. STATE.

Opinion delivered January 25, 1896.

ROBBERY—SNATCHING MONEY FROM ANOTHER.—One who snatches money from another's hand, without using force or putting in fear, and subsequently uses a pistol to prevent the owner from regaining possession, is not guilty of robbery.

CRIMINAL LAW—MODIFICATION OF JUDGMENT ON APPEAL.—A conviction of robbery will be set aside by the supreme court on appeal, and the cause remanded for the trial court to sentence appellant for grand larceny, where the evidence is insufficient to support a conviction of the former, but clearly makes out the latter, offense, under Sand. & H. Dig. sec. 1064, empowering the supreme court to reverse or modify a judgment appealed from in whole or in part, and enter such judgment "as it may in its discretion deem just." (BATTLE, J., dissenting.)

Appeal from Lee Circuit Court.

H. N. HUTTON, Judge.

STATEMENT BY THE COURT.

The appellant, P. M. Routt, and one Jim Morgan, whom the evidence shows to have been gamblers and confidence men, obtained from C. F. Holt one hundred dollars in the following manner: They were passengers upon a train of the Cotton Belt railroad. Routt began a conversation with Holt, and exhibited some cards, saying that the boys had been using them for trick cards, and had won the cigars and drinks from him. He then, to use the language of a witness, "explained to Holt how the trick was worked." About this time Morgan entered the car where Routt and Holt were talking, Routt offered to bet him ten dollars that he could not draw a certain card. Morgan accepted the offer, and Routt asked Holt for a loan of ten dollars, at the same time nudging him with his knee. Holt pulled from his pocket a roll of bills containing

several hundred dollars. On the top of the roll was a hundred dollar bill, which Routt snatched from Holt's hand. Morgan then snatched it from Routt, and started out of the rear door of the car. Holt drew his pistol to prevent Morgan from escaping with his money. Morgan also drew his pistol, when Routt interceded, saying to Holt: "Don't shoot! Don't! I'll give you back your money." In this way he pacified Holt until Morgan left the car, and escaped with the money. There was no violence or display of force or threats of any kind, until Holt drew his pistol in his effort to prevent Morgan from leaving the car with the money. Routt was captured, and indicted for robbery. Upon trial the jury found him guilty of robbery, and assessed the punishment at ten years in the state penitentiary, and a judgment to that effect was rendered against the defendant.

N. W. Norton, for appellant.

The facts in this case do not make a case of robbery. There was neither force, violence, nor intimidation, preceding or accompanying the taking of the money. 58 Ark. 35. The sudden snatching or taking of property, without force, injury, or struggle, is not robbery. 2 Russ, Crimes, 68; Arch. Cr. Pl. 225; 3 Chitty, Cr. Law, 804; 1 East, Pl. Crown, p. 708; 4 Blackst. Com. (Chitty) 243. The basic principle of robbery is violence and fear. 3 Arch. Cr. Pr. & Pl. 417, note 3. Snatching is not robbery. Rapalje, Larceny, etc., p. 64, note 1; *State* v. *Sommers*, 12 Mo. App. See also 66 Ga. 167; Maxwell, Cr. Pr. p. 254, note 5 and 255; 64 Ind. 13.

E. B. Kinsworthy, Attorney General, for appellee.

1. Although a thief may secure money without violence or intimidation, if he remove it from the presence of the other by force, violence or intimidation, it is robbery. 70 Am. Dec. 176. The violence or intimida-

tion is sufficient if it is contemporaneous with the taking. 36 Pac. 571; 17 S. W. 658. While mere snatching is not robbery, yet, if there is an effort to keep it by force or intimidation, it is. 1 Whart. Cr. Law, sec. 854; 33 Ark. 561.

2. The manner of the force is immaterial. Sand. & H. Digest, sec. 1883. On motion to modify judgment, cites Sand. & H. Dig. sec. 1064; 56 Ark. 19; 34 *id.* 232.

As to what is robbery.

RIDDICK, J., (after stating the facts). The judgment of the circuit court must be reversed, for the facts in proof do not make out a case of robbery. Robbery, as defined by the text books and the previous decisions of this court, is a felonious and forcible taking of the property of another from his person or in his presence, against his will, by violence, or putting him in fear. And this violence must precede or accompany the taking of the property. *Clary* v. *State*, 33 Ark. 561; 1 Wharton's Crim. Law, sec. 846.

The taking must be done through force or fear. "If force is relied on in proof of the charge, it must be the force by which another is deprived of, and the offender gains, possession. If putting in fear is relied on, it must be the fear under duress of which the possession of the property is parted with. * * * The fear of physical ill must come before the relinquishment of the property to the thief, and not after; else, the offense is not robbery." *Thomas* v. *State*, 91 Ala. 36; 2 Bish. New Crim. Law, sec. 1175; *Rex* v. *Harman*, 2 East, P. C. 736. It is well established that the snatching of money or goods from the hand of another is not robbery, unless some injury is done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it. In an Indiana case the complainant was fraudulently induced by two confederates to expose

some money in his hands. One of them then snatched it from him, and ran away, while the other held him, so that he could not pursue, and a struggle between them ensued. The court held that this did not constitute robbery. *Shinn* v. *State*, 64 Ind. 13, S. C.; 31 Am. Rep. 110. We need not discuss the authorities further, for there are numerous cases holding that where the property is obtained by artifice or trick, or by merely snatching from the hand, and where the only display of force is used to prevent the re-taking of the property by the owner, the crime is not robbery. *Thomas* v. *State*, 91 Ala. 36; *Shinn* v. *State*, 64 Ind. 13; 31 Am. Rep. 110; *State* v. *John*, 69 Am. Dec. 777; S. C. 5 Jones, Law, (N. C.), 163; *State* v. *McCune*, 70 Am. Dec. 176, and note; *Rex* v. *Harman*, 2 East. P. C. 736; 2 Bish. New Crim. Law, sec. 1167; 1 Wharton, Crim. Law, sec. 854.

In this case the money was obtained by snatching from the hand. There was no force, or display of force, or putting in fear, until Holt drew his pistol to prevent Morgan from leaving the car with the money. Morgan then drew his pistol, but this was done, not to force Holt to surrender the possession of the money, for he had already parted with it, but only to prevent him from regaining possession. The proof, we think, clearly shows that Routt and Morgan were guilty of larceny, but it is not sufficient to sustain a conviction of robbery.

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

ON REHEARING.

Opinion delivered February 22, 1896.

Modification of judgment on appeal.

RIDDICK, J. After the judgment of reversal was entered in this case, the attorney general filed a motion to modify the judgment. He asked that the case be remanded, not for a new trial, but with an order that the circuit court sentence the defendant

for the crime of grand larceny. Our statute provides that "the supreme court may reverse, affirm or modify the judgment or order appealed from, in whole or in part, and as to any or all parties, and when the judgment or order has been reversed, the supreme court may remand or dismiss the cause, and enter such judgment upon the record as it may in its discretion deem just." Sand. & H. Dig. sec. 1064. We have twice held that this statute applies to judgments in criminal as well as civil cases. *Simpson* v. *State*, 56 Ark. 19; *Brown* v. *State*, 34 Ark. 232. In the case last cited the circuit court rendered judgment against Brown that he be imprisoned for the term of two years in the penitentiary. This court modified that judgment by reducing the imprisonment to one year. In *Simpson* v. *State*, *supra*, the jury found the defendant guilty of murder in the first degree. Upon an appeal it was held that the evidence did not sustain a verdict for murder in the first degree. The sentence for murder in the first degree was therefore set aside, and the cause remanded to the circuit court with directions to sentence the prisoner for murder in the second degree. A ruling the same in principle was made by the supreme court of the United States in the recent case of *Ballew* v. *United States*, 160 U. S. 187. See, also, opinion of Mr. Justice Field *In re Bonner*, 151 U. S. 260.

