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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

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T. D. CRAWFORD,
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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME.

HENRY G. BUNN, - - - - -	CHIEF JUSTICE
BURRILL B. BATTLE, -	ASSOCIATE JUSTICES
SIMON P. HUGHES, - -	
CARROLL D. WOOD, - -	
JAMES E. RIDDICK, - -	

CASES REPORTED.

A

Page

Adler-Goldman Com. Co. *v.* Bloom 616
—— (Butler *v.*) . . . 445
Ætna Insurance Co. *v.* Rosenberg 507
Alister (L. R. & Ft. S. R. Co. *v.*) 1
American Bldg. & Loan Ass. (Roberts *v.*) . . . 572
American Employers' Liability Ins. Co. *v.* Fordyce 562
Anderson (Greer *v.*) . 213
—— (St. L., I. M. & S. R. Co. *v.*) 360
Arkansas & La. R. Co. *v.* Harris 452
Arkansas Coal, etc., Co. *v.* Haley 144
Arkansas National Bank (Fletcher *v.*) . . . 265
Armstrong (Powers *v.*) . 267
Aubrey *v.* State . . . 368

B

Bailey (State *v.*) . . . 489
Barnett *v.* Meacham . 313
Beard (Shirey *v.*) . . 621
Bell (Geo. Taylor Com. Co. *v*) 26
Bennefield *v.* State . . 365
Bennett *v.* State . . . 516
Bloom (Adler-Goldman Com. Co. *v.*) . . . 616
Booe (State *v.*) 512
Boone County Bank *v.* Hensley 398
Boyington *v.* Van Etten . 63
British & Am. Mortgage Co. *v.* Winchell . . 160
Bromwell (Germania Ins. Co. *v.* 43
Brown (St. Louis & S. F. R. Co. *v.*) 254
—— *v.* State 126
Bryan *v.* Bryan . . . 79
Bryant *v.* State . . . 459
Busch *v.* Hart . . . 330
Butler *v.* Adler-Goldman Com. Co 445
Byford (Shattuck *v.*) . 431

C

Carpenter *v.* State . . 286
Cheatham (Moseley *v.*) . 133
City Electric St. R. Co. *v.* First Nat. Exch. Bk. 33
City of Little Rock (Waring *v.*) 408
City of Pine Bluff (Pine Bluff Water & L. Co. *v.*) 196
Cockrill *v.* Joyce . . . 216
Cotton *v.* State . . . 585
Crossett (Williamson *v.*) 393

D

Daggett (Lynch *v.*) . . 592
Dale *v.* Payne . . . 357
Davis *v.* Goodman . . 262

Page

Dingman (St. Louis S. W. R. Co. *v.*) 245
Drewry (Fox *v.*) . . . 316
Duncan (King *v.*) . . . 588
Dunham (Messenger *v.*) 326

E

Estes *v.* German Nat. B'k. 7
Evans *v.* Merritt . . . 228

F

Fetzer (Walker *v.*) . . 135
First Nat. Bank (Glaser *v.*) 171
First Nat. Bank of Owatonna *v.* Wilson . . 140
First Nat. Exch. Bank (City Electric St. R. Co. *v.*) 33
Fletcher *v.* Ark. Nat. B'k 265
Fly *v.* Grieb's Adm'r . 209
Forbes *v.* Whittemore . 229
Fordyce (American Emp. Liab. Ins. Co. *v.*) . . 562
—— *v.* Lowman . . . 70
Fort Smith & Van Buren Bridge Co., *ex parte* . 461
Fox *v.* Drewry . . . 316

G

Gabbert (Gregg *v.*) . . 602
Garrett (Martin *v.*) . . 421
Garvin *v.* Linton . . . 370
George Taylor Com. Co. *v.* Bell 26
German-American Ins. Co. *v.* Humphrey . . 348
Germania Ins. Co. *v.* Bromwell 43
German National Bank (Estes *v.*) 7
Glaser *v.* First Nat. B'k. 171

Page

Goodman (Davis *v.*) . . 262
Greer *v.* Anderson . . 213
Gregg *v.* Gabbert . . 602
Grieb's Administrator (Fly *v.*) 209

H

Haley (Arkansas Coal, etc., Co. *v.*) 144
Hall *v.* Melvin 439
Halpern (Spencer *v.*) . 595
Hamilton *v.* State . . . 543
Harkey *v.* Mechanics' & Traders' Ins. Co. . . 274
Harrell (Richardson *v.*) . 469
Harris (Ark. & La. R. Co. *v.*) 452
Hart (Busch *v.*) . . . 330
Havis *v.* State 500
Hawkins (Martin *v.*) . . 421
Hempstead Co. *v.* Jones 272
Hensley (Boone County Bank *v.*) 398
Hill *v.* Yarborough . . 320
Howe (School Dist. of Ft. Smith *v.*) 481
Humphrey (German-Am. Ins. Co. *v.*) 348
Hynes *v.* Stevens . . . 491

J

Jetton *v.* Tobey . . . 84
Johnson *v.* Stewart . . 164
Jones (Hempstead Co. *v.*) 272
—— *v.* Melindy . . . 203
Joyce (Cockrill *v.*) . . 216
—— *v.* State 510

K

King (Duncan *v.*) . . . 588
Kiser (Roe *v.*) 92

L

Page
Leathers (St. L., I. M. & S. R. Co. *v.*) 235
Leflore (Maledon *v.*) . . 387
Lewis *v.* State 494
Linton (Garvin *v.*) . . 370
Little Rock, City of (Waring *v.*) 408
Little Rock & Ft. S. R. Co. *v.* Alister . . . 1
—— (Martin *v.*) . . . 156
—— *v.* Stevenson, . . 354
Lovejoy *v.* State . . . 478
Lowman (Fordyce *v.*) . 70
Lynch *v.* Daggett . . . 592
Lyons (Shattuck *v.*) . . 338

M

McCain (Pine Bluff Water & L. Co. *v.*) . . . 118
Maledon *v.* Leflore . . 387
Martin *v.* Garrett . . . 421
—— *v.* Hawkins . . . 421
—— *v.* L. R. & Ft. S. R. Co. 156
May (Watson *v.*) . . . 435
Meacham (Barnett *v.*) . 313
Mechanics' & Traders' Ins. Co. (Harkey *v.*) . 274
Melindy (Jones *v.*) . . 203
Melvin (Hall *v.*) . . . 439
Messinger *v.* Dunham . 326
Merritt (Evans *v.*) . . 228
Moseley *v.* Cheatham . 133

N

Nesbit *v.* Schwab Clothing Co.. 22
Nichol (Sidway *v.*) . . 146

P

Page
Payne (Dale *v.*) . . . 357
Phillips (State *v.*) . . 119
Pike *v.* Thomas . . . 223
Pine Bluff, City of (Pine Bluff Water & L. Co. *v.*) 196
Pine Pluff Water & L. Co. *v.* City of Pine Bluff 196
—— *v.* McCain . . . 118
—— *v.* Schneider . . . 109
Powers *v.* Armstrong . 267

Q

Quertermous *v.* Taylor . 598

R

Rector *v.* Rose 279
Reed *v.* Reed 611
Richardson *v.* Harrell . 469
Roberts *v.* Am. Bldg. & L. Ass. 572
Roe *v.* Kiser 92
Rose (Rector *v.*) . . . 279
Rosenberg (Ætna Insurance Co. *v.*) 507
Rush (Weaver *v.*) . . . 51
Russell (St. Louis S. W. R. Co. *v.*) 182

S

St. Louis, I. M. & S. R. Co. *v.* Anderson . . 360
—— *v.* Leathers . . . 235
St. Louis & S. F. R. Co. *v.* Brown 254
St. Louis S. W. R. Co. *v.* Dingman 245
—— *v.* Russell 182
—— *v.* Selman 342

Page
Schneider (Pine Bluff W. & L. Co. *v.*) 109
School Dist. of Ft. Smith *v.* Howe 481
Schwab Clothing Co. (Nesbit *v.*) 22
Selman (St. Louis S. W. R. Co. *v.*) 342
Sharp Co. (Shaver *v.*) . 76
Shattuck *v.* Byford . . 431
—— *v.* Lyons 338
Shaver *v.* Sharp Co. . . 76
Shirey *v.* Beard . . . 621
Sidway *v.* Nichol . . . 146
Southern Ins. Co. *v.* Williams 382
Spencer *v.* Halpern . . 595
Starchman *v.* State . . 538
State (Aubrey *v.*) . . . 368
—— *v.* Bailey 489
—— (Bennett *v.*) . . . 516
—— (Bennefield *v.*) . . 365
—— *v.* Booe 512
—— (Brown *v.*) . . . 126
—— (Bryant *v.*) . . . 459
—— (Carpenter *v.*) . . 286
—— (Cotton *v.*) . . . 585
—— (Hamilton *v.*) . . 543
—— (Havis *v.*) 500
—— (Joyce *v.*) . . . 510
—— (Lewis *v.*) . . . 494
—— (Lovejoy *v.*) . . 478
—— (Phillips *v.*) . . 119
—— (Starchman *v.*) . . 538
—— (Texarkana Water Co. *v.*) 188
—— (Wilson *v.*) . . . 497
State (Wright *v.*) . . . 145
Stevenson (L. R. & Ft. S. R. Co. *v.*) 354
Stevens (Hynes *v.*) . . 491
Stewart (Johnson *v.*) . 164

T

Taylor (Quertermous *v.*) 598
Texarkana Water Co. *v.* State 188
Thomas (Pike *v.*) . . 223
Tobey (Jetton *v.*) . . 84

V

Van Etten (Boyington *v.*) 63

W

Walker *v.* Fetzer . . 135
Waring *v.* City of Little Rock 408
Watson *v.* May . . . 435
Weaver *v.* Rush . . . 51
Webster *v.* Williams . 101
Whittemore (Forbes *v.*) 229
Wilkins *v.* Worthen . . 401
Williams (Southern Ins. Co. *v.*) 382
—— (Webster *v.*) . . . 101
Williamson *v.* Crossett . 393
Wilson (First Nat. Bank, etc., *v.*) 140
—— *v.* State 497
Winchell (British & Am. Mortg. Co. *v.*) . . . 160
Worthen (Wilkins *v.*) . 401
Wright *v.* State . . . 145

Y

Yarborough (Hill *v.*) . 320

CASES CITED.

A

Page

Achterberg *v.* State, 8 Tex. App. 406 499
Alexander *v.* Messervey, 35 S. C. 409 430
Allen *v.* Hawks, 13 Pick. 79 98
—— *v.* State, 26 Ark. 333 304
American Nat. Exch. Bank *v.* Oregon Pottery Co., 55 Fed. 265 .. 38
Andrew *v.* Dieterich, 14 Wend. 31. 91
Andrews *v.* Andrews, 8 Conn. 79 .. 84
—— *v.* State, 21 Fla. 598 499
Angier *v.* Webber, 14 Allen, 211 .. 108
Aniba *v.* Yeomans, 39 Mich. 171 .. 596
Apel *v.* Kelsey, 47 Ark. 413 214
Arthur *v.* Caverley, 98 Mich. 82 ... 154
Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141 ..... 115, 119
Attorney General *v.* Northampton, 143 Mass. 589 201
Authur *v.* Caverly, 98 Mich. 82 .. 154
Ayers *v.* Watson, 132 U. S. 394 305
Ayres *v.* Husted, 15 Conn. 504 176

B

Bacon *v.* Miss. Ins. Co. 31 Miss. 116 37
Badgett *v.* Jordan, 32 Ark. 159 341
Badische, etc., Fabrik *v.* Schott, [1892] 3 Ch. Div. 447 106
Baird *v.* Williams, 19 Pick. 381 179
Bank of Harrison *v.* Gibson, 60 Ark. 269 ..... 324, 433
Bank of Metropolis *v.* N. E. Bank, 1 How. 239 221
Bank of Middlebury *v.* Rutland & W. R. Co. 30 Vt. 158 21
Bardwell *v.* Perry, 19 Vt. 292 182
Bartlett *v.* Boston Gas Co. 122 Mass. 210 114
Bauer *v.* St. L., I. M. & S. R. Co. 46 Ark. 399 167
Bayley *v.* Bryant, 24 Pick. 198 177
Beard *v.* Dennis, 63 Am. Dec. 380. 106
Bearden *v.* State, 44 Ark. 331 537
Beasley *v.* State, 53 Ark. 67 505
Beatty *v.* Coble, 41 C. L. J. 494 108
Behler *v.* Ins. Co. 68 Ind. 347 571
Beller *v.* Beller, 50 Mich. 49 613
Bennett *v.* Bennett, 37 W. Va. 396. 32
Bernard *v.* Life Ins. Ass'n, 32 N. Y. Supp. 223 48
Besson *v.* Eveland, 26 N. J. Eq. 471 33

Page

Bigelow *v.* Gregory, 73 Ill. 197 234
Billings *v.* State, 107 Ind. 54 532
Bliss *v.* Kaweah C. & I. Co. 65 Cal. 504 38
Boardman *v.* Woodman, 47 N. H. 136 271
Board of Equalization Cases, 49 Ark. 518 467
Boatmen's Savings Bank *v.* Collins, 75 Mo. 281 150
Boehen *v.* Ins. Co. 35 N. Y. 131 570
Bostic *v.* State, 94 Ala. 45 308
Bowden *v.* Spellman, 59 Ark., 259. 278
Boyce *v.* Railway Co. 63 Ia. 70 261
Boyd *v.* United States, 116 U. S. 616 540
Bragdon *v.* Insurance Co., 42 Me. 262 570
Breuckmann *v.* Twibill, 89 Pa. St. 58 397
Brewer *v.* Marshall, 19 N. J. Eq. 547 106
Brinkley *v.* Willis, 22 Ark. 1 609
Brittin *v.* Handy, 20 Ark. 381 627
Brodie *v.* Fitzgerald, 57 Ark. 445 ..... 486, 488
Brown *v.* Hartford F. Ins. Co. 117 Mass. 479 278
—— *v.* People, 26 Ill. 28 507
—— *v.* Rickets, 4 Johns. Ch. 306 ... 608
—— *v.* State, 55 Ark. 493 74
Bruce *v.* Arrington, 22 Ark. 362 .. 145
Buck *v.* Lee, 36 Ark. 525 438
Building & L. Ass'n *v.* Jones, 32 S. C. 313 154
Bunn *v.* Guy, 4 East, 190 108
Burk *v.* Burk, 21 W. Va. 445 615
Burlington Ins. Co. *v.* Kennerly, 60 Ark. 532 353
Burnside *v.* Twitchell, 43 N. H. 390 450
Bush *v.* Scott, 76 Ill. 524 400
Butcher *v.* Providence Gas Co. 12 R. I. 149 ..... 115, 117
Butterfield *v.* Forrester, 11 East, 60 171

C

Cairo & F. R. Co. *v.* Rea, 32 Ark. 29 145
—— *v.* Trout, 32 Ark. 17 145
Campbell *v.* State, 38 Ark. 508 552
Carroll *v.* Wiggins, 30 Ark. 402 450
Carsley *v.* White, 21 Pick. 256 167
Carson, etc., Ass'n. *v.* Miller, 16 Nev. 327 569

Page
Casat *v.* State, 40 Ark. 511..... 126
Catlett *v.* Railway Co. 57 Ark. 461 160
Cave *v.* Houston, 65 Tex. 619..... 196
Chandler *v.* Neighbors, 44 Ark. 479 319
Charles *v.* Charles, 56 Am. Dec. 155 84
Chicago, etc., R. Co. *v.* James, 22 Wis. 194..... 37
Chicago & E. I. R. Co. *v.* Loeb, 118 Ill. 214..... 364
Chicago, St. L. & N. O. R. Co *v.* Doyle, 60 Miss. 977..... 260
Chisholm *v.* Atlanta Gas Light Co. 57 Ga. 28.....114–7
Churchill *v.* Hunt, 3 Denio, 321.... 569
Cincinnati College *v.* State, 19 Ohio, 110.....487–8
Cincinnati, etc. R. Co. *v.* Street, 50 Ind. 225..... 171
Cincinnati Safe Co. *v.* Kelly, 54 Ark. 476..... 450
Citizens Street Ry. *v*, Steen, 42 Ark. 321..... 169
City Electric St. R. Co. *v.* Conery, 61 Ark 381..... 119
City of Lexington *v.* Butler, 14 Wall. 296..... 39
Claflin *v.* Sylvester, 12 S. W. 508.. 177
Clapp *v.* Clapp, 44 Hun, 451..... 227
Clifford *v.* Turrill, 9 Jur. 633..... 337
Cole *v.* State, 10 Ark. 318..... 537
—— *v.* White County, 32 Ark. 45.. 273
Collins *v.* Underwood, 33 Ark. 265 150
Commonwealth *v.* Coupe, 128 Mass. 63..... 418
—— *v.* Dana, 2 Met. (Mass.) 329.. 541
—— *v.* Henry, 118 Mass. 460..... 532
—— *v.* Parmenter, 5 Pick. 279 ... 534
—— *v.* Williams, 13 Bush, 267.... 530
Conger *v.* Cotton, 37 Ark. 286..... 601
Conway *v.* Smith, 13 Wis. 125.. .. 154
Cookson *v.* Toole, 59 Ill. 515..... 154
Cooper *v.* Lee, 59 Ark. 460..... 193
Covill *v.* Hill, 4 Denio, 323 91
Cox *v.* Cox, 35 Mich. 451 613
—— *v.* State, 28 Tex. App. 92..... 499
Craft *v.* South Boston R. Co. 150 Mass. 208 37
Craig *v.* Pleiss, 26 Pa. St. 271 ...377–8
Crowley *v.* Mining Co. 55 Cal. 273. 38
Culberson *v.* Culberson, 37 Ga. 296 84
Cummings v. National Bank, 101 U. S. 153.....466–7
Cupp *v.* Welch, 50 Ark. 294..... 83
Curry *v.* Woodward, 53 Ala. 376... 406
Cushing *v.* Sambola, 30 La. An. 426..... 212

D

Dabney *v.* Stevens, 40 How. Pr. 341..... 37
Davenport *v.* Wright, 51 Pa. St. 292..... 176
Davies *v.* Mann, 10 M. & W. 546..168–9
Davis *v.* First Nat. Bank, 5 Neb. 242..... 150
—— *v.* Statts, 43 Ind. 103..... 392
Davison *v.* People, 90 Ill. 221..... 311
Dawson *v.* Parham, 55 Ark. 286... 63
DeBussche *v.* Alt, L. R. 8 Ch. Div. 286..... 319
Dennick *v.* Railroad Co. 103 U. S. 11 260
Desha *v.* Robinson, 17 Ark. 240.... 278
Detroit & W. R. Co. *v.* Van Steinburg, 17 Mich. 99..... 167
Dexter *v.* Town Council, 21 Atl. 347 202
Dickinson *v.* Way, 3 Rich. Eq. 412 176
Dixon *v.* State, 29 Ark. 165 304
Dobbin *v.* Hubbard, 17 Ark. 189... 150
Dolan *v.* State, 40 Ark. 454..... 307
Donahue v. Mills, 41 Ark. 422..... 326
Dougherty's Estate, 9 Watts & S. 189 175
Douglass *v.* Flynn, 43 Ark. 403.... 341
Drainage Com'rs. *v.* Giffin, 25 N. E. 995..... 201
Drexel's Appeal, 6 Pa. St. 272.... 175
Driggs & Co.'s Bank *v.* Norwood, 50 Ark. 46..... 32
Dudney *v.* State, 22 Ark. 251..... 542
Duncan *v.* State, 49 Ark. 543..... 307
Dunlop *v.* Gregory, 61 Am. Dec. 746..... 106
Dwight *v.* Hamilton, 113 Mass. 175 108

E

Early *v.* Mahon, 19 Johns. 147.... 376
Edmonds *v.* State, 34 Ark. 726 ... 553
Edwards *v.* Handley, 3 Am. Dec.. 626
Eighmie *v.* Taylor, 98 N. Y. 294.. 337
Emerson *v.* Lowell Gas Light Co. 3 Allen, 410..... 114
Esmeralda Co. *v.* District Court, 18 Nev. 438 201
Eureka Springs R. Co. *v.* Timmons, 51 Ark. 459..... 261
Evans *v.* Davidson, 53 Md. 245.... 116
Ewing *v.* Johnson, 34 How. Pr. 202 108

F

Fargason *v.* Edrington, 49 Ark. 207..... 326
Farmers' Loan & T. Co. *v.* Minneapolis E. & M. Works, 35 Minn. 543..... 450
Fawcett *v.* Osborn, 42 Ill. 411..... 88
Fay, *ex parte*, 15 Pick. 243... 202
Feigel *v.* State, 85 Ind. 580..... 516
Ferrin *v.* Myrick, 41 N. Y. 315...227–8

Page
Fireman's Fund Ins. Co. *v.* Norwood, 69 Fed. 71..... 353
First Nat. Bank *v.* Cochran, 14 So. 439..... 177
—— *v.* Greenwood, 45 N. W. 810.. .....177, 180
—— *v.* Hogan, 47 Mo. 472..... 37
—— *v.* Plankington, 27 Wis. 177.. 377
Fisher *v.* Kuhn, 54 Miss. 483..... 336
Fitzpatrick *v.* State, 37 Ark. 238.. 307
Fleetwood *v.* New York, 2 Sandf. 475..... 626
Floyd Acceptances, The, 7 Wall. 666..... 40
Forbes *v.* Railroad Co. 76 N. C. 454..... 171
Ford *v.* Adams, 54 Ark. 137..... 407
Fordyce *v.* Lowman, 57 Ark. 160.. 71
Fox *v.* Brooks, 88 N. C. 234..... 400
French *v.* Parker, 16 R. I. 219.... 107
Fuller *v.* Rowe, 57 N. Y. 23..... 234

G

Gale *v.* Nixon, 6 Cow. 448 336
Gardner *v.* Barnett, 36 Ark. 479... 392
Garnett *v.* Richardson, 35 Ark. 144 234
Garrentzen *v.* Duenckle, 50 Mo. 104 116
Gaynor *v.* Blewett, 86 Wis. 401 .. 154
Gelpcke *v.* City of Dubuque, 1 Wall. 175..... 39
German Bank *v.* DeShon, 41 Ark. 331 380
German Ins. Co. *v.* Gibson, 53 Ark. 494 48
Gilbert *v.* Wiman, 1 N. Y. 550..... 569
Giles *v.* Hicks, 45 Ark. 271..... 620
Gilkerson-Sloss Com. Co. *v.* Bond, 11 So. 220 177
Goit *v.* Ins. Co. 25 Barb. 189 570
Goodman *v.* Durant B. & L. Ass. 14 So. Rep. 146..... 584
Gore *v.* State, 52 Ark. 285..... 537
Gough *v.* St. John, 16 Wend. 646.. 271
Gould *v.* Cayuga Co. Nat. Bank, 86 N. Y. 75..... 278
Graffam *v.* Pierce, 143 Mass. 386... 337
Gray *v.* Combs, 7 J. J. Marsh, 478. 308
Great Western R. Co. *v.* Miller, 19 Mich. 305..... 261
Green *v.* State, 38 Ark. 304.... ... 496
Griffey *v.* N. Y. Cent. Ins. Co. 100 N. Y. 417.. 387
Griffith *v.* State, 37 Ark. 324..... 305
Grisard *v.* Hinson, 50 Ark. 230 ... 391
Grogan *v.* Garrison, 270 St. 50 84
Grubbs *v.* Ins. Co. 108 N. C. 472 ... 353
Guggenheimer *v.* Geiszler, 81 N. Y. 293..... 377
Guynn *v.* McCauley, 32 Ark. 97.194, 214

H

Page
Hackett *v.* Richards, 13 N. Y. 140. 397
Hagerman *v.* Building & S. Ass'n, 25 O. St. 205..... 579
Haight *v.* McVeigh, 69 Ill. 628.152, 154
Hailey *v.* Falconer, 32 Ala. 536.... 597
Hall *v.* Burgess, 5 B. & C. 332.... 398
Hallowell, etc., Bank *v.* Hamlin, 14 Mass. 180..... 37
Hallum *v.* Dickinson, 47 Ark. 125.. 407
Hamilton *v.* Aurora F. Ins. Co. 15 Mo. App. 59..... 353
Hammond *v.* Hopping, 13 Wend. 505 .....98, 376
Hanna *v.* Int. Petroleum Co. 23 O. St. 622..... 69
Harding *v.* Jasper, 14 Cal. 647.... 420
Hardware Co. *v.* Deere, Mansur & Co. 53 Ark. 140.....177, 179
Harkinson's Appeal, 78 Pa. St. 196 108
Harland's Accounts, in the matter of, 5 Rawle, 323 609
Hart *v.* Morton, 44 Ark. 447..... 135
Harvey *v.* Rose, 26 Ark. 3..... 167
Hauer's Appeal, 5 Watts & S. 473. 175
Hawkes *v.* Dodge County Mut. Ins. Co. 11 Wis. 188..... 350
Haydock Carriage Co. *v.* Pier, 74 Wis. 585..... 154
Hays *v.* Jordan, 85 Ga. 741..... 154
Henderson *v.* State, 14 Tex. 503... 532
Herrick *v.* Carpenter, 6 N. W. 574. 202
—— *v.* M. & St. L. R. Co. 31 Minn. 11..... 261
Hershy *v.* Latham, 42 Ark. 305.... 319
—— *v.* Thompson, 50 Ark. 484.... 193
Hibernia Savings Ins. Co. *v.* Luhn, 34 S. C. 184..... 154
Hickey *v.* Thompson, 52 Ark. 238 152
Hill *v.* Beach, 12 N. J. Eq. 31..... 69
Hoffman *v.* State, 12 Tex. App. 406 499
Holden *v.* Hoyt, 134 Mass. 181.... 43
Holder *v.* State, 58 Ark. 473..... 537
Holly *v.* Boston Gas Light Co. 8 Gray, 123..... 114
Holt *v.* Moore, 37 Ark. 145..... 326
Home Ins. Co. *v.* Howard, 111 Ind. 544..... 278
Holmes *v.* Martin, 10 Ga. 503..... 108
Hoppe *v.* Byers, 39 Ia. 573..... 212
Horner *v.* Graves, 7 Bing. 735.... 106
Hoskins *v.* Wall, 77 N. C. 249..... 400
Houghton *v.* Milburn, 54 Wis. 564. 154
Howard *v.* Hatch, 29 Barb. 297.... 430
—— *v.* State, 34 Ark. 433..... 491
—— *v.* State, 47 Ark. 431..... 415
Hubbard *v.* Miller, 27 Mich. 15.... 108
Hunt *v.* Lowell Gas Light Co. 8 Allen, 169 114
Hurley *v.* State, 29 Ark. 22..... 554

Page
Hurt *v.* Salisbury, 55 Mo. 310..... 234
Hyde *v.* Larkin, 35 Mo. App. 365.. 37

I

Imperial Fire Ins. Co. *v.* Coos Co. 151 U. S. 452.....350, 351
Indianapolis, etc. Ry. Co. *v.* Caudle, 60 Ind. 112..... 171
Insurance Co. *v.* Brodie, 52 Ark. 11 .....48, 353
—— *v.* Colt, 20 Wall. 560..... 570
—— *v.* Mowry, 96 U. S. 547.....47-50

J

Jacks *v.* Dyer, 31 Ark. 334... 194
Jackson *v.* State, 54 Ark. 244 554
Jacoway *v.* Gault, 20 Ark. 190..... 18
Jarrett's Ex'or *v.* Cope, 68 Pa. St. 67..... 584
Jennings *v.* Inhabitants, etc. 5 Gray, 73 418
Johnson *v.* State, 29 Ark. 31..... 304
—— *v.* State, 32 Ark. 309 554
—— *v.* State, 43 Ark. 391..... 555
—— *v.* State, 58 Ark. 57 307
—— *v.* Stewart, 62 Ark. 164... ....238, 244, 252
—— *v.* Sutherland, 29 Mich. 579..... 154
Jones, *ex parte*, L. R. 12 Ch. Div. 484..... 151
—— *v.* Buzzard, 2 Ark. 415..... 329
—— *v.* Childs, 8 Nev. 121..... 569
—— *v.* State, 61 Ark. 102..... 559
—— *v.* Ward, 10 Yerg. 160..... 609

K

Keefe *v.* Railway Co. 60 N. W. 503 171
Kelly *v.* Phelan, 5 Dill. 228..... 221
Kendall *v.* State, 65 Ala. 492 304
Kent *v.* Jackson, 14 Beav. 384..... 609
Kimball *v.* Monarch Ins. Co. 70 Ia. 513..... 351
Kimble *v.* Esworthy, 6 Ill. App. 517 400
King *v.* Chase, 15 N. H. 15 78
Kirby *v.* Insurance Co. 13 Lea, 340 387
Kowing *v.* Moran, 5 Dem. Sur. 59. 228

L

Lanigan *v.* N. Y. Gas Light Co. 71 N. Y. 29..... 117
Lawrence Co. *v.* Hudson, 41 Ark. 494..... 77
Lear *v.* Yarnel, 3 A. K. Marsh. 421 98
Leigh *v.* Mobile & O. R. Co. 58 Ala. 178 90
Lenox *v.* Howland, 3 Caines, 323.. 329
Leonard *v.* Columbia, etc., Co. 84 N. Y. 48..... 260

Page
Leonard *v.* Territory, 7 Pac. Rep. 872..... 369
Levells *v.* State, 32 Ark. 585..... 307
Levy *v.* Brown, 11 Ark. 16..... 98
Lexington *v.* Butler, 14 Wall. 296.
Life & F. Ins. Co. *v.* Mechanic F. Ins. Co. 7 Wend. 31.....37, 41
Lincoln Bldg. etc. Ass. *v.* Benjamin, 7 Neb. 181. 584
—— *v.* Graham, 7 Neb. 173 584
Link *v.* Germantown Bldg. Ass. 89 Pa. St. 15..... 584
Linn *v.* Sigsbee, 67 Ill. 75.... 108
Little *v.* Ins. Co. 38 O. St. 110..... 571
Little Rock & Ft. S. R. Co. *v.* Cavenesse, 48 Ark. 124.....167, 239
—— *v.* Chapman, 39 Ark. 463..... 363
—— *v.* Finley, 37 Ark. 562..168-9, 244
—— *v.* Holland, 40 Ark. 336,168,244, 251
—— *v.* Worthen, 46 Ark. 312...484-485
Locke *v.* Homer, 131 Mass. 93 ... 569
Logan Co. *v.* Trimm, 57 Ark. 499.. 273
Louisville *v.* Com. 1 Duvall, 295.. 488
Lowenstein *v.* McCadden, 54 Ark. 13..... 478
Lukens *v.* Hazlett, 37 Minn. 441.... 377
Lysaght *v.* Edwards, L. R. 2 Ch. Div. 506 285

M

Mabry *v.* State, 50 Ark. 492..537, 554
McAlpine *v.* Sweetser, 76 Ind. 78.. 175
McArthur *v.* State, 59 Ark. 431... 481
McClarren *v.* Thurman, 8 Ark. 316 407
McClurg's Appeal, 58 Pa. St. 51.. 108
McCullough *v.* Moss, 5 Denio, 567 37
McDonnell *v.* State, 58 Ark. 242.. 534
McIntosh *v.* Hill, 47 Ark. 363..... 450
McKennon *v.* May, 39 Ark. 442.. 135
McKim *v.* Mason, 3 Md. Ch. 186.. 450
McKneely *v.* Terry, 61 Ark. 527.. 319
McMahon *v.* Sloan, 12 Pa. St. 229 91
McMinn *v.* Whelan, 27 Cal. 300.... 444
McNair *v.* Pope, 100 N. C. 404.... 627
McPherson *v.* State, 29 Ark. 225.. 307
McRea *v.* Merrifield, 48 Ark. 160.. 450
McReynolds *v.* Counts, 9 Grat. 242 315
Madden *v.* Cooper, 47 Ill. 359..... 430
Mallan *v.* May, 11 M. & W. 653.... 106
Maloney *v.* Nelson, 39 N. E. 82.... 569
Mandeville *v.* Harman, 7 Atl. 37.. 105
Marsh *v.* Burroughs, 1 Woods, 468. 406
Martin *v.* Little Rock & Ft. S. R. Co. 62 Ark. 156..... 250
—— *v.* Tennison, 56 Ark. 291..... 478
Mattox *v.* U. S. 156 U. S. 237..... 305
Mayer *v.* Adrian, 77 N. C. 88 336
Mayes *v.* Woodall, 35 Tex. 687..... 175
Mayor *v.* Shaw, 16 Ga. 172 201
Meckley's Appeal, 102 Pa. St. 536. 175

Page
Meinhard *v.* Youngblood, 15 S. E. 950 177
Memphis & L. R. R. Co. *v.* Kerr, 52 Ark. 162 ..... 168, 185, 240, 244, 252, 253
Merchants' Bank *v.* State Bank, 10 Wall. 644 ..... 38, 42
Merrick *v.* Arbela, 41 Mich. 630 201
—— *v.* Van Santvoord, 34 N. Y. 208 69
Merrill *v.* Agricultural Ins. Co. 73 N. Y. 452 350
Merrills *v.* Law, 9 Cow. 65 99
Meyer *v.* Bloom, 37 Ark. 43 438
—— *v.* Gossett, 38 Ark. 377 ... 18, 326
—— *v.* Smith, 33 Ark. 627 397
—— *v.* State, 19 Ark. 156 126
Miller *v.* Brown, 47 Mo. 506 150
—— *v.* Goodwin, 8 Gray, 542 84
—— *v.* Hull, 4 Denio, 104 376
—— *v.* Life Ins. Co. 12 Wall. 285 570–1
—— *v.* State, 40 Ark. 488 ... 304, 552
—— *v.* Trustees, 88 Ill. 26 201
Mississinewa Mining Co. *v.* Patton, 129 Ind. 472 114
Miss. Valley Ins. Co. *v.* Neyland, 9 Bush, 430 570
Mitchel *v.* Reynolds, 1 P. Wms. 181 106
Mix *v.* People, 26 Ill. 32 507
Mobile Life Ins. Co. *v.* Pruett, 74 Ala. 497 47–8
Moody *v.* Hawkins, 25 Ark. 191 ... 380
Morris *v.* R. I. & P. R. Co. 65 Ia. 727 261
—— *v.* Railroad Co. 45 Ia. 29 ... 171
Morton *v.* Thurber, 85 N. Y. 550 .. 377
Mount Morris Square, *in re*, 2 Hill, 14 201
Mount Sterling, etc., Co. *v.* Looney, 1 Met. (Ky.) 550 37
Mowrey *v.* Walsh, 8 Cow. 243 90
Muldowney *v.* Ill. Cent. R. Co. 36 Ia. 472 74
Mulholland *v.* York, 82 N. C. 510 .. 627
Mullen *v.* Old Colony R. Co. 127 Mass. 89 278
Mulloy *v.* Fifth Ward Bldg. Ass. 2 McArthur, 594 585
Munday *v.* Vail, 34 N. J. L. 418 ... 444
Mussey *v.* Eagle Bank, 9 Metc. 313 42

N

Nashville, etc. R. Co. *v.* Sprayberry, 8 Baxt. 341 260
National Bank *v.* Atkinson, 55 Fed. 465 37
—— *v.* Kimball, 103 U. S. 732 467
—— *v.* Young, 41 N. J. Eq. 531 39
Nelson *v.* Railroad Co. 68 Mo. 593. 171
Neubrandt *v.* State, 53 Wis. 89 ... 542
New Haven, etc., Co. *v.* Fowler, 28 Conn. 103 329
Norman *v.* Fife, 61 Ark. 33 212

O

Oakley *v.* Oakley, 30 Ala. 131 315
Occidental B. & L. Ass. *v.* Sullivan 62 Cal. 394 585
Ochsenbein *v.* Shapley, 85 N. Y. 214 116
Ocmulgee B. & L. Ass. *v.* Thomson, 52 Ga. 427 583
O'Keefe *v.* Chicago, etc. R. Co. 32 Ia. 467 170
Olsen *v.* Bagley, 37 Pac. 739 193
Onstott *v.* Murray, 22 Ia. 458. 415, 419–20
Orr *v.* Bornstein, 124 Pa. St. 311 .. 154
—— *v.* State Board, 28 Pac. 416 ... 202
Oswald *v.* Wolf, 129 Ill. 200 194
Owens *v.* Dickenson, Craig & P. 48 151

P

Packard v. Smith, 9 Wis. 184 175
Padgett *v.* Norman, 44 Ark. 490 ... 315
Palmer *v.* Martindell, 43 N. J. Eq. 90 176
Palmore *v.* State, 29 Ark. 248 .. 125, 307
Parker *v.* Holmes, 2 Hill, Ch. 95 ... 176
Parks *v.* Boston, 8 Pick. 226 201
Patton *v.* State, 50 Ark. 53 .... 415, 418
Payne *v.* Bullard, 23 Miss. 88 406
Pearson *v.* State, 56 Ark. 153 488
Peirce *v.* Partridge, 3 Met. (Mass.) 44 176–8
Pelican Ins. Co. *v.* Wilkerson, 53 Ark. 353 47
Pennell *v.* Monroe, 30 Ark. 661 430
Penyan *v.* Berry, 52 Ark. 130 620
People *v.* Board, 43 Barb. 232 201
—— *v.* Board Com'rs, 97 N. Y. 37 201
—— *v.* Board Supervisors, 30 N. E. 488 201
—— *v.* Calvin, 60 Mich. 123 559
—— *v.* Commissioners, 25 N. Y. Sup. 322 202
—— *v.* Flack, 11 L. R. A. 810 ... 532
—— *v.* Flanagan, 60 Cal. 2 311
—— *v.* Hayden, 27 N. Y. Sup. 881 201
—— *v.* Hope, 62 Cal. 291 540
—— *v.* Knapp, 71 Cal. 10 559
—— *v.* Loehfelm, 102 N. Y. 1 ... 418
—— *v.* Majone, 1 N. Y. Cr. 89 .. 533
—— *v.* Marion, 28 Mich. 255 530
—— *v.* Martin, 142 N. Y. 228 ... 201
—— *v.* Mayor, 2 Hill, 9 201
—— *v.* Nichols, 79 N. Y. 582 201
—— *v.* Van Alstine, 57 Mich. 69 530
—— *v.* Walter, 68 N. Y. 403 201

Page
Perry *v.* Perryman, 19 Mo. 469. .. 84
Person *v.* Wright, 35 Ark. 169..... 135
Pettis *v.* Atkins, 60 Ill. 454..... 234
Petty *v.* Grisard, 45 Ark. 117..... 326
Phelan *v.* Phelan, 135 Ill. 445 615
Philadelphia, etc. R. Co. *v.* Derby, 14 How. 468 116
Phillips *v.* Columbus City Bldg. Ass. 53 Ia. 719 376
Pierce *v.* Plumb, 74 Ill. 326 569
Piety *v.* Stace, 4 Ves. Jr. 620..... 608
Pike *v.* Fitzgibbon, L. R. 17 Ch. Div. 454..... 151
Pine Bluff W. & L. Co. *v.* Schneider, 62 Ark. 109 118
Pinson *v.* State, 28 Ark. 397..... 505
Pipkin *v.* Williams, 57 Ark. 242.... 433
Pleasants *v.* Scott, 21 Ark. 370 ... 194
Pond *v.* People, 8 Mich. 150....308, 310
Pratt *v.* Andrews, 4 N. Y. 493..... 271
—— *v.* Ins. Co. 55 N. Y. 505..... 352
Price *v.* Campbell, 2 Call, 110..... 376
—— *v.* State, 57 Ark. 167..... 554
Proprietors, etc. *v.* Nashua & L. R. Co. 10 Cush. 385..... 363

R

Railroad Co. *v.* Norton, 24 Pa. St. 469..... 522
—— *v.* Stout, 17 Wall. 663 167
Railway Co. *v.* Cullen, 54 Ark. 431. .....158-9, 250-1
—— *v.* Murphy, 60 Ark. 333..... 208
—— *v.* State, 55 Ark. 200 444
—— *v.* Tippett, 56 Ark. 459.250-1, 158-9
—— *v.* Yarborough, 56 Ark. 613... 365
Rector, etc., of Trinity Church *v.* Higgins, 48 N. Y. 532..... 569
Reed *v.* Northfield, 13 Pick. 98.... 420
Reid *v.* Hart, 45 Ark. 41 .....214, 215
Rex *v.* Powell, 2 East, P. C. 976... 534
Reynes *v.* Dumont, 130 U. S. 392.. 221
Reynolds *v.* Reynolds, 55 Ark. 373. 278
—— *v.* Shaver, 59 Ark. 299..... 598
Rice *v.* Dorrian, 57 Ark. 541..... 180
—— *v.* Dudley, 65 Ala. 68 397
Richardson *v.* Com. 80 Va. 124 ... 499
Rife *v.* Geyer, 59 Pa. St. 393..... 149
Riley *v.* Vaughan, 116 Mo. 169.... 32
Rindge *v.* Inhabitants of Coleraine, 11 Gray, 157..... 167
Ritchie *v.* Frazer, 50 Ark. 393..... 391
Robertson *v.* Am. Homestead Asso. 10 Md. 397..... 582
Robinson *v.* Ins. Co. 51 Ark. 441.. 47
—— *v.* Supervisors, 16 Cal. 208..... 202
Rose *v.* Rose, 50 Mich. 92 613
—— *v.* Watson, 10 H. L. Cas. 678. 285
Roth *v.* Williams, 45 Ark. 447..... 438
Rothschild *v.* State, 7 Tex. App. 519..... 535
Rounds *v.* State, 78 Me. 48..... 532
Routt *v.* State, 61 Ark. 594..... 129
Ruan *v.* Perry, 3 Caines, 120..... 271
Russel *v.* Bank, 29 Mich. 671..... 154

S

St. Louis, I. M. & S. R. Co. *v.* Barnes, 35 Ark. 95.. .....145, 202
—— *v.* Biggs, 52 Ark. 240..... 363
—— *v.* Freeman, 36 Ark. 41..... 167
—— *v.* Higgins, 44 Ark. 296..... . 320
—— *v.* Leathers, 62 Ark. 235..250, 253
—— *v.* Monday, 49 Ark. 257...240, 242
—— *v.* Morris, 35 Ark. 622.....363-4
—— *v.* Ross, 61 Ark. 617..... 251
—— *v.* Wilkerson, 46 Ark. 523..... 242
Saltmarsh *v.* Spaulding, 147 Mass. 224..... 69
Saltus *v.* Everett, 20 Wend. 278... 89
Sannoner *v.* Jacobson, 47 Ark 31.179-80
Schattler *v.* Cassinelli, 56 Ark. 177 193
Schuisler *v.* Ames, 16 Ala. 73..... 397
Seamster *v.* Blackstock, 83 Va. 232 444
Second Nat. Bank *v.* Hall, 35 O. St. 158..... 69
Selma, etc. R. Co. *v.* Lacey, 49 Ga. 106..... 260
Sexton *v.* Wheaton, 8 Wheat. 229.. 33
Shannon *v.* Howard Mut. Bldg. Ass. 36 Md. 383..... 583
Shaw *v.* Peckett, 26 Vt. 482..... 196
Sheldon *v.* Gas Co. 26 N. Y. 460 ... 570
Shover *v.* State, 10 Ark. 259. 460
Sibley *v.* Ratliffe, 50 Ark. 477..... 240
Sidensparker *v.* Sidensparker, 52 Me. 481 175
Sidway *v.* Lawson, 58 Ark. 117.... .....83, 324, 433
Simon *v.* Sevier Association, 54 Ark. 58 19
Simonton *v.* Loring, 68 Me. 164 ... 116
Simpson *v.* Shackelford, 49 Ark. 63 ..... 91, 450
—— *v.* Westenberger, 28 Kas. 756 271
Sims *v.* Everhardt, 102 U. S. 300.. 319
Smedis *v.* Railway Co. 88 N. Y. 13 159
Smith *v.* Beach, 3 Day, 268..... 376
—— *v.* High, 85 N. C. 93..... 400
—— *v.* Hollis, 46 Ark. 21..... 341
—— *v.* Ins. Co. 60 Vt. 682 350
—— *v.* Powell, 55 Ia. 215..... 202
—— *v.* Railway Co. 18 Wis. 17... 569
—— *v.* State, 59 Ark. 132..... 307
Smythe *v.* Allen, 67 Miss. 146..... 377
Snap *v.* People, 19 Ill. 80..... 367
Sneed *v.* State, 5 Ark. 431..... 537
Solary *v.* Webster, 17 So. 646..... 569

Page
Southern B. & L. Ass. *v.* Hallum, 59 Ark. 583 145
Southern Ins. Co. *v.* Parker, 61 Ark. 207 46
—— *v.* White, 58 Ark. 281 47
Southern L. Ins. Co. *v.* Booker, 9 Heisk. 606 570
Spoors *v.* Coen, 44 O. St. 503 444
Springfield & M. R. Co. *v.* Allen, 46 Ark. 219 347
Sprott *v.* N. O. Ins. Ass. 53 Ark. 215 47
Stanley *v.* Supervisors, 121 U. S. 551 467
Stanton *v.* State, 13 Ark. 317 307
State *v.* Anderson, 30 Ark. 131 460
—— *v.* Assessors, 35 La. An. 668. 488
—— *v.* Board of Alderman, 28 Atl. 347 201
—— *v.* Dent, 60 Ark. 13 491
—— *v.* Dewey, 55 Vt. 550 516
—— *v.* Flynn, 36 N. H. 64 540–1
—— *v.* Hinson, 31 Ark. 638 514–5
—— *v.* Kemen, 61 Wis. 494 201
—— *v.* Kimball, 50 Me. 409 532
—— *v.* Maas, 37 La. An. 292 530
—— *v.* McClay, 1 Har. (Del.) 520. 397
—— *v.* Maguire, 69 Mo. 202 559
—— *v.* Merrihew, 47 Ia. 112 507
—— *v.* Morton, 27 Vt. 310 534
—— *v.* Rapley, 35 La. An. 668 488
—— *v.* Redman, 17 Ia. 329 304
—— *v.* Shelton, 64 Ia. 333 370
—— *v.* Stackhouse, 24 Kas. 445 370
—— *v.* Sterrett, ... 559
—— *v.* Townsend, 24 N. W. 535 369
—— *v.* Vance, 17 Ia. 138 311
—— *v.* Whitford, 54 Wis. 150 201
State Bank *v.* Cason, 10 Ark. 479 407
Stewart *v.* Anderson, 70 Tex. 588. 444
Stillwell *v.* Adams, 29 Ark. 346 150
Stirman *v.* Cravens, 33 Ark. 384 450
Stout *v.* Zulick, 48 N. J. L. 599 69
Stowell *v.* Grider, 48 Ark. 220 150
Straughan *v.* State, 16 Ark. 41 304
Stull *v.* Harris, 51 Ark. 297 ..... 319, 320
Supervisors *v.* Schenck, 5 Wall. 772 39

T

Taafe *v.* Josephson, 7 Cal. 352. 176, 178
Talbot *v.* Whipple, 14 Allen, 180 397
Tatum *v.* Croom, 60 Ark. 489 193
Taylor *v.* Blanchard, 90 Am. Dec. 203 106
Taylor *v.* Dansby, 42 Mich. 82 392
Tevis' Ex'rs *v.* McCreary, 3 Met. 151 84
Tex. & Pac. R. Co. *v.* Cox. 145 U. S. 593 261
The Floyd Acceptances, 7 Wall. 666 40
Thompson's Appeal, 57 Pa. St. 175 175
Thompson *v.* Ins. Co. 104 U. S. 259. 47–8
—— *v.* Reno Sav. Bank, 3 Am. St. Rep. 804 406
—— *v.* State, 26 Ark. 326 553
—— *v.* Taylor, 30 Wis. 68 569
—— *v.* Thompson, 1 Swab. & Tr. 514 613
Tillman *v.* Shackelton, 15 Mich. 456 154
Titsworth *v.* Frauenthal, 52 Ark. 254 135
Titus *v.* Railroad Co. 37 N. J. L. 98 37
Tod *v.* Union Land Co. 57 Fed. 47. 39
Toledo, etc. R. Co. *v.* Head, 43 Ind. 402 171
Tonnele *v.* Hall, 4 N. Y. 144 336
Trible *v.* Nichols, 53 N. Y. 273 100
Trieber *v.* Stover, 30 Ark. 727 152
Trustees, etc. *v.* Ins. Co. 18 Barb. 69 570
Tucker *v.* Grace, 61 Ark. 410 226
—— *v.* Rankin, 15 Barb. 471 201
Turner *v.* State, 61 Ark. 359 552
—— *v.* State, 40 Ala. 21 304
—— *v.* Tapscott, 30 Ark. 412 226

U

Union Co. *v.* Smith, 34 Ark. 684 341
United States *v.* Shellmire, Baldw. 370 532

V

Vance *v.* Vance, 21 Me. 364 84
Vandervelden *v.* Chicago & N. W. R. Co. 61 Fed. 54 278
Vaughan *v.* State, 58 Ark. 353 ..... 209, 537, 554, 556, 559
Vick *v.* Shinn, 49 Ark. 70 625

W

Wait *v.* Nashua Armory Ass'n, 23 Atl. 77 37
Walker *v.* Jessup, 43 Ark. 167 155
—— *v.* Roberts, 4 Rich. L. 561 178
Wallace *v.* Hall, 19 Ala. 367 316
Waller *v.* State, 40 Ala. 325 304
Wallis *v.* Doe, 2 Sm. & M. 220 316
Walworth County Bank *v.* Farmers' Loan, etc., Co. 14 Wis. 325 37
Ward *v.* Carlton, 26 Ark. 662 341
—— *v.* Worthington, 33 Ark. 830 135
Washburn *v.* Great Northern Ins. Co. 114 Mass. 175 50
Weaver *v.* Rush, 62 Ark. 51 315
—— *v.* State, 94 Ala. 45 308
Wells *v.* McCall, 64 Pa. St. 207 149
Wentworth *v.* Wentworth, 69 Me. 247 84

Page
Werner *v.* State, 44 Ark. 122..... 555
West *v.* Colquitt, 71 Ga. 559..... 507
—— *v.* State, 22 N. J. L. 212..... 532
Western Assurance Co. *v.* Altheimer, 58 Ark. 575..... 47
Western Nat. Bank *v.* Armstrong, 152 U. S. 346..... 39
West Hartford *v.* Water Com'rs, 44 Conn. 360..... 488
Weston *v.* Emes, 1 Taunt. 115..... 47
Wheeler *v.* State, 38 Tex. 173.. .. 507
Whitaker *v.* Elliott, 73 N. C. 186. 400
Whittaker *v.* Venice, 37 N. E. 240. 201
Wicker *v.* Hoppock, 6 Wall. 94.... 569
Wilder *v.* Ritchie, 117 Mass. 382... 154
Wilhite *v.* Roberts, 3 Dana, 175... 98
Williams *v.* Jones, 100 Ill. 362..... 400
—— *v.* Merle, 25 Am. Dec. 611 89
—— *v.* Nichol, 47 Ark. 254... 149
—— *v.* Railroad Co. 11 Am. & Eng. R. Cas. 421..... 171
Williams *v.* Renwick, 52 Ark. 160.. 444
—— *v.* Skipwith, 34 Ark. 529. 133
—— *v.* State, 47 Ark. 230..... 341
—— *v.* Urmston, 35 O. St. 296 150
Wilson *v.* Spring, 38 Ark. 181..... 18
Windsor *v.* McVeigh, 93 U. S. 274. 444
Wintuska *v.* L. & N. R. Co. 20 S. W. 819..... 261
Witherspoon *v.* Nickels, 27 Ark. 332 450
Wood *v.* Insurance Co. 32 N. Y. 619 570
—— *v.* Knapp, 100 N. Y. 109..... 430
—— *v.* State, 47 Ark. 488.....514, 516
Worthington *v.* Welch, 27 Ark. 464 341
Wright *v.* Elliott, 1 Stew. 391..377, 379
—— *v.* State, 35 Ark. 641..... 554
—— *v.* State, 42 Ark. 94..... 304

Y

Yarborough *v.* Ward, 34 Ark. 208 ....226, 228

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS.

61 1
71 300.

LITTLE ROCK & FORT SMITH RAILWAY COMPANY *v.* ALISTER.

Opinion delivered February 8, 1896.

EMINENT DOMAIN—DAMAGES—PARTIES.—No allowance for damages to a leasehold estate should be made in condemnation proceedings where the lessees are not made parties.

EVIDENCE—OPINION OF NON-EXPERT.—The opinion of a witness as to the cost of doing certain work is inadmissible where he has never done such work, and it is apparent from his testimony that his estimate is the result of guesswork.

Appeal from Franklin Circuit Court, Ozark District.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

The petition in this case was filed by the railway company for the purpose of condemning a right of way 100 feet wide through section 24, township 9 north, range 26 west, in the county of Franklin. All proper allegations were made and exhibits attached necessary to entitle the plaintiff to have said land condemned. The circuit judge ordered a deposit of $20 to be made, to the end that work might begin at once. No answer or reply to the petition was filed by defendants, but on September 27, 1893, a trial was had, and a verdict rendered for $2,000 against plaintiff. At the inception of the trial it was admitted before the jury, and agreed to

by all parties, that the amount of land embraced in the right of way sought to be condemed was, in area, 2.84 acres, and that the actual value of the same was $30.

James Alister, one of the defendants, testified as follows: "The plaintiff's line of railway, recently built over the lands described in its complaint, runs where our tipple stood when we were working what is known as the 'Free Labor Slope,' which is situated in Franklin county, Ark., and 50 feet on the north side of its road, measuring from the center of the track, will extend 3 feet on to the dump of dirt and slate taken out of the mine in opening it, and deposited in front of the opening, which dump is about 240 to 260 feet long, extending east and west parallel with the road, and 50 feet wide from north to south, and is an average of 10 to 12 feet deep. From the outside or north line of said 50 feet right of way to the original opening or entry of said mine is 87 feet, and from that point to the present opening 35 feet. The tipple, where it originally stood, made a grade from the mine to it quite an easy road, so we could raise the coal from the mine to the tipple with the use of a mule. In order to work the mine now, it would require the removal of this dump, of dimensions before stated, which I think would cost $800 or $1,000. It would be necessary to do this in order to lay the three lines of railway track which would be necessary to deliver the coal on to the cars. The taking of such 50-foot right of way would necessitate the building of the tipple much further north, and near the opening or mouth of the slope; and, in order to make the tipple the required height, it would become necessary to raise the road leading into the mine an average of 25 feet for the distance of 150 feet back from the mouth of the mine. In order to do this, the top of the present opening would have to be shot or blasted down, and the road thus built up. Besides this, it would be necessary to build up the

road on the outside of the mine from the mouth of the slope to the tipple, a distance of 72 feet, to correspond with the raised condition of road inside the mine. It cost us $1,600 to make the opening or slope from the surface down to the coal, and to thus take down the top, and fill up, and elevate the road down the slope, as above stated, would be more difficult and cost more than to make the original opening. I would fix the cost at $1,600. My testimony refers solely to what is known as the 'Free Slope,' which is the only matter in controversy, and has nothing to do whatever with what is known as the 'Convict Slope,' situated some 300 yards east of this slope. The line between Johnson and Franklin counties runs about midway between the two slopes, leaving the Convict Slope in Johnson county and the Free Slope in Franklin county, formerly so called because the convicts were once worked in the Johnson county slope, while the Franklin county slope was worked by free labor. My brother and co-defendant, David Alister, and I own both of these mines, which we leased to the Ouita Coal Company June 13, 1885, for the term of twenty years. For a time said company worked both of these mines by convicts and free labor, using both slopes; but when the convicts were removed from Coal Hill, they abandoned their work on the Free Slope altogether, and have never worked it since, but confined their operations solely to the Convict Slope, which abandonment was some two or three years ago. The tipple at the Free Slope was torn away by plaintiff in building its line of railway over the line sought to be condemned. At the time we leased to the Ouita Coal Company, there was no underground connection between the two mines, but there was entry made by the said company, after the convicts were removed, from the convict into the free mine; but since that time the props and pillars have been taken out by the Ouita Coal Com-

pany in the western portion of the convict mine, adjacent to the free mine, and the roof has fallen in, till the connection between the two mines is closed, and that part of the convict mine is now abandoned. This will make it impracticable to make an entry from the convict mine into the free mine. Our lease to said company is still in force, and has about twelve years to run."

David Alister, another one of the defendants, testified, in substance, the same as James Alister, and further stated that he estimated the cost of removing the dump to be $700 to $800, and the cost of raising and making the road into the mine to be $1,200. And he added: "when plaintiff's engineer was locating its said road, I suggested that he run it about 50 feet south of where he located it, telling him that in that case we would charge nothing for the right of way, as it would leave our mines in condition to be operated, and would not, therefore, damage us to any considerable amount, but he refused to do so."

W. H. West also testified as follows: "I viewed the ground and assisted in measuring the distances as stated by James Alister in his testimony, which he stated correctly. I figured on the cost of removing the dump from the front of the slope. I have been in and about the mines a great deal, and have seen a good deal of this kind of work done. I understand the usual price for removing such material to be about 40 cents per square yard. At these figures it would cost about $2,000 to remove the dump. I would say that it would cost anyway $1,000 to $2,000, and to make the road into the mine as described by James Alister would cost $800 to $1,000." On cross-examination he stated: "I have never done any such work as I have spoken of in my examination in chief, either as a laborer or contractor, and what I stated as the price was only guesswork." The plaintiff moved the court to exclude the testimony

of this witness as being hearsay evidence. The court thereupon asked the witness: "Do you think you have had sufficient observation, and that you now have sufficient knowledge, of such work to enable you to form a fair opinion of its value?" The witness answered in the affirmative. The court then overruled the plaintiff's motion, and admitted the testimony of the witness, and the plaintiff at the time excepted.

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

1. The verdict was contrary to the law and evidence. The actual value of the land taken was only $30. So the damages awarded for the *leased*, unworked and abandoned coal mine was $1970. This was excessive and outrageous. All the damages caused, if any, were caused by acts of the lessee, the Ouita Coal Company.

2. No damages to the leasehold of the Coal Company could be taken into consideration. Only damages to the reversion could be considered. 61 Miss. 631; 124 Penn. 297; 26 N. E. 577. Having leased to the Ouita Coal Company, they could recover for such damages as effected their expectant estate or reversion,—that is their interest after the termination of the lease. This could only be the value of the land taken, $30. 45 Ark. 252.

3. It was error to admit the testimony of W. H. West. His testimony was simply from hearsay, and was only guesswork.

A. S. McKennon for appellee.

1. If the Ouita Coal Company had any interest in the damages for taking the right of way, or in the slope, plaintiff should have made it a party, or at all events shown the extent of its interest, and how it originated. 45 Ark. 278.

2. There is no error in the declarations of law, prejudicial to appellant. The evidence is that the Coal Company had abandoned work, and did not contemplate working the Free Slope again.

3. There was no error in admitting West's testimony. The knowledge which qualifies a witness to testify as to value must necessarily consist largely of hearsay. 14 Am. & Eng. R. Cas. p. 186; 44 Ark. 258. But, if error, it was harmless, as the jury were controlled by the testimony of David Alister, which was supported by the testimony of Nugent and Caffray, both competent and disinterested witnesses.

Damages in condemnation proceedings.

HUGHES, J., (after stating the facts). It will be seen from the evidence in this case that, at the time this cause was tried, the Ouita Coal Company had a lease on the coal mines to which the railway company condemned the right of way, and that the lease had twelve years to run. It will be observed also that the value of the land taken was only thirty dollars, and that the damages above this amount were for alleged injury to the mines. The lessees were not made parties to the proceeding, though they ought to have been. It will also be perceived that the evidence was directed to the damage done to the leasehold estate, as well as to the reversion, and that the jury gave damages in the largest possible amount that could have been given for the damages to the entire estate. This was error. No damages to the leasehold estate should have been allowed to be shown, or awarded to the appellees in this action. They are not entitled to recover for damages to the leasehold estate, but only for damages to the reversion, after the determination of that estate. The instruction given by the court is erroneous, being calculated to mislead the jury, and to leave it in doubt whether the court meant that they were at liberty to give the appellees damages for the injury to the whole estate, including the leasehold,

or for injury to the reversion only. It is easy to perceive that there would be a great difference in the amount of damages, for an injury to the reversion and the leasehold and reversion.

Admissibility of opinion of non-expert.

There was error also in admitting the testimony of West, which was only the opinion of a non-expert, whose testimony shows that he was guessing merely at what he testified to, and that his opinion was based upon hearsay, and that he really knew nothing about what he was testifying.

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

ESTES *v.* GERMAN NATIONAL BANK.

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Opinion delivered February 8, 1896.

DEED—PRESUMPTION OF DELIVERY.—The presumption that a duly recorded deed has been delivered is not rebutted by proof merely that, after it was acknowledged and before it was recorded, it was in the possession of the president of the grantor, a corporation.

CORPORATION—AUTHORITY OF OFFICERS TO MAKE CONVEYANCE.—A conveyance of land, executed by the president and secretary of a corporation, without authority from the board of directors, is valid as to one to whom the purchase notes have been transferred in good faith as collateral security, carrying the vendor's lien, where the directors had adopted the practice of assenting separately to the making and execution of contracts by such officers, and the corporators had ratified such practice by long acquiescence.

SALE OF LAND—RETENTION OF POSSESSION BY VENDOR.—The fact that a grantor of land retained possession of it and collected the rents after transfer of the purchase money notes cannot affect the validity of the conveyance as against a *bona fide* holder of such notes.

Appeal from Prairie Circuit Court in Chancery, Southern District.

JAMES S. THOMAS, Judge.

Rose, Hemingway & Rose and *Thos. C. Trimble* for appellant.

1. There was no sale or conveyance of the lands to Echlin, and hence there was no vendor's lien. The pretended sale was never authorized by the board of directors. It was intended as a sham—a scheme. The grantee never entered into possession, never claimed the land, never paid taxes on it, nor received any rents, and the pretended *deed was never delivered to him.* Delivery of the deed was essential; and, even if the bank were conceded to be the agent of Echlin to accept the deed, the rights of appellant under their attachment antedated the filing of the deed and could not be impaired by relation. 1 Devlin on Deeds, sec. 285; 11 Bush, 34; 21 Am. Rep. 205; 105 Mass. 560; 7 Am. Rep. 554; 58 Ill. 310; 11 Am. Rep. 67. It has been said that a deed of a corporation is valid without delivery. 1 Devlin, Deeds, sec. 344. But it has long since been overruled. 9 East, 360; 102 U. S. 397; 5 Am. & Eng. Enc. Law, p. 446; 5 *id.* p. 445, note 3. The deed does not purport to be attested by the corporate seal, and without it it is void. 1 Jones, Mortg. sec. 81; 18 Ark. 279; 23 *id.* 439; 2 Black, 715; 3 Sawyer, 90; Waite, Insolvent Corp. sec. 488; 105 N. C. 131; 18 Atl. 1063; 10 Allen, 251. There was no meeting of the directors or stockholders to authorize the making of the deed. Directors have "no authority to act, save when convened in a board meeting." 54 Ark. 50; 55 *id.* 475.

2. Even conceding that the sale and deed are valid, the appellee has no vendor's lien. *(a)* The notes do not purport to reserve a lien; and, if they did, they would be inoperative in that respect. 7 Ark. 254; 33 *id.* 393; 31 *id.* 597; 34 *id.* 81; 30 *id.* 600; 51 *id.* 436. *(b)* Our statute only passes the lien to an assignee, when ex-

pressed upon the face of the deed or conveyance. Sand. & H. Dig. sec. 490. The equitable lien does not pass to the assignee. 18 Ark. 172; 25 *id.* 132; 30 *id.* 155; 33 *id.* 80; 32 *id.* 250; 31 *id.* 142; *ib.* 250; 27 *id.* 230.

Ratcliffe & Fletcher for appellee.

1. No question is made by appellants as to the form of the deed to Echlin, and none can be made. 1 Devlin, Deeds, sec. 468; 95 U. S. 710; 78 Mo. 482; 77 *id.* 180; 25 Mich. 74; 1 Am. & Eng. Enc. Law, 159, 160; 43 N. H. 343; 51 Md. 508; 63 Tex. 91; 23 *id.* 480; 70 Mo. 290.

2. The evidence is sufficient to show a valid sale and delivery of the deed. The presumptions are that the deed was executed and delivered on the day of its date, and was regular. 14 Ark. 29; 62 Wis. 380; Wait, Insolv. Corp. sec. 490; 37 Cal. 544; 93 *id.* 300. The answer admits that the corporate seal was attached, and the decree so recites. But in those states where private seals are abolished, the corporate seal is no longer *essential.* Wait, Insolv. Corp. secs. 10, 488; 43 N. J. L. 325; 60 N. Y. 96; 58 Ga. 547; 62 Ala. 392. The evidence shows that the deed was filed before the levy was made.

3. No meeting of the board was necessary. It was composed of three persons. The deed was made to *one*, and was signed *by* the other two. Here was a *meeting* of the minds of all the board concurring and acting in the same transaction. The rule seems to be that where there is a customary usage for the directors to adopt a certain course of transacting business by consultation and agreeing upon such course, no formal meeting is necessary, in the absence of statute or by-law requiring a different mode. 11 Col. 551; 19 Pac. 508; 12 N. H. 227; 23 *id.* 556–7; 55 Am. Dec. 215–16. All presumptions are in favor of the regularity of the sale. 12

Wheat. 70; 131 U. S. 371; 47 Me. 55; 57 Ark. 355; 1 Beach, Priv. Corp. 296.

4. The articles of association do not contemplate the necessity of any authority from the board of directors to enable the president to act in cases like this. The sale of land and the signing of *papers* was entrusted to him. But if a formal meeting was necessary, the subsequent conduct of the board is a sufficient ratification. 131 U S. 371, 390; 77 *id.* 604; 101 *id.* 181; 66 Fed. 22; 67 *id.* 49; 91 U. S. 592; 67 Fed. 464; 28 Ark. 59; Mechem on Agency, secs. 118, 153–155; 55 Ark. 240; 159 Mass. 505; 12 Wheat. 70.

5. The bank took the notes in good faith, in the usual course of business, without any notice of any want of authority or irregularity, and the company received and used the money without objection or warning. This is enough to invoke the doctrine of estoppel. Even if it be true that the notes were given solely to enable Emonson to use them as collateral security, and that the deed was executed solely that he might exhibit the same to the bank, this would present a case of *fraud*, from which the company could take no advantage, and appellants can claim no greater right than the company. 101 U. S. 181; 58 N. W. 943; 56 Fed. 167; 64 *id.* 710; 159 Mass. 505; 59 Fed. 338; 117 U. S. 96; 35 Ark. 376; 57 *id.* 355; 65 Fed. 65; 12 N. H. 227; 7 Mo. App. 294; 70 Mo. 290; 78 N. Y. 187; 1 Watts, 385; 96 U. S. 640; 66 Fed. 104; 23 How. 469; 10 Wall. 604; 101 U. S. 347; 133 *id.* 431; 34 N. Y. S. R. 16; 78 N. Y. 131; 10 *id.* 66; 122 *id.* 188; 55 Fed. 1; 11 Wall. 482; 2 Moraw. Corp. secs. 610, 611. The company has never questioned the validity of the sale, and appellants should not be permitted to do so. 51 Fed. 1.

6. Appellants can claim no greater right than the company. Their levy was simply on such right as the company had in the land. If their levy was before the

deed to Echlin was filed for record, it could not affect the bank's rights. The appellants were notified of the bank's claim before sale, and they could not claim to be *bona fide* purchasers at their own execution sale. 33 Ark. 621; Bigelow on Fraud, 407; 16 Ark. 559; 55 *id.* 122–3; 41 *id.* 370; 55 *id.* 542, 11 Wall. 482. It is no answer to the bank's claim for a lien that appellants credited the company without knowledge of the lien, 41 Ark. 186.

7. It is not necessary that a lien for purchase money be expressly reserved, in order to inure to the benefit of the assignee of the note. Sand. & H. Dig. sec. 490. It is enough if it *appears from the face of the conveyance*, and in this case it expressly appears that Echlin had given his notes for the purchase money. 37 Ark. 571; 17 Wall. 1–9. But, aside from the statute, appellant is entitled to assert the equitable vendor's lien, as the notes were assigned as *collateral security*. 24 Ark. 563; 28 *id.* 66, 70; 41 *id.* 292; 32 *id.* 250.

Thos. C. Trimble and *Rose, Hemingway & Rose* in reply.

1. The lien dates from the time the writ came to the sheriff's hands. Sand. & H. Dig. sec. 341.

2. There is no evidence of the delivery of the deed to Echlin, but everything to the contrary. The presumption of delivery only arises where the deed is found in possession of the grantee. 1 Devlin, Deeds, sec. 294. If the deed is found in the possession of the grantor, the presumption does not exist. 29 N. E. 870; 17 S. W. 319; 30 N. E. 1041; 50 N. W. 19; 55 Ark. 641; 54 N. W. 61; 17 S. W. 213; 22 *id.* 560; 36 N. E. 955; 35 *id.* 94. The mere fact that a deed was acknowledged will not warrant a finding that it was delivered. 35 N. E. 94. The burden in this case was upon appellee. 34 N. E. 1130. The mere fact that a deed has been recorded

is no evidence of delivery. 13 Atl. 883; 11 N. E. 498; 73 Iowa, 186. If the grantor keeps the deed, no title passes. 79 Me. 257; 11 N. E. 893. See, also, 1 Jones, Mortg. sec. 84; 1 McCrary, 578; 1 Jones, Mortg. secs. 85-6.

3. The lien claimed by appellee is a statutory one. Sand. & H. Dig. sec. 490. It is really a mortgage. 2 Jones, Mortg. sec. 1111; 1 Woods, 386. It was not therefore binding on attaching creditors until the deed was filed for record. 54 Ark. 179; 34 Iowa, 499; 20 *id.* 440; 49 Mo. 64.

4. The deed was void, because made without any corporate action. The making of a deed is not a mere act of routine. The fact that some of the directors concurred is of no importance. If *all* the directors had joined in the execution of the deed, without a board meeting, it is void. 54 Ark, 60; 52 *id.* 515; 55 *id.* 480. Under a grant of general powers, the president has no authority to sell or convey lands. 4 Thomps. Corp. sec. 4647.

BATTLE, J. The German National Bank brought this action against the Emonson Mercantile & Manufacturing Company, G. M. Echlin, Z. N. Estes & Co., and other creditors of the Emonson Company, to foreclose a lien on certain lands lying in Prairie county, in this state. The pleadings in the case present the following state of facts:

1. In behalf of plaintiff, it was alleged that the Emonson Company, being the owner of the lands before mentioned, sold them in good faith to G. M. Echlin, for the consideration of $21,200, and conveyed them to him by a deed duly executed, acknowledged and recorded; that Echlin executed to the company seven notes for the purchase money, payable respectively at two, three, four, five, six, seven and eight years after date, which were described in the deed.

2. That these notes were transferred by the Emonson Company to the bank as collateral security for a large sum of money loaned, before maturity, for a valuable consideration, and "without any notice whatever of any irregularity, illegality or fraud in reference thereto by any one;" and that of the sum loaned and secured, as stated, $11,400 was due by the company to to the bank at the commencement of the suit.

In behalf of Z. N. Estes & Co., they being the only defendants who answered, it was alleged:

"1. That on the 6th of January, 1891, they began a suit in the circuit court against the Emonson Company to recover a debt of $6,547.88, and sued out an order of attachment that was on that day levied on the lands in controversy; that they recovered judgment for the amount sued for on the 25th of July, 1891, and the court sustained the attachment, and ordered the lands to be sold to satisfy the same, which remains unpaid and in full force.

"2. That the Emonson Company was a corporation created by the laws of Arkansas; that its officers were a president, vice-president, secretary and treasurer, and that it had a corporate seal; that the deed set up in the complaint was made by A. Emonson, the president of the company, without consultation with his co-directors, without any meeting of the directors, and without any authority from them; that the deed was wholly unauthorized by the company; and that in executing it Emonson was acting in his individual capacity solely, there never having been any meeting of the directors for the purpose of considering the matter of the sale of the lands, or at which the same was considered; that the transaction was wholly unknown to the stockholders of the corporation; that the minutes and records of the board of directors fail to show that any action was ever taken concerning this pretended sale

and conveyance; and that the appellee acquired no title thereby.

"3. That G. M. Echlin never took possession of the lands, and never exercised any control over them; that, after the said pretended sale, the Emonson Company continued in possession of them, paid taxes on them up to the time that they were attached by the appellants, and continued to receive the rents and profits thereof, which facts were notorious, and were known to the appellee, or would have been learned if proper inquiry had been made.

"4. That the pretended deed to G. M. Echlin was made long after its date; that it was executed solely for the purpose of using the notes mentioned in the complaint as collateral security for a loan from appellee, and that, after it was executed, it was deposited in a private drawer of A. Emonson in the safe of the Emonson Company, and was never delivered to G. M. Echlin, who was not aware of its existence; that the deed was filed for record without the authority of the grantee; that it was not filed until after the attachment of appellants was sued out, when the appellee procured its filing by Emonson, the appellee being then aware of these facts.

"5. That in the meantime, before the filing of the deed, and in ignorance of it, the appellants, on the faith that the Emonson Company owned the lands, extended credit to it, and permitted it to contract the debt for which they recovered judgment."

The facts, as we find them, are substantially as follows: The Emonson Company was a corporation, formed and organized under the laws of the state of Arkansas. Its stockholders were A. Emonson, who owned more than one-half of the stock subscribed, G. M. Echlin, Caroline Shipness, W. C. Shipness, and W. J. Johnson. A. Emonson, P. W. Echlin, and G. M.

Echlin were its board of directors. A. Emonson was its president, G. M. Echlin, vice-president, and P. W. Echlin was its secretary and treasurer, and Carlisle, in Prairie county, Arkansas, was its place of business.

The purposes of the corporation, as stated in its articles of association, were as follows: "The company shall be, and is hereby, authorized to do a general mercantile and manufacturing business in all its branches, making and manufacturing hay, ginning and pressing cotton, operating flour and grist mills, establishing and operating oil mill and saw mill, making and manufacturing staves, barrels and farming implements, *buying and selling real estate*, owning and operating farms, raising, buying and selling live stock, running a banking and brokerage business, publishing a newspaper, and running a job office."

The duties and authority of the president of the company were defined by the articles of association as follows: "The president shall preside at all meetings of the board of directors, and be recognized as the superior officer of the company, and shall give such attention to its affairs as may be necessary for its success. He may borrow money for and in the name of the company, shall sign all checks and drafts, execute papers, and endorse notes for and in the name of the company; shall, in connection with the secretary and treasurer, sign all certificates of stock, and such other documents as may be necessary or required by the board of directors; shall have general management, supervision, and control of the employees; have charge of all credits, purchases, sales, freight rates and commission sales; shall conduct all the correspondence, and perform all other duties not otherwise provided for in these articles."

The president being vested with extensive authority, and the board of directors being composed of only three

members,—the president, vice-president, and secretary (who was also treasurer),—the management of the business of the company was left largely to the president and secretary. The board usually met only once a year, and then to elect officers, and to investigate any business which it deemed proper, and always adjourned subject to the call of the president. They never had any meeting of the board to authorize the president and secretary to borrow money, and yet the president borrowed money. They sold land, but never had a meeting of the board in relation to the same.

In the course of its business the company acquired a large area of lands, among which was the land in controversy. On the second day of January, 1888, the lands which are the subject of this litigation were sold to G. M. Echlin, at and for the price and sum of $21,200, for which he executed to the company his seven promissory notes, payable, respectively, to the order of the company, two, three, four, five, six, seven and eight years after date; and stated in each one that it was given in part payment for the lands, describing them. P. W. Echlin, secretary and treasurer, and a member of the board of directors, prepared the deed for the conveyance of the lands by the company to G. M. Echlin. The notes, which were described, were stated to be the consideration of the deed, which was signed as follows: "Emonson Mercantile & Manufacturing Company. (L. S.) A. Emonson, President. P. W. Echlin, Secretary."

On the 17th of January, 1888, A. Emonson, as president, and P. W. Echlin, as secretary, of the company, appeared before a notary public, and stated that they had executed the deed for the consideration and purposes therein mentioned and set forth, and he so certified in a certificate annexed to the deed. There was no meeting of the president and directors to authorize the

conveyance of the lands, or to authorize the officers of the company to mortgage real estate to secure the payment of borrowed money.

Most of the land in controversy was fenced for hay purposes. It produced annually from 500 to 700 tons of hay, which sold from $5 to $8 per ton. The company cut this hay after it sold the land to G. M. Echlin, and never allowed any credit for it on his notes, and he never asked any compensation, and paid the taxes on the land, and never charged him for them.

On the 17th of January, 1888, fifteen days after the sale and conveyance to Echlin, the Emonson Company being indebted to the German National Bank, and, desiring to borrow money, pledged to it the notes of Echlin to secure the company's present and future indebtedness to the bank,—which notes were received in good faith, without any notice that the sale and conveyance of the lands were in any way irregular, illegal, or fraudulent. Upon this security, the bank continued to advance money to the company until its indebtedness to the bank at the commencement of this action amounted to $11,400, which, with the Echlin notes, remains wholly unpaid.

About three years after the execution of the deed to Echlin, in a conversation about the payment of the notes given for the land in controversy, the cashier of the bank asked the president of the company if the deed was recorded, and he replied that he did not remember, but would find out when he returned home, and, if it was not, he would either have it recorded or send it to the cashier. The presumption is, the president returned to Carlisle, the place of his company's business and of the residence of G. M. Echlin; for in a few days he sent the deed to the cashier of the bank, who, finding that it had not been recorded, filed it for record on the 9th of January, 1891.

There is no controversy about the judgment recovered by Estes & Co., or the validity of the attachment in their favor, which was sustained by the court.

The circuit court decreed that the notes executed by G. M. Echlin were a lien on the lands, that it be foreclosed by a sale of the lands, and that the proceeds be applied to the payment of the debt due to the German Bank, and, if there was any residue, that it be applied to the payment of the company's indebtedness to Estes & Co.; and they appealed.

Presumption as to delivery of deed.

Appellants insist that this decree should be reversed, for the reason, among others, there was no legal sale of the lands to Echlin. They contend that the deed was never delivered to the grantee. In disproof of this contention, the certificate of the acknowledgment of the deed shows that the president and secretary of the Emonson Company appeared before a notary public, and stated that they had executed it for the consideration and purposes therein mentioned and set forth. The deed having been recorded, this is at least *prima facie* evidence of its delivery. (Sandels & Hill's Dig. sec. 721; *Jacoway* v. *Gault*, 20 Ark. 190; *Wilson* v. *Spring*, 38 Ark. 181; *Meyer* v. *Gossett*, *Ib.* 377). But it is said that the deed was in possession of the company, and was delivered by it to the bank. But that fact does not show that the deed had not been delivered to Echlin. When or how the president of the company got possession of it is not shown. He could have received it from Echlin on his return home, after he promised to ascertain whether it was recorded.

Power of corporate officers to execute deed.

Another reason advanced by appellants for their contention is there was no meeting of the directors or stockholders of the company to authorize the sale of the land or the making of the deed. This is true. But the articles of association show that one of the purposes of the incorporation of the company was to buy and sell

real estate; and that the president was thereby authorized to borrow money for and in the name of the company, to sign all checks and drafts, to execute papers, and indorse notes for and in the name of the company; and that he had charge of all purchases and sales. In connection with this, the evidence shows that the management of the business of the company was largely left to the president and secretary; that the board of directors usually met only once a year, and always adjourned subject to the call of the president; that the president borrowed money without a meeting of the board to give him the authority; and that land was sold without convening the directors to authorize the sale. From this course of conduct, it seems that the president, who owned a majority of the stock subscribed, and the secretary, had the entire management and control of the business of the company, and that no meeting of the directors was thought necessary to confer authority on them, except when the president saw fit to call the board together, which was seldom done. Upon these facts and this evidence, the question presented by the contention of appellants should be considered.

In *Simon* v. *Sevier Association*, 54 Ark. 58, the rule which controls corporations like the Emonson Company, and the reason for it, are stated as follows: "The act * * provides that the stock, property, affairs, and business of such corporations shall be under the care of, and shall be managed by, not less than three directors, and that a majority of the directors, convened according to its by-laws, shall constitute a quorum for the transaction of business. Such directors constitute a board, and, in the management of the property, affairs, and business of their corporations, can only act as a board. They have no authority to act save when convened in a board meeting. The separate, individual action of each director is not the action of the

corporation. Less than all do not, under the statute, constitute a quorum for the transaction of business, unless they are legally convened. No director is required to attend a meeting of directors held without authority. Every one of them is entitled to vote and be heard in all the proceedings of the board. The shareholders in the corporation are entitled to the influence and advice of every director in the management of their affairs. Hence, in order to accomplish the object for which each director was elected, a mere majority of the directors cannot constitute a majority of the board for the transaction of business, unless they meet according to, and by authority of, the by-laws or rules of the corporation, or are called together upon due and legal notice given to all of them."

The object of this rule is the benefit and protection of the share-holders of the corporation. The duties of the board are imposed upon more than one member, in order that they may be discharged with that wisdom derived from a conference, discussion, and a comparing of views upon business affairs; and for this purpose they are required to meet and take counsel of each other. As all this is for the benefit of the shareholders, who constitute the corporation, they may waive the necessity of the meeting of the board for the transaction of business within their corporate powers. They can do so by permitting the directors to establish a habit or usage of assenting separately to the making and performance of contracts by their agents. By permitting such usages or habits to be formed by a long course of business, they adopt and become bound by them, so long as they acquiesce. If this were not so, great injustice might be done to parties contracting with them in their usual way. "Hence there follows a necessity of giving effect to acts of such corporations, according to the mode in which they allow them to be transacted. If this were not

done, it would become impossible to dispose of such contracts with any hope of reaching the truth and justice of the rights and duties of the several parties involved. And this is certainly nothing of which the corporation can complain. It is merely holding them to such rules of action as they see fit to adopt for their own guidance and the transaction of their business." *Bank of Middlebury* v. *Rutland & W. R. Co.*, 30 Vt. 158, 170; 3 Thompson, Corporations, sec. 3938, and cases cited.

In this case, the president and secretary of the Emonson Company, constituting a majority of the directors, were intrusted with the management and transaction of the business of the corporation, a part of which was the purchase and sale of land. For several years the company continued in existence. In that time, as before stated, the board usually met once a year, and then chiefly for the purpose of electing officers. The inference from this and the other evidence in the case is, the directors adopted the practice of assenting separately to the making and execution of contracts by their agents, and the corporators ratified it by long acquiescence. After the corporation had been in existence for more than four years, and continued this practice, presumably, for that length of time, it sold the land in controversy to G. M. Echlin, two of the board assenting, and the other purchasing. After this, the president, in the exercise of the power vested in him by the articles of association, borrowed money, for and in the name of the company, from the German National Bank, by depositing notes given for this purchase as collateral security. Believing that the notes were secured by liens on the lands sold, the bank advanced large sums of money to the company, in good faith, and without any notice of any infirmity in their security. The company has never repaid the money, but, on the contrary, was indebted therefor at the commencement of this action in

the sum of $11,400. Under these circumstances, the sale of the land was valid as to the bank, and the lien for the purchase money passed with the notes as collateral security; and the action of the company, and the non-action of Echlin, in reference to the land after the transfer of the notes, did not affect the lien held by the bank.

Effect of transfer of land purchase notes.

The other questions discussed by counsel in their briefs have heretofore been decided by this court in reported cases.

Decree affirmed.

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NESBIT v. SCHWAB CLOTHING COMPANY.

Opinion delivered February 8, 1896.

ATTACHMENT—REMOVAL OF PROPERTY FROM STATE.—Under the statute authorizing attachment to be issued when a debtor has removed property from the state, not leaving enough to satisfy the claims of his creditors (Sand. & H. Dig. sec. 325, subd. 6), the value of the property left in the state must be determined by its fair market value, and not by what it would bring at forced sale.

Appeal from Independence Circuit Court.

JAMES W. BUTLER, Judge.

The Schwab Clothing Company brought an attachment suit against W. T. Nesbit, alleging that the latter was about to remove, or had removed, his property, or a material part thereof, out of the state, not leaving enough to satisfy the claims of his creditors. The court sustained the attachment, and defendant appealed. The facts sufficiently appear in the opinion.

Neill & Neill and *Jno. W. & Jos. M. Stayton* for appellant.

1. It was error to take into consideration defendant's exemptions. The statute does not say "exclusive

of exemptions." Sand. & H. Dig. sec. 3718; Thompson, Homestead & Ex. 829, 830-1.

2. It was error to consider the cost of collecting the choses in action. The inquiry was as to their value.

3. A preponderance of the evidence shows that defendant had assets enough in this state to satisfy his creditors. 44 Ark. 301; 54 *id.* 61, 309; 57 *id.* 611.

4. The pledgeor retains the title to pledged property, the pledgee only has a lien. Jones on Pledges, 3 and 4, 7. These debts were due him in this state. This was the *situs*.

5. Appellant's assets in this state exceeded his liabilities, and he was solvent. The attachment should have been dissolved.

Yancey & Fulkerson and *Morris M. Cohn* for appellee.

1. The evidence fully sustains the court's ruling that defendant has removed a material portion of his property, not leaving enough in the state to satisfy creditors, but the court would have been justified in holding that defendant had fraudulently concealed and appropriated property. If he had $14,000 in notes and accounts, why did he not turn them over to the attaching creditors? His not doing so was certainly not very good faith. 60 Ark. 160.

2. Shipment by a debtor of a material part of his property out of the state, not leaving enough to pay his debts, is ground for attachment, notwithstanding it was shipped to pay a valid debt. 57 Ark. 611; 54 *id.* 58; 44 *id.* 301; 4 Fed. 294. Mere nominal assets, without value, in excess of liabilities, do not render one solvent. See L. R. 14 Eq. 106, 118, 121; 2 Pom. Eq. Jur. sec. 973; 2 Bigelow, Fraud, 604-5. Insolvency—inability to pay debts—is treated as the equivalent of insufficiency of

assets. 4 Fed. 294-6; 2 So. 250; 47 Miss. 281; 12 Fla. 589; 34 Ark. 696; 8 So. 674.

BATTLE, J. The statute under which the order of attachment was sued out by the appellee against the appellant provides that "the plaintiff in a civil action may, at or after the commencement thereof, have an attachment against the property of the defendant," when he "is about to remove, or has removed, his property, or a material part thereof, out of this state, not leaving enough therein to satisfy the plaintiff's claim or the claims of said defendant's creditors." Sand. & H. Dig. sec. 325, subd. 6.

The court, sitting as a jury, found that the appellant had, at the time the order of attachment was sued out against him, removed a material part of his property out of this state, and was indebted at that time in the sum of $12,280, and had still remaining in this state property, estimating his choses in action, which amounted, according to their face value, to $14,000, at fifty-two cents on the dollar, of the value of $13,320, his assets exceeding his liabilities in the sum of $1,040. But the court said: "Taking into consideration the exemptions, to which the defendant [appellant] is entitled, and the necessary costs of collecting any choses in action, and uncertainty as to the amount which could be realized, it appears that the assets of the defendant, in the state of Arkansas, were insufficient to satisfy the claims of his creditors," at the commencement of this action—and for this reason sustained the attachment.

The correctness of this conclusion depends upon the proper interpretation of these words in the statute: "not leaving enough therein to satisfy the * * claims of said defendant's creditors." We understand from them that the property left in the state must be sufficient, at its fair, market value, to pay the creditors. By what other standard can its sufficiency be determined? By

forced sale? Who can tell what it will bring at a public sale? That depends upon the circumstances of the sale, which no one can foresee. Then, in the absence of any other reasonable standard by which the sufficiency of the property left remaining can be determined, it seems its market value should be accepted as the guide. Any other interpretation would offer an inducement to creditors to hasten to sue out the first attachment against the debtor, and thereby oppress him, and sacrifice his property, by allowing them, as it does, to be paid out of his assets in the chronological order of their attachments, when, under other circumstances, they might not disturb him, and he with proper management might pay his debts. He ought not to be required to provide for a contingency which may be created by his creditors in a race for priority. No interpretation conducive to such evil consequences ought to be placed upon the statute, if it can be well avoided.

According to the test suggested, the appellant had property in this state, at the commencement of this action, sufficient to pay his debts. Deducting $500 in personal property for his exemption, there will still be a sufficiency; the homestead occupied by him belonging to his wife, and not being included in his assets.

The judgment of the circuit court is therefore reversed, and the cause is remanded with instructions to discharge the attachment, and for other proceedings.

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GEORGE TAYLOR COMMISSION COMPANY v. BELL.

Opinion delivered February 8, 1896.

EVIDENCE—DECLARATIONS OF VENDOR.—Where, in a proceeding by a creditor to enforce a debt out of land of a husband, the latter's wife intervenes, claiming under deed from the husband, the husband's declarations as to his ownership of the land, made before his conveyance to her, are inadmissible; but such as were made thereafter, and while he was in possession of the land, are admissible.

HUSBAND AND WIFE—CONVEYANCES BETWEEN.—A conveyance of land by a husband to his wife is valid in equity, but may be avoided by the husband's creditors for fraud.

WITNESSES—HUSBAND AND WIFE.—A husband may testify for his wife as to any business transacted by him for her as her agent, but cannot testify against her.

HUSBAND AND WIFE—ESTOPPEL.—A wife who permits her husband to invest her money in land in his own name, and obtain credit upon the strength of his apparent ownership thereof, cannot afterwards assert her claim to the money or its proceeds as against the husband's creditors.

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

On March 2, 1893, appellant brought suit against W. J. Bell in the Clark circuit court for $10,603.43, and sued out an attachment on said day, which was levied upon the land claimed by interpleader, Alice Bell. At the August term of the Clark circuit court, Alice Bell interpleaded for the land in controversy, claiming the same by virtue of a deed dated April 14, 1887, from W. J. Bell (who is her husband). Appellant recovered judgment against W. J. Bell for the sum sued for, and the attachment was sustained. Appellant answered the interplea, denying interpleader's title to the land, and alleging that in the year 1887, and for a long time before,

W. J. Bell was largely indebted to the plaintiff and other persons, beyond his ability to pay; and that the debt he then owed plaintiff had never been paid, except by contracting other and larger debts, which were still unpaid; and that the identical debt for which the attachment in this case was sued out was made upon the faith of W. J. Bell's representations that he was the owner of the lands in controversy; and that on the 14th day of April, 1887, he secretly, and for the purpose of defrauding plaintiff, without consideration, pretended to convey said land to the interpleader, who is his wife, and that said pretended deed was void. This answer concluded with a motion to transfer to chancery.

It appears, from the evidence in this case, that the appellee, Alice Bell, was married to W. J. Bell in 1872; that after their marriage she received some money from her father's estate, with which some land was bought in Nevada county, the title to which was taken in the name of W. J. Bell, her husband, the deed for which bore date 20th of April, 1877. Bell subsequently conveyed the same land to Alice Bell, his wife. Bell and wife swapped this land to Bonner for land in Clark county. The deed to Bonner bore date August 10, 1880. The deed for the land obtained from Bonner was also made to W. J. Bell. Mrs. Bell states that the reason she conveyed the land to her husband was that Bonner wanted a deed from him. They then sold the land they bought from Bonner to Dave Hamilton, a colored man, for $1600, $600 of which was paid in cash, and was paid to Bonner, to cover difference in agreed value of land they sold Bonner, and that they bought of him. The notes given for the thousand dollars deferred payment for the land sold Hamilton were made payable to Mrs. Bell, and all were paid by the spring of 1882. She states she received four hundred dollars interest on these notes. Mrs. Bell

testified that she would sometimes lend her husband money, and take his note for it.

The deed from W. J. Bell to his wife for the land in controversy bears date of 14th of April, 1887, at which time Bell was merchandising, and largely indebted to appellants. This deed was not recorded until 1891, some three years and nine or ten months after its execution, and in the mean time Bell's indebtedness was growing larger, and continued to increase until he failed. W. J. Bell went into business in December, 1886, before he sold his wife the land in controversy on the 14th of April, 1887. Bell testified that the money his wife paid for the land she bought of him went into his mercantile business, the amount being $800.

The appellant offered to prove by C. C. Henderson that on the 18th of January, 1887, he was in the employ of the plaintiff, and that W. J. Bell represented to him that he was the owner of a black-land farm containing 320 acres; but the court refused to allow this testimony to go to the jury, and the plaintiff excepted. But the witness was allowed to testify that about the 25th of April, 1887, which was after the date of the conveyance by Bell to his wife, and while he was in possession of the land, Bell represented his assets to be the black-land farm, mill, gin and good notes for $500. Other testimony as to Bell's statements that he owned the black-land farm, which were made while Bell was not in possession of the farm, was excluded by the court, to which appellant excepted.

The appellant offered W. J. Bell as a witness, and the court held that he could not testify against the interpleader, who was his wife, and that he could testify as to transactions for her, to which appellant excepted. Appellant offered to prove by Bonner that he had never heard that the land in controversy belonged to Alice Bell, which was excluded, to which appellant excepted.

Hamilton testified that Bell told him that the land he bought from Bell belonged to his wife, and he also testified that the notes he gave for the deferred payments of purchase money were made payable to her. But the court refused to allow the deed from Bell and wife to Hamilton to be read in evidence to the jury, to which the appellant excepted; and the court allowed the appellant to offer oral evidence to show that the deed was an ordinary deed to husband's land, reciting notes for $1,000.

The appellant asked ten instructions, all of which were refused except the tenth, to which exceptions were properly saved. The eighth instruction, refused by the court, is as follows, to wit: "You are further instructed that, if you find from the evidence that Alice Bell permitted her husband to take the money received from her father's estate, and invest it in land in his own name, and to deal with it as his own, and obtain credit upon the strength of his apparent ownership thereof, she cannot now claim the same against her husband's creditors."

The court gave the following instructions, to-wit: "(1.) If the jury believe from the evidence that the real estate in controversy was conveyed by W. J. Bell to Alice Bell, the interpleader, for a valuable consideration, and with no intent to cheat, hinder and delay W. J. Bell's creditors, they should find in favor of the interpleader, Alice Bell. (2.) The jury are instructed that, before they can find for the plaintiff, George Taylor Commission Company, they must find that the deed from W. J. Bell to his wife, Alice Bell, was not executed for a valuable consideration, or that W. J. Bell's intention to cheat, hinder and delay his creditors was known to his wife, and participated in by her, or that she was in the possession of such facts as would put a reasonably prudent person upon inquiry by which the fraud could be discovered. (3.) The burden of proof to establish fraud rests upon the George Taylor Commission Company.

(4.) The jury are instructed that, if they find from the evidence that W. J. Bell gave his wife, Alice Bell, the Hamilton notes for $1,000 when the said Bell was not indebted, then the said Bell's subsequent creditors cannot complain that the said notes were conveyed to her as a gift, unless the gift was made with the intention afterwards to fraudulently contract debts." And the plaintiff objected to the giving of these instructions, but the court overruled the objections, and gave them as asked. Plaintiff excepted.

There was a verdict and judgment for the interpleader. Appellant filed a motion for a new trial, raising every question. It contains eleven grounds. Plaintiff below appealed to this court.

Tompkins & Greeson for appellant.

1. A deed from husband to wife is void at law. Our statutes have not removed the disabilities of the wife, so far as to make a deed from her husband to her valid at law. 28 S. W. 796; 43 *id.* 164; 39 *id.* 357; 56 *id.* 294; 49 *id.* 438; 25 N. Y. 333; 105 Ind. 410. The interpleader must recover upon the strength of her title. An equitable title cannot be the foundation of a possessory action. Sand. & H. Dig. sec. 2573; 41 Ark. 465; 54 *id.* 480; Tyler on Ejectment, pp. 74, 78.

2. The court erred in holding that the husband could not testify *against* interpleader, but that he could testify as to transactions *for* her.

3. Credit was extended Bell upon the faith of the ownership of the land in controversy. When a wife permits a husband to take a deed to land purchased with her money in his own name, and deal with it as his own, and obtain credit upon the faith of being the owner, she cannot claim it against his creditors. 50 Ark. 46; Wait, Fr. Conv. sec. 300.

4. The ninth instruction should have been given. Sand. & H. Dig. sec. 3472; 25 Fed. Rep. 87 and note.

5. The evidence shows that there were 180 acres of land. The homestead cannot include more than 160. The excess at least is liable.

J. H. Crawford for Alice Bell, the interpleader.

1. The land was the homestead, and no transfer could be in fraud of creditors. 43 Ark. 430, 434; 54 *id.* 193; 52 *id.* 101.

2. An executed deed from husband to wife is not void at law. Sand. & H. Dig. sec. 4940, 4945; 9 Neb. 16; 126 Pa. St. 470; 117 Ind. 94; 31 Atl. 165; 80 Me. 472; 62 N. W. 1108; 70 Tex. 108; 51 Ark. 108; 88 Am. Dec. 54.

3. The husband or wife can only testify *for the other* in regard to any business transacted as agent, *not against.* Sand. & H. Dig. sec. 2916, subd. 4.

4. A wife is not estopped by the unauthorized statements of her husband in her absence. 73 Tex. 597; 5 Tex. Civ. App. 557.

5. The validity of the wife's deed did not depend upon its being recorded. 77 Cal. 218.

Admissibility of declarations of vendor.

HUGHES, J., (after stating the facts). There was no error in the refusal by the court to admit the evidence of the declarations of W. J. Bell as to his ownership of the land in controversy that were made before he conveyed the land to Alice Bell, his wife. Such as were made afterwards, while Bell was in possession of the land, were properly admitted by the court.

Validity of conveyance from husband to wife.

Appellant contends that a conveyance of land by the husband to the wife is void, that he is incapable of making a valid conveyance to her; but in this he is mistaken. A conveyance of real estate by a husband to the wife is not void, but valid in equity, but may be avoided by creditors of the husband for fraud.

Competency of husband and wife as witnesses.

There was no error in the ruling by the court upon the admissibility of the testimony of W. J. Bell.* The instructions given by the court were correct.

When wife estopped to claim property in husband's name.

The instruction numbered 8, refused by the court, should have been given, as it announces the law correctly, as laid down in *Driggs & Co.'s Bank* v. *Norwood*, 50 Ark. 46, in which case it is said in the syllabus, which correctly states the principle decided in the case, that "where a husband collected his wife's money and used it as his own, without objection on her part, for a period of more than ten years, and obtained credit on the faith of its being his own, she could not afterwards assert her claim to such money, or its proceeds, against the husband's creditors. Her assent to the husband's use of the money would in such case be presumed, in the absence of proof to the contrary." There is no error in the court's refusal of the other instructions. "A wife who gives her husband unlimited control of her property and money, and permits him to invest it in his own business for a series of years, is not, in case of his insolvency, permitted to shield his property from the just claims of persons who, in good faith, have given the husband credit, in reliance upon his ownership. In such a case a conveyance by the husband to the wife is fraudulent and void as to creditors." *Riley* v. *Vaughan*, 116 Mo. 169; *Bennett* v. *Bennett*, 37 W. Va. 396.

It is true that "a husband in failing circumstances, who owes a debt to his wife, may prefer her as a creditor to the exclusion of others, and a transfer of property to her in good faith for this purpose, without fraud on his part, or, if with such fraud, without participation therein by her, must be upheld." But if she permits her husband to take her money, and invest it in land in his own name, and to deal with it as his own, and obtain

*See Sand. & H. Dig. Sec. 2916.—[Rep.]

credit upon the strength of his apparent ownership of it, up to the time of his failure in business, she will not be allowed then to claim it against his creditors, having permitted him to represent it to be his own, and upon the apparent ownership of which he had obtained his credit and standing in business. *Besson* v. *Eveland*, 26 N. J. Eq. 471; *Sexton* v. *Wheaton*, 8 Wheat. 229.

For error in refusing said instruction numbered 8, the judgment is reversed, and the cause is remanded for a new trial, without prejudice to the rights of the appellees to claim their homestead in the lands in controversy.

CITY ELECTRIC STREET RAILWAY COMPANY *v.* FIRST NATIONAL EXCHANGE BANK.

Opinion delivered February 8, 1896.

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CORPORATION—AUTHORITY OF OFFICERS.—The president and secretary of a corporation have no inherent power to execute negotiable notes in its name, nor will their authority be presumed from the fact merely that they have exercised it.

CORPORATION—POWERS OF OFFICERS.—The powers of the president and secretary of a business corporation to act for the corporation must be delegated and special, under Sand. & H. Dig. secs. 1330-5, conferring the management of their business affairs upon "not less than three directors."

CUSTOM—JUDICIAL NOTICE.—A usage to be good, and of which the courts will take judicial notice, must be general, and of such long standing as to have become part of the law itself.

CORPORATE RECORDS—WHEN BINDING.—Corporations are not bound by false and simulated entries upon their records unless, knowing that they are such, they have neglected to correct them, and some innocent third party has acted upon the faith of them, to his prejudice.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

John McClure for appellants.

The answer presented a good defense, and the demurrer should have been overruled.

1. Persons dealing with officers of corporations are put upon notice as to the powers of such officers. Morawetz on Corp. sec. 691. Under secs. 1330, 1335, Sand. & H. Dig. the management of the affairs of corporations are by law placed *under the absolute control of a majority of the board of directors, when convened according to the by-laws.*

2. Our statute makes it a crime for the president and secretary to issue a note in the name of the company, unless authorized by the charter or by-laws. Sand. & H. Dig. sec. 1604. If issued without such authority, the notes are simply forgeries. The notes in suit were issued in violation of a statute, and no court will enforce them. Field on Corp. sec. 218; 145 U. S. 421, 427; 41 Ark. 339.

3. This case must not be confounded with cases where the officers had the power to execute negotiable paper for some purpose, and, instead of making it for that purpose, made it and used it for another.

4. There is no presumption that officers of corporations act within the scope of their powers. 5 Wheat. 326. The notes could not be read in evidence, no authority to execute them having been shown. 5 Wend. (N. Y.) 567. And, in the absence of such showing, the holder cannot recover. 46 Iowa, 106; 27 Ill. App. 315; 46 N. J. 238; 52 Barb. (N. Y.) 411; 1 Saxt. (N. J.) 550; L. R. 2 Exch. 159; 26 Minn. 51.

5. That the holder got the paper before maturity makes no difference, if the persons issuing the paper were without power. 7 Wall. 667; 3 Bos. (N. Y.) 600. There can be *no innocent holder* of void negotiable paper. 41 Ark. 339; 145 U. S. 421-7.

Ratcliffe & Fletcher for appellee.

1. The company had the *power to issue the notes.* The president and secretary *were in the habit of executing promissory notes when authorized* by the board of directors, and the *bona fides* of the holders for value before maturity and without notice is conceded. In such case, the rule is that the parties have the right to presume that all prerequisites and conditions have been complied with, and they will be protected as innocent holders. 2 Morawetz on Corp. secs. 610, 611; 10 Wall. 604; 41 N. J. Eq. 531; 55 Fed. 265. See also 1 Mor. Corp. sec. 538, and note 1; 2 *id.* sec. 602; 58 N. W. 943; 39 Cent. L. J. 143; 93 Cal. 300, 312; 1 Dan. Neg. Inst. sec. 381, 386, 389, 390, 391–2; Taylor on Priv. Corp. secs. 204; 1 Wall. 175; 101 U. S. 181; 11 Wall. 459; 14 *id.* 296; 57 Fed. 47–53; 65 *id.* 341; 58 N. W. 943; 98 N. Y. 553; 48 Ark. 454. But, if we admit that it was the duty of the holders to make inquiry, certainly nothing more could have been required beyond an examination of the record, which showed the authority of the officers. 24 N. E. 384.

2. The free and untrammeled circulation of negotiable paper is universally favored by the courts, and, to successfully attack the title of an indorsee for value before maturity, *knowledge of facts* which would convict him of *bad faith* must be shown. He owes no duty of active inquiry. 2 Wall. 122, 123; 21 Wall. 360; 42 Ill. App. 584; 18 S. W. 622; 46 Mo. App. 440; 52 N. W. 340. Proof of negligence or omission to make inquiry which common prudence would have dictated is not sufficient to defeat his right. *Ib.* Nothing but fraud or *mala fides* is sufficient to charge him with notice of infirmities. 50 Iowa, 600; 66 Fed. 263; 20 How. 343; 102 U. S. 442; 139 U S 166; 76 Ill. 530; 34 N. Y. 247; 35 *id.* 65; 54 N. Y. 288; 67 Pa. St. 59; 29 Iowa, 258;

10 Bush, 504; 63 Mo. 167; 31 Ark. 129; 26 N. E. 979; 16 S. W. 209; 28 N. W. 901; 118 Ind. 586; 21 N. E. 316; 29 Pac. 130; 46 Mo. App. 440; 52 N. W. 819; 34 Barb. 436.

3. The corporation cannot plead ignorance of the resolution. It was the duty of the directors to examine the books and records, and they are conclusively presumed to know all that they would disclose. 110 U. S. 7–15; 56 Fed. 967; 38 Ark. 17.

WOOD, J. The bank sued the railway company on a negotiable promissory note purporting to have been executed by the company, payable to H. G. Allis and Geo. R. Brown, and indorsed by them before maturity for value, and delivered to the First National Bank, and by it indorsed and delivered to the plaintiff.

The answer, in substance, sets up that the defendant was a corporation, organized under the laws of Arkansas (chap. 47, Sand. & H. Dig.); that the note was executed by the president and secretary of the defendant corporation, without any authority from or knowledge of its board of directors; that the charter and by-laws of the corporation gave no such authority; that the president and secretary had the records to show that they were duly authorized to issue the note, but that such record entry was false, and the directors had no knowledge of such entry until long after the maturity of the note; that the directors had never ratified the unauthorized acts of the said officers; that the said secretary and president had never indulged in a course of dealing between the corporation and third parties, so as to lead strangers to believe that they (the president and secretary) had power to issue negotiable paper in the name of the company, nor had the corporation ever received any consideration for said notes. A demurrer to this answer was sustained; and, the defendant re-

fusing to plead further, judgment was rendered against it for the amount of the note, which this appeal seeks to reverse.

The answer presented a good defense, unless it can be said (1) that the authority of the president and secretary to issue the note in suit must be presumed from the fact that they have exercised it, or (2) that the corporation is bound by the false record showing that the directors had conferred such authority upon the president and secretary.

Authority of officers of corporation.

1. It may be stated as a general proposition that the president and secretary of a corporation are not empowered to bind it by their signature to commercial paper, unless the authority is expressly conferred by the charter, or given by the board of directors. They have no inherent power to execute negotiable notes in the name of the corporation. Tied. Com. Paper, sec. 121; Cook, Stock, etc., sec. 716; *McCullough* v. *Moss*, 5 Denio, 567; 4 Thompson, Corp. sec. 4619; *Life & Fire Ins. Co.* v. *Mechanic Fire Ins. Co.*, 7 Wend. 31; *Hyde* v. *Larkin*, 35 Mo. App. 365; Pierce, Railroads, 32–34; *Walworth County Bank* v. *Farmers' Loan, etc., Co.*, 14 Wis. 325; 1 Morawetz, Corp. sec. 537; *Titus* v. *Railroad Co.*, 37 N. J. L. 98–102; *Wait* v. *Nashua Armory Ass'n*, 23 Atl. Rep. 77, and authorities there cited; *Nat. Bank* v. *Atkinson*, 55 Fed. Rep. 465.

Where the authority of the president and secretary to bind the corporation is challenged, as it has been by the answer in this case, that authority should be shown by the proof, and not be presumed as a matter of law. *Mount Sterling, etc., Co.* v. *Looney*, 1 Metc. (Ky.) 550; *Bacon* v. *Miss. Ins. Co.*, 31 Miss. 116; 4 Thomp. Corp. 4619; *Craft* v. *South Boston R. Co.*, 150 Mass. 208; *First Nat. Bank* v. *Hogan*, 47 Mo. 472; *Dabney* v. *Stevens*, 40 How. Pr. 341; 1 Waterman, Corp. 445; *Hallowell, etc. Bank* v. *Hamlin*, 14 Mass. 180; *Chicago*

etc. R. Co. v. *James*, 22 Wis. 194; *Bliss* v. *Kaweah C. & I. Co.*, 65 Cal. 504.

We are aware that there are authorities *contra*, and counsel for appellee have cited us to *Exchange National Bank* v. *Oregon Pottery Co.*, 55 Fed. Rep. 265, where it is held that, "if the president and secretary sign a negotiable promissory note, their authority is inferred from their official relation." This case is analogous, the question being presented (as in the case at bar) on demurrer to an answer which negatived the authority of the president and secretary to issue such paper. But the court, to sustain its position in that case, cited only two cases, viz.: *Merchants' Bank* v. *State Bank*, 10 Wall. 644; and *Crowley* v. *Mining Co.*, 55 Cal. 273. In *Merchants' Bank* v. *State Bank*, *supra*, the court use this language: "It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that the cashier had authority to bind the defendant." True, it is also said "that if the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." But we submit that the broad dictum of the latter quotation was unnecessary for the determination of the question before the court, in view of the fact that there was shown a usage of other banks, and a usual course of dealing with the knowledge and acquiesence of the directors. It was this very language, doubtless, which caused the learned circuit judge in *American Nat. Exch. Bank* v. *Oregon Pottery Co.*, 55 Fed. *supra*, to hold, as a matter of law, that the authority of the president and secretary would be presumed from the fact that they had exercised it.

So, also, in the California case cited to support the ruling in 55 Fed., *supra*, it was admitted that the president, whose authority was being questioned, "was the superintendent and general managing agent, having full control of the business of the corporation." The difference, therefore, between those cases and the one at bar, and the one in which they were cited, is too obvious for further notice. The language above quoted from Judge Swayne in 10 Wallace was first used by him in *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, and it has been repeated in *Supervisors* v. *Schenck*, 5 Wall. 772; *City of Lexington* v. *Butler*, 14 Wall. 296; *Tod* v. *Union Land Co.*, 57 Fed. Rep. 47–53; and *Nat. Bank* v. *Young*, 41 N. J. Rep. 531. The facts of these cases did not justify such a sweeping declaration of law, for an examination will show that, in some of the cases, municipal or county bonds were in controversy, which showed upon their face authority for their issue; and in others that the contracts or transactions made or performed by the agent of the corporation were such as had been frequently or usually made or performed by him before, in the course of the business of the corporation; or that the corporation had received some benefit from the unauthorized act. But the doctrine announced in *American Exch. Nat. Bank* v. *Pottery Co.*, 55 Fed. Rep. 265, is unsound, and not supported by the weight of authority. Besides, the principle it seeks to establish is in conflict with the doctrine announced by the Supreme Court of the United States in *Western Nat. Bank* v. *Armstrong*, 152 U. S. 346, where it was held "that the vice-president of a bank, however general his powers, could not exercise such a power, unless specially authorized so to do, and that persons dealing with the bank were presumed to know the general powers of the officers."

Mr. Morawetz, in speaking of these dicta in those cases where they have been incautiously used, said:

"They must be considered in view of the facts of the particular cases in which they were made. Taken alone, as statements of a principle or rule of law, they are certainly not in accordance with the decisions, and cannot be supported upon any sound principle." 2 Morawetz, Priv. Corp. sec. 608.

The rule that "if the president and secretary sign, their authority is inferred from their official relation," provided they might have had power under any circumstances to issue such paper for the corporation, is begging the question, where the authority itself is challenged. This rule, too, ignores a fundamental principle of the law of agency, whether applied to natural persons or corporations; for corporations can only act through agents. It is said by Mr. Mechem in his work on Agency (sec. 289) that "every person dealing with an agent is bound to ascertain the nature and extent of his authority. He must not trust to the mere presumption of authority, nor to any mere assumption of authority by the agent." Judge Miller, of the Supreme Court of the United States, in *The Floyd Acceptances*, 7 Wall. 666, said: "The person dealing with an agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for, said he, "it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was issued." This language is exceedingly apposite to the case at bar. It must be remembered that the answer in this case denies *in toto* the authority of the president and secretary to issue negotiable paper. Hence, this case bears no analogy to that line of cases where the authority exists for some purposes, but is exercised for different purposes than that for which it was conferred.

Where the authority to issue negotiable paper exists at all in the president and secretary, then the innocent holder would have the right to assume that it was properly and lawfully issued.

Power of corporate officers to issue notes.

Our statute for the incorporation of business corporations expressly confers the management of their business affairs upon "not less than three directors." Sand. & H. Dig. secs. 1330–1335. Another section makes it a felony for the president or secretary of a corporation to "wilfully and designedly sign with intent to issue a promissory note without authority from the charter or by laws of such corporation." Sand. & H. Dig. sec. 1604. Surely the legislature would not have made it a felony for these officers to issue negotiable notes, if they had such power *virtue officii*. From the above provisions, it appears that the president and secretary of corporations are not general agents. Whatever power they may have to act for the corporation at all in business matters must be delegated and special. We note, *en passant*, that the statute defines the duty of the secretary to be that of "keeping the books of the corporation." Sand. & H. Dig. sec. 1332. See Taylor on Corp. sec. 236; 1 Beach, Priv. Corp. sec. 202, and authorities cited in note; *Life, etc., Ins. Co.* v. *Ins. Co.* 7 Wend. 31.

When custom noticed judicially.

Those cases which hold that the president and secretary, or any other officer of a corporation, will be presumed to have authority where they have exercised it, provided, under any circumstances, it might have been conferred upon them, proceed upon the theory of a usage or custom from which authority will be implied. But such a theory cannot be maintained as to electric street railways in this state, for the reason that no such usage as to them exists. A usage, to be good, and of which the courts will take judicial notice, must be general, and of such long standing as to have become a part

of the law itself. *Mussey* v. *Eagle Bank*, 9 Metc. 313; *Merchants' Bank* v. *State Bank*, 10 Wall. 604 (dissenting opinion).

The incorporation of electric street railways in the state of Arkansas is of comparatively recent date, and such corporations do not yet exist to any general extent throughout the state. Moreover, it can scarcely be conceived how a usage of the kind mentioned could have sprung up, in view of our statutory provisions, and especially that one making it a felony for the president or secretary of a corporation to wilfully and designedly issue promissory notes without authority from the charter or by-laws. Sand. & H. Dig. sec. 1604. Manifestly, if the broad dictum of Mr. Justice Swayne in 10 Wall., *supra*, is the law, then that numerous class of individuals who have invested their means in corporate property would have no protection whatever from the dishonest acts of their agents, whom they have intrusted with office. But the rule, as we have declared it, while protecting the shareholders, is just to the innocent holder; for in each case it may be shown by any competent evidence that the corporation is liable (1) where the board of directors or the by-laws have conferred upon the president and secretary the authority to issue negotiable paper; (2) where the corporation, through its directors, has permitted these officers to habitually do such an act in the course of its business—in other words, has clothed them with the apparent authority to so act; (3) where the directors have ratified the unauthorized acts of its officers; (4) where the corporation has received the proceeds or any benefit from the transaction. But all of these things were negatived in the answer. Hence it was sufficient to call for the proofs.

Conclusiveness of corporate records.

2. The entries upon the books of the corporation are *prima facie* evidence against it, as admissions. The records and books of a corporation become conclusive

evidence against it when they are the books and records of the corporation, and the entries upon them have been duly made by the recording officer. But corporations are not bound by false and simulated entries upon their records in any case unless, knowing that they are such, they have neglected to correct them, and some innocent third party, having had proper access to them or knowledge of them, has been misled thereby to his prejudice. But a corporation is not bound to a third party by a false entry upon its records, unless such party, not knowing the entry was false, has acted upon the faith that the entry was the true record of the proceedings. This is the holding of the Supreme Court of Massachusetts in *Holden* v. *Hoyt*, 134 Mass. 181, and authorities there cited.

Reversed, with directions to overrule the demurrer.

[NOTE.—As to the powers of the president of a corporation see note to *Wait* v. *Nashua Armory Asso.* (N. H.) 14 L. R. A. 356. [Rep.]

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GERMANIA INSURANCE COMPANY *v.* BROMWELL.

Opinion delivered February 8, 1896.

FIRE INSURANCE—VALIDITY OF IRON-SAFE CLAUSE.—A provision in an insurance policy requiring the assured to keep a set of books, showing the changes taking place from time to time in the stock of goods insured, in an iron safe or other secure place is reasonable and valid.

POLICY—CONTRADICTION BY PAROL EVIDENCE.—A provision in a policy of fire insurance requiring that assured shall keep a set of books cannot be contradicted by parol evidence that, before the policy was issued, the company's agent told the assured that it was unnecessary to keep such books.

CONDITIONS OF POLICY—WAIVER.—A stipulation in a policy that the assured shall keep a set of books is not waived by a statement to the insured by the agent before the policy was issued that it is unnecessary to keep such books.

Appeal from Phillips Circuit Court.

GRANT GREEN, JR., Judge.

STATEMENT BY THE COURT.

This was an action upon an insurance policy issued to C. E. Bromwell by the Germania Fire Insurance Company. The amount of the policy was $500, apportioned as follows: $300 on stock of merchandise and $200 on furniture, household goods, etc. The insurance company admitted its liability for the loss of the furniture and household goods, but denied that it was liable for the merchandise. The policy contained the usual "iron-safe clause," the material portion of which, so far as it is necessary to consider here, is as follows: "The assured under this policy hereby covenants to keep a set of books, showing a complete record of business transacted, including all purchases and sales, together with the last inventory of said business; * * * 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 policy also contained this provision: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such

provisions or conditions, unless such waiver, if any, shall be written upon and attached hereto," etc.

The plaintiff kept no books, except one showing sales on credit. He had an inventory showing the amount of goods on hand several months before the fire, but he had no record of the cash sales made since the inventory was taken. The plaintiff and his wife, who acted as his agent in attending to the store, testified that Stone, the agent of the insurance company, came and looked at the premises and property before issuing the policy of insurance; that they at that time informed Stone that they could not keep books, and that the business was too small to justify the employment of a bookkeeper; that he thereupon said to them that it was not necessary to keep books. The testimony of Stone, the agent, tended to contradict this testimony of the plaintiff and his wife, but it is not necessary to set it out. There was a verdict and judgment in favor of plaintiff.

Jno. J. & E. C. Hornor for appellant.

1. The verdict of a jury upon the preponderance of the evidence will not be set aside, if the instructions are unobjectionable. 25 Ark. 11. But where the verdict is grossly contrary to law, though in accord with the instructions of the court, and totally unsupported by any *legal* evidence, the judgment will be reversed. 28 Ark. 550. When the verdict is the result of a plain, palpable mistake of the jury, or is attributable to the prejudice, or, may be, of some knowledge on the part of the jury of the circumstances, it will be set aside. 33 Ark. 751. Or where there is no evidence of importance to sustain it, the verdict will be set aside. 40 Ark. 168.

2. The "iron-safe clause" and the keeping a set of books are reasonable conditions, amounting to warranties, and have been given full effect in this state. 58 Ark. 575; 53 *id.* 353. In the absence of fraud or impo-

sition, statements or waivers by the agent, prior to or at the time of making the contract, cannot be proved. The policy is the evidence of the contract, and appellee cannot be heard to say that the contract was other than that shown by the face of the policy. 50 Ark. 406; 26 Pac. 718; 58 Ark. 281. No waiver can be shown, except by endorsement on the policy.

3. The evidence wholly fails to show the amount of the goods destroyed by fire. 2 May on Ins. sec. 465; *Ib.* sec. 460; 12 Fed. Cases, 700.

Quarles & Moore for appellee.

1. All the instructions asked by appellant were given, and the only question is, was there any evidence to sustain the verdict? 40 Ark. 168; 49 *id.* 122; 51 *id.* 467; 58 *id.* 125. In the cases cited by appellant (58 Ark. 575; 53 *id.* 353), there was no proof of a waiver, and they do not apply.

2. In this cause the agent admits the waiver. Proof of loss may be waived by parol, though the policy requires a waiver in writing. 32 S. W. 383; 39 Am. Rep. 591; 36 Md. 102; 36 N. E. 990; 53 Ark. 215; 28 S. W. 453. When an agent accepts a premium, having knowledge that a condition of the policy is being violated, the waiver may be shown by parol. 24 S. W. 804; 26 *id.* 928.

Validity of "iron-safe clause."

RIDDICK, J., (after stating the facts.) It is admitted by Bromwell, the assured, that he did not comply with the provisions of the "iron-safe clause" in his policy. That clause required the assured to keep a set of books showing the changes taking place from time to time in the stock of goods insured. The reason of it is apparent, for without such books the amount of merchandise on hand at time of the fire could not be told. Similar provisions have been frequently held valid by this court. *Southern Ins. Co.* v. *Parker*, 61 Ark. 207,

32 S. W. 509; *Western Assurance Co.* v. *Altheimer*, 58 Ark. 575; *Pelican Ins. Co.* v. *Wilkerson*, 53 Ark. 353.

Contradicting policy by parol evidence.

As an excuse for failing to comply with this requirement of his policy, Bromwell testified that before the policy was issued the agent of the company told him that it was unnecessary to keep such books. But it was not competent thus to contradict the material stipulations of the policy by evidence of the parol declarations of the parties made at the time or before the policy was issued. The rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument" applies to contracts of insurance as well as to other written or printed contracts. *Robinson* v. *Insurance Co.*, 51 Ark. 441; *Southern Ins. Co.* v. *White*, 58 Ark. 281; *Weston* v. *Emes*, 1 Taunton, 115; *Mobile Life Ins. Co.* v. *Pruett*, 74 Ala. 497; *Thompson* v. *Ins. Co.*, 104 U. S. 259; *Insurance Co.* v. *Mowry*, 96 U. S. 547; 1 Wood on Fire Ins. 10; 1 Greenleaf on Ev. sec. 275.

Waiver of condition of policy.

It is contended by counsel for appellee that this provision of the policy was waived by the declaration of the agent, made before the policy was issued, and that the company cannot now assert it, but we think that this contention is not sound. The case of *Sprott* v. *N. O. Ins. Ass.*, 53 Ark. 215, cited by counsel, does not support such contention, for there the written application for insurance, upon which the policy was issued, notified the insurer where the books would be kept. That was not an attempt to contradict the terms of the policy by evidence of parol contemporaneous statements, but by a writing which could be treated as a part of the contract. It is true there are many cases which hold that requirements as to notice and proof of loss may be waived. There are also many cases holding that an insurance company may, under certain circumstances, be estopped from taking advantage of a forfeiture or

breach of a condition in the policy. "Any unequivocal and positive act of the company recognizing the policy as valid after a knowledge of its breach, or any act that puts the insured to unreasonable expense or trouble in the justifiable belief that the company still regards the policy as valid, will estop the company from taking advantage of the forfeiture." Richards on Ins. sec. 64; Wood on Fire Ins. 1161; *Insurance Co.* v. *Brodie*, 52 Ark. 11; *German Ins. Co.* v. *Gibson*, 53 Ark. 494. There are a large number of cases resting upon this rule, some of which have been cited by counsel, but there is a broad distinction between those cases and the one at bar. In those cases the acts of the agent or company which were treated as a waiver or were held to constitute an estoppel took place at the time of or after the breach of the condition, but the declarations of the agent relied on here to create an estoppel or waiver by the company took place not only before the breach of the condition occurred, but before the policy was issued. An estoppel can seldom arise, except when the representation relates to a matter of fact existing at the time or previously. Acts which waive a forfeiture must, of necessity, follow, or at least accompany, the acts which would otherwise constitute the forfeiture, for there cannot be a waiver of a forfeiture until a forfeiture exists.

A company or its agents may, by acts clearly recognizing a policy as valid after notice of the facts, waive a breach of a condition in a policy already existing, but it cannot well be contended that an agent could, by his acts or declarations, waive the stipulations of a policy not then in existence. *Bernard* v. *Life Insurance Association* 32 N. Y., Supp. 223; *Insurance Co.* v. *Mowry*, 96 U. S. 547; Bigelow on Estoppel, (5 ed.) 574; *Thompson* v. *Insurance Co.* 104 U. S. 259; *Mobile Life Ins. Co.* v. *Pruett*, 74 Ala. 497.

This doctrine of estoppel and waiver has no application when the declaration of the agent relates to the rights depending upon contracts yet to be made, to which the person complaining is to be a party, for in such a case he has it in his power to protect himself by proper stipulations in the contract when reduced to writing. *Insurance Co.* v. *Mowry*, 96 U. S. 547; Bigelow on Estoppel (5th ed.) 574.

The case last cited arose upon a life insurance policy. The agent had agreed that the insured should be notified by the company when each premium fell due. No such provision was put in the policy, but, by an express condition of the policy, the company was released from liability upon the failure of the insured to pay the premium when it matured. It was contended that the company could not insist upon this condition on account of the promise of the agent and the failure of the company to give the notice before the premium became due. "But," said the court, "to this position there is an obvious and complete answer. All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was then expressed for the purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understand-

ing of the assured and of the insurance company." *Insurance Co.* v. *Mowry*, *supra*.

The above extract from the opinion of the United States Supreme Court asserts only well known rules of law which must apply in this case. If the agent of the insurance company agreed with appellee that he need not keep books, he should have refused to accept a policy in which it was expressly stipulated that he should keep books. If, through mistake, he accepted a policy which did not express the contract made with the agent, he should have applied to a court of equity to have the contract reformed. Having brought his action at law upon the policy, and prosecuted it to judgment, he has elected to treat it as expressing the true contract between himself and the company, and he cannot now recede from it or contradict it. *Washburn* v. *Great Northern Ins. Co.*, 114 Mass. 175. We must, therefore, in considering this case, disregard entirely the testimony of oral contemporaneous declarations which contradict the provisions of the policy, and we conclude that the judgment of the circuit court is without evidence to support it.

The appellee undertook that he would keep a set of books showing a complete record of his business. He failed to do so, and, by the terms of his contract, he cannot recover. The judgment is reversed, and the cause remanded for further proceedings.

BATTLE, J., dissented.

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WEAVER *v.* RUSH.

Opinion delivered February 8, 1896.

EJECTMENT—PRESUMPTION OF TITLE.—Proof by a plaintiff in ejectment that his ancestor died in possession of the land, claiming the same under color of title, makes a *prima facie* case in his favor, and throws on the defendant the burden of showing that defendant or some third person owned the land or was entitled to its possession.

PRESUMPTION OF TITLE—WHEN NOT OVERCOME.—Evidence by defendants in ejectment that a third person held a deed to the land under which his title was traced back for a little over twenty years, without proof that he or any of his grantors had ever been in possession or paid any taxes, is insufficient to overcome the *prima facie* title shown by plaintiff's evidence that his ancestor died in possession of the land claiming under color of title.

STRIKING DEED FROM FILES—DISCRETION.—In ejectment by a widow and heirs to recover land of which their decedent died possessed, it is an abuse of discretion to strike from the files a deed by the widow conveying to defendant her unassigned dower interest in the land because it was not filed earlier; the cause should have been transferred to the equity docket, to enable defendant to avail himself of the equitable title so conveyed.

CONVEYANCE OF UNASSIGNED DOWER—EFFECT.—A conveyance by a widow of her dower in land before it has been assigned to her cannot be enforced in a court of law, but will be upheld in a court of equity.

Appeal from Crittenden Circuit Court.

JAMES E. RIDDICK, Judge.

STATEMENT BY THE COURT.

It appears from the record in this cause that in the year 1868 a widow Cook resided on a portion of the northeast quarter of section fourteen, in township nine north, range six east, then in Cross, but now in Crittenden, county, Arkansas. There is nothing in the record that convinces the court of the true character of her holding, whether as a mere squatter or by proper title under purchase from some one else. In 1868, John W. Roman,

the ancestor, husband and intestate, respectively, of the plaintiffs in this cause, rented a part, or possibly the whole, of the six or eight acres which Mrs. Cook had in cultivation; and while living there as her tenant he married her, and they lived together as man and wife until she died in 1883 or 1884, and he continued to reside on some part of the lands involved in this suit until he died, in 1888. At various times between the date of Roman's entry on said land and the date of his death, he purchased the lands involved herein at tax sales, and from the State of Arkansas under alleged forfeitures for nonpayment of taxes, including the west half of the northeast quarter of said section fourteen; Roman being such purchaser himself directly at such tax sales or from the state, or being the purchaser from others who had previously bought from, or held under, the state, his last purchase of any of said lands being from Martha Gordon in 1885, who held under a donation deed from the state.

When Roman died, in 1888, his widow and children removed from the land in suit, and went we know not where, nor the cause of their leaving, as the record is silent on those points. On October 30, 1889, W. F. Werner, as administrator, B. F. Rush, as guardian of Roman's minor children, Mary J. Roman, the adult daughter, and his widow, Mary L. Roman (then Mary L. Cave, she having married J. D. Cave after Roman's death) instituted this action of ejectment in the Crittenden circuit court against the defendants, Weaver, Hart, Carmack and Lossen, who were, we suppose, the tenants of W. C. Stephenson (hereinafter referred to as the real defendant); and in their complaint they alleged that John W. Roman died in possession of all the lands involved herein, claiming title under color of title, and that the defendants were in unlawful possession. They further allege Roman's ownership of all of said lands by reason of sales made to him, and they exhibit the deeds. They

further base his ownership by reason of his actual adverse possession of all the lands for the several periods of limitation, seven, five and two years. The defendants filed their answer, composed of fifteen or twenty paragraphs, admitting their possession, and claiming that it is rightful, and denying the title of plaintiffs. They also filed several lengthy amendments to their answer, alleging in detail that the various tax deeds of John W. Roman were void, and of no effect; and that Roman had no right to purchase outstanding tax titles, as he went into possession of a part of the land originally under the widow Cook, as her tenant; and that, as he had received the rents and profits of a part of the land, he should be required to pay the taxes on all, or to redeem all; also that Roman's holding of a part of the lands jointly with Mrs. Cook, after he married her, rebuts the idea of his exclusive adverse possession. The defendants further defend their right of possession by alleging that in 1868 one Dickson and wife sold and conveyed all of said lands to one Fitten (both non-residents), and that in December, 1888, Fitten sold to one Burns, and that, four days later, Burns sold to W. C. Stephenson, the real defendant herein; and that on the same day Mary L. Cave, who is one of the plaintiffs, and the widow of Roman, sold, surrendered, and quit-claimed all of said lands and her dower interest therein to the said W. C. Stephenson, who, on his own motion, was made a party defendant to the suit of plaintiffs—which sales were represented by deeds duly exhibited with said amendment to the answer of defendant. But the lower court, on motion of counsel for plaintiffs, struck out the deed of Mary L. Cave to Stephenson, on the ground that it was not filed in apt time; to which action of the court the defendants, by their counsel, excepted at the time. The defendants also filed their

motion to transfer the cause to equity, which the court overruled.

At the hearing of the cause in the circuit court, oral testimony of witnesses was introduced before the court sitting as a jury, tending to show that John W. Roman died in possession of all the lands; that as fast as he bought a tract he placed laborers or tenants on it, and cleared and cultivated parts of each tract, and otherwise improved the same, and that this condition of affairs existed at the time of Roman's death. One witness testified that Mr. Fitten came to his house, and he went with him to Roman's house, but Roman was absent. That Fitten told Roman's wife that he (Fitten) owned the lands. She neither denied nor admitted the title. Fitten stated to her that he would sell Roman the land, or would let him keep it until the rents paid Roman for the improvements he had made. Fitten returned, and spent the night at witness' house, and said he would go again to see Roman next morning; but witness saw Fitten no more, and he does not think that Fitten was ever in the county after that time. Roman subsequently told witness that Fitten came to see him on that visit, and laid claim to the land, but that he would not recognize Fitten's claim. There was also oral testimony as to the rental value of the lands, and as to the value of the improvements made by the defendant, Stephenson.

