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CASES DETERMINED

IN THE

## SUPREME COURT OF ARKANSAS

OCTOBER, 1896—APRIL, 1897

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# JUDGES

OF THE

# SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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

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

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# ERRATA.

On page 173, fourth line from top, before "Ark." insert *53*.

On page 387, first line of sixth headnote for "creditor" read *debtor*.

CASES DETERMINED

IN THE

# SUPREME COURT OF ARKANSAS.

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## STREETT *v.* REYNOLDS.

Opinion delivered October 10, 1896.

OVERDUE TAX DECREE—CONCLUSIVENESS.—All questions relating to the regularity of the assessment of lands for taxation, the amount of taxes assessed against them, and the payment thereof, are concluded by a decree of confirmation of the lands in an overdue tax suit, and the decree is not open to collateral attack.

LIMITATION OF ACTION—JUDICIAL SALES.—An action to remove a cloud upon the title of land sold at overdue tax sale is not an action for the recovery of land, within section 4818, Sand. & H. Dig., providing that actions for the recovery of land sold at judicial sale shall be brought within five years after the date of sale.

SAME—WHEN STATUTE RUNS.—Where no one is in actual possession of land, the constructive possession follows the legal title, and the statute of limitation does not run in favor of another.

CIRCUIT COURT—ADJOURNED TERM.—An adjourned term of the circuit court fails when the regular judge, at the time fixed for holding such term, is engaged in holding court in another county of his district.

Appeal from Chicot Chancery Court.

J. G. WILLIAMSON, Special Chancellor.

STATEMENT BY THE COURT.

This is a bill to remove a cloud from the title to the west part of the northeast quarter of section 22, township 17 south, range 2 west, 7.70 acres, and the north half of the northwest quarter of section 22 in the same township and range, 69.80 acres, both of which tracts

were wild and uncultivated, and not in the actual possession of any one, when this suit was brought.

The facts, as found by the chancellor, are that a decree of condemnation, under the overdue tax act, was rendered at the January term, 1882, by the Chicot circuit court in chancery, based upon an arbitrary valuation of the lands condemned for sale, and not on the valuations placed on them by the assessor before the forfeiture, or by order of court; that said decree, rendered at the January term, 1882, was set aside and held for naught at the July term, 1882, on the 25th of September, 1882, (which was an adjourned term of the court) as to the N. ½ N. W. ¼ section 22, township 17 south, range 2 west, but not as to the 7.70 acre tract. At said adjourned term, said tract in section 22, under order of the court, was re-assessed by the assessor, and the court decreed said lands to be sold for the taxes, etc., and it was sold and purchased by the defendant, the appellee.

Each of the said sales was reported to and confirmed by the court at said adjourned term, and the sale of the 7.70 acre tract was subsequently confirmed by the court at the July term, 1888, which was held by the regular judge; and the deed for the 69.80 acre tract was approved at the July term, 1885.

The adjourned term of the Chicot circuit court, at which the tract, N. ½, N. W. ¼, 22, was ordered to be sold, and at which the sale was confirmed, was held by a special judge, and at the time it was held (25th September, 1882), the regular judge of that circuit was holding a regular term of the Bradley circuit court, *i. e.*, on the 25th day of September, 1882, the day to which the Chicot circuit court had been adjourned by the regular judge on July 15, 1882.

More than five years had elapsed since the date of the sale of said lands before this suit was brought, and neither party was in the actual possession of said lands.

The chancellor held that the decrees under which said sale took place were void, and that the deeds for the same to the defendant were void, but that the plaintiff was bound by the five years' statute of limitations. The plaintiff appealed.

*W. B. Streett, pro se.*

The decree as to and sale of the 7.70 acre tract are void, because:—

1. The description is too uncertain. Rorer, Jud. Sales, sec. 500; 50 Ark. 484; 59 *id.* 460; 56 *id.* 172.

2. There was an illegal levy of taxes. 32 Ark. 502; 48 *id.* 370. And a sale for illegal and excessive taxes. 32 Ark. 676; 33 *id.* 690; 37 *id.* 649.

3. The last sale of the N. ½, N. W. ¼, section 22, was void for want of power in the special judge who presided. The proceedings were *coram non judice*, and void. 48 Ark. 227; 47 *id.* 323; 49 *id.* 336.

4. The statute of limitations of five years does not apply, unless the purchaser has possession. Rorer, Jud. Sales, p. 67, sec. 149; *Ib.* secs. 141, 488. This is not an action for the *recovery* of land. Sand. & H. Dig., sec. 4818; Cooley, Tax., p. 520; 31 Ark. 275. From a void sale the statute does not run unless actual possession is taken. 57 Ark. 527; 53 *id.* 404; 50 *id.* 390; 24 *id.* 392; 54 *id.* 641.

*D. H. Reynolds, pro se.*

1. The decree of confirmation was final, and cuts off all questions of irregularity, unless appealed from. 44 Ark. 273; 40 *id.* 35; 47 *id.* 323; 49 *id.* 326; 55 *id.* 37; 57 *id.* 423.

2. If we concede that the decree, made at the adjourned term, was void, still it was sufficient to put the statute of limitation in motion. 49 Ark. 248.

3. The decision in 48 Ark. 227 does not correctly interpret the law. See 115 N. Y. 185–9; 2 Cowen, 445;

49 Ark. 227; Mansf. Dig. secs. 1355, 1476, 1481; 34 Ark. 578; 39 *id.* 479; 32 *id.* 280; 39 *id.* 449; 24 Kas. 214.

Conclusiveness of overdue tax decree.

HUGHES, J., (after stating the facts). All questions of irregularity merely in the assessment of these lands for taxation, and as to the amount of taxes assessed against them, and as to whether the taxes had been paid, etc., are conclusively presumed to have been litigated and settled when the decrees of condemnation were rendered, and these decrees cannot be attacked collaterally on the grounds of error in these respects, as they, if erroneous, might have been corrected upon appeal. *Doyle* v. *Martin*, 55 Ark. 37; *Williamson* v. *Mimms*, 49 Ark. 336; *Jefferson Land Co.* v. *Grace*, 57 Ark. 423.

The decree for the sale and the last decree confirming the sale of the 7.70 acre tract were made at a regular term of the Chicot circuit court, and these decrees are valid, and the sale of this tract carried the title.

Limitation as to judicial sales.

As this is not an action for the recovery of land, within the meaning of section 4818 of Sandels & Hill's Digest, the five years statute of limitations is not applicable to this case.

When statute does not run.

Besides, the sale of this tract being valid, the legal title passes to the appellee by virtue of it, and, no one being in actual possession, the constructive possession follows the legal title, and the statute did not run. *Gates* v. *Kelsey*, 57 Ark. 527. The decree as to the 7.70 acre tract is affirmed.

When adjourned term of court fails.

The sale of the N. ½, N. W. ¼, 22, 17 S., 2 W., and the confirmation, were decreed by a special judge of the Chicot circuit court, on the 25th of September, 1882, to which day said court had been regularly adjourned at the regular July term thereof on the 15th of July, 1882, the regular judge presiding. At the time the decrees for sale and confirmation of this tract were made, the

regular judge of that circuit was holding a regular term of the Bradley county circuit court, to-wit, on said 25th day of September, 1882. The decrees for the sale and confirmation of this tract are void for the want of jurisdiction of the special judge to hold said adjourned term of the Chicot circuit court. We adhere to the decision in *State* v. *Williams*, 48 Ark. 227, where it is held that a circuit court may lawfully adjourn its sittings to a distant day, but that when that day arrives and the regular judge is detained by his judicial duties in another county of his circuit, the adjourned session necessarily fails.

The decree as to the N. ½, N. W. ¼, 22, 17 S., 2 W., is reversed, and the chancery court is directed to enter a decree confirming the appellant's title.

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## HOLLY GROVE *v.* SMITH.

Opinion delivered October 17, 1896.

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STREET—DEDICATION.—To constitute a dedication of a highway, there must be a present intent to appropriate the land to public use; and if the intent of the owner is absent, there is no dedication. Thus, the dedication of streets and alleys across a tract of land in a town is not established merely by proof of the making and recording of a map showing the streets and alleys, where the land remained enclosed and cultivated by the owners.

Appeal from Monroe Circuit Court in Chancery.

JAMES S. THOMAS, Judge.

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

There was a dedication by plaintiffs of the streets and alleys to the public. The filing and recording of the plat or map, and selling lots, paying taxes, etc., with reference to same, is a common law dedication.

42 Ark. 66; 58 *id.* 143, 494; 2 Dill. Mun. Corp. (3 Ed.) sec. 640; 23 N. E. 602; 9 So. 584; Elliott on Streets, ch. 4, p. 85 to 134; 22 Pac. 1057; 22 *id.* 615; 44 N. W. 677; 5 S. W. 350; 6 N. E. 866; 12 Ill. 29; 6 Atl. 633; 69 Am. Dec. 489; 8 N. E, 81; 7 N.W. 116; 13 Pac. 405; 19 S.W. 735; 23 Atl. 1128; 14 S. E. 130; Beach, Pub. Corp., secs. 1450, 1456; Elliott, Streets, 14 and 15; 9 So. 584.

*M. J. Manning*, for appellee.

There never was a dedication to the public by bill of assurances, or otherwise. It is essential that the donor should *intend* to set apart the land for the *use* of the *public*, and there can be no dedication unless there is *present intent* to appropriate the land to the *public*. Elliott, Roads & Streets, 92; 2 Dill. Mun. Corp. sec. 636 and note; 45 Md. 524; 110 Ind. 513; 103 *id.* 349; 21 N. Y. 477; 13 Pac. 141. To constitute a valid dedication, there must be an *intention* to dedicate, an *animus dedicandi*. 2 N. E. 803; 76 Ind. 245; 78 *id.* 90; 56 Md. 187; 42 Cal. 541; 88 Ill. 208; 34 Iowa, 144; 61 N. Y. 448; 23 Minn. 271; Angell on Highways, sec. 142; 30 Fed. 734. There must be an abandonment of the use *exclusively* to the public by the owner of the soil. 9 How. 10. Mere surveying streets and platting the land are not sufficient. 9 How. 31; 7 *id.* 196; 1 Md. 21 N. Y. 477. See also, 13 Pac. 143–4.

BATTLE, J. John M. Smith, being the owner of a certain tract containing thirty acres of land, agreed with Stephen W. Dorsey and James E. Gregg that it should be laid off into lots, with the necessary streets and alleys, and divided between him and them, so that he would get every alternate lot, and they, the others. In consideration of which they agreed that the Arkansas Central Railroad Company, which owned and operated a railroad on or near the land, should construct and

maintain a side-track and depot building,—the side-track on or opposite, and the depot building on, the land. It was further agreed that he should remain in possession of the land until the lots were sold or otherwise needed for use by them, and that it might be cultivated by him without charge. The agreement was reduced to writing, dated the 4th day of November, 1872, and signed by the parties. Smith died, and thereafter his representatives and Dorsey and Gregg caused the land to be laid off into lots, streets and alleys, pursuant to the agreement, a map of which was filed by some one in the proper recorder's office (by whom is not shown), and was recorded. A. H. Johnson, becoming president of the railroad company, succeeded to the rights of Dorsey and Gregg under the contract. The widow and heirs of Smith conveyed to him the alternate lots to which his predecessors, Dorsey and Gregg, were entitled; he agreeing in writing that they should remain in possession of and cultivate the lots so conveyed, until they were sold, and not to sell any of them without first consulting the widow. Mrs. Smith, the widow, afterwards purchased from Johnson the lots so conveyed. By some means not shown by the record in this court, J. M. Smith, Jr., and Mrs. Laura Peters, two of the heirs of John M. Smith, deceased, acquired nine acres of the thirty acres so laid off as before stated; and they recognized in many ways the division of the nine acres in lots, streets and alleys, paid taxes on it by lots according to the division, and sold other lots of the thirty acres, which belonged to them, as they are described on the map made of the same as laid off pursuant to said contract.

Mrs. Smith and the heirs of John M. Smith, deceased, remained in possession of the thirty acres, after it was divided into lots, according to the agreement with Dorsey and Gregg, and withdrew their inclosures of the

lots as they sold. As they sold lots, the fences were moved back, and the streets and alleys were opened only as far as the sale extended. No part of the nine acres has been sold, and the whole of it, including streets and alleys, have been inclosed at all times since it was divided. J. M. Smith, Jr., and Mrs. Peters, and those under whom they claim, had been in the adverse possession of it about twenty-three years at the commencement of this action.

On the 18th of January, 1894, the town council of Holly Grove unanimously passed a resolution requesting all persons having fences or obstructions in the streets and alleys laid off on the nine acres to remove the same in ten days after they were notified to do so, and ordering that the town marshal, by the direction of the mayor, execute the request, in the event the resolution was not obeyed. The notice was given. Thereupon J. M. Smith, Jr., and Mrs. Peters instituted this action to restrain the town of Holly Grove and its marshal from enforcing the resolution. The defendants answered, relying upon, and proving, among other things, the contract of John M. Smith, deceased, with Dorsey and Gregg; and the circuit court, by final decree, enjoined and restrained them from opening the streets and alleys so laid off on the nine acres.

The correctness of this decree depends on the decision of only one question, and that is, was there an intent to dedicate the land which the town council undertook to open for streets and alleys? To constitute a dedication, there must be a present intent to appropriate the land to public use. If the intent of the owner is absent, then there is no dedication. *Hall* v. *Mayor of Baltimore*, 56 Md. 187; *Bidinger* v. *Bishop*, 76 Ind. 244; *Irwin* v. *Dixion*, 9 How. (U. S.) 10; *Remington* v. *Millerd*, 1 R. I. 93.

The intent to dedicate may be shown by the open and visible acts of the owner. If they be such as fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and the public and individuals so construe and act upon them, and in good faith accept and use the land so held out as appropriated to public use, the owner will not be permitted to retake the land, and prevent the public from using it, by asserting there was no actual intent to dedicate, although there might have been a secret intent to prevent a dedication always present in his mind. He is estopped by his own conduct.

The evidence must show the intent clearly and satisfactorily, before the owner can be deprived of his land. "Merely laying out grounds, or merely platting and surveying them, without actually throwing them open to use or actually selling lots with reference to the plat, will not, as a general rule," show a dedication. Elliott, Roads and Streets, p. 130; *United States* v. *Chicago*, 7 How. 185; *Vanatta* v. *Jones*, 42 N. J. L. 561.

In the case at bar the contract under which the streets and alleys were laid off and surveyed shows that there was no immediate intent to dedicate. It was expressly agreed that John M. Smith should remain in possession of the land until the lots should be sold, or otherwise needed for use, by Dorsey and Gregg, and cultivate it free of charge. When the land was divided into lots, streets and alleys, it remained inclosed, and the streets and alleys were gradually opened to public use as lots were sold. For about twenty years immediately after this division, the owners denied the public the right to use the streets and alleys, except on condition that the lots which the streets were intended to make accessible were sold, and then only so much of the streets and alleys as made the lots sold accessible were opened, before there was any attempt in behalf of the public to accept them as a dedication. In all that time

no part of the nine acres was opened to public use. The evidence clearly shows that there was no intent to allow the public to use the streets inclosed, and that it was not entitled to the use of them, except on the conditions stated.

Decree affirmed.

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## McLEOD v. DIAL.

Opinion delivered October 17, 1896.

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LICENSE—REVOCABILITY.—Where a landowner grants to another the right to enter upon the land and cut and remove trees growing thereon, the license to enter upon the land is annexed to the grant of the trees, and is not revocable.

LIFE TENANT—RIGHT TO CUT TREES.—A life tenant has no right to cut trees growing upon the land, or to allow them to be cut, except so far as is necessary to the proper enjoyment of his life estate, in conformity with good husbandry, so as not to materially lessen the value of the inheritance.

Appeal from Cleveland Circuit Court in Chancery.

M. L. HAWKINS, Judge.

*Met L. Jones*, for appellant.

1. Land may be divided into its composite elements, so that one may own the trees, another the soil, and another the mines beneath. Tiedeman, Real Property, 10. A sale of trees, if it satisfies the statute of frauds *by being in writing*, gives the vendee the right of property in the standing trees, with a right to enter on the land for the purpose of cutting and transporting them. 22 Wis. 544; 20 *id.* 516; 61 Pa. 297; 1 Denio, 550; 11 Allen, 144; 2 Barb. 613.

2. Dial had notice of the sale, and is bound. 16 Ark. 543; 28 Ark. 543; 27 *id.* 561; 30 *id.* 111; 33 *id.* 385.

*D. H. Rousseau*, for appellee.

1. The contract is not a conveyance of real estate, or any interest therein, but is merely an executory privilege or license to enter and cut timber. 11 Mass. 553; 15 Gray (Mass.), 62; 10 Conn. 375; 2 Am. Lead. Cases, 540; Tiedeman, Real Prop. 651. The record of such an instrument imparts no notice to a purchaser for value. Simpson did not part with his right of dominion, and had the right to enter and cut timber, and he cannot be enjoined. 57 N. H. 217; 12 Am. Rep. 80; 6 Hill (N. Y.), 61; 19 N. J. Eq. 154. The only remedy was an action for breach of contract, by revocation of the license. 5 Barn. & Cr. 221; 11 Metc. (Mass.) 251; 23 Conn. 223; 29 N. Y. 630; 34 N. Y. 20.

2. McLeod is estopped by his acts and conduct. 33 Ark. 465.

3. The conveyance by Simpson to Dial operated as a revocation of the license to McLeod. 13 M. & W. 838; 37 Eng. Law & Eq. 489; 2 Gray, 302; 13 N. H. 264; 113 Mass. 103; 18 Am. Rep. 455; 38 Mo. 599; 20 Wis. 516; Tiedeman, Real Prop. 562; 11 Allen (Mass.) 141; 4 C. E. Green (N. J.), 142; 57 Ark. 215.

4. Timber is not emblements. The life tenant cannot commit waste. Tiedeman, Real Prop. 72, 74; 2 Blackst. Com. 120; Washb. Real Pr. 141.

BATTLE, J. Two sisters, Margaret and Leonora Little, owned a certain tract of land in fee. While they owned the land, Margaret married S. A. Simpson, and Leonora, Thomas S. Dykes. Leonora conveyed her one undivided half interest to S. A. Simpson; and Margaret died, intestate, leaving her husband and three minor children, the offspring of her marriage, her surviving. Afterwards, on the 15th of September, 1886, Simpson executed to George W. McLeod an instrument of writing, which, as it appears in the record here, with

many words unintentionally omitted, is in the words and figures following, towit:

"This deed, made the 15th day of September, 1886, and between S. A. Simpson, of the county of Jefferson and State of Arkansas, party of the first part, and George W. McLeod, party of the second part, witnesseth: That the party of the first part, for the consideration hereinafter set forth, has given, granted and conveyed, and by these presents does give, grant, and convey unto the party of the second part, and its assigns, the *exclusive* privilege for ten years to cut, haul away, and remove pine, oak, hickory and other trees from the land in said counties of Jefferson and Cleveland, described as follows, S. E. ¼ of section 33, township 17 S., range 10 W.; the N. ½, N. E. ¼ of section 4, township 8 S., range 10 W.; and to effect the object of the part aforesaid the second party and its assigns, their agents, servants, and employees, with wagons and teams, shall have free first party over which it may be necessary to pass to effect said object, with right of way not exceeding fifty feet wide for the construction of such railway tracks as they may decide to build and operate through the land described; and the second party has paid to the first party in full compensation for the rights and privileges aforesaid the sum of one hundred dollars, the receipt of which is hereby acknowledged, the first party waiving and releasing all claims for damage its milling business, and will remove such only as it may consider suited thereto.

"In witness whereof the said of the first part hereunto set their hands and seals the day and year first above written.

[Signed] "S. A. SIMPSON."

Simpson was appointed guardian of his children; and he procured an order of the probate court of Jefferson county to sell their interest in the land on the 11th

day of February, 1888, and sold the same on that day to Henry M. Dial, and reported the sale to the probate court, which confirmed it. On the 5th day of March following he conveyed his undivided half interest in the land to Dial, who purchased at both sales with notice of the rights acquired by McLeod by virtue of the deed executed to him by Simpson on the 15th of September, 1886. Dial then took possession of the land, refused to permit McLeod to exercise the rights claimed by him under the deed last mentioned, and commenced to cut and destroy the timber on the land. McLeod thereupon brought this action against Dial in the Cleveland circuit court, to enforce his rights.

Upon the hearing of the evidence adduced by both parties, the court found that McLeod acquired the right to cut and remove the timber on the undivided half that belonged to Margaret Simpson in her lifetime, for ten years from the 15th of September, 1886, and decreed that the title to the land be quieted in Dial, subject to the right of McLeod to cut and remove timber as before stated; and McLeod appealed.

The deed of Simpson to McLeod was assailed by the appellee on the ground that it was a license revocable at the will of Simpson, and was revoked by the deeds to Dial. This contention presents the first question for our consideration.

When license not revocable.

A license is defined to be "an authority given to do some act, or a series of acts, on the land of another, without possessing an estate therein." (*Cook* v. *Stearns*, 11 Mass. 533; *Mumford* v. *Whitney*, 15 Wend. 380). A mere license is revocable, but what is called a license is sometimes connected with an interest or grant, and then it cannot be revoked; thus, a license given to one to hunt on the land of another, and take away the deer when killed to his own use. The gift of the deer when killed

renders the privilege to enter and take it away irrevocable by the party who had given it. He would be estopped from defeating his own grant, or act in the nature of a grant. *Mantooth* v. *Burke*, 35 Ark. 540, 547; *Cook* v. *Stearns*, 11 Mass. 533; *Ruggles* v. *Lesure*, 24 Pick. 187; *Wood* v. *Leadbetter*, 13 M. & W. 838.

In *Funk* v. *Haldeman*, 53 Pa. St. 229, "McElheny, being the owner of a farm, composed of land in Cherry Tree and Cornplanter townships, in consideration of $200, granted to Funk, his heirs and assigns, the free and uninterrupted privilege to go upon a tract of McElheny's land in Cornplanter township, for prospecting, boring, etc., and erecting engines, etc., and taking away ore, etc., out of the earth, Funk to have the exclusive use of one acre of land around each pit or well, with free ingress on said land in common with McElheny; Funk diligently to use all reasonable efforts to obtain oil, etc., and give McElheny one third of all that is taken out; McElheny reserving the right of tillage." The court held "that the conveyance gave Funk an incorporeal hereditament in fee; that the grantors have no mining privileges, and can have none until Funk shall have forfeited his rights by breach of his covenants; that the grants to Funk did not amount to a lease, nor a sale, of the lands or the minerals; that no estate in the soil or minerals was granted; that the right granted to Funk was to experiment for oil, sever it from the soil and take it, on yielding one-third to the landlord; and that Funk's right was a license to work the land for minerals; that it was a license coupled with an interest, not revocable at the pleasure of the licensor."

The deed of Simpson to McLeod, in this case, was something more than a mere license. It was based upon a valuable consideration, and, while it did not absolutely convey the trees, it gave to McLeod the exclusive right to cut and remove them for the period of ten years, and

vested him with the exclusive possessory right to and control of them, with the right to perfect his title to the same by cutting and removing them during that time. This was a valuable grant or interest, and sufficient to make any license connected with it irrevocable.

Right of life tenant to cut trees.

But this deed was not sufficient to authorize appellant to cut the trees on all the land. For Simpson held the one half interest which belonged to his wife, in her life time, as a tenant by curtesy, and had only a life estate in it. He had no right to cut trees growing on this portion of the land, or allow them to be cut, except so far as was necessary to the proper and reasonable enjoyment of his life estate in conformity with good husbandry. For the purpose of using it as farming land, he had the right to clear a part of it, provided such part and that already prepared for cultivation, as compared to the remainder of the tract, did not exceed the proportion of cleared to wooded land usually maintained in good husbandry; and provided, further, that he did not materially lessen the value of the inheritance. He also had the right to cut and use so much of the timber standing on the one half which belonged to his wife as was necessary for fuel, and for making and repairing fences and buildings on the same. But the timber could only be cut or used for the proper enjoyment of the estate for life, and not merely for sale. *Davis* v. *Clark*, 40 Mo. App. 515; *Owen* v. *Hyde*, 6 Yerger, 334; *Jackson* v. *Brownson*, 1 Johns. 227; *Clemence* v. *Steere*, 1 R. I. 272; *Ballentine* v. *Poyner*, 2 Hayw. 110; 1 Washburn, Real Property, pp. 146, 148.

The deed of Simpson to McLeod conveyed no right to cut timber on the one half of the land which belonged to Margaret Simpson in her life time, but did as to the other half. The decree of the court was correct, except it limited the right to cut timber to the wrong half.

As the Cleveland circuit court had law and equity jurisdiction, and there was no controversy in that court as to the proper remedy of the appellant, we have only considered the questions we have decided.

The decree of the circuit court will be corrected in accordance with this opinion; and, inasmuch as no material change is made in the decree, the appellant will be taxed with the costs of this appeal.

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## BANK OF LITTLE ROCK *v.* FRANK.

Opinion delivered October 17, 1896.

FRAUD—CIRCUMSTANCES OF SUSPICION.—Fraud is never presumed, but must be proved; and while it may be inferred from circumstances, it is not sufficient to prove circumstances of mere suspicion, leading to no certain result.

SAME—PROMISE OF PREFERENCE.—A promise by a borrower to prefer the lender in a deed of assignment, if he should be compelled to make one, does not render an assignment containing such preference invalid for fraud.

SAME—WHO MAY TAKE ADVANTAGE.—If a debtor commit a fraud in the purchase of goods, no one can take advantage of it save the creditor affected, and he waives the fraud by suing for the purchase money.

SAME—WHEN ASSIGNMENT AFFECTED.—Frauds in separate and independent transactions do not affect subsequent assignments for the benefit of creditors; the fraud which vitiates must be in the assignment itself.

ASSIGNMENT—PREFERENCE OF ATTORNEY.—A preference in a deed of assignment in favor of an attorney in a sum named for services to be rendered in upholding and enforcing the assignment, and for legal advice previously given to the assignor, is constructively fraudulent and void, as depriving the assignee and the court of their discretion to determine whether an attorney should be employed or not, and the amount of his compensation.

SAME—EFFECT OF FRAUD.—A stipulation for a preference in a deed of assignment, which is void on account of constructive fraud, will not avoid the entire instrument, where no actual fraud was intended, and such provision can be eliminated from it without defeating its general intent.

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

*Dan W. Jones & McCain*, for appellants.

1. There is no proof that the preferences of Louis and Charles Rudolph were simulated, fictitious, or fraudulent. On the contrary, all the evidence shows their debts were genuine and *bona fide*,—due for money borrowed to pay creditors.

2. Nor is there any proof that the assignment was made to cheat, hinder, or defraud creditors. The deed is in form, and violates no provision of the assignment law. The proof in relation to the statements of Rudolph to the commercial agencies was irrelevant and incompetent. It might have been competent if the action had been to rescind, or to recover the goods sold, on account of fraud; but by bringing their suits for the purchase money appellees waived the fraud. 52 Ark. 458. Even if it had been shown that the assignor was guilty of fraud in purchasing the goods, that could have no bearing. The fraud must be in the assignment itself, and not in some act before or after. 54 Ark. 124, 129; 88 Pa. St. 167; Burrill, Assignments, sec. 351 *et seq.*; 68 Wis. 442.

3. The charge that possession was delivered to the assignee before the inventory was filed is not sustained. The assignment is a *partial* one, and *contained the inventory of all the property assigned.* 53 Ark. 92; 60 Ark. 503.

4. Erb's preference was for services in preparing and perfecting the assignment. There is no fraud in this. 54 Ark. 124, 129.

5. Fraud is not presumed, and there is no proof. 4 Ark. 302. See also Acts 1895, sec. 3, p. 163; 86 Ky. 511; 90 *id.* 249; 94 *id.* 5.

*Joseph Loeb*, *Morris M. Cohn*, *Marshall & Coffman* and *W. E. Atkinson*, for appellees.

1. The chancellor was justified in finding that fraud existed in the preferences of the assignor's brothers, considering all the circumstances, their close relationship and business intimacy, etc., and the presence of Charles when the false statements were made. 28 Fed. 792. See 26 Fed. 70; 28 *id.* 788; 34 Pac. 54; 9 Utah, 267; Burrill Assign. (5 Ed.) sec. 181; 83 N. Y. 31; 61 Iowa, 663; 12 Fed. 861; 17 Fed. 705; 58 Ark. 297.

2. The preference of Erb was for future services. 13 So. 248; 12 Fed. 230; 28 N. Y. S. 265; I Sand. Ch. 83; Sand. & H. Dig. 323. An assignment which contains a fraudulent preference is void *in toto* where the intent of the debtor controls, as in this state. 144 U. S. 598; 34 Pac. 54; 9 Utah, 267; 60 Wis. 418; 19 N. W. 400; 28 N. Y. S. 265; 1 Tenn. Ch. 384, 388; Meigs (Tenn.) 328.

3. The assignee took possession before the filing of an inventory. 36 Ark. 421; 39 *id.* 68; 53 *id.* 88; 13 S. W. 515; 54 Ark. 471; 24 Fed. 460; 24 *id.* 465.

4. The assignor contemplated a disposition of the assigned property in violation of the statutes relating to assignments.

BATTLE, J. On the 22d of December, 1893, Joseph Rudolph, a merchant, assigned certain property to Joseph Griffith for the benefit of his creditors, directing that certain persons to whom he was indebted should be first paid. The deed evidencing the assignment was, on the same day, filed in the office of the clerk of the Pulaski chancery court; and immediately thereafter the Bank of Little Rock, one of the preferred creditors,

filed in said court a complaint, asking for the appointment of a receiver to take possession of the property assigned and administer the trust created by the deed of assignment under the orders and directions of the court. In response to the complaint, Joseph Griffith, the assignee, was appointed receiver; and he took the oath, filed bond, and entered upon the discharge of the duties of his office. Then many of the unpreferred creditors of the assignor sued out orders of attachment against the property of Rudolph, and, for the purpose of subjecting it to the satisfaction of their debts, became parties to the action instituted by the Bank of Little Rock, and asked that the deed of assignment be set aside as fraudulent and void for the following reasons: (1) Because the alleged indebtedness to Charles Rudolph and Louis Rudolph, two of the creditors preferred in the deed of assignment, were simulated, fictitious, fraudulent and void. (2) Because the assignment was a fraudulent scheme on the part of the assignor to cheat, hinder and delay his creditors. (3) Because possession of the property so assigned was delivered to the assignee before an inventory was filed by him. (4) Because the preference of Jacob Erb (another creditor) in said assignment was fraudulent, and the amount owing to him was for future services to be rendered by him to the assignor. (5) Because the assignment was made with the fraudulent intent to violate and evade the laws of this state.

These allegations were denied. After a hearing of the evidence adduced by both parties, the chancery court found that the assignment was fraudulent, and set it aside; and the plaintiff, and the assignee, a defendant, appealed.

The facts upon which this decree was based, as they appear in evidence, are substantially as follows: Louis, Samuel, Charles, and Joseph Rudolph are broth-

ers. Charles and Louis did a mercantile business at the corner of Fourth and Main streets, in the city of Little Rock, under the firm name and style of Rudolph & Co., for about sixteen years. Joseph was their clerk for this period of time, and received from $50 to $100 a month for his services, except the last year, for which he was paid $1,500. During the greater portion of the first fifteen years he received $100 a month. At the close of the sixteen years Charles and Louis dissolved partnership, and a new firm, composed of Charles and Samuel, was formed. Joseph served them in the capacity of clerk for four years, and was paid for his services at the rate of $100 a month. At the end of this time he commenced a mercantile business in Little Rock on his own account and in his own name. Before commencing business he went with his brother, Charles, to the office of the Bradstreet Agency, and stated to the manager that he was about commencing business, and wanted to make a statement of his financial condition, and did so; and then went to Dun's Agency, and made the same statement to its manager. In these two statements he said that he had $5,000 in cash to commence business, and had no liabilities. These statements were made as a basis of credit, and were forwarded by the agencies to the respective offices of their companies in the large cities for the benefit of their patrons. After this he went to St. Louis and Chicago, and purchased about $5,000 or $6,000 in goods, merchants selling to him on the faith of his statements to the agencies. This was in August, 1892. In the spring of 1893 he purchased from the traveling agents of merchants about $3,000 in goods, and of the same in the fall following about $4,000 in merchandise. In the fall of 1892 and in the spring of 1893 he borrowed of his brother Louis many sums of money amounting to $1,150, and of his brother Charles various amounts aggregating $1,400, to pay the expenses

of his business and a part of the debts contracted by the purchase of goods in the year 1892; and executed to each of them his promissory notes for the amount borrowed. He continued in business about one and a half years, when he failed and made an assignment of property for the benefit of his creditors, preferring, among others, his brothers, Louis and Charles, as to the debts for borrowed money, and Jacob Erb, an attorney at law, who wrote the deed of assignment, for $200. At this time he owed between $8,000 and $9,000, and the assets belonging to his business and assigned amounted to about $5,300. Between $4,000 and $5,000 of his indebtedness was for money borrowed, and the remainder was for goods purchased.

At the commencement of his mercantile business, he had only $1,500 or $1,600, and while merchandising sold goods at an average profit of twenty per cent. When he closed, his liabilities exceeded his assets about $3,700. How much this difference consisted in shrinkage in the value of goods on hand, if any, does not appear.

How much his sales were, how much indebtedness he paid, what stock he had at any time, he was unable to state or even approximate, when called to testify. He kept no book of accounts, merchandise account, bill or cash book.

He accounted for his expenditures, while he was in business on his own account, in part by testifying that his household expenses were about $200 a month, and that the expenses of his store, such as rent, clerk hire, lights, and insurance, were about $200 a month; and that his individual expenses exceeded $30 a month. He paid $2.50 a month for shaving, but no taxes. Sometimes he gambled at cards, and lost, but did not know how much.

While in business, he and his brother Louis were very intimate, Louis visiting his store about twenty

times a day, and he the store of S. Rudolph & Co. about four or five times daily, and sometimes at night after the close of business. After he failed Louis purchased the property assigned at a receiver's sale, and employed and made him manager of a mercantile business in which he (Louis) was engaged.

In the deed of assignment Joseph Rudolph directed his assignee to pay Jacob Erb the $200 for which he was preferred as before stated, before paying any other creditor. This sum of money was to be paid for services to be rendered by Erb in upholding, maintaining, and enforcing the assignment, and for "legal advice" previously given. The services were to be rendered by bringing and prosecuting an action in equity for the enforcement of the trust vested in the assignee, which Erb undertook to do by bringiug the action instituted in the name of the Bank of Little Rock, one of the preferred creditors, and failed to accomplish.

Evidence of fraud.

Do these facts sustain the finding and decree of the chancery court? Fraud is never presumed, but must be proved, and the burden of proving it is upon the party alleging it. It need not be shown by direct or positive evidence, but may be proved by circumstances. "Slight circumstances or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results," are not sufficient evidence. "They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting." They may be sufficient to excite suspicion, but suspicion is not the equivalent of proof. Circumstances necessary to prove fraud must be such as naturally, logically, and clearly indicate its existence. *Shultz* v. *Hoagland*, 85 N. Y. 464; Burrill, Assignments (6th Ed.), sec. 311.

Promise of preference.

The creditors attacking the assignment in question rely on circumstantial evidence to prove actual fraud. The facts on which they rely are, the fraternal relation existing between Louis, Charles and Joseph, the statement of Joseph in the presence of Charles that he had $5,000 to commence business when he had only $1,500 or $1,600, the financial assistance of Louis and Charles to Joseph when he was embarrassed in business and unable to meet his pecuniary obligations, and the intimacy of the brothers, as shown by their frequent visits. While conceding that a fraud that will avoid an assignment must be in the assignment itself, they insist that these facts show that they aided him in maintaining a business on a fictitious credit, "upon a secret promise of preference in case of ultimate disaster," when they knew that he was insolvent, and thereby enabled him to contract debts which he could not have made without such assistance. But these facts are not sufficient to show that the assignment was void for fraud.

There is no evidence that Charles knew that the statement made by Joseph to Bradstreet's or Dun's Agency as to his financial condition, when he was about to commence business, was false. Joseph had received a salary of Rudolph & Co. at the rate of $100 a month for the greater part of fifteen years, and could, in that time, have saved out of his earnings the sum of $5,000. During a part of that time he had maintained and supported himself on a salary of $50 a month, and thereby demonstrated his ability to save the $5,000 out of the salary he received when he was paid $100 a month. There is no evidence that Charles knew, or had reason to believe, that he had not done so when he represented that he had the $5,000 at the beginning of his business.

The fact that Louis and Charles loaned money to Joseph, when he was embarrassed, to pay expenses of

his business and a part of the debts contracted by the purchase of goods on a credit, was no evidence of fraud. They had the right to do so, and did not thereby diminish his assets or his ability to pay his debts; and no circumstances connected with the loans showed any scheme or conspiracy to defraud creditors. Consequently, no promise of Joseph to prefer them, in a deed of assignment, to other creditors, made at the time the money was loaned, if there were any, could affect such an assignment; for he had the right to do so, and all his subsequent creditors permitted him to contract debts with them on that condition.

Who may take advantage of fraud.

If Joseph, with or without the assistance of Louis and Charles, committed a fraud in the purchase of goods, no one can take advantage of it except the creditor affected; and he can waive the fraud, and does so by seeking to enforce the payment of the debt contracted by the purchase. The creditors who attacked the assignment in question, if affected by such a fraud, waived it by suing for the purchase money. *Bryan-Brown Shoe Co.* v. *Block*, 52 Ark. 458.

When fraud affects assignment.

Frauds in separate and independent transactions do not affect subsequent assignments. The fraud in fact which vitiates assignments must be in the assignment itself.* The evidence adduced at the hearing of this cause was insufficient to prove such a fraud.

When preference of attorney invalid.

Appellees contend that the preference of Erb was fraudulent, because the $200 for which he was preferred, was to be paid him, in part, for services to be rendered thereafter, and for that reason the assignment is void. That is partially true. The assignor assumed the authority to provide for the enforcement of the trust with which the assignee was charged by employing Erb

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**Lowenstein* v. *Finney*, 54 *Ark.* 124, 129: *Excelsior Manufacturing Co.* v. *Owens*, 58 *id.* 556; *Baker* v. *Baer*, 59 *id.* 503.

to uphold and enforce the assignment and fixing his compensation. It was the duty of the assignee to execute the power vested in him, and, if need be, employ counsel to aid him in so doing, and allow him compensation therefor, subject to the approval of the court having the supervision of his expenditures; such allowance being in the discretion of the court and within its power to reduce if, in its opinion, it was excessive. This authority the assignor attempted to take from the control, discretion, or supervision of the assignee and the court by the employment of Erb; and the amount allowed for this compensation, which should have been appropriated by the assignee to the payment of the expenses of executing the trust, or of creditors, was misapplied. This he had no right to do; and the preference is illegal and void.

Effect of fraud.

But did the preference of Erb render the whole assignment void? Upon such questions there is a contrariety of opinion. In *Mead* v. *Phillips*, 1 Sandf. Ch. 83, 85, and *Nichols* v. *McEwen*, 17 N. Y. 22, provisions for the payment of attorney's fees for services to be rendered after the execution of the deed of assignments were held to be for the benefit of the assignors, and, therefore, illegal and fraudulent; and that they rendered the whole assignment void, a New York statute making all assignments in trust "for the use of the person making the same," void as against creditors.

*In re Gordon*, 3 N. Y. Supp. 589, 591, decided by the Supreme Court, it was held that "a transfer of property by an insolvent, in trust to secure the payment for such services as may be thereafter rendered, but which the person for whose benefit the transfer is made is under no present legal obligation to render, is void as against the creditors of the assignor;" the court saying: "The appellants assert that the transfer, being invalid in part, is wholly invalid. Such is the rule when the

security is taken with a fraudulent intent—when there is a fraud in fact; but in this case it is found that 'said assignment was made in good faith, without any intention of hindering, delaying, or defrauding the creditors of the said William and Robert Gordon, Jr.' "

In *Norton* v. *Matthews*, 28 N. Y. Supp. 265, decided by a superior court, it was held that where there is "a direction to pay counsel fees for services to be rendered after the transfer, the assignment is, as a consequence, made void."

In *Selleck* v. *Pollock*, 69 Miss. 870, Mr. Justice Campbell, in delivering the opinion of the court, said: "The instrument (deed of assignment for the benefit of creditors) is assailed as providing for the payment of counsel for *future services to the assignor personally.* It is defended on the ground that the provision for counsel fees had reference only to the maintaining the assignment, and this is probably the true view of the facts. The fee was not wholly for past services, or services then completed * * * We are satisfied that no wrong was intended by any of the parties, and that they did only what they thought was proper, and that they had the right to do. The question is, did they have the right to do what they did? By the provision for payment of $1,500 for counsel fees, that sum was absolutely withdrawn from creditors, and devoted to the payment of the attorney. It was to be paid at all events, whether he was called on for any future services or not. It is a fixed sum, not dependent on any part of it being earned hereafter, and payable as if past due. * * * It must be regarded as the parties regarded it, as binding the attorney to render any future service which might be required, not by the assignee (for the attorney told him he was not to serve him) but by the assignors, in case any question was raised as to their honesty and good faith in the transaction. Assuming,

as we do, that this was to uphold and maintain the assignment, by vindicating the good faith of the assignors, and thus inure to the assignee, whose duty it was to defend the assignment, and whose title depended on the good faith of the assignors, we must pronounce the stipulation inadmissible and vicious to the extent of invalidating the assignment."

In *Drucker* v. *Wellhouse*, (Ga.) 8 S. E. Rep. 40, Chief Justice Bleckley, speaking for the court, in discussing the validity of an assignment, said: "The other ground taken and discussed is that one of the preferred debts is a due-note, payable to the attorney who drafted the assignment, and was given to him by the firm for services rendered in drawing the assignment, and counsel in reference thereto, and services hereafter to be rendered, for the purpose of protecting and upholding the instrument. * * * Whether this debt in full will be a charge upon the assets must depend upon the facts extrinsic to the assignment. That it is fraudulent does not follow, as a matter of inference, from anything which we observe in the record before us. If no actual fraud was intended, but the amount of the note is more than the services rendered and to be rendered are worth, or if the assignee should not choose to employ the attorney as his counsel in behalf of creditors, or should not need professional services at all in their behalf, a proper deduction from the amount of the note can be made, and no injustice follow, either to the attorney or the other creditors. We do not recognize the right of the assignor to dictate to the assignee, either as to the attorney he should employ or the amount of compensation; but, even if an attempt to do so has been made, it may have been an innocent mistake on the part of all concerned in it, and in that event it should not operate, and could not operate, to defeat the assignment *per se*."

The effect of fraud in fact and of constructive fraud upon deeds affected by them is not the same. If a deed be fraudulent in fact as to any of its parts, it is void *in toto*, because the statute declares it to be void in such cases. (*Crawford* v. *Neal*, 144 U. S. 598). But it is different when the deed is only constructively fraudulent as to a part of its provisions. In that case, as a general rule, where that which is valid can be separated from that which is not, without defeating the general intent, the instrument may be sustained as to that which is legal. *Peters* v. *Bain*, 133 U. S. 688; *Denny* v. *Bennett*, 128 U. S. 489, 496; *Cunningham* v. *Norton*, 125 U. S. 77; *Muller* v. *Norton*, 132 U. S. 501; *Darling* v. *Rogers*, 22 Wend. 483; *Howell* v. *Edgar*, 3 Scammon, 417, 419; Burrill on Assignments (6th Ed.) secs. 293, 321.

But this is said in some cases not to be true of preferential assignments, containing void provisions for payments for future services. But it may have been so held because of decisions in which the services to be rendered were held to be for the benefit of the assignor, as in *Mead* v. *Phillips*, *Nichols* v. *McEwen*, and *Selleck* v. *Pollock*, *supra*. In such cases the provisions, like all stipulations in deeds of assignments for the benefit or use of the assignor, could have no motive as to creditors except a fraudulent one, and were void for actual fraud. (Bump, Fraudulent Conveyances (4th Ed.) sec. 377, and Wait, Fraudulent Conveyances (2d Ed.) sec. 326). But be that as it may we can see no sufficient reason for holding a whole assignment void for stipulations for such services, on account of constructive fraud, when the assignor was not to be benefited by them, when there was no violation of a statute, and they can be eliminated without defeating the general intent of the instrument, and it can be carried into effect without them. In *Lund* v. *Fletcher*, 39 Ark. 325, a mortgage to secure a debt was held void as to the parts of it which were

constructively fraudulent, and valid as to the remainder. There is no difference in principle between that case and the one last supposed, and none should be made.

In the deed of assignment executed by Joseph Rudolph, the amount to be paid to Erb for future services was not for the benefit of the assignor. They were to be rendered unconditionally, and the creditors to be paid were to be the recipients of their fruit. The assignor could not have received any benefit from them other than the payment of his debts so far as the assets extended, a benefit received from payments in discharge of any debt. If the preference had been legal, and Erb had failed to perform the services, there would have been a partial failure of the consideration of the stipulation therefor, and he would not have been entitled to compensation for them, and the amount intended therefor would have been disposed of according to the other provisions of the assignment; and held for the benefit of the assignor.

The preference of Erb does not affect the general intent of the assignment. It was not intended to be a condition to the other terms of that instrument, but only an inducement to Erb to uphold and maintain the same. It was only intended to be a means of accomplishing the intention of the assignor, and can be eliminated from the deed without changing or defeating its design, and therefore does not render the whole assignment void.

The decree of the chancery court is, therefore, reversed; and the cause is remanded with directions to the court to enter a decree in accordance with this opinion, and for other proceedings.

WOOD and RIDDICK, JJ., dissent as to conclusion from facts as to actual fraud.

## STIEWEL v. BORMAN.

Opinion delivered October 17, 1896.

PROOF OF PARTNERSHIP—ADMISSION.—The admission of one of several defendants jointly sued as partners is admissible againt himself, but not against his co-defendants, to prove the existence of the partnership relation.

SAME — REPUTATION. — Evidence that defendants were universally understood to be partners is incompetent to prove the existence of that relation between them.

LIABILITY OF AGENT TO THIRD PERSON.—The fact that an agent operates a coal mine for his principal at the time of an injury to an employee working therein, occasioned by the ignition of gas which had accumulated in the mine, does not, of itself, render him liable for damages.

SAME.—An agent having complete control and management of his principal's business, with the power to do what is reasonably necessary to protect third persons against injuries from omissions or commissions in the conduct of the same, is under obligation to so use that which he controls as not to injure another, and will be liable in damages to any third person for a failure to discharge such duty.

JUDGMENT—SERVICE OF PROCESS OUT OF COUNTY.—A judgment cannot, under Sand. & H. Dig., § 5698, be rendered against a defendant jointly sued with others who neither resided in the county in which suit was brought at the commencement of the action, nor was summoned therein, if he objected before judgment to the proceeding against him, unless judgment is recovered against a co-defendant who was summoned in that county, or who resided therein at the commencement of the action.

Appeal from Pope Circuit Court.

JEREMIAH G. WALLACE, Judge.

*S. R. Allen*, for appellant.

1. Plaintiff was not entitled to judgment against Abe Stiewel. Sand. & H. Dig., sec. 5698. Abe Stiewel limited his appearance, and moved to quash the service, and *objected* to the proceedings before trial.

Sand. & H. Dig., sec. 5697–9. Under the issue as to Ed. S., Joe and Harry, the question could be tried only by a jury; and if they were not partners, such of them as were not partners were entitled to a verdict. Joe and Harry were not liable as principals or agents. The verdict against Ed. S. as a partner is not sustained by any evidence.

2. The admission of statements of Ed. S. were incompetent to charge Abe Stiewel. 29 Ark. 512; 60 Ill. 41. General reputation or hearsay is not competent to prove a partnership. 29 Ark. 512; 38 N. H. 99; 83 Ala. 185; 17 Am. & E. Enc. Law, 1322, and notes.

3. The fifth and seventh instructions are erroneous. Sand. & H. Dig., sec. 5698.

4. The assumption that an agent is liable for the negligence of his principal, as a general rule, is wrong, because such is not the law. An agent is not liable to third parties for acts of negligence, nor for non-performance of duty. 62 Miss. 415; 49 Ga. 207; 117 Mass. 548; 123 *id.* 267; 1 Am. & Eng. Enc. Law, 406. The agent is liable to third persons for misfeasance only. The agent is liable only where he has full and exclusive control of the work, and the principal does not interfere, but leaves it exclusively to the agent, in which case the principal is not liable at all. 3 Gray (Mass.), 349; 45 Ill. 455; 63 *id.* 16; 34 Conn. 474.

5. The eighth instruction is correct until the last clause is reached. By that clause the court told the jury that Abe Stiewel is equally liable, whether his co-defendants were his partners or his agents, which is error.

6. Abe Stiewel could limit his appearance, and not be bound. 8 Otto, 476; 18 Ark. 539; 39 *id.* 348; 16 *id.* 337; 5 *id.* 517; 13 *id.* 418; 35 *id.* 331; 86 Mo. 357; Sand. & H. Dig. secs. 5697–9.

*A. S. McKennon*, for appellee.

1. A change of venue having been taken by *all* the defendants, Abe appeared generally, and waived his objections. 21 S. W. 29; 32 N. W. 249. See 3 Met. 459.

2. Abe Stiewel, it is admitted, operated the mine, and whether Ed. S. was manager, partner, or agent, could in no way affect his liability. On a finding that Ed. S. was liable, and that Abe was liable, judgment was properly rendered against both. If Abe *alone* had been found liable, no judgment could have been rendered against him.

3. The admissions of Ed. S. were surely admissible to charge him. But, outside of these admissions, there is abundant evidence to establish the partnership as to Ed. S.

4. An operator of a mine, whose duty it is to see that miners have a safe place to work, if liable when operating it himself, is equally liable when he entrusts the management to another as agent or superintendent, for like negligence on his part. Their neglect to perform duties enjoined upon him by the law is to be deemed, not alone their own, but his as well, and both are liable. McKinney on Fellow Servants, secs. 28, 32, and cases cited; 44 Am. Rep. 573; 41 *id.* 812; Wharton on Neg. 229; Beach, Contr. Neg. 110. On the subject of negligence of master and servant combined, if that question should be deemed as involved in this case, see McKinney on Fellow Servants, sec. 16.

5. If there is error in the instructions, the error only related to defendants, Joe and Harry I, in whose favor the jury found.

BATTLE, J. This is an action by Fred Borman against Abe Stiewel, Joe Stiewel, Ed S. Stiewel, and

Harry I. Stiewel for damages caused by personal injuries. He stated in his complaint that defendants were partners, and as such owned and operated a coal mine at Coal Hill, in Johnson county, in this state, in the month of September, 1892, and that, by reason of their negligence in allowing gas to accumulate in their mines where plaintiff was at work in their employment the same took fire, and he was burned and injured; and asked for judgment for damages.

Ed, Joe, and Harry Stiewel, answering, denied that they were partners, or had any interest in the mining business at Coal Hill; and alleged that the mine was the property of Abe Stiewel. The other defendant, Abe Stiewel, did not answer further than file a motion to quash the summons as to himself, on the ground that he was illegally served with process in Pulaski county, the suit having been brought in Johnson county.

In the course of the trial in the action witnesses were allowed to testify, over the objection of the defendant, that the mining business at Coal Hill was in the name of Stiewel & Co.; that Ed. S. Stiewel, in speaking of it, used the word "we," and said that it belonged to him and his brothers; and that it was universally understood that Ed and Abe were partners in the same, and Harry and Joe had an interest.

Among the instructions given to the jury was the following: "If the jury believe from the evidence that the plaintiff is entitled to recover in this cause, and the jury further believe that the defendant Abe Stiewel was the owner of the mines, and that the other defendants, or some one of them, was operating the mines for him as his agent, then the defendant Abe Stiewel would be responsible with the other defendants in this case." The objection urged against this instruction applies to others which were given.

A verdict was returned in favor of the plaintiff against Abe and Ed S. Stiewel for $142, and in favor of Joe and Harry I. Stiewel; and judgment was rendered accordingly. Abe and Ed, after filing a motion for a new trial, which was overruled, appealed.

Proof of partnership by admissions or reputation.

The evidence as to the admissions of Ed S. Stiewel were admissible as to himself, but could not be considered in determining the liability of the other defendants, or the relation of either of them to themselves. The evidence as to what was universally understood was incompetent, and should not have been admitted.

Liability of agent to third person.

The instructions of the court, in effect, directed the jury, if they believed that plaintiff was entitled to recover, and that Abe Stiewel was the owner of the mines, and the other defendants, or any one of them, operated the same for him, as his agent, to return a verdict in favor of the plaintiff against him and the others who were his agents. This was error. The fact that they operated the mines as agents when appellee was injured, while working in the same, by the ignition of the gas which had accumulated therein, did not render them liable for damages. If they owed him no duty, they were not liable to him for damages. A legal duty is an essential element of negligence. Without it, there can be no negligence, and there can be no duty to do any act when there is no legal right to do it. To entitle the appellee, therefore, to recover of appellants, he must state and show that they owed him a duty, and what it was, and that they failed to perform it. Shearman & Redfield, Negligence (4th Ed.), sec. 8; Wharton, Negligence (2d Ed.), secs. 3, 82.

An agent stands in the relation of confidence and privity to no one except his principal. To him alone he is under obligations to perform those duties which he expressly or impliedly assumed when he entered into that relation, and hence to him alone is liable for their

non-performance. Consequently, no third person is entitled to recover against him for damages sustained by reason of the non-performance or neglect of a duty which he owed to his principal.

He, however, like other persons, in discharging his duties to his principal, is bound to recognize and respect the rights and privileges of others. He must take care that he does not by his own act unnecessarily injure another. If he fails to do so, either negligently or intentionally, and thereby causes an injury to another, he is liable for damages to the party injured. The fact that he was acting as agent at the time will not relieve him of the liability. As is said in *Delaney* v. *Rochereau*, 34 La. Ann. 1123: "Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character, and which the law imposes upon him independent of contract. No man increases or diminishes his obligations to a stranger by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence in respect to duties imposed by law upon him in common with all other men."

In *Osborne* v. *Morgan*, 130 Mass. 102, the plaintiff was at work as a carpenter, putting up by the directions of a corporation certain partitions in a room in which the corporation was conducting the business of making wire. The defendants,—one the superintendent, and the others agents and servants of the corporation,—being employed in that business, negligently and without regard to the safety of persons rightfully in the room, placed a tackle-block and chains upon an iron nail suspended from the ceiling of the room, and suffered them to remain there in such a manner and so unprotected from falling that by reason thereof they fell upon

and injured the plaintiff. Chief Justice Gray, for the court, said: "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be natural consequences of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing, but it is misfeasance, doing improperly. * * * In the case at bar the negligent hanging and keeping by the defendants of the block and chains in such a place and manner as to be in danger of falling upon persons underneath was a misfeasance, or improper dealing with instruments in the defendants' actual use or control, for which they are responsible to any person lawfully in the room and injured by the fall, and who is not prevented by his relation to the defendants from maintaining the action."

This distinction may also be illustrated by the language of Judge Metcalf in *Bell* v. *Josselyn*, 3 Gray, 309, where an agent had been charged with negligence in admitting water into the pipes in a building without seeing that they were in a proper condition. "Nonfeasance," said the learned judge, "is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a

person ought not to do at all. The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes, and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts are, the nonfeasance caused the act to be done a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a nonfeasance."

An agent of the owner of real estate, who has the complete control and management of the property, and has undertaken to keep it in repair, is liable to third persons for injuries to the latter while using the premises in an ordinary and appropriate manner, which were caused by the failure of the agent to make necessary repairs. Thus, in *Baird* v. *Shipman*, 132 Ill. 16, Aaron C. Goodman was the owner of a barn in Chicago. Appellants were his agents for renting the same during the year 1884 and 1885, and during both years were carrying on the real estate business in Chicago. In those years Goodman was absent, and a resident of Hartford, in Connecticut. "On the trial, evidence was given tending to show that they had in fact complete control of the premises, with the residence and farm to which it belonged, and there was no proof that they received any directions from the owner. The property was rented by appellants to Emma R. Wheeler and A. R. Tilman from April 1, 1884, to April 30, 1885, and to Emma R. Wheeler from May 1, 1885, to April 30, 1886. Both leases were in writing, and by the terms of each lease the tenants covenanted to keep the premises in good repair. The tenant in the last lease rented the premises to Nellie E.

Pierce, who occupied the same from April 28 to September, 1885. The evidence tended to prove that when the lease was made to Emma R. Wheeler the large carriage door to the barn was in a very insecure condition, and that appellants, through one, the manager of their renting department, verbally agreed with Mrs. Wheeler to put the premises in thorough repair. Nothing was done to improve the condition of the door, and on June 12, 1885, while the deceased, an expressman by occupation, was employed in delivering a load of kindling in the barn for one of the parties living in the house, the door, weighing about 400 pounds, fell from its fastenings, and injured him to such an extent that he died next day." And the court held that appellants were liable for the damages occasioned by the injury. *Campbell* v. *Portland Sugar Co.* 62 Me. 552.

So an agent having the whole charge of the erection of a building, and exercising full control over it, is liable for an injury to a third person, resulting from the failure to use the reasonable precautions which were probably necessary for his protection against the same. For example, in *Ellis* v. *McNaughton*, 76 Mich. 237, "it was decided that an agent who has entire control of premises and of the erection of a building for his principal is liable for injuries resulting to third persons from the removal of a walk on the premises, contrary to his orders, if, after such removal, he knew of the dangerous condition of the premises, and allowed them to remain in that condition." *Mayer* v. *Thompson-Hutchison Building Co.* (Ala.), 16 So. Reporter, 620; *Slater* v. *Chapman*, 67 Mich. 523; *Bickford* v. *Richards*, 154 Mass. 163; *Nowell* v. *Wright*, 3 Allen, 166; *Brown Paper Co.* v. *Dean*, 123 Mass. 267.

The same rule applies to agents having full and complete control and management of any business, enterprise, or undertaking, and the power and authority to

do whatever, in the exercise of ordinary prudence, he finds reasonably necessary to prevent injuries to others. As to whether the failure to use such precaution be mis-feasance, there is a conflict of opinion. But the question is of no practical importance. The liability of the agent rests upon his failure to discharge a duty, as in mis-feasance. Having complete control and management of the business, with the power and authority to do what is reasonably necessary to protect third persons against injuries resulting from omissions or commissions in the conduct of the same, he stands in the relation to others which his principal occupies. He is under obligation to so use that which he controls as not to injure another. For a failure to discharge this duty, he is liable in damages to the party injured. This is a reasonable rule. As said in *Mayer* v. *Thompson-Hutchison Building Co.*, *supra*, there is no "sound reason why a person who, acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omissions of duty because he was acting as servant or agent."

The above rule is applicable to this case. Tested by it, the instructions given to the jury by the court are erroneous, and were prejudicial to appellants.

Service of process out of county.

As to the sufficiency of the service of the summons upon Abe Stiewel in Pulaski county for a basis of judgment against him, section 5698 of Sandels & Hill's Digest is decisive. That section is as follows: "Where any action embraced in section 5696 is against several defendants, the plaintiff shall not be entitled to judgment against any of them on the service of a summons in any other county than that in which the action is brought, where no one of the defendants is summoned in that county or resided therein at the commencement of the action, or where, if any of them resided, or were summoned in that county, the action is discontinued or

dismissed as to them, or judgment therein is rendered in their favor, unless the defendant summoned in another county, having appeared in the action, failed to object before judgment to its proceeding against him."

According to this statute, appellee is not entitled to judgment in this action against Abe Stiewel, although he may be entitled to recover against him, unless judgment is recovered against one of the defendants who resided in the county in which the action was brought at its commencement, or was summoned in such county, or he fails to object before judgment to its proceeding against him.

As to the proper mode of pleading matters of abatement, appellant's attention is directed to *Grider* v. *Apperson*, 32 Ark. 332; *Union Guaranty, etc., Co.* v. *Craddock*, 59 Ark. 593.

The judgment against appellants is reversed, and the cause is remanded for a new trial as to them.

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NOTE—As to liability of an agent or servant to third persons for negligence, see note to *Mayer* v. *Thompson-Hutchison Building Co.* (Ala.), 28 L. R. A. 435. (Rep.)

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## ADLER-GOLDMAN COMMISSION COMPANY *v.* PHILLIPS.

Opinion delivered October 17, 1896.

DEED—CONSTRUCTION.—A deed, conveying all the grantors' stock of merchandise and accounts in a storehouse to a trustee to secure the payment of certain debts to specified persons, provided that the grantors should remain in possession, and sell the goods and collect the accounts, and apply the proceeds to payment of such debts, in the order in which they become due; that, after the debts shall have been paid in full, the conveyance shall become void, and all the property revest in the grantors absolutely; and that, in case of mismanagement or default in payment, the trustee, on demand of the creditors, shall take possession and sell the prop-

erty, after giving notice. Some of the debts were due at the time the deed was executed. *Held*, that the instrument was not a deed of assignment, but a deed of trust to secure the payment of debts.

DEED OF TRUST—CONTROL AND COMPENSATION OF GRANTOR.—A deed of trust to secure creditors is not void by reason of a provision therein that the grantors shall remain in possession and control of the stock of goods conveyed until default in payment of the debts, and shall sell the goods for cash, and collect the outstanding indebtedness, paying the proceeds into a bank for the creditors secured, after deducting only the necessary expenses of carrying on the business and the living expenses of the grantors.

Appeal from Independence Circuit Court.

JAMES W. BUTLER, Judge.

*Rose, Hemingway & Rose* and *Gustave Jones* for appellant.

1. The interplea should have been transferred to the chancery docket with the rest of the case.

2. The deed was plainly intended as an assignment. 54 Ark. 430; *id.* 6. The provision that on payment it is "to become void, and all of said property to revest in the grantors," does not affect the question. Burrill, Assignments, p. 695, appendix sec. 2, (6 Ed.) As the law would imply a condition of that sort, its insertion does not change the quality of the instrument. 18 Ark. 123; Brown, Leg. Max. sec. 519; 59 Ark. 278. See also 58 Ark. 294; 3 Pars. Cont., sec. 272; 56 Ark. 314. A fund is here raised to be distributed to creditors. 56 Ark. 314; 23 N. E. 646; 131 Ill. 251; Burrill, Assignments, sec. 2, n. 2. The conveyance possesses every element of an assignment. (1) It is made by merchants of their entire stock in trade, notes and accounts. (2) It is made to pay debts, as far as the assets extend. (3) It is made to raise a fund to pay these debts. (4) It reserves no right of redemption. (5) The condition was broken as soon as made, and the grantee was entitled to immediate possession. See 52 Ark. 50; 53 *id.* 538; *id.* 101. The deed stipulates for a method of sale

different from that prescribed in the statute regulating assignments, and is void. 59 Ark. 64; 37 *id* 150; 47 *id.* 367; 53 *id.* 88; 54 *id.* 429; *id.* 64; 18 *id.* 123, 125; 53 Mo. App. 107; Bump, Fr. Conv. 47.

3. Whether regarded as a mortgage or as an assignment, the conveyance to Phillips was plainly fraudulent and void on its face. The mortgagors were to remain in possession, to sell the goods in the regular order of business, collect debts, deposit proceeds in bank for mortgagees, deducting only necessary expenses of mortgagors, and "*the living expenses of*" mortgagors. 24 N. Y. 364; 82 Ala. 467. A mortgage of a stock of goods, with provision that the grantor shall remain in possession, carrying on the business in the usual way, is void, as against attaching creditors, unless the mortgagee takes possession before the attachment lien is fixed. 95 Mo. 132; 6 Am. St. Rep. 32 and note; 46 Ark. 127; 6 D. C. 273. By this last provision, the mortgagors reserved for themselves a support for life, or as long as the mortgagees should choose to keep other creditors at bay. That this clause rendered the mortgage void is plain. There never was but one case holding the reverse,—15 Johns. 571, reversing 2 Johns. Ch. 564, and this case has been repeatedly overruled. 2 Bigelow, Fraud. Conv. 272; 6 Hill, 438; 116 N. Y. 410; 89 N. Y. 270, 280; Bigelow, Fraud. Conv. p. 272, n. 6; 2 Comstock, 371; 6 Binn. 338; Wait, Fr. Conv. sec. 326; 55 N. W. 108; 11 So. 726; 12 S. E. 375; 107 N. C. 405; 89 Ala. 561; 19 Pac. 346; 17 Ala. 554; 69 Mo. 441; 43 Wis. 116; 91 Ala. 401; 6 Wall. 78; 31 Ill. App. 67; 37 Mo. 500; 15 *id.* 459; 25 Or. 15; 126 Ill. 525; Burrill, Assignments (6 Ed.), sec. 167; 47 Ark. 347; 15 Am. & E. Enc. Law, p. 775, n; 13 Wis. 629; 54 Ark. 418.

4. A new trial should have been granted on the ground of surprise. 23 Neb. 485; 38 Iowa, 434; 5 How. (Miss.) 539; 9 Bush, 66; 80 Cal. 330; 81 *id.* 268; 59 Ark.

162; 17 Fed. 667; 32 Conn. 402, 22 Ind. 107; 31 Conn. 334; 53 Wis. 169; 74 Iowa, 227; 62 Cal. 263; 5 Burrow, 2631.

*Morris M. Cohn*, for appellee.

1. The interplea of Phillips was properly tried before a jury. Having taken a change of venue, appellant could not afterward allege that the court had not jurisdiction. 156 U. S. 680; 156 *id.* 689-92; 157 *id.* 198, 201; 13 How. 307. The doctrine of estoppel is as applicable at law as in equity. 13 How. 307; 2 Whart. Ev. sec. 836; 25 Ark. 108, 112; 52 *id.* 458; 24 *id.* 584. While it has been held to be the duty of the court to transfer equitable issues to the chancery docket (39 Ark. 248; 49 *id.* 20; 52 *id.* 411, 415), it has been decided that a mere transfer to equity does not give a right to equitable relief. 31 Ark. 597; 47 *id.* 205. But the issue in this case was a purely legal one, and to deprive Phillips of a trial by jury, would be unconstitutional. 56 Ark. 391, 396; 49 *id.* 492, 498. At any rate, a trial by jury was permissible. It lay in the discretion of the chancellor. 48 Ark. 426; Sand. & H. Dig. sec. 374; 58 Ark. 446, 451. Matters of form, as getting on the wrong docket, are disregarded. 34 Ark. 93, 105. If erroneous, it is harmless. 46 Ark. 542; 43 *id.* 535; 27 *id.* 306; Sand. & H. Dig. sec. 5772.

2. No error was committed in trying the intervention before the attachment issue. Phillips had nothing to do with the attachment issue. He could not be heard on that issue. 47 Ark. 31; 71 Fed. 151; 33 Ala. 526; 47 *id.* 125; 17 S. C. 116, 120. No motion for continuance was filed. Sand. & H. Dig. secs. 5797, 5799. No merit was shown in the motion for a new trial, on the ground of surprise. 24 Ark. 264; sec. 26 *id.* 496; 29 *id.* 225; 33 *id.* 91; 24 *id.* 659; 41 *id.* 229. The ground of countinuance, or for setting aside a

judgment, must be meritorious. 59 Ark. 162; 33 Cent. Law J., 28; 34 Pac. 352; 52 Kas. 743; 18 S. E. 953; 34 Pac. 294: 9 Utah, 338; 35 Ill. App. 361.

3. The deed was not void on its face, and, if not, was not void for anything proved in the case.

(*a*) It is not an assignment, but a deed of trust. 57 Ark. 222; 58 *id.* 293; 53 *id.* 101; 54 *id.* 229; 56 *id.* 314; 59 *id.* 270. The old doctrine of 52 *id.* 30 and 54 *id.* 6, is suspended by these later and better decisions. See also Elphistone, Int. Deeds, Rule 9, pp. 40–46; 2 White & Tud. L. C. in Eq. part 1, p. 89; 32 S. W. 493; 33 Ark. 119, 237; *ib.* 762. Such a trust would be enforced, even in the absence of a trustee, by a chancery court. 4 Ark. 302; 53 *id.* 124, 130. On the question of intention, the verdict is conclusive. 54 Ark. 229.

(*b*) The deed is not fraudulent because it provides that until default the debtors "may proceed to sell * * * goods in the regular order of business for cash, and to collect outstanding debts, and shall pay * * * the amount of sales, * * * etc., after deducting only the necessary expenses," etc. Until default the trustee was not entitled to possession, and the deed was duly recorded. Jones, Ch. Mortg., sec 381 (2 Ed.); 139 U. S. 266, 271; 3 Cr. 73, 89; 15 N. Y. 9, 120; Bump, Fr. Conv. (2 Ed.) 40; 1 Jones, Mortg. Real Prop. (2 Ed.) secs. 771–2; 41 Ark. 193; 152 U. S. 527; 123 *id.* 436; 152 *id.* 534; 58 Ark. 297; 46 *id.* 129; 46 *id.* 131; 55 *id.* 77; 18 *id.* 123; 23 Ind. 285; 22 Kas. 128; 25 Pac. 888; 69 Tex. 161; 19 S. W. 705; 29 Pac. 698; 26 *id.* 706; 23 N. W. 386; 19 *id.* 657; 17 N. E. 159; 29 Pac. 985; 60 Fed. 346.

4. The instructions given fully cover the case, and it was not improper to refuse other instructions. 46 Ark. 141; 52 *id.* 180; 37 *id.* 108; 35 *id.* 585.

*Yancey & Fulkerson*, *J. W. Phillips*, and *M. M. Stuckey*, also for appellee.

1. The court properly refused to transfer to equity. 58 Ark. 445; 38 *id.* 329; 15 *id.* 128; 11 *id.* 180; Sand. & H. Dig. sec. 5707.

2. The court properly refused to declare the deed an assignment. It was a deed of trust. 32 Ark. 255; 60 *id.* 433; 23 *id.* 264; 4 Am. St. 461; 28 *id.* 528; 19 *id.* 907; 106 U. S. 654; 42 *id.* 521; 5 S. W. 636; 58 Ark. 295; 54 *id.* 229; *ib.* 428.