The charge of robbery made against the defendant in this case includes larceny. The indictment alleges the value of the money taken to be one hundred dollars, and under this indictment the defendant might have been convicted of grand larceny. *Haley* v. *State*, 49 Ark. 147; *Allen* v. *State*, 58 Ala. 98; *Com.* v. *Prewitt*, 82 Ky. 240; *State* v. *Jenkins*, 36 Mo. 372; 1 Bish. New Crim. Law, sec. 795. As the indictment for robbery includes a charge of larceny, it follows that the jury,

in finding the defendant guilty of robbery, must have found the defendant guilty of larceny, and also of the aggravating matter which, together with the larceny, makes robbery. 2 Bish. New Crim. Law, sec. 1159. There is no question or doubt about the value of the property taken. It was over ten dollars, and, if the defendant is guilty of larceny, it is grand larceny.

We have said that the evidence does not sustain the charge of robbery, but that it does clearly make out a case of grand larceny. The fact that the defendant was found guilty of a greater crime than was warranted by the evidence does not compel us to set the entire conviction aside when it is in part clearly correct. It was to avoid such an unreasonable and costly procedure that the statute above referred to was enacted. The defendant in this case was sentenced to be imprisoned for ten years, when the maximum punishment for larceny of money is imprisonment for five years. Under the statute and the authorities cited above, we will relieve the defendant from the excessive judgment, of which he has a right to complain, but affirm the conviction to the extent that it seems clearly right. The judgment of imprisonment for robbery is set aside, and the cause remanded, with an order that the circuit court sentence the prisoner for grand larceny.

BATTLE, J., dissents, for the reasons given in the dissenting opinion in *Simpson* v. *State*, 56 Ark. 19.

LEAK v. STATE.

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d77 458

Opinion delivered February 1, 1896.

PERJURY—MATERIALITY OF TESTIMONY.—If, in a prosecution, there is no evidence upon which a conviction may be based, a charge of perjury cannot be sustained by proof that a witness therein falsely

denied having testified to certain facts before the grand jury, when questioned for the purpose of impeaching his testimony, such denial being immaterial.

Appeal from Howard Circuit Court.

WILLIAM P. FEAZELL, Judge.

STATEMENT BY THE COURT.

Appellant was tried and convicted, in the Howard circuit court, of the crime of perjury, on the following indictment to-wit (omitting the formal parts): "The grand jury of Howard county, in the name and by the authority of the state of Arkansas, accuse Jake Leak of the crime of perjury, committed as follows, to-wit: The said Jake Leak, in the county and state aforesaid, on the 9th day of August, A. D. 1895, in the county and state aforesaid, in the circuit court of said county, then in session, there was pending a certain criminal judicial proceeding, wherein the state of Arkansas was plaintiff and one Dave Henry was defendant, wherein the said Dave Henry was duly and legally charged by indictment with having sold liquor within ten miles of Central College, Howard county, Arkansas, and of which said judicial proceedings the said court then and there held jurisdiction, and wherein issue was then and there duly joined between the said state of Arkansas and the said Dave Henry, before the said court duly organized to try said issue. And Jake Leak did then and there personally appear before said court, and then and there take his corporal oath, and was duly sworn as a witness in said cause, said oath being then and there duly administered to him by John M. Somervell, the clerk of said court, who was then and there authorized by law to administer the same, whereupon it then and there became and was material, before said court, in the trial of said judicial proceeding, whether the said Jake Leak did, within and during the month of June, 1895, buy liquors from the said Dave Henry, as alleged in the indictment;

and the said Jake Leak did then and there, before said court, upon the trial of said cause, under the sanction of said oath, administered to him aforesaid, wilfully and unlawfully, corruptly and feloniously, state and testify that he did not know whether he *bought whisky* from Dave Henry during the month of June, 1895, or not; that he did not know that the man he bought the whisky from was Dave Henry; that he bought whisky from a man who said his name was Henry, and when defendant was pointed out to him, and he was asked if that was the man he bought the whisky of, said he could not say that he was; said it might be, and it might not be; said that he did not tell the grand jury that he bought whisky of and from Dave Henry during the month of June, 1895, near Nashville, Howard county, Arkansas; said he told the grand jury that he did not know Dave Henry; said that the grand jury told him that it was Dave Henry; said that he did not know the defendant, then and there upon trial, was Dave Henry,—and which statement was material to the issue in said cause; whereas, in truth and fact, the said witness, Jake Leak, did know that the man he bought whisky of was Dave Henry, and he did tell the grand jury that he bought whisky of Dave Henry, in the month of June, 1895, near Nashville, Howard county, Arkansas, which statement, so made by said Jake Leak, as aforesaid, was feloniously, wilfully and corruptly false when he made it, against the peace and dignity of the state of Arkansas."

There was no demurrer to this indictment, and the case was tried on the testimony and the instructions of the court, and defendant found guilty; and he has appealed to this court.

Jas. D. Shaver, for appellant.

1. The indictment charges no offense. It fails to

allege that the liquor sold by Dave Henry was one of the kind mentioned in the act. Bish. St. Cr. p. 1038. The allegation that Dave Henry was charged with the sale of *liquor*, without alleging that it was one of the kinds prohibited by the act, charges no crime. 34 Ark. 340; 39 *id.* 216; 32 *id.* 185; 45 *id.* 349. If the indictment charged Dave Henry with no crime, then nothing that appellant swore to was material. 45 Ark. 336; 2 Bish. Cr. Law, sec. 1020; 78 Ala. 433.

2. The allegation that Dave Henry sold liquor *during the month of June*, 1895, is too indefinite and uncertain. 59 Ark. 113. The indictment must show on its face that the alleged false statement was material to the issue. 53 Ark. 398; 2 Bish. Cr. Pr. 918; 18 A. & E. Enc. Law, p. 317. What appellant told the grand jury is immaterial.

3. The verdict is not sustained by the evidence. The state failed to prove that Dave Henry was ever indicted for the sale of liquor. Such allegation is *material*, and must be proved. No presumption of facts is indulged. 59 Ark. 113; 2 Bish. Cr. Pr. 933, 910, 911; 18 A. & E. Enc. Law, 329. Such facts must be proved by the record. A variance is fatal. 1 Bish. Cr. Pr. 401; Wharton, Cr. Law, p. 134.

4. Instruction number one was erroneous. 53 Ark. 398; 2 Bish. Cr. Pro. sec. 935; Rice, Cr. Ev. 795; Roscoe, Cr. Ev. 758. It *assumes* the materiality of the alleged false testimony, and the jury were told that, if they believed *either* or all the statements were false, they should convict.

5. By refusing defendant's instructions, the court eliminated all questions affecting the materiality of the alleged false testimony. 53 Ark. 398.

6. The third instruction for defendant should have been given. The state should have proved on which of the two occasions defendant swore falsely, by evidence

other than the contradictory statements of defendant. 2 Bish, Cr. Law, 1044; 2 Bish. Cr. Pr. 931; Rice, Cr. Ev. 795-6; 21 Am. Rep. 365; 1 Gr. Ev. 259; 74 Ala. 34; 2 Wharton, Cr. Law, p. 1317.

7. The state could not discredit its own witness. 1 Gr. Ev. 442, 444.

E. B. Kinsworthy, Attorney General, for appellee.

1. The indictment states that Dave Henry was *duly* and *legally* indicted. It also states that the evidence was *material*, and this is sufficient. 2 Bish. Cr. Pro. sec. 921.

2. The averment of competent authority to administer the oath is sufficient to show jurisdiction. 107 N. C. 876; 135 Ill. 416; 11 Ohio, 400; 66 Iowa, 97; 7 S. W. 40. Under our statute the indictment is good. Sand. & H. Dig. secs. 2075-6.