The court found for the plaintiffs as to the recovery of the lands, and, after allowing the defendant Sephenson compensation for the improvements made by him, found that he was indebted to plaintiffs several hundred dollars, the same being the excess in value of the rents over and above the value of the improvements made by Stephenson. The court, then, of its own motion, reduced the following findings of fact and declaration of law to writing, to-wit: (1) "The court finds that John W. Roman, the ancestor of plaintiffs, died in the

actual possession of the lands described in the complaint, claiming the same as his own under color of title, and that the defendants do not show any title." (2) "The court declares the law to be that when plaintiffs show that their ancestors died in the actual possession of land under color of title, claiming the same as his own, this is sufficient to recover against persons not having a better title; and, defendants having shown no title, the court therefore finds for the plaintiff in this case." The court also made in writing a couple of "declarations of law," at the request of counsel for defendants, which we regard as being entirely abstract merely, and as not having any bearing on the merits of the case.

Judgment was entered for the plaintiffs in the lower court as above indicated. Motion for new trial by Stephenson's counsel was overruled by the court, bill of exceptions filed, and an appeal by the defendants to this court.

W. G. Weatherford for appellants.

1. The tax deeds of Roman were void. 32 Ark. 131; *id.* 496; 33 *id.* 716; 29 *id.* 340; 3 *id.* 274; 42 *id.* 104.

2. Roman, being in possession and receiving the rents, etc., could not acquire title by tax sale. 33 Ark. 275; 37 *id.* 578; 33 *id.* 267.

3. Roman's possession was not *adverse.* 50 Ark. 345; 45 *id.* 89; 47 *id.* 511; 150 U. S. 597, 608.

4. The mere fact that Roman died in possession *claiming* title does not conclude defendants. 33 Ark. 152; 31 *id.* 336; 40 *id.* 110. Under the old ejectment practice, proof of possession was *prima facie* evidence of *seizin*, and was always good against a stranger. 2 Gr. Ev. sec. 555. But in Arkansas *title* is evidenced by assurances in writing, and the period of *adverse* occupancy sufficient to vest title is regulated by statute. 47 Ark. 418.

5. Stephenson had acquired Mrs. Cave's (the widow's) interest, and it was error to allow her to recover.

6. The judgment for rents is excessive. Stephenson was charged the increased rental value of improvements put on the land by him. 31 Ark. 744; 55 *id.* 374; 52 *id.* 384; 47 *id.* 457.

T. P. McGovern and *J. C. Hawthorne* for appellees.

1. Proof of possession under color of title by the plaintiff's ancestor is sufficient to entitle plaintiff to recover, unless the defendant shows a better title. 40 Ark. 108; 31 *id.* 334; 21 *id.* 62; 33 *id.* 151.

2. No errors are pointed out, nor any defects charged or proved that would render any of Roman's tax deeds void.

3. The evidence shows that plaintiff's ancestor was in the adverse possession of all the lands for more than seven years, and this amounted to "an investiture of title." 34 Ark. 534; *ib.* 547; 38 *id.* 181.

4. The land commissioner's certificate, introduced in support of the motion for new trial, does not include a single acre involved in this suit.

5. As to the rents and profits, the evidence is ample to sustain the finding of the court.

When possession presumptive of title.

HON. JAS. P. BROWN, Special Judge (after stating the facts). No principle of the law of ejectment is better settled than that where a plaintiff proves that his ancestor died in possession of real estate, under color of title, and claiming to be the owner, he has proceeded far enough to make out at least a *prima facie* case; and that the defendant in such a case, if he would overcome the *prima facie* showing thus made by the plaintiff, must show, either in himself or some third party, a better title or right of possession than the plaintiff himself has. This canon of ejectment law does not mean, however,

that merely because a plaintiff's ancestor may have died in possession of real estate, claiming the same under color of title, he can prevail in ejectment proceedings against a defendant who, while he could show no right of possession or title in himself, might show that some third party is the true owner of the land in suit, and entitled to its possession. While the rule everywhere is that in ejectment the plaintiff must recover, if at all, on the strength of his own title, not only as against the defendant, but the whole world; yet neither the rule itself nor its wisdom is in the least impaired by allowing the *prima facie* case under the circumstances above referred to. In the case at bar, the *prima facie* case was made out by the proof adduced by the plaintiffs at the hearing in the lower court; and the burden of proving, by the ordinary rules of evidence, that either the defendants, or some one else other than the plaintiffs, owned the land, or had a right to its possession, at once devolved on the defendants. They first tried to convince the court that W. C. Stephenson was the rightful owner, and in support of the effort they exhibited a deed, dated in 1868, from Dickson to Fitten; then a deed dated December 10, 1888, from Fitten to Burns; and next a deed dated December 14, 1888, from Burns to Stephenson, and also a deed of the same date from one of the plaintiffs, Mary L. Cave, widow of John W. Roman (married to Cave after Roman's death), to Stephenson. In this connection, it is proper to state that there has never been an assignment of dower in Roman's realty to his said widow. Consequently Mrs. Cave's conveyance of her dower interest to Stephenson conferred upon him no right that he could enforce in a court of law. Thus, with the burden of proof on them, we find the defendants tracing their title only back to the Dickson deed of 1868, and without a particle of proof as to Dickson's title, or that either he, Fitten, or Burns ever possessed the lands for an hour, or

When such presumption not overcome.

that either of them ever paid one cent of taxes on the property in their lives. Such a showing falls far short of discharging the burden of proof imposed on the defendants. Furthermore, if Fitten had any faith at all in his title to those lands, the manifest indifference with which he regarded them, as property, during the entire twenty years of his alleged ownership, is perhaps without a parallel in the ownership of property in Arkansas; and right here we announce that we can find nothing at all of a substantial nature in the contention of counsel for appellants to the effect that Roman and wife at any time held the lands under Mr. Fitten, or that either of them regarded the claim of Fitten with any feeling akin to seriousness.

But, in addition to that effort of defendants to establish Stephenson's title, and, by way of trying to show an outstanding title in some third party, the defendants allege in their answer, or one of their amendments thereto, that the various tax titles under which Roman claimed title at the time of his death were all void; but beyond exhibiting copies of certain records from the county courts of Cross and Crittenden counties (which copies certainly do not explain, within themselves, anything prejudicial to Roman's titles), and without pointing out or in anywise explaining to the lower court, or to this court, how or in what respect said transcripts from said county courts proved the invalidity of Roman's titles, no proof at all was adduced to prejudice those titles, except that in their motion for a new trial, and by way of newly discovered evidence, the defendants alleged that the title to all of said lands was in the St. Francis Levee District, under the act of the legislature of 1893 donating certain lands of the state to said levee district. But, on a careful examination of the list of lands described in the land commissioner's certificate filed by defendants in support of said alleged fact, last above

referred to, we fail to find in said certificate *a single foot of the lands involved in this suit.* Besides this, there was positive oral testimony to the effect that, at the time of his death, John W. Roman had been in the actual possession of all of the lands, claiming them adversely as his own for the several periods of limitation set out in the complaint; and it is the settled practice of this court to never disturb findings of fact on oral testimony of witnesses, unless they are so clearly erroneous as to shock one's sense of justice. Furthermore, we regard it as a material part of this case that the defendant Stephenson himself recognized the Roman title when he bought from and paid Roman's widow, $1,250, for her interest, *as widow*, in the estate; and filed in support of his right of possession of the lands, and as evidence of his title, so far as it went, the deed conveying to him said widow's interest. Counsel for appellants insist that, as Roman went into possession of some part of the northeast quarter of section fourteen as the tenant of his subsequent wife, he could not hold adversely as to her. As an abstract proposition of law, counsel is probably correct in this; but there is no testimony in the record that convinces us, to the extent of reversing the judgment of the lower court, that the small clearing on which the widow Cook resided when Roman married her was situated in the west half of said quarter. And this view, as just expressed, is perhaps a sufficient response to the still further contention of appellant's counsel that Roman, being in possession, and receiving the rents and profits, could not purchase outstanding tax titles. We might, if we deemed it necessary, go still further, and say that the record discloses no positive fact that stood in the way of Roman's right to purchase outstanding tax titles to any of the lands in this controversy.

When error to strike deed from files.

So, taking the evidence altogether, we do not think that the defendants have discharged the burden of proving that either they or third parties have a better title or right of possession to the lands in suit than the administrator and heirs of J. W. Roman have; nor that the Roman title is not the best title. Therefore, so far as the judgment of the lower court awards to said administrator and heirs their proper interest in said lands, said judgment should be affirmed. But there is a feature of the judgment of the lower court to which this court cannot lend its assent or approval. We refer to the action of the trial court in striking out, on motion of the plaintiffs, the deed of Mrs. Cave (Roman's widow), by which she conveyed to the defendant Stephenson all of her interest as such widow in the Roman lands, merely because, as alleged by plaintiffs in their motion to strike, said deed was not filed in apt time. Mrs. Cave, one of the active plaintiffs, had sold that valuable interest of hers to Stephenson for the expressed consideration of twelve hundred and fifty dollars; and she ought not to be permitted by the courts to thus not only disregard her solemn conveyance, but also actively join Roman's children and administrator in their effort to deprive Stephenson of the lands which she had so recently sold to him, and accepted his money for, and placed him in possession of. Ordinarily, the discretion of a circuit judge would not be reviewed by this court in striking a deed from the files as evidence in a cause on the ground that the party relying on it had failed, without good excuse shown, to file it earlier and at a more proper stage of the proceedings. But, inasmuch as the defendant's motion to transfer to equity had already been denied, and inasmuch as the very substance and vitals of the litigation, so far as Mrs. Cave was concerned, were involved in that deed, it appears to us that, instead of striking the deed out of the case, the

better practice would have been to have transferred the whole cause to the equity side of the court's docket, on the court's own motion, as soon as it was discovered from the filing of that deed, not only that the defendant Stephenson had valuable equities in the case which could avail him only in a court of equity, but also that a refusal to transfer to equity would amount to nothing short of encouragement, in effect, to Mrs. Cave to perpetrate a gross injustice on said defendant. If the filing of the Cave deed had in any way "surprised" the plaintiffs, the court might have granted them their own time in preparing to resist its effects; or, if there was any ground for the motion to strike out the deed, of a more substantial character than the objection to its introduction assigned by plaintiffs, this court's attitude on this feature might now be different. But to sustain the lower court's action on this point would amount to a denial of plain, simple justice to the defendant. Not only that, but the effect would be to aid and enable one of the plaintiffs in this cause to perpetrate an act of injustice, just such as courts are designed to prevent. The judgment of the circuit court is therefore reversed, so far as it deprives the defendant Stephenson of his rights under his purchase from Mrs. Cave.

Effect of conveyance by widow of unassigned dower.

A widow's dower in the realty of her deceased husband, before it is assigned to her as the statute directs, is a mere "thing in action" that cannot be the subject of a conveyance by her to a stranger, so as to confer on him any rights that he can enforce in a court of law. But courts of equity do not hesitate to uphold such conveyances. Scribner on Dower, vol. 2, pp. 42–47, secs. 33–38, and cases therein cited. And as the dower interest bought by Stephenson from Mrs. Cave might have affected the personal judgment of the trial court against him for rents in excess of improvements made by him if his said interest in the dower had been enforced by

that court, it is necessary for this court also to reverse the judgment for the recovery of money.

The judgment of the circuit court of Crittenden county in this cause is therefore reversed, as regards the amount of money adjudged to be paid by Stephenson to the plaintiffs, and in so far as said judgment deprives the said Stephenson of his rights under his purchase from Mrs. Cave, as widow of John W. Roman; otherwise the judgment should be affirmed, so far as it awards to the administrator and heirs of J. W. Roman the recovery of the fee of the lands involved in this controversy, subject only to said dower interest now owned by the said Stephenson; such interest of the said Stephenson and of the said estate to be subject to the homestead rights, if any, of the minor children of the said John W. Roman; his said widow having abandoned her homestead rights in said lands, if any such homestead right existed, by her sale of her entire interest in said lands to said Stephenson; and said homestead, if any, to be enjoyed wholly and solely by the minor children of the said John W. Roman, as the law provides, until they arrive at the ages of twenty-one years.

This cause is therefore remanded to the circuit court of Crittenden county, with directions to transfer it to the equity docket of the court, there to be proceeded with in accordance with equity practice, and not inconsistent with this opinion. And after the dower interest of the said widow of John W. Roman in said lands shall have been set apart and assigned for the benefit of the said Stephenson, as the law provides in the matter of assignment of dower, the said circuit court is hereby directed to ascertain and settle the question of improvements made on said lands by the said Stephenson, so far as he may be entitled under the law to compensation for said improvements, and also the

question of rents owed by him, according to the laws in such cases made and provided.

Perhaps the effects of this reversal might have been as thoroughly attained by affirming the judgment of the lower court in this cause *in toto*, and by leaving the appellant Stephenson free to pursue, if he should see fit to do so, by a separate suit in chancery, the remedy, and to seek the relief, to which we have indicated he is entitled, under the rule of estoppel and *res judicata* announced by this court in the case of *Dawson* v. *Parham*, 55 Ark. 286. But, as such course would necessitate an entirely new proceeding in chancery, thereby forcing the parties to incur additional costs that might be avoided, and as it is the policy of the law that a multiplicity of suits be avoided, and that there be an end to litigation, we have concluded, after due reflection, that the foregoing decision to reverse and remand is best for the interests of all herein concerned.

BOYINGTON *v.* VAN ETTEN.

Opinion delivered February 15, 1896. 62 89 63 372

CORPORATION—LIABILITY OF STOCKHOLDERS.—In an action to recover from the individual stockholders of a corporation money loaned to the corporation, it is error to instruct the jury to find for plaintiff where the evidence showed that he dealt with and recognized the corporation as such, that it was a corporation duly organized under the laws of another state, that defendants did not owe plaintiff or the corporation anything, and had never had any dealings with plaintiff, except as officers of the corporation.

FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS IN STATE.—A corporation organized in another state may transact business in this state, subject to the conditions prescribed with reference to foreign corporations.

APPEAL—BRINGING UP THE EVIDENCE.—Where it is assigned as error that the court erred in directing a verdict for the plaintiff, it is not necessary that the bill of exceptions contain all of the evidence, it being sufficient to show that there was some evidence on the part of defendant.

Appeal from Pulaski Circuit Court.

WILBUR F. HILL, Special Judge.

P. C. Dooley for appellants.

1. The bill of exceptions does not expressly state that it contains *all the evidence*, but it contains expressions from which it may be inferred that it contains all the evidence, and this is sufficient. 35 Ark. 450. At least, there is evidence enough set out to show that the court erred in taking the case from the jury, and in directing a verdict for plaintiff. 57 Ark. 466; 39 *id.* 451; *id.* 491; *id.* 413. From these authorities, if there was any legal evidence to establish the defenses relied on, the direction was improper.

2. Having dealt with and recognized the company as a foreign corporation, knowing it to be such, and having sued it as such, and obtained judgment against it as such, which judgment they are now seeking to enforce, plaintiff cannot now be heard to say that it is not a corporatiou. 57 Ark. 632; 58 *id.* 103; 20 A. & E. Ry. Cases, 523–8; 100 U. S. 61; Bigelow, Estop. (3 ed.), 464–5, and 537, and note; 5 Col. 282–5; 21 N. Y. 542; 2 Mor. Corp. sec. 756; 21 N. E. 12; 95 U. S. 665; 2 Beach, Priv. Corp. sec. 866; 27 Oh. St. 343; 2 L. Raym. 1535; 14 Johns. 238; 24 N. Y. 209; 11 Cush. 289; Angell & Ames Corp. secs. 70, 518; 1 Johns. Cas. 132; 8 Johns. 378; 16 Mass. 94; Mor. Corp. (2 ed.) sec. 756, 661–5; 1 Beach, sec. 290; *ib.* secs. 383–4; 2 *id.* sec. 866. That one dealing with a *de facto* corporation is estopped to deny its legal existence is well settled. 15 N. E. 311; 40 N. W. 771; 8 So. 608; 21 N. E. 981; 41 N. W. 466; 21 Pac. 500; 22 Fed. 197; 147 Mass. 224. No one other than the

state can question the corporate existence of a foreign corporation. In an early case, 12 N. J. Eq. 31, the rule was stated otherwise, but the later decisions hold in harmony with the cases cited above. 48 N. J. L. 599; 128 N. Y. 220; 34 *id.* 215; 1 Wood, sec. 289; 23 Oh. St. 622; 35 *id.* 158; 128 *id.* 205; 96 U. S. 369; Cook on Stock, etc.; sec. 237; 104 U. S. 12; 1 Beach, Priv. Corp. sec. 164.

Cockrill & Cockrill and *Blackwood & Williams* for appellee.

1. The bill of exceptions nowhere states that all the evidence is set out. Thus, it will be presumed that *every fact* was proved that is necessary to sustain the judgment. 44 Ark. 76; 59 *id.* 251; 38 *id.* 106; 58 *id.* 103.

2. In the absence of a bill of exceptions, this court will presume that the evidence was not *legally* sufficient to sustain a verdict, and that the trial court properly directed the jury to find for the prevailing party. 57 Ark. 465-8.

3. Plaintiff was not estopped to deny the corporate existence of the lumber company. 15 S. W. 200; 27 La. An. 607; 45 N. Y. 410, 414; 40 Oh. St. 9. It may be shown that the prescribed method of being incorporated was not complied with. Cook, Stock, etc., (1 Ed.) sec. 233; 73 Ill. 107; 4 Neb. 616; 12 N. J. Eq. 31; 35 Ark. 144; 78 Ind. 344; 56 Iowa, 104; 79 Mo. 410. Unless it be organized legally, a so-called corporation cannot exercise the function of a corporation. 59 Tex. 339, and cases *supra*. No presumption of incorporation arises from the fact that the business was transacted by a president and secretary. 87 Ala. 482; 6 Conn. 302. To work an estoppel, the corporate existence must be admitted in the contract. 23 Tex. 465; 7 Wend. 540; 8 *id.* 480; 15 *id.* 316; 106 Mass. 560; 16 Wend. 607; 26 N. Y. 80.

4. Defendants were liable because they did not comply with the laws of Wisconsin, or of this state. 35

Ark. 144, 380; 15 S. W. 200; 12 N. J. Eq. 31; Cook, Stock & St., etc., sec. 238; 6 Kas. 245; Morawetz, Priv. Corp. sec. 513; 31 N. J. L. 543.

5. Defendants were personally liable by reason of the corporation migrating, contrary to secs. 1322–5, Sand. & H. Digest. Beach, Priv. Corp. sec. 164; 5 Nat. Corp. Rep. 581; 20 Ind. 492; 38 Barb. (N. Y.) 574; 6 Kas. 235; 11 Humph. 1; 12 N. J. Eq. 31; 148 Mass. 244; 86 Mo. 382; Redfield on Railways, sec. 17 *a*.

BUNN, C. J. This is a suit and attachment against W. E. Boyington and V. P. Atwell, under the firm name and style of Boyington & Atwell, and also against the Cypress Lumber Company, of which the complaint alleges the said Boyington and the said Atwell were principal members. The allegations of the complaint are substantially to the effect that defendants are indebted to plaintiff in the sum of $6,195.92, for money loaned and advanced to them; that Boyington and Atwell were the principal subscribers to the capital stock of the Cypress Lumber Company, an alleged corporation organized under the laws of Wisconsin, but whose domicile and place of doing business is in Arkansas, and the said Boyington and Atwell have each failed to pay in their part of the capital stock, and there is now due on said capital stock a large sum, viz., ten thousand dollars; that the Cypress Lumber Company failed to file proper constituting instruments required by the law of the state of Wisconsin, or by the law of the state of Arkansas, or to comply with any of the statutory provisions of the state of Wisconsin, or of Arkansas; that all business done by defendants in the name of the Cypress Lumber Company, or of Boyington and Atwell, was really in truth and fact the business of Boyington & Atwell, and managed by them, and was done in the state of Arkansas, and in the counties of Pulaski and Jefferson, of

said state; that they did in said counties a large amount of business, and the debt sued on herein was contracted in said counties, and as business carried on therein; that if defendants were ever protected by any corporate existence of the Cypress Lumber Company as a corporation, under the laws of the state of Wisconsin, they rendered themselves liable as partners by reason of said Cypress Lumber Company emigrating from said state of Wisconsin, its original domicil, to the state of Arkansas, and in failing to comply with the statutory provision of the state of Arkansas. Wherefore plaintiff prays judgment.

An attachment was sued out, and the individual property of Boyington and Atwell attached.

Boyington and Atwell demurred, and this was sustained as to the non-payment of the shares of the capital stock by defendants, and overruled as their individual liability for the debts of the corporation. They then answered that they had no business dealings with the plaintiff at any time; that he had at no time loaned them money; that it is not true that they (the defendants) were the principal stockholders in the Cypress Lumber Company, if by that is meant that they own most of the stock; that it is not true that they had not paid up their subscribed stock; that they together never owned more than one share over one-half of the capital stock, and that all this has long since been paid up, and that they now owe nothing to the corporation; that the Cypress Lumber Company was a corporation formed under the laws of Wisconsin, for the transaction of such business as it was engaged in in the states of Wisconsin and Arkansas; that it was formed in strict compliance with the requirements of the laws of Wisconsin for the formation of such corporations, and had complied with all the requirements of the laws of Arkansas imposed on foreign corporations doing business in this state, and it was, while doing busi-

ness in Arkansas, a valid corporation; that J. N. Boyington was treasurer, and James A. Brown was vice-president, W. E. Boyington was president, and V. P. Atwell was secretary; that defendants had no business relations with plaintiff, except for the Cypress Lumber Company, and as officers of the same; that plaintiff, in a long course of dealing with the Cypress Lumber Company, a corporation organized under the laws of Wisconsin, recognized and treated it as such, which it really was; and pleaded that he is estopped now to deny its corporate existence.

When the evidence was all in, the court below, on motion of plaintiff, instructed the jury to return a verdict for plaintiff, which was done, and judgment for the debt and on the attachment was rendered by the court. Defendants saved exceptions, appealed, and asked leave to tender their bill of exceptions, which was accordingly done.

Liability of stockholders of corporation.

There was evidence tending to show that plaintiff had dealt with the Cypress Lumber Company as a corporation, and recognized it as such; that the same was a corporation formed and existing under the laws of Wisconsin; that defendant did not owe plaintiff anything individually, and never had any dealings with him, except as officers and members of the corporation; that they were owing nothing to the corporation. It is, therefore, difficult to see how the court below could take the case from the jury and direct a verdict against the defendant.

Right of foreign corporation to do business in state.

That a corporation should transact business in another state, unless such corporate business is prohibited in the one state or the other, or both, is not only no ground to treat it as an invalid corporation, but the transaction of such business is now very generally encouraged under the usual restrictions. Some of the earlier cases announce a different rule, because such manner of operating was supposed to be somehow fraudu-

lent, as against the states concerned, as in *Hill* v. *Beach* 12 N. J. Eq. 31; but the decided weight of the more recent authorities is in support of the more liberal policy, and dealing with the subject as one growing out of the comity of states. *Stout* v. *Zulick*, 48 N. J. L. 599; *Merrick* v. *Van Santvoord*, 34 N. Y., 208; *Saltmarsh* v. *Spaulding*, 147 Mass. 224; *Hanna* v. *Int. Petroleum Co.* 23 Ohio St. 622; *Second National Bank* v. *Hall*, 35 Ohio St. 158, and numerous others.

When once regularly formed in a foreign state, until dissolved according to the laws of that state, the existence of a corporation cannot be destroyed, or even called in question, except to ascertain the fact of its existence at home, by the courts of this state. At least such seems to be the reasonable doctrine. Such a corporation may be forbidden to enter this state at all, and is forbidden by legislative enactment to do business here except on conditions, but that is all. There is no law making such null and void when attempting to do business here, without complying with conditions. The law makes their contracts, made in the course of doing business, void as against citizens.

When not necessary to bring up all the evidence.

The objection that the bill of exceptions does not show that it contained all the evidence is not well founded in a case like this, where the judgment is based on a total want of evidence on the part of defendants, however well founded it might be in a case determined on the weight of evidence. The answer to the objection in this case is that the bill of exceptions shows some evidence on the part of defendant, and when, as in this case, the appeal is taken to correct the error of the lower court in refusing to permit the jury to consider this evidence, whatever may be its weight or value, all the evidence in the case is not needed.

Reversed and remanded for a new hearing.

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FORDYCE v. LOWMAN.

Opinion delivered February 15, 1896.

EVIDENCE—EXPERT TESTIMONY.—Expert testimony is inadmissible on the question whether a brakeman assumed the risk of riding on a flat car pushed in front of an engine.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

J. M. & J. G. Taylor and *S. H. West* for appellant.

1. The court erred in admitting improper testimony. The questions asked and answers by McCool and others were improper and incompetent. The jury were as competent to judge of the methods and circumstances as experts. The facts only should have been put in evidence, and the jury left to draw their own conclusions. 63 Fed. 797; 40 Iowa, 345; 36 Ia. 462, 472; 36 *id.* 473; 1 Gr. Ev. (12 Ed.) 440; 36 Ia. 37; 56 Ark. 612; 1 Wharton, Ev. 512.

2. It was error to limit the questions submitted to the jury to the two mentioned by the court, viz: (1) Was it negligence on the part of the company to push flat cars ahead of the engine? and (2), was there contributory negligence on the part of the deceased? The prominent thing in the trial was that, notwithstanding the custom of pushing flat cars in front was improper and negligent, yet, knowing all these circumstances, Lowman voluntarily accepted such service, and *thereby assumed all the risks thereof.* 68 Fed. Rep. 632; 113 Mass. 396; *ib.* 544; 11 Allen, 312; Wood on Railroads, p. 744, note 1, 2 and 3, etc; 53 Ark. 117: 393; 58 *id.* 175; 54 N. J. L. 411; 62 Mo. 232.

3. The presumption is that Lowman contracted with reference to this custom. The complaint does not

negative this idea, and it must prevail until overthrown by proof. 63 Iowa, 569; 31 A. & E. R. Cas. 255. Knowing these dangers before the accident, and in time to have avoided them, Lowman must be held to have assumed them. 63 Iowa, 562; 125 Mass. 82; 63 N. Y. 452; 88 N. Y. 264; 122 U. S. 195; Bailey, Mast. Liab. for Inj. etc. pp. 170, 191. Even though he had no knowledge when he entered the service, yet, after becoming aware of them, he remains in the service, the servant assumes the risks. Wood, Mast. & Serv. p. 793 and note; 71 Mo. 160; Bailey, Mast. Liab. etc., p. 160. See also 57 Ark. 232, which governs this case. 53 Am. & Eng. R. Cas. 370; *id.* 372; 156 Mass. 200; 162 *id.* 556; 139 *id.* 587; 140 *id.* 152; 117 Ind. 265; 38 Am. & Eng. R. Cas. 222, and note.

N. T. White, *H. King White* and *W. T. Wooldridge* for appellee.

1. The same evidence objected to was introduced in the former trial, and the objections were passed on in the former appeal. If inadmissible, the court would have said so. But the evidence clearly shows that these witnesses were competent to testify as experts. 25 S. W. 911; 26 *id.* 232; *id.* 686; 21 *id.* 737; 57 Ark. 519.

2. The instructions given by the court are sustained by opinion in the former case. 57 Ark. 162. See also 18 S. W. 977; 76 Pa. St. 389; 1 Sh. & Redf. Neg. secs. 211, 212; 128 U. S. 94; 60 Ark. 438.

BATTLE, J. This is the second time this cause has been before this court for consideration. When it was here before, the judgment of the circuit court, which tried it the first time, was reversed, and it was remanded for a new trial. *Fordyce* v. *Lowman*, 57 Ark. 160. Upon its return to the circuit court, the issues were tried again; plaintiff recovered judgment; and the defendants appealed.

Appellants now contend that the judgment from which they have appealed should be set aside because the court permitted appellee to introduce incompetent testimony in the last trial over their objections. To render the testimony objected to more intelligible, it is necessary to state that "this action was brought to recover damages alleged to have been occasioned by the death of Samuel Lowman," the appellee's intestate, who was killed by a derailment of the train on which he was acting, at the time, as a brakeman, in the employment of appellants. This occurred while he was making his first trip over appellants' road after his employment. At the time the accident occurred, the locomotive of the train was pushing ahead of it some flat cars, which were found on the main track after it had gone some distance on the trip; and the deceased, in discharge of the duties of the place he was employed to fill,—that is to say, of first brakeman,—was riding on these flat cars. To prove that he thereby incurred risks which he did not anticipate and assume when he was employed, the following answers of witnesses to questions propounded to them were admitted, over objections of the appellants, as evidence:

"Q. Would you [McCool] consider it a part of the anticipated duties of a brakeman, who hired to go upon a train, that, during the progress of his journey, he would find flat cars standing on the main track, which his train was expected to pick up, and carry them ahead of the engine?

"A. No, I shouldn't think it was. I shouldn't think he would anticipate such a thing at all, being a man who had considerable experience in railroading.

"Q. What would you say about finding cars? Was it proper railroading, or was it negligent railroading?

"A. It was contrary to all rules and regulations of railroading, and you don't find it on any well-disciplined road. You don't find it on the main tracks. Of

course, branches are governed by the same rules main lines are.

"Q. In going on a mixed passenger and freight train, what would he expect?

"A. A railroad man would not expect to find cars on the track in front of his engine.

"Q. Would he ride cars in front of his engine?

"A. He wouldn't expect it at all without being told. If I was to go out on the road today, I would not expect to find cars on the main track."

"Q. If you [Fortune] were employed by the Cotton Belt Railroad to run from Pine Bluff to Little Rock on the Altheimer Branch, on a freight train, would you expect to find on the main line five or six flat cars to push ahead of the train to a side-track?

"A. I would not expect to find any.

"Q. Then, understanding the duties of a brakeman, you say you would not expect to find anything of that kind?

"A. No. sir.

* * * * * *

"Q. What would you say to the jury as to the kind of railroading it would be, leaving five or six flat cars on the main track to be pushed ahead of the engine on the side-track?

"A. Such a thing as that is unknown in railroading, and I never heard of it in all my life until I heard of it on the Altheimer Branch. Sometimes cars will get away. It happened while I was a switchman in Texas. Five cars got away from us. Somebody would have found them there. That was the extent of them there. The idea of pulling cars out, and leaving them there,—there is no railroading in it."

Appellee says this evidence was introduced in the former trial, and was objected to by appellants, and that the objections to it were presented to this court in the

former appeal. The evidence referred to was to the effect that riding on flat cars in front of an engine is more dangerous than it is on cars in rear of it, or than it is on a train without any cars in front of the engine. Nothing was said by this court as to its admissibility in the former trial. Why, we know not, unless it was considered not to be prejudicial. But we are not concluded by this silence in deciding the question now presented. The evidence objected to in the two trials was entirely different. In the former, it was adduced to show which of the two positions is the more dangerous; and in the latter, that the deceased brakeman did not assume, by his employment, the risk he incurred when riding on the flat car in front of the engine.

The opinions of experts are admitted as evidence for the sole purpose of aiding the court or jury to understand questions which inexperienced persons are not likely to decide correctly without such assistance. When the subject-matter of inquiry before a court requires special experience or knowledge to comprehend, they are admissible for that purpose, but are not when the inquiry is into a subject which a man of ordinary intelligence and experience in the affairs of life can understand, as in that case the assistance is not needed. *Brown* v. *State*, 55 Ark. 593; *Muldowney* v. *Illinois Central R. Co.* 36 Iowa, 472.

Let us apply the rule to this case. When Lowman undertook to perform the duties of brakeman, he assumed only those risks which were ordinarily incident to his employment, or of which he had knowledge or notice that he would incur. Now, to determine whether the risk he incurred by riding on the flat cars was assumed by him, it was necessary to ascertain whether he would have incurred it in the discharge of his duties on the train he was employed, had it been run as it would be on railroads operated in the ordinary and usual

manner. If it was running, when he was injured, according to the rules and regulations or practices usually adopted or observed by railroad companies in the operations of such trains, or he knew, or ought to have known, or had notice, at the time he entered the service of appellants, that he would incur the risks he did, then he assumed it; otherwise, he did not. To determine this question, no special experience, knowledge, study, or skill is required. All that was necessary to enable a jury to decide it correctly was proof of all the facts that shed light upon the subject. The opinions of experts were unnecessary for that purpose. It therefore follows that the testimony objected to should have been excluded, and that the court erred in admitting it.

But we do not mean to hold that an employee cannot assume risks after his employment. He can do so expressly, or by continuing in the employment after he becomes fully aware of the additional risk, without promise of the master, or reason to expect, that it will be removed or diminished. But this rule is not without modifications. This court held, on the first appeal in this case, that the employee, Lowman, did not assume the additional risk by continuing in the service of his master "when he was called upon, in an emergency, to perform the duties assigned him." It was thought that the emergency, if it existed, relieved him of the assumption of the additional risk. But sufficient has been said upon this point in the first opinion.

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

SHAVER v. SHARP COUNTY.

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Opinion delivered February 15, 1896.

COUNTY TREASURER—COMMISSIONS.—A county treasurer who succeeds himself is entitled to commissions on funds carried over from one term to another, although he had received commissions thereon during his first term.

APPEAL—QUESTION NOT RAISED BELOW.—The defense of the statute of limitations will not be considered on appeal if it was not raised in the court below.

SETTLEMENT OF TREASURER—ESTOPPEL.—A county treasurer is not estopped to claim commissions because of his failure to include them in his settlement at the end of his term, as his right to them was not in issue.

COUNTY TREASURER—PAYMENT OF COMMISSIONS.—The commissions of a county treasurer are payable in kind out of the particular funds.

Appeal from Sharp Circuit court.

JOHN B. MCCALEB, Judge.

Shaver, late treasurer of Sharp county, presented to the county court of that county his claim for certain commissions alleged to be due him on funds carried over by him from a previous term, and omitted from his last settlement with the county. The claim was disallowed in the county court. Upon appeal, the circuit court likewise disallowed the claim, and declared "that a county treasurer who succeeds himself three times would not be entitled to charge two per cent. commission on funds coming into his hands, as his own successor, when he had charged said commission on said fund during his former term, and when he had failed to make settlement with the county court at the end of each of his said terms, and had made full settlement with said court at the end of his last term of office, and had made no claim to said commission." Plaintiff has appealed.

C. W. Shaver, the appellant, *pro se.*

1. A county treasurer who succeeds himself is entitled to commission on funds carried over from a former to a succeeding term. He is, to all intents and purposes, a new officer, gives a new bond, and assumes a new responsibility. Mansf. Dig. sec. 3254–5; 41 Ark. 404.

2. A county treasurer is not bound to make a settlement with the county court at the close of each of his terms of office, unless required by the court, but is only required to make annual settlements. Sand. & H. Dig. sec. 1199.

3. The fact that he made full settlement at the close of his last term, and made no claim to said commission, is no bar. The matter of his commissions was not adjudicated. 1 Am. & Eng. Enc. Law, p. 109.

E. B. Kinsworthy, Attorney General, and *Sam H. Davidson*, for appellee.

1. The law provides that the county treasurer shall be paid out of the respective funds received into his hands *each year*. Sand. & H. Dig. sec. 3324–5.

2. The treasurer is barred by laches, and the limitation of three years. Sand. & H. Dig. sec. 4822. No formal plea is required in the county court. 32 S. W. 116.

HUGHES, J. It was agreed by counsel in this case that the point in issue is: "Is a county treasurer who succeeds himself entitled to commission on funds carried over from one term to another, when he had received commission on said funds during his former term?"

Commissions of county treasurer.

It is held in *Lawrence County* v. *Hudson*, 41 Ark. 494, that a county treasurer is entitled, under the statute, to commissions on school funds received from the former treasurer, the court saying: "There is no reason in compelling the treasurer to give bond, and assume the custody of funds already collected, under a grave responsi-

bility, and confining him to the receipts which come in during his term of office for his compensation. We can see no difference between a treasurer who succeeds himself and a treasurer who succeeds another person as treasurer. One who succeeds himself as treasurer is required to take the oath of office, and to give bond on entering upon his second term, precisely as he did in entering upon his first term. He is the same person in both terms, it is true, but his terms of office are not the same; they are separate and distinct terms, as much so as where two terms are filled by different persons.

Question not raised below.

It is insisted by counsel for the county that the appellant's demand was barred by the statute of limitations. But this question was not raised below, and will not be considered here. It is true, as counsel contends, that no formal pleadings are required in the county court, but the statute of limitations was not pleaded orally, or in any manner in the circuit court.

When treasurer not estopped to claim commissions.

The fact that the treasurer made settlements at the end of his last term, and did not include these commissions in his settlement, does not conclude him, as his right to them was not in issue and was not adjudicated in any settlement. "That which has not been tried cannot have been adjudicated. * * * * That which is not within the scope of the issues presented cannot be concluded by the judgment." Woerner, Administration, sec. 570, and cases cited, n. 3; Wells, Res. Adj. p. 8, sec. 14; *King* v. *Chase*, 15 N. H. 15; Wells, Res. Adj. sec. 371.

We are of the opinion that the court erred in refusing the instructions asked by the appellant, and in giving those for the appellee.

Fees payable in kind.

The fees of the treasurer are payable in kind, of course, out of the particular funds.

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

As the fees of the appellant, as county treasurer, in this case accrued, and the cause was tried in the circuit court, before the passage of the act approved March 12, 1895, the questions involved here are not affected by that act, which establishes a different rule, so far, at least, as the commissions of county treasurers on school funds are concerned.

BRYAN *v.* BRYAN.

Opinion delivered February 15, 1896.

ANTENUPTIAL CONTRACT—DEFECTIVE ACKNOWLEDGMENT—CURATIVE ACT.—If an acknowledgment of an antenuptial contract was defective in being taken before a notary public, instead of before a court of record, or some judge or clerk thereof, as required by Sand. & H. Dig., sec. 4899, the invalidity was cured by the curative act of 1885.

DOWER—JOINTURE.—An agreement in an antenuptial contract that the land conveyed thereby to the wife shall be "in lieu and full satisfaction of her whole dower" precludes her from claiming dower in land acquired by her husband after as well as before the marriage.

JOINTURE—RIGHT TO POSSESSION.—As a wife does not come into possession of land conveyed to her by her husband as a jointure by an antenuptial contract until his death, she is not entitled, after his death, to rents and profits which accrued prior thereto.

Appeal from Jefferson Chancery Court.

JAMES F. ROBINSON, Chancellor.

Mrs. Mary Belle Bryan, (formerly Douglas), widow of Joel E. Bryan, brought suit against the administrator and heirs of her deceased husband, to recover dower in the lands of her intestate, who died in 1892. In answer, defendants relied upon an antenuptial contract entered into September 5, 1882, between plaintiff and intestate, whereby the latter conveyed to her certain property in

lieu of dower. The terms of the contract are as follows:

"That said Joel E. Bryan, in consideration of a marriage to be solemnized between him and the said Mary Belle Douglas, doth hereby grant, bargain, sell and convey unto the said Mary Belle Douglas, for her natural life, the following real estate, and after her death, to him, or his heirs and assigns forever; that is to say, northwest quarter of section twenty-one, township seven south, range seven west. To have and to hold the said lot and parcel of land as aforesaid as jointure and in lieu and full satisfaction of her whole dower in his estate. And the said Mary Belle Douglas, being of lawful age and being well advised, in consideration of the premises and one dollar paid her by the said Joel E. Bryan, doth for herself, her heirs, executors and administrators, covenant and agree with him, the said Joel E. Bryan, that the said lands so conveyed to her shall be in full satisfaction of her said dower in his estate, and shall bar her from claiming the same, if she shall survive after the said marriage. And, further, that if the said marriage be had, and she survive him, she will not claim or demand any share of his personal estate, under the statutes of distribution or otherwise, but, retaining her own estate as aforesaid, shall be a bar to all interests and purposes to her claiming or having any part of his personal estate after his decease, unless some part thereof be given her by his will, or some act of his done after the execution hereof."

To this answer plaintiff replied in substance (1), that the alleged antenuptial contract is void, because it was acknowledged before a notary public; but (2) that, if it was valid, she was entitled to the rents and profits from the land therein conveyed from September 5, 1882, until the death of her husband in 1892.

Plaintiff demurred to the answer of defendants, and defendants demurred to the reply of plaintiff. The court sustained the demurrer to the reply, and overruled the demurrer to the answer. Thereupon plaintiff appealed.

Austin & Taylor for appellant.

1. The marriage contract is void because acknowledged before an officer not authorized by statute to take it. Sand. & H. Dig. sec. 4899; 86 Mass. 412; Endlich, Int. St. sec. 431. It was *void*, and the legislature could not give life or legal existence to it. 2 Scribner on Dower, p. 385.

2. If the antenuptial agreement is upheld, still appellant is entitled to dower in property acquired after the execution of the contract. The status of the parties was fixed thereby with reference to the estate at the time of marriage.

3. The estate is certainly liable for the rental value of the land used and enjoyed by her husband during his lifetime.

Met L. Jones for appellee.

1. The statute is *directory* merely. There are no negative words in it, and an acknowledgment taken before a notary public, an officer recognized by the constitution, and athorized by law to take acknowedgments, is good. 13 Wall. 590; 20 How. 290; 1 Bouv. Inst. 105; 2 Coke, Inst. 200; 14 Abb. (N. Y.) 126; 1. Pick. (Mass.) 64; 34 Ark. 493; Cooley, Const. Lim. 93; 30 Ark. 91. But the defect, if any, was cured by the curative act of 1885. Sand. & H. Dig. sec. 741. This act is constitutional. 43 Ark. 420; 44 *id.* 365; 47 *id.* 413; 50 *id.* 295; Cooley, Const. Lim. 463; 14 Am. & E. Enc. Law, p. 540, and notes 1, 2 and 3; 5 Cranch, 154; 1 Bald. 344.

2. The antenuptial contract bars the widow of dower. By its terms, it was a "*jointure* in lieu and full

satisfaction of her *whole* dower in his estate," and she warrants that she will not claim or demand any share of his personal estate under the statutes of distribution, etc. The term "*jointure*" settles the meaning of the instrument. 2 Blackst. Com. 137; 1 Coke, Inst. 36; 3 Metc. (Ky.) 151; 12 Bush, 518; 21 Me. 364; 3 Miss. 392; 19 Mo. 469; 1 Washb. Real Prop. 8; 27 Ohio St. 60. At common law, a woman could not be bound by any antenuptial agreement; but in equity any provision in lieu of dower is an equitable jointure, and bars dower. 37 Ga. 296; 69 Me. 247; 8 Conn. 79; 8 Gratt. (Va) 486; 56 Am. Dec. 155; 8 Gray (Mass.), 542; 2 D., M. & G. 209; 1 Blan. 284.

3. As to rents, that is a matter to be presented to the probate court.

WOOD, J. The questions in this case as stated by the appellant are: (1) Is the marriage contract void because it was acknowledged before an officer not authorized by the statute to take it? (2) If the contract be valid, should the widow be allowed dower out of the estate acquired by her husband after the marriage? (3) If the contract be not void, and if she be not entitled to dower out of the property obtained after the making of the contract, has she not a right in equity to charge the estate with all sums due her for the rental value of the land mentioned in the contract, which was used and enjoyed by her husband during his life time?

All these questions must be answered in the negative.

When defective acknowledgment cured.

1. It is unnecessary for us to discuss the question as to whether the antenuptial contract between Joel E. Bryan and Mary Belle Douglas is or is not void by reason of the acknowledgment having been taken before a notary public, instead of before a court of record, or some judge or clerk of a court of record, as provided in sec.

4899, Sand. & H. Dig. For, under the curative act of 1885, and the decisions of this court construing such acts, whatever defects there were in the acknowledgment, rendering the deed ineffectual to convey the title, were removed, and the deed was, after such act, as good and valid to carry out the intent of the parties to it as though the acknowledgment had been properly taken in the first instance. *Cupp* v. *Welch*, 50 Ark. 294, and authorities cited; *Sidway* v. *Lawson*, 58 Ark. 117.

Dower barred by jointure.

2. The widow cannot have dower out of the estate of her husband acquired after the marriage, for the reason that the antenuptial contract into which she entered deprives her of the right to claim dower. That contract, so far as it is necessary to make clear the point, is: "To have and to hold the said lot and parcel of land as aforesaid as jointure and in lieu and full satisfaction of her whole dower in his estate. And the said Mary Belle Douglas, being of lawful age, and being well advised, in consideration of the premises, and of one dollar paid her by the said Joel E. Bryan, doth for herself, her heirs, executors and administrators, covenant and agree with him that the said lands so conveyed to her shall be in full satisfaction of her said dower in his estate, and shall bar her from claiming the same, if she shall survive him after the said marriage. And, further, that if the said marriage be had, and she survive him, she will not claim or demand any share of his personal estate under the statutes of distribution, or otherwise." To construe the above instrument merely as an agreement not to claim dower in the estate of the husband at the time of the marriage, and as not barring dower in property afterwards acquired, would be ignoring the plain meaning of the words employed. "In lieu and full satisfaction of her whole dower" means that she surrenders all claim to dower. The words are too plain to be explained. Besides, the effect of jointure, which

this conveyance is, if accepted, is to bar dower. Sand. & H. Dig., secs. 2528–2531, inclusive; *Grogan* v. *Garrison*, 27 Ohio St. 50; *Wentworth* v. *Wentworth*, 69 Me. 247; *Culberson* v. *Culberson*, 37 Ga. 296; *Andrews* v. *Andrews*, 8 Conn. 79; 1 Wash. Real. Prop. pp. 324, 330, sec. 17; *Tevis' Ex'rs.* v. *McCreary*, 3 Metc. (Ky.) 151; *Vance* v. *Vance*, 21 Me. 364; *Perry* v. *Perryman*, 19 Mo. 469; *Miller* v. *Goodwin*, 8 Gray (Mass.), 542. See, also, *Charles* v. *Charles*, 56 Am. Dec. 155.

When right to possession of jointure accrues.

3. The wife does not come into possession of the provision made for her by her husband, as jointure, until his death. Jointure is defined to be "a competent livelihood of freehold for the wife of lands and tenements, to take effect in profit and possession presently after the death of the husband, for the life of the wife at least." 2 Blackst. Com. 137. "One mode of barring the claim of a widow to dower," says Mr. Washburn, "is by settling upon her an allowance previous to marriage, to be accepted by her in lieu thereof. * * * But in order to have such provision operate as a bar to dower, it must take effect immediately upon the death of the husband." 1 Wash. Real Prop. ch. 8, sec. 1-6. See, also, authorities cited *supra*, from appellees' brief. These authorities show that the appellant is not entitled to rent for the lands conveyed to her as jointure.

The judgment of the circuit court is affirmed.

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JETTON *v.* TOBEY.

Opinion delivered February 22, 1896.

SALE—TITLE CONVEYED.—As a general rule, no one can transfer to another a better title than he has himself.

SAME—BONA FIDE PURCHASER.—The mere possession of personal property, without other evidence of title or authority from the

owner to sell, will not enable the possessor to confer a better title than he actually has, although the purchaser has no notice of any defect in his vendor's title.

BONA FIDE PURCHASER—WHO IS NOT.—One who purchases personal property on credit and never pays for it is not entitled to protection as a *bona fide* purchaser.

REPLEVIN—WHO MAY BRING.—A special constable who seizes personal property under attachment acquires such a right to the possession as entitles him to maintain replevin against one who wrongfully obtains possession of such property.

Appeal from Franklin Circuit Court, Charleston District.

JEPHTHA H. EVANS, Judge.

Rowe & Rowe for appellant.

1. It was error to refuse the instructions asked by plaintiff. 38 Ark. 529; 34 *id.* 707; *id.* 399.

2. The court's instructions were erroneous. A purchase of property actually in the custody of the law is utterly void, and no title whatever is acquired. 11 Ark. 411.

3. The institution of the suit is constructive notice to all purchasers after suit commenced, and there can be no innocent purchaser. 12 Ark. 421; 16 *id.* 175; 13 Am. & Eng. Enc. Law, p. 893, sec. 9.

T. A. Pettigrew for appellee.

1. The instructions asked by plaintiff were properly refused. 38 Ark. 334; 43 *id.* 184; 34 *id.* 469; 37 *id.* 580.

2. The instructions given by the court were clear and complete, and met every phase of the case. The conduct of David Looney and the circumstances show authority for his brother to act for him, but it is only necessary that there be appearance of authority, if caused by himself. Parsons on Cont. (6 Ed.) p. 46. Adopting the acts of his brother in part is an adoption of the

whole agency. *Id.*, sec. 52 and notes. He is estopped to deny the agency. *Id.*, sec. 50.

3. It is true that a purchaser *pendente lite* acquires no title that he can assert to the prejudice of parties litigant, but he may acquire a title that he can assert against his vendor, who is a party to the suit. 12 Ark. 421. The testimony shows that the Jettons released this property to Falconer, and between them and Falconer the doctrine of *lis pendens* does not apply.

BATTLE, J. Three creditors of David B. Looney, to-wit, Fleetwood Morris, R. M. Jetton, and J. P. Falconer, brought three separate actions against him before a justice of the peace of Sebastian county, each one suing for himself, and causing an order of attachment to be issued in his case. A. P. Jetton was duly appointed to serve process in the action instituted by R. M. Jetton. A mare and other property of the defendant were attached, the mare being first attached in the suit instituted by R. M. Jetton, and thereafter in the other two actions. After this the attaching creditors met to divide the property among themselves, some witnesses say, for the purpose of saving costs, and to hold subject to the attachments, and another says, for the purpose of paying the debts of the defendant to themselves, the brother of the defendant (who had possession of the property at the time it was attached) assenting. In the division the mare was delivered to Falconer, who carried her to Franklin county, and sold her to Franklin Tobey on a credit. Thereafter, A. P. Jetton, who served the order of attachment sued out by R. M. Jetton, demanded the mare of Tobey, and, he refusing to comply with the demand, brought this action against him for her possession in Franklin county. The property sued for was delivered to the plaintiff. In the meantime David B. Looney, having been absent, re-

turned, and compromised and paid his indebtedness to Morris and R. M. Jetton; and the three actions against Looney were dismissed, the attachments were discharged, and the mare was returned to him (Looney) by A. P. Jetton, who had previously gained possession of her by the suit against Tobey. The dismissal of the action of Jetton against Looney and the discharge of the attachment therein were subsequent to the institution of the suit against Tobey. There does not appear to have been any payment of the indebtedness of Looney to Falconer.

In the trial of the issues in the action against Tobey, the foregoing facts were shown by the evidence. It was further shown that Tobey had no notice of any defect in the title of Falconer to the mare at the time he purchased her. Upon this evidence the court instructed the jury as follows: "The plaintiff claims possession of the property by reason of the fact that he had levied upon the same by virtue of a writ of attachment against David Looney in favor of Marion Jetton. If plaintiff was appointed by the justice of the peace to serve the writ of attachment in the Jetton case, and the mare was delivered to Falconer by the plaintiff in this case, or Marion Jetton and Falconer brought the mare from Sebastian to Franklin county, and Falconer sold the mare to Tobey with notice to Tobey of the situation of the property, then plaintiff can recover, unless Falconer obtained the mare under a compromise with George Looney, and George Looney had authority from David Looney, expressed or implied from the circumstances, to make the compromise in the Falconer case, and delivered the mare to him in settlement of Falconer's claim, in which event plaintiff is not entitled to recover. If J. P. Falconer obtained possession of the mare as explained in the above instruction, either in lawful compromise with George Looney, and he was Looney's

agent, or otherwise under agreement with plaintiff or Marion Jetton, and conveyed the mare from Sebastian to Franklin county, and sold her to Tobey for cash or on a credit, and at the time of sale Tobey had no notice or knowledge of the condition of the title of the property, and bought believing he was getting a good title, defendant Tobey is entitled to recover."

The jury returned a verdict in favor of the defendant. A judgment was rendered accordingly, and the plaintiff appealed.

The jury were virtually told by the instructions of the court that if Tobey purchased the property in controversy in good faith, without any notice of any defect in the title of his vendor, he was entitled to recover, notwithstanding the person from whom he purchased had and was entitled to nothing more than possession. That is not true.

Title conveyed by sale.

A general rule of the law of personal property is that no man can sell that which he has not and is not authorized by the owner to transfer, or confer a better title than that he has. An honest purchaser under a defective title cannot hold against the true proprietor. "No one can transfer to another a better title than he has himself, is a maxim," says Chancellor Kent, "alike of the common and civil law, and a sale, *ex vi termini*, imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor." To this rule, however, there are exceptions. Among them are enumerated the following: Transfers of money, bank bills, checks, and notes payable to bearer or transferable by delivery in the ordinary course of business to a person taking them *bona fide* and paying value for them: (*Fawcett* v. *Osborn*, 42 Ill. 411), *bona fide* purchases from fraudulent buyers, or others having a voidable or defeasible title; and, in England, sales in market overt, an exception which does not prevail in this country.

Mr. Freeman, in his valuable notes to *Williams* v. *Merle*, 25 Am. Dec. 611, says: "Most of the exceptions to the general rule that a *bona fide* purchaser gets no title if the vendor is not the owner arise from the fact that the real owner has voluntarily clothed such vendor with the apparent ownership or authority to sell. The nature and extent of the exceptions of this class are very clearly stated in the learned opinion of Mr. Senator Verplanck, in *Saltus* v. *Everett*, 20 Wend. 278. After some remarks on transfers of notes, bills, etc., he says: "After a careful examination of all the English cases and those of this state that have been cited or referred to, I come to this general conclusion, that the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser, who buys for a valuable consideration in the course of trade, without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and in those only, where such owner has, by his own direct, voluntary act, conferred upon the person from whom the *bona fide* vendee derives title the apparent right of property as owner, or of disposal as an agent. I find two distinct classes of cases under this head, and no more: (1) The first is when the owner, with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But if the property passes into the hands of honest purchasers, the first owner must bear the loss. Thus, to take an instance from our own Reports, where goods were obtained by a sale on credit, under a forged recommendation and guaranty, and then sold to a *bona fide* purchaser in the customary

course of trade, the second buyer was protected in his possession against the defrauded original owner. *Mowrey* v. *Walsh*, 8 Cow. 243. * * * * (2) The other class of cases in which the owner loses the right of following and reclaiming his property is where he has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal; or, to use the language of Lord Ellenborough, when the owner 'has given the external *indicia* of the right of disposing of his property.' Here it is well settled that, however the possessor of such external *indicia* may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it."

When innocent purchaser's title not good.

The mere possession of personal property, without other evidence of title, or authority from the owner to sell, will not enable the possessor to confer a better title than he actually has. As said by Chief Justice Brickell in *Leigh* v. *Mobile & Ohio R. Co.* 58 Ala. 178, "possession is *prima facie* evidence of the ownership of all species of personal property. It is but *prima facie*, and whoever deals alone on the faith of it must accept it as such, and in subordination to the paramount title, which would prevail over it, if the possession was not changed by the transaction into which he enters. If this be not true, a felon acquiring possession by theft could, by a sale to an innocent purchaser, divest the true owner of his property. A naked bailee, intrusted with possession, could dispose of goods to the prejudice of his principal. A case does not fall within the exception unless the owner confers on the vendor other evidence of ownership, or of authority to dispose of the goods, than mere possession." As an example, take the case of *Simpson* v.

Shackelford, 49 Ark. 63. The owner in that case conditionally sold and delivered a corn mill, with the understanding that the title would remain in him until the purchase money was paid. The vendee sold to another without any notice of any defect in his title, and delivered possession. The purchase money of the first sale was not paid, and the original vendor sued for the property, and recovered it; the court holding that the second vendee, though a *bona fide* purchaser, acquired no title as against him. *McMahon* v. *Sloan*, 12 Penn. St. 229; *Andrew* v. *Dieterich*; 14 Wend. 31; *Covill* v. *Hill*, 4 Denio, 323.

If, in this case, Falconer did not acquire title to the mare in controversy by purchase from Looney, or an agent authorized to dispose of her in payment of his debts, he was a mere custodian of her at the time he sold her to Tobey, and held her subject to the right of the special constable to take possession. He could have acquired no other right from A. P. Jetton in his official capacity; and, consequently, if this was all the claim he had, transferred no title by the sale to Tobey.

Who is not a *bona fide* purchaser.

Another fact that defeats Tobey's right to the claims of a *bona fide* purchaser is, he purchased on a credit, and never paid the purchase money.

Right of officer to bring replevin.

A. P. Jetton, as special constable, acquired a special property and right to the possession of the property when he seized under the order of attachment, and had the right to institute this action. He was liable to David B. Looney for her when the attachments were discharged, if Looney was then her owner, and, of course, was entitled to her possession for the purpose of discharging that obligation.

One of the reasons assigned why the verdict of this jury in this case should be set aside is the alleged misconduct of an interested party and two jurors during the

progress of the trial. While it is not necessary to the disposal of this appeal to pass upon this assignment of error, or to ascertain whether it be based on fact, it may not be amiss to say, without reference to it, that the treating, feeding, or entertaining of jurors by the parties or their counsel during the progress of a trial in a cause in which they have been selected as a jury, whatever the motive may be, is highly improper, and deserves severe condemnation. For such conduct by successful parties, verdicts have been set aside, and new trials granted. 2 Thompson on Trials, sec. 2564, and cases cited. No one in whose behalf such an influence has been exerted on jurors ought to be entitled to the enforcement of a verdict rendered in his favor under such circumstances. The purity and integrity of jury trials should be preserved, so far as it can be lawfully done.

Reversed and remanded.

ROE v. KISER.

Opinion delivered February 22, 1896.

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NOTE—USURY.—A note containing a promise to pay interest at the highest lawful rate is rendered usurious by a contemporaneous verbal agreement that the makers shall pay twice that rate of interest on the money loaned.

NOTE—PAROL EVIDENCE TO CONTRADICT.—In an action on a note providing on its face for a legal rate of interest, parol evidence of a contemporaneous verbal agreement to pay an illegal rate of interest is admissible to show the illegality of the note.

USURY—SURETY PAYING PRINCIPAL'S DEBT.—A surety on a note void for usury, who voluntarily pays the same without any request from the principal, knowing that it is usurious and void, is not entitled to relief under a mortgage given to secure him against liability as such surety.

Cross appeals from Benton Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

The facts necessary to a proper presentation of the case are as follows: H. C. Burrestetta, being the owner of the N. E. ¼ of the N. W. ¼ of sec. 18, township 20 N., range 28 W., and being indebted to R. L. Nance in the sum of $247.90, on the 10th day of June, 1890, executed to Nance his note for said amount, due ninety days after date, and at the same time conveyed the above land to Nance to secure the payment of the note. On the 12th day of Dec. 1891, the Nance note having been transferred to W. R. Felker, and the principal sum thereof being past due, the plaintiff Roe and the defendant Kiser executed to Felker their joint note in the sum of $247.90, due one day after date, in payment of the note held by him as assignee of Nance. At the same time and for the purpose of indemnifying Roe against the payment of said note, Kiser conveyed to Roe the S. E. ¼ of the S. W. ¼ and the south fractional part of the W. ½ of the S. W. ¼ sec. 7, township 20 N., range 28 W.

By his bill the plaintiff seeks (1) to recover a personal judgment against the defendant Kiser for the amount of principal and interest due on the note given by him and Roe to Felker; and (2) to foreclose the mortgage given by Burrestetta to Nance, and also the one given by Kiser to Roe.

Upon the final hearing of this cause the court below cancelled the note given by plaintiffs, Roe and Kiser, to Felker and the mortgage given by Kiser to Roe, upon the ground that the same was usurious and void. And at the same time the court rendered a personal judgment against defendant Kiser, and in favor of Roe, for the amount due on the note given to Felker, and by its

decree fixed a lien upon the forty-acre tract described in the mortgage from Burrestetta to Nance, and ordered the sale of the same to satisfy said judgment.

The plaintiff, Roe, prosecutes his appeal to secure a reversal of so much of the decree below as canceled the note given by Roe and Kiser to Felker, and the mortgage from Kiser to Roe. The defendants Kiser and Bondurant prosecute their appeal to secure a reversal of that part of the decree holding Kiser personally liable for any amount, and the foreclosure of the Burrestetta mortgage on the forty-acre tract.

Burrestetta on the 12th of December, 1891, owned the real estate described in the two mortgage deeds made exhibits to plaintiff's complaint. At this time defendant Bondurant owned real estate in Kansas, and upon the date above they exchanged lands. Prior to and at the time of the exchange, all the parties connected with the transaction resided in Benton county, Arkansas, except defendant Bondurant, who resided at Springfield, Mo., and the terms of the exchange were agreed upon by correspondence between plaintiff and defendant Bondurant; the plaintiff, Roe, at the time being the agent and in the active employment of both Burrestetta and Bondurant. The terms of the agreement for that exchange, in effect, were that each was to convey to the other the lands by him owned, and each was to take the other's lands subject to the incumbrance then upon it. There was no agreement that either of them assumed to pay such incumbrances. They simply exchanged subject to such incumbrances.

In furtherance of their agreement, Bondurant—then being in another state—executed a deed for the land he was to convey to Burrestetta, and mailed the same to defendant Kiser for the purpose of delivery to Burrestetta when he was ready to deliver his deed to Bondurant. Kiser had no authority other than to deliver

Bondurant's deed to Burrestetta, and receive his deed to Bondurant. When the parties met to exchange deeds, Kiser learned for the first time, through plaintiff Roe, that Felker was demanding a settlement of the Nance note. Felker testified: "At the time of the transaction I was the legal owner of the Nance note, and that note was taken up, and a new note executed to me in lieu thereof by Kiser and Roe, and I accepted such new note as payment of the Nance note."

The defenses set up are, in effect: (1) That the note given by Kiser and Roe to Felker, and the mortgage given by Kiser to Roe to indemnify him against the same, are usurious and cannot be enforced. (2) That the execution of the new note to Felker extinguished the old note given by Burrestetta, and that there was no agreement that the old mortgage given by Burrestetta to Nance should be continued in force for any purpose. But if it is true, as contended by plaintiff, that there was such agreement, it was a verbal agreement, in effect, to charge the real estate mentioned in the mortgage with a lien in favor of Roe, and cannot be enforced by him.

E. P. Watson for appellant.

1. There was no usury in the matter. There must be a contract for a greater rate of interest than 10 per cent. Const. art. 19, sec. 13; Sand. & H. Dig., sec. 5085. In this case there was an *exchange of lands*, and the $247.90 was taken into consideration as a part of the price. There was no loan or forbearance of money. Where a party sells mortgaged property, and stipulates that the purchaser is to pay the mortgage debt as part of the purchase price, the purchaser cannot plead usury on such mortgage and debt. Tyler on Usury, p. 407-8; 2 Denio, 598. There can be no usury in a *sale*, unless made to pro-

tect usury by a false cover. 55 Ark. 268; 33 W. Va. 159; 27 A. &. E. Enc. Law, note 1.

2. The note executed by Kiser and Roe to Felker was not void for usury. But if there was, Kiser cannot plead it against his surety who has paid the debt. There was *no loan* between Roe and Kiser. Roe stood as a guarantor of the debt. Tyler on Usury, pp. 92, 110, 172, 113, 114, 273-4. In a suit by a surety to foreclose a mortgage given by the principal to indemnify him against the note, where usury in the original debt is pleaded as a defense, it cannot be set up as against the surety. 42 Ark. 500; 1 Mass. 139. The plea of usury is personal. Where a debt is free from usury in its inception, it cannot be vitiated or destroyed by any subsequent usurious agreement in respect to it, such as giving security, extending time of payment, executing a new form of obligation, or by any other transaction tainted with usury. 27 Am. & Eng. Enc. Law, p. 946-7, note 1; 17 S. W. 713; 56 Ark. 334; 35 *id.* 117; 17 *id.* 138. Where a contract tainted with usury has been in all things fully executed and performed, it is too late to set it aside on the ground of usury. 27 A. & E. Enc. Law, p. 949; 76 Ga. 669; 17 Atl. 713. A note or bond given to a third person, who at the debtor's request advanced money to pay the latter's usurious debt, is not affected by such usury. 71 Iowa, 50; 83 Va. 659; 9 Mich. 21. And it makes no difference that the person advancing the money knew that the debt was usurious. If a third person, at the debtor's request, furnishes the means to discharge a usurious debt, the debtor cannot plead usury against the claim of such third person for reimbursement, nor defeat the original securities in his hands. 27 Am. & Eng. Enc. Law, p. 596-7; 2 Am. Dec. 316; 42 Ark. 500. The defense of usury in one obligation cannot be set up in an action on a separate and distinct obligation between the parties. 27 Am. & Eng. Enc. Law, p. 27 and note 3; 11 Atl. 388; 8 *id.* 478.

J. A. Rice for appellees.

1. The note by Kiser and Roe to Felker was *void* for usury. Const. art. 19, sec. 13.

2. The contract for indemnity is founded upon *an absolutely void contract*, and has no other consideration, and no contract can rest upon such consideration. 53 Ark. 273; *Ib.* 457; 52 *id.* 373; Acts 1887, p. 50–1.

3. The discharge of the usurious note did not revive the original note. 53 Ark. 273.

4. An equitable subrogation will not be decreed in favor of one who has no other equities than the discharge of a usurious note to offer. Authorities, *supra;* 48 Ark. 479.

5. The old mortgage could not be continued in force by the *verbal agreement* of Kiser, as such agreement was unauthorized. Sand. & H. Dig., sec. 3480.

6. A ratification of a void contract, or contract supported solely by an illegal consideration, and all conveyances based thereon, is void, and passes no title. 52 Ark. 373.

When note usurious.

HUGHES, J., (after stating the facts.) Without setting out the evidence in detail, we deem it sufficient to say that we have carefully read and examined it, as set out in the bill of exceptions in the case, and think that the preponderance of it sustains the finding of the chancellor that the note given by Roe and Kiser to Felker, and the mortgage given by Kiser to Roe, were usurious and void; it having been shown by parol evidence that, though the note was given to bear interest at the rate of ten per cent. (which is the highest lawful conventional rate of interest in this state), yet there was, at the time the contract for the loan was made and the note was given, a verbal agreement that Kiser and Roe should pay twenty per cent. interest per annum upon the money forborne to them by Felker, and

that this agreement was understood and entered into by both Kiser and Roe. This certainly made this contract and agreement usurious and void.

Parol evidence admitted to prove usury.

This is a case where the contract and agreement was illegal,—prohibited by law,—and its terms rested partly in parol and partly in writing. It is objected that parol evidence could not be heard to contradict or vary the terms of the written contract, which was for ten per cent. interest per annum only. It is a well settled and recognized general rule that parol evidence cannot be admitted to contradict or vary the terms of a written agreement. But this rule is not without exceptions. This rule assumes that the instrument has a legal existence, and is valid. Testimony to show it to be void is always pertinent. Illegality of an agreement may be shown, to avoid a writing purporting to evidence it. See 2 Phillips, Ev., p. 684, n. 500, and authorities there cited, and n. 495, p. 673, and cases cited; *Wilhite* v. *Roberts*, 3 Dana, 175.

"In an action on a note the defendant may show a distinct parol agreement, made at the time the note was given, to pay usury upon the demand secured by the note, and thus avoid it." *Hammond* v. *Hopping*, 13 Wend. 510, 511; *Lear* v. *Yarnel*, 3 A. K. Marshall (Ky.), 420.

The written contract cannot have the effect, in such cases, of merging the parol contract, "for it is only in virtue of its superior obligation that a written contract has the effect of extinguishing the verbal contract upon which it is founded." *Lear* v. *Yarnel*, 3 A. K. Marshall (Ky.), 421; *Allen* v. *Hawks*, 13 Pick. 79; *Levy* v. *Brown*, 11 Ark. 16. In *Levy* v. *Brown*, *supra*, this court said: "With respect to the admissibility of parol evidence to prove the contract, there can be no doubt; for it is well settled that any matter which shows that a security is void on the ground of its being usurious

may be averred and proved, however contrary it may be to the terms of the security," (quoting from the Kentucky case). The court further said: "An agreement to pay more than legal interest for money loaned on note, such agreement being made at the time of the loan, is usurious, and renders the note void, though the note on its face be for the amount lent, with the legal interest only." But if the parol agreement to pay the illegal interest be made after the time of the loan, it would not make the note usurious. *Merrills* v. *Law*, 9 Cow. 65.

Right of surety paying principal's usurious debt.

The next question is, did the court err in rendering a personal judgment against Kiser, and declaring a lien in favor of the plaintiff Roe upon the forty-acre tract of land described in the mortgage from Burrestetta to Nance, and ordering the same sold to satisfy the judgment? The claim of Roe to have this decree was based upon the fact that he had become the surety of Kiser on the note of Kiser to Felker to settle the note given by Nance to Felker, and had taken a mortgage from Kiser to secure him against the payment of the note Kiser had given to Felker with Roe as security, and that he (Roe) had paid said note, and was entitled to enforce the security which Felker had held against Nance, and which had been paid off by the note of Kiser and Roe. The note given by Kiser and Roe to Felker and the mortgage by Kiser to Roe were usurious and void. There was no legal obligation upon either Kiser or Roe to pay the note they had given Felker, and the evidence does not show that Kiser requested Roe to pay the same, but tends to show that he did it voluntarily, knowing that it was usurious and void. This he had no right to do, and thus make Kiser liable to pay the note which he was not legally bound to pay. Had Kiser requested Roe to pay this note, a different question would be presented. As Roe's right to relief against Kiser depended upon the

unlawful transaction in making the usurious agreement by himself and Kiser with Felker, he was not entitled to any relief. He could have no right upon this unlawful and prohibited agreement, and he had no right that he did not seek to trace through and base upon this transaction.

In *Trible* v. *Nichols*, 53 Ark. 273, this court, through Chief Justice Cockrill, said: "The general rule is well established that one who, at the request of another, pays off an incumbrance upon the latter's land, is entitled to be subrogated to the security; and it is also a settled rule that when a valid security is cancelled by means of a subsequent agreement and security which is void for usury, the original security is not invalidated, but equity will revive and enforce it." But "one who seeks protection under the equitable doctrine of subrogation must come into court with clean hands. It is not applied to relieve one of the consequences of his own wrongful or illegal act. When, therefore, the claim to subrogation grows out of an agreement which is void by reason of usury, it furnishes no basis for the equitable doctrine."

So much of the decree of the circuit court in chancery as holds the note given by Kiser to Roe void for usury is affirmed. But so much of it as declared a lien in favor of Roe upon the forty-acre tract described in the mortgage from Burrestetta to Nance, and the personal judgment against Kiser, is reversed, and the bill is dismissed for the want of equity.

Bunn, C. J., dissents.

WEBSTER *v.* WILLIAMS.

Opinion delivered February 22, 1896.

CONTRACT IN RESTRAINT OF TRADE—VALIDITY.—A contract by a physician and surgeon to permanently retire from practice in a given city or its vicinity is not unreasonable nor void as against public policy.

CONTRACT—CONSIDERATION.—The adequacy of the consideration for an agreement to retire permanently from the practice of medicine and surgery in a given place will not be inquired into where it appears that there was a valid or legal consderation.

Appeal from Miller Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

J. D. Cook, for appellants.

1st. Is such a contract as this, entered into between plaintiff and defendant, such a one as would stand or fall, when the rule of public policy is applied to test its validity?

2d. If such contracts as a class will be upheld as not against public policy, is the contract sought to be enforced sufficiently strong to bind the parties to the same?

We understand the law to be well settled that such cantract will be upheld and enforced in equity, and any breach thereof will be restrained by injunction. 20 Md. 224; 35 Conn. 543; 28 N. J. Eq. 151; 11 Ind. 70; 80 Ind. 260; 16 Vt. 176; 14 Allen (Mass.), 211; 6 Brad. (Ill.) 60; 47 Conn. 175; 6 Ind. 200; 75 Ind. 451; 34 How. Pr. (N. Y.), 202; 36 N. J. Eq. 40; 56 Ga. 504; 27 Mich. 15; 32 Mich. 462; 44 Penn. St. 458; 78 Penn. St. 296; 53 Penn. St. 467. Cases in point where physicians have sold their good will and agreed not to practice in certain localities, and contracts have been upheld. 16 Vt. 176; 67 Ill. 75; 30 Ga. 413; 32 Mich. 462; 113 Mass. 175; 55

Iowa, 144; 41 Wend. (N. Y.), 468; 6 Hun (N. Y.), 374; 45 Ga. 319. One who agrees not to practice as a physician in a certain city and vicinity is properly enjoined from practicing within ten miles of the city limits. 52 Mich. 34; 50 Am. Rep. 240; 39 Am. L. Reg. 50.

When the provisions of a written contract are apparently conflicting or ambiguous, parol evidence is admissible to explain the agreement, the circumstances surrounding the parties at the time of its execution, and the subsequent conduct of the parties acting under it, as a means of correctly construing the language of the instrument. 52 Ark. 65; 52 Ark. 95. Whenever, in construing the validity of a contract, its legality is doubtful, the court will, if possible, uphold it as a matter of public policy. 46 Ark. 129. When there is a valuable consideration for a contract paid, its adequacy cannot be questioned. 33 Ark. 67. If the contract be reasonable when made, subsequent circumstances, such as the covenantee's ceasing to do business, so as to no longer need its protection, do not affect its operation. 47 Conn. 175; 49 L. J., N. S. 335; 33 W. R. 18; 7 Atl. Rep. (N. J.) 37.

Scott & Jones and *W. H. Arnold* for appellee.

1. Such contracts as this, in restraint of trade, are void as against public policy. 31 Am. Dec. 119; 20 Wall. 67. This contract restrains the industrial freedom of appellee, in which the restriction is limited neither as to time or space, and is therefore unreasonable and void. 63 Am. Dec. 380; 2 Oh. St. 519; 3 *id.* 274; 102 Mass. 480; 40 Cal. 251; 16 M. W. 652.

2. There is no positive agreement to retire *permanently* from practice *in Texarkana.* He agreed to retire from *practice*, without any limitation as to place or length of time. It is more monstrous than the one referred to in 91 Am. Dec. 221.

3. Contracts in restraint of trade are strictly construed. Nothing can be supplied by intendment. 55

Iowa, 144. And cannot be enlarged by construction. 80 Ind. 260. For illustration of contracts in restraint of trade, whether general or partial, which have been held void, and of the rule that a limited restraint *may be* good when reasonable, etc., see 40 Cal. 251; 6 Am. Rep. 357; 36 Cal. 357; 45 *id.* 152; 13 Am. Rep. 172; 7 Atl. 37; 68 Pa. St. 185; 43 Am. Dec. 93; 56 *id.* 164; 21 Wend. 168; 19 N. J. Eq. 547; 7 Bing. 735; 91 Am. Dec. 221; 17 Vesey, 335; 8 Gill & J. 150; 66 Ill. 452; 12 Am. Rep. 390.

4. Appellee has in nowise injured or interfered with the business of appellants. There is no necessity for an injunction, and it is not granted except in clear cases. 78 Pa. St. 196; High on Inj. (3 ed.) sec. 1178; 33 Mich. 331.

5. By suing for the penalty of the bond and damages, and at the same time praying equitable relief, appellants are prosecuting two inconsistent remedies. They cannot have both. High on Inj. (3 ed.) sec. 1182; 51 Ind. 365.

WOOD, J. This suit was to enjoin appellee from the practice of medicine and surgery in the city of Texarkana and vicinity, under a contract which, omitting unnecessary parts, is as follows: "I agree to move my office and establish myself in the said Medical and Surgical Institute at once, and remain in active connection and practice therewith in any and every thing that pertains to my profession, so long as I remain or continue to reside in Texarkana or the immediate vicinity. I also agree that I will withdraw and retire from the practice of my profession during the month of January, 1892, and, to the extent of my ability, use every reasonable effort and honorable means to introduce and establish the said doctors, H. R. Webster, M. D., and C. A. Reed, M. D., or either of them, as my successor among my clientage. I also agree to recommend them for appointment as ex-

aminers for the life insurance companies for whom I am now acting as medical examiner. In short, I have decided to permanently withdraw and retire from the practice of medicine in Texarkana and vicinity, and it is my intention and desire to introduce and establish the above named doctors, Webster and Reed, as my successors to my practice and good will among my clientage; and, to that end, I have promised and agreed that I will use all lawful and honorable means and efforts at my command. Now, upon the faithful performance of all the stipulations and agreements above recited, this bond and obligation shall become null and void; otherwise to remain in full force and effect.

[Signed.] D. S. WILLIAMS."

The bond referred to as part of the contract was in the sum of $1,000. The consideration for the above contract, as specified therein, was two hundred and fifty dollars paid by the said Drs. Webster and Reed to the said Dr. D. S. Williams, "for his good will, influence and retirement from practice." This contract was entered into on the 3d day of October, 1891. Afterwards, on the 20th day of February, 1892, the parties agreed in writing to extend the time for the retirement to commence from January, 1892, till 1st day of July, 1892.

Appellants allege that appellee, in violation of this contract, has re-entered, after retirement for a time, upon the practice of medicine and surgery in the city of Texarkana and vicinity, and they contend that his contract bound him to retire permanently. Appellee, on the other hand, while admitting the execution of the contract, and that it required him to retire for a time, yet contends that it did not bind him to retire permanently, but only for a reasonable length of time, and "that it was understood and agreed that he should resume practice in January, 1893, should he desire, and

that he (appellee) had fully complied with the terms of his contract by having retired from the practice for a year.

The first question is: Did the contract bind appellee to retire permanently from the practice of medicine and surgery in Texarkana and vicinity? Second. If such was the contract, was it against public policy, unreasonable, and therefore void?

1. We find the following clause in the contract: "In short, I have decided to permanently withdraw and retire from the practice of medicine in Texarkana and vicinity, and it is my intention to introduce and establish the above named Drs. Webster and Reed as my successors to my practice and good will among my clientage." Appellants both testified that appellee "*agreed to permanently retire from the practice in Texarkana and vicinity.*" Another witness testified that he had heard appellee say, soon after the contract was made, that he (appellee) "had contracted to permanently retire from the practice." Appellee testified that it "was understood and agreed that he should only retire from the practice for six or twelve months; that he did not agree to retire permanently from the practice in Texarkana and vicinity." The clause of the contract quoted *supra*, in connection with the testimony of appellants and the other witness on their behalf, makes a decided preponderance in favor of their contention.

Validity of contract in restraint of trade.

2. Was the contract void? Contracts in restraint of trade are either general or partial. Where the contract is unlimited as to space, it is general; where it is limited as to space, it is partial, although it may be unlimited as to time. Clark, Cont. p. 447. Contracts in partial restraint of trade, if they are reasonable and founded upon a legal consideration, will be enforced. Clark, Cont. p. 454; Metcalf on Cont. p. 232; Bish. Cont. sec. 516; *Mandeville* v. *Harman*, 7 Atl. 37; Whart.

Cont. sec. 431; Chitty on Cont. 984; Smith on Cont. 206–7; *Mitchel* v. *Reynolds*, 1 P. Wms. 181; *Taylor* v. *Blanchard*, 90 Am. Dec. 203; *Dunlop* v. *Gregory*, 61 Am. Dec. 746.

The question as to whether such contracts are reasonable or not is one of law, and the true test to be applied by the court in determining this question is "to consider whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public." *Brewer* v. *Marshall*, 19 N. J. Eq. 547; *Horner* v. *Graves*, 7 Bing. 735; *Mallan* v. *May*, 11 M. & W. 653; Chitty, Cont. p. 985, and note; 2 Keener, Cont. 827; *Beard* v. *Dennis*, 63 Am. Dec. 380.

In passing on the reasonableness of a contract in restraint of trade, the court should have due regard for its subject-matter, and the situation of the parties, the limitations as to space, and all the circumstances which will enable the court to determine what is a proper protection for the covenantee in such a contract. Clark, Cont. 452; *Badische etc. Fabrik* v. *Schott*, [1892] 3 Ch. Div. 447.

The Supreme Court of New Jersey, in *Mandeville* v. *Harman*, in refusing an injunction upon a contract between two physicians, similar to the one under consideration, said that contracts so extensive in duration were of doubtful validity, for the reason that professional skill, experience and reputation were things which could not be bought or sold; were not, in other words, a right, property, or interest called the "good will" of a trade or business, but were so purely personal that, when the person ceased to exist, they also ceased, and that, after the death of the person, such things could have neither an intrinsic nor market value. The court, however, while strongly intimating that such contracts were void, did not so decide; but simply refused the application upon

the ground that the "complainant was not in a position to ask for a *preliminary injunction* when the right on which he founded his claim was as a matter of law unsettled." This is the only case we have been able to find which expresses even a doubt as to the validity of a contract of the kind under consideration, and it could hardly be considered an authority for such a position; since it put its ruling, not upon the ground that the contract was void, but that it had not been determined in that state that such contracts were good. On the contrary, we find numerous authorities, English and American, which maintain the validity of such contracts, and enforce same by injunction. The supreme court of Rhode Island, for instance, in an exactly similar case in principle, after reviewing the English cases, said: "The reason is as valid in the case of a profession as of a trade, for whether, technically speaking, there be any good will attending a profession or not, the professional practice itself would probably sell for more with the restraining contract, if the restraint were unlimited in duration, than it would if the restraint were for the life of the promisee or covenantee only. If the complainant here wished to retire from his practice, and sell it, he could probably sell it for more, if he could secure the purchaser from competition with the defendant forever, than he could, if he could only secure him from such competition during his own life." *French* v. *Parker*, 16 R. I. 219, and cases cited.

One of the most recent deliverances upon this question is from the Supreme Court of Indiana, where, in speaking of a contract similar to the one at bar, the court said: "It is conceded by the appellee that the express stipulation of the contract required him to retire from the practice at Spencer. But he thinks a good-faith retirement for a year and a half was a sufficient compliance with that stipulation. * * * * The

plain meaning and import of that is that the appellee agrees not to engage in practice in that field without limitation as to time. The want of such definite limitation is no objection to such a contract. * * * The stipulation here means that the appellee will not practice his profession in the territory named. Such contracts have been uniformly enforced by injunction." *Beatty* v. *Coble*, 41 C. L. J., 494. In this latter case the stipulation was: "I hereby agree that I will retire from the practice of medicine and surgery at Spencer, Indiana." Nothing said about a *permanent* retirement. But in the case at bar there is a recital that the appellee has made up his mind to "permanently withdraw and retire from the practice of medicine in Texarkana and vicinity." So the case in hand is even stronger in support of the doctrine announced than the Indiana case. See numerous authorities cited in note to *Beatty* v. *Coble*, *supra;* also the following: 1 Wharton, Cont. sec. 433, note 2; *Linn* v. *Sigsbee*, 67 Ill. 75; *Dwight* v. *Hamilton*, 113 Mass. 175; 2 Benj. Sales, sec. 679, 691; 2 Add. Cont. p. 1153, note u; *Bunn* v. *Guy*, 4 East, 190; Greenhood, Pub. Pol. p. 713, 723–38; *McClurg's Appeal*, 58 Pa. St. 51; *Ewing* v. *Johnson*, 34 How. Pr. 202; *Hubbard* v. *Miller*, 27 Mich. 15; *Holmes* v. *Martin*, 10 Ga. 503; *Harkinson's Appeal*, 78 Pa. St. 196; *Angier* v. *Webber*, 14 Allen, 211. Some of the above cases also settle the proposition that the adequacy of consideration will not be inquired into when it appears that there was a valuable or legal consideration. No question of fraud or mistake is involved.

Adequacy of consideration.

It follows that the contract in this case was reasonable, and that complainant's bill was sufficient to entitle them to a perpetual injunction. Reversed and remanded, with directions to enter a decree in accordance with this opinion.

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

Opinion delivered February 22, 1896.

GAS COMPANY—DEGREE OF CARE REQUIRED.—A gas company is bound to use reasonable care in the inspection of its pipes, and in repairing leaks therein, after notice, whether such defects were caused by its own negligence or not.

NEGLIGENCE—QUESTION FOR JURY.—Whether a gas company has used due care in discovering and repairing a break in its pipe is a question for the jury.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—A shopkeeper cannot recover from a gas company for injuries caused by explosion of gas in the shop, although the company was negligent, if the negligence of his servant, left in charge of the shop, contributed to the explosion.

NEGLIGENCE.—It is not negligence *per se* to search for a gas leak with a lighted match.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

STATEMENT BY THE COURT.

The facts proved in this case were in substance as follows: Fred Schneider, a merchant tailor in the city of Pine Bluff, owned a stock of goods pertaining to that business. The Pine Bluff Water & Light Company was engaged in the business of manufacturing and supplying illuminating gas to the city of Pine Bluff and its inhabitants. One of the branch pipes of said company extended from a main pipe in the street under the store house in which the appellee did business, for the purpose of supplying the building with gas. The pipe under the store of appellee was broken by certain parties plowing up the street for the purpose of improving the same. The gas escaped under the building, and also entered the storeroom above. In this room, Allie Strauss and John Hammert, employees of Schneider, were at work, assist-

ing him in his business as tailor. Hammert was employed as a maker of trousers, and was paid by the garment. Strauss was paid by the week; and they both worked for Schneider in this storeroom. When they detected the presence of gas in the room, Hammert lighted a match, and began to look for the leak. The lighted match, coming in contact with the free gas, produced an explosion, which injured the goods of Schneider. This action was brought by Schneider against Hammert and the Water & Light Company. He alleged that the Water & Light Company negligently allowed the gas to escape, and that Hammert carelessly ignited the gas with a match. The Water & Light Company denied that it was guilty of negligence, and alleged that the injury was occasioned by the negligence of Hammert, a servant and employee of plaintiff. The testimony bearing upon the question of contributory negligence was, in substance, as follows: The plaintiff, Schneider, testified that Strauss and Hammert were both employed by him, and worked in his store. At the time the explosion occurred, plaintiff had gone to dinner. He left Allie Strauss in charge of the store during his absence. Hammert, he said, was not in charge, and had no control over the store, further than to work therein.

Allie Strauss, who had charge of the store at the time of the explosion, testified for plaintiff that the gas had accumulated under the store, and, while plaintiff was absent at dinner, it began to enter the store; that Hammert then said he would take a match and find the leak. He was then interrogated as follows: "Q. Did he ask your permission? A. No, sir. Q. Did he say anything about it? A. Yes, sir; he said he would investigate, and see what the trouble was, and he took a match and found the place." Cross-Examined. "Q. How far was he from the leak when he struck the match? A. I should say about four or five feet. * * *

Q. You knew he was looking for the leak? A. Oh, yes, sir. Q. Why didn't you tell him not to do that? A. Because he had done that several times before. Q. You both did that several times before? A. Yes, sir, and found the leak. Q. You were in the habit of doing that? A. Yes, sir. Q. You never undertook to prevent it? A. No, sir. Q. You thought it all right? A. Yes, sir. Q. You thought it a very good idea? A. Yes, sir, but I never said anything about it. Q. You were willing for him to do it? A. Yes, sir. Q. You knew there was an escape of gas in the store? A. Yes, sir, and he was trying to find it."

The first instruction given by the court was as follows: "The court instructs the jury that the defendant company was bound to keep such reasonable inspection of its pipes as would enable it to detect when there was an escape of gas as would lead to danger of explosion."

There was a verdict and judgment against both Hammert and the Water & Light Company, from which judgment the Water & Light Company has appealed.

F. G. Bridges, for appellant.

1. Plaintiff's instruction No. 1 is erroneous. It exacts from gas companies far greater care than the law requires. They are only liable for want of ordinary care and skill, taking into consideration the character of their business. 1 Thompson on Neg. p. 108, sec. 11; 3 C. B. 1; 20 N. Y. S. 168; 33 N. E. 523; 158 Mass. 260; 122 Mass. 219; 8 Gray (Mass.) 123. Where the pipes are properly laid, and broken by third persons, the company is not guilty of negligence until it has notice and a reasonable time to repair. 1 Allen (Mass.), 343; 117 Mass. 539; 26 Gas J. 946; 8 Gray, 123; 2 Fost & Fin. 437; 3 Allen, 410; 20 N. Y. 168; 65 Hun, 378.

2. Instructions 4 and 5 are erroneous, because (1.) they hold defendant liable for any leaks in a whole block, irrespective of the fact whether any of such leaks caused the explosion. Instructions must be restricted to the issues made by the pleadings, and to the evidence under said issues. Sackett, Inst. to Juries, sec. 19; 52 Ark. 125; 72 Ill. 141; 68 Ill. 545. And (2) they assume facts not authorized by the evidence, such as notice, etc. 24 Ark. 251; 45 *id.* 256; 42 *id.* 3; 23 *id.* 289.

3. The negligence of Hammert, the employee of appellee, barred his right to recover. His employee's contributory negligence was his own. 36 Ark. 371; *id.* 41, 451.

4. Hammert's negligence is imputable to appellee. 3 Allen, 543; 117 Mass. 539; 1 Thomps. on Neg. p. 110; 8 Gray, 123; 14 Gas J. 606; 8 Am. & Eng. Enc. Law, p. 1274; 46 Ark. 523; 38 *id.* 557.

5. Instruction 3 for plaintiff is erroneous in holding defendant liable for the conduct of John Hammert. Even if appellant was guilty of negligence, the act of Hammert was an intervening efficient cause which broke the causal connection between the original wrong and the injury, and thus became the proximate cause of the injury, and appellant is not responsible. 71 N. Y. 29; Bishop, Non-Cont. Law, sec. 42; 1 Sh. & Redf. Neg. sec. 32; 99 Ind. 16; 70 Pa. St. 86; 57 N. H. 627; 58 Ark. 157; 74 Ind. 449; 139 U. S. 237; 65 Tex. 274; 105 U. S. 252; 5 Exch. 242; 7 C. P. 253; 2 Dow. H. L. Cas. 390; 103 Mass. 507; 98 *id.* 211; 3 Q. B. D. 536; 3 Allen, 343; 117 Mass. 539; 1 Thomps. Neg. p. 110.

W. T. Wooldridge, *H. King White* and *N. T. White* for appellees.

1. The evidence shows the grossest negligence on the part of the company. The officers knew of the

excavations, and had ample time to prevent the accident. A gas company is bound to exercise such care, skill and diligence in all its operations as is called for by the delicacy and difficulty of the nature of its business. 8 Am. & Eng. Enc. Law, p. 1273; 57 Ga. 28; 8 Gray (Mass.), 123; 3 Allen (Mass.), 410; 4 F. & F. 324; 7 Am. & Eng. Enc. Law, p. 520; 1 Thomps. Neg. p. 108, sec. 11.

2. Both the company and Hammert were liable. One who has suffered from the joint tort of several persons may bring suit against all of them, or against any one of them. Bish. Non-Cont. Law, secs. 519, 520, 521–2. Where the injury proceeds from two causes operating together, the party putting in motion one of them is liable, the same as though he was the sole cause. He who contributes to a wrong is answerable as a doer. 15 Ark. 452; 23 *id.* 131; 39 *id.* 387; 5 Daly (N. Y.), 144. Where one sustains an injury from the separate negligence of two persons employed to do separate things, he may sue either or both. 82 Ky. 432; 4 Fos. & Fin. 354; 5 Exch. 67; 2 Thomps. Neg. p. 1070.

3. Schneider was not responsible for the acts of Hammert. Hammert was not left in possession of the property, and had no control of same. He was employed as a mechanic, working for wages, and Schneider cannot be held for his acts, over which he had no control, and which were not connected with or within the scope of his employment.

RIDDICK, J., (after stating the facts.) It is contended by counsel for appellant that the court erred in its charge to the jury. The first paragraph of the charge, if considered by itself, would be subject to criticism, for it might be construed to mean that the water and light company was to use such care as under all circumstances to discover gas escaping from its pipes, and that a failure to do so would constitute negligence.

But, upon the question whether the jury has been misled by one or more specific instructions, all the instructions must be read together. A consideration of the entire charge in this case leads to the conclusion that the court did not intend to convey such meaning, and that it is not reasonable to believe that the jury could have been misled by it. A gas company must use due and reasonable care in the inspection of its pipes, and must repair defects in the same, whether caused by its own fault or not. When the defect or break in the pipe is caused, not by the negligence of the gas company, but by the act of a third party, and when the company has used due care in inspecting its pipes to discover defects therein, it is allowed a reasonable time, after notice of such defect, in which to make repairs. But if it has notice of a break in its pipes from which gas may escape and accumulate, and injure persons or property, it must, as soon as practicable by the use of due promptitude and diligence, secure its gas, either by cutting off the flow or repairing the break, so as to guard against such injurious consequences. To accomplish this end, the company must use a degree of care commensurate to the danger which it is its duty to avoid. If it fails to exercise this degree of care, and injury results from such negligence, the company is liable, if the person injured is free from fault contributing to the injury. *Chisholm* v. *Atlantic Gas Light Co.* 57 Ga. 28; *Mississinewa Mining Co.* v. *Patton*, 129 Ind. 472, S. C. 28 Am. St. Rep. 203; *Emerson* v. *Lowell Gas Light Co.* 3 Allen (Mass.), 410; *Hunt* v. *Lowell Gas Light Co.* 8 Allen, 169, S. C. 85 Am. Dec. 697; *Holly* v. *Boston Gas Light Co.* 8 Gray (Mass.), 123, S. C. 69 Am. Dec. 233; 8 Am. & Eng. Enc. Law, 1273; Whittaker's Smith, Neg. 234; *Bartlett* v. *Boston Gas Light Co.* 122 Mass. 210; 2 Shear. & Red. Neg. (4th. Ed.) sec. 692.

The evidence tends to show that, previous to the explosion, the appellant company had notice that its pipes had been broken or injured by plowing in the street, and that gas was escaping. If it did not know this, the jury were at least justified in finding that it might have known it by due care in inspecting its line, which would amount to the same thing. If it had notice of the defect in the pipe, it should have taken precautions, by cutting off the gas or repairing the break in the pipe, to avoid injuries being caused by the escaping gas. Whether it was guilty of carelessness in this respect was a question for the jury, whose finding on this point has evidence to support it, and must stand. *Chisholm* v. *Atlanta Gas Light Co.* 57 Ga. 28; *Butcher* v. *Providence Gas Co.* 12 R. I. 149; *Atkinson* v. *Goodrich Trans. Co.*, 60 Wis. 141.

The next question presented is whether the plaintiff was himself guilty of negligence contributing to the injury complained of. It is settled law that the master is responsible for injury occasioned by the act of his servant or employee while acting within the scope of his employment. 1 Shear. & Red. Neg. (4th. Ed.) 141; Whittaker's Smith, Neg. p. 153.

The appellant contends that the appellee must in this case be held responsible for the act of Hammert in putting a lighted match to the gas, and causing the explosion. Hammert was the employee of Schneider. It was his duty to work in the storeroom into which the gas, which had accumulated under the store, began to force its way. The entrance of this gas would necessarily interfere with the work that he was engaged in on behalf of Schneider. It would not be unreasonable to hold that, in order to prevent such interruption of his work, he had the implied authority to discover and stop the escape of gas into the room in which he was at work. It is not necessary to show that he had authority to look

for the defect in the pipe with a lighted match. If the act of attempting to discover the defect in the pipe, in order that the escape of gas might be stopped, was one within the scope of his authority, and that act was done in a way so negligent that it caused or contributed to the injury complained of, it is then of no avail to show that the master did not consent to or approve of the negligence. *Ochsenbien* v. *Shapley*, 85 N. Y. 214; Whittaker's Smith, Neg. 157; *Philadelphia, etc., R. Co.* v. *Derby*, 14 How. (U. S.) 468.

A servant may do an act expressly forbidden by his employer, and yet, if it be within the scope of his authority, the employer may be liable for a resulting injury. This rule is constantly enforced in the cases against railroads, electric light and gas companies, and it applies to private persons who employ servants to transact their business. *Garrentzen* v. *Duenckle*, 50 Mo. 104; *Ochsenbein* v. *Shapley*, 85 N. Y. 214; *Evans* v. *Davidson*, 53 Md. 245; S. C. 36 Am. Rep. 400; *Simonton* v. *Loring*, 68 Maine, 164; Whittaker's Smith, Neg. 157; 14 Am. & Eng. Enc. Law, 810; 1 Shear. & Red. Neg. sec. 155.

But we are not called on to determine whether, if this was the act of Hammert alone, it would come within the scope of his authority, or whether Schneider would be bound by it; for the evidence conclusively shows that Strauss, in whose charge the store was left by Schneider, assented to and approved of the act of Hammert which led to the explosion. Strauss, so far as the control and protection of the store was concerned, stood in the place of Schneider, and his acts in this regard must be considered the acts of Schneider. He was called as a witness by Schneider, and he testified that, when the gas began to enter the room, Hammert complained of the smell, and said that he would light a match and look for the leak; that he (Strauss) knew that there was gas escaping in the room, and that Hammert was trying to find

it; that he made no objection, but thought that it was a good thing, and was willing for him to do so. From this testimony there can be no doubt that Strauss consented to and approved of the conduct of Hammert, and that, if Hammert was guilty of negligence, Strauss was also.

It can be no excuse to show that Strauss was only seventeen years of age, for this fact was known to Schneider when he left him in control of the store. If he left an immature youth in charge, he, and not the gas company, is to blame.

We should not hold. under the facts of this case, so far as they appear, that it was negligence *per se* for Hammert to use a match in trying to discover the place from which the gas escaped, for that would depend upon whether he had notice that the gas was escaping in large quantities or not. If he had notice that it was present in large quantities, it was gross carelessness for him to apply a lighted match to it. But if the quantity was small, or if there was nothing to cause a man of ordinary prudence, placed in the same situation, to believe that there was danger of an explosion, it would not be negligent to light the match. Such a question is one for the jury to determine. *Chisholm* v. *Atlanta Gas Light Co.* 57 Ga. 28; *Butcher* v. *Providence Gas Co.* 12 R. I. 149; *Lanigan* v. *N. Y. Gas Light Co.* 71 N. Y. 29.*

But the appellee alleged, and the jury found, that Hammert was guilty of negligence. There was evidence to support that allegation and finding; but, had there been no proof, the appellee would be bound by his own allegation, and we must treat that fact as established. The case, then, stands that Strauss, who had charge of the store for Schneider, was present, and permitted Hammert, another employee of Schneider, to negligently use a lighted match in endeavoring to locate

*See *Consolidated Gas Co.* v. *Crocker*, 82 Md. 113, 31 L. R. A. 785. —(Rep.)

the place from which gas escaped. This negligent act of Hammert produced an explosion, which otherwise might not have occurred, and directly contributed to the injury of which Schneider complains in this action. Our conclusion is that, under these facts, the judgment against the appellant cannot be sustained.

It is therefore reversed, and remanded for further proceedings.

NOTE.—As to liability for negligence in the escape and explosion of gas, see note to *Ohio Gas Fuel Co.* v. *Andrews* (Ohio) 29 L. R. A. 337—[Rep.

PINE BLUFF WATER & LIGHT COMPANY *v.* MCCAIN.

Opinion delivered February 22, 1896.

NEGLIGENCE—JOINT LIABILITY.—A gas company which neglects to use due care in discovering and repairing a leak in its pipe is jointly liable, with one who negligently lights a match in endeavoring to locate the leak, for damages caused by the resulting explosion.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

Action by McCain & Houston against the Pine Bluff Water & Light Company and John Hammert. Plaintiffs recovered, and defendant company appealed. The facts are stated in the opinion, and in the foregoing case.

F. G. Bridges, for appellant.

W. T. Wooldridge, *H. King White*, and *N. T. White*, for appellees.

RIDDICK, J. The facts in this case are similar to those in the case of *Pine Bluff Water & Light Company* v. *Schneider*, just decided, (*ante*, p. 109) except that the plaintiff was guilty of no contributory negligence.

The injury was occasioned by the same explosion caused by the co-operating negligence of Hammert and

the water and light company. The case is controlled by the rule announced in the recent case of *City Electric Railway Co.* v. *Conery*. Conery was injured by the concurring negligence of the railway company and a third party. It was held that both parties whose negligence directly contributed to cause the injury were liable therefor. *City Electric Ry. Co.* v. *Conery*, 61 Ark. 381; *Atkinson* v. *Goodrich Transportation Co.* 60 Wis. 141; Shearman & Red. Neg. sec. 34. Whittaker's Smith, Neg., 31, and note. The judgment of the circuit court is therefore affirmed.

PHILLIPS *v.* STATE.

Opinion delivered February 29, 1896.

HOMICIDE—EVIDENCE.—On trial of a person for killing his wife, it was not error to admit evidence that, about two months before the killing, the defendant was seen whipping her, and that defendant had threatened to beat her to death if she would not stay at home.

SAME—EVIDENCE of the relations existing between defendant and his wife, with whose murder he was charged, and of bruises on her body exhibited within two months of the killing, are admissible to show the animus of defendant toward deceased.

EVIDENCE—PROOF OF INTENT.—On trial of one for killing his wife, a testamentary instrument executed by defendant on the day of the killing, and referring to the intended killing of his wife, is admissible to show his intent.

APPEAL—HARMLESS ERROR.—A conviction of murder will not be reversed because a motion for continuance made by defendant was taken by the jury to their consultation room, if such paper was taken from the jury immediately upon the court's being informed of the fact that it was there.

TRIAL—WHAT PAPERS JURY MAY TAKE.—A request by the jury to permit them to take a writing alleged to have been written by defendant, while they improperly had a motion for continuance by defendant, in order that they might compare the signatures on the two papers, was properly refused.

APPEAL—NECESSITY OF MOTION FOR NEW TRIAL.—Alleged error in refusing to discharge the jury, in the midst of their deliberations, on the ground that defendant had just learned that one of the jurors had been heard to say, in effect, that if he was on the jury he would hang defendant, will not be considered on appeal where it was not made a ground for new trial.

Appeal from Arkansas Circuit Court.

JAMES S. THOMAS, Judge.

White & Streett for appellant.

1. The court erred in allowing irrelevant, improper, remote, and indefinite testimony to go to the jury, which was prejudicial. 45 Ark. 539; 52 *id.* 303.

2. It was error to permit the jury to be in possession of the motion for a continuance, thus enabling them to compare the signatures to the motion and to the letter introduced in evidence. 29 Ark. 248.

3. It was error not to discharge the jury on account of prejudice of the juror Bass; and also in refusing to allow defendant to prove the charges preferred against said juror. The rule in 40 Ark. 51 does not apply here, as the objection was made before verdict.

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

1. Testimony of Shelton and Hinson was admissible to show appellant's feeling toward his wife, and his animus toward her. 45 Ark. 539; 40 *id.* 511.

2. The letter was admissible, as it shows that appellant had decided to kill his wife, and that he went to where she was to put his plan into execution.

3. No harm was done by possession by the jury of the motion for continuance. All the statements therein were favorable to appellant. 29 Ark. 248.

4. The objection to the juror Bass came too late. 19 Ark. 156; 40 *id.* 515; Sand. & H. Dig. sec. 4259.

BUNN, C. J. The appellant was indicted, tried and convicted in the Arkansas circuit court of the crime of

murder in the first degree, at its November term, 1895, and appealed to this court.

The testimony as to the facts and occurrences immediately connected with the homicide shows that the defendant, some time in the forenoon of the 29th day of June, 1891, in a field near the farm house of W. P. Porter, in Arkansas county, shot and killed Martha Phillips, his wife, in the manner and under the circumstances detailed by the witnesses present, as follows. Porter, the owner of the plantation, testified substantially as follows: "On the morning of the 29th day of June, 1891, I was engaged in mending a plow used by one of my hands on the farm, Joshua Fitzpatrick, by name, who was present; and while leaning over the plow, engaged in mending it, my attention was attracted by the defendant, Jordan Phillips, speaking and saying to his wife, who was twenty or thirty feet from him: 'Aren't you going home to take care of them children? Cut out!' And as I looked up, I saw defendant standing near me with a rifle in his hand. Defendant raised the gun and fired, and Martha Phillips fell. The defendant then stepped off a few yards, re-loaded his gun, and went off through the field in the direction of where his wife and Tom Pike, another hired hand of mine, had been working." Witness went up to Martha Phillips, and found her quivering and in the throes of death, and sent Fitzpatrick for Dr. Kelly, who came, but not before the woman had died, she having in fact died instantly, having been shot in the fleshy part of the left arm and into the left side.

Joshua Fitzpatrick testified, in substance, as follows, to-wit: He had broken his plow, and taken it to a point in the field near the house, and put up his team, and he and Mr. Porter were mending the plow. The deceased came up, and said to Mr. Porter, "Can Jordan [the defendant] make me go home?" And the defendant

then said to her, "You go home. Get out of here," and then fired, and deceased fell, and defendant, after reloading his gun, went off in the direction of where deceased and one Tom Pike had been at work. Witness was then sent for Dr. Kelly.

The defendant, testifying for himself, said, in substance, as to the occurrences: On the morning of the killing, his youngest child—an infant—had fits or spasms, and he started out again to get his wife to return home with him; went to the house of one of his sisters, and was there informed that his wife had hired to Mr. Porter, and was then working on his farm, to which place he then went, and as he passed along the road by the field he saw her and Tom Pike working together in the field, and, as he went towards them, deceased walked in the direction of Mr. Porter, and in that direction he went also, arriving there about the time his wife did. Defendant testified that he then said to her: "Mama, the baby is sick. Won't you go home and take care of it?" and that, in response to this, she said, "I told you last night I was not going home with you, and I will make Tom Pike kill you." Continuing, the defendant said: "The remembrance of the wrongs I had ever suffered at her hands came upon me at once, and in a fit of anger rendering my passions uncontrollable, I fired my gun and killed her. I brought my gun with me that morning, fearing I would meet Tom Pike, and that he would undertake to kill me, as my wife had threatened she would have him do." He further denied having written the testamentary letter.

These were all the witnesses who saw the killing, and all agree that defendant and his wife reached the fatal spot about the same time, and approached at right angles, and Porter says defendant could easily have shot deceased before reaching him. The testimony of defendant tended to show that the wrongs spoken of by him,

as suffered by him at his wife's hands, consisted of her desertion of him, leaving three little children, one an infant at the breast, for him to take care of, and (according to his own statement) living in adultery with Tom Pike, and heartlessly refusing to return home and care for the youngest child, even in its sickness. It will be seen that the manner in which defendant demeaned himself towards his wife at the fatal meeting was quite different according to his testimony and according to that of Porter and Fitzpatrick. The evidence shows that the relations between the defendant and his wife had been most unhappy for several months before the killing, and that she was not really living with him at the time of the killing, but had hired to Porter, to work on his farm for the time being, and that she and defendant had frequent separations before the killing.

Admissibility of evidence in homicide cases.

The tenth, eleventh and twelfth grounds of motion for a new trial are merely formal. The first, second, third, fourth, eighth, and ninth grounds are to the effect (first and second) that the testimony of A. H. Shelton; (third and fourth) that the testimony of W. W. Hinson; and (eighth and ninth) that the testimony of Buck Butterworth was inadmissible because the same is irrelevant, improper, too remote, indefinite, and otherwise objectionable. The testimony of Shelton was to the effect that, about six weeks or two months next before the killing, he saw defendant whipping his wife with a strap, in his (defendant's) front yard, having her tied to a tree for that purpose; that before that he heard defendant making threats that he would beat his wife to death, since she would not stay at home, and if she would not stay at home, and, at the time of the whipping, defendant told witness he whipped her because she would not stay at home. Witness said further that Martha Phillips was, at the time of the

whipping, living with defendant. The testimony of Hinson was to the effect that he lived about a mile from defendant's place; that, about two months before the killing, defendant and his wife came to his (witness') house, and while there, but not in the hearing of his wife, defendant said to witness that, if he (witness) would withdraw his support from his wife, he would make her go home with him; and that he (witness) told him that the law did not give him any such right. Witness further stated that, about six weeks or two months before the killing, the deceased had exhibited to him certain bruises on her arms and body, and related her statements in regard thereto, but on motion of defendant all her statements were excluded. Witness, further testifying, described the character of the bruises, and then said, also, that he had written a contract in the spring of 1891 between defendant and Amanda Phillips (who testified that she was a former wife of defendant) for the purpose of preventing them being prosecuted for living together as husband and wife. The testimony of Buck Butterworth is to the effect that defendant told him, about one month before the killing, that he would make his wife come back home to him, or beat her to death. We do not think that any of this testimony is irrelevant, improper, too remote, or indefinite. It all tends to show the relations existing between defendant and deceased during the period covered by it, and also the animus of defendant towards the deceased. We do not think it is improper, and certainly not indefinite. It is not too remote, for it relates to matters occurring or existing not exceeding two months before the killing, and from that on down to the killing. When taken in connection with the testimony of defendant himself, and others, and viewed in the light of surrounding circumstances, all this testimony goes to show the intent with which the homicide was committed. In *Carroll* v. *State*,

45 Ark. 539, (quoting from the syllabus), this court, in effect, said: "On the trial of a party for the murder of the wife, evidence of his recent acts of personal violence upon her, coupled with oaths, is admissible to show the state of his feelings towards her and the manner in which they lived."

Admissibility of evidence to show intent.

Equally untenable is the defendant's fifth objection, to the effect that the court below erred in admitting in evidence the paper in the nature of a testamentary disposition of defendant's worldly goods, purporting to have been written the day of the killing, proved to have been in the handwriting of the defendant, and found the day after the killing, in his house, by the posse who were in close pursuit of him. This paper contained a reference to the intended killing of his wife, and threw light on his intent, unquestionably.

When taking of papers by jury is not prejudicial.

The sixth objection is that, by inadvertence or otherwise, a paper (a motion by the defendant in the case, a long time before, for a continuance for the absence of a witness, and reciting what he could prove by her if present), had got into the hands of the jury, and was in their possession in their consultation room, and that this was error. That is true; but, immediately on the court being informed of the inadvertence, by its order the paper was taken from the jury. That they should have had possession of it was, of course, improper, but not reversible error. *Palmore* v. *State*, 29 Ark. 248.

What papers the jury may not take.

The thirteenth objection is to the effect that the court erred in denying the request of the jury to permit them to have the testamentary letter while they had the motion for continuance, so that they could compare the handwriting and signature of the former with the signature of the latter. The possession of the motion for continuance by the jury was admittedly improper, and certainly that impropriety could not have been remedied

by giving the jury the other paper for the purpose of comparison.

Necessity of motion for new trial.

The seventh objection is that the court refused to discharge the jury in the midst of their deliberations on the case, on motion of defendant, because, as he said, and offered then and there to show, one Bass, a member of the jury, before being selected as such, had been heard to say, in effect, that defendant ought to be hung, and that if he was on the jury he would hang him, and all this the defendant had only heard at the time of making the motion. Whatever there might have been in this motion, it should have been renewed as part of the motion for new trial, and the offer to make proof also renewed, as a ground to set aside the verdict. Only the fact of the motion having been made and overruled before verdict is embodied in the motion for a new trial. The statute is certainly not favorable to this contention. Sand. & H. Dig. sec. 4259. Nor are the decisions of this court. *Meyer* v. *State*, 19 Ark. 156; *Casat* v. *State*, 40 Ark. 511.

Upon the whole case, since the evidence clearly sustains the charge, we see no reversible error, and the judgment will therefore be affirmed.

BROWN v. STATE.

Opinion delivered February 29, 1896.

TRIAL—REMARKS OF COURT—In a prosecution for a robbery committed at a railway station, where the railway company was criticised by counsel for the defense for employing a private detective to aid in procuring a conviction, it was error for the trial judge to say, in the presence of the jury, that he did not know but that the railroad company would be liable for a robbery of a passenger while on its train or on railroad property.

ROBBERY—EVIDENCE.—In a prosecution for robbery, it being shown that defendant gambled, it is not admissible to prove that the place in which the robbery is alleged to have been committed is infested with a gang of gamblers, who are reported to have committed robberies there for several years past.

Appeal from Independence Circuit Court.

RCHARD H. POWELL, Judge.

Yancey & Fulkerson, John K. Gibson, and Jos. M. Stayton for appellant.

1. The utterances of the court were prejudicial to defendant.

2. It was error to admit Bagley's testimony. Whart. Am. Cr. Law, p. 997; 30 S. W. 602. Even if appellant had been responsible for Hoxie's bad reputation, and had been a thief all his life, proof of the commission of other crimes is not admissible, unless they are connected. 34 Ark. 650; 37 *id.* 261; 43 *id.* 368; 54 *id.* 489, 621; Whart. Cr. Ev. sec. 30.

3. The remarks of the prosecuting attorney were highly prejudicial.

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

1. The remarks of the court were not reversible error. 89 Ill. 580.

2. The testimony of Bagley did not prejudice the substantial rights of defendant. The court permitted it, not to show his guilt, but to show why the railroad had interested itself in seeing that the robberies at Hoxie were punished. This court will not reverse, except for errors which are substantial and injurious to appellant. 28 Ark. 531; 31 *id.* 364.

3. The court below, in the midst of all the facts and surroundings, did not consider the remarks of counsel reversible error. The subject and range of the argument is necessarily left to the sound discretion of the trial judge, and, unless grossly abused to the prejudice of defendant, it is not the subject of review by this

court. 34 Ark. 650; 55 N. W. 756; 22 S. W. 1021. Appellant was not injured by these remarks, hence they constitute no cause for new trial. 32 N. E. 431; 25 S. W. 634. But appellant failed to move to have them excluded from the jury; so the objection is treated as waived. 24 S. W. 420; 20 *id.* 547; 36 Pac. 793; 23 S. W. 793.

HUGHES, J. Larry Brown was indicted by the grand jury of the Eastern district of Lawrence county, at the September term, 1895, for the crime of robbery, alleged to have been committed in the forcible taking of the sum of $205 from the person and against the will of one C. D. Rominger, in said county and district. Appellant entered his plea of not guilty, and filed his application for a change of venue, which was granted, and the cause was transferred to the Independence circuit court for trial. Thereafter, the cause coming on for trial, a jury was impanelled. In the opening statement to the jury, one of the counsel for the defendant stated, amongst other things, "that the evidence would show that this was a hellish and damnable conspiracy to put the defendant in the penitentiary; that he would show and prove by the evidence that one H. N. Faulkinbury, an emissary of the Iron Mountain Railway, was at the back of the prosecution, and alone responsible for it; that he had manufactured it out of whole cloth; that he had paid the witness Rominger to swear that he had been robbed by the defendant, and that he (Faulkinbury) was present to see that he swore straight; that the railroad company and Faulkinbury were together handling this man; that they had paid him and furnished him passes to come here to swear, and Faulkinbury's job depends on this man's conviction."

There was evidence tending to show that the defendant was guilty of either robbery or larceny, which must be

determined from the evidence, and the principles of law applicable thereto, as laid down in the case of *Routt* v. *State*, (61 Ark. 594) decided at the present term of this court, which is similar to case at bar.

The evidence shows that, if an offense was committed by the appellant, it was committed at the town of Hoxie, in the county of Lawrence. On the trial the state introduced I. J. Bagley, a witness in her behalf, who testified as follows: "My name is I. J. Bagley, and I live in Lawrence county, and am familiar with Hoxie." Q. "State what interest the railroad company has in enforcing the law at Hoxie;" to which the defendant objected, which was overruled by the court, and the court stated, in the presence of the jury, that he did not know but that the railroad company would be liable to their passengers for a robbery that had been committed on their passengers while on their trains, and that they would be responsible for a robbery on one of their passengers on railroad property; that counsel for defendant, Mr. Gibson, had stated to the jury, in opening the case, that the railroads were instrumental in bringing this prosecution, and that they had sent their private detective here to see that the witness testified straight, and that the evidence ought to go in to prove that it was not true. The defendant at the time excepted to the ruling of the court, as well as the language of the court in the presence of the jury, and stated to the court that it was not the intention to urge to the jury that the Iron Mountain railroad was doing something that they ought not to do, and that they were attempting to do only what every good citizen would do, and that was to see that the law was enforced, and that they did not blame them for their active interest; but that they desired to show that the detective, Faulkinbury, had been in a position to influence the witness Rominger, and they had furnished him a pass, and the evidence

would be introduced only for the purpose of attacking the credibility of the witness Rominger. Then, in response, the witness answered: "Hoxie is the crossing of the St. Louis & Iron Moutain Railway, and for the past five or six years robberies have occurred there until it was unsafe for any one to get out of the depot. It was dangerous, and the railways were trying to stop it." "Do you know what reputation Hoxie bears?" (Objected to by the defendant, and overruled, and exceptions saved.) "Hoxie bears a bad reputation. It has been infested with a gang of gamblers, and they have been the people who are reported to have committed these robberies in the past five or six years. It is a hard place, and there have been a number of robberies committed there." To both answers of these questions propounded to said witness the defendant at the time objected, and the said objections were overruled, and the defendant at the time excepted.

The court gave instructions, in effect, that the state must prove each and every material allegation in the complaint,—either that defendant committed crime, or that he was present, aiding and abetting others to do so; and, as there were no objections made to them, we do not insert them here. The jury returned a verdict of guilty, and gave him seven years.

The appellant filed his motion for new trial, and set up the following grounds of error of the court: (1) In permitting the state to ask witness Bagley what interest the Iron Mountain Railway had in the enforcement of the law. (2) In stating, in the presence of the jury, that it is probable that the railroad company would be responsible for the robbery of its passengers, and that it is possible that it would be responsible for any robbery of its passengers committed on its grounds or premises. (3) In permitting Bagley to testify that there had been numerous robberies committed at Hoxie

during the past five or six years by the gamblers who frequented the place. (4) In permitting the state to ask what the general reputation of Hoxie was, and in permitting Bagley to state that the town of Hoxie was the junction of the Kansas City and Iron Mountain railroads, and that the place was notorious as being infested with a gang of thieves and robbers, and that they preyed upon the passengers coming over the railroads; that the place was so bad that it was considered unsafe for a passenger to go out of the depot, for fear of being robbed. (5) In permitting associate counsel for the state, in the opening argument, to tell the jury that Hoxie was the home of thieves, robbers, gamblers, and whoremongers, and that was the kind of people who lived there, with but few exceptions, and that Brown was an infernal liar, thief, robber and scoundrel, and had been a robbing scoundrel all his life. (6) In permitting the state's attorney, in the closing argument, to tell the jury the good people of Lawrence county demanded this gang of thieves be proved up, and that a whole army of the Hoxie gang was here, and not one of them dared to go on the stand, as a few of the best people of Lawrence county were here to impeach them, when no evidence of this character had been introduced to the jury. (7) In permitting the state to excuse one of the jurors, who had been selected and accepted, after the jury was complete. (8) The verdict was contrary to the evidence. (9) Contrary to the law. (10) Contrary to both the law and the evidence.

All of the exceptions were properly saved to overruling of motion, as well as to errors mentioned in said trial. The exceptions taken are: (1) To the language of the court in the presence of the jury; (2) to the admission of Bagley's testimony; and, (3) to the remarks of counsel for the state.

When remarks of a trial judge are prejudicial.

1. When witness Bagley was introduced, and the question, "What interest has the railway in the enforcement of the law at Hoxie?" asked, the court, in the presence of the jury, remarked that, as the railroads would be responsible for robbery of their passengers, etc., and as Mr. Gibson had stated that the railway was instrumental in bringing this prosecution, etc., the evidence ought to go in. The attorney who opened the case was rather unfortunate in the use of intemperate language, and, perhaps, went out of the ordinary line a little, but, as it was merely a statement of what the defendant would offer in proof, it was no part of the evidence, and it was clearly wrong for the court to give utterance to the language he did, especially when, at the time, counsel disclaimed any intention of attacking the railway for their interest, and stated to the court that that sort of proof would only be offered to attack the credibility of the witness Rominger. The law, as uttered by the court, was wrong, and was prejudicial to the defendant.

Admissibility of evidence.

2. *The admission of Bagley's testimony.* On cross examination, the appellant testified: "I gamble and have gambled in various places." On the trial of this cause, Bagley, a witness for the state, was permitted, over the objection of the appellant, to testify: "Hoxie bears a bad reputation. It has been infested with a gang of gamblers, and they have been the people who are reported to have committed these robberies in the past five or six years. It is a hard place, and there have been a number of robberies committed there." Hoxie is the place where the alleged robbery is charged to have been committed. The appellant testified on the trial that he gambled, and had gambled in various places. It was error to admit the above testimony of the witness Bagley. The appellant was not on trial for the bad reputation of Hoxie, but on a charge of robbery. It is very apparent that this evi-

dence had a tendency to prejudice the appellant with the jury. They would probably, upon such testimony, conclude that, as Hoxie was infested with a gang of gamblers, and they had been the people who are reported to have committed these robberies in the last five or six years, and the defendant is a gambler, it is but fair and reasonable to find that he is the guilty party in this case. The admission of this testimony warranted the jury in considering it, and in attaching much importance to it. It was damaging testimony. For the error in admitting this testimony, the judgment is reversed, and the cause is remanded for a new trial.

3. The remarks of the prosecuting attorney objected to, though probably made in the excitement of the argument, were not proper, but, whether sufficient in themselves to call for a reversal of the judgment, we do not determine, as the case is reversed on another ground, and the remarks will probably not be repeated.

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MOSELEY v. CHEATHAM.

Opinion delivered February 29, 1896.

REPLEVIN—UNDIVIDED INTEREST IN CROP.—Replevin will not lie on behalf of the mortgagee of a share-cropper's half interest in an undivided crop to enforce a division of the crop between him and the owner of the land who is in possession of the entire crop, nor will the latter be required to surrender possession of the whole upon the payment to him of what his interest is worth.

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

This was a suit in replevin to recover certain cotton and corn. It was developed on the trial that the corn and cotton claimed was the half of an undivided crop

which belonged to a share cropper of appellant. Appellee claimed the cotton and corn under a mortgage from the share cropper. Appellant had released his interest in one-half of the crop of the share cropper by an endorsement on the margin of the mortgage held by appellee. Appellant was in possession, and refused to surrender same. The crop was abandoned by the share cropper, and the appellant, the owner of the land, finished working and gathering same at a cost, as he testifies, of $68.50. Appellee, before bringing suit, tendered to appellant sixty dollars, which was the full value of appellant's half interest. The court found that the appellant had converted to his own use corn of his share cropper equal in value to the labor expended by appellant in working and gathering the crop. Appellant moved the court to dismiss the cause because replevin was not the remedy. But the court overruled the motion, and rendered judgment to the effect that appellee should pay to appellant $60, the value of his (appellant's) share of the crop, and that appellee should recover of appellant the cotton and corn in controversy, or the value thereof ($111). Appellant moved for new trial because the court erred in not dismissing the case, and because the findings were contrary to law and evidence. The motion was overruled, and appeal taken.

J. C. Head for appellant.

1. Replevin will not lie for a share of an undivided crop. 52 Ark. 254; 44 *id.* 447; 35 *id.* 169.

2. Tenant in common cannot maintain replevin against his co-tenant for a division of the crop. 33 Ark. 830.

3. Mosely was the landlord, and the crop was his, and in his possession as *sole owner* until the settlement of his claim. 34 Ark. 179; 39 *id.* 280; 34 *id.* 687.

WOOD, J., (after stating the facts). Replevin was not the remedy for appellee, under the proof in this

case. *Titsworth* v. *Frauenthal*, 52 Ark. 254; *Hart* v. *Morton*, 44 Ark. 447; *McKennon* v. *May*, 39 Ark. 442; *Person* v. *Wright*, 35 Ark. 169; *Ward* v. *Worthington*, 33 Ark. 830.

Appellant was in the lawful possession of the crop, and had the right to retain same until it was divided, and replevin was not the remedy to enforce a division. Nor could appellant be required to surrender possession of the whole upon the payment to him of what his share or interest was worth. However, under the state of case presented by the proof, the appellee had equities which a court of chancery might well enforce. The cause is therefore reversed, with leave to amend the pleadings, and transfer to equity, if desired, and to have the cause disposed of according to the equity practice.

WALKER *v.* FETZER.

Opinion delivered February 29, 1896.

ATTACHMENT—LIEN OF OWNER OF MALE ANIMAL—BOND.—In an action to enforce the lien of the owner of a stallion on a mare served, under Sand. & H. Dig. secs. 4811, 4812, (requiring the justice, when the claimant has filed a statement of his claim, to order the mare to be held subject to the order of the court), a bond given by the plaintiff to procure the order of seizure is unauthorized, and creates no liability against the surety.

WRONGFUL ATTACHMENT—ESTOPPEL.—The owner of attached property is not estopped to claim damages for its wrongful seizure and sale under attachment by being present at the sale and consenting that the balance of the proceeds, after satisfaction of the judgment and costs, shall be applied on a mortgage held by the attaching creditor.

Appeal from Independence Circuit Court.

JOHN B. MCCALEB, Judge, (on exchange of circuits with HON. RICHARD H. POWELL, J.)

STATEMENT BY THE COURT.

It appears that appellant, W. C. Walker, instituted proceedings before a justice of the peace to recover the sum of eight dollars for the services of a stallion, and to enforce a lien for same on the mare served. Walker made before the justice the following affidavit: "The plaintiff, W. C. Walker, states on oath that the defendant, James Fetzer, is justly indebted to him in the sum of eight dollars for services rendered by a male horse kept by Huse Moore, in the year 1891, to one gray mare owned by the defendant, James Fetzer. The said sum is due and unpaid, and said W. C. Walker prays for an attachment to enforce the lien on said mare. [Signed]. W. C. WALKER." Walker made application for a writ of attachment, and filed with the justice this bond: "We undertake and are bound to the defendant, James Fetzer, in the sum of $75, that the plaintiff, W. C. Walker, will prove his debt, and the lien claimed in the action entitled above, in a trial at law, or that he will pay such damages as shall be adjudged against him if the action is wrongfully obtained. [Signed]. W. C. WALKER. E. C. EDWARDS." The attachment was issued, and the mare taken from the possession of Walker. On trial before the justice the attachment was sustained, and the mare was sold. But on appeal to the circuit court the attachment was dissolved, and the suit dismissed.

Appellee then brought suit against appellants before a justice of the peace, alleging that appellants had "illegally seized his mare, and had caused her to be sold, depriving appellee wholly of the said mare, and the benefit of her services," etc., to the damage of appellee in the sum of one hundred dollars, for which he asked, and afterwards obtained, judgment. On appeal to the circuit court, appellee filed an amended complaint, in which he set forth the attachment proceedings *supra*, and claimed that he had been damaged by reason of the

wrongful suing out of the attachment in the sum of one hundred and twenty-five dollars, and asked judgment against appellants on their bond for that amount. A motion was made to strike the amended complaint, but the record does not show that it was ever passed upon by the court. The defense was oral, being a general denial of liability. The trial resulted in a verdict and judgment for appellee in the sum of thirty-six dollars, which appellants seek to reverse by this appeal.

W. B. Padgett and *Yancey & Fulkerson* for appellants.

1. The bond was a nullity. The statute does not authorize nor contemplate a bond. Sand. & H. Dig. secs. 4811, 4812–13–14. If unauthorized by law, it is void, and will not be enforced. 34 Ark. 530. No case was made against appellants, and this court should reverse. 56 Ark. 53.

2. If the appellee had any remedy, it was against the constable who took the mare from him, after he gave a retaining bond. Sand. & H. Dig. sec. 4814. If the complaint failed to state a cause of action, the defect is not cured by the evidence. These questions may be raised here, although not raised in the court below. 49 Ark. 278; 44 *id.* 202.

3. The former suit was the proper time to adjudicate the question of damages. An independent action upon the attachment bond would not lie. 34 Ark. 707; 37 *id.* 614; 55 *id.* 622; Sand. & H. Dig. sec. 362. One trial should settle all questions as to the debt of plaintiff and damages of defendant. 34 Ark. 707; 55 *id.* 622.

H. S. Coleman for appellee.

1. The validity of the bond was not raised below, and cannot be raised in this court for the first time. 30 Ark. 25.

2. There is no allegation in the complaint as to the bond here referred to. Nothing was said about it in the defense, except in Fetzer's testimony, when he says, "I gave bond, and kept her about one week." The question of the retention bond cannot be raised here for the first time. Cases *supra*; 44 Ark. 202; 49 *id.* 277.

3. The contention that the damages should have been assessed in the former suit is not sustained by the cases cited. 34 Ark. 707. In this case there was no trial. The suit was dismissed on motion of defendant.

Validity of unauthorized bond.

WOOD, J., (after stating the facts). The amended complaint showed no cause of action against appellants on the bond. The statute giving to the owner of any male animal kept for the propagation of species a lien upon the female animal which has been served by the male, for the sum contracted for such service, nowhere provides for the filing of a bond as a prerequisite for the enforcement of such lien. On the contrary, where the owner files with a justice a written statement, duly verified, setting forth the amount of his claim, his cause of action, and a description of the animal upon which he has a lien, it is the duty of the justice to issue an order to the constable to take the animal and hold it subject to the order of the court, without requiring the filing of a bond. Sand. & H. Dig. secs. 4811–12. The bond was unauthorized, without consideration, and void. The judgment of the court against appellants on this bond was *coram non judice*, and void. *Williams* v. *Skipwith*, 34 Ark. 529. It is not contended, and is nowhere shown, that appellant Edwards had anything to do with taking the mare from appellee, except the mere signing the attachment bond. As to him therefore the judgment is reversed, and the cause dismissed.

As to appellant Walker, although somewhat loosely and defectively stated, the allegations of the amended complaint, if sustained by the proof, would

justify a verdict and judgment against him as for a trespass or tort. In other words, the complaint shows that upon the application of Walker a writ of attachment was issued by the justice, under which appellee's mare was seized and taken from his possession, and afterwards, by order of the court, sold, and alleges that said mare was worth seventy-five dollars, and that appellee was damaged in the loss of the use of his mare, and in expense incurred in defending the attachment, in the sum of twenty-five dollars, and that his whole damage was one hundred dollars. There was evidence to support the verdict. The jury might have found from the testimony of appellee that the mare, at the time she was taken from him, was worth seventy-five dollars. The mare was sold under the attachment proceedings for forty dollars and fifty cents. The appellee got the benefit of this amount in a credit on his mortgage, and in satisfaction of a judgment against him. It was near sixteen months from the time the mare was taken from appellee till the rendition of the judgment in this case in the lower court. It was in evidence that the use of the mare was worth four or five dollars per month to appellee. Subtracting the forty dollars and fifty cents which the mare brought at the sale, from the seventy-five which the jury might have found her to be worth, leaves thirty-four dollars and fifty cents, and the interest which the jury might have given appellee would more than make the difference between this and the thirty-six dollars, the amount of their verdict.

As to estoppel to sue for wrongful attachment.

The fact that appellee was present at the sale, and consented that the residue of the amount for which the mare sold, after the satisfaction of the judgment and cost against him, should be applied on a mortgage to his creditor, did not estop him from maintaining this suit against appellant Walker for damages caused by him in

the illegal seizure and sale of the mare. The title of the purchaser at the sale under the attachment was in no manner brought in question by this proceeding. The court therefore was correct in refusing an instruction which told the jury, in substance, that, if they found the above to be the fact, they should find for the defendants.

Other questions were raised in the motion for new trial, but have not been insisted upon here, and it is unnecessary to discuss them.

The proof justified the jury in concluding that appellee's mare was taken and sold under an illegal attachment sued out by appellant Walker. Therefore the judgment as to him is affirmed.

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FIRST NATIONAL BANK OF OWATONNA v. WILSON.

Opinion delivered February 29, 1896.

HOMESTEAD IN TOWN—AREA.—One who resides in an incorporated town is entitled to a homestead not exceeding an acre in area, under Const. 1874, art. 9, sec. 5, though he owns a larger tract within the town limits, which has not been divided into lots and blocks, and is cultivated by him as a farm.

Appeal from Monroe Circuit Court.

JAMES S. THOMAS, Judge.

STATEMENT BY THE COURT.

This case arose on a motion to quash a supersedeas issued by a circuit clerk to prevent the sale under execution of land claimed by B. F. Wilson as a homestead. The case was submitted and tried by the circuit court on the following agreed statement of facts, to-wit: "The First National Bank of Owatonna recovered judgment in the Monroe circuit court against N. C. Blake, I. G. Terrell, and B. F. Wilson, and execution

was issued upon said judgment, and levied upon the fractional part of the S. W. ¼ of the N. E. ¼ of N. W. ¼, sec. 15, township 3 North, range 2 West, containing eight acres, as the property of B. F. Wilson, one of the defendants. B. F. Wilson owns nine acres in said tract, and the sheriff did not levy upon, and have advertised for sale, but eight acres, the *land being in the incorporated town of Brinkley.* The limits of the corporation of the town of Brinkley were extended on the 13th day of June, 1887, and included this land; but it was not divided into lots and blocks, and has not been divided as yet. On the 11th day of April, 1889, the defendant bought and established his homestead on this land, and has since resided on it, and does now reside on it, is a married man and the head of a family, and is not worth over one thousand dollars. He cultivates the land as a farm."