3. The court properly refused to declare the instrument void on its face. 123 U. S. 436–442; 55 Ark. 77; 58 *id.* 296.

4. The court properly refused a new trial on the ground of surprise. 16 Am. & E. Enc. Law, 516; 18 Ark. 574; 20 *id.* 62; 41 *id.* 231; 26 *id.* 503; 17 Nev. 417; 76 Ga. 21; 3 Sm. & M. (Miss.), 439.

BATTLE, J. Adler-Goldman Commission Company commenced an action against Charles Bloom, Ben Bloom, and Morris Bloom, partners doing business under the name and style of Bloom Bros. and C. Bloom & Co., on two notes and an open account, and sued out an order of attachment, and caused the same to be levied on certain property.

Joseph W. Phillips filed his complaint in the case, and claimed the property under the following instrument:

"This indenture, made and entered into by and between Charles Bloom, Ben Bloom and Morris Bloom, partners as C. Bloom & Co., parties of the first part, Joseph W. Phillips, party of the second part, trustee, and the Lawrence County Bank, R. Lambeth, Kaminer, Prinz & Co., Isaac Less, Dave Bloom, Schwab Clothing Company, H. Arndt, and the Little Rock Mill and Elevator Company, parties of the third part, witnesseth:

'That whereas, the parties of the first part are now indebted to the parties of the third part as follows: The Lawrence County Bank in the sum of three hundred and seventy-one dollars and seventeen cents

($371.17), as evidenced by their promissory note of this date, payable in thirty days, with 10 per cent. interest from date until paid, with I. Less surety; *to R. Lambeth in the sum of five hundred dollars ($500), as evidenced by their promissory note of——January, 1893, and due and payable on the 1st day of July, 1893, with 10 per cent. interest from date until paid, with I. Less as surety;* to Kaminer, Prinz & Co. in the sum of ten hundred and forty eight dollars and seventy five cents ($1,048.75), which is to become due and payable in equal installments of three hundred and forty nine dollars and fifty eight cents ($349.58), as is evidenced by their three promissory notes of this date, the first one of which is to be due and payable 60 days after date, the second one is to be due and payable 90 days after date, and the third and last one to become due and payable 120 days after date, each of which is to bear interest at the rate of 8 per cent. per annum from maturity until paid; to I. Less in the sum of three hundred dollars ($300), as is evidenced by their promissory note to become due and payable 120 days after date, and bearing 10 per cent. interest from date until paid; to *Dave Bloom the sum of seven hundred dollars ($700) upon an account which is now due, but upon which he is willing to extend the time of payment in consideration of these presents;* to Schwab Clothing Company in the sum of five hundred and twenty six dollars ($526), as is evidenced by their promissory note, payable 90 days from date; to H. Arndt in the sum of one hundred and forty dollars ($140), to become due and payable 60 days after date, as is evidenced by their promissory note bearing date the same as this instrument; and to the Little Rock Mill and Elevator Company in the sum of one hundred and seventy eight dollars ($178) upon an account of goods, wares and merchandise, the full payment of which said debts the parties of the first part are anxious to secure.

"Now, therefore, for the purpose of securing the payment of said debts, and in consideration of $1 cash in hand paid to the parties of the first part by the parties of the second part, the parties of the first part have this day bargained, granted and sold to the party of the second part all of their general stock of merchandise and accounts now in the storehouse now occupied by them as a place of business in the town of Walnut Ridge, in the county of Lawrence, State of Arkansas, together with all the store fixtures therein.

"To have and to hold to the said party of the second part, and to his heirs and assigns. This conveyance is however upon condition and for the purpose of paying the indebtedness aforesaid, *and at the time that it may become due, the parties of the first part to remain in possession of all the property herein conveyed until default is made; and it is expressly understood and agreed that they may proceed to sell any of said goods in the regular order of business for cash, and to collect any outstanding indebtedness; and shall pay at the end of each week into the Lawrence County Bank the amount of sales for said week, after deducting only the necessary expense of carrying on the sales, such as rent of building, clerk hire, and the living expenses of the party of the first part; and the amount of said sales to be immediately applied by them, through said bank, to the payment of the above mentioned debts in the order in which they become due; and after all of said indebtedness* hereinbefore described and mentioned has been paid in full, with any accrued interest thereon, then this conveyance to become void, and all of said property revest in the grantors absolutely. *It is further agreed and understood that the expenses of carrying on the business, until the before mentioned indebtedness shall be fully paid, shall be limited to the least practical sum, considering the successful management of the conveyed property;* but if

the parties of the first part shall make default in the payment of either of the above mentioned debts at the time it becomes due, or should they injure the security herein intended to be given in any manner by their neglect or mismanagement, then it shall be lawful for the party of the second part to, *on demand of the parties of the third part*, take possession of all the property herein conveyed, and, after giving twenty days' notice by printed posters, posted in five public places in Lawrence county, offer all of said property for sale to the highest bidder for cash. The accounts and evidences of debt he shall collect in the regular course of business, and with the proceeds of said sale he shall pay off and discharge the above indebtedness in full, if there be a sufficient amount; but if the amount be insufficient, then he shall pay all the debts *pro ratâ*, according to the respective interest of all the parties thereto. Money received from the collection of accounts and evidences of debt to be applied in the same manner; and, if anything remains, to be paid to the parties of the first part or their legal representatives.

"Witness our hands and seals on this the 15th day of December, 1893.

"C. BLOOM & CO., (L. S.)
"C. BLOOM, (L. S.)
"BEN BLOOM, (L. S.)
"MORRIS BLOOM. (L. S.)"

The plaintiff answered the complaint, alleging that the conveyance relied on was fraudulent; that the debts mentioned therein were simulated; and that the conveyance was an assignment, which, not being made in conformity with law, was fraudulent and void on its face.

Afterwards, on the 19th day of January, 1894, the court made an order that the main issue in the attachment proceeding be tried first, and that the issue formed by the answer to Phillips' complaint be tried afterwards.

On the 27th of April, 1894, the court, being held by a special judge, recited the order made on the 19th of January, 1894, and directed that, so far as said order related to the then present term, it should be sustained.

On the 26th day of September, 1894, the plaintiff filed a motion, copying the order made on the 19th of January, 1894, and that made on the 27th of April, 1894, and moving that the trial of the issues joined by the complaint of Phillips and the answer thereto be postponed until the trial of the issues in the attachment proceeding according to these orders; but on the 27th of September the court overruled said motion, and directed that the claim of Phillips be tried at once.

On the 28th of September, 1894, a jury was impaneled, and the claim of Phillips was tried. There was a verdict in his favor, and judgment accordingly; and the plaintiff, after filing a motion for a new trial, which was overruled, and a bill of exceptions, appealed.

Appellant complains of being forced into trial on the 28th of September, when it was not ready. It insists that it was taken by surprise, and that its motion for a new trial should have been granted on that ground. The evidence relied on to support this contention were the orders made on the 19th of January, 1894, and on the 27th of April, following. But there was evidence sufficient to sustain the finding of the court to the contrary. The motion filed by it on the 26th of September indicates as much. Then, again, there was no sufficient showing for a continuance.

Construction of deed.

Appellant contends that the deed relied on by Phillips is an assignment, and, as such, is void, because it stipulates for a method of sale different from that prescribed in the statute regulating assignments. The reasons given for this contention are: "It is a conveyance by merchants of their entire stock in trade, notes

and accounts. (2) It is made for the purpose of paying, as far as the assets may extend, the debts due to several creditors. (3) It is made for the purpose of raising a fund to pay off these debts, and not to furnish security for their future payment. * * * * (4) It does not reserve any right of redemption. It does not provide for the paying off the debts from money derived from any source, save from the sale of the goods and the collection of the choses in action. Nothing of the sort was contemplated or thought of. (5) The condition was broken as soon as made, and the grantee was entitled to instant possession."

An examination of the deed will show that the reasons assigned for this contention are not true. The deed recites: "That whereas, the parties of the first part are now indebted to the parties of the third part, as follows: (it then describes the debts) the full payment of which said debts, the parties of the first part are anxious to *secure*. Now, therefore, for the purpose of *securing* the payment of said debts, and in consideration, etc., the parties of the first part have granted, bargained, and sold to the party of the second part all their general stock of merchandise and accounts in the store house now occupied as a place of business in the town of Walnut Ridge, in the county of Lawrence, State of Arkansas, together with all the store fixtures therein" (not all of their property). And, after authorizing the party of the first part (mortgagors) to remain in possession of the merchandise, and sell the same, and collect the accounts, it then says: "The amount of said sales to be immediately applied by them, through said bank, to the payment of the above mentioned debts, in the order in which they may become due, and, after all of said indebtedness hereinbefore described and mentioned has been paid in full, with any accrued interest thereon, then this conveyance to become void, *and all of*

*said property revest in the grantors absolutely.*" How can all of the property revest in the grantors absolutely if it was to be sold, and the proceeds applied to the payment of the debts without the privilege of redeeming?

But it is said that some of the debts secured were due when the deed was executed, and that "the condition was broken as soon as made, and the grantee was entitled to instant possession." It is true that two or more of the debts were due, but the deed provides, in reference to the time when the trustee may take possession, as follows: "But if the parties of the first part shall make default in the payment of either of the above mentioned debts at the time it becomes due," etc., "then it shall be lawful for the party of the second part (trustee) to, *on demand of the parties of the third part* (secured creditors), take possession of all the property herein conveyed, and, after giving twenty days' notice by printed posters, posted in five public places in Lawrence county, offer all of said property for sale to the highest bidder for cash." It shows that many of the debts secured were not due at the time it was executed, and provides that they shall be paid when due, and authorizes the mortgagors to remain in possession of the property conveyed, and sell the goods in the regular order of business, and to collect any outstanding indebtedness, which could not be done if the trustee took immediate possession, and converted the property into money for the payment of the debts. And this, in connection with other portions of the deed, shows that no absolute appropriation of property for the payment of debts was intended to be made.

In *Robson* v. *Tomlinson*, 54 Ark. 229, Chief Justice Cockrill, delivering the opinion of the court, said: "Neither the possession of the goods, nor the unreasonableness of the debtor's expectation of paying the debt

at maturity, nor his intent never to pay, is the criterion for distinguishing a mortgage from an assignment. The controlling guide, according to the previous decisions of this court, is, was it the intention of the parties, at the time the instrument was executed, to divest the debtor of the title, and so make an appropriation of the property to raise a fund to pay debts? If the equity of redemption remains in the debtor, his title is not divested, and an absolute appropriation of the property is not made." *Richmond* v. *Miss. Mills*, 52 Ark. 30; *Fecheimer* v. *Robertson*, 53 *Ib.* 101; *Box* v. *Goodbar*, 54 Ark. 6; *Penzel Company* v. *Jett*, *id.* 428; *Wood* v. *Adler-Goldman Com. Co.* 59 *id.* 270; *Marquese* v. *Felsenthal*, 58 *id.* 293; *Smith* v. *Empire Lumber Co.* 57 *id.* 222.

Guided by the previous decisions of this court, we hold that the conveyance in question was not a deed of assignment, but a deed of trust to secure the payment of debts.

Effect of grantors' retaining compensation.

But it is contended that, let the instrument in controversy be what it may, it is void on its face, because it provides that the grantors may remain in possession of the property conveyed until default in the payment of the debts secured, and sell the goods in the regular order of business for cash, and collect any outstanding indebtedness, and pay at the end of each week into the Lawrence County Bank the amount of sales for said week, after deducting only the necessary expense of carrying on the sale, such as rent of building, clerk hire, and the living expenses of the grantors. Upon the question presented by this contention, there is a contrariety of opinion by the courts of the different states. In *Lund* v. *Fletcher*, 39 Ark. 334, a summary of these opinions is made. In that case, after making this summary, this court held, "that a mortgage of articles of merchandise containing a provision that the mortgagor may remain in possession and sell, and no

provision that the proceeds of the sale shall be applied to the payment of the mortgage, or so invested as to fix a continuing trust upon them for the purposes of the mortgage, is invalid, save between the parties." *Martin* v. *Ogden*, 41 Ark. 186; *Gauss* v. *Doyle*, 46 Ark. 122.

In *Gauss* v. *Orr*, 46 Ark. 129, the mortgage in question contained this clause: "It is agreed that I, (the mortgagor) am to hold possession of my stock of goods during the will of said Orr & Lindsay, and retail the same, and account to said Orr & Lindsay each week after this week for the proceeds of sales, and to pay $50 thereof, if not more, each week until said sum (the mortgage debt) is fully paid, said $50 per week to be paid without regard to the amount of sales." This court construed this clause as meaning "that the mortgagor should sell for the mortgagee's benefit, and account to them for the proceeds; that if the proceeds of sales should not reach $50 a week, that sum should be paid nevertheless, and that the first settlement and account of sales should be made the next week after the mortgage was executed;" and held the mortgage to be valid.

There is no good reason why a mortgagor of a stock of goods should not remain in possession and sell them in the usual course of trade, provided he sells for the benefit and as the agent of the mortgagees, and receives nothing further than a mere compensation for his services. As said in *Huntley* v. *Kingman*, 152 U. S. 527: "The tendency of courts in modern times has been not to hold instruments of this character fraudulent and void upon their face, unless they contain provisions plainly inconsistent with an honest purpose, or the instrument indicates with reasonable certainty that it was executed, not to secure *bona fide* creditors, but to enable the debtor to continue to carry on his business under cover of another's name."

In *Smith* v. *Craft*, 123 U. S. 436, a creditor received from his debtor a stock of goods in payment of debts, and the debtor executed to him a bill of sale therefor; and it was stipulated therein that the creditor would employ the debtor in the old business in which the goods were sold, at the rate of $150 per month, so long as the creditor should carry on the business. The court, in speaking of the validity of this stipulation, said: "If its object appeared on its face to have been to secure a benefit to the debtor or his family, it would be fraudulent in law. * * * But if its purpose was to obtain services necessary to wind up the business, and turn the goods into money as promptly and economically as possible, for the benefit of the other party, it is valid. *Wilcoxon* v. *Annesley*, 23 Ind. 285; *Baxter* v. *Wheeler*, 9 Pick. 21; *Strong* v. *Carrier*, 17 Conn. 319. As was well said by the Supreme Court of Indiana in *Wilcoxon* v. *Annesley*: 'Where, as in this case, the purchase was of a stock of goods in a store, and an established trade existing, it seems but reasonable that, at a fair salary, the grantor might be employed, for a time at least, to continue in charge of the business, and that circumstance will not in itself prove the transaction fraudulent.' "

In the deed of trust executed by the Blooms they were to "pay at the end of each week into the Lawrence County Bank the amount of sales for said week, after deducting *only* the necessary expenses of carrying on the sales, such as rent of building, clerk hire, and their *living* expenses," and to immediately apply the amount of sales deposited, through the bank, to the payment of the debts secured, in the order in which they may become due. Moneys received from the collection of outstanding indebtedness by the grantors, after deducting the expenses mentioned which were unpaid, were also to be applied at the end of each week in the same manner. They made their living expenses a part of the expense

of the business, and further stipulated "that the expenses of carrying on the business, until the before mentioned indebtedness shall be fully paid, shall be limited to the least practical sum, considering the successful management of the conveyed property." Their living expenses, which only included the cost of their food, raiment, shelter, and lodging, was a compensation for services to be rendered, and was the only reward to be received by them, and that was to be limited to the least sum practicable. And after this they provide that if they injure the security intended to be given, in any manner, by their neglect or mismanagement, then it shall be lawful for the trustee, on demand of the beneficiaries, to take possession of the goods and sell, and collect the accounts and evidences of debt; thereby limiting their right and opportunity to receive out of the property mortgaged anything more than the necessary expenses of living, reduced to the least sum practicable. We see in this no intent to pay anything more than a reasonable salary for selling the goods and closing up an old business, which they were presumably more competent to do than the trustee, or any one he might employ. There was no evidence to show that the services or compensation were unnecessary or unreasonable.

Entertaining the views expressed in *Smith* v. *Craft*, we hold the deed in question to be valid.

Judgment affirmed.

## STATE v. BURK.

Opinion delivered October 17, 1896.

LIMITATION—ACTION BY STATE—SCHOOL FUNDS.—The statute of limitations cannot be set up as a bar to an action by the state to foreclose a mortgage given to secure a loan of money belonging to the sixteenth section school fund and held by the state in trust for the use of schools.

Appeal from Grant Circuit Court in Chancery.

ALEXANDER M. DUFFIE, Judge.

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

1. By act of Congress, the title to the school lands is vested absolutely in the state. 19 Ark. 308. The state has reserved the title and control of same ever since. Acts 1881, pp. 154 to 159; 50 Ark. 346; 49 *id.* 172; 37 *id.* 133. The school district could not sue for the fund, it must be done by the state. Sand. & H. Dig. sec. 7125, and cases *supra.*

2. The maxim "*nullum tempus*," etc., applies. No laches can be imputed to the state, and against it no time runs to bar its rights. Johns. (N. Y.), 228; 70 Ala. 507; 13 Wall. (U. S.), 92; 9 Wheat. (U. S.), 720, 736; Angell, Lim. secs. 38, 39; 2 Hill (N. Y.), 59; Angell, Lim. sec. 40; 34 Kas. 237.

BATTLE, J. The complaint in this action is, in part, as follows: "The plaintiff, the State of Arkansas, for the use and benefit of the common school fund of Arkansas, and of section 16, in township 4 south, in range 15 west, and Frank W. Rushing, treasurer of Grant county, Arkansas, bring this suit in equity against J. H. Burk and S. D. Reese, who are prayed to be made parties defendants hereto. The plaintiffs state that, under the provisions of section 7 of an act of the

general assembly of the State of Arkansas, entitled 'An act to provide for the sale of the sixteenth sections of the state,' approved March 22, 1881, the then treasurer of Grant county aforesaid, to wit, Daniel Johnson, loaned to defendant, J. H. Burk, the sum of $37.15, belonging to said sixteenth section; and, to secure the payment of the same, a mortgage was executed by said J. H. Burk, and two promissory notes, dated March 20, 1883, for $24.68 and $12.42, respectively, and drawing 10 per cent. interest per annum, and due and payable five years after date, by said J. H. Burk, and defendant S. D. Reese as security, as follows:" Then follow copies of the notes and mortgage, and a prayer for judgments against the defendants on the notes, and a decree to foreclose the mortgage. To this the defendant pleaded the statute of limitations, and the plaintiff demurred to the answer, and the court overruled the same. The state refused to proceeed further, and the court dismissed the action, and the state appealed.

The only question in this case is, was the action barred by the statute of limitations?

No laches is imputable to the state. Its interests are not prejudiced by the negligence of its officers or agents to whose care they are confided. Hence the statute of limitations cannot be set up as a bar to any right or claim vested in the state as a sovereign, unless it expressly provides that it may be done. But this rule has no application to actions brought by the state, to which it is a nominal party, and in which its name is used to enforce a right which inures solely to the benefit of an individual, or a corporation, municipal or otherwise. If, however, the action is brought to enforce a trust assumed by the state for the purpose of discharging a governmental duty, the rule applies. Thus, in *United States* v. *Nashville, etc., Ry. Co.*, 118 U. S. 120, "the United States bought the coupons sued on, and the

bonds to which they were annexed, long before any of them became payable, or the statute of limitations had begun to run against the right of any holder to sue thereon. The money with which they were bought was money received by the United States from the sale of lands ceded to them by the Chickasaw Nation of Indians." The court said: "These lands, the money received from their sale, and the securities in which that money was invested, were held by the United States, in trust, to be applied for the benefit of those Indians, in performance of the obligations assumed by the United States by treaties with them. The securities were thus held by the United States for a public use in the highest sense, the performance of a *quasi* international obligation; and they continued to be so held until that obligation had been performed and discharged, after which they were held by the United States, like all other property of the government, for the ordinary public uses. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158. The necessary conclusion is that the statute of limitations of Tennessee never ran against the right of action of the United States upon these coupons, either while the United States held them in trust for the Indians, or since they have held them for other public uses."

The principle on which the case cited was decided seems to be applicable to the one under consideration. The convention of delegates at Little Rock, assembled for the purpose of making a constitution for the State of Arkansas, prior to its admission into the Union, by an ordinance, submitted certain propositions to the Congress of the United States, which were rejected; and Congress, in lieu thereof, submitted five others, among which was the following: "That the section numbered sixteen in every township, and when such section has

been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state, for the use of the inhabitants of such township for the use of schools." Annexed to these propositions was the following proviso: "Provided, that the five foregoing propositions, hereinbefore offered, are on the condition that the general assembly or the legislature of the said state, by virtue of the powers conferred upon it by the convention which framed the constitution of the said state, shall provide, by an ordinance irrevocable without the consent of the United States, that the said general assembly of the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof; and that no tax shall be levied on lands the property of the United States; and that in no case shall non-resident proprietors be taxed higher than residents; and that the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax levied by order or under the authority of the state, whether for state, county, township or any other purpose, for the term of three years from and after the date of the patents respectively." The state accepted these propositions in the manner prescribed by the proviso, and thereby entered into a solemn compact with the United States, by which it undertook to perform the trust created by the act of Congress.

In *Mayers* v. *Byrne*, 19 Ark. 308, the court held that the effect of the act of Congress, and the acceptance of the propositions therein contained, was to vest the title to the sixteenth sections therein granted, absolutely, in the state; and in this connection said:

"The state accepted the grant, however, charged with the trust that the land was to be appropriated to the use of the inhabitants of the township in which it was situated, for the use of schools. The state, as a sovereign, not as an individual, took upon herself a trust, which she was to execute, and could only execute, by such municipal legislation as her general assembly might deem necessary and expedient to carry into practical effect the objects of the grant."

The duty to maintain schools has ever been recognized by this state. In the constitution of 1836, which is referred to in the act of Congress before mentioned, it is ordained: "Knowledge and learning generally diffused throughout a community being essential to the preservation of a free government, and diffusing the opportunities and advantages of education through the various parts of the state being highly conducive to this end, it shall be the duty of the general assembly to provide by law for the improvement of such lands as are, or hereafter may be, granted by the United States to this state for the use of schools, and to apply any funds which may be raised from such lands, or from any other source, to the accomplishment of the object for which they are or may be intended," etc. Substantially the same language is used in the constitution of 1861, and is literally adopted in the constitution of 1864; and the constitutions of 1868 and 1874 make it the duty of the general assembly to maintain a system of free schools.

In 1842 the general assembly enacted laws providing for a system of public schools for the various counties in the state. Under certain conditions, three trustees could be elected by the qualified voters of each congressional township, and, when elected and qualified, were to constitute a body corporate, and become a part of a school system, and an instrument of the state in the performance of a governmental work, and, as such,

were subject to changes or abolition by the general assembly. This system was from time to time changed and improved, and the management and control of such corporations as were formed passed into the hands of superintending officials. The control and sale of the sixteenth sections and the proceeds of the sale thereof continually underwent changes, the state always exercising the right to control and manage them for the purposes of education. Whatever changes were made in the corporations, they were always a part of a system organized for the purpose of performing governmental functions. In 1868 the old system of schools was abrogated, and a new one was established, which abolished the organization of townships into school districts, and required the state to be divided into districts, which were to become corporations subject to be changed at any time. While the state has always recognized the inhabitants of each township as the beneficiaries of the grant of the sixteenth sections in their township, it has never abandoned the trust it assumed, but has always made and treated the individuals or corporations placed in control of the same as component parts of a general system of education, and at the same time as instruments in its hands for the performance of that trust. Pursuing this line of conduct, the general assembly, in 1885, enacted a law requiring the sales of the sixteenth sections of land to be for cash, and the proceeds of the sale to be paid into the state treasury, and the attorney general to employ counsel to collect all moneys owing for such land, and such money, when collected, to be also paid into the state treasury; and the state thereby undertook the collection of the same in its own name.

Had the sixteenth sections and the fund arising from the sale of the same absolutely belonged to the state, unaffected by any trust, no action for their recovery would have been barred by the statute of limitations.

Under the circumstances, we do not see how the trust subjected the state's right of action to the statute, since the state, while administering the trust, has held and made, and now holds, the land and fund subservient to governmental purposes, and as it could had they been its property, free from any trust, especially when the action is brought for the recovery of a part of the fund or land for the purpose of executing the trust in the manner indicated. Our conclusion from what we have said is that this action was not barred.

Congress offered, substantially, the same propositions to Iowa, when it was admitted as a state into the Union, as were offered to Arkansas. One of them was, "that section numbered sixteen in every township, and, when such section has been sold, or otherwise disposed of, other lands equivalent thereto, shall be granted to the state, for the use of the inhabitants of such township, for the use of schools." This was offered for its free acceptance or rejection, which, if accepted, was to be obligatory upon the United States and the said state. The act of Congress then made three other propositions. The four propositions were subject, substantially, to the same conditions as those submitted to Arkansas. The differences do not affect the question we are considering. Iowa accepted the propositions. In the *County of Des Moines* v. *Harker*, 34 Iowa, 84, one of the questions was, whether that action, which was brought for the recovery of "school fund" money, was an action by the state, in such a sense as the statute of limitations did not apply to it? The court came to the same conclusion we have, saying: "The state being the legal owner of the school fund, and, by the constitution, pledged to keep it good against all losses, it is but just that in controversies concerning it the state should have the benefit of the rules of law attaching to its sovereignty."

*Miller* v. *State*, 38 Ala. 600, was an action brought in the name of the state "for the use of township seventeen, range eleven east, in the Coosa land district," against Samuel Miller and others, to recover the possession of a part of section sixteen in said township and range. The statute of limitations was interposed. The court said: "By the act of Congress of 2d March, 1819, for the admission of Alabama into the Union, the sixteenth section in every township was granted 'to the inhabitants of such township, for the use of schools.' This court has held that the legal title to these lands could not vest in the inhabitants of the township, as they had no corporate existence; nor could such a capacity be conferred on them by the act of Congress. And the construction placed upon this act has been that the grant is in perpetuity to the inhabitants of the respective townships; and that the legal title to the land is in the state, in trust for the inhabitants of the respective townships in which the land is situated. * * This trust the state has executed. As early as 1819, agents were appointed to take care of the lands; and, subsequently, school commissioners were appointed, and trustees required to be elected by the townships, for the management of the lands and the schools in each township; and the officers thus provided for were respectively declared bodies corporate. By the Code, the inhabitants of the respective townships are incorporated, and the election of school trustees provided for, who are entrusted with the management of the sixteenth section, and are expressly authorized to direct suits, at law or in equity, in all cases affecting the interest of such township. Code, sec. 546. It is not to be doubted that, by virtue of the general authority conferred upon them by law, as it stood before the Code, the commissioners were clothed with the power to direct suits to recover the possession of the sixteenth section, when it was improperly held by a

third person. * * * * Though the state is a party to this suit, it has no real interest in the litigation. If there be a right of recovery, the property sued for belongs, not to the state, but to the township; so that, in point of fact, the suit is substantially between the township and the defendant. * * * * In our opinion, the rule that the statute of limitations does not run against the state has no application to a case like the present, where the state, though a nominal party on the record, has no real interest in the litigation, but its name is used as a means of enforcing the rights of a third person, who alone will enjoy the benefits of a recovery."

According to the view we take of the law in the case before us, there never has been an execution of the trust, as in *Miller* v. *State*, *supra*. The corporations into which the trustees of the townships were formed, if ever, were made agents or instruments of the state for the administration of the trust assumed. No independent rights vested absolutely in them in the execution of the trust. *Dartmouth College* v. *Woodward*, 4 Wheat. 629. And another difference is, the state in this case brings the action in her own name by authority of an act of the general assembly.

The judgment of the circuit court is, therefore, reversed; and the cause is remanded with directions to the court to sustain the demurrer to the answer, and for further proceedings.

## SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY *v.* BEATTY.

63 f89 65 590

Opinion delivered October 17, 1896.

DANGEROUS PREMISES—LIABILITY FOR INJURY.—The fact that a telephone wire was fastened to a pier on the top of a building overlooking a street in such manner as to cause brick therein to be loosened by the action of wind and rain, or by such acts of persons or things as should have been anticipated, will not render the company which fastened the wire liable for an injury to a person in the street below, caused by the fall of a brick from such pier, unless the injury was due to the failure of the company to use due care in fastening the wire or in maintaining it in a safe condition. So, an instruction which makes the company's liability to depend upon the dangerous character of the fastening, without regard to the question of negligence in making or maintaining the fastening, is erroneous.

INSTRUCTION—USE OF HIGHWAY.—An instruction that if the street in which plaintiff was injured was used as a public highway plaintiff was rightfully therein was misleading, as the fact that one has a right to be on a highway does not relieve him from the duty of exercising care to avoid danger.

EVIDENCE—CITY ORDINANCE—A city ordinance prohibiting any telephone wire from being strung or located in such manner as to threaten danger to the life of any person is inadmissible in evidence in an action against a telephone company for personal injuries caused by the falling of a brick from a pier to which a telephone wire was attached, as the ordinance imposed no additional duty on the company, so far as it affected the issues in the case.

Appeal from Saline Circuit Court.

ALEXANDER M. DUFFIE, Judge.

*W. J. Terry* and *S. R. Cockrill* for appellant.

1. The evidence did not warrant the verdict. But granting that a brick struck plaintiff, is it not more probable that it was knocked off by persons crowding about the fire-wall, than by the guyed cleat? There are several theories that are as probable as that defendant

caused the brick to fall. And if they are equally probable, the proof fails. 57 Ark. 402. Defendant was authorized to stretch its wires as it did. Sand. & H. Dig. secs. 275–7–8. It was not an illegal act. Mark the distinction between doing a legal act in a reasonably careful manner, and doing an illegal act with the greatest care. Cooley on Torts, 69–70, and note 1; *ib.* p. *572. The liability of electric companies is the same as that of individuals or other companies lawfully using structures in or near the highway. It is not liable for remote injuries. The rule, *Causa proxima, non remota, spectatur*, applies here. Thompson, Electricity, sec. 72; 50 Ark. 387; Cooley, Torts, 69–70; 2 Thompson, Neg. p. 1087, sec. 4. For illustrations, see 37 N. E. 773; 4 Daly (N. Y.) 163; Cooley, Torts, p. *572–3; 44 Ga. 251; Ray's Neg. Personal, 110; 86 Pa. St. 153; 2 Thomps. Neg. 1090; 96 Mass. 211; 87 N. Y. 122; 1 Smith, Dam. sec. 29; 30 Iowa, 176; 105 U. S. 249; Whart. Neg. 95; 1 Sh. & Redf. Neg. sec. 35; 1 Smith, Neg. sec. 19; 30 Minn. 74; 57 Ark. 16; 53 Pa. St. 436; 104 *id.* 306; 7 Wall. 52; 160 Mass. 351; 26 C. P. Div. 369. The case "falls under the ordinary rule that when the defendant is charged with *negligence in the use of a structure* which has become defective, it is incumbent on plaintiff to prove that the defect came to the knowledge of defendant, or existed for such length of time that knowledge should be imputed." 64 Iowa, 762. In this case there was no proof of a defect.

2. The court's charge is erroneous. (1) The first instruction took from the jury all question as to plaintiff's contributory negligence. Thompson's Law of Electricity, sec. 73; Croswell, Law Relating to Electricity, sec. 254. (2) In the second the jury is told that "if defendant constructed anything, or permitted any construction used by it to become, unsafe or dangerous," it was guilty of negligence; and in the fourth the

jury is told that it was defendant's duty to keep the pier safe. Now, that is not the measure of defendant's duty. It was bound only to exercise reasonable care in the construction and maintenance of its lines. Croswell, Law Elec. sec. 234; *ib.* 236; 160 Mass. 351; 16 Ark. 308. The instructions are inconsistent, which is reversible error. 32 S. W. 500.

3. The fourth and sixth assume facts not in evidence, and are otherwise erroneous. The sixth leaves the jury to infer that if the brick had been loosened by defendant, although not otherwise insecure or liable to fall, defendant was liable for its fall, though it had been pushed or knocked off by persons leaning against or walking upon the wall. 4 Daly, *supra.*

4. There was no evidence to support an instruction allowing compensation for "outlays in nursing and medicine." 58 Ark. 198.

5. It was error to admit the city ordinance in evidence, and to charge the jury in reference to it. The ordinance was void. 45 Ark. 158–164; Bish. St. Cr. sec. 41; 1 Dill. Mun. Corp. secs. 319–322; Pet. C. C. 122; 1 Paine, 122; Lieber's Herm. 156; 63 Mich. 396; 26 Mich. 221; 49 Md. 217; Horr & Bemis, Mun. Ord. sec. 131. Even if the wires were strung so as to interfere with the work of the fire department, in violation of a valid ordinance, it would still have been necessary to prove that the breach of the ordinance was the proximate cause of the injury. 1 Sh. & Redf. Neg. sec. 27. The purpose of the ordinance was to protect property rights, and to guard the safety of firemen, and they alone can sue for injury. 69 Fed. 808, 814 (8 Ct. Ct. App.)

6. The court erred in refusing defendant's prayers numbered 7 to 13 inclusive. The thirteenth is sustained by 54 Ark. *supra.*

7. It was error to admit McKay's testimony as to conversation with plaintiff. 51 Ark. 509.

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

1. Upon the whole case the verdict is right, and must on new trial result in a verdict for plaintiff, with perhaps increased damages; therefore it should be affirmed upon the whole record, as appellee had no right to move for new trial, or to appeal on account of smallness of damages, and has not appealed. Sand. & H. Dig. sec. 5840; 44 Ark. 556; 18 *id.* 469.

2. The instructions were more favorable to defendant than it was entitled to, and the case was tried upon the low ground of negligence on the part of defendant, when it was entitled to be tried on the high ground that defendant had created a nuisance—set a dead-fall over the high way, and was absolutely responsible. 18 Minn. 324; 10 Am. Rep. 184; Whart. Neg. secs. 826-7-8; 59 Me. 94; Whart. Neg. sec. 831-2, 840-2; 6 Q. B. 759. The fall of the brick is some evidence of the cleats being improperly placed. Whart. Neg. secs. 841, 842; 4 Har. & C. 403.

3. When the natural consequence of the structure is that ice, snow or water falling on it injures adjacent property or travelers, etc., the owner is liable. Whart. Neg. sec. 843. When one erects a dangerous thing on the property of another, he must guard it, and the fall is *prima facie* evidence of negligence. 54 Ark. 209; 29 Ala. 302. When a thing, dangerous unless particularly guarded, is left unguarded, the party leaving it is responsible for damages to another thereby produced. Wharton, Neg. secs. 851–5, 861; 91 N. Y. 137; Elliott, Highways, p. 447, 74 N. Y. 266. Whether it was a nuisance *per se ab initio*, or became so by negligence, the defendant is liable. Wood, Nuisance, p. 129; 67 U. S. 299. For illustrations, see *Nelson* v. *New Bedford, etc.*, 108 Mass.; 1 Exch. 265; 3 H. L. Cas. 330; Wood, Nuisance,

p. 143; 47 Ga. 263; 2 N. Y. 159; Lloyd on Buildings, sec. 77; 51 Cal. 142; 45 Ind. 429; 11 Md. 1. Any act which unnecessarily incommodes the lawful use of a highway is a nuisance, and is actionable on behalf of one suffering special damages. Lloyd on Building, sec. 222, last clause; 50 N. Y. 679; 1 Exch. 265; 3 Hill, 531; 124 N. Y. 319; 148 Mass. 261; 40 Minn. 127.

4. That it was lawful to string its wires cuts no figure here. The state can never relieve itself of the duty of protecting its citizens, nor grant another the right to injure them, or immunity from liability for injuring them. No matter what the right of franchise, when an injury is done by posts, wires, etc., the corporation is liable in damages to the person injured. Foote & Everett, Law of Corp. 811, 1009 and notes, 1010, 552–3; Webb, Pollock on Torts, pp. 499, 500–1; 39 La. An. 551; 2 So. 395; 72 Cal. 180.

5. The fact that the firemen disturbed the wires does not relieve defendant. If one creates, or by negligence allows, a dangerous thing to obstruct or overhang a highway, he is responsible absolutely *ab initio* for all that can be foreseen as likely to happen. 16 L. R. A. 43; 41 La. An. 1041; 18 Minn. 324, and cases *supra*. The master is not excused for furnishing bad appliances to his servant, because the fellow servant precipitated the injury. McKinney, Fellow Servants, p. 84, sec. 31–2; 54 Ark. 292; 56 *id.* 132; 46 *id.* 207.

6. The old doctrine of "identification" is exploded (Webb's Pollock, p. 580), and the rule is that where two or more independent persons have between them caused damage, any or all are liable. *Ib.* 581–2; *ib.* 508; Elliott on Ways, p. 631; 38 Wis. 33; 10 Mass. 72; 5 Metc. (Mass.), 205; 52 Barb. (N. Y.), 390; 9 Pa. St. 345; 57 Fed. 901. Joint or concurrent wrong-doers may be sued jointly or separately. Webb's Pollock, pp. 230–1; 58 Ark. 655; 49 Fed. 209; 40 *id.* 631; 14 S. W. 291; 132

U. S. 601; Booth on St. Rys. sec. 363; 33 S. W. 426. See particularly 61 Ark. 381.

7. The duty of defendant in regard to its apparatus is clearly defined in 41 La. An. 1041. See 16 L. R. A. 43; 22 *id.* 762; 45 Ill. App. 484; 26 L. R. A. *Jackson* v. *Tel. Co.*; 54 Ark. 133; 54 Ark. 214; 35 N. E. 1127; 25 L. R. A. 552; 28 *id.* 596; 14 S. W. 863; 22 L. R. A. 635; 16 *id.* 545; 19 S. E. 344. See also as to injuries from objects overhanging streets. 1 Thomp. Neg. p. 333, and notes, pp. 343-4-6-7; 2 Dill. Mun. Corp. secs. 1013, 1032-4.

8. *Res ipsa loquitur.* The falling of a brick or wire on a public street is *prima facie* evidence of negligence. 57 Ark. 435; 54 *id.* 209; 61 *id.* 381; 28 L. R. A. 596.

9. There was no error in admitting McKay's testimony. 1 Gr. Ev. secs. 101, 102, 108.

10. The ordinance was valid. Horr & Bemis, Mun. Ord. secs. 15, 217, 229. The power is expressly granted. Sand. & H. Dig., secs. 5132-3, 5146, 5204, 5208. It was sufficient, definite and express, and 45 Ark. 158 does not apply. In cases of doubt such construction will be given as will carry out the object of legislation. Black on Int. Laws, p. 93, 106; 59 N. Y. 53; 9 Wheat. 380; 7 Col. 285; 20 Ala. 54; 102 Pa. St. 190; 22 Pick. 511; Endlich, Const. Stat., secs. 178, 245; *ib.* 247-8. For illustrations, see Horr & Bemis, Mun. Ord. sec. 78; 44 Upper Canada Q. B. 641.

11. The court properly refused defendant's instructions on the subject of contributory negligence. Beach, Cont. Neg. p. 17; *ib.* p. 14, 15, 37; 23 Pa. St. 147; 62 Am. Dec. 323; 2 Ld. Raym. 989; 1 Smith, Lead. Cas. (8 Ed.), 369; 27 Ga. 113, 358; 24 *id.* 75; 17 *id.* 136; Whittaker, Smith on Neg. 59, note; *ib.* 111, 249. Parties rightfully on a highway are not guilty of contributory negligence by being there.

12. Review the objections to instructions given, citing 49 Ark. 182, 423; Horr & Bemis, Mun. Ord. secs. 254–5; 32 S. W. 500; Gr. Ev. sec. 5; 26 L. R. A. *Jackson* v. *Tel. Co.*; 54 Ark. 133; and contend that they were more favorable to defendant than they should have been.

BATTLE, J. James Beatty brought this action against the Southwestern Telegraph & Telephone Company, and stated in his complaint that the defendant had negligently constructed its wire line from Rock street, in Little Rock, in this state, to the corner of the roof of Carl & Tobey building, in the same city, "and had loosely and carelessly nailed, with only two nails, a piece of wood, two by four inches in size and about two feet long, to an ornamental projection of brick above said roof, and negligently placed said timber so as to project one foot beyond the edge of said brick, where it stood loose and unsecured, making a lever by which the wind could prize the said brick projection loose; which brick projection was about thirty feet above the pavement, and was about twelve inches wide by about sixteen inches high above said wall, which had been built with brick laid in common lime mortar, and stood exposed to abrasions from the weather and wind acting upon said timber; that defendant, by nailing said timber to said projection, weakened and loosened the brickwork thereon by driving said nails between the bricks and mortar, permitted it to become loose and insecure, and permitted said timber to project beyond said brick, and constructed and allowed the wire line therefrom to stretch diagonally across the said roof and over the street, where it was fixed to poles, when a slight pull on said wires would throw the bricks from said projection, and cause them to fall in the street below,—said brick projection on said wall standing perpendicular above said pavement below." The complaint further alleges that on the

night of the 29th of April, 1892, while the plaintiff was walking on the pavement below, a brick from said projection on said building, so loosened by the carelessness and negligence of the defendant, fell upon the head of the plaintiff, breaking his skull, and rendering him a cripple for life. It further alleged that he had spent large sums of money in trying to save his life and effect a cure, that he had earned from $100 to $125 per month prior to said accident, and that said accident had greatly impaired his capacity to earn money, and concluded by laying his damages at $20,000.

The defendant answered, and denied all the acts or omissions of negligence attributed to it in the complaint; and alleged that its wires and lines were constructed in a safe and secure manner, and that the cause of the accident arose from no fault or neglect on its part.

The following facts are shown by the evidence adduced at the trial: The defendant's telephone wire extended diagonally over the roof of the Carl & Tobey building, which fronts on Markham street, in Little Rock. "The wire was brought in a southerly direction from Rock street, over the Geyer & Adams building, which was on the corner of Markham and Rock streets, and joined the Carl & Tobey building, running diagonally over the roof of the two houses to the front of the Carl & Tobey building at its northeast corner. At the northeast corner of the roof was a pier which extended about nine inches above the fire-wall at the front of the house. The defendant extended its wire over this pier, down the front wall of the building, in order to reach the office of Carl & Tobey, which was down stairs, in the northeast corner of the building, under the pier. It had no wire upon the house except the two used by Carl & Tobey. The wires were carried over the pier by means of a wooden cleat. The cleat rested on the top of the pier. The wires were attached to insulators,

which were attached to the cleat. The wires extending down the front were drawn taut, and fastened in the office of Carl & Tobey; those extending from the other end of the cleat over the roof were also drawn taut, and fastened to a cleat on the fire-wall between the two buildings, and extended to the west wall of Geyer & Adams building on Rock street, where it was again held by a cleat, and thence to a post on Rock street, where it was fastened. It was a short span from the pier to the cleat on the dividing fire-wall between the Carl & Tobey and Geyer & Adams buildings. The cleat on the pier was held in place by three guy-wires, one was fastened to a thirty-penny wire spike which was driven into the wall of the Concordia hall, which rose one story higher than the pier, just a few feet to the east, to prevent the wires, which extended in a southwesterly direction over the roof, from drawing the cleat in that direction; the other two guys were fastened to nails driven in the fire-wall, near the tin roof, immediately beneath the cleat, to prevent the wires which extended down the front of the house into the office from drawing it to the front. The flat surface of the cleat was thus fastened across the top of the pier. * * * * Just three months after the defendant had thus arranged its wires and cleat, a fire occurred at night in a cotton warehouse in the same block with the buildings before referred to, but across the alley in the rear, or to the south of them." Persons gathered on the roof of the Geyer & Adams building, and, one witness says, were also on the roof of the Carl & Tobey house. The plaintiff was on the pavement in front of the Carl & Tobey building, near its east wall, when a missile of some kind struck him on the head and inflicted the injury of which he complains. Evidence was adduced to prove that this injury was caused by the negligence of the defendant, and also to prove that it was not.

In the course of the trial an ordinance of the council of the city of Little Rock was read as evidence, over the objection of the defendant, which provides, among other things, as follows: "No telegraph, telephone, or electric light wire, or other electrical conductor, shall be strung or located in such manner, place, or position, or in such proximity to any other wire or other object, as to threaten risk or danger to the life, property, or person of any one in this city, or to become the probable cause or occasion of accident to any such. * * * * All wires or electrical conductors used or employed in this city shall be so located, placed and strung as not to unnecessarily or unduly interfere with or obstruct the work or operations of the fire department, or the members thereof, in the extinguishment of fires, or the escape of persons from burning buildings, or the safety of firemen while engaged in the line of duty, nor shall such wires or conductors be so placed or strung as to injure or interfere with, or threaten injury to or interfere with, the property or property rights of others, and whoever shall offend against these or any other requirements or provisions of this ordinance shall be deemed guilty of a misdemeanor."

Among others, the court gave the following instructions to the jury over the objections of the defendant:

"First. If you find from the evidence that the street in front of Carl & Tobey's building was used by the public as a highway, and was recognized by the city as such, then you will find that such street was a highway, and that plaintiff was rightfully therein.

"Second. If you believe from the evidence that defendant constructed anything, or permitted any construction used by it to become, dangerous and unsafe to persons passing on such highway, then such construction became an act of negligence, and defendant would be responsible to plaintiff if injured thereby; provided, such

negligence was the natural and proximate cause of plaintiff's injury."

And four others which were substantially as follows: That it was the duty of the defendant, in fastening its wires upon a brick pier near to or over a street or sidewalk frequented by the public, to do so in such a manner as will not loosen the brick, or cause them to become loose and fall into the street, and to take such precautions in erecting and maintaining such fastenings and other structures and appliances as to make them secure against such ravages of winds and weather as may be expected in the regular course of the seasons, or such other acts of persons or things that may in the natural course of events cause injury to the public, and that might reasonably have been anticipated, and to properly guard and keep the same in a safe condition; and that defendant was liable to plaintiff for any injury which he suffered by reason of the failure to discharge any of these duties.

And another in the following words: "The court instructs the jury that the ordinance introduced by plaintiff, as passed by the city council of the city of Little Rock, October 10, 1888, is only to be considered by the jury in determining the question as to whether the defendant had strung or located their wires in a reasonably safe manner, and so as to make them reasonably safe in the protection of property rights in extinguishing or preventing fires, and so as not to unduly or unnecessarily interfere with or to obstruct the work or operation of the fire department while engaged in the line of their duty."

The following, among other instructions, were given to the jury by the court, at the instance of the defendant:

"The jury are instructed that, if the defendant used ordinary care in stringing, locating and maintaining

its wire and arm on or over the buildings and wall in question, they will find for the defendant."

"The jury is instructed that it is the duty of the owner of the building to keep the walls in repair, and if they find that the plaintiff was injured by a brick falling therefrom from the want of proper mortar or cement to hold it in place, and not from any act of the defendant, they will find for the defendant."

The jury returned a verdict in favor of the plaintiff for $9,000, and the court rendered judgment accordingly. The defendant, after filing a motion for a new trial, which was overruled, appealed.

Liability for dangerous premises.

Appellee insists that the instructions to which appellant objected were more favorable to it than they should have been, and that, therefore, it was not prejudiced by them. His contention is that, if the wires and fastenings of appellant were dangerous, or became so, or if they rendered the pier to which they were attached dangerous, and by means thereof appellee received the injury of which he complains, the appellant is liable to him for the damages occasioned thereby, regardless of unskillfulness or negligence in the stretching and fastening of the same, or in the manner in which they were maintained, and without regard to the right to string the wires in the place they were, and without regard to the question as to the person who caused the injury by means of their instrumentality. Is this contention correct?

No one has the free and unlimited right to use his property in any manner he may desire. The exercise of such right by every one is impossible. The conflicting interests of individuals prevent it. Every one, in becoming a member of society, in order to conserve peace and harmony among its members, concedes to the law-making power the right to regulate the manner and the extent of the exercise of such rights. In the exercise of

the right so conceded, the law requires every one to so use his property as not to injure another, and for the enforcement of this requirement in some cases forbids the exercise of certain property rights in a particular manner, and in some permit it on condition that the person exercising the right shall use ordinary care to avoid injury to others. Hence the liability for damages in every case grows out of the violation of a duty of the injuring to the injured party, and not out of the dangerous character of the act which caused the damages. The law may prohibit the act because it is dangerous, and out of this prohibition the duty is created upon the violation of which the right of action for damages depends. It would be unjust and oppressive to exact of any one the payment of damages to another when he has violated no duty which he owed to him—when he has done him no wrong. For this reason a legal duty is an essential element of negligence, and there can be no negligence where there is no duty.

A few examples will serve to explain what we have said. The old common law of England made it the duty of every man to keep his cattle within the limits of his own possessions. If he failed to keep them up, he failed to discharge his duty, and was liable to the owner of the premises upon which they estrayed for damages done; and this liability did not depend upon any neglect of their owner in failing to keep them up. Here he was required to keep them up, because of their propensities to do mischief when running at large, in order to protect others. For the same reason the owner of any other domestic animal which is known by him to be vicious and accustomed to do hurt is required to keep him secure, and, failing to discharge this duty, is responsible for damages done while he is at large, without regard to the negligence of the owner.

"It is said in an early case," says Judge Cooley, "that where one has filthy deposits on his premises, he whose dirt it is must keep it that it may not trespass. Therefore, if filthy matter from a privy or other place of deposit percolates through the soil of the adjacent premises, or breaks through into the neighbor's cellar, or finds its ways into his well, this is a nuisance. Nor where this is the natural result of the deposit is the question of liability one depending on degrees of care to prevent it. Says Foster, J.: 'To suffer filthy water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well or cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below, is of itself an actionable tort. Under such circumstances the reasonable precaution which the law requires is effectually to exclude the filth from the neighbor's land; and not to do so is of itself negligence.' Only sudden and unavoidable accident which could not have been foreseen by due care could be an excuse in such a case." Cooley on Torts, p. 673.

But the rule is different as to reservoirs in which water is collected for useful and ornamental purposes. As to them, Judge Cooley says: "It is lawful to gather water on one's premises for useful and ornamental purposes, subject to the obligation to construct reservoirs with sufficient strength to retain the water under all contingencies which can reasonably be anticipated, and afterwards to preserve and guard it with due care. For any negligence, either in construction or in subsequent attention, from which injury results, parties maintaining such reservoirs must be responsible. We say nothing now of injuries arising from the flooding of lands by reservoirs, which, by raising the water, must and do have that effect, but confining our attention to the case of

reservoirs which cause injuries to the lower proprietors only as they break away. The American decisions seem to plant the liability on the ground of negligence, and the party constructing or maintaining the reservoir is held liable, not at all events, but as he might be if he had negligently constructed a house which fell down, or invited another into a dangerous place." After reviewing English authorities upon this subject, he says: "A comparison of these cases seems to show the English rule to be as follows: Whoever gathers water into a reservoir, where its escape would be injurious to others, must, at his peril, make sure that the reservoir is sufficient to retain the water which is gathered into it. But, if thus sufficient in construction, the liability for the subsequent escape of the water becomes a question of negligence. The proprietor is not liable if the water escapes because of the wrongful act of a third party, or from *vis major*, or from any other cause consistent with the observance of due and reasonable care by him. Due care must of course be a degree of care proportioned to the danger of injury from the escape; but it is not very clear that the English rule, as thus explained, differs from that of this country." Cooley on Torts, (2d Ed.) pp. 676, 680; *Fletcher* v. *Rylands*, L. R. 1 Exch. 265; S. C., L. R. 3 H. L. 330; *Nichols* v. *Marsland*, L. R. 10 Exch. 255; S. C. 1 Thompson on Negligence, p. 88; *Box* v. *Jubb*, 1 Thompson, Negligence, p. 90; Thompson, Electricity, secs. 64–67.

"One who erects on his own premises a steam boiler, having in it no defect known to him, or which he might have discovered by the exercise of ordinary care and skill, that is to say, by the application of known tests, and who operates it with care and skill, is not answerable to an adjacent proprietor for damages caused by its explosion." So a corporation operating a railway by the dangerous agency of steam is not responsible for

injuries caused thereby, unless they be the result of negligence of the owner or its agents. In both these cases the owner is not denied the right to use his property, and is limited only in the manner in which it is used, although to do so was dangerous to others.

In *Railway Company* v. *Hopkins*, 54 Ark. 209, the court in effect held that one has a right to maintain a heavy sign overhanging a sidewalk in a much frequented part of a city, provided he used ordinary care in keeping it securely fastened. The court said: "The defendant was under a duty to the public to exercise common prudence to place and keep its sign in such position as not to endanger the safety of pedestrians in the street."

In the *City Electric Street Railway Company* v. *Conery*, 61 Ark. 381, this court said: "Electric Companies are bound to use 'reasonable care in the construction and maintenance of their lines and apparatus,—that is, such care as a reasonable man would use under the circumstances,—and will be responsible for any conduct falling short of this standard.' This care varies with the danger which will be incurred by negligence. In cases were the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death, or most serious accidents, the highest degree of care is required. This is especially true of electric railway wires suspended over the streets of populous cities or towns. Here the danger is great, and the care exercised must be commensurate with it. But this duty does not make them insurers against accidents; for they are not responsible for accidents which a reasonable man in the exercise of the greatest prudence would not, under the circumstances, have guarded against."

In this state any person, or corporation organized for the purpose may construct, operate, and maintain telephone lines along and over the streets of the cities

and towns of this state, provided they do not obstruct the same. This right belongs to that class in the exercise of which due care and skill is enjoined. In the exercise of it, it was the duty of appellant to use such skill and care in selecting or constructing its piers and poles, and in suspending and fastening its wires and cleats upon the same, and in making, maintaining, and keeping them, the poles, piers, wires, cleats and fastenings, secure against such wind, weather, and acts of persons or things as might reasonably be anticipated, and in preventing them from becoming dangerous to pedestrians or other persons using the streets, as a prudent and reasonable man, mindful of his duties and desirous of discharging them, would use under the circumstances, which care and skill should be measured by the rule laid down in the case last cited. For a failure to discharge this duty it is responsible to such parties as may be injured by its non-performance. *Ward* v. *Atlantic, etc., Telegraph Co.*, 71 N. Y. 81. Its liability for damages is dependent only on such condition.

According to the foregoing test, are the instructions objected to by appellant correct?

The second instruction makes the dangerous character of the wires and their fastenings the sole test of liability. The same defect exists in the instructions numbered fourth, sixth and eighth. In the sixth the court told the jury that if they "believed from the evidence that the defendant fastened its wires upon a pier over the street in such a manner as to loosen the brick, or cause them to be loosened by the natural action of the wind or rain, and that the brick were so loosened and liable to fall upon any one in the street below, and that said street was a public highway, and that such fastenings rendered travel on the highway less secure or more hazardous, then such fastenings would be negligence on the part of defendant. And if you further

find that plaintiff was injured by a brick or timber falling from said pier, caused by the manner of fastening the same by defendant, you must find for the plaintiff, even though you may find that persons upon the roof of the building, engaged in extinguishing a fire or protecting the building from fire, may have contributed in precipitating the brick to the pavement below, provided you further find that such actions of persons on said roof might reasonably have been anticipated." The fourth and eighth, taken as one instruction, are substantially a repetition of the sixth. According to all of them, it was the duty of the jury to return a verdict without regard to the care, skill and diligence exercised by appellant in suspending and fastening its wires, and in maintaining its structures or appliances in a safe condition. The instructions given at the instance of appellant upon the same subject do not explain, but contradict, them; and the error in the instructions objected to remained uncorrected.

Instruction as to use of highway disapproved.

The instruction numbered "first," while it may not have been prejudicial, was not proper. The fact that a street is a highway, and the appellee had the right to be in it, did not relieve him of the duty to exercise care to avoid danger. If he was guilty of "conduct which a reasonable and prudent man would not have adopted under the circumstances, and this conduct contributed directly to his injury," he was not entitled to recover.

Admissibility of ordinance in evidence.

The ordinance passed by the city council of Little Rock did not impose upon appellant any additional duty, so far as it affected the issues in this case, did not aid the jury, was unnecessary, and should not have been read as evidence.

As to the other instructions given or refused by the court, it is sufficient to say, instructions as to damages should be confined to the evidence, and that the rule as to the duty of the jury, when the evidence shows that

one of two theories is true, according to one of which the plaintiff is not entitled to recover, and one of them is as probable as the other, is correctly laid down in *Railway Company* v. *Henderson*, 57 Ark. 402.

For the errors contained in the instructions objected to and numbered "second," "fourth," "sixth," and "eighth," the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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## DRAFFIN *v.* SMITH.

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Opinion delivered October 17, 1896.

EXEMPTION—JUDGMENT.—A judgment for damages against the plaintiffs in an attachment suit is "personal property," within Const. 1874, art. 9, sec. 2, and may be claimed as exempt from execution by the defendant; and when so claimed by him, such judgment cannot be set off against a judgment subsequently rendered in plaintiff's favor against defendant.

Appeal from Cross Circuit Court.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

This case was tried upon the following state of facts: The plaintiffs, Smith, Graham & Jones brought suit on a promissory note for the sum of $232.50, which was not due, and sued out a writ of attachment, which was levied on the property of the defendant. On the calling of the cause for trial in the Cross circuit court, at the spring term, 1894, the note then being past due, and the defendant refusing to confess judgment on the note, the plaintiffs took a voluntary non-suit, and, upon motion of the defendant, a jury was impaneled to assess the damages which defendant had sustained by reason of the attachment.

Damages were assessed as follows:

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|---|---|
| Value of defendant's corn attached converted to plaintiff's use | $ 75 00 |
| Value of use of live stock attached | 45 00 |
| Damages to live stock | 15 00 |
| Total | $135 00 |

And judgment was so entered against the plaintiffs. After the rendition of the above judgment, and at the same term of the court, the plaintiffs brought a suit in equity, and obtained a temporary injunction, enjoining the defendant from the collection of his judgment for damages.

After plaintiffs had obtained judgment on their note for the sum of $232.50 at the following (fall) term, 1894, they moved the court to set off the judgment for $135.00 damages in favor of defendant against plaintiffs on their judgment for the sum of $232.50 obtained on their note against defendant. Whereupon the defendant filed his schedule of all his property, and his claim of the same as exempt from the process of the court for the collection of debt by contract, and included his judgment for $135.00 damages as a part of his property, and claimed the same as exempt. The defendant was a resident of the state, a married man, and the head of a family, and he did not own property, real and personal, including moneys, rights, credits, and choses in action, including the judgment claimed as exempt, of the value of $500.00. Said schedule was in due form, and set forth all facts necessary to entitle him to hold his exemptions of $500.00, and was properly verified by affidavit. But his right to hold his said judgment as exempt was denied by said plaintiffs, plaintiffs expressly waiving notice of filing schedule and claim in exemption.

The court refused to allow the defendant to hold his judgment for damages as exempt, and ordered the

judgment to be set off against the plaintiff's judgment on the note. Exception was duly saved; motion for new trial overruled, and defendant appeals.

*O. N. Killough* for appellant.

1. The motion to set off should have been denied. 47 Ark. 468; 74 N. C. 51; Thompson on Homstead & Exemptions, 892–4.

2. Appellant was entitled to claim his judgment as exempt. Const. Art. 9, sec. 2; Thompson, Homestead & Exemptions, secs. 892–4; 93 Am. Dec. 5, 78; 31 Ark. 657.

3. The cases in 55 Ark. 622 and 34 *id.* 707, are not applicable. In these cases no claim of exemption was interposed.

*N. W. Norton* for appellee.

1. A judgment for one party may be withheld until the other party, by due diligence, may obtain his judgment, so that one may be set off against the other. Sand. & H. Dig. sec. 5862; 22 Am. & Eng. Enc. Law, p. 445.

2. The cases of 55 Ark. 622 and 34 Ark. 707–19 would seem to be conclusive of this case. See 17 L. R. A. 466, and cases cited.

HUGHES, J., (after stating the facts.) Section two of article nine of the constitution provides that: "The personal property of any resident of this state, who is married or the head of a family, in specific articles to be selected by such resident, not exceeding in value the sum of five hundred dollars, in addition to his or her wearing apparel, and that of his or her family, shall be exempt from seizure on attachment, or sale on execution or other process from any court, on debt by contract." Exemption statutes, being intended to prevent families from being deprived of the means of procuring the necessaries

of life, are entitled to be construed liberally, with a view to effect the benign purposes in their enactment.

If the plaintiffs (the appellees) had sought to enforce their judgment against the property of the defendant by a *fi. fa.* execution, the defendant would have been entitled to claim $500 in value of his personal property exempt from execution, including in his claim his judgment against the plaintiffs for the value of property wrongfully taken from him by the plaintiff.

If the property was exempt, the compensation for its loss, which represented the property, was also exempt. *Atkinson* v. *Pittman*, 47 Ark. 464; *Curlee* v. *Thomas*, 74 N. C. 51.

The appellant's judgment, being a chose in action, was personal property, and, though no execution was issued, an effort was made to have it subjected to his debts; and if, including this judgment, his personal property was of the value of not more than $500, and he was a married man, or the head of a family, and a resident of the state, he is entitled to claim it as exempt from execution, from seizure on attachment or other process from any court, on debt by contract.

There was error in the judgment of the court in refusing to allow appellant to claim his judgment as exempt, and ordering it set off against the judgment of the appellees, for which the judgment is reversed, and the cause is remanded, with directions to deny plaintiff's motion to set off and allow defendant the exemption claimed.

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# AMES IRON WORKS *v.* KALAMAZOO PULLEY COMPANY.

Opinion delivered October 17, 1896.

SALE—BONA FIDE PURCHASER.—The satisfaction of a judgment as a consideration for the transfer of goods fraudulently obtained will not of itself constitute the *bona fide* transferee an innocent purchaser for value, as against the one from whom the goods were obtained.

RES GESTÆ—DECLARATION OF AGENT.—A statement by the agent of a seller of goods purchased with the fraudulent intention not to pay therefor, made while representing his principal in the collection of the debt, that the latter had sold the acceptances given by the purchaser, and was liable thereon only as indorser, is inadmissible against the principal as part of the *res gestæ*, in an action of replevin by such principal against one to whom the goods have been transferred by such fraudulent purchaser.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

This was an action of replevin brought by the Kalamazoo Pulley Company against the Ames Iron Works for the possession of a lot of pulleys which had been sold by the Kalamazoo Pulley Company to Thomas W. Baird, and by him sold to the Ames Iron Works.

The evidence shows that in May, 1891, Thomas W. Baird bought of the Kalamazoo Pulley Company, through their agent C. S. Kelsey, a lot of pulleys, which were shipped to Memphis, Tenn. Baird in payment gave his acceptances maturing January 1, 1892. Being largely indebted to the Ames Iron Works, Baird in June, 1891, confessed judgment in their favor for $2,511.35. Shortly after this he executed a bill of sale to the Ames Iron Works for the pulleys in Memphis in consideration of the satisfaction of the judgment to the extent of $1,200. The Ames Iron Works immediately took possession of the pulleys, and brought them to Little Rock,

where they were replevied by the appellee, upon the theory that Baird had purchased them with intent not to pay for them.

The defendant offered to prove by C. P. Wiggins, agent of the Ames Iron Works, that Mr. Kelsey, the agent of the plaintiff, stated to him, while he was in Little Rock representing said plaintiff in the collection of said debt, before the pulleys were replevied, that the said plaintiffs had sold the acceptances given by Baird to said company for the purchase money of the pulleys, and was only liable on the same as indorsers. Upon the objection of the counsel for the plaintiff, the evidence was rejected, to which ruling of the court the defendant excepted at the time.

The court refused the following declarations of law asked by the defendant, to which refusals exceptions were properly saved:

2. "If you find that the defendant, the Ames Iron Works, purchased the property in controversy from said Baird in good faith, and without any knowledge of any fraud on the part of Baird in the purchase of said goods, and as a consideration therefor satisfied, in whole or in part, a pre-existing debt to the said defendant from Baird, such constituted defendant a *bona fide* purchaser for a valuable consideration, and you will find for defendant."

3. "If you find from the evidence that the defendant, the Ames Iron Works, purchased the property in controversy in good faith and without any knowledge of any fraud on the part of Baird in the purchase of said goods from Thomas W. Baird, and as a consideration therefor satisfied in whole or in part a judgment held by said defendant against said Baird upon the margin of the record at the time of the purchase, such constituted defendant a *bona fide* purchaser for a valuable consideration, and you will find for the defendant."

The jury found for plaintiff. Defendant moved for a new trial on the ground that the court erred in refusing to give the second and third instructions asked by it, and in refusing to permit the witness Wiggins to testify as to the conversation had with Mr. Kelsey. The motion was overruled, and defendant appealed.

*S. R. Cockrill* and *Ashley Cockrill* for appellant.

1. The declarations made by the agent of appellee to the agent of appellant were binding upon the principal, and should have been admitted as evidence. 59 Ark. 251; 19 Ill. App. 620; 37 Ark. 52; 29 *id.* 512; Mechem, Agency, p. 714; Gr. Ev. sec. 113, 114; Story on Agency, secs. 134, 137; 2 Dutch. (N. J.), 541.

2. The court erred in rejecting appellant's prayers for instructions. The satisfaction of an antecedent debt as a consideration for the transfer of chattels would constitute the vendee a purchaser for value. 55 Ark. 45, 47; 2 Pom. Eq. Jur. sec. 749; 1 Beach, Eq. Jur. sec. 393; 42 Ill. 28; 65 *id.* 344; 81 *id.* 312; 75 *id.* 359; 3 Ill. App. 447; 19 *id.* 620; 16 Wis. 689; 17 *id.* 369; 52 Miss. 239; 26 *id.* 567; 43 *id.* 349; 9 Kas. 26; 51 Ala. 220; 8 *id.* 866; 21 Ind. 139; 5 *id.* 396; 75 Cal. 554; 74 *id.* 444; 44 *id.* 335; 65 *id.* 158; 64 Md. 584; 38 *id.* 270; 44 *id.* 111; 3 Md. Ch. Dec. 167; 12 Lea (Tenn.), 684; 42 Mo. App. 110; 29 *id.* 454; 112 Mo. 502; 64 Mich. 439; 14 *id.* 514; 13 *id.* 533; 5 *id.* 459; 1 Doug. (Mich.), 413; 7 B. Mon. (Ky.), 95; 45 Me. 174. Thirteen states hold firmly to this rule that the extinguishment of a debt is a valuable consideration. This rule has been recognized in this state. 27 Ark. 557; 31 *id.* 88; 60 *id.* 160. The rule is well settled as to commercial paper. 13 Ark. 150; 48 *id.* 460; 30 *id.* 684. See 42 Ill. 28; 5 Ind. 396; 15 *id.* 14; 16 Wis. 689; 45 Me. 174; 112 Mo. 511. It is also settled in this state that where a debtor transfers property to his creditor for a pre-existing debt, the

debtor's fraud will not avoid the transaction unless the creditor participated in it. 18 Ark. 23; *ib.* 172; 20 *id.* 325. The satisfaction of a judgment is "the surrender or cancellation of a written security by the creditor," within the meaning of 2 Pom. Eq. Jur. sec. 749, *supra.*

*W. E. Atkinson*, for appellee.

1. The declarations were not admissible. They were no part of the *res gestæ.* It must appear that the agent was executing the authority conferred on him when the statements were made. 1 Rice, Ev. sec. 230, p. 445.

2. The court properly rejected appellant's prayers, even if the law were properly stated therein. Ames was put on inquiry as to Baird's title by the manner of his dealing with him. If the facts be true, Ames could not be an innocent purchaser. 8 Am. & Eng. Enc. Law, p. 841 (*b*), and notes.

3. But they are not the law. Reviews the authorities cited by appellant by states, and contends that in only two or three states was the question squarely presented, and in each case upon a line of authority rejected by the courts of this state. See the following: 64 N. H. 59; 6 Atl. 201; 39 Kas. 674; 18 Pac. 926; 23 Cal. 359; 13 Wend. 28; 58 N. Y. 73; 46 Oh. St. 355; 28 Am. Dec. 482; 18 Md. 496; 42 Miss. 99; 2 Pom. Eq. Jur. 4, 148; 1 Beach, Mod. Eq. Jur. 4391; 8 Am. & Eng. Enc. Law, p. 842, par. C.; 21 *id.* p. 574, note 5; Tiedeman, Sales, p. 533; Newmark, Sales, sec. 205, p. 297; 15 Am. Law Rev. 388; 83 Am. Dec. 122 and notes; 33 *id.* 704 and notes; 25 *id.* 613 and notes; 27 Ark. 557; 31 *id.* 85; 55 *id.* 45.

Who is a *bona fide* purchaser?

WOOD, J. 1. The satisfaction of a pre-existing debt as a consideration for the transfer of goods fraudulently obtained will not of itself constitute the *bona fide* transferee an innocent purchaser for value, as against

the one from whom they were obtained by fraud. *Eaton* v. *Davidson*, 46 Ohio St. 355; 1 Beach, Mod. Eq. Jur. sec. 391, note; *Sleeper* v. *Davis*, 64 N. H. 59; *Henderson* v. *Gibbs*, 39 Kas. 679.

The reason of the rule, says Chancellor Walworth, is "that a purchaser of the legal title, who receives his conveyance merely in consideration of a prior indebtedness, is not entitled to protection, because he has lost nothing by the purchase." *Padgett* v. *Lawrence*, 10 Paige, Ch. 180. He has parted with no new consideration, has given up no security or evidence of indebtedness, nor in any other manner changed his legal status, to his detriment, which is the real test.

The mere crediting the $1,200.00, the purchase price of the pulleys, on the judgment of appellant against Baird for $2,511.35 operated as nothing. There was no cancellation or surrender of any written security in this, for, when appellee rescinded the sale, and reclaimed its goods on account of the fraud of Baird, the consideration for the credit on the judgment failed, and appellant, as to this, and its debts against Baird, was left *in statu quo*. *Eaton* v. *Davidson*, *supra; Sargent* v. *Sturm*, 23 Cal. 359, 83 Am. Dec. 118; *Piper* v. *Elwood*, 4 Denio, 165; *Adams* v. *Smith*, 5 Cow. 280. At least, this transaction alone does not show that appellant's position was changed for the worse. Unless this is shown, the consideration of a pre-existing debt, while good between the parties, will not bring the purchaser within the rule which protects him as a purchaser for value against one having superior equities.

A different rule prevails as to the innocent holder of commercial paper taken in payment of a pre-existing debt. He is protected as a purchaser for value. *Bertrand* v. *Barkman*, 13 Ark. 150; *Harrell* v. *Tenant*, 30 *id.* 684; *Winship* v. *Merchants Nat. Bank*, 48 *id.* 460, and authorities cited.