3. The testimony need not be material to the principal issue in the proceeding, but is sufficient if it is material to any collateral inquiry in the course of the proceeding. Clark's Cr. Law, p. 334; 16 Iowa, 36; 2 Bish. Cr. Law, sec. 1031; 53 Ark. 395.

4. Appellant cannot single out *one* instruction, and complain that it is error. *All* the instructions on the same subject matter are to be taken together as a whole. 48 Ark. 396. The court gave the law correctly, and it is not error to refuse additional instructions presenting the same ideas in different language. 53 Ark. 117; 46 *id.* 141; 52 *id.* 180.

5. On indictment for perjury, it is competent to show what was said and done before the grand jury. 1 Bish. Cr. Pr. secs. 857-8; 1 Gr. Ev. sec. 252, note 5.

BUNN, C. J., (after stating the facts). The court gave two instructions at the instance of the state, the first of which was objected to by the defendant. The defendant asked five instructions, the first and fourth

of which were given, the third and fifth were refused, and the second was modified, and the defendant saved exceptions to the court's refusal of the two and the modification of the other. In our view of the case, however, the first instruction given by the court at the request of the state, and over the objections of defendant, raises all the issues of law involved in this discussion; and, as this is properly based on the evidence, it is only necessary to discuss the evidence to determine its legal sufficiency to authorize the conviction of defendant. The defendant, Jake Leak, swore, in the trial of Dave Henry, that he did not know him, or that he was not certain that he knew him. There was no other evidence of the identity of Dave Henry with the crime charged against him, and none for any other purpose against him. The prosecution necessarily failed for want of proof. As defendant, Jake Leak, had testified before the grand jury that found the indictment against Dave Henry, and upon his testimony that indictment was found, he was indicted for perjury in this: that on the trial of Dave Henry he (the said Jake Leak) swore that he did not know Dave Henry, as aforesaid, and that he did not know the person then present as defendant to be Dave Henry, and did not know he was the person that had sold him the whisky, as charged; and, furthermore, swore that he had not stated before the grand jury that he knew him. It was shown that he had stated before the grand jury that he knew Dave Henry, and that he had bought the whisky from him, or words to that effect. Suppose that defendant herein had admitted on the trial of Dave Henry that he had stated before the grand jury that he knew him, notwithstanding he continued to say on the trial that he did not know him. That would not have justified the conviction of Dave Henry. Hence it was immaterial whether he admitted or denied stating what he was alleged to have stated before the grand

jury. It was immaterial how many falsehoods he might tell as to previous statements, since there was a total failure of proof against Dave Henry.

For a witness to impeach himself by contradictory statements is sometimes material, because one is guilty of perjury who in this way deprives another of the benefit of his true testimony, and thereby tends to defeat the ends of justice. But in such case it should appear that his false swearing had the effect, or might have had the effect, of influencing legitimately the determination of the issue concerning which he was called to testify. Otherwise, his testimony, be it true or false, is immaterial. The false swearing of defendant in the trial of Dave Henry could not have influenced the determination of the question of the guilt or innocence of Dave Henry the one way or the other, since there was no evidence for or against him.

Reversed and remanded.

MERCHANTS & PLANTERS BANK v. FITZGERALD.

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Opinion delivered February 1, 1896.

CERTIORARI—NOT A SUBSTITUTE FOR APPEAL.—Certiorari will not lie at the instance of creditors of a decedent's estate, to set aside the classification of a claim allowed by the probate court in favor of another creditor, as the appeal by the personal representative provided in such case furnishes an adequate remedy.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

Petition for certiorari by Edward Fitzgerald and others, creditors of the estate of Nannie W. Nichol, deceased, to quash an order of the probate court erroneously classifying in the third class of debts a claim of

the Merchants & Planters Bank against the estate, which had not been reduced to judgment in deceased's lifetime. The court quashed the order, and the bank has appealed.

Austin & Taylor, for appellants.

1. The probate court had original and exclusive jurisdiction to determine the character and justness of the claim, and to classify it. Sand. & H. Dig. secs. 125, 127, 128, 110. Its judgments are accorded the same presumptions as those of superior courts of record. 11 Ark. 519; 20 *id.* 424; 33 *id.* 828; 39 *id.* 348; 44 *id.* 516. The presumption is that everything necessary to be done was rightfully done, unless the record *affirmatively* shows to the contrary. 27 Ark. 293; 31 *id.* 190.

2. After one year the judgment is *conclusive.* 12 Ark. 95; 13 *id.* 559; 14 *id.* 244; 27 *id.* 673. The only remedy was by appeal. Sand. & H. Dig. secs. 1149, 1154.

3. Certiorari is not a writ of right, and cannot be resorted to for the correction of mere errors or irregularities. 44 Ark. 509; 43 *id.* 33; 39 *id.* 347; *Ib.* 399; 28 *id.* 87; 40 *id.* 219; 47 *id.* 511; 51 *id.* 281.

Bridges & Wooldridge, for appellees.

1. The claim was *erroneously* and *illegally* classed by the probate court, and certiorari was the proper remedy. The records *affirmatively* show that the appellant's claims were *illegally* classed. Appellees were not parties, and could not appeal. 41 Ark. 104. Certiorari was their only remedy. 47 Ark. 412.

2. In the absence of a bill of exceptions and motion for new trial, this court will presume that it was shown to the court below that the rights of appellees to become parties to the proceeding, and thereby acquire the right of appeal, was lost without any fault of theirs. 24 Ark. 602; 38 *id.* 568; 37 *id.* 528; 46 *id.* 18; *Ib.* 69.

3. The circuit court having jurisdiction on certiorari, it acts as a revising court, and may quash for any *illegality apparent* on the record. 11 Ark. 604; 25 *id.* 420.

4. Having lost the right of appeal, certiorari was the only remedy. 52 Ark. 220. In 25 Ark. 420 it is held that when the probate court improperly classifies a claim, and the error appears on the face of the record, certiorari is the proper remedy. See, also, 25 *id.* 32.

5. There being no bill of exceptions, this court will not review the proceedings. 56 Ark. 85.

BATTLE, J. According to the well settled practice in this state the writ of *certiorari* can be used by the circuit court in the exercise of its appellate power and superintending control over inferior courts in the following classes of cases: (1) Where the tribunal to which it is issued has exceeded its jurisdiction; (2) where the party applying for it had the right of appeal, but lost it through no fault of his own; and (3) in cases where it has superintending control over a tribunal which has proceeded illegally, and no other mode has been provided for directly reviewing its proceedings. But it cannot be used as a substitute for an appeal or writ of error, for the mere correction of errors or irregularities in the proceedings of inferior courts (*Ex parte Pearce*, 44 Ark. 513; *Railway Company* v. *State*, 55 Ark. 205; *McCoy* v. *Jackson County Court*, 21 Ark. 475; *Randle* v. *Williams*, 18 Ark. 383; *Hill* v. *Steel*, 17 Ark. 440; *Ex parte Allston*, 17 Ark. 580; *Baskins* v. *Wylds*, 39 Ark. 347; *Haynes* v. *Semmes*, 39 Ark. 399; *State* v. *Hinkle*, 37 Ark. 532; *Pettigrew* v. *Washington County*, 43 Ark. 33; *Hickey* v. *Matthews*, 43 Ark. 341; *Burgett* v. *Apperson*, 52 Ark. 213; *Flournoy* v. *Payne*, 28 Ark. 87; 2 Spelling on Extraordinary Relief, secs. 1918–1920, and cases cited), except in cases