This was all the evidence, and upon these facts the circuit court held that the defendant was entitled to the nine acres of land as a homestead, and denied the motion to quash. From this ruling and judgment an appeal was taken.

W. T. Tucker for appellant.

In this case the homestead was established two years after the corporate limits were extended over the land. The agreed facts show the land to be in the town of Brinkley, and by the very terms of our constitution the homestead cannot exceed *one acre.* 47 Ark. 400; 51 *id.* 527; 5 Kas. 592–4; 13 Wis. 233; 16 *id.* 223; Const. Ark. art. 9, sec. 5.

C. F. Greenlee for appellee.

The premises claimed have never been surveyed into lots and blocks, nor in any manner dedicated to city uses. It is used as a farm exclusively, and is a rural homestead, within the true meaning and spirit of our homestead act.

Waples, Homestead & Ex. p. 224; 17 Tex. 74; 30 *id.* 604; 38 *id.* 425; 12 Ia. 516. The Michigan and Wisconsin cases are isolated ones, and are not followed by the courts. See Waples, Homestead & Ex. p. 226; notes 4 and 5. The object of the law is to protect the family, and it is liberally construed. 32 S. W. 785; 53 N. W. 711; 22 Ark. 404; 25 *id.* 101; 51 *id.* 527; 14 S. W. 156; 24 Ark. 157; 41 *id.* 94; 42 *id.* 539.

RIDDICK, J. (after stating the facts.) The agreed statement of facts shows that the land claimed by Wilson as a homestead is "*in the incorporated town of Brinkley.*" It was thus situated at the time he established his homestead upon it, the limits of the town having been extended so as to include this land a year or two before it was purchased by him. Our constitution provides that "the homestead in any city, town or village * * * * shall consist of not exceeding one acre of land, * * * provided the same shall not exceed in value the sum of two thousand five hundred dollars," etc. Sec. 5, art. 9, Const. 1874. The right of one who establishes his home in a city or town of this state to claim such homestead as exempt from execution depends upon this section of our constitution, and, as it provides that such homestead shall not exceed one acre of land, he cannot lawfully claim a greater amount. There are decisions in other states which seem to support the ruling made by the learned circuit judge in this case, but they were made under statutes not exactly synonymous with our law. Although homestead laws should receive a liberal construction, to effect the beneficent purposes for which they are intended, yet the courts should not override the plain letter of the law. Under the facts of this case, we think that appellee is entitled to a homestead limited in extent to one acre of land.

We do not hold that the fact that one dwells within the limits of a municipal corporation will in all cases

prevent him from holding as exempt a homestead of more than one acre. A case may be supposed where the corporate limits of a town or city have been extended beyond the actual extent of such urban community, so as to include territory altogether rural. On the other hand, there may be towns that have overgrown their corporate limits, so that one may dwell within the town, and still be outside the corporate limits. In such cases it may be that the courts would look to the facts to determine whether the homestead claimed was located in town or country, and not be altogether controlled by the corporate limits. But we are not called on to determine that question here, for the agreed statement of facts says that the homestead of Wilson is in the town of Brinkley, and there is nothing to show to the contrary. The fact that a homestead had not been divided into lots, and is used for farm purposes only, may be considered by the court in determining whether it is within a town, within the meaning of the constitution; but, when once determined that it is located in a city, town or village, then the fact that it has not been divided into lots can be of no effect.

The homestead in this case is of small value, and there may be some inequality in the law; but, if so, this defect cannot be remedied by the courts. The judgment is reversed, and the cause remanded for further proceedings.

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ARKANSAS COAL, GAS, FIRE-CLAY & MANUFACTURING COMPANY *v.* HALEY.

Opinion delivered March 7, 1896.

SUMMONS—SERVICE ON CORPORATION.—A return on a summons in a suit against a domestic corporation is insufficient, under Sand. & H. Dig. sec. 5669, where it shows service on an agent of the corporation, without showing that the president of the company was absent from the county.

APPEARANCE—EFFECT OF APPEAL.—A defendant who appeals from an order denying a motion to quash service of summons will be treated as in court, although the service is held invalid.

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

Thomas Haley sued the Arkansas Coal, Gas, Fire-Clay & Manufacturing Company, a domestic corporation. Summons was issued and returned served on R. Hibbard, "agent of the Arkansas Coal, Gas, Fire-Clay & Manufacturing Company." Defendant appeared specially, for the purpose of moving to quash the service of summons. The motion was denied, and defendant appealed.

Gaughan & Sifford for appellant.

1. A defendant can enter his appearance for the purpose of objecting to service, without giving jurisdiction for purposes of judgment *in personam*. 5 Ark. 517; 11 *id.* 301; 28 S. W. 424.

2. Defendant being a domestic corporation, service cannot be had upon an agent, unless the president is absent. Sand. & H. Dig. sec. 5669.

3. Judgment without service is absolutely void. Sand. & H. Dig. sec. 4190; 48 Ark. 334; *id* 349; *id.* 500; 45 *id* 271; 49 *id.* 411.

4. An agent's authority cannot be established by his own statements or admissions. Mechem on Agency, sec. 100; 31 Ark. 212; 46 *id.* 222.

5. Judgment cannot be taken for want of an answer on an open account, without evidence, unless the same is properly verified. Sand. & H. Dig. sec. 2972.

Service of summons on corporation.

BATTLE, J. The return upon the summons issued by the clerk in this action does not show a legal service upon appellant, because it fails to state that its president or other chief officer was not to be found in the county of Ouachita. Sand. & H. Dig. sec. 5669; *Cairo & Fulton Railroad Co.* v. *Trout*, 32 Ark. 17, 23; *Same* v. *Rea*, *Id.* 29; *Southern Building & Loan Association* v. *Hallum*, 59 Ark. 583; *St. L., I. M. & S. Ry Co.* v. *Barnes*, 35 Ark. 95; *Bruce* v. *Arrington*, 22 Ark. 362.

Taking appeal is an appearance.

The judgment of the circuit court is reversed, and the cause is remanded for further proceedings. Appellant will be treated as in court, by reason of the prosecution of this appeal, and will have leave to answer the complaint.

Bunn, C. J., being disqualified, did not sit in this case.

WRIGHT *v.* STATE.

Opinion delivered March 7, 1896.

SEDUCTION—INDICTMENT.—An indictment for seduction, under Sand. & H. Dig. sec. 1900, is defective in failing to allege that defendant obtained carnal knowledge of the female mentioned by virtue of any feigned or pretended marriage, or any false or feigned express promise of marriage.

Appeal from Johnson Circuit Court.

JEREMIAH G. WALLACE, Judge.

Jeff Davis for appellant.

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

BATTLE, J. The indictment in this case is based on section 1900, Sand. & H. Dig., which reads as follows: "Any person who shall be convicted of obtaining carnal knowledge of any female by virtue of any feigned or pretended marriage, or of any false or feigned express promise of marriage, shall on conviction, be imprisoned not exceeding two years in the penitentiary, and fined in any sum not exceeding five thousand dollars," etc.

The indictment does not allege that the defendant obtained carnal knowledge of the female therein mentioned by virtue of any feigned or pretended marriage, or any false or feigned express promise of marriage. It should have alleged that it was obtained by one of these two means. In the omission to do so it is fatally defective. 2 Whart. Cr. Law (10th Ed.), sec. 1762.

Reversed and remanded.

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SIDWAY v. NICHOL.

Opinion delivered March 7, 1896.

TRUST—POWER OF BENEFICIARY TO INCUMBER.—Where a legacy, given in trust to pay the income and profits to a married woman, is invested in land, the title of which is taken in a trustee, the married woman has no power to mortgage the land.

MARRIED WOMEN—CONTRACTS.—A married woman who has no separate estate may borrow money and become personally liable therefor, under Sand. & H. Dig., secs. 4945-4951, providing that a married woman may own separate property, and bargain, sell, assign, and transfer the same, and engage in trade or business on her own account, and sue or be sued on account of such property or business.

Appeal from Jefferson Chancery Court.

JAMES F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

Suit upon a promissory note, and to foreclose a mortgage upon real estate executed by Nannie W.

Nichol and her husband, Charles A. Nichol, to secure said note. The complaint alleged that the consideration for the mortgage and note was money loaned to said Nannie W. Nichol. The answer of defendants did not deny that the money was loaned to Mrs. Nichol, but sets up the defense that neither she nor her husband had any interest in the estate that they could convey by mortgage. Both Mrs. Nichol and her husband died before the termination of the suit, and the cause was revived against M. W. Taggart, administrator of the estate of Mrs. Nichol and William, Josiah and Curran Nichol, her children and sole heirs. The court found that the title to the land in question was held in trust by M. W. Taggart for the use and benefit of Nannie W. Nichol, for the uses and purposes described in the will of her father, Willoughby Williams, and that neither she nor her husband nor the said trustee had power to execute the mortgage. The court rendered a judgment against the estate of Mrs. Nichol for the amount of the note and interest, but held that the mortgage was void, and refused to foreclose the same. Both parties appealed.

Bridges & Wooldridge and *Rose, Hemingway & Rose* for appellants.

1. Mrs. Nichol took an absolute estate in equity under the will of Willoughby Williams. The terms import an absolute gift, the only limitation being that it should be free from the debts, contracts and liabilities of her husband. 7 Atl. 178; 3 Jarm. Wills, p. 36, and note; 4 Mon. 257. No words of inheritance were necessary. Sand. & H. Dig. sec. 698; 58 Ark. 303.

2. The power of alienation exists, unless denied by the instrument under which the separate estate is held. 11 Vesey, Jr., 209; 2 Perry, Trusts, secs. 655-6, T.; 1 Bish. Mar. Wom. secs. 851-2; *ib.* secs. 865-6-7-8-9; 23

Mo. 457; 3 Gr. Ch. 512; Sand. & H. Dig. sec. 5446. These authorities settle the question that in this state the separate property of a married woman may be aliened unless alienation is expressly forbidden by the instrument under which she holds.

3. But even if Mrs. Nichol, by her individual act, could not mortgage her separate estate, she and her trustee were clearly entitled to do so by their joint deed. Tiedeman on Real Prop. sec. 515; 2 Washb. Real Prop. secs. 519-20; 16 S. W. 459; 3 Kas. 292; 11 S. W. 806.

4. The trust was executed by the purchase of the land, and the legal title vested with the equitable in Mrs. Nichol. Tiedeman, Real Prop. sec. 469; 69 Ga. 331; 78 *id.* 5; 80 *id.* 36; 20 Am. St. 909.

5. The bequest was in money, and the right of a married woman to dispose of personal property given to a trustee for her benefit has always been recognized, unless restrained by the instrument creating the trust. But the death of her husband removed all restrictions, and her power to alienate became perfect. 20 Am. St. 909. When her legal and equitable title became perfect, it inured to the benefit of her former grantee. Sand. & H. Dig. sec. 699.

6. The claim was properly allowed against Mrs. Nichol's estate. The money was loaned her, and became her separate property, and for its payment the property was liable.

N. T. White and *S. R. Cockrill*, for appellees.

1. Mrs. Nichol has no estate she could mortgage. 47 Ark. 254-268. See also Perry, Trusts, sec. 386*a*; 59 Vt. 530; 3 Gray, 405; 1 Bish. Mar. Wom. sec. 844; 59 Pa. St. 393; 141 Pa. St. 449, 357; 4 Rich. Eq. 475; 3 Johns. Ch. 68; 29 Ark. 346.

2. But if she had the power to dispose of the land, still the decree is right, for by the deed an equitable life

estate was vested her with remainder to her children. The rule in Shelley's case does not apply. Elph. Int. Deeds, p. 210; 1 Devlin, Deeds, secs. 215, 220; 4 Rich. Eq. 470; 1 Atk. 607.

3. No personal decree could be rendered against Mrs. Nichol or her administrator. She was a married woman, and it was not shown that she was carrying on any separate business, or that she had any separate estate. 29 Ark. 349; 43 *id.* 163; 39 *id.* 357; 56 *id.* 220; 52 *id.* 234-6; 56 *id.* 294; Kelley, Cont. Mar. Wom. p. 188; Sand. & H. Dig. secs. 4947-4952.

Power of beneficiary of trust to incumber it.

RIDDICK, J., (after stating the facts). There are only two questions in this case. The first is, did Mrs. Nichol have power to convey by mortgage the lands involved in this case? We think this question was answered in the negative by the case of *Williams* v. *Nichol*, 47 Ark. 254. The land mortgaged was purchased with the proceeds of a legacy left by the will of Willoughby Williams, deceased, to John H. Williams, to be held in trust and the interest and profits therefrom paid to Mrs. Nichol free from the control of her husband. It was held in *Williams* v. *Nichol*, *supra*, that Mrs. Nichol was entitled only to the interest on the money bequeathed to her use. The money, under an order of court, was subsequently invested in land, and the land conveyed to a trustee, to be held in trust for the uses and purposes mentioned in the will of Willoughby Williams. The land then took the place of the money, and Mrs. Nichol had only the right to use and dispose of the rents and profits arising therefrom. The chancellor properly held that after the death of Mrs. Nichol the mortgage was of no effect. *Williams* v. *Nichol*, *supra; Rife* v. *Geyer*, 59 Pa. St. 393; *Wells* v. *McCall*, 64 Pa. St. 207; Perry on Trusts, (4th Ed.), sec. 386*a*.

Liability of married woman on her contracts.

The second question is, did the court err in rendering judgment against the estate of Mrs. Nichol for the amount of the note executed by her? The complaint alleged that the consideration for the note was money loaned to Mrs. Nichol. As this allegation was not denied, we must take it as true; and the question presented is whether a married woman, under our law, has the right to borrow money for her own use and benefit, and whether or not she becomes personally liable for the payment of a note executed for such money.

It has been frequently held by this court that a married woman may make a contract for the benefit of *herself* or her separate estate, and that such contract will be enforced against her separate property. *Stowell* v. *Grider*, 48 Ark. 220; *Collins* v. *Underwood*, 33 Ark. 265; *Stillwell* v. *Adams*, 29 Ark. 346. This was the law before the passage of the statutes enabling married women to acquire and hold property in their own right, free from the control of their husbands, and without the aid of a court of equity. The promissory note of a married woman, given for money borrowed by her before the passage of the enabling statutes, would have been enforced in equity against her separate estate. *Dobbin* v. *Hubbard*, 17 Ark. 189; *Miller* v. *Brown*, 47 Mo. 506; *Boatmen's Savings Bank* v. *Collins*, 75 Mo. 281; *Williams* v. *Urmston*, 35 Ohio St. 296, S. C. 35 Am. Rep. 611; *Davis* v. *First Nat. Bank of Cheyenne*, 5 Neb. 242, S. C. 25 Am. Rep. 484; 2 Kent, 151; Lawson, Rights & Rem. sec. 749. Such a contract, before the enabling statutes were passed, created no personal liability against her, for the reason that the separate property of married women before the passage of such laws was altogether a creation of a court of equity.

By the common law she could make no contracts. The contracts of a married woman were void at law,

and were not recognized by courts of law. Inasmuch as her creditors had no means, at law, of compelling the payment of her debts, the courts of equity, which had created her separate estate, took upon themselves to enforce her promises, not as personal liabilities, but by laying hold of her separate property, as the only means by which they could be satisfied. *Owens* v. *Dickenson*, Craig & P. 48, 54; *Pike* v. *Fitzgibbon*, L. R. 17 Ch. D. 454; 3 Pom. Eq. sec. 1122, and cases cited. If the married woman had no separate estate, her creditors were without a remedy, for the proceedings to enforce her promises made in reference to her separate estate were not against her personally, but against her separate estate. It was a peculiar remedy, formulated by courts of equity to enforce promises which at law were void. *Ex parte Jones*, L. R. 12 Ch. D. 484; 3 Pom. Eq. sec. 1122; and note.

While the law stood in this condition, our constitution was adopted, and statutes were enacted providing that property owned by a married woman at the time of her marriage, or acquired afterwards, should be and remain her sole and separate property; allowing her to bargain, sell, assign, and transfer such property, and to engage in trade or business on her own account; providing that no bargain or contract made by her in respect to her sole and separate property, business, or services shall be binding on her husband, or render him or his property in anyway liable therefor, but that she may alone sue or be sued in the courts of this state on account of said separate property, business, or services; and further providing that any judgment against her may be enforced by execution against her sole and separate estate or property to the same extent and in the same manner as if she were sole. Sand. & H. Dig. secs. 4945-4951.

The object and effect of these statutes was to make a radical change in the law as regards the rights and powers of married women. Every married woman of this state who acquired property after the passage of these laws became at once the owner of a separate estate. It is no longer an equitable estate, to be recognized alone by courts of equity; but it is, by virtue of the statute, a legal estate, recognized by courts of law as well as of equity. These laws do not give the wife power to contract generally. Her note given as surety for the debt of another would not bind her, or be enforced against her property. But they do give her power to contract in reference to her services, her separate estate, and in respect to a separate business carried on by her. The statute not only authorizes her to make such contracts, but expressly provides that she may alone sue or be sued in the courts of this state on account of such "property, business, or services." Sand. & H. Dig. sec. 4946. It has been twice held by this court that under this statute the contracts of a married woman in relation to her separate business create a personal liability against her. *Hickey* v. *Thompson*, 52 Ark. 238; *Trieber* v. *Stover*, 30 Ark. 727.

It follows, upon the same reasons, that a contract in reference to her separate property creates also a personal liability; for the statute includes such contracts,—as much so as it does those concerning her separate business. "The right to contract," said Justice Scholfield in *Haight* v. *McVeagh*, "is indispensable to the acquisition of earnings, and to the unrestricted possession, control, and enjoyment of property." *Haight* v. *McVeagh*, 69 Ill. 628; *Hickey* v. *Thompson*, *supra*. The purpose of the statute was to permit married women to acquire and hold property without the intervention of a trustee or a court of equity. In order that she may be free to acquire property, it permits her

to make contracts binding upon herself in regard to such property; and it provides that her husband shall not be liable upon such contracts, but that she alone may be sued thereon. So we think that, if this was a contract in reference to the separate property of Mrs. Nichol, it created a personal liability against her, and the judgment was proper. Imprisonment for debt having been abolished, the only effect of a personal judgment against a married woman is to render her property liable for its satisfaction.

Was this a contract in regard to the separate property of Mrs. Nichol? It is contended that Mrs. Nichol at the time she borrowed this money had no separate estate, and therefore it was not such a contract. If a married woman who owns separate property binds that property to pay for other property which she buys, such property becomes a part of her separate estate. "If she has no separate estate," says Mr. Kelly, in his work on Contracts of Married Women, "there has been considerable conflict on the question whether or not she can purchase on a credit, so as to create a separate estate; yet the true doctrine appears to be that a married woman can purchase on credit, and the purchase will be her separate estate." Kelly, Contracts of Married Women, p. 160. In a Michigan case the defendant, a married woman, was sued for the price of furniture purchased by her. Among other defenses, it was contended that the contract did not concern her separate property, and was therefore not within the statute. In an opinion delivered by Mr. Justice Cooley, he said: "The contract is for the acquisition of sole property; and the title to it, or at least a right in relation to it, vests when the contract is made. There is, therefore, no straining of terms in saying that the contract has relation to her sole property. The statutes on this subject establish a new system. * * *

The rule which they establish is one of general capacity to own property, and to make valid contracts, binding in law and in equity, in relation to it; and I discover nothing in the statute which so limits that capacity as to prevent her making the first acquisition, any more than any subsequent one, on credit." *Tillman* v. *Shackleton*, 15 Mich. 456. In the case of *Wilder* v. *Ritchie*, 117 Mass. 382, it was held that a married woman may bind herself by agreements for the acquisition of property to her separate use, and that no distinction could be made between money and other personal property. In *Building & Loan Association* v. *Jones*, 32 S. C. 313, the Supreme Court of South Carolina held that, when a married woman borrows money, it becomes at once a part of her separate estate, and that her contract to repay it is a contract with reference to her separate estate, which may be enforced against her.

Our conclusion is that a married woman has, under our law, the right to purchase personal property, or borrow money for her separate use, and that the property purchased or money borrowed becomes her separate property. Her contract to pay for the same is a contract in reference to her separate property, and creates a personal obligation, valid in law and in equity, and this without regard to whether she owned any additional property or not. *Hays* v. *Jordan*, 85 Ga. 741, S. C. 9 Law. Rep. Ann. 373; *Arthur* v. *Caverly*, 98 Mich. 82; *Russel* v. *Bank*, 29 Mich. 671; *Johnson* v. *Sutherland*, 29 Mich. 579; *Gaynor* v. *Blewett*, 86 Wis. 401; *Haydock Carriage Co.* v. *Pier*, 74 Wis. 585; *Houghton* v. *Milburn*, 54 Wis. 564; *Conway* v. *Smith*, 13 Wis. 125; *Haight* v. *McVeagh*, 69 Ill. 625; *Cookson* v. *Toole*, 59 Ill. 515; *Orr* v. *Bornstein*, 124 Pa. St. 311; *Hibernia Savings Ins. Co.* v. *Luhn*, 34 S. C. 184. To hold otherwise would be to say that, although the statute gives a married woman the right to

acquire and hold property, yet, if she undertakes to acquire it by contract, the law will treat such contract as of no validity. Under that view of the statutes, a married woman who had no separate estate could make no valid contract for the acquisition of property, however desirable and beneficial the ownership of it might be to her. If she was a seamstress, and needed a sewing machine, or a music teacher, and needed a piano, she could make no contract for a purchase upon credit. If she borrowed money with which to purchase property, her note given for the money would be void. This was her condition before the passage of the enabling acts. Such a construction, it seems to us, would, to a large extent, nullify the statutes which were intended to emancipate married women from many of the trammels of the common law, and permit them to contract for, acquire, and hold property.

We have not overlooked the case of *Walker* v. *Jessup*, 43 Ark. 167, and other cases by this court, holding that a married woman cannot make an executory contract for the purchase or conveyance of land binding upon her or her heirs. There may be reasons why the executory contracts of a married woman in respect to real estate should not be enforced against her. That question is not before us, and we do not overrule those cases. But, so far as the former decisions of this court may have intimated that the contracts of a married woman in respect to her separate property, and for its benefit, though valid and binding upon her in equity, create no personal obligation on her part, and can only be enforced by a proceeding in a court of equity against her separate property, the same are overruled.

The decree of the chancellor is affirmed. Motion for rehearing overruled.

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MARTIN v. LITTLE ROCK & FORT SMITH RAILWAY CO.

Opinion delivered March 7, 1896.

RAILROAD—ACCIDENT ON TRACK—CONTRIBUTORY NEGLIGENCE.—One who attempts to cross a railway track without looking for an approaching train in plain view is guilty of such contributory negligence as will prevent recovery for injuries caused by collision therewith.

Appeal from Johnson Circuit Court.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

Action by Robert S. Martin against the railway company for injuries received by him while about to cross its track. He alleged that the injuries were occasioned by the negligence of the employees in charge of train of defendant company. The railway company denied negligence, and alleged that the injury of plaintiff was caused by his own carelessness.

The plaintiff, to sustain his case, testified as follows: "About 9 o'clock a. m. March 3, 1894, I wanted to cross the railroad track of defendants at a crossing thereof in the town of Coal Hill, Johnson county. There was a freight train standing on the switch, heading west, and extending across said crossing from a considerable distance east of same, and my recollection is that the second car from the engine was right on the crossing. The engine was blowing off steam and making a very great noise. I went around the head of the engine, stopping a moment to speak to Cull Johnson, the fireman, and then passed on down between the main track and the switch track toward the crossing, when I was struck by a freight train coming in from the west, and seriously injured. * * * I was crossing from

south to north. The train had been standing there for an hour or more obstructing passage at the crossing. I am a little dull of hearing in one ear, but hear well out of the other. I heard no whistle or bell. Don't think I could have heard the bell because of the noise of the escaping steam. I knew nothing of its approach until it struck me. The road there runs east and west. I had gone two-thirds of the length of the engine when I was hit. I did not look up the track because I was watching the engine which I had just passed. I was out of its way when I was struck. I was going east, and could see down the track that way, but did not look back. That was a public crossing. I could have heard the coming train but for the escaping steam. I was expecting the standing train to start, and for that reason was watching it. I could have seen the train that struck me if I had looked up the track in the direction it was coming. I did not stop to listen, and did not look toward the west, from which direction the train was coming that struck me. I don't think I had stepped on to the track, but was just about to step on it. It was some distance from the place where I was struck to the crossing." This was all the testimony of plaintiff except that portion describing his injuries. Other witnesses testified that plaintiff was in the act of stepping upon the railway track when hit by the engine. The train was approaching in full view, and, had plaintiff looked to the west, he could have seen it for at least two hundred yards before it reached him.

Under these facts the court directed a verdict for defendant, and plaintiff appealed.

A. S. McKennon, for appellant.

1. The court erred in taking the case from the jury. The question of contributory negligence should have been submitted to the jury. 62 Wis. 666; 19 Am.

& Eng. R. Cases, 347; 54 Ark. 159; 26 Hun, (N. Y.), 32; 13 Nev. 106; 70 Ill. 211; 101 N. Y. 419; 42 N. Y. Super. Ct. 225; 78 N. Y. 518; 32 N. J. L. 91; 90 Pa. St. 323; 57 Tex. 75; 4 A. & E. Enc. Law, p. 944, and note 1.

2. Under the act of April 8, 1891, railroads are made liable for all injuries occurring from their failure or neglect to keep a proper lookout, and the burden of proof is on them to establish the fact that this duty has been performed.

Dodge & Johnson, for appellee.

There was no evidence in this case that would have justified a verdict for plaintiff. His own testimony shows that he was guilty of contributory negligence, and the court properly directed a verdict for defendant. 57 Ark. 461; 54 *id.* 431; 56 *id.* 459; 48 *id.* 125; 46 *id.* 535.

RIDDICK, J., (after stating the facts.) We agree with counsel for appellee that this case comes within the rule laid down in *Railway Co.* v. *Cullen*, 54 Ark. 431, and again in *Railway Co.* v. *Tippett*, 56 Ark. 459. The question for the trial court was whether, assuming the testimony and all the inferences legitimately deducible from it as true, the jury would be justified in finding a verdict for plaintiff. Patterson's Railway Accident Law, sec. 175. He answered this question in the negative, and directed a verdict for defendant, and we concur in his ruling. "A traveler approaching a railroad track, crossing a highway," says Mr. Wood, "is bound to exercise ordinary prudence—such prudence as is fairly commensurate with the nature of the risk. If he can see for a long distance up and down the track, he is bound to look to see whether a train is approaching; and if the track can only be seen for a short distance, he is bound to *look and listen* for an approaching train; and when, by the exercise of these senses, he might have avoided the injury, no recovery can be had." 2 Wood, Railways,

(Minor's Ed.) 1518; *Railway Co.* v. *Cullen*, 54 Ark. 431; *Railway Co.* v. *Tippett*, 56 *id.* 459.

We do not hold that in every case where a traveler fails to look and listen, and is injured by a train while crossing a railway track, the case should be taken from the jury. It is only where it appears from the evidence that he might have seen had he looked, or might have heard had he listened, that his failure to look and listen will necessarily constitute negligence. *Smedis* v. *Railway Co.*, 88 N. Y. 13; 2 Wood, Railroads, 1527. Then, too, there are cases where the employees in charge of the train fail to use due care after discovering the danger of the traveler. But there is nothing in the evidence here to show that the employees of the company in charge of the train had any reason to believe that appellant would expose himself to injury by stepping before the train. The appellant was struck just as he started to go upon the track, which shows that the employees of the company had no time to anticipate his action in this regard.

The appellant testified that the noise made by the escaping steam from an engine on the side track prevented him from hearing the approaching train, but it furnished no excuse for his failure to look to see whether a train was approaching. He knew that on account of the noise of the steam he could not hear, and there was all the more reason why he should have looked for a train before attempting to step on the track. The train was approaching in full view, and, had he looked to the west along the track, he would have seen it in time to have avoided the injury. His failure to look under such circumstances was negligence directly contributing to his injury, and he cannot recover. As the evidence was not legally sufficient to sustain a verdict for the plain-

tiff, the court properly directed a verdict for defendant. *Catlett* v. *Railway Co.*, 57 Ark. 461.

The judgment is affirmed.

BRITISH & AMERICAN MORTGAGE COMPANY *v.* WINCHELL.

Opinion delivered March 14, 1896.

CONTRACT — FOREIGN CORPORATION DOING BUSINESS IN STATE. — A provision in a contract, which was in fact executed in another state, that it shall be construed and governed by the laws of this state, is not an admission that the making of the contract was a doing or transacting of business in this state, within the statute imposing conditions upon foreign corporations doing business in the state.

CONVEYANCE OF HOMESTEAD—CURING ACT.—A conveyance of a homestead, invalid for want of compliance with the act of March 18, 1887, was validated by the subsequent passage of the curative act of April 13, 1893.

Appeal from Franklin Circuit Court, Charleston District.

JEPHTHA H. EVANS, Judge.

J. M. Rose, for appellant.

1. The evidence fails to establish the plea of usury. Moore was not the agent of the company; but admitting that he was, the expenses were necessary to show the value of the borrower's security, and not part of the interest. 57 Ark. 347; 51 *id.* 549. The expenses of making the abstracts of title, recording the trust deed, and certificates of valuation and as to judgments, were legitimate charges to be paid by the borrower. None of these went to the lender, and the rule is that reasonable charges for services actually rendered, even by the lender or his agent, cannot be added to the in-

terest to constitute usury. 38 N. Y. 281; 2 Owens, 155; 48 Ga. 9; 30 N. J. Eq. 543; 19 Hun, 227; 55 Ia. 555; 2 Day, 483; 2 Conn. 341; 2 Abb. App. Dec. 5; 31 N. J. Eq. 40; 49 N. W. 55; 45 *id.* 1100; 14 Vt. 7.

2. Plaintiff was doing business in Arkansas. It was a Louisiana transaction. 54 Ark. 566.

3. As between the parties, the deed was sufficient to pass the homestead. 57 Ark. 242; 30 S. W. 39. But, if defective, it was cured by the curative act of 1893. 58 Ark. 117.

BUNN, C. J. This is a suit in ejectment, tried and determined in the Franklin circuit court, on the 27th day of September, 1893, in favor of the defendant, and the plaintiff, the said mortgage company, appealed to this court. It appears that the appellee borrowed, and gave his note to appellant for, the sum of $400, on the 2d day of January, 1889, due and payable in four equal annual installments of $40 each, due respectively on the 1st days of November, 1889, 1890, 1891, 1892, and one installment of $240 due 1st November, 1893, and each note bearing interest at the rate of ten per centum per annum from maturity until paid; and to secure the payment of said five promissory notes, and an equal number of notes calling for the interest on same before maturity, appellee and his wife, Victoria Winchell, executed and delivered at the same time their deed of trust in the usual form; and in this deed of trust, among other things, it was stipulated that on default in the payment of either of said notes, or of the interest notes also secured by the same, the whole debt should become due, and the deed of trust foreclosable, and the lands therein described be sold by the trustee therein named, on giving the notice specified and on the terms stipulated. A. R. Shattuck was named as trustee, and the deed of trust contained a clause authorizing another to be appointed

by the beneficiary in case the said Shattuck became unable or refused to serve, and under this power of substitution J. B. Moore was appointed trustee, who foreclosed the deed of trust on breach of the conditions, as directed therein, and at the sale by him appellant became the purchaser, and said Moore, as such trustee, in due course and form made his deed to it, conveying to it in fee, the lands described in said deed of trust, and the same which are in controversy in this litigation. On this trustee's deed, this suit in ejectment was instituted by appellant against appellee for the recovery of said land, alleged to be then in possession of appellee, who, it is alleged, held the same without right, and refused to surrender his possession.

Appellee answered, setting up the plea of usury in the contracting of the debt, and that therefore said deed of trust was void; that the debt was an Arkansas debt, and that the contracting of it was a transacting business in this state, and that appellant is a foreign corporation, and had not complied with the laws of this state, and that for that reason both the debt and the deed of trust are void as against him; and further that the land conveyed in said deed of trust was, and is still, his homestead, and that his wife had not united with him in the conveyance of the same in said deed of trust as required, and for that reason said deed of trust was invalid under the provisions of the act entitled, "An act to render more effectual the constitutional exemption of homestead," approved March 18th, 1887. The loan in question, it appears, was effected for appellee by Shattuck & Hoffman, commission merchants and loan brokers, resident and doing business in the city of New Orleans, in the state of Louisiana, from the appellant company, all the negotiations between them having been done in that city, and all the notes for the money so borrowed being made payable there. It was, therefore, in fact a Louis-

iana contract; but the parties to the deed of trust had stipulated therein that the same, and the notes therein referred to, should be construed and governed by the laws of Arkansas. The evidence shows that the full amount of four hundred dollars was paid by appellants to said brokers for appellee, and that the brokers took for their pay a portion of the interest notes belonging to appellant,—that is, they were paid by appellant company out of its own funds; and that these brokers paid the full amount of said $400 to J. B. Moore, the agent of appellee, and that he, in turn, paid the same over to appellee, less fees and charges for his services, and certain expenditures he had made in the matter for appellee, which do not appear to be any part of the interest on said loan. Besides, it does not appear either that Shattuck & Hoffman were the agents of appellant in this transaction, or that J. B. Moore was the agent of appellant or of Shattuck & Hoffman; but it does appear that he was the agent of appellee. The evidence, therefore, does not sustain the charge of usury, there being in fact none upon which the charge could be based.

When foreign corporation not engaged in business in state.

The agreement in the deed of trust that the same and the notes therein referred to should be construed and governed by the laws of Arkansas, if it had any effect at all to change a Louisiana to an Arkansas contract, evidently was not intended to be an admission or agreement that the making of the contract evidenced by said notes and deed of trust was a doing or transacting business in this state, contemplated and referred to in the statutes imposing conditions upon foreign corporations, in order that their contracts made in the course of the same may be binding upon the citizens of this state who are parties thereto.

When invalid conveyance of homestead cured.

The third contention of appellee is to the effect that the land conveyed in the deed of trust was the homestead of appellee, and that his wife had not united

with him in executing said deed of trust as required by statute to render the conveyance by him of his homestead valid. Upon an inspection of the deed of trust, it appears that the wife united with the husband in the conveyance or granting clause, that she had relinquished her dower in a subsequent clause, and had acknowledged that she had signed the relinquishment of her dower; and in fact that said deed of trust would have been a valid conveyance of the husband's homestead before the passage of the act approved March 18, 1887, aforesaid; that the conveyance was made January 2, 1889, and acknowledged by both husband and wife on the 8th of January, 1889. If this execution of the conveyance of the homestead was defective under the provisions of the act of 1887, as alleged and contended by appellee, still such defect was cured by the act entitled "An act to cure defective conveyances and acknowledgments," approved April 13, 1893.

The evidence does not sustain either of appellee's contentions, and the instructions given by the court below are based upon a theory not established by the evidence, and are therefore erroneous.

The judgment is therefore reversed, and cause remanded with directions to enter judgment for appellant company, which was the plaintiff in the court below.

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JOHNSON v. STEWART.

Opinion delivered March 14, 1896.

NEGLIGENCE—QUESTION FOR JURY.—In an action against a street railway company for killing a horse attached to a wagon, the questions whether tying the reins to the dashboard in such manner that the horse cannot move forward without pulling the wagon by his mouth is a negligent mode of fastening the horse, and whether such negligence contributed proximately to the killing of the horse, are for the jury.

STREET RAILWAY—NEGLIGENCE.—A street railway company is not liable for the killing of a horse by its car, where the owner's negligence contributed to the killing, unless its employees discovered the dangerous position of the horse in time to avoid injury. It is not sufficient that they might have become aware thereof by the exercise of reasonable care.

Appeal from Pulaski Circuit Court.

WILBUR F. HILL, Special Judge.

Action by Stewart, Kelly & Co. against Johnson and Fordyce, receivers of the City Electric Street Railway Company, to recover damages for a horse killed by one of defendant's electric cars. From a judgment for plaintiffs, defendants appeal. The facts are stated in the opinion.

Rose, Hemingway & Rose, for appellants.

The court erred in its modification of the instructions, particularly of No. 3. 36 Ark. 377. See also 36 Ark. 41; 26 *id.* 3; 46 *id.* 399; *id.* 522; 48 *id.* 124; 60 N. W. 503-4. The modification made by the court practically abolishes the whole doctrine of contributory negligence, which is that where the plaintiff has been guilty of negligence contributing to the injury, the defendant will not be liable unless he has acted wantonly, that is, has failed to use due care to prevent the accident after becoming actually aware of plaintiff's peril.

Ratcliffe & Fletcher, for appellee.

1. There is no evidence of contributory negligence on part of appellees.

2. There is a marked distinction in the doctrine of contributory negligence as applied to railroads and street cars. In the one case, until the act of 1891 (Sand. & H. Dig. sec. 6207), parties or stock going upon the roadbed were treated as trespassers, and no duty to keep a lookout was imposed. As to street railways, the rule is

different. 42 Ark. 321; 147 U. S. 571; Booth on Street Railways sec. 306, p. 416.

3. The act of 1891 (Sand. & H. Dig. sec. 6207) applies to street railways. 54 Ark. 453. See also 37 Ark. 563; 1 Hun, 378; 3 Wood on Railways, 1853, n. 3, 1858 n. 1.

Rose, Hemingway & Rose, in reply.

The decision in 42 Ark. 321, does not bear out the syllabus (see p. 326), and the real decision is in accordance with the established principles of this court.

WOOD, J. This is an appeal from a judgment for damages against the appellants as receivers of the City Electric Street Railway Company, for the negligent "running down" of a team in the city of Little Rock. The defense was the contributory negligence of appellees in allowing the team to be loose upon the streets. The proof upon this point was detailed by a witness as follows: "It was the custom to tie the horse to the dash-board of the wagon to which he was harnessed, by tightening the reins until the traces were slack, and the horse could not move forward without pulling the wagon by his mouth. On the night in question, it was tied in the usual manner at the depot." While the driver was at the train looking for the mail, the horse strayed off, the witness not knowing how he got loose, and went upon the track of the street railway, and was killed by an electric car.

Negligence a question for the jury.

The facts were undisputed, but fair-minded men, of reasonable intelligence, might very well differ as to whether the method of fastening in proof was proper, if, indeed, it was fastening at all; and therefore the question as to whether appellees were negligent in pursuing that method, and, if negligent, as to whether such negligence contributed proximately to the injury complained of, was for the jury to pass upon, under proper instruc-

tions. *Railroad Company* v. *Stout*, 17 Wall. 663; Thompson, Neg. 1236; *Detroit & W. R. Co.* v. *Van Steinburg*, 17 Mich. 99; *Carsley* v. *White*, 21 Pick. 256; *Rindge* v. *Inhabitants of Coleraine*, 11 Gray, 157.

As to negligence of a street railway company.

Appellants asked the following: "You are instructed that, even should you find that defendants' employee was negligent, yet, if you should also find from the evidence that the plaintiffs' employee, to whom had been entrusted the care of the team, was likewise guilty of negligence, and that such negligence directly contributed to cause the injuries complained of, your verdict shall be for the defendants, unless you further find that the defendants' employee in charge of the car became aware of the negligence of the plaintiffs' servants in time to have avoided injuring the team by the exercise of proper care, and failed to use such care." The court refused this, but modified it by inserting after the words "became aware of the negligence of the plaintiffs' servants," the following, "or might have become aware thereof by the exercise of reasonable care," and gave it as modified, over appellants' objection. The request should have been granted without modification. It was in accord with the rule of contributory negligence announced by this court in several cases. *Harvey* v. *Rose*, 26 Ark. 3; *St. Louis, &c., R. Co.* v. *Freeman*, 36 Ark. 41; *Bauer* v. *St. L., I. M. & So. Ry.*, 46 *id.* 399; *L. R. & Ft. S. R. Co.* v. *Cavenesse*, 48 *id.* 124, cited in brief for appellants.

It is contended, however, for appellees, that a different rule obtains as to street railways, for the reason that it is the duty of those in charge of a street car, and particularly of the driver, motorman, or gripman, to exercise ordinary care and diligence to ascertain whether the track ahead is clear, in order to avoid striking persons or objects upon or near the same. Booth, Street Railway Law, sec. 306. And it is said that, prior

to the act of April 8, 1891, no such duty was imposed upon railroads as to persons and live stock upon their tracks, and hence the difference in the rule. Counsel are mistaken in this; for, prior to the decision of this court in *M. & L. R. R. Co.* v *Kerr*, 52 Ark. 162, and the act of 1891, it was the duty of railroads to "use all reasonable efforts to avoid harming an animal after it was discovered, or might by proper watchfulness, have been discovered, on or near their track." *L. R. &. Ft. S. Ry* v. *Holland*, 40 Ark. 336; *L. R. &. Ft. S. Ry* v. *Finley*, 37 *id.* 562. The act of 1891, so far as domestic animals are concerned, only had the effect to declare the law as it was before the decision of *M. & L. R. R. Co. v. Kerr*, *supra*, overruling former cases. As to persons going upon a railway track not at a crossing, they were regarded as trespassers, and it was not the duty of railroads to keep a lookout for them, and they were guilty of no negligence in failing to do so. Since the passage of the act of 1891, railroads are guilty of negligence if they fail to keep a constant lookout for *persons* as well as property upon their tracks. This statute (of 1891; sec. 6207 Sand. & H. Dig.), it will be observed, imposes upon *railroads* practically the same duty as was imposed by the common law upon street railway companies, namely, to keep a lookout for persons and property upon their tracks; and it is unnecessary for us to consider whether the term "railroad," as used in the act, was intended to include *street railways*. It may be conceded that a like principle is now applicable to both; but neither the common law duty of street railways, nor the statutory duty of railroads to keep a constant lookout for persons or property upon their tracks, abrogates the cardinal doctrine of contributory negligence.

The modification, if approved, would virtually rehabilitate the old case of *Davies* v. *Mann*, 10 M. & W. 546, which ignores the doctrine of contributory negli-

gence, and teaches the exploded heresy of comparative negligence. This case was cited with approval in *L. R. & Ft. S. Ry.* v. *Finley*, *supra*, relied upon by counsel for appellee. But in that case the plaintiff was not guilty of any *contributory negligence*, and the approval of the principle announced in *Davies* v. *Mann* was not necessary to the decision of the question then before the court, and therefore the quotation of the learned judge from that case was dictum. Certain it is that the doctrine of comparative negligence has no place in our law, and the fundamental rule of contributory negligence, when proved as a defense in actions of this kind, still prevails, notwithstanding the decision of this court in *Citizens Street Ry.* v. *Steen*, 42 Ark. 321. The opinion of the learned judge in that case, however, doubtless misled the lower court into the error under consideration, for it approved a charge as a whole which, along with other requests stating the law of contributory negligence correctly, also contained one employing language similar to the modification which the court gave in this case. It seems, however, from the comments of the judge upon the charge in *Citizens Street Ry* v. *Steen*, *supra*, that the attention of the court was not specifically directed to the point we are considering; "for," says he, speaking of the charge, "it explained to them that, though some negligence might be shown on the part of plaintiff, yet if the defendant, *knowing of that negligence*, might, by the exercise of ordinary care, have avoided same, an action would lie for the plaintiff." Continuing, he says: "They were told that if the plaintiff, by her own negligence, contributed to the injury, the company would not be liable, unless the injury was wilful, or unless it resulted from the want of ordinary care on its part to avert it after the negligence of plaintiff had been discovered,"—thus showing that the judge delivering the opinion had in mind the doctrine of contributory negligence as it had been before

declared by this court. [And the same has been frequently announced since.] But he seems to have overlooked the fact that the use of the words "or by reasonable diligence might have been discovered," in the first instruction asked by plaintiff in that case, and which are similar to the modification added by the court to the third request of appellant in this case, added a qualification so important and far reaching as to even overturn the very doctrine of contributory negligence which he was announcing; for it must be seen that, if this principle be sound, it sweeps away every duty and obligation of the plaintiff to exercise ordinary care for the protection of himself and property. He may be reckless of danger, and heedless of consequences, either deliberately or carelessly putting himself or his property upon the tracks of railroads in front of moving trains; and yet, if it can be shown, in case of injury, that it might not have happened if the defendant had exercised ordinary care to discover the situation, the plaintiff may still recover. In other words, it matters not how careless or reckless the plaintiff may be in contributing to his own hurt, the defendant, nevertheless, is liable if he has also been negligent. This would be erroneous and unjust. The true rule, which no amount of amplification can simplify, is that, whenever the negligence of the plaintiff contributes proximately to cause the injury of which he complains, the defendant is not liable. Beach, Cont. Neg. sec. 27; *O'Keefe* v. *Chicago, &c. R. Co.* 32 Iowa, 467; 4 Am. & Eng. Enc. Law, p. 17, 4 note, 3, Pierce; Railroads, 323. But, notwithstanding the prior negligence of plaintiff, if the defendant has discovered his situation in time to avoid injuring him by the use of ordinary care, and fails to exercise such care, then the defendant is liable; for in such a case the defendant would be guilty either of wilful negligence or of negligence which might be said to be the proximate cause of

the injury; while the negligence of the plaintiff would be but the remote cause, or a mere condition of the injury. Beach, Cont. Neg., sec. 55. However differently the rule may be stated, the above is in accord with the established doctrine of our own court, and the decided weight of authority. Beach, Cont. Neg., secs. 8, 27, 35, 54, 55; *Butterfield* v. *Forrester*, 11 East, 60; Shearman & Redfield, Neg., sec. 99; Thompson, Neg., p. 1155, sec. 7, p. 1157, sec. 8; *Nelson* v. *Railroad Co.*, 68 Mo. 593; *Morris* v. *Railroad Co.*, 45 Iowa, 29; *Keefe* v. *Railway Co.*, 60 N. W. 503, and cases cited. See also as to contributory negligence where live stock is killed, *Forbes* v. *Railroad Co.*, 76 N. C. 454; *Indianapolis, &c., Railway Co.* v. *Caudle*, 60 Ind. 112; *Cincinnati, &c., R. Co.* v. *Street*, 50 Ind. 225; *Toledo, &c., R. Co.* v. *Head*, 62 Ill. 233; *Jeffersonville, &c., R. Co.* v. *Adams*, 43 Ind. 402; 3 Wood, Railroads, sec. 418, note; *Williams* v. *Railroad Co.*, 11 Am. & Eng. Ry. Cases, 421.

For the error indicated, reverse the judgment, and remand the cause.

[NOTE.—As to the duty of a railroad company to maintain a lookout on a train, see note to *Smith* v. *Norfolk & S. R. Co.*, (N. C.) 25 L. R. A. 287.—REP.]

GLASER *v.* FIRST NATIONAL BANK.

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Opinion delivered March 21, 1896.

ATTACHMENT—INTERVENTION BY JUNIOR ATTACHER.—An attachment creditor cannot have a prior attachment set aside because it was without legal grounds, and was based on an affidavit known to be false by both parties to the action in which it was filed, and was procured for the purpose of obtaining a preference, and permitted by the debtor for that purpose while in failing circumstances.

FRAUD—MISREPRESENTATION.—The fact that one creditor falsely informs another that their debtor is solvent, and that he does not intend to press his claim against him, though made for the purpose of obtaining precedence over the latter creditor, will not constitute ground for postponing the former's attachment lien to that of the latter.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

The First National Bank of Fort Smith sued the firm of C. Tilles & Co., and caused their property to be attached. Glaser Brothers, and other creditors of C. Tilles & Co., subsequently brought suits against the latter, and caused attachments to be sued out and levied on the same property. Thereupon they intervened in the first-named suit, seeking to invalidate the bank's prior attachment upon grounds set out in the opinion. Judgment below was against the interveners, and they have appealed. The facts sufficiently appear in the opinion.

Joseph M. Hill, and *Clendening, Mechem & Youmans*, for appellants.

1. An attachment, known both to the creditor and debtor to be without grounds, and brought for the purpose of obtaining a preference, and suffered by the debtor with the intention to thereby give such creditor a preference, is fraudulent, and should be postponed to a junior attaching creditor who intervenes in such suit. This statement involves two propositions, viz: (*a*) A junior attacher can intervene in a senior attachment, and claim the attached property, or proceeds thereof, over such senior attaching creditor, upon a showing that the senior attachment is fraudulent and collusive. Sand. & H. Dig., sec. 372: 57 Ark. 541; 47 *id.* 31; 53 *id.* 140. (*b*) An attachment, based upon a false affidavit and known to be false by affiant and defendant, but brought with

the purpose of obtaining a preference against a failing merchant, and suffered to be brought by such failing merchant, and suffered to be sustained with the intention thereby to give such creditor a preference over other creditors, is fraudulent as to such intervening junior attaching creditors. 74 Tex. 589, S. C. 12 S. W. 235; 11 *id.* 1123; 19 *id.* 791; 8 So. 264; 11 So. 220; 15 S. E. 950; 12 S. W. 508. The latter case sustains appellee's theory.

2. The bank is estopped to claim priority over Rice, Stix & Co. and Bamberger, Bloom & Co., by reason of its false representations to them. 33 Ark. 465.

George H. Sanders also for appellants.

1. A senior attachment when issued without any grounds for it, is not good against a junior attachment issued, served and sustained, and confessedly good and unchallenged. 57 Ark. 541; 58 *id.* 255; Waples, Att. (Ed. 1895) sec. 775; Drake, Att., sec. 274; Wade, Att., sec. 54; Vanfleet, Collateral Attack, p. 583; 65 Tex. 266; 62 *id.* 328; 4 Rich. (S. C.) 561; 4 N. H. 513; 14 *id.* 129; 13 Cal. 435; 18 Cal. 378; 36 Ind. 361; 85 N. Y. 243; 3 Mich. 531.

2. A preference of a creditor cannot be made by attachment without grounds, where other creditors follow, and writs are levied on the same property. Burrill, Assignments, sec. 125; Black, Judgments, sec. 323; Pom. Eq. sec. 886.

3. The bank was guilty of fraud on Rice, Stix & Co. and Bamberger, Bloom & Co. just previous to the attachment, and is estopped by its false and fraudulent representations, to their injury. 66 Wis. 292; Suth. on Dam., vol. 3., p. 587; 28 Fed. 788.

Clayton & Brizzolara, *James F. Read* and *Jno. H. Rogers*, for appellee.

1. All the questions of fact raised by the petition in this case were found against appellants. It must then be taken as true that (*a*) the bank's judgment was for a *bona fide* debt; (*b*) that its attachment was regular, and prior in time to appellants;' and (*c*), it not appearing on what grounds the bank's attachment was sued out, it must be assumed that it was correctly sustained. It was not a fraud for Tilles & Co. to consent or even procure the bank to attach them, for the purpose only of preferring the bank as to a *bona fide* debt. This preference could be made by assignment, mortgage, pledge, or sale, and why not by attachment, if made for no other purpose than to prefer the bank for a just debt? 52 Ark. 40, 41; 53 Ark. 538; 24 Pick. 191. It was neither fraud nor collusion. 45 Barb. (N. Y.) 369; 28 Md. 235; 1 Story, Eq. Jur., sec. 187.

2. A junior attaching creditor cannot attack the validity of a prior attachment where the debt is *bona fide*, because of irregularity in the attachment proceedings, nor because of the non-existence of any valid ground of attachment, nor because the debtor instigated the prior attachment. 47 Ark. 41, recently followed in U. S. Ct. Ct. App. in *Rice, Stix & Co.* v. *Adler-Goldman & Co;* Sand. & H. Dig., sec. 372; 53 Ark. 140; 57 *id.* 542; 2 So. Rep. 168; 34 N. W. 229; 24 Pick. 198; 46 N. W. 910; 58 Ark. 527; 60 *id.* 444; 99 Am. Dec. 719.

3. In law the bank was not required to answer or disclose anything; and if it did speak and deceive Fields, it had the right to do so, if done in order to protect itself only, and not to wrong Rice, Stix & Co. 19 Vt. 292. But appellants were not injured by these representations, and the doctrine of estoppel has no application. 33 Ark. 465.

Right of junior attacher to intervene in senior attachment.

BATTLE, J. When two creditors have sued out orders of attachment against a debtor, and caused them to be levied on the same property, has the junior the

right to file a complaint in the action instituted by the senior, thereby claiming the first lien, and to have the first attachment set aside by showing that it was known at the commencement thereof by both parties to the same to be without legal grounds, that it was based on an affidavit known to be false by both parties to the action in which it was filed, that it was made for the purpose of obtaining a preference over creditors, and that it was permitted by the debtor for that purpose, he and the first attachment creditor knowing at the time that he was in failing circumstances?

No creditor has the right to defend an action or proceeding against his debtor, to which he is not a party, on the ground that, if the suit or proceeding is maintained, he will not be able to recover the whole of his debt. Having no right to interpose a defense in such an action, he could not, for the same reason, have a judgment rendered therein set aside by a motion or other original proceeding at law or in equity, "on the ground that the defendant had defenses which he might have asserted, or that, in the transaction between the plaintiff and the defendant out of which the judgment grew, the former overreached the latter."* But if he is injuriously affected by the judgment, he may obtain relief by showing that it was procured by fraud and collusion, or suffered for the purpose of hindering, delaying or defrauding the creditors of the defendant.†

It has been held that he is entitled to relief against judgments by confession or default against his insolvent debtors for amounts larger than were actually due the

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**Mayes* v. *Woodall*, 35 Texas, 687; *Drexel's Appeal*, 6 Pa. St. 272; *Hauer's Appeal*, 5 Watts & Serg. 473; *Packard* v. *Smith*, 9 Wis. 184; 1 Black on Judgments, sec. 317, and cases cited.

†*Meckley's Appeal*, 102 Pa. St. 536; *Dougherty's Estate*, 9 Watts & Serg. 189; *Thompson's Appeal*, 57 Pa. St. 175; *McAlpine* v. *Sweetser*, 76 Ind. 78; *Sidensparker* v. *Sidensparker*, 52 Me. 481.

plaintiffs, on the ground they are fraudulent and void as to creditors.* So it has been held that he is entitled to relief against a judgment which is not founded on an actual debt, or other legal liability, in existence at the time of its entry, and was suffered by the defendant on the ground that it is invalid against the creditors of the judgment debtor.† But if the judgment be only constructively fraudulent, like mortgages, in like manner affected, it may stand good in equity for what is actually due.‡

The interference of creditors in attachment proceedings is controlled by the same rule. A junior attaching creditor cannot take advantage of irregularities or informalities in the proceedings in a prior attachment, though constituting good grounds for setting aside the attachment on the motion of the defendant. The reason for this is, "priority is in the gift of the debtor;" and when it is obtained from him by means of an irregular or informal attachment, with which both parties to the same are content, no one has room to complain of it. "The formality and regularity of such proceedings, the rightful issuing the attachment, in the absence of fraud and collusion between the plaintiffs and defendants, are matters pertaining exclusively to the defendants." *Bona fide* advantages obtained thereby by one creditor over the others, which entitle him to the satisfaction of his claim out of the debtor's property in preference to and before the remaining creditors, are sustained by the law, although by such payment the collection of other debts will be defeated. But if, in obtaining such advantages,

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**Peirce v. Partridge*, 3 Met. (Mass.) 44; *Palmer* v. *Martindell*, 43 N. J. Eq. 90; *Dickinson* v. *Way*, 3 Rich. Eq. 412.

†*Palmer* v. *Martindell*, 43 N. J. Eq. 90; *Taaffe* v. *Josephson*, 7 Cal. 352; *Ayres* v. *Husted*, 15 Conn. 504; 2 Bigelow, Fraud, p. 132.

‡*Parker* v. *Holmes*, 2 Hill, Ch. 95; *Ayres* v. *Husted*, 15 Conn. 504; *Davenport* v. *Wright*, 51 Pa. St. 292.

there is any collusion between the debtor and creditor for the purpose of hindering, delaying, or defrauding other creditors, their rights are thereby affected, and they have the right to interfere in the disposition of the property attached for the purpose of asserting and protecting them.*

Attachments levied in proceedings instituted by debtors against themselves in behalf of certain creditors, and ratified by such creditors, in the absence of fraud, have been sustained by courts.†

In *First Nat. Bank* v. *Greenwood* (Wis.), 45 N. W. Rep. 810, which was a contest between creditors over a fund held by an attachment, the court said: "The existence of the alleged grounds for the attachment cannot be controverted by the bank. The right to do so is given to the attachment debtors alone, and it is entirely competent for them to abstain from interposing traverses, or to waive the same after they have been interposed, as was done in all the attachment suits."

In *First Nat. Bank* v. *Cochran* (Miss.), 14 Southern Rep. 439, creditors intervening under a statute of Mississippi sought to set aside an attachment for fraud. Judge Cooper, in delivering the opinion of the court, said: "During the investigation it was made to appear that the plaintiffs in the attachment had paid to the defendants, or to their attorneys for them, $300 in cash, in consideration of the withdrawal by the defendants of the plea traversing the grounds upon which the attachment was sued out. The interpleaders thereupon asked to be permitted to so amend their petition as to charge that

**Meinhard* v. *Youngblood*, (S. C.) 15 S. E. Rep. 950; *Gilkerson Sloss Commission Co.* v. *Bond*, (La.) 11 Southern Rep. 220; *Claflin* v. *Sylvester*, (Mo.) 12 S. W. Rep. 508.

†*First National Bank of Madison* v. *Greenwood* (Wis.), 45 N. W. Rep. 810; *Bayley* v. *Bryant*, 24 Pick. 198; *Hardware Co.* v. *Deere, Mansur & Co.* 53 Ark. 140.

the attachment had been sued out by collusion between the plaintiffs and defendants. The court refused to permit this to be done, and this is assigned for error. The action of the court in this respect was correct. The fact that the plaintiffs, after the institution of their suit, found themselves unable to maintain the truth of the averments upon which the attachment was sued out, and thereupon paid the defendants not to interpose or to withdraw their plea putting in issue the said grounds of attachment, does not suggest that it had been sued out by collusion with the defendants. On the contrary, it suggests that the defendants were thriftily making profit of their advantage over their creditors by converting into concrete cash the abstract rights of defending the suits brought against them."

But it has been held that subsequent attaching creditors are entitled to relief against attachments based on demands not due, when there is no statute authorizing it, or on one which has no existence, or on one for which an attachment could not lawfully issue, they being fraudulent and void as to such creditors.* And in *Peirce* v. *Partridge*, 3 Met. (Mass.) 44, it was held that "where a debtor submits to judgment by default, and the creditor (intentionally) takes judgment for the whole claim in suit, without deducting therefrom the amount of articles received by him from the debtor in part payment of such claim, the judgment is void *in toto* as against other attaching creditors of the same debtor." See Drake, Attachments (7th Ed.), secs. 273-275.

As to the manner in which subsequent attaching creditors may assert their rights in this state, a statute upon this subject says: "Any person may, before the sale of any attached property, or before the payment to the

**Taaffe* v. *Josephson*, 7 Cal. 352; *Walker* v. *Roberts*, 4 Rich. Law, 561; *Palmer* v. *Martindell*, 43 N. J. Eq. 90.

plaintiff of the proceeds thereof, or of any attached debt, present his complaint, verified by oath, to the court, *disputing the validity of the attachment*, or stating a claim to the property, or an interest in or lien on it under any other attachment, or otherwise, and setting forth the facts upon which such claim is founded, and his claim shall be investigated." Sand. & H. Dig. sec. 372.

The construction of this statute has been so far in harmony with the law as held in the cases we have cited. In construing it in *Sannoner* v. *Jacobson*, 47 Ark. 31, Chief Justice Cockrill, speaking for the court, said: "The object of letting the second attacher into the suit of the first is declared * * to be to enable him to procure 'such order as may be necessary to protect his rights.' No new right is conferred upon him by the statute, but only a privilege granted of availing himself of the new and expeditious remedy provided for the protection of whatever right he may have acquired by suing out his attachment. It cannot with propriety be contended that the intervener is let in for the purpose of defending the suit, and disputing the grounds of attachment in lieu of the defendant, although that might be an efficacious method of invalidating the attachment. That would involve the practice in manifold difficulties, and even in legal absurdities, without any nearer approach to substantial justice. Such a practice prevailed at an early day in Massachusetts under a statute expressly conferring upon the intervener the right to defend for the defendant, whether the latter desired it or not; but it was abolished a long time ago, after condemnation by the courts in severe terms. *Baird* v. *Williams*, 19 Pick. 381."

In *Hardware Company* v. *Deere, Mansur & Co.*, 53 Ark. 140, an order of attachment was sued out without the knowledge of the plaintiff. After this, another

creditor sued out a second order against the same debtor, and caused it to be levied on the same property as the first, before he knew the first action had been brought in his name. Thereupon the creditor who instituted the second suit claimed the prior lien, and the court sustained his contention, and held that the first attachment was of no effect until the plaintiff in it ratified it, when it became second in priority. *Sannoner* v. *Jacobson*, *supra*, was cited to sustain the priority of the first; but the court said that the objection urged against it did not go to the grounds of it or the irregularities of the proceeding, but denied the validity of the attachment, and attacked the groundwork of the lien.

In *Rice* v. *Dorrian*, 57 Ark. 541, an indorser on seven promissory notes commenced suit against the maker of the notes, and sued out an order of attachment for the purpose of securing for himself indemnity, and caused the property of the defendant to be attached. Creditors of the maker subsequently brought suit against him, and caused the same property to be attached; and afterwards, by complaint filed in the first suit, denied the the validity of the indorser's attachment, and asked that their claim be first satisfied. This court held that the junior attacher had the right to dispute the validity of the first attachment, and to establish the right of his own to precedence, by showing that the first existed without the authority of law.

According to the rule we have stated, which has been followed by this court, a junior attaching creditor cannot controvert the existence of the grounds of a prior attachment. As was said in *First Nat. Bank* v. *Greenwood*, *supra*, "the right to do so is given to the attachment debtors alone, and it is entirely competent for them to abstain from interposing traverses, or to waive the same after they have been interposed." The statute expressly provides: "If judgment is rendered in favor

of the plaintiff, and no affidavit or answer, verified by oath, by the defendant is filed, denying the statements of the affidavit upon which the attachment was issued, or motion made to discharge it, the court shall sustain the attachment." Sand. & H. Dig., sec. 395. In the mere failure to file the controverting affidavit, the defendant commits no fraud upon his creditors. He has the right to prefer his creditors in this manner.

We answer the question propounded in the beginning of this opinion in the negative.

When misrepresentation not fraudulent.

The bill of exceptions filed by appellants shows that evidence was adduced at the trial tending to prove, and that evidence was also adduced tending to disprove, the following statement: "That Rice, Stix & Co. and Bamberger, Bloom & Co., two of the interveners herein, were falsely informed by the First National Bank, after it had prepared its attachment, that C. Tilles & Co. were in solvent circumstances, and that it did not intend to press said C. Tilles & Co. for the debt due it, and that such representations were made in order to gain precedence of said interveners in the order of attachment; that said representations, if made, were false; that, by reason of said representations, said interveners granted C. Tilles & Co. extension upon their debts then due, which occurred after the bank attachment was prepared, and its attorneys were under instruction to file the suit and cause the attachment to issue." Upon this evidence, appellants asked the court to instruct the jury that, if this statement were true, the attachment by the bank was fraudulent as to the creditors misled by the representations. But the court refused to give the instruction, and this is assigned for error. The action of the court in this respect was correct. The bank was under no obligation to indicate to appellants what course it would pursue as to its debtor. It might not have been prudent, but, on the contrary, against its interest,

to inform them. They had no right to rely upon its representations, and it was their own folly to have done so. *Bardwell* v. *Perry*, 19 Vt. 292, 302. The evidence clearly shows that, if they did, they were not injured thereby. They were then too far outstripped in the race of diligence to reasonably hope to overtake their competitor.

Judgment affirmed.

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* RUSSELL.

Opinion delivered March 21, 1896.

STOCK-KILLING CASE—KEEPING A LOOKOUT.—Under the act of April 8, 1891, declaring it the duty of all persons running trains to keep a constant lookout, and providing that railway companies shall be liable "if any person or property shall be killed or injured by the neglect of any employees of any railroad to keep such lookout," a railway company is not liable for cattle killed by a train where the engineer was on the lookout, but the fireman was not, if the engineer was so situated that he could have seen the cattle as well as the fireman.

Appeal from Columbia Circuit Court.

CHARLES W. SMITH, Judge.

STATEMENT BY THE COURT.

Appellees filed their complaint, containing thirty-nine paragraphs, in each of which they alleged the negligent killing of certain live-stock, giving the description and value of each animal killed, and the respective date of the killing. They alleged a failure to comply with sec. 6350, Sand. & H. Dig., and asked for double damages. Motions were made to make more specific and to strike, but these have not been urged here. The answer was a denial of all the material

allegations, admitted the killing of certain stock, but alleged that said killing was unavoidable, and set up contributory negligence. The trial resulted in a verdict for twenty-five hundred dollars, and judgment was entered accordingly, which we are asked to reverse.

Sam H. West and *Gaughan & Sifford*, for appellant.

1. The verdict is excessive. The testimony did not warrant double damages. 45 Ark. 295; 57 *id.* 327; 54 Fed. 301.

2. When stock are found dead on a railroad track, there is no presumption that the death was caused by a train unless it be proved that the animal was killed. If found off the track, there is no presumption that it was killed by a train, though its appearance may indicate that it was killed. 60 Ark. 187; 56 *id.* 551; 42 *id.* 126; 14 S. W. 1068.

3. It was error to refuse appellant's second instruction. 57 Ark. 192 does not sustain the view of the lower court. It is not made the duty of *both* the engineer and fireman at the same time to keep a constant lookout. 75 Ala. 466. The failure to keep a constant lookout cannot be the basis of actionable negligence unless it causes the injury. Prior to the act of 1891, the duty which a railroad owed to the owner of stock was to use *ordinary care*, after the stock were discovered, to avoid injuring them. 36 Ark. 607; 37 *id.* 592; 39 *id.* 413; 40 *id.* 161; 48 *id.* 366; 52 *id.* 162. The degree of care has not been added to by the statute. The only additional duty is that those running the train shall keep a lookout. 8 So. 793. In this case a lookout was kept, and the stock were seen as soon as they came within the range of the headlight, and then everything possible was done to avoid the injury. The value of these five head of stock was $450, and plaintiff sues for $900. The judgment is at least excessive to this amount.

Scott & Jones, for appellees.

1. There is ample proof to sustain a much larger verdict.

2. It was not error to refuse the second instruction. 57 Ark. 192. The instruction uses the word *careful* lookout while the statute requires a *constant* lookout to be kept. 2 How. (U. S.) 376.

3. By statute, the burden of showing a constant lookout is upon the railroad company. Sand. & H. Dig., sec. 6207.

WOOD, J., (after stating the facts.) The only question we find it necessary to discuss is presented by the court's refusing to give the following asked by the appellant: "No. 2. The jury are instructed that while it is the duty of a railroad company, to the owner of stock which may have come upon its track without negligence on the part of the owner, that the employees in charge of its trains shall keep a lookout for the purposes of discovering said stock, and, after discovery, that said employees use all proper and available means to prevent the striking of said stock, still, it is not required that both the fireman and engineer in charge of a train, both at the same time, keep a constant lookout; and if the jury find that any of plaintiff's stock sued for in this action were, without plaintiff's negligence, on defendant's railroad, and were killed by its trains, and that the engineer in charge of the train was keeping a careful lookout for stock, and that he discovered said stock as soon as the light from the headlight of the engine would permit, and that, after discovering said stock, the engineer used all the means at his command to prevent the killing or striking said stock, then, as to such stock, your verdict should be for defendant, and it is not necessary that said stock be posted,"—to which refusal the appellant at the time excepted.

It was in proof that one of the engineers of appellant killed three mules and two horses of appellees, worth four hundred and fifty dollars, by running an engine over same. It was a level, straight track where the injury occurred. The engineer was looking ahead, and says he saw the stock as soon as the light would shine on them, so that he could see what they were. By the light from the engine, he could see a little over two hundred or two hundred and fifty feet. The animals, he supposed, were about two hundred feet in front when he saw them on the track. It was impossible to prevent striking them after he saw them. He stopped the train as soon as it was possible to do so. He did not have time, after attempting to stop, to blow the whistle or ring the bell to scare stock off the track. The headlight on the engine cast its light as far ahead as those in general use. This evidence was sufficient to entitle the appellants to the instruction asked.

Under the statute (Sand. & H. Dig., sec. 6207), it is the duty of railroads to keep a *constant* lookout for persons and property upon their tracks. Before the passage of this act, it was not negligence for railroads to fail to keep a lookout for persons on their tracks, and from the time of the decision in *Memphis & L. R. R. Co.* v. *Kerr*, 52 Ark. 162, in May, 1889, to the passage of the act of April 8, 1891, it was not negligence for railroads to keep a lookout for live stock upon their tracks. By that act (1891), the duty of keeping a constant lookout was enjoined as to both persons and property, upon their tracks; and a failure to perform that duty, resulting in injury to another, is negligence. The act does not designate who of the employees are to keep this constant lookout. A literal construction of it would impose that duty upon every employee on trains running in this state; for it says: "It is the duty of all persons run-

ning trains in this state, etc., to keep a constant lookout; * * and if any person or property shall be killed or injured by the neglect of *any employees* of any railroad to keep such lookout," etc. But this would be impracticable and nonsensical. We must give the statute a reasonable construction, so as to carry out the evident design of the legislature in the protection of persons and property, and the prevention of accidents which might be avoided by compliance with its provisions. A *constant lookout* must be kept, and it is but reasonable to suppose that it was intended that this lookout should be kept by the engineer and fireman, as they are placed in a position on the engine where only a lookout would be available and effectual to accomplish the purpose intended. If not kept by them, it would have to be by some one similarly situated. While a constant lookout is required, it certainly was not intended that both the engineer and fireman should at the same time be keeping such a lookout, unless the circumstances were such as to show that it was necessary in order to avoid striking persons or property upon the track. Where the track is straight and level, and objects could be seen as well by the one as the other, it would be useless to require both to be looking out at the same time. Such, it appears from the testimony of the witnesses set out above, was the case here. There was no curve or embankment, and no obstruction to interrupt the vision of the engineer. And it does not appear that the stock came up from the fireman's side, but that they were on the track, and the engineer discovered them "as soon as the light shown upon them, so that he could see what they were, and he could see no object on the track further than the light shone."

The court gave the following on behalf of the appellees: "If the jury find from the evidence that, at

the time of the commission of the injuries complained of, any of the stock alleged and proved to have been killed or injured came upon defendant's railway track upon the fireman's side of the engine where the engineer, from his post or lookout, could not reasonably observe the same, then it is not sufficient for the defendant to show that said engineer performed his whole duty, as it was also at that time the duty of the fireman to have kept a lookout from his side; and the burden of proving that the fireman did keep such lookout is upon the defendant." There was proof to justify this instruction, and the court properly gave it. It should also have given the second asked by appellants, *supra*, to meet the conditions presented by the proof, where it was not necessary to show that the fireman was also keeping a lookout. The court, in another instruction, had told the jury that the statute required a "*constant lookout.*" So that the second, *supra*, could not be said to be defective because, in the first part of it, the word "*constant*" was omitted, and because, in the latter part, "careful" was used instead of "constant." Taken in connection with the others, it could not have been misleading. In another respect the instruction was responsive to and necessary to cover that phase of the evidence which tended to show that the killing of these five animals, as charged in the twenty-first count of the complaint, was an unavoidable accident. The failure to give the second instruction is the only reversible error we find in the record, and that is only applicable to the three mules and two horses in the twenty-first count of the complaint. The complaint asked, and under the evidence and instructions the jury might have found, double damages. Whether they did or not, as to the twenty-first count, it is impossible for us to say. But to remove all possible prejudice to the appellant, by the

refusal of the above instruction, if the appellees will, within thirty days, enter a remittitur for nine hundred dollars, the judgment will be affirmed; otherwise, it must be reversed, and remanded for new trial.

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TEXARKANA WATER COMPANY v. STATE.

Opinion delivered March 21, 1896.

TAXATION—SUFFICIENCY OF DESCRIPTION.—A description of land on the tax books as "west part S. W. S. W. sec. 20, T. 15, range 28, 30 acres, valuation, $30,000," belonging to the Texarkana Water Co., was insufficient to describe 30 acres belonging to said company, valued at $30,000, not lying in the shape of a parallelogram, and part of it lying outside of the west part of the southwest quarter the southwest quarter mentioned.

TAX TITLE—PURCHASE BY OWNER.—The state's lien on land for taxes cannot be defeated by the owner permitting it to be sold to the state for taxes at a void tax sale, and then purchasing it from the state as land forfeited for taxes.

SALE OF FORFEITED LANDS—TOWN LOTS.—An unplatted tract of land consisting of thirty-one acres, situated within the limits of a city, is a "lot," within Mansf. Dig., sec. 4245, authorizing the sale of lots in towns and cities, forfeited for non-payment of taxes, for the taxes, penalties and costs charged against them.

TAX SALE—PENALTY AND COSTS.—The statutory penalty and costs of sale cannot be charged against land sold for taxes where the sale is void for want of a sufficient description in the assessment of the land.

TAXES—INTEREST.—Taxes are not "debts," within the ordinary meaning of the word, and draw no interest other than the penalty fixed by the statute.

Appeal from Miller Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

The Texarkana Water Company was the owner of a tract of land containing thirty acres lying within the

corporate limits of the town of Texarkana, Ark. A correct description of the lands is as follows, to-wit: Beginning at the southwest corner of section twenty, township fifteen, range twenty-eight west; thence with the west line of said section, 1,320 feet to the north line of S. W. ¼ of S. W. ¼ of said section; thence east, with said north line, 1,110 feet; thence south 825 feet, more or less, to the west line of right-of-way of the St. Louis, Iron Mountain & Southern Railway; thence southwest, with said railroad right-of-way, 670 feet, more or less, to the south line of said section; thence west 660 feet to place of beginning,—containing 31 acres, excepting and reserving a lot of ground 160x175 feet deeded by H. M. Beidler to Polhanner et al., and a lot 40x140 feet conveyed by Beidler to Chiswell Cochran. Upon said land was located the engine house of the company, and other improvements and fixtures with which to operate the waterworks of the company. The land was valued and assessed for taxation for the year 1890 at the sum of thirty thousand dollars. The taxes levied upon the property for 1890 due and payable in the year 1891,—state, county, municipal and school,—amounted in the aggregate to six hundred dollars. The company failed to pay these taxes, and it was sold to the state for taxes. In addition to the taxes, the penalty and costs of the tax sale amounted to one hundred and fifty dollars. The land was not redeemed, and, after the expiration of two years from the date of the forfeiture, the clerk of Miller county, in which the land lay, certified the land to the state land commissioner as unredeemed land. The Texarkana Water Company did not pay taxes on said land for either of the years 1890, 1891 or 1892; but, after the time for redemption had expired, said company purchased said land from the state land commissioner at the price of a dollar and a quarter per acre, amounting in all to $37.50.

This suit was brought by the attorney general in the name of the state, under secs. 6724 and 6732 of Sand. & H. Dig., to collect the taxes which he alleged were due and unpaid upon said land for the years 1890, 1891 and 1892. It was alleged that the taxes (state, county, municipal, and school) due on said land for said years amounted, with penalty and costs of sale, to $1950.60; that the sale to the state was void by reason of insufficient description of the land in the proceedings upon which the sale of the land to the state was based; and that the defendant acquired no title by the purchase from the state land commissioner. The complaint prayed that the taxes be declared a lien on the land, and the same ordered sold for the satisfaction thereof. The answer of the defendant denied the material allegations of the complaint; admits that it purchased the west part of S. W. ¼ of S. W. ¼ of said section 20 from the State of Arkansas, the same being 30 acres in area, and paid $37.50, for the same, and received a deed conveying to it all the right, title and interest of plaintiff thereto, and alleging that plaintiff had never tendered or paid back the amount named, and was estopped to maintain this suit against said 30 acres, and further alleging that the land purchased from the state is not the "same identical land" purchased by the defendant from Beidler, and described in the complaint.

The cause was heard upon the complaint and answer and exhibits thereto, the depositions of witnesses, together with the following records put in evidence, to-wit: "The judgment of the Miller circuit court rendered on appeal by defendant from the board of equalization for Miller county, fixing by said judgment the valuation of the property in question for taxation to be $30,000 for the year 1889; the assessment of the land, as shown by the assessor's book of Miller county for the year 1890, to be $30,000; that part of the tax books showing exten-

sion of said land on tax books for the year 1890; the record of delinquent tax sales for the year 1890;" and certain other records and admissions of parties.

The president of the defendant company, whose deposition was read on the hearing, testified that neither the company, nor any one else, had paid the taxes on the land described in the complaint for the years 1890, 1891 and 1892. When asked why the taxes were not paid, he answered: "For the reason that the assessment was exorbitant, and the description of the real estate incorrect."

There was a finding and decree in favor of plaintiff, from which decree an appeal was taken.

Scott & Jones, for appellant.

1. This suit was brought under Sand. & H. Dig., sec. 6724. Such a suit was not embraced under this section, and the demurrer should have been sustained.

2. Taxes are not *debts* against the owner, to be recovered by suit. The remedy is against the land, in the manner prescribed by statute. Cooley on Taxation, p. 113; 2 N. W. 873; 7 Wall. 71; 6 Mass. 40; 26 Vt. 486; 26 N. J. Law, 398.

3. The description was not void for uncertainty. 14 So. 437; 51 N. W. 167. In this case, if the sale was valid, when the sheriff bid in the land for the state for the taxes, penalty and costs, and when afterwards the land was not redeemed, and was certified to the land commissioner, then the taxes became merged in the land. The state purchased the land for the taxes. Sand. & H. Dig., secs. 4565, 4560, 6557, 6589, 6607, 6627, 6633. The state cannot take title to the land, and also claim the taxes were a debt due from the former owner.

4. But if the sale was invalid by reason of irregularity in the assessment, still the defendant, by the

state's deed, became subrogated to all the right, title and interest of the state to the land. 41 Ark. 149.

5. The consideration paid to the state was never repaid or tendered back to defendant. No attempt was made to place the parties "*in statu quo.*" 36 N. Y. 196; 71 *id.* 549; 18 Pac. 723; 18 *id.* 727; 52 Ark. 150; 14 Otto, 636; 47 Ark. 191; 61 Mo. 565; 51 Ark. 294; 31 *id.* 364; 4 So. 868.

L. A. Byrne and *E. B. Kinsworthy*, Attorney General, for appellee.

1. No taxes were paid for the years 1890, 1891, and 1892, and the land was subject to taxation. It is admitted that the state has no action of debt, as taxes are not such a claim as will support such an action at common law. The remedy is statutory, and until the act of April 9, 1891, the proceedings were summary; but by this act the chancery court was given jurisdiction to enforce payment of taxes of corporations by ordinary suits. Sand. & H. Dig., secs 6724 and 6737.

2. The tax deed, by reason of the description, is void on its face; consequently the state acquired no title. 50 Ark. 484; 56 *id.* 172; 59 *id.* 549. And appellant acquired nothing by the deed of the land commissioner. Furthermore, the conduct of appellant was a deliberate and premeditated fraud, and the lower court so found. The state cannot be estopped by these dishonest acts. Bigelow on Estoppel, (4 Ed.) p. 563.

5. The contention that the $37.50 was not refunded is simply a play upon words. The state did not seek to annul the commissioner's deed, for that was a nullity. But the $37.50 was credited on the amount of taxes due.

Sufficiency of description of land on tax books.

RIDDICK, J., (after stating the facts.) We agree with counsel for appellee that the sale of the land in controversy to the state for nonpayment of taxes was

void, because of an insufficient description thereof in the tax proceedings upon which the sale was based. The land was described upon the tax books as follows: "Texarkana Water Co., west part S. W. S. W. sec. 20, T. 15, range 28, 30 acres; valuation, $30,000." The valuation and acreage of the land described is the same as that of the land owned by the Texarkana Water Company, and the intention, no doubt, was to describe the land of such company. But the land owned by the water company was not in the shape of a parallelogram; and, if we could construe the description to mean a tract of land in the shape of a parallelogram taken off of the west side of the forty-acre tract of which it is said to be a part, it would take only a portion of the land of the water company, and include land of others upon which taxes have been paid. If the land of the company lay in the shape of such a parallelogram, the description might be sufficient; but, as it does not, the case on this point is controlled by the case of *Schattler* v. *Cassinelli*, 56 Ark. 177. The circumstances in this case, as in that, show that there was no intention to sell a tract of land in shape of a parallelogram.

If we treat the description in the tax proceeding as meaning a tract of thirty acres belonging to the company in the west part of the S. W. of S. W. of said section 20, the description is still incorrect, for all of appellant's tract of land does not lie in the west part of said S. W. of S. W. of sec. 20. A portion of it lies in the east half of said forty-acre tract. For these reasons, the description was insufficient to identify the land, and the state acquired no title by virtue of the tax sale. *Schattler* v. *Cassinelli*, 56 Ark. 175; *Hershey* v. *Thompson*, 50 Ark. 484; *Cooper* v. *Lee*, 59 *id.* 460; *Tatum* v. *Croom*, 60 Ark. 489; *Olsen* v. *Bagley*, 37 Pac. Rep. 739.

Effect of purchase of land at tax sale by owner.

The tax sale to the state being void, it follows that the lien held by the state upon the land for taxes was

not in any way affected by this void sale. Did the appellant secure a release of the taxes by the subsequent purchase of the land from the state? It is a rule of law, well established, that one cannot acquire title by a purchase of his own land at a tax sale. To permit him to do so would enable him to take advantage of, and reap a benefit from, his own neglect of legal duty. He should pay the taxes. If he neglects to do so, and his lands are offered at public sale for the payment of such taxes, he can gain no advantage by becoming a bidder at such sale. The money that he pays for the land is simply treated as a payment upon the taxes that he should have paid before the sale. *Jacks* v. *Dyer*, 31 Ark. 334; *Guynn* v. *McCauley*, 32 *id.* 97; *Pleasants* v. *Scott*, 21 *id.* 370; *Oswald* v. *Wolf*, 129 Ill. 200; Black on Tax Titles (2d Ed.), secs. 273 and 274. It seems that the reason of the rule extends to this case. It was the duty of appellant company to pay the taxes upon its land. It failed to do so, and the land was sold to the state in payment of the taxes. This sale was void. The state gained nothing by it, and the lien for taxes still remained upon the land. It would be against public policy to allow appellant to defeat this lien, which existed to the extent of nearly two thousand dollars, by a payment of $37.50 to the state land commissioner in purchase of his land. The state had no title, but only a lien for taxes; and neither the state land commissioner nor any other officer of the state had power to release appellants from such lien for less than the full amount of the taxes due upon the land. Appellant cannot be allowed to avoid the payment of taxes due on its land by permitting such land to sell at a tax sale that it knows is void, and afterwards purchasing the same from the state land commissioner.

Mode of selling forfeited town lots.

This would be true even if it be conceded that this land came within the statute authorizing the commissioner to sell lands forfeited to the state for the non-payment of taxes at one dollar and a quarter per acre. But that provision has reference to lands other than lots in towns and cities. Lots in towns and cities that have been forfeited to the state for non-payment of taxes are subject to sale for the taxes, penalty and costs charged against said lots. Sec. 4245, Mansf. Dig.* The act of Feb. 24th, 1885, directed the commissioner of state lands to sell at public sale any town lots forfeited to the state prior to that act; but it does not change the above section as to lots in cities of the first class, nor as to town lots forfeited to the state subsequent to the date of that act. The land of appellant lies within the corporate limits of the city of Texarkana, and is a city lot, within the meaning of the section above referred to; the word "lot" in that section including any parcel or piece of land lying in a town or city.

For this reason, even had the tax sale been valid, the appellant could not hold the land under its purchase from the commissioner of state lands, and refuse to pay the taxes, penalty and costs charged against it, for the commissioner had no authority to sell the land for less than the taxes, penalty, and costs. His action in that regard was without authority of law, and was caused, no doubt, by a mistake as to the location of the lands.

We conclude that the state is in no way estopped from enforcing her lien for taxes against the land in question.

As to penalty and costs in tax sales.

In addition to the taxes, the court, in its decree, charged against the land of appellant the penalty and costs of the tax sale and interest upon the taxes from the time the same was due. As the description of the

* This section seems to have been omitted from Sand. & H. Digest.

land extended upon the tax books was insufficient, the land should not be charged with this penalty. Appellant is not to blame for failing to pay taxes upon land which was not correctly described upon the books of the tax collector. Neither was it the fault of the appellant that the tax sale was void, and the costs of this void sale should not be charged against the land. Taxes are not "debts," within the ordinary meaning of the term, and bear no interest other than the penalty fixed by the statute; and this penalty cannot attach when the description of the land is insufficient to identify it. *Shaw* v. *Peckett*, 26 Vt. 482; *Cave* v. *Houston*, 65 Tex. 619; Cooley on Taxation, (2 Ed.) 17; Black on Tax Titles, sec. 151.

Interest not recoverable.

To the extent of the penalty, interest and costs charged against the land of appellant, the decree must be modified; in other respects, it is affirmed. The cause is remanded, with an order that the decree be modified and entered in accordance with this opinion.

Bunn, C. J. dissents.

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PINE BLUFF WATER & LIGHT COMPANY *v.* CITY OF PINE BLUFF.

Opinion delivered March 28, 1896.

CERTIORARI—SCOPE AT COMMON LAW.—The action of officers or public bodies, of a purely legislative, executive, or administrative nature, is not reviewable on certiorari at common law, although it involves the exercise of discretion; but it is not essential that the officers or bodies to whom it lies shall constitute a court, or that their proceedings should be strictly and technically "judicial," it being sufficient if they are *quasi* judicial.

SAME—SCOPE UNDER THE CODE.—The scope of the writ of certiorari at common law, which is limited to the review of judicial or *quasi* judicial proceedings, is not enlarged by Sand. & H. Dig., sec. 1125, authorizing circuit courts "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."

SAME—VALIDITY OF CITY ORDINANCE.—An ordinance of a city requiring water companies and others desiring to take up the pavements of any street to deposit a certain sum before doing so, and to pay the city engineer for superintending the work, is purely legislative, and not reviewable on certiorari.

Appeal from Jefferson Circuit Court.

JOHM M. ELLIOTT, Judge.

The Pine Bluff Water & Light Company filed a petition for certiorari to quash an ordinance of the city of Pine Bluff. The petition alleged that the plaintiff was, under an ordinance of January 17, 1887, granted a franchise to lay its mains in the city of Pine Bluff, with authority to repair and make connections of the same; that it is necessary to excavate the street for the purpose of making repairs and connections; that the company built its works under the franchise granted it by the city, and continued to make repairs and connections, excavating the streets as required, but that, on the 21st of November, 1891, the city, in violation of the plaintiff's franchise, passed an ordinance providing that, before making any excavation, the plaintiff should make a deposit with the city of $50 for each 50 linear feet, or fraction thereof, and that the replacing of the street should be done under the supervision of an engineer designated by the board of improvements, who should be paid 30 cents per hour by the party making the excavation; that this ordinance is wholly unnecessary, and imposes a heavy tax upon the plaintiff, in violation of its franchise; that it is unreasonable and oppressive. It therefore prays that the ordinance be brought up and quashed.

The city answered, denying that the ordinance was unreasonable, and alleging that it was a proper exercise of the city's police power.

The writ was refused, and the plaintiff filed a motion for a new trial, and appealed.

The provisions of the ordinance complained of, so far as material to this inquiry, were as follows:

"Section 1. That any person who shall wilfully injure, destroy, dig up, remove, or displace the material of any paved street or alley, except in pursuance of a permit, as hereinafter provided, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $25.

"Sec. 2. Any licensed plumber or drain layer who shall desire to take up or displace any part of the pavement of any paved street or alley, for the purpose of making or repairing any plumbing work or laying any drain under the surface thereof, and any water or gas company having water or gas mains or pipes laid under such pavement by authority of any ordinance of this city, and who may desire to repair, renew, or alter the same, shall apply to the board of improvement of the district in which such pavement is situated for a permit to take up or displace the pavement, and shall deposit with said board the sum of $50 in lawful currency of the United States for each 50 linear feet of the proposed excavation, or fraction thereof, whereupon the board shall issue to the applicant a permit to make the proposed removal or excavation, the extent and location of which shall be fully described therein."

* * * * * * *

Section 5 provides, in substance, that the work must be superintended by an engineer designated by the board of improvements, and be paid at the rate of 30 cents per hour by the person making the excavation.

"Sec. 6. When the work shall have been completed according to the preceding sections, the engineer shall certify the fact to the board of improvement after waiting a sufficient time for the work to settle, and thereupon they shall return to the person making the deposit the money deposited with them as aforesaid, provided that said board may withhold said money until all rubbish, waste and material shall have been removed from the street by the person doing the work in which the same was done."

Wooldridge & Bridges and *Rose, Hemingway & Rose*, for appellant.

1. *Certiorari* lies to quash a void city ordinance. It is true cases can be found which have asserted that *certiorari* will not lie except to quash a void *judicial* order or judgment, but an examination of the books shows that it has never been thus limited in actual practice. Bac. Abr. title, "Certiorari;" 8 Pick. 226; 1 Salk. 144; 1 Ld. Raym. 580; 2 Caines, 179; 16 Johns. 8; 7 Tenn. Rep. 363; 16 Johns. 49; 20 *id.* 209; 10 Mod. 159; 15 Barb. 471; 12 N. Y. 412; 26 N. J. L. 49; *id.* 445; 8 Abb. Pr. N. S. 277; 6 Cold. 421; 35 N. J. L. 200; 60 Me. 266; 50 Mo. 134; 47 Cal. 222; 36 Iowa, 9. In the following cases it was held to lie to correct abuses sought to be perpetrated by municipal councils. 2 Dill. Mun. Corp. sec. 926; 1 Met. 122; 2 *id.* 220; T. U. P. Charlt. 31; *id.* 43; 16 Ga. 172; 9 Barb. 542; 6 Wend. 565. The power to award certiorari, not only to inferior courts, but to persons invested by the legislature with power over the property and rights of others, for the purpose of supervising their proceedings, even in cases where they are authorized finally to hear and determine, is conceded in many cases. 20 Johns. 430; 27 Mich. 3; 88 Ill. 26; 41 Mich. 647; 10 Ill. App. 343; 53 N. W. 391; 41 Mich. 631; 15 N. Y. Sup. Ct. 56; 1 S. W. 32; 49 N.

J. L. 169; 6 Mackey, 148; 40 Wis. 221; 6 Ill. App. 70; 18 Atl. 1041; 83 Me. 541; 14 S. W. 515; 21 Atl. 412; 36 Ill. App. 90; 31 *id.* 378; 39 N. J. L. 489; 122 Mass. 290; 66 Me. 385; 55 Iowa, 215; 45 N. W. 30; 19 Atl. 332; 79 N. Y. 582; 52 Mich. 540; 42 Hun, 239; 44 *id.* 574; 80 Ala. 287; 28 Atl. 553; *id.* 578; 29 *id.* 163; 38 W. Va. 485; 77 Hun, 182; 27 N. Y. Sup. 881; 58 N. W. 1015; 25 N. Y. Sup. 322; *id.* 873; 138 Pa. St. 321; 21 Atl. 347; 55 N. W. 324; 27 Pac. 474; 19 D. C. R. 327; 13 Atl. 5; 37 N. W. 809; 23 Atl. 281; *id.* 284; 28 Pac. 416; 25 N. E. 995; 45 N. W. 899. This view has been sanctioned by the U. S. Supreme Court, 5 Wall. 413. See also Harris on Certiorari, sec. 17.

2. But our statute seems to settle the matter. Sand. & H. Dig., secs. 1125, 1127.

Crawford & Hudson, for appellee.

1. Certiorari did not lie at common law to quash a void city ordinance. Bac. Abr., "Certiorari." With one exception, the writ is confined to a review of a *judicial* nature. Harris, Certiorari, secs. 17, 273; 57 Iowa, 256; 2 Hill, 14; *id.* 9; 1 Beach, Pub. Corp. sec. 537; Throop, Pub. Off. secs. 533, 800, 802; 68 N. Y. 403, 409; 43 Barb. 232; 142 N. Y. 228; 25 N. E. 995, 997; 28 Atl. 347; 54 Wis. 150; 18 Nev. 438; 61 Wis. 494; 37 N. E. 240.

2. The *legislative* and *ministerial* acts of a city council are not, and the *judicial* acts are, reviewable on certiorari. 37 N. E. 240; 28 Atl. 578; 8 Pick. (Mass.), 218; 16 Johns. 49; 50 Mo. 134; 36 Ia. 9; 122 Mass. 290; 79 N. Y. 582; 28 Atl. 553; 29 *Id.* 163; 21 *id.* 367; 25 N. E. 895. The cases cited to support 2 Dill. on Mun. Corp. sec. 926 (except perhaps the New Jersey cases) are cases which hold that only judicial or quasi judicial matters are receivable on certiorari.

3. Sec. 1125, Sand. & H. Dig., does not extend the office of the writ.

BATTLE, J. Does the writ of *certiorari* lie to review the ordinance of the city of Pine Bluff which is in question in this proceeding?

Scope of certiorari at common law.

At common law, the writ lies only to review the judicial action of inferior courts, or of public officers or bodies. When the action of the officers or public bodies is purely legislative, executive, and administrative, although it involves the exercise of discretion, it is not reviewable on *certiorari.* * But it is not essential that the officers or bodies to whom it lies shall constitute a court, or that their proceedings, to be reviewable by the writ, should be strictly and technically "judicial," in the sense that word is used when applied to courts. It is sufficient if they are what is termed "quasi judicial." It has been held that it lies to review the proceedings of officers and bodies, because they are quasi judicial, in the following cases: of supervisors, commissioners, and city councils in opening, widening, altering, or discontinuing public streets and highways (*Parks* v. *Boston*, 8 Pick. 226; *Tucker* v. *Rankin*, 15 Barb. 471); assessments for sewers or other improvements, (*Attorney General* v. *Northampton*, 143 Mass. 589); "of school trustees (*Miller* v. *Trustees*, 88 Ill. 26; *State* v. *Whitford*, 54 Wis. 150); of a town board in removing an assessor (*Merrick* v. *Arbela*, 41 Mich. 630); of a city council removing a city officer (*Mayor* v. *Shaw*, 16 Ga. 172; *People* v. *Nichols*, 79 N. Y. 582; *People* v. *Hayden*, 27 N. Y. Sup. 881); of a city council in grant-

* *People* v. *Walter*, 68 N. Y. 403; *People* v. *Mayor*, 2 Hill, 9; *In re Mount Morris Square*, *id.* 14, *State* v. *Kemen*, 61 Wis. 494; *People* v. *Board*, 43 Barb. 232; *People* v. *Board Com'rs, etc., of New York.* 97 N. Y. 37; *People* v. *Board of Sup'rs of Queens County* (N. Y.), 30 N. E. Rep. 488; *Whittaker* v. *Venice* (Ill.), 37 N. E. Rep. 240; *Drainage Com'rs* v. *Giffin* (Ill.), 25 N. E. Rep. 995; *Esmeralda Co.* v. *District Court*, 18 Nev. 438; *People* v. *Martin*, 142 N. Y. 228; *State* v. *Board of Aldermen* (R. I.), 28 Atl. 347; 2 Dillon, Mun. Corp. (4 Ed.), sec. 927; 2 Spelling, Extraordinary Relief, sec. 1954.

ing a ferry license (*Ex parte* Fay, 15 Pick. 243); of a board of supervisors in ordering an election to re-locate a county seat (*Herrick* v. *Cerpenter*, 6 N. W. Rep. 574); of a board of supervisors in creating the office of clerk of said board, and raising certain salaries which had been fixed by statute (*Robinson* v. *Supervisors*, 16 Cal. 208); of proceedings of directors of a township directing their secretary not to certify a tax that had been voted (*Smith* v. *Powell*, 55 Iowa 215); of proceedings of commissioners in granting or refusing to grant a liquor license (*People* v. *Commissioners*, 25 N. Y. Sup. 322; *Dexter* v. *Town Council* (R. I.), 21 Atl. Rep. 347); and of proceedings of a board of equalization (*Orr* v. *State Board*, 28 Pac. Rep. 416). There are other proceedings of officers and public bodies which it lies to review, because they are quasi judicial, but those mentioned are sufficient to illustrate the rule.

Scope of the writ under the code.

But it is insisted that the ordinance before us is reviewable on *certiorari*, under section 1125 of Sand. & H. Dig. That section 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." Literally construed, this section gives to circuit courts the power to correct, on *certiorari*, every erroneous act of any and all officers, board of officers, and inferior tribunals, and even to correct all their *void* acts. How this can be done is difficult to comprehend. It is evident it was not intended to be understood in that sense. How, then, can its meaning be determined except by aid of the common law? In *St. L., I. M. & S. Company* v. *Barnes*, 35 Ark. 99, this court held that it did not so enlarge the office 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." In that case the court confined

the writ to its office as defined by the common law. By what process of reasoning it can be limited in that respect, and not in others, I am unable to understand.

The "Code of Practice in Civil Cases" and its amendments, of which this statute is a part, were not intended as an amendment of the system of pleading and practice prevailing at the time of its adoption, but as a substitute for "any case provided for by" it "or inconsistent with its provisions." (Section 857). This being the object of it and its amendments, it is evident that so much of section 1125 of the Digest as we have quoted was not intended to amend the common law by enlarging the office of the writ, but, presumably knowing its office at common law, the legislature adopted it, and made it a part of the code, as it was of the common law pleading and practice, and thereby intended to authorize the circuit courts, by means of it, to review judicial and quasi judicial proceedings of officers, boards of officers, and inferior tribunals, and no other.

Validity of city ordinance.

The ordinance under consideration is purely legislative, and is not reviewable on *certiorari*.

The judgment of the circuit court denying the writ is affirmed.

JONES *v.* MELINDY.

Opinion delivered March 28, 1896.

APPEAL—EXCEPTION.—An exception merely stating that defendant objected to the reading of a certain mortgage, without specifying the grounds of exception, is too general and indefinite for consideration on appeal.

MORTGAGE—PROOF OF RECORD.—The record of a chattel mortgage of another state cannot be proved by the testimony of the register of deeds in whose office it is filed, but may be proved by an authenticated copy, as required by Rev. Stat. U. S. sec. 906, or by an examined copy duly made and sworn to by any competent witness.

APPEAL — BRINGING UP THE EVIDENCE. — *An* instrument cannot be found on appeal to have been read in evidence, where there is no mention of it in the bill of exceptions, though it is sent up in response to a writ of *certiorari*, and the clerk, in his return thereto, certifies that it was filed and read in the case.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

STATEMENT BY THE COURT.

The appellee recovered a judgment in replevin for the possession of two horses, to reverse which the appellant has brought the case to this court. The appellee (the plaintiff below) relied upon a mortgage executed to him upon the horses in the state of Kansas, and read in evidence what purported to be the original mortgage, over the objection of the appellant, to which he excepted in general terms only. The appellee was permitted, over the objection of the appellant, to prove by J. R. Brown that he was register of deeds of Sedgwick county, Kansas; that the instrument read in evidence was a chattel mortgage given by E. H. Ward to N. H. Melindy for $466.88, dated the 5th day of March, 1889, and filed for record March 7th, 1889, at 2:55 p. m., and renewed the 18th day of February, 1890, at 9 o'clock a. m., and entered in volume R.; that a true copy of this instrument is recorded in the office of the register of deeds of Sedgwick county, Kansas; and that he knew it to be a true copy, because he had compared it with the original chattel mortgage. The appellant excepted to the ruling of the court in admitting this evidence of Brown.

A writ of certiorari was issued by the clerk of this court, upon the application of the appellee, to bring up a copy of said mortgage, duly proved and certified according to law, which the appellee alleged in his petition for certiorari was filed and read in evidence in the court below, and which he says in his brief was filed

and read as evidence in the case, and which the clerk of the Jefferson circuit court certifies, in his return in answer to the writ of certiorari, was filed and read in the case. But we can find no mention of this in the bill of exceptions, nor any reference whatever to this authenticated copy.

In the exception by the appellant to the ruling of the court in permitting the mortgage to be read in evidence, it is stated that "the defendant objected to the reading of the mortgage from Ward to Melindy," without any specification of the grounds of his objection. His objection was overruled, and he excepted. The laws of Kansas in relation to chattel mortgages were proved and read in evidence, the 9th, 10th, 11th and 12th sections of which are as follows:

"Sec. 9. Every mortgage, or conveyance intended to operate as a mortgage, of personal property which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be forthwith deposited in the office of the register of deeds, in the county where the property shall be situated, or, if the mortgagor be a resident of this state, then in the county of which he shall at the time be a resident.

"Sec. 10. Upon the receipt of any such instrument, the register shall endorse upon the back thereof the time of receiving it, and shall file the same in his office, to be kept there for the inspection of all persons interested.

"Sec. 11. Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless, within thirty days next preceding the

expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent, or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property, at the time last aforesaid, claimed by virtue of such mortgage, and, if the said mortgage is to secure the payment of money, the amount yet due and unpaid. Such affidavit shall be attached to and filed with the instrument or copy on file to which it relates.

"Sec. 12. If such affidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon, it shall be as valid to continue in effect such mortgage as if the same had been filed within the period above provided."

The defendant's motion for a new trial, so far as it relates to the introduction of evidence, is as follows: "2. That the court erred in refusing to sustain his objections to certain parts of the evidence, both oral and depositions herein, and in admitting improper and illegal evidence to go to the jury at the trial thereof, being all the evidence objected to at the trial, as shown from the bill of exceptions."

The second instruction given by the court at plaintiff's request was as follows: "2. If the jury believe from the evidence that the mortgage was properly renewed within one year previous to the institution of this suit, then there was no necessity for any further renewal, the right of the parties being fixed by the condition of the mortgage at the time of the institution of this suit."

N. T. White, for appellant.

1. The mortgage was not admissible in evidence. It does not show the indorsement of the register of deeds, nor that it was ever recorded. Laws of Kansas, sec. 9, ch. 68, art. 2, etc.

2. The laws of another state can only be proved in the mode provided by the act of Congress. Mansf. Dig., pp. 156, 157; Rev. Stat. U. S., secs. 905–6; 7 Ark. 369; 14 *id.* 672; 1 Am. & Eng. Enc. Law, pp. 1022, 1023–4 and cases cited. It was error to admit the testimony of Brown.

3. The second instruction was erroneous. Laws of Kansas, sec. 11, ch. 68, art. 2. At the time of trial, Melindy had no right to the possession of the property, as he had failed to keep his mortgage alive by *annually* renewing it, as required by the laws of Kansas. Cobbey on Replevin, sec. 97; 64 Miss. 204; 59 *id.* 54.

4. The certified copy of the mortgage was not introduced in evidence. The mortgage was not set out as part of the pleadings, nor was it the foundation of the suit, and hence must be brought into the record by bill of exceptions, and this was not done. 33 Ark. 543; 38 *id.* 134; 52 Ark. 478.

H. K. White, *S. M. Taylor* and *Crawford & Hudson*, for appellee.

1. The objections to the evidence are not saved properly, and will not be noticed. They were too general. 39 Ark. 420. The objections should have been specifically pointed out. 58 Ark. 353; 60 *id.* 333; Elliott, App. Pro. 726.

2. But if it was error to allow the original mortgage to read in evidence, it was harmless, as a duly certified copy, authenticated under the act of congress, was properly introduced. Endlich, Int. St., sec. 316; 1 Gr. Ev., sec. 489; *id.* sec. 485; Sand. & H. Dig., secs. 721–2, 5103. This court will not reverse for error in the admission of evidence if there be other evidence to warrant the verdict. 15 Ark. 395; 58 *id.* 374.

3. The second instruction is correct. If the mortgage was in full force when the suit was begun, plaintiff

was entitled to recover. The rights of the parties were fixed by the condition of the mortgage at the time of purchase. 13 Wis. 498; 14 N. Y. 71; 23 N. Y. 539, 550; Jones on Ch. Mortg., sec. 293.

4. If a mortgage is sufficient to give title to property in another state, suit can be successfully maintained on it here, without recording the instrument in this state. 15 Ark. 235; 17 *id.* 154.

Sufficiency of exception.

HUGHES, J. (after stating the facts). The exception of the appellant to the court's ruling permitting the original mortgage from Ward to Melindy to be read in evidence was too general and indefinite. As was said in *Vaughan* v. *The State*, "appellant should have been ingenuous and fair to the court, 'laying his finger' upon the particular point in the court below which he is insisting upon here." 58 Ark. 353; see also *Railway Co.* v. *Murphy*, 60 Ark. 333; Elliott on Appellate Proceedings, 726.

Proving record of another state.

It was not competent to prove by Brown, the register of deeds, the records of his office. They might have been shown by a certified copy thereof authenticated as required by the laws of congress, or by an examined copy duly made and sworn to by any competent witness. The best evidence must be resorted to, and secondary evidence is not admissible, until it is shown that the primary evidence cannot be obtained.

The record relating to this mortgage should have been authenticated as required by section 906 of the Revised Statutes of the United States (which is familiar to the bar) before it could be read in evidence, and not having been so authenticated, and there being no examined copy made and sworn to as required by law, it was error to admit it, to show a lien in favor of the plaintiffs upon, or a right to possession of, the property in controversy by the plaintiff, under the laws of Kansas.

Bringing up evidence on appeal.

There being no showing or mention in the bill of exceptions that the duly certified copy sent up in response to the writ of *certiorari* was filed or read as evidence in the case, we cannot find that it was read as evidence on the trial, as we must look alone to the bill of exceptions for the evidence in the case. If it had mentioned that this authenticated copy was read in evidence, the fact that it had been left out would make no difference, after it had been supplied by *certiorari*. If it was read as evidence in the trial of the case, the bill of exceptions might have been amended to show that fact.

We find no error in the instructions of the court.

There was no evidence to support the findings below. Wherefore the judgment is reversed, and the cause is remanded for a new trial.

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FLY *v.* GRIEB'S ADMINISTRATOR.

Opinion delivered March 28, 1896.

JUSTICE OF THE PEACE—JURISDICTIONAL AMOUNT.—The jurisdiction of a justice of the peace over a controversy between a plaintiff in attachment and an intervener is determined by the amount in controversy between the plaintiff and defendant in the attachment suit, and not by the value of the property attached.

ATTACHMENT—JUDGMENT.—The judgment for the intervener in an attachment suit should be for costs and the proceeds of the property in the sheriff's hands, and not for the property or its value, where the attached property had been sold, and the proceeds delivered to the sheriff.

Appeal from Saint Francis Circuit Court.

GRANT GREEN, JR., Judge.

N. W. Norton, for appellant.

1. The circuit court had no jurisdiction, on appeal from a justice, to render judgment for $950, or for posses-

sion of property of that value. A motion for new trial was not necessary. 31 S. W. 740.

2. Had there been jurisdiction, it was error to render judgment for the value of the goods which were not in possession of appellants. 33 Ark. 31; 34 *id.* 399. The agreement in the justice's court could add nothing to that court's jurisdiction.

J. W. House, for appellee.

1. The question of jurisdiction was waived in the court below. In an attachment suit before a justice, the amount in controversy determines the jurisdiction, and not the value of the property attached. 39 Iowa, 537; 30 La. An. 426. If the justice had jurisdiction, Grieb had the right to interplead for the property claimed by him. Sand. & H. Dig., secs. 372, 374. And the justice had power to investigate his claim, and if the title was found in him, he should have made an order to deliver the attached property to him.

2. While it is true, as a general proposition, that, if the justice had no jurisdiction, the circuit court could acquire none on appeal, yet, if the circuit court would have had jurisdiction, had the action been commenced there originally, it may retain the cause, and acquire jurisdiction by consent; or, if a trial is had, and the question of jurisdiction not raised, consent will be presumed, and it is too late to raise the question here for the first time. Hawes on Jurisdiction, sec. 34; 25 Minn. 128; 3 Gilman (Ill.), 594; 34 Iowa, 243; 18 Ill. 29; 32 Conn. 199; 4 McCord (S. C.), 79; Hawes on Jurisdiction, sec. 11; 25 Minn. 125; 39 Iowa, 537; 60 Ark. 26.

3. If the court erred in rendering judgment for the value of the property, and it becomes necessary to reverse the judgment, the cause should be remanded, with directions to render judgment for the delivery of the property.

N. W. Norton, in reply.

It is decided in 31 S. W. 740 that the court should not order the return of the property which has been sold. This court will not overlook the question of jurisdiction, even if not raised at all. 45 Ark. 346. See also, 44 Ark. 377.

WOOD, J. Five suits were begun before a justice of the peace, each for an amount within the justice's jurisdiction. Writs of attachment were issued in each case, and all the writs were levied upon property of the defendant in the attachment. Appellee filed his interplea in the cause in which appellants were plaintiffs, but he gave no bond; and the attached property was sold by order of the court, and the proceeds of the sale were held by the officer. There was a written agreement upon the part of counsel that the interplea filed in the one cause should be considered as filed in each of the causes, respectively; and the trial and judgment in one case on the interplea was to apply to and be the trial and judgment in each of the other cases. The trial before the magistrate resulted in a judgment against the interpleader. He appealed, and in the circuit court the jury returned the following verdict: "We, the jury, find for the interpleader, and fix the value of the goods at the sum of nine hundred and fifty dollars,"—upon which the court rendered this judgment, viz: "That the interpleader, Geo. Grieb, do have and recover of and from the plaintiffs, D. W. Fly and Sam Hobson, the property attached by the sheriff in this action, or the value thereof, nine hundred and fifty dollars, and all his costs in this cause expended, for which execution may issue." Appellants insist here on two propositions: First, that the court had no jurisdiction to render the judgment; second, if it had jurisdiction, the judgment is erroneous.

Jurisdiction of justice of the peace.

1. The jurisdiction of the justice is determined by the amount in controversy between the plaintiff and defendant in the attachment, and not by the value of the property attached. The attachment is only a remedy or process by which the creditor is enabled to subject the property of the defendant, under certain conditions, to the satisfaction of his judgment. Only to that extent has he any claim or right to or in the property. Beyond this he has no controversy, either with the defendant or the interpleader. *Hoppe* v. *Byers*, 39 Iowa, 573; *Cushing* v. *Sambola*, 30 La. An. 426.

Form of judgment in attachment.

2. Since the attached property had been sold, and the proceeds were in the hands of the sheriff, it was error for the court to render a judgment against the plaintiffs for the property or its value, nine hundred and fifty dollars. *Norman* v. *Fife*, 61 Ark. 33. The interpleader was entitled, under the verdict, to his costs and the proceeds in the hands of the sheriff. If the amount did not equal the true value of the property, or if the interpleader were damaged otherwise by the unlawful taking or detention of same, he would have to seek redress in another proceeding. The issue on the interplea is for the property itself; or, if it has been sold, for its proceeds. Sec. 356, Sand. & H. Dig.

Reversed and remanded, with directions to the lower court to enter a judgment in favor of the interpleader for his costs, and an order directing the sheriff to pay over the proceeds of the property in his hands to said interpleader.

GREER *v.* ANDERSON.

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Opinion delivered March 28, 1896.

GUARDIAN'S SALE—CONFIRMATION.—A sale of an infant's land by his guardian, under an order of the probate court, is a judicial sale, and is incomplete until confirmed by the court.

Appeal from Lee Circuit Court.

GRANT GREEN, JR., Judge.

McCulloch & McCulloch, for appellant.

1. The power of the probate court, at the time of the alleged sale, may well be challenged. Act Jan. 17, 1855; Act Dec. 23, 1846. But no title passed under the sale until confirmed by the probate court. 32 Ark. 97; 45 *id.* 41; 54 *id.* 480. A sale of real estate under an order of the probate court is a judicial sale. 19 Ark. 499; 26 *id.* 421; 32 *id.* 97; 47 *id.* 413; 53 *id.* 400. And in all judicial sales no title vests until confirmation. Rorer, Jud. Sales, secs. 1, 3, 5, 7, and 106; and cases cited, note to sec. 5.

2. No lapse of time will raise a presumption of confirmation, unless accompanied by possession of the purchaser under the sale. Rorer, Jud. Sales, secs. 13, 16, 107, 129, and cases cited.

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

1. Under the laws in force at the time, no report of sale or confirmation was necessary. Gould's Dig., secs. 180, 181; Rorer, Jud. Sales, sec. 332; 24 Wend. 164; 13 Wend. 466.

2. Long acquiescence is sufficient ratification. 18 S. W. 935; Rorer, Jud. Sales, secs. 125, 135. Parties by their own acts may confirm the sale. 12 Am. & Eng. Enc. Law, 220; 3 S. & M. (Miss.) 493; 19 How. (U. S.) 69.

WOOD, J. Plaintiff, Anderson, brought ejectment against defendant, Greer, for a tract of land in Lee county. Both parties deraign title from the heirs of one G. W. Wilcox, deceased. The plaintiff claims under a conveyance from the guardians of said heirs, and the defendant claims under a deed from one of these heirs, the sole survivor, after she became of age. The cause was tried and determined by the court below, sitting as a jury, upon the following agreed statement: "It is stipulated and agreed between the plaintiff and defendant that the records of the probate court of Phillips county, Arkansas, show no report of sale made by the guardians of Elizabeth J., Martha J., and Lucinda Wilcox, or confirmation made of such sale by said court, and that, if the deed of such guardians to Thomas M. Jacks, filed as exhibit D, or No. 1, to plaintiff's complaint, passed the legal title of such minors, without the confirmation of such sale by said probate court, then plaintiff is entitled to a verdict." The court made a general finding in favor of plaintiff, and rendered judgment accordingly.

1. A sale by a guardian under an order of the probate court is a judicial sale, and such sales are incomplete until they are reported to and confirmed by the court. *Apel* v. *Kelsey*, 47 Ark. 413; *Reid* v. *Hart*, 45 Ark. 41; *Guynn* v. *McCauley*, 32 Ark. 97; Rorer, Jud. Sales, secs. 1, 7, 13, 16, inclusive, and sec. 124, and authorities cited in note.

The guardian's sale upon which appellee relies was made under the act of 1846, which provides that the sale "shall be conducted as the court may direct, and upon terms approved by the court." Nothing more is required to show that the court is the vendor in sales made under the act. The contention that the purchaser would take a title if the deed showed that the order of the court had been fully complied with is unsound. Nor is it correct

to say that the sale had been confirmed in advance, provided only the terms of the order were fully complied with. The deed itself does not show upon its face that the sale had been reported to and confirmed by the probate court.

Under the act the guardian or other functionary designated by the court to make the sale receives directions from, and is to make the sale upon terms approved by, the court. But the act of confirmation sets the seal of the court's approval upon what has been done—not upon what is to be done. It is just as essential for the court to approve what has been done, as to direct in the first instance how it shall be done. It is incongruous to speak of the court's having confirmed a sale before the sale takes place. It must be remembered that, in sales of this character, the whole matter after the sale remains *in fieri*, and under the control of the court, until confirmation. Rorer, Jud. Sales, secs. 126, 128; 12 Am. & Eng. Enc. Law, 219, note; *Reid* v. *Hart*, *supra*.

Courts may generally be expected to confirm sales which have been conducted according to the directions and upon the terms prescribed by them, unless intervening circumstances should make it unwise or unjust to do so. But they are not compelled to confirm them, and no purchaser at such a sale has the right to rely absolutely upon the order of the court directing the sale, and the fact that the agent of the court has pursued the terms prescribed in making the sale. See authorities last cited, *supra*.

2. The doctrine of title by lapse of time, acquiescence, or ratification, can not be invoked as against the true owner in possession. Rorer, Jud. Sales, secs. 125–135.

This disposes of the second contention of appellee's counsel. We find nothing in this record to justify the application of the doctrine they invoke.

Reversed and remanded.

COCKRILL v. JOYCE.

Opinion delivered March 28, 1896.

BANK—LIEN.—A bank has a lien on notes delivered to it for collection for the payment of the amount due it by the owner thereof, unless such lien is inconsistent with the actual or presumed intention of the parties.

ESTOPPEL—ELECTION TO TAKE UNDER ASSIGNMENT.—A bank holding notes of its debtor either as collateral security or under its implied lien for the balance due by the debtor will not be estopped to enforce its rights in such notes by electing to claim under an assignment of such debtor purporting to pass title to all notes of the debtor, nor by consenting to a sale by a receiver of all the notes of the debtor in his hands.

PLEADING—INCONSISTENCY.—A claim by a bank of a general lien on a debtor's securities for a balance due by the debtor is not inconsistent with its claim of a lien thereon by special contract.

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

STATEMENT BY THE COURT.

This is a contest concerning the ownership of sixteen promissory notes which were executed to the McCarthy & Joyce Company by certain of its customers. The company was a corporation organized under the laws of this state, and engaged in business in the city of Little Rock. The notes in question were placed by it in the First National Bank of Little Rock, either for collection, or as collateral security for indebtedness due by the company to said bank. Afterwards the company made an assignment to C. H. Whittemore in trust for the benefit of its creditors. The property conveyed by the assignment was described as follows: "All its stock of goods, wares and merchandise now in its two store rooms and cellar, * * * together with all safes and office and store fixtures in said stores; also, all cotton belonging

to said company; and, also, all notes, accounts, and evidences of debt and choses in action of every kind, belonging to said company, and all of its real estate."

Afterwards the chancery court, upon the application of the First National Bank, which was a preferred creditor in the assignment, appointed said Whittemore receiver to take charge of the property conveyed by the assignment. Whittemore took charge of the property as receiver, and filed an inventory thereof, including in said inventory the notes in controversy. Subsequently, under order of the court, the receiver sought bids for the property, and received one from appellees, in words as follows, omitting immaterial portions:

"C. H. Whittemore, Esq.—Dear Sir: We hereby offer you for the stock of goods, real estate, notes, accounts, and other property of the McCarthy & Joyce Co., in your hands as receiver of the Pulaski chancery court, the sum of thirty-eight thousand and two hundred dollars. * * * James E. Joyce & Co." The bid was afterwards raised to forty thousand dollars, and was accepted, and the receiver ordered by the court to transfer and deliver to appellees "the personal property in his hands as such receiver, including notes, accounts, mortgages, choses in action, and property of all and every character of the estate of McCarthy & Joyce Company," etc. Excluding the notes in controversy, the property purchased by the appellees, J. E. Joyce & Company, and for which they agreed to pay $40,000, was valued in the inventory at $100,000, and was of the actual value of $70,000.

Under this purchase, the appellees, J. E. Joyce & Co., claimed the notes in controversy, and filed their petition in chancery, praying that appellant, as receiver of the bank, be required to turn over said notes to them. Appellant, as receiver, denied the claim of petitioners. He filed an answer to the petition, denying that the

notes in controversy were ever in the hands of Whittemore, receiver of McCarthy & Joyce Company, and denying that he was ever ordered to sell the same. He alleged that "said notes were placed with the First National Bank on the 12th day of January, 1893, by McCarthy & Joyce Company, as collateral security to secure the payment of the indebtedness due the bank from said company, and were in the hands of the bank when the company made its assignment." He further alleged that, "at the time the McCarthy & Joyce Co. made its assignment, it was indebted to the First National Bank in the sum of $101,647.46 on its notes, and for overdrafts, and that said bank had a lien upon said notes to secure the payment of said indebtedness, and that said indebtedness remains yet due and unpaid."

The chancellor found that the notes were deposited for collection, and not for collateral security, and that, the bank having been preferred in the assignment, and having elected to take under the assignment, and having consented that the sale to said J. E. Joyce & Co. might be confirmed, was estopped to claim said notes, as against the petitioners, J. E. Joyce & Co. The receiver of the bank was ordered to deliver the notes in controversy to the petitioners, and from this order an appeal was taken. The other facts sufficiently appear in the opinion.

J. H. Harrod, for appellant.

1. A decree in chancery should be reversed when it is clearly against the weight of evidence. 34 Ark. 221. The evidence shows that the notes were deposited as collateral, and thereby became the property of the bank until its debt was paid. But if they were deposited *for collection* only, the bank had a lien on them for the amount of the general balance due it. 104 U. S. 54; 1 Jones on Liens, 241; 5 Term Rep. 492; 129 Mass. 358; 114 Pa. 328; 55 Mich. 379.

2. No obligation rested on the bank under the law to elect between taking under the assignment and under the collateral deposit, and no such election was made. Bisph. Eq., secs. 25, 303; Pom. Eq. Jr. (2 Ed.), vol. 1, sec. 472; Story, Eq. Jur. (8 Ed.), vol. 2, sec. 1075; 1 Pom. Eq. Jur., sec. 473–474; 9 Law. An. Rep., p. 108.

3. The bank is not estopped. The notes were never in the hands of the receiver, but they were in the possession of the bank, which was notice to the interveners that the bank claimed them. 58 Fed. 461; 54 Ark. 499; 53 *id.* 196.

E. W. Kimball and *Rose, Hemingway & Rose*, for appellees.

1. Whether the notes were assigned as collateral, or for collection, was a matter of fact which the chancellor found against the appellant, and the weight of the evidence supports the finding.

2. The bank never had a lien on the notes because it was not so intended by the parties, when they were deposited. 1 Jones on Liens, sec. 255; 130 U. S. 354–390; 104 *id.* 54–71; 99 *id.* 143; 5 Dill. 232; 130 U. S. 394; 41 Fed. 239; 12 Cl. & Fin. 787–806.

3. But if the bank ever had the right to hold the notes, it lost it by accepting the assignment, which, by its terms, attempted to dispose of them. It was put upon its election to accept the benefits and share its burdens, or renounce the same. It could not enjoy the benefits, and at the same time escape the burdens. 2 Beach, Mod. Eq., sec. 1073–4; 2 L. R. Eq. Cas. 481–6; 2 Ch. App. Cas. L. R. 518, 586; Bigelow on Estoppel, 578, 535.

4. It is estopped by its conduct in actively procuring the sale and approving it. Morse on Banks, etc., 43; 51 N. H. 324–333; 2 Herman on Estoppel, 1059; Bigelow on Estoppel, pp. 570–1; 31 Ark. 449; 47 Ark. 229.

5. Even if the bank got the notes under such circumstances as would ordinarily create a lien for a general balance, it cannot assert the lien in this case. It claimed to hold them as collateral security, and made no claim of a general lien. It cannot thus shift its position, as an afterthought, to meet the exigencies of this case. 96 U. S. 258; Bigelow, Estoppel, p. 717; 30 Ark. 453; 47 *id.* 309; 32 *id.* 346; 130 U. S. 394.

RIDDICK, J., (after stating the facts.) The question in this case is whether the receiver of the bank has the right to hold the notes in controversy for the payment of the balance due it from the McCarthy & Joyce Company. There is conflict in the testimony as to whether the notes were delivered to the bank for collection, or to be held as collateral security.

Lien of bank on deposits.

The cashier of the bank testified that the notes were delivered as collateral to secure indebtedness of the McCarthy & Joyce Company to the bank. On the other hand, the bookkeeper and secretary of the company, who delivered the notes to the cashier of the bank, testified that they were delivered for collection. He said that the cashier of the bank called at their office, and asked "what notes they had," saying that the bank examiner would be there shortly, and he wanted to make a good showing to him; that witness thereupon delivered to the cashier the notes in controversy, the face value of which amounted to eleven thousand dollars. "I intended," he said, "for the bank to collect the notes, and place them to our credit." Under these circumstances, we conclude that the bank had a lien upon the notes for the payment of the amount due it by the company, without regard to the fact whether there was an express agreement for a lien or not. The law on this subject is well settled, and is thus stated by a recent writer: "A banker has a lien on all securities of his debtor in his hands for the general balance of his

account, unless such a lien is inconsistent with the actual or presumed intention of the parties. The lien attaches to notes and bills and other business paper which the customer has entrusted to the bank for collection, as well as to his general deposit account. * * * And so, if the securities be deposited after the credit was given, the banker has a lien for his general balance of account, unless there be an express contract, or circumstances that show an implied contract, inconsistent with such lien." 1 Jones, Liens, (2 Ed.), sec. 244. We see nothing in this case inconsistent with such a lien, or showing a different intention on the part of those concerned. The undisputed facts are that the company was owing the bank nearly a hundred thousand dollars. The cashier of the bank reminded the bookkeeper and secretary of the company of this fact, and asked for these notes that he might make a good showing to the bank examiner, who was expected shortly. In response to this request, the secretary delivered the notes; intending, so he says, that the bank should collect them, and place the proceeds to the credit of the company. He was an officer and stockholder in the company, and his authority to deliver the notes is not denied. Taking his statement as true, we think the bank had a lien upon the notes for the payment of the balance due from the company. *Kelly* v. *Phelan*, 5 Dill. 228; *Reynes* v. *Dumont*, 130 U. S. 392; *Bank of Metropolis* v. *New England Bank*, 1 How. 239; 1 Jones on Liens, secs. 241-244.

In addition to this, if these notes were placed in the bank by the company to make it appear to the bank examiner that the indebtedness on the part of the company to the bank was well secured, it furnishes another reason why the company should not now be allowed to withdraw the notes without discharging its debt.

As to estoppel by election.

It is further contended that the bank, having elected to claim under the assignment, and to share in the pro-

ceeds of the property assigned, is now estopped to assert title to the notes. There is no express reference to these notes in the assignment, though it, in general terms, conveyed "all notes, accounts, evidences of debt, and choses in action of every kind belonging to said company." This, of course, conveyed any interest that the company had in these particular notes which was the right to redeem them upon paying its debt to the bank. The notes were in the custody of the bank at the time of the assignment, and it in no way affected the right of the bank to hold such notes.

The title to the notes was in no way involved in the application of the bank for the appointment of a receiver to take charge of the assets conveyed by the assignment, for the assignment did not convey, or purport to convey, more than the right to redeem the notes. The receiver of the company knew that the bank held the notes, and was fully informed by the bank of its claim to the notes. The receiver was only authorized to sell the property in his hands, and the appellees recognized this, for they confined their bid to the property in the hands of the receiver. As the receiver was not offering to sell, or the appellees proposing to purchase, any property, except that in the possession of the receiver, the bank, by consenting to the confirmation of such sale, and sharing in the proceeds thereof, was not estopped from asserting its claim to property not in the possession of the receiver, or embraced in his sale. The bank at all times affirmed its right to hold these notes as a partial security against the amounts due it by the company, and, so far as we can see from the evidence, the appellees were in no way misled by the bank or its agents. Appellees made their bid for and received the property in the possession of the receiver. If they expected by this purchase to obtain title to notes held by the bank, and not within the control of the court or its receiver, it was a mistake of law

for which the bank was in no way responsible. Our conclusion is that the doctrine of estoppel does not apply in this case.

Pleading not inconsistent.

Neither do we think that the claim of a general lien by the bank is inconsistent with its claim of a lien by express agreement. It asserted the right to hold the notes as security for the payment of the debt of the company, and its answer was drawn so as to cover both a general lien and a lien by special contract.

The judgment of the chancery court is therefore reversed, and the petition of appellees is dismissed.

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

PIKE v. THOMAS.

Opinion delivered March 28, 1896.

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ADMINISTRATOR—POWER TO BIND ESTATE.—An administrator has no power to bind the estate he represents by his individual contracts.

PROBATE COURT—JURISDICTION.—The probate court has no jurisdiction of a claim against an estate for services rendered by an attorney employed by an administrator to prosecute a suit on behalf of the estate.

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

Luther H. Pike filed his petition in the probate court of Clark county, setting up the following contract: "Whereas, I, Charles L. Thomas, as administrator of the estates, respectively, of Louis Thomas, deceased, and H. H. Carter, deceased, of Arkadelphia, in the county of Clark, in the State of Arkansas, have employed Luther H. Pike, attorney and counselor, of Washington, D. C., to take charge of and prosecute to

its final determination, in such lawful manner as he may deem best for my interests, the certain claims against the United States for $2,625 and $866.50, respectively, that were presented to the commissioners of claims, under the act of congress of March 3, 1871,—the one on behalf of the estate of said Louis Thomas, the other by said H. H. Carter,—and were disallowed by it; said attorney to defray the further prosecution of said claims out of his own proper means, without reclamation therefor. Now, therefore, I do hereby agree, in consideration thereof, to pay to him a sum of money equal to 50 per centum of the amounts that may be recovered on said claims, the payment of which is hereby made a lien upon the said claims and upon any drafts, money, or evidence of indebtedness which may be paid or issued thereon. In witness whereof I have hereunto set my hand and seal this 28th day of July, A. D., 1896. Charles L. Thomas (Seal). Witnesses: J. P. Hart. A. M. Crow." And he alleged that under said contract he had obtained judgment for thirteen hundred and thirty-eight dollars, which had been paid in full to C. L. Thomas, as administrator of Louis Thomas, deceased, and that under said contract he (Pike) was entitled to the sum of six hundred and sixty-nine dollars, which said administrator had refused to pay. The petition asked for an order upon the administrator to pay over to petitioner said sum. To the petition was attached an account, duly verified.

Upon a hearing, the court adjudged that petitioner was only entitled to the sum of fifty-seven and 45-100 dollars. Pike appealed to the circuit court where judgment was again rendered in his favor for same amount, and for the further sum of sixty-nine and 90-100 dollars for expenses incurred by him in prosecuting the claim. Pike, being still dissatisfied with the judgment, prosecutes this appeal.

Dodge & Johnson, for appellant.

1. The judgment in this case is contrary to law, justice, and fair dealing. The contract was not disputed, nor denied; was made in Washington City, to be executed in Washington City, and the work was done there. Plaintiff was entitled to his fee after the work was performed, and it should have been paid out of the fruits of his efforts. An attorney has a lien on the fund recovered for his fee, costs and advances. 15 How. 415; 13 Ark. 193; 23 *id.* 118; 8 Fla. 183; 62 Me. 286; 12 Conn. 444; 14 Vt. 243; 18 *id.* 616; 1 Cowen, 172; 52 N. Y. 489. Being a lien, the probate court had jurisdiction. The statute of this state does not apply to this. It was a District of Columbia contract, and was not a *debt* due by the United States, as the United States incurred no liability for property taken in the states in rebellion. The claimant had merely the right of petition to congress. 18 Wall. 151; 4 Dall. 37; 18 How. 110; 2 Wall. 258, 404; 5 *id.* 38; 92 U. S. 187; 11 Wall. 268. The laws of Arkansas countenance an attorney's contract for a contingent fee, and it is valid in the District of Columbia. 91 U. S. 252; 93 *id.* 548; 96 *id.* 404; 110 *id.* 42; *ib.* 305; 127 *id.* 235. The probate court is authorized to allow a claim for fees as a part of the *necessary expenses* of administration, whether a previous order authorizing the administrator to employ counsel was made or not. 30 Ark. 320. The contract was of necessity a District of Columbia contract, valid there, and hence valid everywhere. 30 Ark. 520; 38 *id.* 139. Sec. 203, Mansf. Dig., is restricted to percentage for professional services, *strictissimi juris*, and not including compensation for money expended as a loan to the estate to save it from irreparable loss. See U. S. Rev. Stat., sec. 823; 6 Fla. 257; 8 *id.* 183.

2. Thomas, as administrator, and the creditors of Thomas' estate, are estopped, not only in pais, but by

record, from denying the lien of appellant upon the money paid under the judgment recovered by him. 38 Ark. 139; 4 Pa. St. 150, *et seq.*; 6 Fla. 257; 110 U. S. 42; U. S. Rev. Stat., 823; 823; 9 How. Pr. 16; 1 E. D. Smith, 598; 18 Ct. Ct. App. 368; 24 How. Pr. 409; 38 Ala. 532; 10 Wall 483.

Power of administrator to bind estate.