We are cited to cases in Illinois and Wisconsin, which hold that if the rule as just announced be true as to negotiable papers, "*a fortiori*, is it true also of goods and chattels merely." *Non sequitur*. The reason that the satisfaction of a pre-existing debt is regarded as a valuable consideration for the transfer of commercial paper, so as to bring its holder within the rule, and is not so regarded as to goods corporeal merely, is not because of any difference in the consideration itself, for there is no difference. The distinction grows out of the difference in the character or quality of the thing transferred in its relation to trade and commerce. The necessities of the commercial world, says Judge Kent, "require that bills of exchange and promissory notes should possess some of the attributes of money and exchangeable value; and, to clothe them with these attributes and to give parties confidence in their reception, it is necessary to protect them in the hands of a holder for value from defenses growing out of the dealings of the prior parties." Kent's Com. 79; *Bertrand* v. *Barkman*, 13 Ark., *supra*. It is an "arbitrary rule of commercial policy" which makes the transfer of negotiable instruments in consideration of an antecedent debt good as against the prior equities of the defrauded owner. And while this is the rule established by the great weight of authority, and so decided by our own court (see cases *supra*), yet there is very high authority to the contrary. *Comstock* v. *Hier*, 73 N. Y. 269; *McBride* v. *Farmers' Bank*, 26 N. Y. 450; *Weaver* v. *Barden*, 49 N. Y. 286; *Webster* v. *Howe Machine Co.*, 54 Conn. 394 (where New York authorities are reviewed); *Coddington* v. *Bay*, 20 Johns. 637; *Stalker* v. *McDonald*, 6 Hill, 93.

The rule obtains as to commercial paper only by reason of the necessity for facilitating trade by promoting the most liberal circulation of such paper. There can be no reason for extending the rule to goods

merely, which do not perform the functions of a circulating medium, and where the necessity mentioned above does not exist. Certain dicta in other cases, where this question was not involved, have encouraged counsel to say that the rule they contend for "has been expressly recognized by this court," citing *Johnson* v. *Graves*, 27 Ark. 557; *Gerson* v. *Pool*, 31 *id.* 88; *Shibley etc. Grocery Co.* v. *Ferguson*, 60 *id.* 160. But the question under consideration is now for the first time squarely presented, and we conclude that the doctrine announced in the beginning of this opinion is more in accord with reason and justice, and is supported by abundant authority. *Root* v. *French*, 13 Wend. 570; *Johnson* v. *Peck*, 1 Woodb. & M. 334; *Barnard* v. *Campbell*, 58 N. Y. 73; *Beavers* v. *Lane*, 6 Duer, 232; *Sargent* v. *Sturm*, 23 Cal. 359; S. C. 83 Am. Dec. 118, note; Tiedeman, Sales, p. 533; Newmark, Sales, sec. 205; 8 Am. & Eng. Enc. Law, p. 842, note 12; 2 Pom. Eq. Jur. sec. 492. Compare *Jetton* v. *Tobey*, 62 Ark. 84.

When declarations of agent inadmissible.

2. The alleged statements of the agent of appellee were no part of the *res gestæ*, and were properly excluded. The only authoritative act of the agent "in looking after the interest of appellee," as related to the appellant, was to demand of it the possession of the property in controversy. Appellant owed appellee nothing, and, not being an innocent purchaser for value, was in no position to resist the rescission of the fraudulent contract of sale between Baird and appellee. It is nowhere shown that the alleged admissions of the agent were made while he was in the performance of an act of agency. "It is only because they are verbal acts, and part of the *res gestæ*, that they are admissible at all." 1 Greenl. Ev. sec. 113; *Byers* v. *Fowler*, 14 Ark. 105; *Ferguson* v. *Edrington*, 49 *id.* 207; 1 Rice, Ev. sec. 230. That they were made "while the agent was in Little Rock representing appellee in the collection of its

debt" from Baird, "and before the pulleys were replevied," does not show that they were connected in time or relation to the business of recovering a lot of pulleys from appellant.

Judgment affirmed.

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

Opinion delivered October 17, 1896.

EMINENT DOMAIN—AUTHORITY OF RAILROAD TO BUILD BRANCH—Where the board of directors of a railroad company resolved to build a branch line between designated points, and also to build a second branch line to connect with the first, and that the president of the company was authorized to put under construction and make the necessary contracts for such portions of the foregoing roads as his judgment might approve, the president is authorized to construct the latter branch before the former, if he deems best, so as to authorize condemnation proceedings for that purpose.

TRIAL—DIRECTING VERDICT.—Where there is any evidence tending to establish an issue, it is error to take the case from the jury.

Appeal from Sebastian Circuit Court, Greenwood District.

F. A. YOUMANS, Special Judge.

STATEMENT BY THE COURT.

This is an action by the St. Louis, Iron Mountain & Southern Railway Company against Enoch V. Petty, to condemn land for the purpose of constructing a side track.

The company filed its petition for condemnation, alleging, amongst other things, that, by virtue of a consolidation with the Cairo and Fulton Railroad Company, it became vested with all the rights and powers given to said Cairo and Fulton Railroad Company in its

charter; that it became vested with the right to build branches from its main line to any point in the state, and with the power to exercise the right of eminent domain in building such branches. It alleges that the side track for which it asks to condemn land is located on a line which is known as the Fort Smith branch of the St. Louis, Iron Mountain & Southern Railway, and when completed will extend from Gurdon on its main line to the city of Fort Smith; that the board of directors of said company had duly authorized the construction of said Fort Smith branch and the line thereof surveyed and located; that the construction of the line had, for the purpose of convenience, been commenced at Fort Smith, and that the intention of the company was to speedily push the line to completion; that, after a portion of the line had been completed, the construction of the same was temporarily suspended on account of financial difficulties, but that the intention of the company was in good faith to push said line to completion so soon as it was possible to do so.

The appellee, Petty, answered, denying the consolidation as alleged, and denying the right of the company to condemn his land in this proceeding. On the trial the appellant read in evidence a resolution of its board of directors, passed in 1887, which, among other matters, resolved that the company "proceed immediately to build, maintain, own, and operate, with all the necessary equipment, franchises and properties appertaining thereto, a railroad beginning at or near Beebe in White county, running thence through the counties of Lonoke, Faulkner, Perry, Yell, Logan, Scott and Sebastian to Fort Smith, * * * * * * * * * also a branch from the main line of the Iron Mountain road at some point to be hereafter determined, in Clark or Nevada counties, Arkansas, running thence north through the counties of Pike, Montgomery, Hot Springs, Garland,

Polk, Scott, and Sebastian to a connection with the branch above described at or near the boundary line between the counties of Sebastian and Scott. * * * Resolved, further, that the president is authorized to put under construction and make the necessary contracts for such portions of the foregoing roads as his judgment may approve."

Another resolution by said board in reference to the same matter, passed in 1893, was also read.

The special judge presiding at the trial was of the opinion that the appellant company had power to construct branch lines, and to condemn land for the purposes of such construction, but he held that at the commencement of this action there was no resolution of the board of directors of the appellant company authorizing the construction of a branch line from Gurdon to Fort Smith, and no authority to bring this suit. He therefore directed a verdict for the defendant. From the judgment rendered in favor of defendant, the company appealed.

*Dodge & Johnson*, for appellant.

1. The court erred in excluding all the testimony introduced before the jury. Defendant, taking his cue from the *dictum* in 57 Ark. 359, 363, based his defense on the sole ground that appellant had no legal existence, and therefore no warrant to construct a branch. But the courts of this state take judicial notice of the act of January 12, 1853, incorporating the Cairo & Fulton railroad. 30 Ark. 701. Also of the act consolidating the C. & F. Railroad and the St. L.,I. M. & S. Railway Company under sec. 10 of said act. The validity of this consolidation has often been recognized by this court. 30 Ark. 693; *ib.* 674; 41 *id.* 516; 113 U. S. 474; 112 *id.* 129; 98 *id*, 563; Acts 1868, sec. 43 p. 311; Acts 1887, p. 25; 6 Dec. U. S. Land Off. 356; 7 *id.* 204.

2. By virtue of this consolidation, appellant acquired all the property, rights, privileges, etc., belonging to each of the constituent companies. 30 Ark. 680; 6 Gill. 288; 15 Wall. 460; 41 Ark. 509; 113 U. S. 465. Appellant succeeded to the right to build branches "to any point or points in the state." The resolution, therefore, of the board of directors authorizing the construction of this branch should have been admitted.

3. The suit was not prematurely brought. All errors or omissions in the original resolution were overcome by the modification made Sept. 12, 1889, which was filed in the secretary of state's office four years before this suit was brought.

4. It was error to direct a verdict for defendant.

*Winchester & Martin*, for appellee.

1. The court below held that the consolidation of the two roads was properly effected, but that appellant had failed to comply with the requirements of the statute as to the extension or construction of railroads, and hence directed a verdict for appellee. It was essential for the board of directors to put the right to exercise the right of eminent domain into force by some authoritative announcement. The resolution of March 14, 1887, only authorized the branch from Beebe to Fort Smith, and no change was made in this intention until December, 1889, which was *more than a year after this suit was brought.*

2. To *change* a location, certain things are necessary. Mansf. Dig. secs. 5443–4. The statutes granting these privileges are strictly construed. Lewis, Em. Dom. secs. 253–4, 392; 57 Ark. 359; Pierce, Railroads, p. 170; 82 Pa. St. 382; 78 N. Y. 362.

3. The suit was prematurely brought.

Authority of railroad to build branch line.

RIDDICK, J., (after stating the facts.) There is only one question presented for our consideration in this case: Did the resolution of the board of directors of the appellant company, read in evidence and passed by said board in 1887, authorize the construction of the branch line of railroad for which the land of Petty is asked to be condemned? The learned special judge held that it did not, and that there was no authority to bring this suit until given by the subsequent resolution of said board of directors, passed in 1890, after the commencement of this action. The question relates to the intention of the board in passing the resolution of 1887, and to the power conferred by its passage. After consideration of the same, we are of the opinion that this resolution, so far as the board of directors were enabled to do so, empowered the president of the appellant company to construct branch lines of railway connecting the city of Fort Smith with the main line of appellant's railway at Beebe and also with the main line at a point in either Clark or Nevada counties. The objection that the resolution only authorized the construction of a branch line from Fort Smith to Beebe, and that the line from a point in Clark or Nevada county was intended only as a connection with this branch from Beebe to Fort Smith and not to be built until after the construction of said last named branch seems to us hypercritical. It sufficiently appears from the resolution that the board of directors intended to authorize the construction of two branch lines of railway, one leaving the main line at Beebe and the other at a point in Clark or Nevada county; these two branch lines to converge at a point on or near the line between Scott and Sebastian counties from which point a single line to Fort Smith was authorized. It seems to us of no moment, under this resolution, whether the branch from Beebe to Fort Smith was first built, and then a connection made with the point in Clark or

Nevada county by a line diverging from the above named branch, or whether the branch connecting Fort Smith with the main line at a point in Clark or Nevada county was first constructed, and afterwards a connection made with Beebe. In either case the result is the same. The board of directors seems to have been of this opinion, for the resolution authorized the president to put under construction such portion of the lines named therein "as his judgment may approve," thus expressly authorizing him, as we think, to first construct the branch line from Fort Smith to the point in Clark or Nevada county. Nor does it seem material that no particular point in either Clark or Nevada county was designated by the resolution. It is sufficient that the resolution authorized the construction of a branch line to Fort Smith, and that under this authority the line had been surveyed and established and partly constructed through Sebastian county, where the land sought to be condemned is situated.

When error to direct a verdict.

When this case was here on a former appeal, Chief Justice Cockrill, referring to the fact that the construction of this branch line had been commenced at a point in the state remote from the main line, said that the power to take property *in invitum* for the purpose of such construction "could not have been exercised except upon a clear showing of a *bona fide* intent to push the enterprise through presently to the trunk connection which alone authorized its construction." *Railway Company* v. *Petty*, 57 Ark. 359. Upon the question whether the evidence was sufficient to show that the appellant company honestly intended, so soon as practicable, to push the construction to a connection with its main line, as authorized by the resolution of the board of directors, we do not express an opinion. It is sufficient to say that there was some evidence tending to show that such was the intention of the company, and the question should

have been submitted to the jury. It was therefore improper to direct a verdict for the defendant. The judgment must be reversed, and the cause remanded for a new trial, and it is so ordered.

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## MEIGS v. MORRIS.

Opinion delivered October 17, 1896.

PAROL GIFT—ENFORCEMENT.—A suit to cancel a deed of land by the heirs of a donee by parol gift will not lie against the donor's grantee, unless the proof would have been sufficient to warrant a decree for specific performance against the donor.

SPECIFIC PERFORMANCE—SUFFICIENCY OF EVIDENCE.—In order that a court of equity may exercise its power to decree specific execution of a contract to convey land when there has been a part performance thereof, the proof of such contract must be clear and unambiguous, and must be either admitted or proved with a reasonable degree of certainty.

SAME—PART PERFORMANCE.—Where a father agreed orally to give certain land to his daughter at some future time, on condition that she and her husband reside thereon, the agreement will not be specifically enforced, although she was given possession of the land, and made improvements thereon, if the improvements were not made in pursuance of such agreement.

Appeal from Benton Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

This action was brought by R. S. Morris, to recover from appellants, T. M. Meigs, *et al.*, the possession of a tract of land containing five acres. Morris purchased the land from one Morgan, to whom it had been sold and conveyed by John W. Boling. The land was formerly owned by Boling, under whom both appellee and appellant's claim title. The appellant, T. M. Meigs,

married a daughter of Boling, and the other appellants are children of this marriage.

In the year 1876 Boling gave Meigs and his wife possession of this land, upon which there was a small house. The appellants claim that Boling, as an inducement to have his daughter, the wife of Meigs, live near him, agreed to give her this tract of land if she and Meigs would reside upon it. Appellants allege that the gift was accepted, and that, by reason of said promise of Boling, Meigs and his wife took possession of the land, made valuable improvements upon it, purchased other land adjoining said tract, made it their home, and lived upon it for many years. Mrs. Meigs died in 1889, but her husband and children continued to remain in possession until the commencement of this action.

Boling never conveyed the land to Meigs, or his wife, but, after having mortgaged it, he conveyed it in 1892, by quit claim deed, to Morgan, who sold to Morris. The appellees filed their answer and cross-complaint, setting forth above facts, and denying that Boling had any right to convey the land. They allege that they were in the actual possession of the land, claiming the ownership thereof, and that both Morgan and Morris had notice of such claim at the time of the conveyances to them. Prayer of their cross-complaint was that such conveyances be set aside and cancelled, and for other relief.

Deposition of Boling was read on part of appellants. He testified in part as follows: "I gave Martha, my daughter, and T. M. Meigs possession of the house which stands on the five acres in controversy, and told her she she could have it as a home. Ques. Did you not say to your daughter and her husband that if they would buy the adjoining claim you would give your daughter the tract in controversy? Ans. I told them I would let them have it. Ques. Did your daughter and

her family go into possession, and remain in possession up to the time of her death, and after her death defendant Meigs and family continue in possession, with your full knowledge and consent? Ans. Yes, sir; of course. Ques. Have you at any time since they went into possession ever set up claim to the lands in controversy to them, or to any one else? Ans. In this way; I never made any deed, and held it as my property. I reckon you might call it that way. Ques. At the time you told your daughter that she could have it, was it your intention at that time to make her a deed to the land? Ans. Well, if she had lived. I expect I would if she had lived. It was my intention at the time I first gave her possession. Ques. Was her death the reason you had for not making the deed? Ans. Well, it might have been in part, but I never was called upon, and it just remained so." On cross examination he said: "Sometime before her death—could not tell how long—I promised Martha to deed her this land. At that time she was living on a corner of the five acres. I mortgaged the land twice before my daughter's death, once to Horner, and once to Morris. Ques. At the time you mortgaged the land did you consider yourself the absolute owner of it? Ans. Well, you might call it any way you choose. The title was in me, but they were in possession. If I hadn't considered myself the proper owner, I wouldn't have mortgaged it. * * * * * * The day I sold to Lewis he asked me what I reserved the five acres for, and I spoke, and told him this, that Meigs' wife was a poor sickly thing, and that it was for her benefit; also if I took a notion and wanted to move back from town, I could build and live close to her in my old age. Ques. Was it your intention, at the time you put Mrs. Meigs and her husband in possession of the land, that they should hold possession of the same under you, and by your consent, until you got ready to deed

the land to her, and did Mrs. Meigs and her husband so understand from the time you gave them possession? Ans. I guess they understood it that way, and that was my intention. Ques. At the time you placed Mrs. Meigs and her husband in possession of the land, was it not more for the purpose of having her close to you and her mother, on account of her delicate health, than for any other purpose or consideration? Ans. Her health was good at that time; while, of course, a person's children are dear to them, and Meigs was destitute of any home, and of course, I let him go on it for a benefit to him—to have shelter. Ques. Did your daughter or her husband ever call upon you to give her a deed to this land? Ans. Not that I have any recollection of."

Depositions of other witnesses were read, not necessary to set out. On the hearing the chancellor found that there was no equity in the cross-complaint, dismissed the same, and gave judgment in favor of Morris for the possession of the land.

*J. A. Rice*, for appellants.

1. What is a gift? The act by which one voluntarily and without a consideration transfers his property to another. Bouvier, Law Dict. title *Donatio;* 8 Am. & Eng. Enc. Law, p. 1309.

2. As to the amount of probative force necessary to establish a gift,—it may be proved like any other fact in dispute. A reasonable certainty is all that is required. 1 Lead. Cases Eq.; 9 Wall, pp. 1 to 12.

3. Will a parol gift be upheld? It will, in a proper case. 32 Ark. 97–116; 42 *id.* 247; 43 N. Y. 34; 9 Wall. 1–12, Law Ed. Book 19, p. 590.

4. The statute of frauds cannot be pleaded by a stranger to the transaction. 105 Ind. 17; 4 N. E. 281; 103 Ind. 105; 8 Am. & Eng. Enc. Law, p. 659.

5. Only in such cases where the acts, conduct and declarations of the parties to the alleged gift, at and subsequent to the time of the gift, are ambiguous, equivocal, uncertain, and doubtful, will such acts, conduct, declarations, etc., be admitted to impeach the gift. 14 Ark. 304; 8 Am. & Eng. Enc. Law, p. 1336.

6. Aside from the gift, the title has vested in Meigs' children by limitation. 39 Ark. 158; 38 *id.* 181; 34 *id.* 547; *ib.* 534; *ib.* 598.

7. When the evidence is sifted and purged of that which is incompetent and incredible, the decree ought to be reversed. 43 Ark. 318.

*E. P. Watson*, for appellee.

1. Appellants seek a remedy which amounts to a specific performance, by divesting Morris of his title. Specific performance is largely in the discretion of the court, and it will be refused when the circumstances render it inequitable or improper. 19 Ark. 23; 6 Johns. Ch. 111; Pom. Eq. Jur. par. 1404–5 and note.

2. A parol gift from a parent requires a greater amount and different kind of evidence to sustain it than where it is for valuable consideration. 67 Am. Dec. 425; *ib.* 432.

2. Appellee pleads the statute of frauds, and there is no such proof of valuable improvements as to take the case out of the statute. The statute can be pleaded by any one who is defendant to the suit.

3. A change of circumstances surrounding the parties at the time of the contract will prevent specific performance. And when the rights of others have intervened, so that specific performance would be injurious to their legal or equitable interest, it will be denied. 25 Pa. St. 405; 9 Crauch, 456–494.

4. Diligence is requisite, and while one sleeps on his rights, the rights of third parties intervene, and

estoppel arises. 22 Am. & Eng. Enc. Law, pp. 1043, 1049 and notes; 8 Pet. (U. S.) 420.

5. Laches have bound appellants. 95 U. S. 494; 9 Pet. 420; 58 Am. Dec. 139, and note; 54 *id.* 126 and note, p. 132; 14 Pet. 172; 22 Am. & Eng. Enc. Law, 1043, and notes.

Enforcement of parol gift.

RIDDICK, J., (after stating the facts.) The appellants, the husband and children of Mrs. Meigs, allege that her father, Boling, agreed to convey this land to her upon condition that she and her husband would reside upon it. They contend that she complied with the terms of the contract, and that, having since died, the lands now in equity belong to her heirs. Although they did not make Boling a party, nor expressly ask for a specific performance of such contract, they seek to accomplish the same end by having the conveyance by Boling to Morgan cancelled, and the land declared to be the property of appellants. To justify a decree in favor of appellants, the proof should be sufficient to have warranted a decree of specific performance against Boling, had he retained the title, and the suit been brought against him. This is true, even if we concede that both Morgan and Morris had notice of the claim of appellants at the time they purchased; for, if the proof is not sufficient to have justified a decree against Boling, it would not warrant a decree against those to whom, for a valuable consideration, he sold and conveyed the land.

Sufficiency of evidence.

In order that a court of equity shall exercise its power to decree a specific execution of a contract to convey land when there has been a part performance thereof, such contract must be clear and unambiguous, and must either be admitted or proved with a reasonable degree of certainty. When the possession of land is not in pursuance of a contract to convey, or if such possession and

the improvements made by the party holding it can reasonably be accounted for in some other way than by such a contract between the parties, then such possession and improvements will not ordinarily avail as a part performance. Pomeroy, Specific Performance, secs. 116 and 136. For this reason it has been held that "the possession by a son of land belonging to his father, even when accompanied by valuable improvements, will not be treated as a part performance, because the relation between the parties prevents the inference of a contract of sale which would otherwise arise from the facts, and removes all necessity of accounting for the possession by the supposition of a contract to convey. Pomeroy, Specific Performance, sec. 116; *Poorman* v. *Kilgore*, 26 Pa. St. 365; 67 Am. Dec. 425; *Cox* v. *Cox*, 26 Pa. St. 375; 67 Am. Dec. 432; *Ham* v. *Goodrich*, 33 N. H. 32.

Part performance.

In the case of *Poorman* v. *Kilgore*, *supra*, the Supreme Court of Pennsylvania said that: "It is so natural for parents to help their children by giving them the use of a farm or house, and then to call it theirs, that no gift or sale of the property can be inferred from such circumstances. It is so entirely usual to call certain books, or utensils, or rooms, or houses, by the name of the children who use them, that it is no evidence at all of their title as against their parents, but only a mode of distinguishing the rights which the parents have allotted to the children as against each other, and in subjection to their own paramount right. The very nature of the relation, therefore, requires the contracts between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express, and unambiguous. The terms must be clearly defined, and all the acts necessary for its validity must have especial reference to it and nothing else."

The rules of law announced in the above quoted decision are based on sound reasons, for it is a matter of common observation that parents often permit their children to take possession of property, and allow them to claim and use it as their own, but with no intention on the part of such parents of parting with the title, or of conferring upon their children the power to compel them to convey the same.

It is unnecessary to discuss the evidence in this case. The chancellor found that the possession of the land in controversy and the improvements made thereon were not made in pursuance of a contract to convey. We have read the evidence carefully, and, while there is some conflict, we cannot say that the finding of the chancellor is clearly against the weight of the evidence; on the contrary, we are of the opinion that his finding is in accordance with the weight of evidence. The testimony of Boling, whose deposition was taken and read by appellants, seems to support the finding of the chancellor. It tends to show that he had given his daughter possession of this land to be used as a home, and that he at one time intended to give and convey it to her, and had so informed her, but he afterwards became poor, and was compelled to mortgage and then sell the land. A promise to give at some future time cannot be enforced, and the proof, in our opinion, does not show that Boling did more than this. Appellants, therefore, did not make out their case.

The judgment is affirmed.

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# WALLACE v. BERNHEIM.

## Opinion delivered October 17, 1896.

EVIDENCE—ACCOUNT BOOKS.—In the trial of an intervention in an attachment suit, where the intervener claims that there was a conspiracy between plaintiff and defendant to defraud the latter's creditors, he may read in evidence the account of plaintiff against defendant kept in the former's book of accounts, although some of the items were entered thereon prior to the conspiracy.

SAME—FRAUDULENT DESIGN.—Interveners in an attachment suit, seeking to postpone or defeat plaintiff's prior lien, may prove that defendant had formed the design to cheat his creditors, and that he was making active preparations to carry such design into effect when plaintiff sold the last bill of goods to him, if they further show that plaintiff entered into this scheme with defendant, and undertook to carry it out by the means alleged in the petition of intervention.

SAME—ADMISSIBILITY OF LETTERS.—Letters written by interveners in an attachment suit to a bank demanding payment of a check drawn on it by the attachment defendant in favor of interveners, together with the letters of the bank refusing payment, are admissible to show that the check was not paid.

WITNESSES—INTERROGATION—LEADING QUESTIONS.—It is in the discretion of the trial court to permit a party to ask his own witnesses leading questions.

FRAUD—INTENT TO ATTACH.—The mere fact that a seller of goods on credit at the time of the sale intended to attach for the purchase money if not paid when due does not render the debt fraudulent. Nor does the fact that an attachment plaintiff intends some benefit to himself from his attachment, or that the debtor's business may be broken up and destroyed, render the attachment fraudulent as to other creditors.

TRIAL—MISLEADING INSTRUCTION.—The instruction that a debt created with a view of suing out an attachment and thereby breaking up and destroying the debtor's business for the purpose of delaying other creditors is fraudulent as to the latter is misleading where the only issue is whether or not the attaching creditor intends to aid the debtor to defraud other creditors.

Appeal from Sebastian Circuit Court, Greenwood District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

Bernheim Brothers filed a petition of intervention in an attachment suit brought by M. C. Wallace against George Aitken. Aitken was engaged in the saloon business at Huntington, Sebastian County, Arkansas, and purchased liquors of M. C. Wallace, of Fort Smith, and of the interveners, and was indebted to both of said parties. Wallace testified that, on the 8th day of May, he sold to Aitken five barrels of whiskey, for which Aitken agreed to pay him, upon demand, five hundred dollars. He said that, at the time he sold Aitken this whiskey, Aitken owed him about seven hundred dollars, in addition to the price of the five barrels. He further testified that, after he had shipped the whiskey to Aitken, he heard that Aitken had been trying to sell his stock of goods, and, being apprehensive that he might lose his debt, he took steps to attach Aitken. He went to Huntington on the 10th of May, and demanded payment of the five hundred dollars agreed to be paid for the whiskey. Not being paid, he brought suit, and attached Aitken's stock of goods, including the five barrels of whiskey shipped by him, which had not yet been delivered by the railway company to Aitken. Bernheim Brothers also brought suit by attachment against Aitken, and filed a petition of intervention in the suit brought by Wallace. Among other things, they alleged that, "at the time of the suit and the attachment of the said M. C. Wallace herein against the defendant, Geo. Aitken, no ground of attachment existed against him, and that said attachment was sued out and levied at the instance and request of the said George Aitken, under a collusive agreement and understanding previously had,

that the plaintiff should first pretend to sell said Aitken a large amount of goods, and sue therefor, and cause an attachment to be issued and levied on the property of the defendant, and that the same should be sold at a sacrifice, and be bought in by the said plaintiff, M. C. Wallace, for the purpose of hindering these defendants and others in the collection of their debts; and that the defendant George Aitken, under and in pursuance of said collusive agreement, was to have and realize some benefit as one of the results and objects of said collusive agreement, as aforesaid." Wherefore they prayed that the attachment lien of said Wallace be postponed to the lien of petitioners.

Aitken made no defense to either attachment suit. Both parties took judgment against him, and both attachments were sustained. On the trial of the intervening petition, the circuit judge, at the request of interveners, gave instruction No. 2 as follows:

"2. The court instructs the jury that a debt created with a view, at the time the debt is contracted, of suing out an attachment, and thereby breaking up and destroying the vendee's business, for the purpose of either securing some benefit to the creditors, or for the purpose of delaying, hindering, or defrauding other creditors, is fraudulent as to the latter; and, if you find that any portion of Wallace's debt was created in that way, you must find for the interpleader."

In addition to other instructions, the court also gave, on his own motion, instructions Nos. 3 and 7, as follows:

"3. So in this case the issue is simply reduced to the query, was Wallace's debt *bona fide*, or was it, in whole or in part, fraudulent? Upon this issue the evidence in the record presents two questions: (1) Was any part of Wallace's debt, on which suit was brought, paid off, and no credit given therefor? (2) Was any of

it contracted by Wallace with the intention at the time such part was contracted to attach on the debt? If the affirmative of either of these propositions existed, the debt was fraudulent."

"7. The second proposition is that if any part of Wallace's debt was contracted with the specific purpose in view of running this attachment, the debt is fraudulent. Of course, a person may sell to a debtor with a general purpose of securing himself by attachment, if it should become necessary, but he must not sell with the specific intention and purpose in view at the time of the sale of running an attachment that would absorb the debtor's property to the exclusion or detriment of other creditors. This proposition in this case arises on the items in Wallace's claim sold to Aitken on May 8th or 9th, 1893. If, when Wallace sold these items to Aitken, he intended to run this attachment, it was fraud, and renders the whole debt fraudulent. But if he sold the articles straight out, in the usual course of business, without any purpose at the time of the sale of running this attachment, but conceived the intention of attaching after the sale, no matter how short a time thereafter, there would be no fraud in the transaction. This question turns on the intention in the mind of Wallace at the time the items were sold to Aitken. If at that time he intended to run this attachment, whether by collusion with Aitken or on his own accord, the debt was fraudulent, and the attachment cannot stand. But if he sold the items honestly, with no intention at that time of attaching, there was no fraud in the transaction, and in such case it is immaterial how short a time elapsed before he conceived the idea of attaching, nor was he obliged to take back the goods, for, if honestly sold, he had the right to rely on the debt therefor, and to secure himself by attachment,

even if he attach with the understanding with Aitken that he will not contest it."

There was a verdict and judgment in favor of interveners. The other facts sufficiently appear in the opinion.

*Winchester & Martin* and *S. R. Cockrill* for appellant.

1. The court erred in the admission of evidence. The ledger of Wallace showing transactions with Aitken & Evans, and continuing down in the name of Aitken, to March 21, 1893, was improperly admitted. Bump, Fr. Conv. (3 Ed.), 385. They were not declarations or acts which occurred while on the prosecution of the common design to defraud. 20 Ark. 225; 50 *id.* 287. Only acts and declarations of the parties while engaged in the furtherance of the common design to defraud are admissible. Stephen's Dig. Ev. 10; Bump, Fr. Conv. (3 Ed.), 587; 20 Ark. 225. The evidence of Handlin as to Aitken's check, and the check itself, were not admissible. They were transactions of Aitken with appellees in the absence of Wallace. So was the account of Aitken with the First National Bank. All these were irrelevant, because not made in pursuance of the conspiracy; because they were had in appellant's absence; and because no connection or knowledge is shown on the part of Wallace with Aitken's fraudulent purposes, if they existed at that time. Testimony of this character is not admissible to prove a conspiracy. Bump. Fr. Conv. 586; 1 Gr. Ev. (14 Ed.), sec. 111. It was error to allow Aitken to testify as to his fraudulent intentions, etc., because, no matter how corrupt Aitken might have been, unless he acquainted Wallace with them, and Wallace became a party to them, Aitken's frauds could in no wise bind him. 46 Mich. 268. It was also error to allow Aitken's testimony as to purchase of seven barrels

of whiskey from appellee's agent and as to $100 he gave him together with the $300 check. Conversations had by Aitken in the absence of appellant are irrelevant, and not competent; for it is only after a confederation has been established that such declarations of a conspirator are allowed, and then only while engaged in the prosecution of the purpose for which they had confederated. Bump, Fr. Conv. 584; 40 N. Y. 221; 33 Barb. 165. The same objections apply to the other testimony admitted over appellant's objections. 18 Ark. 124; 9 *id.* 92; 5 *id.* 13; 45 *id.* 135; Bump, Fr. Conv. 587.

2. The court's charge was erroneous. It is not necessary to set out all the evidence for the purpose of determining whether the charge is right or wrong. That could be determined without any evidence at all. 44 Ark. 74; 15 *id.* 118. The most obvious errors in the charge relate to fraud in contracting the debt. The court told the jury that appellant's prior attachment was void, if the appellant entertained the design of suing out an attachment at the time any part of his debt was contracted. This was repeated in several forms. Such is not the law. 60 Ga. 669; 53 Ark. 327; Bishop, Ins. Debtors, sec. 203; 58 Ark. 293; 104 N. Y. 297; 123 U. S. 436; 47 Ark. 48. The error was repeated, but never corrected. 32 S. W. 500. In the fourth given by the court on its own motion the jury are told that, in order to find for appellant, they must find that his debt was "all honestly *contracted in the usual course of business.*" Again, in the ninth the court makes it a condition to finding in appellant's favor that he should have sold the goods "straight out, in the usual course of business." If the goods were actually sold, and the price had not been paid, it was a matter of no concern to the appellees, who were only second attachers, whether, as between Aitken and appellant, it was a "straight out" or some other sort of a sale; or whether

the sales, as between the parties, was honest or dishonest. 47 Ark. 48.

3. *Withholding credits of payments.* The third and ninth, on the court's own motion on this subject, leave out of consideration the creditor's intent to commit a fraud. If the suit was inadvertently for more than was due, it would not avoid the attachment. 7 Cush. (Mass.), 587. It was error to make the question of fraud depend solely on the fact whether a payment by the debtor had not been credited. That was to be considered with the other facts and circumstances. It was error to isolate that fact, and make the result depend on it alone. 57 Ark. 569. But even if any item of the debt had been paid, it would not have avoided the whole attachment in favor of a subsequent attacher. 39 Ark. 325; 59 *id.* 280; 50 N. W. 966. There is another reason why interveners cannot set the attachment aside, except so far as it is actually void. When the case was tried, judgment had already been rendered against Aitken, and the attachment sustained. No relief could be granted in such a case until it was established that a defense existed. 50 Ark. 458, 463; 12 *id.* 401; 110 U. S. 184; 47 Ark. 42; 15 Conn. 504.

4. The errors in the admission of testimony were aggravated by the eighth and ninth instructions. See 49 Ark. 148, 153; *ib.* 459; 34 *id.* 696; 45 *id.* 166. It is not the duty of the judge to point out what inference *may* or should *be drawn* from particular facts in proof. 49 Ark. 148, 153.

*John H. Rogers* for appellee; *John S. Little* and *Smith & Brewster* of counsel.

1. The bill of exceptions does not purport to contain all the evidence. 44 Ark. 76; 46 *id.* 69; 49 *id.* 364; 36 *id.* 496; 38 *id.* 102; 7 *id.* 348; 9 *id.* 478; 15 *id.* 118; 54 *id.* 159.

2. All testimony tending to show the financial status of Aitken prior to the attachment is clearly admissible. 59 Ark. 305. The *bona fides* or existence of Wallace's debt was assailed as fictitious, simulated. That was the main inquiry, and Wallace's books and all the other testimony bearing on the state of the account between Wallace and Aitken, before and after the attachment, was clearly admissible as tending to show: (*a*) Whether there was a collusive scheme, and the intent. (*b*) A continuation of the conspiracy after the sale. (*c*) The relations of the parties, socially and in business matters, throwing light on the conspiracy and the intention of the parties. Bump, Fr. Conv. sec. 590; 50 Ark. 287; 20 *id.* 225; 35 Maine, 509. Slight circumstances, when connected with other evidence, may become very important. 10 Ark. 429; 46 Ark. 49.

3. The mortgage on its face was fraudulent as to creditors. 46 Ark. 129. That fact alone made it admissible.

4. The conspiracy did not end, as long as the mortgaged goods continued in existence, and the acts and declarations of Aitken in reference to them were evidence against Wallace. 22 Ark. 225; 59 *id.* 305.

5. The conspiracy began before Bernheim sold the large bill on April 11, 1893. Young's debt was taken up in self-defense. It was an incident essential to the success of the scheme.

6. The letters between Aitken and the bank and the bank and interveners were competent. They were all written pending the conspiracy. If the facts and circumstances within Wallace's knowledge at the time he sold the last bill of goods was sufficient to put a man of common sagacity upon inquiry, and with the use of reasonable diligence he could have discovered Aitken's fraudulent purpose to swindle his creditors, and he neglected to make the inquiry, he is chargeable with notice,

and the principle applies to all the facts he might have ascertained by inquiry at the bank where he knew Aitken was doing business, and where he knew Aitken's check had been protested. 50 Ark. 320; 11 Fed. 561. In matters of fraud, whatever characterizes the conduct of the parties, and the transaction, is competent. 59 Ark. 263; *ib.* 612.

7. Fraud can only be proved by circumstances. 55 Am. Dec. 503.

8. Leading questions are matters within the discretion of the court. The testimony of Patterson and Dunn, so far as they proved what Wallace said and did, was admissible. 58 Ark. 446; *ib.* 125; 32 S. W. 1030; 32 *id.* 67, 717, 815, 168.

9. Where the issue is fraud, great latitude is allowed in proof of circumstances. 9 Conn. 52; 3 Rice on Ev. p. 77; 1 *id.* ch. 12. It is always competent to show what precedes and follows the transfer, the relations of the parties, prior and subsequent, and all the circumstances surrounding. Bump, Fr. Conv. (3 Ed.), 585, 590; 104 N. Y. 305; 59 Ark. 305.

10. The instructions are correct. The main instructions complained of is the second paragraph of instruction three. This must be considered in connection with the second paragraph of the fourth, and with the seventh, and also with the second and fourth asked by interveners. Taking these together, there is no error, and the jury were not misled. Elliott, App. Pro., sec. 648; Thompson, Charging the Jury, par. 131, etc. They clearly state the law. 14 So. 485.

11. A conveyance which places a debtor's property beyond reach of creditors by *legal process*, and at the same time creates a trust in the property for his own use, is void. 6 Hill, 438; 5 Cow. 547–8; Bish. Ins. Debt. secs. 181–3. An assignment to pay a fictitious debt is fraudulent because it hinders and defrauds creditors.

Bish. on Ins. Debt. sec. 212; Wait, Fr. Conv. sec. 345; 2 Sandf. Ch. 594; 1 Sandf. Ch. 83.

12. The assailed instructions were entirely applicable to the case presented. They cannot be attacked by culling a sentence here and there, and considering them separately. Elliott, App. Pro. sec. 648; 12 U. S. App. 482; 10 U. S. App. 375; *ib.* 629.

13. The sale of May 8, 1891, was not a sale at all; it was a fictitious sale, vitiated by collusion and fraud. It was not like 104 N. Y. 297. The fraud in this case cannot be sheltered behind an attachment, or a subsequent judgment. 47 Am. Dec. 409.

14. The fraudulent part of the debt made the whole attachment fraudulent. 57 Ark. 545; 53 *id.* 140; 54 Fed. 94; 12 Pick. 389.

15. If it was the duty of the court to instruct the jury "to give interveners precedence only to the extent they might find that Wallace's debt was paid," appellant cannot complain. He asked no such instruction. 2 Pet. 1–15; 8 Wall. 342, 353–4; 15 *id.* 151, 164; 151 U. S. 73. This court corrects only errors complained of in the court below. 27 Ark. 306; 37 *id.* 159; 55 *id.* 548; 12 U. S. App. 482; 8 U. S. App. 120; 32 S. W. 559, 855.

16. A creditor cannot collude with an insolvent debtor, either by agreement or by legal proceedings, to convey the debtor's property to the creditor, in order that the debtor shall derive a benefit therefrom, to the injury of other creditors. 123 U. S. 441; 6 Wall. 78; 2 Pick. 129; Bish. Ins. Debt. secs. 181–3.

17. The judgment is right, upon the whole record, and should be affirmed, harmless errors notwithstanding. 10 Ark. 53; 26 *id.* 322; 26 *id.* 410; 19 *id.* 96; 66 Fed. 887; 46 Ark. 485; *ib.* 542; 28 *id.* 59; 43 *id.* 296; 44 *id.* 556; 57 *id.* 242.

RIDDICK, J., (after stating the facts.) The questions in this case arise upon a petition of intervention

filed in an attachment suit. The interveners, Bernheim Brothers, contend that the attachment suit brought by Wallace against Aitken was the result of a secret and fraudulent agreement between Wallace and Aitken for the purpose of defrauding interveners and other creditors of said Aitken.

Admissibility of account books in evidence.

In order to prove the allegations of their petition, interveners introduced evidence to show certain transactions between Aitken and Wallace, and the circumstances surrounding the same. Many objections were made, and many exceptions saved, to the introduction of this evidence, but none of these exceptions can be sustained. It was certainly not erroneous for interveners to read in evidence the account against Aitken, kept by Wallace upon his book of accounts, and showing the different transactions between himself and Aitken. That some of the items of this account were entered upon the books prior to the conspiracy alleged to have been entered into between Wallace and Aitken is of no consequence, for these entries are not the acts or declarations of another conspirator, but of Wallace himself. It was important to show the state of the account between Wallace and Aitken, and it was proper, as against Wallace, to show this by his own books; the rule being that the declarations of a party to the record, whether oral or written, are, as against such party, admissible in evidence. 1 Greenleaf, Ev. (Redfield's Ed.), sec. 17.

Admissibility of evidence of fraudulent design.

It was proper to admit evidence to show that Aitken had formed the design to cheat his creditors, and that he was, at the time Wallace sold the last bill of goods to him, making active preparations to carry such design into effect. But, in order to affect Wallace, it was necessary to go further, and show that he entered into this scheme with Aitken, and undertook to carry it out by the means alleged in the petition of interveners.

There was no case to submit to the jury until some evidence was introduced tending to show such connection of Wallace with the fraud of Aitken. If Aitken formed the design of cheating his creditors, and Wallace afterwards became a party to this design, and undertook to aid him to carry it into effect, then the acts and declarations of Aitken done in pursuance of this purpose are competent evidence against Wallace, even though they were prior to the entry of Wallace into the conspiracy. "Every one," says Mr. Greenleaf, "who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others in furtherance of such common design." 1 Greenleaf, Ev. sec. 111. If this were not so, it would, in many cases, be impossible to show the full scope of the conspiracy. *Cox* v. *Vise*, 50 Ark. 287. The evidence tending to show that Wallace entered into a conspiracy with Aitken to defraud his creditors may not be very satisfactory, but it was sufficient, we think, to submit to the jury.

When letters admissible.

The court, over the objections of appellant, permitted the interveners to read in evidence letters written by them to a bank in Fort Smith demanding payment of a check drawn by Aitken upon the bank in favor of interveners; also letters written by the bank in reply, refusing to pay such checks. It is contended that it was error to admit such letters. As the bank was not a party to the action, it would not, as a rule, be competent to prove facts against Wallace by the declarations of the bank officials, whether contained in letters or not. Nor could such facts be established by the letters of interveners. But the only object in introducing these letters was to show that the check of Aitken was not paid. It was proper to show this, and, as the presentment of the check for payment and the refusal of the

bank were each made by letter, it was competent to introduce these letters to show such facts. The letter of the interveners was in itself a demand for payment, and the letter of the bank was a refusal to pay, and they were the direct evidence of such facts. 1 Greenleaf, Ev. sec. 101.

Examination of witnesses.

It is further said that interveners were allowed to put leading questions to their own witnesses. While the general rule is that a party should not be allowed to put questions to his own witness that suggest the answer desired, still there are exceptions to this rule, and the question of when a party should be allowed such a privilege rests largely in the discretion of the presiding judge. Some latitude in this direction may have been permitted in this case, but nothing to justify a reversal on that ground.

Whether intent to attach fraudulent.

Without discussing further the points raised on the admission of evidence, we will say that no material error was committed in that regard, but we are of opinion that the presiding judge erred in his charge to the jury. It will be seen, by reference to instructions three and seven set out in the statement of facts, that the learned judge instructed the jury that if Wallace, at the time he sold any portion of the goods charged in the account on which he brought suit, intended to attach for such debt, then his debt was fraudulent, and the finding should be in favor of interveners. We have been cited to no case that supports this doctrine, and it does not seem to be supported by sound reason. A creditor has the right to sue upon his debt if not paid when it falls due. If, at the time the debt is contracted, he intends to bring suit so soon as it falls due, this intention cannot make his debt fraudulent, for he intends no more than the law permits him to do; in other words, he intends only that which is lawful. If he forms the intention at the time the debt is contracted not only to

sue, but to attach the property of his debtor, this intention cannot be said, as a matter of law, to be fraudulent, for the law permits the creditor to attach under certain circumstances, and his intention to attach may be perfectly lawful. Take this case as an illustration. If Wallace, at the time he sold the last item of goods to Aitken, had learned that Aitken was about to transfer his property, with the intention of defrauding his creditors, and, therefore, at that time formed the intention of attaching unless his debt was paid upon demand, would this be anything more than the law allowed him to do, and can it be fraudulent to resolve to do that which is lawful? We do not think so. On the contrary, we hold that an intention to attach for the collection of a *bona fide* debt cannot, as a matter of law, be said to be fraudulent, although such intention be formed at the time the debt was contracted. But, under the instructions above mentioned, however honest the motive of Wallace may have been in forming the intention to attach, yet if such intention was formed at the time the debt, or any part thereof, was contracted, the jury was compelled to find for interveners.

It may be conceded that very few merchants would sell on time to one whom they knew was disposing of his property to defraud his creditors, and when they knew it would be necessary to attach. A sale under such circumstances, and with the intention on the part of the seller to attach, might, if unexplained, tend to show fraud, but that is a question of fact, which must be left to the jury, or, at least, decided by the weight of evidence, and not as a matter of law.

We are also of opinion that instruction No. 2, given on motion of interveners, was subject to objection. The fraud alleged against Wallace was the result of collusion between himself and Aitken; but this instruction leaves out the question of collusion between Wallace and

Aitken; leaves out the question as to whether Wallace intentionally brought suit for more than was due him, with the view of aiding Aitken, and makes the case turn on the question whether the debt sued upon was contracted by Wallace with the view of suing out an attachment for the purpose of destroying the business of Aitken, and thereby securing some benefit to himself. It is not claimed by interveners that there was any malice on the part of Wallace against Aitken, or that he desired or intended to destroy the business of Aitken. On the contrary, the contention of interveners is that the intention of Wallace was to assist Aitken at the expense of his other creditors. For these reasons, this instruction was calculated to confuse and mislead the jury, and should not have been given. Nor is it clear that such instruction, if abstractly considered, could be held correct. We have already stated our reasons for holding that fraud cannot be predicated, as a matter of law, upon the sole fact that a party sells goods with the intention to attach for the price. Neither can it be said, in law, to be fraudulent for a creditor to intend some benefit to himself by his attachment, for it is the rare exception that an attachment is procured by one who expects no benefit therefrom. This reference to the destruction of the debtor's business had a tendency to mislead the jury. Persons who are perfectly solvent are rarely attached. It is against those who are tottering on the brink of insolvency that this process is usually directed. Hence the destruction of a debtor's business, or at least the cessation thereof, is a frequent result of attachment suits begun in the utmost good faith. It is therefore no evidence of fraud on the part of a creditor that the misfortune to the debtor is caused by the attachment. But we may go further, and say that if a creditor, having a *bona fide debt*, brings an attachment suit, actually intending, by that means, to

destroy the business of the debtor, and to make a benefit thereby, yet it is doubtful if such intention, although indefensible as a matter of morals, can be said, in the absence of collusion, to be fraudulent as a matter of law; for if there be no grounds for the attachment, the debtor can resist and defeat the attempt to destroy his business. If there be just grounds for the attachment, it can only result in the public sale of the goods attached. Other creditors and the public generally have the right to bid at such sale, and may compel the purchasers to pay a fair price for the same. So long as there is is no collusion on the part of the debtor, other creditors have no right to complain that a creditor, who attaches for an honest debt, intends, not only to collect his debt, but to injure his debtor. Against such an intention the debtor and his other creditors can protect themselves, but the case is different when the debtor colludes with the attaching creditor for the injury of his other creditors. For these reasons, it is doubtful if this instruction is correct, abstractly considered; but, as there is no contention that Wallace desired to injure Aitken or break up his business, such an instruction, even if correct, was in this case unnecessary and misleading.

The contention of interveners is set out in the allegation that the suit and attachment commenced by Wallace was, by collusion, purposely brought for a larger sum than was due, with the intent to aid Aitken to hinder and delay interveners and other creditors of Aitken in the collection of their debts. To support this allegation, the interveners undertake to show that a check for $300.00, drawn by Aitken in favor of Wallace, was given in part payment of the debt of Aitken to Wallace, and also that the sale of five barrels of whiskey made to Aitken by Wallace was only a sham sale to increase apparently the debt from Aitken to Wallace, so that the attachment might absorb the whole property of

Aitken. Wallace testified that this check was not given to him as a payment upon his account, but that, the bank upon which the check was drawn having closed for the day, he had, in order to accommodate Aitken, exchanged cash for the check. He also testified that the sale of the five barrels of whiskey was in every respect *bona fide.* If the check for $300.00 was given to Wallace upon his account, and not in exchange for cash, then he should have given credit for it. If he purposely withheld credit for the same, and intentionally brought suit, attached, and took judgment for $300.00 more than was due him, he was guilty of a fraud which would justify a finding in favor of interveners. If the transfer of the five barrels of whiskey was only a pretended sale, made by collusion, for the purpose of apparently increasing the debt due Wallace, that the attachment might absorb the whole assets of Aitken, then the attachment for the price of this pretended sale was fraudulent, and justified a judgment giving precedence to the attachment lien of interveners. But the instructions do not confine the jury to the issues presented by the pleadings.

When instruction misleading.

The question presented by the pleadings was whether Wallace, by collusion with Aitken, brought suit and attached for more than was due him, with the intent to aid Aitken in putting his property beyond the reach of his creditors, and this is the question that should have been presented to the jury. But the instructions complained of left out the question presented by the pleadings, and permitted the jury to decide the case on other issues.

These instructions, we think, were erroneous and prejudicial. The judgment is therefore reversed, and the case remanded for a new trial.

BUNN, C. J., (dissenting.) The judgment of the trial court in this case would be affirmed were it not

that a majority of this court discover error in the seventh instruction given to the jury on the court's own motion, and over the objection of the plaintiff. That instruction is as follows: "The second proposition is that if any part of Wallace's debt was contracted with the specific purpose in view of running the attachment, the debt is fraudulent. Of course, a person may sell to a debtor with a general purpose of securing himself by attachment if it should become necessary; but he must not sell with the specific intention and purpose in view, at the time of the sale, of running an attachment that would absorb the debtor's property, to the exclusion or detriment of other creditors."

It is announced substantially by the court, in its opinion in this case, that it is not fraud against other creditors for one creditor to contract a debt against the common debtor, having the specific intention at the time of attaching his property to secure his debt, if the same is not promptly paid when due. There never was a sounder doctrine than that in the abstract, but is it so in this particular case? In selling a piece of property to another, I may have in my mind the intention to sue him, or to recover and secure my debt in any or all of the ways known to the law, should he fail to pay when the debt is due; and certainly there is no fraud in such intention. That is a plain case. But that rule is not applicable to a case, where the intention is to do something more than to assert and secure one's rights. In the instruction under consideration, the trial court said, that it is a fraud for one to contract a debt with the specific intention at the time "*to run an attachment that would absorb the debtor's property, to the exclusion or detriment of other creditors.*" And whatever may be the want of explicitness, or the inappropriateness, of the language of the remaining portion of the instruction complained of (for it seems to be only explanatory of the first part), the

language we have quoted is so plain and concise that the jury could not but understand exactly what the court meant in the whole of the instruction.

If we were disposed to be critical, we would perhaps say that the phrase "to the exclusion of" was not strictly expressive of the idea evidently intended to be expressed,—not so good as the alternative phrase "to the detriment of" just following it; but, taking it in connection with the subject matter of all the instructions, the simple, well-understood meaning of the court was that, for Wallace to contract his debt, or any part thereof, with the specific intention of absorbing the debtor's property, so as to exclude other creditors from the assertion and maintenance of their rights, was fraudulent. If this be true, the contraction of the debt was certainly a fraud upon the rights of other creditors. That certainly was the idea intended to be expressed by the court, and was evidently the sense in which the jury received the instruction, taken in connection with the other instructions. Wallace claimed that Aitken owed him about $800 previous to the sale of the five barrels of whiskey on the 8th of May, 1893, and the five barrels were sold for about $500. Wallace disclaims, inferentially, all intention of attaching Aitken at the time he sold the five barrels. He testifies that he attached Aitken on receiving information at Huntington, on the day of the attachment, or about that time, that Aitken had been secretly endeavoring to sell to another party.

Wallace attached on his debt of $1300, and afterwards bought up the claim of another small attacher, so that his claim with all interests, etc., added, amounted to $1550. With Aitken's assent, he procured an order from the judge in vacation to sell the goods, as being of a perishable nature, and likely to greatly deteriorate if kept on hand. When it is kept in mind, that the goods consisted of nothing else but whiskey and other liquors

(nothing else of consequence), the application to sell at once, to avoid loss, is rather remarkable, since it is thought among connoisseurs that age adds much to the value of such goods. Besides, there is no intimation of waste or leakage, or that storage amounted to much. His order required the sheriff to sell on five days' notice and interveners' attachment was run on the very day of sale, I think. It would have been, perhaps, earlier, but the attachers were far away, and could not have heard of plaintiff's proceedings any sooner. Wallace bought all the goods at the sale for $1550, the amount he claimed was then owing him by Aitken, and immediately resold to Aitken, for $2000, taking a deed of trust and note from Aitken, with some time to run, on the identical property, and set him (Aitken) up in business again.

The court gave its instructions in view of these facts, as well as of other outside facts, which cannot now be recited. The question is, was there not evidence to the effect that the last debt (the price of the five barrels of whiskey) was contracted for the specific purpose of attaching the whole of Aitken's property, not only these five barrels, but many other barrels he had purchased from interveners and others, and had not had time as yet to dispose of in the usual course of trade? And was there not evidence also to the effect that the forced and hurried sale enabled plaintiff to make, not only his debt, but an undue profit on the goods? If so, the last sale of whiskey may have been made for the specific purpose of making the undue profit; and, in the language of the court to the jury, the intention was, when the sale was made (or the jury might well have thought so) "to run the attachment, to absorb the debtor's property, to the exclusion or detriment (either one or the other) of the other creditors."

To apply the instructions to a part of the facts, it would perhaps be objectionable, as the majority of the

court says, but applying it to all the facts antecedent and subsequent to the institution of the suit, to our minds the court was substantially correct in its deliverance to the jury; and the jury could not have misunderstood the court, in the light of all the instructions, especially the fourth for interveners and the seventh given on the court's own motion.

We think the judgment should be affirmed.

WOOD, J., concurs.

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## PLANT v. PLANT.

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Opinion delivered October 24, 1896.

DIVORCE—ALIMONY PENDENTE LITE.—The allowance of alimony to a wife during the pendency of a suit by her for divorce, and of her costs and attorney's fees, is within the discretion of the chancellor, under Sand. & H. Dig. sec. 2512, providing that during the pendency of an action for divorce the court may allow the wife maintenance and a reasonable attorneys' fee.

Appeal from White Chancery Court.

J. P. ROBERTS, Special Chancellor.

*Grant Green, Jr.*, and *John T. Hicks*, for appellant.

1. The divorce is sought on the ground of personal indignities. Sand. & H. Dig. sec. 2505, subd. 5. Alimony *pendente lite* will not be granted as a matter of right. *Ib.* sec. 2512. Merit must be shown. 28 Ark. 93; 30 *id.* 73; 54 *id.* 558. The wife must be without fault. 2 Story, Eq. 1422–1423a; Schouler, Husb. & W. 485; 2 Bish. Mar. & D. sec. 351; 54 Ark. 175. She must be corroborated. 34 Ark. 37; 38 *id.* 119; 38 *id.* 324. If both parties are equally at fault, no decree will be granted. 53 Ark. 484.

2. The showing as to faculties is wholly wanting. Where there is no estate, there can be no allowance. 61 Am. Dec. 376.

3. The allowance is *unreasonable* and excessive, on the proof.

BUNN, C. J. This is an appeal from an order and decree of the circuit court of White county, in chancery sitting, allowing alimony, costs of suit, and attorney's fees in a proceeding for divorce pending therein, wherein appellee was plaintiff and her husband, D. W. Plant, the appellant here, was defendant. By its decree aforesaid, the plaintiff was allowed $25 per month for the first two months, and $12.50 per month thereafter during the pendency of the suit for divorce for the support and maintenance of herself and child; $75 for the costs to be paid to officers of court, witnesses, etc., and $250 attorneys' fee.

The statute on the subject reads as follows, to-wit: "During the pendency of an action for divorce, the court may allow the wife maintenance and a reasonable fee for the attorneys, and enforce the payment of the same by orders and executions and proceedings as in cases of contempt." Sand. & H. Dig. sec. 2512.

The matter is within the sound discretion of the chanceller before whom the cause is pending; and while the showing on the part of the plaintiff and wife in this case is not of the strongest character, it is sufficient for the purpose, we think, and we find no reason to disturb the finding and decree of the chancellor, except in respect to the matter of allowance of attorney's fee. We think the same is excessive under all the circumstances, and should be reduced.

The decree as to maintenance and court costs is affirmed, and as to the allowance of attorney's fee it is modified, so as that the allowance will be the sum of $75, instead of $250; and with this modification the decree is affirmed.

## HARWOOD v. STATE.

Opinion delivered October 24, 1896.

TRANSCRIPT ON CHANGE OF VENUE—SIGNATURE OF CLERK.—The presumption in favor of the regularity of a transcript on a change of venue which is properly certified over the seal of the court, with the clerk's name affixed, is not overcome by proof that the clerk's signature is not in his handwriting, as he may have adopted another's writing for his signature.

EVIDENCE—FORMER TESTIMONY.—Testimony of a witness in a criminal case that he supposes that one who testified at the preliminary hearing is in another state, that he took the train and went in that direction, is an insufficient foundation for proof of what the latter testified at such hearing.

Appeal from Greene Circuit Court.

FELIX G. TAYLOR, Judge.

*Lamb & Westbrooke*, for appellant.

1. The court erred in allowing Baer to testify to the evidence of Babb, given before the justice of the peace at the preliminary hearing. No proper foundation was laid. 33 Ark. 539, 533.

2. The motion to quash the transcript should have been sustained. Without the signature of the clerk, there can be no certificate, without which there is no transcript. Sand. & H. Dig. sec. 2173; 5 Ark. 474; 8 *id.* 252; 9 *id.* 469; 36 *id.* 237; 48 *id.* 94. It must officially appear that the person whose name is signed was present and directed the action of the writer. 31 N. C. 213. Neither the name of an official, purporting to be signed in his official capacity, nor the name of a private citizen, signed by one whose authority is neither apparent upon the document itself, nor otherwise proved, imports verity. 65 Ill. 223; 56 Me. 390; 24 N. H. 267.

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

1. The state proved that witness, Babb, was in Kentucky, that he had left the state. This falls within the rule of 33 Ark. 539. The admission of evidence of this kind is left to the discretion of the court, and unless abused will not be disturbed. 58 Ark. 353.

2. The court properly overruled the motion to quash the transcript. *The seal was affixed*, and the name of the clerk is attached to the certificate. The natural conclusion is that the clerk was present, and authorized the signature. The duties of a clerk are wholly ministerial. 28 Ark. 428. They may be discharged by parties acting under directions. 9 Iowa, 87; 14 Ill. 254; 43 Mo. 353. Webb acted as a deputy clerk, but had not qualified. If this was so, Webb was authorized to sign the clerk's name, and the signature is legal. 38 Ark. 244. The presumption is that Webb acted within the scope of his authority. 25 Ark. 219. Where one signs the name of another at his request, it is binding. 35 Ark. 198; 13 So. 570; 35 N. E. 925.

BATTLE, J. Phillip Harwood was indicted in the circuit court for the eastern district of Clay county for stealing a hog. On his application the case was transferred to the Greene circuit court. When it was called for trial, he moved to quash the transcript of the records and proceedings in the former court, which was filed therein, on the ground that the certificate thereto was not signed by the circuit clerk of Clay county. To sustain his motion he proved that the signature was not in the handwriting of the clerk of Clay, whose name was signed, but in the handwriting of Webb, who was not his deputy, but an employee in his office. The motion was overruled by the court, and exceptions were saved by the defendant.

The state introduced the following evidence: Joshua Baer testified as follows: "About a week or ten days

after September 9, 1894, this defendant with others was arrested for the larceny of the hog in question. There was a preliminary hearing before Justice Settlemyer, at Piggott, Clay county. The defendant was present at the hearing. Babb testified as a witness before Settlemyer, justice of the peace, against the defendant. Babb is in Kentucky, or I suppose he is. He took the Cotton Belt train at Piggott, and went north toward Cairo." As to the preliminary hearing he was allowed to testify, over the objections of the defendant, as follows: "Babb testified that on Sunday morning, September 9, 1894, before the hog was killed, he and the defendant and two Vincent boys, Cossey, and perhaps others, were there in the bottom near Cossey's, and made an agreement in writing, and signed it, that they would stand by each other in protecting their stock; that they then went to Cossey's, and got his gun; then went down the road together, shot one hog, and dressed it, and a little further down the road, shot another hog and dressed it; that the defendant stood on a log as guard while the others dressed the hog; that they all then brought the meat back to Cossey's, and divided it up, each taking his share away. Babb said further that a few days later Fuqua and Hardin and himself rode up to the place where the hog was killed, and when they reached the place, Babb showed Fuqua and Hardin where the killing occurred."

Cossey testified in behalf of the state as follows: "Myself, the defendant, Brent Vincent, and Hunt signed an agreement Sunday morning, September 9, 1894, whereby we agreed to stand by each other in the protection of our stock. After doing this we all went up to my house, got a gun, and started out in the woods. We first shot a small hog, and dressed it, and then a large hog, the one in question. We took the meat to my house, and divided it, each taking his share away. I am

promised immunity from punishment if I testify in this case. The agreement we signed was merely to look after each other's stock, help pay expenses of litigation, and was not in reference to larceny of hogs, or other misconduct."

Mrs. Cossey, for plaintiff, testified as follows: "I am the wife of Counts Cossey. On September 9, 1894, I was at home all day. That morning, which was Sunday, Counts Cossey, my husband, the defendant, Rip Vincent, and his brother, and Hunt came to the house, and got a gun, and went off into the woods. During the afternoon they came back with two hogs. They divided the meat at my house, each taking his portion, and my husband kept his there. We used the meat about the house. I cooked and ate it. I didn't know the meat was stolen, but I supposed it was. They said it was venison, but I knew it was pork. Mrs. Meyers was at my house when the meat was brought there. I attended the preliminary hearing before Justice Settlemyer. Attorneys Barlow and Mack said they would use me as a witness. My husband was also accused of the theft at that time. I told the attorneys that there had been no pork in my house for several months, and no other meat, except some beef and venison."

The defendant adduced evidence tending to prove that he was not present at the place where the larceny was perpetrated at the time it was committed.

He was convicted. He now insists that the conviction should be set aside, because the court overruled his motion to quash the transcript, and allowed Baer to testify as to what the testimony of Babb was in the preliminary hearing before the justice of the peace.

Presumption as to clerk's signature in transcript.

The transcript was transmitted by the clerk of Clay county to the clerk of Greene circuit court, properly certified, with the seal of the circuit court of Clay

county and the name of the clerk affixed to the certificate. There is no controversy as to the ensealing of the certificate or the transmission of the transcript. The presumption is, the transcript was legally transmitted, and the certificate to the same was properly signed and sealed, by the clerk of Clay county, until the contrary appears. To rebut this presumption, the defendant proved that the signature to the certificate was not in the handwriting of the clerk whose name was signed to the same. But this proof was not sufficient to overcome the presumption, because he adopted the signature and made it his own by sealing the certificate and transmitting the transcript. *Greenfield Bank* v. *Crafts*, 4 Allen, 447; *Bartlett* v. *Drake*, 100 Mass. 174; *Willis* v. *Lewis*, 28 Texas, 185. Evidence consistent with a presumption is not sufficient to overcome it. The motion was properly overruled.

Admissibilty of proof of former testimony.

The testimony of Baer as to what Babb testified should not have been admitted. The foundation laid for its admission was wholly insufficient.

Reversed and remanded for a new trial.

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## KANSAS CITY, SPRINGFIELD & MEMPHIS RAILROAD COMPANY *v.* STATE.

Opinion delivered October 24, 1896.

RAILROAD—PENALTY FOR FAILURE TO SIGNAL—NATURE OF PROCEEDING.—The failure of a railroad company to give the signals required by §6196, Sand. & H. Dig., subjects it to a penalty, to be recovered by civil action brought by the prosecuting attorney in the name of the people, and it is error to proceed with the case as a criminal action.

APPEAL—PREJUDICIAL ERROR.—The error of bringing a criminal action against a railroad company for failure to signal at a crossing, instead of a civil action, as provided in §6200, Sand. & H. Dig., is not ground for reversal of a judgment against the company where it is not shown that a different judgment might have been rendered in a civil proceeding.

Appeal from Sharp Circuit Court.

RICHARD H. POWELL, Judge.

*Wallace Pratt* and *Olden & Orr*, for appellant.

The mode of procedure prescribed by section 6200, Sand. & H. Dig., is exclusive. Sand. & H. Dig. secs. 6196, 6200; 26 S. W. 824; 55 Ark. 200; 56 *id.* 166; 29 *id.* 173. Where a statute creates a new offense, and provides a specific remedy or punishment, the statute is exclusive, and must be followed. 8 Otto (U. S.), 555; 91 U. S. 59; Sutherland, Stat. Constr. sec. 399; 39 Mich. 141; 67 Barb. 350; Sedgwick, Stat. & Const. Law, 343; 55 Ala. 408; *Expressio unius est exclusio alterius.* 2 Bish. St. Cr. sec. 249, 250; Endlich, Int. Stat. sec. 78; 5 Blatch. 225; 29 Ala. 651; 14 Md. 184; 13 Beav. 22. The indictment was not sufficient as a complaint at law. 26 S. W. 824; 54 Ark. 546; 58 *id.* 39. Treating the indictment as a complaint, appellant was not required to plead before the third day of the term, and a trial before that time was premature. Sand. & H. Dig. sec. 5735; 2 Tidd's Prac. p. 512; 34 Mo. 321; 58 *id.* 242.

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

The offense charged is a public offense and may be prosecuted by indictment. Sand. & H. Dig. secs. 6200, 6196, 1928–9. The remedy is cumulative. The jurisdiction of one court is not taken away by an affirmative statute giving the same to another. Bish. St. Cr. sec. 164; 52 Ark. 54; 45 *id.* 387; Suth. St. Const. sec. 396; 85 Mo. 480; 121 Ill. 99; 54 Ark. 546; 78 Va. 422. The indictment is a good complaint at law, and can be treated as such. 55 Ark. 200. The court will not

reverse a judgment for an error which could have been corrected below. Sand. & H. Dig. sec. 1061, 5772, 5764. Appellant refused to plead, set up no defense, and the judgment should stand. 52 Ark. 80; 50 *id.* 458.

Nature of proceeding to recover penalty.

WOOD, J. A failure by a railroad to comply with the requirements of sec. 6196, Sand. & H. Dig., subjects it to a penalty to be recovered by civil action brought by the prosecuting attorney in the name of the people of the state. Sec. 6200, Sand. & H. Dig. The act creates no public offense. The circuit court erred, therefore, in proceeding with the case as a criminal, instead of a civil, action. *Railway Co.* v. *State*, 55 Ark. 200; *Railway Co.* v. *State*, 56 *id.* 166.

No reversal for error not prejudicial.

But this court will not reverse except for errors which are substantial and prejudicial. Sand. & H. Dig. p. 414, note q, and sec. 5772.

The record does not show that the result would or could have been different had the court adopted the civil, instead of criminal, procedure, which it should have done. The indictment, treated as a complaint, though not as specific as it should be, states a cause of action. Appellant was present, and, through its attorney, refused to plead to the indictment, insisting that the indictment should be treated as a complaint, and that it was not required to plead until the third day of the term. But the court ordered a plea of not guilty entered for appellant, and proceeded regularly with the trial. Evidence was adduced, the jury were charged, and a verdict and judgment were rendered for $100.

Treating appellant's motion in arrest as a motion for new trial, it does not show that a different judgment might have been rendered in a civil proceeding. It should, at least, have shown to the trial court that it had a good defense to the action. Merely alleging in general terms that it had a meritorious defense was not

sufficient. This court will not go through the idle ceremony of reversing and remanding the cause for new trial when the result, for aught that appears to the contrary, must remain the same. *Prima facie*, this record shows a good cause of action. Affirmed.

BUNN, C. J., (dissenting.) This is an indictment for failing to ring a bell or sound a whistle, under section 6196, Sand. & H. Dig. Verdict and judgment against defendant for $100 fine, and defendant appeals. The indictment is as follows (omitting formal parts): "The said Kansas City, Fort Scott & Memphis Railroad Company, on the 27th day of January, 1895, in the northern district of the county and state aforesaid, did, then and there being a railroad company, operating a railroad and running through the northern district of said county, for the purpose of running passenger, freight, and other cars thereon, and there being a certain crossing of said railroad across the Pocahontas & Salem road on the day and year aforesaid, the said railroad company did then and there unlawfully fail to ring a bell or whistle a whistle on a locomotive and train of cars at the distance of eighty rods from the place where said railroad crosses said Pocahontas & Salem road; said locomotive and train of cars, being then and there run along said railroad, did fail to keep a bell ringing or whistle whistling from said point of eighty rods until said train had passed said crossing, against the peace and dignity of the State of Arkansas."