where the appeal or writ of error was lost through no fault of the party applying for it (*Payne* v. *McCabe*, 37 Ark. 318; *Roberts* v. *Williams*, 15 Ark. 43, 49; *Wyatt* v. *Burr*, 25 Ark. 476; *Smith* v. *Parker*, 25 Ark. 518; *Burgett* v. *Apperson*, 52 Ark. 213; *Baker* v. *Halstead*, Busbee, L. (N. C.), 41; 2 Spelling on Extraordinary Relief, secs. 1923–24, and cases cited), and in cases in the third class (*Ex parte Couch*, 14 Ark. 337; *Carnall* v. *Crawford County*, 11 Ark. 613; *Lindsay* v. *Lindley*, 20 Ark. 573; *Baxter* v. *Brooks*, 29 Ark. 180; *People* v. *Williamson*, 13 Ill. 660, 661, 663; *Groenvelt* v. *Burwell*, 1 Ld. Raymond, 469; *Rex* v. *Inhabitants*, *Id.* 580; *C. & I. R. Co.* v. *Whipple*, 22 Ill. 105; *Nicoulin* v. *Lowery*, 49 N. J. L. 391, 396; *Doolittle* v. *G. & C. V. R. Co.*, 14 Ill. 381, 383; *Trustees* v. *Shepherd*, 139 Ill. 114; *Mendon* v. *Worcester*, 2 Allen, 463; 2 Spelling on Extraordinary Relief, sec. 1921, and cases cited).

In violation of this rule, it was held, in *Tucker* v. *Yell*, 25 Ark. 420, that *certiorari* lies in behalf of a creditor holding a claim against the estate of a deceased person, to correct an error of the probate court in allowing his claim in the wrong class. In that case the court allowed the claim in the fourth class when it should have been allowed in the third. This court held that the circuit court on *certiorari* should have set aside the classification, and allowed it in the proper class.

In *Flournoy* v. *Payne*, 28 Ark. 87, "John B. Payne, as administrator of the estate of Sally C. Flournoy, deceased, presented for allowance and classification a claim against the estate of D. J. Flournoy, deceased, notice having been given to Robert C. Flournoy, as executor of the last will and testament of the said D. J. Flournoy, deceased, that said claim would be presented. The claim was allowed and classified. Over two years afterward, Robert C. Flournoy and others interested in the estate petitioned the Desha circuit court for a writ

of certiorari requiring the clerk of the probate court to certify to the circuit court the proceedings and judgment of the probate court in relation to the presentation and allowance of said claim, etc." They "alleged, substantially, that the probate court erroneously allowed said claim upon a certain decree * * * obtained by the appellee against Robert C. Flournoy, as executor, etc., in the Fayette circuit court of Kentucky; that * * * three of the petitioners, namely, Elizabeth Stevenson, Mary Stone and Letitia Hume * * * were residents of the state of Kentucky, and had no notice that said claim would be presented, and therefore had no opportunity of appealing from the judgment allowing and classifying said claim, and that, as to the said Robert C. Flournoy, although he was served with notice that the said claim would be presented for probate and allowance, it was in the city of Louisville, Ky., where he was then living, and that his engagements were such that he could not, on such short notice, then go to the state of Arkansas to attend said court, and therefore he had no opportunity of appealing from the said judgment," etc. Upon this state of facts, the court, after holding the excuse of the executor insufficient, said: "As to the other petitioners, they were represented by the executor at the time this claim was presented for allowance, and were not entitled to be parties in the adjudication thereof. They can, therefore, plead the negligence of the executor neither as an excuse for their failure to appeal, nor as in any manner giving them rights in a proceeding of this character. The appellant, Robert C. Flournoy, not having shown circumstances sufficient to excuse him from his neglect to appeal, his only remedy was by appeal, and the circuit court had not the jurisdiction to determine the case upon certiorari."

In *Burgett* v. *Apperson*, 52 Ark. 213, "the appellant, who is the daughter and sole heir of Isaac Burgett, deceased, presented her petition to the circuit court for a writ of certiorari to quash an order of the probate court confirming a sale of her father's lands made by the administrator to pay debts." This court ordered the sale to be quashed, holding that it was erroneous, and finding that the heir, though entitled to be a party to the proceeding in which the sale was made, was not, and had lost her right to become such without fault on her part, and thereby the right to an appeal. It said: "The writ [certiorari] is granted in two classes of cases; first, where it is shown that the inferior tribunal has exceeded its jurisdiction; and, second, where it appears that it had proceeded illegally, and no appeal will lie, or that the right has been unavoidably lost. * * * Mere errors are never reviewable on certiorari, at the instance of one who has lost the right of appeal by his own fault, or who neglects to apply for the writ as soon as possible after it becomes necessary to resort to it. * * It cannot be used as a substitute for appeal to correct errors where an appeal is provided, except by a party who could have appealed."

In determining the manner in which the writ of certiorari can be used in this state, we have not overlooked the statute which provides that circuit courts shall have power to issue writs of certiorari to any officer or board of officers, or any inferior tribunal of their respective counties, to correct any erroneous or void proceeding, and to hear and determine the same." As to its effect upon the office of the writ, it was held in *St. Louis, etc., R. Company* v. *Burns*, 35 Ark. 95, that it did not so enlarge the use of the writ "as to make it answer the ends of an appeal or writ of error for the correction of mere errors in judicial proceedings." And

such has been the settled doctrine of this court, as shown by subsequent cases ; and to it we adhere.

In this case, creditors sued out a writ of certiorari for the purpose of setting aside the classification of a claim allowed by the probate court in favor of the Merchants & Planters Bank against the estate of Nannie W. Nichol, deceased, it having been allowed in the third class, and they insisting that it should have been in the fourth. This defect, which they invoke the writ to remedy, is an error committed by the probate court in the exercise of its jurisdiction, for the correction of which an appeal was allowed by statute, and no person was authorized to take it except the administrator. He and the creditor presenting the claim were the only parties. The other creditors were not entitled to become such. The administrator was the representative of them and all other persons interested, as creditors and otherwise, in the estate of his intestate, and in that respect stood to them in the relation of a trustee, and it was his duty to protect their interest in the estate of the deceased.

The law imposes on administrators the duty to "prosecute all actions that may become necessary to recover debts owing to the estate of their intestates, or property of any kind, and to protect the interest of the estate whenever the same is jeoparded." "To this end," says Woerner, on the American Law of Administration, "they must act not only with honest intent and perfect integrity, but also with promptness and diligence, and reasonable prudence and foresight. They are required to investigate the circumstances attending the affairs of the estate, lest by indifference and indolence its debtors escape or become insolvent, and the estate suffer. If they are remiss in their duty in this respect, they become liable personally, and on their bond, for whatever loss may ensue. * * * * But

they are not bound to attempt the collection of bad or doubtful debts, or to prosecute claims of a doubtful character, at least not unless the parties demanding such prosecution will indemnify the estate or the executor or administrator against costs." *Griswold* v. *Chandler*, 5 N. H. 492, 494; *Sanborn* v. *Goodhue*, 28 N. H. 48, 58; *Andrews* v. *Tucker*, 7 Pick. 250; 2 Woerner on the American Law of Administration, sec. 324.

The law also imposes on them the duty to defend all actions, proceedings, or claims brought against them in their fiduciary character, or the estates of their intestates, and to plead all meritorious defenses that may become necessary to protect the estate or its creditors, and prosecute such appellate proceedings as may be necessary to sustain the same. In the discharge of this duty they should act with the same honest intent, integrity, prudence, promptness, and diligence as is required of them in the prosecution of actions, and for the failure to perform it are liable to the parties injured, under such circumstances and upon such conditions as they would be for the neglect of duty in the prosecution of actions, the reason for the requirements and liabilities being the same in both cases. *Davis* v. *Smith*, 5 Ga. 274, 291; *Hutchcraft* v. *Tilford*, 5 Dana, 353, 360; *Shackelford* v. *Gates*, 35 Texas, 781.