WOOD, J., (after stating the facts). This court has repeatedly held that an administrator has no power to bind the estate he represents by his individual contracts. The last announcement upon the subject was in an opinion delivered by Judge Riddick, at the present term, in *Tucker* v. *Grace*, 61 Ark. 410, where he said: "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." It was there also said to be the "proper practice, where the administrator refuses to pay for such services, for the attorney to bring suit against him individually, and not in his representative capacity." *Tucker* v. *Grace*, 61 Ark. 410, and authorities there cited.

Jurisdiction of the probate court.

In *Turner* v. *Tapscott*, 30 Ark. 312, the learned judge, in drawing the distinction "between contracts for services which should be charged against an estate as costs of administration and such as render the administrator liable," held that the fees of an attorney who, under contract with the administrator, rendered services beneficial to the estate, were a proper charge against the estate; for, said Judge Walker, "if fees, under such circumstances, are to be held as a personal charge upon the administrator, no counsel would be employed, and the estate would be wasted." In *Yarborough* v. *Ward*, 34 Ark. 208, Judge Eakin commenting upon the language of the judge in *Turner* v. *Tapscott*, *supra*, said: "The court sanctions by implication the practice of

presenting the claim to the probate court, not for allowance and classification, but for the purpose of obtaining an order on the administrator to pay the same as expenses of administration, leaving only the surplus of assets to go to the claims properly allowed against the estate." Continuing, says Judge Eakin: "It is certainly the duty of the administrator to pay such claims, and, if he does so, he will be allowed a credit on settlement. Should he refuse, it is certainly within the scope of the general powers of the probate court, in its control over the conduct of the administrator, to order him to do so upon proper application in the case, and to enforce its order. The remedy of the party may in this case, as in many others, be cumulative." It was unnecessary in either of the above cases for the court to approve, either expressly or by implication, the practice for creditors of the administrator to come into the probate court to establish their claims against him. The point was not before the court in either case. We cannot agree with the learned judge that the rule as above announced in *Yarborough* v. *Ward* is a wholesome one. Whatever merit of expedience or convenience such a practice may seem to possess, it is not sanctioned by the weight of authority, and confers a jurisdiction not given by our constitution or statutes. If the administrator is individually liable, the only authorized procedure is for those who have contracted with him to go into the proper forum at law or equity, as the nature of their claim and the remedies to be applied may suggest, and there have the amount of his liability determined. We are not called upon to determine into which court appellant should have gone to have his claim adjudicated. The following authorities, however, may afford some useful suggestions on that subject: *Ferrin* v. *Myrick*, 41 N. Y. 315; 2 *Woerner*, sec. 758; *Clapp* v. *Clapp*, 44 Hun, 451. But the probate court has no power to render

and enforce a judgment against the administrator for an individual liability.

Mr. Woerner says: "Although it may be the duty of the court, in passing upon the administration account, to determine the reasonableness of payments for such services, and allow or reject the credits taken therefor, it has not the power, unless expressly granted by statute, to adjudicate upon the claims of such persons against the administrator. Their remedy, if he refuse to pay, is in another court." 1 Woerner, Adm'n, sec. 152; 2 *id.* sec. 356. Also the following: *Ferrin* v. *Myrick*, 41 N. Y. 315, and authorities cited; Rice, American Probate Law, 442; *Kowing* v. *Moran*, 5 Dem. Sur. 59.

So much of the opinions in *Turner* v. *Tapscott* and *Yarborough* v. *Ward*, *supra*, susceptible of being construed as approving any other rule, is overruled.

It follows that the circuit court had no jurisdiction to render the judgment in this case, and the same is therefor reversed, and the cause is remanded without prejudice.

EVANS *v.* MERRITT.

Opinion delivered April 4, 1896.

APPEAL—INSTRUCTION—HARMLESS ERROR.—A judgment will not be disturbed on appeal because of an erroneous instruction if the verdict upon proper instructions could not have been otherwise.

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

W. H. Martin, for appellant.

Murphy & Menkus, for appellee.

BUNN, C. J. This is a suit for damages for personal injuries done by driving into and against

plaintiff's vehicle, overturning the same, and throwing him out, and severely wounding and bruising him. The defendant Evans, and one John Breese, were both in the single-horse buggy of defendant, and both somewhat, if not very much, intoxicated at the time; Breese actually holding the reins and driving. The contention of appellant is mainly to the effect that the court erred in giving instruction "B" on its own motion, having reference to the responsibility of one or both of the men in the buggy for the injury. We are of the opinion that said instruction was erroneous, but that the evidence fully sustained the verdict,—that, in fact, it should not have been otherwise,—and therefore the judgment is affirmed.

FORBES v. WHITTEMORE.

Opinion delivered April 4, 1896.

PARTNERSHIP LIABILITY—ASSUMPTION OF DEBTS OF CORPORATION.—Purchasers of the "right, franchise, and privilege" of a corporation, and of all the real and personal property belonging thereto, are liable as partners on a note executed by their direction by two of their number, who signed as president and secretary, respectively, of the corporation, where they never undertook to organize themselves into a corporation, and the contract of sale, by a provision for reversion of the property to the corporation in a particular event, recognized that both the buyers and the seller should continue to be distinct parties.

Appeal from Miller Circuit Court.

RUFUS D. HEARN, Judge.

L. A. Byrne and *E. F. Friedell*, for appellants.

1. The notes sued on were a debt of the corporation at the time defendants took charge under their contract. Defendants constituted the board of trustees of the college after the execution of the contract, and sec.

1395, Sand. & H. Dig., converts the incorporators into a board of trustees. The contract transfers to them and "their successors" all the rights, franchises, etc., of the college, and was a transfer of the corporate power and franchise. The attorney for plaintiff was notified that the individuals were not personally bound, and signed the name of the college to the notes, and plaintiff is estopped, especially when no one is here denying the right and authority of defendants to act for and bind the corporation. 47 Ark. 270. The rule that fastens liability as partners on persons attempting to act as a corporation does not apply here. It is only where they have failed to comply with the statute in some material step, to form a corporation. 35 Ark. 144.

2. Defendants were at least a *de facto* board of trustees, and their acts are binding as the acts of the corporation during their administration of corporate duties. Morawetz on Corp. (2 Ed.), secs. 639, 640, and authorities cited in foot notes; 6 Cow. 23; 9 Wend. 414; 28 Mich. 110; 96 N. Y. 137.

3. The contract vested defendants with full power to administer the duties and attend to all the business of the corporation, and the result was to make defendants the agents of the original board of trustees to conduct the business of the corporation; in which case the execution of the notes was the act of the board through their authorized agents. Sand. & H. Dig., sec. 1396; Mor. Corp. (2 Ed.), secs. 637-8.

4. It was error to exclude evidence to prove that defendants constituted the board of trustees of the college, and that the notes were the obligations of the college, and that defendants were acting under the franchises and original charter of the corporation.

J. D. Cook, for appellee.

1. The defendants were not a corporation, nor acting as such, nor were they successors to the trustees of the

college. They were simply a board of trustees of the Baptist church. The contract itself proves there was no incorporation. Such an association of persons are bound as partners. 35 Ark. 144; Angell & Ames, Corp., sec. 591; 9 Mass. 336; 19 Johns. 64; 1 Cowen, 531; 15 Wend. 256.

2. The court's charge was correct, and there is ample testimony to support the verdict.

3. The original charter fixed the number of trustees at *nine*, and, these nine still holding their office, it was impossible for the *thirteen* defendants to represent the college, nor does the record disclose any authority given defendants to constitute a *de facto* board with power to bind the college upon the notes given—the very thing they contracted to relieve the college from paying—and therefore they were without authority to contract in the name of the college, and are bound as individuals. 9 Mass. 336; 19 Johns. 64; 1 Cow. 531; 15 Wend. 256.

BATTLE, J. The Southwestern Arkansas College was a corporation engaged in maintaining a school in Miller county, in this state, and was the owner of property, consisting of land, a brick building, subscriptions, and furniture. On the second day of August, 1890, W. A. Forbes and others, styling themselves "trustees," entered into a contract with it in the words and figures following, to-wit:

"Whereas, the board of directors of the Southwestern Arkansas College have this day transferred to W. A. Forbes, W. H. Tilson, John Hallum, H. W. Stevens, John C. Watts, H. H. Echols, B. R. Attaway, John Winham, J. B. Lumbley, E. F. Friedell, Chas. S. Todd, R. J. Harriston, Noah P. Sanderson, E. D. Merideth, and John B. Nix, and their successors in office, the right, franchise, and privilege heretofore appertaining and belonging to the Southwestern Arkansas College, located on College Hill, Miller county, Arkansas,

which transfer includes all the real and personal property belonging to the Southwestern Arkansas College, also the unpaid subscription belonging to said college, for and in consideration for which the said above-named trustees and their successors in office obligate and bind themselves as trustees, and their successors in office, to pay all liabilities of said Southwestern Arkansas College as they now exist, to honor the subscription of stock for tuition, and in all respects to assume the place, duties, and responsibilities of the above said directors of said college; and, furthermore, at all time during the scholastic year to maintain a first-class school, which school shall in its course be in all respects equal to the curriculum of ordinary colleges through the sophomore year, and up to the junior year, in classical, literary and scientific course, and at all times to maintain in good condition and repair the buildings now on the ground, and from time to time, as necessity may require, to add thereto such buildings as may be necessary to carry on the school herein provided for.

"And it is further agreed and understood that if the said board of trustees fail to comply with these conditions after reasonable notice given to said board of trustees, the property herein conveyed is to revert to the said board of directors of Southwestern Arkansas College, or their successors or assigns; and we, for ourselves and our successors in office, as trustees, agree to surrender the possession of said property, real and personal.

"Witness our hands and seals, this 2d day of August, 1890.

"W. A. Forbes,
President Board of Trustees.

"E. F. Friedell,
As Secretary Board of Trustees."

Under this agreement, Forbes and his associates in the enterprise took possession of the property, and

entered upon the performance of their contract; and, at a meeting held by them, authorized and directed W. A. Forbes, as their president, and E. F. Friedell, as their secretary, to execute to Osgood Whittemore two notes for $138 each, due, respectively, six and twelve months after date, in payment of a debt assumed by them in the contract with the "Southwestern Arkansas College." In the exercise of this authority Forbes and Friedell executed the two notes, a copy of one of which, which serves to show in what manner both were written and executed, is as follows:

"$138.00. Texarkana, Ark., July 1st, 1891.

Six months after date, the Southwestern Arkansas College promises to pay to the order of Osgood Whittemore the sum of one hundred and thirty-eight dollars at the Gate City National Bank, Texarkana, Arkansas, for value received, without defalcation or discount, with interest at the rate of ten per cent. per annum from date until paid. This note is given in settlement of B. Fronhaff's account for labor and material furnished in the building of the Southwestern Arkansas College, in Miller county, Ark.

Southwestern Arkansas College,
By W. A. Forbes, Prest. of Trustees,
Southwestern Arkansas College,
By E. F. Friedell, as Secy."

Forbes and those named with him in their contract with the Southwestern Arkansas College, without organizing themselves into a corporation, undertook to perform their undertaking for about two years, and failed, when they abandoned the same, and surrendered the property, real and personal, which they had received from their predecessors, subscriptions excepted, leaving the two notes unpaid. Thereafter, on the 14th of November, 1892, Osgood Whittemore brought an action

on the notes against Forbes and his co-contractors, as late partners, doing business under the firm name and style of "the Southwestern Arkansas College." The defendants, answering, denied that they executed the notes in the capacity of partners, and that they were individually liable for the payment thereof, and alleged that the notes were contracts of a corporation. In the trial of the issues in the case, all the foregoing facts were proved. The plaintiff recovered judgment, and the defendants appealed.

The only important question in the case is, were the appellants individually liable for the payment of the notes sued on? They were not the agents of the college, nor members of it. In their contract with it, each party preserved its individuality, neither being merged into the other. Appellants agreed that, if they failed to comply with their contract, the property conveyed should "revert" to the "Southwestern Arkansas College," its assigns, or successors, thereby recognizing each other as distinct parties, and that they would remain so. Their assumption of the name of the corporation from which they purchased did not constitute them such a corporation, or give them the right to act in a corporate capacity. They never undertook to organize themselves into a corporation, and were not a corporation *de facto*. Having undertaken in writing, for a valuable consideration, to pay the debt of another, they are as much liable as partners as they would have been had there been no pretense of incorporation,—like the members of any other merely voluntary association in respect of personal liability,—and are personally and individually liable. *Garnett* v. *Richardson*, 35 Ark. 144; *Pettis* v. *Atkins*, 60 Ill. 454; *Bigelow* v. *Gregory*, 73 Ill. 197; *Hurt* v. *Salisbury*, 55 Mo. 310; *Fuller* v. *Rowe*, 57 N. Y. 23; 1 Thompson on Corporations, secs. 218, 417, 503, 5002; 3

id. sec. 2992; 1 Cook on Stock, Stockholders and Corporation Law, (3 Ed.), sec. 234; 2 Morawetz on Corporations (2 Ed.), sec. 749.

Judgment affirmed.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO. *v.* LEATHERS.

Opinion delivered April 4, 1896.

RAILROADS — FAILURE TO KEEP LOOKOUT — CONTRIBUTORY NEGLIGENCE.—The defense of contributory negligence is available in an action against a railroad, under the act of April 8, 1891, making it the duty of all persons running trains to keep a constant lookout for persons and property upon the track, and making the company liable for all damages resulting from neglect to keep such lookout. (BATTLE, J., dissenting.)

Appeal from White Circuit Court.

GRANT GREEN, Jr., Judge.

Dodge & Johnson, for appellant.

1. This case is similar to 56 Ark. 457; 54 *id.* 431 and *Railway Co.* v. *Martin*, *ante* p. 156, and the contributory negligence of deceased was a complete bar. Besides he was an employee of the company, was fully aware, and had been duly cautioned of the danger of passing through the yards. 46 Ark. 396, 404; 106 Mass. 461.

2. The court erred in modifying instructions 4, 5 and 6. The addition to the 4th instruction simply eliminates the defense of contributory negligence, and entitled the plaintiff to recover if they found no lookout was being kept, even if it was impossible to prevent the injury.

J. N. Cypert, for appellee.

HUGHES, J. This is an appeal from a judgment against the railway company for damages for killing a twelve-year old son of the appellee, while attempting to cross the railroad track in front of a train, which was backing at the time it struck the boy, with no one on the end of the train next to the deceased to keep a lookout.

The boy was attempting to cross at a crossing obstructed by a train of the appellant company. The view from the backing train, that struck him, to a point beyond where he was killed, was open and unobstructed. The fireman and engineer of the train that killed him testified that they did not see the boy until after he was struck.

The jury must have inferred that the employees of the railway might have seen him before, if they had kept a constant lookout, as required by the act of April 8th, 1891, and in time to have prevented striking him, and, under the circumstances and testimony in the case, this was a question for the jury. We would not disturb the finding as to this, if there was no question of contributory negligence in the case.

The court gave, of its own motion, several instructions, to which no objections were made by defendant. The court refused to declare the law as set out in the fourth, fifth, and sixth instructions as asked by the defendant, but gave the same in a modified form. That part of the instructions in parenthesis, italicized, were the modifications made to defendant's instructions, over defendant's objections, in which form they were given by the court. "4. If the jury find, from the evidence, that the deceased came upon the track so close to the backing engine and tender that it would have been impossible for those in charge of the engine to have prevented his being run over or struck (*had they been keeping a lookout for persons on the track*), you will find for the defendant."

"5. You are instructed that contributory negligence is a complete defense to actions of this character, and if you find, from the evidence, that the deceased, Samuel Leathers, was guilty of negligence in being on or near the track, and that, without such negligence on his part, the accident would not have happened, then you will find for the defendant, even though you should find that the defendant's employees failed to keep a proper lookout, or were guilty of negligence in any other particular charged in the complaint, unless you further find that the defendant's employees became aware of the negligence of deceased in time to have avoided injuring him, and failed to exercise such care, (*or that they failed to keep a lookout for persons on the track when, by keeping such a lookout, the injury might have been avoided*)."

"6. You are instructed that it is negligence for one at a railroad crossing to go upon the railroad track without first looking up and down the track, and listening for any approaching train or engine. And a failure to so look and listen will prevent a recovery from the railway company for an injury occasioned thereby, unless the employees of the railway company became aware of the negligence of the injured party in time to have avoided injuring him by the exercise of reasonable care, and failed to exercise such care, (*or if he might have been discovered by keeping a lookout, and they failed to heep such lookout*)."

The jury returned a verdict in favor of plaintiff for $350.00. Defendant filed a motion for a new trial, which was overruled. Exceptions were saved, and defendant appealed.

These instructions were erroneous. The fourth was inconsistent in itself. Each one of them ignored the doctrine of contributory negligence, which we hold

still applies to cases like this, notwithstanding the act of April the 8th, 1891, which provides:

"Sec. 1. That it shall be the duty of all persons running trains in this state, upon any railroad, to keep a constant lookout for persons and property upon the track of any and all railroads, and if any person or property shall be killed or injured by the neglect of any employees of any railroad to keep such lookout, the company owning and operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout, and the burden of proof shall devolve upon such railroad to establish the fact that this duty has been performed." Acts of 1891, page 213.

This act has been construed by this court in an opinion delivered by Mr. Justice Wood, at the present term of this court, in the case of *Johnson* v. *Stewart*, *ante*, p. 164. We adhere to the ruling in that case respecting the effect of that statute upon the doctrine of contributory negligence. In our opinion, it makes the failure to keep a constant lookout by the employees of a railroad company negligence, and puts the burden upon the railroad company to establish the fact that it has kept such lookout. This is the extent of the change made in the law by this statute, which, in our opinion, does not, in such cases as this, abrogate the doctrine of contributory negligence. It has been repeatedly held by this court that "one who is injured by mere negligence of another cannot recover at law or equity any compensation for his injury if he, by his own or his agent's ordinary negligence or wilful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him, except when the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper

degree of care to avoid the consequences of such negligence." *L. R. & Ft. S. Ry. Co.* v. *Cavenesse*, 48 Ark. 124, and cases cited. This is a doctrine which, according to the great weight of authority, seems founded in reason and justice, and which, in our opinion, the act referred to was not intended to and does not abrogate.

If it had been the intention of the legislature that passed this act to abolish the right to interpose the defense of contributory negligence in such a case, it could, should, and doubtless would, have said so in unambiguous terms. As said by Judge Wood in *Johnson* v. *Stewart*, *supra*, "where the negligence of the plaintiff contributes proximately to cause the injury of which he complains, the defendant is not liable," unless the defendant, after becoming aware of the plaintiff's negligence, could, by the use of proper care, have avoided the consequences of such negligence.

Before the passage of this act, it was the duty of railway employees to keep a lookout at crossings, as repeatedly held by this court, and it was never thought that this fact would exempt a party injured by a railway at a crossing from the consequences of his own negligence, which contributed to the injury.

The company claimed that the deceased was himself guilty of negligence contributing to his injury, and this question should have been submitted to the jury. On the facts as shown by the record, we would not disturb the verdict. But, for the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

BATTLE, J. I do not concur with the court as to the interpretation of the act of the General Assembly, entitled, "An act to better protect persons and property upon railroads in this state," approved April 8, 1891.

Previous to the enactment of this act it was held by this court that "a person who goes upon a railroad track

without license or invitation of the company owning the road is a naked trespasser," and the railroad company owes him no duty until his presence there is discovered; that, after he is seen upon the track by the men in charge of a train running upon the road, they may act upon the presumption that he will step aside in time to avoid a collision, unless it is obvious, from his condition or circumstances beyond his control, that he cannot extricate himself from the danger menacing him; that the sole duty which the corporation owes him is not wantonly or with reckless carelessness to run over him after his situation is perceived; that its liability must be measured by the conduct of its employees after they become aware of his presence upon the track, and not by their negligence in failing to discover him; and that if, before they become aware of his presence, the train runs over and injures or kills him, no damage can be recovered by the company, because he was guilty of contributory negligence in being on the track without leave or invitation. (*St. Louis, &c. Railway* v. *Monday*, 49 Ark. 257; *Sibley* v. *Ratliffe*, 50 Ark. 477.) It also held in *Memphis & L. R. Railway* v. *Kerr*, 52 Ark. 162, that "the *extent* of a railroad company's duty to the owner of stock which has strayed upon its track is that the engineer in charge of the train at the time shall use ordinary or reasonable care, after he discovers the stock, to avoid injuring it; and it is not negligence for a railroad company to fail to keep a lookout for stock." No damages, of course, were recoverable of the railroad company for killing stock by trains before its discovery upon the track.

To avoid the force and effect of these decisions the act of April 8th, 1891, was passed. It is as follows:

"Whereas, in this state the railroad tracks are mostly exposed and uninclosed, and persons and live stock are often upon the tracks, and are in danger of

being killed, and *are injured and killed* upon the track, *when, by a proper outlook and care on the part of those running trains, such injury could be avoided;* and

"Whereas, the supreme court has recently decided that it is not the duty, under existing laws, of the railroad companies in this state to keep an outlook for trespassers on their tracks, whereby those who run the trains are led to neglect the precaution to keep a lookout in running the trains, and thereby great damages to persons and property are occasioned to the good poople of this state, therefore,

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

"Section 1. That it is and shall be the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads, and if any person or property shall be killed or injured by the neglect of any employees of any railroad to keep such lookout, the company owning and operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such outlook, and the burden of proof shall devolve upon such railroad to establish the fact that this duty has been performed."

Under this act it is the duty of railroad companies to keep a constant watch for persons upon their tracks. For what purpose? To avoid killing or injuring them. The imposition of the duty to keep a constant lookout indicates clearly the intention of the act to require railroads to use the means prescribed by law to avoid injuring them after they discover them upon their track. This was their duty before the act of April 8th became a law. The former, without the latter, would be entirely unnecessary, and accomplish nothing.

The act makes no change in the duties of railroads after discovering persons upon their tracks. Their duties in this respect are thus defined in *St. Louis, I. M. & S. Railway* v. *Wilkerson*, 46 Ark. 523: "If the employees of a railroad company in charge of its train see a man walking upon its track at a distance ahead sufficient to enable him to get out of the way before the train reaches him, and are not aware that he is deaf or insane, or from some other cause insensible of the danger, or unable to get out of the way, they have a right to rely on human experience, and to presume that he will act upon the principles of common sense and the motive of self-preservation common to mankind in general, and will get out of the way, and to go on, without checking the speed of the train, until they see he is not likely to get out of the way, when it would become their duty to give extra alarm by bell or whistle, and if that is not heeded, and it becomes apparent that he will not get out of the way, then, as a last resort, to check its speed, or, stop the train, if possible, in time to avoid disaster. If, however, the man seen upon the track is known to be, or from his appearance, gives them good reason to believe that he is insane or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, they have no right to presume that he will get out of the way, but should act upon the hypothesis that he might not or would not, and should use a proper degree of care to avoid injuring or killing him." See also *St. L., I. M. & S. Railway* v. *Monday*, 49 Ark. 263.

But what are the consequences of the failure of a railroad company to keep a constant lookout? The act says that, if any person shall be killed or injured on account of such failure, it "shall be liable and responsible to the person injured for all damages resulting from neglect to keep such outlook." Does it mean to say that the railroad company shall be responsible

only for a failure to observe proper watchfulness, and not for a neglect to use the proper precautions to avoid injuring a person on the track after he would have been discovered by a constant lookout? Damages do not result from the mere neglect to keep a lookout, but from the failure to use the means to avoid a collision with the person injured which should have been used after he would have been discovered on the track, had the proper lookout been kept, and not then if the discovery would or could not have been made in time to avoid the injury in the manner prescribed by law. Hence, the act necessarily means that, if a constant lookout is not kept by persons running trains upon any railroad in this state, the company owning and operating the road shall be responsible for all damages from injuries to persons upon its track by its trains which could have been reasonably avoided had a constant lookout been kept. If this is not its intention and effect, it has failed to accomplish the end for which it was obviously enacted.

But it may be said that the effect of this construction would relieve persons injured on railroad tracks of the consequences of contributory negligence. This may be true to some extent. The act recognizes the fact that persons often go upon the tracks of railroads "without leave or license," and because they do so, and for their protection on account thereof, the act was enacted. The preamble, in assigning the reasons for enacting it, recites that, "Whereas, in this state, the railroad tracks are mostly exposed and uninclosed, and persons and live stock are *often* upon the tracks, and are in danger of being killed, and are injured and killed upon the track, when, by a proper outlook and *care* on the part of those running trains, such injury could be avoided, * * * * therefore, be it enacted," etc. For this reason it was held, at one time, in this state that it was the duty of an

engineer upon a railroad train "to keep a constant and careful lookout and watch for stock which might be on the track," and that although stock be wrongfully on the railroad track, and was not seen by the engineer, and was injured, "yet if, by the exercise of ordinary care and watchfulness, he might have seen it in time to have averted the danger," the railroad company was liable for the injury that resulted from the accident. *L. R. & Ft. S. Railway* v. *Finley*, 37 Ark. 562; *L. R. & Ft S. Railway* v. *Holland*, 40 *id.* 336. This rule is substantially the act in question, extended to and protecting stock and persons alike, so far as applicable. The history of the law upon this subject in this state, and the reasons assigned for both the act and rule, it seems to me, clearly show that the act was intended to make the rule the law in this state for the protection of persons and stock alike, so far as appropriate.

Johnson v. *Stewart*, *ante*, p. 164, is cited in the opinion of the court. What is said in that opinion in reference to this act of April 8th, 1891, was an *obiter dictum*, and, while entitled to much respect and consideration, is not controlling in this case. In one respect it might be cited to sustain the view I have taken. It is said in that opinion: "Prior to the decision of this court in *Memphis & L. R. Railway* v. *Kerr*, 52 Ark. 162, and the act of 1891, it was the duty of railroads to 'use all reasonable efforts to avoid harming an animal after it was discovered *or might by proper watchfulness have been discovered* on or near the track." *L. R. & Ft. S. Ry Co.* v. *Holland*, 40 Ark. 336; *Same* v. *Finley*, 37 *id.* 562. The act of 1891, so far as domestic animals were concerned, only had the effect to declare the law as it was before the decision of *Kerr* v. *Railway*, *supra*, overruling former cases." Why it does not adopt the same rule as to persons is not easily explained. But this and all said about the act of 1891 was an *obiter*

dictum. I so thought at the time the opinion was read, and for that reason filed no dissent.

The other cases cited or referred to in the opinion of the court state what the law was at a time before the 2d day of April, 1891, and do not undertake to construe the act of that date. As to them, it is sufficient to say that a valid statute repeals all laws in force at the time it takes effect, which are inconsistent with it.

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* DINGMAN.

Opinion delivered April 4, 1896.

CONTRIBUTORY NEGLIGENCE — WALKING ON RAILROAD TRACK. — One who is struck and injured by a railway train while walking on the track is guilty of contributory negligence where he knew it was time for the train to pass and yet failed to look or listen.

RAILROADS—FAILURE TO KEEP LOOKOUT—DEFENSE OF CONTRIBUTORY NEGLIGENCE.—Contributory negligence defeats recovery against a railroad company under the act of April 8, 1891, imposing upon railroads the duty to keep a constant lookout for persons and property upon the track. (BATTLE, J., dissenting.)

Appeal from Woodruff Circuit Court.

GRANT GREEN J., Judge.

STATEMENT BY THE COURT.

Dingman, a mechanic engaged for three or four years past in work at saw mills, and, at the time of the injuries complained of, residing at Meredith, a station on appellant's railroad about three miles south of Fair Oaks, had left McCrory, a station north of Fair Oaks, and reached the latter station late in the afternoon,—having walked on the railroad track,—and about 9:50 p. m. of the same day left Fair Oaks, going south on the

track toward his home, and, when about three-fourths of a mile from Fair Oaks, was struck by the pilot of one of defendant's passenger trains going south, and running at the rate of speed of about 20 miles an hour, and was thrown headlong on the right side of the track. His left arm, however, extended across the rail, and the same was run over, and severed from the body, between the shoulder and the elbow, and, in his effort to get up, his head was also struck by some part of the moving engine or cars, and severely bruised; and for this injury he sued, laying his damages at the sum of twenty thousand dollars, alleging negligence on the part of the trainmen in not keeping a proper lookout as the law requires, and that, had such lookout been kept, he would not have been injured. Verdict and judgment for $3,700, and defendant company appealed.

The proof tended to show that the night had been dark and stormy, with considerable rainfall; that when the accident occurred, about 10 p. m., the storm had somewhat abated, but flashes of lightning were still occurring at intervals, and the night foggy, so that the engineer's headlight, shown to be in good working order, did not aid the lookout from the cab, except imperfectly, and that a man standing or walking on the track ahead could not have been readily observed by the engineer and fireman more than one hundred and fifteen feet, whereas, had the night been clear, he could have been seen by them five hundred feet. The engineer and fireman both testify that they did not see plaintiff before or after the accident, and knew nothing of it until informed by the telegraph operator at Altheimer on the train's arrival there, and that they were on the constant lookout at the time.

Plaintiff testifies that he left Fair Oaks about the time the train arrived there southward bound, as he was also; that just before he was struck he looked back, and

saw the train on the Y track, but did not see the train any more until the engine was within fifteen or twenty feet of him, and on seeing it so near he just jumped up, and the pilot struck him under the feet and threw him off, as stated; that he knew it was the time for the train to pass. He further stated that no alarm or signal was given by the trainmen as it approached him; that the headlight was burning all right, and he would probably have seen it in time, but for the lightning flashes; that he was walking along between the rails in the middle of the track, when struck.

There was evidence tending to show that the plaintiff had been drinking heavily during the day, and was intoxicated at the time of the accident, and also that he had admitted the next morning to one of the witnesses that he was not walking on the track, but sitting down on the end of a cross tie, resting, when the accident occurred. The trainmen testified that they all had experience in their callings, and had been a long time engaged therein.

The court refused to give the following instructions, and others to the same effect asked by defendant: "(1) One who is injured by the negligence of another cannot recover any compensation for his injury, if he, by his own negligence and wilful wrong, contributed to produce the injury of which he complains; so that, but for his concurring and co-operating fault, the injury would not have happened to him, except where the direct cause is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence. (2) In this case, if you find from the evidence that defendant was guilty of negligence which contributed to his injury, your verdict should be for the defendant, unless you find defendant's employees were aware of the plaintiff's negligence, and then failed to use a proper

degree of care to avoid the consequences thereof. (3) If the facts and circumstances in evidence in this case show that plaintiff, at the time he was injured, was in a dangerous position, and was where a prudent man would not have stopped, and that his acts directly contributed to the injury, he will not be entitled to a verdict on account of any negligence on the part of the defendant's employees, unless the employees in charge of the train saw the danger plaintiff was in in time to have prevented the accident, and neglected to use all efforts in their power to avoid the accident. (4) If the jury believe from the evidence that the employees in charge of the train neglected to keep a proper lookout, and thereby failed to see the plaintiff; that plaintiff was walking on the track in advance of the train; that the track was open, and he could have seen the approaching train for some distance, and in time to have got out of the way of same,—then he was guilty of contributory negligence, and defendant is not liable, notwithstanding the negligence of its employees, and verdict should be for the defendant."

The court gave the following instruction for plaintiff: "(5) Although you may believe from the evidence that plaintiff was guilty of negligence in being on the track at the time of the accident, yet that does not prevent his recovering damages, if you find from the evidence that the injury would not have been sustained if the defendant's employees had kept a constant lookout."

Sam H. West and *J. C. Hawthorne*, for appellant.

1. The verdict is without evidence to support it. Plaintiff's conduct convicts him of gross negligence contributory to the injury, and there can be no recovery. 34 Ark. 636.

2. The 5th instruction for plaintiff is misleading, and conflicts with the 2d and 3d given by the court, and the 7th and 8th given for defendant. It assumes that

the defense of contributory negligence is abolished by sec. 6207, Sand. & H. Dig. This court has *always* held that contributory negligence is a complete defense, and that the only limitation is where defendant, *after becoming aware of the negligence* of plaintiff, fails to exercise due care. The act of 1891 was passed long after a definite and fixed construction had been given by the court to secs. 6196 and 6349, Sand. & H. Dig. See 33 Ark. 816; 47 *id.* 322; 47 *id.* 502; 53 *id.* 97; 36 *id.* 41; *ib.* 371; 49 *id.* 542; note to S. C. in 6 S. W. 8; 54 *id.* 431; 56 *id.* 47; *ib.* 271. The construction was well known to the legislature, and if there had been any intention to change, modify, or abolish contributory negligence as a defense, it would have been easy to have added the words, "notwithstanding the injured party may have been guilty of contributory negligence."

3. The court's charge fails to give the law of contributory negligence as a defense to actions for personal injury. 46 Ark. 522; 45 *id.* 249; 8 S. W. 371; 1 Dill. 584; 41 Ark. 549; 50 *id.* 478; 52 *id.* 125; 48 *id.* 491; 42 *id.* 321; 40 *id.* 298; 24 N. W. 422; 49 Ark. 257; 44 Penn. 378; 81 Pa. St. 375; 71 Ill. 500; 46 Ark. 193; 48 *id.* 107, 460; Shear & Redf. Neg., sec. 11; 6 Or. 417; 8 Ohio St. 570; 28 La. An. 320; 73 Mo. 168; 28 Ill. 299; 71 Mo. 636; 83 Mass. 177; 26 N. W. 524.

4. Plaintiff is not entitled to recover, from his own statement of the facts. 57 Fed. 921. The injury was the result of deceased's own carelessness. 95 U. S. 697; 114 *id.* 615; 4 N. W. 782; 55 Fed. 949; 59 N. W. 468; 26 N. E. 741; 18 N. W. 422; 22 S. W. 939; 39 N. Y. 358; 2 N. E. 138, and note. 34 Am. & Eng. R. Cases, 30; 41 Ark. 161; 60 *id.* 381; 16 S. W. 281, etc.

J. H. Harrod and *J. M. Battle*, for appellee.

1. Unless the act of 1891 is to be treated as an utter absurdity, the appellee is entitled to an affirmance.

It is clear that, if the bell had been rung or whistle blown, the approach of the train would have been known in ample time to have enabled deceased to escape the injury. *No lookout was kept*, and appellant is liable under the act.

2. Taking the instructions together, every proposition of law involved in a fair determination of the cause was completely covered. The defense of contributory negligence was fairly and completely covered by the court's charge. Under the law as it now exists, *it is incumbent on the railroad to discover the plaintiff's peril.*

Contributory negligence.

BUNN, C. J., (after stating the facts). Does the evidence make out a case against the appellant company? At the time of the injury the appellee, Dingman, was not at a crossing, but, according to his own statement, was walking along the track at a place where he had no right to be. He knew that it was about the hour for the passenger train of appellant to pass along the track at the place where he was walking, but he made no reasonable effort, by looking or listening, to inform himself of the approach of such train. These circumstances clearly show that he was guilty of negligence directly contributing to his own injury. *Martin* v. *Railway Co.*, *ante*, p. 156; *Railway Co.* v. *Cullen*, 54 Ark. 431; *Railway Co.* v. *Tippett*, 56 Ark. 459.

As Dingman was struck while upon or near the track, and as he was not seen by the employees in charge of the train, there is sufficient evidence to support the finding that they were negligent in not keeping a proper lookout. The only question, therefore, is whether, under the act of April 8th, 1891, the appellant company is liable, notwithstanding the contributory negligence on the part of appellee.

On this point the case is controlled by the case of *St. Louis, I. M. & S. Ry Co.* v. *Leathers*, *ante*. p. 235.

In that case it was held that although the railway company may have been negligent in failing to keep a lookout, yet the plaintiff cannot recover if his own negligence directly contributed to the injury of which he complains. The ruling announced in that case we believe to be supported by reason and the decisions of this court.

For many years before the passage of the act of April 8th, 1891, the courts of this state followed and enforced a rule of law that required employees in charge of railroad trains to keep a lookout for stock upon the track, and also to keep a lookout at crossings to avoid injuring travelers along the public highway. *L. R. & Ft. Smith Ry.* v. *Holland*, 40 Ark. 336; *Railway Co.* v. *Cullen*, 54 Ark. 434.

Liability of railroads for failure to keep a lookout.

Notwithstanding this rule required a lookout to be kept, and made the company liable for damages occasioned by a failure to keep such lookout, yet no one ever doubted that negligence on the part of the plaintiff, whose person or property was injured, directly contributing to the injury, would be a sufficient defense for a failure to keep such a lookout. The doctrine of contributory negligence was frequently applied, and the plaintiff denied a recovery for injuries occasioned by negligence of the company when he was also guilty of negligence contributing to his own injury. *Railway Co.* v. *Cullen*, 54 Ark. 434; *Railway Co.* v. *Tippett*, 56 Ark. 459; *St. Louis, I. M. & S. Ry. Co.* v. *Ross*, 61 Ark. 617.

In ordinary cases of killing stock, the rule of contributory negligence rarely applies, for the reason that it is the custom of the country to allow stock to go at large upon "the range," and when the railway track is not enclosed the owner is usually not guilty of negligence if his stock stray upon it. You cannot impute negligence to a horse or an ox; but if the owner of such an animal should carelessly drive it upon the track, or

in any other way be guilty of negligence contributing to its injury, the rule would apply. This is shown by the case of *Johnson* v. *Stewart*, *ante*, p. 164, where the question is fully discussed.

This rule requiring the employees in charge of a train to keep a lookout for stock was changed by the decision in *M. & L. R. R. Co.* v. *Kerr*, 52 Ark. 162, where it was held that they were under no duty to keep such lookout. Soon afterwards the legislature passed the act in question, requiring employees in charge of railroad trains to keep a lookout both for persons and property upon the track. The rule that, with certain exceptions, prevents a recovery by one for an injury to which his own negligence has directly contributed has been long enforced by the courts of this state, and was well known to the legislature, and if it had intended to abolish this rule by the act in question, it seems reasonable to believe that some reference would have been made to it in the act. But the act makes no reference to it, and does not purport to abolish the rule of contributory negligence in such cases. It simply requires the employees in charge of trains to keep a lookout, and provides that the railroad company shall be liable for all damages resulting from the failure to keep such lookout. It does not say that the contributory negligence of the plaintiff shall be no defense in such cases, or that the company shall be liable for accidents which would not have happened but for the carelessness of the plaintiff acting as a proximate contributing cause. In such cases the injury is caused, not by the negligence of the defendant only, but by concurring negligence of both plaintiff and defendant. "The law has no scales to determine, in such cases, whose wrongdoing weighed most in the compound that occasioned the mischief," and the plaintiff cannot recover. *Railroad Co.* v. *Norton*, 24 Pa. St. 469; Whittaker's Smith, Neg. 377, note.

The decision in *Memphis & L. R. Railway* v. *Kerr*, 52 Ark. 162, called the attention of the legislature to the fact that the law did not require the employees in charge of trains to keep a lookout for persons or property upon the track, and the legislature, by the act of April 8, 1891, remedied this defect by requiring a lookout to be kept. The act made an important and beneficial change in the law, for, before the passage of this act, if stock, or children too young to know their danger, got upon the track at a place away from a town or public crossing of a railway, and were injured by trains, the company could not be held liable, unless it was shown that the employees in charge of the train saw the children or stock in time to have avoided the injury. But now the company is liable if, by proper care and watchfulness, it could have discovered and avoided the danger. And so in other cases the company would be liable, under this act, for damages occasioned by a failure to keep a lookout, but we see nothing in the act to justify us in holding that a plaintiff may recover for injuries occasioned by his own carelessness. An adult who sits or stands upon a railroad track, where he has no right to be, and carelessly allows a train to strike him, is in the same condition now as he would have been before the passage of the act. If the company is negligent, he also is negligent, and he cannot recover unless he can show that the employees in charge of the train, after discovering his danger, failed to use ordinary care in avoiding it. We conclude that the rule of contributory negligence was not affected by the act in question, and that, under the facts of this case, the plaintiff cannot recover, and that the learned judge erred in instructing the jury. The judgment is reversed, and the cause remanded.

Battle J. dissents, for reasons stated in *St. L. I. M. & S. Railway Co.* v. *Leathers*, *ante*, p. 235.

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ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY v. BROWN.

Opinion delivered April 11, 1896.

TRIAL—OBJECTION TO EVIDENCE.—An exception to the admission of evidence is waived where the question of its admissibility was taken under advisement by the court, and never finally disposed, nor subsequently called to the court's attention by a motion to exclude the evidence.

EVIDENCE — OPINION OF NON-EXPERT. — A witness who is not an expert as to the speed of a train may testify his opinion as to the distance from the station which a train had gone before stopping on a particular occasion, although, on account of darkness, he was unable to observe external objects.

CARRIER—EXPULSION OF PASSENGER.—An expulsion of a passenger from a train in a rude, insulting, or rough manner renders the company liable for damages, although her expulsion in a proper manner was authorized because her ticket, being unstamped and unsigned, did not entitle her to carriage, and she refused to pay her fare.

EVIDENCE—PROOF OF BAD TEMPER.—Evidence that a conductor was in bad temper when he re-entered the coach after ejecting a passenger therefrom is admissible in corroboration of testimony tending to show that the passenger was ejected in a rude, insulting, or rough manner.

CONFLICT OF LAWS—ACTION BASED ON STATUTE OF ANOTHER STATE. —A non-resident may sue a domestic corporation in the courts of this state on a transitory cause of action arising under a statute of another state, where such statute does not conflict with the public policy of this state; and the fact that there is a similar statute in this state is evidence that the statute in question is not against public policy.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

L. F. Parker and *B. R. Davidson*, for appellant.

1. The plea to the jurisdiction should have been sustained. It is against public policy to allow such

suits to be maintained at a point so far from where the acts are alleged to have occurred, and between residents of other jurisdictions. 2 N. Y. Sup. 524; Black, Const. Law, p. 222; 127 U. S. 706; 14 S. W. 228; 98 Mass. 65. It is the settled policy of our law and of Missouri that suits shall be brought where the defendants reside. Mansf. Dig., secs. 5007–9, 4029, 5003; 38 Ark. 205; Dig. Stat. Mo., vol. 2, p. 1454, secs. 6126, 2009; 80 Mo. 634; 55 Ark. 282.

2. It was error to allow Humphreys' opinion in evidence. He was not an expert. 61 Wis. 357; 19 Am. & Eng. Ry. Cases, 74, 79; 58 Fed. 947–8.

3. There was no cause of action, under the Missouri statute, for ejecting at a wrong place. 64 Mo. 465; 77 *id.* 663; 53 *id.* 320; 50 Fed. 496–501; 127 U. S. 390. The plea in abatement should have been sustained. 2 N. Y. Sup. 524; 14 S. W. 228; 19 Mich. 305–315; 8 Bissell, 31.

4. It was error to admit statements of the conductor as part of the *res gestæ* 11 Am. & Eng. Ry. Cases, 85–89.

5. Evidence that plaintiff had rheumatism before and after the occurrence was not admissible. 56 Fed. 994.

Rogers & Oglesby, for appellee.

1. Where a right accrues by virtue of a statute of any state, the action may be maintained in any other state, if not contrary to public policy of the place where brought, such actions being transitory. 31 Minn. 11; 103 U. S. 11; 65 Ia. 729; 60 Miss. 977; 63 Ia. 70; 8 Baxt. (Tenn.), 341; 19 Mich. 305; 51 Ark. 459; 84 N. Y. 48; 145 U. S. 593; 17 Wend. 323; 20 S. W. 819.

2. The testimony of Humphreys was competent. Questions of time, distance, etc., are matters of common knowledge. 41 Vt. 99. And what the conductor said

was admissible as part of the *res gestæ*, and to show his temper and frame of mind. 20 Ark. 225. The testimony as to plaintiff's rheumatism was not admitted, but excluded.

3. This is a case of conflict of testimony, and the jury believed the plaintiff's theory to be true. This court will not disturb the finding. 46 Ark. 149; 51 *id.* 476; *ib.* 475; 147 U. S. 150; 23 U. S. App. 349.

BUNN, C. J. This suit was instituted in the Sebastian circuit court, Fort Smith district, and, having progressed to a certain point, plaintiff, Drura Brown, suffered judgment of nonsuit, and subsequently renewed the suit against the defendant company, which resulted in judgment in her favor in the sum of three hundred and seventy-five dollars, and the defendant company appealed to this court.

The plaintiff, Drura Brown, and her husband, referred to in the record as Dr. Brown, resided at Vinita, in the Indian Territory, and only a short distance from the city of Fort Smith; and on 22d December, 1892, each purchased at Fort Smith, from defendant's agent, a round-trip ticket over its railroad and connecting lines to and from Memphis, Tennessee. This ticket was conditional to the extent that it was stipulated thereon that the holder thereof, in order to make the return part good, should identify herself or himself, as the case might be, by signing her or his name, and having the ticket stamped by the agent of the company, at a point named between the punch marks thereon made.

Plaintiff and her husband were on their return, and, by the connecting railway, reached defendant's road at Nichols, in Green county, in the state of Missouri, without having her ticket signed as aforesaid, and stamped by an agent of the connecting road over which she had traveled on her said return. From Nichols station, defendant's road runs south to the Arkansas line, thence

through the counties of Benton, Washington, Crawford and Sebastian in this state, and thence southerly, through the Indian Territory, to the city of Paris, in the state of Texas. Plaintiff and her husband boarded one of the coaches of defendant's passenger train going south, at Nichols station, sometime before daylight on the 1st day of January, 1893; and, having gone a short distance (about which the evidence is conflicting), the conductor demanded, and was shown, plaintiff's said ticket, and, observing that the same had not been signed and stamped as required, informed plaintiff that it was worthless, and, after some conversation with her, the nature of which is in dispute, informed plaintiff that she must get off at once, and immediately stopped the the train, and escorting her to the door and platform, followed by her husband, caused her to alight from the steps of the coach to the ground, in a manner which is also in dispute. At the time it was very cold and dark, and there is testimony showing that the ground was covered with snow or sleet, or both. There is testimony tending to show that the trainmen who assisted her to alight from the train did so in a rude and rough manner, jerking her down, so that she was hurt and bruised, and also that the place on which she was thus caused to alight was an embankment or "dump," and sloped outward, and was difficult to stand upon under the circumstances. There was testimony just to the contrary of this, the plaintiff testifying the one way, and the trainmen the other, as to the place at which and the manner in which she was put off. There was evidence also pro and con as to the manner in which plaintiff was treated by the conductor from the time he examined the ticket until she was ejected from the coach, her evidence being to the effect that his manner, words, and actions toward her were rude, rough, and profane; and that on the part of defendant that they were just to the con-

trary. The witnesses on the part of plaintiff testified that the train had gone a mile and a half, more or less, from the depot; and those on the part of the defendant, that it had gone but a short distance from the depot, and where its lights were still in plain view. There was evidence that, by reason of the plaintiff's exposure to the inclemency of the weather, and by reason of her having to walk a long distance from the point where she was put off to the first house near the road, there being no house observable at or near the place at which she was put off the train, she contracted a severe cold, producing pneumonia; so that she was confined to her bed for a long period after she arrived at her home, and also that she suffered much from rheumatism produced by such exposure.

When objection to evidence waived.

The first contention we will notice is that which arose from the admission by the court of evidence to the effect that plaintiff had rheumatism sometime before she was put off the train and sometime afterwards. The testimony was not admissible, but the defendant contends that it was admitted, while the plaintiff contends that it was not admitted. The record shows that evidence to that effect was given, and that the defendant objected. The question was taken under advisement, but was never finally disposed of by the court, and seems to have been overlooked. We think defendant should have called the court's attention to it, and asked a ruling on its motion to exclude, and, failing to do so, waived its objection. More likely still, the evidence was never considered by the jury, as it seems to have been taken under advisement in their presence.

Admissibility of opinion of non-expert.

It was also objected by defendant, that the witness Humphreys, who was a passenger in the coach at the time, not having shown himself to be an expert judge of the time, speed, and distance at which trains may be running, or have run, on any given occasion, when the

circumstances are such that he cannot observe external objects, was incompetent to testify as to the distance the train had gone from the station to where it was stopped and the plaintiff put off. We do not think this objection is tenable. It may be true that people accustomed to travel much on trains, in the night as well as in the day time, as trainmen are accustomed to do, are better and more accurate judges of such matters than those who travel on trains only occasionally, as does the average passenger; and yet the difference is only in degree at last, and, the subject-matter being more or less of common knowledge, we cannot say that one is incompetent to testify because he is not an expert. His testimony may not be entitled to as much weight as that of the experienced man, but that is all that can be said against it, and that of course is a question for the jury.

Liability of carrier for rude expulsion of passenger.

It may and must be admitted that the unstamped ticket which plaintiff presented to the conductor in payment of her fare was, in its then shape, void, and did not authorize her to ride on the defendant's cars; and her tender of the same in payment of her fare, instead of money, may be considered as a refusal to pay her fare; and, therefore, that the conductor, under the provisions of the Missouri statute, had a right to put her and her baggage off the car, near any depot or dwelling house; and yet, in doing so, he should have used no more force than was necessary, and, irrespective of any particular statute, should not have ejected her in a rude, insulting, or rough manner. Whether this was done in this particular instance was also a matter for the consideration of the jury, from the evidence relating thereto.

Admissibility of proof of conductor's bad temper.

It is objected that the evidence adduced by the plaintiff to show the temper of the conductor on re-entering the coach after ejecting plaintiff should not have been admitted. We cannot see the reason in this objection. It was admissible in corroboration, however little

weight there should be given to such evidence, even if true.

Enforcement of cause of action based on statute of another state.

The principal argument of defendant's counsel is devoted to its contention that, since plaintiff was a resident of the Indian Territory, and since the injury was done in the state of Missouri, and since the case must be adjudicated according to the laws of the latter state, therefore it is contrary to the public policy of this state to lend the aid of her courts to settle the controversies of parties so situated, and thus the trial court was without jurisdiction. On this particular subject, we cannot better express our views than by quoting from others. In the case of the *Chicago, St. Louis & New Orleans Railroad Company* v. *Doyle*, 60 Miss. 977, Chief Justice Campbell, in delivering the opinion of the court, said: "The right of action for damages for killing a husband, given by the statute of Tennessee, may be asserted in the courts of this state, because of the coincidence of the statutes on this point, and, independently of this, because a right of action created by the statute of another state, of a transitory nature, may be enforced here, when it does not conflict with the public policy of this state to permit its enforcement; and our statute is evidence that our policy is favorable to such rights of action, instead of being inimical to them,"—citing *Dennick* v. *Railroad Co.* 103 U. S. 11; *Nashville &c. R. Co* v. *Sprayberry*, 8 Baxter, 341; *Selma &c. Ry. Co.* v. *Lacey*, 49 Ga. 106; *Leonard* v. *Columbia &c. Co.* 84 N. Y. 48. There is but a slight difference between the provisions of the statute of the state of Missouri, shown in evidence as governing this case, and those of the statute of this state on the same subject; and that difference is as to the nature of the place at which a passenger may be put off. As was said in the Mississippi case, from which we quote above, our statute is evidence that our policy is favorable to rights of action for wrongs to persons of the nature of

those charged in this case. We do not see, therefore, that any public policy of this state is contravened by the assumption of jurisdiction of this cause by the court below.

We append a list of authorities touching each phase of this question, or rather the reason of the rule from the different standpoints from which the question has been discussed. The common law rule is that, where the right of action is transitory in its nature, courts everywhere, when the defendant may be lawfully summoned to appear therein, have jurisdiction; and, when the suit is governed by statute of the state in which the injury is committed, courts of another state, having similar laws, or where it is not contrary to its public policy, will enforce such laws, by the rule of comity. *Eureka Springs R. Co.* v. *Timmons*, 51 Ark. 459; *Boyce* v. *Ry. Co.*, 63 Ia. 70; *Morris* v. *R. I. & Pacific R. Co.* 65 *Ib.* 727; *Herrick* v. *M. & St. L. R. Co.*, 31 Minn. 11; *Tex. & Pacific R. Co.* v. *Cox*, 145 U. S. 593; *Wintuska* v. *L. & N. R. Co.*, 20 S. W. 819.

In some jurisdictions, action for torts committed in and governed by the laws of another state are purely matters of comity; and when it appears that the courts of one state are resorted to, to adjudicate upon mere personal torts committed abroad, between persons who are all residents where the tort was committed, the courts may decline to take jurisdiction. *Great Western Railway Co. of Canada* v. *Miller*, 19 Mich. 305.

There does not appear to have been any objection to the instructions given, or because any were refused. The evidence sustained the verdict of the jury, and, seeing no substantial erorr in the action of the court, the judgment is affirmed.

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DAVIS *v.* GOODMAN.

Opinion delivered April 11, 1896.

UNLAWFUL DETAINER—JUDGMENT.—A judgment in unlawful detainer awarding defendant possession of a tract of land on which a house is situated will not be reversed where the complaint alleged plaintiff's title to the land, and that defendants were tenants of a house thereon, and were unlawfully holding possession of the "premises," and the writ of possession awarded plaintiff possession of the land, as well as the house.

APPEAL—AIDER OF PLEADING BY EVIDENCE.—The judgment of the trial court will not be set aside on appeal where it is in conformity to the evidence in the case, although the pleadings fall short of the facts in evidence, as the pleadings will be considered as amended to conform to the evidence.

APPEAL—OBJECTION NOT RAISED BELOW.—A judgment for defendant in an action of unlawful detainer will not be reversed on appeal for uncertainty and indefiniteness, because it gives to defendant such possession only as she had at the institution of the suit, if the defect was not called to the trial court's attention.

Appeal from St. Francis Circuit Court.

GRANT GREEN, JR., Judge.

N. W. Norton, for appellant.

The judgment is void for uncertainty. The suit as to Mrs. Goodman was only as to the house, and the judgment is in her favor for the whole quarter section of land, except a portion of the field which is indefinitely and uncertainly described. Judgment cannot be broader than the issues made. 1 Black, Judg., secs. 138-141. An uncertain reservation makes all pass under the grant. 11 So. 834.

The appellee, *pro se*.

The action was for S. W. ¼ sec. 11. The judgment is on the issues made, which involved the whole quarter section. The officer can easily identify the 24 acres

reserved. It is the land rented to Parker. The judgment is sustained by the evidence, and should be affirmed.

BUNN, C. J. This is an action of unlawful detainer, instituted by appellant, D. Davis, against the appellees, Francis Goodman, Marion Parker, and George Parker, to recover the possession of the southwest quarter of section eleven (11), in township four (4) north, of range five (5) east, in St. Francis county; the complaint alleging ownership in the plaintiff, tenancy and possession under him by defendants of a house on said land for the years 1887 and 1888, and a holding over without right after the termination of said tenancy, and after due notice given in writing and demand of possession by plaintiff. Prayer for possession of the premises.

The answer denied occupation of the premises, to-wit, the house mentioned in the complaint as the tenants of plaintiff in the years 1887 and 1888; denied that defendants were ever in possession of, or detained, unlawfully and without authority, the premises in the year 1889 or at any other time; and also denied that plaintiff was damaged in any sum whatever.

The writ of possession was issued by the clerk, on bond being given by the plaintiff, and required the sheriff to take possession of the whole quarter section, without reference to the house thereon, and deliver the same to the plaintiff; and the sheriff was also required thereby to summon the defendants to appear. During the pendency of the action, the deaths of both Marion and George Parker were suggested and admitted, and J. S. Fitch was appointed administrator *ad litem* to defend for them, and the action progressed accordingly. The cause was tried by the court sitting as a jury, and upon the facts the court found for the defendant Goodman, and, as she claimed no damages, it rendered judgment upon its said findings as follows, to-wit: "It is by the

court considered, ordered, and adjudged that the defendant, Francis Goodman, do have and recover such possession of the premises, to-wit: southwest quarter of section 11, township 4 north, of range 5 east, except *twenty-four* acres in south field, as she had at the institution of this suit; and that Francis Goodman recover of plaintiff her costs, etc., not, however, to include any costs incurred on account of the deceased Parkers and Fitch, the administrator *ad litem*.

Form of judgment in unlawful detainer.

The error complained of by appellant is in the form of the judgment. The action being for a house on the quarter section of land, and not for the quarter section itself, he contends that the court erred in its judgment in extending the scope thereof to all the land of the quarter section, less the 24 acres adjudged to them, instead of confining the judgment to the house, since that was all the complaint and answer put in issue. It is not altogether certain what the language of appellant's complaint means, in respect to the description of the property involved. It may mean the house only, and yet there are just as strong, if not stronger, reasons to say it means the whole quarter section, since in the outset plaintiff claims to be the owner of the whole quarter section, and prays to be put in possession of the "premises" – quite an indefinite word, and dependent for its meaning on some going before. And the house is only mentioned in the complaint in that portion which charges the unlawful possession of defendants.

Furthermore, the plaintiff had possession given him by virtue of the writ issued by the clerk in the first instance, and his giving bond as the statute provides. That writ of possession calls for the whole quarter section, and is not confined in its scope to the house, and, as we have seen, the complaint is so inexplicitly worded as that the clerk may well be excused for wording the writ as he did. It does not seem altogether consistent

for the plaintiff to raise an objection to the judgment, which entered into the writ he sued out and holds under.

When pleading aided by evidence.

But, according to a uniform holding of this court, the trial court's findings and judgment will not be reversed, when they are in conformity to the evidence in the case, notwithstanding the pleadings fall short of the facts in evidence, for in such case the pleadings will be considered as amended to suit the facts.

Objection not raised below.

We see no real, substantial defect in the judgment except, perhaps, it left the descriptions of the land somewhat uncertain and indefinite, in this, that it gave to Goodman such possession as she had at the institution of this suit. And this defect would have doubtless been corrected by the court on motion, or a mere suggestion of plaintiff. This was not made by him, and we conclude that the defect does not materially affect him, and that he chose to waive it by not having it corrected at the proper time.

Upon the whole case, we think there was no substantial error in the proceedings of the court.

The judgment is therefore affirmed.

FLETCHER *v.* ARKANSAS NATIONAL BANK.

Opinion delivered April 11, 1896.

EVIDENCE—NOTARY'S CERTIFICATE OF PROTEST.—A certificate of protest of a note by a notary public of another state, attested by his seal, is *prima facie* evidence that the acts indicated were done by him.

Appeal from Hot Spring Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Chas. D. Greaves, for appellant.

1. The protest of the notary was not under his seal of office, and was not admissible in evidence. Sand.

& H. Dig., sec. 2884-5; 2 Daniel, Neg. Inst., secs. 945-6-8.

2. The burden of showing due notice was on plaintiff. 2 Dan. Neg. Inst., sec. 1050-1, 961, 962; Tiedeman on Com. Paper, sec. 327. No material fact will be presumed. 19 Ark. 484. The notice in the case was not in time. 2 Daniel, Neg. Inst., sec. 1039.

Wood & Henderson, for appellee.

1. The notary's seal was on the same sheet, and our statute does not require it to be placed in any particular place. Whether the certificate was under seal, was a question for the court to determine from the evidence. The court so found, and there is evidence to sustain its finding. 4 Ark. 195; 121 Pa. St., 204. It was not necessary for the notary's name to be signed at the end of the writing. All that is necessary is that his name be signed to the document, intending to be bound by its contents. 22 Am. & E. Enc. Law, 782, and note; 58 Md. 546; 41 Am. Dec. 755, and cases in note. The certificate of the notary proves protest and due notice. Sand. & H. Dig., secs. 2884-5.

2. But, independent of the notary's certificate, the evidence supports the finding of the court that notice was duly given. The draft was protested on the 16th, and the holder had until the last mail on the 17th to forward notice. Tiedeman, Com. Paper, sec. 337. This notice was received by appellee on the 21st, and on the same day it forwarded the notice to appellee. This was in due time. *Ib.* sec. 337.

2. Appellant waived any objection to Rix's testimony by not making same grounds of motion for new trial.

BUNN, C. J. This was a suit on a protested check, issued by Bonner & Bonner of Tyler, Texas, to appellant Fletcher, on Kountze Bros., New York, for $115,

endorsed by Fletcher, sold for cash to appellee bank, and protested for non-payment on presentation in New York. Judgment for plaintiff.

The contention of appellant is that there was no proof of sufficient protest in New York, and also that there is no proof of notice of protest to him, nor of due diligence in giving him the notice thereof. The court found against him in both issues, and we will not disturb its findings. The certificate of protest was sufficient, and the attestation by seal was also sufficient to make a *prima facie* case that the acts indicated had been done by the notary. The certificate of the fact that due notice was given appellant was wanting, but the fact was established by extraneous evidence, and we think also that all proper diligence was used in giving the notice to him.

The judgment is therefore affirmed.

POWERS *v.* ARMSTRONG.

Opinion delivered April 11, 1896.

EVIDENCE—TESTIMONY AS TO CHARACTER.—Evidence of general reputation is not admissible, in civil suits, to rebut imputations of fraud or misconduct.

APPEAL—HARMLESS ERROR.—The erroneous admission of evidence of the good character of the vendee of property, upon the question whether or not the transfer was a fraud upon the creditors of the vendor, is not reversible error where the undisputed evidence shows that the vendee was a *bona fide* purchaser.

Appeal from Johnson Circuit Court.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

In January, 1895, appellee brought an action of replevin against appellant for a stock of merchandise,

which he alleged to be worth $1,685, situated in the store-house of Joe Brown, in Coal Hill, Ark. Appellant answered, justifying under certain writs of attachment placed in his hands upon orders of the court in suits of *B. Baer & Co.* v. *N. E. Armstrong & Co.*

The evidence at the trial of this cause showed that on the 3rd day of January, 1894, J. S. Armstrong, who was the father of N. E. Armstrong, and who lived at Ozark, Ark., bought from his son, N. E. Armstrong, for eighty cents on the dollar, his stock of merchandise at Coal Hill, Ark., which amounted to $1,384, and that he gave him $500 for $700 or $800 worth of book accounts; that he paid his son for the stock and book accounts by surrendering to him $1,848 of his son's notes which he held, and that, after giving his son credit for the $1,848, he still owed him $242.28. A good deal of evidence was introduced to show the *bona fides* of appellee's claim against his son, and, as far as the record, as it now stands, shows, N. E. Armstrong did owe his father about $2,200 at the time he bought him out in January, 1894. N. E. Armstrong was a very poor business man, and constantly lost money. J. S. Armstrong, however, was a thrifty, prosperous trader, and, according to the testimony of J. B. Carter, cashier of the Ozark Bank, could always get from the bank any amount of money he needed, and frequently indorsed, and afterwards paid, the notes of his son, N. E. Armstrong. J. S. Armstrong testified that in December, 1893, he contemplated going into business with his son; but when, in January, 1894, he looked more fully into his son's condition, he found that he was going to fail, and so bought him out, to save what he was owing him.

N. E. Armstrong testified that he had never made a statement of his financial condition to any commercial agency, but when shown the statement of August 23, 1893, made to R. G. Dun & Co., in which he claimed a

total net worth of $1,450, and stated that he had no liabilities of any sort at that time, admitted that the statement was made in his own handwriting, and that at the time he made the statement he owed his father, J. S. Armstrong, $1,200, and about the same amount of commercial debts, and the total amount put into the business by him was about $150; and, when asked how he reconciled this statement to Dun & Co., made in August, 1893, to the effect that his net worth was $1,450, and he owed nobody, with his sworn statement now on the stand that at the time he owed his father $1,200, and about the same amount to other parties, he said he could not reconcile the statements.

R. M. White testified that he was present when N. E. Armstrong sold to appellee, and that appellee took possession of the property at once, and left him in charge to manage it.

Eugene Adler testified that he was a member of the firm of B. Baer & Co., wholesale grocers of Fort Smith, Ark., and that in December, 1893, he sold N. E. Armstrong $50 worth of groceries on the faith of his statement that appellee (his father) was going into business with him, and that afterwards, when he saw appellee in Fort Smith, he asked him if he was going into business at Coal Hill with his son, and he replied that it was so reported, but he had not done so yet, and he did not know what he would do.

Appellee offered in rebuttal J. M. Moore, J. M. Crompton, A. S. McKennon, Dr. Brown, and T. B. Crawford; and each was asked if he knew J. S. Armstrong's general reputation, in the neighborhood where he lived, for truth, honesty and morality, and each answered, "Yes." They were each then asked if that reputation was good or bad, and each replied that it was good. To all of appellee's testimony in rebuttal touching his good character, appellant objected.

After the charge of the court, and the verdict of the jury for appellee, the court made an order taxing all the cost, both in this suit and in the suit of B. Baer & Co. *v.* N. E. Armstrong, against appellant; and afterwards, on a motion filed to retax costs, an order was made modifying the first order, and taxing one-half of the costs to appellants, and one-half to appellee. The first order does not appear in the record.

Winchester & Martin, for appellant.

It was error to admit evidence proving appellee's good character. His character was not put in issue, nor assailed. Stephens' Dig. Ev., p. 115, note; 16 Wend. 646; 47 N. H. 136; 4 Gray, 574, 581; 28 Kas. 756. The good character of a party cannot be shown except in answer to impeaching evidence from the other side. 4 N. Y. 493; 1 Comst. 530; 34 Pa. St. 114. The appellee obtained an unfair advantage before the jury by this procedure. 1 Gr. Ev., sec. 55.

Virgil Bourland, for appellee.

1. When a party is charged with fraud from mere circumstances, evidence of his general character is admissible to repel it. 3 Caines, 120; 3 Esp. 284; 1 Greenl., Ev. sec. 54.

2. But, even if this were not true, appellant is not injured, for the proof clearly shows that he was not entitled to a verdict in any event. 18 Ark. 469; 40 *id.* 168; 43 *id.* 535; 31 *id.* 365; 28 *id.* 531; 18 *id.* 469; 23 *id.* 121; 44 *id.* 556.

Admissibility of testimony as to character.

HUGHES, J., (after stating the facts.) It appears from the record in this case that the only error complained of by appellants is that the court allowed appellee to prove a good character by witness McKennon and others. There is nowhere in the record any testimony which reflects upon either the truth, honesty, or morality of appellee, J. S. Armstrong; and since he was

the plaintiff in the trial below, and was presumed in law to have a good character, until it was attacked or impeached, and since there was no evidence of bad character, and nothing before the court or jury which put his character in issue, was it error to allow witness McKennon and others to testify as to his good character? The law credited him with having a good reputation, until that reputation was assailed. Evidence of character is not admissible in civil suits to rebut imputations of fraud or misconduct. *Boardman* v. *Woodman*, 47 N. H. 136, and cases cited. Such evidence is in general confined to criminal prosecutions involving the question of moral turpitude. The case of *Ruan* v. *Perry*, 3 Caines, 120, cited by counsel for appellee to the contrary is exploded by later authorities. *Gough* v. *St. John*, 16 Wendell, 646, and cases cited. In the case last cited it is said: "But where a civil action is brought for an injury to property, though the injury was legally criminal, and involved moral turpitude, in so much that, on an indictment, character would be obviously receivable, there is no authoritative case save *Ruan* v. *Perry*, which favors its admissibility." The case of *Simpson* v. *Westenberger*, 28 Kas. 756, is directly in point, and holds that, in a case like the one at bar, evidence of good character is not admissible. This is a civil action, and the character of the appellee was not put in issue in the action, and the defendant relied solely upon the facts shown in evidence to support his contention. We are of the opinion that the admission of this evidence was improper, the character of the appellee not having been put in issue or impeached. *Pratt* v. *Andrews*, 4 N. Y. 493.

When error not prejudicial.

But, while it was error to admit this evidence, and while there is evidence from which the jury might have found fraud upon the part of N. E. Armstrong, there is no proof that the appellee, J. S. Armstrong, participated

in his fraud. On the other hand, the evidence shows that J. S. Armstrong bought the goods, accounts, etc., in controversy, in good faith, to realize a just debt owing to him by N. E. Armstrong; that he paid a fair price, and that the goods were insufficient to pay his debt; and that he delivered up the notes of N. E. Armstrong, and credited him on his account against him,—in other words, paid for the goods and choses in action, and took immediate possession and control of them. We do not believe the jury could have found otherwise than they did, had the evidence as to appellee's good character not been admitted. We are therefore of the opinion that, though it was error to admit this in evidence, its admission was not prejudicial, and therefore not reversible error.

The judgment is affirmed.

HEMPSTEAD COUNTY *v.* JONES.

Opinion delivered April 11, 1896.

SHERIFF—FEE FOR SUMMONING SPECIAL JURORS.—A sheriff is not entitled to a fee for summoning special jurors to serve in felony cases, in addition to his mileage, there being no express statutory provision therefor.

Appeal from Hempstead Circuit Court.

RUFUS D. HEARN, Judge.

J. H. McCollum, for appellant.

There is no law authorizing the paying or charging for the service of summoning special jurors. By sec. 3318, Sand. & H. Dig., the sheriff is allowed $10 for summoning a petit jury, but no fee is allowed for the services claimed. Constructive fees are not allowed. Sand. & H. Dig., sec. 1237; 25 Ark. 235; 32 *id.* 45; 55 *id*, 387; 56 *id.* 581; 57 *id.* 487, 565.

PER CURIAM. On a trial in the circuit court, it was admitted that the appellee, as sheriff of Hempstead county, had, under order of the circuit court of said county, summoned 45 special jurors to serve in felony cases. The court held that he was entitled to charge the county a fee of 33⅓ cents for each of said jurors, and gave judgment accordingly.

The only question in this case is whether a sheriff is entitled to a fee for summoning special jurors to serve in felony cases, in addition to his mileage. It has been frequently held that sec. 3350, Sand. & H. Dig., which provides that, "in all cases where any officer or other person is required to perform any duty for which no fees are allowed by law, he shall be entitled to such pay as would be allowed for similar services," does not apply to allowances against counties. *Logan County* v. *Trimm*, 57 Ark. 499; *Cole* v. *White County*, 32 Ark. 45. To authorize a county court to allow a claim against a county in favor of an officer, "there must be specific statutory authority to the officer to make a charge for the service rendered." Sec. 1237, Sand. & H. Dig.; *Logan County* v. *Trimm*, 57 Ark. 491. No such authority is given for the allowance of a fee for summoning special jurors to serve in felony cases. The duties of a sheriff are important and arduous. In many of the counties the pay is small. We see no reason why they should not be allowed pay for such services, except that the statute has made no provision for it.

Reversed and remanded.

Bunn, C. J., dissents.

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HARKEY v. MECHANICS' & TRADERS' INSURANCE COMPANY.

Opinion delivered April 11, 1896.

CONTRACT—RESCISSION.—Where the assured accepts a sum of money in full settlement of a disputed loss, he cannot rescind the settlement as procured by fraud, without a return of the money received. (BUNN, C. J., dissenting).

Appeal from Yell Circuit Court, Dardanelle District.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

This was an action at law upon a fire insurance policy. The complaint stated, in substance, the following facts: The defendant insurance company, in consideration of a premium paid to it by the plaintiff, issued on the 30th day of Nov., 1892, a policy of insurance against loss or damage by fire upon the barn and dwelling house of plaintiff, for the term of three years. The amount of the policy was four hundred dollars on the barn, and one hundred and twenty-five on the dwelling. The barn was destroyed by fire on the 19th day of May, 1893, and plaintiff sustained a loss of four hundred dollars.

Afterwards, one Miles, who was sent by the insurance company to adjust the loss, induced plaintiff, in consideration of one hundred dollars, to surrender the policy, and sign an agreement to accept said one hundred dollars in full settlement of said loss. It was alleged that this settlement was procured through the fraudulent statements and dishonest conduct on the part of said Miles; that "said Miles represented to plaintiff that, in swearing to the proof of loss, he had

committed perjury, and that it was the duty of the defendant company to prosecute him, and send him to the penitentiary; that he had sworn that no one was interested in the lands upon which the barn stood except himself, when, as a matter of fact, one George L. Kimball had a mortgage on it; that he had sworn that there was no other insurance on the said property, when, in fact, the plaintiff had insured said property in the German Insurance Co. of Freeport, Ill.; that he had forfeited his policy in divers ways; and that plaintiff could not recover anything at law,—all of which statements said Miles knew were false." Plaintiff further alleged "that the deceitful conduct, false assurances, and cruel threats of the said Miles frightened him, and so bewildered and shocked him that he was wholly unable to transact any business, or formulate a business idea; that said Miles had made out his proof of loss; and that he did not know what construction might be placed upon it, and felt that he was completely at the mercy of said Miles, who still claimed to be the friend of the plaintiff, and said Miles then and there proposed, in order to avoid trouble, and to prevent this plaintiff from being prosecuted for perjury, to pay this plaintiff one hundred dollars if he would receipt in full for his loss under said policy, and then and there agreed that, if plaintiff would accept his propositions, he would suppress the testimony, and prevent his being prosecuted for a felony, but stated that the plaintiff must accept the propositions then and there before he left the store-house, or the proposition would be withdrawn, and, if it was not accepted, the defendant company would never pay him a cent, and would prosecute him to the bitter end." Under these circumstances, plaintiff accepted the one hundred dollars, and signed a receipt that it was in full settlement of the loss suffered by plaintiff from said fire. The prayer of the complaint was that plaintiff

have judgment for the sum of three hundred dollars, and other relief.

There was a demurrer to the complaint, which was sustained, on the ground that it did not show that plaintiff had returned or offered to return, to defendant the money received on the compromise before commencing his action at law upon the policy. Plaintiff electing to stand upon his complaint, his action was dismissed.

W. D. Jacoway, for appellant.

No tender was necessary. The loss was a liquidated demand, and the $100 was only a payment *pro tanto* on the debt. Sand. & H. Dig., sec. 4140. If a person effect a compromise of his debt by fraudulent representations, and procure a discharge of the same by paying a per cent. thereon, and an action be brought to recover the balance, on the ground of fraud, it is not necessary, as a preliminary to the right of recovery, that the plaintiff repay, or offer to repay, the per cent. received. 3 Foster (N. H.), 519; 73 Ill. 303; 109 Ill. 120; 33 N. W. 24; 26 Ark. 604; 55 Ark. 369; 4 Cent. Rep. 35; 20 Conn. 557; 9 B. Mon. 249; 70 N. C. 573; 71 *id.* 70; 67 Barb. 394; 118 Mass. 482; 12 Gray, 341; 8 Am. Rep. 539; 66 N. Y. 609; 9 How. 55. A mere receipt by a creditor of part of his debt then due is not a good defense, by way of accord and satisfaction, to an action for the remainder, although the creditor agreed to receive it in full satisfaction. 1 N. J. 391; 3 Bing. N. C. 454; 7 So. 821. The settlement and release of a claim for insurance on receipt of a sum less than the full amount due on the policy is without consideration, unless it is made as an honest compromise of a disputed demand. 18 N. E. 322; 2 Dan. Neg. Inst., sec. 1289*a;* 55 Ark. 373; 33 *Id.* 572. It is essential to the validity of a release that there be a consideration. 19 Am. & Eng. Enc. Law, p. 744, note; 1 Cowen, 122; 7 *id.* 224. A release procured by

duress is void. 34 Fed. 116; 44 *id.* 631. The compromise of a *doubtful* claim will be set aside for fraudulent misrepresentations, or concealment, or imposition amounting to unfair and unconscientious dealing. 26 Am. Dec. 61, and note. A receipt in full, in consideration of stifling a criminal prosecution, is void. 1 Am. & Eng. Enc. Law, pp. 339 to 404, and notes; 32 Ark. 358.

S. R. Allen and *E. W. Kimball*, for appellee.

1. The complaint is insufficient on its face.

2. In this case there was a *disputed* claim, a settlement of which cannot be opened and an action brought on the original demand, unless the money paid on compromise be first tendered back. This is the law. 68 Me. 400; 117 Mass. 470; 61 Fed. 54.

RIDDICK, J., (after stating the facts.) The only question for us to determine is whether, under the facts as stated in the complaint, it was necessary for the plaintiff to return, or offer to return, the money received by him upon the compromise agreement, before commencing his action at law upon the policy of insurance.

The complaint alleges that one Miles, the agent of the company, claimed that the policy had been forfeited "in divers ways, and that plaintiff could not recover anything at law." It also alleges that he stated to plaintiff that, if the offer of compromise was not accepted, "the defendant company would never pay him a cent, and would prosecute him to the bitter end." These allegations show that this was a disputed claim. The company, through its agent, asserted that the policy had been forfeited, but offered a compromise, which plaintiff accepted. He agreed to receive, and did receive, one hundred dollars in full settlement of his claim against the company, and gave his receipt to that effect. He understood the nature and effect of the compromise, and knew the contents of the instrument that he signed.

Under these circumstances, as was said in a similar case by the supreme court of Massachusetts, the settlement and discharge, "although obtained by false and fraudulent representations, constitutes a good defense until rescinded and avoided by a return of, or an offer to return, the money paid by the defendant to obtain it." *Brown* v. *Hartford Fire Ins. Co.*, 117 Mass. 479; *Home Ins. Co.* v. *Howard*, 111 Ind. 544; *Vandervelden* v. *Chicago & N. W. Ry.*, 61 Fed. Rep. 54.

This is not a case where a debtor compromises with his creditor by the payment of a part of an undisputed debt in satisfaction of the whole, nor is it a case where a party has been induced by fraud to sign a release of his claim through ignorance of the character and contents of the instrument signed. In each of these cases a different rule would apply. *Reynolds* v. *Reynolds*, 55 Ark. 373; *Mullen* v. *Old Colony Railroad*, 127 Mass. 89. This case rests on the rule that one who receives money or property in consideration of making an agreement, and afterwards seeks to avoid and hold for naught such agreement, must first give back to the other party the consideration received. *Gould* v. *Cayuga Co. National Bank*, 86 N. Y. 75; *Home Ins. Co.* v. *Howard*, 111 Ind. 544; *Brown* v. *Hartford Fire Ins. Co.*, *supra*; *Bowden* v. *Spellman*, 59 Ark. 259; *Desha* v. *Robinson*, 17 *id.* 240.

The plaintiff had no right of action at law upon his policy until he had rescinded the agreement annulling such policy by offering to return the money received from defendant upon such agreement.

Our opinion is that, as the facts stated appear in the complaint, the judgment of the circuit court is correct, and it is affirmed; but the judgment of dismissal is without prejudice to a future action.

Bunn, C. J. dissents.

RECTOR *v.* ROSE.

Opinion delivered April 18, 1896.

ATTORNEY—CONTINGENT FEE—CONSTRUCTION OF CONTRACT.—Where a contract between two attorneys and a client stipulated that they should prosecute certain suits for the recovery of land, and, if successful therein, should receive one-fourth of the land recovered, or its equivalent in value, and the lands were recovered, and a deed to one-fourth of the lands was executed to the attorneys, they are not entitled to any portion of the rents accruing before final determination of the suits, but only to one-fourth thereof after that time. (RIDDICK, J., dissenting).

Appeal from Pulaski Circuit Court.

WILBUR F. HILL, Special Judge.

H. M. Rector, for appellant.

1. The agreement is plain and unambiguous, and means what it says, that appellees were to have one-fourth of the lands recovered. There is no room for construction, and no interpolation can be made.

2. The agreement embodied the entire contract, and parol evidence was not admissible to vary it, by extending or enlarging its terms so as to include *rents*.

3. The claim of *quantum meruit* cannot be sustained. The fee was a prospective, contingent one, to be paid when appellant was put in possession of the lands recovered. Then, and not until then, rents and profits accrued to appellees.

4. The final decree in the case was entered March 21, 1891, and shortly afterwards appellant got possession, and partitioned appellee's one-fourth. There was no investiture of title until this final decree, subsequent to which there were no rents and profits.

W. E. Hemingway, for appellees.

1. No sufficient abstract has been filed by appellant, and the judgment should be affirmed.

2. No exceptions were saved to the findings of fact or declarations of law.

3. The parties intended that appellees should bring suit for lands and rents, and should have one-fourth of whatever they recovered. It is true the contract provided that they should receive one-fourth in value of all *lands*. But it also provided that they should attend to cases brought by Rector claiming *lands*, no mention of rents being made. Under its provisions, suits were brought for *lands* and *rents;* judgments were obtained for *lands* and *rents;* appeals were taken and questions contested, principally over the rents; and, lastly, rents were collected. After judgment for the lands, appellees were certainly entitled by the terms of the contract to their one-fourth of the rents. But it is plain both parties understood that the term *land* fully covered the subject matter of litigation. Rents are mere incidents to the recovery of the lands; and if the contract is extended to include appellees' obligation to sue for rents, it should be extended to cover their compensation in the fruits of the litigation. If the term *land* did not embrace rents, then appellees performed services with appellant's knowledge and approval, the benefits of which he accepted, and appellees are entitled to recover on a *quantum meruit* reasonable compensation.

BUNN, C. J. Appellant, Rector, employed appellees as attorneys to institute and prosecute all the suits he might bring to recover a large number of lots and parcels of land in and near the city of Hot Springs, which had been set apart to others by what are known as the "Hot Springs Commissioners." The attorneys were to be paid as set forth in the following contract, to-wit: "Agreed between the undersigned, Henry M. Rector, of the first part, and F. W. Compton and U. M. Rose, of

the second part, that said Compton and Rose shall attend to all cases to be brought by Rector, claiming any lands in or near Hot Springs as against persons claiming under adjudications recently made by the Hot Springs commissioners; and for their legal services, they are to be paid as follows: (1) One thousand dollars to be paid by said Rector within one year from this date. (2) Said Rose and Compton shall receive one-fourth in value of all lands recovered in said suits, or its equivalent in money. If Rector shall desire to pay such value in money, then he and Compton and Rose shall each appoint one appraiser, and the two appraisers thus appointed shall select a third, and the decision of a majority of them shall be binding as to such value, which may be paid by said Rector to Compton and Rose at any time within sixty days after said appraisment shall have been made."

The one thousand dollars was paid as agreed, and the controversy arises as to what really is the amount of the remaining portion of the fee. The suits were prosecuted to a successful termination for Rector in the United States circuit court for the Eastern district of Arkansas, but the defendants took an appeal to the Supreme Court of the United States, and by consent the property involved was placed in the hands of a receiver, who collected the rents, in part, and reported the same at the final termination of the litigation. It also appears that the defendants in those suits, when they were finally decided, paid to the said attorneys certain of the rents due. It is not so stated in the record, except in the most general terms, and yet the suits, being in the nature of proceedings in ejectment, for the adjudication of the title, carried the accrued rents, as we infer, only the amount being left to be ascertained, and this perhaps was done on the evidence in the main case. Of this, however, the record does not speak definitely. The

parties, by agreement, and with the approval of the United States Court, have so arranged the matter as that the only thing before this court is the proper construction of the contract; and this is made the more necessary by the death of Compton.

Unfortunately, we are not aided by any authorities to which we have been cited by either of the parties, and are unable, of ourselves, to find any directly in point.

It is evident that the deferred part of the fee was not only conditioned upon the success of the prosecution of the suits, but was also not due until the final termination of those suits. When that event should occur, Rector was to pay in property specifically, or in cash according to its value, and in either case, one-fourth of the land gained. He elected to perform his contract by giving the one-fourth of the land specifically. This of course necessitated his making a deed to that portion to the appellees. Presumably, this deed was in the usual form of deeds of conveyance of lands, for there is nothing in the contract to indicate that it was or should be otherwise. If this be true, the previously accrued rents,—that is, the rents which had accrued previous to the final judgment in the suits,—belonged to appellant; for, without some specific words to that effect in the deed, or in a separate written instrument, we do not think the grantee can claim rents previous to the date of his vestiture of title, either equitable or legal, for a deed in the usual form has no retroactive effect ordinarily, if ever.

Again, whatever may have been the effect of ejectment proceedings in the earlier times of our jurisprudence, it has long been a universal rule that in such suits the recovery of the *corpus* of the estate and the accrued rents involve only one proceeding. This being true, and the general rule being that a suit for the recovery of land, and for the recovery of the accrued

rents and profits thereof, involves only one litigation, if a fee is stipulated in the contract, it covers the services in the whole case. See section 2583, Sand. & H. Dig. By the terms of the contract, at the favorable termination of the suits, the parties were to cause the recovered lands to be valued by appraisers, and Rector, if he should so choose, might fulfill the obligation by paying to the attorneys one-fourth of the value of the lands thus ascertained, in money; or he might set apart to them one-fourth of the land in value specifically. It could hardly be contended that, in making this appraisement, these appraisers should take into consideration, as part of the land, the past accrued unpaid rents. The evident meaning of the contract in this respect is that the land, as it should then be, should be valued by the appraisers, and, according to this valuation, the fee could be paid.

The case is not without difficulty both as to the proper construction to be given to the contract, and also as to the real equities of the matter, but we are not to judge except upon the meaning of the language of the contract, in the light of the circumstances surrounding as appears from the record. The appellees are entitled to their one-fourth of the rents and profits since the date of the termination of the suits, by the decision of the Supreme Court of the United States, but not those accrued before that time.

Reversed and remanded, to be proceeded with in accordance with this opinion.

RIDDICK, J., (dissenting.) I am unable to concur in the opinion of the court in this case. The facts are plain. Rose and Compton agreed, as attorneys, to bring and prosecute actions to recover lands claimed by Rector, and Rector agreed to give, in return for such services, $1000 in money, and also "one-fourth in value of the lands recovered in said suits, or its equivalent in

money." Nothing was said about rents either in the contract or by the parties, but a large portion of the litigation was concerning rents. The question to be determined is whether the appellees are entitled to receive any portion of the rents recovered by them, and which grew out of the land after the litigation commenced. I maintain that a reasonable construction of this contract gives them one-fourth of the rents recovered for the use of the land after commencement of the action. If the parties who were in possession of the lands had declined to contest the action, and had surrendered the possession on the day the action was commenced, there would be no doubt that appellees would have been entitled to one-fourth of the land recovered, with the rents arising thereon from the day on which the adverse holders surrendered possession. If possession had been surrendered at the commencement of the action, the appellant would now have no more than is conceded to him, while the appellees would have all they now claim, without the trouble of conducting a long litigation. But the adverse holders did not surrender. An action was brought against them for appellant in the United States circuit court by the appellees as his attorneys, and a protracted litigation followed, the case going on appeal twice to the Supreme Court of the United States. After a ten year legal war, the stubborn resistance of the adverse holders was overcome, their defenses battered down, and the possession of the land recovered for appellant. The appellees expended much time and labor in attending to this litigation, but appellant was not injured by the delay. The energy and skill of appellees protected him against any injurous consequences by reason thereof, for, along with the land, they recovered several thousand dollars, as value of rents or use and occupation of land after commencement of the suit. Appellant now has all that he would have had if the possession of the land had been obtained on the day

suit was brought. He has his land and the rents or value of the use of the land from the commencement of this action. But he claims more. He insists that he is entitled to the rents arising, after the commencement of the action, out of that portion of the land he had agreed to give appellees for their services in recovering the same. If his construction of the contract be correct, then appellees agreed to receive a smaller fee for attending to a long litigation than for bringing an action when no defense was made. I see nothing in the contract that warrants such a construction, and his contention seems to me without merit. This contract was, in effect, an agreement to convey land in consideration of services to be performed by appellees. The appellees commenced to perform such services at the commencement of the lawsuit. In equity, an interest in the land belonged to them from that time, and they were entitled to the rents upon the portion which Rector had agreed to convey them. *Lysaght* v. *Edwards*, L. R. 2 Ch. Div., 506; *Rose* v. *Watson*, 10 H. L. Cases, 678; 3 Pomeroy's Eq. Jur., secs. 1260-1261; 1 Warvelle, Vendors, 192. As these rents grew out of the land after the commencement of the action, they were, in contemplation of the parties and within the meaning of the contract, a part of the lands.

But if we adopt the opposite theory, and say that the word "lands," used in the contract, did not include the rents growing out of the land after the commencement of the action, then appellees were not required to bring suit for these rents. On that theory, as the proceeding for the recovery of rents was prosecuted by appellees with the knowledge and consent of appellant, and for his benefit, he is responsible to them for the reasonable value of such services, which is shown to be one-fourth of the amount recovered. Take either view of the matter, and it seems to me that the judgment of the circuit court is correct, and should be affirmed.

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CARPENTER v. STATE.

Opinion delivered April 18, 1896.

GRAND JURY—INDORSEMENT OF LIST.—A mistake of the jury commissioners in indorsing the list of grand jurors as for the next February term, instead of for the next January term, is not prejudicial, where there was no February term, and such jurors were impaneled and sworn for the January term.

SAME—WAIVER OF OBJECTIONS.—Objections for irregularities in the formation of the grand jury are waived by pleading to the indictment.

FORMER JEOPARDY—SECOND TRIAL AFTER REVERSAL.—Where a judgment of death is reversed in a murder case because the verdict failed to state the degree of unlawful homicide of which defendant was found guilty, the former trial and conviction constitute no bar to a second trial on the same indictment.

CONTINUANCE—WHEN DENIAL NOT PREJUDICIAL.—Denial of a continuance, asked on the ground of the absence of witnesses, is not prejudicial where the facts sought to be established by such witnesses are proved by other and undisputed evidence.

IMPEACHMENT OF WITNESS — FOUNDATION.—Evidence to impeach a witness by proof of contradictory statements is inadmissible where no foundation was laid by interrogating such witness in reference to such statements.

INSTRUCTION—JUSTIFIABLE HOMICIDE.—On a trial for murder in the first degree, it was not error to instruct that justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person, or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony, and that if the jury believed that defendant shot and killed deceased while the latter was standing talking to defendant's brother, and not to save his own life or to protect his person from great bodily harm, nor in defense of his habitation, person or property, they should find defendant guilty of murder as charged in the indictment.

SAME—REASONABLE DOUBT.—It is not error to charge the jury that "a reasonable doubt is not a captious, imaginary, or possible doubt, but must be such a doubt as a reasonable man would have in matters of deepest concern to himself, and must arise out of the evidence in the cause."

SAME—CONSPIRACY.—It is not error, in a murder case, to charge the jury that if defendant was present and participated in the killing of deceased, by shooting him with a shotgun, as charged in the indictment, and that said shooting was done in furtherance of a previous design and understanding between himself and his brother to kill said deceased, and that, as a result of such design and understanding, deceased was killed, you will find him guilty, although it may not be shown that the shot or shots fired by defendant, if any were shot by him, actually caused the death of the deceased.

SAME—JUSTIFIABLE HOMICIDE.—It is not error in a murder case to refuse to charge the jury upon the theory that defendant's brother, being in possession of his field, had a right to resist a trespass upon the same by deceased, to the extent of taking deceased's life, and that defendant could lawfully assist him in such resistance.

SAME—SINGLING OUT EVIDENCE.—A request to charge as to the effect the jury might give to the bad character of deceased was properly refused. It is not within the province of the court to select one fact, and suggest to the jury what effect they might give to it.

Appeal from Drew Circuit Court.

WILLIAM F. SLEMMONS, Special Judge.

Geo. W. Norman, *Robert E. Craig*, and *Wells & Williamson*, for appellant.

1. The court erred in striking out the word "threats" in instruction No. 1, asked by defendant.

2. The court erred in refusing No. 3, asked by defendant; and in refusing Nos. 4 and 5.

3. Also in refusing Nos. 7, 8, 9, 10 and 11 asked by defendant.

4. The court erred in giving No. 5, asked by the state; and in giving Nos. 8 and 9.

5. Also in refusing Nos. 3, 4, 5, 6, 7, 8, 9, 10 and 11 as asked by defendant, and not of its own motion giving proper instructions in lieu of them.

6. It was error to refuse a continuance.

7. And to overrule the plea of former jeopardy as to the murder in the first degree.

8. Also to overrule defendant's motion to quash.

9. The court erred in not permitting defendant to prove, by Ben Burgess, a member of the grand jury which found the indictment, evidence given by Sallie Hannibal before said grand jury, and that it was different from her evidence read in the trial of this cause.

10. The court erred in this: After granting a *subpœna duces tecum* to the clerk of Ashley county to produce the grand jury book of 1892, and after it had been produced, in permitting the prosecuting attorney to say that said book should not see the light of day in this court, and in not allowing defendant's counsel to see and examine the evidence of Sallie Hannibal reduced to writing in said book, and to prove her evidence by Ben Burgess.

11. The court erred in refusing to allow defendant to introduce the evidence of Sallie Hannibal, as contained in the grand jury book, for the purpose of contradicting her testimony, as taken before the examining court.

12. It was error to permit the state to prove by R. L. Cone what the verdict of the coroner's jury was.

13. It was error to permit the state to introduce what purported to be an affidavit made by D. L. Moore on a former trial, on motion for new trial for said cause.

14. The transcript filed in the Drew circuit court does not show that the court had jurisdiction.

15. The special judge had no power to open and adjourn court in the absence of the regular judge.

16. The court erred in refusing to permit D. L. Moore, J. P. Clark and others to testify as to what W. O. and B. L. Carpenter stated to them as to the manner of the killing and who did the shooting, etc.

17. It was error to allow the verdict to be amended by inserting the words "murder in the first degree."

18. The court erred in permitting the state's attorney to argue that if defendants, B. L. and W. O., formed a design previous to the homicide to go and kill Hannibal, and in pursuance of such design did go to the

premises of Hannibal for that purpose, then B. L. is guilty of murder in the first degree, although W. O. did all the shooting, if Ben L. was present consenting thereto and ready to assist.

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

1. The exceptions to the instructions are in mass, 54 Ark. 16. But, taking the instructions together, they contain no error. In order to justify on the ground of self-defense, it must appear that defendant, at the time he caused the death of deceased, 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 strike the fatal blow in order to avoid death or great bodily harm, which was apparently imminent. Sand. & H. Dig., sec. 1676; 49 Ark. 543. If one is attempting to commit an *aggravated* felony upon either the person or property of another, he is justified in taking life; otherwise not. Sand. & H. Dig., sec. 1672. A man cannot set up self-defense until he has done everything reasonable in his power to prevent the killing. He cannot bring on a fight or difficulty, and then set up self-defense. 40 Ark. 459; 32 *id.* 585. The court's instructions as to reasonable doubt are the law. 29 Ark. 266. The 9th instruction given by the court is certainly the law. Sand. & H. Dig., sec. 1452; 42 Ark. 94.

2. There was no error in refusing appellants instructions. It was proper to strike out the word "threats" in the 1st. Sand. & H. Dig., sec. 1670; 2 Thompson on Trials, secs. 2160–2173. Threats alone, without any overt act or indication of intention to follow up the words with an assault, are not sufficient for the reasonable belief of imminent danger which is necessary to sustain the plea of self-defense. 77 Ala. 471; 36 Ark. 653; 62 Cal. 468. The 3rd, 4th, and 5th are abstract.

W. O. Carpenter was not on trial. One in defense of his property must not kill the aggressor, but must find redress in the courts. 1 Bish. Cr. L. sec. 875. The slayer must be without fault. Appellant was not on his premises—he was not defending his castle. He did not use every means to avoid the killing. He used the first opportunity to bring it on. 1 Bish. Cr. Law. secs. 844, 869; Clark, Cr. Law. pp. 144, 146, and authorities. The 6th, 7th, 8th, 9th, 10th and 11th are not law. When a dwelling is assailed with intent to take life, or inflict great bodily harm, the owner or occupant may lawfully use such fatal means to protect himself and family as may be necessary. He is not bound to retreat, but may kill his assailant, if it reasonably appear to be necessary for the protection of the dwelling; *but the killing of another to prevent a mere trespass upon property other than the habitation, and not to prevent a felony, is not justifiable or excusable.* Sand. & H. Dig., sec. 1670; 1 Bish. Cr. Law, sec. 875; 71 Ala. 329; 59 Ala. 1; 89 Mo. 667; 60 Cal. 2. These instructions are all too general and unqualified. 29 Ark. 267; 29 *id*, 226. Appellant's theory of the homicide was covered by the 1st and 2nd instructions given for appellant. When the court has covered the law, it is useless to multiply instructions on the same point. 34 Ark. 649.

3. The using the word "February" for "January" was a mere clerical error, in no wise prejudicial. He made no objections to the grand jury. Mere slight irregularities in selecting and impaneling the grand jury, where no substantial right of the accused is affected, do not affect the validity of the panel. 9 Am. & Eng. Enc. Law, p. 3, note 17. These irregularities are waived by plea to the indictment. 29 Ark. 165; 42 *id.* 94; 40 *id.* 488.

4. No foundation was laid for the impeachment of Mrs. Hannibal. 37 Ark. 324. Contradictory statements

cannot be used to impeach a witness after death has placed him beyond the power of explaining. 29 Am. & Eng. Enc. Law, p. 788.

5. The writs of certiorari cure all defects in jurisdiction charged by appellant.

6. The statements of the Carpenters to Moore and others, long after the killing, were no part of the *res gestæ*. 3 Rice on Ev., sec. 80; 50 Ark. 397; 61 Ark. 52.

7. The record does not bear out appellant's objections as to the amendment of the verdict, or the remarks of the counsel for the state.

Robert E. Craig, for appellant in reply.

1. Defendant's theory was that he and W. O. armed themselves, and went to repair the fence of W. O., and, while on his *own premises* repairing his fence, *which was a lawful act*, deceased, seeing him there, left his house, crossed the public road, and went to where he was, and attempted to drive him away, drew his pistol, and attempted to shot W. O.; that W. O. or appellant shot and killed deceased to save the life of W. O. from imminent, pressing, and urgent danger, and that it made no difference which fired the fatal shot; both or either were justifiable. There was conflict of evidence, and this theory should have been presented to the jury under proper instructions. 29 Ark. 248; 47 *id.* 196; 50 *id.* 545; 52 *id.* 45; 58 *id.* 241; 8 Cal. 341; 19 S. W. 975.

2. It was impossible to lay any foundation to impeach Mrs. Hannibal. She was dead. Sand. & H. Dig., secs. 2959–60, are taken from the common law. Gr. Ev., vol. 1, 461–2–3. The rule is confined solely to cross-examination. It was error to refuse Burgess' testimony. Sand. & H. Dig., secs. 2042–3, 2054, 2055.

3. There was no such term as the "February" term, and the action of the commissioners was a nullity. 21 Ark. 200; Sand. & H. Dig., secs. 4265 to 4272, 4280, 4284, 4291; 58 Ark. 37.

BATTLE, J. Ben L. Carpenter was indicted in the Ashley circuit court for murder in the first degree; was tried, after a change of venue, in Drew county; and was convicted of the crime of which he was accused. He now brings the record of his trial and conviction to this court, and asks for a reversal of the judgment against him, and for a new trial.

The indictment was filed in open court by the grand jury on the 19th of January, 1892. The defendant was tried and convicted in August, 1893. The judgment of conviction was reversed by this court on appeal [58 Ark. 233], and the cause was remanded for a new trial. After this, on the 24th of September, 1895, the defendant filed a motion to set aside the indictment because the commissioners who selected the grand and alternate grand jurors for the January term, 1892, of the Ashley circuit court (at which term this indictment was filed), stated in their indorsement on the same that the lists were for the February term, 1892, when they should have said that they were for the January term, 1892. The motion was denied.

On the 24th of September, 1895, the defendant filed a plea in which he alleged that, in a former trial of the issues in this prosecution, he had been convicted by a jury of the charge alleged in the indictment, but they failed to specify the degree of homicide of which they found him guilty in their verdict, and that a judgment was rendered upon this verdict, which judgment was afterwards reversed by this court on appeal, and a new trial was granted, and that, therefore, he had been put in jeopardy for the same offense charged in the indictment, and should be discharged. The trial court held that the plea was insufficient.

On the 26th of September, 1895, he filed a motion for a continuance, in which he alleged that he could not safely go to trial, because of the absence of James Coulter

and Lee Turner, and that he expected to prove by Coulter that he was at the place of killing on the evening it occurred, and saw a pistol lying on the mantel, which pistol Hugh Estelle said Hannibal had when he was killed; and that he expected to prove by Turner that he had examined the gun which the defendant had on the day of the homicide; that it was an old, muzzle-loading gun; that it had been loaded a long time; that he tried and could not "discharge" it, and "drew the load with a gun wiper." The motion was denied.

The court thereupon proceeded with the trial of the defendant for the offense charged against him in the indictment.

The facts, as stated by witnesses in the trial, are substantially as follows: W. O. Carpenter, the brother of appellant, rented a field on Pine Prairie, in Ashley county, in this state, for the year 1891, and planted it in peas and corn. H. L. Hannibal lived near this field, and had adjoining it a small cow pen. After the crop of corn had matured and was gathered, W. O. Carpenter saw Hugh Estelle, a boy who was living with Hannibal, bringing some stock out of the field. Carpenter remonstrated with him, and requested him to tell Hannibal not to put his stock in there again. He also discovered that a gap leading from the cow pen into the field had been made by Estelle and Hannibal for stock to pass in and out. He closed the gap, and then put his own mules in the field. This was on Saturday morning, September 26, 1891.

On Sunday morning following, W. O. Carpenter, going into the field, discovered that the gap had been reopened. One story is that he called Hannibal, who was then sitting on the gallery of the house near by, to him, and remonstrated with him in reference to the gap and putting his stock in the field, and that an angry altercation ensued, and Hannibal, going into the field

where Carpenter was, refused to permit him to repair the fence, cursed him, and drove him away. Another story is that Carpenter went to Hannibal's house, and cursed him, and said that he did not want him to put his mules in the field any more; if he did, he would kill him; and that Hannibal offered to pay damages, and Carpenter refused to accept them; and that Hannibal was sitting on the fence while this conversation continued.

On the same morning, after seeing Hannibal, he visited his brother, Ben L. Carpenter, and a justice of the peace, and asked the latter what he should do for the protection of his property. The justice informed him that a renter had the right to the possession of the rented land for the full period of his lease, and said, "If it was my field, I would put up the gap, at all hazards." He then went to T. J. Wells, and got a pistol; and then to John Wheat's, and borrowed a breech-loading double-barreled shotgun, and three or four brass shells, from him. He then returned home, ate his supper, and then returned to his brother Ben's. About ten o'clock in the night following, some one went to the house of Wilson Hunnicutt, and borrowed of him eighteen buckshot and a headlight, and said he "wanted to go a fire-hunting." Hunnicutt says that he knew him well, and that he was Ben L. Carpenter, but W. O. and Ben L. Carpenter swear that it was W. O. Carpenter.

Jesse George testified as follows: "I saw Ben Carpenter at his house Sunday morning after Ol. Carpenter (W. O. Carpenter) had been there. He told me that he would rather Ol. would get somebody else to go with him down to Hannibal's, for if Hannibal hurt or killed Ol. he would have to kill Hannibal; that Ol. would be so slow he would have to kill Hannibal."

On Monday morning following (the 28th of September, 1891), B. L. Carpenter went to W. O. Carpenter's,

carrying with him a double barreled shotgun, and ate breakfast. After breakfast, early in the morning, the two brothers (Ben with his gun, and W. O. with a shotgun and pistol) went to the field on Pine Prairie which W. O. Carpenter had rented, as before stated, and which was near to the residence of W. O. Carpenter. When they entered the field, W. O. went to the gap. About this time, Hannibal came out of the door of his house with a bucket, intending to draw water from a well about 100 yards distant. Seeing W. O. at the gap, he handed the bucket to the boy, Hugh Estelle, and went back into the house. One story was, he came out again with something in his hand which looked like a pistol; that he immediately went to the gap to prevent Carpenter from repairing the fence; that Carpenter expressed a determination to repair it, and, as he did so, Hannibal threatened to kill him, and turned his back, and exhibited a pistol in his hip pocket, and moved his hand as if he would draw it, when W. O. Carpenter shot him; that Hannibal attempted to shoot, and W. O. Carpenter shot again, killing him; and that Ben L. Carpenter was 25 or 30 yards distant from the gap, and took no part in the shooting.

Another story told by the witnesses for the state was that, when the deceased saw W. O. Carpenter at the gap, he went back to the door, and pushed it open, and without entering, said to his wife that he was going out there and tell Carpenter not to put up the fence, that he would put it up after breakfast; that he went to the gap, but carried with him no weapon, not even a pocket knife; that he had a pistol, but left that in the house; that he was standing with his left hand on a little tree by the fence talking to W. O. Carpenter, when Ben L. Carpenter, who was standing near by, shot him in the left side with a shotgun, when he turned around, and Ben L. shot him the second time with the same gun; that

the deceased fell, and W. O. Carpenter then shot him twice in the face with a pistol; and that the Carpenters then ran off, yelling.

Immediately after the killing a pistol was found on the ground near the deceased, but witnesses for the state testified that the pistol was at the time of the shooting on the mantel piece in the house of the deceased; that when the gun was fired, the wife of the deceased ran back, got it, and carried it to where he was, and, seeing him lying on the ground dead, threw it down.

A witness in behalf of the defendant testified that, on the Sunday preceding the killing, the deceased endeavored to borrow a Winchester rifle, and to procure cartridges, and expressed the purpose to put his stock in Carpenter's field, or kill him.

In the progress of the trial the testimony of Mrs. Sallie Hannibal, the widow of the deceased, taken and reduced to writing before an examining court, was read as evidence in behalf of the state, she being dead at the time of the trial. In that testimony she stated that she did not see Ben L. Carpenter until he shot, when he was about ten feet above the gap, close to the fence. Afterwards she testified before a grand jury as to the same matter. A member of this jury, Ben Burgess, was introduced as a witness in behalf of the defendant, and was asked the following questions: "Were you a member of the grand jury that indicted defendant? If so, did you hear Sallie Hannibal testify before that body? If so, what did she say as to where Ben L. Carpenter stood at the time the shooting was done?" And the court refused to allow him to answer them. But he was permitted to testify that she said, on the day of the killing, that Ben shot the deceased with a shotgun while he was leaning on the fence at the gap, and that Ben was about fifteen feet east of the gap. Another witness was allowed to testify that she said

that "she was in bed when the first gun fired; and just as she was putting her dress over her head, the second gun fired, and as she went on the gallery the pistol fired," and that she said in this connection that "Ben Carpenter (defendant) hollowed out in the field." And the court gave the defendant permission to read, as evidence, the testimony of Mrs. Hannibal before the grand jury which returned the indictment against the defendant, as written by its clerk, which testimony so written was then in court, and he refused to read it. To the refusal of the court to permit Burgess to answer the questions propounded to him, the defendant excepted, and made it one of his causes for a new trial.

The following instructions were given to the jury by the court on its motion:

"First: The court instructs the jury that murder is the unlawful killing of a human being in the peace of the state, with malice aforethought, either express or implied.

"Second. The manner of the killing is not material, further than it may show the disposition of mind, or the intent, with which the act was committed.

"Third. Express malice is that deliberate intention of mind unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

"Fourth. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing manifest an abandoned and wicked disposition.

"Fifth. You are instructed that justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person, or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony; and if you believe from the evidence that the defendant shot

deceased twice with a shotgun, and that said shots killed deceased, while deceased was standing talking to his brother, and not to save his own life, or to protect his person from receiving great bodily harm, nor in defense of his habitation, person, or property, you will find defendant guilty of murder, as charged in the indictment.

"Sixth. All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, 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, shall be murder in the first degree. All other murder shall be deemed murder in the second degree.

"Seventh. The jury are the sole judges of the evidence and the credibility of the witnesses. In determining as to the weight that should be given to the testimony of any witness, they may take into consideration his manner of testifying, his means of information, his interest, if any, in the cause pending, his prejudices, and his motives; and if from these you should believe that any witness has sworn falsely, wilfully, to any material fact, you may disregard the whole or any part of the evidence of such witness.

"Eighth. The court instructs the jury that a reasonable doubt is not a captious, imaginary, or possible doubt, but must be such a doubt as a reasonable man would have in matters of deepest concern to himself, and must arise out of the evidence in the cause.

"Ninth. You are instructed that if you believe from the evidence that the defendant was present and participated in the killing of H. J. Hannibal, by shooting him with a shotgun, as charged in the indictment, and that said shooting was done in furtherance of a previous design and understanding between himself and his

brother to kill said Hannibal, and that, as a result of such design and understanding, H. J. Hannibal was killed, you will find him guilty, although it may not be shown that the shot or shots fired by defendant, if any were shot by him, actually caused the death of the deceased.

"Tenth. Manslaughter is the unlawful killing of a human being without malice, expressed or implied, and without deliberation. Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible."

To the giving of the fifth, eighth, and ninth of which the defendant at the time excepted.

And the defendant requested, and the court gave, the following instructions:

"First. The jury are instructed that justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony; and, if the killing in this case is shown by the evidence to be justifiable or excusable, the defendant shall be acquitted and discharged.

"Second. A felony is a crime punishable by death or imprisonment in the state penitentiary; and, if the jury believe from the evidence that Hannibal attempted, by force, to drive W. O. Carpenter from his field, and if, in so doing, drew a pistol with intent to shoot, and attempted to shoot and kill W. O. Carpenter, this was a felony on the part of Hannibal.

"Twelfth. The jury are instructed that it is incumbent on the state to prove every material allegation contained in the indictment, beyond a reasonable doubt, and it is a material allegation that Ben L. Carpenter shot and killed the deceased with a shotgun; and if, from all the evidence, you have a reasonable doubt whether or not Ben L. Carpenter shot and killed the

deceased with a shotgun, and if, from all the evidence, you have a reasonable doubt whether or not Ben L. Carpenter shot and killed Hannibal with a shotgun, or whether he came to his death by shots fired by W. O. Carpenter, then the defendant is entitled to the benefit of such doubt, and you will acquit him.

"Thirteenth. The jury are instructed that if, upon the whole of the evidence in the case, they have a reasonable doubt as to the guilt or innocence of the defendant, they will give the defendant the benefit of the doubt, and acquit him."

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

"Third. If the jury believe from the evidence that W. O. Carpenter had rented the pasture field for the year 1891, then for the whole of that year the field was the property of W. O. Carpenter, and for that time he might lawfully protect the same as fully as if he owned it in fee simple.

"Fourth. If the jury believe that W. O. Carpenter, being in the lawful possession of the pasture field, had reasonable grounds to believe that it was necessary to kill Hannibal to protect himself from great bodily harm at the hands of Hannibal, and if, acting under such belief, he shot and killed him, then he was justifiable.

"Fifth. The jury are instructed that a person on his own premises is not bound to retreat, but has the right to use such force as is reasonably necessary to repel a forcible entry thereon.

"Sixth. If the jury believe that W. O. Carpenter was on his own premises, and that Hannibal threatened him, while he was putting up his fence, to kill him if he did so, and that he had at the time reasonable grounds to believe, and did believe, that Hannibal intended to take his life, or do him great bodily harm, then he was not

obliged to retreat, nor consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made on him with a deadly weapon; and if, under all the circumstances, he, at the moment, believed, and had reasonable grounds to believe, that it was necessary to save his own life, or to protect himself from great bodily injury, he had the right to kill Hannibal.

"Seventh. If you believe that Hannibal had made slip gaps in W. O. Carpenter's fence, and on Sunday before the killing, Hannibal, by his manner, threats, and acts, led W. O. Carpenter to believe that he intended forcibly to take, hold, and use his pasture against his will, and forcibly to prevent him from repairing his fence, then he had the right to prepare himself and hold his property against any violence which might be offered; and if you further believe from the evidence that, on the morning of the killing, W. O. Carpenter armed himself with a shotgun and pistol, and the defendant, Ben L. Carpenter, armed himself with a shotgun, and they together went to repair W. O. Carpenter's fence, and Hannibal, seeing W. O. Carpenter repairing his fence, armed himself with a pistol, and went to where Carpenter was repairing the fence, to forcibly prevent him from doing so, and made such overt acts that, from his manner, threats, and words, the defendant, Ben L. Carpenter, had reasonable grounds to believe that W. O. Carpenter was in immediate danger of death or great bodily harm at the hands of Hannibal, and W. O. Carpenter, or the defendant, Ben L., one or both, shot and killed Hannibal to avert such impending danger, then defendant was justifiable, and you will acquit him; and if you have a reasonable doubt on this proposition, you will give the defendant the benefit of the doubt, and acquit him.

"Eighth. If the jury believe that W. O. Carpenter had the right to go to his field for the purpose of putting up a gap in his fence, and that he had a right to

arm himself for the purpose of protecting himself from violence at the hands of Hannibal while so repairing it, then you are instructed that defendant, Ben L. Carpenter, also had a legal right to arm himself, and go with his brother to the pasture field, for the purpose of protecting his brother from death or great bodily harm at the hands of Hannibal, while so repairing the fence.

"Ninth. The jury are instructed that W. O. Carpenter had the legal right to arm himself, and defend his property against a forcible trespass. The defendant, B. L. Carpenter, had the legal right to arm himself, go with his brother, and, if necessary, assist him against such forcible trespass; and if you believe from the evidence that the two brothers armed themselves, and went to repair W. O. Carpenter's fence, and that he shot and killed Hannibal in resisting a forcible trespass made by Hannibal, then defendant, Ben L. Carpenter, is no wise responsible for said killing; and if you have a reasonable doubt upon this question, you will give the defendant the benefit of such doubt, and acquit him.

"Tenth. If the jury believe that Hannibal was a violent and dangerous man, then, in considering the guilt or innocence of defendant, they may take such bad character as a circumstance tending to show who was the aggressor in the encounter which resulted in the death of Hannibal.

"Eleventh. If the jury have a reasonable doubt, from all the evidence in the whole case, whether or not W. O. Carpenter, at the time of the killing (if you believe from the evidence that W. O. Carpenter did all the shooting), had reasonable grounds to believe, and did believe, that he was in danger of death or great bodily harm at the hands of Hannibal, then the defendant, Ben L. Carpenter, is entitled to the benefit of the doubt, and you will acquit him."

In addition to what we have stated, other grounds for setting aside the verdict were stated in a motion for a new trial, which do not appear elsewhere in the record, and consequently will not be noticed in this opinion.

As to formation of grand jury.

First. The trial court committed no error in refusing to set aside the indictment against appellant on account of the formation of the grand jury which found it.

The statutes of this state require circuit courts to appoint three commissioners, at every term, to select grand jurors to serve at the term next succeeding their selection, and make it their duty to enclose and seal a list of the jurors so selected, and indorse it "List of Grand Jurors," designating for what term of the court they are to serve, and deliver the same to the judge in open court. The judge is then required to place it in the custody of the clerk (after administering to him and his deputies certain oaths), whose duty it is then made to keep the same enclosed and sealed until thirty days before the next term, and then make out a fair copy of it, and deliver it (the copy) to the sheriff, or his deputy, who is then required to summon the persons named therein to attend on the first day of said term for the purpose of serving as grand jurors. In compliance with these statutes, three commissioners were appointed by the Ashley circuit court, at its August term in 1891, to select grand jurors to serve at its next term, which was to commence on the third Monday in January following. They selected them, and made a list of their names, and indorsed it as the list of grand jurors selected for the February term, 1892, when there was no such term. The persons selected were summoned to attend the court on the first day of its January term, and were present on that day, and sixteen of them were selected, impaneled, and sworn as grand jurors for that

term. There was no error in this proceeding. They were unquestionably selected to serve at the term succeeding their selection. The designating that term as the February, instead of the January, term was an obvious mistake. The intention was apparent and unmistakable.

When objection to grand jury waived.

If there had been any error in the impaneling the grand jury, the appellant was too late in taking advantage of it. He had waived it by pleading to the indictment. *Dixon* v. *State*, 29 Ark. 165; *Wright* v. *State*, 42 *id.* 94; *Straughan* v. *State*, 16 *id.* 41; *Miller* v. *State*, 40 *id.* 488.

Sufficiency of plea of former conviction.

Second. The plea of former jeopardy was properly overruled. The jury found the appellant guilty as charged in the indictment. There was no intention to acquit. But the verdict of the jury was defective because it failed to state the degree of unlawful homicide of which the appellant was found guilty. No legal judgment could be rendered upon it. Neither party sought to have the jury so amend it as to make it specify the degree of homicide. A judgment of death was rendered on it against the defendant, and he appealed, and the judgment was reversed, and the cause was remanded for a new trial. Under these circumstances, the former trial and conviction are no bar to a second trial on the same indictment. *Johnson* v. *State*, 29 Ark. 31; *Allen* v. *State*, 26 Ark. 333; *State* v. *Redman*, 17 Iowa, 329; *Turner* v. *State*, 40 Ala. 21; *Waller* v. *State*, *id.* 325; *Kendall* v. *State*, 65 Ala. 492; 1 Bishop, New Cr. L., sec. 998, and cases cited.

Denial of continuance not error.

Third. The denial of the continuance that was asked for by appellant was not prejudicial. What he expected to prove by James Coulter was sworn to by as many as two witnesses in behalf of the state, and three witnesses testified to what he expected to prove by Lee Turner, which was not contradicted.

Laying foundation for impeaching witness.

Fourth. We do not think that the court erred in refusing to allow Ben Burgess to testify as to what Mrs. Hannibal said in her testimony before the grand jury as to the place where appellant "stood at the time the shooting was done." No foundation was laid for it by asking Mrs. Hannibal, when she testified, as to whether she had ever made such statements. *Griffith* v. *State*, 37 Ark. 324; *Ayers* v. *Watson*, 132 U. S. 394; *Mattox* v. *U. S.*, 156 U. S., 237. If the evidence was competent, no prejudicial error was committed in the refusal to admit it. She was contradicted in that respect by her own statements to different persons, as shown by the testimony of the witnesses; and the court gave appellant permission to read her testimony before the grand jury, as taken down by its clerk, for the purpose of impeachment, and, without giving any reason for refusing to accept the offer, he failed or refused to read it as evidence. We do not see that he has any room to complain of the refusal of the court to admit the testimony of Burgess.

Instruction as to justifiable homicide.

Fifth. The determination of the questions presented by the instructions given and refused by the court involves, to some extent, a consideration of the following sections of Sandels & Hill's Digest:

"Section 1670. Justifiable homicide is the killing of a human being in necessary self-defense; or in defense of habitation, person or property, against one who manifestly intends, or endeavors, by violence or surprise, to commit a felony.

"Sec. 1671. If the homicide with which any person shall be charged shall appear upon the trial to be justifiable or excusable, such person shall be fully acquitted and discharged.

"Sec. 1672. An attempt to commit murder, rape, robbery, burglary, or any other aggravated felony, although not herein specifically named, upon either the

person or property of any person shall be justification of homicide.

"Sec. 1676. In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given."

These statutes, so far as they extend, are a re-enactment of the common law. They make homicides in self-defense excusable, and justify those committed by the slayer in defense of "person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, robbery, arson, burglary, and the like, upon either," as at common law. As construed by this court, they uphold, protect, and enforce the right to slay an assailant in self-defense, to the same extent it existed at the time of their enactment. To construe them properly, it is necessary to ascertain what the common law upon the same subject was at the time they took effect.

At common law, and under the statutes of this state, no one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden rencounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, or in a mutual combat, is justified or excused in taking the life of the assailant, unless he is so endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. He cannot provoke an attack, bring on

the combat, and then slay his assailant, and claim exemption from the consequences of killing his adversary, on the ground of self-defense. He cannot invite or voluntarily bring upon himself an attack with the view of resisting it, and, when he has done so, slay his assailant, and then shield himself on the assumption that he was defending himself. He cannot take advantage of a necessity produced by his own unlawful or wrongful act. After having provoked or invited the attack, or brought on the combat, he cannot be excused or justified in killing his assailant for the purpose of saving his own life, or preventing a great bodily injury, until he has in good faith withdrawn from the combat, as far as he can, and done all in his power to avoid the danger and avert the necessity of killing. If he has done so, and the other pursues him, and the taking of life becomes necessary to save life or prevent a great bodily injury, he is excusable. *Palmore* v. *State*, 29 Ark. 248; *McPherson* v. *State*, 29 Ark. 225; *Levells* v. *State*, 32 Ark. 585; *Stanton* v. *State*, 13 Ark. 317; *Dolan* v. *State*, 40 Ark. 454; *Fitzpatrick* v. *State*, 37 Ark. 238; *Duncan* v. *State*, 49 Ark. 543; *Johnson* v. *State*, 58 Ark. 57; *Smith* v. *State*, 59 Ark. 132.

But the rule is different where a man is assaulted with a murderous intent. He is then under no obligation to retreat, but may stand his ground, and, if need be, kill his adversary.

In East's Pleas of the Crown, the author says: "A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he killed him in so doing it is called justifiable

self-defense; as, on the other hand, the killing by such felon of any person so lawfully defending himself will be murder. But a bare fear of any of these offenses, however well grounded, as that another lies in wait to take away the party's life, unaccompanied with any overt act indicative of such an intention, will not warrant him in killing that other by way of prevention. There must be an actual danger at the time." 1 East's Pleas of the Crown, p. 271. See, to the same effect, 4 Blackstone's Com., p. 180; Foster's Crown Law, p. 273; and 1 Bishop's New Cr. Law, sec. 850.

According to the common law, it is the duty of every one, seeing any felony attempted, by force to prevent it, if need be, by the extinguishment of the felon's existence. This is a public duty, and the discharge of it is regarded as promotive of justice. Any one who fails to discharge it is guilty of an indictable misdemeanor, called misprision of felony. And, as a result of this doctrine, Mr. Bishop says: "If a man murderously attacked by another flies instead of resisting, he commits substantially this offense of misprision of felony; even though we should admit that in strict law he will be excused, because acting from the commendable motive of saving life." 1 Bishop, New Criminal Law, sec. 851-849; *Pond* v. *People*, 8 Mich. 150. See, also, *Bostic* v. *State*, 94 Ala. 45; *Weaver* v. *State*, 53 Am. Rep. 389; *Gray* v. *Combs*, 7 J. J. Marsh. 478; 4 Blackstone's Com. 180; 1 Hale's P. C. 480; Clark's Cr. Law, 137; 1 Wharton's Cr. L. (10 Ed.), sec. 495.

It is evident, therefore, that sections 1670 and 1672 of Sandels & Hill's Digest are enactments of no new laws, but are an affirmance of the common law then in force. They declare no new right or duty, and provide that only homicides committed in the exercise or discharge of the common law right or duty to defend the habitation, person, or property against one who mani-

festly intends or endeavors, by violence or surprise, to commit a known felony, or to prevent attempted felonies, such as murder, rape, robbery, burglary, or other aggravated felony, shall be justifiable, and leave the common law as to the extent, the circumstances, and the manner in or under which the right or duty may be exercised or discharged, still in force.

It follows, then, that any one, under the laws of this state, may repel force by force in defense of person, habitation, or property against any one who manifestly intends and endeavors by violence or surprise to commit a known felony upon either; and that he need not retreat, in such cases, but may stand his ground, and, if need be, kill his adversary. It is also true that any person, for the prevention of murder, rape, robbery, burglary, or any other aggravated felony, may, under our statutes, if necessary, kill another attempting to perpetrate such felonies. But these rights are not without limitations. "A bare fear," says the statute, "of those offences, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under their influence, and not in a spirit of revenge." (Sec. 1675). The circumstances must be such as to impress the mind of the slayer, without fault or carelessness on his part, with the reasonable belief that the necessity for killing to prevent the felony was immediate and impending, and the danger imminent. Knowing the other's design, the slayer had no right to seek a conflict, but must wait until the other does something at the time indicating a present intention of carrying his design into effect. While the slayer can stand his ground, and refuse to retreat, he should do what he can to avoid the necessity of killing, and at the same time exercise this right, and

prevent the threatened felony. In no case will he be justified in taking the life of the aggressor, when, by arresting or disabling him, or otherwise, he can prevent the felony, or when the danger, in the reasonable belief of the assailed, has ceased to be immediate and impending. There must be an immediate necessity for the killing, for the statute says, "Every person who shall unnecessarily kill another while resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt has failed, shall be guilty of murder or manslaughter, according to circumstances," Sec. 1649. See *Pond* v. *People*, 8 Mich. 150; 1 East, P. C. 272; 1 Wharton, Cr. Law, (9th Ed.), secs. 495–501, and cases cited; 1 Bishop's New Cr. Law, secs. 843, 846, 869, and cases cited.

But the right to defend property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, to the extent of slaying the aggressor, does not include the right to defend it, to the same extent, where there is no intention to commit a felony. A man may use force to defend his real or personal property in his actual possession against one who endeavors to dispossess him without right, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of defense and prevention. But, in the absence of an attempt to commit a felony, he cannot defend his property, except his habitation, to the extent of killing the aggressor for the purpose of preventing a trespass; and if he should do so, he would be guilty of a felonious homicide. Life is too valuable to be sacrificed solely for the protection of property. Rather than slay the aggressor to prevent a mere trespass, when no felony is attempted, he should yield, and appeal to the courts for redress. Ordinarily, the killing allowed in the defense of property is solely for the prevention of a felony. "If," as Clark on Crimi-

nal Law says, "a man attacks me, and tries to take my property by force, he attempts a robbery, and I may kill him to prevent the felony. The justification does not rest on my right to defend my property. If a man attempts to set fire to my dwelling house by surprise, and I can only prevent it by killing him, I may do so; but the reason is because I may and must prevent the felony, and not because, if I do not kill him, I will lose my property. If the house were uninhabited, and therefore not the subject of arson (at common law), I would have no right to kill him, though my loss of property would be as great." *People* v. *Flanagan*, 60 Cal. 2; *State* v. *Vance*, 17 Iowa, 138; *Davison* v. *People*, 90 Ill. 221; 1 Bishop's New Crim. Law, secs. 857, 861, 875; Clark on Cr. Law, p. 144.

Tested by what we have stated the law to be, did the trial court commit any reversible error in giving or refusing instructions to the jury?

There is no reversible error in the instruction given by the court on its own motion, numbered "fifth," and objected to by the appellant. The jury could not have found him guilty under that instruction, except upon a state of facts, which, if true, proved him guilty of a deliberate murder. If they convicted him under it, they found him guilty of deliberately killing the deceased while he was standing talking to the brother of appellant, and making no effort to do violence to any one.

Instruction as to reasonable doubt approved.

The eighth instruction given by the court on its own motion, and objected to by the appellant, was a definition of a reasonable doubt, and, while it is not as full and complete as it might be, contains no reversible error.

As to a conspiracy.

The ninth instruction given by the court on its own motion, and objected to by the appellant, was obviously given to modify the instruction given at the request of the appellant, and numbered "twelfth," in which the court told the jury that if they had "a reasonable doubt

whether or not Ben L. Carpenter shot and killed Hannibal with a shotgun, or whether he came to his death by shots fired by W. O. Carpenter," then the defendant was entitled to the benefit of such doubt, and to acquit him. In the ninth they were told that if "defendant was present and participated in the killing of H. J. Hannibal, by shooting him with a shotgun, as charged in the indictment, and that said shooting was done in furtherance of a previous design and understanding between himself and his brother to kill said Hannibal, and that, as a result of such design and understanding, H. J. Hannibal was killed, you will find him guilty, although it may not be shown that the shot or shots fired by defendant, if any were shot by him, actually caused the death of the deceased." Taking this in connection with the instructions defining justifiable homicide and the different degrees of unlawful homicide, and the verdict of the jury finding him guilty of murder in the first degree, we see no reason to conclude that it was misleading or prejudicial.

As to the right to resist a trespass.

So much of the instructions asked by the appellant and refused by the court, and numbered third, fourth, fifth, sixth, seventh, eighth, and ninth, as is applicable to appellant, was based on the theory that W. O. Carpenter, being in the possession of his field, had the right to resist a trespass upon the same by Hannibal to the extent of taking his life, and that his brother, the appellant, could lawfully assist him in such resistance, and were properly refused.

Instruction should not single out evidence.

The instruction numbered "tenth," which the appellant asked and the court refused to give, was as to the effect the jury might give to the bad character of the deceased. It was not within the province of the court to select one fact, and tell or suggest to the jury what effect they might give to it. The jury should consider all the

evidence, and base their verdict upon their conclusions from it as a whole. The prayer was properly denied.

The first half of the other instruction which was refused was covered by instructions given, and the other half, as to self-defense, was incorrect.

Sixth. There was sufficient evidence to sustain the verdict of the jury. While the conviction of murder in the first degree is not entirely satisfactory, we are without authority to interfere with it.

Judgment affirmed.

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

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BARNETT v. MEACHAM.

Opinion delivered April 18, 1896.

DOWER INTEREST—TRANSFER BEFORE ASSIGNMENT.—If a widow conveys her dower interest before it is assigned to her, the heir may recover the land from her vendee.

LIMITATION OF ACTION—RECOVERY OF DECEDENT'S LAND.—Where a widow conveyed her dower interest in her deceased husband's land before it was assigned to her, and her vendee entered and kept uninterrupted, peaceable, adverse possession for more than seven years, he acquired title thereby.

Appeal from Independence Circuit Court in Chancery.

JOHN B. MCCALEB, Judge, on exchange of circuits.

STATEMENT BY THE COURT.

The appellant brought this suit to recover the land in controversy. Judgment was rendered against him, and he seeks by this appeal to reverse said judgment. The land was owned by the appellant's brother, who died, while a soldier in the Confederate army, in 1862, leaving him surviving, Julia, his widow, and an infant

son, who died in 1863. The widow died in 1893, never having had dower assigned her in the land. After the death of her husband, the brother of the appellant, she was married to Thomas Ward in 1864; and on January 9, 1869, she and her husband, Ward, sold and conveyed this land to James A. Meacham, who afterwards sold part of it to appellees, the Grays.

Upon the execution of the deed of Ward and wife to appellee Meacham, he assumed control of said lands, and claimed to own the same absolutely; and he and his vendees, the Grays, have, as the evidence shows, had uninterrupted, peaceable, adverse possession of the same for a period of much over seven years next before the institution of this suit, and they rely upon the purchase by Meacham from Ward and wife and the statutes of limitations of seven years for title. It is admitted that the appellant, W. H. Barnett, is the only heir to his brother, the first husband of Julia Ward. This suit was brought in 1893, less than a year after Julia Ward's death.

J. J. Barnwell, for appellant.

The court erred in its instructions to the jury. There was testimony showing that Meacham admitted that appellant would get the land at the death of the widow. This shows there was no adverse possession. Meacham held as trustee for the heirs of Barnett. The statute did not run. 12 S. W. 1045; 31 Ark. 334; 83 Mo. 581; 84 *id.* 104. Appellees held only the reversionary estate. 42 Ark. 118. They got no title, as Mrs. Barnett had none. 30 *id.* 640. There was no actual adverse possession. 27 *id.* 77; 45 *id.* 81.

H. S. Coleman and *Neill & Neill* for appellees.

1. The cause was properly transferred to the law docket. Sand. &. H. Dig., sec. 6121.

2. The deed of Julia Ward was evidence of color of title and of abandonment by the widow, and started the statute of limitation. 34 Ark. 547; 30 *id.* 640; 33 *id.* 150; 44 *id.* 490.

3. Even if the widow had not sold and abandoned the land, in this case no dower having been assigned, and neither the widow nor the heir being in possession, her right of dower was barred after seven years, and a right of action would certainly then accrue to the heir to recover the land from a stranger in possession. 22 Ark. 263; 29 *id.* 660; 33 *id.* 294; 40 *id.* 203. Appellee was in open, notorious, continuous, peaceable, adverse possession, claiming title, for seven years, which was a complete bar.

Effect of transfer of dower before assignment.

HUGHES, J., (after stating the facts). It has been recently decided in this court that the conveyance by a widow of her right of dower in the lands of her deceased husband, before the assignment of her dower, confers upon the alienee no right which he can enforce at law, but that he may, in equity, have her dower set aside and assigned to him.* A widow, before the assignment of her dower, may occupy and hold the mansion house and farm attached free of rent, till her dower is assigned. But, if she abandons the possession, the heir may enter and occupy the premises, subject to her right to have dower assigned. "She may occupy and cultivate the land herself, or allow another to do it for her." She need not remain on it in person, "for it may be she could only derive a support from the premises by renting them." *McReynolds* v. *Counts*, 9 Grat. 242; *Oakley* v. *Oakley*, 30 Ala. 131; *Padgett* v. *Norman*, 44 Ark. 490. "But this (quarantine) right to occupy the premises, or to receive the profits for her maintenance, is so far personal to the widow that it cannot be transferred to

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* *Weaver* v. *Rush*, *ante*, p. 51.

another; and if, before her dower is assigned, she makes a conveyance of her interest, the heir may recover in ejectment against the alienee." 2 Scribner, Dower, p. 64; *Wallace* v. *Hall*, 19 Ala. 367; *Wallis* v. *Doe*, 2 Smedes & M. 220. When Mrs. Ward transferred her interest to Meacham, and abandoned the premises, a right of action in ejectment against Meacham accrued to the appellant.