The record states: "On this 2d day of the term (Tuesday), came the State of Arkansas by her attorney, and also came the defendant by its attorney, and this cause coming on to be heard, the state by its attorney announced ready for trial, and, the defendant refusing at this time to plead to the indictment as such, it is ordered by the court that a plea of 'Not guilty' be entered for the

defendant. Whereupon, by order of the court, come twelve of the regular panel of petit jurors at the present term hereof, who were duly examined by the court, and found competent to serve, and were accepted as a jury for the trial of this cause. After the hearing of the testimony, and there not being sufficient time to complete the trial of this case, the jury was discharged until tomorrow morning at half past 8 o'clock. The above proceedings were on yesterday and entered now for then. Now, on this day came again the jury herein, who, after receiving instructions of the court, retired to consider of their verdict, and afterwards returned into court the following verdict: 'We the jury, find the defendant guilty, and assess the fine at one hundred ($100) dollars.' It is therefore considered, ordered, and adjudged by the court that the State of Arkansas do have and recover of and from the defendant, the Kansas City, Fort Scott & Memphis Railroad Company, the said sum of one hundred dollars as her fine and all her costs in and about this cause had, laid out, and expended. And on Wednesday, January 8, 1896, and the third day of said January term, 1896, of this court, the defendant filed its motion in arrest of judgment assigning six several grounds therefor, some of them subsequently abandoned, so that our attention is directed to the following assignment of errors, to wit: (1) The indictment, as such, does not charge any offense known to the laws of Arkansas. (2) The indictment, treated as a complaint, fails to state facts sufficient to constitute a cause of action. (3) The court erred in treating the proceeding as criminal, and rendering judgment before the third day of the term. (4) The court erred in overruling appellant's motion in arrest of judgment."

This court has repeatedly held that a violation of this bell-ringing statute is not a criminal offense, but on

the contrary that proceedings thereunder are civil proceedings. *Railway Co.* v. *State*, 55 Ark. 200; *Railway Co.* v. *State*, 56 *id.* 166; *Railway Co.* v. *State*, 59 *id.* 165. It is incontrovertible, therefore, that the first assignment of error was well made.

The second assignment is to the effect that the indictment, even if taken as a complaint at law, does not state facts sufficient to constitute a cause of action. Under the ruling in *Railway Co.* v. *State*, 59 Ark. 165, the indictment, taken as a complaint, would be insufficient. The question just here is, can such a defect be the subject of consideration in a motion in arrest of judgment? If the indictment was the subject of general demurrer, the court should have quashed it on its own motion. If it was not full enough in its statement of the cause of action, it should have been quashed, for an indictment is not the subject of correction on motion, or otherwise.

The third assignment is, in its nature, the same as the first. The fourth ground is well taken if any of the others are well taken. It is useless to argue the correctness of a proposition, or of a number of propositions, whose correctness is self evident. All the assignment of errors are, in my opinion, sustainable from almost any point they can be considered.

The judgment of the lower court is affirmed by a majority of this court, solely on the grounds that defendant, in his motion in arrest, does not specifically show that it has a good defense to the action, and that the mere general statement that it has a good defense, without giving the particular facts constituting the defense, will not answer; and, furthermore, because the defendant does not show that the judgment would or could have been otherwise had the case been tried as a civil case.

Section 2272, Sand. & H. Dig., being a section of the code of criminal procedure, is in these words: "The only ground upon which a judgment shall be arrested is that the facts stated in the indictment do not constitute a public offense, within the jurisdiction of the court; and the court may arrest the judgment without motion or observing such defect." It has been held repeatedly by this court, as shown in citations herein made, that the failure to ring a bell or sound a whistle, under the statute involved, is not a public offense, cognizable in the criminal courts. This appearing upon the face of the papers, the judgment might have been arrested on the court's own motion, and should have been on the motion of defendant.

We know of no rule that compels a defendant to make a defense (other than to plead to the jurisdiction) before a court which has no jurisdiction of the case pending therein against him. The criminal court is certainly a very different tribunal from a civil court, although both may be presided over by the same judge. They have different dockets, and their proceedings are under different systems of procedure, and the rights and liberties of parties are different in the two, and in fact between the two there is a great gulf fixed.

The defendant, if the proceedings are viewed in any sort as a substitution for a civil proceeding, had the right — the unquestioned and unconditional right — to defend and begin his defense at any time before the expiration of the third day of the term, even granting that it had been summoned to appear at least ten days before the convening of the court, which does not appear in this case, and doubtless could not be made to appear. Sand. & H. Dig., secs. 5735 and 5813.

I think the judgment should be reversed.

## HILL v. DRAPER.

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Opinion delivered October 31, 1896.

JUDGMENT OF SUPREME COURT—CONCLUSIVENESS.—Where the supreme court on appeal set aside a sale and remanded the cause for further proceedings consistent with its opinion, the trial court has no jurisdiction to sustain the sale, in the absence of any ground for review or new trial for newly discovered evidence.

Appeal from Sevier Circuit Court in Chancery.

W. H. COLLINS, Special Judge.

*Rose, Hemingway & Rose* and *A. C. Steele*, for appellants.

1. The former decree in this court left no discretion in the court below. The sale was *vacated and set aside*. The court below had no authority to do anything except to enter a decree in accordance with the opinion. 54 Ark. 395. It is true that where new evidence has been discovered after a case has been disposed of in this court—evidence which the parties by the exercise of due diligence could not have discovered before—the party may, by an original bill in the nature of a bill of review, have the decision reviewed, as in 36 Ark. 532. But this is not such a case, and the decision of this court is final, and the lower court must obey the mandate. 6 Cr. 267; 12 Pet. 339; 12 Wall. 129; 12 Pet. 494; 3 How. 413, *ib.* 613; 6 *id.* 40; 17 *id.* 258; 1 Wall. 69; 94 U. S. 498; 95 *id.* 361; 101 *id.* 553; 112 *id.* 375; 116 *id.* 47; 144 *id.* 417; 148 *id.* 228; 21 Ark. 197; 73 Fed. 908.

*W. C. Rodgers*, for appellees.

This cause was reversed and remanded for *further proceedings* consistent with the opinion delivered in 54 Ark. 295. 24 S. W. 1075. Nothing in the cases cited

militates against the position that the question of estoppel is not *res judicata.* 1 Herman, Est. & Res. Jud. pp. 117, 118; 27 S. W. 882, 886; 98 Cal. 105; 32 Pac. 876; 49 Mo. 472, 474; 52 Ill. 272; 120 *id.* 136; 130 *id.* 515. The question of estoppel has never been passed on by this court. The only question decided before was, that the surviving partners could not sell the partnership assets to pay an individual debt of a member of the firm. No other question was presented.

BATTLE, J. This is the third time this case has been in this court. The first time it came on an appeal from the judgment of the circuit court sustaining a demurrer to the complaint in the action. The allegations in that complaint, as stated in *Hill* v. *Draper*, 54 Ark. 396, are as follows:

"Draper, McElroy and Rhyne composed the mercantile firm of Draper, McElroy & Co. After Rhyne's death, the firm being insolvent, the surviving partners conveyed the stock of goods in satisfaction of an individual indebtedness of McElroy to John and Kelly Cowling, who had full knowledge of the firm's insolvency. Hill, Fontaine & Co., creditors of the firm, brought suit in equity to subject the property in the hands of the Cowlings to the payment of their debt against the firm, alleging the foregoing facts."

The court held that the complaint stated a good cause of action, on the ground that surviving partners could not dispose of the partnership assets in payment of the private debt of one of the survivors.

Upon the case being remanded, the defendants, W. K. and J. P. Cowling (John and Kelly Cowling), filed an answer, in which they allege: "The Cowlings had been in partnership with Draper and Rhyne under the firm name of Cowling, Draper & Co. McElroy purchased their one-third interest in the property of the

firm, giving them a note for $1600, the price agreed to be paid. Afterwards Draper, McElroy & Co., the new firm, procured an indorsement from the Cowlings upon $3500 of commercial paper due Hill, Fontaine & Co.; and the new firm promised that, if any misfortune should happen, it would protect them, not only for the amount for which they had indorsed, but for the $1600; and afterwards Draper and McElroy, the surviving partners of the new firm, sold the goods, wares, and merchandise held by them as such partners in payment of the note for $1600."

Upon this answer the circuit court heard evidence, and rendered a decree in favor of the defendants; and Hill, Fontaine & Co. and Rhyne's administrator appealed.

This court, upon the evidence adduced, set the sale to the Cowlings aside, and remanded the cause for further proceedings consistent with the opinion delivered in *Hill* v. *Draper*, 54 Ark. 395.*

Upon the return of the case to the circuit court the defendants were permitted to file an amendment to their answer in these words:

"That plaintiffs led and induced these defendants to believe that they would not extend any credit to the firm of Draper, McElroy & Co. in addition to the amount these defendants became responsible for. The defendants could and would have realized all that was due them for their one-third interest in the old firm of Cowling, Draper & Co. at the time plaintiffs agreed not to let Draper, McElroy & Co. have any additional goods or property, and looked to these defendants, and not to Draper, McElroy & Co., or any member of that firm.

"Premises considered, the defendants W. K. and J. P. Cowling pray that the plaintiffs be adjudged estopped

*The opinion on the second appeal was not reported. See 58 Ark. 625. (Rep.)

to pursue these defendants or the goods in their hands for said indebtedness, which by their complaint in this action they seek to satisfy, and that plaintiffs take nothing by this suit, and be adjudged to pay all costs of same.

"Defendants further ask, in the alternative, that if the court should be of the opinion that the question of estoppel is not well raised, and defendants are not entitled to such relief, that there be by the court declared an equitable lien in favor of these defendants on the said goods delivered to their possession, to the extent of their interest in the old firm of Draper, McElroy & Co., which was one-third, and that defendants have such further relief as may comport with equity."

Upon evidence as to facts which were known to the Cowlings before and at the time the cause was first heard upon its merits, the circuit court held that the plaintiffs were estopped to complain of the sale of the partnership assets by the surviving partners in payment of the individual debt of McElroy to the Cowlings, and dismissed the complaint. In this the court erred.

In *Jacks* v. *Adair*, 33 Ark. 161, it is said: "It results from the nature and supremacy of this court that no inferior tribunal can review, alter, or modify its judgments or decrees for any supposed error, or for any matter which might have been considered here. Hence there can be no review for error upon the record. It has been well settled, however, that for matters arising after the judgment or decree of an appellate court, which would render it inequitable to carry the judgment or decree into execution, it may be enjoined. That detracts nothing from the dignity or supremacy of the superior tribunal. It presents new equities for original jurisdiction." See also *Meyer* v. *Johnson*, 60 Ark. 50.

In this case the circuit court treated a part of the decree of this court as of no effect, and upheld a sale

which had been set aside by it, without any ground for review or new trial, there being no newly discovered evidence. In defense of this action of the court, it is said its judgment was reversed on the second appeal, and the cause remanded for further proceedings consistent with the opinion delivered in *Hill* v. *Draper*, 54 Ark. 295. This is true. But at the same time and in the same decree the sale was set aside. There was nothing in the decree which prevented the court from obeying or enforcing it as a whole, which it was its duty to do. It had no jurisdiction to set aside any part of it upon the ground it did.

The decree of the circuit court is therefore reversed, and the cause is remanded, with directions to the court to treat the sale as set aside by the order of this court, and appropriate the property in controversy by sale, or its proceeds, if sold, to the payment of the lawful debts of the late firm of Draper, McElroy & Co., to which its creditors in this action are seeking to subject the same, so far as the same will extend, and for further proceedings.

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## WILSON *v.* HINTON.

Opinion delivered October 31, 1896.

ADMINISTRATION—LIABILITY OF DECEASED ADMINISTRATOR.—Under act of March 13, 1889, providing that, when an administrator of an estate dies his successor in office shall compel his personal representative to account for and pay over all money and property due such estate from the estate of the deceased administrator, a former settlement of his account by the deceased administrator is sufficient evidence of the amount due, in the absence of any showing that he was entitled to any credits thereon; and it is no defense that the administrator of such deceased administrator has no personal information as to the amount due by his intestate, and that none of the money shown to be due by his intestate had come into his hands.

CIRCUIT COURT—PRACTICE ON APPEAL FROM PROBATE COURT.—On a trial *de novo* on appeal from the probate court, the circuit court should make such order as the probate court ought to have made.

Appeal from St. Francis Circuit Court.

GRANT GREEN, JR., Judge.

STATEMENT BY THE COURT.

D. M. Wilson, Sr., was appointed administrator of the estate of Vital Lesca, deceased, by the probate court of St. Francis county, and took possession of the assets of said estate. Wilson afterwards died, and the appellee, C. F. Hinton, was appointed administrator in succession of said estate of Vital Lesca. Hinton, as such administrator, thereafter commenced in the St. Francis probate court this proceeding to compel the appellant, as the administrator and personal representative of Wilson, the deceased administrator, to account for and pay over to said Hinton the assets of said estate of Vital Lesca. Hinton alleged in his written petition for a settlement that the deceased administrator, Wilson, had filed only one account current as administrator of the estate of Vital Lesca, and that such account showed that Wilson had in his possession the sum of $1,187.93, money belonging to said estate, and he asked that appellant, as the personal representative of said Wilson, be compelled to account for and pay over said sum of money. The appellant, as administrator and personal representative of said Wilson, deceased, filed a response to this petition for settlement, denying the right of the administrator in succession to call him to account, and stating in substance that no assets of the estate of Vital Lesca had come to his hands or possession, except certain notes and accounts which he had already tendered to said Hinton as administrator in succession.

The circuit court, where the case was heard on appeal, found that the estate of Wilson, the deceased

administrator, was due the estate of Vital Lesca the sum of $1,187.93, besides certain notes and accounts. It accordingly restated his account, and charged him with that amount, and ordered appellant, as personal representative of said Wilson, to pay said sum, and turn over the notes and accounts to said Hinton, administrator in succession.

*Geo. Sibly* for appellant.

*John Gatlin* and *Norton & Prewett* for appellee.

Liability of deceased administrator.

RIDDICK, J., (after stating the facts.). We are of opinion that the finding and order of the circuit court was correct. Hinton alleged that the account current filed by the deceased administrator showed that he had in his hands a sum of money belonging to the estate of Vital Lesca. Appellant did not contradict this allegation. On the contrary, if we understand his response, he admitted that the account filed by Wilson, the deceased administrator, showed that he had in his hands this sum of money belonging to the estate of Vital Lesca. Appellant did not attempt to show in any way that his intestate was entitled to any credit on said charge, but his whole defense consisted in the allegation that he had no personal information as to whether said charge made by the deceased administrator against himself was correct or not, and that none of said money had come into his hands, as the personal representative of said deceased administrator. This was no defense to the petition for a settlement, for the object of the proceeding was, not to determine whether he, the personal representative of Wilson, had received such money, but whether it was due from the estate of his intestate. By an act of the general assembly, approved March 13, 1889, it is provided, that when an administrator of an estate dies, his successor in office shall compel the personal representative of the deceased administrator to account for and pay over to such

successor all money and property due such estate from the estate of the deceased administrator. For this purpose the administrator in succession may compel the personal representative of the deceased administrator to appear in the probate court and make settlement. If the amount found due upon settlement is not paid, the administrator in succession is required to bring suit against the personal representative and bondsmen of the former administrator. So the purpose of Hinton in filing his petition was, not to make the appellant personally liable, but to bring him to a settlement, and to ascertain the amount due from the intestate to the estate of Vital Lesca, to serve as a basis of suit against the estate of the deceased administrator and his bondsmen. See Acts of 1889, p. 50.

As the settlement filed by Wilson, the deceased administrator, showed that he had in his hands $1,187.93 belonging to the estate of Vital Lesca, and as there was no showing or claim that said Wilson had paid out any portion of same for the benefit of the estate, or was entitled to any credit on this charge, the circuit court was justified, without further evidence, in finding that such sum was due, and in ordering the appellant, as personal representative of said Wilson, to pay the same over to Hinton as administrator in succession of said Vital Lesca.

Practice on appeal from probate court.

Cases on appeal from the probate court are tried by the circuit court *de novo*. The contention of appellant that the circuit court should have reversed the judgment, and remanded the case for a new trial in the probate court, cannot, therefore, be sustained. Sand. & H. Dig. sec. 1152; *Grider* v. *Apperson*, 38 Ark. 388.

The probate court refused to compel the personal representative to make settlement for all the money and property due from the estate of the deceased administrator to the estate of Vital Lesca, but only compelled

him to settle for so much of the assets of the estate of Vital Lesca as had come to the hands of such personal representative. It was therefore proper, on the hearing *de novo* on appeal, for the circuit court to make such order as the probate court should have made, the circuit court having on such trial the power of the probate court.

Finding no error, the judgment is affirmed.

BATTLE, J., did not participate.

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## MORRIS *v.* SCHOOL DISTRICT NO. 86.

Opinion delivered November 7, 1896.

SCHOOL LAND—TRESPASS—PARTY.—A deed conveying land for school purposes to the people of a certain school district, instead of to the school district, though informal, is at least evidence of a dedication to public use, and the school district is the proper party to sue for a trespass thereon.

SAME—NOTICE OF TITLE.—A school district to which land is conveyed by an unrecorded deed is entitled to possession thereof, as against one who subsequently purchases with notice of the prior conveyance or of facts sufficient to have put him upon inquiry.

Appeal from Benton Circuit Court.

EDWARD S. MCDANIEL, Judge.

*E. P. Watson*, for appellant.

BUNN, C. J. This is an action of trespass upon land and damages for cutting timber thereon and taking the same therefrom. The cause was tried by the court sitting as a jury, in the Benton circuit court, and resulted in judgment against the defendant, Morris, in the sum of $25, from which he appealed in due form to this court. In 1876, one William Crawford, the undisputed owner, conveyed the lot involved in this litigation to the people of School District No. 61 for school and church

purposes, and the grantees then erected a house thereon, which they used from that time on at stated periods, and as occasion required, until the institution of this suit, or a short time before. In the course of time the number of the school district was changed by the county court from 61 to 86, the territory remaining identically the same. In 1887, William Crawford, aforesaid, conveyed the 80 acres, which includes the school lot, to the appellant, without excepting the school lot, and under this deed appellant took possesion of the school lot by enclosing it with a portion of the adjoining lands belonging to himself under his said deed, and shrubbed off the bushes and undergrowth, wholly or partially. It is alleged in the complaint that he also cut the growing timber from the school lot, to the damage of the appellee in the sum stated above.

Who may sue for trespass to school land.

The deed of Crawford to the people of the school district seems not to have been made a matter of record, and we gather that the original had been lost or mislaid, but its existence and contents were fairly proved on the trial. Indeed, the original may have been in evidence. The record is not explicit as to this. Whether this deed is formally good or not, it is at least evidence of a dedication to public use, and the district is a proper party to sue in behalf of the people.

As to notice of title.

The testimony shows that Morris had notice of this conveyance to the school district, before his purchase, and if he did not at that time have such notice, he was in possession of such facts, and had such knowledge of circumstances, as that he was put upon inquiry as to the ownership, among which facts were the possession and occupation by the people of the district. We think, therefore, the finding of the court in favor of the school district as to the right of possession was correct. We think, however, that there was a want of evidence to sustain the finding of the court as to the commission of

the alleged damages by the appellant, directly or indirectly. In other words, if the trees were in fact cut, as alleged, there is no proof connecting appellant with the act. He is only liable for nominal damages.

If, therefore, the appellee will, within thirty days, remit the sum adjudged by the court below as damages, down to the sum of one dollar, the judgment for that amount will be affirmed; otherwise, the judgment of the court below will be reversed, and the cause remanded for a new trial.

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## MERRIMAN *v.* SARLO.

63 151
187 406

Opinion delivered November 7, 1896.

INFANCY—REMOVAL of DISABILITIES.—The removal of the disabilities of a minor by a judgment of the circuit court, authorizing him to transact business "in general," and providing that the acts done by him "shall have the same force and effect in law and equity as if done by a person of full age," as provided by Sand. & H. Dig. § 1119, authorizes the minor to sue or defend a suit without the appointment of a guardian *ad litem*.

JUSTICE OF THE PEACE—ATTACHMENTS.—The authority of justices of the peace to issue attachments is not limited to cases in which the debtor is a non-resident.

ATTACHMENT—NECESSITY FOR BOND.—Sand. & H. Dig., § 4422, providing for a "bond to the defendant in the manner now provided by law," applies only where the defendant is a non-resident, as provided by § 5877, *ib.*

SAME—LIEN.—An attachment from a justice's court binds the property of the defendant from the time it comes to the hands of the constable.

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

STATEMENT BY THE COURT.

On the 17th day of July, 1894, the appellee filed his complaint in the Pulaski chancery court, and alleged, in

substance, that Merriman & Menkus had, on the 18th day of April, 1894, brought suit before Hiram Robbins, a justice of the peace of Big Rock township, Pulaski county, Arkansas, against one Fred Blittersdorf for the sum of $75, and at the time procured an attachment from said justice, which was levied on the east 70 feet of lots 11 and 12 and all of lot 9, in block 199, in the city of Little Rock, by the constable; that Blittersdorf was under 21 years, and the grounds of the attachment were that he was about to sell, convey or otherwise dispose of his property with a fraudulent intent to cheat, hinder and delay his creditors, etc.; that on April 28, 1894, judgment by default went against Blittersdorf for $75, and the attachment was sustained; that on June 2, 1894, said Merriman & Menkus filed with the circuit clerk a transcript of the proceedings before Robbins, and on the same day got from the clerk an execution or order of sale of said lands, and placed it for enforcement in the hands of Anderson Mills, the sheriff of said county, who proceeded to advertise said lands for sale on the 28th day of July, 1894; that said judgment was rendered against Blittersdorf without a guardian *ad litem*, or any defense being made for him. Appellee further alleges that he purchased said lands from Blittersdorf on the 20th day of April, 1894, and without knowledge of the attachment, and after the removal of the disabilities of Blittersdorf by order of the Pulaski circuit court; that the transcript of the justice was not noted by the clerk on the docket, as the law directs, until July 11, 1894.

On August 17, 1894, appellants filed their answer, in which they admit the beginning and disposition of the suit before the magistrate, substantially as alleged, and set up that Blittersdorf had his disabilities as a minor removed by order of the circuit court, before he entered into the contract with appellants, and before the institution of the suit before Robbins. They therefore

submitted that a guardian *ad litem* was unnecessary, and that notice to appellee of the attachment cut no figure, because the lien had attached before he bought.

The agreed statement of facts is as follows: "(2) That the plaintiff, at the time he purchased the property from Fred Blittersdorf, had no actual notice that Merriman & Menkus had or claimed any lien upon or any rights in said land described in the complaint. (3) That Fred Blittersdorf, mentioned in the complaint, was, when the writ of attachment was sued out before Robbins, justice of the peace, and when judgment was rendered by said justice, a citizen and resident of Arkansas, and of Pulaski county, and was not twenty-one years of age, and was a male person. (5) That the transcript, filed with the complaint as Exhibit "C," was not entered in the docket of the circuit court for common law judgments of Pulaski county, Arkansas, until the 11th day of July, 1894, but was filed with the clerk on June 2, 1894. (6) That the defendant sheriff was proceeding to sell said lands as alleged in the complaint. (7) That Merriman & Menkus filed no bond in the office of the clerk of the circuit court of Pulaski county before the issuance of the order of sale, a copy of which is filed with the complaint as Exhibit "D," except an ordinary attachment bond, a copy of which is attached hereto as Exhibit "B." (8) That no guardian *ad litem* was appointed for Fred Blittersdorf in any of the proceedings set forth in the complaint, and no defense of any kind was made for him to the suit of Merriman & Menkus as alleged in the complaint. (9) That the plaintiff had no actual notice of the issuance or pretended levy of the writ of attachment in the suit of Merriman & Menkus *v.* Blittersdorf, until after he had become the purchaser of the land involved in this suit and obtained his deed thereto. (10) That all of the dates alleged in the complaint as to the filing and issuance of papers of

all kinds therein mentioned are correct, except the dates of the affidavit for and the issuance of the writ of attachment by the justice of the peace, about which we cannot agree."

The affidavit and writ of attachment before Robbins appear to have been made and issued on the 17th, while the magistrate states in his indorsement on the affidavit and his docket entry that it was all done on the 18th. This apparent conflict is explained in the deposition of Judge Merriman to have occurred from oversight on his and the magistrate's part in not changing the date of the papers that had been prepared and dated by him the day previous to the institution of the suit before Robbins. His testimony, which is undisputed, shows that the attachment bond was given, the affidavit made, and the writ issued, at the same time.

On the 22d day of January, 1895, the court sustained the contention of Sarlo, and made the injunction perpetual against the sale of the lands in dispute, and based its judgment on the fact that Merriman & Menkus got no lien on the lands by virtue of the proceedings before the magistrate; and they appealed.

*W. F. Hill*, for appellant.

1. The justice had jurisdiction. Sand. & H. Dig. secs. 4421–2–3; 40 Ark. 129.

2. No guardian *ad litem* was necessary for Blittersdorf. His disabilities had been removed, and he could be sued as an adult. But if a guardian was necessary, appellee cannot complain. 31 Ark. 375; 18 Am. St. Rep. 696, and note, and 698. The judgment cannot be attacked collaterally. 49 Ark. 414, 415.

3. No further bond was necessary, as the defendant was a resident. The original attachment bond was all that was necessary. 40 Ark. 124, 130–1.

4. The attachment was a lien from the time it came to the constable's hands and was duly served. 29 Ark. 92–3; Sand. & H. Dig. secs. 336, 341.

*Murphy & Menkus* for appellee.

1. A guardian *ad litem* should have been appointed for Blittersdorf. The act removing his disabilities is not broad enough to dispense with the provisions of the statute providing for guardians *ad litem* for all minors. Sand. & H. Dig. secs. 1119, 5647–8.

2. The judgments in 31 Ark. 375 and 49 *id.* 414 were judgments of superior courts, which are presumed to take care of the rights of infants, and where judgments are, by a general rule of the common law, not void, but only voidable by plea or error. 18 Ark. 53; 11 *id.* 519.

3. The attachment was ineffectual because Blittersdorf was a resident. 40 Ark. 129, etc.

4. No lien was acquired until the transcript was filed and entered in the clerk's office. Sand. & H. Dig. sec. 4422.

HUGHES, J., (after stating the facts.) The jurisdiction of the justice of the peace to issue an attachment and have the constable levy the same on real estate, and to transmit his judgment to the circuit court to be there enforced, is fully provided for by sections 4421–4423, Sand. & H. Dig. The constitutionality of these provisions has been settled in *Bush* v. *Visant*, 40 Ark. 129.

Removal of infant's disabilities.

The removal of the disabilities generally of a minor by a judgment of the circuit court authorizing the minor to transact business "in general," and providing that acts done by the minor "shall have the same force and effect in law and equity as if done by a person of full age," as provided by the statute (sec. 1119 of Mansfield's Digest), authorizes the minor to sue or defend a suit without the appointment of a guardian *ad litem*.

The latter clause of said section 1119 provides "that letters testamentary, of administration, or guardianship, may be granted to any such person," etc. Surely, if a minor, whose disabilities have been removed, can act as executor, administrator, or guardian for another, he ought to be competent to act for himself in a suit at law, without the appointment of a guardian *ad litem* to conduct the suit or defense for him, and we think he may lawfully do so, under the statute, and that he is bound by his action or his failure to act.

The order removing the disabilities of Blittersdorf in this case provides "that the disabilities of said petitioner be and the same are hereby removed, and all of his acts done and contracts made shall have the same force and effect in law or equity as though done by a person of full age."

Authority of justice of the peace to issue attachments.

We do not agree with the appellee in his contention that the act which authorizes the justice of the peace to issue attachments applies only in case the debtor is a non-resident. The act is not so limited.

Necessity for bond.

Section 4422, Sand. & H. Dig., provides for a "bond to the defendant in the manner now provided by law." But the statute only prescribes a bond in case the defendant is non-resident. Sub-division 2, sec. 5877, Sand. & H. Dig. The original attachment bond was all that was required in this case.

When lien attaches.

The attachment bound the property of the defendant from the time it came to the hands of the constable. The law fixed the lien, and not the justice of the peace. Sec. 341, Sand. & H. Dig.

Reversed, and remanded for further proceedings not inconsistent with this opinion.

## DAVIS *v.* H. B. CLAFLIN COMPANY.

Opinion delivered November 7, 1896.

INSOLVENT CORPORATIONS—PREFERENCES.—The act of April 4, 1893, to prevent preferences among the creditors of insolvent corporations, has no application to an attachment against an insolvent corporation levied before the act took effect.

ATTACHMENT—DEBT NOT DUE—INTERVENTION.—The suing out by a creditor of an attachment upon a debt not due, upon the allegation that the debtor had disposed of its property with fraudulent intent to hinder and delay its creditors when such allegation is false, and there is no ground for the attachment, is such a violation of the law as amounts to a constructive fraud upon junior attaching creditors, who may intervene for the purpose of having such prior attachment subordinated to their liens.

Appeal from Sebastian Circuit Court in Chancery, Fort Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

H. B. Claflin Company brought suit against the Holmes Dry Goods Company, of Fort Smith, in this state, for $28,333.34, for which amount H. B. Claflin Company held the promissory notes, eight in number, of the Holmes Dry Goods Company, which had been transferred to it in due course of trade, before maturity, by one Daughaday.

H. B. Claflin Company sued out an attachment in said suit, and had it levied upon the stock of goods of the Holmes Dry Goods Company, at Fort Smith, Ark.; alleging in its affidavit for attachment that the Holmes Dry Goods Company was a non-resident of the state, and that it had fraudulently disposed of its property with the fraudulent intent to hinder and delay its creditors. This affidavit was made by Leo Frank, the agent of H. B. Claflin Company.

Subsequently the appellants, as interveners, brought suits on their demands against the Holmes Dry Goods Company, sued out attachments, and had them levied upon the same stock of goods. Immediately before H. B. Claflin Company had their attachment levied, the American National Bank of Fort Smith had brought suit, and had an attachment against the Holmes Dry Goods Company, which was levied prior to either of the other attachments. Judgment went against the Holmes Dry Goods Company in all the suits, the attachments all having been sustained.

The stock of goods of the Holmes Dry Goods Company was sold by the sheriff, under order of the court, and he held the proceeds when appellants intervened, and upon their intervention the cause was transferred to equity. The interveners claim that H. B. Claflin Company ought to be postponed to them in the distribution of the proceeds of the sale of the stock of goods of the Holmes Dry Goods Company,—not however contesting the right of the bank to precedence. The interveners charge that the notes upon which H. B. Claflin Company's suit is based do not represent *bona fide* debts owing by the Holmes Dry Goods Company to it, and say that they are "collusive, simulated, and fraudulent, and were contrived, executed, delivered, and received by the plaintiff and the managing officers and agents of the defendant for the purpose of hindering, delaying, and defrauding the *bona fide* creditors of defendant; that the said notes were never legally executed by defendant." The interveners in their petition allege also that, at the time the plaintiff's attachment was issued, no grounds for said attachment existed, and said suit, with others, was brought with the assent, connivance and procurement of the defendant's managing officers, and with the knowledge on the part of the plaintiff that no ground for attachment existed; that the attachment of plaintiff was not sued out in good faith,

adversely, but in the furtherance of a conspiracy between plaintiff and the managing officers and agents of defendant to apply the assets of the defendant to the payment of the simulated and fictitious debts of plaintiff, etc. There are other matters alleged in the petition of the interveners, which the court finds it unnecessary to mention, in the view it takes of the case. They concluded with a prayer that the plaintiff, H. B. Claflin Company, be postponed to the liens of the petitioners under their attachment, etc.; and, by way of amendment to their petition, made by leave of court, the interveners "allege that, on the 8th of December, 1892, the Holmes Dry Goods Company was an insolvent company; that the attachment herein was sued out by H. B. Claflin Company, and judgment obtained, for the purpose of obtaining preference, in violation of the act of the general assembly, approved April 14, 1893, entitled 'An act to prevent preference among the creditors of insolvent corporations,' and the interveners thereupon pray that if it be found that H. B. Claflin Company's debt is *bona fide*, and its attachment not fraudulent as to petitioners, the funds in the hands of the sheriff be distributed ratably among all the creditors of the Holmes Dry Goods Company."

The appellee in its answer denies all fraud and conspiracy, and that its debts were simulated, and says they were *bona fide*, and that the debts for which the notes were given, upon which its suit is brought, were just debts; and it denies that it was party to any schemes, conspiracy, or contrivance for the purpose of hindering, delaying, and defrauding the *bona fide* creditors of the Holmes Dry Goods Company; denies that said notes were never legally executed; denies that no grounds for attachment existed when it sued out its attachment; denies that its attachment was not sued out in good faith, and that it was sued out in furtherance of a conspiracy, as charged; denies that it sued out

its attachment to obtain a preference, under the act of April 14, 1893, entitled "An act to prevent preferences among the creditors of insolvent corporations," and prayed that the interveners' petition be dismissed.

There was much testimony in the case, which it is not necessary for this court to notice.

It appeared in evidence, and from the pleadings and exhibits in the cause, which was transferred to equity, that the Holmes Dry Goods Company made no defense in the suit by H. B. Claflin Company against it, and it also appeared from the notes sued upon by H. B. Claflin Company in the suit against the Holmes Dry Goods Company, and by the testimony of their agent, Leo Frank, who filed the affidavit for their attachment, that seven of the eight notes sued upon were not due when they had their attachment issued.

The court decreed for H. B. Claflin Company, and dismissed interveners' petition, from which decree they appealed to this court.

*Geo. H. Sanders*, for appellants.

1. In *Sannoner* v. *Jacobson*, 47 Ark. 31, as also in the cases from South Carolina, Missouri and Massachusetts, the ruling is that an intervener is prohibited from interfering in a case where there is an irregularity or informality in the proceedings which could have been amended, and thus made whole; but that in all other cases where there is or was a radical defect in the cause of action, as where no ground of attachment existed, or any other defect that showed there was no authority for maintaining the action, then the intervention is admitted to show this defect, and, upon proof of the fact, the prior attachment is postponed to the clear right of the subsequent attachment. Sand. & H. Dig. secs. 377, 372; 47 Ark. 38; 4 N. H. 319; 2 Bailey, 209; 3 McCord, 201; *ib.* 345; 35 Ohio St. 664; 9 Mo. 397; 57 Ark. 541;

Mans. Dig. secs. 356, 358; 53 Ark. 140; Waples, Att. sec. 775 (Ed. of 1895); Drake, Att. sec. 274; Wade, Att. sec. 54; Van Vleet, Col. Attack, p. 583; 93 Ky. 270; 44 La. An. 843; 65 Tex. 266; 62 *id.* 328; 4 Rich. S. C. 561; 14 N. H. 129; 13 Cal. 435; 18 *id.* 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 with grounds, and writs are levied on the same property. Burrill, Assignments, sec. 125; Pom. Eq. Jur. sec. 886.

3. The debt sued on in this case was not *bona fide*, and not such as would support an attachment against third parties holding *bona fide* debts against the party attached. Cook on Corp. sec. 716, and notes; Dan. Neg. Inst. sec. 393; 146 U. S. 705; 55 Fed. 471; 120 N. Y. 145.

*Clendenning, Mechem & Youmans* and *Jos. M. Hill* also for appellants.

An attachment known to both debtor and creditor to be without grounds, and resorted to, in pursuance of an agreement between them as a method of giving a preference, should be postponed at the instance of a prior attaching creditor. 47 Ark. 31; 58 *id.* 524; 60 *id.* 444; 53 *id.* 140; 57 *id.* 545; 12 S. W. Rep. 235; 18 *id.* 1019. There are two grounds of attachment in this case: (1) That defendant was a non-resident, and (2) that it had fraudulently disposed of its property, etc. The *first* ground is applicable only to *due* debts. Sand. & H. Dig. secs. 325, 327. Six of the notes, aggregating $20,000, *were not due*, and this amount must depend on the second ground of the attachment, that the Holmes company had fraudulently disposed of its property, etc. This ground is shown to be false, and the attachments fail. 12 S. W. Rep. 508. There was a clear abuse of

the court's process—a fraud on the court and junior attachers in good faith.

*Morris M. Cohn* for appellee, *Clayton & Brizzolara* of counsel.

1. In Arkansas it is settled that interveners cannot contest the ground of the attachment, whether they are denied or confessed by the defendant in the attachment. 47 Ark. 31, 41–2; 71 Fed. 151; 2 So. 168; 69 Wis. 434; 34 N. W. 229; Drake, Att. (6 Ed.) secs. 280, 281.

2. The statute expressly authorizes an attachment for debts *not due*. And if a judgment was taken thereon, it was a matter for the Holmes Dry Goods Company to set up, not a matter of which the interveners could complain. Cases *supra*. and Freeman, Judgments, sec. 337; 76 Ind. 78; 102 Pa. St. 536; 16 *id.* 18; 22 Atl. 90; 10 Pet. 449; 141 U. S. 260; 71 Fed. 591–5.

3. If, as has been held, the failure to give bond or make the affidavit is immaterial, surely the fact that the affidavit was based on no sufficient grounds would be immaterial, on collateral attack. 3 Pet. 193, 207; 131 U. S. 352; 150 *id.* 371, 380; 152 *id.* 327, 329; 156 *id.* 527, 533. After appearance by defendant and plea, it is too late to take advantage of preliminary defects. Drake, Att. sec. 112. The absence of bond, or affidavit, does not impair the right of the attaching creditor on collateral attack by an intervener. 60 Ark. 444; 10 Wall. 308; Drake, Att. (6 Ed.) secs. 273, 112. A corporation may be guilty of acts against public policy, yet the objection only lies at the instance of the government. 98 U. S. 621–8; 112 *id.* 405, 413; 107 *id.* 174, 188; 47 Ark. 270, 281; 5 Atl. 751, and note; 8 N. E. 159.

4. The notes were not void. 104 Mo. 531, 539; 86 Mo. 125, 139; *Estes* v. *German Bank*, 62 Ark. 7; *City Electric Street Ry. Co.* v. *Bank*, 62 Ark. 33. But the H. B. Claflin

Company was a *bona fide* holder for value before maturity. 48 Ark. 460; 42 *id.* 22; 53 *id.* 537, 542-3; 102 U. S. 25; Tiedeman, Com. Pap. secs. 35, 115, 116, 117; Dan. Neg. Inst. secs. 386, 389, 390; Taylor on Corp. sec. 204. Possession by payee is *prima facie* evidence of title, and a purchaser may safely rely on it without injury. 42 Ark. 22; 23 N. E. 727; 23 Pac. 509; Tiedeman, Com. Pap. sec. 116. Outside creditors cannot raise the question of *ultra vires;* that is solely the right of the corporation, which it may waive. 51 Fed. 1; 105 U. S. 173; 107 *id.* 174, 188; 16 Iowa, 293, *et seq.*

HUGHES, J., (after stating the facts.) Are the interveners entitled to the relief they ask, that is, that H. B. Claflin Company be postponed to them in the distribution of the balance of funds, proceeds of the sale of the goods of the Holmes Dry Goods Company in the hands of the sheriff? Can they be heard to complain, inasmuch as the Holmes Dry Goods Company made no defense, and does not complain?

At the time of the execution of the notes, which are the basis of the suit of H. B. Claflin Company *v.* Holmes Dry Goods Company, and the date of the institution of this suit, and the issuance of the attachment in favor of the appellees, preferences among creditors by insolvent debtors were allowed in this state.

This court decided, in *Glaser* v. *First National Bank*, 62 Ark. 171, that when two creditors have sued out attachments, and cause them to be levied on the same property, the junior attacher has no right to file a complaint in the action instituted by the senior attacher, and have the senior 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 attaching creditor knowing at the time that he was in failing circumstances; that section 372, Sand. & H. Dig., providing that any person may before sale of the attached property present his complaint to the court disputing the validity of the attachment and setting up some claim to the attached property, and his claim shall be investigated, gives no such right. We adhere to this.

As is said in that case, and the cases generally involving this question, "no creditor has the right to defend an action or proceeding against his debtor, to which he is not a party. * * * A junior attaching creditor cannot take advantage of irregularities or informalities in the proceedings in a prior attachment, though constituting good grounds to set aside the attachment on the motion of the defendant. * * * Priority is in the gift of the debtor." If he is content, no one else can complain of mere irregularities or informalities. "The formality and regularity of such proceedings, * * * in the absence of fraud and collusion between the plaintiffs and defendants, are matters pertaining exclusively to the defendants."

In the case of *Glaser* v. *First National Bank*, there was no showing or contention that the debts for which attachments were issued were not due when suit was brought, and when the attachments were issued.

The weight of judicial determination seems to be that subsequent attaching creditors, whose attachments are sustained, and who obtain judgments upon their claims, ought to have relief against attachments based on demands not yet due, where there is no statute allowing attachments for debts not due. *Ward* v. *Howard*, 12 Ohio St. 158; *Seibert* v. *Switzer*, 35 Ohio St. 661; *Nenney* v. *Schluter*, 62 Tex. 327; *McCluny* v. *Jackson*, 6 Gratt. 96; *Fairfield* v. *Baldwin*, 12 Pick. 388; *Pierce* v.

*Jackson*, 6 Mass. 242; *Henderson* v. *Thornton*, 37 Miss. 448; *Taaffe* v. *Johnson*, 7 Cal. 352; *Ayres* v. *Husted*, 15 Conn. 504; *Patrick* v. *Montader*, 13 Cal. 434; *Davis* v. *Eppinger*, 18 Cal. 378; *Walker* v. *Roberts*, 4 Rich. Law. 561; *Palmer* v. *Martindell*, 43 N. J. Eq. 90 (10 Atl. 802); Drake, Attachments, secs. 273–275; *Peirce* v. *Partridge*, 3 Met. 49; *Hale* v. *Chandler*, 3 Mich. 531. "And in California, Indiana, Mississippi, and Michigan, where an attachment could not be had upon a demand not due, the issue of an attachment to secure such debt was a fraud upon junior attaching creditors, for which they could have the prior attachment dismissed." Shinn, Attachments, note 1 to section 411, p. 760, and authorities cited. See also *Fairfield* v. *Baldwin*, 12 Pick. 388; *Pierce* v. *Jackson*, 6 Mass. 242; *Kollette* v. *Seibel*, (Tex. Civ. App.) 26 S. W. 863; *Bateman* v. *Ramsey*, 74 Tex. 589, S. C. 12 S. W. 238.

Construction of act prohibiting preferences.

The act of April 14, 1893, entitled "An act to prevent preferences among the creditors of insolvent corporations," has no application to this case, as the attachments in this case were levied before the passage of said act.

Validity of attachment on debt not due.

Section 377 of Mansfield's Digest provides: "In an action brought by a creditor against his debtor, the plaintiff may, before his claim is due, have an attachment against the property of the debtor where: First. He has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts."

The affidavit of Leo Frank, as agent of H. B. Claflin Company, upon which their attachment was issued, states, "that the defendant is a non-resident of the State of Arkansas, and that it has fraudulently disposed of its property, with the fraudulent intent to hinder and delay its creditors."

It appears from the evidence in the case that there was no ground for the attachment of appellee. Had the Holmes Dry Goods Company interposed a defense, and made this proof, the attachment would doubtless have been discharged, and judgment would have gone against H. B. Claflin Company as to the debts not due when the suit was brought and the attachment by H. B. Claflin Company was issued. *Cox* v. *Dawson*, 2 Wash. 381 (26 Pac. Rep. 973).

Where the statute provides for suit upon a debt not due, upon the ground that the defendant has fraudulently disposed of his property with the fraudulent intent to hinder or delay his creditors (upon which ground alone an attachment upon a debt not due is allowed by statute in this state), can junior attaching creditors intervene and show by proof that there was no ground for the attachment, and have the senior attachment postponed to their lien?

Perhaps most of the cases maintaining the right of junior attaching creditors, upon their intervention, to have a senior attachment lien postponed, when the senior attachment is issued upon a debt not due, have been determined in states where there is no statute authorizing attachments for a debt not due. Most of the cases base the right upon the ground of constructive fraud by the junior attaching creditor in obtaining an attachment upon a debt not due, when he has no ground for it, and the attempting to secure a prior lien and preference, when he is not entitled to it. Some say only that the prior attachment in such case is void, and seem to place it upon the ground that the prior attachment at the time it is issued is not authorized by law.

We think that, upon reason and authority, an attachment issued upon a debt not due may be avoided by a junior attaching creditor, and postponed to his

attachment lien, where there is no statute authorizing the issuance of an attachment for a debt not due; and it seems that there ought to be no difference where the statute authorizes the attachment for a debt not due, upon particular circumstances or conditions which are alleged as grounds for the attachment, but which, in fact, are shown to be false. It is only where such circumstances or conditions exist that an attachment is allowed by law. If it be true that an attachment issued upon a debt not due can be avoided or postponed at the instance of a *bona fide* attaching creditor, it is not important, in the opinion of some members of the court, whether we say that the reason why it can be done is because the senior attachment is void, as against the junior, because it is not authorized by law, or because it is constructively or legally fraudulent. The same end is reached, by whatever name we give the means by which it is reached.

But a majority of the court are of the opinion that the suing out of their attachment by the appellee, H. B. Claflin Company, upon the ground that the Holmes Dry Goods Company had fraudulently disposed of its property with the fraudulent intent to hinder and delay its creditors, when there was proof that such allegation was in fact false, and that there was no ground for the attachment, was such a violation of law as amounted to a constructive fraud, as against the junior attaching creditors, and would, if permitted to stand, give the appellees an unfair, inequitable, and unjust advantage over such interveners, to which they are not entitled.

By reason of such fraud the appellee must be postponed, as to all its debts not due when its attachment was sued out, to the interveners, in the distribution of the proceeds of the attached property in the hands of the sheriff, and it is so ordered.

The decree is reversed, and the cause is remanded, with directions to enter a decree for the appellants, and for futher proceedings not inconsistent with this opinion.

BUNN, C. J., (concurring.) It was held by this court in *Sannoner* v. *Jacobson*, 47 Ark. 31, and in *Glaser* v. *First National Bank*, 62 Ark. 171, that a junior attaching creditor cannot controvert the grounds of an attachment of a senior attaching creditor. Upon the doctrine thus announced in these two cases especially, and many cases doubtless decided in other jurisdictions, appellees base their contention in the case at bar mainly, that is to say, since the defendant, the Holmes Dry Goods Company, has filed no countervailing affidavit, and otherwise made no defense, judgment on their affidavit should go as a matter of course, the same not being controverted by the defendant, and no one else being permitted to do so.

I concur in the result of the consideration of this case by the court, but not altogether in the reason of the opinion.

This is a case, so far as plaintiff's attachment is concerned, of an attachment on a debt the most of which was not due when the suit was instituted; whereas the case of *Sannoner* v. *Jacobson*, *supra*, and the latter case of *Glaser* v. *First National Bank*, *supra*, were cases where the debts were both overdue at the time of the institution of those suits respectively, or at least were so treated in the discussion of them.

One of the reasons, if not the most potent reason, why a junior attacher cannot attack the grounds of the attachment of the senior attacher, may be found in the history of our attachment laws, and the various statutes on the subject. Previous to the adoption of the code of civil procedure in 1868, we had never had any statute authorizing an attachment on a debt not due, but all our statutes on the subject of attachment were applicable

only to cases where the debts were due and suable, and upon which judgments could be rendered in the absence of such extraordinary provisions. Until the passage of an act approved March 7, 1867, which was embodied in the code of 1868, in a more perfect form, an affidavit in attachment had never been traversable, but in all cases, the plaintiff being entitled to judgments on his debt, the judgments in attachment, or rather the orders sustaining the attachments, went as a matter of course. The defendant could appear and *except* to the affidavit, which means he could show its non-compliance with the statute, or its informality. Sec. 29, ch. 17, Gould's Dig. He of course could defend by answer to declaration. *Ib.* sec. 24. But the provision of the code now in force, and digested as section 397, Sand. & H. Dig., gives the defendant the right to file his countervailing affidavit; and when he has done so, the plaintiff's affidavit in attachment is to be considered as controverted, and issue joined. But this is a privilege accorded to the defendant alone, according to the language of the statute. Without this countervailing affidavit, to be made and filed only by the defendant as stated, the procedure in respect to the attachment continues to be the same as before the statute authorizing the controversion of the grounds of attachment by the defendant, and, the debt being proved in any case, and the plaintiff being entitled to judgment thereon, the judgment in attachment follows as a matter of course. Hence the rule that a junior attacher cannot attack the grounds of the senior attachment.

This being a case of attachment before debt due, the the first question made by the contention of the parties is, whether or not the rule referred to as pertaining in cases where the debts are overdue pertains also in cases where the debts are not yet due when the suits are instituted.

Our statutory provisions governing proceedings in ordinary attachments—that is, attachments upon debts already due—manifestly contemplate a complaint and an affidavit for the order of attachment in separate instruments or papers, for the language is: "The plaintiff in a civil action may, at or after the commencement thereof, have an attachment against the property of the defendant, in the cases and upon the grounds hereinafter stated." Section 325, Sand. & H. Dig. Since the affidavit may be made by the plaintiff himself, or by some (any) one else for him, at any time after the complaint has been filed, it follows that the complaint and affidavit are separate papers in that case, and of course at least *may be* when both are filed at the same time; and moreover, while the verification of the complaint must be by the plaintiff, his attorney or agent, the affidavit in attachment may be made by any person for the plaintiff; hence the two—the complaint and the affidavit—are usually two separate papers, in the meaning of the statute. See sections 326 and 5744, 5745, Sand. & H. Dig.

I have not overlooked the fact that, in two cases at least, this court has held that an affidavit in ordinary attachment, when it contains all the essential ingredients of a complaint, may serve as both. See *Sannoner* v. *Jacobson*, 47 Ark. 31; *Lehman* v. *Lowman*, 50 Ark. 444. But while this, by the authority of those decisions, is allowable, it is, in my opinion, a rule of very doubtful propriety, because it tends to confuse things; for in such case a failure of defendant to answer would justify a judgment in attachment, while such failure might not justify or authorize a judgment on the complaint.

However that may be, or should be, no such rule is allowable in cases of attachment on debts before they are due. In these last cases, there can be no separate affidavit for the attachment, for the language of the statute is: "In an action brought by a creditor against

his debtor, the plaintiff may, before his claim is due, have an attachment against the property of the debtor, where, etc." Section 377, Sand. & H. Dig.

"The attachment authorized by the last section (377) may be granted by the court in which the action is brought, or the clerk or judge thereof, or any circuit judge in vacation, where the *complaint*, verified by oath of the plaintiff, his agent or attorney, shows any of the grounds for attachment enumerated in that section, and the nature and amount of plaintiff's claim, and when the same will become due." Section 378, Sand. & H. Dig.

Thus the grounds for attachment become, in such cases, part and parcel of the complaint, serving as so many material allegations thereof; and further, in order that the court may not be misled into rendering a judgment as if on debts due, the time when the debt will become due is an essential element or allegation in the complaint, not to be substituted by the statements contained in the exhibits to the complaint; for exhibits are generally no part of the pleadings, and are only referred to by the court to verify the pleadings.

Unless the complaint contains the statutory averments, of course judgment for a debt not due is not authorized, for the evidence of debt sued on is the note, which is not due; and since the grounds for attachment become material allegations in the complaint, before the court can pronounce judgment, these allegations, as so many essential facts, must be proved, on failure of the defendant to answer (see sec. 5863, Sand. & H. Dig.), although, if the defendant had answered, and failed to join issue on some of the allegations of the complaint, these will be taken as true, and judgment will be rendered thereon at any time after such partial answer is filed. See secs. 5761 and 5864, Sand. & H. Dig.

So it matters not then whether a junior attacher is permitted to controvert the grounds of attachment or not, the court must take the proof as to the truth of same before taking judgment by default, because these grounds are allegations of facts constituting part of the complaint or cause of action—the basis of the lien, which is always the subject of controversy.

The difference in the manner of formulating the pleadings in the case of debt due and that of one not due is significant, and I do not think can be disregarded if we would understand precisely what to do in order to obtain judgment upon our pleadings.

In those jurisdictions where there are no statutory provisions for attachment on debt not yet due, every effort knowingly made to obtain judgment in suits brought before the debts are due is necessarily fraudulent—an imposition upon the court, and therefore in fraud of the rights of adverse litigants—but in jurisdictions where such provisions are made, I do not think the institution of such suits and relying solely upon the defendant's failure to answer and judgments by default, are necessarily fraudulent, either actually or constructively. Such efforts may, however, amount to actual fraud, for they may be efforts to deceive and mislead the court. But an honest conviction that no proof of an alleged fact is necessary, unless the allegation is controverted by affidavit, as in the present case, in my opinion, is never fraudulent, but involves a right to litigate and try the question, which ought never to be denied, expressly or by implication. If one's honest theory prove false or erroneous, the consequences of failure is all the burden that ought to fall on him.

In fine, "constructive fraud" is a phrase that, I think, should have a very narrow and exceedingly circumscribed meaning.

WOOD, J., (concurring.) The attachment was incident to and dependent upon the right to sue and have judgment for the debt. *Hardware Co.* v. *Deere, Mansur & Co.*, Ark. 140; Sand. & H. Dig. sec. 325. As to the debts not due, no such right existed. For the complaint does not show any of the grounds of attachment for debt not due prescribed by sec. 377, Sand. & H. Dig. Under sec. 378, *id.*, this is expressly required. Judgment by default could not be had upon a complaint binding appellants. These are not matters of mere irregularity or informality,—matters pertaining to the grounds of attachment, which the attachment debtor alone can question. They go to the basis of the action itself, showing the invalidity of the attachment, and destroying the foundation of the lien. *Hardware Co.* v. *Deere, Mansur & Co., supra.* As the complaint shows that the debts are not due, and neither the complaint nor the proof shows any of the conditions upon which a judgment for a debt not due can be predicated, it follows that the judgment in this case sustaining the attachment and fixing a lien in favor of appellees as against appellants (who have a judgment and a lien by attachment for debts past due), is without authority of law and void.

RIDDICK, J., (dissenting.) I am of the opinion that the interveners have no right under the statute to contest the grounds of plaintiff's attachment. It is not denied that the claim of plaintiff is based upon an honest debt. The affidavit showed cause for attachment upon a debt not due, and as this affidavit was not controverted by defendant, its allegations should be taken as true, not only against defendant, but against interveners also. *Glaser* v. *Bank*, 62 Ark. 171; *Rice* v. *Adler*, 71 Fed. 157.

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## UNION COMPRESS COMPANY *v.* WOLF.

Opinion delivered November 7, 1896.

TRIAL—REMARK OF COUNSEL—A remark by plaintiff's counsel, in his argument to the jury, that the word "Union" in the name of the defendant corporation implied that it had bought up all the compresses in the state, and was a monopoly, not being authorized by the evidence, is prejudicial error where the jury were not instructed to disregard such statement, and the case was closely balanced on the facts.

Appeal from Independence Circuit Court.

JOHN B. MCCALEB, Judge.

*J. M. & J. W. Stayton* and *Morris M. Cohn* for appellant.

1. It was improper to permit counsel to use in argument the fact that defendant had taken a change of venue. 33 N. E. 1031.

2. The statements by counsel in the closing argument were highly prejudicial, and justify a reversal. 156 U. S. 361; 48 Ark. 130, 131; 58 *id.* 368; 26 S. W. 998; 58 N. W. 1009; 23 S. W. 298; 26 *id.* 307; 33 N. E. 1031; 20 S. W. 614; 112 Mo. 390; 1 Thompson, Trials, secs. 966, 974, 976, 986; 41 N. H. 317, 324–5; 44 Wis. 282, 291.

*Joseph W. Phillips* and *M. M. Stuckey*, for appellee.

1. The court below properly instructed the jury not to regard the statements and remarks of counsel objected to, and this and the admonition of the court was sufficient to cure any seeming prejudice. 58 Ark. 483.

WOOD, J. This is an action for damages alleged to have accrued to appellees through the negligence of

appellant in storing certain cotton of appellees. The answer denied all material allegations of the complaint.

The bill of exceptions shows that, "in the opening argument for the plaintiff, the attorney for the plaintiff stated to the jury that counsel for the defendant had made an attack on one of the plaintiffs, and to show you how he is regarded in the county from which a change of venue was taken, I will read you the affidavit which was made by the defendant. Here the attorney was reminded by the court that he had no right to refer to that fact, or to read the affidavit; and, regardless of the instructions of the court, and over the objections of the defendant, the attorney, not reading the affidavit, further stated that the change of venue had been taken by the defendant from Jackson county, and that was a sufficient endorsement of the plaintiff's character. To all of which the defendant excepted." "In the closing argument to the jury counsel for the plaintiff referred to the fact that this defendant was a corporation, said its name "*Union*" implied that it had bought up all the compresses in the state, and was a monopoly, which said statement was unauthorized by the evidence in the case, and was done to prejudice the minds of the jury. To which statement defendant excepted."

This court in forceful language has often condemned conduct and statements of counsel in argument which were prejudicial, and not justified by the evidence. Some deliverances upon this subject have been quite recent. *Sokal* v. *Kansas City, Ft. S. & M. R. Co.*, 61 Ark. 130; *Holder* v. *State*, 58 Ark. 473; *Vaughan* v. *State*, 58 Ark. 368.

The duty of trial courts under such circumstances has been clearly defined. The scope of legitimate argument has been plainly outlined, and should be well understood. See *Little Rock & Fort Smith R. Co.* v.

*Cavenesse*, 48 Ark. 106, and authorities cited; *Kansas City, Ft. S. & M. R. Co.* v. *Sokal*, 61 Ark. 130.

It only remains for us to determine, from the record in each case, whether the rules announced have been ignored. The remarks of the attorney for the appellees on the subject of change of venue, after he had been told by the court that "he had no right to refer to that fact, or to read the affidavit," were exceedingly improper. Where counsel persevere in saying things that are not pertinent to the issue, and are prejudicial to the other party, the court in civil cases should see that they do not reap any benefit from such statements, even to the extent of setting aside a verdict in favor of the client of the attorney thus offending, if the court should deem that the prejudice cannot otherwise be overcome. There is not wanting high authority for the position that prejudicial statements made in argument are not removed by the rebuke of counsel and a direction of the court to disregard such statements. *Tucker* v. *Henniker*, 41 N. H. 317; *Brown* v. *Swineford*, 44 Wis. 282. Our court has not gone to that extent, but, as was said by us in *Vaughan* v. *State*, "we will not hesitate to reverse when it occurs to us that prejudice has resulted on account of improper argument," although the trial court may have endeavored to remove it. In this case the instruction of the court to the jury "not to consider or weigh in any manner the way in which this came to this county for trial" probably removed all prejudice from the minds of the jury occasioned by the remarks of counsel as to the change of venue, and we would not reverse for this alone. But we are told in the bill of exceptions that the other remarks, to wit: "That the name "*Union*" of the defendant implied that it had bought up all the compresses in the state, and was a *monopoly*, were unauthorized by the evidence, and were made to

prejudice the minds of the jury." If such was the purpose of the remarks, they certainly produced that effect, for they were clearly prejudicial; and as the case was closely balanced upon the facts that were in evidence, these that were not in evidence may have turned the scale in appellees' favor. Such at least was their tendency; and, in the absence of any showing that the jury were instructed by the court specifically to disregard these statements, we must hold that they were prejudicial, and for this error reverse the judgment, and remand the cause for new trial.

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

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Opinion delivered November 7, 1896.

ACCIDENT AT RAILROAD CROSSING—PROXIMATE CAUSE.—Where a railway accident was occasioned by the fact that the plaintiff, a child of four years, standing within a few feet of a railway crossing, suddenly broke away from her grandmother, and attempted to cross the track ahead of a train rapidly approaching, it is error to instruct the jury that they should find for the plaintiff if they believe that the injury was caused by the failure of the trainmen to give the signals required at crossings.

RAILROAD COMPANY—SPEED OF TRAIN.—It is not negligence for a railway company to run its regular passenger train on schedule time past a way station at the rate of thirty miles an hour, its usual speed, where the track near the station is straight, so that the train could be seen some distance away.

SAME—NEGLIGENCE—FAILURE TO KEEP LOOKOUT.—A railway company cannot be said, as matter of law, to be free from negligence where its fireman neglected to keep a lookout on his side of the track at a village crossing, and plaintiff, a small child, while standing near the track, broke away from its grandmother and ran nearly across the track before being struck by the approaching train.

Appeal from Hot Springs Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

Imogene Denty, an infant four years of age, was struck and injured by a train upon appellant's railway. This action was brought to recover damages for her injury. The accident occurred at a station called Donaldson, an unincorporated village, having three stores and a planing mill, and where several families lived. The little girl, Imogene, with her grandmother, Mrs. Riley, were walking east towards the railway track, intending to pass the same at a public crossing in said village. A passenger train,—the "cannon ball,"—was at the same time approaching from the south, and about to pass the station without stopping. The train gave a long whistle for the station and four short blasts for the crossing.

There was conflict in the testimony as to whether the bell was rung or not. Mrs. Riley had a sunbonnet on her head, and she did not at once see or hear the train. She held Imogene by the hand, and walked on until she came to the side track, about ten feet from the main track upon which the train was approaching. She then noticed the train, and stopped, standing upon or near the side track, far enough away from the main track to be out of danger from the train. At this time Imogene suddenly broke loose from her, and attempted to run across the track in front of the train. She had got nearly across the track when she was struck by the engine, and thrown some distance forward, and off the track to the right of the train. She subsequently recovered from her injuries. The other facts sufficiently appear in the opinion. There was a verdict for plaintiff, and damages assessed at one thousand dollars.

*J. E. Williams* and *Dodge & Johnson* for appellant.

1. The proof in this case makes a case of unavoidable accident. The clear weight of the evidence is that the statutory signals were all given. No physical power on earth could have prevented this accident. The company was in no wise negligent, and hence was not liable. 19 L. R. A. 567; 88 Pa. St. 520; 32 Am. Rep. 472; 11 Wright, 300.

2. The view that the tender years of the child may protect it from the ordinary rules as to contributory negligence will not warrant the court, and did not warrant the jury, in entertaining the presumption of negligence against the defendant. If there be no negligence, the incapacity of the child creates no liability. 65 Pa. St. 269; 3 Am. Rep. 628–634; 95 Pa. St. 398; Patterson, R'y. Law, 72, sec. 75; 14 R. I. 314; 51 Am. Rep. 386; 72 Mo. 62; 4 A. & E. R. Cases, 589.

3. The rate of speed did not contribute to the injury, but was no act of negligence. 19 L. R. A. 567; 34 N. Y. S. 279; 61 N. W. 514; 38 Pac. 257; 37 N. E. 663; 22 S. W. 939; 44 Fed. 574; 32 Ill. App. 365. The crossing at Donaldson was a mere country railroad crossing.

4. The court erred in granting the second instruction for plaintiff. It was thoroughly abstract and completely out of place to submit to the jury, in view of the circumstances of this case, that any failure to ring the bell or sound the whistle, and keep it sounding for eighty rods, might be the cause of this accident. The same is true of the third instruction. While, ordinarily, contributory negligence cannot be imputed to a child of tender years, yet the child was in the custody of an adult, capable of taking care of her, and if she permitted her to escape from her, and thus bring injury upon herself, the doctrine of imputed negligence attaches to the child.

52 Cal. 602; 29 Minn. 336; 9 Allen, 401; 142 Mass. 301; 152 *id.* 294; 46 Ind. 25; 62 Me. 468; 60 N. Y. 326; 36 Hun, 508; 21 Wend. 615; 94 Mo. 600; 28 Kas. 541; 39 Md. 459; 62 Wis. 272.

5. The court erred in refusing the prayers asked by defendant, and modifying those given.

6. On the instructions given the verdict should have been for the defendant.

7. On the whole, the court might well have taken the case from the jury, as being one that warranted no inference of negligence. 55 Fed. 364; 54 *id.* 301.

*W. E. Atkinson*, for appellee.

1. The evidence in this case fully sustains the verdict. There is ample proof of negligence in failing to keep a lookout, and this neglect to perform their duty caused the injury. This court declines to interfere with a verdict when there is evidence to support it. 49 Ark. 369; 47 *id.* 196.

2. The question as to whether the rule that negligence cannot be imputed to plaintiff will not of itself justify a presumption of negligence, does not arise in this case. There is positive evidence of gross negligence in this case, and does not require presumption of the fact.

3. The rate of speed, the want of signals, and the failure to keep a lookout, make a case of recklessness which warranted a verdict. 46 Ark. 45; Sand. & H. Dig., sec. 6207.

4. The engineer's testimony shows a failure to comply with the statute, and the jury evidently believed, and the evidence justifies them, that if a proper watch had been kept, the injury would not have happened.

5. The exceptions to the instructions are in gross to groups. Such exceptions are not good. 38 Ark. 539;

54 *id.* 19; 39 *id.* 337. The third instruction is from 36 Ark. 45.

6. A parent's negligence will not be imputed to an infant. 59 Ark. 186.

7. The modification of defendant's third prayer was right. As prepared, it was not the law, and would have been misleading.

8. As to rate of speed, etc., see 4 Am. & Eng. Enc. Law, p. 932.

9. The suggestion of counsel to take the case from the jury is not well taken. They seem to have overruled and ignored the law, the evidence, and the force and conclusiveness of the verdict, and merely ask this court to set aside the verdict on the weight of evidence.

Proximate cause of accident.

RIDDICK, J.,(after stating the facts.) In this action damages are sought for an injury to Imogene Denty, a child, four years of age. She was struck by a train while attempting to cross the track of appellant's railway at a public crossing in a small village or hamlet called "Donaldson." A consideration of the evidence convinces us that the case turns on the question whether the employees in charge of the train could have avoided the injury by keeping a proper lookout, and also whether that question was properly presented to the jury. It is true there is conflict in the evidence as to whether the signals for the crossing, where the injury occurred, were given by the trainmen as required by the statute, and the presiding judge instructed the jury that they should find for the plaintiff if they believed that the injury was occasioned by the failure to give such signals. But it seems plain that the failure to give such signals, if proved, had no causal connection with the injury complained of. Mrs. Riley, the grandmother of Imogene, a lady sixty-four years of age, with whom Imogene was walking at the time, saw the train before she had got to

the main track of the railway upon which the train was approaching. She stopped with Imogene on the side track, and out of danger from the train. There is nothing in the evidence to justify a finding that, had she heard the signals, she would have stopped before she did, or that she would have occupied a safer position while the train was passing. The failure to give the signals did not cause her to come within dangerous proximity to the train, nor was the injury caused by the position in which she and Imogene stood. It was occasioned by the fact that Imogene suddenly broke away from her grandmother and attempted to cross the track. With this act the failure to ring the bell had no connection, for Imogene was too young to understand the meaning of such signals had they been given. We therefore think it was improper to instruct the jury that they should find for the plaintiff if they believed that the injury was occasioned by the failure to give the statutory signals required for crossings. There was no evidence upon which to base such an instruction, and it was likely to mislead the jury. *Railway Co.* v. *Roberts*, 56 Ark. 387.

As to speed of train.

The instructions also permitted the jury to decide whether the speed of the train was unreasonable or not. But we think that it was not negligence for the railway company to run its regular passenger train past a way station at the rate of thirty miles an hour, when the track near the station is straight, so the train could be seen some distance away, and the train is run on schedule time.

It is necessary for public convenience that passenger trains should make fast time. The people at the station had reason to expect the approach of the train, for it was running on its regular schedule time, and at its usual speed. The track was straight, and the train could be seen some distance away. There was, in our

opinion, nothing to justify a finding that such speed was unreasonable, and we think it was improper to submit that question to the jury for determination. *Tobias* v. *Michigan Central Railroad Co.*, 103 Mich. 330, 61 N. W. 514.

From the instructions given, we do not know that the verdict of the jury was not based on a finding that the speed of the train was unreasonable, or on a finding that the failure to give the statutory signals for the crossing was the proximate cause of the injury, for these questions were submitted to the jury by the instructions. It is true that the circuit judge said to the jury that not every act of negligence on the part of defendant would make it responsible, but only such negligence as caused the injury. This was sound law, but it was only a statement of a general proposition. He was then asked to apply the law to the facts of this case by a special instruction to the jury that if the child "broke loose from its grandmother, and so suddenly ran upon the track that the trainmen could not have seen it, or become aware of its danger, in time to have avoided injuring it," they should find for the defendant; but he refused to do so, and modified the instruction by adding thereto the words, "unless you further find that defendant was guilty of negligence that caused the injury." As there was no other negligence upon which a finding in favor of plaintiff could be based except the failure to keep a proper lookout, this modification of the instruction was improper and prejudicial. *Railway Co.* v. *Roberts*, 56 Ark. 387.

For the reasons above given the judgment of the circuit court must be reversed, but we are asked to go further, and hold that the facts in proof do not make out a case sufficient to go to the jury.

As to failure to keep lookout.

With this contention we cannot agree. While we have said that propelling the train over the crossing at a speed of thirty miles an hour was not of itself negligence, yet, when a train is run at such speed over a public crossing in a town, village, or hamlet, increased vigilence is demanded on the part of the persons having charge of such train, to the end that needless injuries to persons and property may be avoided. Our statute places the burden in cases of this kind upon the railroad company to show that a proper lookout was kept. Sand. & H. Dig., sec. 6207.

The evidence in this case does not so conclusively show that the employees in charge of the train exercised the vigilance and care required by the law under such circumstances as to justify the court in withdrawing the case from the jury. It is admitted that the fireman was not keeping a lookout. The engineer testifies that he was keeping a lookout, but either from his position or from some other cause this lookout was not sufficient.

Mrs. Riley and her granddaughter were standing on the side track, in plain view of the approaching train, and might have been seen had the careful lookout required in such cases been kept. But neither the engineer nor the fireman saw them until after the child was struck by the engine. It is no excuse for this failure to say that Mrs. Riley and the child were on the side next to the fireman, and that he was putting coal in the engine. The train was passing at a high rate of speed over a crossing in a village, and ordinary care required that the fireman or some other employee should have kept a lookout along the track, so that the persons about to approach the track from that side could be seen. *St. L. S. W. Ry. Co.* v. *Russell*, 62 Ark. 182; *Railway Co.* v. *Lewis*, 60 Ark. 416.

The failure of the company to keep a lookout would not excuse an adult person who carelessly sat or stood

upon the track and allowed a train to strike him. Under the previous decisions of this court, such a person could not recover; but with an infant four years of age the rule is different. A child of that age does not possess sufficient discretion to be adjudged guilty of negligence; and if the employees of the company in charge of the train were guilty of carelessness causing injury, the company must respond in damages. *St. L. S. W. Ry. Co.* v. *Dingman*, 62 Ark. 253.

The negligence of the parent or other person having custody of the child will not in such cases be imputed to the child. *Railway Co.* v. *Rexroad*, 59 Ark. 180.