In the manner indicated, the entire care, custody, management, preservation, and protection of the personal estate of a deceased person is entrusted to the administrator, with the duty of protecting the rights and interests of all persons in the same, and in this way the interference of creditors with all things concerning the estate is excluded, and they are left to enforce their rights in the estate in and through the administrator.

It therefore follows that the appellees had no right to sue out the writ of certiorari in this case, that the

judgment of the circuit court should be reversed, and the writ quashed; and it is so ordered.

BUNN, C. J., (dissenting). I dissent because, while the writ of certiorari is not a writ of right, but one of discretion, this discretion in the circuit court will not be controlled, except when abused, and I cannot see any abuse of it in this case. I do not agree with the court that the writ cannot be properly issued in a case like this. On the contrary, I think it the appropriate, if not the only, remedy.

WESTERN UNION TELEGRAPH CO. *v* AUBREY.

Opinion delivered February 1, 1896.

TELEGRAPH COMPANY — MISTAKE IN MESSAGE — LIABILITY.—One to whom a telegram is addressed, advising him that the sender can use a certain number of bales of cotton at a price named, can recover only nominal damages for an error in transmission of the message, whereby the price offered was raised, if he could have realized a profit on the cotton purchased in pursuance thereof by selling it to the sender at the price actually offered.

NOMINAL DAMAGES — WHEN RECOVERABLE. — Nominal damages may be recovered for the bare infringement of a right, or for a breach of contract unaccompanied by actual damage.

Appeal from Phillips Circuit Court.

GRANT GREEN, JR., Judge.

STATEMENT BY THE COURT.

This was an action brought by Aubrey against the Western Union Telegraph Company to recover damages alleged to have been sustained by him, by reason of an error in transmitting a cipher telegram from Cowen & Co. to him.

The complaint alleges that in April, 1893, Cowen & Co. delivered to the Telegraph Company at Memphis,

for transmission to Aubrey at Helena, the following telegram: "Mitchell has eat bluebird tinged staple on factor's table here. We find ten rough deep stains, and ten good grade white cotton. Leaving out these twenty, we can use remaining blood-shed ink alack f. o. b., Helena, provided we are not known in the transaction, and there is nothing under abat rising. Important not to mention us in the matter." That Cowen & Co. paid the usual and customary charges for such telegram. That the message received by Aubrey differed from that sent by Cowen & Co. in substituting the word "alike," meaning $8\frac{1}{2}$ cents, for "alack," meaning $7\frac{5}{8}$ cents. That the meaning of the telegram as sent was as follows: "Mitchell has ninety-five bales tinged staple on factor's table here. We find ten rough deep stains and ten good grade white cotton. Leaving out these twenty, we can use remaining seventy-five May shipment $7\frac{5}{8}$ f. o. b. Helena, provided, we are not known in the transaction, and there is nothing under inch and quarter. Answer immediately. Important not to mention us in the matter." That the message as received by Aubrey meant the same thing, except that the cotton could be used at $8\frac{1}{2}$, and not at $7\frac{5}{8}$, as it was written by Cowen & Co. That on the day after the telegram was received, and before Aubrey learned of the error in transmitting it, he purchased forty-four bales of cotton at 7 9-16 cents, and thirty-three bales at $7\frac{1}{2}$ cents; that Cowen & Co. refused to take it at $8\frac{1}{2}$ cents, and Aubrey held it from April 7 to April 14, when he sold it to A. N. Tanner for $7\frac{1}{4}$ cents. That the error was due to the negligence of the Telegraph Company, and Aubrey was damaged $175.

The answer denies that on the day named in the complaint, or any other day, C. C. Cowen & Co. delivered to defendant the telegram alleged to have been delivered for transmission to plaintiff; denies that it

transmitted another or different telegram, as alleged in the complaint; denies that plaintiff purchased seventy-five bales of cotton, or any part of it, under instructions contained in the telegram, or that he was damaged thereby in the sum of $175, or any other sum.

Upon the trial of this cause, the following interrogatories were, upon motion of the defendant, submitted to the jury, to-wit: "If you find that the plaintiff bought seventy-five bales of cotton, from whom do you find, from the evidence, he bought the cotton, and what price did he pay for same per pound?" The jury found generally for the plaintiff, and assessed his damages at one hundred and seventy-one dollars. In answer to the interrogatories, it found that 39 bales were bought from Higgins at 7 9-16 cents, 31 bales from Clifton at 7½ cents, and 5 bales from Hornor at 7 9-16 cents per pound.

The appellant filed a motion for a new trial, which was overruled, and, to reverse the judgment, he appealed to this court.

Rose, Hemingway & Rose, for appellant.

1. The court erred in its instructions. For a failure to correctly transmit a message, a telegraph company is liable only for such damages as arise naturally from the breach of the contract, or such as may reasonably be supposed to have been contemplated by both parties, when the contract was made, as the probable result of the breach of it. 53 Ark. 434; 154 U. S. 29, 33; 68 Fed. 137; 60 N. Y. 198; 34 Wis. 471–9; 21 Minn. 155, 161; 16 Nev. 222; 9 Ill App. 587; 61 Tex. 452; 60 Col. 579; 37 Mo. App. 554; 8 Bis. 131–3; L. R. 1 C. P. D. 326–8; 14 So. 1.

2. There is no evidence to sustain a verdict for more than *nominal* damages. He could have delivered the cotton to Cowen, and still made a profit, and hence he was not damaged at all.

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

1. It is not true that, unless the interest of the sendee appear on the face of the message, no damages will result from negligent transmission. 53 Ark. 434. That may be the rule in England, but not in this country. 3 Suth. Dam. 314; 25 A. & E. Corp. Cases, 559.

2. The rule applied in *Hadley* v. *Baxendale*, and approved in 53 Ark. 434, is the rule announced by the court below in this case. 1 L. R. Exch. 177. The telegram itself showed on its face that it related to a commercial transaction, and put the company on notice that, if improperly transmitted, it might lead to pecuniary loss. 25 A. & E. Corp. Cas. 542; 68 Ga. 299; 30 A. & E. Corp. Cas. 600.

3. When a mistake is made in a telegraphic message, neither party is bound, because their minds have not met. 21 A. &. E. Corp. Cas. 150; 25 *id.* 542. Cowen notified Aubrey to protect himself. That meant to sell the cotton. The jury found that he acted reasonably and properly by selling the cotton in the market. In this case no special damages were allowed, but only such as naturally resulted from the breach of the contract occasioned by the negligence of appellant. 5 A. & E. Corp. Cases. 203.

Liability for mistake in telegram.

HUGHES, J., (after stating the facts). There was no evidence that Cowen & Co. refused, or would have refused, to take the cotton at what they had offered for it, $7\frac{5}{8}$ cents per pound, and it is apparent that at this price the appellee would have lost nothing. But he chose to hold the cotton, and afterwards sold it at $7\frac{1}{4}$ cents, and for the loss he sustained thereby the appellant is not liable. Had he delivered the cotton to Cowen & Co. at their offer, $7\frac{5}{8}$ cents per pound, he would have realized a profit of 1-16 of a cent per pound on the 39 bales he bought from Higgins at 7 9-16 cents per pound,

and a profit on the 31 bales he bought from Clopton at $7\frac{1}{2}$ cents of $\frac{1}{8}$ of a cent per pound, and upon the 5 bales he bought from Hornor a profit of 1-16 of a cent per pound. Cowen & Co., by their offer, were bound to accept the 75 bales at $7\frac{5}{8}$ cents per pound, if delivered in accordance with their telegram. It is apparent, therefore, that the appellee suffered no damages by the mistake in sending the telegram.

When nominal damages recoverable.

The judgment is reversed, and, as the appellee would be entitled to nominal damages only if the case were remanded, judgment will be entered here in favor of the appellee for costs in the circuit court. "Nominal damages may be recovered for the bare infringement of a right, or for a breach of contract unaccompanied by any actual damage." 1 Sedgwick on Damages, sec. 98.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* ROSS.