Limitation to action to recover decedent's land.

Having delayed to bring his action until long after the lapse of seven years, and Meacham and those claiming under him having had adverse possession for over seven years next before the commencement of this suit, the appellant's right of action was barred by the seven-years statute of limitations before his suit was commenced. Wherefore the judgment is affirmed.

FOX *v.* DREWRY.

Opinion delivered April 18, 1896.

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INFANT FEME COVERT—DISAFFIRMANCE OF CONVEYANCE.—An infant married woman conveying her land may disaffirm the deed during coverture.

STATUTE—REPEAL BY IMPLICATION.—The act of April 28, 1873, authorizing married women to sue alone, does not by implication repeal the saving clause in their favor in the seven-years statue of limitation.

DISAFFIRMANCE OF CONTRACT — ESTOPPEL. — Where an infant *feme covert* conveyed her land, and lived near it for eight years after becoming of age, without asserting title to it, though it was being held adversely under claim of title by one who purchased from her vendee, she is not estopped by laches from disaffirming the contract, if the party in possession had made no valuable improvements on the land.

SAME—RETURN OF CONSIDERATION.—Where land of an infant married woman was held by herself and her husband, and he received and spent the purchase money, she is not bound to return it before suing to disaffirm the conveyance, especially where she was not able to do so.

Appeal from Searcy Circuit Court in Chancery.

B. B. HUDGINS, Judge.

STATEMENT BY THE COURT.

This is an appeal from a judgment adverse to appellant in a suit in ejectment for the recovery of lands devised to her by the will of her father. Appellant and her husband, who was living at the time of the institution of this suit, and from whom she had not been divorced, conveyed the lands by deed to one McMahan, who conveyed to the appellee. At the date of the said conveyance by the appellant, she was under the age of eighteen years, and was a married woman. She was therefore incompetent to convey her real estate, being an infant. This suit was begun on the 31st of August, 1891. The date of her conveyance to McMahan was 19th of April, 1875. The date of McMahan's conveyance to the appellee was 13th day of June, 1876. Upon her purchase the appellee took immediate possession, and before the institution of this suit had held the lands for about seventeen years, claiming to own them, and had appropriated the rents and profits, acknowledging accountability to no one, and intending to hold for herself only, and adversely to all others. The appellee pleads the seven years' statute of limitations as a bar to the action, and insists also that plaintiff was barred by laches.

The evidence shows that, for eight years before the institution of this suit, the appellant had lived within five miles of this land, knew that appellee was in possession and claimed to own it, and that she had not, prior to the commencement of this suit, made any claim to the land since her conveyance, of which appellee or any one knew; that there were eight acres of land in cultivation when the appellant conveyed, and no additional improvements had been made, when this suit was

brought. No offer to return purchase money was made by appellant, and the evidence tends to show that her husband received the purchase money, and expended it before she was eigteen years of age, and that she was unable to refund it. No act of ratification by her is shown. She had only refrained from bringing suit to assert her right to the land; had only remained silent and inert.

W. F. Pace, for appellant.

1. While this cause was transferred to equity, it did not change the nature of the action, nor authorize the court to apply other than principles governing actions at law, unless appellee set up some equitable defense. None was set up. 26 Ark. 59; 31 *id.* 605.

2. The demurrer should have been sustained to the answer, and to each paragraph thereof. A general denial is no answer in ejectment. 43 Ark. 296; 52 *id.* 290. Abandonment by the husband does not remove a wife's disability. 8 Ark. 36.

3. An infant can disaffirm without restoring the consideration. 44 Ark. 296; 51 *id.* 299.

4. At the time of the execution of the deed appellant was both an infant and a *feme covert*. The disability of coverture *still exists*. Mansf. Dig., sec. 4471, 4503; 24 Ark. 494.

5. The act of April 28, 1873, for the protection of married women, does not, by implication, repeal the saving clause of the Digest, sec. 4471. 42 Ark. 307; 51 Me. 305; 50 Cal. 303; 83 Ill. 172; 93 U. S. 674; 52 Barb. 146; 72 N. C. 551; 51 Ark. 298; 47 *id.* 562.

6. Appellant is not estopped by mere silence or failure to disaffirm, while covert. Const., art. 9, sec. 7; 39 Ark. 357; 44 *id.* 158; 51 *id* 298.

Right of *feme covert* to disaffirm conveyance.

HUGHES, J., (after stating the facts.) At the time the appellant conveyed the land in controversy, she was

an infant *feme covert*, and was remaining under the disability of coverture, when she commenced this suit. Was she barred by the seven-years statute of limitations or by laches?

Statute allowing disaffirmance not repealed.

The statute of limitations in this state allows a married woman three years *after* she becomes *discovert* within which to commence her action. *Hershy* v. *Latham*, 42 Ark. 307; *McKneely* v. *Terry*, 61 Ark. 527. But "where seven years have elapsed since the right of action for land accrued, and three of these years have been free from disability, the right of entry or of action is barred." *Chandler* v. *Neighbors*, 44 Ark. 479.

The act of April 28, 1873, which authorizes married women to sue alone, and in their own names, does not repeal by implication the saving clause in their favor in the statute of limitations. *Hershy* v. *Latham*, 42 Ark. 305; *Stull* v. *Harris*, 51 Ark. 297.

When married woman not estopped to disaffirm.

A married woman may be estopped to claim real estate. But mere silence or inertness will not suffice to work an estoppel. *Sims* v. *Everhardt*, 102 U. S. 300. "Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although, under the name of laches, it may afford a ground for refusing relief under some peculiar circumstances. *De Bussche* v. *Alt*, L. R. 8 Ch. Div. 286, 314. Unless in some way the party relying upon an estoppel is put at disadvantage by the action of the party sought to be estopped, it will not be available. Of course, if one stand by, without making his claim known, and see another make permanent and valuable improvements upon land, knowing that the party improving claims to own it, he will afterwards be estopped to enforce his claim, for his silence in such a case would imply consent. If the doctrine of laches could apply in an action at law, which this really was,

though it was transferred to the equity docket, there is no sufficient evidence in this case to support it.

When unnecessary to return consideration.

As the purchase money paid for the land in this case was received by appellant's husband, and expended by him while she was an infant, she was not required to offer to return it. The evidence tends to show she was not able to do so. *St. L., I. M. & S. Ry. Co.* v. *Higgins*, 44 Ark. 296; *Stull* v. *Harris*, 51 Ark. 299.

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

HILL *v.* YARBOROUGH.

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Opinion delivered April 18, 1896.

HOMESTEAD—DEFECTIVE CONVEYANCE—CURATIVE STATUTE.—A mortgage of a homestead, which was invalid under the act of March 18, 1887, because the signature and acknowledgment of the grantor's wife were obtained through fraud, was rendered valid by the act of April 13, 1893, making all conveyances purporting to affect the title to real estate which are defective or ineffectual by reason of the act of 1887, as valid and effectual as though such act had never been passed.

RELINQUISHMENT OF DOWER—EFFECT OF ACKNOWLEDGMENT.—A mortgage upon a homestead accepted as security for an antecedent debt of the husband, in consideration of which the time is extended for a definite period, is valid to convey the wife's dower, although the wife was induced to execute it by the misrepresentations of the officer who took her acknowledgment that the mortgage did not cover the homestead, where the mortgagee had no notice thereof.

Appeal from Searcy Circuit Court in Chancery.

B. B. HUDGINS, Judge.

Rose, Hemingway & Rose, for appellants.

1. The rule laid down in *Meyer* v. *Gossett*, 38 Ark. 377, governs this case. It was re-affirmed in *Donahoe* v. *Mills*, 41 Ark. 421 and 45 *id.* 117. See 1 Devlin on

Deeds, sec. 530. Appellants were *bona fide* purchasers. They gave further time of payment while the debtor was solvent. 1 Jones, Mortg., sec. 459; Thomas on Mortg., sec. 482; 55 Iowa, 132; 77 Ala. 500; 63 Ind. 576; 32 N. W. 243; 71 Iowa, 132; 55 Miss. 348; 63 Ala. 561; 85 N. Y. 226; 36 Hun, 565; 54 Iowa, 14.

2. The testimony of the justice was not admissible to impeach his certificate. 18 Md. 305; 35 Miss, 83; 53 *id.* 321.

W. F. Pace and *Dan W. Jones & McCain*, for appellees.

1. The chancellor found that the wife was illiterate, and that her signature was obtained by fraud. The evidence sustains this finding. Where there is fraud in the deed itself, it is void. 38 Ark. 377; 37 *id.* 148.

2. Appellants are not *bona fide* purchasers for value and without notice. The mortgage was given for an *antecedent debt*. It is true it is held that, under the law merchant, one who takes negotiable paper as collateral security for a pre-existing debt is a *bona fide* holder for value. But the court refused to extend the rule to a mortgage. 102 U. S. 14; 120 *id.* 556. An extension of time is not sufficient to constitute a *bona fide* purchaser for value, within the equity rule. 102 U. S. 14, and cases cited. The remark in 49 Ark. 214 is *obiter dictum*, as the mortgagee in that case advanced a large sum on faith of the mortgage. The exact point has not been decided in this state; but see 51 Ark. 59; 34 *id.* 85; 31 *id.* 258; 58 *id.* 252; Herman on Ex., sec. 328; 2 Freem. Ex., sec. 345; 2 Freeman, Judg. (4 Ed.), sec. 366*a;* 66 N. Y. 162; 83 Pa. St. 372; 30 Am. Dec. 182; 18 *id.* 577; 12 *id.* 136; 6 Minn. 402; 27 Tex. 593; 33 *id.* 768; 46 Am. Dec. 527; 4 Paige, Ch. 215; 1 Dill. 201.

3. If the mortgagees neglected to see the wife, and trusted to the husband or justice to get her signature, he was, as to this, the mortgagees' agent, and they are affected by his misconduct. 2 Wall. 24. As between the parties to an instrument, there can be no estoppel against pleading fraud by one who has been guilty of no negligence or misconduct. Bigelow, Estop., 286, 288, 519.

4. The husband signed the mortgage only on condition that his wife sign it. He is not bound, unless his wife is. It was void as to her, and this releases him. 48 Ark. 426.

Rose, Hemingway & Rose, in reply.

1. 49 Ark. 214, settles the point that an extension of time for a definite period constitutes the creditor a *bona fide* purchaser.

2. The cases cited by appellee refer to execution sales and mortgages where there was no extension of time.

3. The fact that the mortgage covered the homestead is immaterial, under the curative act. Sand. & H. Dig., sec. 743; 58 Ark. 117; 60 *id.* 269.

WOOD, J. This suit was brought by Hill, Fontaine & Co. against Yarborough and wife, to foreclose a mortgage which, it is alleged, was executed by them April 22, 1890, to secure a note of even date for $1,390, due December 1, 1890. The answer set up fraud in the execution of the mortgage, in that Mrs. Yarborough was illiterate, and that the justice of the peace taking the acknowledgement represented to her that the mortgage did not cover the homestead, but conveyed a different tract. The court rendered a decree setting aside the mortgage, and Hill, Fontaine & Co. appealed.

1. There was proof to justify the finding that the signature and acknowledgment of Mrs. Yarborough to

the mortgage were obtained through a misapprehension of the facts, superinduced by the misrepresentations of the justice taking the acknowledgement. The mortgage was in proper form for conveying the homestead and dower. It was shown to have been executed by Yarborough himself, to secure a pre-existing debt then due, upon the understanding that time for payment should be extended to a definite day.

We cannot agree with counsel that Yarborough signed the mortgage "only on condition that his wife would sign it." The proof by Yarborough himself shows the contrary. He says that he signed the mortgage at the request of the attorneys of Hill, Fontaine & Co., who were about to sue him upon the debt, and that he did not know that the justice had misrepresented the facts to his wife until after she had signed. True, he also said that he had told them he did not know whether his wife would sign or not; that they could go down to the farm and see her, with the understanding that, if she would sign the mortgage, it would be all right, and, if not, it would be of no account, and they would have to bring suit; but this latter statement only goes to show that Yarborough knew and was expressing what would be the effect of his wife's failure to sign the mortgage, and not that he had signed only upon condition that she would sign. It appears that Yarborough at this time had property over and above his exemptions, which Hill, Fontaine & Co. could have subjected to the payment of their debt. The justice testified that Yarborough sent him down to take the acknowledgment of his wife. The only conclusion justified by the proof is that Yarborough executed the mortgage to procure an extension of time for the payment of his debt, and to avoid an impending law suit.

When defective conveyance of homestead cured.

Since the signature and acknowledgement of the wife were obtained through the misrepresentation of the justice as to the material facts, this would render the mortgage void as to the husband, under the act of 1887, making every conveyance of a homestead by a married man, except for certain purposes, of no validity, "unless the wife joins in the execution of such instrument and acknowledges same." But the sweeping provisions of the curative act of April 13, 1893, made the mortgage as "valid and effectual as though the act of 1887," *supra*, "had never been passed." For said act (1893) provides that "all deeds, conveyances, instruments of writing affecting or purporting to affect the title to the real estate, which have been executed since the 18th day of March, 1887, and which are defective or ineffectual by reason of section one (1) of an act entitled 'An act to render more effectual the constitutional exemptions of homesteads, approved March 18, 1887,' be and the same, and the record thereof, are hereby declared as valid and effectual as though said act had never been passed." If the act of 1887 *had never been passed*, the mortgage in controversy would have conveyed the homestead. The legislature, by the act of 1893, dispensed with the prerequisites for the alienation of the homestead which they had prescribed by the act of 1887, as to all conveyances which had been executed between the passage of said act and the act of 1893, where the rights of no innocent party had intervened.

As was held by this court in *Sidway* v. *Lawson*, 58 Ark. 117: "The legislature never undertook to create any interest or estate by the act, but to prescribe the manner in which instruments affecting the homestead of a married man should be executed and acknowledged; at the same time recognizing the homestead as the husband's, and not the wife's, nor as the joint property of husband and wife." *Bank of Harrison* v. *Gibson*,

60 Ark. 269. The curative act of 1893 is broad enough in terms to cure all instruments which are ineffectual because of the failure of the wife to join the husband in the execution of same, or where she has failed to acknowledge same, as well as those where she has joined in the execution, and has acknowledged the instrument, but has done so in a defective manner.

Effect of acknowledgment procured by fraud.

2. The mortgage also in form was properly executed and properly acknowledged for the relinquishment of dower. Is Mrs. Yarborough bound by it? It appears that the mortgagees were ignorant of the fact that the signature and acknowledgment of Mrs. Yarborough were procured by the misrepresentations of the justice. There was nothing to charge them with notice. The mortgage was sent to them duly executed and acknowledged, and they readily accepted same as security for the debt, and extended the time of payment for a definite period. When the debt became due, plaintiffs had the right to sue, and, by doing so then, could have enforced the payment of their claim. Since that time, Yarborough's condition financially has changed, as it was shown by his deposition in this case on the trial that he was worth only five or six hundred dollars outside of the farm included in the mortgage. Upon the faith of this mortgage then, and at the time of its execution, appellants gave up their right to sue and collect their debt. It may not be technically accurate to speak of the mortgagees as *bona fide* purchasers for value, as against the mortgagor, Mrs. Yarborough, both being the immediate parties to the instrument; and yet the above facts certainly entitle them, as against her, to all the rights of an innocent purchaser. Under the proof, if fraud was perpetrated upon Mrs. Yarborough, it was done by the justice of the peace who was sent by her husband to take her acknowledgment. The mortgagees were not parties to the fraud, and had no notice thereof, and they

were purchasers for value, as shown *supra*. Jones, Mort., sec. 459–61, and authorities cited. *Fargason* v. *Edrington*, 49 Ark. 207, and authorities cited.

But, if the rights of Mrs. Yarborough are to be determined upon the doctrine of estoppel, the result will be the same, for it will be found difficult to distinguish this case in principle from *Donahue* v. *Mills*, 41 Ark. 422, and *Meyer* v. *Gossett*, 38 Ark. 377; and the doctrine there announced as to acknowledgments of married women has become a rule of property in this state. See also *Petty* v. *Grisard*, 45 Ark. 117; *Holt* v. *Moore*, 37 Ark. 145.

The decree of the court below is therefore reversed, and cause remanded, with directions to enter a decree of foreclosure, in accord with this opinion, and for further proceedings.

MESSINGER *v.* DUNHAM.

Opinion delivered April 18, 1896.

ATTACHMENT—CLAIM ARISING ON CONTRACT.—An attachment may issue against a non-resident for refusal to perform a contract, although the damages claimed are unliquidated, under Sand. & H. Dig., sec. 325, providing that an attachment shall not be granted against a non-resident "for any claim other than a debt or demand arising upon contract."

APPEAL—CONCLUSIVENESS OF VERDICT.—A verdict will not be disturbed on appeal upon the ground that excessive damages were allowed, if there was evidence to support the verdict.

Appeal from Lee Circuit Court.

GRANT GREEN, JR., Judge.

STATEMENT BY THE COURT.

This action arose out of a contract made by plaintiff, Dunham, with defendant, Messinger. By the contract, which was in writing, Dunham agreed that he would

erect his saw mill on a certain tract of timber land in Lee county, and proceed to saw the timber, which was owned by him, into lumber for Messinger. Dunham agreed to saw, stack, and load the lumber upon cars for Messinger, under the direction of his agent, who was to measure the logs before they were sawed by Dunham. Messinger agreed to pay Dunham $8.50 per thousand feet of lumber loaded on the cars. Three separate causes of action were set out by Dunham in his complaint in separate paragraphs, but the contention here is concerning that set out in the third paragraph. In this paragraph plaintiff, after stating that he had complied with the contract on his part, alleges a breach of the contract on the part of the defendant as follows, to-wit: "But the defendant, from May 1, 1893, until August 15, 1893, failed to perform his part of said contract by measuring said logs so that plaintiff could saw the same as aforesaid, but from day to day and from week to week during said interval stated to plaintiff, and induced him to believe, that he (defendant) would proceed with the performance of said contract, and cause said logs to be measured; that on or about said August 15, 1893, the defendant refused to perform his part of said contract; that, by reason of such conduct on the part of the defendant, and his failure as aforesaid to perform his part of said contract, and solely on that account, the plaintiff was prevented from performing said contract, and from operating said mill during said time, and was subjected to expense and delay, and suffered damages and loss thereby in the sum of thirteen hundred and fifty dollars," for which he prayed judgment. The plaintiff also filed an affidavit and obtained an attachment on the ground that the defendant was a non-resident. The affidavit alleged that "his claim is for money due on contract," and stating the amount. The defendant appeared, and filed his answer. There was a verdict in favor of plaintiff, and the damages

assessed for the cause set out in the 3d paragraph were $1,150.90.

James P. Brown, for appellant.

1. An attachment will not lie as to unliquidated damages, as claimed in the third paragraph of the complaint. It only lies for debts or demands arising from contract. Sand. & H. Dig., sec. 325, subd., sec. 8; Wade on Att., secs. 12, 18, 23 and notes.

2. There was clearly a misjoinder of actions—tort and *ex contractu*.

3. The damages allowed are foreign to every sense of justice, and out of proportion to the facts in evidence.

McCulloch & McCulloch, for appellee.

1. It is too late now to object that the third paragraph was for unliquidated and uncertain damages, and that it was error to sustain the attachment as to that paragraph. The grounds of the attachment were not controverted, nor exceptions saved. Sand. & H. Dig., secs. 395, 399; 60 Ark. 444. In this case the defendant *appeared*, and failed to controvert the attachment, and he cannot raise the question on appeal. 50 Ark. 446; 53 *id.* 181.

2. The statute authorizes an attachment upon a demand arising out of a contract or its breach, though the amount claimed as damages be uncertain. It was only intended to exclude actions for *torts*. Sand. & H. Dig., secs. 325, subd. 1, and sec. 7206; 2 Ark. 415; 55 Ark. 547; 42 *id*, 210; Wade on Att., sec. 12; 2 Tex. Cir. App. 346.

3. The damages are not excessive, but are amply sustained by the evidence. The rule laid down by the court as the measure of damages is fully sustained. The end to be attained is to give *compensation* to the party not at fault. 1 Suth. on Dam., pp. 113–118; 3 *id.* p. 522; 7 Hill, 61; 13 How. 344; 60 Ark. 151; 58 *id.* 617;

52 *id.* 117; 39 *id.* 280; 33 *id.* 545. The damages were not "speculative;" the profit was fixed and certain.

Attachment on claim arising on contract.

RIDDICK, J., (after stating the facts). The first contention is that the attachment was not lawfully issued. The attachment having been granted on the ground that the defendant was a non-resident, and the claim of plaintiff set out in the third paragraph being for unliquidated damages, it is contended for that reason that the court could not lawfully sustain the attachment or order a sale of the property. Our statute provides that an attachment "shall not be granted on the ground that the defendant or defendants or any of them is a foreign corporation or non-resident of this state for any claim other than a debt or demand arising upon contracts." Sand. & H. Dig., sec. 325. This restriction of the right to attach to debts and demands arising upon contract is for the purpose of excluding actions for torts and actions where "the contract relations between the parties do not furnish a basis upon which the measure of liability may be ascertained." 1 Wade, Attachment, sec. 12. The action in this case was founded upon a demand against the defendant for refusing to perform a contract which he had made with the plaintiff. This demand arose out of, and the measure of damages in the action depended upon, and was controlled by, the contract. The word "demand" is broader than the word "debt;" and although the damages claimed were unliquidated, still we are of the opinion that the claim was "a demand arising upon contract," within the meaning of the statute. *Jones* v. *Buzzard*, 2 Ark. 415; *Lenox* v. *Howland*, 3 Caines, 323; *New Haven &c. Co.* v. *Fowler*, 28 Conn. 103.

Conclusiveness of verdict on appeal.

It is further said that the damages allowed are excessive. But the question was peculiarily within the province of the jury to determine. There was evidence

to support the verdict, and the case is not one that would justify us in disturbing the judgment of the circuit court on that point.

Judgment affirmed.

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BUSCH v. HART.

Opinion delivered April 18, 1896.

CONTRACT—SUFFICIENCY OF SIGNING.—Where a bond conditioned on the performance of a contract refers to the contract as thereto attached, a signing of the bond, to which the contract is attached, is in legal effect a signing of the contract also.

CONTRACT IN WRITING—PAROL EVIDENCE OF CONSIDERATION.—In a case where the statute of frauds does not apply, a contract to furnish materials and perform work may be in writing, and the price to be paid for the same be established by parol, when it does not contradict or vary the writing.

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

J. A. Busch, on the 28th of December, 1892, entered into a contract with Mark J. Smith to erect a bath house for said Smith in the city of Hot Springs. Busch afterwards sublet a portion of the work to appellee, J. E. Hart, agreeing to pay him therefor the sum of $4,100. Hart gave a bond for the performance of his contract, which contained the following conditions, to-wit: "The condition of the above bond is such that, whereas, the said J. E. Hart has this day entered into a contract with the said Jacob A. Busch to furnish certain labor and materials towards the construction of the new Hot Springs Bath House, * * * *a copy of which contract is attached hereto and made part hereof*: Now, if the said Hart shall well and faithfully perform all the stipulations

mentioned and undertaken as set forth in the said contract, then this bond shall be void and of no effect; otherwise, in full force and virtue," etc. Hart furnished the material, and completed his contract, and afterwards brought suit against Busch to recover $427.50, alleged to be due him upon the contract. Busch alleged that he had paid in full for the work, and, further, that Hart failed to complete the work within the time required by his contract. He alleged that this failure of Hart delayed the completion of the building sixty-six days, and that, by the terms of the principal contract made with Smith, he (Busch) was required to pay damages at the rate of ten dollars for each day of said delay, amounting in all to $660.00, which amount he claims that he is entitled to recover from Hart.

Upon the trial, Busch exhibited the bond executed by Hart, above referred to, attached to which bond was a writing. Busch claimed that this was the contract referred to in the bond; that it was attached to the bond at the time it was executed, and was the contract under which Hart performed his work. This writing was unsigned, but purported to be a contract between Busch and Hart for the performance of the work concerning which this action was brought. It commenced with the following recital, to-wit: "This agreement, made and entered into on this, the———day of January, 1893, by and between James E. Hart, party of the first part, and Jacob A. Busch, party of the second part, all of Hot Springs, Ark., witnesseth," etc.

Hart claimed that the contract referred to in the bond was never reduced to writing, while Busch contended that the contract was in writing, and attached to the bond at the time of its execution. The evidence bearing on the question as to whether the contract was attached to the bond at the time of its execution was as follows: Samuel Hamblin, a civil engineer, who super-

intended the construction of the bath house, testified that Busch and Hart came to him in the first days of January, 1893, and stated that Busch had contracted with Hart to do a portion of the work, and asked him to draw a bond and contract according to their agreement. "I made," he said, "pencil notes of the several points in their verbal agreement, and from them drew the contract. I also drew a bond; both documents being in duplicate, and bound, the bond and contract together, one for each of the contracting parties. I delivered the paper to the parties, who expressed themselves as satisfied with the terms as expressed therein, and took them from me for execution." He identified the bond and contract exhibited in evidence by Busch as one of the set prepared and delivered by him to the parties. Busch, the appellant, testified on this point, and, after reciting the circumstances under which he made the contract with Hart, he proceeds as follows: "Afterwards we called on Col. Hamblin, the superintendent of the building, to draw a contract and bond in accordance with our agreement. He took notes of our agreement, and prepared a bond and contract in duplicate. In each copy the bond and contract were bound together. Both of us expressed ourselves satisfied with the terms of the contract as expressing our agreement, and Hart took them for execution, and returned a copy to me with the bond executed. The bond was signed, and I always supposed the contract was signed until the case came up, when I found that the copy of the contract attached to this bond was not signed. *The copy of the contract was attached to the bond just as it is now.*" Hart testified in his own behalf: "My contract," he said, "was that the work should be done in a reasonable time, and there was no penalty after any particular date." On cross-examination he was shown the bond signed by him, and testified concerning it: "That he had given this bond to

the defendant for the faithful performance of his part of the work. *He stated that the form of a contract attached to the bond shown him might have been attached when he delivered the bond, but that he had never signed it, and refused to sign such contract.* He was asked to what contract the bond referred, and stated that it was not the one attached, and that there had been no contract signed, and that there was no other, except as he had previously stated."

There was a finding and verdict in favor of plaintiff.

Chas. D. Greaves and *Rose, Hemingway & Rose*, for appellant.

1. There was no evidence to support the verdict. The contract was attached to the bond, and made part of it by reference to it. A signing of the bond was equivalent to signing the contract. If an unsigned paper is referred to in a paper signed by the party, or is attached to such a paper, it is just as though it was incorporated in the paper signed, and is equivalent to signature. 2 Starkey, Ev. 485; 1 Reed, St. Fr., sec. 341, 344; 2 Whart. Ev., sec. 872; 4 N. Y. 144; 6 Cow. 448; 5 Exch. 631; 77 N. C. 88; 54 Miss. 483; 5 Exch. 907; 8 Ala. 546; 2 DeG. & Sm. 561; 14 N. Y. 584; 14 How. 456; 18 Ill. 483; 15 Me. 40; 5 Pick. 395; 30 Minn. 389; 58 Md. 547; 77 Ind. 2; 3 Rich. 373; 5 Strobh. 129; 1 Sneed, 25; 3 Daly, 496; 38 N. J. L. 38; 9 Allen, 385; 2 Fairfield, 438; 33 Barb. 392.

2. But if that were not so, it would make no difference. Hart gave a bond for carrying out the contract, signing the bond himself. Instead of signing the contract, he, in effect, wrote upon it, "I undertake that the within contract shall be performed," and, being the person to perform it, undertook its performance. He cannot escape by saying he did not read it. It was his duty to read it, and he had every opportunity to do so,

and he cannot profit by his own neglect. 2 Whart. Ev., sec. 1028; 117 U. S. 519; 78 Ind. 136; 6 Blackf. 380; 29 Ind. 580; 82 Pa. St. 202; 3 Ind. 449; 18 Kas. 529; 100 Ill. 298; 79 Ind. 604; 41 Am. 604, and note; 48 Ind. 436; 56 N. Y. 137; 70 Ind. 19; 55 N. H. 493; 54 Ill. 196; 72 Ind. 533; 29 Iowa, 498; 12 Neb.433; 118 Mass. 109.

3. The language of the court to defendant was prejudicial to him in the eyes of the jury. 59 Ark. 417; 49 *id.* 148; *id.* 439; 43 *id.* 73; 52 *id.* 263; 43 *id.* 290.

A. Curl and *W. H. Martin*, for appellee.

1. The evidence fails to show that the contract was attached to the bond at the time it (the bond) was signed. Appellee testified that he refused to sign the contract, and that his contract with appellant was oral. The architect testifies that appellant refused to sign the contract. There is no expression in the bond that refers to the contract, or identifies it. Hence appellant's contention fails. The attached writing relied on must be clear and certain as to its terms. It must show the contract between the parties. There must be nothing to guess at, nothing to fill in, to make it complete. And it must not be left so as to require oral evidence to explain what is meant, or make it complete. The writing in question was not signed, and no price is named therein for the work. 1 H. & N. 473; 5 B. & C. 583; 2 Whart. Ev., sec. 870. The contract, so-called, was not admissible in evidence.

2. The evidence sustains the claim for extra work.

3. Appellant was not prejudiced by the remark of the judge. It only shows that appellant did not demean himself very well on the witness stand.

Chas. D. Greaves and *Rose, Hemingway & Rose*, for appellant in reply.

1. It is said there is no proof that the contract was firmly attached to the bond when the bond was signed.

Neither is there any proof that it was not. To have attached a false contract to the bond after its execution would have been a fraud, and *a forgery*, and the law does not presume fraud,—far less crime. 31 Ark. 554; 38 *id.* 419; 116 U. S. 615; 59 Fed. 73.

2. The fact that the price or consideration is blank, does not render the contract void, under the statute of frauds, where the contract is *executed*. Where *executed*, the statute does not apply, nor has it been pleaded, which is essential. Browne, St. Frauds, sec. 16. In this case there was no dispute as to the consideration. All parties agree as to that.

Sufficiency of signing of contract.

RIDDICK, J., (after stating the facts). The decision of this case turns on the question whether the contract sued on was in writing or not. The appellant, Busch, claimed that the contract was in writing, and attached to the bond at the time it was executed. Hart denied this, and based his right to recover on the contention that the work was done under an oral contract in terms different from the written contract set up by Busch. The verdict of the jury in favor of Hart was no doubt based on the finding that the work was done under an oral contract, and that the contract exhibited by Busch was not attached to the bond at the time of its execution, and not the contract between the parties. The bond expressly refers to the fact that Hart and Busch had entered into a contract for the performance of which the bond was given, and contains the following recitals, to-wit: "a copy of which contract is attached hereto, and made a part hereof." At the trial the contract was exhibited by Busch attached to the bond, and, referring to the time when the bond and contract were delivered to him by Hart, he testified that "the copy of the contract was attached to the bond just as it is now." Now, if the contract exhibited by Busch was in fact attached

to the bond at the time of its execution, and was the contract referred to therein, then a signing of the bond was in legal effect a signing of the contract also. *Tonnele* v. *Hall*, 4 N. Y. 144; *Gale* v. *Nixon*, 6 Cow. (N. Y.), 448; *Mayer* v. *Adrian*, 77 N. C. 88; *Fisher* v. *Kuhn*, 54 Miss. 483; 2 Whart. Ev., sec. 872.

The testimony of both Busch and Hamblin tends strongly to show that the contract exhibited by Busch was attached to the bond at the time of its execution. This is further supported by the reference in the bond to a contract attached thereto. We can find nothing in the record to contradict or impeach this testimony. It is true that Hart testifies that his contract with Busch was not reduced to writing, but he nowhere states that the contract exhibited by Busch was not attached to the bond at the time of its execution. On the contrary, when cross-examined on this point, he stated that "the form of a contract attached to the bond shown him might have been attached when he delivered the bond, but that he had never signed it." It appears from his testimony that his contention that the contract was not in writing was based on the fact that he had never signed the contract itself; but this, we have seen, was a matter of no consequence if he signed the bond with the contract attached, and delivered it to Busch in this condition. He does not deny that the contract exhibited with the bond was attached to it at the time he executed the bond, but only denies that he signed such contract. His assertion that this writing was not the contract is only a legal conclusion he draws from the fact that it was not signed, and is entitled to no weight as evidence.

After carefully considering the transcript, we are forced to the conclusion that the undisputed testimony shows that the contract exhibited with and attached to the bond at the trial was thus attached at the time the bond was delivered to Busch by Hart. This contract

having been attached to the bond at the time of its execution, and expressly referred to therein as the contract for the performance of which the bond was given, the parties are bound by its stipulations.

Parol proof in aid of writing.

The fact that the consideration to be paid Hart is not stated in the bond can make no difference now, for the contract has been executed. This is not a case in which the statute of fraud applies, nor has it been pleaded. When that statute does not apply, a contract to furnish materials and perform work may be in writing, and the price to be paid for the same may be established by parol, when it does not contradict or vary the contract. 1 Greenleaf, Ev. 284*a*, 285; *Eighmie* v. *Taylor*, 98 N. Y. 294; *Graffam* v. *Pierce*, 143 Mass. 386; *Clifford* v. *Turrill*, 9 Jur. 633. There is no dispute here about the consideration to be paid, and the only dispute is about matters fully covered by the written contract attached to the bond.

The court correctly instructed the jury as to the legal effect of signing the bond with the contract attached, but the finding and verdict of the jury is without evidence to support it for the amount found against appellant.

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

Hughes, J., dissents.

SHATTUCK *v.* LYONS.

Opinion delivered April 25, 1896.

APPEAL—NO BILL OF EXCEPTIONS is necessary where the decree of the lower court, reciting the facts, shows error on its face.

HOMESTEAD—DEFECTIVE CONVEYANCE—CURATIVE STATUTE.—A mortgage of a homestead which was invalid under the act of March 18, 1887, because it was not executed and acknowledged by the wife in accordance with its provisions, but which would have been valid prior to such act, was rendered valid by the curative act of 1893.

Appeal from Franklin Circuit Court in Chancery, Ozark District.

JEPHTHA H. EVANS, Judge.

J. M. Rose, for appellant.

1. No bill of exceptions was necessary. The error appears upon the face of the record. 34 Ark. 686; 47 *id.* 230; 46 *id.* 21; 32 *id.* 159, 163; 26 *id.* 536; 26 *id.* 662; 27 *id.* 464; 43 *id.* 403.

2. There was no usury. The charges were legitimate. 57 Ark. 347; 51 *id.* 549.

3. The evidence shows that the company had an agent and was doing business in Louisiana. It was a Louisiana contract. 54 Ark. 566.

4. Even if there were defects in the execution and acknowledgments of the mortgage, they were cured by the act of 1893, no third parties being interested. 57 Ark. 242; 30 S. W. 39; 58 Ark. 117.

BUNN, C. J. This is a bill to foreclose a mortgage on certain real estate, given by appellees to appellant, as trustees for the benefit of the British & American Mortgage & Loan Company, Limited. The answer of defendants alleged that the beneficiary, a foreign corporation, had failed to comply with the constitution and laws of

this state, by never having had a known place of business therein, or any agent upon whom process might be served; that the debt secured by said mortgage is in fact usurious, and therefore void; that the land conveyed therein was the homestead of said Charles H. Lyons, owned by him, and occupied by him and his wife as such, when said mortgage was attempted to be executed, and that the same was not executed and acknowledged by the said Sarah F. Lyons, as the law requires, and that this defect renders the same null and void; that, notwithstanding it is in fact null and void, yet it is a cloud upon defendant's title,—and the prayer is that this be taken as an answer and cross bill, and that said cloud upon title be removed. Decree for defendants, and plaintiff appealed.

The mortgage and notes were exhibited with the complaint, and depositions of all witnesses, except J. B. Moore and John Nickols, seem to be regularly filed and made part of the record; but the evidence of said Moore and Nickols, adduced on the part of the defendants, does not appear to have been brought on the record by bill of exceptions, or any order of court directing the same to be taken down in open court, filed and treated as depositions, or in any manner made a part of the record.

Subsequent to the docketing of the cause, and the filing of the abstract and briefs by appellant, appellee moved this court to strike from the record all that part of the transcript included in pages 22 to 53, inclusive, purporting to be a statement of the evidence in the cause, on the ground that the same is not included in any bill of exceptions, or otherwise authenticated as part of the record. This motion and the cause are heard together.

The decree of the court below is as follows, to-wit: "Whereupon this cause is submitted to the court upon the pleadings, proofs, and exhibits, and the court, having

the same under consideration, and being well and sufficiently advised in the premises, doth find that, on the 19th day of December, 1888, the defendants, Chas. H. Lyons and Sarah F. Lyons, his wife, executed and delivered to the plaintiff, Albert R. Shattuck, as trustee, for the British & American Mortgage & Loan Company, Limited, the notes and mortgage mentioned in the complaint, said mortgage being now of record at pages 404 to 409 of Deed Book 2 in the recorder's office at Ozark in Franklin county, and which conveys or attempts to convey the southwest quarter of the northwest quarter, and the northeast quarter of the northwest quarter, and the southeast quarter of the northwest quarter of section 34, in township 10 north, of range 28 west in the Ozark district of Franklin county, Arkansas; that, at the date of the execution or attempted execution of said mortgage, said defendant, Charles H. Lyons, was a resident of the state of Arkansas, and the head of a family; that he and his said wife, Sarah F. Lyons, were then occupying said lands as the homestead of the said Charles H. Lyons; that he was then the owner thereof; that said land did not exceed in area 160 acres, nor $2,500 in value; that said mortgage was not executed and acknowledged by said Sarah F. Lyons, as required by law in cases of alienation of the homestead; and that said conveyance is of no validity, but void, and constitutes a cloud upon defendants' title, the defendants being still in possession of the land. It is therefore considered, adjudged, and decreed that the mortgage aforesaid to plaintiff, Albert R. Shattuck and British & American Mortgage Company, be, and the same is, declared invalid, void, and of no effect, and that the same be, and is hereby, cancelled and removed as a cloud from the title of defendants, and that their title be quieted, and that they have and recover of and from said plaintiff all their costs herein expended, for which they may have execution as at law."

When bill of exceptions is unnecessary.

It thus appears that, in its findings and decree, the court below ignored all the issues made by the complaint and answer, except that relating to the conveyance of the homestead; and since, to raise each and all of the issues, the answer set up affirmative matter necessary to be proved to overcome the *prima facie* case made by the complaint and exhibits thereto, the presumption is that its findings and decree as to the other issues were for the plaintiff, and the only issue left for our consideration in the one disposed of by the court below,—the conveyance of the homestead. Upon this issue the findings and decree of the court are based solely upon the complaint and exhibits thereto and the answer of the defendants; the facts, in effect, being uncontroverted. In other words, the issue was determined upon the record, and the question for us to determine is whether or not there be error in the rulings of the court below, upon its own finding of facts; no bill of exceptions or motion for new trial being necessary. *Union County* v. *Smith*, 34 Ark. 684; *Williams* v. *State*, 47 *ib.* 230; *Smith* v. *Hollis*, 46 *ib.* 21; *Badgett* v. *Jordan*, 32 *ib.* 159; *Ward* v. *Carlton*, 26 *ib.* 662; *Worthington* v. *Welch*, 27 *ib.* 464; *Douglass* v. *Flynn*, 43 *ib.* 403,—all cited by appellant's counsel.

When defective conveyance of homestead cured.

It appears, from an inspection of the mortgage, that it was executed and delivered after the passage of the act entitled "An act to render more effectual the constitutional exemption of homesteads," approved March 18, 1887, by which the conveyance of the husband's homestead was declared to be invalid unless the wife joined in the execution of the same. But it appears also that this mortgage was executed and delivered before the passage of the curative act of 1893, which declared, in effect, that all defective conveyances and acknowledgments of conveyances of homesteads made since the passage of the act of 1887, where the same

would be good to convey the homestead before the act of 1887, should be as valid as if said act of 1887 had never been passed. The mortgage involved in this case was executed by the husband, his wife joining in the conveyance clause, also in the clause relinquishing dower, and acknowledging that she had relinquished her dower, the certificate being in due form; and this would have been a good conveyance of the husband's homestead prior to the act of 1887. It follows that the court below erred in declaring the mortgage null and void.

The decree is therefore reversed, and the cause is remanded, with directions to enter a decree of foreclosure.

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. SELMAN.

Opinion delivered April 25, 1896.

COMPROMISE—CONCLUSIVENESS.—One who accepts a draft for a less sum in full settlement of a claim against a railroad company for damages for stock killed, and gives a receipt reciting such settlement, cannot repudiate the settlement and sue for what he claims to be the value of his stock, although, by mistake of the company, the receipt and draft included an additional sum in excess of his claim as payment for other stock killed belonging to a person of similar name, which sum the claimant was compelled to refund.

Appeal from Craighead Circuit Court, Jonesboro District.

WILLIAM H. CATE, Judge.

Sam H. West and *J. C. Hawthorne*, for appellant.

1. Plaintiff's claim was extinguished and settled when he accepted the seven dollars. Compromises of disputed claims, fairly entered into, are final, and will be

sustained. 21 Ark. 69; 43 *id.* 172; 29 *id.* 131; 61 N. Y. 623; 60 Mass. 148; 12 Wall. 232; 120 N. Y. 190; 8 *id.* 402; 99 *id.* 174.

2. If his claim was not settled, he could not retain the money, and maintain this suit for the balance. 15 Ark. 286; 17 *id.* 603; 20 *id.* 424; 46 *id.* 337; 53 *id.* 16; 52 *id.* 150; 17 *id.* 229; 144 Mass. 546; 76 N. Y. 36.

BUNN, C. J. This is a suit for damages for killing a sow and five pigs, begun in a justice's court, appealed to the circuit court of Craighead county, and there resulting in judgment for plaintiff, Selman, in the sum of $20, the amount claimed, less the amount of $7 already paid plaintiff; from which defendant railway company appeals to this court.

The controversy is somewhat out of the usual order; no question of the right to recover being involved, but solely the question of the binding force of a settlement of the claim having been made before the institution of this suit. In July, 1892, the hogs in question were killed by one of appellant's trains, and in a negotiation for settlement between appellee, Selman, the owner of the hogs, and the stock claim agent of appellant, the latter offered to pay the former the sum of seven dollars in full settlement, on the offer of the former to take the sum of ten dollars, which had been declined by said agent. After this the agent received notice that one of the trains of his company had in August killed two cows of Selman, which were valued at twenty dollars by the owner. This was in September, 1892, and immediately the agent, under the impression that the cows were the property of appellee, Selman, made out and sent to him the following receipt or voucher, notifying him that if he would sign the same, and return to him, he would send him a check for the $37.00 therein mentioned, to-wit:

"$37.00. St. Louis Southwestern Railway. Received of the St. Louis Southwestern claim agent draft No. 2844, for thirty-seven dollars, for amount in full for settlement of claim of W. L. Selman for one black and white sow, and five pigs killed July 3rd, 1892, (marked); 1 black and white cow, four years old, killed Aug. 23rd, 1892, (branded); 1 yellow and white cow, four years old, killed Aug. 23rd, 1892,—killed at or near mile post 137 about 1¼ miles north of Obear, on or about the 3rd day of July and 23rd day of Aug., 1892. This receipt is in full demands against said railway company for damages and claim, and I hereby warrant that I am the owner of said stock, and entitled to receive said money and receipt for same."

. . . . . .

Indorsed (on the outside of fold):

"July 3rd, 1892, 1 black and white sow and five pigs . . . . . $ 7.00.
Aug. 23rd, 1892, 1 black and white cow . . 15.00.
Aug. 23rd, 1892, 1 yellow and white cow . . 15.00."

This receipt or voucher was received, signed in his own name, and so returned to said agent, who at once forwarded the check for the $37 to appellee, and he received and cashed it.

Subsequently it was ascertained that the cows did not belong to appellee, but to one Salman; and defendant's attorney notified appellee of the mistake, and demanded a repayment of $30 of the amount,—that being the value of the two cows, as named in the receipt or voucher. Appellee refused to refund this amount, but offered to refund $17; thus retaining $20 for the hogs, which he claimed to be their value. The attorney declined to accept this amount, and sued Selman in a justice's court, and obtained judgment for the $30 claimed, which was paid by Selman. Selman then sued for the killing of his hogs, laying his damages at $20,

with the result stated, and the railway company appealed.

The testimony of the plaintiff in the case is to the effect that Selman was the owner of the hogs; that they were killed as stated; that they were worth $20, and that plaintiff had agreed to accept $10 in payment for them, and that the claim agent had declined to pay that sum, but had offered to pay $7; that afterwards the receipt or voucher was signed, and the check received by him and cashed; that he knew at the time of signing the receipt, and receiving and cashing the check, that he did not have any cows killed; that the claim agent called on him, and asked him to refund thirty dollars of the amount so paid him; and that in response he advised him that he was looking after his own interest, and not that of his (the agent's), and would return $17 of the money,—and other facts stated above.

Daniel Haynes, the claim agent, testified substantially to the same state of facts as Selman, and, in addition thereto, that the itemized indorsement on the voucher was on the outer fold, and Selman could not have helped but observe it.

The case was tried by the court, sitting as a jury, and the court refused to declare the law as asked by the defendant. Defendant excepted to this refusal to declare the law. Thereupon the court, after finding the facts substantially as recited above, made this declaration of law, to-wit: "Plaintiff had no legal right to the check, nor to take out of it $20 for his hogs, for defendant had not agreed to pay $20 for his hogs, or that they were worth that much; and plaintiff was liable to the company for the full amount of the check $37. On the other hand, defendant had no right to arbitrarily assess the value of the hogs at $7, for plaintiff had not agreed to take that sum for them. If defendant had tendered plaintiff a check and voucher for $7, in full for his hogs, and he

had accepted and signed same, he would be bound thereby, and barred of any further recovery, but the fact that he took a check for $37, and signed a voucher for that amount, does not signify that he intended or agreed to accept $7 in pay for his hogs, though there was a memorandum or statement in or upon the voucher fixing the value of the hogs at $7, because at the time he disclaimed any such intention by proposing to keep $20 as pay for the hogs, and has ever since insisted. Hence there has been no mutual agreement or settlement of the matter between the parties which is binding upon them, and their rights in the matter remain subject to adjudication and determination here. The finding will be for the plaintiff, and the value of the hogs assessed at $20. As defendant has entered a plea of payment, it would perhaps be proper, under the plea, to allow a credit of the $7 already in the hands of the plaintiff by reason of the check, leaving a balance of $13 for plaintiff. Judgment accordingly."

The declaration of law to the effect that defendant, in tendering the receipt or voucher to the plaintiff to sign and return the same containing the value of the hogs killed, arbitrarily fixed the value of the same is misleading. Defendant could not bind plaintiff by such valuation, and plaintiff was free to accept it as a proposition of settlement, for that was all that it was. The plaintiff saw fit to accept the proposition by signing and returning the receipt to that effect, and by receiving and cashing the check. What other arrangments he afterward determined upon, of himself, does not matter.

There does not appear to have been in the settlement of this matter any fraud, intimidation, overreaching, or concealment on the part of defendant's agent, and, indeed, none such is charged against him; therefore, our consideration is directed solely to the proposition whether or not, under the state of

case made out, the settlement between plaintiff and the defendant's agent is final and conclusive on both the parties, or is still open for adjudication, as held by the court below in its declaration of law. In this respect this case is governed by the principle announced in *Springfield & Memphis R. Co.* v. *Allen*, 46 Ark. 219, in which this court said: "It is certainly true that a receipt is only *prima facie* evidence of what it imports, and may be explained or contradicted by the party signing it; and if that were all of this case, it would be apparent that Allen's action was not barred by the receipt he signed. But here was a claim, or several claims, the justice of which was denied, and the amounts due upon them were in dispute. The debtor, in effect, said to the creditor: "I will pay you a certain sum on your disputed claims, provided you will take it in satisfaction of the whole." While the offer stood in this form, there was but one of two courses open to the creditor,—either to decline the offer, or accept it with conditions attached. It was competent for him to receive the amount in discharge of his debt, and the receipt that he executed is presumptive evidence that he did so. A settlement and receipt in full of an unliquidated demand, when made with complete knowledge of all the circumstances, is a bar to a subsequent action upon the demand. The bar does not rest upon the written receipt, but upon the acceptance of the sum paid and received, the writing being only one of the modes of showing the intention of the parties.

After the voluntary adjustment of a matter in dispute, the contest is ended, and the disputed question cannot again be raised by the parties. Compromises avoid litigation, and are encouraged by the law; and, when legally made, they are binding, and are not disturbed by the courts."

The declaration of law by the court below, and the judgment in accordance therewith, were erroneous, and the judgment is reversed, and the cause remanded.

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GERMAN-AMERICAN INSURANCE COMPANY *v.* HUMPHREY.

Opinion delivered April 25, 1896.

MORTGAGE—PAYMENT—SATISFACTION.—THE Entry on record of the satisfaction of a chattel mortgage is not essential to the removal of the incumbrance, where the mortgage debt has been paid off and cancelled.

FIRE INSURANCE—FORFEITURE.—Where a policy of fire insurance provides that it shall be void if the property insured be incumbered by mortgage, the giving of a mortgage on the property avoids the policy absolutely, though the mortgage was paid off and cancelled prior to a loss.

SAME—AUTHORITY OF AGENT.—An insurance agent who has been furnished with blank applications, and with policies duly signed by its officers, and who has been authorized to take risks, and to issue policies by simply signing his name, to collect premiums and cancel policies,—all without consulting his principal,—has power to waive a condition for forfeiture of the policy in case the property shall be incumbered.

SAME—WAIVER OF FORFEITURE.—An insurance agent, authorized to waive a forfeiture in a policy, may do so orally, though the policy provides that a forfeiture can be waived only by writing indorsed upon or attached to the policy.

SAME—AUTHORITY OF AGENT.—A clerk of an insurance agent who has no authority to make any contract about insurance, or to sign insurance policies, has no implied authority to waive a forfeiture of a policy.

Appeal from Jefferson Circuit Court.

A. B. GRACE, Special Judge.

Rose, Hemingway & Rose, for appellant.

1. John L. Mills had no authority to waive the forfeiture clause in the policy. He was a mere clerk in the

office of his father, who himself could not waive it. 54 Ark. 75; 60 *id.* 532. The moment the chattel mortgage was placed on the property, the policy was void. No return of the premium was required. May on Ins., sec. 567; 53 Ark. 155; 151 U. S. 452.

2. The validity of the provision forfeiting the policy in case the property should become incumbered is well sustained. May on Ins., sec. 571; 88 Mich. 94; 50 N. W. 100; 122 Pa. St. 128; 15 Atl. 671; 119 Pa. St. 449; 13 Atl. 317.

N. T. White and *Bridges & Woolridge*, for appellee.

1. Whether there was a waiver by John L. Mills was a question for the jury. The policy was only suspended during the life of the mortgage, and, when it was canceled and paid off, the policy was in full force. May on Ins., sec. 292; 61 Iowa, 577; 122 Pa. St. 128; May on Ins., sec. 294, p. 589.

2. R. H. M. Mills was the general agent of the company at Pine Bluff, who had authority to solicit insurance, countersign and deliver policies, and collect premiums, and John L. Mills was a clerk in his office and solicited insurance, delivered policies, and collected premiums. The tendency of the courts now is that such an agent may waive forfeitures. See May on Ins. secs. 143, 144, 294*b*, 294*c*, 132, 152, 502*a*, etc; 84 Ind. 253; 20 Am. St. 809; *id.* 51, 11; 23 *id.* 62; 24 S. W. 804; 28 *id.* 453; 69 Fed. 71; 21 Am. St. 721; 25 S. W. 685. Mills was notified of the mortgage, and failed to cancel the policy. Notice to the agent is notice to the company. May on Ins., secs. 132, 152, and note 6 to sec. 132; see also 52 Ark. 11; 26 S. W. 928; 53 Ark. 494; Richards, Ins., p. 75.

When mortgage satisfied.

WOOD, J. 1. The plaintiff sued upon a fire insurance policy, for the loss of certain hotel furniture. The defense was based upon alleged noncompliance with

the terms of the policy, which provided "that if the subject of the insurance be personal property, and be or become encumbered by a chattel mortgage," the policy should be void. The property covered by the policy was mortgaged after the issuance of the policy. But the plaintiff contends that the policy was only suspended during the continuance of the mortgage, and was revived by the discharge of the mortgage before the loss occurred. There was proof, though meagre, to support the finding that the mortgage was cancelled before the fire, although the record was not satisfied until after. The satisfaction of the record was not essential to the removal of the incumbrance. If the mortgage was paid off and cancelled, it was sufficient. May, Ins., sec. 292; *Hawkes* v. *Dodge County Mut. Ins. Co.*, 11 Wis. 188; *Smith* v. *Ins. Co.*, 60 Vt. 682; *Merrill* v. *Agr. Ins. Co.*, 73 N. Y. 452.

When policy of insurance forfeited.

But the proposition that the incumbrance, while it existed, only suspended the policy, contravenes the unambiguous terms of the contract, which the parties themselves have made. The language of the clause quoted *supra*, in its plain, ordinary, and popular sense, indicates a total extinction of the policy if the property be incumbered, and not a suspended animation thereof, subject to be revived upon payment of the mortgage debt. Courts, by interpretation, cannot ingraft upon insurance contracts, any more than upon any other, a meaning totally foreign to that which the plain terms employed by the parties themselves convey. It is undoubtedly true that where the contract, on account of any ambiguity in the language used, is reasonably susceptible of different constructions, that construction should be adopted most favorable to the insured. *Imperial Fire Ins. Co.* v. *Coos Co.*, 151 U. S. 452; 1 May, Ins., sec. 175, 176, and authorities cited.

The insurer has the right to contract against any possible risk of loss or embarrassment incident to incumbering the property insured. If it be said that, where the mortgage is paid off, there is no longer an incumbrance and increase of risk, still as to whether or not the mortgage had been paid off would be the question, and one that often could not be settled without expensive litigation. The insured mortgagor might enter into collusion with the mortgagee to defraud the insurance company after the loss occurred by claiming that the mortgage had been paid off and discharged, when in fact it had not. Unfortunately, all men are not honest. Without some such provision in the policy, the unscrupulous would have an inviting opportunity, after a loss, to divide the spoils, at the expense of the insurer. Doubtless some such considerations as these prompted the clause in the policy under consideration. The clause is reasonable and clear, and the parties had the right to thus contract. The opinion in *Imperial Fire Ins. Co.* v. *Coos Co.*, *supra*, and the numerous authorities there reviewed, leave no doubt of the correctness of our ruling. *Contra*, counsel cite, May on Fire Insurance, at page 589, sec. 294, where he says: "An incumbrance in violation of the policy only suspends it, and, if paid before the loss, the policy revives;" and the learned author cites *Kimball* v. *Monarch Ins. Co.*, 70 Iowa, 513. An examination of that case will show that, after the mortgage had been paid off, the insured assigned the policy, and the company indorsed upon it its assent to the assignment. This was tantamount to the issuance of a new policy. It was a waiver of forfeiture. So the case cited does not support the text.

Power of insurance agents to waive conditions.

2. It is also contended by the appellee that, if there was a forfeiture, it was waived by an agreement of the plaintiff with John L. Mills, clerk of the local agent, to the effect that the assured should see the mortgagee, and

have the mortgage canceled, and that the policy should remain in force. And appellee says that said agreement on his part was performed before the loss occurred. Such an agreement, if made by one having authority, would be a waiver of the forfeiture. *Pratt* v. *Ins. Co.*, 55 N. Y. 505. Since counsel for appellant's have not questioned here the sufficiency of the evidence to prove such an agreement, we will treat the verdict as conclusive on that point. Appellant questions only the authority of the clerk of the local agent to make such agreement. The testimony as to the authority of the agent and his clerk is related by Jno. L. Mills as follows: "R. H. M. Mills is my father, and I am a clerk in his office. I never make any agreement about insurance, other than the conditions in the policy. The only contract we have is the policy. I am not a partner with my father, but only a clerk. I merely sell the policies, and receive the premiums. My brother and I merely do the office work for my father. I have no authority from the German-American Insurance Company. My father has never appointed me sub-agent for them. I have no power, from the agent or otherwise, to alter any of the terms of the printed contracts, nor to make any changes in a policy of insurance. I have no power to sign policies, but they are all signed by my father. I solicit insurance, and fill up blank policies for my father's signature. I filled up this one. This policy is signed by my father, who is the only person authorized to sign it. I am simply a soliciting agent and clerk, without any authority to modify the contract embodied in the policy."

The policy provides that "no agent shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions or conditions no agent shall have such

power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon, or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached."

Under the express terms of the policy, the placing of a mortgage upon the property *ipso facto* avoided the policy. The forfeiture thus created could only be waived by one who had authority to do so, and authority, too, as high as that by which the contract was made in the first instance. *Hamilton* v. *Aurora Fire Ins. Co.*, 15 Mo. App. 59.

There is a marked distinction between a waiver of conditions made before and those made after the issuance of a policy. But an agent who has been furnished by his principal with blank applications, and with policies duly signed by its officers, and who has been authorized to take risks, and to issue policies by simply signing his name, to collect premiums, and to cancel policies,—all without consulting his principal,—would certainly be empowered to waive the condition as to incumbrance either before or after the issuance of the policy. And he could waive the forfeiture by parol, nothwithstanding the limitations upon his power in this respect contained in the policy. *Ins. Co.* v. *Brodie*, 52 Ark. 11, and authorities cited; *Grubbs* v. *Ins. Co.*, 108 N. C. 472; S. C. 23, Am. St. Rep. 62 and authorities cited; *Fireman's Fund Ins. Co.* v. *Norwood*, 69 Fed. Rep. 71; *Burlington Ins. Co.* v. *Kennerly*, 60 Ark. 532.

If R. H. M. Mills, the local agent, possessed this power, there is nothing in the record to show that he exercised it himself, or that he assented to its exercise by his son. If he could delegate such power to his subordinate, the undisputed proof shows that he has not done so. The work of Jno. L. Mills, as he shows, was

clerical and special. There was nothing in the nature of his employment, or in the manner of the discharge of his duties, from which authority to waive a forfeiture could be inferred. Nor does it appear that the defendant company, or its local agent, held him out to the public as possessing such power.

The court's first instruction was correct. The second was not supported by the evidence.

Reversed and remanded.

LITTLE ROCK & FT. SMITH RAILWAY COMPANY v. STEVENSON.

Opinion delivered May 2, 1896.

NEGLIGENCE—JOINT LIABILITY OF TWO CARRIERS.—A joint judgment recovered against two railroad companies for a personal injury sustained by a passenger through the negligence of trainmen can not be sustained where there is no proof of the joint ownership, operation, or control of the road, but such judgment will be allowed to stand as to one of the defendants, where it admits its liability for whatever damages were sustained.

Appeal from Pope Circuit Court.

JEREMIAH G. WALLACE, Judge.

Suit by Alice Stevenson against the Little Rock & Ft. Smith Railway Company and the Missouri Pacific Railway Company. The facts appear in the opinion of the court.

Dodge & Johnson, for appellant.

1. The evidence fails to support the verdict as against the Missouri Pacific Railway Co.

2. The evidence fails to show any negligence on part of defendant.

3. If plaintiff was injured as alleged, it was due solely to her jumping from a moving train. Her action,

under the circumstances, was not only imprudent, but actually reckless and dangerous. Her contributory negligence bars a recovery. 54 Ark. 25; 61 Iowa, 555; 61 Miss. 417; 73 Ind. 579; 30 Am. & Eng. R. Cases, 571; 31 *id.* 45; 1 S. W. 1; 40 Ind. 37; 47 Am. & Eng. R. Cases, 566; *ib.* 576; Wood on Railroads, 1148; 103 N. Y. 441.

A. S. McKennon, for appellee.

The instructions given fully state the law. Those refused were properly refused. 54 Ark. 25; 46 *id.* 423.

BUNN, C. J. This is an action for damages for personal injuries, by appellee against the appellant companies. Damages laid at $10,000, and judgment in the trial court for $5,000, from which defendent companies appeal to this court.

The appellee boarded one of the passenger cars of the Little Rock & Fort Smith Railroad at Knoxville, and got off at Piney Station, three miles from Knoxville. In alighting from the car she was seriously hurt. It was alleged that her injuries were occasioned by the servants of the railroad company in not stopping the train a sufficient time for her to alight; and in attempting to do so, as the train was beginning to move out after a brief stoppage at Piney, she was injured as aforesaid. There is evidence sufficient to sustain the verdict of the jury, and there does not appear to be any reversible error in the instructions, which, upon the whole, presented the case fairly to the jury, and the judgment is therefore affirmed as to the cause of action and the amount of damages.

There is, however, another question in the case,—a question of misjoinder of parties defendant. The complaint alleges a joint ownership, operation, and control of the railroad by both the defendants—the Little Rock & Fort Smith, and the Missouri Pacific Railroad Com-

panies,—and consequently a joint liability; and the judgment was against both accordingly. On this part of the case, the evidence is as follows: In its answer, the Little Rock & Fort Smith Company alleges that it alone is liable for any damages that may be adjudged in the case, and that its co-defendant was not the owner of the road at the time, and had no control over it, and nothing to do with it, nor any interest in it. The Missouri Pacific answers the same, denying all responsibility in the matter.

On trial, the conductor of the train involved in the charge testifies as follows: "Q. Who is operating this road? A. The Missouri Pacific. Q. The Missouri Pacific is what it is called? A. To the best of my knowledge." The ticket about which the plaintiff had testified being handed to the witness by plaintiff's counsel, he said: "Q. Is this one of the tickets? A. Yes sir, that is one of the tickets. Q. That is a passenger ticket? A. Yes sir. Q. That is by the Missouri Pacific Railway? A. It is operated by the Missouri Pacific and Iron Mountain. This is not a ticket for that day though. This is the 24th of September. Some other conductor let that ticket go by." This admission by the Little Rock & Fort Smith Railway Company, and disclaimer by the Missouri Pacific Railway Company, and the testimony of the conductor, constitute all the evidence in the case, touching the question of joinder or misjoinder of the parties. There is no evidence of joint ownership, joint operation, and control of the road by the two defendant companies, and therefore no proof of joint liability. There is a liability, but not a joint liability. It is a liability of the one or the other of the two companies. A more explicit and definite showing of the exact relations existing between the two might or might not influence our determination of the question, and make it otherwise than what it is; but, unless such

proof is made, we cannot assent to judgment of joint liability, but must confine it to the one or the other, relieving the one or the other. The testimony of the conductor, and the manner in which he answered the questions propounded to him, and the data from which he evidently derived his knowledge of the subject, all go to show that he knew little or nothing as to the parties owning and operating the road, and that little only from inference, and at the same time most indefinitely. His testimony we do not think sufficient to justify a verdict and judgment against the Missouri Pacific Railway Company. We think, therefore, that the judgment against the latter company should be reversed, and the same is accordingly done. But, as the Little Rock & Fort Smith Railway Company admits its liabilities for whatever damages that may be adjudged in the matter, as to it the judgment is affirmed. Reversed and remanded as to Missouri Pacific Railway Company.

DALE *v.* PAYNE.

Opinion delivered May 2, 1896.

COUNTY TREASURER—ACTION ON BOND—DEFENSE.—In an action against a county treasurer to recover the statutory penalty for refusal to pay a county warrant when he had money applicable thereto, under Sand. & H. Dig., secs. 993-4, it is no defense that, after the treasurer refused payment of the warrant, the holder exchanged it for other smaller warrants, before commencing his action on the bond.

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

C. V. Murry, for appellant.

1. The evidence fails to show that there were funds in the treasury to pay this warrant when it was presented.

2. Under the statute, before plaintiff can recover he must show he was the holder of the warrant at the beginning of this suit. Sand. & H. Dig., sec. 993. The statute is highly penal, and must be strictly pursued.

3. By electing to receive smaller warrants in exchange for it, in lieu of money, plaintiff waived whatever right he may have had to claim the penalty. 14 Am. Rep. 565; 18 Am. St. Rep. 803; 7 B. & C. 310; L. R. 8 C. P. 350; 46 N. Y. 357; 14 Wend. 419.

4. There was a specific appropriation by the county court of all the "money then in the hands of the treasury" for the payment of county expenses. This was a specific appropriation of the money, and, the item of "circuit court expenses" being the first item, and being more than the amount then in the treasury, the whole of it was set apart to the payment of warrants drawn on that account. 45 Cal. 149; 13 Col. 316; 31 Pac. 334; 34 Pac. 770.

5. Under sec. 1243, Sand. & H. Dig., all the money in the treasury had been appropriated; therefore the warrant was only payable out of the pauper fund, and *not out of the general fund*, as held by the court.

6. The court erred in its refusal of the seventh instruction. This is obvious.

J. H. Crawford and *D. M. McMillan*, for appellee.

1. The evidence fully sustained the judgment. It is shown that the treasurer had still in his hands, when this warrant was presented, $824.87 to the credit of the county general fund.

2. It was sufficient, under the statute, to show that plaintiff was "the holder of such warrant" at the time of its presentation. When the treasurer refused payment, his rights became fixed, and the penalty accrued.

3. There is nothing in the contention that the items of the appropriation would have to be paid in

their order as they were named. There is no law to that effect. They all stand on the same footing, to be paid in the order of the presentation of the warrants drawn thereon.

BATTLE, J. This was an action to recover a penalty under the following statute: "If he [county treasurer] should neglect or refuse to pay any warrant drawn on him by order of the county court of his county, having in his hands money applicable thereto, he shall forfeit and pay to the holder of such warrant fourfold the amount thereof. Such forfeiture may be recovered by action in the name of the party aggrieved against such treasurer and his securities, and he shall be deemed guilty of a misdemeanor in office, and on conviction thereof shall be removed from office." Sand. & H. Dig., sec. 993–4.

On the 2nd day of October, 1893, $3,469.82, belonging to the general fund for county purposes, were in the hands of D. T. Dale, as the treasurer of Clark county. On the same day, the Clark county court, consisting of the county judge and justices of the peace, made appropriations aggregating $13,900 for the current year, to be paid out of the general fund; among other items there being $600 for keeping paupers. On the 6th of October, 1893, W. E. Payne received from the county clerk of Clark county a warrant on the treasurer for $209, issued in pursuance of an order of the county court, and payable out of the fund for keeping paupers, the appropriation for such fund being then unexhausted; and on the same day presented it to Dale, in his official capacity, and requested him to pay it; and he replied that there was no money in the treasury for that purpose, and refused to pay the same, there then being in his hands $824.87 belonging to the general fund. Payne thereupon brought this action against Dale and the sureties on his official bond, to recover the penalty

allowed by the statute, and recovered judgment for the same, and the defendants appealed.

The evidence adduced at the trial was sufficient to prove the facts we have stated. Appellant contends that, notwithstanding these facts, appellee was not entitled to recover the penalty, because he had exchanged the warrant, which he received from the county clerk and presented to the treasurer, for smaller warrants, and, by reason thereof, was not the holder of it at the commencement of this action. But that is no defense. The warrant belonged to him when it was presented to the treasurer for payment. There was then money in the treasury belonging to the general fund of the county, sufficient to pay the same. It was payable out of that fund. The treasurer refused to pay it, and the penalty thereupon accrued. The holder of the warrant at that time became entitled to the penalty, and it could not have accrued to any one else. The subsequent exchange of the warrant for others did not set aside the penalty, nor transfer it in the exchange. It was no part of the warrant, and hence did not pass with it.

Judgment affirmed.

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

Opinion delivered May 2, 1896.

RAILROAD—OBSTRUCTING DRAINAGE.—A railroad company acquiring for a right of way land in which a ditch has been made for drainage by the owner of the land, or by one who has acquired the right of drainage thereby as an easement, has no right to fill up the ditch or obstruct the drainage.

DAMAGE—OBSTRUCTING DRAIN.—The damage for overflowing land by obstructing a ditch is measured by the difference between the value of the land as it would have been with the ditch open and the value of it with the ditch closed.

LIMITATION OF ACTION—OBSTRUCTING DRAIN.—The statute of limitations begins to run against an action for damages caused by filling up a ditch by a permanent obstruction from the time it is so filled up.

Appeal from Jackson Circuit Court.

SAMUEL PEETE, Special Judge.

On June 19, 1894, Ida F. Anderson and others filed their suit against the St. Louis, Iron Mountain & Southern Railway Company, alleging that they were the lessees in possession of the old Patterson place, lying on the Batesville branch of defendant's railway; that in the spring of 1890 the defendant caused a trestle in said branch road, and near said farm, to be closed up, thereby stopping a natural drainage of said farm; causing six acres of cotton and four acres of corn to overflow; that said overflow occurred during the year 1893, to their damage $150. An amendment to the complaint alleged that, in the spring of 1890, the defendant caused a trestle on its road near said farm to be closed up, thereby stopping a drainage of said farm through a ditch that had been dug prior to 1871, and serving as drainage for said farm before the building of said road, and up to the time of its stoppage.

The answer in its first paragraph denied every allegation contained in the complaint, and in paragraph two pleaded the statute of limitations of three years, alleging "that said trestle or drain had been closed up three years next before the commencement of the suit."

A demurrer to the second paragraph of the answer was interposed and sustained, all proper exceptions being saved. Upon the complaint and first paragraph of the answer the case was tried.

The court gave the following prayer, at the request of plaintiffs, over defendant's objections:

"The jury are instructed that if they find from the evidence that, on account of the stoppage of the trestle

on said defendant's railroad, plaintiffs' crops were overflowed and damaged, then they may find for the plaintiffs; and in estimating their damage they may take into consideration the rent of the land, the worth of cleaning it up, the worth of labor of preparing it for planting in, and the worth of work actually performed in cultivating it."

The court refused to give the following instructions asked by defendant:

"1. The plaintiffs allege that in the spring of 1890 the defendant caused a trestle to be closed up on its Batesville branch, thereby stopping the drainage of their farm. You are therefore instructed that, unless you find from the evidence that the defendant closed up said trestle and obstructed a natural drain, thereby causing plaintiff's land to overflow, you will find for the defendant.

"2. It would not be sufficient to prove that water which formerly drained off of plaintiffs' land by passing through the trestle was, by the closing up of the trestle, caused to overflow his land, but he must show that in a state of nature, unaided by a ditch, such water flowed off of plaintiff's land to the place where the trestle was through a natural drain.

"3. You are instructed that if, in order to drain the water from plaintiff's premises through the trestle in question, it was necessary to dig a ditch in that direction, and that without such ditch such water would not flow toward the trestle, then it was not such a natural drainage of water as would entitle the plaintiffs to have it kept open for their benefit, and the plaintiffs cannot complain on account of the closing of the trestle."

The jury returned a verdict for $86.25 for plaintiffs. A motion for a new trial was filed and overruled, exceptions saved, and defendant appealed.

Dodge & Johnson, for appellant.

1. The action was barred by limitation. 35 Ark. 622; 39 *id.* 465; 50 *id.* 250; 52 *id.* 244; 56 *id.* 612.

2. The court erred in its instruction as to the measure of damages. 56 Ark. 613; 57 *id.* 399; 10 S. W. 576; 47 Ga. 26; 41 Wis. 602; 11 S. W. 123; 16 Ill. 534; 67 Barb. 88.

Liability of railway company for obstructing drain.

BATTLE, J. 1. A railroad company has no right to fill up a ditch made for the purpose of drainage over lands afterwards acquired by it for a right of way, when the person owning the soil drained made said ditch over his own land, or had acquired the right of drainage thereby as an easement. It has no right to obstruct such drainage, but if it has occasion to cross the drain by an embankment or raised way, it is its duty to place a culvert or covered drain under it to carry off the water as before, and for a neglect to perform this duty is liable for the damages caused by the failure. *Proprietors of Locks and Canals* v. *Nashua & L. R. Co.*, 10 Cush. 385.

2. The next material question for consideration is, in what time shall an action for the damages occasioned by such an obstruction be brought? In *St. L., I. M. & S. Railway* v. *Biggs*, 52 Ark. 240, it is said: "Whenever the nuisance is of a permanent character, and its construction and continuance are *necessarily* an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance." *St. L., I. M. & S. Railway* v. *Morris*, 35 Ark. 622, and *Little Rock & Ft. S. Railway* v. *Chapman*, 39 Ark. 463, are cited to sustain the rule.

In *Railway* v. *Morris*, *supra*, "a solid roadbed embankment was built across a wet weather stream which drained an area of several square miles." The railway company left an open trestle at a considerable distance from the natural crossing, and endeavored, without success, to drain off the water through that. The

court held that the evidence justified the jury in finding that damage had resulted from the failure to use due care and skill in constructing the roadbed, and that the action for the recovery of such damage should be brought within three years from the time the embankment was completed.

In *Railway* v. *Chapman*, *supra*, the appellant "erected and maintained an embankment on its right of way, across a natural drain or swale, through which the accumulation of waters from the surrounding country, in their natural flow, had previously passed off from the land of appellee and into the Arkansas river. Appellant had, by reason of a failure to place sufficient culverts or drain pipes in said embankment and roadbed, obstructed the usual flow of water across the grounds occupied by the defendant, and had dammed up the water, and caused it to flow back and accumulate on the appellee's land." This court held that an action for the damages caused by the embankment should be brought within three years after its completion.

Damage for obstruction of drain.

So, in this case, the obstruction of the ditch was permanent; that is, it will continue without change from any cause except human labor. The effect of it was to restore the land drained to the condition in which it was before the ditch was dug. Its present and future effect upon the land could be ascertained with reasonable certainty. The damage was original, and susceptible of immediate estimation. "No lapse of time was necessary to develop it." It was the difference between the value of the land as it would have been with the ditch open, and the value of it with the ditch closed. *St. L., I. M. & S. Railway* v. *Morris*, 35 Ark. 622; *Chicago & E. I. R. Co.* v. *Loeb*, 118 Ill. 214.

Limitation of action for obstructing drain.

As the law does not favor the multiplicity of suits, and all damages which will be sustained as the necessary result of the filling of the ditch in question, and are

recoverable, could have been estimated at the time of such obstruction, from the effect of it upon the value of the land, only one action should be brought therefor, and that within three years after the ditch was closed up.

The rule for the measure of damages recoverable in an action at law for the destruction of crops is given in *Railway Co.* v. *Yarborough*, 56 Ark. 613. It is unnecessary to repeat it here.

Reversed and remanded, with instructions to overrule the demurrer to the second paragraph of appellant's answer, and to grant a new trial.

BENNEFIELD *v.* STATE.

Opinion delivered May 2, 1896.

MALICIOUS MISCHIEF—DEFENSE.—It is no defense to the charge of malicious mischief in shooting and wounding a mule that the animal was trespassing and was breachy, unless he was at the time on ground inclosed by a lawful fence, although the circumstances might mitigate the punishment.

APPEAL—HARMLESS ERROR.—The error of excluding mitigating evidence in a misdemeanor case is not prejudicial where the lowest possible fine was imposed.

TRIAL—RESTATING EVIDENCE TO JURY.—Witnesses may be allowed to restate their testimony, on request of the jury, in the presence of the court after the cause has been submitted and the jury have retired.

Appeal from Sebastian Circuit Court, Greenwood District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

This is an appeal from a judgment of conviction of malicious mischief, committed by shooting and wounding a mule trespassing in the enclosed grounds of the

appellant. The proof tended to show that the fence around the enclosure where the mule was shot was not a lawful fence,—that is, that it was not five feet high,—when the offense was committed. The appellant offered to show on the trial that he shot the mule to protect his crop, and without malice toward the owner or the mule, which the court refused, to which he excepted. The court also refused to permit the appellant to prove that the mule was breachy, and that he had been in appellant's field a number of times, and that on one occasion appellant had taken the mule from his field, and had notified the owner, and offered to furnish a yoke for the mule. The appellant excepted.

The court instructed the jury by reading secs. 1766, 3764, and 3766, Sandels & Hill's Digest, and the following instructions, among others: "(2) Now, if a person wantonly, maliciously, or wilfully wounds any animal trespassing on his grounds, he is guilty, unless he shows that his fence was a lawful fence. (3) A fence, to be a lawful fence, must be five feet high all around the enclosure at the time of the trespass, for the statute says that to justify the offense the 'grounds must be enclosed in a lawful fence.' "

After the case was submitted to the jury, the jury came into court, and desired two of the witnesses be required to restate their testimony on a certain matter, which was permitted by the court, over objection of appellant, and to which he excepted.

R. W. McFarlane and *T. B. Pryor* for appellant.

1. The act in the case of malicious mischief must proceed from *malice*, and, according to the general doctrine, it must be against the owner of the animal. 30 Ark. 435. Since the above decision, the legislature has relieved the state from the burden of proving malice toward the owner of the animal, but did not change the

law so that an act committed without any malice of any kind would be malicious mischief. Sand. & H. Dig., sec. 3769; Bish. St. Cr., sec. 437; 2 Bouvier, L. Dic. (14 Ed.), p. 92; 48 Ark. 57.

2. Appellant should have been allowed to introduce testimony to show his good or bad faith, and to show the breachy character of the animal. The words "wilfully, maliciously" in the statute were intended to express the gist of the crime. 14 Am. & Eng. Enc. Law, p. 15. Any evidence to show want of malice was admissible. *Ib.* p. 15; 22 N. E. 88; 2 S. W. 591; *ib.* 767.

E. B. Kinsworthy, Attorney General, and *Brewster & Brown*, for appellee.

1. The law requires a lawful fence before the right to kill or wound trespassing stock is granted. If the fence is lawful, the owner of the stock is liable for damages. Sand. & H. Dig., secs. 3769, 3770.

2. Under our statute, malice toward the owner is not necessary. Sand. & H. Dig., sec. 1766; 19 Ill. 80; 60 Am. Dec., p. 582; 3 Tex. App. 228. The law has been changed in this respect. Mansf. Dig., sec. 1654; 30 Ark. 433; 48 *id.* 57. As to the meaning of the words "malicious mischief," "wilfully, maliciously, and wantonly," see Whart. Cr. Law, sec. 1067, 8 Ed.; Anderson, Dict., p. 1099, 649; Webster, Dict. *s. v.* The only defense now is a lawful fence.

3. It was in the sound discretion of the court to permit witnesses to restate their testimony.

HUGHES, J. (after stating the facts). The law, as found in Sandels & Hill's Digest in the sections read to the jury by the court, seems to us to be too plain to require comment or construction. For a case in point, we refer to the case of *Snap* v. *People*, 19 Ill. 80. Under our statute, it is malicious mischief to kill or wound any animal of another, the stealing of which is

larceny, with or without malice toward the owner of the animal, if the killing or wounding of the animal is done unlawfully, maliciously, or wantonly.

As to defenses to malicious mischief.

It is no defense that the animal, when killed, was trespassing upon the grounds of the defendant, unless he show that, at the time, his grounds were enclosed by a lawful fence. Nor is it any defense that the animal was breachy, and had previously trespassed upon defendant's grounds, though this might go, and is admissible, in mitigation, as the circumstances attending the offense might materially affect the punishment, which the statute fixes at not less than twenty nor more than one hundred dollars.

When error not prejudicial.

In this case, however, there was no prejudicial error in excluding this evidence, as the lowest fine was imposed.

Witness may restate testimony.

There was no error in permitting the witnesses to restate their testimony to the jury in the presence and by direction of the court, after the cause had been submitted to the jury, and they had retired to consider of their verdict.

We find no substantial error. The judgment is affirmed.

AUBREY v. STATE.

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Opinion delivered May 2, 1896.

HOMICIDE—SUFFICIENCY OF INDICTMENT.—An indictment for murder in the first degree which charges that defendant "did unlawfully and feloniously, with malice aforethought, and with premeditation and deliberation, assault, kill and murder," etc., is sufficient, though the word "wilfully" is omitted.

Appeal from Lafayette Circuit Court.

CHARLES W. SMITH, Judge.

J. W. Warren, for appellant.

1. The omission of the word "*wilful*," and the failure to state the degree, render the indictment defective and insufficient to charge murder in the first degree. 2 Bish. Cr. Pro., sec. 576; *ib.* secs. 571, 587; 29 Ark. 265; 34 N. H. 510; 97 N. C. 465; 60 Ark. 564; 27 Iowa, 402; 4 Green (Iowa), 415, 500; 27 Iowa, 415; 21 Kas. 43; 64 Iowa, 333; 1 Bish. Cr. Pro., sec. 40, 43, 548, 503, 613; 618.

2. The verdict is not sustained by the evidence.

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

The word "*wilful*" is necessarily included in the words "*with malice aforethought.*" 11 S. E. 990; 1 Bish. Cr. Proc., sec. 613; 66 Maine, 324, 328; 17 S. W. 414; 14 Am. & Eng. Enc. Law, pp. 5 and 8. "*Deliberately*" means wilfully. 68 Cal. 434, and cases *supra*. It is not necessary to use the exact words of the statute. Other words conveying the same meaning may be used. Sand. & H. Dig., sec. 2088, 2090, 2076. The indictment is good.

WOOD, J. The defendant was convicted of murder in the first degree, upon an indictment which charged that he "did unlawfully and feloniously, with malice aforethought, and with premeditation and deliberation, assault, kill, and murder one Rufus Harris by shooting him with a pistol, * * * with the felonious intent to kill and murder," etc. Does the omission of the word "wilfully" render the indictment defective as a charge for murder in the first degree? A *wilful* killing is an *intended* killing. Both the words "deliberation" and "premeditation" involve a prior purpose to do the act in question. And it is impossible to conceive of a murder committed with a "felonious intent" that is not wilful. *State* v. *Townsend*, 24 N. W. Rep. 535; *Leonard* v. *Territory*, 7 Pac. Rep. 872, and authorities

cited; *State* v. *Shelton*, 64 Iowa, 333; *State* v. *Stackhouse*, 24 Kas. 445; 1 Wharton, Cr. Law, sec. 380. We conclude therefore that the word "wilful" finds its equivalent in the other terms employed.

We cannot say that the verdict is without evidence to support it.

Affirmed.

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GARVIN v. LINTON.

Opinion delivered April 25, 1896.

CONTRACT—WAIVER.—One to whom new notes have been delivered in lieu of old notes and a mortgage for the purpose of purging the original transaction of usury, under an agreement that a mortgage shall subsequently be given to him to secure the new notes, may waive such security and rely upon the notes alone.

USURY—ENTIRETY OF CONTRACT—NEW PROMISE.—A usurious contract cannot be divided into separate and distinct contracts, so that one obligation shall be given for the money actually loaned and another for the excessive interest. Each obligation is a part of the same contract, and both are void. Neither can a promise to pay any part of a usurious debt be enforced without consent, so long as the original contract which supports it remains unrevoked.

SAME—NEW PROMISE.—The parties to a loan of money which is usurious may cancel the old contract, purge the consideration of usury, and make it the basis of a new obligation which will be binding upon the borrower.

SAME—INTENT.—A concurrence of the intent of both parties is not an essential element of usury, under Sand. & H. Dig., sec. 5085, making void all notes and other contracts whereby there shall be reserved, taken, or secured any greater sum or value for the loan or forbearance of any money or other valuable thing than is prescribed by the act. (BUNN, C. J., dissenting.)

SAME—RESERVING INTEREST BY MISTAKE.—There is no usury in a contract in which excessive interest is reserved through mistake of fact on part of the lender; but such excess is not recoverable.

Appeal from Searcy Circuit Court.

BRICE B. HUDGINS, Judge.

J. C. Floyd and *Crump & Watkins*, for appellant.

1. Instruction No. 1 is not sustained by any authority, ancient or modern. After usurious securities have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is founded on a sufficient consideration, and is binding. 17 Ark. 138; 3 Am. Dec. 273; 10 Wheat. 368; 1 Campbell, 165; 2 Taunt. 184; 19 Johns. 447; 4 Denio, 104; 13 Wend. 505; 53 Iowa, 719; Perley, Int. 247.

2. To constitute usury there must be a corrupt intent and the knowingly receiving and demanding a rate in excess of the legal rate. A mere failure by mistake or miscalculation to deduct all the usurious charge will not render the new contract usurious.

S. W. Woods and *Carmichael & Seawel*, for appellee.

1. Was the agreement founded on a sufficient consideration? The case in 17 Ark. 138 would seem to sustain the contention of appellant. But it was not necessary to pass on that question, as that kind of a case was not before the court. Under our laws, a usurious contract is absolutely void, and no moral consideration exists. In those states where the equitable rule is enforced to pay back the principal with legal interest, the creditor must first cancel all of the securities, and then the promise of the debtor becomes binding. The promise must be *subsequent* to the cancellation and destruction of the original securities. In this case the original securities were existing and alive at the time of the alleged agreement, and they have never been cancelled or destroyed. 13 Wend. (N. Y.), 505; 53 Ark. 346; Bish. Cont. (Enl. Ed.), sec. 614.

2. If the agreement is valid, the creditor must deduct all the usury; and if a part of the original usury remains, the new agreement is void. 17 Ark. 138; Tyler

on Usury, p. 397; 22 N. J. Eq. 606. Even if the court erred in its first instruction, this is no cause of reversal, as the appellant was not entitled to a verdict upon any state of case. 57 Ark. p. 251, last paragraph.

3. The new agreement was never completed. The execution of the note and mortgage was an entirety. The agreement must be mutual, complete, and equally binding on both parties. 30 Ark. 194; 22 *id.* 160; 52 *id.* 262.

4. It is generally competent to rebut the presumption of intent by showing that the excess of interest was a mistake. But it must be shown to be a mistake; it will not be presumed. 87 N. Y. 50; 28 Ind. 452. The delivery of the old securities to Bailey was not a delivery to appellee. Dan. Neg. Inst., sec. 63.

BATTLE, J. F. M. Garvin commenced an action against I. N. Linton on a note executed to him by the defendant for $240, and ten per cent. per annum interest from date until paid. The note was dated May 2, 1892, and was due two years after date, provided the interest, as evidenced by coupons, was paid annually. In the event the interest was not promptly paid when due, the principal of the note and all interest accrued thereon were then to become payable at the election of the legal holder of the note.

The defendant answered, and denied that the note had ever been delivered to the plaintiff, the payee, and alleged that it was without consideration, and was usurious and void.

On a trial of the issues in the action, there was a verdict for the defendant, and a judgment against plaintiff for costs, from which he has appealed to this court.

The following facts were proved in the trial: Some time in December, 1887, appellee procured a loan of $405 from appellant, for which he executed to the lender

his note for $450, and a mortgage to secure the same. Two or three annual payments of interest were made. About the latter part of May, 1892, appellant and appellee agreed that the note for $450 should be purged of all usury, and that $25 for an attorney's fee should be deducted from the amount remaining unpaid, and two new notes for the remainder and ten per cent. per annum interest thereon, due and payable two years after date, should be executed by the appellee to the appellant, together with a mortgage to secure the payment. In compliance with this agreement, the appellee executed the note sued on, and another for $200; it having been represented by appellant's agent, and believed by him, that the amount of these notes was the sum of the $450 and ten per cent. interest thereon remaining unpaid after it had been purged of all usury, and the $25 had been deducted.

The appellee testified that he delivered the two notes to John W. Andrews, the agent of the appellant, to be delivered to DeRoos Bailey, to be held by him until appellee should deliver to Bailey a mortgage signed and acknowledged by himself and wife, to secure the same, when they were to be exchanged for the note for $450 and the first mortgage; but the appellee failed to execute the mortgage to secure the new notes, because they were for a larger amount than was due according to the compromise.

Andrews testified that the two notes were delivered to him as the agent of the appellant, and that there was no understanding that they should be delivered to Bailey, but that it was agreed that appellee would, within ten days, deliver to Bailey a mortgage, signed and ackowledged by himself and wife, securing the two notes, to be exchanged for the old notes and mortgage; that appellant decided to accept the new notes in payment of the old, although the mortgage to be delivered should never

be executed, and delivered the old note and mortgage to Bailey, who was the attorney of the appellee.

Bailey testified that it was agreed, by and between the agent of appellant and appellee, that the new notes were to be delivered to Andrews, as appellant's agent, and that appellee would deliver to him a mortgage to secure them, to be exchanged for the old note and mortgage, which were to be delivered to and held by him until the new mortgage was received, when the exchange was to be made; that this was to be done within ten days; that the old note and mortgage were delivered to him soon after the agreement, but the new mortgage never was; and that he was the attorney of the appellee in the adjustment and litigation of this indebtedness.

Upon this evidence the following instructions were given to the jury by the judge:

"Gentlemen of the jury: This is a suit brought by the plaintiff against the defendant on a promissory note. The defendant admits the execution of the note, and pleads usury and no consideration. The burden is on the defendant. Before you will be authorized to find for the defendant, you must find that he has established one of these pleas by a preponderance of the testimony.

"(1) If you believe that these notes were executed in consideration of the cancellation or return to the defendant of certain notes and mortgages executed by this defendant to the plaintiff, and that said notes and mortgage which were to be returned were usurious, you will be authorized to find for defendant.

"(2) I further instruct you that if you find that the notes sued on were in lieu of certain notes and mortgage given by this defendant to the plaintiff, and said original notes and mortgage were to be returned to this defendant upon the execution of a new mortgage by this defendant to secure the payment of said new notes, and that these new notes were executed by the defendant, with

the understanding from the plaintiff, or his agent, that all of the usurious part of the old notes had been eliminated, and that the new notes were drawn for an amount equivalent to the old notes, less the usury, and that the defendant ascertained, soon after the signing of said notes, that all the usurious part of the old notes had not been taken out, but that a part of the same had been put in the new notes, this would excuse the defendant for not complying with his agreement in executing the mortgage and lifting the old note and mortgage, and you will be authorized to find for the defendant."

Right to waive part of contract.

In the instructions of the court, the new notes were treated as duly executed, and the only questions submitted to the jury were, were they without consideration? and were they usurious? According to the preponderance of the evidence, they were delivered to the appellant, and nothing remained to carry into effect the compromise, except the execution of the mortgage. Appellant performed his part of the agreement as to the exchange of writings, and thereby became entitled to hold the new notes, and to the mortgage to secure them, provided the notes were not affected by usury, or void for fraud. The fact that appellee refused to execute the mortgage did not affect his right to the notes. It was to be a security for the payment of the notes, and for the exclusive benefit of the appellant, and he had the right to waive it, which he did.

Usurious contract is indivisible.

It is ordained by the constitution of this state that all contracts for a greater rate of interest than ten per cent. per annum shall be void as to principal and interest. The express contract being void, no implied obligation can arise from it. It cannot be divided into separate and distinct contracts, so that one obligation shall be given for the money actually loaned, and another for the excessive interest. Each obligation is a part of the same contract, and both are void. Neither can a promise to pay

any part of a usurious debt, for the same reason, be enforced without consent, so long as the original contract which supports it remains unrevoked. The taint of usury in the old contract infects the new promise. This is not true of usurious contracts to pay a pre-existing valid debt. That debt is not destroyed by the usury. It may be recovered on the strength of the contract which created it. But, where the contract on which it depends in the beginning for existence is usurious, there was never anything to give it life, and to support an action for its enforcement. But if the debt be for money loaned, and actually received by the debtor, there is an equitable and moral duty to pay it, which, while the law will give it no effect, may be made the consideration of a new promise. The parties can cancel and destroy the old contract, purge the consideration of usury, and make it the basis of a new obligation, and thereby bind the borrower, in law and equity, to pay the money actually received, and a legal rate of interest. *Hammond* v. *Hopping*, 13 Wend. 505, 511; *Early* v. *Mahon*, 19 Johns. 147; *Miller* v. *Hull*, 4 Denio, 104; *Phillips* v. *Columbus City Building Association*, 53 Iowa, 719.

Usury purged by new promise.

As to intent in usury.

To constitute usury in this state, there must be an intention to take or receive more than ten per cent. per annum interest. But need there be a concurrence of intent of both parties,—that is to say, on the part of the borrower to pay, and of the lender to receive,—to constitute usury? Many authorities hold that "it is not enough that the borrower intended to make a usurious agreement, but the intention to take the usury must have been in the full contemplation of the parties,—not of one party, but of both,—to the transaction. There must be an *aggregatio mentium*." *Price* v. *Campbell*, 2 Call, 110; *Smith* v. *Beach*, 3 Day, 268; *Smythe* v. *Allen*,

67 Miss. 146; *Morton* v. *Thurber*, 85 N. Y. 550; *Guggenheimer* v. *Geiszler*, 81 N. Y. 293; Tyler on Usury, p. 103. While others say that if the lender knowingly contracts for an illegal rate of interest, the contract is usurious, although the borrower is ignorant of the facts. *First National Bank* v. *Plankington*, 27 Wis. 177; *Lukens* v. *Hazlett*, 37 Minn. 441; *Wright* v. *Elliott*, 1 Stew. (Ala.), 391; *Craig* v. *Pleiss*, 26 Pa. St. 271.

In *Price* v. *Campbell*, *supra*, the court, taking the former view of the question, says that usury "presupposes the consent of both borrower and lender to this effect; and without it there is no usurious contract, whatever may be the hopes, wishes, or expectations of either party."

In *Lukens* v. *Hazlett*, *supra*, the court takes the other view, and Mr. Justice Mitchell, speaking for it, says: "There are some loose statements in the text books, and perhaps some judicial authority, to the effect that, to render a contract usurious, both parties must be cognizant of the fact constituting usury, and must have a common purpose to evade the law. But it seems to us that it would be contrary both to the language and policy of the usury law to hold any such doctrine, as thus broadly stated. These laws are enacted to protect the weak and necessitous from oppression. The borrower is not *particeps criminis* with the lender, whatever his knowledge or intention may be. The lender alone is the violator of the law, and against him alone are its penalties enacted. It would indeed be strange if the only party who could violate the law had intentionally done so, and could escape its penalty because, by some device or deception, he had so deceived the borrower as to conceal from him the fact that he was taking usury."

We have not been able to find any case in which the question has been presented to, or determined by, this

court. We find many expressions, in cases decided, as to what is necessary to constitute usury, but nothing decisive of the question.

We have a statute upon the subject which seems to have been enacted to settle the question in this state. It provides: "All bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatever, whereupon or whereby there shall be *reserved*, *taken or secured*, *or agreed* to be taken or reserved, any greater sum or greater value for the loan or forbearance of any money, goods, things in action, or any other valuable thing, than is prescribed by this act shall be void." Sand. & H. Dig., sec. 5085.

Similar statutes have been in force and construed in other states. In *Craig* v. *Pleiss*, 26 Pa. Stat, 273, the court, in speaking of a statute in some respects like ours, says: "This idea of a corrupt contract which expressly stipulates for more than six per cent. is derived from the English statutes which were never in force here. The statute of 37 Henry VIII, c. 9, which fixed the rate of interest in England at ten per cent.; the statute of 21 Jac. I, c. 17, which reduced it to eight per cent.; the statute of 12 Car. II, c. 13, which reduced it to six per cent., and the statute of 12 Anne, c. 16, which reduced it to five per cent,—all use the expression 'corrupt bargain, loan, or exchange,' in defining the offense, and the adjudications under these statutes are often quoted here, without adverting to the fact that our statute contains no such expression. 'No person shall directly or indirectly, for any bonds or contracts to be made after the publication of this act, take for the loan or use of money, or any other commodities, above the value of six pounds for the forbearance of one hundred pounds on the value thereof, for one year, and so proportionably for a greater or lesser sum.' And then comes the definition of the offense,—'if any person or persons

whatsoever do or shall *receive or take* more than six pounds per cent. per annum or any such bond or contract as aforesaid, upon conviction thereof,' &c. There is not a word here about corrupt bargains or contracts. Any bonds or contracts may be the subject of usurious payments. The offence consists not in *bargaining* for more than six per cent., but in *taking* it on any bond or contract. * * * The imagined necessity, then, of a corrupt bargain to complete the offence of usury, favored as it no doubt has been by loose expressions of judges, is wholly without foundation in our statute."

In *Wright* v. *Elliott*, 1 Stew. (Ala.), 393, the court, in construing an Alabama statute, says: "The words of the statute are, 'No person or persons shall, upon any contract whatsoever, *take* directly or indirectly for the loan of any money, wares, merchandise, etc., more than the rate of eight dollars for the forbearance of one hundred dollars, etc. It is true that in this case there was no contract between the parties by which the defendants *agreed to pay* the plaintiff more than legal interest; but it is equally true there was a contract between the parties, and that in that contract the plaintiff did *take* more than eight per cent. Can it be possible that the circumstance of his having circumvented the defendant, by inducing him to believe that the note was drawn for the amount due on the executions, when it was for a much greater, and thus adding fraud to injury, shall operate to his advantage? For it will be recollected that under the plea of usury the defendant can testify; not so when he pleads fraud. Certainly it cannot. To permit him to do so would be subversive of a fundamental principle of the common law, 'that no man shall take advantage of his own wrong.' "

According to those decisions there need not be, under our statute, a mutual agreement to give and receive unlawful interest to constitute usury. If it be

actually "reserved, taken, or secured, or agreed to be taken or reserved," the contract is void for usury. As it may be reserved, taken, or secured by contract without the knowledge of both parties, a concurrence of the intent of both of them is not an essential element of usury, under the statute.

Effect of reserving usury by mistake.

There must be an intent to take unlawful interest, to constitute usury. There can be no usury when the amount taken in the contract for interest in excess of ten per cent. per annum was reserved through a mistake or ignorance of the fact that it was in such excess. If the lender, by mistake of fact, by error in calculation, or by inadvertance in the insertion of a date, contracts to receive an illegal rate of interest, "such mistake, error or inadvertance will not stamp the taint of usury on such engagement, nor cause to be visited upon him, who did not knowingly and intentionally disregard the law in this behalf, the highly penal consequences of an usurious offense." *Moody* v. *Hawkins*, 25 Ark. 191; *German Bank* v. *DeShon*, 41 Ark. 331.

In the case before us the parties undertook to rescind the old note and mortgage, and agreed that appellee should execute to the appellant two notes for the money actually loaned, and ten per cent. per annum interest thereon from the day it was received, less the payments made, and $25 for attorney's fees, and a mortgage to secure the notes. Appellant undertook to ascertain what the principal of the notes should be, and they were executed for the amounts he represented to be due according to the agreement. Upon what basis he made his calculation to ascertain this amount does not appear. The evidence as to the payments made on the old note is unsatisfactory. Appellee says that he made two or three payments of interest. How much or when is not stated. According to the evidence, appellant could well have taken the two notes without knowingly

and intentionally reserving or securing thereby unlawful interest. If he did so, the notes were not void, except as to the excessive interest; and he was entitled to recover the amount lawfully due.

The instructions given by the court to the jury are not in harmony with this opinion; and are therefore erroneous. Reversed and remanded.

Opinion on Motion for Rehearing.

Delivered November 14, 1896.

In the opinion in this case it is said: "According to the evidence, appellant could well have taken the two notes without knowingly and intentionally reserving or securing thereby unlawful interest. If he did so, the notes were not void, except as to the excessive interest, and he was entitled to recover the amount lawfully due." This was based on the testimony of appellee, in which he said he made two or three annual payments of interest on the note for $450. Upon him devolved the burden of proving usury. He was unable to say that there were more than two annual payments of interest. Assuming there was no more, no usury was proved as to the note sued on, and the conditions on which it was given were performed.

But it is said that the court erred in holding that the taking of unlawful interest by a lender through a mistake of fact would not render the note sued on void, except as to the excessive interest. Appellee contends that when parties undertake to cancel a contract, and purge its consideration of usury, and when so purified make it the basis of a new contract, and for any reason fail to cleanse it of usury, the new contract, like the old, is void. We have carefully examined the authorities cited by him, and fail to see wherein they support this contention. In none of them does it appear

that the parties to a usurious contract, in attempting to eliminate the usury, retained in the new contract a part of the excessive interest through a mistake of fact. They hold that the latter contract is void, if what the parties have thereby knowingly or intentionally done or undertaken to do constitutes usury. That is true. But the case is different when the element which constitutes usury is made a part of the new contract by a mistake of fact. In such a case the usurious element was not actually intended to be a part of the contract—was really no part of it—and can and should be eliminated to make the contract speak the truth. The validity of the new contract is subject to the same test as that of other contracts, and usury incorporated in it through a mistake of fact will not taint it, any more than it would had its consideration never been the basis of any other contract. For the same reason, the mistake in the contract should be corrected in both cases.

The motion for a rehearing is denied.

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SOUTHERN INSURANCE COMPANY *v.* WILLIAMS.

Opinion delivered May 9, 1896.

INSURANCE—CANCELLATION OF POLICY.—In an action upon a policy of fire insurance providing for its cancellation by either party on five days' notice, and for a return of the unearned premiums, it appeared that the assured had assigned the policy; that the company notified its agent to cancel the policy; that he wrote to the assignee asking him to forward the policy to one D., in order that he might procure the assured's cancellation receipt, and promising to refund the assignee's *pro rata* of the premium as soon as cancelled; that such agent also wrote to D., asking him to procure the cancellation receipt, and forward the same to him; that the property was destroyed by fire between the time of mailing and the receipt of the policy. *Held* that the policy was not canceled before the loss.

Appeal from Lee Circuit Court.

GRANT GREEN, JR., Judge.

STATEMENT BY THE COURT.

Plaintiffs, J. A. Williams and W. A. Gage & Co., sued the defendant upon a fire insurance policy to recover for the loss of certain property embraced therein. The defense was that the policy had been cancelled before the fire. The policy was issued to Williams, and by him, on the 18th of November, 1893, assigned to W. A. Gage & Co., with the assent of the defendant company indorsed thereon. W. A. Gage & Co. paid half the premium, and the loss was made payable to them as their interest might appear. The policy provides: "This policy shall be cancelled at any time at the request of the insured, or by the company, by giving five days notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy, or last renewal, this company retaining the customary short rate, except that, when this policy is cancelled by this company by giving notice, it shall retain only the *pro rata* premium."

On the 25th of November, 1893, one Johnston, the agent at Marianna, Ark. (who issued the policy,) was notified by the company to cancel the policy. He thereupon wrote the following letter:

"November 25th, 1893.

W. A. Gage & Co., Memphis, Tenn.—

Gentlemen: You will please mail Southern Insurance Company's policy No. 149,784, J. A. Williams, to M. L. Dawson, Haynes, Lee County, Ark. by first mail and oblige. I have telegram from company's agent ordering this policy cancelled at once, and I want it mailed to Dawson, that he may take cancellation receipt,

and forward to me. As soon as cancelled, I will refund to you your *pro rata* of premium paid, provided I cannot insure in another company, which think not probable that can do, with the mortgage on it. Would have been better for you to have kept the policy with the transfer by J. A. Williams, and not have sent to me for any indorsement of loss-payable clause. Regretting that have to cancel, I am, yours truly.

S. D. Johnston, Agent."

He also wrote to his representative at Haynes, where the property was situated, the following:

"November 25th. 1893.

Mr. M. L. Dawson, Haynes, Ark.

Dear Sir: I received a telegram today from the general agent, ordering cancellation at once of policy No. 149,784, J. A. Williams. This policy is in the hands of W. A. Gage & Co., and I have this day written them to mail it to you at once by first mail, and I suppose it will reach you by Monday or Tuesday. When it does, please get Dr. Williams' receipt for cancellation, and mail to me by first mail. I suppose of course, that it was ordered cancelled on account of the mortgage on it and the loss-payable clause.

Yours truly,

S. D. Johnston, Agt."

W. A. Gage & Co., of Memphis, mailed the policy to Dawson, of Haynes, Ark., November 27th., 1893. It was received by Dawson on the 28th. The policy was mailed at Memphis before the fire occurred, but was not received at Haynes until after. Dawson was acting for the defendant when he received the policy for cancellation. After the loss occurred, the agent, Johnston, credited the account of Johnston and Grove with half of the premium which they had paid for W. A. Gage & Co., but the latter refused to receive it back. The half of the premium paid by Gage & Co. was paid for Williams. Gage testi-

fied that he "understood that the policy would not be cancelled until it reached Williams." Gage & Co. were in possession of the policy from the 20th day of November.

Rose, Hemingway & Rose and *John J. & E. C. Hornor*, for appellant.

1. It was not necessary to say in the letter to Gage, "Your policy is hereby cancelled." Any language that advised him of the election of the company to cancel it was sufficient. 59 Tex. 507.

2. Notice to Gage & Co. was sufficient; it was unnecessary to notify Williams. 87 Pa. St. 399.

3. The policy did not require the repayment of the premium as a prerequisite to cancellation. Appellees were entitled to five days' notice, and could have refused to submit to a cancellation until the time was past; but they did not see fit to do so. They acquiesced in the company's demand, and surrendered the policy. The mailing of the policy was a delivery to the company. Hare on Contracts, 178. No mutilation of the policy was necessary to effect a cancellation. When the minds of the parties met, the one demanding a cancellation and the other assenting, the cancellation is effective. 11 N. Y. Sup. 533; 62 N. Y. 603; 6 N. Y. Sup. 602; 43 N. W. 494; 74 Wis. 498; 54 Mich. 531; 13 Lea, 341; 43 N. W. 196; 78 Iowa, 344.

E. D. Robertson, for appellee.

1. This whole case hinges on the letter of Johnston to Gage & Co. The language is plain that the act of cancellation was in the future, *yet to be done*. The letter to Dawson embodies the same idea, that the cancellation was not to take place until the policy was received. 2 Fed. Rep. 432; 51 Ill. 342; 55 Barb. (N. Y.) 28; 25 *id.* 189.

2. If Johnston had intended his letter to be a notification that the policy was cancelled, a tender of the unearned premium was necessary. 47 Ill. 516.

3. The mailing of the policy was not a delivery to the company. 127 N. Y. 608, at p. 619; 1 Pick. 278; U. S. Post. Laws & Reg. 1893, p. 213, sec. 489.

4. Williams only assigned Gage & Co. the policy, to the extent of their interest. So, notice to Gage did not affect Williams' interest. 43 Up. C. Q. B. 556; Clements, F. Ins. Dig., p. 461, sec. 58.

5. The evidence shows that the fire occurred before the policy was received, and before its cancellation.

WOOD, J., (after stating the facts). Appellees, Gage & Co., were entitled to five days' notice of cancellation. Recognizing this, the insurance company instructed its agent "*to cancel*" the policy, not that the policy was cancelled; showing that the cancellation of the policy was to be effected by their agent in the future. The letter of the agent, Johnston, to the holders of the policy, in which he says, speaking of the policy: "I want it mailed to Dawson, that he may take cancellation receipt, and forward to me; as soon as cancelled, I will refund to you your *pro rata* of premium paid,"—shows that the agent understood that the policy would not be cancelled until it had reached the assured, Williams. Likewise his letter to Dawson, where he says: "I have this day written them to mail it to you at once by first mail, and I suppose it will reach you by Monday or Tuesday. When it does, please get Dr. Williams' receipt for cancellation, and mail to me by first mail." Gage also understood that the policy would not be cancelled until it reached Williams. Indeed, the letters of the agent are not susceptible of any other construction. Dawson, the agent at Haynes, to whom the policy was mailed, did not receive it until after

the loss; and, of course, he could not have delivered it to Williams before he received it. We conclude that the undisputed facts show that the policy was not cancelled before the fire. *Griffey* v. *N. Y. Cent. Ins. Co.*, 100 N. Y. 417.

The insurance agent, Johnston, seems to have reached this conclusion, for he promised in his letter to Gage & Co. to refund the *pro rata* premium paid by them "as soon as the policy was cancelled," and his effort to refund was not until after the fire.

Notice to the assured and the refunding of *pro rata* premium for the unexpired term are usually conditions precedent to the cancellation of insurance policies, and, being for the benefit of the assured, may be waived by him. *Kirby* v. *Ins. Co.*, 13 Lea, 340. But, having found that there was no cancellation previous to the fire, the question of waiver of the conditions does not arise.

The judgment is correct, though the instructions in some respects are erroneous.

Affirm.

MALEDON *v.* LEFLORE.

62 387
69 146

Opinion delivered May 9, 1896.

ACTION ON NOTE—DEFENSE—MISTAKE OF LAW.—It is no defense to a suit on a note that defendant signed it jointly with a corporation of which he was a director, in the mistaken belief that it was necessary for him to sign it in order to bind the company, and without intending to bind himself personally.

SURETY—LIABILITY.—A surety on a note is not discharged by the payee's failure to resort to a mortgage given by the principal to secure the note.

NOTE—LIABILITY OF SURETY.—A surety on the note of a corporation, which is secured by a mortgage, is not discharged from liability on such note on account of the mismanagement and waste of the mortgaged property by the president of the corporation, although

such president be a member of the firm of lawyers employed by the payee to collect such note, in the absence of any showing that the president was acting as agent of the payee in his management of such property.

SAME—LIABILITY OF SURETY.—A surety on a note is not relieved from liability thereon by the fact that it was executed by a corporate principal, without proper authority.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

This is an action by Campbell Leflore against John B. Maledon for a balance of $1,665.59 alleged to be due upon a promissory note. The note was jointly executed to Leflore for the sum of $5,000 by the following parties, to-wit: Fort Smith Evaporating Company, J. H. Clendening, Wm. M. Cravens, Geo. Sengel, and John B. Maledon, the appellant. The note was given for money loaned by Leflore to the Evaporating Company, and Maledon was in fact only a surety.

Maledon, in his answer, admitted the execution of the note, and that it was given for money borrowed by the Evaporating Company; alleged that he was persuaded to purchase stock in the company by the statement of its officers and directors that its affairs were in good condition; that he had been elected a director, and signed said note believing at the time that it was necessary for him and the other directors to sign the same in order to bind the company; that he received no consideration or benefit for the same; that the assets of the company had been wasted by the president of the company, in whose hands plaintiffs had placed the note for collection; that the note given to plaintiff was secured by a mortgage upon property of the company; but that plaintiff had failed to foreclose his mortgage, or take any steps to collect his debt, until the property had

been wasted by the president of the company. His prayer was that his answer be taken as a cross-complaint against the Evaporating Company; that said company be made a defendant; that the same be dissolved, and its affairs wound up; that plaintiff be compelled to foreclose his mortgage, and in the meantime be enjoined from proceeding with the action against the defendant; that the cause be transferred to the equity side of the docket; and that plaintiff be discharged from liability on said note.

The court overruled the motion to transfer to the equity docket, and, after hearing the evidence, directed a verdict for the plaintiff. The other facts appear in the opinion.

Ben T. Duval and *T. W. M. Boone*, for appellant.

1. It was error to refuse to transfer the cause to equity, and in not requiring plaintiff to foreclose his mortgage. The answer was an equitable one, and complete justice could not be done without bringing in the corporation as a party, and requiring plaintiff to foreclose the mortgage and exhaust that remedy before proceeding against defendant. The giving of the note was *ultra vires*. The corporation had no power to borrow money; and, even if it had, no authority from the board of directors was shown. The recitals in the mortgage are not binding on the company. Thompson, Corporations, sec. 4677; 25 Fed. Rep.

2. It was error to instruct the jury to find for plaintiff.

3. The testimony shows that defendant's intention was not to bind himself. Plaintiff was bound, in dealing with the corporation, at his peril to take notice of its powers and the powers of its officers to contract. 2 Johns. 109; 40 N. Y. 68; 23 How. N. S. 381; 2 Beach, Corp., sec. 383, 384. If the president signed the note

without authority, the company was not bound, unless the money was received and used for the benefit of the company. 54 Ark. 58; 55 *id.* 58. A president of a corporation has no power to borrow money, and give notes without the authority of the directors. Thompson, Corp., secs. 4619, 4622, 4623; 5 Denio, 567; 46 Iowa, 106; 100 Am. Dec. 106. The directors must act as a board. Thompson, Corp., sec. 3905. An invalid act cannot be ratified "by individual consent of a majority of the board." 29 Am. Rep. 262; Thompson, Corp., sec. 3908. When the president of a corporation attempts to bind it by contract *ultra vires*, he does not bind himself. Thompson, Corp., sec. 4676.

4. It was error not to allow defendant to show that the board never authorized the president to borrow the money of the plaintiff.

Clendening, *Mechem & Youmans*, for appellee.

1. The loan and mortgage was authorized.

2. Appellant was a joint maker of the note, and was bound, whether he received any consideration or not. 24 Ark. 511; 34 *id.* 534; 40 *id.* 545; 60 Ark. 644.

3. The testimony offered by appellant was properly excluded. 50 Ark. 229.

4. A mere misapprehension as to the legal effect of his signature to the note is no defense. 1 Dan. Neg. Inst., secs. 669*a*, 672, 675.

5. Mere delay to sue does not discharge even a surety. 50 Ark. 229.

6. The court properly refused to transfer to equity. Appellee had the right to foreclose the mortgage, bring ejectment, or sue on the note. 7 Ark. 319; 18 *id.* 545; Sand. & H. Dig., sec. 5633.

7. The court properly instructed the jury to find for plaintiff. 36 Ark. 451.

RIDDICK, J., (after stating the facts). We are of opinion that the judgment of the circuit court is right, and it must be affirmed. Appellant, Maledon, with other parties, stockholders in the Fort Smith Evaporating Company, executed a promissory note to Leflore for money loaned by him to said company. This note, under our statute, was in effect a joint and several obligation, and plaintiff had the right to sue one or all the makers thereof. Sand. & H. Dig., secs. 4186 and 5634.

Mistake of law no defense.

Appellant states that he signed the note under the belief that it was necessary for him and the other directors to sign the same in order to bind the company, and that he did not expect to bind himself individually. His name appears signed to the note as one of the obligors for the payment of the amount named therein. Upon the faith of this obligation, Leflore parted with his money for the use of a corporation of which appellant was a stockholder and director. Appellant does not pretend that he was misled or induced by Leflore to sign said note, and the fact that he was mistaken concerning the legal effect of signing the note is of no avail against the action in this case. A written contract cannot be varied or affected in that way. *Ritchie* v. *Frazer*, 50 Ark. 393.

When surety on note not discharged.

Leflore did not have possession of the mortgaged property, and the contention that appellant is discharged by the failure of Leflore to foreclose his mortgage, and by other laches, cannot be sustained on the facts of this case, for, at most, he is guilty of only the passive conduct of not suing. *Grisard* v. *Hinson*, 50 Ark. 230. Appellant, as one of the obligors in the note, had the right to pay the note and foreclose the mortgage for his own benefit, and he cannot complain because Leflore elected to proceed against him without resorting to the mortgage. *Grisard* v. *Hinson*, *supra*.

Liability of surety on note.

The fact that Clendening, the president of the Evaporating Company, was a member of the firm of attorneys employed by Leflore to collect his debt did not make Leflore responsible for the official conduct of said Clendening in the management of the property of said company. When counsel for appellant offered to show that Clendening had mismanaged and wasted the property of said company, they were asked by the circuit judge whether they intended to connect Leflore with such mismanagement, or to show that Clendening had possession of the property as his agent, to which inquiry counsel responded, "No." As they did not propose to show that Leflore was in any way responsible for the management of the property of the Evaporating Company, by its president, the conduct of the president in that regard was a matter entirely outside of the case, and the evidence was properly excluded.

It is also contended that the court erred in refusing to allow appellant to show that the board of directors of the company had never authorized the president to borrow the money for which the note was executed, but this contention cannot be sustained. In the first place, there is no such allegation in the answer; but, if such a defense had been made, it would not have been tenable, for the reason that a surety is, as a general rule, liable on a note executed by him as such, although his principal has no capacity or authority to make such contract. The rule has been frequently applied in cases where the principal was an infant or married woman, and we see no reason why it should not apply where the note is executed by a corporate principal, without proper authority. *Gardner* v. *Barnett*, 36 Ark. 479; *Davis* v. *Statts*, 43 Ind. 103; *Taylor* v. *Dansby*, 42 Mich. 82; 2 Randolph's Commercial Paper, sec. 915, and cases cited.

There were other objections to rulings of the trial court urged by counsel, but our conclusion is that the

evidence did not show any defense to the action of plaintiff, either at law or equity, or any disputed fact to be considered by a jury, and the court properly directed a verdict for plaintiff.

The judgment is affirmed.

WILLIAMSON v. CROSSETT.

62 393
71 254
71 255
71 258

Opinion delivered May 9, 1896.

LANDLORD AND TENANT — SURRENDER OF LEASE — ACCEPTANCE.— Where, a year before the expiration of a lease of a farm for a term of years, the lessees wrote to the lessors that they would be unable to work the farm, and advised the lessors to rent out the land to some one else, and the lessors did not reply to the letter, but soon afterwards took charge of the farm, and induced a sub-lessee to take up a rent note executed to the lessees and execute a new note to them, and rented part of the land to another, this constituted an offer on the part of the lessees to surrender the farm, and an acceptance thereof by the lessors.

Appeal from Woodruff Circuit Court.

GRANT GREEN, JR., Judge.

STATEMENT BY THE COURT.

In the year 1888, the appellants, Benj. H. and Louis S. Williamson, leased a farm in Mississippi to the appellees, W. A. Crossett and others, who were engaged in farming and mercantile business, under the firm name of W. A. Crossett & Co. The lease was for a term of five years, commencing with the year 1889, and the consideration therefor was an annual rental of $650, to be paid by appellees in November of each year during the existence of the lease. W. S. Martin, one of the appellees, who was a member of the firm of W. A. Crossett & Co. at the time the lease was executed, retired from the firm in 1890, and moved to this state.

The rents for the first four years were paid, but in 1893 the firm of W. A. Crossett & Co. failed. Shortly afterwards, W. A. Crossett, the senior member of the firm, sent the following letter to B. H. Williamson:

"Hernando, Miss., Jan. 29th., 1893.

Mr. B. H. Williamson,

Dear Sir: I write to inform you that it will be impossible for us to furnish hands and teams to work your place, which we have a lease on for this year. We have rented to Mr. W. B. Counts that part of the lands on the hills for four bales of cotton, and to a negro by the name of John Floy, some land in the valley for four bales of cotton. He is a good negro, and has nearly corn enough to feed three mules; and if you would go there at once, and see the parties, maybe you could get them to stay. We have sold out our entire effects to Fulmer & Thornton, to pay our indebtedness; and it would be folly in you to try to make us keep it, for it would have to lay out, and we could not pay the rent next fall. And, as it is early, you can rent it out to some one else, and thereby lose nothing. Sorry we are in this condition, but can't help it. Yours truly,

W. A. Crossett & Co.
Per W. A. C."

Williamson did not reply to this letter, but, soon after receiving it, he went down, and took charge of the place.

W. R. Counts, who had rented a portion of the land from Crossett & Co., testified: "Sometime in February or March, Williamson came to me, and told me that Crossett & Co. had failed, and turned him back the place." Counts thereupon requested Crossett & Co. to return the note he had executed to them, which was done, and he gave a new note to Williamson for the land rented. Williamson also rented a portion of the place to one Clapp, and tried to rent out the remainder, but

failed to do so. He afterwards brought this suit against Martin and other members of the firm of Crossett & Co. for the rent of the place for the year 1892, less the amounts received by him after taking charge of the place. Martin filed an answer to the action, and alleged "that early in the year 1893, the defendant firm of W. A. Crossett & Co. agreed with the plaintiffs that the plaintiffs might take and use the land during the year 1893, the consideration being that the defendants should be released from the payment of the rent for 1893; * * that the plaintiffs under this agreement took charge of the land, and used and controlled it themselves during the year 1893." There was a verdict and judgment for the defendants.

Fletcher Roleson, for appellant.

1. A tenant cannot abandon a lease, so inform the landlord, and then be protected, in an action for rent, by the fact that the landlord entered and rented to another. 18 Atl. 721; 33 Ark. 627; 31 N. Y. S. R. 549.

2. Even if Crossett's letter and Williamson's conduct amount to a contract, then what that contract was should have been submitted to a jury. Thompson on Trials, sec. 1072, and cases cited.

3. The court *assumed* that Crossett's letter was a proposition to surrender. It was rather a renunciation of the lease, and Williamson was under no obligation to keep himself in a position to fulfill his part, but could sue at once, or wait and pursue the course he did. 3 Am. & Eng. Enc. Law, p. 904.

N. W. Norton, for appellee.

1. The instructions are not before this court for review. 38 Ark. 528; 32 *id.* 222; 39 *id.* 337, etc.; 93 U. S. 46.

2. The instructions given are unobjectionable. Those refused are not the law of this case. 11 Am. & Eng. Enc. Law, p. 758*h*, and note 2.

3. The evidence fully supports the judgment.

RIDDICK, J., (after stating the facts). We need not discuss the instructions given by the learned judge to the jury in this case. In our opinion, he was justified in holding, as a matter of law, that the letter of W. A. Crossett & Co. to Williamson was an offer to surrender the place for the year 1893. The appellees, by that letter, stated to Williamson, in substance, that they were unable to furnish hands and teams to work the place which they had rented from him for that year, and advised him that, as it was early in the season, he could rent it out to some one else, and lose nothing. This could mean nothing else than an offer to surrender the premises to him. Williamson did not reply to this letter, but soon afterwards took charge of the place, and controlled it for the remainder of the year, without any notice to appellees that he was managing the place on their account, or that he expected them to make good any deficiency in the rents. This conduct on his part amounted to an acceptance of the offer to surrender made by Crossett & Co.

The evidence conclusively shows that this was the understanding of the parties at the time Williamson took possession. He himself says that, at the time he received this letter from Crossett & Co., he supposed that they were "totally insolvent." Upon arriving at the place, he stated to Counts, a tenant who had rented a portion of the place, that Crossett & Co. "had failed, and turned him back the place." He thus induced Counts to take up the note he had executed to Crossett & Co., and to execute a new note direct to him for the rent of a portion of the land. This proves that he was not managing the

place for the account of Crossett & Co., and that he considered that they had no further rights in the premises. When the tenant offers to surrender his lease, and the offer is accepted by the landlord, the tenant is not liable for rents accruing afterwards. The facts of this case show that Williamson had no right of action against Crossett & Co. for rents accruing after he took possession. *Talbot* v. *Whipple*, 14 Allen, 180; 2 Wood, Landlord & Tenant (4 Ed.), sec. 494.

We have not overlooked the case of *Meyer* v. *Smith*, 33 Ark. 627, cited by counsel for appellant. It was held in that case that when the tenant abandons the premises, refuses to pay rent, and repudiates the tenancy before the expiration of the lease, the landlord may take possession, and rent for the benefit of whom it may concern, and hold the tenant liable for any portion of the rent unpaid at the end of the term. There was no offer to surrender made in that case by the tenant, and nothing to show that the landlord had accepted a surrender of the lease by the tenant, as there is in this case. It was said in that case that the tenants "refused to respond to all letters concerning the rents, withdrew from the occupancy, and left the house open and unprotected;" that "they never acknowledged any liability for rent after a short occupation to serve their business purpose, but acted in such a manner as to indicate beyond doubt their fixed purpose to repudiate the tenancy." It was held that the landlord, by taking possession under those circumstances, did not, as a matter of law, accept the surrender of the tenant's lease. There are cases in other states opposed to the rule announced in *Meyer* v. *Smith*. As supporting it see *State* v. *McClay*, 1 Har. (Del.) 520; *Breuckmann* v. *Twibill*, 89 Pa. St. 58. Opposed to it, see *Schuisler* v. *Ames*, 16 Ala. 73; *Rice* v. *Dudley*, 65 Ala. 68; *Hackett* v. *Richards*, 13 N. Y. 140.

But the facts here are different. There is no repudiation of the tenancy here. On the contrary, there is an express acknowledgment of the tenancy in the letter of Crossett to Williamson, and an offer to surrender. "I write to inform you," he says, "that it will be impossible for us to furnish hands and teams to work your place which we have a lease on for this year." He admits the contract and the liability, but states that, by reason of business reverses, they will be unable to comply with the contract, and, in effect, offers to surrender the place to appellants. By taking charge of the place soon after receiving this letter, and controlling it for the remainder of the year, without further notice to Crossett & Co., appellants accepted the offer to surrender. Their holding was not for Crossett & Co., but for themselves, and the rights and liabilities of Crossett & Co. as to rents thereafter accruing were at an end. *Hall* v. *Burgess*, 5 B. & C. 332.

The judgment of the circuit court is therefore affirmed.

BATTLE, J., dissented.

BOONE COUNTY BANK *v.* HENSLEY.

62 398
69 125

Opinion delivered May 16, 1896.

HOMESTEAD—LIABILITY FOR PURCHASE MONEY.—Under Const. 1874, art. 9, sec. 3, providing that a homestead shall not be subject to the lien of any judgment, "except such as may be rendered for the purchase money," a purchaser of land cannot claim a homestead therein as against a judgment recovered on the purchase money note by an assignee thereof, upon the ground that the vendor waived his lien thereon by taking personal security in lieu thereof.

Appeal from Boone Circuit Court.

BRICE B. HUDGINS, Judge.

W. F. Pace, for appellant.

The land is subject to execution. A debtor cannot schedule his homestead against a judgment on a note for the purchase money thereof, although the purchase money note has been transferred to the hands of a third party before suit. Const. Ark. art. 9, sec. 3; 36 Ark. 92; 48 *id.* 214; 54 Ga. 355.

BATTLE, J. On the 2d day of December, 1890, J. A. Melton sold to N. M. Hensley a tract of land containing thirteen acres, and Hensley, A. L. Bromly, and J. N. Bromly executed to him their promissory note for the purchase money. The Boone County Bank afterwards purchased the note, and, in an action upon it, recovered judgment against Hensley, and caused an execution issued thereon to be levied on the land purchased from Melton. Hensley thereupon filed his schedule with the clerk, and claimed the land as his homestead, and that it was exempt from execution. The clerk sustained his claim, and issued a supersedeas. The plaintiff appealed to the circuit court, and there the appeal was treated by both parties and the court as a motion to quash the supersedeas, and the action of the clerk was sustained, and the plaintiff appealed.

On the hearing of the motion by the circuit court, it was admitted that the judgment was for the purchase money which Hensley agreed to pay for the land; that he was a married man, and a resident of the state; and that the land was his homestead. Evidence was adduced tending to prove that, in selling the land, Melton waived a lien, and accepted personal security in lieu thereof. The question is, was the land subject to the execution?

The constitution of this state ordains: "The homestead of any resident of this state, who is married

or the head of a family, shall not be subject to the lien of any judgment or decree of any court, or to sale under execution, or other process thereon, *except such as may be rendered for the purchase money*, or for specific liens," etc. (Constitution, art. 9, sec. 3.) The statutes do not enlarge or change the exemptions allowed by the constitution, but provide how they may be claimed. The constitution determines what the exemptions of a debtor, including the homestead, shall be. When he claims its benefits, he must take them subject to its exceptions. In the exceptions there are no exemptions.

The constitution, in providing that homesteads shall not be exempt from sales for the purchase money, does not undertake to create liens, but to deny to the debtor the right to hold his homestead exempt from sales under executions issued on judgments for the purchase money which he owes for the same, and to subject it to sale in such cases. No man has a right to hold property for which he is owing his creditor in any such manner. No such dishonesty is tolerated by the constitution. *Kimble* v. *Esworthy*, 6 Ill. App. 517; *Williams* v. *Jones*, 100 Ill. 362; *Bush* v. *Scott*, 76 Ill. 524; *Smith* v. *High*, 85 N. C. 93; *Fox* v. *Brooks*, 88 N. C. 234; *Hoskins* v. *Wall*, 77 N. C. 249; *Whitaker* v. *Elliott*, 73 N. C. 186.

In this case the appellant was not seeking to enforce a lien, but to subject land to sale under an execution from which it was not exempt. The judgment of the circuit court is therefore erroneous, and is reversed, and the cause is remanded, with directions to quash the supersedeas.

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WILKINS v. WORTHEN.

Opinion delivered May 16, 1896.

STATUTE OF LIMITATION—STOCK SUBSCRIPTION.—The right of a creditor of a defunct corporation to sue a stockholder upon his unpaid stock subscription accrues at least so soon as an execution on a judgment against such corporation is returned *nulla bona*, and will be barred unless commenced within five years after such right accrued.

SAME—WHEN ACTION COMMENCED.—The filing of a complaint and making out of a summons against a resident of another state, to be served there, is not the commencement of an action to obtain a personal judgment, so as to prevent the running of the statute of limitations, under Sand. & H. Dig., sec. 5657, providing that a civil action is commenced by filing a complaint in the proper court, and causing a summons to be issued thereon. The summons must be delivered to the sheriff, or to some one else for him, with the intent and purpose of having it served by the sheriff.

Appeal from Jefferson Chancery Court.

JAMES F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

In the year 1879, the Memphis & Great Southwestern Railway Company was incorporated under the laws of this state. Afterwards J. B. Bowman subscribed for 16,670 shares of the capital stock of said company, of $100 each. The company did nothing but organize and make a preliminary survey. The last meeting of the stockholders was held in 1880, and all attempts at carrying on the operations of the company were soon thereafter abandoned. The company owned no property except the subscriptions for its stock, not more than five per cent. of which was paid. On Nov. 16th, 1882, the appellants, Wilkins & Bro., recovered judgment in the Jefferson circuit court against the company for $1,725.77. On this judgment an execution was issued Jan. 27, 1883, and returned *nulla bona* March

27, 1883. On March 29, 1883, Wilkins & Bro. filed a complaint in equity in the Jefferson circuit court against Bowman and other subscribers to stock of the company, to compel them to pay a *pro rata* share of their respective subscriptions, sufficient to satisfy this judgment. Upon this complaint a summons was issued for certain of the defendants, who were residents of this state, and it was served upon some of them, in Jefferson county. Bowman was at the time a resident of Lexington, Kentucky, and the following summons was made out by the clerk of the Jefferson circuit court, for service upon him in Kentucky:

"In the Jefferson circuit court, in equity. State of Arkansas, County of Jefferson. The State of Arkansas to J. B. Bowman, of Fayette county, Kentucky,—Greeting: You are hereby warned to appear in the circuit court of Jefferson county, Arkansas, within sixty days after the service upon you of this writ, and answer the complaint in equity, a copy whereof is hereto attached, which has been filed in said court against you and others by V. D. Wilkins and E. T. Wilkins, as partners under the name and style of Wilkins & Bro.; and you are warned that, upon your failure to answer, said complaint will be taken for confessed as to you.

Given under my hand and the seal of said court, at my office, in the city of Pine Bluff, county of Jefferson, state of Arkansas, on this 29th day of March, A. D., 1893. Ferd. Havis, Clerk.

R. H. Stanford, D. C. [Seal]."

Here followed a certified copy of the complaint and interrogatories. This summons was not delivered to the sheriff, but was sent to Kentucky by said clerk, and there, on December 3, 1883, it was served on Bowman, with a copy of the complaint attached.

No other summons was issued for Bowman, and no further steps were taken against the other defendants,

until after Bowman's death. Bowman died in 1891, leaving property in Pulaski county; and W. B. Worthen was appointed administrator of his estate with the will annexed, by the Pulaski probate court. The plaintiffs, on May 19, 1892, amended their complaint, and alleged the death of Bowman, and that Worthen was administrator of his estate. A summons was then issued on this amended complaint, and served on Worthen. Worthen pleaded the statute of limitations, and that the claim was barred by laches. On the hearing the chancellor sustained the plea, and dismissed the complaint, for want of equity.