Had a proper lookout been kept, the danger to this child might have been discovered at the time it broke away from its grandmother. While there is conflict in the testimony on this point, yet there is evidence that the child ran about fifteen feet after it broke away from its grandmother before it was struck by the engine. When struck it had nearly crossed the track. Some of the witnesses say was just stepping from the last rail. In an instant more it might have been out of danger. The speed of a train running at the rate of thirty miles an hour must be many times faster than a child only four years of age can run. The train then was much farther than the child from the point of collision at the time the child started across the track. Several of the witnesses testify that the appearance of Mrs. Riley, as she approached the track holding the child by the hand, with a sun bonnet covering the sides of her face and without turning her head to look, indicated that she did not see the train until she had got to the side track. Had the persons in charge of the train seen them, and been on the alert, prepared to act on the instant the child broke away from her, we are not prepared to say that the injury might not have been avoided. We feel by no

means certain that it could have been avoided; but whether it could have been avoided by due diligence in keeping a lookout, and by acting on the first indications of danger, is a proper question for a jury to determine.

We have not set out the instructions given, for the reason that the error complained of is not in the instructions, abstractly considered, but in submitting to the jury issues upon which there was no evidence to support a finding. *Railway Co.* v. *Roberts*, 56 Ark. 387; *Gibbons* v. *Wisconsin Valley R. Co.*, 62 Wis. 546; 2 Thompson, Trials, sec. 2319.

The presiding judge, in his instructions on the measure of damages, told the jury that plaintiff could recover for future pain and suffering if it was reasonable to believe from the evidence that she must suffer in the future as the result of her injuries. This was a correct statement of the law, but the testimony of the two physicians, who alone testified on this point, seems rather to the effect that the child had fully recovered. As the case must be retried, we mention this for the reason that we are not certain that the evidence on this point, as it appears in the transcript, was sufficient to sustain a finding for prospective damages.

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

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# PHŒNIX INSURANCE COMPANY *v.* PUBLIC PARKS AMUSEMENT COMPANY.

Opinion delivered November 14, 1896.

FIRE INSURANCE—VALIDITY OF CONDITION.—A provision in a policy of fire insurance that if the interest of the assured in the property be other than an unconditional and exclusive ownership it must be notified to the company, and be so expressed in the written part of the policy, and that otherwise the policy shall be void, is reasonable and valid; and an acceptance of the policy by the assured is an affirmance that its interest in the property insured is an unconditional and exclusive ownership.

SAME—TITLE OF ASSURED.—A conditional vendee of a chattel, the title of which is reserved in the vendor until payment of the purchase money, is not, until such payment is made, the unconditional and exclusive owner thereof, within the meaning of a policy of insurance stipulating that if the interest of the assured be other than an unconditional and exclusive ownership it must be notified to the company and expressed in the policy, and otherwise the policy shall be void; and the fact that at the time of its destruction the property was in the vendee's possession under a retaining bond given by him in a replevin suit brought by the vendor to recover the property does not alter the character of his holding.

SAME—WAIVER OF STIPULATION.—Where a policy of insurance provides that it shall be void if the interest of the assured be other than unconditional ownership unless such fact be expressed in the policy, the necessity for a statement that the insured property was held under a conditional sale is not obviated by making the loss payable to a mortgagee.

POLICY—INDIVISIBILITY.—Where a contract of insurance is entire and indivisible, the consideration and risk being single, any breach which renders the policy void as to any part of the property renders it void as to all of the property; and the fact that separate amounts of insurance in a policy are apportioned to separate items or classes of property does not make the policy divisible.

INSURANCE AGENT—AUTHORITY.—Insurance agents, who are entrusted with blank policies signed by the principal officers of the insurer, with power and authority to solicit insurance, and, when obtained, to fill the blanks in the policies, receive the premium, and countersign and issue the policies, have the implied authority to waive a condition in a policy against incumbrance.

SAME—WAIVER OF FORFEITURE.—An insurance agent, authorized to waive a forfeiture in a policy, may do so orally, though the policy provides that the waiver must be indorsed on the policy.

CONDITION AGAINST INCUMBRANCE—WAIVER.—A condition against incumbrances in a policy of insurance is waived by the acts of agents of the insurer who, having authority to waive conditions, and knowing that the property was incumbered, attach to the policy permits for additional concurrent insurance, upon which additional policies are issued.

EVIDENCE—MEMORANDUM.—An inventory of the chattels insured, prepared by the assured before the fire, is not admissible as independent evidence to prove their value, but it may be used to refresh the memory of a witness, and if upon examining it he is unable to remember what it contains, but knows its contents to be true, he may so testify, and read the same to the jury.

INTEREST—WHEN RECOVERABLE.—Interest is recoverable on a policy of insurance from the time the loss is made payable.

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

*Charles D. Greaves* and *Wood & Henderson* for appellant.

The Public Parks Amusement Company was not the unconditional and exclusive owner of the property, and the policy was void. 123 Ind. 172; 70 Md. 538; 34 Pac. 140; 86 N. Y. 423; 57 How. Pr. 222; 5 Bush, 186; 61 N. W. 722. A conditional sale passes no title until the conditions are performed. 47 Ark. 363; 48 *id.* 160; *ib.* 273; 49 *id.* 63; 52 *id.* 164; 54 *id.* 478. The reprerentations and stipulations were material. They were warranties. Cases *supra.* The fact that a bond was given in the suit of the Embree-McLean Carriage Company does not change the legal status of the parties as to the ownership. If the carriage company won the suit, it would have the right to recover the specific property, regardless of the bond. 37 Ark. 544; 54 *id.* 121. An insurable interest is not sufficient; there must be ownership. 86 Ala. 189; 27 Atl. 1077; 22 N. E. 229; 96 Pa. St. 37; 36 La. An. 600; 9 So.

327; 17 *id.* 326; 68 Mo. 127; 2 Pet. 25; 87 N. Y. 69; 41 Am. Rep. 359; 32 Fed. Rep. 640. The contract was entire, and, if void as to any portion of the property insured, was void as to all. 52 Ark. 257; 127 Mass. 555; 69 Iowa, 202; 111 Ind. 90; 118 N. Y. 518; 8 L. R. A. 834, and note; 4 *id.* 759; 5 Cent. Rep. 484; 51 N. W. 555. By giving the mortgage of December 17, 1891, the policy was forfeited, and there was no waiver by appellant or any authorized agent. 85 N. Y. 278, 283; 49 Mo. App. 423; May on Ins. sec. 137A; *ib.* (3d Ed.), sec. 126, and note 3, p. 220; 117 U. S. 519; 95 U. S. 329; 96 *id.* 240; 2 Wood, Fire Ins. 841–846; 8 West. Rep. 815; 66 N. Y. 274; 33 N. J. L. 487. A local agent cannot waive conditions in a policy. 60 Ark. 532; 144 Mass. 43; 54 Ark. 78; 53 Vt. 418; 13 B. Mon. 400; 11 Kas. 533; 13 Gray, 79; 79 Pa. 475; 4 Abb. (N. Y.) App. 315; 9 Allen, 231; 2 Dak. 114; 73 N. Y. 5. There is no presumption of an agent's authority. It must be shown. 2 Wood, Fire Ins. 860; *ib.* 870, 888; 54 Ark. 78. The policy provided that no officer * * * could waive any of its terms or conditions, unless * * in writing, etc. This is valid, and prevents an oral waiver by any agent. 20 L. R. A. 267; 54 N. W. 18; 55 Cal. 408; 80 Hun, 251; 6 Gray, 169; 11 Cush. 265. The waiver must be in writing. 85 Ind. 362; 108 *id.* 270; 144 Mass. 43; 66 Cal. 6; 67 *id.* 621; 1 Allen, 294; 4 *id.* 116; 3 Gray, 583; 23 Wend. 260; 16 Pet. 495; 160 Pa. St. 229; 65 Hun, 621; 80 Wis. 393; 51 N. W. 455; 52 *id.* 754.

The inventory made for Reinman & Simon was improperly admitted in evidence. It was error also to allow the inventory and other papers to be sent to the jury room. 1 Cent. Rep. 599; 110 Pa. St. 548. Interest should only have been computed from the day the policy was payable, i. e., sixty days after receipt of proof of loss.

*Geo. G. Latta* and *E. W. Rector* for appellees.

The policy is not void because some of the property covered by was held under a conditional sale. No *formal* or *written application* was made, and hence no *warranty* as to title, and no concealment. An *insurable* interest is all that is required. 1 May on Ins. sec. 284, 285, 288, 287 C; 1 Wood on Ins. sec. 88; 29 Conn. 10; 36 Md. 102; 11 Am. Rep. 169; 2 Michigan Lawyer, 201; 26 Gratt. 871; 27 Am. Rep. 582; 95 U. S. 242; 31 Am. Rep. 741; 18 Mo. 262; 59 Am. Dec. 299; 117 Penn. St. 686; 70 Wis. 196; 5 Am. St. Rep. 159; 67 Miss. 620; 19 Am. St. Rep. 326; 52 Miss. 231; 132 Pa. St. 236; 145 *id.* 346; 93 Mich. 184; 32 Am. St. Rep. 497; 46 Mich. 15; 66 *id.* 98; 53 *id.* 306; 18 Am. Rep. 681; 95 U. S. 673. Only a stern legal necessity will induce such a construction as will nullify a policy. Courts will construe a contract of insurance liberally, so as to give it effect, rather than make it void. 2 Pet. 25; 18 Am. Rep. 681; 95 U. S. 673; 1 So. Dak. 342; 19 Am. St. Rep. 596; 47 W. W. 288; 53 Ark. 494. If there was a breach of warranty, it was waived by the adjustment of the case. 49 Wis. 89; 35 Am. Rep. 772; 62 N. Y. 85; 53 *id.* 144; 7 La. An. 218; 5 Rep. 490; 50 Ill. 111; 27 Barb. 354; 2 East, 469; Angell, Ins. sec. 409; May, Ins. sec. 575; 52 Ark. 11; 53 *id.* 215; 53 *id.* 494. This is a different case from 52 Ark. 257, and the doctrine in that case should not be applied to this. The court should be guided by a respect to general convenience and equity, bearing in mind that the law leans strongly against forfeitures. The contract should be held separable. 27 Am. Rep. 584; 49 Ohio St. 10; 34 *id.* 365. In answer to the contention that the policy was forfeited by the mortgage of December 17, 1891, we submit (1) that *lawful notice* was given of same, and (2) that the provision requiring *written notice* and the company's assent was waived. 2 Wood, Ins. sec.

430, 392; 53 Ark. 494. The inventory facilitated plaintiff in identifying and valuing the property destroyed and was admissible. The jury were simply allowed to refresh their memory from the papers sent to their room, and there was no abuse of discretion by the court, and no prejudice. Plaintiff was entitled to interest from *date of the loss*. 22 Atl. Rep. 655.

BATTLE, J. The Public Parks Amusement Company and Edward Butler sued the Phœnix Insurance Company on a policy of insurance. The pleadings in the action, so far as it is necessary to set them out in this opinion, are as follows: It is alleged in the complaint that the Public Parks Amusement Company was a corporation, and on the 14th day of November, 1891, was engaged in the general livery business in the city of Hot Springs, in this state, and was the owner of forty horses, of hacks, carriages, buggies, carts, wagons, and other property, which were used in their livery business. On the 12th of September, 1891, it executed a deed of trust to John Loughran, and thereby conveyed to him, as trustee, for the use and benefit of Edward Butler, the said horses, hacks, buggies, carts, wagons, and other property, to secure the payment of $10,346 which it owed to Butler, and on the 17th day of December, 1891, conveyed the same property by a deed of trust to the same trustee to secure the payment of $3,000 to the same beneficiary; and no part of these sums have been paid. On the 14th day of November, 1891, the defendant, in consideration of $87.50, executed to the Public Parks Amusement Company a policy of insurance for one year, and thereby agreed to indemnify said company against loss or damage by fire of or to the aforesaid property, to an amount not exceeding the actual value thereof, and in no event the sum of $2,500; loss, if any, payable to Edward Butler, as his interest might appear. On the

17th of May, 1892, said property was totally destroyed by fire. That the defendant is indebted to the plaintiff company, by reason of the foregoing facts, for the use and benefit of Edward Butler, in the sum of $2,500, for which it asked judgment.

The policy was filed with and made a part of the complaint. So much of it as we deem necessary to set out in this opinion is in the words and figures following: "The Phœnix Insurance Company of Brooklyn, N. Y., in consideration of the conditions, limitations and requirements of this policy hereinafter mentioned, and of the receipt by said company of $87.50, will indemnify Public Parks and Amusement Company against loss or damage by fire, to the following specified or located property, only to an amount not exceeding the actual cash value of the property herein described, at the time of such loss, and in no event to exceed twenty-five hundred dollars, as follows: "$1,250 on their forty horses, not to exceed $125 on any one horse in case of loss; $875 on their rolling stock and vehicles of all kinds, including hacks, carriages, buggies, carts, and wagons; $375 on their harness, saddles, bridles, whips, blankets, robes, office and stable furniture, and fixtures of all kinds, including feed on hand,—all while contained in the one-story frame, metal and shingle roof building, known as the "Metropolitan Livery Stables. * * * * * Other concurrent insurance permitted, subject to three-quarter loss clause. Loss, if any, payable to Edward Butler, as his interest may appear. * * * *If the interest of the assured in the property be other than an unconditional, exclusive ownership;* and, if it be real property, if it be other than an absolute fee simple title, or if *any other person or persons have any interest whatever in the property described, whether it be real estate or personal property*, or if the building insured by this policy stands on leased

ground, *or if there be a mortgage or other incumbrance thereon*, building or contents *or any part thereof, whether inquired about or not, it must be so notified to the company, and be so expressed in the written part of this policy; otherwise, the policy shall be void. When the property insured shall be sold or incumbered or otherwise disposed of, written notice shall be given to the company of such sale or incumbrance or disposal, and its assent thereto endorsed hereon; otherwise, this insurance on said property shall immediately terminate.* * * * * * * That no agent or other representative of this company (excepting only the principal officers of the company at New York and its general agent at Chicago) shall have any power to waive or in any manner to modify any provision or condition of this policy, except such as, by the terms of this policy, may be subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions no agent or representative, except as above mentioned, 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 on or attached hereto, and unless so signed as aforesaid."

$13,000 of total concurrent insurance was permitted by the insurance company as follows: $6,500 on horses; $5,000 on vehicles, and $1,500 on horses, saddles, etc.

Nothing was stated or expressed in the policy showing that the insured had any interest in the property described other than the unconditional and exclusive ownership, or that any other person had any interest in it.

The defendant answered. Among the allegations contained in its answer were the following: "That, at

the time of procuring said insurance policy, the plaintiff, Public Parks Amusement Company, through its agents and officers, represented and stated to defendant that it was, subject to the said deed of trust dated September 12, 1891, the absolute and unconditional owner of all the property described and covered by said policy, which were all the horses, carriages, hacks, buggies, carts, surreys, wagons, and all other vehicles, harness, bridles, saddles, and all other property used in the livery business which was then being carried on in the city of Hot Springs, in the building known as the 'Metropolitan Stables,' and by and through such representations procured said insurance; but defendant says that the title to a large amount of said property was reserved in, and held by, others than said plaintiff, at the time of insurance, to whom plaintiff, the Public Parks Amusement Company, owed large sums of money as the purchase price for said property, which said sums had not been paid at the time of said fire, and said plaintiff had only a conditional ownership of said property where the title was so reserved, both at the time of procuring said insurance and at the time of said fire. That the said statements and representations of said plaintiff, as to the ownership of said property, were wilfully false, and the said policy was thereby rendered null and void.

"(4.) That, after procuring said policy of insurance, said plaintiff, on the 17th day of December, 1891, executed to John Loughran, as trustee, for the benefit of Edward Butler, a deed of trust on the property covered by said policy for the sum of $3,000; that said deed of trust was executed without the knowledge or consent of defendant, or its agent, and was in open and direct violation of the terms, stipulations, and conditions of said policy; that thereby the title to said property was conveyed from said plaintiff to the said Loughran, the

same was thereby incumbered, and the ownership of the same changed and altered, and the said policy was thereby rendered null and void."

The issues in the case were tried by a jury. As to the execution of the two deeds of trust mentioned in the complaint and the policy sued on, there was no controversy. In the month of November, 1891, the Public Parks Amusement Company secured insurance on the property referred to in the complaint, amounting in the aggregate to $10,000, $2,500 of which was by the Niagara Insurance Company; $2,500 was by the Caledonia Insurance Company; $2,500 was by the Phœnix Insurance Company, of Brooklyn, New York, the plaintiff; and the remainder by the Phœnix Insurance Company, of London. At the time these policies were issued, Ware & Avery were the local agents at Hot Springs, Ark., of the companies which issued them, and received from Louis Knorr, the agent of the Public Parks Amusement Company, who procured the same, notice of the existence of the first deed of trust, and made the policies payable to the beneficiary therein, Edward Butler, as his interest might appear. All these facts were proved in the trial.

Evidence was also adduced to prove the following facts: Ware & Avery were the agents of the defendant at Hot Springs. They kept policies, signed by its principal officers in blank, on hand. They had authority to solicit insurance for the defendant, and, when insurance was applied for, to fill the blanks in its policies, receive the premium for it, and countersign and issue the same. Shortly after the execution of the four policies we have mentioned, they were sent to Edward Butler, at St. Louis, Mo. When the second deed of trust was executed, the Public Parks Amusement Company, by its agent, Louis Knorr, notified Ware & Avery of the execution of the same, and that it desired to secure $3,000

additional insurance on the property already insured, and stated at the time that it wished the policies for the additional insurance written as the first, payable to Edward Butler, as his interest might appear. Ware & Avery then told Knorr to get the policy sued on, and the other three policies, in order that they might change them by making them authorize $13,000 concurrent insurance, instead of $10,000. Knorr thereupon sent a telegram to Butler, at St. Louis, to send to him the four policies, which was done. When they came, Knorr delivered them to Ware & Avery, and slips filled out and signed by Ware & Avery, in their capacity of agents, as before stated, allowing $13,000 concurrent insurance, were pasted upon each of them. The policies were then returned to Butler. After this the Public Parks Amusement Company secured the $3,000 additional insurance, $1,500 of which was by the German-American Insurance Company, and the remainder by the American Central Insurance Company. The policies of the two last mentioned companies were likewise made payable to Butler, as his interest might appear, and were delivered to him. The application for none of these policies was reduced to writing.

On the 17th of May, 1892, much of the property insured was damaged by fire, a part being totally destroyed. Two wagonettes and carts, which were a small part of the property insured and destroyed, were sold to Public Parks Amusement Company by the Embree-McLean Carriage Company conditionally, the carriage company reserving title in itself until the purchase money was paid. The title to the property was never acquired by the former company by the entire performance of the conditions of the sale. The purchase money remaining unpaid in part, the carriage company brought an action of replevin against its conditional vendee for the possession of the property sold, and the

defendant in that action gave bond to retain possession of it, and to perform the judgment of the court, and held possession until it was burned. The action was pending at the time of the trial.

During the trial in this action, an inventory of the property insured and its valuation, which had been made for Reinman & Simon, prior to the fire, when they were negotiating to buy or trade for the property, was read as evidence over the objection of the defendant. A witness testified that it shows the horses, vehicles, and rolling stock, bridles, saddles, blankets, robes, office and stable furniture, and feed on hand, belonging to the Public Parks Amusement Company on March 29, 1892; that between March 29, 1892, and the 17th day of May, 1892, the Public Parks Amusement Company shipped of said property four horses, two buggies, and two sets of harness to St. Louis, Mo., worth about $750; that this shipment was made in the month of April, 1892; and that the value of the property in the Metropolitan Stables on the night of May 17, 1892, when the fire occurred, was $22,000 or $23,000.

Upon this evidence, the court instructed the jury, at the instance of the plaintiff, over the objections of the defendant as follows:

"4. If you believe from the evidence that, at the time of the application for insurance in this case, or at any other time, Louis Knorr stated that the property insured belonged to the Public Parks Amusement Company; that, at the time he made such statement, a few of the vehicles insured were held under a contract with Embree-McLean Carriage Company, by which said Embree-McLean Carriage Company retained the title to said vehicles until all the purchase money was paid; that only a portion of the purchase money had been paid; and that said Embree-McLean Carriage Company had instituted an action for said property; and that said

Public Parks Amusement Company had given bond in said case to retain said property, and to perform the judgment of the court; that said action is still pending in this court; and that said Public Parks Amusement Company had the possession of said property from the time it was purchased until it was burned, then you should find that said Public Parks Amusement Company had an insurable interest in said property, and that said representation of Knorr, as to the ownership of said property, cannot be used or relied upon by the defendant in this action to defeat the claim of the plaintiff herein."

"12. The court instructs the jury that even if they should find from the evidence that a portion of the purchase money was due upon some of the buggies, that this fact does not necessarily prevent plaintiff from recovering the full value of the property insured."

And the court refused to instruct the jury, at the request of the defendant, as follows:

"5. If you find from the evidence that the Public Parks Amusement Company, after the policy sued on in this case was issued, executed a deed of trust or mortgage on the property covered by said policy for $3,000, and had failed up to the time of said fire to give defendant, or its authorized agent, written notice of such deed of trust or mortgage, and to have the assent of said company thereto endorsed on said policy, then you will find for the defendant.

"6. The fact, if it be a fact, that Louis Knorr, stated to Mr. Avery, the local agent of defendant company, when applying for additional insurance on said property in the month of February, 1892, that he had [placed] or intended to place a mortgage or deed of trust on said property, and that he wanted additional insurance on the same for that reason, will not prevent a forfeiture of said policy therefor, nor be a waiver by

defendant of its rights to rely on said mortgage or deed as a defense to this action.

"8. The local agents of defendant at Hot Springs had no authority to waive the condition in said policy, which terminates the insurance thereunder on account of encumbrances placed on the property covered by said policy after the same was issued.

"9. The local agents of defendant at Hot Springs could not, except by written assent endorsed on said policy, waive the condition in said policy terminating the insurance thereunder on account of an incumbrance placed on said property after said policy was issued."

Other instructions were given over the objections of the defendant, and others which it asked for were refused, which we do not deem necessary to mention in this opinion.

After the instructions were given, and the jury had retired for sometime, the inventory made for Reinman & Simon, on the 29th of March, 1892, was sent to them at their request, to be considered by them, over the defendant's objections.

The jury returned a verdict in favor of plaintiffs, upon which the court entered a judgment in their favor against the defendant for $1,662.67, and six per cent. interest on the same from 28th of July, 1892; and the defendant appealed.

Validity of condition in policy.

The appellant denies the right of appellees to recover on the policy sued on for the reason, among others, that the Public Parks Amusement Company was not the sole and unconditional owner of all the property insured at the time of the execution of the policy, and when the fire occurred. It bases this contention on that part of the policy which provides that "if the interest of the assured in the property be other than an unconditional, exclusive ownership, * * * or if any other person or persons have any interest whatever in the

property described, whether it be real estate or personal property, * * * or if there be a mortgage or other incumbrance thereon, building, or contents, or any part thereof, whether inquired about or not, it must be so notified to the company, and be so expressed in the written part of this policy, otherwise the policy shall be void"; and upon the fact that a part of the property insured and destroyed by fire was held by the company, which is appellee, under a contract of conditional sale, by the terms of which it was stipulated that the title to the same should remain in the seller until the purchase money should be fully paid, and the fact that the price paid therefor was not fully paid at the time of the insurance, or when the fire occurred.

The object of the stipulation of the policy relied on "is to protect the company againt taking risks on property for an amount disproportionate to the value of the interest of the insured, on which the company relies to a great extent as an incentive to use all reasonable precautions to avoid the destruction of the property." This being its purpose, it is reasonable and valid; and, as the policy does not show that the Public Parks Amusement Company did not have any interest in the property insured except the exclusive and unconditional ownership, the truth of it is a condition precedent upon which the right of the assured to recover depends. By accepting the policy with the condition in it without qualification, it affirmed that its interest in the property insured was an unconditional and exclusive ownership, and no other person had any interest in it. If this was not true, the policy is void. *Brown* v. *Commercial Fire Ins. Co.*, 86 Ala. 189; *Lasher* v. *St. Joseph Fire & Marine Ins. Co.*, 86 N. Y. 423; *Barnard* v. *National Fire Ins. Co.*, 27 Mo. App. 26; *Farmville Ins. & Banking Co.* v. *Butler*, 55 Md. 233; 1 May on Insurance, secs. 287 A, 287 B, 294 C.

As to assured's title.

The question in this case "was, not whether the assured had an insurable interest in the property, but whether that interest was sole, unconditional, and entire." The evidence adduced at the trial tended to prove that a part of the property insured and destroyed was held under the terms of a sale by which title was reserved in the seller until the purchase price should be fully paid, and that it never had been paid. If this be true, the assured did not have the unconditional and exclusive ownership of the property, and the policy is void. *Geiss* v. *Franklin Ins. Co.*, 123 Ind. 172; *Westchester Fire Ins. Co.* v. *Weaver*, 70 Md. 538; *Lasher* v. *St. Joseph Fire & Marine Ins. Co.*, 86 N. Y. 423; *Brown* v. *Commercial Fire Ins. Co.*, 86 Ala. 189; *Garver* v. *Hawkeye Ins. Co.*, 69 Iowa, 202. The fact that the vendor instituted an action against the Public Parks Amusement Company to recover the possession of it, and that the defendant in the case had given bond to retain possession of the property, and was in possession at the time it was barred, and that the vendor could not recover without returning a part or all the purchase money paid, did not convert the interest of the defendant company into an unconditional and exclusive ownership. The Public Parks Amusement Company still held the property conditionally.

When condition not waived.

The necessity for a true statement of the interest of the Public Parks Amusement Company was not obviated by making the loss, if any, payable to Edward Butler as his interest might appear. That stipulation, at most, implied that Butler had some lien, incumbrance, or other interest in the property, which was consistent with the unconditional and exclusive ownership in the assured. A lien or incumbrance would not be inconsistent with respect to insurance. *Lasher* v. *St. Joseph Fire & Marine Ins. Co.*, 86 N. Y. 423; *Clay Fire & Marine Stock Ins. Co.* v. *Beck*, 43 Md. 358; *Manhattan*

*Fire Ins. Co.* v. *Weill*, 28 Gratt. 389; *Milleville Mutual Fire Ins. Co.* v. *Wilgus*, 88 Pa. St. 107, 110; 1 May, Insurance, sec. 287 C.

Contract held indivisible.

The contract of insurance was entire and indivisible. Being void as to a part of the property insured, it is void as to all. It was all exposed to one risk, and the consideration for the policy was a specified sum. The fact that separate amounts of insurance were apportioned to separate items or classes of property did not make the policy divisible. The contract and risk being indivisible, the contract is entire, and any breach which renders it void as to a part of the property affects it in the same manner as to the remainder. *McQueeny* v. *Ins. Co.*, 52 Ark. 257; *Havens* v. *Home Ins. Co.*, 111 Ind. 90; *Geiss* v. *Franklin Ins. Co.*, 123 Ind. 172.

Authority of insurance agent.

Appellant contends that the policy was forfeited by the execution of the deed of trust to John Loughran on the 17th of December, 1891; and appellees insist that the forfeiture was waived. In support of the contention of appellees, the evidence adduced at the trial tended to prove that Ware & Avery were the agents of the appellant company at Hot Springs; that they kept policies of the appellant on hand, signed by its principal officers in blank; that they had power and authority to solicit insurance for appellant, and, when such was obtained, to fill the blanks in the policies, receive the premium, and countersign and issue the same. If this be true, it would be within the apparent scope of their authority to waive the condition as to the incumbrance of December 17, 1891. *German-American Insurance Co.* v. *Humphrey*, 62 Ark. 348, 35 S. W. Rep. 428; *Insurance Co.* v. *Brodie*, 52 Ark. 11. They were not deprived of the authority to do so by the policy. It is true that the policy says that no agentor representative of appellant (excepting only the principal officers of the company at New York and its general agent at Chicago), shall have

any power to waive or in any manner modify any of its provisions or conditions, but it expressly excepts "such as by the terms of the policy may be the subject of agreement indorsed thereon or added thereto." The authority to waive them was not limited to its principal officers and its general agent at Chicago. The policy provides that "when the property insured shall be sold or incumbered, * * written notice shall be given to the company of such sale or incumbrance, * * and its assent thereto indorsed thereon." This assent then comes within the authority of Ware & Avery, and they could give it without the written notice or indorsement. *German-American Ins. Co.* v. *Humphrey*, *supra*. But did they do so? The evidence adduced tended to prove that they did. Notice of the incumbrance was given to them. Additional concurrent insurance was requested for the purpose of indemnifying Butler, who held the incumbrance, against loss by fire. The policy sued on was delivered to them for the purpose of granting the same, which was done by pasting on the policy strips filled out and signed by them, such strips having been furnished by the company for that purpose; and the additional insurance was secured on the implied assurance that the policy sued on would still be treated as valid. If this be true, the condition was waived. *German Ins. Co.* v. *Gibson*, 53 Ark. 494; *Ring* v. *Windsor Co. Mut. Ins. Co.*, 54 Vt. 434; *Mutual Life Ins. Co.* v. *French*, 30 Ohio St. 240; *Potter* v. *Ontario & Livingston Mutual Ins. Co.*, 5 Hill, 147; *Haas* v. *Montauk Fire Ins. Co.*, 49 Hun, 272.

Waiver of forfeiture.

The inventory prepared for Reinman & Simon on the 29th of March, 1892, should not have been read as evidence. It was not admissible to prove any fact to which the witness could testify from his recollection, or as independent evidence. But it could have been used to refresh the memory of the witness; and if, upon

Admissibility of memorandum in evidence.

examining it, he was unable to remember what it contains, but knew its contents to be true, he might have so testified, and then read them to the jury, and in that way the facts stated in it might have been proved. In that manner it could have been received and considered by the jury as any other evidence. *Woodruff* v. *State*, 61 Ark. 157; *Insurance Companies* v. *Weides*, 14 Wall. 375; 1 Greenleaf Ev., secs. 436, 437, 440. As to the admissibility of the jury taking papers to their rooms, see *Hickman* v. *Ford*, 43 Ark. 207.

Interest recoverable.

As, by the terms of the policy, the amount of the insurance was payable sixty days after the receipt of proof of loss at the office of the appellant in Chicago, the interest on the sum due on the policy, if any, should be computed from the expiration of that time. *Southern Ins. Co.* v. *White*, 58 Ark. 277.

For the errors in giving the instructions specified over the objections of appellant, and admitting incompetent evidence, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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## KING v. COX.

63 204
67 438

Opinion delivered November 14, 1896.

INSURANCE—VALIDITY OF ORAL CONTRACT.—An oral contract to renew a policy of insurance is not within the statute of frauds, and, if supported by a valuable consideration and free from fraud, and made by competent parties, is binding, though the premium is not paid at the time, if credit is given, or it appears from the circumstances and the situation of the parties that payment at that time was not exacted.

SAME—WAIVER OF FORFEITURE.—An insurance company which, through its general agents, is chargeable with knowledge that the title of the property insured was in an individual member of the insured firm waives the right of insisting upon a forfeiture

because of the violation or falsity of the representation and warranty by the insured that they were the absolute owners of the property.

SAME—WAIVER OF FORFEITURE.—The insurer cannot insist upon the forfeiture of a renewal contract of insurance because of a breach of the warranty that the house and lot are free from incumbrance, in that there was a vendor's lien thereon for the purchase money on a sale from the insured firm to an individual member thereof, where the company through its general agents assented to the sale of the property while the original contract was in force, although the agents may not have actually known of the reservation of the vendor's lien.

LIABILITY OF AGENT TO THIRD PERSON.—Where, in an action on a policy of insurance against the insurer therein and its agent, it appears that the agent was authorized to issue the policy, and that the insurer is bound thereby, no recovery can be had against the agent.

Appeal from Boone Circuit Court.

BRICE B. HUDGINS, Judge.

STATEMENT BY THE COURT.

The appellees recovered judgment, in a suit brought by them against the appellants, upon a parol contract to renew a policy of insurance against loss by fire. The policy was not in fact issued in accordance with the agreement for renewal, and the property insured was consumed by fire. To reverse the judgment against them, King Brothers and the insurance company have brought the case here by appeal. The policy to be renewed, as we understand, expired the 27th day of December, 1892, and was numbered 31,162. Cox & Denton made a written application for this policy numbered 31,162, in which they stated that their title to the store house and lot on which the house insured was situated was absolute, and the property was not mortgaged or otherwise incumbered.

The application, numbered 31,162, made and signed by Cox & Denton, which was read in evidence, contains the following statements, which, by the terms of the policy, are warranties, viz:

"Insurance is desired in the American Fire Insurance Company of Philadelphia upon the following described property, belonging to the undersigned, Cox & Denton, and situate in Gassville, in the county of Baxter, State of Arkansas. Location—(give lot and block, numbers and side of street). Ans. North side of Main street. How occupied? Ans. Applicant; country store. Is your title to above described property absolute? Ans. Yes. If you do not own building, give name of owner. Is property on which insurance is wanted mortgaged or otherwise incumbered? Ans. No."

The policy of insurance expiring December 27, 1892, which was introduced in evidence by the appellees, contains the following provisions:

"The American Fire Insurance Company of Philadelphia, in consideration of the stipulations herein named, and of $38.78, premium, does insure Cox & Denton for the term of one year from the 27th day of December, 1891, at noon, to the 27th day of December, 1892, at noon, against all loss or damage by fire, except as herein provided. * * * $1,055 on their stock of general merchandise, etc.; $333.⅓ on their building, above described (description same as in application); $166.⅔ on their store and office fixtures.

"Special reference being had to the assured's application, No. 31,162, on which this insurance is based, and which is hereby made a warranty by the assured, and a part of this policy. * * * This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject-matter thereof, whether before or after a loss.

"This entire policy, unless otherwise provided by agreement indorsed or added hereto, shall be void * * * if the interest of assured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the assured in fee simple, * * * or if any change, other than by the death of an insured, takes place in the interest, title, or possession of the subject of insurance. * * * * This policy may, by a renewal, be continued under the original stipulations, in consideration of the premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal, or this policy shall be void. * * * This policy is made and accepted subject to the foregoing stipulations and conditions."

Cox & Denton, at the time of the oral agreement for the renewal of the policy, had sold the house and lot to Cox, a member of the firm of Cox & Denton, and had taken notes for the purchase money, and had reserved a lien, on the face of the deed, upon the house and lot conveyed by them to Cox to secure the payment of the notes, which they transferred to Hill, Fontaine & Co. as collateral security. King Brothers, who, the evidence shows, were the general agents of the insurance company, had consented that the house and lot might be sold by Cox & Denton to Cox, and knew that it had been so sold by Cox & Denton. But they deny that they knew the terms of the sale, or that any notes were given, or that any lien existed for the purchase money, or that Hill, Fontaine & Co. held notes for the same, and there is no proof that they knew or had any notice that such was the case.

*S. R. Cockrill*, *De Roos Bailey*, and *Ashley Cockrill* for appellants.

A naked oral promise of an insurance company's agent to renew a policy when it runs out is not actionable

on the agent's failure to do so. 53 Ga. 109; 68 Ill. 414, 418; 84 Ky. 470; 47 Wis. 365; 101 N. Y. 575; 1 May, Ins. sec. 138. An agent to receive and forward applications, to collect premiums, and to countersign and issue policies, is an agent of limited powers, and has no implied authority to depart from his custom of issuing a written policy upon a written application. 1 May, Ins. sec. 138; 60 Ark. 532; 144 Mass. 43; 1 Biddle, Ins. sec. 122. The contract was void because the representations that Cox & Denton were the owners of the ground, and that there were no incumbrances on the property, were false. This was a breach of the contract, and it cannot be enforced. 58 Ark. 528; 1 May, Ins. sec. 144 G, p. 270; 117 U. S. 519, 530; 50 Ark. 397; 15 *id.* 193; 71 Mich. 414; 70 Wis. 1–5; 1 May, Ins. sec. 133 B. An agent's knowledge of the falsity of a representation, which is an inducement to the contract, does not estop the company from taking advantage of its falsity. 58 Ark. 528; 117 U. S. 519, 530; 92 N. Y. 274, 283; 74 Mo. 174; 1 May, Ins. sec. 23 A; 133 Mass. 82; 17 Mo. 287; 46 Me. 394; 133 Mass. 45; 135 *id.* 440; 1 May on Ins. 290. The contract was an entirety, and not separable. 52 Ark. 257; 1 May, Ins. sec. 277, 189; 47 Me. 403; 48 Wis. 26; 1 Biddle, Ins. sec. 28; 12 Mass. 40. A local agent cannot waive conditions in a policy, even when the naked power of adjusting a loss is granted him. 1 May on Ins. sec. 138; 60 Ark. 532; 144 Mass. 43. Plaintiff could not maintain the action without tendering the premium. 19 How. (N. Y.) 318, 323.

*Rose, Hemingway & Rose, Crump & Watkins*, and *M. N. Dyer* for appellees.

An insurance company is bound by a parol contract of its agent to renew a policy. 6 Ins. Law Journal, 341; 1 Fed. Cases, p. 264; 90 N. Y. 281; 19 How. 318; May,

Ins. sec. 19. Contracts of insurance need not be in writing. 19 N. Y. 305. The issuance of policies was within the general scope of authority of the agents, and third parties are not bound by private instructions received from the principal, not communicated to them by the agents. 55 Ark. 629; *ib.* 632; May on Ins. sec. 126; 89 N. Y. 315. Where an insurance company grants power to an agent, it cannot contract against a corresponding liability. 54 Ark. 56; 53 *id.* 222. Where, through the neglect of an agent, an application is not received or acted on by the company until a loss occurs, the company is liable. 44 N. Y. 538; 50 N. Y. 405; 59 N. Y. 171; 123 Mass. 324. Although, by the printed terms of a policy, it is stated that no policy is binding unless the premium is paid, yet the agent may waive such condition and give a short credit. 35 N. Y. 131; 51 *id.* 117; 66 *id.* 29; *ib.* 222; 59 *id.* 171. Authority to issue a policy includes the power to make a parol contract for its issue. 15 Blatchf. 504; 78 Ind. 136; 138 Mass. 398; 2 Dill. 156; *id.* 282; 5 Hun, 90; 16 Gray, 448; 33 Pa. St. 221; 7 Daly, 555; 59 N. Y. 171; 39 Hun, 176; 43 Wis. 108; 9 Heisk. 606. It was competent for the agent to waive written notice of loss. 52 Ark. 21; May, Ins. sec. 464; 43 Wis. 108; 58 Ala. 476; 29 N. Y. 184; 35 *id.* 131; 51 *id.* 117; 27 Fed. Rep. 25; 39 N. J. L. 482; 58 Wis. 508; 20 Fed. 663; 4 Hun, 413; 112 Mass. 136; 73 N. Y. 11; May, Ins. sec. 131; 50 Pa. St. 331. The denial of liberty is a waiver of the ninety days, and of proof of loss. 53 Ark. 501; 52 Mich. 131; 12 Mo. App. 100. When the agent makes the mistakes, and the insured relies on him as to the proper making of the application, the company will not be allowed to profit by it. 66 Md. 236; 13 Wall. 222; 30 N. W. 401; May on Ins. sec. 143; 29 N. W. 605; 52 Ark. 11; 84 Ind. 253; 53 *id.* 222; 76 N. Y. 415; 68 N. Y. 434; 43 N. J. L. 652; 77 N. Y. 605. If

King Bros. are not bound, the Insurance Company is, and the judgment can be reversed as to them, and affirmed as to the company. Sand. & H. Dig., sec. 1064.

Validity of oral contract of insurance.

HUGHES, J., (after stating the facts.) The policy which was to be renewed according to the parol contract was, of course, to be upon the same terms and conditions as the one that expired on the 27th day of December, 1892, numbered 31,162. It is contended by counsel for appellant that the oral agreement to renew the policy was invalid; that the contract, to be binding, should have been in writing. But in this, we think, the counsel are mistaken. An oral contract for insurance is not within the statute of frauds, and if supported by a valuable consideration, and free from fraud, and made by competent parties, is binding, though the premium be not paid at the time, if credit be given, or it appears from the circumstances and the situation of the parties that payment of the premium at the time was not exacted. *Ellis* v. *Ins. Co.*, 50 N. Y. 405; *Trustees* v. *Ins. Co.*, 19 N. Y. 306; *Angell* v. *Ins. Co.*, 59 N. Y. 171; *Gans* v. *Ins. Co.*, 43 Wis. 108; *Putnam* v. *Ins. Co.*, 123 Mass. 324; *Goldwater* v. *Ins. Co.*, 39 Hun., 176; 1 May on Ins., sec. 126; *Southern Ins. Co.* v. *Booker*, 9 Heisk. 606; *Steen* v. *Ins. Co.*, 89 N. Y. 315; *Union Ins. Co.* v. *McKookey*, 33 Ohio St. 555; *Taylor* v. *Ins. Co.*, 2 Dill. 282; *Scott* v. *Ins. Co.*, 53 Wis. 238.

When forfeiture waived.

It is also insisted that the policy was void, or that the agreement for it was void, because of the violation or falsity of the representation and warranty that Cox & Denton made, when they said they were the absolute owners of the house and lot, whereas they had sold it to Cox, an individual—a member of the firm. But the evidence shows that they had consented to the sale, and knew, when the contract for renewal was made, that it had been so sold and conveyed. They thereby are precluded from insisting upon a forfeiture by reason of this.

They waived it. *Insurance Co.* v. *Brodie*, 52 Ark. 11. The agent knew it and his knowledge was the company's. We think the proof in the case shows that King Brothers were the general agents of the insurance company, with power to make contracts of insurance and to issue policies, and that they had the power to make this contract of insurance, and that they did make it. They had the power therefore to waive the forfeiture (as they did) by reason of the fact that the company had consented through them, as general agents, to the sale and conveyance by Cox & Denton of the store house and lot to Cox.

But it is urged that the warranty that the house and lot were free from incumbrance, according to the evidence, was broken, as there existed at the time the oral agreement was made an equitable mortgage upon the property, in the shape of a vendor's lien for purchase money, and that this, according to the express terms and stipulations of the policy, rendered the entire policy void. To support the contention, counsel cite, *Providence Life Assurance Society* v. *Reutlinger*, 58 Ark. 528; 1 May on Ins., sec. 290; *N. Y. Life Ins. Co.* v. *Fletcher*, 117 U. S. 519; *Loehner* v. *Home Mutual Ins. Co.*, 17 Mo. 247. If there was no waiver of this incumbrance, the contention is well founded. But "assent given by an insurance company to a sale of the insured property amounts to an assent to the terms of sale, although the company did not know till after the loss that the terms provided for the execution of a mortgage to secure the purchase money." 1 Wood on Fire Ins., sec. 330; *Farmers' Ins. Co.* v. *Ashton*, 31 Ohio St. 477. In this case the insurance company waived the sale of the property insured, and also the existence of the lien for the purchase money, knowing as they did of the sale before entering into the agreement to renew the policy.

Liability of agent.

As we have held that King Brothers were the general agents of the insurance company, and that they as such agents bound the company, and were acting within the scope of their authority, it follows that the insurance company is bound, but that King Brothers are not.

The judgment as to King Brothers is reversed, and the cause dismissed as to them, but as to the insurance company it is affirmed.

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## ATLANTA NATIONAL BUILDING & LOAN ASSOCIATION *v.* BOLLINGER.

Opinion delivered November 14, 1896.

ESTOPPEL—AGENT'S CONTRACT.—The agent of a building and loan association, in his individual capacity, covenanted with one applying for a loan that, in case the loan was not made within ninety days after application, he would return his initiation fees and all monthly dues that he might have paid. This agreement was communicated to the association by the applicant, with an inquiry as to when he could get the loan. The association replied to his inquiry, without referring to the agreement with the agent. The applicant knew that the agent had no authority to bind the association by such agreement. *Held* that the association was not estopped to deny its liability under such agreement.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

*Winchester & Martin* for appellant.

If the company can be held at all, it must be because, with a knowledge of this contract, it ratified and confirmed it. Mechem, Agency, sec. 546, and cases cited. There is no evidence of this. To work an estoppel, there must be knowledge and conduct. Bigelow, Estoppel, 546, 547, 552, 588, 589, *et seq.* Ratification can be

predicated only upon knowledge, or upon intentional and deliberate ignorance. 55 Ark. 242; *ib.* 426–7; *ib.* 631, 632; 29 *id.* 530. In this case the contract sued on was made after the sale of the stock, and the sale of stock was the only business the agent was authorized to transact.

*Joseph M. Hill* and *Preston C. West* for appellee.

WOOD, J. This appeal is to reverse a judgment for $220.00, recovered on the following contract: "Fort Smith, Ark., December 6, 1893. R. C. Bollinger, of Fort Smith, Ark., having subscribed for and received from Atlanta National Building & Loan Association, of Atlanta, Ga., seventy shares of stock, being taken for securing a loan of seven thousand dollars: Now, I, undersigned, as special agent for said association, and in my individual capacity, hereby agree and covenant to return to said R. C. Bollinger his initiation fee and all monthly dues that he may have paid, provided that he does not secure said loan within ninety days after the time his application for such loan was received at the home office of the association, said application having been acknowledged received by the association, November 17, 1893, the said R. C. Bollinger covenanting to pay his monthly dues promptly to the above mentioned time, and any failure to do so will render this argument null and void. (Signed) W. B. Hammond, R. C. Bollinger.

The answer, *inter alia*, denies the contract, and the authority of the agent to make it. The court instructed the jury that the contract was "not binding on the defendant association, unless it had by its action estopped itself to deny its binding effect on it." This was correct, for the undisputed evidence shows that the agent had no authority to bind the association by such a contract. What is the proof of estoppel? Appellee contends that appellant, "with full knowledge of the

contract, ratified it by silence, after being called upon to respond to its force." The proof shows that on November 25, 1893, appellee wrote to the secretary of appellant as follows: "Dear Sir: I was very much surprised on receiving your papers stating that I would have monthly dues to pay before the loan of $7,000 was made, for which I applied. Mr. Hammond told me that if you accepted the loan, I could get the money right away; that there would be no delay; that if you did not accept the loan, then the eighty dollars which I paid him would be returned. Now, I will tell you my circumstances, which I explained to Mr. W. B. Hammond. We have $7,000 borrowed on the property from M. Joel, and it is now due, and he insists on having the money, and threatens to foreclose. Now, Mr. Hammond says that you have already accepted the loan, but the papers you sent me don't show it, and don't say so. Let me know at once how soon I can accept the money, as I must know something definite at once. Yours truly, R. C. Bollinger." And received the following reply: "Atlanta, Ga., November 28, 1893. Mr. R. C. Bollinger, Fort Smith, Arkansas. Dear Sir: Yours of 25th inst. received, and I am somewhat surprised at its contents. You state that Mr. Hammond told you that you could get the money right away, and further that you should not be required to pay dues until you did get it, etc. I cannot understand why Mr. Hammond should make such a statement, for the fact is that loans by the association are only made in the regular way, as indicated in the plans and by-laws herewith. And I refer you especially, in reference thereto, to pages 9, 10 and 11. All applications for loans are treated as therein indicated. Please read the literature carefully, as we strictly comply therewith. Yours truly, J. W. Goldsmith, Secretary."

And again in December appellee wrote as follows: "Mr. J. W. Goldsmith, Secretary Atlanta National

Building & Loan Association—Dear Sir: I would not object to paying monthly assessments, if I could be assured by you of getting the loan in the sixty or ninety days from date of my application, No. 3031, even if Mr. Hammond did promise me that I would know right away. It was also expressly understood that if I did not secure the loan my money would be refunded at once. The money on loan wanted is needed to pay off a mortgage of $7,000 now due on the property, as I had explained to Mr. Hammond. Please give me some satisfaction, as near as you can, on the above questions. Can I get the loan in sixty or ninety days from date of application? And how long will it take before I will know if I can get the loan or not? And if I cannot get the loan, will I get my money back right away that I paid in? Awaiting an early reply, Yours truly, R. C. Bollinger." And received the following reply: "Dear Sir: The board reserve to themselves the exclusive right to pass on each application for a loan, which they do as per plans and by-laws, pages 9, 10 and 11 herewith. No one can act and bind them further than therein indicated. But if they are satisfied with the security offered, they make the loan as per the book in its turn, and it requires just now four to five months from date of filing such application, on account of money famine reducing receipts and also increasing applications. Yours truly, J. W. Goldsmith, Secretary. December 4, 1893."

The testimony of Goldsmith, the secretary of the appellant company, on this question is as follows: "I never knew anything of any agreement between Hammond and Bollinger until the receipt of Bollinger's letter of November 25, 1893, and from Mr. Hammond's letter of February, 1894, both of which are hereinbefore attached, and from which, as I stated before, and as stated in said letters, I understood the matter to be purely an individual agreement between Hammond and

Bollinger, but I had never heard it expressed or intimated from any source that the dues on Mr. Bollinger's shares which he had paid into the association were expected, under any circumstances, to be paid back, until after this suit was brought. If there had been any condition accompanying the application for the stock, or the application for the loan, or had we had any knowledge of any such alleged agreement, both would have been refused, and promptly returned to Mr. Bollinger." He further testified that "the $80 referred to in Bollinger's letter, as paid by him to Mr. Hammond, which he says Mr. Hammond stated would be returned unless he got the loan right away, was $70.00 for admission fees paid to Hammond, and which belonged to and was retained by him as his commission for taking the shares of stock, and the remaining ten was for attorney's fees with regard to examination of title. I took no note of said matter, because I regarded it as a personal and individual arrangement between Hammond and Bollinger with regard to Hammond's own commission. I regarded it simply as an agreement by Hammond, if such were made, to relinquish his commissions on the stock, in case Bollinger did not obtain the loan."

Appellee contends that appellant is estopped by failing to respond expressly to that part of appellee's letter in which he says: "Hammond told me if you did not accept the loan that the $80.00 which I paid would be returned," and also by failing to answer specifically the question propounded in the letter of December 4th, to-wit: "If you can not get the loan, will I get my money back right away that I paid in?" Certainly, appellant was not estopped to deny liability for the eighty dollars which appellee claims to have paid upon the promise of its agent to refund in case of failure to make the loan. For the agent was not authorized to make such promise, and this amount was paid before

any letters were written to appellant concerning it. We fail to comprehend how silence in answering letters that were not written until after the eighty dollars had been paid could have caused the payment of said eighty dollars. That would be impossible. Certain it is, then, that the eighty dollars which appellee had paid before writing the letters were not paid by reason of silence in not answering anything in said letters. And if said silence had not in any manner influenced appellee to part with said eighty dollars, how is appellant estopped to deny his right to recover for it? But we think the letters of appellant were sufficent to show appellee that appellant's agent had no authority to bind it by any contract he might make to refund fees in case of failure to make loan, not only the fees that had already been paid, but any that might thereafter be paid. These letters advised appellee specifically that their agent had no authority to make any promises pertaining to loans except such as were authorized by their prospectus, etc. Appellee, the evidence shows, also was well aware of this fact before. Yet, despite that knowledge, he enters into a written contract with appellant's agent, unauthorized by appellant, whereby he agrees to promptly pay his dues, etc., to a certain time, upon condition that if a loan is not made the dues shall be refunded. Appellee's contract with appellant's agent was not superinduced by any conduct whatever of appellant, and appellant is not estopped.

As to ratification, it cannot be seriously contended, that a contract could be ratified before it was made. There is no evidence to support the verdict. Reversed and dismissed.

# STATE v. BUCK.

Opinion delivered November 14, 1896.

GUARDIAN'S BOND—LIABILITY OF SURETIES.—The sureties on a guardian's bond, conditioned that the guardian shall, upon the determination of the guardianship, deliver and pay over to the ward all money due her, are liable for a conversion of money by the guardian committed prior as well as subsequent to the execution of the bond.

SAME—WHEN CAUSE OF ACTION ACCRUES.—Where a guardian's bond is conditioned that the guardian shall, upon determination of the guardianship, deliver and pay over to the ward all money due her, the latter has no claim which can be exhibited against the estate of a deceased surety until such guardianship has ended, and if, before that time, the administration on the deceased surety's estate is closed, an action against the heirs to whom property has descended will not be barred by the statute of non-claim.

SAME—LACHES.—A cause of action in favor of a ward against the sureties upon a guardian's bond, conditioned that the guardian shall, upon determination of the guardianship, deliver and pay over to the ward all money due her, does not accrue until the final settlement of the guardian's account, and will not be barred by laches or the statute of limitations by reason of delay in compelling a settlement, unless prejudice has resulted.

Appeal from Jefferson Chancery Court.

JAMES F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

This suit was brought by appellant, Clara T. Davis, on the 8th day of September, 1892, upon the bond of her former guardian.

Appellant was born on the 9th of October, 1867. Her mother, from whom she inherited property, died on the 28th day of July, 1869, and her father was, on the 7th day of September, 1869, appointed her guardian by the probate court of Jefferson county. He thereupon gave bond as such guardian,

with J. B. Dodds and James H. Hawley as sureties. Afterwards, in the year 1875, he gave another bond as guardian of appellant in the sum of $6,000, and James M. Holcombe, J. L. Buck, and T. S. James became his sureties upon said bond. It was conditioned as follows: "The condition of this obligation is such that, whereas, the said G. W. Davis was, on the 7th day of September, 1869, appointed by the court of probate of the county of Jefferson guardian of Clara T. Davis, a minor under the age of twenty-one years: Now, if the said G. W. Davis, his heirs, executors, or administrators, upon the determination or ceasing of such guardianship, shall deliver and pay the said Clara T. Davis, her executors, or administrators, or any guardian that may be appointed to the said Clara T. Davis, after the determination or ceasing of the guardianship of the said G. W. Davis, all money, property, and effects belonging to her in the possession or under the control of the said G. W. Davis, and that shall be due her from the said G. W. Davis, and if the said G. W. Davis shall in all things faithfully perform and fulfill his duty as guardian as aforesaid, then this obligation shall be void and of none effect; otherwise, to remain in full force and virtue."

This bond was filed and approved on the 22d day of April, 1875. T. S. James, one of the sureties, died in August, 1877. Letters of administration were granted on his estate August 26, 1877. The administration was closed by final settlement July 16, 1885, and the property of the estate, of the value of forty or fifty thousand dollars, was turned over to his children and heirs.

The appellant became of age in October, 1885. In May, 1890, she procured a citation to compel her guardian to make settlement of his accounts. The probate court ascertained the balance due from him, and ordered him to pay the same to the appellant. Davis appealed

from this judgment, and upon the hearing on appeal the circuit court found that, after allowing all just credits, he had in his hands the sum of $5,924.91 belonging to his ward, Clara T. Davis, and ordered him to pay over that sum to her. Failing to do so, this suit was brought on his bond against J. L. Buck, T. S. James, Jr., Garland D. James, and Eugenia James Wilson, the three last named parties being the heirs of T. S. James, Sr., a surety on the bond of Davis. On the hearing below, there was a finding in favor of defendants, and a decree was entered dismissing the complaint for want of equity. The other facts are stated in the opinion.

*Rose, Hemingway & Rose*, and *Austin & Taylor* for appellant.

1. The fact that the guardian has wasted the estate of his ward before the execution of the bond is no defense to this suit. 51 Ark. 231; 21 *id.* 447; 59 *id.* 32; 1 Wormer, Adm. sec 255.

2. The fact that the claim was not presented to the administrator of Thos. S. James within two years after the grant of letters does not bar this suit. The statute of non-claim does not apply to rights "inchoate and contingent." 14 Ark. 253; 23 *id.* 163; 36 *id.* 146. There is no liability until default, and there is no default until the amount due is ascertained by a settlement of the probate court. 35 Ark. 93; 47 *id.* 223; 21 *id.* 447; 45 *id.* 49. See also, 19 Ill. App. 310; 6 Ark. 241; 2 Gray, 113; 24 Me. 358; 29 Eng. Com. Law, 168; 38 *id.* 569; 45 id. 384; 81 *id* 399; 85 *id.* 384; 94 *id.* 397; 52 *id.* 367; 86 *id.* 177; 7 Ind. 491; 18 Vt. 241; 5 Hurlst. & N. 586; 3 Williams, 392; 32 Me. 94; 11 Humph. 77; 8 *id.* 197; 1 Carter, 397; 17 Metc. 132; 56 Ark. 474; 31 *id.* 229; 32 *id.* 716.

3. The doctrine of laches has no application. Mere delay in enforcing payment from the principal

affords no defense for a surety. 36 Ark. 145; 50 *id.* 217; 43 *id.* 261.

*J. M. Moore*, *Crawford & Hudson*, and *Bridges & Woolridge* for appellees.

1. The waste was committed prior to the execution of the bond, and the sureties are not liable. 21 Ark. 447; 22 *id.* 331; 36 Mo. 258; Sand. & H. Dig., secs. 40, 3592.

2. The claim is barred by the statute of non-claim. 14 Ark. 253. The liability began when the breach occurred, even though it be true that the right of action arising from the breach was postponed. The fact that the demand may not have matured will not save it. 35 Ark. 93; 47 *id.* 225; 46 *id.* 261; 49 *id.* 433; 48 *id.* 262; 5 *id.* 470; 34 *id.* 151; 24 *id.* 20; 74 Mo. 95; 12 Allen, 140; 6 S. W. Rep. 68; 24 Md. 320; 4 S. W. 311; 22 N. E. 330; 16 Ark. 32; 56 *id.* 474; 31 *id.* 229; 36 *id.* 147; 45 *id.* 495; 51 *id.* 234; 53 *id.* 293; 21 *id.* 263; 58 Ala. 25; 82 *id.* 281; 52 *id.* 139.

3. It is barred by lapse of time and laches. 37 Ark. 155; 56 *id.* 633; 12 Metc. 411; 41 N. W. 1044; 47 *id.* 543; 6 Johns. Ch. 388; 12 Metc. 409, 410, 412, etc.; 49 N. H. 295; 15 Mass. 58; 8 Greenf. 220; 16 Maine, 312; 49 Miss. 500; 55 Cal. 57; 44 Ark. 479; 36 Kas. 633; 33 Iowa, 154; 32 Penn. St. 22; 20 Mass. 1; 148 U. S. 360.

*Austin & Taylor*, and *Rose*, *Hemingway & Rose* for appellant in reply.

Until there was an order of the probate court to pay over, there was no claim against the guardian or sureties. Claims of this kind have always been held to be contingent, within the meaning of the statute of non-claim, until final settlement and order to pay over. 16 So. 344; 63 N. W. 1070; 144 Mass. 195; 2 N. H. 395; 133 Mass. 533; 51 N. W. 1110; 1 Gray, 317; 27 N. E. 22; 40 N. E. 466; 19 Fed. Cases, 23; 28 N. E. 264; 13

Gray, 561; 73 Wis. 533; 41 N. W. 713; 65 Miss. 9; 6 Bush, 653; 25 Minn. 466; 8 Mo. 176; 10 Ala. 26; 46 N. H. 344; 3 S. & M. 489; 60 Miss. 987; 34 Cal. 258; 19 Ill. App. 310; 6 Conn. 259; 27 *id.* 251; 23 Mo. 174. As the cause of action did not come into existence until after the administration of the estate of James was closed, recourse could properly be had upon the lands that had passed into the custody of the heirs. 40 Ark. 434; 15 *id.* 412; 31 *id.* 229; 48 *id.* 277; 56 *id.* 470. Laches are not imputed to infants. 55 Ark. 86; 39 *id.* 159. As to what constitutes laches, see 160 U. S. 186; 40 Ark. 31; 2 Pom. Eq. sec 961; 145 U. S. 398; L. R. 9 Eq. 50; *id.* 8 Ch. Div. 808, 817; 37 N. J. Eq. 130.

Liability on guardian's bond.

RIDDICK, J., (after stating the facts.) This is a suit against John L. Buck, a surety on a guardian's bond, and the heirs of Thomas S. James, another surety on said bond, to collect the balance found on settlement to be due from the guardian to his ward. The surety James having died, leaving valuable real estate, which descended to his heirs, the appellant, Clara T. Davis, seeks by this suit in equity to charge such property with the payment of the money found due from her guardian. Her suit is resisted by the heirs of James on several grounds. It is first alleged that the guardian converted and wasted the assets of his ward prior to the execution of the bond sued on in this action. But we are of opinion that this contention cannot avail, for the bond, by its terms, relates back and covers such breaches, whether committed prior or subsequent to the execution thereof. This bond was executed in 1875. It recites that Davis, the principal, was on the 7th day of September, 1869, appointed guardian of Clara T. Davis, a minor, and the condition of the bond is that said Davis, upon the determination of guardianship, shall deliver and pay to the said Clara T. Davis "all money, property, and effects belonging to her in the possession or under the control of the said Davis,

and that shall be due her from the said Davis." It will be noticed that the bond undertakes that the guardian shall pay his ward all sums due her upon the determination of his guardianship. We therefore consider it immaterial whether the conversion of the money by the guardian took place prior or subsequent to the execution of the bond. *Dugger* v. *Wright*, 51 Ark. 232.

When cause of action accrues.

The next contention is that the action is barred by the statute of non-claim, for the reason that the claim of plaintiff was never exhibited to the administrator of the estate of Thos. S. James. It is conceded that the statute of non-claim has no application to claims that are inchoate and contingent, but it is denied that this is such a claim, and we are asked to decide the question thus raised. James died in 1877, and the administration upon his estate, begun soon after his death, was closed on July 16, 1885, by final settlement and discharge of of the administrator. During the whole period of the administration the guardianship of Davis existed and continued until his ward became of age, which was on October 9, 1885, some months after the administration upon the estate of James had been closed. The appellant, through her attorney, procured a citation against Davis on the 15th of May, 1890, to compel him to make final settlement of his guardianship account in the probate court, but this settlement was not made until 1892. Until this settlement was made and the balance due from the guardian ascertained by the court, the appellant had no cause of action that she could enforce, either at law or in equity, against the sureties on her guardian's bond. *Vance* v. *Beattie*, 35 Ark. 93. It seems to us that, before this settlement, she had no claim that could properly be exhibited to the administrator of the estate of James, but we need not decide that question, for certainly she had no such claim before she became of age

and the guardianship of Davis had terminated. Prior to that time she had no right to demand of her guardian the payment of money belonging to her which had come into his hands, much less had she the right to demand this of the sureties upon his bond.

It is true she could have required her guardian to make the annual settlements required of him by the statute, but the right to demand a showing of his accounts by the guardian is not a claim that can be exhibited against the estate of his surety. The contract of the surety was that the guardian upon the determination of his guardianship should pay the sums of money then due his ward, and until that time arrived there was no claim that could be exhibited against the estate of the surety. *Berton* v. *Anderson*, 56 Ark. 474; *Perry* v. *Field*, 40 *ib.* 175; *Sebastian* v. *Bryan*, 21 *ib.* 447; *Walker* v. *Byers*, 14 *ib.* 252. Prior to the termination of the guardianship, the plaintiff's claim was uncertain and contingent. As was said by another court in a similar case, it "depended upon a future, uncertain event, for it might happen that, by reason of losses in investments for which the guardian was not responsible, or by advances to, or expenses incurred for, his ward, a final accounting would show that there was nothing due from the guardian." *Hantzch* v. *Massolt*, 63 N. W. R. (Minn.) 1070. As the administration upon the estate of James closed before the guardianship of Davis terminated, there was no one to whom she could exhibit her claim after it accrued, and therefore her suit is not barred by her failure so to do.

When claim not barred.

It is further said that appellant is barred by laches and the statute of limitations. But, as before stated, her cause of action did not accrue until the final settlement of her guardian's account. As it is not shown that the appellees were in any way injured by the delay in bringing the guardian to a settlement, and as this

suit was commenced soon after such settlement was made, the contention that the suit was barred by the statute of limitations and laches cannot be sustained. *Vance* v. *Beattie*, 35 Ark. 93; *Hawkins* v. *Mims*, 36 *ib.* 145; *George* v. *Elms*, 46 *ib.* 260; *State* v. *Roth*, 47 *ib.* 222.

There may be some hardship in compelling the heirs of James to pay back to appellant the money squandered by her father, but the bond executed by James was a valid contract; and although he received no benefit therefrom, it is binding upon the estate that descended from him to his heirs. *State* v. *Roth*, 47 Ark. 222; *Hall* v. *Brewer*, 40 *ib.* 433.

The judgment of the chancery court is reversed, and the case is remanded, with an order that a decree be entered in favor of apellant in accordance with this opinion.

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## JARVIS *v.* SOUTHERN GROCERY COMPANY.

63 225
75 390
77 138

Opinion delivered November 28, 1896.

USURY—AGREEMENT TO ELIMINATE.—Where the parties to a loan agree to eliminate all items that might render the loan usurious, the fact that by inadvertence some of the items were left uncorrected will not render the loan usurious.

SAME—MISTAKE.—Mere mistakes or clerical errors, evincing no intention to violate the usury laws, will not render a loan usurious.

SAME—COMMISSIONS.—An agreement by a borrower of money to pay a specified commission to the lender for storing, weighing, and selling cotton to be received from the borrower will not render the loan usurious where the commission is reasonable, and is not shown to have been a cover for usury.

MORTGAGE—STIPULATION FOR ATTORNEY'S FEE.—A stipulation in a mortgage for attorney's fees on foreclosure is void.

Appeal from Jefferson Chancery Court.

JAMES F. ROBINSON, Chancellor.

*W. P. & A. B. Grace*, *N. T. White*, and *Rose*, *Hemingway & Rose* for appellants.

A note given to settle a balance due on an account, containing two usurious items, is usurious itself, and void. 41 Ark. 331; 2 Rich. (S. C.) 73. To constitute usury, an intent to charge interest in excess of the legal rate is essential; but where the charge is intentionally made, and the blight of usury fixed upon the contract, it can only be validated by eliminating the entire usurious charge or element. An unexecuted design is not enough. 103 U. S. 261; 32 Ark. 346, 357; 1 C. & P. 396; 2 Taunton, 184; 2 Starkie, 237; 10 Mich. 148; 1 N. Y. Suppl. 676; 4 Denio, 104; Clarke, Ch. (N. Y.) 76; *id.* 252; 61 Ala. 507; 1 Kelley, (Ga.) 409; 48 Ga. 652; 81 Tex. 369; 6 Wend. 415; 2 Allen, 551; 36 N. J. Eq. 612, 616; 47 *id.* 396; Tyler, Usury, p. 396; 27 Am. & Eng. Enc. Law, p. 964. If the $1,204.00 note was usurious, and the others not, it was error to enter credits on this note, but they should have been entered on the valid claim. 48 Ark. 279; 83 Ind. 436; 63 Miss. 237; 43 Ohio St. 220.

2. The sale of goods at credit prices was resorted to as a mere device to charge more than 10 per cent, and was usurious. 36 Ark. 248; 47 *id.* 287; 54 *id.* 155. The charge of $1.25 per bale was also a mere device to cover usury. It was excessive and unreasonable as a charge for services to be performed. 64 Ala. 527, 534; 5 So. Rep. 197; 6 Lea, 411; 4 Am. Rep. 47; 55 Am. Dec. 395, and note; 5 Johns. Ch. 122; 9 Am. Dec. 283.

3. The stipulation in the mortgage to pay attorney's fees was without consideration and void. 42 Ark. 167.

*Bridges & Wooldridge*, *Austin & Taylor*, and *Dan. W. Jones & McCain* for appellee.

The excess in the $1,204.76 note was included by mistake. To constitute usury, there must be an intent

to charge excessive interest. 26 Ark. 356; 25 *id.* 191; 57 *id.* 251. But this excess was stricken out when attention was called to it. 41 Neb. 716; 10 N. Y. Suppl. 777; 67 Miss. 147. The $1.25 per bale was a reasonable charge. 59 Ark. 356; 115 N. C. 236. Usury cannot be predicated upon a sale either for cash or on credit. 55 Ark. 265; 51 *id.* 268; 68 Miss. 310; 3 W. Va. 159. The provision for attorney's fees is binding. 53 Ark. 569; Jones, Mortgages, (3 Ed.) sec. 1606; 144 U. S. 451.

BUNN, C. J. In the early part of 1890 appellee company, organized as a corporation, and doing business under the laws of this state, and domiciled in the city of Pine Bluff, began to furnish appellant, an extensive farmer in the vicinity, with supplies and money for the current year, and this continued until 1893, when the matter culminated in this suit.

As is customary in such cases, at the beginning of each year a note (and sometimes more than one note) was given, covering the balance unpaid on the last year's transaction, and an amount estimated to cover all needed supplies and money for the current year; and these notes, in the present case, were signed by Mrs. S. A. Pitts, mother of appellant, along with him, but in fact as his surety, and they were also secured by mortgages on personal property given by appellant alone. In February, 1893, a more definite understanding as to the transaction of future business seems to have been had between all the parties. On the 24th of February, 1893, appellant gave his note for $1,150.36, as a balance on the year 1892, and also another note for $4,000, covering supplies to be furnished, the amount to be increased as deemed necessary by appellee, and deeds of trust were given on personal property by Jarvis to secure the same, both falling due

on the 15th of November, 1893; and on the 15th of March, 1893, another deed of trust was given to secure a note of $1,204.72, dated March 5, 1892, due 1st of December, 1892, which was the amount of balance for the year 1891. All these notes were signed by Mrs. S. A. Pitts, as stated.

On the 19th of December, 1893, this suit was instituted for judgment for the aggregate sum of $4,853.15, and $300 attorney's fee, and to foreclose the three mortgages of February and March, 1893, securing said $1,150.36 note, said $4,000 note and said $1,204.72 note.

Defendant answered, setting up usury upon various grounds and overcharge. Decree for the sum of $5,-295.16, and for the foreclosure of the deeds of trust of February and March, 1893, and defendants all appealed.