61 617
62 251

Opinion delivered February 1, 1896.

RAILROAD COMPANY—LIABILITY FOR EMPLOYEES' NEGLIGENCE.—A railroad company is not liable for the failure of its employees to discover a danger to which a person on the track is exposed by his own negligence.

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

The facts in this case are as follows: George Ross was the owner of a saw mill and lumber shed. The shed fronted on a spur track of defendant railway company. On the 6th day of August, 1890, a flat car was sent down this track. This car was detached from the engine, which had passed down the main track.

Ross called to the brakeman upon the flat car not to let it strike another car, which was standing in front of the shed on the same track. The brakeman replied that his car had no brake, and told Ross to throw something under it to stop it. Ross thereupon threw a scantling under the car. When the wheels of the car struck the scantling, the end of it flew up, and, to avoid being hit by it, Ross stepped over upon the main track of the defendant company. He was there struck and killed by the tender of an engine which, in full view, was backing along the track at a speed of only three or four miles an hour. Had Ross seen the engine at the time he stepped upon the track, he could easily have avoided the collision, but he was looking in the opposite direction, and did not see it until he was struck by the tender. There was nothing in the evidence to show that either the engineer or fireman in charge of the engine had any notice of the dangerous position in which Ross had placed himself, until too late to avoid the injury.

Dodge & Johnson, for appellant.

Upon the admitted facts in this case, George Ross was guilty of negligence which directly and proximately contributed to his death, and for which defendant cannot be held liable. 45 Ark. 248; 46 *id.* 92; 49 *id.* 259; 36 *id.* 371; 47 *id.* 477; 46 *id.* 513; 54 *id.* 434; 56 *id.* 271. There is no evidence to sustain the verdict.

A. D. Jones and *Williams & Bradshaw*, for appellee.

The testimony in this case presents a new and different case, and was tried upon a different theory from that of the former appeal. 56 Ark. 271. The testimony of Worthen and Johnson bring this case clearly within the rule laid down in 46 Ark. 513. See, also, 68 Fed. 148. It is only *when the facts are undisputed*, and are such that reasonable men may fairly draw but *one conclusion from them*, that the question of negligence is

ever considered one of law for the court. 10 U. S. App. 439; 3 C. C. A. 433, 437, 438; 53 Fed. 65–70; 144 U. S. 408, 417; 12 Sup. Ct. 679; 139 U. S. 469; 22 Wall. 341; 39 Minn. 254; 39 N. W. 488; 30 Minn. 482; 16 N. W. 266; Whit. Smith on Neg. p. 40. If the employees of appellant saw Ross in danger, and could have saved him, and failed, then this negligence, and not the trespass of being on the track, if such it was, is the proximate cause of the injury; and in such case appellant is liable even to a trespasser, or one guilty of contributory negligence. 25 S. W. 712; 30 *id.* 367. But Ross was not a trespasser, but rightfully where he was under the circumstances. 24 S. W. 140; 118 Mo. 268; 40 N. E. 923; 28 S. W. 95; 53 Ill. App. 588; 56 Minn. 340; 90 Va. 340; 50 Fed. 186; 58 Ark. 322. Being rightfully there, he was under an overpowering necessity, in order to escape danger, to step on the track, and is not held in such case to the rule applying to deliberate acts; and he had a right to presume that those in charge of the engine would be careful, and do their duty, and give warning by bell or whistle. This was not done, and therefore Ross was not guilty of such contributory negligence as barred the right of recovery here. 68 Fed. 152; 25 S. W. 293; 26 *id.* 760; Patterson's Ry. Ac. Law, 252; 59 Mo. App. 626; 16 So. 456; 40 La. An. 1543; 105 Cal. 379; 30 N. Y. S. 724; 81 Hun, 156; 24 S. W. 140; 118 Mo. 268.

It was gross negligence to make a flying switch. Patterson, Ry. Ac. Law, 166. By this flying switch with the rickety car, appellant produced an emergency which excused Ross for jumping on the track. Wharton, Neg. sec. 304; 66 Me. 376; 35 Ind. 510; Whart. Neg. secs. 89, 93, 95 and 377 and notes. This principle was recognized in 55 Ark. 248. One may jump off a moving train to escape danger. 18 S. W. 50; 17 *id.* 946; Schouler on Bail. & Car. 652. This court recog-

nizes the duty of care in such cases as this in trainmen failing to catch signals. 58 Ark. 484. An emergency excuses apparent negligence. 53 Ark. 466. Contributory negligence was a question for the jury. 57 Ark. 429. It depends on the circumstances of the case. 56 Fed. 464.

RIDDICK, J., (after stating the facts). It was held by this court in *Railway Co.* v. *Ross*, 56 Ark. 271, under evidence substantially the same as we have here, that the deceased, Ross, was guilty of contributory negligence, and that the defendant company was not liable for his death.

After again considering the evidence, we adhere to the conclusion arrived at in that case. It is contended that the employees of the railway company discovered the dangerous position of Ross in time to have avoided the injury; that they negligently failed to do so, and that for this reason the appellant is liable, notwithstanding the contributory negligence of the deceased. The evidence tends to show that one of the brakemen noticed the danger to which Ross was exposed, and that he attempted to signal the engineer to stop the engine, but this brakeman was not upon the engine, and had no control over it, except by signals, which he tried to give. There is nothing to show that either the engineer or fireman in charge of the engine had any knowledge of the danger to which Ross was exposed until after he was struck by the engine. The engineer may have been negligent in failing to keep a lookout and to observe signals, but, as the deceased was himself guilty of negligence directly contributing to his injury by stepping upon the railway track close to a moving engine, which was in plain view, the company is not responsible for his death.

The contributory negligence of Ross is a sufficient defense against the negligence of the engineer in failing

to discover the dangerous position in which Ross had suddenly and through inattention placed himself. Had the employees of the company discovered the danger of Ross in time to have avoided the injury by the use of proper care, they should have done so; but they had no notice that Ross would thus expose himself, and the company is not liable for the failure of its employees to discover a danger to which Ross was exposed by his own negligence. *Little Rock, &c., R. Co.* v. *Pankhurst*, 36 Ark. 377; *St. Louis, &c., R. Co.* v. *Freeman*, *id.* 46; *Little Rock, &c., R. Co.* v. *Cavenesse*, 48 *id.* 129; *Bauer* v. *Railway Co.* 46 *id.* 399; *St. Louis, &c., R. Co.* v. *Wilkerson*, *id.* 522; *St. Louis, &c., R. Co.* v. *Monday*, 49 Ark. 263.

Counsel for appellee have discussed the different questions in this case in an able and admirable brief. We have given it careful attention, but we remain of the opinion that the evidence, looked at from the point of view most favorable to appellee, does not make out a case against the railway company. In our opinion the death of Ross was due, not to the fault of the employees of the railway company, but to an accident such as may at times be brought upon one by even a moment's inattention, while standing upon a railway track. We think that the circuit court should have directed a verdict for the defendant. *Catlett* v. *Railway Co.* 57 Ark. 461. As the facts in the case seem to have been fully developed, it would be of no benefit to prolong this litigation. The judgment of the circuit court is reversed, and the case dismissed.

61 622
64 316
64 470

LITTLE ROCK v. QUINDLEY.

Opinion delivered February 1, 1896.

CONSTITUTIONAL LAW—AMENDMENT OF STATUTE.—The constitutional inhibition against the amendment of any law by reference to its title only (Const. 1874, art. 5, sec. 23) does not apply to amendments by implication; and hence the act approved April 19, 1895, providing that assessments in local improvement districts in cities of the first class shall be payable to the city collector, is not unconstitutional, though it impliedly amends existing statutes.