W. P. & A. B. Grace, for appellants.

1. The suit was brought against Bowman in due time, and was pending at the time of his death. Service was had on Bowman in his lifetime, by a literal compliance with Sand. & H. Dig., secs. 5677–8. It is true, no personal judgment could be rendered on such service, but it would be effective in ejectment, attachment, bill to quiet title, etc.; and, if valid for any purpose, it was not *void*. A civil suit is *commenced* when the complaint is filed and the *writ issued*, regardless of how the writ is served. Sand. & H. Dig., sec. 5657; 57 Ark. 459. The writ was not void because it was not directed to any sheriff. As the courts have no extra-territorial jurisdiction, it could not be directed to any officer out of the state, and hence could only be directed to the non-resident defendant. Const. art. 7, sec. 49, Sand. & H. Dig., secs. 5992, 5658, 5677. The requirements as to the form and substance of writs are only *directory*. 12 Ark. 535; 13 *id.* 415; 10 *id.* 579; 11 *id.* 750. A voidable writ may be used as evidence of the commencement of a suit within the period of limitation. 11 Ark. 750; 13 *id.* 36; 11 *id.* 334; 17 *id.* 543–5. These defective writs may be amended, 13 Ark. 415; 19 *id.* 252; 22 *id.* 364; 25 *id.*

97; 32 *id.* 278; 32 *id.* 409; 34 *id.* 683; 48 *id.* 33; 14 *id.* 59; 44 *id.* 410. The only office of a summons is notice. 84 N. C. 496; 45 *id.* 36. See also 45 Ark. 36; 47 *id.* 377; 50 *id.* 115; 49 *id.* 251. In the light of these authorities, even if the writ was imperfect and void, its issuance was the commencement of a suit, and would stop the statute of limitations. The course pursued was the same in substance as that prescribed by sec. 5927, Digest; the admistrator appeared, and a mere error in form of procedure is immaterial. 84 Ark. 33.

2. This action being in equity, and of exclusively equitable cognizance, only laches of appellants would operate as a bar, and to this charge the absence of Bowman from the state furnishes a complete answer. Sand. & H. Dig., ch. 100, p. 1104; 16 Ark. 124; 46 *id.* 25; 55 *id.* 85; 94 U. S. 811; 31 Ark. 275; 58 *id.* 91; 28 *id.* 506; *Ib.* 115; 29 *id.* 245; 33 *id.* 470; 2 Sim. 398; 13 Am. & Eng. Enc. Law, 676-7-8-9, etc., and notes. Absence from the state is a good plea against the statute of limitations. 13 Am. & Eng. Enc. Law, pp. 742-3-4 and notes; Wood, Lim., sec. 244; Sand. & H. Dig., sec. 4846; 47 Ark. 170; 24 *id.* 556; Wood, Lim., sec. 6, pp. 11-14, n. 4; 12 Mich. 202.

3. The cause of action is based on a judgment, and this suit was brought within ten years. Sand. & H. Dig., sec. 4831; 23 Ark. 169.

Ratcliffe & Fletcher, for appellee, Bowman's administrator.

1. The motion to quash the summons against the administrator of Bowman should have been sustained. If there had been a case against Bowman at the time of his death, it should have been revived. Sand. & H. Dig., sec. 5925 *et seq.;* 48 Ark. 33; 19 Ark. 491; 39 *id.* 64; Sand. & H. Dig., sec. 5698.

2. There was no cause of action against Bowman. Bowman's subscription was conditional, and the condition was never performed. 54 Ark. 316.

3. The action is barred. No suit was ever instituted against Bowman in his life time. Sand. & H. Dig., sec. 5657. The summons must be directed to the sheriff. *Ib.* sec. 5668. The mere signing and sealing is not sufficient. It must be delivered to the plaintiff for the purpose of being delivered to the sheriff for service. 8 Ark. 316–318; 10 *id.* 479; 16 R. I. 266; 15 Atl. 69; 18 N. E. 384; 116 Ind. 35. It is conceded that Sand. & H. Dig., sec. 5678, would not authorize a personal judgment, but it is claimed it would be effective in cases of attachment. But this is not that kind of a case. The notice was simply intended as a warning order, and could *never* give jurisdiction of the person. It is worthless, except in a proceeding *in rem.* 95 U. S. 714; 36 Fed. 154; 144 U. S. 41-47; 54 Ark. 137. There was no allegation that Bowman was a non-resident. The burden was on plaintiffs to show that process was sued out within the period prescribed by the statute of limitations. 27 Ark. 344; 47 *id.* 125. The statutes of limitation apply in equity as well as at law. 47 Ark. 313; 39 *id.* 158; 58 *id.* 95; 61 Ark. 527. This was not a suit upon a judgment against Bowman. But Bowman's liability, if any, was upon his contract of subscription for stock. The company being insolvent, and having ceased operations, the complaint was a creditor's bill against the stockholders for the amount due on subscriptions to stock. 101 U. S. 885; 92 U. S. 156; 32 Pa. St. 22. The fact that Bowman was a non-resident did not stop the statute. There are no exceptions in the statute, and the courts can make none. 53 Ark. 418; 59 *id.* 244; Sand. & H. Dig., 4834.

4. Plaintiffs are barred by laches. 46 Ark. 25; 55 *id.* 86; 21 Wall. 178; 2 Wall. 95.

When right of action accrues on stock subscription.

RIDDICK, J., (after stating the facts). The only question we need consider is whether the action against Bowman is barred by laches and the statutes of limitation. At the time Wilkins & Bro. recovered judgment against the Memphis & Great Southwestern Railway Company, it owned no property excepting the amounts due from subscribers to its stock, had suspended operations of all kind, and ceased to be a going concern. The right of action against Bowman and other subscribers to the stock of said company accrued in favor of Wilkins & Bro. at least so soon as their execution was returned *nulla bona*, which was on the 27th of March, 1883. *Marsh* v. *Burroughs*, 1 Woods (U. S.), 468; *Thompson* v. *Reno Savings Bank*, 3 Am. St. Rep. 804, and note; 3 Thompson, Corporations, sec. 3371. This was not an action upon a judgment, for there was no judgment against the stockholders, but an action upon the written contract of subscription to take and pay for the stock of said company. This action would be barred unless commenced within five years after it accrued against the stockholders of a company which had disbanded and permanently ceased operations. *Curry* v. *Woodward*, 53 Ala. 376; *Payne* v. *Bullard*, 23 Miss. 88; Thompson's Liability of Stockholders, secs. 290, 291.

When a cause of action is commenced.

The right of action accrued in 1883, and the summons was not issued against Worthen until 1892, and the action is barred unless the making out and serving the summons upon Bowman, in Kentucky, was a commencement of an action, within the meaning of our statute. The statute provides that "a civil action is commenced by filing in the office of the proper court a complaint and causing a summons to be issued thereon." Sand. & H. Dig., sec. 5657. But the mere signing and sealing a summons by the clerk is not sufficient. It must be delivered to the sheriff, or to some one for him, and with the intention and purpose of placing it in the

hands of the sheriff to be served. *McClarren* v. *Thurman*, 8 Ark. 316–318; *State Bank* v. *Cason*, 10 *id.* 479; *Hallum* v. *Dickinson*, 47 *id.* 125. In this case the writ was not directed or delivered to the sheriff, nor was there any intention to deliver it to him. The object in filing the complaint was to obtain a personal judgment against Bowman, which required either an appearance on his part, or the service of a summons by an officer of this state; yet no summons was directed or delivered to an officer of the state. We are therefore of the opinion that an action was not commenced against Bowman, within the meaning of our statute.

It is true that, when property is attached, a nonresident defendant may be constructively summoned by delivering him a copy of the summons with the complaint attached, but no personal judgment can be rendered on such summons. Sand. & H. Dig., sec. 5887. *Ford* v. *Adams*, 54 Ark. 137. No property was seized, or intended to be seized, in this case, and the constructive summons had nothing to rest upon, and was without effect.

It was well known to plaintiffs that Bowman was a resident of Lexington, Kentucky; and, if they desired a personal judgment, the way was open by a suit in that state. We conclude that the chancellor was right in holding that, after a delay of nine years, the appellants were barred by laches and the statute of limitations. The decree is affirmed.

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WARING v. CITY OF LITTLE ROCK.

Opinion delivered May 16, 1896.

STREET—PRESCRIPTION.—A street across certain lands exists by prescription where a plat showing the existence of such street, made by the sheriff and duly recorded, has been in existence for twenty-five years, and such plat has been recognized by the owners of the land, and the city has worked such street, and, ten years before suit, permitted a street railway company to lay its track and operate its cars thereon, and has allowed a telephone company to erect its poles thereon.

SAME—ACCEPTANCE BY ORDINANCE.—The statute providing that no street dedicated to public use by the proprietor of ground in any city shall be deemed a public street unless the dedication shall be accepted by ordinance (Sand. & H. Dig., sec. 5209,) has no application to a street established by prescription.

SAME—ESTABLISHMENT BY PRESCRIPTION—EVIDENCE.—It requires less proof to establish a street by prescription across certain land where such street serves to unite the disconnected ends of two established streets than where the street claimed runs diagonally across a block.

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

STATEMENT BY THE COURT.

This is a controversy concerning the right of the city of Little Rock to control and keep open a street across a piece of land claimed by appellant, Waring.

The suit was brought by Waring to enjoin the city from interfering with his possession of such land. The city claimed that Eighth street extends across said land, and that it has been established across said land both by dedication and prescription. The land was at one time owned by Mrs. Matilda Johnson. In the year 1868, Edwin H. Hilliard recovered a judgment against said Matilda Johnson. An execution was issued thereon, and the sheriff levied the same upon a tract of land

belonging to Mrs. Johnson, containing six acres. The land in controversy lay adjoining the land levied upon, but had been previously transferred by Mrs. Johnson to A. H. Sevier. Before selling the land levied upon, the sheriff divided it into lots and streets, and platted the same, with other land adjoining it, as "Johnson's Addition." The land in controversy was a part of the tract owned by Sevier, and was included in the plat of said addition made and recorded by the sheriff. The plat of said addition showed Eighth or Holly street as extended across the land in controversy. This plat of Johnson's addition was filed for record on the 9th of December, 1868. There is nothing to show that the sheriff had authority to make and record this plat, but, after the same was made, the owners of land included therein described such property in all subsequent conveyances thereof as in Johnson's addition to the city of Little Rock. Waring and Fletcher, from whom Waring purchased the land, testified on the trial that the land had never been used as a street by the public; that the travel was not over it, but diagonally across the adjoining lots; that the city had done no work on the property, nor repaired it as a street. Fletcher also testified that, about a year after the street railway had been built, he served notice on the president of the company that the company had built on his property, and the president, for the company, recognized his rights, and promised not to plead the statute of limitations.

On behalf of the city, J. N. Jabine testified as follows: "I have known Eighth street since 1861. It was an open street at that time, to the best of my recollection. It has been used as a street continuously since. I never heard of any dispute about it being a street until this suit was brought. East and west of the property in controversy the houses and fences are all built evenly

with reference to Eighth street being a regular street. * * * * * The street railroad threw up a track in the center of Eighth street, and injured the travel very much, but the people could and did travel it on either side of the dump. Before the track was built, there was, I suppose as much travel there as on any of the out streets, with the exception of Ninth street. I sometimes rode over Eighth street in the street cars, and sometimes walked over it. I live two blocks from the property in controversy. So far as I know, this street has been used continuously since 1861."

John E. Geyer, who stated that he lived near the property in controversy, testified for the city as follows: "I have known Eighth street, as projected through or by the property in controversy, about twenty-one years. I bought the property that I live on now about that time, and Eighth street was a street then. It was a street then through the property in controversy. Prior to the time the street railway threw up their levee or dump on Eighth street, it was as good as three-fourths of the streets in the city, and it was used as a public street by wood wagons, buggies, and other wagons. There was not much travel over it. I never heard of any objection to its being used as a street until today, as I thought Mr. Waring was suing for damages for the dump being put and left there. I have heard Mr. Jabine's testimony read. The statements made by him in reference to the fences and buildings, condition, and travel of the street for the last fifteen years are true, and I adopt it as my deposition."

The testimony of W. D. Holtzman was substantially the same as that of Jabine and Geyer. He also testified that, "before the street railway was built, Eighth street over the property in controversy was worked by the city as much as other streets. The ditches were

cleaned out, and property drained. It was not done often, as not much work was done on the streets."

The following facts were also proved: About the year 1882, the city, by an ordinance, permitted a street railway company to build a street railway over this property, as part of Eighth street. The cars of the company were run over it regularly for several years, until the track was changed to Ninth street. A telephone company was permitted to erect its poles along Eighth street without the consent of either Waring or his grantor. H. L. Fletcher, the grantor of Waring, in the year 1887, made application to the city council to be paid for the use of this property by the city, stating that the city had taken possession of it. Appellant, Waring, afterwards, in 1891, made a similar application to be paid for the use of the property by the city. The city paid them nothing, and in no way recognized their right to obstruct the street. The other facts sufficiently appear in the opinion. The chancellor dismissed the complaint of appellant for want of equity.

Marshall & Coffman, for appellant.

Appellant shows a chain of title from the U. S. government, and an appropriation for public use as a street must be shown by a clear preponderance of the testimony to have been done in some of the modes known to the law. There was no express dedication of the land. The plat filed by the sheriff was abortive as to lands lying west of those sold by him, in the suit, as to those who were not parties, and who never joined in or assented to its execution, but always asserted rights antagonistic to it. Land can only be dedicated by its owner. 42 Ark. 66; 22 Pac. 623; 29 Kas. 28. Nor has there been any implied dedication by conduct of the owners amounting to an estoppel. In such case the intent to yield the land to public use must be clear and unequivocal. Dill. Mun.

Corp., sec. 495; 5 Am. & Eng. Enc. Law, 400; 59 Ark. 26. The use by the public in this case was permissive only. 29 Atl. 370; 58 Am. Dec. 610; 60 *id.* 407; 9 Am. & Eng. Enc. Law, 367; Ell., Roads, etc. 93, 126; 59 Ark. 35; 39 Am. Dec. 754. In 59 Ark. 26, and 47 *id.* 431, there were unmistakable acts of the owner and the public authorities, tending to show dedication and adverse user, and even these were not held conclusive. Here nothing was done by the city, except perhaps to drain off the water at rare intervals. Knowledge of work or travel by the owners is essential to proof of intent to dedicate. Elliott, Roads and Streets, 126; 41 N. J. Eq. 489; 58 Iowa, 567. The public travel and work may be perfectly consistent with the rights of the owner. The travel was not confined to any particular route, and is not shown to have been confined to the so-called street at all. There are no circumstances to show that the use was not merely permissive. 24 Am. & Eng. Enc. Law, 10, 11 and notes; 5 *id.* 409. Even if this land, or any part of it, has been dedicated by estoppel or otherwise, it is still but a private way, to be insisted on only by those who have acquired rights, unless the city has, in the manner required by law, adopted it as a public street and highway. Without this she cannot protect it by any civil or criminal proceedure. 24 Am. & Eng. Enc. Law 11, 12; Dill. Mun. Corp., 505, and notes; 5 Strobh. (S. C.) 217; 58 Ark. 142; 47 Ark. 431; 31 Pac. 338; 3 Pick. 408; 9 Bush, 61; 8 Gratt. 632. When there is a statutory requirement, it is exclusive. 5 Am. & Eng. Enc. Law, 414; Elliott, Roads and Streets, 118. Slight and unequivocal acts are not sufficient. *Id.* 115, 116; 15 N. E. 854; 17 *id.* 43; 65 Mich. 241. The street must be accepted. Gantt's Dig., sec. 3210; Mansf. Dig., sec. 738; 58 Ark. 142; 44 *id.* 537. The act of 1873 does not apply, for these lands were not decided,—at least those west of Ferry street. 58 Ark. 142; 44 *id.* 537. The

city's claim by prescription is untenable, because (1) such right can only grow out of adverse user in a well defined line of travel for the statutory period, under claim of right with knowledge of the owner or circumstances of notoriety. 44 Ark. 537; 50 *id.* 53; 47 *id.* 66; 1 Am. & Eng. Enc. Law, 264; 9 *id.* 366–9; 19 *id.* 12, 15, 23, and notes. And (2) a mere user by private individuals, who have no authority or desire to bind the city, but simply act upon their own choice, however long, can never start the statute. Cases *supra*; 35 Kas. 717; 55 Atl. 618; Angell, Highways (3 Ed.), 151. In those cases where prescription was sustained, there was work done or some distinct recognition by public authorities. 83 Am. Dec. 264; 110 Ind. 509; Elliott, Roads, etc. 137, and note; 19 Atl. 1051; 30 Pac. 64; 17 S. W. 520. And the assertion of their rights by the owner defeats the prescription. 19 Am. & Eng. Enc. Law, 22, and note; 10 L. R. A. 484, and note; 59 Ark. 35. The reference to Eighth street in Fletcher's deed would create an estoppel between the parties, but does not inure to the benefit of others, or of the city. As to them, it is no more than a reference to a brook or other natural object. 63 Mich. 165; 12 Atl. 664; 16 *id.* 631, 59 Ark. 12; 25 Pac. 673; 29 N. E. 274.

J. W. Blackwood, City Attorney, for appellee.

The proof shows that this property has been used as a public thoroughfare for thirty years. All the city maps for twenty years show it as Eighth street. Houses and fences are built with reference to it as a street. Fletcher's deed to appellant describes it as bounded north by Eighth street "and 150 on Eighth street." In 1868 it was platted and recorded, and shows Eighth street extended through this property, *60 feet wide.* It was labelled "Johnson's Addition." It is true there was no bill of assurances, but all these facts show a common law dedication, and a grant or prescription will be presumed. Broom's Leg. Max., p. 729; Mech. Pub. Off.,

sec. 579; 10 Am. Dec. 232; 64 *id.* 680; 1 Gr. Ev., secs. 19, 20, 21, 38*a* (13 Ed.); 2 Rob. (La.) 374; 24 Am. & Eng. Enc. Law, p. 5, note 5; 13 *id.* p. 509; Ell. Roads, etc., p. 111; 31 Am. & Eng. Corp. Cases, p. 278. The proof necessary to establish a right by prescription, and the law governing the same has been settled. 47 Ark. 66; *Id.* 431; 50 *id.* 53; 58 *id.* 494; *Ib.* 142. The street was accepted by lapse of time; also by the act of 1873. 58 Ark. 142. In 58 Ark. 494, there was no acceptance, nor had the ten acres been sub-divided. Proof of any public work done on land to make it passable as a street, or near approaches to it to facilitate access to it, and the public use of it, are admissible, and shows not only use and possession of it as a highway, but acceptance of it as a highway. 9 N. E. 269; 5 *id.* 783; 11 *id.* 43; 24 N. W. 287; 11 *id.* 124; 33 *id.* 785; 106 Ill. 353; 30 N. W. 593, and note; 12 Atl. 130; 47 Ark. 436; 58 *id.* 494. When a street has been in use for a number of years, acceptance is presumed. 45 N. Y. 129; 47 Ark. 436; 12 Atl. 130. The assent of the owner will be inferred from silence and acquiescence in the public use. 2 R. I. 493, 499. There is a distinction also where the property separates the ends of abutting streets. 12 Atl. 130. It is too late to challenge the plat of Johnson's Addition, no matter who made it. 24 Am. & Eng. Enc. Law, p. 6, and note 5. Where land in a city is conveyed as bounded by, or bordering on, a street, the vendor and vendee are estopped from denying that it is a public highway. 54 Am. Dec. 671, and note on 681; 24 Ark. 106; 50 *id.* 471–2; 24 Am. & Eng. Enc. Law, p. 7, and note; 19 Pac. 485; 5 S. W. 352, and note; 5 Atl. 750; 11 Pac. 808; 1 So. 512. When a "street" is mentioned, it means a street in its full sense. Elliott, Roads and Streets, p. 15.

When street established by prescription.

RIDDICK, J., (after stating the facts). The question in this case is whether Eighth street of the city of

Little Rock extends across the land claimed by appellant. The appellant, Waring, contends that it does not, and brought this suit to enjoin the city from interfering with his possession, and from keeping open a street across said property. On the other hand, the city contends that such street does extend across the land claimed by Waring; that it was platted across such land over a quarter of a century ago, and has been used continuously since as one of the public streets of the city; and that now it is established by prescription. It is settled law in this state that a street or highway may be established by prescription. "If the public, with the knowledge of the owner of land, claim and continuously exercise the right of using the same for a public street or highway for a period equal to that fixed by the statute for the limitation of real actions, which in this state is seven years, the highway thereby becomes established, unless it appears that such use was by leave, favor, or mistake." *Howard* v. *State*, 47 Ark. 431; *Patton* v. *State*, 50 *id.* 53; *Onstott* v. *Murray*, 22 Iowa, 458.

Eighth street was platted over the land in controversy, as shown by the plat of Johnson's addition to the city of Little Rock, in the year 1868; and the proof tends to show that it was used as a street long before it was platted as such. The plat was made by the sheriff of the county, and duly recorded. It is said that the sheriff had no authority to make and record this plat, and that his action in that regard could not affect the owners of land who never assented to its execution. There is nothing to show whether or not the sheriff had authority to make and record this plat. Such an act, if unauthorized, could of itself alone have no effect upon the right of non-assenting land owners, but we find here that the land owners recognized this action of the sheriff by describing such lands in all subsequent

conveyances executed by them as located in "Johnson's Addition." This shows conclusively that they knew of the existence of this record, and tends to show that they assented to its execution. From 1868, the time when said plat of Johnson's addition was made and recorded, the public have continuously exercised the right of using Eighth street, as shown on said plat, over the land in controversy as a public street, and it is now too late to deny that right. There is nothing in the evidence to show that such use was by leave, favor or mistake. On the contrary, we think the evidence shows that such use was under a claim of right, and adverse to the claim of appellant. A plat made and recorded by the sheriff of the county showed Eighth street as extended across the land. The city exercised the right of controlling the street across the land, as it did other portions of Eighth street, by permitting a street railway company to lay its tracks and operate its cars over said street and the land in controversy. A telephone company was allowed to erect its poles along the street, and over this property. The street railway was laid in the year 1882, and one of the witnesses testified that, "before the street railway was built, Eighth street was worked by the city over the property in controversy, as much as other streets." This action of the city in permitting a street railway company to lay its rails and operates its cars along this street, and over the property in controversy, was adverse and opposed to the claim of appellant, and shows clearly that the city and public claimed a street over this land.

The testimony of Fletcher, the grantor of appellant, that, a year after the street railway had been built, he gave notice to the company that he claimed the land, and that the president of the company acknowledged his claim, to the extent of promising not to plead the statute of limitations, can have but little effect upon the

right of the city or public to use such street, for the president was the agent of neither city nor public. The action of the city in granting the right to the company to lay its tracks along Eighth street on this property was known to Fletcher, the grantor of appellant, and was notice to him of the adverse claim and use by the city and public, and this was over ten years before suit was brought. Fletcher afterwards, in 1887, made application to the city council to be allowed pay for the use of this property by the city. But the city ignored his claim, and the public continued to use the street. This application of Fletcher shows that he knew that the city had taken possession of the property as a street, and the fact that the city ignored the application tends to show that the use of the street was under a claim of right. In the year 1887, Fletcher, before selling to Waring the land in controversy, sold and conveyed him other lots adjoining and bounded on the north by this land, which the city now claims as Eighth street. In the deed which Fletcher then executed to Waring, he described such land as in "Johnson's Addition," and bounded on the north by Eighth street. It is apparent from this that both Fletcher and Waring then knew of the plat of Johnson's addition, and recognized the fact that the public were using a street across this land. They located it exactly as it is shown on the recorded plat of Johnson's addition, and as the city now claims that it is located. This tends to contradict their statement that the public had not been using the land as a street. If it was not known and used as a street, why should they call it a street, and describe land bounded on the north by this property as "bounded on the north by Eighth street?" This knowledge on their part is again shown by the fact that, when Waring purchased the land in controversy from Fletcher, it was conveyed by quit-claim deed, and for a consideration dependent

upon the result of this lawsuit, which was then in contemplation.

It is said that there is no proof of the acceptance of the street by the city. If this was necessary to be proved, it is shown by the action of the city in controlling it, and by the continuous use thereof by the public for a long period of time. *People* v. *Loehfelm*, 102 N. Y. 1; Elliott, Roads and Streets, 115, and cases cited.

When necessary to accept street by ordinance.

Section 5209, Sand. & H. Dig., which provides that no street dedicated to public use by the proprietor of ground in any city shall be deemed a public street unless the dedication shall be accepted by an ordinance, does not apply to streets established by prescription. The object of that statute was to prevent the public from being burdened with the care of unnecessary streets. The long and continuous use by the public of a street or highway affords conclusive evidence of its necessity and usefulness. It was probably for this reason that the statute was confined in its operation to streets "dedicated by the proprietor of ground." *Jennings* v. *Inhabitants of Tisbury*, 5 Gray, 73; *Commonwealth* v. *Coupe*, 128 Mass. 63; *Patton* v. *State*, 50 Ark. 53.

In their motion for rehearing, counsel for appellant contend that there is no evidence to establish the width of this street, and ask, why has the court not adopted sixty feet as the width of the street, instead of fifty feet? The answer to that is that the court has not determined, nor is it necessary to determine, what is the width of this street, whether fifty or sixty feet. Appellant built a fence across this street, and it was removed by the city, and he thereupon brought a suit to enjoin the city from entering upon or interfering with his possession of the land. There was no allegation concerning the width of the street made by either plaintiff or defendant. The only question at issue between the parties

was whether Eighth street extended across the land of appellant.

Sufficiency of proof of establishment by prescription.

We fully agree with counsel that the doctrine that roads may be established by prescription should be cautiously applied to roadways across wild land or vacant city blocks, but the argument does not apply to the facts of this case. Judge Dillon stated the rule in *Onstott* v. *Murray*, 22 Iowa, 457, as follows: "A block of land often lies open in a town or city, and, for mere convenience, foot passengers or even wagons may pass over it diagonally, making thereon a well-defined path or road. Ordinarily, there would be no dedication, however long this continued. But if the same amount of travel was at the end of a recorded street, and between that and another street, long use and long acquiescence would be evidence, and, if continued sufficiently long, might be conclusive evidence, of a dedication." If the contention of appellant is correct, Eighth street was never properly laid out or established over the land in controversy, but was cut in two parts, bisected by such land. There is no dispute that the street came up to the land on both sides, and that, if continued in a straight line until the two ends met, it would pass over this land. Without the use of a street across this land, the two parts of the street would be separated by a space of 150 feet, and the public would be put to much inconvenience. The roadway or street used by the public connected the two ends of the street, and made the street continuous. Under these circumstances, the use of this land by the inhabitants of the city as a part of a public street was, when taken in connection with the control exercised by the city, well calculated to notify the owner, who knew of such use, that it was done under a claim of right. As there was no gate, nor anything to show to the contrary, he ought to have known that the public would reasonably suppose that all portions of

such street were owned by the city, and would use it as a public street. But the same grounds for such a belief would not exist in the case of a road passing across a vacant block. Public streets do not usually run diagonally across blocks, and the indications in such a case would be that the use of the road was permissive, and not adverse to the rights of the owner of the block. For this reason, it requires less proof to establish a street in a case of this kind than when one undertakes to show that a road has been established by prescription across vacant land in the country, or where the street claimed runs diagonally across a block. *Harding* v. *Jasper*, 14 Cal. 647; *Onstott* v. *Murray*, 22 Iowa, 457.

We are not called on to determine whether a street can be established by mere use on the part of the public without evidence of any control or acceptance by the city, for such control is shown here. The city exercised the same control over this land as it did over other portions of Eighth street.

This case seems to be one to which the doctrine of prescription is peculiarly applicable. We find here an ancient recorded plat of Johnson's addition, made by the sheriff of the county, showing the street as it is now located, and afterwards long and continuous use by the public. It is not unreasonable to believe that the sheriff had authority to make and record this plat, but the evidence of that authority is lost. The doctrine of prescription, which rests on the presumption, arising from long and continuous use by the public, "that the street was at some anterior period laid out and established by competent authority," may, under such circumstances, justly be invoked to supply the place of this lost evidence, and to show that the right to the use of the street is now established. *Reed* v. *Northfield*, 13 Pick. 98.

We have twice considered this case and the learned briefs furnished us by counsel for appellants, but we still feel convinced that the chancellor properly refused to enjoin the city from the use of a street over the land claimed by appellant. The decree is affirmed, and motion to rehear denied.

[NOTE—For public user as acceptance of dedicated highway, see note to *Southern Pac. R. Co.* v. *Ferris* (Cal.), 18 L. R. A. 510.—Rep.]

MARTIN *v.* HAWKINS.

MARTIN *v.* GARRETT.

Opinion delivered May 23, 1896.

APPEAL—NECESSITY OF BRINGING UP EVIDENCE.—A decree which is materially inconsistent with the facts found by the chancellor will be reversed, though parol evidence was introduced at the trial, and is not brought up in the transcript.

CONFIRMATION OF TAX-TITLE—CONCLUSIVENESS.—A decree confirming a tax-title cuts off all controversy as to mere irregularities of the original tax sale and forfeiture, such as errors as to the assessment and the return made thereof, the advertisement and the payment in part of the taxes, and any subsequent misconduct or mistakes of officers.

SAME—FILING AMENDED DEED.—Where a purchaser from the state of land forfeited for taxes brings suit to confirm the tax sale to the state, he may, upon discovering that his deed from the state is invalid for irregularity, procure and file a new and valid deed from the state after advertisement and before decree is rendered in the confirmation proceedings.

SAME—PUBLICATION OF NOTICE.—Under Mansf. Dig., sec. 577, requiring that the notice of an application for confirmation of a tax-sale shall be published for six weeks in succession six months before the beginning of the term of which the petition is to be heard, the fact that the period intervening between the first and last insertions of the notice is only thirty-seven days does not render the publication insufficient, where one insertion was made in each of six successive weeks, and the full period of forty-two days and six months from the time of the first insertion elapsed before the first day of the return term.

Appeals from Garland Chancery Court.

LELAND LEATHERMAN, Chancellor.

Rose, Hemingway & Rose and *Chas. D. Greaves*, for appellant.

1. All inquiry as to the validity of the tax-sale or tax-title is cut off by the decree confirming the sale. 42 Ark. 344; 55 *id.* 105; 52 *id.* 400; 55 *id.* 400; 50 *id.* 189; 49 *id.* 336; 57 *id.* 423; 55 *id.* 37; *Ib.* 472.

2. Appellee does not fall within the purview of "defendants constructively summoned," as mentioned in sec. 4197, Sand. & H. Digest. 57 Ark. 49.

3. The first deed from the land commissioner was good. The signature of the commissioner was unnecessary, his seal being sufficient. Sand. & H. Dig., sec. 4496. An appointment to office need not be in writing. 12 Mod. 200; 10 Bush, 144. The fact that Myers signed the deed as deputy, and affixed the seal, is sufficient evidence of his being a deputy. 1 Gr. Ev. sec. 92; Lawson's Pr. Ev. 47; 11 Q. B. 44; 11 M. & W. 581; 3 Wash. C. C. 464; 108 Mass. 429; 21 Ga. 217; 12 Q. B. 478; 8 C. & P. 310. He was a *de facto* officer, and his official acts will be upheld. 4 Ark. 582; 49 *id.* 439; 22 *id.* 556; 32 *id.* 666; 38 *id.* 158; 52 *id.* 356; 43 *id.* 243; 24 *id.* 474; 28 *id.* 312; 46 *id.* 96; 55 *id.* 82. Myers' acts were duly ratified by his principal. Public officers may ratify acts done in their name. Mech. Pub. Off., secs. 528-9; Murfree, Sheriffs, sec. 78; Mech. Pub. Off., sec. 546.

4. It appears with reasonable certainty that the bill of exceptions contains all the evidence. No set formula is required. 49 Ark. 364; 36 *id.* 496; 38 *id.* 102; 7 *id.* 348; 9 *id.* 478. But in this case no bill of exceptions was necessary. The decree sets out all the findings of the court, and these findings do not justify the decree. 46 Ark. 17; 52 *id.* 455; 57 *id.* 370; 43 *id.*

398; 34 *id.* 684; 27 *id.* 464; 26 *id.* 536; *Id.* 662; 40 *id.* 298; 50 *id.* 85; *Ib.* 434. When the court makes special findings, no presumptions are indulged beyond the allegations of the complaint. 41 Ark. 394; 29 *id.* 501; 46 *id.* 96; 53 *id.* 269.

5. The publication was sufficient. "Six weeks in succession" means once a week for six weeks. Mansf. Dig., sec. 577; 2 Jones on Mortg. sec. 1838; 30 Ark. 661; 117 U. S. 255; 18 Wall. 271; 55 Ark. 30; 33 Pac. 827; 54 N. W. 1058; 39 N. E. 595; 11 Foster (N. H.), 501; 55 Me. 190; 48 Ill. 250; 12 Abb. Pr. (N. S.) 172; 29 Barb. 297; 100 N. Y. 109; 1 Mass. 256; 7 Nev. 416; 47 Ill. 359; 51 N. W. 1130; 84 Ill. 29; 6 Minn. 20; 117 Mass. 48; 32 Fed. 745; 24 N. E. 329; 24 Pac. 1043; 14 S. E. 854; 25 So. C. 409.

John M. Harrell, for appellee.

1. The notice by publication was not sufficient. 49 Am. Dec. 111; 139 U. S. 137; 30 Ark. 661; 57 *id.* 49.

2. This was a case of *constructive* service. Mansf. Dig., secs. 1148, 4539. And appellee had the right to a retrial at any time within two years. Sand. & H. Dig., sec. 5882.

3. The judgment was *void*, and the answer presented a good defense. 39 Minn. 336; 12 Am. St. 657; 45 Ark. 96; 55 *id.* 192.

4. This was not a proceeding *in rem*. 42 Ark. 77-9. The statute requires evidence of notice to appear of record, and the record alone can be looked to. 55 Ark. 30; 51 *id.* 34; 140 U. S. 634; 55 Ark. 218.

C. V. Teague and *S. R. Cockrill*, for appellee.

1. The decree recites that the cause was heard in part upon oral testimony. The bill of exceptions does not contain this oral testimony. It does not profess to set forth all the evidence. This court in such cases will presume that every fact susceptible of proof, that could

have aided appellee's case, was fully established. 44 Ark. 76; 59 *id.* 251; 35 *id.* 230; 38 *id.* 481; 45 *id.* 310.

2. The forfeiture was absolutely void. 140 U. S. 634; 55 *id.* 218.

3. The notice of publication was insufficient. 30 Ark. 661; 16 How. (U. S.) 610; 139 U. S. 137, 148. No presumption can be indulged. 55 Ark. 213; 50 *id.* 390; 38 *id.* 181, 195; 52 *id.* 312. The notice is part of the record. 47 Ark. 120. Jurisdictional facts must appear. 52 Ark. 312; 55 *id.* 30; 147 U. S. 173; Waples, Att., sec. 640.

4. Martin had *no deed* when he gave notice. Myers' deed was a nullity. Mansf. Dig. sec. 4245. The amendment to the complaint set up a *new* deed, a new cause of action, and a new publication was necessary. Works, Jurisdiction, p. 42; 56 Ark. 419. The decree of confirmation does not estop appellee from raising the question as to Myers' authority. It settles nothing, except that the proceedings up to and including the sale for taxes are regular. 56 Ark. 419. Myers was not an officer at all. Mansf. Dig. sec. 4182. He was not even a *de facto* officer. 17 Ark. 332; 83 Ky. 367, 372; 41 N. W. 459; Mech. Pub. Off., sec. 38. It was a fraud to mislead the court by representing that the deed was executed by *the commissioner*. 50 Ark. 458. Such acts cannot be ratified. Mech. Pub Off. sec. 536.

5. The action was premature.

6. In addition to cases cited on insufficiency of publication of notice, see 85 Ind. 264; 56 *id.* 253; 37 Miss. 567-573.

BUNN, C. J. These two cases are to be considered together, the difference between them being mostly as to the manner in which they were presented to the court below.

It appears that R. W. Martin purchased the lands involved in both suits from the commissioner of state lands, on the 16th day of June, 1887, and received his deeds for the same on that day and of that date; that said deeds were executed in the name of Paul M. Cobbs, commissioner of state lands, by C. B. Myers, deputy commissioner; and that, on the 22d of July, 1887, Martin filed his petition for the confirmation of the tax-sales by which said lands had been certified to the state for the non-payment of the taxes for 1884, exhibiting his deeds therewith, and gave notice in form as required by statute in such cases, by publication in the Hot Springs Sentinel, a weekly newspaper, then published in the city of Hot Springs, where said lands are situated, by six weekly insertions, to-wit, on July 30, Aug. 6, 13, 20, and 27, and Sept. 3, 1887.

On the 28th of March, 1888, having discovered a defect in the deeds first filed with the petition as aforesaid, in this, that the said deputy commissioner had not been formally appointed as such, the said R. W. Martin filed an amended petition, exhibiting therewith proper deeds from the commissioner in person; and on the 17th of January following, the petition and amended petition coming on for hearing, upon proper finding as to forfeiture, description, and purchase from the state, the Garland circuit court in chancery entered its decree of confirmation, in due form.

It appears, further, that appellant, Fannie A. Hawkins, after the expiration of the term at which said confirmation decree was rendered, to-wit, on the 25th of April, 1889, filed her petition and amended petition, setting up that she was the owner of certain of said lots, and contesting said confirmation decree,—First, on the ground of sundry alleged irregularities in the assessment, sale, forfeiture, and certification of said lots to the state; secondly, that she had regularly paid all prior

taxes due on said lots, but that the tax receipt of the taxes of 1884 had been misplaced and could not be found, that the deed upon which the notice of confirmation was founded, that is to say, the deed from the commissioner of state lands, by his reputed deputy, C. B. Myers, was void, and that all proceedings thereon were consequently void, and that the notice was not published as required by law. This was denominated "an answer and cross-bill" in the original proceedings by Martin for confirmation, but seems to have been treated as a bill of review to set aside the confirmation decree. This constituted what is here case No. 2689.

On the 4th of September, 1890, appellee, Garrett, filed his bill of review, having for its object the annulment of said confirmation decree; also setting up the same grounds as did his co-appellee, Fannie A. Hawkins, except as to the payment of the taxes for 1884. This case is No. 2690.

It further appears that the said Paul M. Cobbs was commissioner during the years 1885 and 1886, and on the 30th October, 1886, was commissioned, in pursuance of a previous election, as commissioner of state lands, for his second term, thus succeeding himself, and that the said C. B. Myers had been, during his first term, his regular appointed and acting deputy, but that by some oversight or inadvertence the commissioner had failed to formally reappoint him as deputy for the second term, but that he had continued to act as such, and, while so acting, executed the deed in question, in the name of the principal.

There was a decree in each case for the petitioner annulling the confirmation decree, mainly on the ground that the deed of the commissioner of state lands to Martin by his said alleged deputy was void, because of the want of authority in said deputy as aforesaid. In the meantime, Martin having died, his widow, Annie E.,

was appointed administratrix of his estate, and the causes were revived in her name as such, and in the name of the children and heirs of Martin, and they appealed to this court, and the issues suggested in the court below now come up for review.

When unnecessary to bring up the evidence.

There is a motion pending in the court, at the instance of the appellees, to dismiss the appeals, for the reason that, while the record shows that oral testimony was taken, yet there is no bill of exceptions showing that all the testimony is now presented to this court. When a cause has been determined in the trial court on the weight of evidence, it stands to reason, and accords with all precedents and the decisions of this court, that all the evidence should be presented to the appellate court. This can only be done by bill of exceptions or by writing in nature of agreed statement or deposition, where oral testimony has been used, and in such case the bill of exceptions must be such as to show to the appellate court that it contains all the testimony, *dehors* the record, adduced in the trial court. But when the finding and judgment of the trial court, as in this case, show that the judgment is not in accord, or is not consistent with the facts found, the judgment will be reversed, if the error be a reversible one,—that is, material. That question will be determined in determining the various questions which follow.

Conclusiveness of decree of confirmation.

The confirmation decree of the court having jurisdiction to render it cuts off all controversy as to the mere irregularities of the original tax-sale and forfeiture, such as mere errors in assessment and in the return made thereof, the advertisement, and the payment in part of the taxes, and subsequent misconduct or mistakes of officers, as all these might have been the subject of an answer in the confirmation proceedings, and are not such matters as show a want of jurisdiction of the court to decree confirmation. This leaves but two questions

to be settled,—the one as to the deeds of Cobbs by the deputy, and the other as to the notice,—these being all that may be considered as jurisdictional, and therefore all that really could affect the confirmation decree.

Right of petitioner to file amended deed.

As to the deed: It appears that the petition with the defective deed exhibited therewith, or referred to therein, was filed just before the notice for confirmation was first published, and that an unobjectionable deed was substituted by the way of amendment about eight months afterwards. It appears, also, that Cobbs, in the meantime, having discovered his failure to reappoint his said deputy for his second term, regularly appointed him, reciting that the appointment should relate back and have effect from the commencement of his said second term, and also confirming and ratifying all that his said deputy had done as such in the meantime.

The statute authorizing confirmation proceedings reads as follows (Mansf. Dig., sec. 577): "The purchasers, or the heirs and legal representatives of purchasers, at all sales which have been, or may hereafter be, made, may, when such lands are not made redeemable by any of the laws of this state applicable to such sales, or, if redeemable, may at any time after the expiration of the time allowed for such redemption, publish six weeks in succession, in some newspaper published in this state, a notice calling on all persons who can set up any right to the lands so purchased, in consequence of any informality or illegality connected with such sale, to show cause at the first circuit court which may be held for the county in which such lands are situated, six months after the publication of said notice, why the sale so made should not be confirmed, which notice shall state under what authority the sale took place, and also contain the same description of the lands purchased as that given in the conveyance to the buyer, and, further, shall declare the price at which the land

was bought and the nature of the title by which it is held." The preceding section provides what class of purchasers may enjoy the benefits of this act.

The contention of the appellees is that, as there was, before the notice was given, no valid conveyance from the commissioner of state lands to Martin, so the conveyance mentioned in the latter part of the section quoted above never had any existence, and therefore there could not have been any compliance with the terms of the law in the matter of the description to be set forth in the notice. To maintain this contention, it would, of course, have to be shown or assumed that the deed in question was not merely voidable, but absolutely null and void, and incapable of being given vitality, so as to make it operative for any purpose. We do not think this contention well founded. In the first place, the defect is not one attributable to the grantee in the deed; and, in the next place, it is shown to be one made by oversight; and, in the third place, it is an attempt purely and solely affecting the state and the grantee, in so far as the question of title is concerned. Under such a state of facts, it would be contrary to all principles of equitable procedure to say that the holder of the defective deed cannot, at any time before decree in equity, have the same corrected, and made to speak the truth, by the party authorized to make it in the first instance.

The conveyance referred to in the statute, from which the description given in the notice must be taken, or to which it must conform, is evidently the conveyance to the state. It is true also that the petitioner should show such a title by purchase direct at tax-sale, or from the state, as will entitle him to the benefits of the act. In attempting to do this, it is sufficient, of course, that he exhibit a good deed with his petition, and in equity, also, that he show himself entitled to a good

deed, and has procured it before hearing. Any other rule would partake of the nature of technicality,—a system now happily discarded.

Sufficiency of publication of notice.

The notice was published by six successive weekly insertions,—the first on the 30th of July, the last on the 3d of September, constituting, it is true, a period of time equal to thirty-seven days; yet, according to the weight of authorities, the notice so published must not be measured by such a restricted rule. The notice must be "published six weeks in succession," six months before the beginning of the term at which the petition is to be heard. The petition in this case was called up for hearing on the 17th of January, 1889, and during the September term, 1888. The September term of the Garland circuit court began at that time on the 4th Monday of September, and it appears that this was more than six months subsequent to the 10th of September, 1887, giving the longest possible time for the notice to run—six full weeks, or forty-two days, from the first publication, and the six months thereafter before the beginning of the term. For, indeed, the six months from September 10th had expired before the beginning of the term to which the notice was directed (March term, 1888), but the hearing was doubtless postponed because of the filing at that time of the amended petition. The amended petition was, perhaps, no cause for delay, as even the filing of the original petition might have been delayed until then, but this delay is something of which appellees could not complain.

As to what notice is sufficient, under statutes similar to the one upon which these confirmation proceedings are based, we refer to the following authorities, to-wit: *Pennell* v. *Monroe*, 30 Ark. 661; *Howard* v. *Hatch*, 29 Barb. 297; *Wood* v. *Knapp*, 100 N. Y. 109; *Madden* v. *Cooper*, 47 Ill. 359; *Alexander* v. *Messervey*, 35 S. C. 409 (14 S. E. 854).

The decree of the Garland circuit court in chancery in each case is inconsistent with the findings of facts, which we find to be correct, and is therefore reversed and remanded, with directions to enter decree accordingly.

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SHATTUCK *v.* BYFORD.

Opinion delivered May 23, 1896.

HOMESTEAD—CONVEYANCE BY HUSBAND AND WIFE.—A conveyance of a husband's homestead is invalid, under the act of March 18, 1887, where the wife merely acknowledges the relinquishment of her right of dower therein.

DEFECTIVE CONVEYANCE OF HOMESTEAD—CURATIVE ACT.—The act of April 13, 1893, curing defects in the execution and acknowledgment of a married man's homestead under the act of March 18, 1887, did not affect the intervening rights of purchasers.

PLEADINGS—AMENDMENT TO CONFORM TO PROOF.—A judgment for defendant in a foreclosure action, based upon the invalidity of a conveyance of a homestead, will not be reversed upon appeal because such ground was not set up by the answer, where the cause was submitted on the pleadings and an agreed statement of facts containing testimony tending to prove the invalidity of such conveyance, to which no objection was interposed.

Appeal from Franklin Circuit Court in Chancery, Ozark District.

JEPHTHA H. EVANS, Judge.

John M. Rose and *J. F. Loughborough*, for appellant.

1. The answer does not set up the fact that the mortgage was void under the homestead act, and there was no evidence presented to sustain that defense. The sole defense was usury. Thompson, Homestead, etc., sec. 701-2; Beach, Eq. Pr., sec. 516; 46 Ark. 103. Homestead should be pleaded. Waples, Homesteads, 718; 26 Ark. 356; 42 *id.* 513; Thompson, Homestead, etc., 701;

29 *id.* 500; 24 *id.* 371; 6 *id.* 135; 59 *id.* 170; Mansf. Dig., sec. 5077. There is a total divergence between the *allegata* and *probata*, and it cannot be amended, or treated as amended. Pom. Rem. & Rem. Rights, sec. 554; 2 Rice, Ev., p. 661; Newman, Pl. 723; Maxwell, Code Pl. 583; Green's Pr. & Pl. sec. 475; 16 N. Y. 254; 2 Comst. 506; 88 N. C. 95; 55 Ark. 332.

2. The burden was on defendant to show that the property when mortgaged was Byford's homestead. 34 Ark. 55; Thompson, Homestead, etc., 879; 20 S. W. 543. It may be waived, as it is a privilege. 55 Ark. 139. It must be shown that he is a resident of the state. 34 Ark. 111. And prove he is entitled to the exemption. 53 Ark. 182. There was no proof that the land was Byford's homestead at the time of executing the mortgage.

BUNN, C. J. This is a bill to foreclose a mortgage on a tract of land in Franklin county, conveyed in said mortgage by James P. Byford and wife, Louisa Byford, to Albert R. Shattuck, as trustee, to secure a debt of $400 and interest, owing to the British & American Mortgage Company. William and Fletcher Peters, in some way not shown, became parties defendant in the outset, probably because they were in possession of the land when the suit was instituted, and they alone answered. In the answer, the defendants, William and Fletcher Peters, state that they purchased the land in question from Byford in December, 1889; that Byford was then occupying the land as his homestead, and owning no other lands; that one of them, Fletcher Peters, immediately took possession, and has ever since been in possession, occupying the land as his homestead; and in reference to the mortgage given, as aforesaid, by Byford to Shattuck, the answer charges that the debt secured thereby is usurious, as is also the mortgage.

Validity of conveyance of homestead.

The said mortgage was given in December, 1888, to secure a debt of $400 and 10 per cent. interest thereon, and due in five years. A note for the principal and for each annual installment of interest accompanies the mortgage. The wife united with the husband in the granting clause of the mortgage. She also relinquished her dower interest in the usual place, and in the usual manner, and then acknowledged that she had signed the relinquishment of her dower, and the certificate of the officer is in due form. This mortgage was properly executed and acknowledged by the husband and wife, and is a good conveyance of the husband's land in general, and would have been a good conveyance of his homestead before the passage of the act of March 18, 1887, but is not a good conveyance of the homestead under that act, for, in order to make such a conveyance valid under that act, the wife must join the husband both in the execution of it and the acknowledgment thereof. Following the ruling in *Pipkin* v. *Williams*, 57 Ark. 242, this court, in *Bank of Harrison* v. *Gibson*, 60 Ark. 269, held that, in order to make valid the conveyance by husband and wife of the husband's homestead, the wife should join with the husband in the execution of the conveyance, and also should acknowledge that she had executed the same; a mere acknowledgment of the relinquishment of dower right not being a sufficient compliance with the act. This suit having been instituted since the passage of the curative act of April 13, 1893, the mortgage, rendered invalid by the defective execution and acknowledgment as aforesaid, would have become valid, under the provisions of this latter act, but for the intervening rights of William and Fletcher Peters; since, according to the doctrine announced in *Sidway* v. *Lawson*, 58 Ark. 117, the curative act cannot effect their rights.

Effect of the curative act.

When pleadings amended to conform to proof.

The controversy is narrowed down to one between the plaintiff and these alleged purchasers from Byford. The defense set up in the answer is one of usury only, and not that of defective conveyance of Byford's homestead. The plea of usury was manifestly not sustained by the testimony, since all that was shown on that subject was that Byford has only in fact received $390, when his note was for $400 and interest at the highest legal rate, and it was shown that the difference between the two amounts consisted of a sum taken out to pay certain expenses incurred by Byford in relation to the transaction. However, the cause was submitted on the pleadings and what purported to be an agreed statement of facts, and, as a part of this agreed statement was the testimony of Fletcher Peters, who testified as to the homestead right of Byford, as well as that of himself as his vendee; and, upon this state of facts, the court found that, at the time the mortgage was executed, the land conveyed was the homestead of Byford, and, since the same had been defectively executed and acknowledged by the wife of Byford, it was void, and so decreed. The relief on this ground was not prayed in the answer, and, furthermore, it may be said to be rather a loose practice in chancery to treat the pleadings as amended to suit the evidence, under the circumstances presented in this case. But the evidence was admitted without objection, under the character of an agreed statement of facts, and the court below seems to have understood that he had the case before him to be decided upon all the facts presented, and we do not see our way clear to disturb the decree.

Affirmed.

WATSON *v.* MAY.

Opinion delivered May 23, 1896.

LABORER'S LIEN—FILING CONTRACT.—The provision of Sand. & H. Dig., sec. 4787, that no third party shall be prejudiced by the existence of a laborer's lien unless a copy of the contract is filed in the recorder's office does not apply to contracts for a less period than one year, such as a contract to raise a single crop.

SAME—PRIORITY.—The lien of a mortgage upon crops to be raised is inferior to a laborer's lien, under Sand. & H. Dig., sec. 4766, giving an absolute lien to laborers on the production of their labor for such labor.

Appeal from Ashley Circuit Court.

MARCUS L. HAWKINS, Judge.

Geo. W. Norman, for appellant.

1. Appellant's mortgage bound the crop the same as if it had already been in existence. Sand. & H. Dig., sec. 5100; 32 Ark. 598. The title vested in appellant from the date of its execution, and any contract made with appellee afterwards was subject to appellant's rights. Sand. & H. Dig., sec. 5102, 5105. The laborer's lien act makes the lien good between employer and laborer, but no third party shall be prejudiced by the existence of such lien unless a copy is filed in the recorder's office. Acts 1875, p. 231. There can be no statutory lien to the prejudice of third parties without writing. 44 Ark. 96.

2. A contract lien is superior to a statutory lien, with the single exception of the landlord. 51 Ark. 222; Jones, Ch. Mortg. (2 Ed.) sec. 472. Unless the legislature clearly made a laborer's lien superior to that of a prior recorded mortgage, the same rule will apply as in cases of mechanics' liens. 51 Ark. 223; 5 *id.* 217; 8 *id.* 231; 25 *id.* 490; Mansf. Dig., secs. 4408, 4410; Jones on

Liens, secs. 691-3; Jones, Ch. Mortg. 474. Intervening liens takes priority, if they attach before the completion of the labor. Mansf. Dig., sec. 4436; 8 Ark. 231; 5 *id.* 218, 237; Boone, Mortg. 75; Jones, Liens, sec. 691-3.

Robert E. Craig, for appellee.

The act of 1875, p. 231, was long since repealed, and the decision in 44 Ark. 96 is nugatory. Sand. & H. Dig., sec. 4776; 42 Ark. 263; 50 *id.* 244; 54 *id.* 522. These were all suits to enforce laborers' liens under verbal contracts. If the statute evinces the intention to give preference to the statutory lien, it will prevail over prior liens. 51 Ark. 223; Jones on Liens, secs. 691-3; Jones, Ch. Mortg., sec. 474. The language of the statute clearly makes an exception in favor of the laborer, as it does of the landlord. Sand. & H. Dig., sec. 4727, 4794. The language as to vendors, livery-stable keepers, male animals, is "shall have a lien." In the laborer's lien act it is "shall have an *absolute* lien on the *production* of their labor." 50 Ark. 244. The intention is clear to place the laborer on a footing with the landlord. His lien is *coeval* with the coming of the crop into existence; it is the *product* of his labor.

BATTLE, J. One bale of cotton, of the value of $34, is the property in controversy in this action. Appellant, D. E. Watson, claims possession of it under a mortgage executed to him by R. P. Brown, and appellee, J. W. May, says that it was the product of labor performed by him in the service of Brown, and was received by him in payment of the amount due him for such labor.

No bill of exceptions was filed; and the facts and the declarations of law, upon which a reversal is asked, are set out in the judgment of the court. The facts, as found by the court, are as follows: "(1) That the bale of cotton in controversy was the product of the labor of defendant, May, and delivered to him in payment for

services as such laborer, under a verbal contract with one R. P. Brown in 1891. (2) That the plaintiff Watson had a valid mortgage on the crop of said R. P. Brown for said year 1891. (3) That plaintiff's mortgage, duly acknowledged, was filed for record January 15, 1891, and defendant May's contract with Brown was made in April, 1891."

Filing contract to secure laborer's lien.

Appellant contends that his mortgage having been filed for record on the 15th of January, 1891, and the contract of appellee to perform labor having been entered into in April, 1891, his lien upon the cotton was prior and paramount to that acquired by appellee, and that he is entitled to the possession of the cotton. The accuracy of this contention depends upon the proper interpretation of the statutes regulating laborers' liens.

Section 4766, Sand. & H. Dig., provides: "Laborers who perform work and labor for any person under a written or verbal contract, if unpaid for the same, shall have an absolute lien on the production of their labor for such work and labor." Other statutes were subsequently enacted which are as follows: "Section 4783. Contracts for services or labor for a *longer period* than one year shall not entitle the parties to the benefit of this act, unless in writing signed by the parties, witnessed by two disinterested witnesses, or acknowledged before an officer authorized by law to take acknowledgments.

"Sec. 4786. Specific liens are reserved upon so much of the produce raised, and articles constructed or manufactured, by laborers during their contract as will secure all moneys, and the value of all supplies furnished them by the employers, and all wages or shares due the laborers; *and if either party shall, before settlement, dispose of or appropriate the same without the consent of the other, so as to defraud him of the amount due, such party shall be deemed guilty of a misdemeanor, etc.*

"Sec. 4787. A copy of such contract, or the original, shall be filed in the recorder's office of the proper county, and such filing shall be sufficient notice of the existence of such lien, and no third party shall be prejudiced by the existence of such lien, nor in any manner liable under the provisions of this act, unless a copy of the contract is filed in the recorder's office as above provided."

As verbal contracts cannot be filed, the last section has no reference to them, or contracts for a less period than one year, as they are not required to be in writing.

It not appearing that appellee was hired to labor, except in the production of the crop of 1891, it is apparent he was not employed for a longer period than one year. The court did not so find, and we cannot presume that he was; and it was not necessary that his contract should have been in writing.

Laborer's lien prior to mortgage.

The mortgage of appellant and the contract of appellee being valid, who had the superior lien? Upon this question the statute is silent, and no decision has been rendered by this court. But the decisions of similar questions as to liens of landlords furnish us with a guide in this case. The statutes give landlords liens upon the crops of their tenants for rent, but say nothing about the superiority of such incumbrances over prior mortgages; yet this court has held that such liens take hold of the crops as soon as they come into existence, and are superior to a mortgage on the same property executed and filed for record before that time, notwithstanding the statutes make a mortgage on a crop to be planted valid. *Meyer* v. *Bloom*, 37 Ark. 43; *Buck* v. *Lee*, 36 *id.* 525; *Roth* v. *Williams*, 45 *id.* 447. No lien can attach at an earlier moment. Being the creatures of the statute, liens created by contract must yield to them in superiority. This preference is due to the fact that the crop is the fruit of the lands of the landlord.

The lien for rent is on the production of the land of the landlord, while the lien of the laborer is on the production of his labor. As the lien of the former seizes the product of the land as soon as it comes into existence, so does the latter seize the product of the laborer. As a prior mortgage of a crop must yield to the lien of the former on the same property, so a like mortgage for the same reason must yield under the same circumstances to the latter. The evidence of the intention of the statute to protect the latter against older mortgages is stronger than it is in the case of the former. It inhibits the employer from disposing of or appropriating the production of labor, before settlement, so as to defraud the laborer of the amount due him, and makes it a misdemeanor for him to do so, thereby evincing an intention that the lien of the laborer on the product of his labor shall be paramount to any created by his employer.

As the bale of cotton in controversy was the product of the labor of the appellee, and was received in payment of the amount due him for his services, he is entitled to hold it.

Judgment affirmed.

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81 462

HALL v. MELVIN.

Opinion delivered May 23, 1896.

JUDGMENT—JURISDICTION—COLLATERAL ATTACK.—Where a bill shows no cause of action against the defendants with reference to the subject-matter of the suit, and tenders no issue with them, but, on the contrary, shows that there never could be any issue with the defendants, a decree based upon such a bill is a nullity, no matter how attacked.

SAME—VALIDITY.—A decree in favor of the grantee of the widow of an intestate, quieting his title to land of the intestate, rendered upon a warning order against unknown heirs, is void on collateral

as well as direct attack, where the bill does not show that the title of the heirs had been divested; since, if there are heirs, plaintiff is entitled to no relief, the title being in them; and if there are no heirs, there is no one to serve, no title to quiet, and the court had no jurisdiction.

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

STATEMENT BY THE COURT.

One Valentine Melvin died seized of a certain tract of land, which was his homestead. His widow, Rebecca Melvin, while occupying it, married one Bourke, to whom, for a valuable consideration, she conveyed same. Bourke filed a bill in the Pulaski chancery court, setting up the deed from his wife, and alleging that there were no known heirs of Melvin, but that there were unknown heirs, non-residents of the state. He prayed for a warning order against them, and "that upon the hearing the title to plaintiff to said lands under his said conveyance from Rebecca Bourke, *nee* Melvin, be held good as against the said unknown heirs."

On the 7th of May, 1889, the chancery court rendered a decree quieting the title against the unknown heirs of Melvin. Bourke mortgaged to one O'Doughtery, who assigned said mortgage to appellant McCabe, who sold, under the power in the mortgage and assignment, to appellant Hall, who conveyed a half interest back to McCabe. Appellees, who are non-residents, and the brothers and sisters of Valentine Melvin, brought this suit against appellants to set aside the decree of the court confirming and quieting the title of their grantor, Bourke, and to cancel the various intervening conveyances *supra*, alleging fraud and the want of jurisdiction.

The answer denied the allegations of the complaint. The cause was submitted upon the complaint, answer, and exhibits, and upon an agreed statement of facts,

which, *inter alia* unnecessary to set out, contained a clause that "the papers and records of this court in the case of J. J. Bourke *v.* The Unknown Heirs of Valentine Melvin shall be used as evidence." The decree of the Pulaski chancery court in the case of J. J. Bourke v. The Unknown Heirs of Valentine Melvin was set aside by the decree in the case at bar; also, the several intervening conveyances were cancelled, and the title to the lands was quieted in appellees. To reverse this latter decree, this appeal is prosecuted.

John B. Jones and *Thos. J. Oliphint*, for appellant.

1. This is purely a collateral attack upon the former decree. No fraud is proved, and there is nothing to sustain the allegation of fraud. The decree was not *void*, but simply erroneous. The court had jurisdiction of the subject-matter and parties, and the decree is valid, however erroneous, and cannot be attacked collaterally, as attempted here. Van Fleet, Collateral Attack, p. 79-80, 82; 77 Ind. 371; 47 Ark. 31; 11 Wis. 401; 21 Ark. 364; 5 *id.* 424; 46 Wis. 650; 28 Fed. Rep. 410; 70 Ill. 378; 11 Ark. 519; 3 Peters, 193; 55 Ark. 442; 57 *id.* 49.

2. The suit is barred by the seven years statute of limitations; Mrs. Bourke claiming and holding the lands adversely, as sole owner, for more than that period.

Ratcliffe & Fletcher, for appellees.

1. The complaint of Bourke showed no cause of action on its face. It was a fraud on the court and its jurisdiction, and is void either on direct or collateral attack. It was simply a bill to confiscate another's land. This cannot be done. 4 Hill, 144-147; 46 Ark. 96; 42 *id.* 77; 33 Ark. 816; Freeman, Void Jud. Sales, sec. 64; Cooley, Const. Lim. (4th ed.), 438; 53 Fed. 993-4.

2. A decree quieting title only quiets the title set out in the complaint; and, as Bourke set forth no title, the decree was a nullity. 9 Ark. 336; 13 *id.* 491. No issue was made or tendered. 140 U. S. 254; 53 Ark. 307, 312; 55 *id.* 205; 41 Miss. 89; 42 *id.* 506. Such decrees are nullities, even on collateral attack. 24 Atl. 229; 34 N. J. L. 418; 9 Atl. 898-902; 93 U. S. 274, 282, 283; 56 Ark. 422; Newman, Pl. & Pr., p. 688; 83 Va. 232; 44 Oh. St. 503; 27 S. W. 549. See, also, Works, Jur., p. 42; 70 Tex. 588; 27 Cal. 300-313; Van Fleet, Col. Attack, 81.

3. Even if the complaint had shown a cause of action, there is nothing in Mansf. Dig., sec. 4991, which authorizes a warning order of the kind in this case. That statute only refers to "property to be *divided or disposed of in the action.*" Bourke sought no such division or disposition. In other cases, the legislature has provided specially for warning unknown heirs. Gantt's Dig., secs. 3991, 3998; 30 Ark. 719; Sand. & H. Dig., sec. 72.

John B. Jones and *T. J. Oliphint*, in reply.

1. The statute provides for notice by publication to unknown heirs, and unknown owners in suits to quiet title and other proceedings. Gould's Dig., ch. 28., p. 219, sec. 7; Sand. & H. Dig., sec. 5681. The heirs were properly warned. The court below found that the notice was sufficient. 24 Ark. 364.

2. It is not true, that unless the complaint on its face shows a good cause of action, the decree is void. 55 Ark. 205. It is enough to show that the case belongs to a class of cases over which the court had jurisdiction. Van Fleet, Collateral Attack, pp. 79-82; 77 Ind. 371; 11 Wis. 401; Freeman, Judg., sec. 118; 14 Wis. 180.

WOOD, J., (after stating the facts). The decree was correct. The Pulaski chancery court had no power

to confirm and quiet the title in J. J. Bourke to the lands in suit between himself and the unknown heirs of Valentine Melvin, for the all-sufficient reason that Bourke shows affirmatively in his bill, not only that he had no title to quiet, but that the title was in the parties sued. Sec. 2476, Sand. & H. Dig., provides: "If there be no children, or their descendants, father, mother, nor their descendants, or any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or husband of the intestate." Under this section, Rebecca A. Melvin, as the widow of Melvin, could only have become the owner in fee, provided there had been no heirs of Melvin in existence, known or unknown. Bourke, as her grantee, only acquired such title as she had. So, as strange and paradoxical as it may seem, we have here the anomalous spectacle of one asking that a title be confirmed and quieted in him, which he shows to be in another. "Plaintiff says he believes there are unknown heirs of Valentine Melvin, non-residents of this state," is the language of the bill, and he prays for and obtains a warning order against them. And then, without alleging a single fact that would work a divestiture of their title, he asks that it be confirmed and quieted in him. It should require no argument or citation of authority to show that a decree in favor of the complainant, based on such a complaint, is a sort of juridical monstrosity. The learned chancellor who rendered it in the first instance did so doubtless through inadvertence. He was evidently misled; and it was but to be expected that he should promptly annul what had been done, as he did, when he discovered the real status of the case upon which he had passed.

When judgment subject to collateral attack.

The decree was void, and will be so treated, whether attacked by direct or in a collateral proceeding. Where a bill shows no cause of action against the defendant with reference to the subject matter of the suit, tenders

no issue with them, but, on the contrary, shows that there never could be any issue with them, the complaint not even being susceptible of amendment to show an issue, a decree based upon such a bill is a nullity, no matter how attacked. *Windsor* v. *McVeigh*, 93 U. S. 274; *Munday* v. *Vail*, 34 N. J. L. 418; Newman, Pl. & Pr., 688; *Stewart* v. *Anderson*, 70 Tex. 588; *McMinn* v. *Whelan*, 27 Cal. 300; *Spoors* v. *Coen*, 44 Ohio State, 503; *Seamster* v. *Blackstock*, 83 Va. 232; Works, Jurisdiction, p. 42; 1 Black, Judg., sec. 242.

When judgment against unknown heirs is void.

Counsel for appellant have concluded that "if the complaint had nothing in it whatever from which it might be gathered that it was a proceeding to quiet title, the decree might be said to be invalid, for the reason that there would be pending no cause upon which the court acted." Such is the case here. Merely a prayer to quiet title is not enough. This is not like the case of *Williams* v. *Renwick*, 52 Ark. 160. It is not merely a failure to state a cause of action, but an affirmative showing of no cause of action.

The court has jurisdiction of the subject-matter of quieting titles, but here there is no colorable presentation of the facts necessary to bring this case within that class of cases. *Railway Company* v. *State*, 55 Ark. 200.

As authority for bringing this action, counsel for appellants invoke section 5681, Sand. & H. Dig., which is as follows: "Where, in an action against the heirs of a deceased person as unknown heirs, or against other persons made defendants as unknown owners of any property to be divided or disposed of in the action, it appears by the complaint that the names of such heirs, or any of them, of such other persons are unknown to the plaintiff, a warning order, as directed in the last section, shall be made by the clerk against such unknown heirs or owners." This section has no application to the case at hand; for, if there be heirs, the court as above shown would

have no power to grant the relief sought, the title in such case necesssarily being in them. Whereas, if there be no heirs, no service could be had, for there would be no one to serve, and the court would be without jurisdiction. Besides, if there were no heirs, there would be no cloud upon the title to remove, and no suit could be brought or would be necessary for that purpose. No authority can be found for bringing such a suit as was brought in the case of Bourke *v.* The Unknown Heirs of Valentine Melvin.

Other questions are presented, but it is unnecessary to discuss them.

Affirmed.

BUTLER *v.* ADLER-GOLDMAN COMMISSION COMPANY.

Opinion delivered May 23, 1896.

MORTGAGE—APPROPRIATION OF PROCEEDS.—A mortgage of real estate upon part of which certain machinery is situated, which is not a fixture because of the reservation of title by the mortgagor's vendor until payment of the purchase money, is not security for the amount paid by the mortgagee as the balance of the purchase money of such machinery, as against a junior mortgagee of another portion of such premises; but if, with the consent of the holder of the purchase money note, the machinery is sold with the land, under power of sale in the first mortgage, and enhances the price received to the extent of such note, the junior mortgagee cannot complain of the application of the proceeds of the sale to the payment of such note.

Appeal from Independence Circuit Court in Chancery.

JOHN B. MCCALEB, Judge, on exchange of circuits.

STATEMENT BY THE COURT.

Appellees were the holders and beneficiaries of two deeds of trust, which were executed by one M. A. Wycough, to secure an indebtedness which amounted in

the aggregate to $5,500. In one of the deeds of trust the description of the property was as follows: "Northeast quarter of section 4 (four), T. 12 N., R. 5 west, 160 acres; northeast of northeast, section nine (9), T. 12 N., R. 5 W., 40 acres, upon which is situate one mill and cotton gin and twenty-horse power steam engine, all complete; also, part of west ½ lot nine, block 13, fronting 23½ feet on Main street, town of Batesville; also, east part lot nine, block 13, fronting 28⅓ feet on Main street, town of Batesville, upon which two parts of lots are situate the two storehouses now occupied by M. A. Wycough & Co." "To have and to hold, with all appurtenances thereto," etc. In the other deed of trust the property is described as "NE. ¼ sec. 4, and NE NE. ¼, sec. 9, T. 12 N., R. 5 W., 200 acres," with a clause, "To have and to hold, with all improvements thereto belonging," etc. Appellants, as junior mortgagees of the store property described in the first of the above deeds of trust, filed their bill to restrain the trustee from selling the store property, and alleged, *inter alia*, that the mortgage or deed of trust embracing the property first above described "had been paid off and satisfied in full," but that, notwithstanding that fact, "*the trustee is proceeding to foreclose said deed of trust on said property, and has advertised the said property for sale, and, according to the terms of said advertisement, said property is to be sold on February 11, 1893.*" They asked for and obtained a temporary restraining order, restraining the trustee from selling the store property as advertised, but not the other property contained in the deed of trust.

The answer, alleged that there was a total indebtedness of $6,706.07 due the appellees from Wycough & Co., secured by the deeds of trust, and included in said amount was the sum of $203.30, the balance of a purchase-money note for the machinery

described in the mortgage, which J. D. Goldman had purchased; that the trustee, on the day of sale, February 11, 1893, offered for sale only so much of said real estate as the sale thereof had not been enjoined, to-wit, the farm property, described thus: NE. ¼ of sec. 4, and the NE. ¼ of the NE. ¼ of sec. 9, all in T. 12 N., R. 5 W.; and that the defendant J. D. Goldman became the purchaser, bidding for the two tracts the aggregated sum of $5,350.00, which, after being credited on the mortgage debt, left a large sum still due appellees. And they asked that the injunction be dissolved.

In their replication, the appellants, denied that the machinery was, by the terms of the deed of trust, an appurtenance upon the NE. of NE. of sec. 9, T. 12 N, R. 5 W., at the date of the execution of said deed of trust, or any other property mentioned in said deed of trust, or was embraced therein, or was any part of said real estate; and they say that the amount of the purchase-money note transferred to Goldman was improperly charged in the account as an item secured by the first deed of trust mentioned *supra*. They deny that the trustee had any power to sell the lands therein described except for the debt therein mentioned.

The court found that the machinery note held by Goldman was a proper charge, and was secured by the deed of trust. Appellants excepted, and appealed.

Yancey & Fulkerson, for appellant.

1. The note for $225.12 purchased from the Iron Works Co. is not secured by defendant's mortgage, because neither the property nor the debt is covered by the mortgage, and (2) because the machinery was not of "the appurtenances thereto belonging." The title to the machinery was not in Wycough, and he could not mortgage it, nor could it be a fixture, because the title was in another person than he who owned the real estate. 27 Ark. 332; 33 *id.* 384.

2. The note was not an incumbrance, but the evidence of a debt and a conditional sale reserving the title in the vendors. 30 Ark. 402; 47 *id.* 463; 48 *id.* 160; 54 *id.* 476; 56 *id.* 426; 1 Jones, Liens, sec. 820. Even if it was an incumbrance, it would not be prior to a recorded mortgage. Sand. & H. Dig., sec. 5090. If a lien is claimed under ch. 90, Sand. & H. Dig., they must comply with the statute. 52 Ark. 450.

3. The court erred in appropriating the proceeds of the sale of the farm to the payment of this machinery note. 57 Mo. 135; 49 Fed. 203.

Neill & Neill and *H. S. Coleman*, for appellee.

The machinery was a fixture, an appurtenance to the land, and was especially conveyed by the mortgage, and in the absence of any reservation would pass with the land. The land would not have sold for as much without the machinery as it did with it. It thereby enhanced the bid, and *benefited* appellants. This debt being an incumbrance on their security, appellee had the right to pay it off. 15 Am. & Eng. Enc. Law, p. 826; Tiedeman on Sales, par. 216.

Yancey & Fulkerson and *J. W. House*, for appellant on motion for rehearing.

1. The title to the machinery remained in the Iron Works Co., and the note was not an incumbrance. 30 Ark. 402; 47 *id.* 463; 48 *id.* 160; 54 *id.* 476; 56 *id.* 426; 3 Am. & Eng. Enc. Law, p. 436; 1 Jones, Liens, sec. 820. The machinery was not a fixture. 27 Ark. 332; 33 *id.* 384. Wycough could not mortgage it. It is not alleged that this machinery was sold or authorized to be sold by the trustee. All the trustee could sell was the land. 36 N. J. Eq. 230. A party claiming subrogation can claim nothing beyond the rights of the person under whom he claims. 36 Vt. 721; 131 Ill. 376; Sheldon, Subrogation, secs. 1 and 2. If the machinery increased the

price of land at the sale, the burden was on appellees to show it. But there is not a scintilla of evidence to show this.

Rose, Hemingway & Rose, in reply, for appellees.

The mortgage conveys the machinery by name. The mortgage was foreclosed, and the property sold. This implies that all was sold. It is not shown that the property sold for less by reason of the machinery being sold with it. The clear inference is that it enhanced the price, and appellants are in no wise injured.

WOOD, J., (after stating the facts). Did the court err in allowing the trustee to pay off the note for the purchase money of the machinery held by Goldman out of the proceeds of the sale of the farm under the mortgage? The purchase money note for the machinery was not secured by the deed of trust, and the court erred in so holding. But it by no means follows that the error is one of which appellants can complain. Before equity will interpose in their behalf, they must show some injury. If the machinery was actually sold with the land, and enhanced the purchase price to the extent of the unpaid purchase-money note, it is impossible that appellants could have been prejudiced by the transaction.

Now the note shows that it was the "second one of two." It was dated Sept. 19th, 1890, and was originally for $296.67, but upon it had been paid $150, leaving a balance due on the day of the transfer to Goldman of $203.30. The machinery for which these notes were given was "one mill and cotton gin and twenty-horse power steam engine, all complete." The note was transferred to Goldman on the 13th of February, 1893, the day of the sale. The machinery, therefore, was about two and one-half years old, and, as the outstand-

ing note was the "second one of two," the chancellor might have reasonably concluded that the machinery cost originally $593.34, and, being still comparatively new, enhanced the value of the farm to which it was attached, and increased the purchaser's bid at the sale (if it was sold) to at least the amount still due upon it,—$203.30.

Then, the only question remaining is, was it sold with the land in the deed of trust? The machinery is specifically described in the deed of trust. But, even if this were not so, a mortgage simply of the land "with its appurtenances" would generally carry with it such machinery, especially where it was firmly attached to the freehold by being "set in masonry," as was the case here with the engine and boiler.* And, but for the fact of the title to the freehold and to the machinery being in different persons, such machinery would have passed here under the mortgage. True, this machinery was not a fixture, because in equity the title to it was not in the owner of the land.† And, since the vendor of the of the machinery expressly reserved the title until the purchase price was paid, the vendee could vest no *absolute* title in another until he had paid the purchase money.‡ But he did have an interest in it, which he could sell or mortgage.§ He testifies that "the property described in the note to Batesville Iron Works Company is a part of the same property described in the mortgage

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**Farmers' L. & T. Co.* v. *Minneapolis E. & M. Works*, 35 Minn. 543; *McKim* v. *Mason*, 3 Md. Ch. 186; *Burnside* v. *Twitchell*, 43 N. H. 390, and other authorities cited in 8 Am. & Eng. Enc. Law, 50, title, "Fixtures."

†*Witherspoon* v. *Nickels*, 27 Ark. 332; *Stirman* v. *Cravens*, 33 Ark. 384.

‡*Carroll* v. *Wiggins*, 30 Ark. 402; *McIntosh* v. *Hill*, 47 Ark. 363; *McRea* v. *Merrifield*, 48 *id.* 160; *Cincinnati Safe Co.* v. *Kelly*, 54 *id.* 476; *Simpson* v. *Shackelford*, 49 *id.* 63; 1 Jones, Liens, sec. 820; 3 Am. & Eng. Enc. Law, 436.

§*McRea* v. *Merrifield*, 48 Ark. 160.

to the Adler-Goldman Commission Company; that he "put it on the land as a permanent improvement, expecting it to remain there,"—thus showing that he intended to and did include the machinery in the deed of trust. Now, appellants' complaint alleged that the trustee "is proceeding to foreclose said deed of trust *on said property*," and has advertised the *said property* for sale, and, according to the terms of said advertisement, "said property is to be sold." It is shown in the answer of appellees that the amount of the purchase-money note was included in the account of Wycough, the mortgagor, with Adler-Goldman Commission Company, which the trustee was foreclosing the mortgage to pay, and the trustee applied the proceeds of the sale to the payment of the account, of which the note was a part. This clearly indicates that the note was treated by the trustee and appellees as an incumbrance, and that the machinery was sold with the land. Notwithstanding this was shown, and in effect alleged in the answer, appellants nowhere in their replication deny this, but impliedly admit it. In this way it was treated in all the subsequent proceedings, without anything to indicate that it was questioned. The appellants except to the ruling of the court in "approving and sustaining the appropriation by the trustee of the proceeds of the sale to the payment of the purchase-money note;" but that is not an objection that the machinery was not sold. Having treated the machinery as sold in the court below, they are bound by that action here. Appellants do not deny that, if the machinery was sold, it increased the proceeds of the sale as much as was due on it. They evidently proceeded entirely upon the theory that the note was not secured by the mortgage, and not upon the theory that the property was not actually sold. If appellees were the owners of the machinery by reason of the purchase by J. D. Goldman of the purchase-

money note for same,—as claimed by appellants,—they were also the owners of the mortgage, and they could certainly have had the machinery sold with the land if they desired. We conclude that the record makes a strong *prima facie* case that the machinery was sold with the land, and that it increased the proceeds of the sale to the amount of the outstanding note. As the burden was upon appellants, and they have failed to make the error of the court, if any, appear, the motion for reconsideration must be overruled, and the decree will stand affirmed.

ARKANSAS & LOUISIANA RAILWAY COMPANY *v.* HARRIS.

Opinion delivered May 30, 1896.

RAILWAY COMPANIES — POSTING FREIGHT SCHEDULES — PENALTY.—Under the act requiring railroad companies to keep posted in every depot freight office printed schedules of freight rates, and providing that, for a violation of the act, they shall forfeit a certain sum, "to be recovered by a civil action by the party aggrieved," and that a notice of the violation, with a demand for reparation, must be served by the claimant (Act March 24, 1887, sec. 7, 12), the "reparation" contemplated by the act is compensation for injuries or wrongs suffered by reason of a railway company's failure to comply with the act, and only the person to whom reparation is due can be entitled to the penalty of the act.

SAME—NOTICE OF INJURY—SUFFICIENCY.—A notice to a railway company of a violation of the act requiring the posting of freight rates is insufficient if it fails to show how the claimant was injured by the failure to post such rates, the extent of his grievances, and the damages occasioned thereby.

Appeal from Sevier Circuit Court.

WILLIAM P. FEAZEL, Judge.

Dodge & Johnson, for appellant.

1. The complaint is fatally defective. It does not state facts to constitute a cause of action. It fails to

state *where* the defendant neglected to post its schedules; the agent upon whom the notice was served; the kind and character of notice served; to show any facts as to how plaintiff was aggrieved, or whether he was aggrieved at all. All these facts were necessary to be set up, not only in the notice, but in the complaint.

2. The notice was not a compliance with the statute. The statute is in derogation of the common law, and must be strictly construed and complied with. Fifteen days must be given to refund any overcharge, or make other reparation. The notice must make known the grievance, in order that the company may make reparation, and should state the amount of damages claimed, etc. The notice was fatally defective.

3. No evidence was introduced to show any damage or grievance. The penalty could only be recovered by *one aggrieved.* There is not a scintilla of evidence that appellee was *aggrieved* or damaged. 8 Pick. 514; Suth. St. Const., sec. 359; 47 Md. 217; 13 Pick. 94; Endl. Int. St., sec. 470, 471, 473, etc.; 11 Q. B. 731; Sedgwick, Stat. Const. 76; 10 Pick. 383; 2 Exch. Div. 440, 448.

W. S. Curran, for appellee.

1. It affirmatively appears that appellee was a *bona fide* shipper over appellant's road, and thereby was *aggrieved.* Sec. 12 of the act declares who shall recover, and it is unambiguous,—*the party aggrieved.*

2. This is not a penal statute but a *remedial* one. It was passed in pusuance of sec. 17, art. 10, Constitution, and was intended to correct abuses by adequate penalties. 49 Ark. 265; 17 Wall. 567; 35 N. W. 118; 57 Ark. 120.

3. The rates must be posted, as required by the act. 9 So. 89.

4. The notice is only required when there has been a mistake or an overcharge to be corrected; but when

there is a wilful violation of the statute, and where notice would serve no useful purpose, none is required. 3 S. W. 323. See also 23 N. J. L. 373; 32 Fed. 722; 43 *id.* 37; 15 Pac. 775; 4 Neb. 58.

BATTLE, J. During the year 1893, Milton Harris resided at Nashville, in this state, and dealt in country produce. He purchased apples, hides, chickens, and eggs, and shipped them over the road of the Arkansas & Louisiana Railway Company. In this time, the railway company did not keep posted at its depot freight office at Nashville, in a conspicuous place, plainly and legibly printed schedules of its rates of freight and charges; and the consequence was, whenever Harris wished to find out what the charges for shipping any of his property on the railroad was, he asked the agent of the company for the information, and received it. Finally growing weary of this manner of doing business, he, on the 12th of December, 1893, gave to the agent of the company the following notice:

"State of Arkansas, County of Howard, Town of Nashville. To W. B. McDonald, agent of the Arkansas & Louisiana Railway Company, Nashville, Ark.: You are hereby notified that the Arkansas & Louisiana Railway Company has failed to comply with section seven (7) of the statute approved March 24, 1887, requiring a schedule of the rate of freight charges to be posted up in the depot freight office. I am the party aggrieved by this violation of the law, and I demand that said company make proper reparation to me for each and every day the law has been violated during the year last past. Given under my hand this 12th day of December, 1893. Milton Harris, by W. S. Curran, his attorney."

And, failing to receive the desired reparation within fifteen days, and being out of business, he brought this

action against the railway company to recover the statutory penalty of $50 to $1000 for each and every day in the year 1893 the company had failed to keep the schedule of rates of freight and charges posted at the Nashville depot freight office, and recovered judgment for $12,000, and the defendant appealed.

While the evidence adduced in the trial of the action was sufficient to show that no schedule was posted at any time during the year 1893 at the depot freight office at Nashville, and that the notice in writing which we have set out in this opinion was given, and the other facts which we have stated, there was no evidence that Harris received any actual injury. He testified, and could not tell when he first examined to see whether or not the schedule had been posted, nor how often he had looked. He testified that he usually went to the agent of the company, and inquired as to rates of freight, which were always given to him upon request. Upon such evidence, was he entitled to recover a penalty?

This action is based on sections seven and twelve of the act entitled, "An act to prevent unjust discrimination and exhorbitant charges by railroads," etc., approved March 24, 1887, which are sections 6307 and 6312 of Sand. & H. Digest, and are as follows:

"Sec. 7. That all railroad corporations in this state shall [be] and are hereby required to keep posted up at every depot freight office under the control of, or used by, any such railroad corporation, in a conspicuous place therein, plainly and legibly printed schedules, which shall state: First, the different kinds and classes of property to be carried; second, the different places between which property shall be carried; third, the rates of freight and charges for carriages between such places and for all services connected with transportation of such property, from its receipt until it is delivered or forwarded, and each day of failure to post up such

printed schedule shall constitute a separate offense. Such schedule shall be posted at least five days before the same shall go into effect, and the same shall remain in full force until another schedule shall, as aforesaid, be posted. And every person and corporation engaged as aforesaid shall receive, load, unload, transport, store, and deliver to the consignee thereof any and all property offered for shipment at and for charges not greater than those specified in such schedule as may at the time be in force, and shall, on demand, issue to shippers duplicate freight receipts, which shall state the class of freight shipped, the weight, and charges, etc.

"Sec. 12. That any railroad corporation that shall violate the * * * * seventh * * sections of this act * * * * * shall forfeit and pay for every such offense any sum not less than fifty dollars nor exceeding one thousand dollars and costs of suit, to be recovered by a civil action *by the party aggrieved*, in any court having jurisdiction thereof, * * * but all such actions shall be brought within one year after the cause of action accrues, or within one year after the party complaining comes to the knowledge of his or her rights, and no such action shall be maintained unless it is alleged and shown that, before bringing his action, the party complaining brought the matter to the attention of the railroad company by a notice or statement of facts in writing, accompanied by the papers showing such violation, if any he has, and a demand for reparation, delivered to some agent of the railroad company, and that said railroad company, for fifteen days after the reception of said notice, neglected or refused to refund any overcharge or make other proper reparation."

Who may recover penalty for failure to post freight schedule.

The schedule mentioned is required to be posted for the benefit of those desiring and seeking to ship their property over railroads. So much of section 7 of the act as prohibits the charging of more than the rates

fixed by the schedule, and the information afforded by the posting, clearly indicates that this is its sole object. No other person can be benefited thereby, or injured by the failure to post.

But who is entitled to the penalty allowed by section 12 of the act for a failure to post the schedule? The statute says the party thereby aggrieved; and that he is not, unless the railroad company neglects or refuses to make "proper reparation" within fifteen days after demand and notice has been made and given in the manner prescribed by law. The proper interpretation of the word "reparation," as used in this connection in section 12, will enable us to decide this question; for no one to whom reparation is not due can be entitled to the penalty. What is meant by it?

No reparation can be made for a failure to post a schedule in the past by a present posting. The posting is for the purpose of affording information to those desiring and seeking to ship property after the posting. It can be of no service to any one as to shipments made. As to him no reparation can be made, except by compensation for the injuries he has suffered from the failure to post. Compensation, then, for injuries or wrongs suffered by reason of the failures to comply with the act to which penalties are annexed is what is meant by "reparation." Section 7 furnishes an illustration, and that is overcharges paid by the shipper through ignorance of the regular rates of freight caused by the failure to post the schedule. The refunding of the amount paid in excess of the regular rates and interest would be a proper reparation in that case. The shipper who has looked for the posted schedule, and failed to find it, may be injured by time lost and trouble incurred in the search, and may be entitled to compensation therefor, and to nominal damages if no actual injury has been suffered. Other examples, which are unnecessary to

mention, might be given, but those given are sufficient.

Sufficiency of notice of injury.

The obvious intention of the act is to give to the railroad company an opportunity to make reparation for all injuries caused by its failure to comply with it. For that purpose, the party aggrieved is required to give notice to the company of the violation of the injury received therefrom, and to demand indemnity therefor; and the company is given fifteen days in which "to refund any overcharge or make other proper reparation." The notice should specify wherein the company had violated the act, and the damages to the party aggrieved occasioned thereby; otherwise, it would fail to accomplish the object for which it is required, for the railroad company cannot make reparation until it is apprised of the injury and the extent of the damages. Hence, notice containing information sufficient to accomplish this purpose should be given. The intention of the act in this respect is to be just, and to afford to railroad companies ample opportunities of making adequate compensation for specified injuries before penalties can be imposed on them.

It follows, then, that the person desiring and seeking in good faith to ship, or who has shipped, his property over the railroad, and who has been injuriously affected by the neglect to post the schedule, and has made demand and given notice according to the act, and failed to receive adequate compensation for the injuries he has suffered from such neglect, is the party aggrieved and entitled to the penalty for the failure. No other person, that is to say, no one who has not been injuriously affected, can perform the conditions essential to a recovery of the penalty, and hence is not entitled to it.

The evidence fails to show that appellee is entitled to any relief, by way of a penalty, on account of the failure of appellant to post a schedule of rates at Nashville. He did not state in the notice given how he was

aggrieved by the failure to post, the extent of his grievances, and the damages occasioned thereby. His notice is fatally defective. He has not complied with the act, and is not entitled to a penalty.

The judgment of the circuit court is, therefore, reversed; and a final judgment is rendered by this court in favor of appellant.

BRYANT *v.* STATE.

Opinion delivered June 6, 1896.

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LIQUORS — ILLEGAL SALE — VARIANCE AS TO PLACE OF SALE. — An information charging the unlawful sale of liquors in a particular building will not be sustained by proof of an illegal sale of liquors in any other place.

Appeal from Green Circuit Court.

FELIX G. TAYLOR, Judge.

John Bryant was tried and convicted before a justice of the peace on an information filed by the prosecuting attorney, alleging that, being the owner of the old Baird Saloon building in the town of Paragould, in the county of Greene and state of Arkansas, he "did unlawfully sell and give away, and cause to be sold and given away, and keep for sale and to be given away, and allow to be kept for sale and to be given away, in said building, ardent, vinous, malt, fermented, and intoxicating liquors, without first having obtained a license," etc. He appealed to the circuit court, with similar result, and thereupon appealed to this court.

The appellant *pro se.*

No venue was proved in this case. Nor was it proved, *as alleged*, that any sale of liquor was made in

the "Baird Saloon building." Having so alleged, the state must prove it.

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

Courts take judicial notice of the locations of towns, and the boundaries of counties. 12 Am. &. Eng. Enc. Law., p. 169. The evidence shows that the sheriff gave Davis the money to buy the whiskey, and in fifteen minutes he returned with the whiskey. It was an *impossibility* for the witness to have gone out of the county within the time.

BATTLE, J. The evidence adduced in the trial of the appellant in the circuit court failed to show that he sold and gave away, and caused to be sold and given away, and kept for sale and to be given away, and allowed to be kept for sale and to be given away, *in the Baird Saloon building*, in the town of Paragould, in the county of Greene and State of Arkansas, ardent, vinous, malt, fermented, and intoxicating liquors, and thereby failed to prove that he was guilty of the offense charged against him. Having alleged that the liquors were sold and given away, and were kept for sale and to be given away, *in the Baird Saloon building*, it devolved upon the state to prove it in order to convict. Proof of sale and gift, and keeping for sale and gift, in any other place would not be sufficient. *Shover* v. *State*, 10 Ark. 259; *State* v. *Anderson*, 30 Ark. 131.

Reversed and remanded.

Ex parte FORT SMITH & VAN BUREN BRIDGE COMPANY.

Opinion delivered June 6, 1896.

TAXATION — EQUALIZATION OF ASSESSMENT. — Where all other real property of the county has been assessed at one-half of its actual value, the owner of a bridge which is assessed at its actual value is entitled, upon application to the county court, to a reduction of one-half of the assessment, under Const. art. 16, sec. 5, providing that all property shall be taxed according to its value, "to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state," and Sand. & H. Dig., sec. 6530, providing that the board of equalization may reduce the valuation of such tracts as have been returned above their true value, "as compared with the average valuation of the real property of the county."

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

L. F. Parker and *B. R. Davidson*, for appellant.

"No one species of property * * shall be taxed higher than another species * * of equal value." Const. art. 16, sec. 3. There must be uniformity. 27 Ark. 202–210; 49 Ark. 337; 48 *id.* 382; 101 U. S. 143, 153; 127 *id.* 193; 41 Fed. 468. It is a violation of the constitution to assess at its *full value* one piece of property, while all other property is assessed at fifty per cent.

E. B. Kinsworthy, Attorney General, *contra.*

1. In estimating the *value* of property, it is proper to take into consideration the advantages or profits that can or may be derived from it. 17 Atl. 234; 46 N. J. L. 67; 25 Am. & Eng. Enc. Law, 226; 79 Am. Dec. 396. Appellants have only estimated the *cost of construction*, omitting the *franchise* and profits, etc.

2. In the absence of proof to the contrary, it will be presumed that the value fixed is a fair and just one. 146 N. Y. 304.

3. It is the duty of the assessor to assess the property at its cash value—not at half its cash value. Sand. & H. Dig., sec. 6498; 15 S. E. 768, 67 Miss. 614. The fact that other property is assessed below its true value will not entitle appellant to have the assessment of its property reduced to a value less than its cash value. 26 Atl. 845; 25 N. E. 469.

BATTLE, J. The Fort Smith & Van Buren Bridge Company owns a bridge over and across the Arkansas river, one-half of which is in Sebastian, and the other in Crawford, county. The assessor assessed the half of it in Crawford, for the year 1895, at $150,000. The bridge company then complained to the county board of equalization of excessive valuation, and asked that the assessment be reduced to $75,000; and the board reduced it to $125,000, and refused to make any further reduction. The bridge company then appealed to the county court, and it refused any relief, and then appealed to the circuit court, and, it refusing to reduce the valuation, appealed to this court.

The evidence adduced at the trial in the circuit court proved the facts we have stated; that $240,000 or $250,000 was a fair market price for the entire bridge; and that the basis on which the board of equalization of Crawford county attempted to equalize the assessment of all real estate in that county for 1895 was 50 per cent. of its actual value; that is to say, made the assessed or taxable value of such property one-half of what it was actually worth. Appellant contends that, under the circumstances, the assessment of one-half of the bridge should have been reduced, according to its request, to $75,000.

The theory of our constitution is that the burden of the support of the government should be borne by common contributions. Taxation is the principal means provided for this purpose. To make this burden equal, all property subject to taxation is required to be taxed according to its value, "that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state;" and the constitution provides that "no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value." Constitution, art. 16, sec. 5.

To carry into effect the constitution in this respect, the general assembly has enacted statutes making it the duty of the assessors of the counties in this state to assess all real estate "at its true market value in money" (Sand. & H. Dig., secs. 6498, 6499), and to prevent unjust discrimination, and to make the burden of taxation equal and uniform, enacted statutes which require the appointment of a board of equalization for every county in this state, whose duty it is to hear complaints of property-owners, and to equalize the valuation of all property, personal and real. In the discharge of this duty the board is required to observe the following rules:

"*First.* It shall raise the valuation of such tracts and lots of real property as in the opinion of the board have been returned [that is, by the assessor] below their true value to such price or sum as may be deemed to be the true value thereof, agreeably to the requirements of this chapter in regard to the valuation of real property. Said board may actually enter upon and view property when they are not fully satisfied of its true value.

"*Second.* It may reduce the valuation of such tracts or lots as in the opinion of the board have been returned above their true value, *as compared with the*

average valuation of the real property of such county, having due regard to the relative situation, quality of soil, improvements and natural and artificial advantages" (Sand. & H. Dig., secs. 6526, 6530).

According to the first of these rules, it is the duty of the board to raise the valuation of all real property, which has been undervalued, to its true value; and, according to the second, it is authorized to reduce the valuation of that which has been "returned above its true value, *as compared with the average valuation of the real property of the county.*" From the two it is apparent that the board has no authority to discriminate against one tract or lot of real estate in favor of all other property of the same kind in the county. All property of the same class should be valued according to the same standard, and that should be the market value. But, in the event the assessor has not done this, and the board finds that he has made exceptions to his rule of valuation, and assessed the real estate of a few higher than that of the majority of the property owners, the statute authorizes it to reduce the assessment of the few by valuing their property according to the rule by which such property of the majority was assessed. Whether the statute in this respect is constitutional, it is not necessary, at this time, to determine. One thing is clear, however; and that is, the assessor and board have no right to make discriminations in the assessment and equalization of the valuation of property.

The real property of Crawford county, with few exceptions, was assessed, it appears, for 1895, at one-half its market value. The bridge of appellants was one of the exceptions. The board refused relief against this wrong, and its owner appealed to the county court. Was it entitled to relief? It may be said that, inasmuch as its property was not assesed above its true value, it had no right to complain. But this is not true. It had

the right to demand that no unequal burden be imposed upon it by taxation. *Dundee Mortgage Trust Investment Co.* v. *Charlton*, 32 Fed. Rep. 194. The duty to contribute to the support of the state government by the payment of taxes is imposed upon all persons owning property subject to taxation. The constitution provides that this burden shall be apportioned among them according to the value of their property, to be ascertained as directed by law. When, therefore, the property of a few is taxed according to its value, and of all others at one-half its value, then the few are required to contribute double their portion of the burden. This is manifestly a wrong, and justice demands that it be redressed, whenever it can be done conformably to the laws.

When the Fort Smith & Van Buren Bridge Company, in the exercise of the right conferred upon it by the statute, appealed from the board, the county court, to which it appealed, thereby acquired jurisdiction over the valuation or assessment of the bridge, and the authority to grant any relief to which the company may be entitled. Was it entitled to any?

Judge Cooley says: "For a merely excessive or unequal assessment, where no principle of law is violated in making it, and the complaint is of an error of judgment only, the sole remedy is an application for an abatement, either to the assessors, or to such statutory board as has been provided for hearing it. The courts, either of common law or of equity, are powerless to give relief against the erroneous judgments of assessing bodies, except as they may be specially empowered by law to do so. * * * * The grounds on which one should have an abatement are not such as arise on a consideration of his assessment, considered by itself; but they may include the assessment of others, so far as, by reason of their not being what they should be, they

affect him injuriously. One may, therefore, justly claim an abatement of an assessment which, considered by itself, is not too high, if those of others are relatively and purposely made too low." Cooley on Taxation (2d Ed.), pp. 748, 751.

But can one be entitled to an abatement of an assessment which, considered by itself, is not too high, under any circumstances, when the constitution and statutes require all property to be assessed and taxed at its true value? In *Cummings* v. *National Bank*, 101 U. S. 153, "it appeared that the officers of Lucas county, Ohio, charged with the valuation of property for the purposes of taxation, adopted a settled rule or system by which real estate was estimated at one-third of its true value, ordinary personal property about the same, and moneyed capital at three-fifths of its true value. The state board of equalization of bank shares increased the valuation of them to their full value. Upon a bill brought by the Merchants' National Bank of Toledo against the treasurer of the county, in which the bank was established, to enjoin him from collecting taxes assessed on the shares of the stockholders, payment of which was demanded of the bank under the law, it was held that the rule or principle of unequal valuation of the different classes of property for valuation adopted by the board of assessment was in conflict with the constitution of Ohio (art. 12, sec. 2), which declares that 'laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and, also, all the real and personal property according to its true value in money,' and worked manifest injustice to the owners of shares in national banks; and that the bank was, therefore, entitled to the injunction against the illegal excess, upon payment of the amount of the tax which was equal to that assessed on other property. That decision was

rendered upon a disregard by the assessing officers of a rule prescribed by the constitution of the state." *Stanley* v. *Supervisors of Albany*, 121 U. S. 551; *National Bank* v. *Kimball*, 103 U. S. 732; Cooley, Taxation (2d ed.), 784.

In *Cummings* v. *National Bank* the court did not deny relief because the plaintiff's property was assessed at its true value, but relieved it of the unequal burden imposed upon it contrary to the constitution, by enjoining the collection of so much of the tax as was in excess of the amount of that assessed on other property of the same value. The relief granted was equivalent to superseding, before the levy of taxes, so much of the assessment as rendered it unequal; for without the assessment the tax is void. The right to grant either relief is based on the same principle. For the same reason that the injunction was granted in *Cummings* v. *National Bank*, the equivalent can be granted in a proper case by a court of competent jurisdiction, the object of the two remedies being the same.

In this case the county court acquired jurisdiction, by the appeal of the bridge company, to grant relief from the illegal, erroneous, or unequal assessment of appellant's property, but did not acquire the right or authority to make the valuation of all real property in the county, for the purposes of taxation, in all cases in which it had not been done, the true value, by raising it, or to change the valuation of any property except the bridge. The assessment of no property can be increased without notice first given to the owner by the board of equalization. (Sand. & H. Dig., sec. 6520; *Board of Equalization Cases*, 49 Ark. 518). How, then, was the county court to afford relief to appellant? The only relief it could have afforded was to reduce the valuation, so as to make it conform to the standard adopted in the valuation of the other real property in the county, or the

average valuation of such property. Why should not this relief be granted? The valuation of property is only a constitutional means adopted for the purpose of making the burdens of government bear upon each taxpayer in proportion to the value of his property. The relief suggested accomplishes that end in this case. By granting it a constitutional right will be enforced, and by denying it will be withheld, because the means devised for its enforcement were not adopted. By pursuing the latter course the constitution will be made the means of defeating itself, by the imposition of unequal burdens. To avoid this result, the relief should be granted.

In assessing and equalizing the value of bridges, buildings, structures and improvements on lands, the assessors and boards are governed by the same rules; they being real property, as defined by the revenue laws of this state. Sand. & H. Dig., sec. 6401.

As the assessment of the real property of Crawford county for 1895 was purposely equalized at one-half of its market value, so the valuation of one-half of the bridge of appellant should have been reduced by the county court to $75,000, as the owner requested; that being fully as much as, or more than, one-half of its market value.

The judgment of the circuit court is, therefore, reversed, and the cause is remanded, with directions to reduce the valuation of the bridge, for assessment for 1895, to $75,000, and for other proceedings.

RICHARDSON *v.* HARRELL.

Opinion delivered June 13, 1896.

FORCIBLE ENTRY AND DETAINER—SUFFICIENCY OF BOND.—A bond in unlawful detainer conditioned that if defendant deliver to plaintiff possession of the premises, together with the costs and damages awarded plaintiff if so decreed by the court, the bond shall be void, etc., is a substantial compliance with Sand. & H. Dig., sec. 3452, providing that the bond required of defendant to enable him to retain possession of the property shall be that, if plaintiff recover, defendant will deliver possession and satisfy any judgment the court may render against him in the action. (BATTLE, J., dissenting.)

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

The intestate of appellee brought his action of unlawful detainer for the property in question against H. C. Billingsly in April, 1892, alleging a lease of the premises to Billingsly in writing, and a forfeiture of the lease by Billingsly; and prayed for possession, and for $600 damages for the unlawful detention thereof. The writ of possession was issued on the same day, and on the 28th of April, 1892, Billingsly filed a bond to retain possession of the property in the sum of three thousand dollars, with appellants as securities, conditioned that, if Billingsly should deliver to the plaintiff the possession of the premises, together with the costs and damages awarded to the plaintiff, if so decreed by the court, then the bond should be void; otherwise to be and remain in full force and effect. This bond was approved by the sheriff, 30th of April, 1892. On his motion, the appellee, Harrell, was made a party plaintiff, as administrator of Wm. Beard, the lessor, and the cause was revived in his name as such administrator. On the 10th

of December, 1892, Harrell, as administrator, amended the complaint, and alleged a forfeiture of the contract of lease by Billingsly, claiming the sum of $1825 for rents that had accrued before the demand for possession.

The appellee Billingsly demurred to this amendment, and, his demurrer being overruled, the cause was tried upon the complaint and amendment thereto, the answer of Billingsly, and the testimony of John M. Harrell. Judgment was rendered upon the verdict of the jury for $3,237.50 in favor of appellee and against Billingsly and his bondsmen. The bondsmen filed a motion for a new trial long after the time within which such a motion could be filed according to law, and upon motion of the appellee the same was stricken out, and disallowed by the court. The bondsmen appealed to this court.

Wood & Henderson, for appellants.

1. No judgment could be rendered on the bond except for the damages sustained by being kept out of possession after notice of plaintiff was served on Billingsly to quiet and deliver possession. Mansf. Dig., sec. 3362. Prior to act February 8, 1883, no judgment for damages could be rendered against bondsmen except for possession and costs. 40 Ark. 38; 44 *id.* 500; 36 *id.* 330. Since this act (now Sand. & H. Dig., sec. 3460), judgment may be rendered for damages from *demand of possession* to judgment against the bondsmen. 57 Mo. App. 481; 36 Ark. 524. The act of 1891 (Sand. & H. Dig., sec. 3458) has not changed this provision. It provides for judgment against the *defendant*, but makes no provision for judgment against the bondsmen. See Mansf. Dig., sec. 3362; Sand. & H. Dig., sec. 3460. The judgment can only be for *damages*, and not for back rents, etc.

2. The bond is not in accordance with the statute, and no judgment could be rendered upon it without notice and the bondsmen being made parties.

3. It was error to permit plaintiff to prove his damages by the contract of lease. After the contract of lease expired or was forfeited, it was no criterion by which to measure the damages. The rent might be more or less. After forfeiture the question is, what is the rental value of the property? Even if this was a good common law bond, under the ruling in 38 Ark. 72, no judgment could be rendered against the sureties without notice.

4. The court erred in its instructions. As no rents were claimed in the original complaint, the $100 paid must have been paid on the April rent, and, if so, the forfeiture up to that time was waived, and a new notice was necessary. Taylor's Landlord & Tenant (8 Ed.), 485–7.

5. Even if the motion for new trial was not filed in time (Sand. & H. Dig., sec. 5481), the court ought to pass on the errors, because they appear from the record itself; and no motion for a new trial was necessary. 46 Ark. 21; 26 *id.* 536; *Ib.* 666; 43 *id.* 403; 34 *id.* 686; 32 *id.* 154; 27 *id.* 37; 27 *id.* 464.

6. The judgment was for more than the bond. 37 Ark. 599.

7. The bondsmen had no notice of the amendment to the complaint, and were not made parties. 1 Black, Judg., 219; 19 Ark. 574; 73 Am. Dec. 647; 6 L. R. A. 821. Summary judgments against sureties must be in accordance with their undertaking. 29 Ark. 212.

8. The administrator had no right to bring this suit. 46 Ark. 377.

Geo. G. Latta, for appellee.

1. The judgment for back rents is fully authorized by law, and the jury were authorized to bring in a verdict for the rent due at the commencement of the

suit, and up to the time of judgment. The bond is substantially in compliance with the statute, and no notice to the bondsmen was necessary, nor was it necessary to make them parties.

2. The lease was properly admitted to show the amount of rent due.

3. No motion for new trial was filed in time. 26 Ark. 536; 25 *id.* 275; 29 *id.* 320; 54 *id.* 551.

4. The remittitur cured the error, if the judgment was excessive. 37 Ark. 599; 54 *id.* 354; 11 *id.* 280; 26 *id.* 94.

5. The administrator had the right to sue. 34 Ark. 63; Mansf. Dig., sec. 81; 42 *id.* 25; 55 *id.* 222. The heirs were not necessary parties. 49 Ark. 87.

HUGHES, J., (after stating the facts). The motion for a new trial not having been filed in time, and having been stricken out by the court, the only question presented for our determination in the case is, was it competent for the court to render judgment on the defendant's bond against the securities in this action? The contention of the appellants is that no judgment could be rendered on their bond against them for any amount, save the damages sustained by the plaintiff by being kept out of possession of the property after the notice was served on Billingsly to quit and deliver possession to the plaintiff. To maintain this contention, the appellant relies upon the act of February 8, 1883, which provides for the recovery only of damages by plaintiff for being kept out of possession, but the later act of February 5, 1891, is in conflict with this, and must prevail.

By the act of February 5, 1891, it is provided that, "if, upon the trial of any action under this act, the finding or verdict is for the plaintiff, the court or jury trying the same shall assess the amount to be recovered by the plaintiff for the rent due and withheld at the time of commencement of the suit and up to the time of

rendering judgment, or the value of the use and occupation, or of the rents and profits thereof during the time the defendant has unlawfully detained possession, as the case may be, and damages for withholding the same, or the damages to which said plaintiff may be entitled on account of the forcible entry and detainer of said premises," etc. Sand. & H. Dig., secs. 3458, 3459, (part of same act) provides that * * * * in all cases where judgment is rendered either against the plaintiff or defendant, for any amount of recovery, judgment shall also be rendered against his sureties in the bond given under the provisions of this act." The condition of the bond required by statute of the defendant to retain possession of the property, as prescribed by act of February 5, 1891, is that, if the plaintiff recover in the action, he will deliver possession of the premises to the plaintiff, and satisfy any judgment the court may render against him in the action. (Sand. & H. Dig., sec. 3452). This can mean only that, besides delivering possession of the premises, the defendant will pay any damages that may be assessed against him, and these may include rents that were due and unpaid at the time of the commencement of the suit, and up to the time of rendering judgment, or the value of the use and occupation, or of the rents and profits thereof, during the time the defendant has unlawfully detained possession, as the case may be, and damages for withholding the same, or the damages to which the plaintiff may be entitled on account of the forcible entry and detainer of said possession, as provided by section 3458, Sand. & H. Dig. The condition of the bond given in this case by the defendant to retain possession of the property is: "Now, if the said H. C. Billingsly shall deliver to the plaintiff the possession of the premises aforesaid, together with the costs and damages awarded to the plaintiff, if so decreed by the court, then this bond

shall be void; otherwise to be and remain in full force and effect. It is a mere play upon words to say that these bonds do not mean the same thing, though differing in phraseology. They both mean that the defendant, if judgment be rendered against him, shall pay the amount of the judgment, all the damages by reason of the defendant's failure to pay rents, as well before the institution of the suit as after, down to the rendition of the judgment; for they are all damages.

"DAMAGE.—A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another." Black, Law Dictionary, p. 316, tit. "Damage."

The counsel for appellants maintain that there is a distinction made by the statute between a recovery for rent and a recovery for damages; one being for the unlawful withholding, and the other for rent due by contract. Yet it is plain that they are only damages arising from different wrongs suffered; that is, from the withholding of the premises after demand, and from withholding rents to the time of commencement of the suit. Though arising from different wrongs, they are nevertheless damages, and are unquestionably recoverable in the same action.

A bond to "deliver to the plaintiff possession of the premises with the costs and damages awarded to the plaintiff, if so decreed by the court," certainly, by fair and reasonable construction, provides for the payment of all damages of whatever kind, or from whatever cause accruing, that may be awarded by the court. "It is so nominated in the bond."

The bond given in this case conforms to the requirement of the act of March 2, 1875, as amended by act December 13, 1875, and differs from the one required by

act of February 5, 1891, in phraseology, but not in legal effect. The parties who executed this bond are presumed to have known that the law provided that, if judgment were rendered for any amount against the defendant in the action, judgment should be rendered for the same amount against the sureties on the bond; and that judgment might be rendered in the action for rents past due when the suit was brought, as well as for damages for the unlawful withholding of the property after demand therefor made, and for other damages sustained by the plaintiff by reason of said unlawful withholding of the possession of the premises. The act of 1891 amended the law as it existed before then, so as to allow the recovery of damages for failure by the defendant to pay back rents that accrued prior to the demand for possession. We are of the opinion that the bond in this case was a substantial compliance with the requirement of the act of 5th February, 1891 (sec. 3452, Sand. & H. Dig.); and that it was proper in this action to give judgments for back rents, and to render judgment for the same against the sureties on the bond, if the pleadings and proof in the case warranted.

All questions as to the evidence and instructions having been waived by the failure of the appellants to file a motion for new trial in time to have it made a part of the record in this case, there is nothing more left for determination. The error of entering judgment for a sum greater than the amount named in the bond of the appellants was cured by a remittitur of the excess. The judgment is affirmed.

BATTLE, J., (dissenting). The bond executed by the defendant and his sureties in order to retain possession of the property in controversy is not in conformity to the statute. It is conditioned that "if the said H. C. Billingsly [defendant] shall deliver to the plaintiffs the

possession of the premises aforesaid, together with the costs and damages awarded to the plaintiff, if so declared by the court, then this bond shall be void." The condition of the bond the statute authorized him to give in this case is "that he will deliver possession of the premises to the plaintiff, if the plaintiff recover in the action, and *satisfy any judgment the court may render against him in the action.*" A comparison of the two conditions shows that the bond in this case is not in conformity with the statute.

The bond before us was given in accordance with section 3355 of Mansfield's Digest, which was amended in 1891, and is in part as follows: "If the said defendants shall express a desire to retain possession of said premises, the said sheriff shall give said defendant ten days time within which to make his bond, with sufficient securities, in an amount equal to that named in plaintiffs bond, and conditioned that he will deliver to the plaintiff the possession of the premises, together with the costs and damages awarded to the plaintiff, if so decreed by the court." The condition of the bond under consideration was copied from this statute. What the language copied meant was clearly understood when the statute from which it was taken was in force. By it the defendant and his sureties were bound to plaintiff to pay to him all damages he suffered by withholding the land in controversy after lawful demand therefor was made. This did not include rents and profits, or any sum for the use and occupation of the land, which accrued before the demand was made. Mansf. Dig., sec. 3362.

On the 5th of February, 1891, the statutes were amended, and the remedies of plaintiffs in actions of unlawful detainer were so enlarged as to include *damages for withholding* the land already allowed, together with the rent due and withheld at the time of the com-

mencement of the suit and up to the time of rendering judgment, or the value of the use and occupation or of the rents and profits thereof during the time the defendant has unlawfully detained possession, as the case may be. Whatever the plaintiff recovers as rent for use and occupation, or rents and profits, *damages for withholding* the land, is allowed *eo nomine* in addition thereto. In the sense that word ("damages") is used in the statutes regarding the rights of parties in actions of unlawful detainer, the amounts recoverable for rents and for use and occupation are not intended. They are kept separate and distinct in the statutes. For example, the statute says: "If, upon the trial of any action under this act, the finding or verdict is for the plaintiff, the court or jury trying the same shall assess the amount to be recovered by the plaintiff for the rent due and withheld at the time of [the] commencement of [the] suit and up to [the] time of rendering judgment, or the value of the use and occupation, or of the rents and profits thereof during the time the defendant has unlawfully detained possession, as the case may be, and *damages for withholding the same*, * * * and in all cases where judgment is rendered, either against the plaintiff or defendant for any amount of recovery, *damages*, or costs, judgment shall also be rendered against his sureties in the bond given under the provisions of this act." Sand. & H. Dig., sec. 3458.

The bond before us and that used by the statute are not of the same legal effect. The latter binds the defendant, if the plaintiff recovers, to satisfy any judgment the court may render in the action; the former, to deliver to the plaintiff the possession of the premises, "together with the costs and damages awarded to the plaintiff, if so decreed by the court,"—only a part of what the latter binds him to do. The former is not a statutory bond, and no judgment can lawfully be ren-

dered upon it in this action. *Lowenstein* v. *McCadden*, 54 Ark. 13; *Martin* v. *Tennison*, 56 Ark. 291.

I think the judgment against the appellant should be reversed.

LOVEJOY *v.* STATE.

Opinion delivered June 13, 1896.

CRIMINAL LAW—INSTRUCTIONS—WEIGHT OF EVIDENCE.—An instruction in a larceny case that if the jury believe, "from a preponderance of the evidence," that defendant took the property under the honest belief that he was the owner, they should acquit, is erroneous, as the state must prove his guilty intent beyond a reasonable doubt.

Appeal from Prairie Circuit Court, Northern District.

JAMES S. THOMAS, Judge.

J. P. Roberts, for appellant.

1. There is a total want of proof to sustain the verdict. 34 Ark. 632; 47 *id.* 567; 57 *id.* 567.

2. The third instruction given by the court on its own motion is not the law. It throws the burden on defendant to show his innocence by a *preponderance* of the evidence. The court should have given the second and third asked by defendant. An honest purchase of property cannot be criminal by reason of the price paid. The non-consent of the owner taking the property is not shown, and it cannot be presumed or inferred. The alleged owner testified in the case, and circumstantial evidence cannot be resorted to to prove it. 12 Tex. App. 481; 44 Ark. 39; 14 Tex. App. 49; 12 Am. & Eng. Enc. Law, 838.

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

Appellant admitted that the cattle belonged to Wood, but claimed that he bought them from Conner, whom he thought to be the owner, and the burden was on him to show these facts, and the court properly so instructed the jury.

WOOD, J. The appellant was convicted of the larceny of two heifers. There was proof on behalf of the state to the effect that the heifers were the property of one Wood, and that appellant had taken same and sold them, appropriating the proceeds to his own use; and the state endeavored to show that appellant knew that the property belonged to another when he sold same. The appellant, on the other hand, contended that he sold the heifers in good faith, believing them to be his own; and he introduced proof tending to show that he had bought the heifers from one Conner, who claimed to own the same.

The court gave the following instruction, to which appellant excepted: "(3) You are further instructed that if you believe, from a preponderance of the evidence, that the defendant took the cattle under the honest belief that he was the owner of them by virtue of having bought them from another person, and if you believe that said defendant acted honestly and in good faith in the matter, then you would be authorized to find him not guilty, although you may believe that the seller was not the owner; and it would be for you to say, from all the facts and circumstances proved in the case, as to whether he acted honestly and in good faith in the transaction."

The court correctly charged the jury as to the material allegations of the indictment, one of them being "that the defendant took the property with the felonious intent to deprive the owner of the use of it," and the court also correctly charged the jury that these allegations must be established "beyond a reasonable doubt."

But the above instruction is in conflict with these. "Preponderance" and "reasonable doubt" are not synonymous terms. It is sufficient if the proof in the whole case raises a reasonable doubt as to whether the defendant took the cattle with a felonious intent. The state would not be justified in a conviction upon a preponderance of the evidence. Yet this instruction tells the jury "that, if they believe from a preponderance of the evidence that the defendant took the cattle under the honest belief that he was the owner," they should acquit. The converse would be, "If you do not believe from a preponderance of the evidence" that defendant took the cattle under the honest belief that he was the owner, etc., you should convict. The instruction makes the question of intent, which is the very essence of the crime charged, depend upon the preponderance of the evidence to establish it, whereas it must be established by the state beyond a reasonable doubt. It must not be forgotten that in criminal cases, under the plea of not guilty, every element in the crime is controverted, and the state must affirmatively prove guilt.

"It would," says Mr. Bishop, "be a wide departure from the humanity of the criminal law to compel a jury, by a technical rule, to convict one of whose guilt, upon the whole evidence, they had a reasonable doubt. And it would reverse the presumption of innocence to hold a defendant guilty unless, taking the burden on himself, he could affirmatively prove himself innocent. All evidence should be viewed in its entirety, not in detached parts. The whole of an alleged crime must be proved, just as the whole of it must have been committed. In reason, therefore, this whole and indivisible thing, the burden of proof, must be borne by the government throughout the trial." 1 Bish. Cr. Pro., sec. 1051.

It is only in those cases where the defendant either absolutely, or for the purposes of the trial, admits all

the allegations of the indictment, but sets up some special matter of defense, as license, pardon, *autrefois acquit* or *convict*, insanity, etc., that the burden is on him to maintain his defense by a preponderance. *McArthur* v. *State*, 59 Ark. 431; 1 Bish. Cr. Pro., sec. 1049; Whar. Cr. Ev. (8 Ed.), sec. 720.

The defendant asked the following among other instructions: "You are instructed that if you believe from the evidence that the defendant purchased the heifers mentioned in the indictment from one Conner in good faith, believing Conner to be the owner of them, or if you have a reasonable doubt as to whether his purchase from Conner was in good faith, believing him to be the owner, you will find the defendant not guilty." This was the law.

The refusal to give this, and the giving of the third, *supra*, was error, for which the judgment is reversed, and the cause remanded for a new trial.

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SCHOOL DISTRICT OF FORT SMITH *v.* HOWE.

Opinion delivered June 13, 1896.

TAXATION—EXEMPTION.—Lands purchased and held by a school district solely for sale or rent and for the sake of profit are not within the provision of the constitution exempting from taxation "public property used exclusively for public purposes." (Const. 1874, art. 16, sec. 5).

Appeal from Sebastian Circuit Court, in Chancery, Fort Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

Proceeding to enjoin clerk of Sebastian county from extending taxes against certain lands owned by the

School District of Fort Smith. The facts are as follows: A portion of the military reservation at Fort Smith was donated by act of Congress to the city of Fort Smith, to be held in trust for the use of the free public schools of said city. The act provided that within ten years the lands should be laid off into lots, and the lots sold at public sale, and that the proceeds should be paid "to the treasurer of the school board of the single school district of Fort Smith, to be used by said board in the erection of school houses and for the pay of teachers and the maintenance of the free public schools in said district." Afterwards the General Assembly of this state passed an act the first section of which is as follows: Section 1. "That the school board of the school district of Fort Smith shall [be] and is hereby authorized and empowered and required, in behalf of and for the said school district, to become a purchaser at any sale hereafter made by said city of any unsold lots or real estate donated or granted by the act of Congress, approved May 13, 1884, to the said city for the use and benefit of the free public schools of the single school district of said city; and hereafter to own, lease, control, or sell the same, and also to become a purchaser at any sale of any property situated in said school district, on which said school district may at the time of such purchase have any lien, or in which it may have any interest, whenever, in the opinion of said school board, it shall be deemed necessary in order to protect the interest of said school district." Acts 1891, p. 166. The property described in the complaint and claimed to be exempt was acquired by the school district of Fort Smith through purchase by the board of directors of said district under the authority of the act above quoted. Most of the property consists of vacant and unimproved city lots, but a portion of the lots have buildings upon them and are rented.

Humphry & Warner, for appellant.

1. Appellant is a governmental agency of the state, and holds the property for the *sole purpose* of maintaining free public schools, and it is not subject to taxation under the constitution and laws of this state. Rev. St. U. S. 1883–4, p. 19; Acts Ark. 1885, p. 102; Acts 1887, p. 93; Acts 1891, p. 166; 1 Desty, Tax., p. 34, sec. 12; Cooley, Tax., p. 72; Const. Ark. act 16, sec. 5; Sand. & H. Dig., sec. 6414. All the property held is public property, and is property belonging to the state. The appellant is a mere agency of the state. 56 Ark. 360; 30 N. J. Eq. 686; 42 Pa. St. 25; 36 Cal. 222; 76 Ill. 187; 80 Ill. 384; 80 N. Y. 302; 118 Ill. 55; 60 Pa. St. 31; 51 Ill. 52; 77 Me. 534; 28 Kas. 376; 29 *id.* 699; 47 Cal. 361; 1 Swan, 269; 83 Mich. 470; 49 Ark. 96; 44 Conn. 367; 37 Iowa 168.

2. To lay a tax on school property is a positive violation of the constitution. Art. 14, sec. 2, Const.; 80 Ill. 384; 80 N. Y. 302; 4 Wheat. 326; Cooley, Tax., (2 Ed.), p. 5. See also 71 Tex. 192; 109 Ind. 562.

Clendening, Mechem & Youmans, for appellee.

1. The title to this property is not in the state, but in the school district. The fact that the latter is an agency of the state does not matter. The cases cited by counsel are under constitutions and laws of other states not like ours, and were cases where the property *belonged* to the state in trust. The grant here was not to the state, but to the city of Fort Smith. See Rev. St. U. S. 1884; Acts 1885, p. 102, etc. The state is not even a trustee. The reasoning of the cases cited does not apply. The property must be used *exclusively* for public purposes. 57 Ark. 445; Sand. & H. Dig., sec. 6414. If the property belonged to the state, it would be exempt under the fourth clause of the section. There is a vast difference between property belonging to the

state and that belonging to an agency of the state. 56 Ark. 153; 64 Iowa, 554; 85 Am. Dec. 624. Only property used for public purposes, or which belongs to the state, is exempt. Cases *supra*. All public school property devoted to free public school purposes is certainly exempt, but that used for rental or owned for sale for profit stands on a different footing, and is not exempt under our law.

2. The property is not exempt under sec. 2, art. 14, Const. As construed by counsel, this section is antagonistic to the provisions in sections 5 and 6 of Art. 16. Cooley, Const. Lim. 70–71; Endl. Int. St., sec. 515. The property belonging to appellant is no part of the fund referred to in sec. 2, art. 14. If two provisions of a constitution are irreconcilably repugnant, that which is last in order of time and in local position shall be preferred. 7 Ind. 570; 19 Pa. St. 211; 8 Col. 408; 9 Neb. 429.

RIDDICK, J., (after stating the facts). The lots claimed by appellant to be exempt from taxation belong to the school district of Fort Smith, and the question before us is whether such land is exempt from taxation. The constitution of the state declares that laws exempting property from taxation, except as therein provided, shall be void. Const. 1874, art. 16, sec. 6; *L. R. & Ft. S. Railway* v. *Worthen*, 46 Ark. 312. It further provides that the following property shall be exempt from taxation: "Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity." Const. 1874, art. 16, sec. 5. This provision defining what public property is exempt from taxation does not refer to property owned by the state, for the presumption is that the state does not intend to

tax its own property; but it refers to property owned by the public corporations or organizations of the state, such as counties, cities, towns, and school districts. The question before us is not whether this land is presumptively exempt from taxation, for, under the provision of the constitution above referred to, there is no room for such a contention. Under that provision all property not expressly exempted by the constitution is subject to taxation, except property of the state or general government. In order therefore to justify us in holding that this property is exempt, there must be found in the constitution itself provision for its exemption. Const., art. 16, sec. 6; *L. R. & Ft. S. Railway* v. *Worthen, supra.*

It is first said that this is public property, but it will be noticed that all public property is not exempt from taxation, but only that public property which is used exclusively for public purposes. It is conceded that this land is public property, but the question of its exemption from taxation is not determined alone by its character as public property, but also by the nature of its use. This land is not used for school grounds, nor is there any intention to erect upon it buildings of any kind for the use of schools, but it was purchased and is now held only for the purpose of sale or for rent. It was purchased by the board of directors of the school district of Fort Smith as an investment and for profit, under the authority conferred by the act of April 1, 1891. The proceeds arising therefrom, when sold or rented, are to be used for the benefit of the public schools of said district, yet this does not justify us in holding that the land itself is now used exclusively for public purposes, within the meaning of our constitution. It is true that in a certain sense all land belonging to the public must be used for public purposes, for whether it be held for sale or rent or used

as a park or pleasure ground, or in some other way, in contemplation of law its control and use must be regulated by considerations of benefit to the public community to which it belongs. But it is obvious that this is not the sense in which the constitution speaks of exempting "public property used exclusively for public purposes." It seems clear that the intention was to exempt only that public property which in itself directly subserved some public purpose by actual use, as distinguished from property belonging to the public but not used by it, and from which a benefit accrues to the public, not by the immediate use thereof by the public, but indirectly through selling or renting the same to private parties. To illustrate: Some of these lots have buildings upon them, and are rented to different tenants. One may be rented to a grocer, another to a butcher, and another to a saloon keeper. Although the object and effect of renting the property in such cases may be a benefit to the public, yet we cannot say that such property is used exclusively for public purposes. To do so would be to confound the use of the property with the incidental benefit to the public derived from rents paid by the party who uses it for his own private purposes. Neither the use of the property for the sale of groceries by a grocer, of meat by a butcher, nor for the sale of liquor by a saloon-keeper, is the use of it for a public purpose, or for the purpose of benefiting the public. The purpose for which these tenants use this property is their own private gain, and the fact that they pay rents to the public does not change the purpose of this use from a private to a public one. The case of *Brodie* v. *Fitzgerald*, 57 Ark. 445, bears directly on this point. It was held in that case that, although the rents and revenues derived from certain land were devoted solely to public charity, yet such land was not exempt from taxation, under the provision in the constitution

exempting from taxation buildings, grounds, and materials used exclusively for public charity.

If the intention of the makers of the constitution was to exempt public property the use of which inures to the benefit of the public in some way, then the effect is to exempt all public property, for such property can be used lawfully only for the public benefit, and this seems to be the conclusion reached by counsel for appellant. But all public property is not exempt. All property belonging to the public must be used for the benefit of the public, but our constitution distinguishes and sets apart as exempt from taxation only that public property which is itself used exclusively for public purposes. If a school district purchases land not to be used for school grounds, or for some other public purpose, but as an investment of its funds, and for the purpose of sale or rent, then it must take such lands with the burden which the law imposes even upon public property not used exclusively for public purposes. It must pay taxes upon such lands, as other land owners do. If the burden becomes too heavy, it can get rid of it by selling the land; for so long as the money arising from such sale is kept as a fund to be used in defraying the expenses of the public schools of the city, it will be exempt from taxation, such a use of the fund being exclusively for a public purpose. *Cincinnati College* v. *State*, 19 Ohio, 110.

It is necessary that a school district should have a school building and grounds. If such property was taxed and sold for the non-payment of taxes, the public would have to pay other taxes in order to replace the same, for it is absolutely essential that a school district should own a school house. For that reason school buildings and grounds are exempt from taxation. But it is not essential that a school district should hold land for the purpose of sale or rent, and as an investment for profit.

When land is thus held by a school district, it is deemed to be held by such corporation in "its commercial capacity as a private corporation," and the reasons for exempting such property from taxation are slight as compared with those which exist in favor of exempting buildings and grounds actually and exclusively used for public purposes. Considerations of this kind probably led the makers of our constitution not to exempt such property from taxation. Cooley, Taxation (2d Ed.), 173; *City of Louisville* v. *Commonwealth*, 1 Duvall, 295; S. C. 85 Am. Dec. 624; *Brodie* v. *Fitzgerald*, 57 Ark. 445; *West Hartford* v. *Water Commissioners*, 44 Conn. 360; *State* v. *Assessors*, 35 La. An. 668; *Cincinnati College* v. *State*, 19 Ohio, 110.

It is further said that a school district is one of the governmental agencies of the state, that property belonging to it is property of the state, and as such not subject to taxation; but such contention, as applied to the facts of this case, is not tenable. A school district is a creature of the state, and the general assembly enacts the laws under which the property of such a district is acquired and used. But the property of a school district is not the property of the state, any more than the property of a city or county is the property of the state. *Pearson* v. *State*, 56 Ark. 153; Cooley, Const. Lim. 290, 291. The title of this property is not in the state, but in the school district of the city of Fort Smith, and it does not come within the meaning of sec. 2, art. 14, Const. 1874, which has reference to property held by the state in trust for schools and colleges, and to the public school fund of the state, of which this property is not a part.

As the decision of this case turns on the construction of our own constitution, we have not felt it necessary to discuss the cases from other states cited by counsel

in their printed argument, and to which we have given that consideration they well deserve.

Our conclusion is that the circuit court correctly ruled that lands of the school district of Fort Smith, purchased and held by such district solely for sale or rent, and for the sake of profit, are not, within the meaning of the constitution, used exclusively for public purposes, and are subject to taxation.

Judgment affirmed.

Bunn, C. J., dissents.

STATE v. BAILEY.

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Opinion delivered June 27, 1896.

INDICTMENT—JOINDER OF COUNTS—ELECTION.—Where an indictment for unlawfully carrying a pistol contains two counts, but alleges that the same offense is intended to be charged in both, the state should not be required to elect between the two counts, because the first count states that the pistol was not such as is used in the army or navy of the United States, and the second states that it was; especially where a demurrer to the second count upon the ground of failure to allege that the pistol was carried as a weapon should have been sustained.

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

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

1. But one offense was charged in the indictment. The counts are but a form of alleging the modes and means in the alternative, which may be done. Sand. & H. Dig., sec. 2076. The second count states that the offense therein charged is the same as that charged in the first. Such indictments are good. 60 Ark. 13; 34 *id.* 433; 50 *id.* 306; 37 *id.* 224.

2. An offense may be charged in as many counts as are necessary to cover the different modes in which it might have been committed. 50 Iowa, 372; 89 Ill. 571; 20 Tex. App. 320; Whart. Cr. Pl. & Pr., sec. 285. No election will be required when the counts vary only in form, as in the case at bar. Whart. Cr. Pl. & Pr., sec. 293; 58 Ga. 577; 20 S. E. 892.

BUNN, C. J. This is an indictment for carrying a pistol as a weapon, containing two counts. Motion by the defendant to compel the state to elect upon which count it would prosecute, and motion sustained. The state declined to elect; took exceptions. Judgment for defendant, and state appeals.

The indictment reads as follows: "The grand jury of Garland county, in the name and by the authority of the State of Arkansas, accuse Pres Bailey of the crime of carrying a pistol as a weapon, committed as follows: The said Pres Bailey in the county and state aforesaid, on the 22d day of April, 1895, unlawfully did carry, as a weapon, such a pistol as is not used in the army or navy of the United States, against the peace and dignity of the State of Arkansas." Second count: "And the grand jury aforesaid, in the name and by the authority aforesaid, on their oath, do further present that the said Pres Bailey, in the county and state aforesaid, on the 22d day of April, 1895, unlawfully did carry such a pistol as is used in the army or navy of the United States, said pistol not being then and there carried by the said Pres Bailey uncovered and in his hand (this being the same offense as that charged in the first count of the indictment), against the peace and dignity of the State of Arkansas."

Notwithstanding the seeming inconsistency between the charges in the first count that the pistol was not such as is used in the army or navy of the United States, and that in the second count that the pistol was

such as is used in the army or navy, the offenses in the two counts are one and the same, as stated in the second count, and for this reason the motion to elect should not have been sustained. *State* v. *Rapley*, 60 Ark. 13; *Howard* v. *State*, 34 *id.* 433.