The decree was founded upon the following finding of facts as to amount due and owing from the appellants to appellees: "That there is no usury in any of the notes sued upon; that the note for $1,204.72, executed on the 15th of March, 1892, should have been for the sum of $1,123.76, and that the sum of $80.96 was included in said note by clerical mistake; that said note should be credited with said sum of $80.96 as of March 5, 1892; that on November 30, 1893, said note was overpaid in the sum of $14.20, which should be credited on the note for $1,150.36, executed February 24, 1893, as of November 30, 1893; that there is now due by the said Jarvis and Pitts to the plaintiff on the notes executed February 24, 1893, for $1,150.26, and the note for $4,000, including interest according to the tenor and effect thereof, the sum of $5,268.88." (Additional interest and intervening credits presumably make the real amount to be $5,295.16 as stated.) Again: "The court further finds that there was an express contract and agreement between the plaintiff and defendant Jarvis that a commission of $1.25

a bale for storage, handling, insurance, weighing, and selling should be paid to the plaintiff by the said defendant on all cotton received by the plaintiff as cotton factors from defendant Jarvis. The court further finds that the plaintiff is entitled to recover for the foreclosure of said mortgage, under and by virtue of the provisions contained in said mortgage, a reasonable attorney's fee against the defendant Jarvis."

Effect of agreement to eliminate usury.

This case comes under the rule announced in the case of *Garvin* v. *Linton*, 62 Ark. 370, and as especially reiterated in the decision of the motion for a rehearing in that case in regard to the elimination of usury by agreement of parties, if indeed there was usury in said note and not merely clerical errors. In adjusting the matter between them, before the institution of this suit, and upon complaint of appellant that there was usury in the notes, it appears that the bookkeeper of appellee was directed to eliminate all items that might be usurious, and that this was assented to, and that whatever items were left uncorrected that might have been considered usurious, if failed to be corrected, were not so intentionally, but by inadvertence. The elimination of usury by agreement and consent is proper, for the parties should always be free to correct all wrongs, and the act of correcting is governed by the same rule as in making the original contract; that is to say, where mistakes are made, they will not vitiate the correction, but the same will be corrected, the same as unintentional mistakes and errors of fact in the first instance.

Effect of mistake.

If the discrepancies complained of were mere mistakes or clerical errors, evincing no intention to violate the usury laws, the chancellor's findings were correct; and, on the other hand, if the same did in fact constitute usury, but by agreement of the parties an honest effort was made to purge the transaction of usury, the same is

not invalidated because of mistake or error in the act of correction.

Charge of commission not usurious.

In regard to the commission of $1.25 per bale for storing, weighing, and selling cotton, the evidence is conflicting as to whether or not it was a matter of express contract. The commission was deducted from the gross proceeds of each bale of cotton when sold, and this was at the end of the year, or towards the end of the year, and presumably after all, or nearly all, advances had been made for the year. If this commission was a matter of express contract, it could not be usurious, for it was for services rendered, and the price for services rendered or to be rendered is not, ordinarily, at least, the subject of usurious contracts. The evidence does not show this contract for commission to have such an intimate connection with, or relation to, the loan of money as that it could necessarily be considered a device to exact usury. On the other hand, if the commission was not a matter of express contract between the parties, then it could amount to nothing more than an overcharge, as might have been on any other item of services or merchandise in the running account, if, indeed, it was not a reasonable price for such services. If the theory contended for by appellant was the theory of the law in vogue, it is impossible to see to what extent it might be carried in any transaction involving price for labor and for services, and of articles of merchandise.

In a case like that of *Harmon* v. *Lehman*, 6 So. Rep. 197, cited in appellant's briefs, there was a loan of money secured by a shipment of cotton. Money lending and money borrowing was the soul of the transaction; there was nothing else in it. The double amount contracted for as commission for selling this cotton held as a pledge, according to the opinion of the court, was one-half for services and the other half without consideration,

and therefore intended by the parties to increase the value of the money loaned above the lawful price; that is to say, to be usury. That was a case where the commission was, in the first place, plainly in excess of the value of the services rendered in the management of the pledged cotton. Had there been no loan in the transaction, no recovery could have been had for the excess, in the absence of an express contract to pay it. But it was the subject of express contract; and, since it was manifestly more than the services were worth, the conclusion followed that it was the expression of an intent to increase the price of the money loaned above that which could be lawfully contended for. The excess, in the case at bar, if there was an excess, is not plainly established, for as to whether it was a reasonable charge or not the testimony is conflicting; and, in the next place, according to the contention of the appellant, it was not the subject of express contract between the parties.

We must decline to interfere with the findings of the chancellor on this issue, since, if the commission was a matter of express agreement, as he found it to be, it is not usurious, for the rate cannot be said to be unreasonable, or such as the parties had not the unquestionable right to fix; and if the commission was not the subject of agreement, it was simply the subject of the rule of *quantum meruit*, and not usury.

Effect of stipulation in mortgage for attorney's fee.

In *Boozer* v. *Anderson*, 42 Ark. 167, this court held the stipulation in a promissory note for attorney's fees was void. In the case at bar the stipulation is in the mortgage or deed of trust. There does not appear to us to be any difference of principle between the two cases. If void in a suit at law, there is no reason why it should not be held as void in a suit in equity. The mere matter of difference of trouble in collecting the debt in the one case and that of the other, we think is not sufficient to make a difference between the rule to be applied

in the one, from that to be applied in the other case. It is but fair to say that, were it a new question, we would not be agreed as to the doctrine of the validity of such a stipulation, either in the note or the mortgage, but the majority stands on the previous decisions of this court as to the stipulation in the note, while all of us agree that the rule is to be applied to the stipulation in the mortgage the same as to the stipulation in the note.

Modified, therefore, so as to disallow the attorney's fee, the decree of the chancellor is in all other respects affirmed.

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## SMITH v. JONES.

63 232
73 452

Opinion delivered November 28, 1896.

FRAUD—RETENTION OF POSSESSION BY VENDOR.—A sale of chattels is not rendered fraudulent as to creditors of the vendor by the fact that the vendor is permitted to remain in possession after the sale as lessee of the property sold.

SALE—SUFFICIENCY OF DELIVERY.—Proof that the vendors of a large quantity of lumber directed the vendees to mark it in their name, which was accordingly done, is sufficient to support a finding that there was a delivery of the lumber in pursuance of the sale.

SAME—DELIVERY—SEPARATION OF PROPERTY.—Where a quantity of lumber is sold to two persons separately, and they on the same day form a partnership for the purpose of handling it, a delivery of the whole quantity to the two is sufficient, without making a separation of the part purchased by each.

SAME—CONFLICT OF LAWS.—The rule that an assignment made in one state of property situated in another state is invalid as to creditors residing in the latter state does not apply in the case of an absolute sale of the property.

Appeal from Craighead Circuit Court, Jonesboro District.

JAMES E. RIDDICK, Judge.

STATEMENT BY THE COURT.

This case was affirmed orally some time ago, the affirmance was set aside, and it now comes before us again on a motion for rehearing.

Jones & McPherson Bros. was a firm composed of H. V. Jones, who resided in St. Louis, Mo., and kept the firm's office there, and J. J. McPherson and W. G. McPherson, who manage the firm's business at Gates, Tennessee, and in and near Earle in Cross county, Arkansas, and were brothers. The co-partnership was engaged in the saw mill business, mainly in Arkansas, so far as the record shows. There was another firm, styled McPherson Bros., composed of J. J. McPherson and R. T. McPherson, and doing a milling business at Gates, Tennessee, and had their office there in the same room as did Jones & McPherson Brothers. All the McPhersons named in the record were brothers, and J. J. McPherson was brother-in-law to T. F. Lee, hereinafter referred to.

On the 28th of June, 1893, Smith, Graham & Jones, a firm of merchants at Wynne, Ark., brought suit in attachment against Jones and McPherson Bros., and on 8th of July, 1893, attached their saw-mill, about 200,000 feet of sawed lumber, and all the saw-logs about the mill in Cross county, the grounds of attachment being "that the defendants, Jones & McPherson Bros., are about to remove a material part of their property out of the state, with the effect of hindering and delaying their (defendants') creditors in the collection of their debts."

On the 11th of July, 1893, the Cross County Bank also brought its suit in attachment against defendants, and attached, on the 16th of August, 1893, the said mill, sixty-five stacks and parts of stacks of poplar lumber, and 218 poplar logs; and the grounds of attachment

were "that said defendants have sold, conveyed, or otherwise disposed of their property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder and defraud their creditors, or to hinder or delay them in the collection of their debts"; "that said defendants are not residents of the state of Arkansas."

No defense was made by any of the defendants, nor was there a countervailing affidavit in either of the suits.

The saw-logs were partly sawed into lumber after the levy of the attachment by order of the court, and all the lumber was sold by order of the court in vacation.

On the first day of November, 1893, Lee & Co., by T. F. Lee, one of that firm, filed their interplea for the property attached (which was substantially the same in both suits and in the interplea), claiming to be the owner thereof by purchase of the same from the defendants. It is in testimony that J. J. McPherson, one of the defendants, and acting for them, sold the mill to T. F. Lee on the 27th of February, 1893, for $1,300, and on the 21st of June, 1893, 150,000 feet of the lumber to T. F. Lee and 100,000 feet, which was all on the yard, to R. T. McPherson, and the logs, also, to them, and they two, on that day, formed a partnership to continue the milling and lumber business at the same place. These sales and this organization of partnership were effected at Gates, in the State of Tennessee, when all the parties to the cause were there. The consideration paid for the mill and lumber was the satisfaction of pre-existing debts owing to Lee and R. T. McPherson by Jones & McPherson Bros. It is in testimony that Lee, at the time of his purchase of the mill, wrote from Tennessee to the foreman in charge of the mill near Earle, in Cross county, Arkansas, to the effect that he had an interest in the mill, and requested him to keep the exact number of days that the mill was run from that time on for him. This message seems to

have been based upon what appears in evidence to the effect that the defendants were to retain the mill a time after the sale for the purpose of sawing up all the logs they had cut, and they were to pay rent at the rate of four dollars each day the mill was actually operated, and to make repairs to the amount of twenty-five dollars. It appears in evidence, also, that R. T. McPherson went from Gates to Earle to look after and take possession of the mill and lumber early in July, 1893, and was advised by J. J. McPherson, whom he found at Wynne, Arkansas, to go and mark the lumber, which he did on the 5th of July, 1893, in the name of "Lee & Company" the name of the new-formed firm. It also appears that all of the McPhersons had always resided at Gates, Tennessee.

*J. C. Hawthorne* and *N. W. Norton* for appellants.

No sale is complete while the vendors retain an interest in the property. There must be delivery, constructive or actual. 54 Ark. 308; 47 *id.* 210; 31 *id.* 136. A retention of possession is *prima facie* evidence of fraud, and the proof does not overcome the presumption. 50 Ark. 289. A non-resident firm's property in this state, especially when insolvent, should be held to pay creditors of this state. 36 Cent. Law Journal, 312; 128 Ill. 222; 108 *id.* 385; 29 N. E. Rep. 209; 35 Ill. App. 155; Story, Conf. Laws (5 Ed.), sec. 388; *ib.* sec. 414.

*E. F. Brown* and *N. F. Lamb* for appellees.

Actual delivery is not necessary in any case as against creditors, not even of articles present at the time and place of sale. 7 Ark. 269; 18 *id.* 123; 31 *id.* 131; 35 *id.* 304; 44 *id.* 301; 50 *id.* 289; 54 *id.* 308; 5 Caldwell (Tenn.), 476. See also 44 Mo. 238; 54 Pa. 514.

BUNN, C. J., (after stating the facts.) This cause was considered by this court, and the judgment was affirmed orally. The affirmance was subsequently set aside for the purpose of considering a motion for a new

hearing, the term being about to expire. The motion for rehearing assigns two grounds upon which the affirmance aforesaid should be set aside and the judgment reversed. The first is because the transaction involving the sale from Jones & McPherson Bros., the defendants herein, to T. F. Lee and R. T. McPherson, the interpleaders, was in fact fraudulent as to the plaintiffs, Smith, Graham & Jones, and the other creditors of the defendants. The second proposition is that there is in fact no evidence of the completion of the sale, and especially because there was no delivery in law.

First then, as to the fraudulent character of the sale. There is evidence to the effect that the defendants were honestly owing Lee and R. T. McPherson debts equal to, and even in excess of, the prices they respectively paid for the portion of property they purchased of defendants; and the price paid in each instance seems to have been reasonable, and the consideration seems to have been by agreement paid by these debts. These things being true, unless there is some other circumstance going to show fraud (and there does not appear to be such), we are not at liberty to set aside the finding and judgment of the lower court, as to the *bona fides* of the sale.

It must be kept in mind that plaintiffs cannot be held as innocent purchasers for value and without notice.

When vendor's possession not fraudulent.

A question, however, that affects or may affect the character of the sale arises upon the facts stated in connection with the sale of the mill in February, 1893, to Lee. In that connection it is contended by appellants that, in making that particular sale, defendants in fact reserved to themselves some interest in the mill property. If that be true, the sale was fraudulent as to creditors, as contended. Interveners Lee and R. T. McPherson (the appellees) contend, on the other hand,

that in the contract of sale of the mill no interest whatever in the property was reserved by defendants, the vendors, but that, as a part of the transaction, in which the sale was the principal part, it was also agreed by and between the parties to it that the vendees would rent the mill to the vendors for a time sufficient to enable them to saw up the logs then on the yard, at the rate of four dollars a day, and the latter to make repairs not to exceed the value of twenty five dollars.

The law on this subject is as announced in *Valley Distilling Co.* v. *Atkins*, 50 Ark. 289, where, in speaking of a retention of possession of personal property by the vendor, this court said: "It is *prima facie* evidence of a secret trust, which is fraudulent as to creditors, and, if unexplained, the presumption becomes conclusive." It is in evidence that defendants remained in possession after the sale by them, not as vendors, but as renters. If this be true, it is a sufficient explanation, or may be so considered, of the possession, and this was a question for the jury.

The rule of law as laid down by Judge Story in *Barrett* v. *Goddard*, 3 Mason, 114, is: "The principle is sound that a continuance of the possession of the vendor does not prevent the delivery being complete, if nothing further remains to be done on either side, and the possession is by mutual consent. There is nothing in reason or principle to make the present case different simply because the bales of cotton remained in the plaintiff's warehouse. It was part of the bargain that they should so remain, and a part of the consideration of the promise." That case is cited with approval in *Hotchkiss* v. *Hunt*, 49 Me. 221, wherein are also cited with approval in Pothier on Sales (Cushing), 203, and *Holly* v. *Huggeford*, 8 Pick. 73. The case of *Lynch* v. *Daggett*, recently decided by this court, and reported in 62 Ark. 592, involves this principle, although the purpose of the

retention of possession by the vendor in that case was different from that in the case at bar.

As to the question of delivery, Mr. Benjamin in his work on Sales (6 Ed.), page 678, *et seq.*, makes this statement: "It has already been shown that non-delivery is, in some states, a conclusive, and in others a presumptive, badge of fraud, enabling creditors of the vendor to disregard the sale and seize the property as if a sale had never been made. Some maintain that delivery is not essential, even as against creditors and subsequent purchasers, except as non-delivery may be a badge of fraud; and if no fraud be alleged, or non-delivery be satisfactorily explained, that a sale without delivery is as valid against third persons as against the vendor himself."

Sufficiency of delivery.

There is a charge of fraud in this case, but on the other hand the non-delivery (if there was such) is sought to be explained by the facts and the testimony in the case. The sale was made at a distance, and the articles constituting the subject-matter of the sale were bulky and incapable of manual or actual delivery, and the purchasers both did certain acts looking to a taking of possession, which were or were not reasonably timely, accordingly as the jury, under the instructions of the court, might find from the evidence. This subject is elaborately and ably discussed in *Meade* v. *Smith*, 16 Conn. 346, by Judge Story in delivering the opinion of the court, wherein he shows that the rule under the civil law and that under the common law are different on the subject.

Necessity of separation of property sold.

The contention that there was no segregation of the lumber purchased by Lee, or of that purchased by R. T. McPherson, from the bulk on the yard, and that for that reason there was no complete sale of the lumber, we think is not sustained. The evidence shows that on the very day of the sale these two purchasers

formed a partnership to carry on the mill and lumber business, and enough is shown to conclude that this lumber was to constitute a part of the partnership's stock in trade. It would have been a needless and very expensive formality to have separated the lumber, allotting each his share under the circumstances, when it would have been thrown together again for the purpose of their business. Ordinarily, separation is an element of the sale, but when separation can serve no useful purpose to the parties, but on the contrary will entail great expense, we think a delivery of the whole to the two, who have in the meantime become the owners in common, when done in a reasonable time, is sufficient.

It is contended that nothing is said about the logs. It is true that the evidence is meagre on that subject. Enough was given however to lead us to conclude that they are to be placed in the same category as the lumber; that each of the partners gave $250 for his half of the logs, and that possession was taken as in case of the lumber.

Conflict of laws as to sales.

It is contended by appellants that, by analogy to the case of a foreign assignment, this sale of defendants to interpleaders, made in Tennessee, of property in this state ought not to stand as against creditors residing in this state, such as are the plaintiffs. Some courts have applied the rule of administration to cases of assignment, because of the real or supposed analogy between them. Whatever analogy there may be between proceedings under the administration laws and those under the assignment laws, there is none between the latter and the proceedings to enforce ordinary contracts of sale, in so far as the interest of foreign and domestic creditors may be involved. To sustain their contention, appellants' counsel cite us to the case of *Barnett* v. *Kinney*, 36 Cent. Law Journal, 310–12, where there is a very full discussion of the subject, and in the course of which

are cited *Woodward* v. *Brooks*, 128 Ill. 222, and *Heyer* v. *Alexander*, 108 Ill. 385.

A careful examination of the discussion in case of *Barnett* v. *King*, and especially of the elaborate editorial note thereto, leads us readily to see the distinction between the two classes of proceedings to which the rule contended for does, and does not, apply, if we were disposed to apply it in either case. The contracts of ordinary sale are very much the same in all jurisdictions, and there is no peculiarity in cases arising thereon to give a preference of a citizen of one state over one in another state, as is claimed to be in assignments and as in administrations.

Complaint is made that the instructions of the court were so numerous and minute as to confuse the jury. Whatever may have been the reason or motive in the mind of the trial judge for giving instructions in full, he had a sound discretion in the matter, and it would not be safe for us to attempt to control that discretion except in the most extreme cases, for the circumstances which controlled him are unknown to us. The close contests of counsel, and their accurate and technical learning and legal acumen, very often make it necessary to touch upon many minute points in instructions, which would not be noticed, where there is more of carelessness in the management of a case.

Every phase of the case, and every point at issue, were presented in a lucid and direct manner, and we do not see how the jury could have misconstrued the meaning of the court in any particular; and to reach this standard is at last the whole duty of trial courts, after all is said. This case is one of facts mostly, and the jury's verdict has determined them, and we see no ground for reversal, whatever may be the suspicions that arise out of the facts, or whatever doubt we may have as to what the findings of facts should have been.

Affirmed.

## PALATINE INSURANCE COMPANY *v.* EVANS.

63 88 241 509

Opinion delivered November 28, 1896.

CHANGE OF VENUE—COUNTY OUTSIDE OF DISTRICT.—A circuit judge may change the venue of a civil action to a county outside of his judicial district, under Sand. & H. Dig., sec. 7381, authorizing him, on a petition by either party, to change the venue "to a county to which there is no valid objection, which, in his judgment, is most convenient to the parties and their witness."

Petition for Prohibition to Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

The Palatine Insurance Company filed its original petition, asking that the Honorable J. H. Evans, judge of the circuit court of Crawford county, be prohibited from hearing the civil case of Mary L. Haglin, plaintiff, against the Palatine Insurance Company, defendant, alleging that the case was wrongfully transferred on change of venue from one of the circuit courts of Sebastian county, a county belonging to the twelfth judicial district, to the circuit court of Crawford county, a county belonging to the fifteenth judicial district.

*Clayton & Brizzolara* for petitioner.

*John H. Rogers, contra.*

BATTLE, J. Can a judge of a circuit court change the venue in a civil action pending before him to a county outside of his judicial circuit?

It is ordained by the constitution (art. 2, § 10) that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, of the county in which the crime shall have been committed; provided that the venue may be changed to any other county of the judicial district in which the

indictment is found, upon the application of the accused, in such manner as now is, or may be, prescribed by law;" but does not limit the power of the legislature to authorize the change of venue in civil actions.

As to the change of venue in such actions the statutes provide as follows:

"Section 7379. Any party to a civil action, trial by a jury, may obtain an order for a change of venue therein by motion upon a petition stating that he verily believes that he cannot obtain a fair and impartial trial in said action in the county in which the same is pending, on account of the undue influence of his adversary, or of the undue prejudice against the petitioner, or his cause of action or defense, in such county." * * * * * * *

"Section 7380. The motion shall be made before, and the order granted by, the judge of the circuit court of the county in which the action is pending, in open court or in vacation. * * * * The party may make his petition and the affidavit supporting the same apply to one county in addition to the one in which the action is pending.

"Section 7381. Upon presenting the petition and notice to such judge, he shall make an order for the change of the venue in such action to a county to which there is no valid objection, which, in his judgment, is most convenient to the parties and their witnesses."

Under these statutes, each party has the right to prevent the trial in two counties, if he has valid objections to that many, making four to the two, if their objections are to different counties. The result in such a case would be, if the venue could not be changed to a county in another circuit, and there were not exceeding four counties in the circuit in which the action is pending, the parties could not exercise their rights, or there could be no trial. At the time the statutes were passed,

there were two judicial circuits in this state in which there were only four counties. At this time there are six which have four, two which have three, and two which have two counties. In this arrangement of the judicial circuits, a condition of affairs, as in this case, might well be imagined in which the administration of justice might be defeated by allowing each party to exercise his rights under the statutes as to the change of venue, unless the venue could be changed to another circuit. To prevent an occurence of this kind, the general assembly may well have intended to leave the circuit judge without restriction as to the circuit to which the venue may be changed.

Whatever the intention of the general assembly may have been, as the statutes contain no restriction as to the county to which a cause may be sent, except that stated, we have no authority for saying it shall not be sent out of the circuit. The only restriction contained in the statute is that the judge shall make the change to a county to which there is no valid objection, which, in his judgment, is most convenient to the parties and their witnesses. This provision, if observed, protects all parties and witnesses against unnecessary hardships, and removes all reasonable objections to sending the action out of the circuit. *Miller* v. *Toledo, etc., R. Co.*, 33 Ind. 535; *Cromie* v. *Hoover*, 40 Ind. 49.

But it is urged that the general assembly divided the county of Sebastian, in which the action in which the venue was changed was instituted, into two districts, and provided that circuit courts should be held in each district, and that "the circuit court of said districts may change the venue of cases from one district to the other, or to any county in the judicial circuit, *in like manner as changes of venue are granted in this state.*" But what is said about the change of venue to a county in

the judicial circuit is an expression of an opinion as to the law at that time, and can have no effect in the interpretation of the statutes under consideration, which were passed subsequently. We answer the question in the beginning of this opinion in the affirmative.

The demurrer to the petition is sustained.

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## KEITH v. HINER.

Opinion delivered November 28, 1896.

LIMITATION OF ACTION—WHO ARE DEBTORS.—One against whom a judgment for damages has been obtained for burning the property of another is a "debtor," within Sand. & H. Dig., § 4835, providing that if any "debtor" shall fraudulently abscond from any other state to this state without the knowledge of his creditor, such creditor may commence suit within the time prescribed for limiting such action after the creditor becomes apprised of the residence of the absconding creditor.

SAME—ABSCONDING DEBTOR.—A debtor who, while residing in South Carolina, was arrested and carried to North Carolina, whence he escaped and returned to the former state, and there openly resided for six months, when he removed to this state, is not an absconding debtor, within Sand. & H. Dig., § 4835, providing that if any debtor shall fraudulently abscond from any other state without the knowledge of his creditors they may bring suit against him at any time within the statutory period after learning of his residence.

SAME—FRAUDULENT CONCEALMENT.—A concealment of himself by a debtor, occuring several years before the right of action on a judgment obtained against him accrued, does not extend the time for suing him, under Sand. & H. Dig., § 4846, providing that if any person, by leaving the county or concealing himself, prevents the commencement of any action against him, such action may be commenced within the time limited after the commencement of such action shall have ceased to be so prevented.

Appeal from Logan Circuit Court.

J. VIRGIL BOURLAND, Special Judge.

*A. S. McKennon* for appellant.

The action is barred. Sand. & H. Dig., secs. 4834, 4835, 4846; 20 Ark. 186; 20 Pac. Rep. 49; 8 Kas. 262; 30 *id.* 181; 27 Pac. Rep. 978. At the time of the alleged burning of the mill, no relation of debtor and creditor existed. 3 Ark. 552; 5 Am. & Eng. Enc. Law, 179, and cases cited; Whart. Law Dict. "Debtor," "Creditor;" Freeman on Judg. (3 Ed.), sec. 217. The relation of debtor and creditor must exist at the time the debtor absconds. See 131 U. S. 336. It was incumbent on Deavers to show not only that Keith fraudulently absconded, but also that he was not apprised of his residence in Arkansas until within ten years next before the institution of this suit. 6 Ark. 381; 27 *id.* 343.

*Dan W. Jones & McCain*, and *S. R. Cockrill* for appellee.

The term "debtor" includes tort-feasors, as well as persons liable on contracts. 66 N. C. 206. There is abundant evidence to support the chancellor's finding that Keith was an absconding debter, and fraudulently concealed his whereabouts, within the meaning of our statute. Sand. & H. Dig., secs. 4835, 4846, 4646; 9 Mo. 398.

BATTLE, J. Previous to the fall of 1865, James A. Keith resided in the county of Madison, in the state of North Carolina. In that fall he moved, with his family, to the Greenville district, in the state of South Carolina. While there, he was arrested by the military powers, and carried to North Carolina; and was there imprisoned in the Buncombe county jail. While imprisoned, and on the 17th of November, 1868, Deavers sued him for burning a mill, and caused process to be served on him. On the 22nd of February, 1869, he escaped from jail, and returned to his home and family

at Greenville district, in South Carolina, and openly resided there until September, 1869, when he removed, with his family, to Logan county, in this state. On the 3rd day of October, 1876, Deavers recovered a judgment against him in the superior court of Buncombe county, in the suit instituted against him on the 17th of November, 1868. Twelve years, ten months, and five days after the recovery of this judgment, Deavers brought suit upon it against Keith in the Logan circuit court.

The defendant pleaded the ten-years' statute of limitations in bar of the right to maintain the action. To avoid the force of this statute, the plaintiff undertook to show that the defendant fraudulently absconded from the state of South Carolina, without his knowledge, and that he did not discover his residence until less than ten years before the commencement of this action.

The issue presented by the pleading and evidence in this case depends upon section 4835 of Sandels & Hill's Digest, which is as follows: "If any debtor or debtors shall fraudulently abscond from any other state, territory or district to this state, without the knowledge of his, her or their creditor or creditors, such creditor or creditors may commence suit against such absconding debtor or debtors within the times in this act, or any other act of limitations now in force, prescribed for limiting such action or actions, after such creditor or creditors may become apprised of such residence of such absconding debtor or debtors." Under this statute two questions arise in this action: (1) Did the plaintiff and defendant sustain to each other the relation of creditor and debtor, within the meaning of this statute? And (2) did the defendant fraudulently abscond from the state of South Carolina?

Who are debtors?

A creditor, in its strict legal sense, is one who voluntarily trusts or gives credit to another for money or other property, but, in its more general and extensive

sense, is one who has a right by law to demand and recover of another a sum of money on any account whatever. Conversely, a debtor is one who owes another anything, or is under obligation, arising from express agreement, implication of law, or from the principles of natural justice, to render and pay a sum of money. *Stanly* v. *Ogden*, 2 Root, 259, 261.

The object of the statute in which these words are used is to prevent the creditor from being barred by the statutes of limitations from maintaining his action against the debtor who has eluded him by fraudulently absconding to this state without his knowledge, and the debtor from taking advantage of his own wrong. For this purpose the creditor is allowed to bring his action within the time prescribed for bringing such actions after he discovers the debtor's residence. To accomplish its object, the statute should be liberally construed, and in that manner which will best advance the remedy provided, and suppress the mischief intended to be avoided, and to this end the words "creditor" and "debtor" should be understood in their general and extensive sense. There is no reason why they should be limited to their strict sense, when all the persons coming within their broad signification are liable to be affected by the mischief intended to be remedied, and, according to the principles of natural justice, are equally entitled to the protection of the statute.

The debtor coming within the provisions of the statute is one who secretly, or in a manner calculated to deceive his creditors as to his intention to change the state of his residence, leaves "any other state, territory, or district," without their knowledge, and comes and resides in this state. Unless he fraudulently absconds in the manner indicated, the creditor is not entitled to bring his action under section 4835. This is one of the

conditions upon which the benefit of this statute is allowed. If the debtor leaves openly, publicly, or with the knowledge of the creditor, the creditor has the opportunity of tracing or following him to his destination, or suing him before he changes his domicile, and cannot extend the time for bringing his action by a failure to discover the debtor's residence. Upon the conditions of the statute only is he entitled to its benefits.

Debtor held not to be an absconder.

The burden was upon the plaintiff to prove that his action was brought within the time prescribed by the statute. He endeavored to do so by showing that he was ignorant of the defendant's place of residence until a short time before the commencement of this action. That was not sufficient to show that the defendant fraudulently absconded from another state to this When he first left the state of North Carolina, the plaintiff had no cause of action against him. The breaking jail in North Carolina and returning to his home in South Carolina was not fraudulently absconding. He was not a resident of the former state at that time, and was held there forcibly and against his will. His residence was then in the latter state. There was no evidence that he fraudulently absconded from the state of South Carolina to this state.

As to fraudulent concealment.

But plaintiff says that section 4846 of Sandels & Hill's Digest provides: "If any person, by leaving the county, absconding, or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the times respectively limited, after the commencement of such action shall have ceased to be so prevented;" and that the defendant concealed himself. The facts relied on to show concealment, if true, occurred four or five years before his right of action upon the judgment sued on accrued, and for that reason were

insufficient to extend the time for bringing suit. *Richardson* v. *Cogswell*, 47 Ark. 170; *Denton* v. *Brownlee*, 24 Ark. 556.

The judgment of the circuit court is therefore reversed, and final judgment will be entered here in favor of the defendant.

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## SHERWOOD *v.* HANEY.

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## CROSBY *v.* JAMES.

## LARNED *v.* SHEPARD.

Opinion delivered November 28, 1896.

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

Appeals from Yell Circuit Court in Chancery, Dardanelle District.

JEREMIAH G. WALLACE, Judge.

*J. H. Watson* for appellant.

Usury must be proved. The burden is on the party pleading it. 3 Green (N. J.) 481; 69 N. Y. 339; 57 Ill. 138; 36 Wis. 390; 22 N. Y. Eq. 606; 25 *id.* 491; 34 N. Y. 444; 48 Ill. 353; 17 Vt. 231; 2 Green (N. J.) 460. There was no usury shown. *Banks* v. *Flint*, 54 Ark. 50; *May* v. *Flint*, 54 Ark. 574; *Holt* v. *Kirby*, 57 *id.* 256.

*Robert Toomer* for appellees.

This case was tried upon the evidence taken in the case of *Banks* v. *Flint*, 54 Ark. 40. In these cases the

lender exacted the *highest rate of interest* allowed by law, and was charged with notice that the agent would collect his commissions from the borrower. 51 Ark. 546; 51 *id.* 534.

HUGHES, J. These are all suits to foreclose mortgages upon lands, given to secure money loaned in each case, respectively, to the appellees.

The defense in each case is usury, which was sustained by the court below, and in each of which a decree was entered annulling and cancelling the note and trust deed, from which the plaintiff in each case appealed.

In the case of *Banks* v. *Flint*, 54 Ark. 50, this court said, through Hemingway, Judge, that, "to sustain the plea of usury, it must appear that excessive interest was paid to the lender, or that a bonus or commission was paid to the agent of the lender, with his knowledge, or under circumstances from which his knowledge will be presumed, which commission, when added to the interest paid or to be paid the lender, would exceed the lawful rate."

Now, we do not find any evidence, in either of these cases, that there was any unlawful interest paid to the lender, or that in either a bonus or commission was paid to any agent of the lender, with his knowledge or under circumstances from which his knowledge can be presumed, which commission, when added to the interest paid, or to be paid the lender, would exceed the lawful rate.

We are therefore of the opinion that there is error in the judgment of the court below in each of these cases in sustaining the plea of usury in each case, and the judgment in each of these cases is reversed, for the error aforesaid, and each of said causes is remanded, with directions to the court below to enter a decree in each of said causes foreclosing the mortgage therein, and for further proceedings in accordance with law and the opinion herein.

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

Opinion delivered November 28, 1896.

PARTIES—INJURY TO TENANT'S POSSESSION.—The owner of land cannot maintain an action against a railroad company for damages for building a temporary fence cutting off access from such land to a spring on its adjoining right of way used for domestic purposes and for watering stock, where such land is in possession of a tenant.

Appeal from Sharp Circuit Court.

JOHN B. MCCALEB, Judge.

STATEMENT BY THE COURT.

The appellant had obtained, by conveyance to it, a right of way over the land of appellee. It fenced the right of way, enclosing a spring upon the appellee's land, which had been used by the appellee's tenants for general domestic purposes and for stock water. The fence cut off access to the spring by the way by which it had usually been reached from the dwelling house, barn and lots of the appellee. The appellant refused to open the way to said spring, and the tenants of appellee were compelled to go a circuitous route and a greater distance to reach the spring. The appellee recovered judgment for damages against appellant, from which it appealed to this court.

*Wallace Pratt*, and *Olden & Orr* for appellant.

Under the agreed statement of facts, the obstruction is a temporary one. The law will not presume a permanent injury. No injury to the reversion or permanent injury is averred or proved. The court erred in its measure of damages. 1 Sutherland, Damages, 199; Sedgwick, Lead. Cases on Damages, 655; 18 C.;

B. 658; 65 Maine, 140; 17 Ohio, 489. When damage is the gravamen of the action, only such as have actually accrued before action brought can be recovered. 3 Blackst. Com. 220; 42 N. Y. 313; 57 Ga. 378. Plaintiff's testimony as to how much he considered himself damaged was incompetent. It was a mere opinion, without any statement of facts upon which it was based. 1 Wharton, Ev. sec. 510; 2 Best, Ev. sec. 511; 24 Ark. 251; 29 *id.* 459. See 47 Ark. 335. It is expressly agreed that the farm has been in the possession of a tenant since plaintiff purchased it. The tenant alone could sue for damages to his possessory right, and no damage to the reversion or fee is shown. 1 Addison, Torts (Wood's Ed.), sec. 108; 35 Ark. 362; 45 *id.* 254; Wood's Mayne on Damages, p. 397.

*D. L. King*, *pro se*, and *Sam H. Davidson* attorneys for appellee.

As to measure of damages, see 2 Sedgwick, Damages (7 Ed.), pp. 638, 639. The obstruction of a right of way under circumstances of injury to the reversion is an injury to the tenant as well as to the owner. Cooley, Torts, p. 826; 3 Kent, Com., title, "Right of Way." The obstruction is necessarily an injury to the reversion, as it affects the rental value of the premises. It also possesses the element of *permanence*. See 45 Ark. 253; 23 N. H. 83. There is no question as to excessive damages, as appellant did not claim that the damages were excessive. 47 Ark. 343; 45 *id.* 256.

HUGHES, J., (after stating the facts.) It appears from the testimony in this case that the land of the appellee, upon which the appellant has a right of way, and upon which the spring is situated, was, at the time this suit was brought and the cause was tried, in the possession of a tenant of the appellee, and had been in the possession of such tenant since the building by the

appellant of the fence enclosing the right of way and the spring thereon situate.

It does not appear that there was any evidence that any damage had been done to the reversion, and, if there was any damage, it must have been to the right and interest which the tenant had in the possession of the land by virtue of his tenancy, and it follows therefore that there was no right of action in the plaintiff; that the right of action, if there was any, was in the tenant, who, as we understand, was in possession when the wrong was done of which the appellee complains, and held continuous possession until after the institution of this suit.

It appears that the structure complained of was a fence, which, according to the adjudged cases, as we understand them, being temporary and not permanent in its character, gave to the party who might be entitled to sue for any damage consequent upon its erection a right to sue for such damages only as had accrued before the institution of the suit, and a right to bring successive actions for damages consequent upon the continuance of the structure thereafter, if the same was wrongful. It is not to be presumed that the railroad company would persist in the wrongful continuance of the fence, or that the party who might be entitled to damages for such wrong could foresee all the damages that might occur from a wrong which might occur in the future and which might never occur. *Uline* v. *N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Nashville* v. *Comar*, 88 Tenn. 415.

For the want of evidence showing any damage to the appellee, the judgment is reversed, and the cause is dismissed, without prejudice.

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# LUTTRELL v. REYNOLDS.

Opinion delivered November 28, 1896.

JUDGMENT SUSTAINING DEMURRER—CONCLUSIVENESS.—Where the court errs in sustaining a demurrer, and entering judgment for defendant thereon, the judgment is, nevertheless, on the merits, and is final and conclusive until reversed on appeal.

SAME—RES JUDICATA.—A judgment entry on sustaining a demurrer to a complaint, which identifies the parties, shows that the court found that the defendant had curtesy in the land sought to be recovered, that the plaintiffs stood on their complaint, refusing to plead over, and that their complaint was dismissed with costs, is sufficiently formal, and is conclusive on the question of curtesy in a subsequent action between the same parties. (BATTLE and HUGHES, JJ., dissenting.)

CROSS-BILL—SERVICE OF PROCESS.—Where one who is made a party defendant on her own motion desires cross-relief against a co-defendant, she must make her answer a cross-bill and pray relief, and must serve process on him unless he enters his appearance.

Cross Appeals from Randolph Circuit Court in Chancery.

JOHN B. McCALEB, Judge.

STATEMENT BY THE COURT.

In 1890, appellants brought suit in the Randolph circuit court against the appellee, D. W. Reynolds, for the lands in controversy in the present suit. The complaint in that case, after setting up title in appellants by inheritance from their father, alleged: "That, about the year 1860, their sister, Jane H. Luttrell, was married to one D. W. Reynolds, the defendant, of which marriage there was an issue, one son named James S. Reynolds; that, on the —— day of —— 1863, the said Jane H., wife of the said D. W. Reynolds, and sister to

said plaintiffs, died intestate, leaving her said son, James S. Reynolds, her sole heir at law. Plaintiffs state that on the —— day of ——, 1882, their mother, America Luttrell, died, thereby terminating her life estate in said lands, when the said plaintiffs and the said James S. Reynolds entered into a voluntary partition of the aforesaid estate in the lands of the said John A. Luttrell, deceased, whereby each plaintiff and the said James S. Reynolds received to his part forty acres of said lands as his proportionate part of said estate; the said James S. Reynolds receiving the southwest quarter of section 6, in township 19 north of the base line, in range 3 east of the fifth principal meridian, as his proportionate part of said estate, it being the part and portion that the said Jane H. Luttrell, his mother would have received had she remained living." Plaintiffs then allege that James S. Reynolds, their nephew, died without issue, leaving them his sole heirs. They allege unlawful possession in the defendant, D. W. Reynolds, and close with the usual prayer for possession, damages, etc.

The defendant, D. W. Reynolds, demurred as follows: "Comes the defendant, and demurs to the complaint of the plaintiffs herein, and for cause says that it affirmatively appears from the complaint of the plaintiffs herein that the defendant is entitled to an estate by the curtesy in the real estate described therein." The cause was disposed of on the issue joined by the demurrer as follows: "Now on this day, this cause coming on to be heard upon the demurrer heretofore filed by the defendant, and it appearing to the court from the complaint that the defendant is entitled to curtesy in the lands in controversy, the court sustains the demurrer. And, the plaintiffs electing not to plead further, the cause is dismissed at their cost." No appeal was taken.

The present suit was brought to recover the same land.* Appellee, *inter alia*, pleads *res judicata*.

*S. A. D. Eaton* for appellants.

This was an ancestral estate, and ascended to appellants, as next of kin, in the natural line from which it came, upon the death of James S. Reynolds, intestate and without issue. 15 Ark. 590; *ib.* 688. D. W. Reynolds is estopped to claim curtesy, by his acts and by laches. Bigelow, Estoppel, 584; 48 Ark. 409; 50 *id.* 116. Nor was he entitled to curtesy, as his wife was not seized, either in fact or in law, of the land during coverture. 4 Kent. Com. 28 and 29; Tiedeman, Real Prop. 106; 15 Ark. 466; 31 *id.* 576; 48 *id.* 17; 11 Ohio St. 367. The widow of John A. Luttrell was entitled to the exclusive possession of the land during her life. 29 Ark. 633; 31 *id.* 145; 33 *id.* 399; 48 *id.* 230; 51 *id.* 335; Mans. Dig., sec. 2588; 40 Ark. 393; 34 *id.* 63; 75 Va. 129; 42 Ark. 25; 49 *id.* 87. The former judgment on demurrer does not debar appellants. The merits of the case were not and could not have been passed on by the court in sustaining the demurrer. The matter is not *res judicata*. 3 Tex. Civ. App. 361; 1 Freeman, Judg. 267; 36 Ark. 196; 21 Am. & Eng. Enc. Law, 269, and note 1; 14 S. W. Rep. 955; 5 Wall. 556; 10 C. C. A. 591; 35 Pac. Rep. 1004; 65 Cal. 575; 35 Pac. Rep. 985; 44 N. W. Rep. 648; 70 Md. 472; 1 So. Rep. 512; 47 Ark. 222, 126. There was no judgment on the demurrer, simply a memorandum by the clerk, and

* Perhaps the statement of facts by the court ought to be supplemented by adding that the complaint in the second suit, after alleging the title of plaintiffs, as in the first complaint set out in the opinion, alleged further that D. W. Reynolds was not entitled to curtesy in the land sought to be recovered, for the reason that it constituted the homestead of America Luttrell, plaintiffs' mother, until her death, and consequently that Jane H., the wife of D. W. Reynolds, was never seized of the land. (Reporter).

not a sentence of a court. 1 Black, Judg. 2 and 3; 1 Freeman, Judg. 52; Bigelow, Estoppel, 51; 1 Black, Judg. 29; 1 Freeman, Judg. 15; 2 Black, Judg. 508, 509; 3 Ark. 419; 15 *id.* 226; 7 Neb. 227.

*J. C. Hawthorne* for appellees.

The judgment for curtesy in the former action is a bar to the suit. It is *res judicata.* 7 N. E. Rep. 735; 15 *id.* 451; Wells, *Res Adjudicata*, 370, 371; 5 Wall. 566; 18 So. Rep. 847; 15 N. E. Rep. 244; 27 Am. St. 44; 26 *id.* 828; 10 *id.* 210; 43 *id.* 604; 44 *id.* 554, and notes; 7 Wall. 99; 91 U. S. 526; 3 Denio, 238. The judgment was sufficiently formal. Hempst. 50; 32 N. E. Rep. 342; 5 Lea (Tenn.), 358; 26 N. E. Rep. 478.

Mrs. Connor was made a party defendant. She filed no cross-complaint, nor sued out any process; nor did appellees enter their appearance or plead to her suit. The judgment in her favor for dower was erroneous. Sand. & H. Dig., sec. 5712; 43 Ark. 497; 49 *id.* 430.

Conclusiveness of judgment.

WOOD, J., (after stating the facts.) The issue as to curtesy was expressly raised and determined upon the merits in the former suit. That was the effect of the finding and judgment of the court upon the demurrer. No technical objection was raised to the complaint. The facts are well pleaded, and were conceded to be true. If the facts stated did not show curtesy in the defendant, the complaint in the first suit was good. Now, whatever may be the rule elsewhere, this court in *McDaniel* v. *Grace*, 15 Ark. 465, held that there must be *actual seizin* in the wife during coverture to constitute curtesy; unless the lands are "waste and uncultivated, and not held adversely." The complaint in the first suit did not show *actual seizin* in the wife of the lands in controversy. Nor did it show that said lands were wild and uncultivated, not held adversely. Seizin in law draws to it the possession only of such

lands. The lands in controversy may have been held adversely continuously during the coverture. There is nothing in the first complaint to show to the contrary. Therefore said complaint did not affirmatively show curtesy, and was not demurrable. Mr. Freeman says: "If any court errs in sustaining a demurrer and entering judgment for defendant thereon, when the complaint is sufficient, the judgment is, nevertheless, on the merits. It is final and conclusive until reversed on appeal." 1 Freeman, Judg. sec. 267. See also the following as to *res judicata* on demurrer. *Gray* v. *Dougherty*, 25 Cal. 266; cases cited to note in *Lea* v. *Lea*, 96 Am. Dec. 772; *Aurora City* v. *West*, 7 Wall. 82, 99; cases cited in note to *Bell* v. *Merrifield*, 4 Am. St. Rep. 436; *Gould* v. *Evansville R. Co.*, 91 U. S. 526; *McLaughlin* v. *Doane*, 10 Am. St. Rep. 210; *Smith* v. *Hornsby*, 70 Ga. 552; *Grotenkemper* v. *Carver*, 4 Lea, 375; *Ruegger* v. *Ind. Ry. Co.* 103 Ill. 449; *Price* v. *Bonnifield*, 2 Wyo. Ter. 80; *Lamb* v. *McConkey*, 76 Iowa, 47.

*Res judicata.* 2. The judgment entry showed that the court rendered the judgment, identified the parties to it, that the court found that the defendant had curtesy, that the plaintiffs stood on their complaint, refusing to plead over, and that their complaint was dismissed with costs. This was sufficiently formal. 1 Freeman, Judg. p. 50; *Kimbro* v. *Va. & Tenn. R. Co.* 56 Ga. 185.

The decree of the court on the question of *res judicata* as to curtesy is affirmed.

Service of process on cross-bill. 3. But the court erred in decreeing dower to the widow of J. S. Reynolds, without giving the defendant, D. W. Reynolds, an opportunity to be heard. On her motion she was made party defendant, and filed her petition for dower. The record does not show that this petition was made a cross-bill against appellee. It

does not show that appellee was served with process, or that he entered his appearance to said proceedings. This was necessary before the decree as to dower could affect him. *Ringo* v. *Woodruff*, 43 Ark. 497; *Pillow* v. *Sentelle*, 49 Ark. 430.

The decree as to dower is reversed, and the cause remanded.

HUGHES and BATTLE, JJ., dissent.

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## REYNOLDS v. JONES.

Opinion delivered December 5, 1896.

ACTION—SPLITTING CAUSE.—A claim for damages for use and occupation of land is a single cause of action, and cannot be split into two actions. Thus, a judgment for damages for use and occupation of land for six months before the commencement of the action is a bar to a subsequent action for damages for its use and occupation prior to such six months.

JUDGMENT—RES JUDICATA.—A judgment against a guardian in his individual capacity for the recovery of damages for use and occupation of his ward's land will bar a second action brought against him as guardian to recover damages for the same use and occupation.

GUARDIAN AND WARD—ACCOUNTING.—A guardian, sued for a final accounting as such, will not be allowed for items of board, clothing, medicine, and tuition bills for which he manifestly did not intend to charge at the time the expenses were incurred.

Appeal from Randolph Circuit Court in Chancery.

JOHN B. MCCALEB, Judge.

STATEMENT BY THE COURT.

This is a case from the Randolph circuit court, and originally an appeal to that court from the probate court of Randolph county. The subject-matter of the proceeding is the final account of Reynolds as guardian of Hattie Jones, nee Kelsey, and her exceptions thereto,

which exceptions were sustained, account re-stated accordingly, and ordered recorded, and an appeal to the circuit court, where substantially the same judgment was rendered, and from that this appeal is taken. Judgment against Reynolds as balance of account of $2,600.

Alva G. Kelsey, father of Hattie, the appellee herein, died in 1862, leaving surviving him his widow and the appellee, an only child, then an infant one year old, and seized and possessed of the S. W., S. E., and N. E., S. E., section 33, township 20 north, and range 3 east, and other lands in said county of Randolph, having resided on said 80 acres up to the time of his death. In 1864 the widow intermarried with D. W. Reynolds, the appellant herein, and they continued to reside on the place until the death of the widow of Kelsey, then the wife of Reynolds, in 1868, and the parties to this proceeding continued to reside there until the marriage of appellee with J. L. Jones in 1877, she being then sixteen years old. Reynolds continued to reside there until ejected in 1891.

After his marriage, Reynolds became administrator *de bonis non* of the estate of Kelsey, and sold the lands of the estate on the 22d of January, 1872, by order of the probate court to pay debts, one J. M. Shaver becoming the purchaser of the said eighty acres for the sum of $720 and receiving his deed dated April 1, 1872. The sale was approved by the probate court at its April term, 1872.

Shaver resold to Reynolds individually on the 28th of June, 1873, for $1,000; and afterwards Reynolds, treating the land as his own, put extensive improvements thereon to the value of $6,000, as he claimed.

After paying the debts of Kelsey's estate, Reynolds had on hand as administrator the sum of $269 in money, and in 1872 took out letters of guardianship, and became the guardian of appellee, charging himself as such with

the sum of $269. There is a controversy here as to what disposition was made of this sum finally; appellant claiming that he paid the same over to appellee, through her husband, soon after their marriage, and appellee denying that she had ever authorized such payment, and Jones that he received such sum for his wife.

In 1890, appellee brought suit in ejectment against appellant individually for the eighty acres, on the ground that the same, being the homestead of the family, could not have been legally sold under order of the probate court to pay debts, and claimed damages for wrongful possession for six months next past. On the final hearing of that cause in 1891, there seems to have been an agreement in the nature of a compromise after the case had been submitted to the jury, and the verdict of the jury and the judgment of the court were rendered accordingly, the plaintiff obtaining judgment for sixty acres of the land and the $200 damages for the six months use. In this suit defendant pleaded the statute of limitations among other things.

There is a controversy between the parties as to the meaning of the compromise, appellant contending that it was intended as a settlement of all matters between the parties in reference to the land, and appellee contending that it was only an agreement to settle the matters in suit.

Having in this way settled the title of the land, appellee then petitioned the probate court to cite appellant to appear therein at the July term, 1891, and make final settlement, he having never made any settlement as guardian. In response to this citation, appellant filed his final settlement, which was excepted to by the appellee, principally because of his failure to charge himself with the rents of the eighty acres from the time the guardian got control of same as such till the

beginning of the six months next preceding the institution of the suit in ejectment.

In the course of the controversy over this settlement, appellant presented his account for board and maintenance of appellee, his ward, during the time she resided with him, taxes, improvements, etc.; so that the said back rents on the one hand, and the account for support, maintenance, taxes and improvements on the other, became the principal, if not the only, matter of controversy, and both claims were finally allowed by the circuit court, which left the balance aforesaid against appellant. The record fails to show exceptions by appellee.

*J. C. Hawthorne* for appellant.

The probate court had no jurisdiction to render a judgment for rents of lands held by one under a *bona fide* claim of ownership. 55 Ark. 222; 15 *id.* 381; 10 Paige, 40; art. 7, sec. 34, Const. 1874. The judgment of the Randolph court was a bar to a recovery in this suit. A judgment is conclusive, not only as to such matters as were determined, but as to every other matter which might have been litigated as an incident to or essentially connected with the subject-matter of the litigation, whether the same as a matter of fact was considered or not. Sand. & H. Dig., sec. 3583; 13 Am. St. Rep. 234; 5 *id.* 502, 509; 109 N. Y. 202; 20 Am. St. Rep. 301; 122 N. Y. 41; 21 *id.* 71; Freeman, Judg. 262. The demand for rents was entire and indivisible. When the demand is against the same person in a different capacity for the same wrongs, all must be joined in one suit. See 60 Mass. 103; 36 Am. Rep. 79; 21 Ala. 485; 19 Wend. 208; 15 Johns, 229; 16 *id.* 136; 13 Ohio St. 284; 18 S. W. Rep. 867; 126 Mass. 492; 29 N. E. Rep. 367; 41 N. W. Rep. 378; 1 Van Fleet, Former Adjudication, 276; 1 Wend. 487.

*S. A. D. Eaton* for appellee.

The probate court has power to compel appellant to account to appellee for rents and profits arising from her homestead. Appellant stood *in loco parentis*, and could not acquire her property, except in trust for her. 54 Ark. 636. The land was not assets in his hands as administrator, nor under his control as such. Thomps. Homestead & Ex. 546; 47 Ark. 454. The sale was void. Freeman, Judg. 117; Black, Judg. 218; Freeman, Void Jud. Sales, 2. His holding of the land was at all times as guardian of appellee, and he is estopped to set up any claim to rents and profits. 15 S. W. Rep. 159. As soon as appellant was appointed statutory guardian, he became liable to his ward for the rents and profits, and should have accounted for them to the probate court. Mansf. Dig., sec. 3493. He cannot complain of ignorance of the law. Perry, Trusts, 433 and 863; 42 Ark. 25; 9 Am. & Eng. Enc. Law, 106 (c). See also 14 Ark. 396; 23 *id.* 47; 29 *id.* 636; 37 *id.* 316. The probate court has authority to compel him as guardian to account for all property in his hands. 38 Ark. 494; 2 Pom. Eq. Jur. 961. The former suit was not a bar. It was against appellant individually; this suit is against him *as guardian.* Bigelow, Estop. 130; 2 Black, Judg. 548. There is no identity of parties. The provision of sec. 3583, Sand. & H. Dig., is not mandatory. Compare sec. 5703, subject 2, and sec. 5704, Sand. & H. Dig. Trustees must see that funds in their hands are paid to the person authorized to receive them. They are liable for mistakes. 2 Perry, Trusts, 296. A release is not binding unless the *cestui que trust* is fully acquainted her rights and the full liability of her trust. 2 *id.* 923; Bish. Eq. 234. A partial payment does not release the debt. 55 Ark. 369. When a ward is self-sustaining, it is error to allow compensation to a guardian for maintenance. 30

S. W. Rep. 995; 16 *id.* 358; 6 *id.* 68-71; 35 N. E. Rep. 709. Interest should have been computed at ten per cent. Mansf. Dig. secs. 3513, 3514; 38 Ark. 494; 16 S. W. Rep. 358.

As to splitting cause of action.

BUNN, C. J., (after stating the facts.) The principal question in the case is one of pleading, that is to say, whether or not appellee had a right to split up her claims for back rents, or for use and occupation, or for damages for the retention of the possession of her lands.

It is a well established rule of law that a single cause of action cannot be split, in order that separate suits may be brought for the various parts of what really constitutes but one demand. It is said by the court in *Dutton* v. *Shaw*, 35 Mich. 431, that "the principle which prevents the splitting up of causes of action and forbids double vexation for the same thing is a rule of justice, and not to be classed among technicalities." In *Damon* v. *Denny*, 54 Conn. 253, the court said: "Where a pending suit is one in which it is legally possible for a judgment to be rendered upon a cause of action alleged in the second, and was brought for the purpose of obtaining such a judgment, the plaintiff is bound to exhaust the possibilities of that suit, before subjecting the defendant to the cost of a second suit." See also *Hitchin* v. *Campbell*, 2 W. Bl, 827; *Martin* v. *Kennedy*, 2 B. & P. 71; *Seddon* v. *Tutop*, 6 Term R. 607; *Thorpe* v. *Cooper*, 5 Bing. 116, 15 E. C. L. 387. The justice of the rule is however questioned by some courts and jurists, perhaps more, however, in its too extensive application than on any account of any injustice in it when applied under proper restrictions. Thus Brett., J., in *Brunsden* v. *Humphrey*, 14 Q. B. Div. 145, said: "When that rule is applied to damages which are patent, it is a good rule; but where damages are afterwards developed, it is not a rule to be commended. It is a rule which sometimes produces a harsh result,

and if it were now for the first time put forward, I could not consent to its being pushed to the length to which it has been sometime carried." In *Stickel* v. *Steel*, 41 Mich. 350, the principle is advanced that claims originally one and indivisible may become single and separate, and in turn may again return to their indivisible estate. Cooley, J., uses this language: "In short, if the two bills constituted one demand in their origin, they must have become two for all legal purposes when the one fell due before the other; and if united again by the other falling due, they would be again separated when the remedy on one was barred, or whenever anything occurred which should render one the subject of a suit when the other was not."

So much for the rule. It obtains in all the states of the Union and in England. The difficult thing is to apply the rule properly, that is, just what makes a single contract, giving only the one right of action, which cannot be split, is often a difficult question, and it is said that the cases are not altogether harmonious. "The bare fact that the two causes of action spring out of the same contract does not *ipso facto* render a judgment on one a bar to a suit on the other." *Perry* v. *Dickerson*, 85 N. Y. 345. "When several claims payable at different times arises out of the same contract or transaction, separate actions can be brought as each liability accrues." *Reformed Church* v. *Brown*, 54 Barbour, 191; *Sterner* v. *Gower*, 3 W. &. S. (Penn.), 136; *Union Ry. Co.* v. *Traube*, 59 Mo. 355; *Ryall* v. *Prince*, 82 Ala. 264. "Yet if no action is brought until more than one is due, all that are due must be included in one action; and if an action is brought when more than one is due, a recovery in that suit will be an effectual bar to a second action brought to recover the other claims that were due when the first was brought." *Reformed Church* v. *Brown*, *supra; Union Ry. Co.*

v. *Traube, supra; Nickerson* v. *Rockwell*, 90 Ill. 460. Instalments of rent are subject to the same rule as are other instalments of money due. An action may be brought as each instalment falls due, but all instalments due are but one cause of action. 1 Enc. Pl. & Prac., p. 155, and the cases there cited. These authorities seem to settle the question. It seems to us that a suit for damages for wrongfully withholding or for use and occupation is even more a single cause of action, if anything; than a contract rental to be paid in instalments.

When matter is *res judicata.*

We are met at this stage of the discussion with the proposition that the doctrine of *res judicata* governs this case, rather than the rule of pleading which we have been discussing, and that the defendant guardian is, in effect, sued first in his individual capacity and then in this form of action as guardian, so that there are really two different defendants in the two actions. Having established this as a point of attack, it is next contended that the doctrine of *res judicata* does not apply, because the parties are not identical in the two suits. The authorities to which we have been referred to sustain this view are *McBurnie* v. *Seaton*, 111 Ind. 56; 2 Black, Judgments, 536; *Hall* v. *Richardson*, 22 Hun, 444; *Rathbone* v. *Hooney*, 58 N. Y. 463.

It will be seen that in the case of *McBurnie* v. *Seaton*, McBurnie being dead, his wife, to whom had been allotted the notes and mortgages involved, instituted the second suit, and the other unsuccessful suit by McBurnie in his lifetime on the same notes and mortgages as guardian was set up, and *res judicata* pleaded. The notes and mortgages were the property of McBurnie individually, and not as guardian, and for this reason his suit as guardian failed, and as a matter of course his wife was not estopped to sue on the notes of which she was the legal owner. The statement in 2 Black on Judgments is based on this case of *McBurnie* v. *Seaton*.

In *Hall* v. *Richardson*, 22 Hun, 444, the first action had been brought against Richardson, as executor of Sutton Hall, deceased, and was unsuccessful, because he was not liable as such. The second action involving perhaps something of the same subject was brought against him individually. The second suit was not barred by the first. The case reported in 58 N. Y. 463 was determined on a similar state of facts.

It will readily be seen that, even if we were determining the case at bar on the principles governing the subject of *res judicata*, these cases are inapplicable. In the case at bar the appellant, if liable at all, was liable throughout individually in the ejectment suit. Were it possible in any case for an action to be maintained against one, either individually or in his fiduciary capacity, it is not certain that *res judicata* could not be well pleaded in the second suit.

As to guardian's account.

The several items allowed by the court below or named in the commissioner's report as credits to appellant, consisting of value of improvements, repairs and taxes paid, were involved in and settled by the ejectment suit; and the items of board, clothing, medicine, and tuition bills were evidently an afterthought, manifestly never intended to be made a matter of charge against the ward by the guardian, and therefore will be disallowed here.

This settles the controversy between counsel as to the real meaning of the compromise judgment in ejectment on principles of law, and we are relieved of the duty of attempting to do so on the facts of the controversy.

Reversed and remanded, with directions to enter judgment according to this opinion; appellee paying the cost of this appeal.

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# SUNNY SOUTH LUMBER COMPANY v. NEIMEYER LUMBER COMPANY.

Opinion delivered December 8, 1896.

CONDITIONAL SALE—TITLE OF VENDEE.—A vendee of personal property, who pays part of the purchase price under an agreement that the title shall remain in the vendor until the purchase money is fully paid, has an interest in the property which may be mortgaged by him.

SAME—FORFEITURE.—Where personal property is sold on condition that the title shall remain in the vendor until the purchase money is paid, and that, in case of default, the vendor may repossess himself of the property, the failure of the vendees to pay the purchase money when due does not, of itself, operate as a forfeiture of their interest in the property or of the rights of one to whom they have given a mortgage of such interest.

ESTOPPEL—PURCHASE SUBJECT TO MORTGAGE.—One who purchases the interests of a vendor and vendee of personal property which had been conditionally sold, expressly agreeing, as part of the consideration, to pay off a mortgage on the property executed by the vendee, cannot deny the validity of such mortgage on the ground that the mortgagor had forfeited his interest in the property by failing to pay the purchase money, nor because the mortgage was not properly acknowledged and recorded, nor for the reason that the mortgagee, a foreign corporation, had failed to appoint an agent in this state, as required of foreign corporations doing business in the state.

FOREIGN CORPORATION—DOING BUSINESS IN STATE.—A foreign corporation, engaged in its business of buying and selling lumber, to which a citizen of Arkansas becomes indebted in another state, may secure such debt by taking a mortgage on personal property in this state, without first appointing an agent in Arkansas, as the taking of a mortgage under such circumstances is not "doing business" in the state, within the statute relating to foreign corporations.

TROVER—EVIDENCE.—Where personal property is sold subject to a mortgage, and the mortgagee subsequently brings suit against the vendee for the property, tendering to him the amount which he paid for the property, an answer which specifically denies any right or interest of the plaintiff in the property is *prima facie* evidence of a conversion of the property by defendant.

SAME—LIABILITY.—One who converts property which is subsequently destroyed is liable to a mortgagee of such property for the value of his interest therein at the time of the conversion.

DAMAGES—TROVER.—Where a mortgagee of personal property seeks to recover damages for its conversion from one conceded to be the holder of a prior lien, the measure of damages is the value of the property, less the amount of the prior lien, in the absence of any proof of special damages.

APPEAL—INCONSISTENT POSITIONS.—When the complaint of appellee alleged that the claim of appellant for money paid by it was paramount to its own claim, and the circuit court found that such was the fact, the appellee will not, upon appeal, be allowed to dispute such fact.

Appeal from Lafayette Circuit Court in Chancery.

CHARLES W. SMITH, Judge.

STATEMENT BY THE COURT.

This suit in equity was brought by the A. J. Neimeyer Lumber Company against the Sunny South Lumber Company and C. H. Gates & Son to foreclose a mortgage upon personal property. The essential facts are as follows: The firm of C. H. Gates & Son purchased from C. L. Byrne & Company certain personal property, to-wit, a saw-mill, boiler and machinery attached, besides wagons and oxen, etc., for which they agreed to pay $6,500. Gates & Son paid $1,500 in cash, and gave five notes, of $1,000 each, for the payment of the remainder. It was also expressly agreed in the written contract of sale that the title of the property should remain in Byrne & Company, until said notes were paid in full, and it was further stipulated in said contract that "if the said C. H. Gates & Son shall make default in the payment of either of said notes, and said default shall continue beyond a reasonable time thereafter, the said Byrne & Company shall have the right to repossess themselves of said property."

The Neimeyer Company advanced to Gates & Son several thousand dollars in money to make payment to

Byrne & Company upon this contract of purchase. Before any default had been made, Gates & Son mortgaged this property purchased from Byrne & Company and certain other property to the Neimeyer Company to secure to it payment of such money. Byrne & Company also promised the Neimeyer Company that they would make no sale or transfer to prejudice the claim of said company, without first giving it an opportunity to perfect the title in Gates & Son and protect its claim against Gates & Son by paying the remainder of the purchase money due Byrne & Company for such property. Afterwards Gates & Son were unable to make payment of one of the instalment notes when it became due. They afterwards sold the property to appellant, the Sunny South Lumber Company. Said company purchased the interest of both Gates & Son and Byrne & Company in the property, and took a transfer of the contract of sale from Byrne & Company. Before making the sale and transfer, Byrne & Company informed Garrigues, who acted for the Sunny South Lumber Company in making the purchase, of the promise Byrne & Company had made to the Neimeyer Company, and refused to make any sale or transfer to Garrigues until he promised that the Neimeyer Company should be protected and its claim paid. The consideration which Garrigues, as agent of the Sunny South Lumber Company, agreed to give Gates & Son for their interest in the property was the payment of the claim of the Neimeyer Company against Gates & Son and certain other debts of Gates & Son, and, as a further consideration, that it would transfer to Gates & Son stock in the Sunny South Lumber Company. Under this purchase from Byrne & Company and Gates & Son, the Sunny South Company took possession of the property. Afterwards the Neimeyer Company demanded of the Sunny South Company payment of its debt against Gates & Son. This demand

being refused, suit was begun by the Neimeyer Company to foreclose its mortgage upon the property purchased by the Sunny South Company.

It alleged that Garrigues, acting for the Sunny South Lumber Company, and under an agreement with Gates & Son, purchased the property from Byrne & Company by paying the balance of the unpaid purchase money, and taking a transfer from Byrne & Company to Garrigues for the Sunny South Lumber Company. The prayer of complaint was that plaintiff have judgment against Gates & Son for its debt, "that the same be declared a lien on the property in said mortgage recited, and that the same be ordered sold to satisfy said mortgage debt, and, furthermore, plaintiff prays that the said Sunny South Lumber Company be required to answer herein, and show, if any, what sum of money is due it by reason of assignment of contract of purchase to them, to the end that this plaintiff may reimburse them in their expenditure, relieve the property of all prior liens, and thereby obtain a decree for sale of the property free from other incumbrances," etc.

The Sunny South Lumber Company appeared, and filed a demurrer to the complaint, which being overruled it filed an answer denying that the mortgage to plaintiff was a lien upon the property, or that plaintiffs had any interest in the property, and denying the right of plaintiff to the relief prayed.

Afterwards the Neimeyer Lumber Company filed an amendment to its complaint, alleging that payment of the indebtedness of Gates & Son to the Neimeyer Company was a part of the consideration which the Sunny South Lumber Company agreed to pay Gates & Son for the mill plant in question, and that said Sunny South Company was liable to plaintiffs for the full amount of its claim against Gates & Son; and they pray judgment for the same. The defendants filed a motion to strike out this

amendment, and, when the cause came on for hearing, the motion was sustained, and the amendment stricken out. The court held that the note and mortgage sued upon were valid and subsisting liens upon the property mortgaged, that the plaintiff had the right to redeem the property embraced in said mortgage, and subject the same to the satisfaction of its mortgage debt. The court further held that the claim of the Sunny South Company was superior and paramount to the claim of plaintiff, to the extent of the money paid by the Sunny South Company in purchase of the property of Byrne & Company, with interest thereon, and necessary expenses, and that, upon the payment of the same by plaintiff, it was entitled to the possession of said property for the foreclosure and satisfaction of its mortgage. The court gave judgment in favor of plaintiff against Gates & Son for the amount of the note and mortgage sued on, and ordered an account to be stated between plaintiff and the Sunny South Company, defendant. The report of the master showing that the mortgaged property had been completely consumed while in the possession of said defendant company, the court found that "the value of all said property and rents, reduced by expenditures as aforesaid, was more than sufficient to pay plaintiff's judgment and decree against C. H. Gates & Son on the mortgage in question," and thereupon gave judgment against the Sunny South Lumber Company for the amount of said decree, being the sum of $5,941.00. From which decree an appeal was taken.

*J. M. Montgomery* and *Henry Moore* for appellant.

The sale of chattel under agreement that the title shall remain in the vendor until the payment of the purchase price passes no title until the condition is performed, even to a *bona fide* purchaser, as against the original vendor. 1 Benj. Sales, sec. 366; 47 Ark. 363; 48 *id.* 160;

49 *id.* 63; 54 *id.* 476. The mere willingness or readiness to pay amounts to nothing, without an offer or tender of payment and a refusal by the creditor. 25 Am. & Eng. Enc. Law, p. 916, and cases cited. There are defects in the acknowledgment and record of the mortgage which render it void. Sand. & H. Dig., secs. 715, 717, 5090; 49 Ark. 83; 53 *id.* 18; 9 *id.* 112; 25 *id.* 152; 4 *id.* 536. The mortgage is void for uncertainty of description. 35 Ark. 470; 30 *id.* 657; *ib.* 680. Appellee had no right to redeem after a foreclosure had been had under the contract. Jones, Chat. Mort. (2 Ed.), secs. 693, 696, 697. Appellee was not entitled to rents. 20 Am. & Eng. Enc. Law, p. 1035; Hempst. Rep. 563. 3 Am. & Eng. Enc. Law, p. 200, sec. 14; 20 *id.* p. 611, and note 1. The cases of 36 Ark. 17, 31 *id.* 430, and 40 *id.* 275 are not applicable. He that comes to redeem a mortgage must show title to the equity of redemption. 1 Vern. 182. Appellant was not liable for the loss by explosion. A mortgagee in possession is responsible for ordinary diligence in preserving the property after condition broken, and while the right of redemption exists, and is liable for ordinary neglect. If the property be destroyed without fault on his part, he cannot be held for its value. Jones on Chat. Mortg. (2d Ed.), sec. 697, and cases cited; 5 Wait, Act. & Def. 506. The tenement houses were not covered by the mortgage. The tender by appellee was insufficient. 25 Am. & Eng. Enc. Law, 910; 53 Ark. 69. The decree is excessive. Appellants were entitled to the amount paid Byrne on the purchase money debt. Appellee was a foreign corporation doing business in this state without complying with our statute, and cannot sue in this state. 8 Am. & Eng. Enc. Law, 340; 8 Wall. 168; 143 U. S. 305; 93 U. S. 99, 102; 124 *id.* 474.

*L. A. Byrne* for appellee.