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

J. W. Blackwood, City Attorney, for appellants.

1. The circuit judge held the act unconstitutional, upon the ground that it was in violation of sec. 23, art. 5, const. 1874. The law is, and purports to be, an independent act. It nowhere attempts to revive or amend the provisions of any act, or to confer anything by reference to the title of any other act, nor to revise, alter or amend any prior act or law. It repeals all inconsistent acts. It is not unconstitutional. 13 Mich. 481; 70 Ill. 388; 109 *id.* 593; 20 Am. & Eng. Corp. Cases, 32; Cooley on Const. Lim. p. 185 (4 ed); 86 Ala. 22. Statutes which amend others by implication are not within the provision. The constitutional provision reaches those cases where the act is strictly amendatory or revisory in its character. 40 Ala. 77; 11 S. W. 265; 10 Col. 403; 4 L. R. A. 94; 47 Ark. 480; 52 *id.* 329. See also Suth. St. Constr. sec. 135; Sedgw. Const. St. & Const. Law, p. 530; 28 Am. & Eng. Enc. Law, p. 276; Potter, Dwar. on St. & Const. p. 154; Cooley, Const. Lim. p. 152. The enactment of one law is as much a repeal of all inconsistent laws as if those inconsistent laws had been repealed by express words. 61

Am. Dec. 331; 50 Ark. 132; 46 Ark. 229; 54 *id.* 346. The power of courts to declare legislative acts unconstitutional is to be exercised with the most guarded circumspection and care. 52 Am. Dec. 694; 63 *id.* 487; 89 *id.* 221; Cooley, Const. Lim. p. 194. The statute must be plainly and manifestly unconstitutional. 41 Am. Dec. 636; 26 *id.* 221; 59 *id.* 756. In *doubtful* cases, legislative acts are never pronounced unconstitutional. 92 Am. Dec. 646; Cooley, Const. Lim. p. 194–195. Courts have nothing to do with the wisdom or the policy of the law. The legislature *had the power* to pass the law, and it must stand.

Whipple & Whipple, for appellees.

A regular system of organization and procedure is provided for improvement districts in Sand. & H. Dig. secs. 5337 to 5362, etc. Sec., 5267 *id.*, prescribes the duties of city collector. Now, in lieu of this complete system, the legislature presents a crude, incomplete and obscure act, covering but a small portion of the ground. It is strictly *amendatory* of every one of the above sections, and yet *does not re-enact any portion of them.* It confers greatly increased duties upon the city collector, without so much as *referring* to sec. 5267. It *repeals nothing.* It relates only to cities of the first class. It is within the letter and very spirit of sec. 23, art. 5, Const. It both *amends* prior acts, and *confers* and *extends* the provisions of prior acts, without so much as a reference to the titles of the acts so affected. The reasons of this rule are laid down in Cooley on Lim. p. 15. See also 23 Am. & Eng. Enc. Law, p. 278; 4 L. R. A. 742. All that is really attempted by this act is to strike out "collector" where it occurs and insert "city collector." It attempts to abolish all other collectors, and devolves upon the new collector but one or two duties, and practically abolishes all other

duties required of collectors. 39 Fed. 380. The leaning of the courts is so strong against repeals by construction as almost to establish the doctrine of "no repeal by implication." Potter's Dwar. St. p. 154; 3 Bibb (Ky.), 180; 7 Nev. 15; 50 Ind. 203; 70 Ill. 391; 4 Neb. 354; 43 N. J. 388; 2 Or. 71; 31 Ark. 239; 47 *id.* 482; 49 *id.* 133; 52 *id.* 295.

RIDDICK, J. This action arose upon a petition of James O'Brien, as collector for the city of Little Rock, for a writ of mandamus to compel A. J. Quindley, as collector, and certain others, as commissioners of the Scott Street Paving District No. 46, to deliver the tax books for said district to said petitioner. The only question before us is whether the act of the legislature, approved April 19, 1895, entitled "An act to provide for the collection of assessments by the local improvement districts in cities of the first class," is a valid law or not. The act in question requires that "in the collection of all assessments in local improvement districts in cities of the first class the assessment shall be payable to the city collector," etc. Under this act the appellant, as city collector, claims the right to possession of the tax books for certain improvement districts in the city of Little Rock.

It is contended by the appellee that the act is in conflict with section 23 of article 5 of the state constitution, which provides that "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 re-enacted and published at length." It is argued that the statute in question is amendatory of certain sections of the digest relating to the levying and collecting of assessments for local improvements in towns and cities, and that it is void because it does not re-enact

and publish at length the sections as amended. After a consideration of the question, our conclusion is that this position is not tenable. The act in question does not expressly amend any section of the statute. Whatever amendatory effect it had upon the law existing at the time of its passage was by implication only. The rule is settled, by a decided weight of authority, that repeals by implication are not within the meaning of this provision of the constitution, and it is not essential that they should re-enact, or even refer to, the acts or sections which, by implication, they repeal or amend. *Watkins* v. *Eureka Springs*, 49 Ark. 134; *Scales* v. *State*, 47 Ark. 480; *People* v. *Mahaney*, 13 Mich. 481; Cooley's Con. Lim. 182, 185; Sutherland, Stat. Construction, sec. 135, and cases cited.

The purpose of such a provision in the constitution has seldom been better expressed than by Mr. Justice Cooley in the old case of *People* v. *Mahaney*. "The mischief designed to be remedied," he said, "was the enactment of amendatory statutes in terms so blind that legislatures themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation." *People* v. *Mahaney*, 13 Mich. 497.

The statute under consideration does not purport to amend any statute by a reference to its title or otherwise. No one can say that its terms are blind, or in any

sense obscure or misleading. It plainly appears from it that the intention of the legislature was to require all assessments by local improvement districts in cities of the first class to be paid to, and collected by, the collector. To understand its meaning and effect, no reference is required to be made to any other section or statute. It was said by Chief Justice Cockrill, speaking for this court, in *Watkins* v. *Eureka Springs*, that "it could not have been the intention of the framers of the constitution to put unreasonable restraints upon the power of legislation, and thus unnecessarily embarrass the legislature in its work. They meant only to lay a restraint upon legislation where the bill was presented in such form that the legislature could not determine what its provisions were upon an inspection of it. What is not within the mischief is not within the inhibition." *Watkins* v. *Eureka Springs*, 49 Ark. 134; *Montgomery Ass'n.* v. *Robinson*, 69 Ala. 415; *Home Ins. Co.* v. *Tax Dist.* 4 Lea, 644.

For these reasons, we do not believe that this act is in conflict with the provision of the constitution mentioned above. The legislature, we think, had the power to pass it, and the courts must uphold it. The judgment of the circuit court is reversed, and the case remanded with an order for further proceedings.

BUNN, C. J., dissents.

MANSUR & TEBBETTS IMPLEMENT CO. *v.* DAVIS.

61 627
f82 334

Opinion delivered February 8, 1896.

TRIAL—ATTACHMENT—OPENING AND CONCLUSION OF ARGUMENT.—Where, on the trial of an intervention in an attachment suit, the plaintiff admits the sale and delivery of possession of the attached property to the intervener before the attachment, but alleges that such sale was fraudulent, the burden of proof is on plaintiff, and he is entitled to open and conclude the argument.

Appeal from Miller Circuit Court.

RUFUS D. HEARN, Judge.

W. H. Arnold, for appellant.

The court erred in refusing plaintiff the right to open and conclude the argument. When a party assumes the burden of proof, he is entitled to open and conclude the argument. 58 Ark. 446; 32 *id.* 593; 29 *id.* 151; 59 *id.* 143.