Besides the second count of the indictment was of itself demurrable, and should have been so held, on the demurrer interposed, leaving only the first count valid, for the reason that the pistol was not alleged to have been carried as a weapon in this count.

For the errors named the judgment is reversed, and the cause remanded for further proceedings not inconsistent herewith.

HYNES *v.* STEVENS.

Opinion delivered June 27, 1896.

USURY—EFFECT UPON CONTRACT ORIGINALLY VALID.—A mortgage given to secure a valid debt will not be vitiated by a subsequent agreement that it shall also be security for a usurious debt.

Appeal from Crawford Circuit Court in Chancery.

JEPHTHA H. EVANS, Judge.

Jesse Turner, for appellant.

Whether the original agreement was usurious or not, it matters not now, as that note was paid off. There was no usury in the $110.50 note, as the bank only deducted the interest in advance. 60 Ark. 288. Nor was there any in the Hays note. It may be true that, *long after* the agreement, two $20 notes were executed, and were usurious, but this subsequent usurious agreement for the *extension* of valid notes could not taint the original notes or discharge the lien on the land. No authorities need be cited on this point.

BUNN, C. J. The facts in this case are that appellee had purchased the SE ¼ of SE ¼ of section 34, township 10 north, range 32 west, from the Little Rock & Fort Smith Railway Company for the sum of $120, and given his note therefor, less $30 cash, and taken bond for title, conditioned in the usual way. The $90 were to be paid in three equal annual instalments, and deed to be made when all the instalments were paid.

On December 17, 1888, plaintiff Stevens borrowed of defendant Hynes, as cashier of the Crawford county bank, $100, and executed his promissory note to him for $120, of that date, due November 1, 1889, and to secure the payment of same assigned said bond for title or contract of sale to him.

On December 17, 1889, plaintiff Stevens paid off said note, and demanded his bond for title, and the same was refused by the defendant, acting for said bank, claiming that the bank owned a note (called the "Hays note") of plaintiff for $125, with accrued interest. After some negotiations it was finally agreed between them that defendant's bank should loan plaintiff $100 for one year at 10 per cent. interest, plaintiff to pay the accrued interest on the $125, and the land contract or title bond should remain as security for all the indebtedness of plaintiff to said bank, and an extension of one year to be given on the $100 and the $125. Defendant then paid over to plaintiff the $100, less $12.50, on the accrued interest on the $125, took plaintiff's note for $110.50, payable November 15, 1890, and dated December 2, 1889. (The $100 and interest at 10 per cent. from date until maturity, and the interest on said interest for that time made the $110.50, the note to draw interest only from maturity.) Subsequently a further extension of one year was given on the two notes, and in consideration thereof plaintiff gave defendant two notes, each for $20. The $110.50 note, the $125 note,

and the two $20 notes all remained unpaid at the time of the institution of this suit. This was a bill in equity to compel defendant to surrender title bond, on the ground that the debts for which it was held were usurious.

On bill and answer and testimony of plaintiff with exhibits, the court found that there was no usury in the $110.50 nor in the $125 note, but that the deed, which in the meantime had been executed and delivered to defendant on the bond for title by the railroad company, was in fact a mortgage, and that some of the debts for which it was held for security were usurious, and therefore the same was void as a mortgage, and was only held in trust for plaintiff by defendant. Decree in behalf of defendant for the $110.50 note and the $125 note, and that defendant's lien be discharged; that the legal title vest in plaintiff, he having paid the full amount of the purchase money, and that defendants deliver up said deed to plaintiff. Defendant took exceptions, and appealed to this court.

The only question before us is whether or not the court below erred in holding the deed as a mortgage in the hands of defendant to secure the claims against plaintiff was usurious as to certain of the said secured debts, not mentioned in the decree, but presumably the two $20 notes, and therefore void. The two $20 notes are admitted to be usurious, if they are to be taken with the other indebtedness, but no claim is made on their account, and it is contended that they were made long subsequent to the agreement by which the title bond, and, consequently, the deed, was agreed to be held as security for the indebtedness of plaintiff to defendant, and, under the rule on that subject, could not taint said indebtedness, so secured, with usury. The contention of defendant was correct, and the court

erred in not so holding, and in decreeing the deed void as a security as aforesaid.

The decree is therefore reversed, and the cause is remanded, with directions to foreclose the deed (properly held to be a mortgage), and out of the proceeds pay off the amount decreed in favor of the defendant and the costs, if same are not paid in a reasonable time.

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LEWIS v. STATE.

Opinion delivered June 27, 1896.

TRIAL—INSTRUCTION AS TO REASONABLE DOUBT.—It is not reversible error in a criminal case depending on circumstancial evidence to refuse to charge the jury that, in order to convict, the evidence must exclude every other reasonable hypothesis than that of defendant's guilt, if the usual instruction as to reasonable doubt has been given.

HEARSAY EVIDENCE—ADMISSIBILITY.—Where the evidence as to the identity and ownership of property alleged to have been stolen is conflicting, it is error to permit a witness, who has found property on defendant's premises, to state that he could have identified the same by a description previously given by the alleged owner.

Appeal from White Circuit Court.

H. N. HUTTON, Judge.

J. P. Roberts, for appellant.

1. The testimony does not sustain the verdict. Mays is not corroborated, except by Hamilton and Roberts, and only as to his statements to them before the meat was found, and in the absence of defendant, which was hearsay, and inadmissible. 1 Gr. Ev. (12 Ed.), 99; Rice on Cr. Ev., 370, 371; 11 Tex. App. 388; 14 *id.* 49.

2. The fifth instruction should have been given. Defendant's explanation as to how he got possession of the meat was a reasonable one, and one which, if true,

exonerated him, and the burden was on the state to prove the explanation false. 3 Gr. Ev. (8 Ed.), 161; 12 Tex. App. 385; 13 *id.* 499, 587; 34 Ark. 443; 12 A. & E. Enc. Law, 852.

3. The evidence is insufficient to warrant a conviction. 13 Tex. App. 499; 44 Ark. 39; 13 S. W. 889.

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

1. The evidence is conclusive as to appellant's guilt.

2. May's describing the meat was simply admitted to show that he identified the same. It was not hearsay, but simply the statement of a fact,—of what they saw and found in possession of defendant.

3. The court properly refused the fifth instruction. The question was not how he came into the possession of the meat, but whether or not it was May's meat. If it was not May's meat, appellant was guilty.

BUNN, C. J. This is an indictment for grand larceny, tried in the White county circuit court. The trial resulted in a verdict for petit larceny, and defendant appeals.

The grounds upon which the verdict and judgment are asked to be set aside are: (1) That the same is contrary to the evidence; (2) that the court erred in refusing to give instruction No. 5 asked by the defendant; (3) because the court admitted, over the objection of defendant, the testimony of Hamilton and Roberts, to the effect that the defendant did identify or could have identified the stolen property by the description thereof previously given them by the owner.

Refusing instruction as to reasonable doubt.

There was evidence to sustain the verdict. How much, or how strong it was, it is improper for us now to say. There was no reversible error in refusing to give the instruction asked by defendant to the effect that, in order to convict, the evidence must exclude every other

reasonable hypothesis than that of the defendant's guilt. It is true that this case is one of circumstantial evidence, and the rule sought to be invoked is applicable to and proper in such cases; yet this court has held, in effect, that the usual instruction on the subject of the reasonable doubt covers the ground of the instruction refused, in so far as to make its refusal not reversible error. *Green* v. *State*, 38 Ark. 304.

Admissibility of hearsay evidence.

The witnesses Hamilton and Roberts, who were in search of the stolen property, on the trial testified, in answer to a direct question of the prosecuting attorney, that they could have identified the meat they found in defendant's smoke house as the meat of the alleged owner by the description he (May) had previously given them of it.

In view of the fact that the owner, May, was present, and testified as to his ownership of the meat, and as to its description, and especially in view of the fact that the testimony as to the identity and ownership of the meat was very conflicting, it was rather unfair to interject into the evidence what the owner said as to the identity of the meat in private conversation with the other witnesses, in the absence of defendant, or, rather, that witnesses identified the meat as that of the prosecuting witness as his own by the description he gave them of it. This was hearsay testimony, and had the tendency of bolstering up and giving undue weight to the testimony of the alleged owner, May.

For this error the judgment is reversed, and the cause remanded, with instructions to grant a new trial, and to proceed not inconsistently herewith.

WILSON v. STATE.

Opinion delivered June 27, 1896.

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CRIMINAL LAW—VENUE—PROOF.—It is sufficient in a criminal case for the state to prove the venue by a preponderance of the evidence.

Appeal from Greene Circuit Court.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

The appellant was indicted for assault and battery, alleged to have been committed in Greene county, was convicted, and appealed to this court. The evidence tends to show that the offense was committed on Lower White Oak Island, and that this island is in the St. Francis river, and that the river is the boundary between Craighead and Greene counties. Instructions were given by the court and excepted to by the defendant, but the giving of them was not made grounds of the motion for new trial. According to the rulings of this court, the exceptions were waived by failure to make them grounds of the motion for a new trial, and are not before us for consideration. The appellant asked the court to give to the jury the following instruction, to-wit: "Second. The jury are instructed that, before they can find the defendant guilty, they must find, beyond a reasonable doubt, that the crime, if any, was committed in Greene county, Arkansas." The court refused to give this instruction, to which the defendant excepted, filed a motion for a new trial, making the refusal to give this instruction a ground of his motion, which was overruled, whereupon he appealed to this court. There was conflict in the evidence, some of which tended to show the offense was committed in Greene

county, while some of the evidence tended to show that it was committed in Craighead county.

The appellant, *pro se.*

1. The court erred in refusing to instruct the jury to acquit unless they found from the evidence that the crime was committed in Greene county. The venue must be proved. 30 Ark. 41; 23 *id.* 156; 9 So. 652; 42 La. An. 316; 56 Ark. 242; 53 *id.* 46; 18 S. W. 923.

2. The fact that the first husband of the state's witness worked the road, etc., in Greene county creates no presumption that Lower White Oak Island is in Greene county. 17 S. W. 3.

3. There was no uncertainty as to venue. The crime, if any, was committed in Craighead county. 54 Ark. 371.

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

The island is in the St. Francis river, which is the line between Greene and Craighead counties. It has not been surveyed, nor the line established. The boundary is thus uncertain, and the venue may be laid in either county. Sand. & H. Dig., sec. 1938. This section is not unconstitutional. 23 Ark. 156; 54 *id.* 371. When a river is the boundary, the criminal jurisdiction of each county shall embrace offenses committed on the river or any island thereof. Sand. & H. Dig., sec. 1943; 35 Iowa, 199; 46 Mo. 350.

HUGHES, J., (after stating the facts). Was there error in the court's refusal to instruct the jury that, unless the venue was proved beyond a reasonable doubt, the defendant could not be convicted? Upon this question there is diversity of judicial opinion, and it may be that a majority in number of the rulings are that the venue must be proved beyond a reasonable doubt. Bishop, in the first volume of his New Criminal Procedure, section 384, 2, says: "As in other issues, the

proof is not required to be delivered in the words of the indictment. Any ordinary evidence suffices which in fact leads the jury to the conclusion, beyond, it is perhaps commonly assumed, a reasonable doubt. But we have some authority for saying that the doctrine of reasonable doubt does not extend to this issue, being only jurisdictional,"—citing *Cox* v. *State*, 28 Tex. App. 92; *Achterberg* v. *State*, 8 Tex. App. 463; *Hoffman* v. *State*, 12 Tex. App. 406, 407. To which we add: *Richardson* v. *Commonwealth*, 80 Va. 124; *Andrews* v. *State*, 21 Fla. 598; *State* v. *Dent*, 6 Rich. (S. C.) 383. We believe that this is the more reasonable view of this question, as the question of venue is a question affecting only the jurisdiction of the court, and does not in fact affect the question of the defendant's guilt.

The venue must be proved, but the question is whether it must be proved beyond a reasonable doubt, or by a preponderance of the evidence only. As Bishop says, it is often, and perhaps generally, *assumed* that it must be proved beyond a reasonable doubt, but we see no reason in this assumption. To hold that it may be proved by a preponderance of the evidence, and that the doctrine of reasonable doubt has no application where the quantum of proof required to show the venue in a criminal case is involved, deprives the defendant of no right, for it is only his guilt that is required to be proved beyond a reasonable doubt. We are of the opinion that it is sufficient in a criminal prosecution to prove the venue by a preponderance of evidence only. There was no error in the court's refusal to give the instruction No. 2 asked by the defendant. The judgment is affirmed.

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HAVIS v. STATE.

Opinion delivered June 27, 1896.

BAIL BOND—VALIDITY.—The failure of a sheriff, on approving a bail bond, to return it to the county in which the prosecution had its origin is an irregularity merely, and does not affect the substantial rights of the sureties.

SAME—AUTHORITY TO TAKE.—Where the court fixed the amount of a bail bond, and afterwards, on granting a change of venue, ordered that defendant give bond for his appearance in the court to which the venue was changed, and that the bond be approved by the sheriff, without further direction as to the amount of bail, the sheriff was authorized to approve a bail bond in the amount originally named by the court.

SAME—DISCHARGE.—It is not a valid defense to an action on a bail bond that, prior to the forfeiture, defendant was arrested, tried, and found guilty of another offense in another court, and that, after being placed in the custody of the sheriff in such case, he escaped.

Appeal from Lincoln Circuit Court, Watson District.

JOHN M. ELLIOTT, Judge.

STATEMENT BY THE COURT.

The grand jury of Jefferson county in 1891 indicted W. J. Hancock for the crime of assault with intent to kill. Thereupon the circuit judge made and signed the following indorsement upon the indictment, to-wit: "Bail will be received in this case in the sum of one thousand dollars." Hancock was arrested, and gave bond in the sum of $1,000 for his appearance, with the appellants, Ferd Havis and Alvah Collier, as his sureties. Afterwards, on 23rd of November, 1891, the venue was, upon Hancock's application, changed to the Desha circuit court for the Watson district at Dumas.

The court ordered that the defendant give bond for his appearance at the February term, 1892, of said court,

the bond to be approved by the sheriff of Jefferson county. Hancock then gave bond in the sum of $1,000 for his appearance in the court to which the venue had been changed. The appellants, Ferd Havis and Alvah Collier, who were sureties on his former bond, also became sureties on this bond, which was approved by the sheriff of Jefferson county. The sheriff did not file this bond with the clerk of the Jefferson circuit court, but he sent it by mail to the clerk of the Desha circuit court at Arkansas City. It was not copied in the transcript of the proceedings of the Jefferson circuit court made and transmitted by the clerk of said court to the clerk of the Desha circuit court at Dumas. Hancock appeared at the next term of the Desha circuit court at Dumas after the venue was changed to that court, and the case was continued. He was afterwards tried for another offense in the Lincoln circuit court, and the jury returned a verdict of guilty, and assessed his punishment at four years in the penitentiary. The Lincoln circuit court, upon the return of this verdict, placed Hancock in the custody of the sheriff, to be conveyed to the county jail, and, while being conveyed to jail, he escaped. Hancock failed to appear at subsequent terms of the Desha circuit court, and the prosecuting attorney had a rule upon the sheriff of Jefferson county to produce and file the bond executed by Hancock for his appearance in that court. The bond was discovered on file in the circuit clerk's office at Arkansas City in another district of said county. It was withdrawn and filed in the Desha circuit court at Dumas on the 6th day of February, 1894. Hancock still failing to appear, his bond was on that day declared forfeited, and the sureties were ordered to be summoned to appear and show cause why judgment should not be rendered against them on such bond. They appeared, and set up several grounds of defense against the bond, but the same were

overruled, and judgment rendered against them. The other facts appear in the opinion.

Austin & Taylor, for appellants.

1. The court erred in sustaining the demurrer to and striking from appellants' answer paragraphs 3, 4, 5 and 6. The third paragraph pleaded non-compliance with the statute by the clerk. Sand. & H. Dig., sec. 589. This statute, we think, is mandatory.

2. The fourth paragraph set up a good defense. The conviction of Hancock, and ordering him into the custody of the sheriff, and the *taking of him into custody* of the law, were *judicial acts*, and deprived the sureties of their right to arrest and surrender him, and hence discharged the bail. 29 Ark. 130; 40 *id.* 332; 1 Root (Conn.), 102; 1 Blackl. (Ind.), 309; 36 Barb. (N. Y.), 429.

3. The fifth set up the fact that the bond was never made a part of the record in this cause until February 6, 1894, and was never transmitted to the Desha circuit court. Sand. & H. Dig., sec. 2173. The Desha court therefore had no jurisdiction. 36 Ark. 237; 9 *id.* 469; 37 *id.* 491; 38 *id.* 221; 48 *id.* 105. The sheriff had no authority to fix the amount of the bond, to take it, approve it, or transmit it, so as to give it any validity. The court failed to fix the amount of the bond. See Sand. & H. Dig., secs. 2168–9.

4. It was error to admit in evidence the transcript from the Jefferson court, the record of the Desha court, and the alleged bail bond. While it is true that the records, etc., constitute the complaint against the bail, yet it does not follow that the transcript on change of venue and all the record entries are competent and legal evidence. The transcript was certainly incompetent because it contained a bail bond which was not for the appearance of Hancock in the Desha court, but in the Jefferson court. Among the record entries introduced

was a forfeiture taken on February 9, 1893, while the bond *was not filed* until February 6, 1894.

5. The venue in this case was not changed in accordance with sec. 2169, Sand. & H. Dig. No sum was fixed by the court, and the sheriff could not fix the amount. Sec. 2169. The bond was not filed with the clerk as part of the record. Sec. 2170, *id.* The law must be strictly complied with. The bond was not even a good common law bond. 29 N. W. 184; 2 Am. & Eng. Enc. Law, p. 5. Only such officers as are authorized to "*let to bail*" can approve or take bail. 23 Ark. 278; 35 *id.* 330. The recognizance could only be taken by the court or a judge or officer authorized by law to *let to bail.* Sand. & H. Dig., sec. 2169.

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

1. The provisions of sec. 589, Sand. & H. Dig., are merely directory. Suth. Stat. Const., sec. 447; 1 Kas. 273; 34 Ark. 491. Acts relating to matters of procedure by public officers are directory. Endl. Int. Stat. secs. 436–7.

2. A party out on bail for one offense may be arrested and tried for another without releasing his sureties. If convicted and committed to jail for the second offense and escape, his bondsmen in the first case are still responsible for his appearance. 38 Tex. 173; 10 Tex. App. 46; 54 N. H. 156; 32 Ill. 28; 3 B. Mon. 346; 35 Ark. 532.

3. The change of venue could have been taken without a recognizance or new bond, the statute being directory merely. Sand. & H. Dig., sec. 2168. A total failure to take bond would not affect the jurisdiction on change of venue. 53 Ark. 67. The transcript was under seal. The court *fixed* the amount of bond; the sheriff merely approved or accepted the surety. The mere failure of the sheriff to file the bond with the clerk

of Jefferson county, so the clerk could copy it in the transcript, invalidated nothing. Sand. & H., Dig., secs. 2169; 53 Ark. 67; Endlich, Int. Stat., 436–7; 23 Am. & Eng. Enc. Law, p. 458; 28 Ark. 397; Sand. & H. Dig., sec. 2016, 2017; 28 Ark. 480.

4. The records and proceedings constitute the complaint, so the transcript on change of venue was competent. 51 Ark. 186.

5. The court fixed the amount of bond, and ordered the sheriff to take bail. This fully empowered him to do so. 28 Ark. 397; 28 *id.* 480; Sand. & H. Dig., sec. 2016.

RIDDICK, J., (after stating the facts). This is an appeal by the sureties upon a forfeited bail bond from a judgment rendered against them upon such bond. Several reasons are urged by counsel why such judgment should be reversed, but we are of opinion that none of them are tenable.

Validity of bail bonds.

The statutes of this state concerning bail bonds evince an unmistakable intention on the part of the legislature to dispense with all merely technical defenses by the obligors in such bonds, and to compel the courts to consider only those defenses that affect the substantial rights of the parties. Sand. & H. Dig., sec. 2017.

This bond is in the usual form. It appears from it that Hancock was in custody, charged with the offense of an assault with intent to kill, and that the bail undertook that he should appear in the circuit court of the Watson district of Desha county to answer said charge, and that he should at all times render himself amenable to the orders of said court in the prosecution of said charge, and in default thereof that the bail should pay the State of Arkansas one thousand dollars. This being so, we hold that the act of the sheriff in sending said bond direct to the clerk of the Desha circuit court instead of filing the same with the clerk of the Jefferson circuit

court, that it might be copied in the transcript, was an irregularity merely, and would not justify us in reversing the judgment upon the bond, for it did not in any way affect the substantial rights of appellants. The order for a change of venue and the filing of the transcript in the Desha circuit court at Dumas gave that court jurisdiction to try the charge against Hancock, notwithstanding the bond was omitted from the transcript. *Beasley* v. *State*, 53 Ark. 67. As the court had jurisdiction to try the charge against Hancock, and as he had given bond to appear in that court, it follows that, upon his failure to appear, the court had jurisdiction to declare the bond forfeited, and to try the action upon the forfeited bail bond, for the statute provides that such action shall be in the court in which the defendant was required to appear for trial. Sand. & H. Dig., sec. 2033.

Authority to take bail.

It is also said that the sheriff had no authority to take the bond. The court had previously fixed the amount of bail by an indorsement upon the indictment that bail be received in the sum of one thousand dollars. When the change of venue was granted, it was ordered that the defendant give bond for his appearance in the court to which the venue was changed, and that the bond be approved by the sheriff. As no further order was made changing the amount of bail, the sheriff was bound by the order fixing the bail at one thousand dollars. The admission to bail and the amount of the same were determined by the court, and the only act of the sheriff was the approval of the bond, which was done in obedience to the order of the court. Under these circumstances, the sheriff had the right to take the bail. Sand. & H. Dig., secs. 2014, 2015 and 2016; *Pinson* v. *State*, 28 Ark. 397.

When bail bond not discharged.

Neither was it a valid defense to this action to show that Hancock, prior to the forfeiture, had been

arrested, tried, and found guilty of another offense in another court, and that, after being placed in the custody of the sheriff, he had escaped. He was not in custody at the time the bond was declared forfeited, and the performance of the condition of the bond was not made impossible by this act of the state in arresting him for another offense. The appellants executed this bond with knowledge that the principal might commit another offense, and be ordered into custody for such offense. The fact that he was placed in the custody of the sheriff, and so remained a short time, did not deprive them of the right to surrender him in discharge of their liability on such bond, for, even had he remained in custody, they could still have surrendered him by a proper proceeding. We do not say that in such a case it would have been no defense to show that he was in custody at the time the bail was declared forfeited. What we hold is that the fact that he was taken in custody for a short time on a different charge does not, of itself, operate to discharge the bail, when it is shown that he was at large at the time the forfeiture was taken. If the law was different, a person under a heavy bond on a charge of murder, or other felony, might go into another county or circuit and purposely commit some misdemeanor, in order that his subsequent arrest might discharge the sureties on his former bond. If the officers having him in custody for the second offense were ignorant of the first arrest and bail, they would, so soon as he paid his fine, or served a term in jail, allow him to go at large, and, if the effect of this second arrest and imprisonment discharged the sureties on his first bail bond, he might by this way escape punishment for the first offense. For these reasons, we conclude that a person who is on bail for one offense may be arrested for another offense without discharging his bail. If he be committed to jail for the second offense, and escape, his

bondsmen may, in a case such as this, still be held liable, if they fail to comply with the conditions of their bond. *Wheeler* v. *State*, 38 Tex. 173; *West* v. *Colquitt*, 71 Ga. 559; S. C. 51 Am. Rep. 277; *State* v. *Merrihew*, 47 Iowa 112; S. C. 29 Am. Rep. 464; *Brown* v. *People*, 26 Ill. 28; *Mix* v. *People*, *Ib.* 32; 2 Am. & Eng. Enc. Law 26, and cases cited.

There were other objections to the rulings of the circuit court urged by counsel, but we are of opinion that no error affecting the substantial rights of appellants is shown. The judgment is therefore affirmed.

ÆTNA INSURANCE COMPANY *v.* ROSENBERG.

Opinion delivered July 8, 1896.

INSURANCE—CANCELLATION OF POLICY.—An insurance agent, who had the power to cancel policies on five days' notice to the insured, and tendering repayment of the unearned premium, without giving such notice or making the tender, wrote to an insured, asking him to return to him his policy for cancellation, and promising to reinsure the property in another good company. The insured returned the policy as requested, but the agent did not actually cancel it, nor issue any other policy to the insured. *Held* that the policy remained in force.

Appeal from Hempstead Circuit Court.

RUFUS D. HEARN, Judge.

W. M. Greene, for appellant.

1. The policy was cancelled. The cancellation took effect the moment the agent received the policy from the appellees for cancellation. 36 Mo. App. 126; *Ib.* 142.

2. The surrender of the policy by insured to the agent, and the acceptance of it by the latter with the mutual intention of cancelling, is a cancellation. 62 N. Y. 599; 39 Mich. 489; 90 Pa. St. 220; 6 N. Y. S.

602, 876. When a person signs papers pertaining to important business, he cannot be permitted to escape their binding effect by stating that he did not read them. 35 Ark. 555; 50 *id.* 406.

3. Re-insurance in some other company was not a condition precedent; nor was the return of the unearned premium a prerequisite to cancellation. 54 Mich. 531; 74 Wis. (1887); 105 N. Y. App. 543; 13 Lea (Tenn.), 340; 62 N. Y. App. 598; 50 *id.* 402.

4. Under the facts of this case there was a valid contract of insurance with the North America Insurance Company. 1 May on Ins., secs. 14 to 23 A; 1 Pick. (Mass.), 278; 16 Gray (Mass.), 448; 4 Otto, 574.

R. B. Williams, for appellee.

1. Appellees did not by their conduct waive the tender or return of the unearned premium due them on cancellation of their policy. This return was a condition precedent. 45 Ga. 294; 9 Am. L. Rev. 385; 3 N. E. 309; 51 N. Y. 465; 1 May on Ins., sec. 67, C; 6 Fed. 143; Biddle on Ins., vol. 1, sec. 373.

2. The policy was not cancelled before the fire. The placing of insurance in some other company was the condition upon which the policy was surrendered. 2 Fed. 432; 35 N. E. 53; 50 Oh. St. 532; 60 Ark. 543; 4 Wheat. 228; 3 Cliff. 608; 2 Cranch, 127; 14 Pet. 77; 3 Conn. 357; 27 Pa. St. 268; 36 N. Y. Sup. 329.

BUNN, C. J. On the 6th of March, 1894, appellees, the plaintiffs in the court below, filed their complaint against the appellants in the Hempstead circuit court, and on the 10th of April, 1894, defendants filed their answer. Judgment for plaintiff, and defendant moved for a new hearing. The same was overruled, and they tendered their bill of exceptions, and take an appeal. This is an action on a policy of fire insurance issued to plaintiffs by the Aetna Insurance Company. The Union

Guaranty Company executed the bond to the State of Arkansas for the benefit of holders of policies in said insurance company; and, as such bondsman, was made defendant in the suit.

The policy contained a stipulation to the effect that, on giving five days' notice to the holders, and tendering the payment of the unearned premiums, said insurance company had a right to cancel said policy, and it was shown that Knighton, the agent of the company with whom the dealings were had, was authorized to cancel the policy according to its terms. The property insured (a storehouse and goods in the town of Fulton, Hempstead county, Arkansas) was destroyed by fire. Previous to the fire the agent, Knighton, wrote to appellees to return the policy for cancellation, coupling the request with the promise (as testified by Rosenberg, one of the appellees) that, if appellees would return the policy for cancellation, he would insure the property in another good company.

There was evidence tending to show that, while the company through its said agent had the right to cancel the policy on giving the five days' notice, yet this notice was not given, and the agent really intended to exercise the power of cancellation, not according to the strict letter of the policy, but rather in conformity to the voluntary surrender of it for that purpose by the holders. Indeed, it does not appear that the agent ever actually cancelled the policy, or did anything to that effect; even failing to open letters of appellees to him which accompanied the returned policy. It thus appears in evidence that not only may the appellees have reasonably expected that the policy would not be cancelled until their property should be insured in another company, and thus be at all times covered by insurance, but that the insurance in the other company was the condition upon which the cancellation should be made. Furthermore, if such was

the condition upon which alone the cancellation could have been made by the company's agent, under the particular circumstances, it was also the only condition upon which the five days' notice could have been legitimately considered as waived, if it was waived at all.

There was evidence supporting the findings of the court to the foregoing effect, and the judgment is therefore affirmed.

JOYCE v. STATE.

62 510
67 375

Opinion delivered July 8, 1896.

EVIDENCE—OPINION.—A witness in a criminal case should not be permitted to testify that defendant, in a conversation with him, had contradicted himself, such testimony being matter of opinion merely.

Appeal from Independence Circuit Court.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

This is an indictment in the Independence circuit court for the crime of incest. Trial and verdict against defendant, and he appeals to this court. The errors assigned in the motion for new trial are: (1) The verdict is contrary to the evidence. (2) The verdict is contrary to law. (3) The verdict is contrary to both the law and evidence. (4) The instructions 1, 2, 3 and 4, given by the court, were erroneous. (5) The court erred in permitting witness Wiley to testify over the objection of defendant, that defendant had crossed himself when he was talking to him. (6) Because the court refused a new trial on the ground of newly discovered evidence.

Yancey & Fulkerson, for appellant.

1. The admission of the statement of Wiley that defendant had "crossed himself" was highly prejudicial

and erroneous. 1 Thompson, Trials, sec. 377; 52 Ark. 187; 58 *id.* 396; 88 Ala. 78; 107 N. Y. 427; 24 Am. St. 847.

2. The verdict is not supported by the evidence. 46 Ark. 149.

3. A new trial should have been granted upon the newly discovered evidence.

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

1. There is evidence to sustain the verdict.

2. The error, if any, of admitting Wiley's testimony, was not prejudicial. 43 Ark. 535; *Ib.* 219; 46 *id.* 485.

3. There was no abuse of discretion in refusing a new trial for newly discovered evidence. 28 Ark. 121; 54 *id.* 364; 41 *id.* 229.

BUNN, C. J., (after stating the facts). The verdict was based solely on the testimony of one Andy Lovell, in so far as relates to the identification of defendant with the act charged, and upon the contradictory statements of defendant, as shown in the testimony of Wiley, a witness for defendant, on cross-examination, admitted over the objection of defendant. Wiley's testimony was to the effect that he had been on a church committee to investigate this charge against the defendant; that in August last he went to Andy Lovell (the state's witness), and informed him that he had been put on such committee by the church of which he (Wiley) and defendant were members, to investigate the charge, and desired him (Lovell) to tell him what he knew about it,—that is, as to whether or not defendant had had sexual intercourse with his daughter; that Lovell told him, in answer to his request, that defendant had had intercourse with his daughter, but said also, "However, a man might be mistaken as to that." On cross-examination the following question was asked witness: "In the conversation you had with Joyce, didn't he cross

himself?" The question was objected to by the defendant on the ground of incompetency and irrelevancy; objection overruled by the court, and the witness permitted to answer it. Witness then answered "Yes" to the question, and his answer was also duly objected to. The objection to the question and answer should have been sustained. It was but the opinion of the witness to the effect of the statement of defendant made in private conversation with him, and, being admitted, may have been exceedingly prejudicial to the defendant on the trial.

The error complained of in the refusal of the court to grant a new trial because of newly discovered evidence cannot be the ground of complaint in a new trial of the case, and therefore need not be discussed now. Other grounds named in the motion for new trial seem to have been abandoned.

For the error named the judgment is reversed, and the cause remanded.

STATE v. BOOE.

62 512
77 322
62 512
79 308

Opinion delivered July 8, 1896.

INDICTMENT—DISTURBANCE OF RELIGIOUS CONGREGATION.—An indictment for disturbing a religious congregation, under the act of January 10, 1857, is insufficient if it fails to allege that the language or conduct charged as a disturbance was calculated to disquiet, insult, or interrupt the congregation.

Appeal from Lonoke Circuit Court.

JAMES S. THOMAS, Judge.

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

It was not necessary for the indictment to state that the words and acts of defendant were done in a

manner calculated to disturb, insult or interrupt the congregation. Sand. & H. Dig., sec. 1541. The indictment charges appellant with disturbing the congregation by doing certain things, naming them. This is sufficient. 31 Ark. 638; 14 Ind. 219; 47 Ark. 233. It is not necessary to use the exact language of the statute. Sand. & H. Dig., sec. 2088, 2090, 2076.

The appellant, *pro se.*

Cited 31 Ark. 638; 19 *id.* 578; 47 *id.* 223, 488.

BATTLE, J. The indictment against the defendant is based on section 1541 of Sandels & Hill's Digest, which is as follows: "If any person shall maliciously or contemptuously disturb or disquiet any congregation * * * * by profanely swearing or using indecent gestures, or threatening language, or committing any violence of any kind to or upon any person so assembled, or by using any language, or acting in any manner that is calculated to disquiet, insult, or interrupt said congregation, he shall, upon conviction thereof, be fined in any sum not less than twenty nor more than fifty dollars." This section is a consolidation of two acts of the general assembly, the first of which makes it an offense to maliciously or contemptuously disturb a religious congregation by profanely swearing, or using indecent gestures, or threatening language, or committing any violence of any kind to or upon any person so assembled." Finding that many disturbances which are contrary to good morals are not embraced in this act, the legislature enlarged its scope, and by a second act, of which section 1541 of Sandels & Hill's Digest is in part composed, made public offenses of all malicious or contemptuous disturbances of congregations assembled for religious worship or the transactions of church business which are caused "by using any language or acting in any manner that is calculated to disquiet,

insult, or interrupt said congregations." (Act Jan. 10, 1857). *State* v. *Hinson*, 31 Ark. 638.

To constitute an offense under the second act there must be a disturbance; the disturbance must be caused by language or acts; and the language or acts must be calculated to disquiet, insult, or interrupt the congregation. To accuse a person of an offense under it, it is not sufficient to allege that a religious congregation was maliciously or contemptuously disturbed by him, but, in order to complete the offense, it must be further shown that the disturbance was caused by using language or acting in a manner calculated to produce such a result. *State* v. *Hinson*, 31 Ark. 638.

The indictment under consideration is based on the second act. It alleges that the defendant maliciously and contemptuously disturbed a religious congregation by "laughing and talking, and putting his head in the lap of William Shute, and making remarks upon a sermon as it was being delivered." It alleges that the disturbance was made and the conduct or acts which caused it, but does not show in any manner that the acts or conduct was calculated to produce it. In this it is fatally defective. "For an indictment upon a statute must state all the circumstances which constitute the statutory offense, no case being brought by construction within a statute unless it is completely within its words." *Wood* v. *State*, 47 Ark. 488. "It is not indeed necessary that the words of the statute should be precisely followed. Words of equivalent import, or more extensive signification, which necessarily include the words of the statute, may be substituted." *Wood* v. *State*, 47 Ark. 488.

The demurrer to the indictment was properly sustained, and the judgment of the circuit court is affirmed.

WOOD, J., (dissenting). The indictment charges that the defendant "unlawfully and maliciously and

contemptously did *disturb and disquiet a religious congregation*," (naming it), "*by then and there laughing and talking, and putting his head in the lap of Will Shute, and making remarks upon the sermon as it was being delivered*, against the peace and dignity of the State of Arkansas." It is contended that the indictment is defective because it fails to allege that the words or acts were said and done "in a manner that was calculated to disturb, insult, or interrupt said congregation." How is it possible for one to *maliciously and contemptuously disturb* a congregation without doing or saying something in a manner that is calculated to disturb? If the disturbance actually took place as was alleged, then how can it be said, without a plain contradiction in terms, that the words or acts were not said and done "in a manner calculated to produce it." After alleging that the congregation was *maliciously and contemptuously disturbed*, and setting forth the words and acts by which it was done, it was unnecessary to add that such acts and words were "calculated to disturb." Had the pleader done so, to my mind, he would have been guilty of inexcusable redundancy.

Sec. 2088, Sand. & H. Dig., declares: "The words used in a statute to define an offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used." Here the indictment followed the exact language of the statute, so far as it was essential to describe the offense. It alleged that the congregation was disturbed, and that it was unlawfully, maliciously and contemptuously disturbed, and set out the means by which it was done. This was sufficient, under *State* v. *Hinson*, 31 Ark. 638.

The words, "in any manner that is calculated to disquiet, insult, or interrupt said congregation," do not add anything to the offense, which has been fully and accu-

rately described in the preceding language of the section. The whole clause can be omitted and the offense be left complete, just as the legislature designed it. It is surplusage, and for the sake of brevity and force should be omitted. "Needless words and averments may ordinarily be treated as mere waste material, having no legal effect whatever. They need not be proved or otherwise regarded." 1 Bishop, Cr. Pro. 478; *State* v. *Dewey*, 55 Vt. 550; *Feigel* v. *State*, 85 Ind. 580.

To constitute the offense, the disturbance must be *malicious or contemptuous*. The law looks alone to the motive in this offense. If any one *maliciously or contemptuously disturbs* a congregation by words or acts, necessarily he does it *in a manner that is calculated to disquiet, insult, or interrupt said congregation*; for in no other way could a congregation be disturbed under the statute. So that the words *maliciously or contemptuously* refer to the manner of the disturbance, and express the whole meaning intended to be conveyed by the clause omitted. *Wood* v. *State*, 47 Ark. 488.

In my opinion, the judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

BENNETT *v.* STATE.

Opinion delivered July 8, 1896.

62 516
72 616

62 516
74 258

62 516
178 290

62 516
86 130

FORGERY—SUFFICIENCY OF INDICTMENT.—An indictment for forgery which charges that defendant "did unlawfully, etc., make, write, forge, and counterfeit a certain deed," without setting out the particular acts in which the forgery consisted, necessarily imports that it was done without authority, and sufficiently states the manner of its execution.

INDICTMENT—DUPLICITY.—An indictment charging the forgery of a deed and of the acknowledgment thereof charges but one offense.

FORGERY—PRESUMPTION AS TO INTENT.—An intent to defraud must necessarily be inferred by the jury, in a prosecution for forgery, where the evidence shows it to have been committed with the design that the instrument forged should be used as good, and that there was a possibility that some person, or his estate, might be thereby injured or made liable.

VARIANCE—IDEM SONANS.—"Watkins" and "Wadkins" are *idem sonans*, so that there is no variance between an indictment for forging a deed to the former and the deed purporting to convey to the latter.

SAME—WHEN FATAL.—In a prosecution for forgery of a deed, the deed set out *in haec verba* in the indictment recited the consideration thus "five hundred and fifty dollars ($550.00)"; described the land as "north half," etc.; contained the word "sum" in the clause reciting the consideration for release of dower; and concluded, "Witness my hand and seal," etc. The deed offered in evidence recited the consideration thus, "the sum of five hundred and fifty dollars 550\frac{00}{100}$ dollars;" described the land as "the north half," etc.; did not contain the word "sum," it being crossed out; and concluded, "Witness my hands and seals," etc. *Held*, that the variance was fatal.

INDICTMENT—PRESENCE OF STRANGER IN GRAND JURY ROOM.—Although the statute provides that "no person except the prosecuting attorney and the witnesses under examination are permitted to be present while the grand jury are examining a charge, and no person whatever shall be present while the grand jury are deliberating or voting" (Sand. & H. Dig., sec. 2058), it is not cause for quashing the indictment that an attorney acting for the prosecuting attorney examined witnesses before the grand jury if he was not present when the grand jury were deliberating or voting, especially where it is not shown that anything was said to influence the finding of the grand jury.

EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATOR.—On a trial of one for forgery of a deed, evidence that the person for whose benefit the deed was forged asked another to obtain for him two blank deeds, being the act of a co-conspirator in furtherance of the common design, was admissible; but such person's declaration, in defendant's absence, that defendant had promised to forge the deed, not being in furtherance of such common design, was inadmissible.

TRIAL—REMARKS OF COUNSEL.—Remarks of counsel for the state to the effect that defendant had committed another crime than that charged against him may be prejudicial.

SAME—TAKING TESTIMONY IN DEFENDANT'S ABSENCE.—The taking of testimony in a felony case while defendant is necessarily absent for a few minutes by permission of the court is prejudicial error.

Appeal from Clay Circuit Court, Eastern District.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

At the February term, 1895, of the Craighead circuit court, Jonesboro district, the defendant, J. P. Bennett, was indicted for forgery. The case was removed on change of venue to the eastern district of Clay county, and at the January term thereof, 1896, defendant was convicted, and sentenced to the penitentiary for a term of two years and six months.

The indictment is as follows:

"INDICTMENT.

Craighead Circuit Court, Jonesboro District, February Term, 1895.

State of Arkansas,

v.

J. P. Bennett.

The grand jury of Craighead county for the Jonesboro district, in the name and by the authority of the State of Arkansas, accuse J. P. Bennett of the crime of forgery, committed as follows, viz.: the said J. P. Bennett, on the 17th day of March, 1894, in the county of Craighead and district aforesaid, did unlawfully, wilfully, knowingly, and feloniously and fraudulently make, write, forge, and counterfeit a certain deed and acknowledgment thereof, in words and figures as follows, to-wit:

WARRANTY DEED.

With Relinquishment of Dower.

Know all men by these presents:

That I, John T. Burns, and ——, his wife, for and in consideration of five hundred and fifty dollars

($550.00) to us paid by J. N. Watkins do hereby grant, bargain, sell, and convey unto the said J. N. Watkins, and unto his heirs and assigns forever, the following lands lying in the county of Poinsett and State of Arkansas, towit; East half of section six, township twelve north, range five east, and also north half of section seven, township twelve north, range five east. To have and to hold the same unto the said J. N. Watkins, and unto his heirs and assigns forever, with all appurtenances thereunto belonging. And I, ———, hereby covenant with the said J. N. Watkins that I will forever warrant and defend the title to said lands against all lawful claims whatever. And I, ———, wife of said ———, for and in consideration of the said sum of money, do hereby release and relinquish unto the said ——— all my rights of dower in and to said lands. Witness my hand and seal this 22nd day of August, 1892. JOHN T. BURNS, [Seal.]

[Seal.]

ACKNOWLEDGMENT.

STATE OF ARKANSAS, }
County of Craighead. }

Be it remembered that on this day came before me, the undersigned, a justice of the peace within and for the county aforesaid, duly commissioned and acting, John T. Burns, to me well known as the grantor in the foregoing deed, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth.

Witness my hand and seal as such justice this the 22nd day of August, 1892.

J. P. BENNETT, J. P.

Which said deed and acknowledgment were so unlawfully and fraudulently forged and counterfeited by the said J. P. Bennett for the purpose and with the

intent to defraud and prejudice John T. Burns, pretended grantor in said deed, and the estate and heirs-at-law of the said John T. Burns, against the peace and dignity of the State of Arkansas.

W. W. BANDY,
Prosecuting Attorney Second Judicial District."

The appellant moved to quash the indictment, and one of the grounds of his motion was that N. F. Lamb, not a prosecuting attorney or a witness was present with the grand jury while they were examining this charge. The motion was overruled, and the defendant excepted.

The defendant demurred to the indictment because its allegations were repugnant; because it did not allege the signing of the deed was without authority; because the intent to defraud was not apparent; because it stated a conclusion of law; because it did not state a public offense. The demurrer was overruled, to which defendant excepted.

The evidence tended to show the following facts: In 1894, Joseph N. Watkins was indicted and tried for cutting and removing timber from the lands described in the deed set out in the indictment. In order to enable him to make his defense to the indictment, the appellant, J. P. Bennett, made out a warranty deed, and signed the name of John T. Burns, who was then deceased, to said deed, which purported to convey the land from which the timber was charged to have been cut by Watkins in the indictment against him.

The appellant swore at the trial of Watkins that the deed was genuine. The deed was used as evidence on the trial in behalf of Watkins and he was acquitted.

Watkins and one Stotts, who were connected with Bennett in the forgery, having also sworn on the trial of Watkins that the deed was genuine, were not indicted for perjury in the Watkins case, and, proposing

to testify against Bennett, were not indicted for forgery. At the trial of Bennett, Watkins and Stotts testified substantially to the facts as set out above; and that the sole object and intent in making the deed was to defeat the prosecution against Watkins for taking the timber. It was shown that the signature to the deed was not in John T. Burns' handwriting. It was testified by John Weaver that, before the Watkins case was tried, Watkins came to him, and asked him to go to the office of the Jonesboro Times, and get him two blank deeds; that he did so; and that on the same day Watkins had told him that Bennett had promised to make a deed that would clear him.

Watkins and Blalock testified substantially to the same facts. Neely and Moss testified that Burns claimed to own some land, and E. Foster Brown that the records showed that he owned considerable lands.

The following are the chief instructions asked by the plaintiff and given, to which appellant excepted:

3. "If the jury find from the evidence beyond a reasonable doubt that the defendant fraudulently made the deed and acknowledgment in evidence, intending to defraud some one, and that John T. Burns, whose name appears in said deed, was dead at the time said deed was made, and that an heir or heirs of said John T. Burns were living at the time of the making of said deed, and that the said John T. Burns left an estate consisting of real estate or personal property, or both, then you will find defendant guilty.

4. "If you find from the evidence beyond a reasonable doubt that the defendant fraudulently made the deed and acknowledgment in evidence, intending to defraud some one, and that John T. Burns, whose name appears in said deed, was living at the time of making said deed, then you will find the defendant guilty."

The following are the chief instructions asked by defendant and refused, to which he excepted:

2. "The intent to defraud is the very essence of the crime of forgery, and, unless you are satisfied beyond a reasonable doubt upon this point, you will find the defendant not guilty; and the particular intent that must be proved here is an intent to defraud John T. Burns, his heirs or estate, because that is the intent charged in the indictment, and no intent to defraud another or different person can support this charge.

3. "If you believe from the evidence that the forgery was actually committed by the defendant, but that the intent was to defeat a criminal prosecution against J. N. Watkins and not to defraud John T. Burns, his heirs or estate, you will find the defendant not guilty.

10. "The jury are instructed that in this case the indictment charges the forgery to have been committed for the purpose of defrauding John T. Burns, his heirs and estate, and, before the jury can convict the defendant, they must find from the evidence beyond a reasonable doubt that the purpose of the defendant in committing the forgery, if committed, was to defraud either John T. Burns, his heirs, or estate.

12. "If the jury find from the evidence that defendant forged the deed in evidence, a presumption of law would arise that it would have its legal effect to defraud Burns, his heirs, or estate; but this presumption is rebuttable, and if a different intent is proved, and you believe that the intent of defendant was to get witness Watkins out of trouble, and not to defraud Burns, his heirs, or estate, you cannot find defendant guilty.

13. "The state is bound to prove, under this indictment, not only that the deed itself was forged by the defendant, but that the acknowledgment also was forged by him. And you are instructed that if defendant

signed his own name to the acknowledgment, with the intent that it be taken as his own name, that act does not constitute forgery; and if such are the facts of this case, you will find the defendant not guilty.

14. "The state must show that the defendant made the deed in evidence, and that he did it with the intent to defraud John T. Burns, his heirs, or estate, and without his authority. The burden of proof is not upon defendant to show that he had authority to sign Burns' name, but the burden is on the state to show that he did not have authority. And unless the proof here has demonstrated that such authority was not given, you will find the defendant not guilty.

15. "The intent to defraud is the gist of the crime of forgery, and, while the presumption of the law obtains that every sane man contemplates and intends the necessary, natural, and probable consequences of his own acts, this, though a very important circumstance in making the proof necessary upon this point, is not conclusive nor alone sufficient to convict, and should be supplemented by other testimony to avoid a reasonable doubt. And, consequently, the mere fact of the forging of the deed in evidence would not establish the necessary intent, beyond a reasonable doubt, even if not rebutted by proof of a different intent; and, unless there is other proof of the intent to defraud John T. Burns, his heirs or estate, than the mere presumption aforesaid, you will find the defendant not guilty."

The court gave said instruction, numbered 4, asked by the prosecuting attorney, and gave his No. 3 as a modification of defendant's instruction No. 2.

The court modified instruction No. 2, asked by defendant by omitting therefrom the concluding clause, "and no intent to defraud another or different person can support this charge," and also by adding thereto the third instruction aforesaid asked by the prosecuting

attorney; and refused instructions numbered 2, 3, 10, 12, 13, 14, and 15, asked by appellant.

In the course of the argument, certain objections were made by appellant to the remarks of counsel for the prosecution. The language used is set out in the opinion.

The appellant was convicted, and moved for a new trial and an arrest of judgment. One of the grounds upon which a new trial was asked was that the appellant was absent from the court room during the trial. Testimony was introduced in open court to the effect that appellant during the trial had been afflicted with flux, and that, when all the state's witnesses except Neeley, Moss, Lamb and Brown had testified, the state announced that it would rest its case, and the attorneys began to discuss what instructions should be given. At this moment it became necessary that the appellant should retire to the water closet, and he secured permission from the court, and retired for about fifteen or twenty minutes, during which time the state re-opened its case, and Neeley, Moss, Lamb and Brown testified.

A new trial was refused. Motion in arrest of judgment was overruled, and defendant appealed.

Among the errors assigned are the following:

1. That the court's charge on the question of intent was erroneous, and that there was no evidence to support the intent alleged in the indictment.

2. That there was a variance between the deed offered in evidence and the deed set out in the indictment.

3. That N. F. Lamb was present in the grand jury room with the grand jury while they were examining this charge.

4. That the demurrer to the indictment should have been sustained.

7. That the court erred in permitting Weaver and Blalock to testify as to the acts and declarations of Watkins in appellant's absence, the same not being in furtherance of any common design.

9. That the court erred in refusing to charge that the burden was on the state to prove that Burns' name was signed without his authority.

10. That the argument of the prosecution was reversible error.

11. That the taking of a part of the testimony during the appellant's necessary absence entitled him to a new trial.

Cate, *Hughes & Cate* and *Block & Sullivan*, for appellant.

1. The court's charge on the question of intent was erroneous. When an intent to defraud a particular person is alleged, it must be proved as laid. 2 Bish. Cr. Pro. (3d. Ed.), sec, 420, *et seq.*; 2 East, Crown Law, p. 988. See, also, 51 Ark. 88; 2 Bish. New Cr. Law, sec. 598; 3 Gr. Ev. (14 Ed.), sec. 17, *et seq.*; 103 Cal. 377; 49 Ark. 156; 22 N. W. 50; 26 S. W. 354.

2. The evidence on the question of intent does not support the verdict. There is no evidence of an intent to prejudice Burns, his heirs or estate. 2 Bish. Cr. Law, sec. 596; 95 Ill. 71.

3. There was no evidence of an intent to defraud any one. Bish., Cont., sec. 39, *et seq.* The whole intent was to defeat a criminal prosecution. There can be no forgery without an intent to work pecuniary wrong. 22 S. W. 876, and cases *supra;* 2 Bish. Cr. Law, sec. 601. There was no evidence that Burns left heirs or an estate.

4. The deed admitted in evidence varies from that set out in the indictment. The indictment purports to set out the deed *in haec verba*, and an *exact copy* must

be introduced. 58 Ark. 248; 1 Bish., Cr. Pro., 488*a*. The omission or insertion of a word is fatal. 1 Dougl. 194; 2 Salk. 660; 1 East, 180; Cowp. 229; 2 East, 602; Bish., Cr. Pro., vol. 1, sec. 562; 1 Ore. 269; 14 Oh. St. 55; 86 N. C. 679; 32 Ark. 609. Wadkins and Watkins are not *idem sonans*. 66 Ill. 344; 23 Tex. App. 401; 76 Ill. 188; 7 Ark. 70; 18 Fed. 377; 61 Ind. 447; 107 *id.* 404; Speers (S. C.), 46.

5. The indictment should have been quashed because N. F. Lamb was present in the grand jury room with the grand jury, while they were examining the charge. He was not the prosecuting attorney nor a witness. Sand. & H. Dig., sec. 2058; Wharton, Cr. Pl. & Pr. (9 Ed.), sec. 365. The privilege is not extended to mere temporary assistants, but is limited to the state's attorney and his permanent deputies. Sand. & H. Dig., sec. 6024; Acts 1895, p. 106. Where this provision has been violated, the indictment will be quashed. Whart. Cr. Pl. & Pr. (9 Ed.), sec. 367; 8 So. 673; 13 *id.* 225; 7 Tex. App. 519; 1 Conn. 428; 74 N. C. 194; 16 Fed. 765.

6. The indictment is bad. 1 Ark. 179; 38 *id.* 519; 15 Ohio, 717; 51 Ga. 535; 13 Bush, 267. It only alleged a legal conclusion, and not the acts constituting the forgery. 18 S. W. 356; 29 Tex. 295; 12 Bush, 342; 96 Ky. 40. It is also bad for duplicity. It charges a forgery of the deed *and* of the acknowledgment thereto. Sand. & H. Dig., sec. 2077; 32 Ark. 203; 33 *id.* 176; 36 *id.* 55; 38 *id.* 555; 100 Cal. 188; 63 Ind. 567; 137 Mass. 109.

7. It was error to force defendant to trial upon a defective transcript.

8. The acts and declarations of Watkins were not in furtherance of any common design, and were not admissible in evidence. 59 Ark. 422; 109 Ind. 415; 122 Ill. 1; 3 Gr. Ev. (14 Ed.), sec. 94; 13 N. E. 536; 35 S. W. 172.

9. Want of authority should have been alleged and proved. 25 Tex. 326; 24 Tex. App. 342; 19 N. Y. Sup. 360; 37 N. E. 1040; 96 Ky. 40; 37 N. E. 932.

10. The cause should be reversed for the improper argument of the attorney prosecuting. 1 Bish., New Cr. Pr., sec. 975*a;* 12 Mo. App. 431; 2 S. W. 585; 58 Ark. 353, 473; 150 U. S. 76; 27 S. W. 1109; 11 Ga. 615, 628; 65 N. C. 505; 75 *id.* 306; 41 N. E. 545; 32 S. W. 1149; 5 *id.* 842; 8 Tex. App. 416; 41 N. H. 317; 61 N. W. 246; 65 *id.* 61.

11. The taking of testimony during defendant's necessary absence entitles him to a new trial. 5 Ark. 432; 10 *id.* 518; 44 *id.* 331; 21 L. R. An. 402. Examination of witnesses is a substantive step. 24 S. W. 418; 44 Ark. 331. It is not necessary to show prejudice. 44 Ark. 331; 50 *id.* 492, 499; 10 N. E. 500. See also 52 Ark. 285; 56 *id.* 4; 36 Miss. 531; 7 Ohio, 327; 1 Bish. Cr. Pro. sec. 274; 2 Car. & P. 413; Whart. Cr. Pl. & Pr. (9 Ed.), sec. 544.

N. F. Lamb and *E. B. Kinsworthy*, attorney general, for appellee.

1. When the criminal intent is proved, the defendant cannot be heard to say that he did not intend to defraud the one whose name he wrongfully signed, etc. The original guilty motive being proved, the presumption of intention to defraud all against whom the forged instrument can create a liability becomes conclusive. 1 Bish. Cr. Pro. (3 Ed.), 1098; 2 Bish. New Cr. Law, 596–7–8; 118 Mass. 460; 2 Humph. 494; 50 Me. 409; 3 Gr. Ev. 18; 10 N. E. 88; 3 Gray, 441; 1 Whart. Cr. Law, 695, 717–18, 743; 86 Pa. St. 353; Whart. Cr. Ev. 149, 734; 2 Bish. Cr. Pro. 422, 427*a*; 51 Ark. 88, 92. The felonious execution of a document to be used in a litigation is forgery. Whart. Cr. Law, 683, 701;

116 Mo. 605; 67 Mich. 222; 13 Tex. App. 289; Sand. & H. Dig., sec. 1593.

2. The evidence shows that John T. Burns left at least one heir, a brother. 14 Tex. 503; 8 A. & E. Enc. Law, 480, 481.

3. The variance is not fatal. The variances are immaterial. Wadkins and Watkins are *idem sonans*. Variances must be material; they are not fatal if the meaning is not in any degree altered or obscured. Clarke, Cr. Pr., p. 333; 22 S. E. 351; 30 S. W. 807; 31 *id.* 987; 10 N. E. 178. To be material, a variance must be such as to mislead a party to his prejudice. Rice, Ev., vol. 3, p. 170; 68 Mo. 286; 19 Vt. 530; 5 Pick. (Mass.), 279; 57 Mo. 205. See also 38 N. E. 248; 12 S. W. 595; 11 Pac. 493; 38 N. W. 519; 6 S. W. 300; 5 *id.* 243; 3 Gr. Ev., sec. 1080, and notes; 1 *id.* 63–71; Whart. Cr. Pl. & Pr., 173, 273.

4. The mere presence before the grand jury of another than the official prosecutor, doing no more than to examine the witnesses, offering no advice, making no suggestions, and taking no part in their deliberations, has never been held sufficient to set aside an indictment. Sand. & H. Dig., secs. 2058, 2126; 8 So. 673; 13 *id.* 225; 16 Fed. 765; Whart., Cr. Pl. & Pr., sec. 366.

5. The indictment is good. The offense is charged in the language of the statute, our former decisions, and all text writers. Sand. & H. Dig., sec. 1593; 4 Bl. Com. 247; 1 Bish. New Cr. Law, 572; 1 Whart. Crim. Law, 653; 5 Ark. 349; 51 *id.* 88; *ib.* 242; 48 *id.* 94; 1 Whart. Crim. Law, 727; 2 Bish. Cr. Pro. 400, 401, 437, 473. It was not necessary to negative the authority to sign the name. Cases *supra*. Where the whole instrument is set out, special allegations are unnecessary. 1 Whart. Cr. Law, 678–735; 2 Bish. Cr. Pro. 415, 418*a*, 419. The acknowledgment was only a part of the deed. Only one offense was charged. Sand. & H. Dig., secs.

1591, 1605, 1612; Bish. Cr. Pro. 440, 480-1. An indictment charging the forgery of a whole instrument is sustained by proof of the forgery of any material part. 1 Bish. Cr. Pro. 488, 440, 480*d*; 100 Mass. 12 (18); 1 Whart. Cr. Law, 678; 2 Bish. Cr. Pro. 426.

6. No prejudice to appellant appearing, the correction of the transcript at any time before judgment was sufficient. 19 Ark. 178; 35 *id.* 118.

7. The acts and declarations of Watkins were admissible. The conversations occurred after the formation of the conspiracy and before its consummation. 2 Bish. Cr. Pro., 227-230; 1 *id.* 1248-9.

8. There was some earnest but no improper argument of counsel. The subject and range of argument is necessarily left to the sound discretion of the presiding judge, and, unless grossly abused to the prejudice of appellant, is not subject to review by this court. 34 Ark. 650; 4 Am. & Eng. Enc. Law, 875; 55 N. W. 756; 22 S. W. 1021; 23 *id.* 793; 25 *id.* 634; 24 *id.* 420.

9. Bennett's absence was voluntary. 52 Ark. 285; 88 N. Y. 585; 89 N. C. 539; 68 Mo. 22; Whart. Cr. Pl. & Pr., 554, *et seq.*

Sufficiency of indictment for forgery.

HUGHES, J., (after stating the facts). There was no error in the judgment of the circuit court in overruling the demurrer to the indictment. It sufficiently charges the crime of forgery. It is not necessary to allege the mode in which the offense was committed, further than it is stated in this indictment; and it is not essential that the indictment should state that the forgery was committed by signing the name of another without his authority, in so many words. The charge that the defendant "did unlawfully, wilfully, knowingly, and feloniously and fraudulently make, write, forge, and counterfeit a certain deed and acknowledgment thereof, in words and figures, as follows, to-wit" [setting out

a copy of the deed alleged to have been forged], necessarily imports that it was done without authority, and sufficiently states the manner of its execution. 2 Bishop's Cr. Pro., sec. 437. It is not necessary to set out the particular acts in which the forgery consisted. *State* v. *Maas*, 37 La. An. 292; *People* v. *Van Alstine*, 57 Mich. 69; *People* v. *Marion*, 28 Mich. 255. And this is according to the weight of authority. But it is said in *People* v. *Marion*, 28 Mich. 255, that the omitting to do so is a practice not to be commended, as an instrument may be forged in various ways, and fairness to the accused would seem to require it. The case of *Com.* v. *Williams*, 13 Bush (Ky.), 267, holds that it is necessary to do it. But this seems to be against the weight of authority. Where the prosecutor undertakes to set out in what the forgery consisted, he is bound to state it truly, so as not to mislead the defendant, and to prove it as stated. *People* v. *Marion*, 28 Mich. 255.

Indictment held not duplex.

We are of the opinion that the acknowledgment was only a part of the deed, and that the indictment in charging forgery of the deed and of the acknowledgment charges but one offense.

When intent to forge presumed.

One of the errors assigned in the motion for a new trial is "that the court's charge on the question of intent was erroneous, and there was no evidence to support the intent alleged in the indictment," which is that Bennett made the deed with the intent to defraud Burns, his heirs and estate. The counsel for the defendant contend, with much earnestness and plausibility, that, inasmuch as the evidence was to the effect that Bennett forged the deed for the sole purpose of use as evidence for the defendant on the trial of Watkins, charged with taking timber from the land of another, the presumption of intent to defraud Burns, his estate and heirs, was fully rebutted, and that the defendant was not guilty of forgery, within the meaning of the law.

Bishop, in his New Criminal Law (vol. 2, sec. 5978), says: "We have seen that forgery is an attempt to cheat. And an attempt, within the ordinary doctrine, exists only where the wrongdoer's intention is specific,—to do the particular criminal act. Whence it might be inferred that there can be forgery only where there is a specific intent to effect the particular fraud which the false writing is adapted to accomplish. But we are about to see that the adjudged law is not exactly so. In the ordinary language of the books, there must be, in the mind of the wrongdoer, an intent to defraud a particular person or persons; though no one need in fact be cheated. Yet the intent is not necessarily, in truth, exactly this; it is rather that the instrument forged shall be used as good. Consequently, if the forger means, for instance, to take up the bill of exchange or promissory note when it becomes due, or even if he does take it up, so as to prevent any injury falling upon any person; * * * * * or if a party forges a deposition to be used in court, stating merely what is true, to enforce a just claim,—he commits the offence, the law inferring conclusively the intent to defraud. And from the intent to pass as good the law draws the conclusion of the intent to defraud whatever person may be defrauded. Ordinarily there are two persons who may legally be defrauded,—the one whose name is forged, and the one to whom the forged instrument is to be passed; therefore the indictment may lay the intent to be to defraud either, and it will be sustained by proof of an intent to pass as good, though there is shown no intent to defraud the particular person." (See the authorities cited to support the doctrine of these sections. They are numerous.) There must be a possibility of fraud, but that is sufficient. The making alone of the false writing, with the evil intent, is sufficient. No fraud need be actually perpetrated.

2 Bishop, New Cr. Law, secs. 599, 602; *Com.* v. *Henry*, 118 Mass. 460; *State* v. *Kimball*, 50 Maine, 409. "Where the intent alleged is to defraud the person whose name is forged, it should be presumed from the forgery, without further proof." 2 Bishop, Cr. Pro., sec. 427; *Henderson* v. *State*, 14 Tex. 503; *Rounds* v. *State*, 78 Me. 48.

The deed in this case, as appears from the evidence, was forged with an evil intent, was designed and intended to be used as good, and as material evidence on the trial of Watkins upon a criminal charge, and was so used, and procured the acquittal of Watkins. It purports to be the warranty deed of John T. Burns, and it requires no argument to show that, had it been genuine, it might have made the estate or heirs of Burns liable, if the warranty should be broken, or assets descend to the heirs. It is shown that he left an estate, and a brother him surviving. We make no question that the proof of these facts is sufficient to sustain the charge of forgery. 1 Wharton, Cr. Law, sec. 743; 3 Greenleaf, Ev., secs. 18, 103; *Billings* v. *State*, 107 Ind. 54; *West* v. *State*, 22 N. J. L., 212; *United States* v. *Shellmire*, Baldw. (C. C.), 370.

"The courts are not entirely agreed as to how far the law will presume, in criminal cases, that a man intends to accomplish results which are the material and probable consequences of acts which he does knowingly and intentionally. On the one hand, some courts have laid down the rule broadly that the law will presume such intention, and have acted upon the rule so laid down, with no intimation that there might be exceptional cases in which the rule would not apply." Note to *People* v. *Flack*, 11 L. R. A., 810, 811, under head "Presumption as to Natural Consequences of Acts." "The New York courts hold that the rule that a party intends the ordinary and probable consequences of his acts is only a presumption, which may be rebutted by

competent evidence, and is for the jury." *Id.* 811. "But even in that state it has been stated that, whether it be denominated a presumption of law or a presumption of fact, an intent to kill would be necessarily inferred from a voluntary and wilful act, which has a direct tendency to destroy another's life, and which in fact does so." *People* v. *Majone*, 1 N. Y. Cr. R. 89.

An intent to defraud must necessarily be inferred by the jury, in a prosecution for forgery, where the evidence shows it to have been committed with the design that the instrument forged should be used as good, and it is also shown that there was a possibility that some person might be injured thereby, or that person's estate might be thereby injured or made liable. An estate is a "person," in contemplation of law.

When variance between indictment and evidence fatal.

The second ground of the motion for a new trial is "that there was a variance between the deed offered in evidence and the deed set out in the indictment."

The deed admitted in evidence, in setting out the consideration, has it thus: "The sum of five hundred and fifty dollars 550\frac{00}{100}$ dollars, to us paid by J. N. Wadkins." The deed set out in the indictment has it thus: "Five hundred and fifty dollars ($550.00) to us paid by J. N. Watkins." In describing the lands, as to one piece, the deed offered in evidence has it "the north half," while the deed set out in the indictment has it "north half," omitting the word "the" before "north half." In the blank form for relinquishment of dower in the deed offered in evidence, in setting out the consideration, the word "~~sum~~" is crossed as indicated, while in the deed set out in the indictment it is not, but appears without the cross marks, thus, "sum." Again, the deed offered in evidence concludes: "Witness my hands and seals this 22 day of August, 1892," while the deed set out in the indictment concludes: "Witness my hand and seal this 22nd day of August, 1892."

It is the opinion of the court that "Wadkins" and "Watkins" are "*idem sonans*," and that there is no material variance in the using of "d" in one deed, and "t" in the other, in setting out the name of the grantee, and we deem it unnecessary to cite authorities as to this.

It is the opinion of a majority of the court that, as the indictment professes to set out an exact copy of the deed charged to have been forged, the other numerous variances between it and the deed offered in evidence, taken altogether, are material, and that, in contemplationof law, the two deeds are not the same. The words and figures which are a part of the deed set out in the indictment are said to be descriptive of the deed charged to have been forged, and a defendant could not have been convicted on such a charge by producing in evidence a deed not having these words and figures in it. *McDonnell* v. *State*, 58 Ark. 242, and cases cited. If the deed had been set out according to its purport, it might have been proved by the one offered in evidence; but, as the indictment professes to set it out in words and figures, it was necessary to prove it by an exact copy. *Com.* v. *Parmenter*, 5 Pick. 279; *State* v. *Morton*, 27 Vt. 310; *Rex* v. *Powell*, 2 East, P. C. 976.

We do not deem it important to discuss the instructions given or refused, as the opinion sufficiently, we think, states the court's views of the question of law involved. We will state, however, that, while the instructions for the state probably contain no reversible error, we think they should have embodied the idea that if the jury found from the evidence that the deed was made to be used as good, and that there was possibility of another's being made liable or injured thereby, a presumption of fraud necessarily arose from the proof of these facts.

Effect of presence of stranger in grand jury room.

The third ground of the motion for new trial is "that N. F. Lamb was present in the grand jury room while they were examining this charge." The evidence shows that Mr. Lamb was neither prosecuting attorney, nor deputy prosecuting attorney, and that he was not requested by the prosecuting attorney to be present in the grand jury room, but that he consulted the prosecuting attorney before going into the room, and it seems that he went by the consent of the prosecuting attorney. He testified that he examined the witnesses, and that he said nothing to influence the grand jury in their determination. It is not contended that he was present while the grand jury were deliberating or voting on the charge. Section 2058 of Sandels & Hill's Digest provides that "no person except the prosecuting attorney and the witnesses under examination are permitted to be present while the grand jury are examining a charge, and no person whatever shall be present while the grand jury are deliberating or voting on a charge." The importance of this provision cannot be overestimated, when we consider that the "secrecy of the grand jury room, and the privity and impartiality of that inquest," may prevent the presentment of any one "through envy, hatred, or malice." *Rothschild* v. *State*, 7 Tex. App. 519. But Mr. Lamb, while present in the grand jury room examining the witnesses, by the consent of the prosecuting attorney, was acting in his stead; and we are of the opinion that, as he was not present when the grand jury were deliberating or voting on the charge, his presence, in the capacity in which he was acting, is not cause for quashing the indictment, especially as it is shown that nothing was said by him to influence the finding of the grand jury.

Admissibility of acts and declarations of a conspirator.

The seventh ground of the motion for a new trial is "that the court erred in permitting Weaver and Blalock to testify as to acts and declarations of Watkins

in appellant's absence, the same not being in furtherance of any common design." That "Watkins procured Weaver to obtain for him two blank forms for a deed" was competent evidence, being the act of a co-conspirator in the furtherance of the common design, having occurred after the conspiracy was formed, and before it was ended. But what Watkins told Weaver later in the same day (*i. e.*, that the appellant "had promised to make a deed which would clear him") was incompetent; the appellant not being present when the conversation occurred, and it not being in furtherance of the common design. The conversation between Watkins and Blalock, in the absence of the defendant, in which the former told the latter that appellant had proposed to make a deed which would arrange the timber trouble, was inadmissible, not having been something done or said in furtherance of the common design to forge the deed. 1 Greenleaf, Ev. 111; 3 *id.* 94.

When remarks of counsel prejudicial.

The tenth ground of the motion for a new trial is, in substance, that in his argument before the jury the counsel for the state made improper and prejudicial remarks. The remarks of Mr. Lamb, of counsel for the state, in making his argument to the jury, were as follows: "The only relief this county can get from men who will commit forgery, who will go to Harrisburg and commit perjury, and who will commit subornation of perjury, is to send such men as Polk Bennett to the penitentiary. The defendant knows he has committed forgery, and that he committed perjury in swearing that Burns had signed the deed, and that he has committed subornation of perjury." To which remarks the defendant at the time objected, whereupon Attorney Lamb said: "I will say, then, he swore a falsehood at Harrisburg." To which the defendant objected. His objection was overruled, and he excepted. The defendant was not on trial for perjury or subornation of per-

jury, and we think the remarks were improper, and might have been prejudicial to the defendant. Whether they are grounds for reversal in this case, we need not decide. *Vaughan* v. *State*, 58 Ark. 353; *Holder* v. *State*, 58 Ark. 473.

Effect of taking testimony in defendant's absence.

The eleventh ground of the motion for a new trial is "that the taking of a part of the testimony during the appellant's necessary absence entitled him to a new trial." The record shows that appellant, by the permission of the court, retired to the water closet for about fifteen minutes; that he was suffering with flux at the time, which made his retirement and absence for the time necessary; that there was no refusal upon his part to be confronted with the witnesses, as in *Gore* v. *State*, 52 Ark. 285; that his retirement and absence were made necessary by his physical condition, and were voluntary only because necessary. In a prosecution for felony, the accused must be present in person whenever any substantive step is taken in his case. It is a constitutional right of his to be confronted with the witnesses. In this case, while the defendant was absent, several witnesses (at least three) were examined. The examination of witnesses is an important and substantive step in a criminal prosecution, and it is not required that defendant should show prejudice on account of his absence. *Sneed* v. *State*, 5 Ark. 431; *Cole* v. *State*, 10 Ark. 318; *Bearden* v. *State*, 44 Ark. 331; *Mabry* v. *State*, 50 Ark. 492. It was error in this case to proceed, as the court did in the trial of this case, while the defendant was necessarily absent by permission of the court.

We have found it unnecessary to refer to the grounds for new trial in appellant's motion, which are based on the court's refusal to grant motion for postponement of the trial, or those tending to that end.

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

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STARCHMAN v. STATE.

Opinion delivered July 8, 1896.

BURGLARY—EVIDENCE.—INSTRUMENTS OF CRIME.—On a trial for burglary, where it appeared that a safe was drilled and opened by means of an explosive, it was competent for the state to introduce in evidence certain drills and punches capable of being used to open the safe, which were found by officers on defendant's premises while they were searching for the stolen property under a search warrant.

SAME—DESCRIPTION OF PROPERTY.—Where an indictment for burglary charges a breaking and entering with intent to steal United States two-cent postage stamps, the allegation as to the kind of property intended to be stolen, being descriptive of the offense, must be proved.

Appeal from Lawrence Circuit Court.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

The defendant, Starchman, was indicted by the grand jury of Lawrence county for the crime of burglary. The indictment alleged that Starchman, "on the 15th day of March, 1895, in the county, district and state aforesaid, and during the night time of said day, the court-house in the town of Powhatan, then and there situate, and owned and possessed by the county of Lawrence, then and there wilfully, maliciously, feloniously, and burglariously, did break and enter with felonious and burglarious intent twenty-five hundred two-cent United States postage stamps of the value of fifty dollars, of the property of the United States, then and there being in the possession and under the control of one Geo. Wells, he being the postmaster of the post office in the town of Powhatan, which said stamps were by him deposited and kept in the safe of the treasurer of said county, which safe was in the room or office of the

said treasurer in said court-house, then and there feloniously and burglariously to steal, take, and carry away, against the peace and dignity of the State of Arkansas."

On the trial, the State was allowed to introduce in evidence certain instruments found in defendant's house by officers while searching for postage stamps alleged to have been stolen. The other facts sufficiently appear in the opinion. Defendant was convicted, and judgment of imprisonment for a term of three years in the state penitentiary was rendered against him, from which he appealed.

Jos. W. Phillips, for appellant.

1. The evidence is not sufficient to sustain the conviction. 59 Ark. 52; 7 *id.* 468; 11 *id.* 463; 13 *id.* 567; 14 *id.* 420; 36 *id.* 131; 34 *id.* 640. There is no evidence of a *breaking*. 63 Ala. 143; 25 Neb. 780; 82 Ga. 441. Nor that it was done in the *night* time. 53 N. W. 1036; 59 Ark. 52; 8 Am. St. 495. There is a total want of evidence as to the intent to steal postage stamps, or of their value or denomination, etc. 49 Ark. 517. The place and intent, as well as the character of the felony intended to be committed, ought to be set out. 49 Ala. 25; Clark, Cr. Pro. p. 182.

2. The admission of defendant's personal property wrongfully taken from his house, over his objections, in evidence against himself, was prejudicial error. Const. art. 2, secs. 15, 8; 116 U. S. 616; 142 *id.* 547; 63 Ga. 669; 5 N. C. 259; 30 Am. Rep. 72; 4 Am. Cr. Rep. 183; 67 Ga. 76; 86 Ala. 610; 32 Am. St. 640; 41 *id.* 376; 132 Pa. St. 403.

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

1. While the evidence is not as satisfactory as it might be, yet it satisfied an impartial jury. There is some evidence to sustain the verdict. 24 Ark. 251; 40 Ark. 168; 27 *id.* 517; 46 *id.* 141; 47 *id.* 196.

2. There was no error in admitting the tools, etc., found in appellant's possession. Bish. Cr. Pro. (3 Ed.) sec. 151; 2 Cush. (Mass.) 582; 8 Gray (Mass.), 375; 7 N. Y. 445; 43 N. Y. 177; 33 Mo. 496; 39 Miss. 705; 29 Cal. 658; 64 Iowa, 39.

Competency of evidence.

RIDDICK, J., (after stating the facts). It was not error to allow witnesses on the part of the state to exhibit to the jury certain drills and punches found by them in the house of appellant, Starchman. It having been shown that the safe which was entered was opened by means of similar instruments in connection with an explosive substance, such evidence was proper as tending more or less to connect Starchman with the offense. *People* v. *Hope*, 62 Cal. 291; Rapalje on Larceny & Kindred Offenses, sec. 358.

In *Boyd* v. *United States*, 116 U. S. 616, cited by counsel for appellant, it was held that a defendant cannot be compelled to produce his private papers in order that they may be read in evidence against him upon a criminal prosecution, for the reason that to do so would, in effect, be compelling him to testify against himself. But that case has no application here, and rests on principles different from those controlling the admission of this evidence. No private papers of the defendant were introduced, and he was not compelled to produce the instruments offered in evidence in this case. These instruments were found by the officers while searching for stolen property, and it was proper for such officers to testify concerning any material fact discovered by them while making such search. This case is similar to the case of *State* v. *Flynn*, 36 N. H. 64, where it was held that "evidence obtained by means of a search warrant is not inadmissible either upon ground that it is in nature of admissions made under duress, or that it is evidence which the defendant has been compelled to fur-

nish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that the search warrant was illegally issued." If the drills introduced in evidence in this case were taken by the officers without authority, they may be forced to respond in damages for such wrongful act; but that question, not being before the court, could not be considered, and furnished no reason to exclude such evidence from the jury. *State* v. *Flynn*, 36 N. H. 64; *Commonwealth* v. *Dana*, 2 Met. (Mass.) 329; Bishop's New Crim. Pro. sec. 246.

Description of property must be proved as laid.

While the court did not err in the admission of evidence, the contention that the verdict is without evidence to support it must be sustained. The indictment alleged that the defendant broke and entered the court-house with the intent to steal "twenty-five hundred two-cent United States postage stamps, of the value of fifty dollars, and the property of the United States." The evidence connecting defendant with the breaking and entering the house was altogether circumstantial, and to us not very convincing, but there is an entire absence of proof tending to show that such breaking and entering was with an intent to steal two-cent United States postage stamps. The only witness who refers to stamps in any way testified as follows: "I went before Wayland, justice of the peace, and swore out a search warrant to search Starchman's house for one hundred dollars worth of stamps stolen by the man or men who opened the safe. I went with Mr. Childers, the deputy sheriff. He summoned me to assist him. We made a full search. Found no stamps." It will be noticed that the witness does not mention two-cent postage stamps or postage stamps of any kind. If we overlook this deficiency, and assume that by the word "stamps" the witness meant two-cent United States stamps, there is still nothing to show that such postage stamps were stolen

from the safe or court-house when the burglary was committed. The witness says the stamps were stolen by the man or men who opened the safe, but where were the stamps at the time they were stolen? The witness does not say that they were stolen from the safe or court-house, or that they were even kept in such safe or court-house, nor was there any fact shown from which it can be inferred that the breaking and entering of the house was with the intention to steal stamps of any kind. There is no evidence to show that the stamps stolen were owned by the United States, or that the United States had at any time kept postage stamps in said safe or court-house, and nothing to show that either the defendant or any one else had any reason to believe that such stamps were kept in that place. There is therefore nothing to sustain the allegation that the breaking and entering the court-house was with an intent to steal postage stamps. While the intent to commit a felony is a material part of the crime of burglary, and the indictment should set out the felony intended, yet it was probably unnecessary to describe the property which the burglar intended to steal with the particularity shown in this indictment. But, having made allegations descriptive of the property and of the offense, there must, in order to convict, be some proof tending to support them. *Dudney* v. *State*, 22 Ark. 251; Bishop's New Crim. Pro., secs. 486, 488, and cases cited; *Neubrandt* v. *State*, 53 Wis. 89; Rapalje on Larceny & Kindred Offenses, sec. 355.

The evidence to support the allegation that the breaking and entering took place in the night time, so far as it appears in the transcript, is very weak, but we deem it unnecessary to discuss it further. We know that this apparent defect in the proof may have been the result of haste or oversight in preparing the bill

of exceptions, but, as no effort has been made to amend it, we must assume that it reflects the facts.

For the reasons given above, the judgment is reversed, and the cause remanded for a new trial.

HAMILTON v. STATE.

Opinion delivered July 8, 1896.

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INDICTMENT—FINDING AT SPECIAL TERM.—The validity of an indictment found at a special term of the circuit court will not be affected by the fact that, had the case been tried at such special term, it could not have been concluded before the regular term of another circuit court in the same district.

SAME—WAIVER OF IRREGULARITIES.—An indictment will not be quashed because the accused was not allowed to be present while the grand jury was being impaneled, and was given no opportunity to challenge grand jurors for cause, where no prejudice is shown, and no objection was raised until after a plea of not guilty had been entered.

MURDER—SUFFICIENCY OF INDICTMENT.—An indictment alleging that defendant "did unlawfully, wilfully, feloniously, and of his malice aforethought, and after deliberation and premeditation, kill and murder," etc., is sufficient, without alleging that the killing was "malicious."

CONTINUANCE—WHEN REFUSAL NOT ERRONEOUS—It is not error to deny a continuance in a prosecution for murder for the absence of a witness who would testify that on one occasion deceased made an unprovoked assault on witness, such assault having no connection with the killing, and not being competent evidence of deceased's character; nor is it error to refuse a continuance where it is not shown that the testimony of the absent witness could be procured by a continuance.

SAME—DISCRETION OF COURT.—It is no abuse of discretion to deny a continuance in order that defendant's counsel may have further time to prepare for trial, where defendant was in jail on the charge for several weeks before trial and neglected to employ counsel, and where defendant was the sole eye witness to the killing.

JURY—DISCRETION OF COURT is not abused in excusing a juror for ill-health or in rejecting a juror because he has formed an opinion as to the merits of the case.

JURY—SEPARATION.—Permitting the jury in a murder case to separate before the cause was finally submitted to them is not reversible error where no prejudice is shown.

APPEAL—OBJECTION NOT RAISED BELOW.—An objection will not be considered on appeal where no exception was saved below, and the matter was not referred to in the motion for a new trial.

HOMICIDE—INSTRUCTION.—One desiring an instruction in a murder case as to the second degree of murder should present a correct instruction.

INSTRUCTION—CREDIBILITY OF DEFENDANT.—It is not error to charge the jury that they have the right, in considering the testimony of the defendant, to take into consideration his interest in the result of the verdict, in order to determine the proper weight to be given to his testimony.

SAME—WHEN ABSTRACT.—The court may properly refuse to instruct as to self-defense where there is no evidence upon which to base such an instruction.

DEFENDANT AS WITNESS—CONTRADICTION.—Where the state proves that defendant, at the time he borrowed the gun with which he killed deceased, stated that he wanted it to shoot ducks, it may show that such statement was false.

Appeal from Logan Circuit Court.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

The appellant, Charles Hamilton, on the 2d day of December, 1895, in the Charleston district of Franklin county, killed A. C. McAbee by shooting him with a gun. He surrendered himself, and was placed in jail at Ozark, in said county, to await the action of the grand jury. The day for the holding of the next regular term of the circuit court for the Charleston district of said county, after said killing, was the first Monday in February, 1896; but the judge of the circuit court, on the 12th of December, 1895, issued an order for a special term of said court, to be held on the 30th day of December, 1895, for the trial of Hamilton. The special term

convened on that day. A grand jury was impaneled, and soon afterwards returned an indictment against Hamilton, charging him with murder in the first degree. The body of the indictment alleged that "the said Chas. Hamilton, on the 2d day of December, 1895, in the county and district aforesaid, did unlawfully, wilfully, feloniously, and of his malice aforethought, and after deliberation and premeditation, kill and murder one A. C. McAbee, by shooting him, the said A. C. McAbee, with a certain gun which the said Chas. Hamilton then and there had and held in his hands, the said gun then and there being loaded with gunpowder and leaden bullets, against the peace and dignity of the state of Arkansas. Sam. R. Chew, Pros. Attorney."

The defendant filed a motion to quash this indictment, for the reason that the special term of court at which it was found was ordered at a time and under circumstances not authorized by law. The motion was overruled. The defendant thereupon filed a demurrer to the indictment, which was also overruled. A motion for continuance filed by the defendant was overruled, and then, on motion of defendant, the venue was changed to the Logan circuit court. On the 8th day of January, 1896, the case was called in the Logan circuit court. The defendant again filed a motion for a continuance, which was overruled, and the defendant placed on trial. From the evidence adduced at the trial, the following facts appear: The deceased, McAbee, was a farmer, fifty-three years of age, who lived upon his farm two miles distant from the town of Charleston, in Franklin county. The appellant, Hamilton, a young man about 26 years old, and a cousin of the wife of McAbee, cultivated a crop on McAbee's place in 1895, but during the summer he left the place, and went to Texas. After remaining there two or three months, he returned to this state. On the morning of December 2, 1895, he called at

McAbee's house between 9 and 10 o'clock, and inquired for McAbee. Upon being told that McAbee was in the field, plowing, he walked over to the field. When Hamilton approached the field, McAbee was alone, plowing, and no one was present until after the killing, except McAbee and Hamilton. What then took place was told by Hamilton himself on the witness stand, as follows: "I told him [McAbee] that I was going to Mazzard Prairie to collect a debt, and that I had come by to get what he owed me for pitching up some hay. We stood there, and talked some time, and McAbee said it was too cold to stand there, and asked me to walk with him while we talked. So I walked several rounds with him, and finally McAbee said that he did not owe me anything, and would not pay me anything. I told him that he owed me $5.75, but that I would give him $2.00, and he could pay me $3.75. But he said that he did not consider that he owed me anything, and would not pay me anything; that I owed him for board while I stayed there and was not at work; that if anybody was to pay money I ought to pay him for my board. So I left, and went back to the house, where I had left my horse. This was about 9 o'clock in the morning. I told Cousin Mary [Mrs. McAbee] that the old man would not pay me, and that I was going to town, and see what I could do with the law. I got on my horse, and rode back up in the field, and told Mr. McAbee that, if he did not pay me, I was going to town, and attach a stack of hay, and he plowed on, and told me to go on and do what I was going to do, that he did not care what I did, but not to come bothering him; so I went on." Hamilton then stated that, on the way to town, he saw some ducks in a branch, and that he borrowed a shotgun from a man named Dawson to shoot the ducks. When he returned, the ducks had gone, and, after looking for them a while, he went again to the field where McAbee was plowing.

"McAbee asked me," said Hamilton, "what I was doing with that gun. I told him about being after the ducks, and said to him that we could settle our differences some other way than by going to law with it. McAbee told me to get out of his field, and pulled out his knife, and came at me with it, waving his hands, and saying he would tear me all to pieces. I told him not to come, to stand back. At that time my gun was resting on the ground, on the butt end of the gun. He kept coming at me, so I raised the gun, and fired, when McAbee staggered, and fell backwards. I then walked up in about two feet of him, and stood there a moment or so, and heard him groan a time or two. Then I walked back to where I left my horse, and went up to Mr. Dawson's, and put the gun up, and then rode over to my brother-in-law, Mr. House, about twelve miles, and told him about it, and we came back to Charleston that night about dark, and I gave myself up to Mr. Carter, the deputy sheriff."

There was testimony tending to contradict some of the statements of defendant.

After McAbee was killed, his body remained on the ground until late in the afternoon. It was then found by a boy sent to look for him. The horses were still standing hitched to the plow, which had fallen over, but apparently had not been moved. The body of McAbee lay face upwards, the feet within a few inches of the plow handles. In his left hand was his pocket knife, loosely grasped, the blade open. On his feet were a pair of coarse brogan shoes which he wore. Hamilton on that day wore a pair of sharp-toed shoes about No. 6 or 7 in size. The witnesses testified that the tracks made by these shoes of Hamilton on the plowed ground when he approached and left the body could be plainly seen. At one place about seventy-five yards from the body the tracks of deceased were seen where he had removed a

loose stump from the plowed ground. With this exception, although the witnesses looked carefully, no other tracks of the deceased were found, except such as he made in the furrow following his plow, and at the ends of the furrows when he turned his team. Dawson, the man from whom Hamilton borrowed the gun, testified that Hamilton asked him for his gun to shoot some ducks in the branch. "I told him," said Dawson, "that he could have the gun. * * I got him some shells that I had loaded for bird shooting. The defendant said he wanted some larger shot, and asked me if I did not have some larger shot. I told him I thought so, and looked about in the closet, and found three shells that I had loaded last spring to shoot some geese. The shot were large duck shot. * * I handed the defendant the shells, and he asked me for a gimlet to draw the wads with, to see the size of the shot. I could not find the gimlet, and the defendant then took out his knife, and drew the wad, and looked in the shell, and remarked to me, 'These are the ones. These will do.' He took the gun, and left," etc. These were the main facts in evidence. Such other portions of the evidence necessary to notice are referred to in the opinion.

Rowe & Rowe, *J. Frank Keith* and *Robert J. White*, for appellant.

1. The indictment should have been quashed. (1) There was no reason for a special term of the court. (2) There was no person confined in the county jail subject to trial. (3) The holding of a special term must not interfere with the holding of the regular term. Sand. & H. Dig., 1312, 1130. The power to hold a special term being a special power, every circumstance necessary to its exercise must exist, and *appear of record.* 9 Ark. 326; 2 *id.* 230.

2. Defendant had no opportunity to object to the grand jury. Sand. & H. Dig., sec. 2067; 50 Ark. 534; 44 *id.* 332.

3. The indictment was bad. The word "malicious" is omitted entirely. 60 Ark. 567; Sand. & H. Dig., sec. 1644; 21 Ark. 183; 43 *id.* 345.

4. It was error to refuse the continuance. 2 Bish. Cr. Pro. (3 Ed.), sec. 610.

5. It was error to excuse jurors Creekmore, Morris, and Henry. They were competent jurors. 47 Ark. 185; 40 *id.* 460.

6. The evidence is totally inadequate to sustain the verdict.

7. The court erred in its instructions. See 49 Ark. 542. The court *assumed* there was a difficulty. This should have been left for the jury to determine. Sackett, Inst. to Juries, sec. 16; 45 Ark 256; 52 *id.* 517. Instructions based upon a hypothetical state of facts, as to which there is no evidence, are abstract and erroneous. 54 Ark. 339. It was error to give instruction No. 12. Defendant was a witness, and was entitled to have his evidence considered by the jury in the same way as the other witnesses. 58 Ark. 362–5. It was error to single out and give undue prominence to isolated parts of the testimony, while sinking out of view the theory of the defense. 2 Thomp. Trials, sec. 2330, 2331; Sackett's Inst. to Juries, secs. 13, 14; 37 Ark. 333; 14 Heisk (Tenn.), 197. If there is any evidence to sustain the theory of defendant, it is the duty of the court to instruct on this theory. Sackett, Inst. etc. to Juries, sec. 15; 50 Ark. 549. The definition of the judge of murder in the first degree leaves out the words "wilful" and "malicious." Sand. & H. Dig., sec. 1644; 2 Bish. Cr. Pr. secs. 561–570; 1 *id.* sec. 102.

8. It was error to allow a communication to be delivered to W. A. Brown, one of the jurors, after the

jury had retired to consider their verdict. 2 Thomps. Trials, sec. 2553.

9. And to allow the jury to separate, 2 *id.* 2548.

Sam R. Chew, Prosecuting Attorney, and *E. B. Kinsworthy*, Attorney General, for appellee.

1. The indictment is in conformity with our statute and former decisions. 29 Ark. 166; 34 Ark. 435; 33 S. W. 104; 32 *id.* 81.

2. The special term of the court was properly held. All the powers to hold the court appear of record. 2 Ark. 253–4; 29 *id.* 170; 45 *id.* 452; 32 S. W. 81.

3. It is too late now to urge for the first time that defendant was not present at the time the grand jury was impaneled, etc. 12 Ark. 630; 50 Ark. 543; 55 *id.* 344; 51 *id.* 145; Sand. & H. Dig., sec. 1061. There is nothing to show that appellant was prejudiced. 55 Ark. 342; *Ib.* 369.

4. Motions for continuance are in the sound discretion of the court, and the action of the court will not be disturbed unless it clearly appears the discretion has been abused. 26 Ark. 323; 54 *id.* 244; 57 *id*; 167; 44 *id.* 482.

5. The testimony of Phelps was incompetent, and no diligence is shown to obtain the witness Felts. 38 Ark. 508; 2 Bish. Cr. Pro., secs. 610, 611; 29 Ark. 262–3; *Ib.* 228–9.

6. There was no error in excusing the jurors mentioned. No abuse of discretion is shown. 29 Ark. 22. No one has a right to any particular juror. 35 Ark. 641–3; 50 *id.* 498; 45 *id.* 169–170.

7. No error in permitting Lora Hamilton to testify. 1 Gr. Ev., sec. 367; Whart. Cr. Ev., sec. 366; 25 Ark. 96; *Ib.* 447.

8. The placing the jury in charge of a bailiff, or permitting them to separate, are matters left to the sound discretion of the judge. 43 Ark. 152; 29 *id.* 253–5. No improper influences were shown. 12 Ark. 810; 20 *id.* 59–62; *ib.* 47–50.

9. The evidence fully sustains the verdict. 46 Ark. 142; 47 *id.* 199; 18 *id.* 303; 34 *id.* 632; 31 *id.* 196; 44 *id.* 115; 32 S. W. 81.

10. The court properly instructed the jury. Citing 29 Ark. 248; 38 *id.* 304; 25 *id.* 405; 38 *id.* 235; 51 *id.* 192; 40 *id.* 454; 49 *id.* 548; 53 *id.* 516; 58 *id.* 362.

RIDDICK, J., (after stating the facts). The learned counsel for defendant have set up many grounds why the judgment of the circuit court in this case should be reversed. We will now proceed to notice such of these grounds as seem to us necessary to consider here.

Validity of indictment found at special term.

In the first place, the record shows the facts that gave the circuit judge power to hold the special term of circuit court ordered by him, and at which the defendant was indicted. It is said that, had the trial of Hamilton commenced at the special term, it could not have been concluded before the commencement of the regular term of the Logan circuit court, and that it would have interfered with that court. But whether, had the trial commenced at the special term, it could have been concluded before the time of the convening of the Logan circuit court, is a matter concerning which we need not speculate. The trial did not commence at the special term, and such special term did not in any way interfere with the Logan circuit court. The validity of the proceedings at such special term cannot be affected by the contention that, if something had occurred that did not occur, the special term would have interfered with the regular term. Enough for us to know on that point is that the special term did not interfere with any other

term of the court. The motion to quash the indictment on this ground was properly overruled.

When irregularities waived.

It is further said that the indictment should have been quashed for the reason that Hamilton was not allowed to be present while the grand jury that returned the indictment was being impaneled, and was given no opportunity to challenge grand jurors for cause. Appellant does not show that any grand juror was a prosecutor or witness against him, or that he was prejudiced by not being allowed the opportunity to challenge. Further, he did not make this a ground of his motion to quash in the circuit court, and it is too late to insist upon it now, for it was waived by the plea of not guilty. *Miller* v. *State*, 40 Ark. 492.

Sufficiency of indictment for murder.

The demurrer to the indictment was properly overruled. When an indictment alleges that the defendant "did unlawfully, wilfully, feloniously, and of his malice aforethought, and after deliberation and premeditation, kill and murder," etc., it is not necessary also to allege that the killing was "malicious," or to use the word "malicious" in addition to the words used. The indictment in this case contains every allegation necessary under our statute to constitute a sufficient indictment for murder in the first degree. *Turner* v. *State*, 61 Ark. 359.

When not error to refuse continuance.

It was not error to refuse a continuance on account of the absence of witness Felts, by whom defendant claimed that he could show that McAbee had on one occasion made an unprovoked assault upon said Felts with a knife. Such assault, if made, had no connection with the killing of McAbee, and was not competent evidence of the character of McAbee, for it could not be shown that McAbee was a man of violent and uncontrollable passion by proof of particular acts of violence having no connection with the crime under investigation. *Campbell* v. *State*, 38 Ark. 508; 2 Bishop, Cr. Pro.,

sec. 617. Again, there is nothing in the motion or evidence tending to show that Felts was within the jurisdiction of the court, or that his attendance or testimony could have been procured by a continuance of the case.

Neither can we say that the court should have allowed defendant further time to prepare for his trial. It may be that the time allowed Hamilton to prepare for his defense was shorter than customary, but we cannot say that more time was necessary. The killing occurred in a neighborhood where both himself and McAbee were well known. No one besides McAbee and Hamilton was present at the killing. Hamilton was the only living witness of the tragedy, and it was largely a question of whether or not the jury would believe his version of the facts. So far as we can see, every fact tending to throw light on the transaction was presented to the jury. If counsel for defendant had little time after they were retained to prepare for trial, it was mainly the fault of defendant. He was arrested and confined in jail on this charge for several weeks before the court convened, and no reason is shown why he could not have employed counsel earlier than he did. It may be true that there was no urgent reason for calling a special term to try this case. As the regular term was near at hand, it might have been less expensive to the public, and as well in other respects, to have allowed the case to pass till that time; but that was a question within the discretion of the circuit judge, with which we see no reason to interfere. We must repeat the settled rule that motions for continuance are addressed to the sound discretion of the trial judge, and a refusal to grant such a motion is not ground for a new trial, unless it clearly appears to have been an abuse of such discretion, and manifestly operated as a denial of justice. *Thompson* v. *State*, 26 Ark. 326; *Edmonds* v. *State*, 34 Ark. 726;

Jackson v. *State*, 54 Ark. 244; *Price* v. *State*, 57 Ark. 167.

Discretion of court in excusing jurors.

Neither the dismissal by the circuit court of a juror from the regular panel on account of the feeble state of the juror's health, nor the rejection of two of the talesmen because they had formed opinions, requires any consideration here, for those matters were clearly within the discretion of the court. *Hurley* v. *State*, 29 Ark. 22; *Wright* v. *State*, 35 Ark. 641; *Mabry* v. *State*, 50 Ark. 498; *Vaughan* v. *State*, 58 Ark. 361.

As to separation of jury.

It is said that the court, against the objection of the defendant, permitted the jurors to separate before the case was finally submitted to them. This also was a matter within the discretion of the court. Sand. & H. Dig., sec. 2236. But in *Johnson* v. *State*, 32 Ark. 309, it was remarked by this court that "such discretion should be exercised, especially in trials for felony, with the utmost caution." The great interest usually taken by the public in trials for offenses punishable by death, and the danger that either the state or defendant may suffer prejudice from such separation of the jurors makes it in our opinion rarely prudent for a court to permit such separation in trials for capital offenses, when either the counsel for the state or defendant objects. It is not always easy in such a case to ascertain the influences to which a separation has subjected the jurors. For this reason, as the defendant objected to the separation of the jurors, we believe that it would have been better to have kept them together. But as the statute leaves this matter to the discretion of the circuit court, and as there is nothing to show that the defendant was prejudiced by the separation, the exception must be overruled, and a new trial on that ground refused.

Objection not raised below.

Another contention is that the court wrongfully permitted witnesses, who described the appearance of

certain tracks made by some one near where the body of deceased lay, to state that these tracks appeared to have been made by a man while squatting, and to indicate opinions as to the position of the man at the time he made the tracks. It is said that these witnesses got off the stand, squatted, extended their arms and hands, and held themselves in position as if firing a gun; thus intimating to the jury their opinion upon a material point in the case. But the record does not support this contention. It is true that after the testimony of several of the witnesses about these tracks follows this statement in parenthesis, "Here witness demonstrated to the jury;" but what or how he demonstrated is not shown. The record does not show that the defendant or his counsel made any objection to these demonstrations. No exceptions were saved, nor is the matter referred to in the motion for new trial, and it cannot be considered here. *Johnson* v. *State*, 43 Ark. 391; *Werner* v. *State*, 44 Ark. 122.

Sufficiency of court's charge as to murder in second degree

The contention that the presiding judge did not, in his charge to the jury, sufficiently define murder in the second degree cannot avail. He read the statutory definitions of the different degrees of homicide, and the punishment therefor. In addition thereto, he gave instructions defining murder in the first degree and voluntary manslaughter, and the following instruction: "If you are satisfied beyond a reasonable doubt that defendant is guilty of murder in some degree, but entertain a reasonable doubt as to the degree, you will convict only of murder in the second degree. If you are satisfied beyond a reasonable doubt that defendant is guilty of some grade of criminal homicide, as explained in these instructions, but entertain a reasonable doubt as to whether it is manslaughter or some degree of murder, you will convict only of manslaughter. If you entertain a reasonable doubt as to whether defendant

is guilty of any degree of criminal homicide, explained in these instructions, you will acquit the defendant."

As the circuit judge had defined the crime of murder in the first degree, it is clear that, had the jury entertained a reasonable doubt as to whether defendant was guilty of that degree of homicide, they would have returned either a verdict of some lower degree of homicide, or of not guilty. If there was any defect in the charge on this point, we think that no prejudice resulted to the defendant. In addition to this, it may be said that neither of the instructions requested by defendant contained a satisfactory definition of murder in the second degree. He should have presented a correct instruction if he desired one to be read to the jury on this point.

The contention that the presiding judge, sometime after the jury had retired, recalled them, and read to them a single instruction, defining murder in the first degree, is not supported by the record. The record does show that, after the case was submitted, the jury came in on their own motion, and requested the judge to repeat the instructions, which he did, and also added two other instructions, touching on the question of motive and the failure of the defendant to flee. Both of these instructions were favorable to defendant, and not in any way prejudicial.

Instruction as as to defendant's credibility approved.

It is further contended that the presiding judge erred in telling the jury that they had the right, in considering the testimony of the defendant, to take into consideration his interest in the result of the verdict, in order to determine the proper weight to be given to his testimony. It is unnecessary to set out this instruction, for it is admitted that it states the law correctly, and it is a copy of one given in *Vaughan* v. *State*, 58 Ark. 353. But it is said that the defendant was prejudiced by being thus singled out from the other witnesses. We think

that this contention is not tenable. In the first place, a defendant on trial is already singled out by the indictment and the fact that he is on trial and directly interested in the result. His position in the trial has already singled him out, and for this very reason it may be necessary in some cases to give an instruction on this point. To illustrate, let us suppose a case in which an attorney for a defendant who has testified argues to the jury that the defendant of all men best knows the motives that prompted the act under investigation, and that the greatest weight should be attached to his testimony. Let us suppose that the attorney for the state, who looks at the matter from another standpoint, argues for his side that a defendant accused of a high crime, especially one accused of a capital offence, and whose life depends to some extent on his own testimony, has such a strong inducement to protect himself, if necessary, at the expense of the truth, that his testimony is entitled to little, if any, weight, and that the jury should disregard it entirely. This is no far-fetched supposition. Attorneys have the right to argue the weight to be attached to the testimony of witnesses, and such arguments are often heard in the trial courts. What is the presiding judge to do in such a case? Is he to sit silent, and allow the jury to adopt the advice of that attorney in whom they have the most confidence, or whose views they feel most inclined to follow? We do not think so. It is the duty of the judge to instruct the jury in the rules of law by which the testimony is weighed and its credibility tested. These rules are simple, and can be easily stated in a way to prejudice no one.

The defendant has the right to testify, and the jury should give his testimony the same impartial consideration that they accord to the testimony of other witnesses. They should not arbitrarily disregard what he testifies, simply because he is the defendant, nor, on the other

hand, are they required blindly to receive a fact as true because he says that it is true; but they are to consider his testimony in connection with the other facts in proof, in order to determine whether his statements are true and made in good faith, or made only to avoid conviction. The jury are the exclusive judges of the weight of such testimony. In considering the degree of credit to be given it, they may take into consideration his appearance and manner while testifying, the reasonableness or unreasonableness of his statements, and his interest in the result of the verdict. After a due consideration of his testimony, in connection with the other evidence in the case, they should give it such weight as they may deem it entitled to receive, their sole object being to ascertain the truth.

We do not see that an instruction on this point would prejudice either the state or defendant, but, as jurors are not always highly intelligent, it might in some cases avoid confusion in their minds, and tend to promote the ends of justice. Take the case at bar. The defendant was the only eye-witness of the killing. Was it not proper for the jury to understand clearly that, although no other witness saw or could give the details of that tragedy, yet that they were not bound to take his statements as true, and that it was their duty to determine whether such statements were true or false after a careful consideration thereof in connection with the whole evidence? If it was necessary for them to have this information, it was then not improper for the judge to give it to them. It is true that the judge should be careful not to intimate an opinion as to the weight of the testimony. Such an instruction should be both carefully drawn and read; otherwise, prejudice may result. A high and important trust is imposed by the law upon our circuit judges in this as in many other respects,—that, under all circumstances, they secure to the defendant, as well as the

state, a fair and impartial trial, without favor or prejudice. Of each of them, as of Lord Chief Justice Holt, it should be truly said, that the criminal before him knew that "his judge would wrest no law to destroy him, nor conceal any that would save him." But while, above all men, the judge presiding at a criminal trial should be impartial, yet great injury may be done by restricting his powers too closely. The law must be enforced. "If," says Judge Dillon, "we are to expect satisfactory verdicts, the presiding judge must in his charge make the way of the jury plain and clear, and he must have the power, as well as the legal ability, to do this." The Laws and Jurisprudence of England and America, 127.

While it may be possible to draw an instruction on this point in language more apt than the one given in this case, yet that instruction is copied from one given in the case of *Vaughan* v. *State*, 58 Ark. 362, and which was held not erroneous. The same ruling was made in *Jones* v. *State*, 61 Ark. 102. Although some doubts as to the propriety of such an instruction were expressed in *Vaughan* v. *State*, still we all agree that no error was committed by giving such instruction, while a majority of the judges are of the opinion that it was proper and right to give such an instruction in this case. The decided weight of judicial opinion, as we believe, supports this conclusion. *Jones* v. *State*, 61 Ark. 102; *People* v. *Calvin*, 60 Mich. 123; *People* v. *Knapp*, 71 Cal. 10; *State* v. *Sterrett*, 71 Iowa, 386; *State* v. *Maguire*, 69 Mo. 202; cases cited in *Vaughan* v. *State*, 58 Ark. 365; also 2 Thompson, Trials, sec. 2445, and cases cited.

Abstract instruction properly refused.

It is urged that the court did not sufficiently define the right of self-defense. But we need not discuss that question, for there is no evidence to show that defendant acted in self-defense, and nothing upon which to base such an instruction. The defendant, who testified in his

own behalf, was the only witness of the killing, but he does not say that he killed McAbee to protect himself, or anything from which that fact can be inferred. On this point, he said, in his direct examination: "McAbee told me to get out of his field, and pulled out his knife, and came at me with it, waiving his hand, and saying he would tear me all to pieces. I told him not to come, to stand back. At that time my gun was resting on the ground, on the butt end of the gun. He kept coming at me. So I raised the gun, and fired, when Mr. Abee staggered, and fell backwards. I then walked up in about two feet of him, and stood there a moment or so, and heard him groan a time or two." On cross-examination, he said: "There was no obstruction behind me, to keep me from retreating when the deceased was cutting at me with a knife. I stood there, and raised my gun, and shot him just as he was swaying around like this [here defendant showed how deceased swung his arm around]. The deceased, as I raised my gun, had left the plow eight or ten feet, and I got mad when I saw he was coming at me, and when I raised my gun he swung around, and said, 'Look out there! What are you going to do there?' when I shot him, my gun being in four feet of him." It is to be presumed that defendant stated the facts as favorably to himself as the truth would warrant. But it is plain from his own testimony that McAbee was not at any time within striking distance of him, and that McAbee, by waiving his hand and knife at defendant, was not endeavoring to cut him, but only to intimidate him, and get him to leave the field where McAbee was at work. This act of McAbee aroused the anger of Hamilton. "I got mad," he says, "when I saw he was coming at me." The most favorable view of the facts than can be taken for defendant is that he had no premeditated intention of killing McAbee, but shot him under the influence of a fit of anger, suddenly aroused by the acts and

threats of McAbee in rudely ordering him from the field. Under no reasonable view of the facts could the jury have found that this killing was justifiable.

State may contradict defendant's statements.

Finally, it is said that the evidence was not sufficient to support the verdict. It is argued that the state, having proved the statement of Hamilton, made at the time he borrowed the gun from Dawson, to the effect that he wanted it to shoot ducks, cannot now assert that those statements were false, but is bound by such statements. It is clear that this is not the law. Such statements go to the jury in connection with all other facts and circumstances in proof, and it is for them to decide whether they are true or not, and what conclusions to draw from them. The evidence, we think, was amply sufficient to support the verdict. The defendant, Hamilton, was a young man twenty-six years of age. McAbee was over twice as old, with a right hand so badly crippled that it was of little use. The evidence shows that Hamilton went to McAbee's field, where McAbee was plowing, and there killed him, under circumstances which justified the jury in finding that the killing was not only unnecessary, but that it was intentional and premeditated.

Counsel for defendant say that he owned no property except a hundred bushels of corn, upon which the state claimed a lien; that, on account of the penniless condition of defendant, every step taken by them was under the most adverse circumstances. The question of the right of defendant to use this corn to pay the expenses of his defense is not raised in the record, or before us for decision, but we willingly bear testimony to the fidelity and energy with which counsel for defendant have striven to save the life of this unfortunate man. That their efforts in that direction have been thus far

ineffectual is, in our opinion, due to the fact that the evidence is such as to leave no question of his guilt.

We are convinced that the judgment is right, and it is therefore affirmed.

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AMERICAN EMPLOYERS' LIABILITY INSURANCE COMPANY v. FORDYCE.

Opinion delivered July 8, 1896.

INSURANCE AGAINST LIABILITY—WHEN ACTION LIES.—A policy of insurance binding the insurer to pay all damages with which the insured company may be legally charged, or required to pay, or for which it may become legally liable, is not merely a contract of indemnity, but also a contract to pay liabilities, and a recovery may be had although the liability has not been discharged by the insured, the measure of damages being the amount of the accrued liability.

INSURANCE AGENT—POWERS.—A general agent of an insurance company, having authority to make terms for insurance, to countersign and deliver policies, and collect premiums, may waive a condition requiring payment of the premium in money.

CANCELLATION OF POLICY—EFFECT ON ACCRUED LIABILITIES.—Where a policy of insurance reserves to the insurer the right to cancel the policy for non-payment of the premium, the exercise of such right by the insurer will not prevent the insured from recovering the amount of any liability accruing under the policy between the time of its issuance and cancellation, less the premium earned for that time.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

STATEMENT BY THE COURT.

The American Employers' Liability Insurance Company issued its policy to the City Electric Street Railway Company, which contained this clause: "That said company will pay to the insured or their legal representatives all damages with which the insured may be

legally charged, or which the insured may be required to pay (not exceeding the amounts hereinafter limited), for or by reason of any liability on account of injuries inflicted upon the person or property of any person or persons whomsoever while traveling on the railroad of the insured, or for which the insured may be legally liable." The policy was dated first of December, 1892, and was to be in force from the ninth of December, 1892, to the ninth of December, 1893. The consideration expressed in the policy was $1,200. It was countersigned by "W. H. Parker & Co., General Agents," who were located at Pine Bluff. On the 8th of December, 1892, Parker sent the policy to the street car company, through the mail. It was duly received, and the receipt of same acknowledged. Mrs. Meredith, a passenger on the City Electric Street Railway Company, was injured by said company on the 27th day of December, 1892. She had recovered judgment for $1,250 and costs against said company, and no appeal had been taken from said judgment. This suit was brought by appellees, as receivers of the City Electric Street Railway Company, on the policy heretofore mentioned, to recover of appellants, the American Employers' Liability & Insurance Company, and the Union Guaranty & Trust Company, its surety, the amount of said judgment.

The defenses were that the premium was not paid, and that the policy in suit was not to be delivered nor to take effect until the premium was paid in cash; that, if the cash premium was not a condition precedent to the delivery of the policy, the street railway company had promised that said premium should be paid on or before the 10th day of January, 1893, which was not done, and that therefore, the consideration having wholly failed, said policy was afterwards cancelled, and became of no effect; that the street railway company had agreed

to execute three notes of $400 each to cover premiums due thirty, sixty, and ninety days respectively, from 9th of December, 1892; that said notes were never executed and tendered, and that therefore the consideration failed, and the policy was cancelled; that Parker & Co. were agents with limited power only to deliver the policy sued on upon the payment of cash premium, and that they exceeded their authority in delivering the policy without such payment.

The insurance company, by way of counter-claim, set up that if the policy were in force, the street railway company was indebted to it in the sum of $1,200, with interest from 9th of December, 1892, and judgment was prayed for said amount.

The cause was submitted to the court sitting as a jury, which, from the evidence, found the following facts: (1) "That on the 8th of December, 1892, the defendant insurance company, by W. H. Parker, who was its general agent for the State of Arkansas, executed and delivered to the City Electric Street Railway Company the policy sued on. (2) That said Parker was fully authorized to waive the payment of the premium in cash, and to give time for the payment thereof. (3) That said Parker did in fact waive the payment of the premium in cash, and delivered said policy with the intention that the same should become operative according to its terms, although the premium was not then paid. (4) That, after the delivery of the policy, the defendant insurance company treated the same as in full force and effect until the 23d day of January, 1893. (5) That on the 27th day of December, 1892, one Callie A. Meredith, while a passenger on the cars of said street railway company in the city of Little Rock, received personal injuries, for which she was entitled to recover damages from the said street railway company.

(6) That she recovered judgment against the said company for $1,250, with interest from its date at 6 per cent., and the sum of $53.50 costs. (7) That notice of the injury of the said Callie A. Meredith was given by the said street railway company to W. H. Parker; and that neither the said Parker nor the said insurance company, in response to said notice, made any claim that the policy was not in full force and effect. (8) That no demand for the payment of the said premium was made upon the said railway company until the 9th day of January, 1893, after the injury of the said Callie A. Meredith. (9) That on the 23d day of January, 1893, the said insurance company gave notice that it had cancelled the policy for non-payment of the premium, and therefore treated said policy as cancelled. That the earned premium to the date of cancellation of the policy was the sum of ——— dollars."

And the court, upon the foregoing facts, declared the law to be that the defendant railway company was not in default for non-payment of the premium at the time when its cause of action upon said policy accrued, and that the plaintiff is entitled to recover the amount of the judgment in favor of the said Callie A. Meredith and against the said street car company, including interest and costs, less the amount of the premium due upon the policy from the 9th day of December, 1892, to the 24th day of January, 1893, when the said policy was cancelled, and that judgment should be rendered accordingly against both defendants, the insurance company and the Union Guaranty & Trust Company. Proper exceptions were saved to the court's findings of facts and its declaration of law.

The defendants asked the court to find: (1) "That W. H. Parker & Co. only had authority, as agents, to deliver the policy sued on herein upon payment to them of the premium in cash; that they delivered it without

such payments, and without authority, and they did not bind their principal by such delivery." (Which the court refused.) (2) "That the City Electric Street Railway Company did not pay the premium on demand of Parker & Co. as agents, and a demand for a payment of the premium by Parker & Co. upon the insured was duly made about thirty days after the policy sued on was delivered; and that the same has never been paid." (Which the court found.) (3) "That the insured, the City Electric Street Railway Company, has never tendered payment of said premium according to its contract." (Which the court found.) (4) "That the facts are for the defendants on the whole case, and accordingly judgment should be for defendants." (Which the court refused.)

The defendants presented requests for instructions which the court refused to grant. Proper exceptions were saved to all the rulings of the court to which objection was made. Motion for new trial, presenting all the questions contended for by appellants, was overruled, and this appeal taken.

Blackwood & Williams, for appellant.

1. Since the decision of this case, it has been decided that the mortgage on the street railway was superior to these judgments, and they could not be paid as a preferred claim. 70 Fed. 32.

2. The contract sued on was a contract of *indemnity*, and no liability incurred thereon until the insured suffers a loss, and the loss in this case would be an actual payment of the judgment. Until the company paid this judgment, it cannot recover. The payment into the registry of the United States court was not a "loss," within the meaning of the policy. Where a corporation holding one of these policies becomes insolvent, and the assets are insufficient to pay its debts, so that nothing is left to pay any damages to persons injured on suits

pending, the liability under the policy cannot be enforced. 1 N. Y. 550; 21 N. J. L. 73; 6 Hill (N. Y.), 324; 2 Vt. 532; 17 So. 646; 39 N. E. 82.

3. The policy was not in force. The premium was never paid. 51 Ark. 445; 2 Whart. Cont. sec. 547; 63 N. Y. 160; 64 N. Y. 304. The insurance company had the right to cancel for default. 2 Pars. Cont. (6 Ed.), pp. 678–9: Bish. Cont. secs. 825, 828, 832–5, Or for non-payment of premium notes. 147 U. S. 177; 104 *id.* 441; 100 Mass. 500; 33 N. J. 487; 43 N. Y. 283; 63 *id.* 160.

4. Parker had no authority to deliver the policy. An agent can only bind his principal within the scope of his authority. 11 Am. & Eng. Enc. Law, p. 284; 126 Mass. 158; 89 Pa. St. 296.

Rose, Hemingway & Rose and *C. S. Collins*, for appellee.

1. The company bound itself in terms to pay "all damages for which the street railway company might become legally liable," and it was not necessary *to pay* the judgment before suit. 8 Wend. 452. It became liable as soon as the liability of the street car company arose. 15 Minn. 461; 122 Mass. 566; 6 Wall. 94; 119 Mass. 507; 131 *id.* 93; 133 U. S. 432; 137 *id.* 308; 23 Oh. St. 271; 34 Ia. 71; 134 Mass. 299; 21 Conn. 117-25; 8 Nev. 121; 16 *id.* 327-32; 14 Johns. 117; 1 Free. Chy. (Miss). 533-40; 1 N. Y. 550; 17 Johns. 239; 68 Ill. 604-617; 9 Pa. St 366-371; 8 Watts, 157; 5 W. & S. 440; 2 Bay (S. C.), 145; 18 Wis. 21, 28; 48 N. Y. 532. Suit may be brought before the damage is complete. 7 Wend. 503; 6 Wall. 100; 131 Mass. 115, 120; *Ib.* 93, 109; 136 *id.* 34; 19 Wend. 424.

2. Parker & Co. were the general agents, and had authority to issue policies *on time* or credit. Before the premium was due, liabilities had accrued for more than

the amount of the premium. All the company could ask would be a deduction of the premium from the amount they owed. See 12 Wall. 285; 35 N. Y. 131; 25 Barb. 189; 26 N. Y. 460; 32 N. Y. 619; 42 Me. 262; 18 Barb. 69; 20 Wall. 560; 9 Bush, 430. A general agent has a right to waive the condition requiring payment in advance, etc. 22 Fed. 586; 35 N. Y. 131; 26 *id.* 460; 25 Barb. 189; 51 N. Y. 117; 9 Heisk. 606; 45 Ia. 377; 115 Pa. St. 591; 2 Biddle, Ins. sec. 1074, p. 347; May on Ins. sec. 134; 25 Conn. 207, 542; 20 Fed. 232. The delivery of a policy raises a presumption that a credit was intended. 35 N. Y. 131; 12 Wall. 303; 68 Ind. 347; 38 Oh. St. 110.

3. The judgment has been paid by paying the amount into the registry of the court.

WOOD, J., (after stating the facts). The findings of fact are comprehensive and accurate. We do not discuss the evidence upon which these findings are based for the reason that objection is urged here, not to the findings of fact, but to the legal conclusions drawn from them.

Effect of insuring against liabilities.

1. Appellants asked the court to declare the law to be "that the insurance contract sued on herein is a contract of indemnity, and that no liability is incurred thereon until the insured suffers a loss, and that the loss in this case would be an actual payment of the judgment rendered in favor of Callie Meredith." The contract speaks for itself. It is couched in unequivocal language. The insurer binds himself to pay "*all damages with which the insured might be legally charged, or required to pay, or for which it might become legally liable.*" This is plainly a contract *to pay liabilities*. But if it could be said that the meaning were left in doubt on account of any ambiguity in the language of the contract, the proof leaves no doubt that it was the intention to require the insurance company to pay to the

street railway company the damages for which it (railway company) should become liable. The insured insisted upon a contract to pay liabilities, and the insurer consented to make it that way, embracing this special feature by way of interlineation in writing upon a printed form of contract. After it was so written, the general agents, in a letter to the insured, in which they enclosed the contract, mentioned this special feature, saying: "We think, with this amendment to the policy, you have the best insurance issued." This is not simply a contract of indemnity. It is more. It is also a contract to pay liabilities. The difference between a contract of indemnity and one to pay legal liabilities is that upon the former an action cannot be brought and a recovery had, until the liability is discharged; whereas upon the latter the cause of action is complete when the liability attaches. *Locke* v. *Homer*, 131 Mass. 93, and authorities cited; *Jones* v. *Childs*, 8 Nev. 121; *Carson, etc., Ass'n* v. *Miller*, 16 Nev. 327-32; *Smith* v. *Railway Co.*, 18 Wis. 17; *Thompson* v. *Taylor*, 30 Wis. 68; *Rector, etc., of Trinity Church* v. *Higgins*, 48 N. Y. 532; and numerous other cases cited in appellees' brief. Also *Maloney* v. *Nelson* (N. Y.), 39 N. E. Rep. 82; *Solary* v. *Webster* (Fla.), 17 So. 646; *Gilbert* v. *Wiman*, 1 N. Y. 550, cited in brief of appellants.

The measure of damages is the amount of the accrued liability. *Wicker* v. *Hoppock*, 6 Wall. 94; *Churchill* v. *Hunt*, 3 Denio, 321; *Pierce* v. *Plumb*, 74 Ill. 326.

Mrs. Meredith had recovered a judgment against the City Electric Street Railway Company from which the company had not appealed. This judgment was a legal liability against the street railway company, for which, under its contract with the insurance company, the railway company was entitled to recover.

Powers of insurance agent.

2. Appellants insist that Parker & Co. had no authority to deliver the policy without collecting the premium. This is not the law. "A general agent of an insurance company, whose business it is to solicit applications for insurance, and receive first premiums, has the right to waive the condition requiring payment in money, and to accept the promissory note of the applicant, or of a third party in lieu thereof, or to undertake to make the payment to the company himself; and, when the cash payment is actually waived in either of these modes, the contract binds the company, notwithstanding the recital in the policy that it is not binding until the first premium is paid in cash." This excerpt, quoted by counsel for appellees from *Miss. Valley Ins. Co.* v. *Neyland*, 9 Bush, 430, is according to the consensus of modern authority. *Southern Life Ins. Co.* v. *Booker*, 9 Heisk. 606; *Miller* v. *Life Ins. Co.*, 12 Wall. 285; *Boehen* v. *Ins. Co.*, 35 N. Y. 131; *Ins. Co.* v. *Colt*, 20 Wall. 560; *Goit* v. *Ins. Co.*, 25 Barb. 189; *Sheldon* v. *Ins. Co.*, 26 N. Y. 460; *Wood* v. *Ins. Co.*, 32 N. Y. 619; *Bragdon* v. *Ins. Co.*, 42 Me. 262; *Trustees, etc., v. Ins. Co.*, 18 Barb. 69; May, Ins., sec. 134, and other cases cited by counsel for appellees.

The policy under consideration contained no provision requiring payment of the premium in cash as a condition precedent to the delivery of the policy and its taking effect. The court, however, evidently treated the matter as though such a condition existed, but found that it had been waived. The proof showed that Parker & Co. were general state agents, and had authority to make terms for insurance, to countersign and deliver policies, and collect premiums; and that they sometimes collected when the policy was delivered, sometimes at the end of the month, and sometimes took notes. They carried a general account with the company, and on the

10th of each month sent to it what was due upon a general balance. The policy having been delivered unconditionally, without a payment of the premium in cash, the court's finding that such payment had been waived, in view of this proof, and the law as announced *supra*, was clearly correct. The delivery of the policy without condition, and without exacting payment of the premium in cash, raised the presumption that a short credit was intended. *Behler* v. *Ins. Co.*, 68 Ind. 347, and numerous cases there cited; *Miller* v. *Life Ins. Co.*, 12 Wall. 303 *Little* v. *Ins. Co.*, 38 Ohio State, 110.

Effect of cancellation of policy.

3. The issuance and delivery of the policy to the assured for a valuable consideration agreed upon and expressed therein, and the acceptance of the policy by the assured, put said policy in force. See authorities already cited. By the express terms of the policy, the insurance company was liable to the street railway company for all damages occasioned by injury to its passengers for which it (street railway) was liable, from the 9th of December, 1892, until its policy was cancelled. The policy was not cancelled by the insurance company until the 23d day of January, 1893. The liability sued on had supervened in the meantime. While the insurance company had the right to cancel the policy for the non-payment of the premium, as per the contract between the parties, it had no power to make this cancellation relate back and avoid the policy *ab initio*. Had it not cancelled the policy, but continued same in force one year, the assured would have been liable to the insurer for the entire premium. If the entire premium had been paid, and no liability had accrued between the time of the execution of the policy and the time of cancellation, the insurer might have cancelled the policy, under certain conditions therein contained, by refunding the premium less the *pro rata* portion thereof for the time the policy was in force. If, in the meantime, a liability had accrued,

cancellation without the assent of assured could only take place by refunding the premium, less the *pro rata* for the time the policy had been in force, and also by the payment of intervening liabilities. Now, in the present case, while the premium had not in fact been paid, credit had been extended, and, before any demand had been made for the payment of the premium, the liability accrued. The insurer also a short time thereafter cancelled the policy, thus electing not to insist upon the payment of the premium. The liability of the insurance company to the street railway company at the time of the cancellation of the policy, and at the institution of this suit, exceeded the entire amount of the premium. Under such circumstance, the most that the insurance company could demand would be to have the amount of premium which had been earned while the policy was in force deducted from the amount of its liability to the assured. This the court did, and its judgment is correct.

Affirmed.

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ROBERTS *v.* AMERICAN BUILDING & LOAN ASSOCIATION.

Opinion delivered July 8, 1896.

BUILDING ASSOCIATION LOAN—PREMIUM.—Where a mortgage given to secure a loan by a building association for one thousand dollars provides that, in case of default, the association shall have the election to foreclose, not only for the sum so loaned with interest, but also for a "premium" of one thousand dollars bid by the borrower for the loan, equity will not decree for the premium in addition to the loan and interest, as to do so would be tantamount to enforcing a penalty for a breach of contract.

SAME—RULE FOR COMPUTING AMOUNT DUE.—The rule for determining the amount which is due on a loan by a building association to a member, on the latter's default, is to ascertain the amount of stated dues and interest which will become due during the probable

existence of the association; then find the principal which, with interest for the supposed time, will amount to the dues and interest already calculated; this will be the present value of the anticipated payments; to this principal add the arrearages due and the fines for the time between the date of default and the entry of the decree of sale.

BUILDING ASSOCIATIONS—FINES.—The monthly fines provided for by the by-laws of a building and loan association are not intended as penalties, but are to be considered as liquidated damages, fixed by consent of the parties, to indemnify the association for the loss it has sustained by reason of the failure of the defaulting member to make prompt payments; and where prescribed by the charter or by-laws, in precise and unequivocal terms, so as to be readily understood by members, such fines will be enforced, independently of statutory provisions, if reasonable in amount and equitable.

SAME—REASONABLENESS OF BY-LAW.—A provision in the by-laws of a building association imposing on its stockholders a fine of "ten cents per share, to be imposed for each and every month that payment is not made," is reasonable.

Appeals from Carroll Circuit Court in Chancery, Western District.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

The appellee brought this suit to foreclose a mortgage which was given to secure the following note, to-wit:

"$2000.00 MINNEAPOLIS, MINN., Dec. 11th, 1888.

For value received, on or before nine years from date, I promise to pay to the order of the American Building & Loan Association, at its home office in Minneapolis, Minnesota, the sum of two thousand dollars, with interest at the rate of six per cent. per annum on the sum of one thousand dollars, payable monthly. It is understood that this note is given for a loan obtained on twenty shares of stock of said American Building & Loan Association, and if the maker hereof fails to make any monthly payments on the said stock, or to pay any installment of the interest for a period of six months

after the same is due, then the whole amount of this note shall at once become due and payable. But if the maker hereof shall pay all installments of the interest which become due hereon, and all fines and monthly payments which become due on said stock until said stock becomes fully paid in, and of the value of $100 per share, and before any of said installments of interest or monthly payments shall have been past due for a period of six months, then, upon the surrender of said stock to said association, this note shall be deemed to be fully paid and cancelled. This note is understood to be made with reference to and under the laws of the state of Minnesota.

[Signed.] MARY A. ROBERTS,
LEONIDAS ROBERTS."

On the margin of the face of the note is the following: "If this note is paid before seven years from date, there shall be allowed such rebate from the amount of the premium as the board of directors of said association shall deem equitable.

Premium $1000.00. Loan $1000.00."

The mortgage executed at the same time by appellants recites that the conveyance of the land therein described is upon a consideration of two thousand dollars paid to appellants by the appellee. The mortgage contains the following conditions, viz.: "This mortgage being given to secure a loan made on twenty shares of stock in said American Building & Loan Association, the monthly payments of which amount to $12 per month, said party of the first part does further covenant and agree to make the said monthly payments on said stock as they shall become due until said stock shall become fully paid in. Provided, nevertheless, that if the said party of the first part * * * shall pay to the party of the second part, at its home office, one thousand

dollars and interest, according to the conditions of one certain promissory note, bearing even date, payable after three years from, and before nine years from, date for the sum of one thousand dollars, with interest on the same at 6 per cent. per annum before and after maturity until paid, interest payable monthly, then this deed shall be null and void; otherwise, to remain in full force and effect. But if default be made in the payment of said sum or sums of money, or of any installment of interest thereon, or of any monthly payment on said stock for a period of six months after the same shall fall due, or any part of either, * * * * or in any condition in this mortgage contained, then in either or any such case the whole principal sum or sums secured by this mortgage, and the interest thereon accrued up to the time of such default, shall, at the election of said second party, its successors or assigns, or his or their agent, become thereupon due and payable immediately upon said default, and the said party of the first part does hereby authorize and empower the said party of the second part, its successors or assigns, the owner hereof, its agent and attorney, at its or their election, and without notice of such election, to foreclose at once this mortgage for the whole of said principal sum or sums and accrued interest as herein provided, or to foreclose for such sum or sums and interest and money paid as may be due and payable by the terms of said note hereby secured, and sell the said hereby-granted premises at public auction, and convey the same to said purchaser in fee simple, agreeably to the statutes in such case made and provided, and out of the moneys arising from such sale to retain the principal and interest then accrued on the sum or sums so elected to be foreclosed for, together with any and all costs and charges of such foreclosure, including one hundred dollars attorney's

fees for foreclosing this mortgage; paying the overplus, if any, to the said party of the first part," etc.

The complaint alleged that the by-laws of the association provide that each member should pay his share of capital stock in monthly installments of sixty cents upon each share, beginning thirty days from the date of his certificate of stock, and that every member neglecting to pay such installment when due and payable should forfeit and pay to the association ten cents per month as a fine for each share of stock so owned by him, and so in default.

The breaches of the condition of the mortgage alleged were that the monthly installments of dues on said twenty shares of stock due and payable on the 11th day of May, 1890, and for each subsequent month, amounting to $84.00, and the installments of interest for the same period, amounting to $35.00, and the fines accruing for the same period, amounting to $14.00, had not been paid. The amount claimed to be due at the institution of the suit was two thousand dollars, with interest on one thousand dollars at six per cent per annum from the 11th day of April, 1890, and an attorney's fee of $100.00; and plaintiff elected to claim for the two thousand dollars, with interest at 6 per cent on one thousand, and for $100.00 attorney's fee, and asked judgment accordingly, and for sale of twenty shares of stock to satisfy same, and for sale of property mortgaged, and the proceeds to be applied to the payment of the remainder of said judgment, if any, after application of proceeds of sale of stock. The bill was filed 18th of November, 1890. The answer admitted the execution of a note for one thousand dollars, but denied that a note of two thousand was executed. It admitted the execution of the mortgage, but alleged that it was to secure the note for one thousand dollars. The execution of the note sued on is denied.

Usury, and a failure to comply with the law authorizing foreign corporations to do business in the state, were set up, but these defenses have been abandoned here.