The conditional sale of personal property, with a reservation of title, creates the relation of debtor and creditor, and the reservation of title is but a security for the debt. 48 Ark. 160; 36 *id.* 71; 52 *id.* 162. The debtor has an equitable interest, which he can sell or mortgage. A conditional sale to secure a debt is a mortgage. 1 Jones, Mortg. sec. 11; 13 Ark. 112; 32 *id.* 478; 5 *id.* 321; 40 *id.* 146; 29 *id.* 358; 34 *id.* 113. The testimony shows that appellant agreed to pay appellee's debt, and took the property under that agreement, and it cannot question the validity of the mortgage. 47 Ark. 301; 59 *id.* 280. The mortgage was good between the parties without acknowledgment or record. 25 Ark. 152; 49 *id.* 279. In a suit between senior and junior mortgagees no tender is necessary. Jones on Chat. Mortg. sec. 690 to 696. A foreclosure does not bind a junior mortgagee unless he is made party to the suit. 37 Ark. 632; Jones on Mortg. sec. 1057. The value of the plant cut no figure. Appellant was liable for use and occupation, and it was error to allow credit for repairs and improvements made by appellant to make the plant more profitable to it in its business, but not necessary to preserve it. 52 Ark. 381; 42 *id.* 422; 38 *id.* 285. It was error to allow interest on these expenditures. 42 Ark. 422; 36 *id.* 17. It is proper to tax a mortgagee in possession for use and occupation of same. Jones on Chat. Mortg. sec. 696; 2 Jones on Mortg. secs. 1114 to 1143; 36 Ark. 17; 40 *id.* 275; 49 *id.* 508. When the mortgagee converts or makes way with the property, equity will render a personal decree for the value of the equity of redemption. Jones on Chat. Mortg. sec. 684. The court should have rendered a personal decree on the amendment to the complaint; but as appellee succeeded in its claim, no appeal was necessary from the sustaining the demurrer. It is a rule of appellate courts that it makes

no difference upon what grounds the lower court bases its judgment, if the decree is right upon the whole record. 56 Fed. Rep. 567; 6 Ark. 431; 7 *id.* 238. Having taken the property under a promise that appellee's claim would be paid, appellant is bound by that promise. 45 Ark. 67; 42 N. Y. 318; 67 Mass. 391. Appellee relinquished a valuable right, relying on the promise of appellant to pay its claim, and appellant is estopped to dispute or take any advantage of that claim. 35 Ark. 465; 37 *id.* 37; Herman on Estoppel, secs. 753 to 785. The amendment presented several causes of action, mainly equitable, and there was no motion to transfer. The court should have rendered judgment on all. 27 Ark. 585; 35 *id.* 565; 37 *id.* 164; 48 *id.* 312; 46 *id.* 96. The judgment is right upon the whole record, and as the final decree was put upon grounds differing from our view of the case, but the relief was equally adequate, appellee cannot complain, and there was no necessity to appeal. 90 Mich. 152; 56 Ark. 450; 48 Mass. 300; 24 Mich. 305; 93 *id.* 383; 82 *id.* 105; 48 Ark. 258; 80 Cal. 507; 69 Mich. 127; 63 *id.* 25. See 56 Ark. 119.

*J. M. Montgomery* and *Henry Moore* in reply.

The alleged promises of appellant, and the testimony taken on the issues raised by the amendment to complaint, have nothing to do with the case, as appellee did not appeal from the judgment dismissing its amended complaint. 25 Ark. 52; 34 *id.* 63; 26 *id.* 526; 24 *id.* 30; 14 *id.* 122. If such were made, they were within the statute of frauds. 45 Ark. 67; 37 *id.* 145; 52 *id.* 174. They were made before the incorporation of appellant, and are void. 37 Ark. 164. The mortgage is void because not recorded in the proper county, and for uncertainty. 43 Ark. 350; 41 *id.* 495. The assignment cannot be varied or added to by parol evidence. 24 Ark. 210; 13 *id.* 593; 24 *id.* 269.

Title of vendee in conditional sale.

RIDDICK, J., (after stating the facts.) We are of the opinion that the circuit court did not err in holding that the Neimeyer Lumber Company had a valid lien upon the property mortgaged to it by Gates & Son. This property had been purchased by Gates & Son from Byrne & Company under an agreement that the title should remain in Byrne & Company until the purchase money was fully paid. Afterwards the Neimeyer Company furnished the money to pay a considerable portion of the purchase price, and to secure itself received from Gates & Son a mortgage upon the property. Although the purchase price had not been paid in full, and the title to the property was still in Byrne & Company, yet Gates & Son acquired by their contract of purchase an interest in the property which they could sell or convey, and the mortgage was valid against them. *Nattin* v. *Riley*, 54 Ark. 30; *McRae* v. *Merrifield*, 48 Ark. 160; Benjamin on Sales (Bennett's Ed.), 283.

As to forfeiture.

If, upon the failure of Gates & Son to make payments as required by the contract of purchase, Byrne & Company had retaken possession of the property, as provided in the contract, the rights of Gates & Son and of the Neimeyer Company would have been ended. But Byrne & Company did not take possession of the property, and the failure of Gates & Son to pay an instalment note at its maturity did not of itself operate as a forfeiture of their interests in the property or of the rights of the Neimeyer Company under their mortgage. *Nattin* v. *Riley*, 54 Ark. 30; *Ames Iron Works* v. *Rea*, 56 *ib.* 450.

Estoppel by purchase subject to mortgage.

Byrne & Company did not desire to take possession of the property, but were endeavoring to aid Gates & Son in finding a purchaser for the property. They also promised the Neimeyer & Company that, in the event Gates & Son were unable to pay off the remainder of the purchase money, the Neimeyer Company

should be permitted to pay the same, and so protect their mortgage interest. Afterwards the Sunny South Company purchased the interest of both Byrne & Company and Gates & Son in this property. While there is conflict in the evidence, we think that it is shown by a preponderance thereof that the payment of the debt of Gates & Son to the Neimeyer Company was a part of the consideration to be paid by the Sunny South Company to Gates & Son for the property.

The appellant company, having purchased the interest of Gates & Son, and agreed as a part of the consideration thereof to pay the debt of the Neimeyer Company secured by a mortgage upon the property purchased, and having made in effect the same promise to Byrne & Company to induce them to part with their interest, cannot, after having obtained possession of the property in that way, be permitted to dispute the validity of the mortgage, on the ground that Gates & Son had forfeited their interest in the property by failing to pay the purchase money. Neither can it do so on the ground that this mortgage was not properly acknowledged and recorded, nor for the reason that the Neimeyer Company had failed to appoint an agent in this state as required of foreign corporations doing business in the state. *Clapp* v. *Halliday*, 48 Ark. 258; *Millington* v. *Hill*, 47 Ark. 301; Jones, Chattel Mort. (4 Ed.), sec. 487; Jones, Real Prop. Mort. (5 Ed.), secs. 740, 741; *Ghio* v. *Byrne*, 59 Ark. 280.

When foreign corporation doing business in state.

In addition to this, there is nothing to show that the Neimeyer Company was doing business in this state at the time this debt was contracted or the mortgage executed. The mortgage was executed by Gates & Son in this state upon property here to secure a debt due the Neimeyer Company, but that does not show that such company was doing business in this state. The Neimeyer Company was not a corporation engaged in the

business of loaning money or taking mortgages, but was engaged in the business of buying and selling lumber. Such a corporation doing business in another state, to whom a citizen of this state becomes indebted in the course of its business there, may collect such debt in this state, or secure it by taking a mortgage, without first appointing an agent here; for the taking of a mortgage under such circumstances is not "doing business" in the state, within the meaning of our law relating to foreign corporations. *Florsheim Bros. Dry Goods Co.* v. *Lester*, 60 Ark. 120; *The Charter Oak Life Ins. Co.* v. *Sawyer*, 44 Wis. 387.

Sufficiency of proof of conversion.

Having concluded that the court did not err against appellant in holding that the mortgage in question was a valid lien upon this property in appellant's possession, to the extent that its value exceeded the sums paid by appellant to Byrne & Company, we are next to consider the relief to which the plaintiff is entitled under the facts of this case. The complaint filed by appellee contained, in substance, an offer to repay to appellant the amount paid Byrne & Company, and a demand for the property. The answer of appellant was a refusal of this demand, and a specific denial of any right or interest in said property on the part of appellee. This was *prima facie* evidence of a conversion of such property by appellant. *Ray* v. *Light*, 34 Ark. 421; *Zachary* v. *Pace*, 9 *ib.* 212.

Liability for conversion.

As the property was afterwards consumed and destroyed, while in the hands of the appellant company, it is liable to appellee for the value of the interest of appellee therein at the time of the conversion, and can be compelled to account for the same.

Damages for conversion.

But the circuit court not only charged appellant with the full value of said property in excess of the sums paid by Byrne & Company, and interest thereon, but also charged it with the full rental value of said

property so long as it remained in its possession. We think that this was clearly in excess of the relief to which appellee was entitled under the pleadings. Appellant had peaceably and lawfully obtained possession of the property, and claimed it as a matter of right. As, under the decree of the circuit court, it had a beneficial interest in the property superior to the mortgage of appellee, to the extent of the purchase money paid by it to Byrne & Company, it could be liable to appellee only for the value of the property less the value of its own interest therein. The remainder left represents the value of the interest in the property covered by the mortgage of appellee. No special damages are alleged or proved, and appellant, under the facts here, cannot be compelled to account for a greater sum than this value, with interest added. *Jones* v. *Horn*, 51 Ark. 19; *McClure* v. *Hill*, 36 Ark. 268; *Street* v. *Sinclair*, 71 Ala. 110.

Restating the account in accordance with these rules, we have the following result, to wit:

| | |
|---|---|
| Value of property in mortgage from Gates & Son to Neimeyer Company, afterwards sold by Byrne & Company to Sunny South Company, and converted by it | $ 4,575 00 |
| Value of other property included in said mortgage, afterwards sold by Gates & Son to Sunny South Company, and converted by it | 835 00 |
| Total | $ 5,410 00 |
| Amount paid by Sunny South Company to Byrne & Company on 17th of July, 1888, for balance due on purchase money of property | $ 3,350 00 |
| Interest on same from July 17th to September 29, 1888 | 40 20 |
| Total credits | $ 3,390 20 |

Balance representing the interest in said property subject to the Neimeyer Company mortgage ..... $ 2,020 80

In stating this account we have taken the value of the property as found by the circuit court, except that we deduct therefrom $820, the value of the following property improperly charged against appellant:

| | |
|---|---|
| Boarding house | $ 150 00 |
| Tenement houses | 250 00 |
| Six yoke oxen | 270 00 |
| Saw edger | 150 00 |
| Total | $ 820 00 |

The mortgage to the Neimeyer Company did not include such houses, and the evidence shows that appellant did not receive or convert the other property named. It was therefore improper to charge appellant with the value of the same.

Parties cannot assume inconsistent positions.

The Neimeyer Company obtained a decree against Gates & Son upon their mortgage debt for the sum of $5,941.00. By charging appellant with the rental value of the mortgaged property, the circuit court found that the value of all the property and rents which came into appellant's hands, subject to the mortgage in question, "was more than sufficient to pay plaintiff's judgment against Gates & Son upon the mortgage in question." The court, therefore, gave judgment in favor of the Neimeyer Company against the Sunny South Company, appellant, for the full amount of said mortgage debts. The appellee contends that this judgment should be affirmed, for the reason that the evidence shows that the appellant company agreed to pay this debt of Gates & Son to the Neimeyer Company as a part of the consideration for the mortgaged property; that for this reason the court was justified in giving a judgment against appellant for the full amount of this claim to Neimeyer Company against Gates & Son, and that the same should

be upheld. But we are not called upon to decide whether, if the question was presented by the pleadings, this mortgage of appellee might not, under the evidence, have been, as against appellant, held to be a first lien on the entire property acquired by it from Byrne & Company. No such question is before us, for no such question is presented by the pleadings. The original complaint filed by the appellee asked for no personal judgment, but distinctly recognized and admitted the right of appellant to demand the repayment of the sums paid by it to Byrne & Company, in discharge of the balance due on the purchase money, and asked permission to repay these sums to appellant, that appellee might subject the property to its mortgage. The case having been tried in the circuit court upon the allegation of appellee that the claim of appellant for the amount paid by it to Byrne & Company was paramount to its own mortgage lien, it will not now be allowed to assume the inconsistent position of disputing such claim.

It is true that the appellee afterwards filed an amended complaint, setting out additional facts, and praying for a personal judgment against appellant for the full amount of its debt against Gates & Son; but this amendment was, on motion, stricken out, and the decree of the court was rendered on the original complaint. No appeal was taken from this order of the court striking out the amendment to the complaint, and that amendment is not before us, and cannot be considered. So far as the evidence in this case tends to support the cause of action set out in the original complaint, and the judgment entered thereon, we can consider it; but we cannot base our judgment upon a pleading which was stricken out and not considered by the circuit court when no appeal is taken by the party whose pleading was thus stricken out. *Dooley* v. *Dooley*, 14 Ark. 122; *Clark* v. *Barnett*, 24 Ark.

30. The evidence which tends to show that the appellant purchased the mortgaged property, and as a part consideration therefor agreed to pay the mortgage debt, tends directly to support the cause of action set out in the original complaint; for it shows that the mortgage which appellee seeks to foreclose was valid as against the appellants. The circuit court found that "the claim of the Sunny South Lumber Company is superior and paramount to plaintiff's to the extent of the money paid by them in the purchase of the claim of Byrne & Company, with legal interest." We cannot disturb the finding and decree of the court in this regard, even if we were convinced that it was wrong, for there is no pleading on the part of appellee before us which asks for a ruling contrary to this finding of the circuit court, and it must therefore stand. *Mock* v. *Pleasants*, 34 Ark. 63; *Thorn* v. *Ingram*, 25 *ib.* 52; *Clark* v. *Barnett*, 24 *id.* 30; *Dooley* v. *Dooley*, 14 *id.* 122.

The evidence in this case is conflicting, and so voluminous that we have been compelled to state our conclusions in regard to it, without discussing it or setting it out in detail. A consideration of it convinces us that substantial justice will be administered by requiring the appellant to account for the value of the property included in the mortgage and afterwards converted by it, less the credits allowed by the circuit court for money paid by appellant to Byrne & Company for said property. The balance for which appellant should account we have ascertained to be the sum of $2,020.80, with interest at six per cent. from September 29, 1888, the date of the conversion of the mortgaged property by appellant. The decree of the circuit court will be modified to this extent, and a decree in favor of appellee entered here for such sum and interest.

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NOTE.—As to when a foreign corporation is engaged in doing business within a state, see note to *Cone Export, etc. Co.* v. *Pool* (S. C.), 24 L. R. A. 295. (Rep.)

## SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY *v.* BENSON.

Opinion delivered December 12, 1896.

INTERPLEADER—WHEN LIES.—A bill of interpleader will not lie where petitioner denies his liability to either claimant as to part of the fund in suit, although he admits his liability for the balance.

PARTIES—MISJOINDER—DISMISSAL.—Where, in an action at law upon a debt, the debtor procures one who had obtained a garnishment against him to be made a party, and asks that the cause be transferred to equity, to determine the respective rights of the plaintiff and the garnisher, and the court refuses to transfer the cause or grant the relief asked, the garnisher should be dismissed from the action, and left to pursue his remedy on his garnishment.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

*W. J. Terry* for appellant Telegraph Company.

The cause should have been transferred to equity. Sand. & H. Dig., sec. 5619. Interpleader is one of the recognized heads of equity jurisdiction. 2 Story, Eq. Jur. sec. 806; 11 Am. & Eng. Enc. Law, p. 496 and p. 506. For practice, see 2 Paige, Ch. 572; 3 Edw. Ch. (N. Y.), 71; Story's Eq. Jur. sec 801; 2 *id.* sec. 824; 20 Ark. 641; 3 Wait's Ac. & Def. p. 138.

*Dan W. Jones & McCain* for appellant Bank of Little Rock.

When the court refused to transfer the cause to equity, it should have dismissed the bank from the case. 46 Ark. 272; Story, Eq. Jur. sec. 805; 2 Paige, Ch. 570; Sand. & H. Dig., sec. 5619.

*G. W. Murphy* for appellee.

The court could not properly transfer to equity. Sand. & H. Dig., sec. 5619. The bank is not prejudiced.

BUNN, C. J. This is an action by Mrs. V. Benson, the appellee here, against the Southwestern Telegraph & Telephone Company to recover the sum of $442, a balance due on the contract price and extra work and labor done and materials furnished in constructing appellant's line from Pine Bluff to Little Rock.

Defendant answered, denying that it owed plaintiff the said sum of $442, but alleging that it owed her, if anything, only the sum of $150, which said sum had been deposited, by agreement between them, in court, to await the result of another action then pending also in the circuit court of Pulaski county, wherein the Bank of Little Rock, having previously recovered judgment therein in the sum of $123.88 and costs against J. W. Benson, husband of plaintiff herein, had sued out a writ of judicial garnishment on said judgment against the said Telegraph & Telephone Company as garnishee, and in which the company had answered the facts as stated in regard to its indebtedness to Mrs. Benson or her husband.

On motion of the Telegraph & Telephone Company, through its attorney, the Bank of Little Rock was made a party defendant, and it immediately entered its appearance by its attorney, and moved the court to transfer the cause to the equity court. Afterwards it united with defendant telephone company in a motion to transfer the cause to the equity court, having at the same time filed its answer to the cross-bill and counterclaim of the defendant company, asking that said answer be also taken as a cross-bill. In the answer and cross-bill the bank alleged that J. W. Benson, the husband, was insolvent, and that, being insolvent, in order to hinder and defraud his creditors, he had transferred certain of his property to his wife, the said Mrs. V. Benson, with a fraudulent intent to defraud his creditors, and particularly that said husband, with such intent, by the

contract or pretended contract sued on made in her name, but for his benefit, caused about $800, which defendant company owed said husband under said contract, to be put in the name of the plaintiff, his wife, without any consideration; and although the said defendant was really indebted to the husband in the sum of $800, it and the husband pretended that whatever was owing on said contract was owing to the wife.

The motion to transfer was overruled, as also was the motion to dismiss the bank from the case. Exceptions were taken, and the bank was invited by the court to take part as a party in the subsequent proceedings, but it declined to do so, and asked to be permitted to withdraw, which was refused by the court, and the cause was proceeded with, resulting in judgment in favor of Mrs. V. Benson against the Telegraph & Telephone Company in the sum of $250.

In the closing proceedings, after the overruling of the motion to transfer and to dismiss defendant company's cross-bill by the bank, no mention of the interest of the bank is made, and it seems to have been treated as having voluntarily withdrawn from the case, and its pleas were in no manner disposed of or noticed.

The bank appealed from the ruling of the court refusing to transfer to equity, in refusing to dismiss the cross-bill of the defendant company against it, and in not permitting it to withdraw after said motion was overruled, and the rulings were excepted to, and this raises the first question for our consideration.

When bill of interpleader lies.

The interpleader sought to be obtained in this action must not be confused with the statutory provisions which enable third parties having certain interest in the subject-matter of proceedings at law to voluntarily appear, assert their rights or claim, and ask that the same be adjudicated. The interpleader here sought is purely a matter of equity, and the relief is obtained by

the bill for interpleader filed in a court of equity, containing all the necessary averments upon which all parties against whom the relief is sought will be summoned to appear and plead, and the matter involved will be in that court adjusted and settled, and proper decree rendered. Among the necessary averments in the bill for interpleader is that the plaintiff therein has property or money which may lawfully belong to one or the other of the defendants brought in, and that plaintiff has no other interest in the property or fund than to have it delivered or paid to the one entitled, and seeks to be protected from a mistake he might make by acting without judicial direction.

Under the rule of some of the English courts, an interpleader would be allowed in this case, since a portion of the amount involved the $150—is undisputed. But under the rule universally followed by the American courts, and which we adhere to, an interpleader would not be allowed, because, at the time of filing the bill for the same, there was still a controversy between the defendant and the plaintiff in this action over the remaining portion; that is, petitioner still had an interest in the litigation other than to have the fund properly applied or paid to the proper party. The bill itself, or the petition in the case, being without the necessary averments as a bill for an interpleader, the motion to transfer to the equity court was properly overruled.

Misjoinder of parties.

A bill for interpleader being cognizable only in an equity court, and the bill in this case being without the proper averments to be transferred, the retention of the bank as a party to this case was erroneous. It should have been permitted to withdraw as asked.

As to the controversy between Mrs. V. Benson on the one part and the telephone company on the other, the issue was as to whether or not defendant owed the $442, as claimed by plaintiff, or only $150, as contended

by defendant; and this issue seems to have been tried without the trial being affected in any manner by the appearance of the bank in the suit, and we therefore treat the case as independently tried and regularly appealed.

The only question left for our consideration is, does the evidence sustain the verdict in favor of Mrs. Benson and against the Telegraph & Telephone Company?

J. W. Benson, husband and agent of Mrs. V. Benson, testified that he rendered an account for extra work and all credits to Adams, the agent and manager of defendant company,—the account on page four of the transcript,—and then he says, in relation thereto: "Exhibit 'B' to the complaint is a copy of the bill sent by me to Mr. Adams after the work was done. I went to see Mr. Adams, with a view of having a final settlement. I found he had been garnished by the Bank of Little Rock. We looked over the account I had rendered, and scratched off some items, and allowed some charges for extra work, and he then said he would hold $150 back until the determination of the suit of the bank. He paid me on that day, January 16th, the sum of $163.40 leaving a balance of $150, according to the way that account showed which I O.K'd. But the account is not as I O.K'd it. The letters dated Hensley. Arkansas, January 14th, 16th, and 26th, and February 7, 1893, addressed to A. F. Adams, were written by me for Mrs. V. Benson. The reason I agreed to allow him to retain the $150 is that I was trying to get the amount within the jurisdiction of a justice of the peace, after the advice of my attorneys."

The evidence of both J. W. Benson and Adams plainly shows that the account presented to Adams by Benson was adjusted between them, a balance struck, a check given for $163.40, as part payment of the balance due, leaving a final balance of $150, which they had

agreed to leave unpaid to await the determination of the garnishment, and that J. W. Benson, acting all the while as the agent of Mrs. V. Benson, O.K'd the account, as then adjusted, and the letters from Mrs. V. Benson directly, and from J. W. Benson as her agent, to Adams, all written subsequent to the settlement between them, evidence without a doubt a ratification of the settlement, and only express claim for the $150. The testimony of Lee that all the extra work charged for was done, and was worth what was charged for it, is not inconsistent with the adjustment of the account as claimed by Adams, since some of the extra work may have been in place of corresponding items provided for in the main or original contract; in which case only the difference between extra work and the contract work should be added to the original.

At all events, the parties' settlement of the matter does away with the necessity of outside testimony, and that settlement is shown to have been made, without a doubt.

If the plaintiff will in 15 days enter a remittitur, so that the judgment will be for $150, instead of $250, then the judgment will be affirmed; otherwise, it will be reversed, and the cause remanded.

The Bank of Little Rock is dismissed from the case, to pursue its remedy by garnishment, as it may deem proper.

# SIMPSON v. BIFFLE.

# SIMPSON v. DOWNMAN.

Opinion delivered December 12, 1896.

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EXECUTION SALE—REDEMPTION.—Where an execution debtor seeks to redeem his homestead from a sale under an execution to which it is subject, under sec. 3114, Sand. & H. Dig., providing for a redemption upon payment of the purchase money, with 15 per cent. interest and all lawful charges, he is not entitled to a credit on the purchase money for the surplus applied to pay off another execution, to which the homestead was not subject, held by a firm of which the purchaser was a member, as his claim against such firm for the surplus paid to it could not be set off against the claim of a member thereof who purchased in his individual right to receive the purchase money paid by him.

HOMESTEAD—EXEMPTION FROM JUDGMENT LIEN.—The occupation of premises as a homestead on a day subsequent to the rendition of a judgment against the owner does not relieve them of the lien of such judgment.

SAME—IN WHAT ESTATE.—A husband is entitled to claim his residence as a homestead, whether held by him with his wife as a tenant in common or by the entirety.

SAME—RENTING PART TO ANOTHER.—The fact that a part of a building is rented as a hotel does not divest the right of the owner of the premises, who occupies the remainder, to hold the premises as his homestead.

SAME—SALE ON EXECUTION—SURPLUS.—The surplus arising from a sale of premises under an execution on a judgment rendered before the occupation of the premises as a homestead is exempt from levy under an execution from a judgment rendered after such occupation, so long as the execution debtor intends to use it in acquiring another homestead, but the right of exemption is lost when he abandons the intention so to use it.

ESTOPPEL—SILENCE.—Where land is conveyed to a wife by deed, the subsequent insertion of her husband's name also as a grantee before the deed is recorded, with the consent of the grantor but without the wife's knowledge, does not divest her of any interest acquired by the deed, and her failure to take steps to correct the deed, after discovering the alteration, will not estop her from

asserting her title, as against a purchaser of the property under an execution against her husband who bought in reliance on the record title.

HUSBAND AND WIFE—TITLE IN ENTIRETY.—A conveyance of land to a husband and wife jointly vests in them an estate in entirety, and a sale of the husband's interest does not divest the wife of her right of possession during her lifetime.

Appeals from Clay Circuit Court in Chancery, and from Craighead Circuit Court, Jonesboro District.

FELIX G. TAYLOR, Judge.

*J. C. Hawthorne* for appellant.

The general rule is that money realized from a voluntary sale of the homestead or other exempt property is subject to execution. But where sold under an execution or at forced sale, the proceeds in excess of the amount required to satisfy the liens are exempt from seizure and sale under execution. 48 N. Y. 188; 86 Am. Dec. 707; 92 Am. Dec. 112; 22 N. E. Rep. 613; 93 Ill. 387. The surplus must be treated *as land.* 7 Wend. 259; 20 N. Y. 412; 2 Freem. Ex. 447; 29 Pa. St. 362; 33 Mich. 183; 38 *id.* 168; 51 Mich. 492; 10 S. W. Rep. 501; 7 Ill. App. 294. Husband may, as head of family, have a homestead exempt in property the title to which is in his wife. 9 Am. St. Rep. 326. When a homestead is limited to a certain sum, and is incapable of division, it may be sold, and the amount or value of the homestead reserved for the debtor. 93 Ill. 387; 112 *id.* 377; 1 Am. St. 554. We have no statute, but equity courts have inherent power to mould remedies so as to give effect to rights guaranteed by the constitution. Art. 9, sec. 3, Const. 1874; 41 Ark. 59; 1 Barb. Ch. 189; 3 *id.* 9; 86 Mass. 347; 1 Pomeroy, Eq. 111 *et seq.* The appellant had the right to redeem by paying the Peters judgment, interest and costs, and the tender was sufficient.

Mrs. Simpson is not estopped from claiming to be sole owner. 19 Am. St. 600; 39 Ark. 131; 49 *id.* 218; 50

*id.* 116; 10 Am. St. Rep. 307; 9 *id.* 587. Silence will not estop, unless there is not only a right but a duty to speak. 107 N. Y. 310; 10 N. E. Rep. 204; *ib.* 735; 4 Johns. Ch. 66; 4 N. E. Rep. 370; 32 Am. St. 784; 33 *id.* 105; 41 N. E. Rep. 1044. In view of these authorities, the court's charge was erroneous. All the essentials of an estoppel are wanting. Bigelow on Estoppel, 484. A party must be actually deceived or misled to his injury by the conduct of another, and the latter must *intend* that his conduct should be acted on. 5 Am. St. 49; 5 *id.* 285; 56 Ark. 217; 54 *id.* 465; 58 *id.* 20; 53 *id.* 545; 54 *id.* 196; 51 *id.* 62; 33 *id.* 465; 109 Mass. 53; 93 *id.* 349; 60 *id.* 4. As to omission to speak, see 82 N. Y. 33; 82 *id.* 327; 55 *id.* 325; 2 Wall. 24.

A husband's interest in an estate by entirety may be sold under an execution against him, but the purchaser only acquires an interest in one-half of the rents and profits, and cannot deprive the wife of the possession in an action at law. 33 S. W. Rep. 424; 39 N. E. Rep. 337; 35 Am. St. 182, and cases in note. If Mrs. Simpson was estopped from claiming to be the sole owner, she was entitled to retain possession of half during her life. 33 S. W. Rep. 424; 61 Ark. 388.

*G. B. Oliver* for appellee.

In Vermont, Illinois, Michigan and Tennessee, there are special statutes limiting the value of the homestead, and providing that where it exceeds the maximum value, and is indivisible, it shall be sold, and the maximum value set aside to the debtor. The cases cited by appellant uphold these statutes, but not a case is cited sustaining his theory where there is no such statute. But Downman is not a party to this suit (in equity), and no tender was ever made to him. Our statute provides the manner by which an officer shall levy on money coming to his hands, and in this case the statute was followed.

See also Freeman on Ex. 130. The homestead right is not an absolute one. Our courts have held that, under the statute of 1887, it is but a privilege which may be waived by the debtor. 53 Ark. 182; 55 *id.* 139; 57 *id.* 179.

All that Mrs. Simpson can claim as against creditors is an interest equal to the amount she paid on the property. *Kline* v. *Ragland*, 47 Ark. 111. She is estopped. Sand. & H. Dig., sec. 727; 19 Ark. 543; 47 *id.* 226. Downman was an innocent purchaser.

BATTLE, J. On the first day of April, 1893, J. S. Simpson was, and at all times since has been, a citizen and resident of the State of Arkansas, and the head of a family. During all this time he and his family resided upon lots 10 and 11 in block 5, in the town of Rector, in Clay county, in this state. The value of these lots and the improvements thereon did not exceed the sum of $2,500, and the area thereof did not exceed one-fourth of an acre. Previous to the time he entered into the possession of the lots, the Peters Shoe Company recovered a judgment in the Clay circuit court, at the August, 1892, term thereof, against him for $580. At the August, 1893, term of the same court, J. W. Scuddar & Co. also recovered a judgment against him for $1,262.21. G. B. Oliver, who is an attorney at law, controlled both these judgments, and in January, 1894, caused an execution to be issued on the judgment in favor of the Peters Shoe Company, and placed it in the hands of R. L. Hancock, sheriff of Clay county, who levied upon the lots occupied by Simpson, and advertised the same to be sold on the 17th of February, 1894, to satisfy the execution. On the day of the sale Oliver caused an execution to be issued on the judgment in favor of J. W. Scuddar & Co., and placed it in the hands of the same sheriff. The lots were sold on the day fixed, and H. H. Downman, a member of the firm of J. W. Scuddar & Co., bid

the sum of $2,000 for them, and he, being the highest bidder, became the purchaser thereof. He thereupon paid the $2,000 to the sheriff. Scuddar & Co. then demanded of the sheriff that he levy the execution in their favor on the sum of $1,316.68, the balance of the $2,000 remaining in his hands after the satisfaction of the execution in favor of the Peters Shoe Company, which he did, upon their giving a bond of indemnity, and immediately, upon the day of sale, paid it to them.

On the 31st day of July, 1894, Simpson instituted an action against B. B. Biffle, clerk of the Clay circuit court, R. L. Hancock, sheriff of Clay county, and James W. Scuddar & Co., in the said court on the equity side, and alleged substantially the forgoing facts, and that the lots sold constituted his homestead, and that he had tendered to the clerk and Scuddar & Co. $660 to redeem the property from the sale, and each of them had refused to accept; and offered to pay in court any sum necessary to redeem his homestead, provided he was only required to pay the judgment in favor of the Peters Shoe Company, and interest, penalty, and costs; and asked that the clerk and Scuddar & Co. be required to accept the $660 in redemption, or, in the event he is not entitled to redeem, that a judgment be rendered in his favor against Scuddar & Co. for the amount received by them. The defendants answered, and did not deny that $660 was tendered to the clerk and Scuddar & Co.; but it does not appear in the pleadings or evidence when the tender was made.

The foregoing facts were proved at the hearing, and the deposition of Simpson was read, in which he deposed that his wife purchased the lots sold, and paid $150 for them; that he erected a brick building thereon for a residence, and expended in its construction $1,300 of his own money, and that his wife contributed the remainder of the cost of the same, less $400; that fourteen rooms

of the building were at one time rented as a hotel, and the remainder was occupied by him and his family; that he intended, when he built it, to use it as a hotel, but was unable to furnish it, and was compelled to rent.

It was further proved that when the lots were levied on by the sheriff and before the sale, Simpson claimed them as a homestead, and filed a schedule, in which he stated that he purchased the lots, and occupied them as a homestead; and that the schedule was sworn to by him.

The court found that the lots were the homestead of Simpson, and that he resided upon them at the time of the rendition of the judgment in favor of Scuddar & Co., and that their judgment was no lien upon them, but that the one in favor of the Peters Shoe Company was; and that an amount equal to the sum paid to the latter company in satisfaction of the execution in its favor, and interest and penalty, had been tendered by Simpson in redemption. But the court, being of the opinion that so much of the $2,000 paid by Downman as remained in the hands of the sheriff after paying the Peters Shoe Company was subject to execution, nevertheless dismissed the complaint of Simpson, and rendered judgment against him for costs, and he appealed.

On the 19th day of April, 1895, H. H. Downman, who purchased at the sale under execution on the 17th of February, 1894, instituted an action of ejectment against Simpson and his wife to recover the possession of the lots bought by him at said sale. He alleged in his complaint that he acquired title to the lots in the manner we have stated. The defendants answered, and denied that the plaintiff was the owner of the lots, and alleged that the title thereto was in Annie Simpson, the wife of J. S. Simpson, and that A. B. Eason, in March, 1893, conveyed the lots to her by a deed, and that the name of J. S. Simpson, long after the execution and

delivery thereof, was inserted in the deed as a grantee therein; and that she was the owner of the lots in fee, and entitled to the possession thereof.

On motion of the plaintiff, the action was transferred from the Clay to the Craighead circuit court.

In the trial before a jury a deed executed by the sheriff of Clay county to the plaintiff, conveying to him the lots in controversy, was read as evidence; and it was shown that he acquired title in the manner before stated. The deposition of plaintiff was also read, in which he stated that he was the owner of the lots; that he did not know that Annie Simpson claimed to be the sole owner thereof, until he had paid the purchase money, or that the name of J. S. Simpson had been inserted in the deed after its execution and delivery, until after this action was instituted, and the first suit had been determined by the circuit court, and that he had the records examined as to the ownership of the lots before purchasing.

Annie Simpson testified in her own behalf as follows: "She purchased the lots in controversy, and paid for them with her own money. The deed was executed and delivered to her individually, and she kept it for some months in a drawer, among other papers. Simpson took it out, and had his name inserted as a grantee therein, and then had it recorded. When it was returned from the recorder's office, she discovered the change, but took no steps to correct it. She knew that her husband scheduled the property as his homestead. She read the schedule. She also knew that the property was advertised for sale under the Peters Shoe Company's judgment, but took no steps to prevent it. She never assented to her husband having his name inserted in the deed, but made no objections to it in the presence of any one except him."

J. S. Simpson testified substantially the same as his wife, and as follows: "He took the deed to a notary

public, who certified to the acknowledgment thereof. With the consent of Eason, the grantor in the deed, his name was interlined therein, and he was made to appear as one of the grantees. It was then recorded. When he took it home, his wife 'objected some,' but took no steps to correct it. The reason he had his name inserted was that he was wanting to borrow money to furnish the house built on the lots, and had made application for it in his own name. Afterwards he and his wife concluded to rent it, and not borrow. But they did mortgage it, sometime thereafter, to Adams, and the mortgage was recorded in Clay county.

"He sold a house and lot, which belonged to himself and wife, or to himself, he did not remember which, for $800, and used the money in paying for a brick house on the lots in controversy. In addition to this sum, he expended $500 of his own money, and his wife about $400 of hers, in paying for the same."

The deed from A. B. Eason to Annie Simpson was read as evidence; and it appeared on its face that it was executed to her and her husband; that is to say, Annie Simpson and J. S. Simpson.

The deposition of J. S. Simpson which was taken in the first mentioned suit, and the schedule filed therein, were read as evidence in the trial of this action for the purpose of contradicting Simpson.

The judge instructed the jury, over the objections of the defendants, as follows: "If you find from the evidence that A. B. Eason executed a deed to the lands in controversy to Annie Simpson, wife of the defendant, J. S. Simpson, and afterwards, and before the recording of the said deed, the name of J. S. Simpson was inserted therein, and the same was recorded with said interlineation, and she took no steps to have the same corrected on the record, or otherwise, and permitted the said J. S.

Simpson to use and to treat the property as the property of herself and J. S. Simpson, and treated the deed, after the name of J. S. Simpson had been inserted, as a genuine conveyance to J. S. Simpson and herself; and that the plaintiffs purchased said lands at an execution sale without the knowledge of said interlineation, then you will find for the plaintiff."

And the defendants asked and the judge refused to instruct the jury as follows: "The jury are instructed that if they find from the evidence that the defendant Annie Simpson purchased the land in controversy and took a deed of conveyance therefor in her own name, and the defendant J. S. Simpson, after the execution and delivery of the deed to her, changed the same by interlineation or adding the name of J. S. Simpson, as grantee, that would not vest any title in J. S. Simpson, and your verdict should be for the defendants."

"The jury are instructed that if they find from the evidence that the property in controversy was conveyed to J. S. Simpson and Annie Simpson, his wife, such conveyance would vest in them an estate in entirety, and an execution sale against the husband alone will not pass such a title to purchaser as will deprive the defendant Annie Simpson of the possession of the land during her lifetime."

And the judge modified the first of said refused instructions by adding these words: "Unless you further find from the evidence that the said Annie Simpson treated the deed, after the name of J. S. Simpson had been inserted as a genuine conveyance to herself and J. S. Simpson," and gave it as modified.

The jury returned a verdict in favor of plaintiff for the lots and assessed his damages at $100. Judgment was rendered accordingly; and defendants, after a motion for a new trial was filed and overruled, and exceptions were saved, appealed.

For the sake of convenience we have stated the facts, and will decide the questions, in the two cases mentioned, in one opinion.

The $660 tendered in the first action to redeem the lots was insufficient. According to the evidence, the lots were sold for $2,000, and $1,316.68 were left in the hands of the sheriff after the satisfaction of the execution in favor of the Peters Shoe Company, making $683.32 held by the sheriff to pay that execution, which was larger than the amount tendered.

Redemption from execution.

But J. S. Simpson insists that he has the right to redeem by paying the amount received in satisfaction of the execution in favor of the Peters Shoe Company and fifteen per cent. per annum thereon, and lawful charges. This contention is based upon the assumption that, the lots being his homestead, he was entitled to all of the purchase money remaining after the execution in favor of the shoe company was satisfied. Taking the assumption as true, it does not follow that he was entitled to a credit in the redemption of the lots for so much of the purchase money as he was entitled to according to the assumption. Under the statutes of this state, when any real estate, or any interest therein, is sold under execution, the debtor may redeem the same at any time within twelve months after the sale by paying to the clerk of the court from which the execution issued the purchase money, with fifteen per cent. per annum thereon, and all lawful charges. In this case the real estate was sold for $2,000, and purchased by H. H. Downman in his own name, and ostensibly for his own benefit. He paid the purchase money to the sheriff; and $1,316.68 of it were appropriated to the payment of an execution in favor of the firm of Scuddar & Co., of which Downman was a member, which then became the property of the firm, or, if not the property, the firm became liable for it, and it could not be used as a set-off against any debt or

liability to Downman in his individual right. *Collier* v. *Dyer*, 27 Ark. 478; *Houston* v. *Brown*, 23 Ark. 333. Consequently $2,000 and fifteen per cent. per annum thereon and lawful charges were necessary to redeem the lots, and Simpson's tender and offer to redeem were insufficient.

Exemption of homestead.

As the judgment in favor of the Peters Shoe Company was rendered before the lots were occupied as a residence, it was a lien on them, and they were subject to be sold to satisfy the same. The occupation of them on a day subsequent to the rendition of the judgment did not relieve them of the lien. *Reynolds* v. *Tenant*, 51 Ark. 84. But they were occupied by Simpson and his wife, as a residence, at, before, and ever since the time the judgment in favor of Scuddar & Co. was rendered.

Nature of estate.

Whether held by him as a tenant in common or by the entirety with his wife, he was entitled to hold them as a homestead free from all liens of judgment rendered and executions issued thereon while so held. *Ward* v. *Mayfield*, 41 Ark. 94; *McGrath* v. *Sinclair*, 55 Miss. 89.

Effect of renting part.

The fact that he rented a part of the building on the lots as a hotel, and occupied the remainder, did not divest him of his right to hold them as a homestead. *Gainus* v. *Cannon*, 42 Ark. 503.

When surplus of homestead exempt.

If the lots were the homestead of Simpson at the time they were sold under execution, he was entitled to the surplus remaining after the satisfaction of the execution in favor of the Shoe Company, and to use it in acquiring another homestead. Should he abandon or never entertain the intention so to use it, while it remains his property, it will become subject to execution or other process as his personal property. *Mitchell* v. *Milhoan*, 11 Kas. 617; *Tillotson* v. *Wolcott*, 48 N. Y. 188. Having been received and appropriated by Schuddar & Co. to the payment of a judgment and execution in their favor, he was entitled to a judgment against

them for the amount thereof and interest, provided the lots were his homestead at the time they were sold. *Mitchell* v. *Milhoan*, *supra*.

Finding that the lots were Simpson's homestead, the court, in the first action, erred in holding that the surplus was subject to execution.

In the action of ejectment instituted by Downman, the court improperly instructed the jury.

Estoppel by silence.

When Eason conveyed the lots in controversy to Mrs. Simpson, he thereby conveyed to her all the interest and title he had in them. The subsequent insertion of the name of her husband in the deed with the consent of her grantor did not divest her of any interest which she had acquired. He had none to convey.

The mere failure of Mrs. Simpson to institute proceedings to correct her deed does not estop her from setting up the forgery of her husband, and claiming to be the sole owner of the lots. Something more than mere silence or inactivity is needed to constitute an estoppel. As held by this court in *Bramble* v. *Kingsbury*, 39 Ark. 131, "equity does not require one having title to property to seek out a party who is about to purchase it from a supposed owner, and inform him of his title. All that it requires is that he shall do no act, nor be guilty of any misleading silence, or apparent acquiescence, by which another may be entrapped into a transaction which he would not have entered upon if he had been advised of the objection."

As said by Mr. Bigelow: "It is not enough to raise an estoppel that there was an opportunity to speak which was not embraced; there must have been an imperative duty to speak. Nor is any duty generated by the mere fact that a man is aware that some one may act to his prejudice if the true state of things is not disclosed. To use an apt illustration of one of the judges, a man may become apprised of the fact that his

name has been forged to a negotiable instrument, and so become aware that some one may be led to purchase the paper by supposing the signature to be genuine, and yet he is not bound to proceed against the forger, or to take any steps to protect the interest of others whose claims he may know nothing of. So long as he is not brought into contact with the person about to act, and does not know who that person may be, he is under no obligation to seek him out, or to stop a transaction which is not due to his own conduct, as the natural and obvious result of it. If the party is present at the time of the transaction, it may be necessary for him to speak, if speaking would probably prevent the action about to be taken; if absent, his silence (or other conduct) must at least be of a nature to have an obvious and direct tendency to cause the omission or the step taken. Only thus can a duty to speak arise." Bigelow on Estoppel (5th Ed.), p. 595; *Anderson* v. *Hubble*, 93 Ind. 570; *Meley* v. *Collins*, 41 Cal. 663.

Conveyance to husband and wife.

A conveyance of the lots in controversy to J. S. Simpson and Annie Simpson, his wife, would vest in them an estate in entirety, and a sale of the husband's interest would not divest the wife of the right of possession during her lifetime. *Branch* v. *Polk*, 61 Ark. 388.

It follows from what we have said that the instructions to the jury in the action of ejectment were erroneous and prejudicial.

Although no question in the two cases demands it, it may be well to say that if Mrs. Simpson was the sole owner of the lots in controversy, the homestead was hers, and that her husband was not entitled to the surplus remaining after the satisfaction of the shoe company execution.

For the errors indicated, the judgments in the two actions are reversed, and the causes are remanded for proceedings consistent with this opinion.

BUNN, C. J., (dissenting.) As to whether or not Mrs. Annie Simpson, by her conduct, was estopped from denying that the two lots in controversy were held by herself and her husband, J. S. Simpson, in entireties, I do not desire to discuss, as that may possibly be for future consideration, as the case now stands. But assuming, for the sake of disposing of other questions at once, that the husband and wife were joint owners, and held by entireties, I proceed directly to discuss the husband's homestead and exemption rights and the proceedings by which he has been deprived of their benefits. In Thompson on Homestead, section 165, after naming various kinds of estates in lands out of which a homestead may be carved, that author says: "These questions have all, under various phases, addressed themselves to the courts. It would seem, upon principle, that they are questions with which the creditor can have nothing to do. If the debtor's estate is such as, under general law, would be vendible under execution, it does not lie in his (the creditor's) mouth to say that it will not support a homestead." If, in other words, the husband's estate in these lots was subject to execution, when not claimed as homestead (which these creditors are estopped from denying), then the estate of the husband in them is such as will support the claim of homestead, if so dedicated, and these creditors will not be heard to controvert that right where it is properly asserted.

According to the uniform rulings of this court, at least wherever its rulings have been called for, almost any interest in land, carrying with it possessory rights, may be the subject of homestead exemptions. See also, *Deere* v. *Chapman*, 25 Ill. 612; *Conklin* v. *Foster*, 57 Ill. 107; *Bartholomew* v. *West*, 2 Dill. 293; *Randal* v. *Elder*, 12 Kas. 261; *Vogler* v. *Montgomery*, 54 Mo. 584; *Sears* v. *Hanks*, 14 Ohio St. 301; *Watts* v. *Gordon*, 65 Ala. 546;

*Tyler* v. *Jewett*, 82 Ala. 93; *Rockafellow* v. *Peay*, 40 Ark. 69. In the last named case this court said: "An equitable estate was enough. Indeed, it is probable that the homestead exemption withdraws from the demands of creditors whatever interest the claimant has in the property dedicated to that use."

The homestead is a *right*, under the act of March 18, 1887, especially, and like almost any other right may be waived (*Snider* v. *Martin*, 55 Ark. 139), but it has not been waived in this instance.

In *Draffin* v. *Smith*, *ante*, p. 83, this court held, in regard to personal property exemptions, that the proceeds of the exempted property, sold by order of the court in vacation, in an attachment proceeding, belonged to the defendant, and could not be set-off by the judgment debt of the plaintiff in the proceeding, after the attachment had been dissolved, and suit for damages against plaintiff and in favor of defendant had been sustained. This was on the ground that the proceeds of the sale of the exempted property partake still of the character of the property itself, and like it are also exempted.

It is not controverted, so far as I can ascertain, that the excess for which the lots were sold under the Peters Shoe Company execution belonged to Simpson, and that the same was not subject to the execution issued on the judgment of J. W. Scuddar & Co.

The first of these suits, that is to say, case No. 3049, is a bill in equity by appellant J. S. Simpson against R. L. Hancock as sheriff, B. B. Biffle as clerk of the circuit court, and J. W. Scuddar & Co. (of which firm H. H. Downman was a member), to redeem the lots in question from the sale under the execution of the Peters Shoe Company, calling for $600 interest and costs; and the record shows that he had made a tender of this amount to the clerk aforesaid, and also to J. W. Scuddar & Co., and also offered to pay this amount into court for

the purpose of redeeming from said sale, and that the money was refused by the clerk, and also by J. W. Scuddar & Co., and it seems that his offer to deposit in court was not accepted by any of the parties. He then instituted his suit to redeem.

It appears that the two judgments were controlled by the same attorney, and just immediately before and on the same day the sale was made under the first—the Peters Company judgment—execution was caused to be issued on the second judgment, which was in favor of J. W. Scuddar & Co. The sale under the first execution was made on the 17th of February, 1894, and the lots bid in by J. W. Scuddar & Co. for the sum of $2,000, an amount sufficient to cover both judgments and probable costs. Immediately, as stated, the second execution, having been issued, was put in the hands of the sheriff, and asked to be levied upon the surplus of the proceeds of the sale aforesaid, over and above the amount required to satisfy the first judgment, interest and costs; said surplus to be applied to the satisfaction of the second execution calling for the sum of $1,300 interest and costs. The sheriff demanded an indemnifying bond, which was given, and the levy on the fund in hand was made, and the fund immediately paid over to J. W. Scuddar & Co., to be applied towards the satisfaction of their judgment.

It appears that, at the instance of the purchaser, J. W. Scuddar & Co., the sheriff made his deed to H. H. Downman, one of the members of that firm, and upon that deed he instituted the second of these suits, that is to say, case No. 3269, against Simpson *et al.* Other facts will be stated in this opinion, as they become necessary.

It appears that execution on the Peters Shoe Company judgment had been stayed by defendant in October, 1892, and that and the judgment had been reinstated after

being destroyed by fire. This fact somewhat affects the action of the sheriff in making the sale and his return of the executions.

The sheriff, in regard to the disposition of the proceeds of the sale, was, or should have been, governed by the provisions of sec. 3103 of Sandels & Hill's Digest, and accordingly, if the defendant had a right to stay the execution, and had not exercised the right, the sale should have been on a credit of three months, and the excess over an amount sufficient to satisfy the Peters Shoe Company should have been covered by a bond from the purchaser to the defendant, payable in three months, and if a stay of execution was not allowable, or had been already had, then the sale might have been for cash, but the excess should have been paid over at once to the defendant, unless it was subject to the levy of the second execution, the one in favor of J. W. Scuddar & Co.

So the controlling question at last is whether or not the excess in the hands of the sheriff was subject to the second execution, and I think it was not any more so than was the homestead before the sale; and if this excess was not subject to be taken under that execution, it was the duty of the sheriff to pay it over to Simpson at once, and this duty is none the less a duty because J. W. Scuddar & Co. indemnified the sheriff. That is a matter between them which Simpson can make use of or not in asserting his rights against both of them.

The clerk and the plaintiff in execution, and apparently the sheriff, all contest Simpson's right of redemption, because he did not tender the full amount for which the lots sold, namely $2,000, in redemption of the property, and their refusal to accept the amount due on the Peters Shoe Company judgment is sustained, in effect, by the majority of the court. In other words, the sheriff having at once paid over to J. W. Scuddar & Co. the excess, and they, having received it (that is to

say, having appropriated to their own use a fund belonging to defendant), now resist his application to redeem, unless he tenders the same amount to them over again. The question is, what becomes of Simpson's homestead rights? Whatever may be the theory of it, practically, J. W. Scuddar & Co. as plaintiffs in an execution, which is confessedly no lien upon the homestead, will have collected their debt out of the homestead nevertheless, for it does not appear just how Simpson could ever get his money back had he tendered and paid this excess over to J. W. Scuddar & Co. The simple truth is, by preventing the sheriff from paying the excess over to Simpson, they have deprived Simpson of the right, or the privilege, and perhaps the ability, to make such a tender as all these parties have demanded of him, and Downman is one of them.

There is no way pointed out by statute for a defendant in execution to protect himself in this peculiar situation. The fund is not personal property, because it still partakes of the character of the homestead; and it is not real estate, so as to be dealt with as real estate in every particular. If it be considered as personal property, the excess is more than the personal exemption, and that theory would fail. My opinion is that Simpson has adopted the true and only course for asserting his rights which one could under the circumstances, and the decree of the lower court should have been reversed, and the decree entered here for him.

I have not considered the question whether or not Simpson fraudulently deprived himself of means to pay his debts by expending them all upon the improvement of his homestead. In a proper case I should consider that as a very important question, but it is not involved here.

This view would settle the case No. 3269, as the parties thereto were affected with notice of the right of defendant and his suit from the beginning.

## WILLIAMS *v.* STATE.

Opinion delivered December 12, 1896.

CRIMINAL LAW—FORMER CONVICTION.—A conviction of a misdemeanor for violating an ordinance in a mayor's court of a town is not a bar to a prosecution in the circuit court on an indictment for the same offense, under Acts 1891, p. 97, § 3, providing that a conviction before any police or mayor's court or before any justice of the peace "shall be a bar to further prosecution before any mayor's or police court or justice of the peace for such offense, or for any misdemeanor embraced in the act committed."

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

*T. N. Wilson* for appellant.

Since the passage of the act of March 30, 1891, a defendant, after having been convicted of a misdemeanor before a mayor's court, cannot be convicted again of the same offense on indictment in the circuit court. That is the *plain* intention of the legislature. 3 Ark. 284 and 285; Const. 1874, art. 7, sec. 40; Sand. & H. Dig., sec. 1932, subd. 5; 56 Ark. 367. In the absence of *collusion*, the conviction before a mayor is a bar to the indictment.

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

The act of 1891 (p. 97) makes a conviction before a mayor a bar to a further prosecution before a justice of the peace, but *not* to an *indictment*. 56 Ark. 367 simply decides that a conviction before a mayor is a bar to prosecution before a justice, although the city had not made the penalty for the offense the same as that prescribed by statute. Acts creating new or special jurisdictions, and acts delegating powers, are always strictly construed. Endlich, Int. Stat. secs. 351, 352 and 353.

HUGHES, J. In the disposition of this case we adopt substantially the statement and brief of the attorney general.

Appellant was arrested, tried, and convicted before the mayor of Arkadelphia, for carrying a pistol as a weapon, in the town of Arkadelphia, in Clark county, Arkansas, and fined five dollars and cost. After this trial, and within twelve months from the time that appellant committed the offense of carrying said pistol as a weapon, he was indicted by the grand jury of Clark county. Appellant pleaded the conviction before the mayor as a bar to further prosecution. He was tried by the judge, sitting as a jury, by agreement; was found guilty, and fined $50 and cost.

Appellant was tried upon the following agreed statement of facts: "That the defendant, E. K. Williams, did, in the city of Arkadelphia, Clark county, Arkansas, on the 30th day of November, 1895, wear and carry as a weapon one certain pistol, which was not such a pistol as is used in the army and navy of the United States; that on the 2d day of December, 1895, the defendant herein was arrested on a warrant regularly issued, charging him with carrying a pistol on the 30th day of November, 1895, by G. W. Carder, then mayor of the city of Arkadelphia, and brought before him for trial, and that the defendant was, by the mayor, tried and found guilty of said charge, and fined $5 and costs, which were by the defendant paid; that said trial and conviction before the mayor were in all respects regular; that the offense charged in this indictment was the same, and identical with that for which defendant was tried, convicted and fined by the mayor. It is further agreed that the city of Arkadelphia had not prescribed the same penalty for carrying weapons for the violation of the ordinance of said city as is prescribed by the statute of the state for the same offense

against the laws of the state." It was also agreed that the warrant issued by the mayor, and the mayor's judgment as written in his docket, and the ordinance of the town of Arkadelphia prohibiting the carrying of a pistol, be read in evidence.

The only question in this case is, can one, after being convicted for a misdemeanor before a mayor's court of a town in this state, be again convicted by the circuit court, on an indictment for the same offense? It is admitted by appellant that, prior to the act of March 30, 1891, a trial and conviction before a mayor's court was no bar to a prosecution before a justice of the peace, or before the circuit court for the same offense, but he contends that under this act a conviction before a mayor's court is a bar to a prosecution before the circuit court. This act is found on page 97 of the Acts of 1891. The section under which appellant claims protection reads as follows: "Sec. 3. Whenever any party shall have been convicted before any police or mayor's court in any city or town in this state, or before any justice of the peace, said conviction shall be a bar to further prosecution before any *mayor's* or *police court* or *justice of the peace* for such offense, or for any misdemeanor embraced in the act committed."

While this act makes a conviction before a mayor's court a bar to further prosecution before a justice of the peace, it does not make it a bar to an *indictment in the circuit court.* The act does not and did not intend to prevent a prosecution in the circuit court. In the case of *Richardson* v. *State*, 56 Ark. 367, this court simply decided that a conviction in a mayor's court is a bar to a prosecution before a justice of the peace, although the city had not made the penalty for the offense the same as that by statute, and this is all that it did decide.

Affirmed.

## SCOTT v. STATE.

Opinion delvered December 12, 1896.

ACCOMPLICE—CORROBORATION.—The testimony of an accomplice that defendant stole some women's dresses and underwear is not sufficiently corroborated by proof that, on the day following the night on which the garments were stolen, defendant offered to sell to two witnesses a woman's dress and some women's underwear, without identifying them as part of the stolen goods.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

STATEMENT BY THE COURT.

The appellant was indicted with one Charles Gowens in the Pulaski circuit court for and convicted of grand larceny, and appealed to this court. No exceptions were saved to the instructions of the court. The chief witness against the defendant was the said Charles Gowens, who was an accomplice, and was himself convicted of the offense. He testified that he and the defendant entered a room at the residence of Dr. Ayers, and took and carried away therefrom the goods which they were charged with stealing, consisting of ladies' dresses, gowns and underwear. The goods or part of them were found in the possession of Charles Gowens, after they were stolen, and he confessed that he was guilty, and stated that the defendant was also guilty. None of the goods were found in possession of the defendant, or at any place where he had left them. The only testimony offered to corroborate the testimony of Gowens, the accomplice, was that of two negro women of bad repute, who testified that on Saturday evening, about three o'clock, the day following the night on which the goods were stolen, the defendant

passed them at the corner of Fifth and Center streets, and that he had a bundle under his arm, which contained a ladies' black dress and some ladies' underwear, which he offered to sell them at $1.50.

There was no description otherwise of these articles, nor was there any evidence identifying them as part of the stolen goods. This was the substance of all the evidence.

*C. T. Lindsay* for appellant.

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

HUGHES, J., (after stating the facts.) "A conviction cannot be had in any case of felony upon the testimony of an accomplice, unless corroborated by other testimony tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof." Sand. & H. Dig., sec. 3230. There must be other evidence *tending to connect the defendant with the commission of the offense. Vaughan* v. *State*, 58 Ark. 365; *Polk* v. *State*, 36 Ark. 117.

As there is no evidence in this case tending to connect the defendant with the commission of the offense, save the statement of the accomplice, which was not corroborated as the law requires, the judgment is reversed, and the cause is remanded for a new trial.

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# JENKS v. STATE.

Opinion delivered December 12, 1896.

ESCAPE—WHAT CONSTITUTES.—A state convict who has been made a "trusty" while serving his term of imprisonment, and who is not confined within the walls of the penitentiary, nor kept under guard, but is required to remain within certain bounds, to do work, and to obey prison rules, is guilty of an escape in fleeing from the county and state, under Gould's Dig., p. 833, § 8, providing for punishment "if any convict shall escape."

EVIDENCE—VARIANCE.—Evidence that defendant was not at the time of his escape confined in the penitentiary, but that he was confined in Pulaski county, is not a fatal variance from an allegation in the indictment that he escaped from the penitentiary in Pulaski county, the reference to the penitentiary being unnecessary and immaterial.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

STATEMENT BY THE COURT.

The appellant, Ed. Jenks, was a convict serving a term in the penitentiary for the crime of burglary and larceny. While thus serving as a convict, he was made a "trusty" by the commissioners of the penitentiary. He was afterwards sent with other convicts from the walls of the penitentiary to a camp or stockade, near the state insane asylum, upon which the convicts were at work. After being made a "trusty," he was not required to eat or sleep with other convicts, called "linemen," but ate at a table prepared for "trusties," and slept in a house on the outside of the stockade in which the "linemen" were confined. He was not under guard, and was allowed to go at large occasionally within certain limits, but, in common with other "trusties," was required to report to the warden, perform certain duties, and to obey prison rules. While at large on one occa-

sion, he left the county and state, and did not return until brought back. The grand jury returned an indictment against him for the crime of escape, alleged to have been committed in Pulaski county. Upon a trial under this indictment the defendant was convicted and sentenced for the crime of escape.

*Thos. J. Oliphint* for appellant.

Appellant did not escape from the *penitentiary*. He was a trusty, under sec. 5570, Sand. & H. Dig. See act of 1838; 5 Mass. 311; 30 S. W. Rep. 791; 2 Am. Cr. Rep. 47; Archbold, Cr. Pl. pp. 1074, 1075; 6 Am. & Eng. Enc. Law, p. 244; 16 Conn. 47; 2 Bish. Cr. Law (5 Ed.), sec. 1104.

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

Appellant is guilty of an *escape*. Act of 1838, p. 115; Sand. & H. Dig., secs. 1562, 5499, 5570; Webster's Dict. "Trusty"; 16 Conn. 47; 14 S. W. Rep. 350; Whart. Cr. Law, sec. 1678; 14 Nev. 445. Once a convict, he remains a convict until he serves his time or is pardoned. 56 Ark. 8.

What constitutes an escape.

RIDDICK, J., (after stating the facts.) The question is whether the defendant is guilty of an escape, as described in the indictment. Our statute provides that "if any convict shall escape, on conviction thereof by indictment, he shall suffer such additional imprisonment as the jury before whom he may be tried shall direct, not less than five nor more than ten years." Gould's Digest, page 833, sec. 8.*

*This law passed in 1838 is not correctly stated in either of the Digests published subsequently to Gould's Digest. The reading of these latter digests is as follows: "If any convict confined in the penitentiary shall escape therefrom," etc., while the statute makes it a crime for the convict to escape, without reference to whether he escapes from the penitentiary or other place. See act of 1838, Gould's Digest, p. 833; Sand. & H. Dig., § 1562.

Although Jenks had been made a "trusty," and was not confined in the walls of the penitentiary, nor kept under guard, yet he was required to remain within certain bounds, to do work, and to obey prison rules. He was, in law, still a convict in custody, serving his term of imprisonment. When, therefore, he fled from the county and state, he committed the crime of escape, for the punishment of which the statute above referred to was passed. *Riley* v. *State*, 16 Conn. 47; 1 Russell on Crimes (8 Am. Ed.), p. 416; 2 Wharton's Crim. Law, sec. 1678.

As to variance.

But the indictment alleges that Jenks escaped in Pulaski county and from the penitentiary, and it is said that the proof does not sustain the allegation. The evidence shows that Jenks was not, at the time of his escape, confined in the penitentiary, nor did he escape therefrom, but he escaped while outside the penitentiary, and outside of the stockade where the other convicts were confined. It is contended that this is a fatal variance, but we are of opinion that this contention cannot be sustained. If the offense was one of a local character, so that the house or place in which it was committed must be alleged and proved, then the description of such house or place would be material, and should be proved as alleged. The recent case of *Bryant* v. *State*, 62 Ark. 459, was a case of this kind. The indictment there was for a violation of a statute (sec. 4881, Sand. & H. Dig.), making it a misdemeanor for the owner, user, or controller of any house or tenement to keep therein for sale, or to be given away, any ardent, vinous, malt, or fermented liquors, etc. It was necessary to allege that the defendant was the owner, user, or controller of a house, and that liquors were sold or kept therein. A description of the house in such an indictment was descriptive of the offense, and material, and it was so held. But the locality does

not, under our statute, enter into the substance of the crime of escape. It is a violation of the statute for a convict to escape at any place, whether from the penitentiary or not. To determine the venue and jurisdiction over the offense, it was necessary to allege and prove the county in which the crime was committed, and that was done in this case. Beyond this, the reference to the penitentiary or place from which the convict escaped was wholly unnecessary and immaterial, and may, therefore, be rejected as surplusage. It is not necessary to show that such an offense was committed in the place alleged, if it be shown to have been committed in some other place in the same county. *Commonwealth* v. *Lavery*, 101 Mass. 207; *Commonwealth* v. *Tolliver*, 8 Gray (Mass.), 386; 3 Greenleaf, Ev. (15th Ed.), sec. 12; 2 Russell, Crimes (8th Am. Ed.), 800; 1 Phillips, Ev. (4th Am. Ed.), 890.

Finding no error, the judgment is affirmed.

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## JOHNSON COUNTY *v.* BUNCH.

Opinion delivered December 19, 1896.

COUNTY CLERK—FEES.—Under Sand. & H. Dig., § 3309, providing that a county clerk shall be entitled to a fee of ten cents "for making settlement of each account with the county," a county clerk is not entitled to a fee for each warrant paid and presented by the county treasurer for allowance in his annual settlements with the county.

Appeal from Johnson Circuit Court.

JEREMIAH G. WALLACE, Judge.

*Charles C. Reid*, Prosecuting Attorney, for appellant.

There is no provision of law for the payment of the services charged for in this claim. It may be one of the

duties required of him, but he takes the office *cum onere.* 32 Ark. 45; 56 *id.* 581; 57 *id.* 487. For definition of "settlement" and "account," see Webster; 1 Am. & Eng. Enc. Law, p. 108; 22 *id.* p. 488; Bouvier, Law Dict. Reviews the statutes, citing Sand. & H. Dig., secs. 3309, 3310, 997, 1248, 1245; Gould's Dig. ch. 69, sec. 3; Gantt's Dig., sec. 2839, 2841, and contends that this claim is not a legal charge against the county.

*Jeff Davis* for appellee.

This claim is not for "constructive" fees, but is allowed by law. Sand. & H. Dig., sec. 3309; 32 Ark. 45. Applying the three tests laid down in 57 Ark. 487, the claim should be allowed. Cites Sand. & H. Dig., secs. 1245-8, 997, 6655. As to what is an "account," see 1 Am. & Eng. Enc. Law (2 Ed.), p. 434; 5 Cow. (N. Y.), 587; 47 Ark. 541; Acts 1895, p. 198, etc.

BUNN, C. J. The appellee in this case was county clerk of Johnson county for two consecutive terms, and until the 30th October, 1894, and during these four years was present and performed the duties of such clerk at every settlement made with the county court by the county treasurer, who is and was by law required to make settlement at least once a year. In these settlements, the treasurer, as he was required to do, presented for examination, comparison, notation on the register, and indorsement as redeemed, 5,200 county treasury warrants.

The appellee here, and plaintiff in the court below, presented his claim to the Johnson county court for $520, alleging that, as such county clerk, he was present at each settlement of the treasurer, etc., and that he received, examined, and compared each of these warrants, as they were presented by the treasurer in such settlement, with the record of warrants issued under the orders of the county court, and noted their

number, amount, the names in which they were drawn; and upon this they were indorsed by the county judge, and then noted upon the proper register by himself, and afterwards he safely preserved them, as the law requires, and that for this service he was entitled to 10 cents each, and that he was allowed this fee by the twenty-fourth item in section 3309, Sand. & H. Dig. That item reads as follows, to-wit: "For making settlement of each account with the county, 10 cents." The only question in this case is, is the item in the fee-bill above quoted applicable to each one of the warrants presented in settlement by the treasurer? In other words, is each one of these warants an account with the county, and its presentation and disposition, as stated, a settlement of the same, in contemplation of the law regulating fees for the clerk in respect to settlement of accounts with the county? We think not. We do not think a warrant or order drawn by the county's authority, which has been paid and is returned for cancellation, is an account to be settled. There is no statute expressly allowing the clerk, as against the county, for such services, the fees claimed, and therefore allowance of the same was erroneous. This case was appealed by Bunch from an order of disallowance by the county court to the circuit court, in which the claim was allowed, and the county appealed to this court.

For the reasons stated above, the judgment of the circuit court is reversed, and judgment will be entered here for appellant county.

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## EDWARDS *v.* RANDLE.

Opinion delivered December 19, 1896.

CONTRACT—PUBLIC POLICY—SALE OF OFFICE.—A contract for the sale of the fixtures of a post office, in which the vendor, who was the postmaster, agreed to resign his office and recommend the appointment of the vendee as his successor, is void as against public policy, and money paid under such a contract cannot be recovered, on the refusal of the vendor to perform.

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

*John E. Bradley* for appellant.

This suit is founded on an illegal contract, which can neither be enforced in law or equity, and all the parties are *in pari delicto*, and the courts will leave them where they have placed themselves. Lawson, Cont. secs. 310, 311; 32 Vt. 721, 546; Lawson, Cont. secs. 314, 315; 2 Parsons, Cont. (3 Ed.), p. 253; 47 Am. Dec. 422; 33 Am. Rep. 548; 47 Ark. 378; 48 *id.* 490; 31 Am. Dec. 599; 34 *id.* 712; 32 *id.* 348.

BUNN, C. J. The appellee, Randle, sued the appellant, Edwards, in the Clark circuit court for the sum of two hundred dollars, money paid him on a contract of purchase and sale. Judgment for plaintiff for said sum and interest, and defendant appealed.

It is shown in evidence that on or about the first day of December, 1892, the appellant, who was then postmaster at Gurdon, bargained and sold to appellee, to be delivered on the first of January following, for the said sum of two hundred dollars, his post office cabinet, fixtures, and the counters and shelving, agreeing at the time, as a part of the transaction, to resign his office and recommend appellee as his successor, which he then

and there did; also to appoint Ben Cable his deputy, and to permit appellee to receive all the fees and emoluments of the office, as he says, from the time of appellee's appointment until his installation in office, but, as appellee says, from January first until he should become postmaster. The two hundred dollars were paid when the bargain was made. On the first of January aforesaid, appellee demanded a delivery of the articles sold, and in a few days afterwards the demand was renewed, and both times refused to be complied with by appellant, for the reason, as he states, that he was not permitted to remove the post office from his to appellee's store without authority from the post office department, and that the delivery sought and demanded by appellee was, in fact and in truth, a demand to make such removal. Upon the refusal of appellant to comply with the demands of appellee, he then demanded a recission of the contract of sale, on which also being refused by appellant he instituted this suit for the recovery of the money he had paid as stated, and lawful interest thereon. The defendant answered, averring that he had fully complied with his contract as far as it was possible for him to do, and was still ready and willing to do whetever he had contracted to do, if he could do so.

There is something of a controversy as to when Cable should be appointed deputy, and when appellee should begin to enjoy the fees and emoluments of the office; also, as to whether the counters and shelves were part of the consideration of the purchase, or a mere gift. Otherwise, there is no substantial controversy as to the facts.

The transaction, taken altogether, plainly shows that the sale and purchase of the office of postmaster was the main thing, and the cabinet furniture, fixtures, counters, and shelves were mere conveniencies, of little

or no value to any one except he were postmaster. In fact, this is in effect admitted. Whether Cable should have been appointed deputy at once by appellant, or not until appellee's appointment should be assured, we cannot say, and that really depends upon another fact, that is, when the appellee should begin to enjoy the fees, for the appointment of Cable seems to have had some connection with that. It is reasonable to suppose that the fees should begin to be paid to appellee whenever his appointment should be assured, and not before, as stated by appellant. Be this as it may, the contract seems to have been an executed one, so far as anything the parties could do in the premises. Enough is shown, at all events, to convince the reasonable mind that the desire to rescind on the part of the appellee did not spring from any sentiment of repentance, but rather because of a failure, present or prospective, to obtain the object of his desires,—the office.