T. E. Webber, for appellee.

The burden remained on the interpleader to make out his case. 58 Ark. 446; 29 *id.* 270; 27 *id.* 504; 45 *id.* 492; 53 *id.* 96; 58 *id.* 564; 55 *id.* 59. But, if error, it was harmless. The right to open and conclude is of value only when the party applying for it has testimony to argue. Here they have nothing but inferences, suspicions and illogical conclusions, not based on the testimony. The showing made by appellee was complete and convincing, and, in the absence of proof to destroy it, no order of argument could disturb it.

PER CURIAM. This was an attachment by the Mansur & Tebbetts Implement Company against Robert Ellis, in the Miller circuit court, on the ground that he had disposed of his property with the fraudulent intent to cheat, hinder and delay his creditors. N. L. Davis,

the appellee, interpleaded, claiming the goods by purchase from the defendant. Defendant, Ellis, filed an affidavit controverting the affidavit for attachment; and, on the trial of this issue, judgment was for plaintiff for its debt, and the attachment was sustained.

Thereupon, plaintiff filed an answer to the interplea, admitting the sale by defendant to interpleader, and the delivery to him of the possession of the goods sold, as alleged in the interplea, previous to the issuance of the writ of attachment, and that the property was so in the possession of the interpleader when the writ of attachment was served by the sheriff, but alleged that, at the time of said sale by defendant, Ellis, to interpleader, Davis, the defendant was largely indebted, and was, in fact, insolvent, and that said sale and transfer was without consideration, and for the purpose of cheating and defrauding the defendant's creditors, and of hindering and delaying them in the collection of their debts.

Before the introduction of testimony, plaintiff asked to assume the burden of proof, and this was refused; and after the evidence was all in, and the instructions settled, plaintiff moved the court that, as it had admitted the sale to, and possession of, the interpleader, and thus made a *prima facie* case for him, and as the remaining issue was as to the *bona fides* of said sale, as to which issue the burden was on it, to permit it to open and conclude the argument. This motion was overruled, and plaintiff reserved exceptions.

Section 2927, Sandels & Hill's Digest, reads thus: "The party holding the affirmative of an issue must produce the evidence to prove it." Section 2928: "The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." The 3rd sub-division of section 5820, Sandels & Hill's Digest, reads thus: "Third. The party on whom rests the burden of proof in the whole action

must first produce his evidence. The adverse party will then produce his evidence." The 6th sub-division of the same section reads thus: "Sixth. The parties may then submit or argue the case to the jury. In the argument the party having the burden of proof shall have the opening and conclusion; and if, upon demand of his adversary, he shall refuse to open and fully state the grounds upon which he claims a verdict, he shall be refused the conclusion."

The majority of the court are of the opinion, that upon the state of case here made by the pleadings, the motion of plaintiff should have been sustained, and that, in overruling the same, the court erred, and that the error is such that the judgment must be reversed. *Railway Co.* v. *Taylor*, 57 Ark. 137; *Tobin* v. *Jenkins*, 29 Ark. 151.

In other respects this cause is on a footing with the cases of *Hargadine-McKittrick Dry Goods Co.* against *N. L. Davis*, *Interpleader* (No. 2811), and *Stern*, *Lauer*, *Shohl & Co.* against *N. L. Davis*, *Interpleader*, (No. 2881), determined to-day,* and would be affirmed except for the error mentioned.

Reversed, and remanded for further proceedings not inconsistent with this opinion.

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*Orally decided.

APPENDIX.

I.

OPINIONS NOT REPORTED.

Lakenan *v.* Prophett; appeal from Garland circuit court; Alexander M. Duffie, judge; reversed October 12, 1895; per Bunn, C. J.

Geyer & Adams *v.* King; appeal from Faulkner chancery court; David W. Carroll, judge; reversed January 18, 1896; per Hughes, J.

II.

CASES DISPOSED OF ORALLY.

Jenkins *v.* Fidler; appeal from White circuit court; Grant Green, Jr., Judge; affirmed June 15, 1895; *per curiam.*

Abraham *v.* Williams; appeal from Clark circuit court; W. V. Tompkins, special judge; affirmed June 15, 1895; Bunn, Ch. J.

Brady *v.* State; appeal from Craighead circuit court; Felix G. Taylor, judge; affirmed June 15, 1895; Battle, J.

Deshazo *v.* State; appeal from Boone circuit court; Brice B. Hudgins, judge; affirmed June 15, 1895; Wood, J.

First Nat. Bank *v.* Savings Bank East Saginaw; appeal from Pulaski circuit court; Robert J. Lea, judge, affirmed June 15, 1895. Wood, J.

Southern Insurance Co. *v.* Ramsey; appeal from Phillips circuit court; Grant Green, Jr., judge; dismissed for non-compliance with rule nine, June 15, 1895; *per curiam.*

Stewart Drug Co. *v.* Merchants, etc., Bank; appeal from Cleveland circuit court; Carroll D. Wood, judge; affirmed June 22, 1895; Bunn, Ch. J.

Moore *v.* State; error to Independence circuit court; Richard H. Powell, judge; affirmed June 22, 1895; Battle, J.

Rose *v.* Hays; appeal from Pulaski circuit court; Robert J. Lea, judge; affirmed June 22, 1895; Hughes, J.

Parnell *v.* Goodwin; appeal from Columbia circuit court in chancery; Charles W. Smith judge; affirmed June 22, 1895; Hughes, J.

Gatling *v.* Hatcher; appeal from Saint Francis circuit court; Grant Green, Jr., judge; affirmed June 22, 1895; Wood, J.

Nichols *v.* Ward; appeal from Sebastian circuit court in chancery; T. C. Humphry, special judge; affirmed June 22, 1895; Wood, J.

Conn *v.* Martin; appeal from Independence circuit court in chancery; James W. Butler, judge; affirmed June 29, 1895; Bunn, Ch. J.

Bullock *v.* Hixon; appeal from Logan circuit court in chancery; Oscar L. Miles, special judge; affirmed June 29, 1895; Bunn, Ch. J.

Williams *v.* Neely; appeal from Woodruff circuit court; Grant Green, Jr., judge; affirmed June 29, 1895; Wood, J.

St. L. I. M. & S. Railway Co. *v.* Davis; appeal from Pulaski circuit court; Robert J. Lea, judge; affirmed June 29, 1895; Riddick, J.

Gibson *v.* Ball-Warren Commission Co.; appeal from Conway circuit court; Jeremiah G. Wallace, judge; affirmed June 29, 1895; *per curiam.*

Forrest, Turner & Co. *v.* Wolf & Bro.; appeal from Pope circuit court; Jeremiah G. Wallace, judge; dismissed June 29, 1895; *per curiam.*

Richardson *v.* Bank of Bolivar; appeal from Prairie circuit court; J. P. Roberts, special judge; affirmed June 29, 1895; *per curiam.*

School District Fort Smith *v.* Williams; appeal from Sebastian circuit court, Fort Smith district; Edgar E. Bryant, judge; affirmed on remittitur being entered, July 6, 1895; Bunn, Ch. J.

Hays *v.* Hynes; appeal from Crawford circuit court; Hugh F. Thomason, judge; affirmed July 6, 1895; Battle, J.

St. Louis Southwestern Railway Co. *v.* Kemp; appeal from Cleveland circuit court; Carroll D. Wood, judge; affirmed by consent July 13, 1895; *per curiam.*

Montgomery *v.* Shaver & Neff; appeal from Carroll circuit court; Edward S. McDaniel, judge; affirmed July 15, 1895; Wood, J.

Hill, Fontaine & Co. *v.* Woodberry & Hamilton, appeal from Nevada circuit court in chancery; Rufus D. Hearn, judge; affirmed July 15, 1895; Hughes, J.

Black *v.* State, *ex rel* Randolph county; certiorari to Randolph circuit court in chancery; John B. McCaleb, judge; dismissed for non-compliance with rule nine, October 7, 1895; *per curiam.*

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