The case was tried upon the pleadings, exhibits, and depositions of witnesses, and the court found the issues for the plaintiff, and that the note sued on was executed, and the mortgage also, for the purpose of securing it according to its terms; that monthly dues to the amount of two hundred and sixty-four dollars had been paid; that interest on the advancement had been paid to April 11th, 1890, and that $84 in monthly dues, $35 in interest to November 11th, 1890, and $14 in fines were in arrears at the institution of the suit; that there had been default in the payment of monthly installments for more than six months; that appellees were entitled to monthly dues on stock for nine years, amounting to twelve hundred and ninety-six dollars, less two hundred and sixty-four dollars paid thereon, leaving a balance of one thousand and thirty-two dollars, with interest on the advancement from April 11th, 1890, to November 18th, 1890, amounting to thirty-six and 15-100 dollars, and fourteen dollars in fines, making an aggregate of one thousand eighty-two and 15-100 dollars due at the institution of the suit. To this sum was added interest at six per cent. from November 18th, 1890, the time of the institution of the suit, to August 17th, 1893, the date of the decree, and judgment was rendered for $1260.70. Appellants were allowed thirty days to pay off and satisfy the decree, surrender their stock, and have mortgage satisfied and cancelled. Upon failure to do so, the equity of redemption was foreclosed, and sale of the property ordered. From the decree this appeal was taken.

C. D. James, for appellant.

1. The most appellee can claim under the note and mortgage was $1,000 and six per cent. interest to the date of filing the suit, less the payments made, amounting to $900.31.

2. It was error to give judgment for fines. We have no statute authorizing the imposition of fines, nor does the statute of Minnesota authorize it. They are a penalty, and cannot be enforced. 2 Am. & Eng. Enc. Law, p. 620; 7 Neb. 173; *Ib.* 181; 68 Pa. St. 167; 82 *id.* 180; 89 *id.* 15. Nor is interest chargeable on fines. 28 L. T. Rep. (N. S.), 55; 2 Am. & Eng. Enc. Law, p. 612; 5 Duer, 671.

3. The proof shows that the note was only for $1,000, and that it was changed to $2,000, and the decree should be reversed. 41 Ark. 294; 17 S. W. 706. The alteration was material, and avoided the note. 49 Ark. 140. The note being void, the security cannot be enforced. 34 Ill. 100; 19 S. C. 264; 1 Spear, Eq. 142; 65 Me. 195; Parsons, Bills and Notes, 572; 2 Barb. Ch. 135.

L. H. McGill, for appellee.

1. The obligation was for $2,000.00. There is ample evidence to support the finding of the chancellor on this point. There was no spoliation. The burden was on appellant.

2. The mortgage secured the payment of all dues, interest, and fines, as expressed in the contract. A simple repayment of the advance with interest would not be a compliance with the contract. Endlich, B. Ass'ns (2 Ed.), secs. 124, 129, 133, 434, 435, 442–3, 149; 56 Ark. 335.

3. The court properly gave judgment for the accrued fines. Endlich, Bldg. Ass. 415, 417. Fines are a necessary incident. They are not penalties, but liquidated damages for breach of contract. Endlich, Bldg. Ass. 412, 418; 117 Pa. St. 1; 2 Am. St. 639.

4. The judgment was not excessive. The Maryland and Ohio rule is the proper one, and is approved by Endlich, Bldg. Ass. 386. See 10 Md. 397 for Maryland rule. Tested by this rule, the judgment was less than the amount appellee was entitled to claim.

5. A reasonable attorney's fee may be stipulated for and enforced. 1 Jones on Mortg. 359.

WOOD, J., (after stating the facts). 1. The appellee was duly incorporated under the laws of Minnesota. Its articles of incorporation and by-laws, which were in evidence, show that it is a mutual building and loan association, having the same plan or scheme as that in general use by such associations. For a description of such associations, see note by Freeman in 69 Am. Dec. 151. The purpose of this association was to exact of appellant an obligation equal to the advancement which it had made her, together with the premium which she had bid for same, the whole amount being equal to the par value of her twenty shares of stock at maturity. And this purpose it carried out, as appears from the face of the note itself and the mortgage, as well as from the testimony of witnesses. While there is testimony to the contrary, it is improbable and unreasonable. The ruling of the trial court upon the issue of *non est factum* was correct.

Premium for loan not collectible.

This issue, however, is immaterial. For, although the note specifies that, in case of default, the "whole amount of the note is at once due and payable," and although the mortgage gives appellee, in case of default, "the election to foreclose for the whole of said principal sum," still a court of equity would not decree for the full amount of the advancement and interest, together with the premium. Such a decree would be tantamount to enforcing a penalty for breach of contract. *Hagerman* v. *B. & S. Ass.* 25 Ohio St. 205, 206. The evident design of the parties to this contract was to have the

debt discharged according to the system peculiar to building and loan associations.

Rule for computing amount due.

This contract, then, binds the appellant to pay monthly installments of interest on the advancement, monthly dues on stock, until its maturity (not to exceed a period of nine years), and fines assessed for failure to make stock payments or dues as specified. Default having been made for more than six months in the payment of the installments of interest and monthly dues, foreclosure proceedings were begun, and the only real question here is as to the amount of the decree.

The lower court charged the borrower with the whole amount of dues for nine years, and added to this sum the interest and fines in arrears at the institution of the suit. From this sum was deducted the amount of dues already paid on stock, and to the balance was added six per cent. interest per annum from the institution of the suit to date of the decree, making the sum of $1,260.70, for which decree was entered. Was this correct? The rule for determining the amount which we think most nearly enforces all the contract obligations is "to ascertain the amount of stated dues and interest which will become due during the future existence of the corporation, as estimated; then find the principal which, with interest for the supposed time, will amount to the dues and interest already calculated; this will be the present value of the anticipated payments; to this principal add the arrearages due, and the fines for the time between the date of default and the entry of the decree of sale."

It was in proof, by the actuary of the association, that the stock would have matured in ninety eight months. The date of the certificate of stock was June 11th, 1888. The date of the decree was August 17th, 1893. The time therefore for the stock to run before maturity from date of decree was 35⅘ months. Dues,

interest and fines were in arrears from April 11th, 1890, or forty months and six days. Then, from this data, applying the above rule, we have the following:

Dues, 35⅘ months at $12.00 per month	$429 60
Interest on $1000 (advancement) for 35⅘ months, at $5.00 per month	179 00
Total,	$608 60

Now, the principal which will amount to this sum in 35⅘ months at 6 per cent interest is $516.20, which is ascertained by dividing the $608.00 by $1,179, the principal and interest on one dollar at 6 per cent for 35⅘ months. The present value of the anticipated payments then is $516.20. To this add arrearages:

Dues 40 months at $12.00	$ 480 00
Interest 40 months at $5.00	200 00
Fines 40 months at $2.00	80 00
Total,	$1,276 20

This sum represented the amount for which the mortgage should have been foreclosed. But the court rendered judgment for $1,260.70, making a difference in favor of appellant of $15.50. So it is clear that she has not been prejudiced by the decree. The above rule is that announced by the superior court of Cincinnati. Endlich, Building Associations, sec. 386.

The rule, as announced in a leading case in Maryland, is "to ascertain by proof the probable duration of the society, then to estimate the aggegate amount of the weekly and monthly installments payable during that time, from that sum rebate a just amount of interest, and add thereto the arrearages due, after allowing for payments made to the society, and the sum thus ascertained is the amount which the mortgagee is entitled to receive *in præsenti* in satisfaction of the mortgage."

Robertson v. *American Homestead Asso.*, 10 Md. 397; S. C. 69 Am Dec., and cases cited in note.

The application of this rule to the facts of this record would give substantially the same result as above. Either of these would be just to the borrowing member and to the association. But we prefer the former, because it gives a simple, certain, and accurate method of arriving at the amount, whereas, by the latter rule, the amount of interest to be rebated is not fixed, but such as the chancellor may deem just. The rule we have approved is announced upon the basis of a final and complete foreclosure by sale of the property mortgaged, and a termination of appellant's membership in the association. There is no intimation anywhere in the record that appellant desires or would be willing to continue her membership in the association. She repudiated the contract as a real building and loan contract, insisting that it only binds her to repay the amount advanced at six per cent. interest, and that the mortgage only secured that amount, *i. e.*, that the contract was for a straight loan.

When fines enforcible.

2. The amount of the decree, under the rule announced, as well as the rule adopted by the trial court, includes fines for failure to make monthly payments. The by-laws authorize a fine of "ten cents per share to be imposed for each and every month the payment is not made." The success of the building and loan association scheme depends upon the certainty and regularity with which members pay their dues. Fines, strictly as such, imposed merely by way of punishment for a breach of contract, a court of equity would not enforce. But what is usually designated as "fines" in a genuine building and loan association is intended for, and does subserve, a different purpose. They are treated by the best authorities as liquidated damages, fixed by consent of the parties, to indemnify the association for

the loss it has sustained by reason of the failure of the defaulting member to make prompt payments. *Shannon* v. *Howard Mut. Bldg. Ass'n*, 36 Md. 383; *Ocmulgee Building & Loan Ass'n* v. *Thomson*, 52 Ga. 427; 2 Am. & Eng. Enc. Law, p. 620, and authorities cited.

Dues being the vitalizing principle in the whole plan, and the measure of the prosperity of the whole depending upon the promptness with which each member discharges his obligation to every other to pay them, it is but just that each delinquent may contract as far as possible to make good the loss occasioned by him.

In most of the states, the legislature, recognizing that some such power is indispensable to preserve the equality of burdens, while each is sharing equally in the profits, has enacted laws providing for the imposition of fines. But, in the absence of such statutes, it is within the province of a court of chancery to enforce such an essential regulation, when adopted by the association. Those who become members or stockholders of an association having such a by-law, of course, approve and accept same, and should be bound thereby, provided said by-law be reasonable. Endlich, Building Associations, 415; *Shannon* v. *Howard Mut. Bldg. Ass. supra.*

Mr. Endlich, speaking of a member who defaults in the payment of dues, says: "He will be getting an advantage over and above his fellows; he will have had the use of his subscription money for a longer period than they had theirs, and, besides, he will have his proportionate share of the gains made upon all their prompt payments, whilst he will lose only the trifling amount that would have come to him as his proportionate share of the profits, which, if he had paid his dues properly, would have accrued from such payment in the interval between the day when it was his duty to make it and that upon which he did make it. It follows that the

society is, in good conscience, entitled to be made whole for the injury resulting from tardy payments." Endlich, Bldg. Ass. sec. 412. In *Goodman* v. *Durant Bldg. & Loan Association*, 14 So. Rep. 146, Chief Justice Campbell said: "What is called a fine (merely an agreed sum as liquidated damages) is imposed for every default in payment, as a spur to prompt payment, so as not to derange the process of compounding, which must fail if there is want of payment as agreed, and failure of which would cause failure of the scheme. We see nothing wrong in members of full age and *compos mentis* mutually binding themselves to so beautiful a scheme for reciprocal advantage, and being held to the performance of what they had agreed." Mississippi, like Arkansas, has no statutes on the subject.

We are aware that some courts regard fines as penalties, and will not lend their aid to enforce them, independent of statutory enactment. *Lincoln Bldg., etc., Ass.* v. *Graham*, 7 Neb. 173; *Lincoln Bldg., etc., Ass.* v. *Benjamin*, 7 Neb. 181; *Jarrett's Ex'or* v. *Cope*, 68 Pa. St. 67; *Link* v. *Germantown Bldg. Ass.*, 89 *id.* 15. But the rationale of the doctrine of fines for the non-payment of dues is that they are essential to the proper exercise of the express powers conferred upon building and loan associations in their incorporation. And therefore they have the right to impose them, whether any express warrant is found for it in the statute under which they are incorporated or not. They have such power by implication. Endlich, Bldg, & Loan Ass. sec. 417; *Goodman* v. *Bldg. & Loan Ass.* 14 So. *supra.*

It has been suggested that the menace of foreclosure, which overhangs the borrower in case of default, is a sufficient stimulus to promptness, and that, therefore, the by-law imposing fines is unnecessary, and should not exist. But the investor has no such stimulus

to enforce punctuality on his part. The imposition of fines for non-payment of dues must apply to every member alike,—the investor as well as the borrower.

Fines must be reasonable.

The power to impose fines, however, if unrestrained, might be abused, and thus cause injustice and oppression. Therefore, courts of equity, operating with or without the sanction of the statute, will see that fines are reasonable in amount, and equitable in every respect, having in view the object to be attained by them. They must be prescribed by the charter or by-laws, in precise and unequivocal terms, so as to be readily understood by the members. Endlich, Bldg. Ass. secs. 419–22; *Occidental Bldg. & Loan Ass'n* v. *Sullivan*, 62 Cal. 394; Davis, Law of Building, etc., Societies, p. 36; *Mulloy* v. *Fifth Ward Bldg. Ass.*, 2 McArthur (D. C.), 594. The by-law under consideration conforms to these requirements.

Since the decree is for a sum less than it might have been, under the rule announced, it is unnecessary for us to determine whether the small interest on fines included in the decree is error. If so, it was not prejudicial.

Affirm.

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COTTON v. STATE.

Opinion delivered September 26, 1896.

LIQUORS—SALE IN FIVE-GALLON PACKAGE—SPECIAL ACT.—The special act prohibiting the sale or giving away of intoxicating liquors within five miles of the Dardanelle public school building (Acts 1895, p. 105), excludes the right of a manufacturer of such liquors, under the general statute, to sell the same within such territory in original packages of not less than five gallons.

Appeal from Yell Circuit Court, Dardanelle District.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

The appellant, W. E. Cotton, was indicted for selling whiskey within five miles of the public school building of the town of Dardanelle. The case was submitted to the court upon the following agreed statement of facts: "It is agreed that, on the first day of June, 1895, the defendant, W. E. Cotton, sold to Hugh McNutt for the sum of two dollars five gallons of whiskey at his distillery in the town of Dardanelle, Yell county, Arkansas; that at the time of said sale the said W. E. Cotton was a manufacturer of ardent liquors in said town of Dardanelle, and that said sale was made at his warehouse in said town, and that said whiskey was in the original package, and was manufactured by said Cotton."

The court found the defendant guilty as charged, and assessed his punishment at a fine of $50.00 and imprisonment in the county jail for a period of thirty days, and gave judgment accordingly. From this judgment an appeal was taken.

Bullock & Hart, for appellant.

The act of 1895 is but cumulative of the acts of 1883 amending the act of 1879, and appellant comes within the proviso of sec. 1 of said act. The act of 1895 contains no repealing clause, and the proviso of sec. 1 is not repealed. 51 Ark. 177; 41 *id.* 308; 51 *id.* 182.

J. W. House, also for appellant.

In the construction of a statute the context and the general scope of the same must be considered. Endlich, Interp. Stat., sections 40, 41, 43, 46, 228 241. In amendments to a general scheme of legislation a repeal is not presumed. Endlich, sections 195, 183, 210, 226; 67 Iowa, 541; 91 N. Y. 231. Where there is no repealing clause, it does not repeal a former statute, unless it is repugnant, or covers the whole scope of legis-

lation. 41 Ark. 150; 11 Wall. 656; 11 Wall. 364, 365; 3 How. 648; 10 Ark. 588; 23 Ark. 304. It is not enough to justify the inference of repeal that the later law is different; it must be contrary to, and in conflict with, the prior law. Sutherland, Stat. Const. sec. 147, 152, 153; 94 Pa. St. 495, 502, 503; 50 Ala. 276, 277; 56 Ala. 500; 16 La. An. 379, 380; 39 N. J. L. 274, 275, 276, 277; 16 Peters, 342, 363; 54 Mich. 168, 171. If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced, and made to operate in harmony, and without absurdity, both statutes will be upheld. Sutherland, Stat. Con. sec. 152; 12 Bush (Ky.), 233, 236, 237; 64 Md. 419, 420, 421, 422, 423; 2 Ohio St. 607, 608.

RIDDICK, J., (after stating the facts). The general assembly of 1895 passed a special act to prevent the sale or giving away of intoxicating liquors within five miles of the Dardanelle school house in Dardanelle, Yell county, which act was approved April 9th, 1895. The contention of appellant is that section 4851, Sand. & H. Dig., gives manufacturers of vinous, ardent, malt, or fermented liquors the right to sell liquors in original packages of not less than five gallons without license, and that this right of such manufacturers to sell was not affected by the special act above mentioned. We are of opinion that this contention cannot be sustained. The act in question makes it "unlawful for any person to sell or give away any vinous, spirituous, or intoxicating liquors * * * within five miles of Dardanelle public school building." It contains an exception in favor of wines for sacramental purposes, and also provides that the provisions of the act shall not extend to Pope county, but it makes no exception in favor of the manufacturers of liquors, and the courts can make none.

The judgment is affirmed.

KING v. DUNCAN.

Opinion delivered October 3, 1896.

FORCIBLE ENTRY AND DETAINER—TITLE TO SUPPORT.—As a present right of possession is essential to a recovery in forcible entry and detainer, as well as in unlawful detainer, a landlord cannot, during the term of a lease, recover the leased premises in either action from one who, by permission of a sub-lessee in possession as such, has taken possession of a portion of the premises under an adverse claim of title.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

N. T. White, for appellant.

An owner of lands not in possession, but who has leased the same for a term of years, and placed his tenant in possession, cannot maintain forcible entry and detainer against one who takes possession with the consent of his tenant in actual possession. 38 Ark. 587; 13 *id.* 448; 31 *id.* 296; 38 *id.* 257; 41 *id.* 450; 53 *id.* 94; 27 *id.* 46.

D. H. Rosseau, for appellee.

This suit is brought under clause 2, sec. 3444, Sand. & H. Dig., and is an action of unlawful detainer. 24 Ark. 578; 13 *id.* 448. See 55 Me. 33; 6 Cush. (Mass.), 87; 98 Mass. 309; 33 N. H. 633; 68 Iowa, 685; 38 Ark. 448. The legislature evidently intended by the amended act of February 5, 1891, to remedy some defect in the law as it stood, and to reach such cases as this.

BUNN, C. J. This is an action of unlawful detainer, as contended by plaintiff and appellee, and of forcible entry and detainer, as claimed by defendant and appellant, for the recovery of a tract of land containing about sixteen acres, and damages for the detention thereof.

The cause was heard and determined in the Jefferson circuit court, resulting in a judgment for the plaintiff, Florence V. Duncan, against defendant, J. W. King, from which he appeals.

Florence V. Duncan, *nee* Vassar, by inheritance from her father, J. F. Vassar, was the owner of her deceased father's farm, which included the land in controversy, the same being within the farm enclosure at the time of his death, and of which he had possession for many years previously, claiming to be the owner. In 1892 J. F. Vassar died, leaving his daughter, the said Florence V., his sole heir, his wife also being dead.

Soon after the death of J. F. Vassar, one B. F. Tuttle was appointed administrator of his estate, and held possession of the farm, including the land in controversy, until the close of administration, and then surrendered possession to appellee, sole heir as aforesaid, who about this time or soon afterwards was married to one Duncan, and afterwards, to-wit, in December, 1893, Tuttle leased the farm from appellee for the term of five years, and was put in possession by her. In the early part of the year 1894, Tuttle sub-rented the farm to one L. Coontz for that year, having previously, however, moved the fence boundary of a portion of the leased farm back, so as to leave the land in controversy outside the inclosure. Shortly after this, Duncan, husband of plaintiff, acting for her, replaced the fence on the line where it stood before Tuttle moved it. After that, by permission of Coontz, appellant, King, placed the fence back to the line on which Tuttle had built it, thus turning the disputed territory again into his farm and inclosure, he being the owner of the adjoining farm by inheritance; and, on appellee's further attempt to place the fence back on the original line, she was met by appellant, and forbidden to do so, and thereupon this suit was instituted, after demand made in writing.

The defendant claimed that the tract in controversy was part of his father's farm, now his own as aforesaid; and that, while his uncle, J. F. Vassar, had had possession of the tract up to the time of his death, it was only by permission of himself, the sole heir of his deceased father. He also alleged, by way of excuse for his delay in asserting his rights, that, after his parent's death, he lived with his uncle, and from that fact, and the further fact of his uncle's financial condition, he did not desire to disturb him.

We do not deem it necessary to attempt to settle the controversy as to the name to be given to this action; that is to say, to determine whether it be an action of unlawful detainer founded upon the second clause of section 3444 of Sand. & H. Digest, as contended by appellee's counsel, or whether it be an action of forcible entry and detainer, founded upon section 3443, as contended by appellant's counsel. In either case the plaintiff must needs show a present right of possession in herself. Neither is it necessary for us to consider and determine how far the amendatory act of February 5, 1891 (section 3443 of the Digest), has done away with the necessity of charging and proving force in every case of forcible entry and detainer.

The right of possession is still the essential question in all actions, under this possessory statute. We are first, then, to inquire as to the plaintiff's right of possession. She had leased the premises to Tuttle, and put him in immediate possession under the lease, and this lease had several years yet to run when the alleged entry was made by the defendant. At this time Coontz, as sub-renter from Tuttle, for that year, was in possession as such. Of course, he had no further right than Tuttle had when he rented to him for that year, and Tuttle had no other rights than those conferred upon him by the contract of lease from appellee; and

neither had any right or authority to do anything, outside his contract of lease or rental, that would conflict with the rights of landlord and owner. But, as we are not dealing with their particular rights as a first question, it is not necessary to inquire whether they, or either of them, were doing right or wrong as tenants. We must first determine the present possessory right of appellee—her right to sue—before any other questions may be considered.

As between appellee and her lessee, Tuttle, he was entitled to the possession under the terms of his lease, and would be for more than four years after suit was brought. Coontz simply held under Tuttle for that year, having no privity of contract with appellee, and was only bound to attorn to Tuttle, and could defend under him in so far, and could sub-let to another so far as anything to the contrary appears. The only thing to be kept in view in all this by either or both or all the parties was that neither of them could do anything to prejudice the rights of appellee as landlord and owner; nor could they all combined do anything to prejudice her rights as such.

But appellee, under the state of case made, certainly had no present right of possession, for, according to her contract, that was in Tuttle, or in Coontz holding under him. All that appellee could ask was that the premises be restored to her at the termination of her lease to Tuttle, intact, as when leased to him. This suit was brought before that time had arrived. It was therefore brought prematurely, and consequently when there was no right in appellee to bring it.

The transaction between Coontz and appellant, however far it might have gone to terminate his tenancy under a different state of case, where there are limitations and restrictions in the lease or rental, were not

such in the present case. Tuttle is not complaining, and appellee alone cannot, but must submit.

There being no present right of action in appellee, in the absence of her right of possession, the judgment of the court below is reversed, and judgment without prejudice will be entered here.

BATTLE, J., absent.

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LYNCH v. DAGGETT.

Opinion delivered October 3, 1896.

SALE OF CHATTEL—WHEN COMPLETE.—A sale of specific personal property may be final and complete, where such is the intent of the parties, although something remains to be done subsequently by the seller as part of the consideration of the contract, as to deliver the property at a place named.

Appeal from Craighead Circuit Court, Jonesboro District.

WILLIAM H. CATE, Judge.

J. C. Hawthorne, for appellants.

1. The evidence does not show title in appellees. 47 Ark. 210; 18 So. 655.

2. A sale is not completed when the quantity of the property sold is to be ascertained. 39 Am. St. 39; 29 Tex. 204; 22 Wall. 180; Benj. on Sales, B. 2, C. 3. Appellants had no notice of the sale, and they were innocent purchasers. 127 Mass. 381; Benj. on Sales, sec. 675, and note; 57 N. H. 102; 44 Vt. 389; 49. N. Y. 35; 68 N. Y. 598.

E. F. Brown and *N. F. Lamb* for appellees.

BUNN, C. J. This is an action of replevin, brought by appellees against appellants for the recovery of one

thousand sawed red-oak wagon tongues, and other lumber. Judgment for plaintiffs as to the wagon tongues, and for defendants as for the other lumber, and defendants appealed. The plaintiffs failing to take a cross-appeal, the other lumber is no longer in the controversy.

On the 30th of January, 1893, appellees, creditors of one Charles Lynn, the owner and operator of a steam saw-mill located six miles from Weiner, a station on the Cotton Belt railroad in Poinsett county, purchased of him in settlement of their debt, as far as might be, one thousand red-oak wagon tongues and other lumber, said tongues being then in one pile on the yard of said saw-mill (which contained all the wagon tongues then owned by said Lynn), for the fixed price of $240, Lynn agreeing to haul and deliver the same at Weiner for appellees, the purchasers. A bill of sale was duly signed and delivered to appellees by Lynn on the same day and bearing date of that day. About the last of September of that year, Lynn employed appellants to haul the wagon tongues to Weiner for him, and on their arrival there he notified appellees of the same, with the request that they should come to Weiner and receive them. On the 11th of November, Lynn sold the wagon tongues to appellants, receiving credit on an antecedent debt he owed them. One of appellees, after this, came for the tongues, but they were then in possession of appellants, who refused to give them up, and this suit was thereupon instituted.

The contentions of appellants are: First, that there was never any delivery of the wagon tongues to appellees by Lynn, and that the sale was, therefore, never in fact completed, but that the delivery was to have been made subsequently to the day of sale, and was never in fact made; second that there was no ascertainment of the number of tongues at the time of the sale, but that, according to its terms, that was left to

be ascertained at Weiner when they should be delivered; and finally, that the pile on the mill yard contained in fact 1,151 wagon tongues instead of 1,000, as found by actual count at Weiner.

In order to enjoy the full benefit of their contentions, appellants endeavored to show that they were innocent purchasers from Lynn. We think, however, that the testimony is against them in this effort, and shows that they were affected with the knowledge of the sale from Lynn to appellees,—if not with full knowledge, as sought to be shown, yet with knowledge to put them on the inquiry, so that they are not innocent purchasers; and the jury might well have so concluded in making up their verdict.

We think there was evidence going to show that the understanding between Lynn and appellees was to the effect that the sale was then and there final and complete, and that the hauling and delivery at Weiner was a separate contract, although they were acts that Lynn should perform as part of the consideration going from him in making the sale; and we also think that there is evidence to the effect that there was a sufficient ascertainment of the number of tongues on the day of sale to make the sale complete, and the jury in both instances were justified in finding as they did.

The court seems to have presented the case fairly to the jury in its instructions. The judgment is therefore affirmed.

BATTLE, J., absent.

SPENCER *v.* HALPERN.

Opinion delivered October 3, 1896.

COMMERCIAL PAPER—SPECIAL INDORSEMENT.—Where the holder of a negotiable note transfers merely his interest therein before maturity, he will not become liable upon the note in case of the maker's failure to pay at maturity.

Appeal from Monroe Circuit Court.

JAMES S. THOMAS, Judge.

W. J. Mayo and *N. W. Norton* for appellant.

The indorsement in this case was a complete written indorsement, expressing only one thing, *i. e.*, a transfer of title, and there was *no personal liability* as an indorser. This personal liability was *excluded* by operation of the maxim, *Expressio unius, etc.* 32 Ala. 540; 39 Mich. 171; Tiedeman on Com. Pap., p. 442. 1 Dan. Neg. Ins. (4 Ed.), sec. 688*c*, disapproves of the Michigan case, but his contention is without reason and unsound. 47 Iowa, 658, *contra*, is not reasoned out.

M. J. Manning for appellee.

There is no distinction in law between an assignment in blank and that made by appellant in this case. His liability is the same, the endorsement only being a little more elaborate. 9 Car. & P. 221; 1 Dan. Neg. Inst. (3 Ed.) sec. 688, *b.* and *c.*; 4 McLean, 173; 47 Iowa, 658; 21 Iowa, 263; 7 Baxter, 498; 24 Kas. 166; 66 Me. 19; Bigelow, Bills and Notes, 134; 44 Md. 573; 59 Ind. 540; 31 Ga. 210; 19 S. E. 601; Tiedeman, Com. Pap. sec. 265.

W. J. Mayo, *N. W. Norton*, and *J. M. Prewitt*, in reply.

WOOD, J. Appellant made the following indorsement on two promissory notes held by him, viz.: "For

value received I hereby transfer my interest in the within note to Isaac Halpern. (Signed) Geo. Spencer." The maker having failed to pay at maturity upon demand, is appellant bound as indorser after due notice?

Where a negotiable instrument is indorsed in blank, or in full, the indorser contracts to pay the amount called for by the instrument if it is not paid by the principal on demand at maturity, provided notice of demand and non-payment is duly given. He also contracts that the instrument is genuine, that it is valid, that the parties are competent to make it, and that he has the title and right to transfer it. 1 Dan. Neg. Inst., sec. 669*a*; Tiedeman, Com. Paper, sec. 259. These rights of the indorsee and obligations of the indorser, under an indorsement in blank or in full in the common form, are not expressed, but fixed by implication, under the rules of the law merchant; and when there is such an indorsement, there is nothing for construction. But when the indorsement is in irregular form, and the contract is expressed, it may become, says Mr. Daniel, "a nice question for legal interpretation." But we cannot agree to his interpretation that an indorsement containing an express assignment of "my interest" over one's signature does not "exclude and negative the idea of conditional liability, which the law also imports, if such assignment were not expressed in full." 1 Dan. Neg. Inst., sec 688*c*. That would be true only if the effect of the signature *per se* did nothing more than transfer the *interest* of the signer. But, as we have seen, the indorsement in blank not only transfers the title and interest of the indorser in the instrument, but it does more. It confers the absolute title upon the indorsee, and gives him rights against the maker which the payee himself might not have, and imposes upon the signer all the legal obligations of an indorser mentioned *supra*. *Aniba* v. *Yeomans*, 39 Mich. 171.

We fail to see the application of the maxim "*Expressio eorum quae tacite insunt nihil operatur*" in a case where all the implications of the law following an indorsement in blank, or in full, in the regular form, are not expressed. On the contrary, it seems clear to us that the payee, by expressing one only of the implications which the law attaches to an indorsement in blank or in full, in the regular way, and that one, too, not imposing any personal liability upon him, excludes every other. And the maxim "*Expressio unius*," etc., does apply. *Hailey* v. *Falconer*, 32 Ala. 536.

In Michigan the indorsement was "I hereby transfer my right, title, and interest of the within note to S. A. Yeomans," signed by the payee. The supreme court held that such an indorsement gave the transferee the same rights that the payee had, "but none other or greater." *Aniba* v. *Yeomans*, 39 Mich., *supra*. Mr. Tiedeman says: "The declaration that the payee assigns or transfers all his *right*, *title and interest* in the paper would seem to limit in a most effective way the rights acquired by the transferee to those which the transferrer had therein, and thus prevent the writing from operating as an indorsement." Tiedeman, Com. Paper, sec. 265.

To avoid the necessity for construction, and the probability of misconstruction, it would always be better for the one desiring to escape the liabilities of an indorser to add the words "without recourse." But the question here is not what the appellee *should* have done, but what did he *actually do?* Why should we not let the contract mean and have the effect that is plainly expressed by the terms "*my interest*" in their ordinary acceptation?

Had the payee intended to be bound as indorser, why use so many words? Had the transferee expected more than the "*interest*" of the transferrer, why did he

accept the instrument transfering only *his "interest?"* We must accept and interpret the completed contract as the parties made it. They have seen proper to express it at length, and have used unambiguous terms. Construing the terms "*my interest*" most strongly against the transferrer, we do not feel authorized to say they mean anything more than simply "*my interest.*" They are clearly terms *of limitation*, when used in an indorsement on a negotiable instrument. Compare *Reynolds* v. *Shaver*, 59 Ark. 299.

Counsel for appellee cite us to cases which seem to hold the contrary, but we find in some of these the language of the indorsement is different from that under consideration, and, where similar, the cases are not satisfactory. With due respect to these, and to Mr. Daniel, we must conclude that their conclusions are illogical, and the doctrine they announce unsound.

Reversed and remanded, with directions to sustain the demurrer to appellee's set-off.

BATTLE, J., absent.

QUERTERMOUS *v.* TAYLOR.

Opinion delivered October 3, 1896.

EQUITY—OVERCOMING ANSWER BY PROOF.—The ancient rule of equity that where an answer is responsive to the complaint it must be overcome by the testimony of two witnesses, or of one with strong corroborating circumstances, has been abolished by the code.

AGENT'S PURCHASE AT HIS OWN SALE—EFFECT.—If an agent purchases at his own sale, without informing his principal of such fact, the sale will be set aside, at the option of the principal.

Appeal from Arkansas Chancery Court.

JAMES F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

The appellees, John Y. Taylor *et al.*, who resided in Tennessee, owned lands in Arkansas. They employed the appellant, F. M. Quertermous, a resident of Arkansas, to sell certain tracts of their lands. He afterwards informed them that one Derreisseaux wished to purchase the land, and had offered therefor the sum of $1,000. Acting under the advice of said appellant, the appellees accepted the offer, and conveyed the land to Derreisseaux for $1,000. Of this sum, they paid appellant $100 for making such sale. They afterwards learned that Derreisseaux was only a nominal purchaser, his name having been used for the benefit of appellant Quertermous, who paid the purchase money, and became the real owner of the land. They thereupon filed a complaint in equity, alleging, in addition to the above facts, that Derreissaux, at the instance of Quertermous, had sold and conveyed a portion of the land to third parties, the consideration for which sale was paid to Quertermous; that the remainder of the land had, by several *mesne* conveyances, been transferred to Quertermous, who had transferred it to his mother and sister; that no consideration was paid by the mother and sister, and the land was held for the benefit of appellant. The mother afterwards died, and by her will devised the land to her daughter, the sister of appellant, who was made defendant. They further alleged that, out of the proceeds of that portion of the land sold to third parties, Quertermous received more than the sums paid by him to appellees.

Prayer that the conveyances to his mother and sister be set aside, that an account be stated against Quertermous, and that they have judgment against him for amount received by him from sale of lands in excess of the amount paid appellees and reasonable commissions for selling land. The appellees answered, denying allegations of complaint. Upon the hearing, the chancellor

found that the allegations of the complaint were true, that Quertermous had received for that portion of the land sold by him an amount largely in excess of the sums paid by him to appellees. The conveyances made by Quertermous to his mother and sister were cancelled, and the title to that portion of the land vested in appellees.

Met L. Jones, *W. H. Halliburton* and *John F. Park*, for appellants.

1. There was no relation of agent in this cause. 1 Bouv. Dict. p. 84, par. 2; Story, Agency (4 Ed.), p. 3; 1 Am. & Eng. Enc. Law, p. 1. Mere declarations of agency are not sufficient. 22 S. W. 504; 23 *id.* 910; 29 *id.* 943.

2. Appellee must put appellant *in statu quo*, before asking a rescission. This he has not offered to do. 12 L. R. A. 240; Hempst. 710, 711; 15 Ark. 286–293; 25 *id.* 204, 53 *id.* 17.

3. There is no proof of fraud. 7 Ark. 167; 11 *id.* 58; 46 *id.* 245; 31 *id.* 170; 3 L. R. A. 801.

RIDDICK, J., (after stating the facts). We are of opinion that the decree of the chancellor should be affirmed. The appellant F. M. Quertermous in his answer denies that he was the agent of appellees, but he afterwards states facts that show conclusively that he was such agent. He states, both in his answer and deposition, that appellees, desiring to sell the land described in the complaint, agreed to pay him to find a purchaser for said lands; that he afterwards negotiated a sale of the lands to one Derreisseaux, to whom appellees conveyed the lands for a consideration of one thousand dollars. They paid appellant for negotiating the sale the sum of one hundred dollars. These statements of appellant show that he acted as agent of appellees in making the sale to Derreisseaux. He may

not have been the general agent of appellees, nor authorized to sell other lands belonging to them, but that is a matter of no moment here, for the only sale complained of is this sale, which he states that he made for appellees, and received from them pay for such service.

The only debatable question in this case is whether the evidence shows that Quertermous was interested as a purchaser in the sale made by him for appellees. The lands were conveyed to one Derreisseaux, but he had transferred the title before the commencement of the action, and was not made a party, and did not testify.

The deed executed by appellees to Derreisseaux was sent by them to a bank at Pine Bluff, as directed by appellant Quertermous. Quertermous received the deed, and paid the purchase money to the bank, and afterwards continued to control and dispose of the land. He says that he was acting as the agent of Derreisseaux, but the facts and circumstances in proof justified the chancellor in finding that this was only a subterfuge, and that Quertermous himself was the real purchaser of the land. In any event, we cannot say that the finding of the chancellor on this point is clearly against the weight of evidence, and it must stand.

Practice as to overcoming answer by proof.

The appellants contend that, as they alleged in their answer matters of defenses directly responsive to the allegations of the complaint, to overcome this defense it was necessary to substantiate the averments of the complaint by the testimony of two witnesses, or of one witness with strong corroborating circumstances. But this contention cannot be sustained, for the rule in question was changed by the code of civil practice. *Conger* v. *Cotton*, 37 Ark. 286.

Effect of agent's purchase at his own sale.

Having concluded that the evidence was sufficient to support the finding of the chancellor that appellant purchased at a sale made by him for appellees without informing them of that fact, it follows that

the chancellor was right in holding that appellees were not bound by such sale, for there are few propositions of law better settled than the one which holds that, if an agent purchases at his own sale without informing his principal of such fact, the sale will be set aside at the option of the principal. The amount of consideration, the absence of undue advantage, and other similar features are wholly immaterial. "Nothing," says Mr. Pomeroy, "will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts." 2 Pom's Eq. Jur., sec. 959, and cases cited.

The judgment is affirmed.

BATTLE, J., absent.

GREGG v. GABBERT.

Opinion delivered October 3, 1896.

TRUST—ACCOUNTING—ESTOPPEL.—Where a trustee, having funds to invest, obtains from the beneficiary permission to use the funds at a lower rate of interest than could have been obtained on safe security, the beneficiary, after receiving such interest without objection for a number of years, is estopped from claiming additional interest for the use of the money during such period.

SAME—COMMISSIONS OF TRUSTEE.—Where a trustee who has funds to invest obtains permission of the beneficiary to retain them, he is not entitled to commisssions on the money so retained, as there was no disbursement of the money.

SAME—TAXES.—Where a trustee, with the beneficiary's consent, borrows the trust funds at a low rate of interest, it is in the discretion of the chancellor to disallow him the taxes paid by him on such funds.

Appeal from Washington Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

Rose, Hemingway & Rose for appellants.

1. If there was any doubt about the validity of the contract of 1888, it has been ratified by plaintiff. 30 Ark. 453; 32 *id.* 346; 47 *id.* 301; *Id.* 320; 50 *id.* 201; 53 *id.* 514; 11 Ves. 318; 2 Pom. Eq. Jur. sec. 965.

2. The complaint should have been dismissed for laches. 2 Pom. Eq. Jur. 965; 55 Ark. 92; *Id.* 155.

3. By statute, administrators are entitled to commissions on all sums paid out. Sand. & H. Dig., sec. 134. Considered as trustees, the two administrators would be entitled to compensation. 39 Ark. 430; Perry, Trusts, secs. 914, 918, 919.

J. D. Walker, *J. W. Walker* and *D. W. Watkins*, for appellee.

1. Every contract or transaction had between a trustee and his *cestui que trust* is constructively fraudulent. 2 Pom. Eq. Jur. sec. 956; Bigelow, Fraud, p. 315; Story, Eq. Pl. sec. 252; 54 Ark. 624.

2. The mere acceptance of the payments of interest under the contract,—a contract not authorized by law,—is not a ratification, and appellee is not estopped. To make good a voidable contract by confirmation, ratification, or acquiescence, the *cestui que trust* must be free, and the relation of *cestui que trust* and trustee at an end. 2 Pom. Eq. Jur. secs. 964, 965, 850. See also 2 Perry, Trusts, (3 Ed.), sec. 851; 91 Am. Dec. 177; 1 Story, Eq. (12 Ed.) secs 322, 322*a;* 1 Story, Eq. (12 Ed.) sec. 465; 1 Perry, Trusts, sec. 467.

3. Appellee is not seeking to keep the advantage derived from the sale of the bonds and repudiate the burdens. There is no question of election here. The sale of the bonds and the contract for interest are separate transactions. The one was beneficial to the estate, and the other unconscionable and voidable. 2 Story, Eq. (12 Ed.), sec. 1075; 1 Pom. Eq. Jur. secs. 395, 465; 50 Ark. 201. The only effect of appellee's agreement

to the sale of the bonds would be to estop her from suing for any advance the bonds might have made during the trust.

4. The case of *Brinkley* v. *Willis*, 21 Ark. 1, is an answer to the plea of laches. Less than five years had elapsed from the making of the contract and the filing of the complaint. 2 Perry, Trusts, sec. 863; Wood on Lim. p. 413.

5. Under the will of Wilson, Gregg was executor and also trustee and guardian. He was trustee of an express trust. As executor, he should have wound up the estate, so far as the probate court was concerned, within three years. Const. 1874, art. 7, sec. 34; Sand. & H. Dig., sec. 220; *Id.* sec. 108, clause 5; 2 Woerner, Adm. sec. 151. L. W. Gregg, as administrator of Wilson's estate, had no authority to intermeddle with the trust. Chancery alone has jurisdiction in such matters. 1 Woerner, Adm. 346; 104 N. Y. 250; 1 Pom. Eq. Jur. sec. 100; *Ib.* sec. 351; 3 Pom. Eq. Jur. sec. 1154; Brown on Jur. sec. 130; 33 Ark. 727; 34 *id.* 63; 40 *id.* 393; 42 *id.* 190; 15 Wall. 211. The court properly appointed Wilson trustee, and ordered L. W. Gregg to turn over the trust fund. Schouler, Ex. & Adm., secs. 245, 247; 6 Yerg. 220; 2 Woerner, Adm. p. 720. A court of equity has power to remove a trustee and appoint another. 2 Pom. Eq. Jur., secs. 1086, 1087; 1 Perry, Trusts, secs. 275, 276–7; 2 *id.* secs. 817, 818; 2 Story, Eq. Jur. (12 Ed.), secs. 1287–8, 1289*b*.

6. The contract was unlawful, in violation of duty as trustee, and will not be permitted to stand. Aside from the question of actual fraud, the relationship of the parties, their dealings, the fact that appellee had barely reached her majority, and that Gregg was her legal and confidential adviser, in whom she reposed all confidence, raise a condition of presumptive fraud which casts the burden of disproving upon defendants. 2 Pom.

Eq. Jur. secs. 956-7-8, 961, 1075; 1 Story, Eq. (12 Ed.), sec. 465; 1 Perry, Trusts (3 Ed.), secs. 194-5-6-7; 1 Bigelow, Fraud, 315-336; 54 Ark. 627; 4 Johns. Ch. 303; 4 How. (U. S.), 503; 100 Am. Dec. 314; 1 Lead. Cases in Eq. 53; 92 Am. Dec. 637; 1 Perry, Trusts, secs. 196-7. Having unlawfully invested her money, plaintiff is entitled to the profits, or the highest rate of interest. 2 Pom. Eq. Jur. secs. 1072, 1075, 1077, 1080; 1 Perry, Trusts, secs. 427 to 433, 452, 463, 464, 466-7, 470-1-2; 1 Suth. Dam. pp. 622-3; 3 How. (U. S.), 401; 16 How. (U. S.), 535; Mechem, Agency, 469; 1 Johns. Chy. 508; 1 Hoffman, Ch. 267; 4 Vesey, Jr., 620; 2 Pom. Eq. Jur. sec. 1076, *et seq.*, 5 Rawle, 323; 10 Yerger, 160.

7. The commissions were properly disallowed. 23 Ark. 592; 2 Pom. Eq. Jur. (3 Ed.) sec. 919; 9 S. C. 465; 17 Am. Dec. 257.

Rose, Hemingway & Rose, in reply.

1. The change of securities was authorized by the will, and it was accomplished by agreement of all parties interested. Perry, Trusts, sec. 920.

2. Seventeen payments were made under this contract, ten of them after plaintiff was married and had the advice of her husband. If 17 payments, voluntarily received, will not amount to a ratification, with full knowledge of all the facts, then 17,000 would be no more effectual. 52 Ark. 467; 106 U. S. 468; 21 Wall. 178; 91 U. S. 592; 17 Wall. 78; 99 U. S. 201; 143 *id.* 553; Bigelow, Est. 685; Perry, Trusts, sec. 849; 2 Pom. Eq. sec. 820.

HUGHES, J. This is a bill in chancery to compel the executors of the will of Lafayette Gregg to account for profits realized by the testator upon trust funds bequeathed by William T. Wilson to his wife, his daughter (the plaintiff), and two sons; the two sons having

died before the institution of this suit, and the plaintiff having, under the provisions of the will, succeeded to the interest bequeathed to them. The funds consisted originally of money, which, under the provisions of the will, Gregg (the trustee) converted into United States bonds, amounting to $18,000 principal.

Gregg was appointed executor of Wilson's will, as well as trustee to purchase these bonds and manage his estate for the best interest of his children, who were legatees, until they should, respectively, reach the age of thirty years. Not a great while after the purchase of the bonds, Gregg procured an order of the probate court directing him to sell said bonds, which he shortly afterwards did, realizing therefor in cash $23,720. Soon after the sale of the bonds, Gregg entered into a contract with the legatees entitled to the fund under the will whereby he secured to himself the right to hold and use said funds at an agreed interest of $900 per annum for the use thereof.

The bonds were sold by Gregg at a premium of 28 cents on the dollar, and such bonds afterwards declined to 10 cents premium on the dollar. The sale was a good one, and perhaps the best that could have been made for the interest of the legatees, and we incline to the opinion that in making the sale the executor was not without the power to do so, under the discretion with which he was invested by the will, and the order of the probate court, and the consent of the *cestui que trust*. When the executor had made this advantageous sale of the bonds, it was his duty, acting for the best interest of the legatees, for whom he was trustee, to reinvest the funds upon good and approved security at the highest rate of interest obtainable upon that character of security. But, instead of doing this, he contracted with the *cestui que trust* for the privilege of using this fund himself, upon his personal obligation, without

security, at less than 4 per cent. per annum interest, and, as the proof shows, invested $17,000 of it in a bank on his own account. What profit was made by the bank is not shown, but it is shown that the interest on money loaned at the time, and up to the time of this suit, was as high as 10 per cent. per annum.

After the contract was made with the legatees, they continued to receive the interest on the $23,720 into which the bonds had been converted, which interest was promptly paid by Gregg until, at the commencement of this suit, seventeen payments had been received by the plaintiff under the contract. She now says, however, that she was not advised, and did not know, what the usual interest on money was. But she was *sui juris* when she entered into the contract, and eleven payments of interest were received by her under it, after her marriage.

As to the payments made before she brought her suit, without objections upon her part, she cannot be heard to complain. She acquiesced in the contract made with Gregg up to the time she brought this suit. It is not shown that any positive undue influence was brought to bear upon her, and, being *sui juris*, she had opportunities, no doubt, to have ascertained what her rights were, and might have asserted them.

But we are of the opinion that Gregg did wrong in contracting with the *cestui que trust* to be allowed to hold and use the trust fund himself, at a rate of interest much below what might have been obtained for the use of the money upon safe security. It was his duty to manage and invest the funds in his hands as trustee for the interest of the *cestui que trust*, and not to use it for his own advantage. A trustee is not allowed to speculate for his own interest upon trust funds, or to make profit out of his position as trustee. 1 Perry, Trusts, secs. 197, 427, and cases cited; secs. 430, 431, and cases;

Brown v. *Rickets*, 4 Johns. Ch. 306. In England he is not even allowed compensation for his services, but the rule is different in America. Hill, Trustees, *574, 576, 577; 1 Perry, Trusts, sec. 432; 2 *ib.* sec. 904.

As early as 1799, in the case *Piety* v. *Stace*, 4 Vesey, Jr., 620, the master of the rolls said: "The rules are now so well understood that it is a waste of time to repeat them. An executor, if he will take upon himself to act with regard to the testator's property in any other manner than his trust requires, puts himself in this situation, that he cannot possibly be gainer by it. Any gain must be for the benefit of his *cestui que trust;* and if there is any loss upon the capital, as if the stocks rise ever so much, he must replace it, in order that the *cestui que trust* may sustain no damage from his conduct. Every farthing more than the dividends, that lay in his hands, is just so much gain to himself. For every shilling he got by any of these transactions, he shall pay interest at the rate of 5 per cent. for every minute it lay in his hands. As to what he lent his son, paying only the dividends of the stock, he ought to have lent it at 5 per cent. What business had he to lend it to his son upon such terms? There is a breach of trust in that respect. He must therefore pay 5 per cent. upon the whole. I suppose, he imagined he might make an advantage to himself, if he could do so without any disadvantage to the *cestuis que trust*, which is the notion of trustees; but he must pay for that."

Sutherland says: "A trustee who has the custody and management of funds, and uses them in his private business, realizes interest by lending, neglects to render the fund productive when it was his duty to do so; fails to account when called upon, or is otherwise guilty of neglect, evasion, fraud, or any wrong administration,

will be charged with interest, and even compound interest, according to the culpability of his conduct." 1 Suth. Dam. p. 622; *In the Matter of Harland's Accounts*, 5 Rawle, 323; *Jones* v. *Ward*, 10 Yerger, 160; 1 Perry, Trusts, sec. 464, *et seq.*

Pomeroy says: "The beneficiary is always entitled to claim and receive the actual profits, when they can be ascertained. If it is difficult to distinguish the fund, so as to tell the amount of profits or proceeds which the beneficiaries share, the court may not only require the trustee to restore the principal which he has appropriated, but, in the place of the profits, may compel him to pay interest compounded, with rests annual or semi-annual, or even more frequent, as the extent of his bad faith may seem to demand." 2 Pomeroy, Eq. Jur. sec. 1076, *et seq.*

Under the circumstances of this case, the plaintiff was not barred by laches or limitations when she brought this suit. *Brinkley* v. *Willis*, 22 Ark. 1. But we are of the opinion that there is error in the decree of the court below in refusing, in effect, to hold that, from the date of the contract of L. Gregg with the *cestui que trust* to the time of the filing of the complaint in this case, the plaintiff was bound by the payments made to and accepted by her under it, and cannot now be heard to complain as to the interest she voluntarily accepted upon the funds in the hands of L. Gregg as trustee paid to her according to said contract. She is estopped by her acceptance, and cannot undo what has been done. *Kent* v. *Jackson*, 14 Beav. 384; 2 Perry on Trusts, sec. 870; Hill on Trustees, (Star p. 382, and cases cited); 1 Perry on Trusts, sec. 467.

In other respects the decree of the chancellor is affirmed, and the decree will be modified so that the executors of L. Gregg shall pay to R. J. Wilson, trustee appointed by the chancery court, such amounts as

may be found due the trust estate, calculating interest upon the amount that was due and unpaid at and after the filing of the bill in this cause at the rate of interest fixed by the chancellor below, which was 6 per cent. per annum.

There can be no doubt that, in appointing some other person to act as trustee, instead of L. W. Gregg, one of the executors of the will of L. Gregg deceased, the chancellor properly exercised his discretion, as the interest of the estate of L. Gregg is not consistent with that of the estate of Wilson, and the confidence reposed in L. Gregg by his appointment by Wilson as trustee for his children was a personal trust and confidence, which was not reposed in L. W. Gregg.

There is no error in the court's refusal to allow the estate of L. Gregg commissions on money he retained in his hands and used under the contract made with the legatees, as there was no disbursement of this sum; nor is there any error in the refusal of the court to credit his estate with the taxes paid by it upon the moneys in his hands, the proceeds of the bonds. Ordinarily, a trustee is allowed for taxes upon the trust property, and for all necessary disbursements incident to its management. But, under the circumstances of this case, it was within the discretion of the chancellor to allow or refuse to allow these taxes, and we do not think he abused his discretion, as he may have considered that the money was worth six per cent. interest and the taxes.

The cause is reversed and remanded, with directions to the chancery court to enter a decree below in accordance with this opinion. The parties will each pay half the costs in this court, and the appellants all the costs of the court below.

BATTLE, J., absent.

REED v. REED.

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Opinion delivered October 10, 1896.

DIVORCE—DESERTION.—A husband is not entitled to a divorce upon the ground of desertion by the wife where she separated from him by his consent; and such consent may be expressly given or implied from words or acts.

DESERTION—CONDONATION—RENEWAL OF INTERCOURSE.—Renewal of matrimonial intercourse by a husband after his wife has separated from him is a condonation of her desertion.

Appeal from Saline Chancery Court.

LELAND LEATHERMAN, Chancellor.

STATEMENT BY THE COURT.

W. M. Reed brought this suit against his wife, Henrietta Reed, to obtain a divorce. For cause of action he alleged wilful desertion for over the period of one year without reasonable cause. The defendant filed an answer denying the allegations of the complaint, and further alleging that plaintiff had deserted her, and prayed for a divorce and alimony.

The plaintiff Reed testified, in part, as follows: "Defendant and I were married the 20th day of September, 1891, and lived together until the 8th of December, 1891, at which time she left me, and has not since lived with me. I did not know that defendant was dissatisfied until the day before she left, at which time she said she could not see why her children could not be treated as well as anybody else, and that she was going back home next day. She had three children when we were married, and I had five at home. I never mistreated her children, and I never mistreated defendant in any way. * * * * When she told me she was going home, I told her if she was dissatisfied that I had the same team that brought her to my home, and they

could take her back. I did not assist her in moving back. One of my boys came to me, and wanted my wagon and team to take a load of her things to her old home. He carried a part of a load of corn and some other things. I drove her cow and calf to her. Defendant and I have not kept up the relationship of husband and wife since she moved away. I have been to see her two or three times since she left me. Defendant and I never made any agreement, after she left me, that she was to come back to my house. I did tell her in January, 1894, that if she moved back to my house I would leave." He also said that after she left him he had traded a colt for her, and in other ways assisted in managing her stock; that she had woven cloth, and made him two over-shirts and two pair of trousers out of wool and warp furnished by him, and had also made for him two pair of drawers. He further said that on some of his visits to her he had remained over night.

The defendant, Henrietta Reed, testified in part as follows: "The reason I moved back home was because Mr. Reed was displeased, and made a distinction between his children and mine. It was getting cold, and all the children needed winter clothing and shoes. He sent to town and purchased some clothing for his children, and, failing to get any for my children, caused us to have a conversation, in which he said, if I was not satisfied, he would bring me home. I came back home because, from his acts and words, it seemed that it was what he wanted me to do. He and his children assisted me in moving back to where I formerly lived. After I moved back the plaintiff made regular visits to see me, and would stay as long as two nights and a day on a visit, which he kept up till the 8th day of November, 1893. During all of this time the relationship of husband and wife were sustained, and we bedded and cohabited with each other. * * * He came to my house as often as three

times in one month." She further testified that she had made clothing for him, and that he had paid her by giving her sorghum. He had also given some attention to stock owned by her. He had always treated her kindly.

There was other testimony, not necessary to set out. The finding and decree of the chancellor were in favor of the plaintiff. A decree for a divorce was entered in his favor, from which decree this appeal was taken.

E. H. Vance, Jr., for appellant.

The facts in this case do not show *wilful desertion.* The separation was by mutual consent. 1 Bishop, Mar. & Div. (6 Ed.), secs. 776, 777, 783; 2 *id.* sec. 671.

Tom M. Mehaffy, for appellee.

1. There is ample proof of desertion. The question of support or assistance is not involved. 5 Am. & Eng. Enc. Law, p. 801; 1 Bish. Mar. & Div. sec. 1673.

2. Desertion is the refusal to live with another as husband or wife. Sexual intercourse does not prove, nor the refusal disprove, the question of desertion. 5 Am. & Eng. Enc. Law, p. 800; 3 *id.* p. 308.

3. Defendant left plaintiff, and fails to show a reasonable cause, such a cause as would support an action by her for divorce. 34 Ark. 37, and cases.

Desertion as ground of divorce.

RIDDICK, J., (after stating the facts). The only question in this case is whether the appellant wilfully deserted her husband, as alleged in his complaint. When a wife separates from her husband, and lives apart from him with his consent, this is not a "wilful desertion," within the meaning of the statute. Nor is it necessary that such consent be expressly given. It may be implied from the words or acts of the husband which show that he consented to the separation. *Cox* v. *Cox*, 35 Mich. 451; *Beller* v. *Beller*, 50 Mich. 49; *Thompson* v. *Thompson*, 1 Swab. & T. 514; *Rose* v. *Rose*, 50 Mich. 92;

1 Nelson, Divorce, sec. 67, and cases cited; 1 Bishop, Marriage & Divorce, secs. 1671, 1690.

In this case the appellant, Henrietta Reed, testified that she left the residence of appellee and returned to her former home because appellant advised her to do so if she was not satisfied. The appellee, Reed, in his testimony, does not state or pretend that he objected to her leaving his home. When she spoke of leaving, he did not attempt to dissuade her, but, on the contrary, told her that he had the same team that brought her to his home, and it "could take her back." With his consent it did take her back, the appellee himself assisting her by driving her cow and calf. He afterwards visited her, remained over night at times, and occupied the same bed with her. These facts are not denied. It is true that he testified that "he and appellant had not kept up the relationship of husband and wife since she moved away," but he does not deny that he visited her after she moved away, that at times he remained over night, and on such occasions slept with her. His denial that they kept up "the relationship of husband and wife" seems to have been based on the belief that a common home was necessary for the existence of such a relationship, and this statement is only an expression of a conclusion he formed from the fact that they lived apart. Before their marriage he was a widower and she a widow, and each of them had children. Afterwards some disagreement as to the treatment of these children probably convinced each of them that it was better to live separately, and so, with his advice and assistance, she moved away. The friendly relations existing between them were disturbed very slightly, if at all, by this separation. He afterwards assisted her at times in trading and managing her stock. She wove cloth, and made clothing for him, for which he returned provisions for her family. He did not at any time raise any objection

to her living apart from him, or make any request that she return to him. Afterwards, when she offered to return, he told her not to do so. The testimony of the plaintiff himself convinces us that he consented to the separation of which he now complains, and his case has no foundation to rest upon. Nelson, Divorce, sec. 67.

When desertion condoned.

Even if it be conceded that the appellant was guilty of a wilful desertion, the evidence shows that such desertion was condoned by appellee. We do not hold that a husband whose wife had wilfully deserted him would, if he afterwards visited her and assisted in supporting her, necessarily lose his right to divorce or condone such desertion. Such acts might, under some circumstances, evince regret for her absence and a desire for her return, and serve to make more clear the fault of the wife in remaining away from his home. But, if he goes further, and continues to exercise the right of matrimonial intercourse upon such visits, he will be treated as having condoned the conduct of the wife, and the continuity of her desertion will be broken. *Burk* v. *Burk*, 21 W. Va. 445; *Phelan* v. *Phelan*, 135 Ill. 445; Nelson, Divorce, sec. 81. The appellant testified that the appellee continued to occupy the same bed with her when he visited her up to the 8th day of November, 1893. The appellee does not deny this statement, and, as he commenced his action in less than four months from that date, he had no grounds for a divorce. 1 Nelson, Divorce, sec. 81. In refusing to allow the appellant to return to his home when she offered to do so, the appellee was himself guilty of a wilful desertion, but, as such desertion had not existed for the statutory period, the appellant was not entitled to a divorce.

We would not disturb the finding of the chancellor on a mere preponderance of the evidence, but, being fully convinced that no cause for divorce is shown by either

party, the judgment is reversed, and case dismissed at costs of appellee.

BATTLE, J., absent.

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ADLER-GOLDMAN COMMISSION COMPANY *v.* BLOOM.

Opinion delivered October 17, 1896.

GARNISHMENT—TIME OF TRIAL—An action begun by a plaintiff in an attachment suit against one summoned therein as a garnishee is an ancillary proceeding, and cannot be prosecuted to judgment before the plaintiff has recovered judgment in the principal suit.

SAME—CONSOLIDATION WITH ORIGINAL SUIT.—An action against a garnishee who fails to make a satisfactory disclosure in the original attachment suit cannot be consolidated with the latter suit.

Appeal from Independence Circuit Court.

JAMES W. BUTLER, Judge.

The Adler-Goldman Commission Company, a corporation, brought suit in attachment in the Jackson circuit court against Morris, Charles, and Ben Bloom, partners by the style of Bloom Bros., and procured writs of garnishment to be issued, directed to Rufus C. Jones and David Bloom. Plaintiff filed interrogatories, and the garnishees answered, denying any indebtedness to defendants. Thereupon plaintiff brought suits against the garnishees, alleging that the garnishees had in their possession a stock of merchandise at Swifton worth $4,000, belonging to Bloom Bros. The garnishees answered, denying any indebtedness to defendants, or that they had in their possession any property belonging to them. The attachment suit was, on motion, transferred to equity. The plaintiff filed a motion to transfer the garnishment proceedings to the equity docket, and to consolidate them with the chancery suit against

Bloom Bros., which motion was overruled. The grounds of this motion were because: (1) The issue on the garnishment should not be tried until the attachment suit, which was still pending, had been disposed of. (2) The order requiring the trial of the garnishment issue before final judgment on the issues in the principal suit was erroneous. (3) The garnishment proceeding was merely an incident of the attachment suit; and, as that had been transferred to equity, the garnishment proceeding had passed with it. And, (4) the purpose of the garnishment being to reach the partnership interest of Bloom Bros. in the stock of goods at Swifton, the proceeding against the garnishees was of an equitable character.

Both the original suit and the garnishment proceedings having been transferred by change of venue to the Independence circuit court, the plaintiff filed a motion stating that the original attachment suit was still pending and undetermined, and asked that the trial in the garnishment suits should be postponed until a judgment should be rendered in the principal suit; which motion was overruled. Upon this, over the objections of the plaintiff, the court called a jury; and, the plaintiff declining to introduce testimony on the issue, the garishees were allowed to introduce witnesses, and the jury found a verdict in favor of the garnishees, Jones and David Bloom. Whereupon they were discharged. No objection was made because the two garnishment suits were tried together.

The plaintiff filed a motion for a new trial, upon the ground that the court had erred in refusing to transfer and consolidate, and in forcing the garnishment proceedings to a hearing before a judgment was rendered in the original suit. This motion was overruled. Plaintiff excepted, and brought the case here by appeal.

Rose, Hemingway & Rose and *Gustave Jones*, for appellant.

1. The court erred in refusing to transfer and to consolidate the garnishment proceeding with the principal suit. 17 Ark. 387; Bump, Fr. Conv. p. 551; 6 Johns. Ch. 139; Bump, Fr. Conv. p. 583; 63 N. W. 570.

2. It was error to try the garnishment issue before the principal case was disposed of. Drake, Att. sec. 459; 46 Mich. 28; 10 Iowa, 498; 35 N. W. 587; 45 Ark. 271; 48 *id.* 349; 52 *id.* 131; 10 So. 455; 15 Pac. 326.

J. W. Phillips, M. M. Stuckey, Yancey & Fulkerson, for appellees.

1. It would have been error to consolidate the garnishment with the principal suit. 38 Iowa, 556; Drake, Att. sec. 452; 5 Ark. 55; 17 *id.* 364; 14 N. H. 243; 26 *id.* 35; 65 Ala. 581; Drake, Att. 462; 24 Miss. 638; 19 Pick. (Mass.), 20; 132 Mass. 56; Hempstead, 662; 56 Mo. 267; 72 Iowa, 61.

2. Garnishment is not a chancery proceeding, but a proceeding at law. 18 Ark. 583; 54 Ala. 246; 56 Mo. 276; 60 Ala. 356; 72 Iowa, 61; 31 Ill. 322-334; Wade on Att. sec. 334; 5 Kas. 349; 5 Dana (Ky.), 361; 9 Mo. 249; 23 Tex. 515; 43 N. H. 290; 43 N. J. Eq. 277; 16 Wis. 169; 50 N. Y. 80; 21 Tex. 614; 69 Wis. 69; 2 Am. St. 717. For only exception, see 55 N. H. 488; 14 Wis. 22.

3. The court did not err in requiring the garnishment issue to be tried before the principal case was disposed of. 10 Iowa, 498; 35 Iowa, 20; 53 *id.* 415; Drake, Att. secs. 463, 452-3; 38 Iowa, 556; 21 Tex. 614; 20 Ala. 334; 60 *id.* 361; 35 Conn. 310; 38 Ark. 528; 39 *id.* 97; Sand. & H. Dig., secs. 347-8.

BATTLE, J. Two questions are presented for our consideration.

First. Can a suit instituted by a plaintiff in an attachment proceeding against a person summoned as a

garnishee in such proceeding, whose answer was unsatisfactory to the plaintiff, be legally prosecuted to judgment before the plaintiff recovers judgment in the action in which the order of attachment was sued out, and before the attachment in the same is sustained?

Second. Can the action instituted against the garnishee be consolidated with the action in which he was summoned?

Time of trial of garnishment.

First. An order of attachment, the execution of it, and the disposition of the property attached constitute a proceeding ancillary to the action in which it is pending. It depends upon such action for its existence and support, and is a provisional execution of the judgment in the same, provided before its recovery. As a part of this proceeding, persons indebted to the defendant may be summoned as garnishees for the purpose of aiding in the accomplishment of the same design—the satisfaction of such judgment. When summoned, each of them is required to disclose truly the amount owing by him to the defendant, whether due or not, and the property in his possession or control. If he fails to make a disclosure satisfactory to the plaintiff, the latter can proceed in an action against him by filing a complaint and suing out a summons. (Sand. & H. Dig., sec. 360). As to the time when the action shall proceed to judgment, the statute is silent, but it does provide that when it is instituted "such proceedings may be had as in other actions, and judgment (shall) be rendered in favor of the plaintiff to subject the property of the defendant in the hands of the garnishee, or for what shall appear to be owing to the defendant by the garnishee," and that "the judgment shall be enforced by execution or other proper means." When the object of the garnishment is considered, in connection with these provisions of the statute, it is apparent that the action against the garnishee should not be prosecuted to final judgment until

the plaintiff recovers judgment against the defendant in the main action; for until then he does not become subrogated to the defendant's right of recovery, and entitled to a judgment against the garnishee and satisfaction thereof, as provided by the statute. *Giles* v. *Hicks*, 45 Ark. 271; *Penyan* v. *Berry*, 52 Ark. 130.

As the action against the garnishee cannot be legally prosecuted to final judgment before plaintiff recovers a judgment against defendant in the main action, it necessarily follows that the issue joined between him and the garnishee should not be tried before that time; for a trial before then would avail nothing.

The garnishment being a part of the attachment proceeding, the plaintiff is not entitled to recover against the garnishee until it is sustained; for the garnishment is as much dependent on the grounds upon which the order of attachment was sued out as any other part of the attachment proceeding, and is based on the right to the attachment and its maintenance; and the plaintiff's right to recover against the garnishee depends on the validity of the garnishment. Upon the discharge of the attachment the defendant is entitled to the return of all his lands, goods, chattels, and choses in action which are held subject to any judgment that might be recovered against him.

As to consolidation with original suit.

Second. The main action and the action against the garnishee should not be consolidated. The former must be prosecuted to a judgment against the defendant before the issues in the latter can be legally tried. A consolidation cannot avoid this and enable the court to try them as one action. The parties and issues are different, and in whatever manner they may be tried the issues in the latter must be separately and last determined.

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

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SHIREY *v.* BEARD.

Opinion delivered October 17, 1896.

SETTLEMENT—CONCLUSIVENESS—Where the land of A was sold under the decree of a court, and was purchased by, and conveyed to, B, and A remained in possession, and a controversy afterwards arose between them as to the manner in which the purchase was made, A claiming that it was purchased for him and B that it was purchased solely for himself, and they afterwards settled the controversy by B selling the land to A and taking two notes for purchase money, A cannot subsequently reopen the controversy and defeat the recovery of the balance due on the notes by showing that he executed them in order to hold possession of the land.

Appeal from Craighead Circuit Court, Jonesboro District.

T. P. MCGOVERN, Special Judge.

J. C. Hawthorne, for appellant.

Defendant is not entitled to rescissions of the contract because—

1. If there ever was any trust relationship, it was dissolved and repudiated by plaintiff more than a year before the sale of the land, and it is not contended that defendant agreed to pay more than the land was worth, or that he was in any manner deceived by defendant or forced him to make the trade.

2. Defendant was in possession of all the facts when the trade was made, and he delayed making any objections to it for more than seven years. 20 Am. St. 237; 16 *id.* 237; 7 Johns. Ch. 90; 9 Pick. 212; 3 Paige, Ch. 274; 33 Am. St. 258; 120 U. S. 377; 52 Ark. 76.

Jno. K. Gibson and *Cate, Hughes & Cate*, for appellee.

1. Upon the purchase of the land by Shirey and the taking of the title in his own name, a trust arose in

Beard's favor. 20 Ark. 381; 26 *id.* 344; *Ib.* 249; 42 *id.* 531; 49 *id.* 242; 16 Pac. 57; Bisph. Eq. (4 Ed.) sec. 93; 10 Am. & Eng. Enc. Law, pp. 73, 75 and notes. This trust may be established by parol evidence. 39 Ark. 309.

2. It is true, equity will not enforce a stale trust, but the time depends upon the circumstances of the case, and no certain time can be stated as the limit. 1 Perry, Trusts, (3 Ed.) sec. 228 *et seq.;* Bisph. Eq. (4 Ed.) sec. 260. Appellee's age and ignorance, his confidence in appellant, and the circumstances of oppression and fraud explain the delay, and demand the interference of a court of equity. The burden was on the trustee to show the fairness of the transaction. 41 Ark. 264; Bisph. Eq. (4 Ed.) sec. 143; 1 Perry, Trusts, (3 Ed.) secs. 195, 206, 428 *et seq.*; 27 Am. & Eng. Enc. Law, p. 213.

BATTLE, J. On the 15th of June, 1893, A. W. Shirey instituted an action against Calvin Beard, and alleged in his complaint that he was, on the 31st day of May, 1886, the owner of a certain tract of land, which he described; that he sold it on that day to the defendant for $500, for which the defendant executed to him his two promissory notes, each for $250, payable, respectively, eight and twenty months after date, and bearing ten per cent. per annum interest; that the note last falling due remained unpaid; and that the defendant was further indebted to him in the sum of one hundred and fifteen dollars for goods, wares, and merchandise sold and delivered to him. And, tendering with his complaint a deed of conveyance of the land to the defendant, he asked for a judgment against the defendant for the amount of his indebtedness, and a decree foreclosing the lien on the land for the purchase money remaining unpaid.

The defendant answered, and alleged that he owned the land in 1877, subject to a vendor's lien, which was

ordered to be foreclosed in 1884; that he employed the plaintiff to purchase it for him at the sale under the decree of foreclosure, and paid him $60 therefor; that the plaintiff, in pursuance of the agreement, purchased the land, on the 19th of April, 1884, in his own name for the benefit of the defendant, with the understanding that the land was to be conveyed to him when he paid to plaintiff the purchase money.

The defendant admitted the execution of the note sued on, but alleged that he had paid the plaintiff $1,000 more than he owed on account and for the purchase money of the land; that the plaintiff was indebted to him in the sum of $747.60; and asked judgment against plaintiff for $500, and that plaintiff be required to convey the land to him.

Plaintiff replied, and denied that the defendant paid him $60 for purchasing the land, that he held it as trustee, that the purchase money had been paid, and that he was indebted to the defendant in any sum.

Plaintiff testified that the defendant informed him that he was about to lose the land in controversy, and proposed to pay his expenses if he would go to Jonesboro and buy it, and give him an opportunity to purchase it from him, and paid him $6 to cover his expenses; that the land was sold on the 19th of April at a commissioner's sale, and purchased by him at the price of $265, which he paid; that he purchased the land for himself, and never agreed to let the defendant have it at what he paid for it, or at any other price until he sold it to him; that in the year 1885, the sheriff, at his instance, dispossessed the defendant; that Beard, the defendant, then rented the land for 1885, and paid him therefor $25 and a half of a bale of cotton; that he sold the land to the defendant, in May, 1886, for $500, and took his two promissory notes therefor, each for $250, payable,

respectively, eight and twenty months after date. One of them has been paid, and $36 or $40 on the other.

Defendant testified: That the plaintiff agreed to buy the land for him, and he was to return the amount paid and ten per cent. interest, and pay to plaintiff $60 for his trouble. In the spring after he purchased the land, plaintiff wanted $400 for it. When he put him out of the house in 1885, he had to pay rent in order to get possession. After the crop was gathered, plaintiff asked $500 for the land, and he had to sign the notes or lose the land. He did not sign them willingly. He had receipts for $350 on his notes, but gave them to plaintiff when he returned the first land note.

Other evidence was adduced at the hearing to prove circumstances slightly corroborating the statements of both parties, and other matters in controversy, which we do not notice in this opinion.

The circuit court found that the defendant employed the plaintiff to purchase the land for him, and paid $60 for his services; that the plaintiff was to pay for the land with his own money, but agreed that the sum advanced was to be repaid when the defendant became able to do so; that plaintiff represented that he took title in his own name as security for the money, and collected $167.65 more than all the sums due for money loaned to buy the land and on the account sued on amounted to; that he took advantage of the relation of trust subsisting between him and the defendant to sell the land at an exorbitant price, for which the defendant gave his notes; and that the sale was inequitable, unconscionable, and fraudulent; and rendered judgment in favor of the defendant against the plaintiff for $167.65 and all costs, and decreed that the sale of the land and notes sued on be cancelled, and that plaintiff convey the land to the defendant.

Is the decree of the court correct?

At the time plaintiff purchased the land at commissioner's sale, no relation of trust existed between him and the defendant. When he sold it for $500, the defendant was not deceived as to a single fact. He had a personal knowledge of every fact material for him to know. The only reason he gives for purchasing the land is, he had to sign the notes or lose the land. Is this a sufficient reason for setting aside the sale?

Vick v. *Shinn*, 49 Ark. 70, decides the question. In that case "the mortgaged chattels," says the court, "were in the debtor's possession. There was no circumstance or threat of the use of violence or force to take them. The debtor voluntarily met his creditor in the office of the attorney who held the notes for collection, to effect a settlement. He admitted a liability of about $300, but claimed a credit on the notes to the extent of the corn that was not delivered to him. A small credit was conceded, but less than he contended for, and less than the circuit court found that he was really entitled to. The mortgagee would not agree to his terms of settlement, and finally informed him that he would take possession of and sell the mortgaged property if he did not pay the full amount demanded. The mortgagee's attorney repeated the same thing to him. He protested throughout that the excess over the amount he was willing to pay was unjust, and that he did not owe it, but he agreed to pay the whole, and, after having time to arrange to raise the money, caused it to be paid, saying he did it to protect his property from sale, and that he would sue for and recover the excess over his just debt."

The court said "There was no compulsion, in a legal sense, in this. It was incumbent upon the mortgagee, before a legal sale of the mortgaged goods, to get possession of them, and, if this could not be done peacea-

bly, he must have resorted to the action of replevin for the purpose. But it is not shown that he had the power or opportunity to put his threat of seizing the property into execution against the will of the debtor, and a threat to enforce a demand by suit is not sufficient to create duress of goods. If there is in fact a cause of action when the threat is made, the plaintiff, by bringing suit, would only enforce a legal right; if there was no cause of action, or a demand for more than is due, the party threatened should exercise the ordinary degree of firmness which the law presumes every man to possess, and meet the issue of the unjust suit. One cannot be heard to say he had the law with him, but feared to meet his adversary in court. It is only when he has no chance to be heard that he can pay under protest and afterwards recover. * * * By proper defense to the action of replevin the plaintiff could have protected himself against surrendering his property without paying more than the mortgage debt. * * * Having chosen to make terms with his creditor, instead of pressing his rights when there was nothing to prevent him from so doing, he could not afterwards change position and complain that the terms were forced upon him. * * * A protest is of no avail, except in case of duress of some sort, and then it only tends to show that the payment was the result of the duress."

But it is said that the doctrine as to duress of goods has no application to real estate; that the rule is founded upon the movable and perishable character of personal property, and the uncertainty of a personal remedy against the wrong-doer; and the reason of the rule is wholly inapplicable to real estate.* But we do not undertake to say that the rule has no application to

* *Fleetwood* v. *City of New York*, 2 Sandf. 475; *Edwards* v. *Handley*, (Ky.) 3 Am. Dec. 745; Sheppard's Touchstone, p. 61.

real estate under any circumstances, but that *Vick* v. *Shinn* shows that, if applicable to any case in which land is involved, it has none to the one before us. Here Beard was in possession of the land in controversy. He had full and adequate remedies against any action or course Shirey might take.* No threats, force, or intimidation of any kind appears to have coerced him into the making of any contract. He had a controversy with Shirey as to facts. They met for the purpose of settling it, as they had a right to do, and did settle it by Beard ratifying Shirey's purchase and recognizing his right to the land, and Shirey selling it to him for $500 and giving him time in which to pay for it, and taking his notes for the purchase money. For many years, Beard voluntarily made payments on these notes. Seven years passed before he undertook to resurrect the controversy which they had buried in their settlement, and not then until this action was brought. He was willing for it to remain settled so long as he was permitted to make payments at will; and we think it should not be disturbed, but be allowed to continue to rest in peace.

The decree of the circuit court is, therefore, reversed, and the cause is remanded, with directions to the court to take an account between the plaintiff and defendant, and, if it finds anything due on the purchase money, to foreclose the lien of the plaintiff on the land to pay the same, and for other proceedings not inconsistent with this opinion.

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* *Mulholland* v. *York*, 82 N. C. 510; *McNair* v. *Pope*, 100 N. C. 404; *Brittin* v. *Handy*, 20 Ark. 381; Perry on Trusts, sec. 171.

APPENDIX.

I.

OPINIONS NOT REPORTED.

Stephenson *v.* Rush; appeal from Crittenden circuit court; James E. Riddick, judge; affirmed February 8, 1896; per J. P. Brown, Sp. J.

Kendall *v.* Milligan; appeal from Cleveland circuit court; Carroll D. Wood, judge; reversed February 8, 1896; per Battle, J.

Shattuck *v.* Stephens; appeal from Franklin circuit court in chancery, Ozark district; Jephtha H. Evans, judge; reversed March 21, 1896; per Hughes, J.

Bowden *v.* Land Mortgage Investment, etc., Co.; appeal from Hempstead circuit court in chancery; Rufus D. Hearn, judge; affirmed April 25, 1896; per Battle, J.

Cox *v.* Dougherty; appeal from Jackson circuit court; James W. Butler, judge; reversed June 6, 1896; per Bunn, Ch. J.

II.

CASES DISPOSED OF ORALLY.

Johnson *v.* Meacham; appeal from Conway circuit court in chancery; Jeremiah G. Wallace, judge; affirmed February 15, 1896; Bunn, Ch. J.

Rowland *v.* Kuykendall; appeal from Franklin circuit court, Ozark district; reversed February 15, 1896; Battle, J.

Schaurte *v.* Sumner, appeal from Hempstead circuit court in chancery; Rufus D. Hearn, judge; affirmed February 15, 1896; Hughes, J.

Coney *v.* Bulkley; appeal from Columbia circuit court; Charles W. Smith, judge; affirmed February 15, 1896; Hughes, J.

Butler *v.* Adler-Goldman Commission Co.; appeal from Independence circuit court; John B. McCaleb, judge; affirmed February 15, 1896; Wood, J.

St. L., I. M. & S. Ry. Co. *v.* Duncan; appeal from Saint Francis circuit court; Grant Green, Jr., judge; judgment affirmed by consent for $300, February 15, 1896; *per curiam.*

City Electric St. Ry. Co. *v.* Gates; appeal from Pulaski circuit court; Robert J. Lea, judge; affirmed February 17, 1896; *per curiam.*

Mixon *v.* Jarrett; appeal from Lee circuit court in chancery; Grant Green, Jr., judge; affirmed February 22, 1896; Battle, J.

Pegg *v.* State; appeal from Washington circuit court; Edward S. McDaniel, judge; affirmed February 22, 1896; Hughes, J.

Steen *v.* Tompson; appeal from Pulaski chancery court; David W. Carroll, chancellor; affirmed February 29, 1896; Bunn, Ch. J.

Wilmans *v.* Smith; appeal from Jackson circuit court; James W. Butler, judge; dismissed for non-compliance with rule nine, March 2, 1896; *per curiam.*

Adams *v.* Wolf; appeal from Lincoln circuit court in chancery; James F. Robinson, judge; dismissed for non-compliance with rule nine, March 2, 1896; *per curiam.*

Ashley County *v.* McKain; appeal from Ashley circuit court; M. L. Hawkins, judge; dismissed for non-compliance with rule nine, March 2, 1896; *per curiam.*

Hollowa *v.* Puckett; appeal from Yell circuit court, Dardanelle district; Jeremiah G. Wallace, judge; affirmed March 7, 1896; Bunn, Ch. J.

Spears *v.* State use, etc.; appeal from Pulaski chancery court; David W. Carroll, chancellor; affirmed March 7, 1896; Hughes, J.

L. R. & F. S. Ry. Co. *v.* Wilson; appeal from Faulkner circuit court; James S. Thomas, judge; affirmed March 7, 1896; Hughes, J.

McCulloch *v.* State; appeal from Clark circuit court; Rufus D. Hearn, judge; dismissed on suggestion of pardon, March 7, 1896; *per curiam.*

Brazier *v.* Ark. Building & Loan Ass'n; appeal from Hemptead circuit court in chancery; Rufus D. Hearn, judge; affirmed on motion for non-compliance with rule nine, March 9, 1896; *per curiam.*

Davis *v.* Johnson; appeal from Saint Francis circuit court; Grant Green, Jr., judge; affirmed March 14, 1896; Bunn, Ch. J.

St. L., I. M. & S. Ry. Co. *v.* Nichols; appeal from Pulaski circuit court; Robert J. Lea, judge; affirmed March 14, 1896; Bunn, Ch. J.

Taylor *v.* Jarvis-Conklin Mortgage, etc., Co.; appeal from White chancery court; David W. Carroll, chancellor; affirmed March 14, 1896; Bunn, Ch. J.

Smith, Graham & Jones *v.* Lee & Co.; appeal from Craighead circuit court, Jonesboro district; James E. Riddick, judge; affirmed March 14, 1896; Bunn, Ch. J.

Battle *v.* Sowell; appeal from White chancery court; David W. Carroll, chancellor; affirmed March 14, 1896; Hughes, J.

Read *v.* Cunningham; appeal from Little River circuit court; Will P. Feazel, judge; affirmed March 14, 1896; Wood, J.

Baird *v.* Smith; appeal from Crawford circuit court in chancery; Jephtha H. Evans, judge; affirmed for non-compliance with rule nine, March 16, 1896; *per curiam.*

Lockman *v.* Dillon; appeal from Garland circuit court; Alexander M. Duffie, judge; dismissed for non-compliance with rule nine, March 16, 1896; *per curiam.*

Merkel *v.* Evans; appeal from Clark circuit court in chancery; Rufus D. Hearn, judge; affirmed March 21, 1896; Bunn, Ch. J.

Ehrman *v.* Vaccaro; appeal from Phillips circuit court; Grant Green, Jr., judge; affirmed March 21, 1896; Bunn, Ch. J.

Consumers Cotton Oil Co. *v.* Reese Pritchard Transportation Co.; appeal from Pulaski circuit court; Robert J. Lea, judge; affirmed March 21, 1896; Battle, J.

Little Rock & Memphis Railway Co. *v.* Burns; appeal from Saint Francis circuit court; affirmed March 21, 1896; Riddick, J.

Brown *v.* Williams; appeal from Saint Francis circuit court; Grant Green, Jr., judge; dismissed for non-compliance with rule nine, March 23, 1896; *per curiam.*

Robins *v.* Geo. Taylor Commission Co.; appeal from Hempstead circuit court in chancery; Rufus D. Hearn, judge; dismissed for non-compliance with rule nine, March 23, 1896; *per curiam.*

Wooley *v.* Hallums; appeal from Faulkner circuit court; James S. Thomas, judge; affirmed March 28, 1896. Bunn, Ch. J.

Ireland *v.* Inge; appeal from Jackson circuit court; James W. Butler, judge; affirmed March 28, 1896; Hughes, J.

Rainey *v.* State; appeal from Lincoln circuit court, Varner district; John M. Elliott, judge; appeal dismissed by consent March 28, 1896; *per curiam.*

Kas. City, Ft. Scott & M. Railroad Co. *v.* King; appeal from Sharp circuit court; John B. McCaleb, judge; affirmed by consent March 30, 1896; *per curiam.*

St. L. So. Western Railway Co. *v.* Watson; appeal from Green circuit court; W. H. Cate, judge; reversed April 4, 1896; Battle, J.

Luce-Monroe Savings, etc., Co. *v.* Caruth; appeal from Sebastian circuit court, Fort Smith district; Edgar E. Bryant, judge; affirmed April 4, 1896; Hughes, J.

Farmer's Store *v.* Ligon; appeal from Dallas circuit court; M. L. Hawkins, judge; affirmed April 4, 1896; Wood, J.

St. L. So. Western Railway Co. *v.* Slocum; appeal from Cross circuit court; Felix G. Taylor, judge; affirmed April 4, 1896; Wood, J.

London *v.* Renegan; appeal from Crawford circuit court; Jephtha H. Evans, judge; affirmed for non-compliance with rule nine, April 13, 1896; *per curiam.*

Ferguson *v.* Sharpe; appeal from Washington circuit court; Edward S. McDaniel, judge; dismissed by consent, April 18, 1896; *per curiam.*

McCracken *v.* Williams Saw Mill Co.; appeal from Clay circuit court; Felix G. Taylor, judge; affirmed on motion under rule seven, April 25, 1896; *per curiam.*

Kile *v.* Eureka Springs Railway Co.; appeal from Carroll circuit court; Edward S. McDaniel, judge; affirmed May 2, 1896; Battle, J.

Hicks v. Hinton; appeal from Saline circuit court; Alexander M. Duffie, judge; affirmed May 2, 1896; Wood, J.

Atkins *v.* Valley Distilling Co.; appeal from Crawford circuit court; compromised and dismissed by consent, May 2, 1896; *per curiam.*

Smith, Graham & Jones *v.* Fisher; appeal from Saint Francis circuit court; Grant Green, Jr., judge; affirmed May 9, 1896; Bunn, Ch. J.

Gray *v.* Williams; appeal from White chancery court; David W. Carroll, chancellor; affirmed May 9, 1896; Bunn, Ch. J.

Mills *v.* McCloy & Trotter; appeal from Drew chancery court; James F. Robinson, chancellor; affirmed May 9, 1896; Battle, J.

St. L., I. M. & S. Railway *v.* McCullen; appeal from Franklin circuit court; James S. Thomas, judge; affirmed May 9, 1896; Hughes, J.

City Electric Street Railway Co. *v.* Butler; appeal from Pulaski circuit court; Robert J. Lea, judge; affirmed May 9, 1896.

London *v.* Bear Bros. & F[illegible] appeal from Crawford circuit court; Jephtha H. Evans, judge; [illegible]issed for non-com[illegible]ance with rule nine, May 11, 1896; *per curiam.*

Honnet & Weil *v.* Allen; appeal from Jefferson c[illegible] court; James F. Robinson, chancellor; affirmed May 11, 18[illegible] J.

Rowland *v.* Suit; appeal from Polk circuit court; Wi[illegible] Feazel, judge; affirmed for non-compliance with rule nine, May 18, 1896; *per curiam.*

Elliott *v.* Massie-Herndon Shoe Co.; appeal from Madison circuit court; Edward S. McDaniel, judge; affirmed for non-compliance with rule nine, May 18, 1896; *per curiam.*

Wheeler *v.* Harrison; appeal from Lafayette circuit court; Charles W. Smith, judge; affirmed May 23, 1896; Bunn, Ch. J.

L. R. & F. S. Railway Co. *v.* Mercus and L. R. & F. S. Railway Co. *v.* Walters; appeals from Crawford circuit court; Jephtha H. Evans, judge; affirmed May 23, 1896; Hughes, J.

Leonard *v.* Miller; appeal from Garland chancery court; Leland Leatherman, chancellor; affirmed May 23, 1896; Wood, J.

London *v.* Smith; appeal from Crawford circuit court in chancery; Jephtha H. Evans, judge; affirmed May 23, 1896; Riddick, J.

L. R. & F. S. Railway Co. *v.* Stephan; appeal from Faulkner circuit court; James S. Thomas, judge; compromised and dismissed by consent, May 23, 1896; *per curiam.*

Trimble *v.* St. Louis Sash & Door Works; appeal from Miller circuit court; Rufus D. Hearn, judge; affirmed May 30, 1896; Hughes, J.

K. C., F. S. & Memphis Railway Co. *v.* King; appeal from Sharpe circuit court; John B. McCaleb, judge; affirmed May 30, 1896; Wood, J.

Henderson *v.* Martin; *ex parte* petition for prohibition; granted May 30, 1896; Riddick, J.

Coleman *v.* State; appeal from Yell circuit court; Jeremiah G. Wallace, judge; affirmed June 6, 1896; Hughes, J.

Brooks, Neely & Co. *v.* Sadler; appeal from Yell circuit court in chancery; Jeremiah G. Wallace, judge; compromised and dismissed June 6, 1896; *per curiam.*

Warbritton *v.* State; appeal from Clay circuit court; Felix G. Taylor, judge; affirmed June 13, 1896; Wood, J.

Ward *v.* Carlyle; appeal from Pulaski circuit court; Wilbur F. Hill, special judge; affirmed for non-compliance with rule nine, June 13, 1896; *per curiam.*

Scoville *v.* Devaney; appeal from Sebastian circuit court; Edgar E. Bryant, judge; affirmed June 20, 1896; *per curiam.*

Scoville *v.* Cazort; appeal from Sebastian circuit court; Edgar E. Bryant, judge; affirmed June 20, 1896; *per curiam.*

Horsefall *v.* Quisenberry; appeal from Prairie circuit court; James S. Thomas, judge; affirmed June 20, 1896; Bunn, Ch. J.

Black *v.* Harris; appeal from Cleveland circuit court; Carroll D. Wood, judge; affirmed June 27, 1[illegible] Bunn, Ch. J.

Marr *v.* Union Manuf'g Co., [illegible]peal from Howard circuit court; Can[illegible], judge; affirmed June 27, 1896; Battle, J.

Alexand[illegible] Poe; appeal from Grant circuit court in chancery; Unio[illegible]ie, judge; affirmed June 27, 1896; Battle, J.

[illegible]niture Co. *v.* Paul; appeal from Pulaski circuit court; Robert [illegible]. Lea, judge; affirmed June 27 1896; Riddick, J.

Emonson M. & M. Co. *v.* Estes; appeal from Lonoke circuit court; Robert J. Lea, judge; dismissed on motion of appellant, June 27, 1896; *per curiam.*

Ark. Valley Bank *v.* Jones; appeal from Logan circuit court in chancery; Virgil Bourland, special judge; appeal dismissed July 8, 1896; Battle, J.

St. L. I. M. & S. Ry. Co. *v.* James; appeal from Saline circuit court; Alexander M. Duffie, judge; affirmed on remittitur being entered, September 21, 1896; Hughes, J.

Ryan *v.* Florsheim; appeal from Garland circuit court; Alexander M. Duffie, judge; affirmed as a delay case, October 3, 1896; *per curiam.*

Gibson *v.* Spratlin; appeal from Cleveland circuit court; M. L. Hawkins, judge; affirmed October 3, 1896; Bunn, Ch. J.

Devaney *v.* Nelson; appeal from Pulaski chancery court; D. W. Carroll, chancellor; affirmed October 3, 1896; Hughes, J.

Martin *v.* Block; appeal from Desha circuit court; John M. Elliott, judge; affirmed as a delay case, October 3, 1896; *per curiam.*

Gray *v.* Brinkley Stave, etc., Co.; appeal from Monroe circuit court; James S. Thomas, judge; affirmed October 3, 1896; Wood, J.

INDEX.

ACCEPTANCE:
of street, see ROADS & HIGHWAYS.
ACKNOWLEDGMENT:
defective acknowledgment of antenuptial contract held cured. *Bryan* v. *Bryan*, 79.
effect of procuring acknowledgment of relinquishment of dower by fraud. *Hill* v. *Yarborough*, 320.
ADMINISTRATION: SEE PROBATE COURT.
administrator cannot bind estate by contract. *Pike* v. *Thomas*, 223.
ACTION: SEE GARNISHMENT; ATTACHMENT; REPLEVIN.
taking an appeal held an appearance to. *Ark. Coal, etc., Co.* v. *Haley*, 144.
when commenced. *Wilkins* v. *Worthen*, 401.
AGENCY: SEE INSURANCE.
effect of agent's purchase at his own sale. *Quertermous* v. *Taylor*, 598.
AMENDMENT:
of pleading presumed to conform to evidence. *Shattuck* v. *Byford*, 431.
ANIMAL:
proceedings to enforce lien on mare for services of stallion, see *Walker* v. *Fetzer*, 135.
duty of railway employees to keep lookout for stock on track, see *St. Louis, etc., R. Co.* v. *Russell*, 182.
APPEAL AND ERROR:
when unnecessary to bring up all the evidence in bill of exceptions. *Boyington* v. *Van Etten*, 63.
defense of limitation not raised below will not be considered on appeal. *Shaver* v. *Sharp Co.*, 76.
judgment not reversed for error not made ground of motion for new trial. *Phillips* v. *State*, 119.
taking an appeal as an appearance. *Ark. Coal, etc. Co.* v. *Haley*, 144.
exception to reading of mortgage held too indefinite for consideration on appeal. *Jones* v. *Melindy*, 203.
bill of exceptions cannot be contradicted by clerk's certificate. *Ib.*
no reversal for erroneous verdict if the verdict upon proper instructions could not have been otherwise. *Evans* v. *Merritt*, 228.
objection to evidence held waived by failure to insist on it. *St. Louis, etc., R. Co.* v. *Brown*, 254.

APPEAL AND ERROR—*Continued.*

judgment not reversed for objection not raised below. *Davis* v. *Goodman*, 262.

erroneous admission of evidence held not prejudicial. *Powers* v. *Armstrong*, 267.

verdict not set aside for excessive damages if supported by evidence. *Messinger* v. *Dunham*, 326.

bill of exceptions unnecessary where decree reciting facts shows error on its face. *Shattuck* v. *Lyons*, 338: *Martin v. Hawkins*, 421.

erroneous exclusion of mitigating evidence in misdemeanor case held not prejudicial where the lowest fine was imposed. *Bennefield* v. *State*, 365.

objection not raised below not considered on appeal. *Hamilton* v. *State*, 543.

APPEARANCE: SEE ACTION.

ASSIGNMENT FOR BENEFIT OF CREDITORS: SEE ELECTION.

ATTACHMENT: SEE FRAUD; GARNISHMENT.

in attachment for removing property from state, the value of the property left is determined by its fair market value. *Nesbit* v. *Schwab Clothing Co.*, 22.

in attachment of mare for services of stallion, no bond is required of claimant, and no liability created against surety. *Walker* v. *Fetzer*, 135.

owner of property wrongfully attached is not estopped to claim damages therefor by consenting to application of proceeds. *Ib.*

junior attacher held not entitled to intervene in prior attachment, when. *Glaser* v. *First Nat. Bank*, 171.

form of judgment for intervener in attachment. *Fly* v. *Grieb's Adm'r*, 209.

may issue against non-resident on claim for unliquidated damages arising on contract. *Messinger* v. *Dunham*, 326.

ATTORNEY AND CLIENT:

in contract providing that the attorneys shall at end of the suit receive part of the land recovered, they are entitled to share in rents accruing before final termination of the suit. *Rector* v. *Rose*, 279.

BAIL:

bond not vitiated by sheriff's failure to return it to the proper county. *Havis* v. *State*, 500.

when sheriff authorized to take bond. *Ib.*

arrest of defendant in another case and escape is no defense to action on bond. *Ib.*

BANK:

has lien on notes of its debtor held for collection for the amount due by him. *Cockrill* v. *Joyce*, 216.

BILL OF EXCEPTIONS: SEE APPEAL AND ERROR.
BILLS AND NOTES: SEE USURY.
bona fide purchaser of note held to acquire good title. *Estes* v. *German Nat. Bank*, 7.
no defense to action on note that defendant signed it jointly with a corporation of which he was director, without intending to bind himself personally. *Maledon* v. *Leflore*, 387.
surety on note not discharged by payee's failure to resort to mortgage given by principal. *Ib.*
nor by reason of the waste of the mortgaged property. *Ib.*
nor by the fact that it was executed by a corporate principal without authority. *Ib.*
effect of transfer merely of indorser's interest in note. *Spencer* v. *Halpern*, 595.
BONA FIDE PURCHASER: SEE BILLS AND NOTES.
purchaser of property on credit is not. *Jetton* v. *Tobey*, 84.
of land acquires good title, though the vendor's wife's acknowledgment was procured by another's fraud. *Hill* v. *Yarborough*, 320.
BOND: SEE ATTACHMENT; FORCIBLE ENTRY AND DETAINER; BAIL.
BURDEN OF PROOF: SEE PRESUMPTION; VENUE.
BURGLARY:
instruments of crime may be introduced in evidence. *Starchman* v. *State*, 530.
description of property must be proved as laid. *Ib.*
BUILDING ASSOCIATIONS:
premium bid for loan held a penalty and not enforceable. *Roberts* v. *Am. B. & L. Ass.* 572.
rule for computing amount due on loan. *Ib.*
monthly fines held valid if reasonable. *Ib.*
fine of ten cents per share for each month that payment is not made held reasonable. *Ib.*
CANCELLATION SEE CONTRACT; INSURANCE; COMPROMISE.
CARRIER: SEE RAILROADS.
is liable for expelling a passenger in a rude manner, though the carrier had no ticket and refused to pay fare. *St. Louis, etc., R. Co.* v. *Brown*, 254.
conductor's bad temper after the expulsion may be shown. *Ib.*
joint judgment against two carriers for injury to passenger held erroneous. *L. R. & Ft. S. R. Co.* v. *Stevenson*, 354.
when railway liable for penalty for failure to post freight schedules. *Ark. & La. R. Co.* v. *Harris*, 452.
notice of injury held insufficient. *Ib.*
CASES OVERRULED, CRITICISED, ETC.
Citizens Street R. Co. v. *Steen*, 42 Ark. 32, explained in *Johnson* v. *Stewart*, 169.
Turner v. *Tapscott*, 30 Ark. 312, overruled by *Pike* v. *Thomas*, 226.
Yarborough v. *Ward*, 34 Ark. 208, overruled by *Pike* v. *Thomas*, 226.

CERTIORARI:
scope of the writ at common law and under the code. *Pine Bluff W. & L. Co.* v. *Pine Bluff*, 196.
city ordinance held not reviewable on certiorari. *Ib.*
COMPROMISE:
cannot be rescinded without restoring money received. *Harkey* v. *Mechanics', etc., Ins. Co.* 274.
compromise of claim for killing stock held binding. *St. L., I. M. & S. R. Co.* v. *Selman*, 342.
settlement held conclusive. *Shirey* v. *Beard*, 621.
CONFIRMATION:
of judicial sale, see JUDICIAL SALE.
of tax title, see TAXATION.
CONFLICT OF LAWS:
when action based on statute of another state lies in this state. *St. L., I. M. & S. R. Co.* v. *Brown*, 254.
CONSIDERATION: SEE CONTRACT.
unauthorized bond is without consideration. *Walker* v. *Fetzer*, 135.
CONSPIRACY: SEE EVIDENCE.
instruction as to, see INSTRUCTIONS.
CONSTITUTIONAL LAW: SEE TAXATION.
CONTINUANCE:
denial of, not prejudicial where the desired facts are otherwise proved. *Carpenter* v. *State*, 286.
denial of, held not prejudicial. *Hamilton* v. *State*, 543.
CONTRACT: SEE USURY; LANDLORD AND TENANT; LIEN; INSURANCE; HUSBAND AND WIFE; ATTORNEY AND CLIENT; COMPROMISE.
contract of physician to retire from practice in a given city is not unreasonable. *Webster* v. *Williams*, 101.
adequacy of consideration not inquired into. *Ib.*
of foreign corporation, see CORPORATIONS.
party cannot rescind settlement of loss as procured by fraud, without returning the money received. *Harkey* v. *Mechanics', etc., Ins. Co.* 274.
signing of bond held a signing of contract annexed. *Busch* v. *Hart*, 330.
consideration of written contract may be proved by parol. *Ib.*
party to a contract may waive part of its stipulations. *Garvin* v. *Linton*, 370.
CONTRIBUTORY NEGLIGENCE: SEE NEGLIGENCE.
CONVEYANCE: SEE DEED.
CORPORATION: SEE WRIT AND PROCESS.
when estopped by course of dealing to deny the authority of its president and secretary to execute a deed. *Estes* v. *German Nat. Bank*, 7.

CORPORATION—*Continued.*
president and secretary have no inherent power to execute notes. *City Elec. St. R. Co.* v. *First Nat. Exch. B'k*, 33.
their power must be delegated and special. *Ib.*
corporation held not bound by false entries on its record. *Ib.*
when stockholders not liable for corporate debts. *Boyington* v. *Van Etten*, 63.
right of foreign corporation to do business in this state. *Ib.*
whether foreign corporation was doing business in state, see *British, etc., Co.* v. *Winchell*, 160.
purchasers of "right, franchise, and privilege" of a corporation held to become liable as partners. *Forbes* v. *Whittemore*, 229.
when right of action on stock subscription accrues. *Wilkins* v. *Worthen*, 401.
COUNTY TREASURER: SEE TREASURER.
COURTS: SEE PROBATE COURTS; JUSTICES OF THE PEACE; APPEAL AND ERROR.
CRIMINAL LAW: SEE SEDUCTION; GRAND JURY; CONTINUANCE; HOMICIDE; TRIAL; WITNESSES; INSTRUCTIONS; DISTURBING RELIGIOUS CONGREGATION; EVIDENCE; JURY.
after reversal in felony case the former trial and conviction is no bar to second trial. *Carpenter* v. *State*, 286.
when state not required to elect between two counts of indictment. *State* v. *Bailey*, 489.
indictment not required to follow exact language of statute. *State* v. *Booe*, 512.
indictment for forgery held to charge a single offense. *Bennett* v. *State*, 516.
indictment not quashed on account of presence of stranger in grand jury room, when. *Ib.*
validity of indictment found at special term. *Hamilton* v. *State*, 543.
irregularity in finding indictment held waived by pleading over. *Ib.*
CURATIVE STATUTE: SEE STATUTES.
CUSTOM:
to be good must be general and of long standing. *City Elec. St. Ry. Co.* v. *First Nat. Exch. Bank*, 33.
DAMAGES:
no damages allowed to leasehold estate in condemnation proceeding unless lessee is made party. *Little Rock & Ft. Smith R. Co.* v. *Alister*, 1.
amount of damages recoverable for obstructing a drain. *St. L., I. M. & S. R. Co.* v. *Anderson*, 360.

DEED: SEE ACKNOWLEDGMENT; HOMESTEAD.
presumption of delivery of deed from its being recorded held not rebutted by proof that deed is in grantor's possession. *Estes* v. *German Nat. Bank*, 7.
validity of conveyance by corporate officers, see *Ib.*
of conveyance from husband to wife. *Geo. Taylor Com. Co.* v. *Bell*, 26.
effect of conveyance by widow of unassigned dower, see *Weaver* v. *Rush*, 51.
DEFINITIONS:
damage. *Richardson* v. *Harrell*, 474.
lot. *Texarkana Water Co.* v. *State*, 474.
DELIVERY: SEE DEED.
DISTURBING RELIGIOUS CONGREGATION:
indictment for, held insufficient. *State* v. *Booe*, 512.
DIVORCE:
separation by consent is not "wilful desertion." *Reed* v. *Reed*, 611.
wife's desertion condoned where husband renews intercourse. *Ib.*
DOWER:
effect of conveyance of unassigned dower by widow. *Weaver* v. *Rush*, 51.
jointure held to bar dower. *Bryan* v. *Bryan*, 79.
where widow conveys dower interest in husband's land before its assignment, heir may recover the land from vendee. *Barnett* v. *Meacham*, 313.
effect of procuring relinquishment of, by fraud. *Hill* v. *Yarborough*, 320.
DRAINS: SEE DAMAGES; LIMITATION OF ACTIONS.
railroads liable for obstructing drains, whether natural or artificial. *St. L., I. M. & S. R. Co.* v. *Anderson*, 360.
DUPLICITY: SEE CRIMINAL LAW.
DURESS:
facts held not to make out case of duress. *Shirey* v. *Beard*, 621.
EJECTMENT:
evidence held to make *prima facie* case in plaintiff's favor. *Weaver* v. *Rush*, 51.
when such case not disproved. *Ib.*
discretion of court to strike defendant's deed from files held abused. *Ib.*
ELECTION:
between two counts of indictment, when unnecessary. *State* v. *Bailey*, 489.
creditor held not estopped by electing to take under assignment. *Cockrill* v. *Joyce*, 216.

EMINENT DOMAIN:
no damages to leasehold estate allowed unless lessee be made a party. *Little Rock & Ft. S. Ry. Co.* v. *Alister*, 1.
railway acquiring right of way is not entitled to obstruct drain. *St. Louis, etc., R. Co.* v. *Anderson*, 360.
EQUITY:
ancient rule as to overcoming answer by proof abolished by code. *Quertermous* v. *Taylor*, 598.
ESTOPPEL:
corporation held estopped to deny authority of officers to make conveyance. *Estes* v. *German Nat. Bank*, 7.
wife permitting husband to obtain credit on strength of her property is estopped to claim it. *Geo. Taylor Com. Co.* v. *Bell*, 26.
county treasurer not estopped to sue for commissions by failure to include them in settlement. *Shaver* v. *Sharp Co.*, 76.
owner of property wrongfully attached is not estopped to claim damages therefor by consenting to the application of the proceeds. *Ib.*
bank held not estopped by electing to take under assignment. *Cockrill* v. *Joyce*, 216.
infant *feme covert* held not estopped to disaffirm conveyance. *Fox* v. *Drewry*, 316.
beneficiary who for several years has received interest on trust funds loaned to trustee held estopped to claim additional interest. *Gregg* v. *Gabbert*, 602.
EVIDENCE: SEE PRESUMPTION; JUDICIAL NOTICE; VARIANCE; VENUE.
opinion of witness as to cost of doing certain work inadmissible if it is the result of guess work. *Little Rock & Ft. S. Ry. Co.* v. *Alister*, 1.
when declarations of vendor admissible against vendee. *Geo. Taylor Com. Co.* v. *Bell*, 26.
fire insurance policy may not be contradicted by parol evidence. *Germania Ins. Co.* v. *Bromwell*, 43.
expert testimony is inadmissible to prove matter of common knowledge. *Fordyce* v. *Lowman*, 70.
parol evidence admissible to contradict note by showing usury. *Roe* v. *Kiser*, 92.
on trial of uxoricide, it is not error to prove that defendant beat her and threatened to kill her. *Phillips* v. *State*, 119.
so it is admissible to show the relations of defendant and his wife, and that she had bruises on her body. *Ib.*
it is admissible to introduce a writing executed by defendant on the day of the killing and referring to the intended killing of his wife. *Ib.*

EVIDENCE—*Continued.*
in prosecution of a gambler for robbery it is not admissible to prove that the place of the robbery was infested with gamblers reported to have committed robberies. *Brown* v. *State*, 126.
mode of proving mortgage recorded in another state. *Jones* v. *Melindy*, 203.
how objection to evidence waived. *St. Louis, etc., R. Co.* v. *Brown*, 254.
opinion of non-expert as to distance train had gone is admissible. *Ib.*
proof of conductor's bad temper in ejecting passenger is admissible. *Ib.*
notary's certificate of protest is *prima facie* true. *Fletcher* v. *Ark. Nat. B'k*, 265.
testimony as to character inadmissible in civil cases. *Powers* v. *Armstrong*, 267.
parol evidence held admissible to prove consideration of written contract. *Busch* v. *Hart*, 330.
witness may not identify stolen property from another's description. *Lewis* v. *State*, 494.
witness not permitted to state his opinion that defendant contradicted himself. *Joyce* v. *State*, 510.
admissibility of acts and declarations of conspirator. *Bennett* v. *State*, 516.
in burglary case the instruments of crime may be produced. *Starchman* v. *State*, 538.
ancient rule of equity as to overcoming answer by proof abolished by code. *Quertermous* v. *Taylor*, 598.
EXCEPTIONS: SEE BILL OF EXCEPTIONS; APPEAL AND ERROR.
EXEMPTIONS: SEE HOMESTEAD.
from taxation, see TAXATION.
FEES: SEE TREASURER; SHERIFF.
FINE: SEE BUILDING ASSOCIATIONS.
FORCIBLE ENTRY AND DETAINER:
judgment in unlawful detainer sustained. *Davis* v. *Goodman*, 262.
bond in unlawful detainer held insufficient. *Richardson* v. *Harrell*, 469.
title required to support forcible entry and detainer and unlawful detainer. *King* v. *Duncan*, 588.
landlord cannot sue for the land in either action during period of lease. *Ib.*
FOREIGN CORPORATION: SEE CORPORATION.
FORFEITURE: SEE INSURANCE:
FORGERY:
indictment for, held sufficient. *Bennett* v. *State*, 516.
when intent to defraud presumed. *Ib.*

FORMER JEOPARDY: SEE CRIMINAL LAW.
FRAUD: SEE AGENCY.
when retention of possession of land sold by grantor no evidence of fraud. *Estes* v. *German Nat. Bank*, 7.
misrepresentation by one creditor to another held not to constitute fraud. *Glaser* v. *First Nat. Bank*, 171.
to rescind fraudulent compromise party must offer to restore consideration received. *Harkey* v. *Mechanics', etc. Ins. Co.*, 274.
effect of procuring relinquishment of dower by fraud. *Hill* v. *Yarborough*, 320.
GARNISHMENT:
ancillary garnishment suit should not be tried before attachment suit disposed of. *Adler-Goldman Com. Co.* v. *Bloom*, 616.
nor should the former suit be consolidated with the latter. *Ib.*
GAS:
duty of gas company to use due care in inspecting and repairing its pipes. *Pine Bluff W. & L. Co.* v. *Schneider*, 109.
whether it has used due diligence is question for jury. *Ib.*
one cannot recover from the gas company if the explosion was due to his servant's negligence. *Ib.*
not negligence *per se* to search for a gas leak with lighted match. *Ib.*
gas company neglecting to repair gas pipe is jointly liable with one negligently causing explosion for resulting injury. *Pine Bluff W. & L. Co.* v. *McCain*, 118.
GRAND JURY:
mistake in indorsement of list of, held not prejudicial. *Carpenter* v. *State*, 286.
objection for irregularity in formation of, waived by pleading to indictment. *Ib.*
GUARDIAN AND WARD:
guardian's sale must be confirmed. *Greer* v. *Anderson*, 213.
HOMESTEAD:
area of, in town, see *First Nat. Bk. etc.*, v. *Wilson*, 140.
defective conveyance of, cured by act of 1893. *British, etc., Co.* v. *Winchell*, 160; *Hill* v. *Yarborough*, 320; *Shattuck* v. *Lyons*, 338.
effect of procuring wife's signature to conveyance of, by fraud. *Hill* v. *Yarborough*, 320.
when liable for purchase money. *Boone Co. Bank* v. *Hensley*, 398.
conveyance of, insufficient where wife fails to join in deed. *Shattuck* v. *Byford*, 431.
curative act of 1893 held not to affect intervening rights. *Ib.*
HOMICIDE: SEE EVIDENCE; INSTRUCTIONS; CRIMINAL LAW.
indictment for murder held sufficient, though it omits the word "wilfully." *Aubrey* v. *State*, 368.
indictment for murder held sufficient. *Hamilton v. State*, 543.

HUSBAND AND WIFE; SEE WITNESSES; DOWER; JOINTURE; HOMESTEAD; MARRIAGE.
validity of conveyance from husband to wife. *Geo. Taylor Com. Co.* v. *Bell*, 26.
when wife estopped to claim her property in husband's hands. *Ib.*
married woman may borrow money and execute her note therefor. *Sidway* v. *Nichol*, 146.
right of infant married woman to disaffirm her conveyance. *Fox* v. *Drewry*, 316.
saving clause in seven-years statute of limitation not repealed. *Ib.*
married woman *held* not estopped to disaffirm contract. *Ib.*
when married woman not bound to restore consideration before disaffirming. *Ib.*
effect of procuring wife's relinquishment of dower by fraud. *Hill* v. *Yarborough*, 320.
INDICTMENT: SEE HOMICIDE; SEDUCTION; CRIMINAL LAW; DISTURBING RELIGIOUS CONGREGATION.
INFANTS: SEE HUSBAND AND WIFE.
INSTRUCTIONS:
refusal to give instruction held not prejudicial. *Evans* v. *Merrett*, 228.
instruction as to justifiable homicide, reasonable doubt, and conspiracy approved. *Carpenter* v. *State*, 286.
error to single out evidence. *Ib.*
as to weight of evidence disapproved of. *Lovejoy* v. *State*, 478.
when refusal to give instruction as to reasonable doubt not prejudicial. *Lewis* v. *State*, 494.
duty of party desiring a correct instruction to present one. *Hamilton* v. *State*, 543.
instruction as to accused's credibility approved. *Ib.*
abstract instruction properly refused. *Ib.*
INSURANCE:
"iron-safe clause" in fire policy held reasonable. *Germania Ins. Co.* v. *Bromwell*, 43.
such policy cannot be contradicted by parol evidence. *Ib.*
stipulation in policy cannot be waived by agent before it is issued. *Ib.*
policy of fire insurance held forfeited by giving of mortgage. *German-Am. Ins. Co.* v. *Humphrey*, 348.
agent authorized to sign policies held authorized to waive forfeiture. *Ib.*
such waiver may be by parol. *Ib.*
insurance clerk held not authorized to waive forfeiture. *Ib.*

INSURANCE—*Continued.*
policy held not to have been cancelled before loss occurred. *Southern Ins. Co.* v. *Williams*, 382; *Ætna Ins. Co.* v. *Rosenberg*, 507.
when action lies on policy insuring against liability. *Am. Employers' Liability Ins. Co.* v. *Fordyce*, 562.
general agent with power to sign and issue policies may waive conditions. *Ib.*
effect of cancellation of policies on accrued liabilities. *Ib.*
INTENT: SEE USURY; HOMICIDE; PRESUMPTION.
INTEREST:
none recoverable on delinquent taxes. *Texarkana Water Co.* v. *State*, 188.
INTERPLEADER: SEE INTERVENTION.
INTERVENTION:
in attachments, see ATTACHMENTS.
JOINT RIGHTS AND LIABILITIES: SEE GAS.
two independent carriers held not liable for injury to passenger. *L. R. & Ft. S. R. Co.* v. *Stevenson*, 354.
JOINTURE: SEE DOWER.
right of widow to possession of lands conveyed to her as a jointure. *Bryan* v. *Bryan*, 79.
JUDGMENT AND DECREE:
form of judgment for intervener in attachment suit. *Fly* v. *Grieb's Adm'r*, 209.
in unlawful detainer, see FORCIBLE ENTRY AND DETAINER.
decree confirming tax title conclusive as to irregularities. *Martin* v. *Hawkins*, 421.
decree based on bill showing no cause of action is void collaterally. *Hall* v. *Melvin*, 439.
JUDICIAL NOTICE:
to be noticed judicially, a custom must be general and long standing. *City Elec. St. Ry. Co.* v. *First Nat. Exch. Bank*, 33.
JUDICIAL SALE:
guardian's sale must be confirmed. *Greer* v. *Anderson*, 213.
JURISDICTION: SEE JUSTICE OF THE PEACE; PROBATE COURT.
JURY:
discretion of court to excuse juror for ill health or bias. *Hamilton* v. *State*, 543.
separation of jury held not prejudicial. *Ib.*
JUSTICE OF THE PEACE:
jurisdiction of, in controversy between plaintiff in attachment and intervener. *Fly* v. *Grieb's Adm'r*, 209.
LACHES: SEE LIMITATION OF ACTIONS.
LANDLORD AND TENANT:
landlord held to have accepted an offer of lessee to surrender lease. *Williamson* v. *Crossett*, 393.

LIEN: SEE VENDOR'S LIEN.
mode of proceeding to enforce lien of owner of male annimal, see *Walker* v. *Fetzer*, 135.
of bank on notes of debtor deposited for collection. *Cockrill* v. *Joyce*, 216.
when unnecessary to file contract to enforce laborer's lien. *Watson* v. *May*, 435.
of laborer on crop held prior to that of a mortgage. *Ib.*
LIMITATION OF ACTION:
when action by heir to recover land of an ancestor barred. *Barnett* v. *Meacham*, 313.
saving clause in favor of married women in seven-year statute not impliedly repealed. *Fox* v. *Drewry*, 316.
married woman held not estopped by laches to disaffirm conveyance made by her while an infant. *Ib.*
when statute begins to run against action for obstructing drain. *St. Louis, etc., R. Co.* v. *Anderson*, 360.
when right of action on stock subscription accrues. *Wilkins* v. *Worthen*, 401.
when action is commenced. *Ib.*
LIQUORS:
effect as to variance between information and evidence as to place of sale. *Bryant* v. *State*, 459.
special act held to exclude right of manufacturer to sell in original packages of five gallons. *Cotton* v. *State*, 585.
MALICIOUS MISCHIEF:
defense to charge of malicious mischief in shooting a mule that the animal was trespassing held insufficient. *Bennefield* v. *State*, 365.
MARRIAGE:
defective acknowledgment of ante-nuptial contract held cured by act of 1885. *Bryan* v. *Bryan*, 79.
MASTER AND SERVANT:
a master cannot recover of a gas company damages by an explosion partly due to his servant's negligence. *Pine Bluff W. & L. Co.* v. *Schneider*, 109.
MAXIMS:
no one can transfer to another a better title than he himself has. *Jetton* v. *Tobey*, 84.
"*Expressio unius*," etc., held inapplicable. *Spencer* v. *Halpern*, 597.
Expressio eorum quae tacite insunt nihil operatur. *Ib.*
MINORS: SEE INFANTS.
MISTAKE:
effect of reservation of usury by mistake: *Garvin* v. *Linton*, 370.

MORTGAGE:
power of beneficiary to incumber trust property. *Sidway* v. *Nichol*, 146.
mode of proving mortgage recorded in another state. *Jones* v. *Melindy*, 203.
entry of satisfaction on record is not essential to removal of incumbrance. *German-American Ins. Co.* v. *Humphrey*, 348.
on crop held subordinate to laborer's lien. *Watson* v. *May*, 435.
appropriation of proceeds to pay prior claim held not prejudicial. *Butler* v. *Adler-Goldman Com. Co.*, 445.
MUNICIPAL CORPORATIONS: SEE ROADS AND HIGHWAYS.
ordinance held to be of legislative character, and not reviewable on *certiorari*. *Pine Bluff W. & L. Co.* v. *Pine Bluff*, 196.
NEGLIGENCE: SEE RAILWAYS.
degree of care required of gas company in inspecting pipes, see *Pine Bluff W. & L. Co.* v. *Schneider*, 109.
whether such company was negligent is question for jury. *Ib.*
shopkeeper cannot recover damages if explosion of gas was due partly to his servant's negligence. *Ib.*
not negligence *per se* to search for gas leak with lighted match. *Ib.*
gas company neglecting to repair leak in pipe is jointly liable, with one whose negligence caused an explosion, for injury caused thereby. *Pine Bluff W. & L. Co.* v. *McCain*, 118.
one who attempts to cross railway track without looking for approaching train is guilty of contributory negligence. *Martin* v. *Little Rock, etc., Ry. Co.*, 156.
whether owner of horse attached to wagon was negligent in tying him is question for jury. *Johnson* v. *Stewart*, 164.
where the owner was negligent, he cannot recover for the killing of the horse by a street railway company. *Ib.*
as to duty of railway fireman and engineer to keep lookout for cattle on track, see *St. Louis, etc., R. Co.* v. *Russell*, 182.
contributory negligence is a defense to action against a railroad company for failure to keep a lookout. *St. Louis, etc., R. Co.* v. *Leathers*, 235; *St. Louis, etc., R. Co.*, v. *Dingman*, 245.
one struck by train while on track is negligent in failing to look or listen. *St. Louis, etc., R. Co.* v. *Dingman*, 245.
joint judgment against two carriers for negligent injury to passenger held erroneous when. *L. R. & Ft. S. R. Co.* v. *Stevenson*, 354.
NEGOTIABLE INSTRUMENT: SEE BILLS AND NOTES.
NEW TRIAL: SEE APPEAL AND ERROR.
NOTARY PUBLIC:
certificate of protest of note by, is *prima facie* true. *Fletcher* v. *Ark. Nat. Bk.*, 265.

NOTICE: SEE WRIT AND PROCESS.
of injury caused by carrier's failure to post freight schedule held insufficient. *Ark. & La. R. Co.* v. *Harris*, 452.
OFFICERS AND OFFICES: SEE SHERIFFS; TREASURERS; JUSTICES OF THE PEACE.
PARTIES:
as to necessary parties in railway condemnation proceeding, see *Little Rock & F. S. R. Co.* v. *Alister*, 1.
PARTNERSHIP:
persons assuming debts of corporation held to be liable as partners. *Forbes* v. *Whittemore*, 229.
PAYMENT:
of mortgage, see MORTGAGE.
PENALTY: SEE CARRIER; TREASURER; BUILDING ASSOCIATIONS.
PLEADING:
claim of a general and also a special lien held not inconsistent. *Cockrill* v. *Joyce*, 216.
when pleading aided by evidence. *Davis* v. *Goodman*, 262; *Shattuck* v. *Byford*, 431.
PRACTICE: SEE TRIAL; APPEAL AND ERROR.
PRESCRIPTION: SEE ROADS AND HIGHWAYS.
PRESUMPTION:
presumption of delivery of deed from its being recorded not rebutted, when. *Estes* v. *German Nat. Bank*, 7.
ancestor dying in possession of land is presumed to have been the owner. *Weaver* v. *Rush*, 51.
when such presumption not overcome. *Ib.*
is in favor of notary's certificate of protest of note. *Fletcher* v. *Ark. Nat. B'k*, 265.
as to intent in forgery. *Bennett* v. *State*, 516.
PRINCIPAL AND SURETY: SEE BILLS AND NOTES.
surety knowingly paying a usurious debt of his principal cannot hold the latter liable. *Roe* v. *Kiser*, 92.
PRIORITY: SEE LIENS.
PROBATE COURT:
has no jurisdiction of claim against an estate for fee of attorney employed by administrator. *Pike* v. *Thomas*, 223.
PUBLICATION: SEE WRIT AND PROCESS.
QUESTIONS OF LAW AND FACT:
negligence held a question for the jury. *Pine Bluff W. & L. Co.* v. *Schneider*, 109.
RAILWAYS: SEE EMINENT DOMAIN; STREET RAILWAYS; CARRIERS.
person injured while crossing track held negligent, when. *Martin* v. *Little Rock, etc., R. Co.*, 156.
whether necessary for both fireman and engineer to keep lookout for stock, see *St. Louis, etc., R. Co.* v. *Russell*, 182.

RAILWAYS—*Continued.*
contributory negligence a defense to an action against a railroad for failure to keep lookout, etc. *St. Louis, etc., R. Co.* v. *Leathers*, 235; *St. Louis, etc., R. Co.* v. *Dingman*, 245.
person walking on track without looking or listening for train held negligent. *St. Louis, etc., R. Co.* v. *Dingman*, 245.
are liable for obstructing drains, whether natural or artificial. *St. L., I. M. & S. R. Co.* v. *Anderson*, 360.
REPLEVIN:
constable may bring, for property levied on. *Jetton* v. *Tobey*, 84.
will not lie on behalf of the mortgagee of a share-cropper's undivided interest in crop. *Moseley* v. *Cheatham*, 133.
RESCISSION: SEE CONTRACTS; COMPROMISE; INFANCY.
ROADS AND HIGHWAYS:
city's presumptive right to street held established by evidence. *Waring* v. *City of Little Rock*, 408.
street established by prescription need not be accepted by ordinance. *Ib.*
sufficiency of proof to establish street by prescription. *Ib.*
ROBBERY:
evidence in robbery case held to be prejudicial. *Brown* v. *State*, 126.
SALE: SEE FRAUD; BONA FIDE PURCHASER; VENDOR'S LIEN.
no one can transfer to another a better title than he himself has. *Jetton* v. *Tobey*, 84.
mere possession of personal property *held* to impart no authority to convey. *Ib.*
when sale of chattel complete. *Lynch* v. *Daggett*, 592.
SCHOOL AND SCHOOL DISTRICTS:
lands of school district held for profit are taxable. *School Dist. of Ft. Smith* v. *Howe*, 481.
SEDUCTION:
indictment for, held insufficient. *Wright* v. *State*, 145.
SETTLEMENT: SEE COMPROMISE.
SHERIFF: SEE BAIL.
not entitled to fee for summoning special jurors. *Hempstead Co.* v. *Jones*, 272.
STATUTES: SEE LIMITATION OF ACTIONS.
curative act of 1885 held to cure defective acknowledgment of ante-nuptial contract. *Bryan* v. *Bryan*, 79.
curative act of 1893 held to cure defective conveyance of homesteads. *British, etc., Co.* v. *Winchell*, 160; *Hill* v. *Yarborough*, 320; *Shattuck* v. *Lyons*, 338. But not to cut off intervening rights of third persons. *Shattuck* v. *Byford*, 431.
where an act makes no exception, the courts can make none. *Cotton* v. *State*, 585.

STATUTES CITED, ETC.:
REV. STAT. U. S.:
sec. 906 208
CONSTITUTION OF 1874:
art. 9, sec. 3 400
9, sec. 5 142
14, sec. 2 483
16, sec. 5 463
16, sec. 6 484-5
CODE CIVIL PROCEDURE:
sec. 1125 203
MANSFIELD'S DIGEST:
sec. 3355 476
3362 476
4245 195
SANDELS & HILL'S DIGEST:
sec. 325 ..... 24, 329
356 212
372 179
395 181
721 18
993-4 359
1125 202-3
1237 273
1330-5 41
1541 513
1604 41-2
1670-2 ..... 305, 308
1675 309
1676 ..... 306, 310
1766 366
1900 146
2014-6 505
2017 504
2033 505
2088 515
2236 554
2476 443
2916 32
3350 273
3443-4 590
3452 ..... 473, 475
3458 ..... 473, 477
3459 473
3764 366-7
sec. 3766 366-7
4186 391
4259 126
4766 437
4787 ..... 435, 437
4786 437
4811-2 138
4815 319
4851 587
4899 83
4945-51 151
4946 152
5085 378
5209 418
5634 391
5657 407
5681 444
5887 407
6207 ..... 168, 185
6307 455
6312 455
6350 182
6401 468
6498-9 463
6520 467
6526 464
6530 464
OTHER STATUTES:
act 1873, April 28 319
1875, March 2 474
1875, Dec. 13 475
1883, Feb. 8 472
1885, Feb. 24 195
1885, April 1 83
1887, M'ch 18 ... 164, 324, 341-3
1891, Feb. 5 472
1891, April 1 485
1891, April 8 (p. 213), ... 238-40, 244, 253
1893, April 13, ... 164, 324-5, 341, 343
1895, M'ch 12 79
1895, April 9 587

STREET RAILWAY:
question whether owner of horse killed by street railway company was negligent in hitching the animal is for the jury. *Johnson* v. *Stewart*, 164.
street railway company is not liable if owner was negligent. *Ib.*

SUMMONS: SEE WRIT AND PROCESS.

SURETY: SEE PRINCIPAL AND SURETY.

TAXATION:
description of land in tax deed as "west part of" a forty-acre tract held insufficient. *Texarkana Water Co.* v. *State*, 188.
effect of purchase of tax-title to land by its owner. *Ib.*
mode of selling town lots. *Ib.*
right of state to enforce lien for taxes by suit. *Ib.*
penalty and costs not collectible where tax-sale was void. *Ib.*

TAXATION—*Continued.*
taxes are not "debts," within the statute providing for interest on debts. *Ib.*
conclusiveness of decree confirming tax-title. *Martin* v. *Hawkins*, 421.
right of purchaser from state of forfeited land to procure and file amended deed. *Ib.*
sufficiency of publication of warning order in confirmation proceeding. *Ib.*
if necessary to equalize assessments, courts may reduce assessment of particular property below its true value. *Ex parte Ft. Smith, etc., Bridge Co.*, 461.
lands of school district held for profit are not exempt from taxation. *School Dist. of Fort Smith* v. *Howe*, 481.
TREASURER:
county treasurer succeeding himself is entitled to commissions on funds carried over. *Shaver* v. *Sharp Co.*, 76.
not estopped to claim commissions by failure to include them in previous settlement. *Ib.*
commissions of, payable in kind out of the particular funds. *Ib.*
county treasurer liable for penalty for failure to pay a county warrant when he had money applicable thereto. *Dale* v. *Payne*, 357.
TRIAL: SEE QUESTIONS OF LAW AND FACT; APPEAL AND ERROR; INSTRUCTIONS; JURY.
discretion of court in striking out deed on file in ejectment case held abused. *Weaver* v. *Rush*, 51.
when error for court to direct a verdict, see *Boyington* v. *Van Etten*, 63.
conviction of murder not reversed because jury were allowed to take a document with them. *Phillips* v. *State*, 119.
what papers the jury should be allowed to take. *Ib.*
when remarks of trial judge prejudicial. *Brown* v. *State*, 126.
remarks of prosecuting attorney held improper. *Ib.*
objection to evidence held waived by failure to insist upon it. *St. Louis, etc., R. Co.* v. *Brown*, 254.
witnesses may be allowed to restate their testimony after submission of the case. *Bennefield* v. *State*, 365.
remarks of counsel prejudicial, when. *Bennett* v. *State*, 516.
error to take testimony in accused's absence. *Ib.*
time of trial of garnishment. *Adler-Goldman Com. Co.* v. *Bloom*, 616.
TRUST:
one entitled to receive the rents of land held in trust for her, cannot incumber it. *Sidway* v. *Nichol*, 146.
when beneficiary estopped to demand additional interest for money loaned to trustee. *Gregg* v. *Gabbert*, 602.
when trustee not entitled to commissions. *Ib.*
trustee held chargeable with taxes on trust fund. *Ib.*

USAGE: SEE CUSTOM.
USURY:
note bearing legal interest may be shown by parol to be usurious. *Roe* v. *Kiser*, 92.
surety paying usurious debt of principal cannot recover, when. *Ib.*
usurious contract is entire, cannot be divided. *Garvin* v. *Linton*, 370.
usurious contract may be purged of usury, and new obligation be taken. *Ib.*
concurrence of corrupt intent in both parties is not essential. *Ib.*
no usury where excessive interest is reserved by mistake. *Ib.*
will not vitiate a contract originally valid. *Hynes* v. *Stevens*, 491.
VARIANCE:
effect as to variance between information and evidence as to place of sale. *Bryant* v. *State*, 459.
"Watkins" and "Wadkins" held *idem sonans*. *Bennett* v. *State*, 516.
variance between indictment and proof as to deed alleged to be forged held to be fatal. *Ib.*
description of property in burglary case must be proved as laid. *Starchman* v. *State*, 538.
VENDOR'S LIEN:
on homestead held not waived by taking personal security. *Boone County Bank* v. *Hensley*, 398.
VENUE:
proved in criminal case by preponderance of evidence. *Wilson* v. *State*, 497.
VERDICT: SEE APPEAL AND ERROR.
WAIVER: SEE INSURANCE; GRAND JURY; CONTRACT; VENDOR'S LIEN; CRIMINAL LAW.
when objection to evidence waived. *St. Louis, etc., R. Co.* v. *Brown*, 254.
WATERS: SEE DRAINS.
WITNESS: SEE TRIAL.
husband cannot testify against wife, but may testify for her, when. *Geo. Taylor Com. Co.* v. *Bell*, 26.
foundation must be laid for impeaching witness. *Carpenter* v. *State*, 286.
state may prove statements of accused, and then prove them false. *Hamilton* v. *State*, 543.
WRIT AND PROCESS:
mode of service of summons on domestic corporation. *Ark. Coal, etc., Co.* v. *Haley*, 144.
sufficiency of publication of warning order in confirmation proceeding. *Martin* v. *Hawkins*, 421.

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