The contract, as explained by the pleadings and testimony, is an indivisible one; that is to say, the lawful and the unlawful parts cannot be separated, so as to enforce the one and annul the other. Looking at the transaction in the most favorable light, it is in contravention of public policy, simply because it is an effort to create a vacancy in a public office, and to fill that vacancy by and through methods that the law cannot tolerate. The contract is therefore null and void throughout.

In *Edgerton* v. *Earl Brownlow*, 4 H. L. Cas., 1-256 (which is the leading English case on the subject), is to be found a most elaborate discussion of the subject by the English circuit judges and the jurists of the house of lords, and from the language of one of these in that case, Greenhood, in his work on Public Policy, p. 2, makes this statement, viz.: "By 'public policy' is intended that principle of the law which holds that

no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law," and continuing said: "The strength of any contract lies in the power of the promisee to appeal to the courts of public justice for redress for its violation. The administration of justice is maintained at the public expense; the courts will never, therefore, recognize any transaction which, in its object, operation, or tendency, is calculated to be prejudicial to the public welfare." We need not adopt this language in all its scope and bearing, for, as said by another, the rules of public policy must not be extended, for it is always to be kept in mind that persons have a right, *prima facie*, to contract, and therefore the objection to their contracts that they contravene public policy should be manifestly against the public good.

In *Filson* v. *Himes*, 5 Pa. St. 452, also reported in 47 Am. Dec. 422, it was held that "a promise to secure the removal of a post office and the appointment of one as postmaster is illegal, on the ground of public policy, and a contract founded on such promise is void." And further: "If any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void." Except as to the resignation of the incumbent, that case was very much like the one at bar. For a list of cases on the subject see *Clippinger* v. *Hepbaugh*, 40 Am. Dec. 519, notes.

As to whether money paid on an illegal contract will, in any case, be the subject of recovery, and if so, in what cases, see the case of *Pickett* v. *School District No. 1*, 25 Wis. 551, where it was said by one of the judges (all agreeing, it seems): "Still, there seems ground for a distinction between contracts which are held to be against public policy, merely on account of

the personal relations of the contractor to the other parties in interest, and those which are void because the thing contracted for is itself against public policy. In the latter class, the parties acquire no rights which can be enforced either in the courts of law or equity; but in the former, the thing contracted for being in itself lawful and beneficial, it would seem unjust to allow the party who may be entitled to avoid it to accept and retain the benefit without compensation at all. And it is accordingly held, in all those cases where agents or trustees empowered to sell attempt to purchase for their own benefit, not that the sales are absolutely void and pass no title, but that they may be avoided by the principal, who may have set them aside in equity. (Story, Agency, note 2, page 246)." "In such cases the trustee or agent, if the sale or contract were avoided, would get his money back. The principal could not take the money and avoid the sale also." See also *Wiggins Ferry Co.* v. *Chicago & A. R. Co.* 73 Mo. 389.

It is sufficient to say that the case at bar is one in which the contract is not void nor alleged to be void on account of any peculiar relation which the parties to it occupy one to the other, but because the subject-matter of the contract, the thing itself contracted for, the disposition of the post office and the incumbency attempted, is void. This court cannot lend its aid to either party in respect to any claim or thing involved in such a contract.

The judgment is reversed, and the cause dismissed.

# HUNTON v. EUPER.

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Opinion delivered December 19, 1896.

VACATING JUDGMENT—JURISDICTION—DOCKET.—The fact that an action to vacate a judgment at law, under Sand. & H. Dig., § 4197, was placed on the chancery instead of the law docket is immaterial.

SAME—UNAVOIDABLE CASUALTY.—A judgment by default may be set aside where the defendant therein was not served with summons, under Sand. & H. Dig., § 4197, subdiv. 7, authorizing the vacation of a judgment for "unavoidable casualty or misfortune preventing the party from appearing or defending."

SAME—PRACTICE.—In an action at law to vacate a default judgment on the law docket for failure to serve defendant with notice, the judgment should be set aside and a new trial ordered, instead of making perpetual a temporary injunction restraining the execution of the judgment.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

Appellants recovered a judgment against the appellee by default.

After the lapse of the term at which the judgment was rendered, the appellee filed his complaint at law, under section 4197, Sandels & Hill's Digest, to set aside said judgment upon the ground that the same was rendered without any summons or notice having been served upon the appellee. The complaint prayed for a temporary restraining order to prevent the execution of the judgment till the hearing, which was granted.

Upon the hearing it appeared that a summons was issued on the original suit, and that a return upon it stated that it had been served upon the defendant,

Euper, by delivering to him a copy. It appeared that this service was made by a negro boy 17 or 18 years of age, who, being sworn, testified that he did not know Euper; that he supposed the paper he handed to a man he supposed to be Euper was an account. The evidence by this boy tended to show that the summons, or what is supposed to have been the summons, was handed to him by an attorney for the plaintiff in the action with directions to give it to the defendant, Euper; that he handed the same to a man, pointed out to him as Euper, as he was going up the steps of the railway car to leave Fort Smith; that he did not know Euper, the defendant in that action; and that he did not see the face of the man to whom he gave the paper. Euper swore positively that he had never been handed a summons in the case, by the boy, and that he had never been served with process in the case, and that he knew nothing of the judgment until long after the term of the court had elapsed at which it was rendered, when a writ of garnishment in the case was served upon his son.

*Thos. E. Ward* for appellant; *Jo. Johnson* of counsel.

No affidavit for injunction was filed, as required by sec. 3798, Sand. & H. Dig. This is jurisdictional, and was not waived by answer nor cured by judgment. *Ib.* secs. 5729, 3759. There was no allegation that plaintiff was without remedy at law. 58 Ark. 314. To entitle one to injunction against a judgment at law, it must be shown, not only that the judgment is unjust, but that plaintiff has not been guilty of fault or negligence. High on Inj. secs. 85, 86, 99, 126, 165; 1 Ark. 31; *ib.* 186; 5 *id.* 501; 6 *id.* 79; *ib.* 317; 14 *id.* 360; 42 *id.* 560. A court of equity may enjoin a judgment at law in a proper case, upon timely application. But if a court of law has concurrent jurisdiction, and a complainant elects to go there for relief, he is bound by its action, and cannot afterwards

go into equity. 57 Ark. 500; 6 *id.* 80; *ib.* 318; 9 *id.* 535; 14 *id.* 360; 33 *id.* 786. A defense must be shown. 50 Ark. 458. It must be a *meritorious* defense. The plea of limitation is not a *meritorious* defense. 10 Ark. 428. See also 35 Ark. 123; 40 *id.* 338; 48 *id.* 535; 50 *id.* 341; 51 *id.* 341.

*W. M. Cravens* for appellee.

This is a statutory proceeding, and the only remedy left open. Sand. & H. Dig., secs. 4197, 4200. The service in this case, if any, was obtained by fraud. 54 Ark. 539; Sand. & H. Dig., sec. 4197. No affidavit, under sec. 3978, was required, as this is not a regular bill in equity to set aside a judgment, but a statutory proceeding under secs. 4197, 4202, *ib.* All that is requisite is to show a *valid* defense. Sec. 4200. A plea of the statute of limitations is a *valid* defense. The finding of a trial court is as conclusive as the verdict of a jury. 55 Ark. 331; 53 *id.* 75; 54 *id.* 229. In chancery the finding is only persuasive. 55 Ark. 112; 41 *id.* 294; 23 *id.* 341.

Jurisdiction to vacate judgment at law.

HUGHES, J., (after stating the facts.) The fact that the complaint was put on the chancery instead of upon the law docket can make no difference. The court had jurisdiction of the action at law.

Unavoidable casualty.

This action was brought under section 4197, Sandels & Hill's Digest, which provides that: "The court in which a judgment or final order has been rendered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order. * * * *Fourth.* For fraud practiced by the successful party in the judgment or order. * * * *Seventh.* For unavoidable casualty or misfortune preventing the party from appearing or defending."

Considering that it does not appear that the judgment was obtained by fraud practiced by the successful

party, the court is of opinion that in this case the defendant was prevented, without any fault upon his part, from appearing or making his defense to the action, and that his case comes fairly within the spirit of the seventh subdivision of section 4197, Sandels & Hill's Digest. It is also the opinion of the court that the appellee showed a valid defense at law to the action in which the judgment was rendered against him, as provided by section 4200, Sandels & Hill's Digest, and that the evidence tends to support the court's finding of facts.

Practice as to injunction.

Though the case was treated as a case in equity, it is in fact a case at law, and, instead of making the temporary injunction perpetual, the circuit court should have set aside the judgment, and granted a new trial.

Reversed and remanded with directions that the judgment be modified as indicated.

Wood, J., dissents.

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## LITTLE ROCK & FORT SMITH RAILWAY COMPANY v. ODOM.

Opinion delivered December 19, 1896.

CARRIER—CONVERSION.—An initial carrier which stipulates in the bill of lading for exemption from liability for anything beyond its line, "excepting to protect the through rate of freight named therein," is not liable as for a conversion because of the failure of a connecting carrier to deliver the property at the place of destination upon tender of the freight charges shown by the bill of lading to be due.

Appeal from Johnson Circuit Court.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

This appeal is to reverse a judgment for $286.90, which appellee recovered of the appellant for an alleged conversion of certain cattle, which appellants agreed to

transport under the following contract: "Arkansas Station, November 3, 1892. This agreement, made between the Missouri Pacific Railway Company, of the first part, and ——— of the second part, witnesseth: That, whereas, the Missouri Pacific Railway Company transports live stock, as per above rules and regulations, all of which are hereby made a part of this contract by mutual agreement between the parties hereto; now, therefore, for the considerations and the mutual covenants and conditions herein contained, the said first party will transport for the said second party the live stock described below, and the parties in charge thereof, as hereinafter provided, viz.: One car, said to contain thirty-nine head of cows, yearlings, ones and twos, from Clarksville, Ark., station, to Checotah station, consigned to E. W. Odom, at the rate of $43 per car, the same being a special rate, lower than the regular rates, or a rate mutually agreed upon between the parties hereto; for and in consideration of which the said second party hereby covenants and agrees as follows:

* * * * * * * * * * *

"Twelfth. And it is further stipulated and agreed between the parties hereto that in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road; and the party of the second part hereby so expressly stipulates and agrees; the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri Pacific Railway Company, excepting to protect the through rate of freight named herein. * * Fourteenth. The evidence that the said second party, after fully understanding and accepting all the terms, covenants and conditions of this contract, including the

printed rules and regulations at its head and on the back thereof, and that they all constitute a part hereof, assents to each and all of the same, is his signature hereto. "W. B. DUFF, Agent.

"E. W. ODOM, Shipper."

An agreed statement of facts was filed and read in evidence, as follows: "The cattle mentioned in the complaint, thirty-nine head in all, were shipped by the plaintiff, E. W. Odom, on the 3d day of November, 1892, at Clarksville, Ark., to be transported from that point to Checotah, I. T., on a live stock contract or bill of lading, issued by the defendants, railway companies, signed by the agent of the defendants, and by the plaintiff, E. W. Odom. The cattle were shipped in one car, and the rate or amount to be paid by plaintiff was named and written in the contract to be $43 from Clarksville to Checotah. This live stock contract, which is exhibited with plaintiff's complaint, is the only contract which was made between the plaintiff and the defendants in regard to this shipment of cattle. Clarksville is a station on the Little Rock & Fort Smith Railway, and Checotah is a station on the Missouri, Kansas & Texas Railway. In going from Clarksville to Checotah, the cattle had to go over the line of the Little Rock & Fort Smith Railway to Van Buren, Ark., and from Van Buren to Wagoner, I. T., over the Kansas & Arkansas Valley Railway, and from Wagoner to Checotah, over the Missouri, Kansas & Texas Railway; and they did pass over these lines of railroad. The Little Rock & Fort Smith Railway, and the Missouri Pacific Railway Company, for the purposes of this suit, and so far as any liability in respect of these cattle, are to be regarded as one and the same.

The Kansas and Arkansas Valley Railway and the Missouri, Kansas and Texas Railway are separate and distinct corporations from the defendants, and in the

transportation of these cattle they were *connecting carriers* of the defendants. The Missouri, Kansas and Texas Railway is entirely separate and distinct from any of the other railway companies, above mentioned.

The defendant transported the cattle promptly from Clarksville to the end of their line at Van Buren, Ark., and delivered them in good order to their next connecting carrier, the Kansas and Arkansas Valley Railway, and the Kansas and Arkansas Valley Railway transported them promptly, and delivered them in good order at Wagoner, to its connecting carrier, the Missouri, Kansas and Texas Railway, and they were by it promptly transported to Checotah, where they arrived in good order on the morning of November 4, 1892." Plaintiff tendered to the last named carrier the freight charges shown by the bill of lading to be due, but it refused to deliver the cattle, claiming additional freight charges.

*Dodge & Johnson* for appellants.

A carrier has a right to limit its liability, or to contract for exemption from liability, except for its own negligence. 46 Ark. 243; 112 U. S. 337; 47 Ark. 103; 50 *id.* 412; 52 *id.* 30. It may contract against liability for damage or loss happening beyond its own line. 32 Ark. 399; *ib.* 670; 39 *id.* 148; *ib.* 529; 40 *id.* 375; 44 *id.* 209; 35 *id.* 410; 42 *id.* 472; 107 U. S. 106; 155 *id.* 339. After a written contract limiting liability, the consignor, in the absence of fraud, if he had opportunity to read it, cannot avoid it on the ground that he did not read it, or hear it read, and signed it under a mistake as to its contents. 50 Ark. 406. A common carrier is liable for a negligent delay in the transportation of property, but the owner cannot, on account of unreasonable delay in the carriage and delivery, refuse to receive the goods and sue for a conversion. 48 Ark. 502; 54 *id.* 402. The

remedy was to pay the freight, receive the cattle, and sue on the guaranty. 49 Ark. 354. Having contracted against liability beyond the terminus of its line, the defendant is not responsible. 47 Ark. 103; 32 *id.* 399; 39 *id.* 148, 158; *ib.* 529; 40 *id.* 375; 44 *id.* 209; 50 *id.* 412; 52 *id.* 30; 35 *id.* 510; 42 *id.* 472.

*J. E. Cravens* for appellee.

The contract for exemption from liability was invalid. 57 Ark. 112, 127. With the limiting clauses stricken out, under the decisions *supra*, the contract stands as a contract of shipment with the common law liability attaching to appellant as a common carrier on a through bill of lading. The English rule is not invoked, but we stand squarely on the American doctrine that railroads, as common carriers over the lines of other connecting roads, are not responsible, unless by special contract they make themselves liable. 107 U. S. 106; 22 Wall. 123; 6 Otto, 258. When a carrier has transported goods to their point of destination, and refuses to deliver to owner on demand and tender of freight charges, it amounts to a conversion, especially when the goods are afterwards removed and sold. 1 Cowen, 322; 4 Wend. 613; 32 N. E. Rep. 476.

WOOD, J., (after stating the facts.) Independent of contract, appellants were under no duty or obligation to transport appellee's cattle beyond their termini. *Packard* v. *Taylor*, 35 Ark. 402. There is nothing to show that they had assumed that relation to the public by reason of any usage or the character of their business. Then, since appellants were not, by law, common carriers as to these cattle at the time of the alleged conversion, their liability depends solely upon their contract with appellee. *Piedmont Mfg. Co.* v. *C. & G. R. Co.*, 19 S. C. 353; S. C. 16 Am. & Eng. R. Cases, 194; 3 Wood, Railways, sec. 452a.

The contract was for through transportation from Clarksville, Ark., to Checotah, I. T. But the twelfth paragraph expressly exempts the Missouri Pacific Railway Company from liability "for anything beyond" its line "excepting to protect the through rate of freight named therein." Appellee is bound by the contract. *St. L., I. M. & S. R. Co.* v. *Weakly*, 50 Ark. 397. The cases of *Railway Co.* v. *Cravens* and *Railway Co.* v. *Spann*, 57 Ark. 112 and 127, relied upon by appellee, are not analogous. The court erred in holding appellants liable as for conversion.

Reversed and remanded for a new trial.

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## KANSAS & ARKANSAS VALLEY RAILROAD COMPANY *v.* AYERS.

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Opinion delivered January 2, 1897.

LIVE-STOCK SHIPMENT—CONTRACT LIMITING LIABILITY.—A contract for the shipment of live-stock which, in consideration of a reduced rate, makes it a condition precedent to the recovery of damages to such stock that, before such stock is mingled with other stock and within one day after delivery of the stock at destination, the shipper shall give to the carrier notice in writing of his intention to claim damages, is a reasonable one.

QUESTIONS OF LAW AND FACT—REASONABLENESS OF CONTRACT.—The reasonableness of a contract limiting the liability of a carrier is a question for the jury where there is a dispute as to the facts; but where there is no dispute as to the facts, the court may determine the question.

LIVE-STOCK SHIPMENT—CONSTRUCTION OF CONTRACT.—It is not necessary to give a carrier notice of the death of cattle in the car in which they are shipped before reaching their destination, under a contract which makes it a condition precedent to the recovery of damages that written notice of the intention to claim damages shall be given to the carrier before the stock shall be mingled with other stock.

SAME—NEGLIGENCE.—Proof that a carrier induced a shipper to load his cattle in expectation of a train that would take them at 10:42 a. m., and that they were not moved until 5:30 p. m. of the same day, and that some of the cattle, on reaching their destination, were found to be dead, is sufficient to establish negligence on the part of the carrier.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

To reverse a judgment recovered by the appellee for $250 against the appellants, on account of damages claimed to have been sustained by the appellee, in injury done to his cattle shipped over appellant's railway, this appeal was taken.

In consideration of a reduced rate, the shipper (the appellee) entered into a contract with the carrier (the railway company), as follows: "First. That the livestock covered by this contract is not to be transported within any specified time, nor delivered at any particular hour, nor in season for any particular market.* * *

"Fifth. That, as a condition precedent to any damages or any loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general office, or to the nearest station agent of the first party, or to the agent at destination, etc., to some general officer of the delivering line, before such stock is removed from the point of shipment, or from the place of destination, and before such stock is mingled with other stock, such written notice to be served within one day after the delivery of the stock at destination, to the end that such claim may be fully and fairly investigated; and that a failure to comply with the provisions of this clause shall be a bar to the recovery of any and all such claims." It did not appear in the testimony that the notice as

required by the above clause was given. The proof shows there was an agent at the depot or station where the cattle were delivered, and that he saw the cattle, and knew some of them were dead, and that they were in a bad shape generally, but it does not show that he knew or was informed that any claim would be made for damages. The cattle were shipped at Muldrow for Lenapah in the Indian Territory.

The contract was made with the agent at Fort Smith, who informed the appellee (the plaintiff below) that the train which would carry his stock would leave Muldrow at 10.40 a. m. The appellee loaded his cattle at 9:45 a. m. on two cars furnished by the company for that purpose. No train stopped for his two cars of stock until 5:30 p. m., which train left Muldrow at 5:30 p. m., and arrived at Lenapah at 5:30 a. m., where he unloaded the stock. There were four dead cattle in the cars, and a number of them down, and the balance in bad condition, when they arrived.

The contention of the appellee is that the delay caused by the non-arrival of the train that was to take his cattle at 10:42 a. m. till 5:30 p. m. caused the injury to his cattle, as thereby they were on the cars some seven hours longer than they would have been had they been taken at 10:42 a. m. It appeared that the running of the train which was to take appellee's cattle at 10:42 a. m. was abandoned by the railway company, as they did not have freight sufficient to justify running it that day, but the appellee was not notified of that, and hence loaded his cattle on the cars for the train at that hour, and all the time afterwards expected the train until one came, as stated, at 5:30 p. m. It is also stated by the counsel for the appellee that said contract in regard to notice was unreasonable.

*Dodge & Johnson* for appellant.

1. When a shipper is afforded an opportunity to contract with a carrier by paying one of two rates, by which the liability is limited or not limited, and the shipper chooses the limited liability rate, the contract is valid, and he is bound by it. *Railway Company* v. *Cravens*, 57 Ark. 112. See 46 Ark. 243; 47 *id.* 103; 50 *id.* 412; 52 *id.* 30; 107 U. S. 106; 112 *id.* 337; 155 *id.* 339; 77 Mo. 634; 21 S. W. 80.

2. By the fifth clause of the contract, it was made a *condition precedent* to a recovery that the shipper should *give notice in writing* of his claim, etc., before he removed the stock. No notice was given, and there can be no recovery.

3. The fifth clause is not unreasonable, and the question whether it was reasonable or not was for the jury. 11 So. Rep. 791; 24 S. W. Rep. 355; 18 S. E. Rep. 88; 59 Fed. Rep. 879; S. C. 8 C. C. A. 341; 24 S. W. Rep. 354; 21 *id.* 77; 78 Tex. 374; 14 S. W. Rep. 666; 21 Wall. 264; 54 Miss. 566; 28 Am. Rep. 388; 5 Hurl. & Norm. 867; 30 S. W. Rep. 1113; 30 *id.* 500; 39 N. E. 426.

*Grace & Forrester* for appellee.

A common carrier cannot contract against liability for negligence. 17 Wall. 357; 46 Ark. 243; Lawson, Bailments, secs. 137, 163. An exemption from liability must be read as if the words "except for negligence" were inserted after them, and an exemption from "delay" does not cover a negligent delay. 37 La. An. 468; 3 N. Y. Supp. 708; Lawson, Bailments, sec. 162; 56 N. Y. 168; Hutchinson, Car. sec. 261; 39 Ark. 528; 115 Ill. 407; 71 N. Y. 180; 27 Am. Rep. 28; 29 Barb. 132; 24 N. Y. 222;

The complaint is for injury by *negligence*, and the contract is no defense. Its clauses are void because unreasonable. 86 Tenn. 198; 6 S. W. Rep. 209; 4 Lawson, Rights, Rem. & Pr. sec. 1857. The fifth article is too vague, uncertain and indefinite, and is void. Lawson,

Bailments, sec. 162; 39 Ark. 523. See 67 Tex. 166; 4 Fed. 170, 707; 23 S. W. 930; 25 *id.* 1019; *ib.* 142. The provisions of a contract as to the manner and time of presenting claims must be reasonable, which question is one of law for the court. 54 Ark. 121–3; Wheeler on Carriers, 125; Lawson, Bailments, sec. 158; 57 Wis. 562; 2 Hilt. 19; 2 Daly, 117; 39 Ark. 528–9; 51 Ind. 127; 2 S. W. Rep. 574; 16 S. W. 775; 4 Fed. Rep. 170, 707. If cattle are placed on board the cars in time for the next regular train, and notice given to the company's agent, the company is liable for damage occasioned by not forwarding them by that train. 41 Ill. 73; 67 Am. Dec. 215, and notes.

Reasonableness of limitation.

HUGHES, J., (after stating the facts.) Where the facts are undisputed, the reasonableness of such a contract is a question of law for the court; but where there is dispute about the facts, the reasonableness of the contract is a question of fact for the jury. In this case we think the contract was correctly held to be a reasonable one. *International & G. N. R. Co.* v. *Garrett*, 24 S. W. 354; *Missouri Pacific Ry. Co.* v. *Childers*, 21 S. W. 77; *Texas & Pacific Ry. Co.* v. *Adams*, 78 Tex. 372; *Texas & Pacific R. Co.* v. *Adams*, 78 Tex. 372; *Texas & Pacific Ry. Co.* v. *Barber*, 30 S. W. 500; *Case* v. *Cleveland, C. C. & St. L. Ry. Co.*, 39 N. E. 426.

Questions of law and fact.

As we understand, there is no dispute about the facts, and that all the facts and circumstances are fully presented in the evidence, and that by them it is shown that the contract is a reasonable one. It is true that one day (the time limited by the contract within which the notice was required to be given by the appellee of his intention to claim damages) was short; yet, when we consider the circumstances, it appears that it was sufficient.

The appellee was obliged by it to give notice of his intention to claim damages, but not to specify the

amount of damages he intended to claim, but only to make known to the company his intention to claim damages for the injury done the cattle before they were removed and mingled with other cattle, that the railway company might have a fair opportunity to examine them. The agent of the company was at the station, and the appellee saw him, and talked to him about the injury his cattle had suffered; and it would have required but a few minutes to have given the notice required by the contract of his intention to claim damages. But he moved the cattle out to a ranch without having given this notice.

Assuming that the burden was upon the railway company to prove, as matter of fact, that the contract was reasonable, we cannot understand how other proof can be required, when the evidence in the case shows all the facts, and from them it appears that the contract was reasonable, and the facts are undisputed. In fact, it seems that the reasonableness of the contract was not made a question by the appellee, but that he thought he had to give the notice to the agent at Fort Smith, where he entered into the contract. It is true that it is held that the burden to prove the reasonableness of a contract of this kind is upon the party relying upon it, and we agree that where there is a dispute as to the facts the reasonableness of such a contract is a question for the jury, but where there is no dispute as to the facts (as we understand was the case here) the reasonableness of the contract is a question of law for the court. Where there is a question as to the reasonableness of the contract, and the facts and circumstances all appear in the testimony, and there is no conflict in it, the court is authorized to determine the question.

Construction of contract.

The cattle that were dead in the car before the stock were removed and mingled with other cattle are not within this provision of the contract as to notice. The object in requiring the notice by the shipper of his

intention to claim damages to be given before the cattle were removed and mingled with other cattle was to afford the railway company a fair opportunity to examine the cattle before they were removed and mingled with other cattle. As to these that were dead, the company had all the opportunity it could have had to examine them.

When carrier negligent.

We think as to these there is some evidence to support the charge of negligence upon the part of the railway company, which occasioned their loss, as it may be a fair inference from the testimony that the agent of the railway company induced the appellee to lead his cattle on to the cars at Muldrow, in expectation of a train that would take them at 10.42 a. m., whereas the train that did take them did not reach Muldrow until 5.30 p. m. of the same day, on account of the fact that the railroad company had declined to run that train that day, because not enough freight was offered for transportation that day to warrant the company in running it, as it thought, but of which the appellee was not in any way notified.

For the error in giving judgment for the damage to all the cattle claimed to have been injured, the judgment is reversed, and the cause is remanded for a new trial.

BATTLE, J., dissents.

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## WOOD v. STATE.

Opinion delivered January 2, 1897.

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OFFICIAL BOND—REJECTION—LIABILITY OF SURETIES.—The sureties on the bond of a county treasurer approved by the circuit judge in vacation are not liable for any funds which come into the treasurer's hands after rejection of the bond by the circuit court and the expiration of 15 days thereafter within which the treasurer fails to file a new bond, as required by § 5399, Sand. & H. Dig.

Appeal from Carroll Circuit Court, Eastern District.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

This action was brought by the State of Arkansas against W. H. Wood, as treasurer of Carroll county, and Jas. P. Fancher, W. R. Hamilton, W. P. George and Isaac Felton, as sureties upon his official bond. The complaint alleges that, at the general election in 1882, Wood was elected treasurer of Carroll county; that on the 8th day of December, 1882, Wood and the other defendants made and delivered an official bond for Wood as treasurer; that said bond was, on the 8th of December, 1882, filed with the clerk of said county, it being presented to the county judge of said county in vacation, and by him approved, subject to the final approval of the circuit court of said county; that said Wood, having entered upon the duties of his office under said bond, received by virtue thereof a large amount of moneys belonging to the public funds of said county; that at the April term of the county court of said county a settlement was had with Wood as treasurer, and it was ascertained that he, as treasurer, had taken into his hands large sums of money, among the items named being $134, funds received for redeemed lands from October, 1880, to January 18, 1884, and other sums, describing them, which had never been paid out according to law, and which he, as treasurer, still held, etc., and he was ordered by the court to produce said funds to be counted, and refused, failed, and neglected so to do. The complaint further states that on the —— day of ——, 188—, the office of treasurer of Carroll county was declared vacant according to law, and was duly and legally vacated, and that on —— day of ——, 1884, at a special election, one Field

was duly elected, commissioned, qualified, and gave bond, and entered upon the duties of the office of treasurer as aforesaid, that Wood was legally ordered to pay over to said Field the said sums found to be due from him as aforesaid, and that said Field, his successor, made demand upon him for same, but that he (the said Wood) wholly failed to pay same over, as he was required to do, etc.

Appellants answered as follows: "Come the defendants [the sureties above named] and, answering herein, admit that the defendant Wood was elected county treasurer of Carroll county about the time alleged, and that they executed the bond set out and mentioned in the plaintiff's complaint, and that the said Wood entered into the discharge of his duties as such treasurer; that on the 8th day of December, 1882, said bond was filed with the clerk as alleged, but deny [that] said bond was presented to the county judge of Carroll county in vacation, or that said judge approved said bond. Defendants say that on the 24th of March, 1883, at the regular term of circuit court of Carroll county, Arkansas, said bond was presented to said court for its approval, and by said court rejected, and the defendant Wood was ordered to make, execute, and deliver a good and sufficient bond in fifteen days thereafter. The defendants say that the rejection of said bond by said court discharged these defendants, who were sureties on said bond, from all subsequent liabilities on the same after the expiration of said fifteen days in which the defendant Wood was required to execute his said bond. The defendants say that no part of said money mentioned in the complaint was lost, stolen, or appropriated by said Wood till long after the rejection of the bond sued on, and long after the expiration of the fifteen days in which defendant Wood was required by

the court and the law to make and execute the second bond aforesaid."

To this answer plaintiff demurred as follows: "Comes the plaintiff, and demurs to the answer of the defendants, and for cause of demurrer says that the facts stated in the answer do not constitute any defense to the plaintiff's complaint."

The court sustained the demurrer to the answer, and, the appellants failing to plead further, judgment was rendered against them for the penalty of the bond. Appellants excepted to the judgment of the court sustaining the demurrer, and appealed to this court.

*S. R. Cockrill*, *O. W. Watkins* and *Ashley Cockrill* for appellant.

The provisions of our statute bearing on the subject are Sand. & H. Dig., secs. 979, 3247–3248 and 5398–5402. It may be conceded that the bond was operative until the expiration of the fifteen days after the order of the circuit court rejecting it. After that it was a rejected bond, which is no bond, binding no one. A failure to give new bond made the office *ipso facto* vacant. 36 Ark. 134; 42 *id.* 372; 44 Iowa, 15; 36 Ark. 392; 47 Mich. 586; 84 Ky. 496; 3 Martin (La.), N. S. 589, S. C. 15 Am. Dec. 169; 24 Am. St. Rep. 893. See also 3 Scam. (Ill.), 35; 60 Ark. 399. The bond was never accepted. It was rejected. Murfree on Off. Bonds, sec. 46; *ib.* sec. 48; 79 Cal. 84; 19 How. 595; 97 Pa. St. 332; 11 Gill & J. (Md.), 382; 9 Ga. 185; 47 Mich. 586; 86 *id.* 329; 84 Ky. 496; 57 Cal. 620. The case of 2 Ark. 73 is not inconsistent with these authorities. It is based on a different statute. Sec. 2, Revision of 1838, p. 138. The complaint is not sufficient. Maxwell, Code Pl. 148; Murfree, Off. Bonds, sec. 48; 7 Md. 179, 201; 2 Ark. 382. No breach is alleged. Murfree, Off. Bonds, sec. 555; 10 B. Mon. 461; Green's Pl. & Pr. sec. 304.

*J. M. Pittman* and *W. S. Stuckey* for appellee.

The demurrer raised the point whether the denials and allegations in the answer were a sufficient answer to the complaint. These alone were passed on by the court below, and these only can be adjudicated here. 40 Ark. 96; 54 *id.* 442. The validity of a bond is not affected by an omission to acknowledge or to approve it, or by any defects in its justification. 2 Ark. 73 and 174; Throop on Pub. Officers, sec. 183. A treasurer is liable for all moneys coming to his hands during his office, and until he settles, even though he resigns, is removed, or the office becomes vacant. Art. 7, sec. 46, Const.; *ib.* sec. 48; Sand. & H. Dig., sec. 991 and 992. The averment that appellant did *execute* the bond implies delivery and acceptance. 2 Harr. (Del.), 108, note; 2 Ark. 73, 174, 189. Signing, sealing and delivery is *prima facie* evidence of acceptance and approval. 4 Md. 444. The execution of the bond, the filing in the clerk's office, the entering of Wood into the office and receiving and disbursing money, etc., are all strong evidences of acceptance. 40 Iowa, 462; 47 Ind. 418; 39 Ark. 468; 1 Harr. & J. (Md.) 324; 57 Pa. St. 219. The circuit judge has authority to approve in vacation. Sand. & H. Dig., sec. 5398. The answer should have alleged non-approval by the circuit judge in vacation, and in the absence of this allegation the presumption is that it was thus approved, hence accepted.

*O. W. Watkins* and *S. R. Cockrill* in reply.

A treasurer cannot enter into office until he has given bond, Sand. & H. Dig., sec. 979; Mansf. Dig., sec. 1187; *ib.* secs. 5398, 5402; 36 Ark. 134, 143; *ib.* 386, 394. The bond must be approved by one of the officers or judges prescribed. Murfree, Official Bonds, secs. 46, 48. The complaint fails to allege that any part of the money the treasurer failed to account for was received

*prior* to the expiration of the fifteen days after the bond was rejected. Hence no breach is alleged. 2 Ark. 382.

WOOD, J., (after stating the facts.) The statute requires each treasurer, before he enters upon the duties of his office, to enter into bond that he will truly account for and pay over all money that may come into his hands as treasurer. Sec. 979, Sand. & H. Dig. The complaint alleges that Wood and his sureties made a bond, which was approved by the county judge in vacation; that the bond was filed with the clerk; and that Wood entered upon the duties of the office of treasurer. The answer admits these allegations, except that the bond was approved by the county judge in vacation, which it denied. Now, as the treasurer could not legally enter upon the duties of his office without a bond approved by the county or circuit judge in vacation, inasmuch as it is admitted that he did enter, and there is nothing in the pleadings to show that his bond was not approved by the circuit judge in vacation, a provisional acceptance of the bond may be presumed. From the terms of the bond itself, which are according to the statute, the treasurer and his bondsmen are liable for all funds which come into his hands as treasurer while the bond was in force, and which he failed to account for and pay over. This, notwithstanding said funds may not have been lost, stolen, or appropriated by the treasurer, as is alleged in the answer, until long after the rejection of the bond, and after the expiration of the time prescribed by law for filing a new one. But the answer expressly alleges, and the demurrer admits, that the bond sued on was rejected by the circuit court March 2, 1883, and that defendant was ordered to file new bond in fifteen days thereafter. So his sureties were not liable for any funds which may have come into the hands of Wood after that time,

unless they are to be held liable upon an instrument which had been rejected. But, upon elementary principles, that cannot be. When the party named as obligee refuses to accept, the parties signing as obligors are not bound. The statute makes the office vacant *ipso facto* upon rejection of the bond by the circuit court and a failure to give new bond in fifteen days. Sec. 5399, Sand. & H. Dig.; *Ex parte Lowman*, 42 Ark. 372. See also *Falconer* v. *Shores*, 37 *id.* 392; *Oliver* v. *Martin*, 36 *id.* 134. Besides, the complaint alleges that the office became vacant, but does not show when the vacancy occurred.

After the bond had been rejected by the circuit court, and the fifteen days had expired, the treasurer could no longer claim or exercise any right under it, and his sureties were no longer bound by it. The cases of *Wood* v. *Auditor*, 2 Ark. 73, and *Taylor* v. *Auditor*, 2 Ark. 174, respectively, relied upon by appellee, cannot control this question. When they were decided, there was no statute like that *supra*, and in them no question as to the effect of an affirmative rejection of the bond was raised. In the former facts were stated from which an acceptance would be presumed, and in the latter the demurrer simply raised the question of a failure "to acknowledge and approve." Here the record shows affirmatively that the bond was rejected by the circuit court, the only duly accredited agent of the state for accepting such instruments. The general allegation in the answer that the bond was "executed" cannot be taken in the technical sense that the instrument was both signed and delivered, except as it may refer to the provisional acceptance, for there is a specific allegation in the answer "that the bond was presented to the circuit court for approval, and was by it rejected." This the demurrer admits. Authorities cited in brief of

counsel for appellee clearly establish the views we have expressed.

Since the answer shows that the bond was rejected, and denies liability thereafter, and the complaint shows that funds came into the hands of the treasurer after his office became vacant, as stated in his answer, and fails to show that any funds came into the hands of the treasurer before it was rejected, it follows that the answer states a good defense, and the demurrer should have been overruled.

Reversed, and remanded, with directions to overrule the demurrer, and to allow plaintiff to amend if desired, and for further proceedings.

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## KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY v. MCGAHEY.

Opinion delivered January 9, 1897.

BAGGAGE DEFINED.—Baggage is whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purposes of the journey.

BAGGAGE—LIABILITY of CARRIER.—When a passenger, in presenting his goods to a carrier for transportation, either informs the carrier that they are not such as are usually carried by passengers, or that fact is apparent from the outward appearance of the packages, and the carrier receives and carries them as baggage, he will be responsible for them as baggage, notwithstanding he was not bound to receive them as such.

SAME—WHEN CARRIER'S LIABILITY ENDS—The liability of a carrier as insurer of the baggage of a passenger continues until the baggage is ready to be delivered to the owner at the place of his destination, and until he has a reasonable time and opportunity to take it away. If it be not called for in a reasonable time, the carrier may store it in a secure warehouse, when it becomes a mere warehouseman.

SAME—REASONABLE TIME FOR REMOVAL.—Where a railway passenger reaches his destination at 11 o'clock p. m., and leaves his baggage at the depot, the lateness of the hour of arrival, and the fact that there were no vehicles at the depot by which the baggage could have been removed, were not sufficient to extend the time within which the passenger should call for the baggage until the next morning.

SAME—WHEN CARRIER LIABLE AS WAREHOUSEMAN.—Where a passenger fails to remove his baggage within a reasonable time after arriving at his destination, and it is destroyed by fire, it is necessary, before he can recover of the carrier for its loss, that he should show such negligence on the part of the carrier as would make it liable as warehouseman.

Appeal from Sharp Circuit Court, Northern District.

JOHN B. MCCALEB, Judge.

*Wallace Pratt* and *Olden & Orr* for appellants.

Defendant's relation to the baggage, at the time it was destroyed, was that of warehouseman, and not that of common carrier, and, without proof that the fire was occasioned by negligence of defendant, plaintiff could not recover. Hutchinson, Carriers, secs. 707, 713; 50 Barb. 193; 49 *id.* 148; 56 *id.* 191; 3 Daly, 162, 390; 8 Bush (Ky.), 184; 18 S. W. Rep. 850; 4 Mo. App. 582; 17 S. W. Rep. 135; 35 Vt. 695; 2 Civ. Ct. App. Tex. 35; 24 S. W. Rep. 668; 139 Mass. 423; 19 Wis. 40; 53 Ill. 227; 73 *id.* 510; 17 Ill. App. 632; 63 Wis. 100; 1 Daly (N. Y. C. P.), 202. Even adopting the New Hampshire rule as to the delivery of freight by carriers, there is no liability here. 32 N. H. 523; 44 N. Y. 505.

2. Under the pleadings and evidence, defendant is not liable for the *household* goods, as baggage. Baggage, at common law and even under our statute, does not include articles not usually carried for use, comfort, or convenience on the trip. Sand. & H. Dig., sec. 6215; 4 Burrows, 2298; 4 Barn. & Ald. 21; 5 Cush. 69; 10 *id.* 506; 98 Mass. 83; 126 Mass. 121; 127 *id.* 322; 6 Hill, 586;

9 H. L. Cases, 556; 29 Minn. 160; 70 Cal. 169; 73 Ill. 348; 17 Ill. App. 321; 6 Q. B. 612. For illustrations, see 3 Tex. App. 25; 1 *id.* 224; 32 U. C. Q. B. 66; 73 Ill. 510; 106 Mass. 146; 56 Ill. 293. There is no allegation nor proof that the agent knew or was informed of the contents of plaintiff's trunks and boxes, so as to bring it within the rule of 30 S. W. (60 Ark.) 764. The mere payment of extra compensation on account of overweight of baggage does not convert it into freight. 127 Ill. 598; 22 S. W. (Tex.) 1011.

*Phillips & Horton* for appellee.

Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to his immediate necessities, or the *ultimate* purpose of his journey, must be considered as personal baggage. 1 Am. & Eng. Enc. Law, 1042. If appellant had knowledge that the package contained other than personal baggage, or if the articles were so packed that their nature was obvious, it is estopped to deny that it was baggage. 41 Mo. 503; 52 N. Y. 429; 67 N. Y. 208; 32 Kas. 55; 104 Ind. 293; 16 Am. & Eng. R. Cases. 120; 46 N. W. Rep. 456, and cases cited; 21 Am. & Eng. R. Cas. 286. See also 60 Ark. 433. The rule adopted in 60 Ark. 375 as to freight should apply to baggage. 59 N. W. Rep. pp. 257, 258; 8 Bush. (Ky.), 184.

Baggage defined.

BATTLE, J. "Baggage," as defined by Lord Chief Justice Cockburn in *Macrow* v. *Great Western Railway Co.*, L. R. 6 Q. B., 612, is "whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey." As said by Mr. Justice Field in *Hannibal Railroad*

v. *Swift*, 12 Wall. 272, the contract of the carrier to carry a passenger, as to baggage, "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." Under the statutes of this state, "each passenger who shall pay fare * * * * shall be entitled to have transported along with him, on the same train, and without additional charge, one hundred and fifty pounds of baggage, to consist of such articles as are usually carried by ordinary persons when traveling." Sand. & H. Dig., sec. 6215. With the exception of the amount of the baggage, the statute is substantially the contract of the carrier with the passenger, as stated in *Hannibal Railroad Co.* v. *Swift*, *supra*.

What is baggage, within the rule of the carrier's liability, is often difficult to determine. It depends, as already stated, in a great measure upon the condition in life of the passenger, and the length, nature, and object of his journey. According to this criterion, the following articles have been held to constitute baggage: the wearing apparel of the passenger in all cases; the easel of an artist on a sketching tour; the gun or fishing tackle of the sportsman when on a hunting or fishing excursion; the costly laces of a lady of wealth, high rank and social standing, traveling on a railway; "a manuscript price book, which a commercial agent took in his valise, and used in making sales;" the surgical instruments of a surgeon in the army, traveling with troops; a few books carried for amusement or entertainment; and the manuscript books of the passenger used in the prosecution of his studies. Many cases upon this subject have been collected in a valuable treatise by

Judge U. M. Rose upon the "General Liability of Carriers of Passengers for Baggage," in 2 Am. & Eng. R. Cases, (N. S.) 1.

When carrier liable for baggage.

When a passenger presents to the carrier for transprtation his goods and chattels, and makes known what they are, or exposes them to view, or packs them in a way to give to any one concerned good reason to understand and know that they are not usually carried as baggage, and demands transportation of them as his luggage, and the carrier receives and carries them accordingly, he will be responsible for them as baggage, notwithstanding he was not bound to accept and transport them as such. If he wishes to avoid responsibility for them as baggage, he must refuse to receive them in that way. *Railway Co.* v. *Berry*, 60 Ark. 433; *Minter* v. *Pacific Railroad Co.*, 41 Mo. 503; *Sloman* v. *Great Western Railway Co.*, 67 N. Y. 208; *Great Northern Railway Co.* v. *Shepherd*, 8 Exch. 30; *Mauritz* v. *N. Y., Lake Erie & Western R. Co.*, 21 Am. & Eng. R. Cases, 286; *Waldron* v. *Chicago & N. W. R. Co.*, 46 N. W. Rep. 456; *Oakes* v. *Northern Pacific R. Co.*, 47 Am. & Eng. R. Cases, 437; *Hannibal Railroad* v. *Swift*, 12 Wall. 262; *Texas, etc., R. Co.* v. *Capps*, 16 Am. & Eng. R. Cases, 118; *Hamburg-American Packet Co.* v. *Gattman*, 127 Ill. 598.

In *Railway Company* v. *Berry*, 60 Ark. 433, this court held "that where a passenger, who is ignorant of the rules or instructions of railway companies forbidding agents to receive money for transportation as baggage, delivers to the baggage agent more money than the carrier is required to transport, and informs the agent of the amount (it being inclosed in the baggage, and concealed from view), if he accepts it to ship as baggage, and a loss occurs, the carrier's common-law liability will attach."

In *Minter* v. *Pacific Railroad*, *supra*, a passenger delivered his trunk and a piece of carpet to the baggage master of a railroad company. The carpet was exposed to view. The passenger received a check for the trunk, but was told that none was necessary for the carpet, as it would go safely. The carpet was lost, and a suit was brought for the recovery of its value. The court held that, inasmuch as the railroad company had received and treated the carpet as personal baggage, it was liable for the loss of it, although, by the printed rules of the company, the baggage master was forbidden to receive as passenger's baggage articles of merchandise.

In *Sloman* v. *Great Western Railway Co.*, *supra*, the plaintiff's son, a lad eighteen years of age, was employed by him as traveling agent to sell goods by sample. He had two large trunks containing the samples, and a valise for his personal baggage. The trunks did not present the appearance of ordinary traveling trunks. They were thirty inches long, twenty-seven deep and twenty-four wide. One was covered with oil-cloth, and the other was of wood. "He delivered the trunks to a baggage master at a railroad depot, and, when asked where he wanted them checked to, replied that he did not then know, as he had sent a dispatch to a customer at Fentonville to know if he wanted any goods; if not, he wanted them to go to Rochester, where he expected to meet some customers. Soon after he had them checked to Rochester, paying two dollars, and receiving a receipt ticket for them, headed 'Receipt Ticket for Extra Baggage and Dogs.' The court held that the jury were authorized by these facts to infer that the baggage master understood that the agent was traveling for the purpose of selling goods, and that these trunks contained his wares; and that he was not entitled to have them carried as ordinary baggage; and further held that the railroad company, having this

notice, was responsible for the loss of the trunks and their contents."

Some courts hold that where a railroad company receives for transportation property which it is not bound by its contract with the passenger to transport as personal baggage, of which it has notice, it must be considered to assume, with reference to such property, the liability of a common carrier of merchandise (*Hannibal Railroad* v. *Swift*, *supra; Sloman* v. *Great Western Railway Co.*, *supra*); while others say that, if it received the property, under such circumstances, as baggage, it will be responsible therefor as a common carrier, and will be estopped from denying that it was baggage. *Texas & P. R. Co.* v. *Capps*, 16 Am. & Eng. R. Cases, 118; *Minter* v. *Pacific R. Co.* 41 Mo. 503; *Hoeger* v. *Chicago, M. & St. P. R. Co.* 63 Wis. 100, 21 Am. &. Eng. R. Cases, 308; *Chicago, R. I. & P. R. Co.* v. *Conklin*, 32 Kas. 55, 16 Am. &. Eng. R. Cases, 116; *Butler* v. *Hudson River R. Co.* 3 E. D. Smith (N. Y.), 571; *Railway Company* v. *Berry*, 60 Ark 433. It seems to us the latter view is sustained by the better reason and weight of authority. But, be that as it may, the liability of the carrier for loss and damage in transportation in either case is the same.

In the case under consideration, the plaintiff, McGahey, purchased for himself and his family, consisting of a wife and three small children, three tickets, which entitled him to transportation for himself and family and 450 pounds of baggage over the railway of the defendant railroad company from Sulligent, in the state of Alabama, to Mammoth Springs, in this state. He delivered to the company his baggage, which was contained in two trunks and three boxes, and weighed over 500 pounds, and paid the usual rate for the weight in excess of his baggage allowance, and received checks

for the trunks and boxes, which contained property of the following description and value:

| | | |
|---|---|---|
| "Four feather beds 40 lbs. each at 40 cts | | $ 64 00 |
| Ten pillows 4 lbs. each, at 40 cts | | 16 00 |
| Forty-five quilts at $5 each | | 225 00 |
| Three pairs of blankets at $5 | | 15 00 |
| Three bed ticks at $2 | | 6 00 |
| Five double woven counterpanes at $6 | | 30 00 |
| Fourteen bed sheets at 50 cts | | 7 00 |
| Thirty pillow slips at 15 cts | | 4 50 |
| Eight dresses (ladies') $2 | | 16 00 |
| Thirty dresses (children's) | Estimate | 30 00 |
| Twenty-five shirts and underwear | Estimate | 12 00 |
| Twenty articles underwear, ladies' | Estimate | 12 00 |
| Twelve pairs socks | Estimate | 1 80 |
| Twenty-five yards cloth | Estimate | 3 60 |
| Razor hone | | 1 50 |
| Knitting yarn | | 1 50 |
| Three suits clothing | | 24 00 |
| Two pairs pants | | 2 00 |
| Four cotton shirts | | 2 00 |
| Four pairs drawers (gents') | | 1 60 |
| Two razors | | 3 00 |
| Two pairs shoes (ladies') | | 2 50 |
| Five table cloths | | 3 00 |
| Eight hand towels | | 2 00 |
| One lot of pictures (photographs) | | 10 00 |
| One lot carpenter tools | | 5 00 |
| Seven books | | 2 70 |
| Set knives and forks | | 1 00 |
| One clock | | 1 25 |
| Six buckets and two flat irons | | 2 00 |
| Total amount | | $508 95" |

The trunks were of the aggregate value of five dollars. From this description of the trunks and boxes

and their contents, it is evident that the trunks and boxes must have been of a size very much larger than was necessary to hold the ordinary luggage of the number of persons entitled to transportation on three tickets would amount to. It is highly improbable that the plaintiff would carry with him such large trunks and boxes for the purpose of carrying such personal effects of himself and family as he was entitled to have carried as baggage on three tickets. The effects contained in the boxes were thereby packed in such a manner as to indicate that they were not carried as necessary personal baggage to be used on the journey, but as merchandise would be when it reaches its place of destination. From all these circumstances, we think that the judge, sitting as a jury, as he did in this case, was authorized to infer that the company was put upon notice, and given to understand, that the trunks and boxes contained more than the ordinary baggage, and that it accepted and treated the contents, without regard to what they might be, as baggage, and transported them accordingly.

When carrier's liability ends.

Railroad companies are responsible as common carriers for the baggage of their passengers. Such responsibility continues until the baggage is ready to be delivered to the owner at the place of his destination, and until he has had a reasonable time and opportunity to come and take it away. If it be not called for in a reasonable time, the company may store it in a secure warehouse, when it becomes a mere warehouseman, and is thenceforward bound to exercise the same care, and no more, that ordinarily prudent men do in keeping their own goods of similar kind and value. *Mote* v. *Chicago & N. W. R. Co.*, 27 Iowa, 22; *Chicago, R. I. & P. R. Co.* v. *Boyce*, 73 Ill. 510.

What constitutes a reasonable time and opportunity for a passenger to remove his baggage is, ordinarily, a mixed question of fact and law. When the facts are in

dispute, the jury should decide, under the instructions of the court as to the law; otherwise, it is a question of law, and the court should decide it. *Chicago, R. I. & P. R. Co.* v. *Boyce*, 73 Ill. 510; *Louisville, C. & L. R. Co.* v. *Mahan*, 8 Bush, 184; *Roth* v. *Buffalo & S. L. R. Co.*, 34 N. Y. 548.

No absolute rule on this subject can be stated. In determining whether a passenger has had a reasonable time in which to receive and remove his baggage, "the customs of the railway and of the station, the manner of transporting baggage therefrom, in short, the peculiar circumstances surrounding each case," except as hereafter stated, must be considered. *Mote* v. *Chicago & N. W. R. Co.*, 27 Iowa, 22.

In many places, especially in cities, transportation for baggage can be procured immediately upon its arrival by railroad trains and steamboats. If such places be its destination, it is the duty of the passenger to present his check and receive it, on its arrival by train or steamboat, or as soon thereafter as the checks can reasonably, under the circumstances, be presented, and the baggage delivered. If he refuses or neglects to do so, the liability of the carrier is changed from that of an insurer to the responsibility of a warehouseman. *Roth* v. *Buffalo & State Line R. Co.*, 34 N. Y. 548; *Ouimit* v. *Henshaw*, 35 Vt. 605.

"The passenger, however, cannot extend the strict and rigid liability of common carriers as insurers by postponing the time of taking possession of his baggage for his own convenience on account of its arrival at a late hour of the night, or his peculiar circumstances. In *Chicago, Rock Island & Pacific Railroad Co.* v. *Boyce*, 73 Ill. 510, it was held that the fact that a passenger on a railroad is taken sick, and is given a lay-over ticket, so that he does not reach his destination as soon as his

baggage, will not have the effect of extending the liability of the carrier as insurer beyond what it would otherwise be."

As to reasonable time for removing baggage.

In the case before us the plaintiff and his baggage arrived at Mammoth Springs, their place of destination, at 11.08 o'clock at night. There were no conveyances at the depot, or running at that hour. They were in the city, "a mile's distance from the defendant's depot." The plaintiff, although he saw his baggage on the platform, made no demand for it during the night of its arrival, but left it in the possession of the defendant, who stored the same in its warehouse, which was destroyed with the baggage by fire about one o'clock that night.

According to the evidence, it appears that plaintiff had a reasonable time in which he might with the use of diligence have received and removed his baggage before the fire occurred. There is no excuse given for his failure to do so, except the lateness of the hour, and the fact that no vehicles were at the depot or "running" that night, by which it could have been removed. This merely shows that it was inconvenient for him to remove it during the night. This, in the absence of a better showing, was not sufficient to extend the reasonable time within which the plaintiff should call for it to the next morning, so that, it not being called for, the defendant became liable for its custody as a carrier. "If it was not the usual course of business for the defendant to deliver baggage immediately on the arrival of the train at that late hour of the night, or if the railroad company detained the plaintiff's baggage for their own convenience upon the arrival of the train, such facts should have been shown by the plaintiff, and, if shown, might vary the defendant's liability for the custody of the property. But we cannot presume such facts to exist." *Ouimit* v. *Henshaw*, 35 Vt. 616.

The defendant company not being liable as common carrier for the loss of the baggage of plaintiff, before he could recover on account thereof, it was necessary for him to show that the fire was the result of such negligence of the railroad company as would make it liable as a warehouseman for hire, which he failed to do.

Liability as warehouseman.

Reversed and remanded for a new trial.

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## SOUTHWESTERN ARKANSAS & INDIAN TERRITORY RAILROAD COMPANY *v.* HAYS.

Opinion delivered January 9, 1897.

RAILROAD PROPERTY—MORTGAGE SALE.—The roadbed and rolling stock of a railroad company may be sold as an entirety under a mortgage, where the debtor requests it, and it can be done without prejudice to the creditor, although Const. 1874, art. 17, § 11, provides that the rolling stock and all other moveable property of any railroad company shall be considered personal property.

SAME—DECREE OF SALE.—The refusal of the chancellor, in a suit to foreclose a mortgage of the roadbed and rolling stock of a railroad company, to order the roadbed and rolling stock to be sold as an entirety, as requested by the mortgagor, is not error where it does not appear that all of the rolling stock is needed for the operation of the road, and where it was left to the commissioner's discretion to sell the property as an entirety or separately, as he might deem most expedient.

SAME—MODE OF SALE.—A decree foreclosing a mortgage on the roadbed and rolling stock of a railroad company which directs the commissioner to sell "all of said property" will not be held to require a sale of the roadbed and rolling stock separately merely because the court refused to specifically direct that they be sold together as an entirety.

INTEREST—NOTE OF RAILROAD COMPANY.—The mere fact that a note executed by a railroad company bears 10 per cent. interest does not bring it within Sand. & H. Dig., § 6268, under which railroad companies are prohibited from borrowing money at a rate of interest exceeding 7 per cent.

MORTGAGE SALES—APPRAISEMENT.—The act of March 17, 1879, which regulates the sales of property under powers of sale contained in mortgages and deeds of trust, providing for an appraisement of the property and a sale for not less than two-thirds of the appraised value, does not apply to a sale made under a decree of court.

Appeal from Clark Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

Suit in equity to foreclose a mortgage upon the roadbed, rolling stock, and other property of the Southwestern Arkansas & Indian Territory Railroad Company.

The plaintiff, John Hays, alleged in substance that the defendant railroad company, being indebted to him, did on the 4th day of August, 1890, execute and deliver to him its promissory note for the sum of $10,000, payable in two years, with 10 per cent. interest per annum from date until paid; that to secure said note the defendant company gave him a deed of trust upon its property, said property being described in said deed as "all of the property, real and personal, belonging to the Southwestern Arkansas & Indian Territory Railroad Company, consisting of roadbed, right of way, cross ties, iron and steel rails, depot buildings at Smithton, Okolona and Hebron, rolling stock now on hand, and all that said railroad may come into possession of during the existence of this mortgage."

The appellant company appeared by its attorney, but did not answer the complaint nor demur thereto. The cause was heard upon the complaint, note and deed of trust. The court rendered judgment against the defendant for $11,981.74, being the balance due on note with interest at 10 per cent.; ordered the property conveyed by the deed of trust sold for the satisfaction of said judgment; appointed a special commissioner to

make the sale; ordered said commissioner to have said property appraised, and to sell at public auction after due advertisement. The court further ordered that if the property should not sell for two-thirds of its appraised value, the commissioner withhold it from sale, and report to the court, and further that defendant have the right to redeem the property, as provided by statute.

The defendant, at the time the decree was made, moved the court to make an order requiring the commissioner to sell all the railroad bed and rolling stock described in the trust deed in bulk as one property, and not separately, which the court refused to do, and defendant excepted and appealed. The plaintiff took a cross appeal, for the reason that the court required the commissioner not to sell the property for less than two-thirds of its value.

*J. H. Crawford* for appellant.

1. It was error to order the commissioner to sell the rolling stock, depot houses and railroad track separately. 3 Wood, Railroads, 434; 3 Dill. 412; 14 Bush, 425; 29 Am. Rep. 412; 3 Bush, 650; 127 Ind. 250; 70 Fed. Rep. 267.

2. Railroads cannot borrow money at a rate exceeding 7 per cent. Sand. & H. Dig., sec. 6268; 120 U. S. 287, 300. An act forbidden by statute cannot be made the foundation of a contract. 48 Ark. 489; 32 *id.* 619; 103 Ill. 460; 42 Am. Rep. 26. If not void, it is void as to the excess of interest. 55 Ark. 149, 159. It is not necessary that this objection appear upon the record. It may be made here for the first time. Sand. & H. Dig., sec. 5720; 12 Ark. 399; 25 *id.* 565; 58 *id.* 39; 96 U. S. 89.

3. There is no redemption from chancery sale. 60 Ark. 510. The commissioner could disregard the decree as to appraisement, etc.

*Tompkins & Greeson* for appellee.

There was no error in refusing to order the property sold in bulk. 20 N. E. Rep. 432. Sec. 6268, Sand. & H. Dig., does not apply. There is no limitation on a railroad to borrow money for legitimate purposes, with the one exception, an increase of capital stock. 1 Sand. Ch. p. 288; 23 Am. & Eng. Enc. Law, p. 383. Even if the act applied, the appellant cannot hold the money, and plead that its contract to repay is *ultra vires*. 1 Jones on Mortg. 127; 37 Cal. 543; 43 Iowa, 48; 101 Mass. 57; 63 N. Y. 69; 54 Tex. 125; 2 Am. & Eng. R. Cases, 443; 1 Rich. Law, 281; 98 U. S. 628; 24 N. J. Eq. 26; 29 Vt. 93; 83 Penn. St. 160; 96 U. S. 640; 125 Mass. 339; *ib.* 336; 6 Hill, 37; 96 U. S. 267; 101 *id.* 86; 120 U. S. 287; 19 Fed. Rep. 388. This objection cannot be made for the first time in this court. 54 Ark. 442. There is no appraisement nor right of redemption under the foreclosure sales in chancery. 60 Ark. 510.

Mode of sale of railroad property.

RIDDICK, J., (after stating the facts.) The appellant railroad company contends that the decree of the circuit court should be reversed, for the reason that the court refused to order the railroad bed and rolling stock described in the deed of trust sold in bulk as an entirety. While the decisions of some courts treat the rolling stock of a railway company as appurtenant to the roadbed, and a part of the same, yet the courts of this state cannot follow these decisions to that extent. The language of our constitution forbids them from doing so. It provides that "the rolling stock and all other moveable property belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals." Const. art. 17, sec. 11.

There are other states having similar provisions in their constitution, and the general purpose of such a

provision "is to enable general creditors of railroad corporations, whose claims may be small, to find property out of which their claims may be satisfied." Jones, Corporate Bonds and Securities, sec. 157.

But, notwithstanding this provision of the constitution requires us to treat this rolling stock as personal property, it was still within the discretion of the circuit court to have ordered the property covered by this deed of trust to be sold in bulk, as an entirety; for the deed, by its terms, seems to contemplate but one sale. We see no reason why the wishes of the debtor in this respect may not be followed, if it can be done with safety to the creditor, and without injury to others having claims against the company or its property. *Livingston* v. *Mildrum*, 19 N. Y. 440; *Campbell* v. *MaComb*, 4 Johns. Ch. 534; *Wilmer* v. *Atlanta & Richmond Air Line R. Co.*, 2 Woods, 409; 2 Jones, Mortgages, secs. 1616, 1617; Jones, Corporate Bonds and Mortgages, sec. 634.

But we are not able to say that the circuit court committed an error in regard to this matter for two reasons: (1) We do not know the amount and value of the rolling stock included in the trust deed. We do not know the condition of this rolling stock, or whether all of it is needed for the operation of the road, or anything concerning it whatever. In the absence of any knowledge upon these matters, we are unable to determine whether it would be more beneficial to have the whole property sold as an entirety, or to have the rolling stock, or so much of it as may not be needed in the operation of the road, sold separately. (2) We are not certain that the court intended that the property should be sold separately. It will be noticed that the circuit court did not direct the commissioner to sell the roadbed and appurtenances thereto separately from the rolling stock, but only refused to specifically direct him not to sell

them separately. The decree, after describing the property as given in the trust deed, directs that the commissioner shall proceed to advertise and sell "all of said property." It would seem, from this language, that the intention of the court was that the property should be offered first as an entirety. The argument that the court intended that the roadbed and fixtures should be sold separately from the rolling stock is based altogether upon the refusal of the court to specifically direct that they be sold together as an entirety. But it is probable that the only object of this refusal was to permit the commissioner, in the event that no bids were received for the entire property, to then offer the real and personal property separately. We do not see that any harm would follow from allowing the property to be offered in this way, for such a sale is incomplete until confirmed by the court. It rests in the discretion of the circuit court whether the sale shall be confirmed or not, and this discretion would be exercised prudently and fairly in the interest of all concerned. 2 Jones on Mort. secs. 1637 and 1638.

Interest recoverable on railroad note.

It is next said that the judgment should be reversed, for the reason that the court allowed interest upon the notes at the rate of 10 per cent. It is contended that, under our statute (sec. 6268, Sand. & H. Dig.), railroad companies have no power to borrow money at a rate of interest exceeding 7 per cent. per annum, and that the note sued on was void, at least for the interest in excess of 7 per cent. But, without going into a discussion of the meaning of the statute referred to, it is a sufficient answer to this contention to say there is nothing in the record to show that the note sued on was executed for borrowed money. It may have been executed for the purchase price of rolling stock, or for material used in the construction of the roadbed, or as a consideration for the construction of the roadbed and depot

houses, and in such a case the statute referred to would certainly have no application. And so we conclude that no error was committed against appellant.

Necessity for appraisement of mortgaged property.

In support of his cross-appeal, the appellee complains that the court ordered the commissioner to appraise the property, and not to sell it for less than two-thirds of its value. Whether the court, as a matter of discretion, and to avoid a sacrifice of property, might order the commissioner to appraise the property, and not to accept a bid below a certain proportion of its value, is a question we need not determine here. As the mortgage in this case confers the right to an absolute sale, it is doubtful whether the court could prevent such a sale by requiring that the property should be appraised, and not sell for less than two-thirds of its value. 5 Thompson, Corporations, sec. 6219.

But the language of the decree and the admission of counsel show that the circuit court did not make this order for appraisement as a matter of discretion, but was only following the mandates of a statute which was believed to apply to this sale. It was decided in *Martin* v. *Ward*, 60 Ark. 510, that the statute in question which regulates sales of property under powers of sale contained in mortgages and deeds of trust did not apply to sales under decree of court. The decree of the circuit court will therefore be modified to the extent that the commissioner may sell without appraisement. In other respects the decree is affirmed.

## MANSUR & TIBBETTS IMPLEMENT COMPANY *v.* WOOD.

Opinion delivered January 16, 1897.

ASSIGNMENT—SUFFICIENCY OF DESCRIPTION OF PROPERTY.—A general description of property in a deed of assignment for creditors, sufficient to identify it, is not vitiated by a reference, for a further description, to a schedule annexed, which contains no description of such property.

SAME—TIME OF SALE.—An assignment for creditors is not void because it requires the property assigned to be sold by the assignee within 120 days from its date, instead of from the giving of the bond, as required by the statute, where the deed and bond were executed and filed on the same day.

SAME—RESERVATION OF PROPERTY.—An assignment for creditors is not void because it withholds the assignor's homestead, even though such homestead exceeds in value the legal homestead.

Appeal from Drew Circuit Court.

MARCUS L. HAWKINS, Judge.

STATEMENT BY THE COURT.

On the 21st November, 1894, R. W. Shelton, of Monticello, made an assignment for the benefit of his creditors. Plaintiff herein attached, and the assignee, Wood, intervened, claiming the attached property under and by virtue of his deed of assignment; and his intervention was sustained in the court below, and plaintiff appealed, relying for reversal of the judgment on three several grounds, to-wit:

"(1) The deed of assignment is void as to certain personal property, which it purports to convey, because a schedule of the property is referred to for description of same, but no schedule, except of notes and accounts, is attached. (2) The deed is void because it provides that the assignee shall sell the property within 120 days from the date of the deed, the statute requiring that the

property be sold within 120 days after the execution of the bond. (3) The purchase of the livery stable property by Kerr at the foreclosure sale made after the assignment, and after the levy of the attachment, crediting the amount of his bid—less the amount paid Miles to lift the first mortgage—on the purchase-money note due from Shelton to Kerr for the town property on which Shelton lived, and for which he held Kerr's bond for title; Kerr's deeding to Shelton a part of his residence property within the constitutional homestead limit as to area, and taking the remainder back, delivering up to Shelton his note, and receiving his bond for title, and taking immediate possession of the residue of the residence property and of the livery stable, and receiving the rents and profits therefrom; and Shelton's failure to include any part of the residence property, or of the rents and profits of the livery stable property, in his deed of assignment,—constitute a fraud against the creditors, and render the deed of assignment void."

*Wells & Williamson* for appellant.

Where a deed of assignment purports to convey all of the debtor's property, and refers to a schedule as thereto attached, and no schedule is annexed, the deed is inoperative. 23 Ark. 1. The personal property did not pass by the deed. A deed of assignment which provides for a sale at a time different from that provided by statute is void. 37 Ark. 150; 47 *id.* 367; 52 *id.* 30. The deed requires a sale within 120 days from the date of the deed, while the statute provides for a sale within 120 days after the execution of the bond. The withholding of property from creditors, even under guise of a homestead, is a fraud, and vitiates the deed. 27 Kas. 375; 25 Pac. Rep. (Cal.) 415; 47 N. W. Rep. (Iowa) 60. The rule in cases of excess of homestead, upon which there is incumbrance, is to charge the incumbrance *pro rata*

against both the homestead value and the excess. 40 Ark. 102; 31 *id.* 91; 57 Mo. 380; 50 Vt. 345; *id.* 700; 33 Cal. 225; 121 Mass. 19; 75 Tenn. 319; 48 Pa. 315.

*Z. T. Wood* for appellee.

1. The description in this case is sufficient without the schedule. 39 Ark. 329, 394; Burrill on Assignments, p. 187.

2. The bond was filed on the same day the deed was executed.

3. A debtor may make a partial assignment of his property. The omission to include a homestead or more than a homestead is not fraudulent, unless done with intention to defraud or mislead.

*Dan W. Jones & McCain* for appellee.

The actual transfer and delivery indentified the property, and supplied the place of a schedule. 124 U. S. 505. But really no schedule was necessary. 39 Ark. 330, which virtually overrules 23 Ark. 1. It was not unlawful for the debtor to try and save his homestead, 39 Ark. 571; 31 Ark. 203.

Sufficiency of description in assignment.

BUNN, C. J., (after stating the facts.) The deed of assignment, in the general description of the personal property, except evidences of indebtedness, sufficiently points out the property to make its identity easily determined. At least, the description is just such as is usual in the cases of tangible personal property, and the notes and accounts are minutely set forth in the schedule attached. Burrill on Assignment, § 138, after reference in the preceding section to cases which sustain the position of appellant's counsel in this case as to reference to the schedule, has this to say: "In the earlier cases in New York this doctrine was applied, but in the later cases the principle of construction, prohibiting a false or erroneous addition from vitiating what had been previously sufficiently and fully described as a portion

of the subject-matter intended to be transferred by the instrument, has been regarded as the correct rule of construction in such cases. Thus, in the case of *Turner* v. *Jaycox*, 40 N. Y. 470, where the transfer was of 'all and singular the lands, tenements and hereditaments situate, lying and being in the state of New York, and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt, and property of every name and nature whatsoever of the said parties of the first part, more particularly enumerated and described in the schedule hereto annexed, marked Schedule A,' and no allusion was made in the schedule to any of the tangible personal property of the assignors, it was held that such property passed under the previous general description." The facts of the case cited in the text, and the facts in the case at bar, render the authority more precisely in point than it is ordinarily possible to find in the search for precedent. To the same effect is the ruling in the case of *Clark* v. *Few*, 62 Ala. 243. So also is the ruling in the case of *Knefler* v. *Shreve*, 78 Ky. 297.

As to time of sale.

This disposes of the first objection raised. The second contention, that the deed provided for the sale of the property within 120 days from the date thereof, instead of "within 120 days from the giving of the bond by the assignee, as required by statute," is not well grounded in this case, because, as a matter of fact, as we gather from the argument of counsel, and inferentially at least from the record, the deed of assignment was executed and filed for record on the 21st November, 1894, and the bond of the assignee was executed and filed on the same day. So the error complained of was at most a mere *lapsus pennæ*, neither injuring any one, nor calculated in any sense to work an injury or to do violence to the statute. Evidently, in this matter, there

was no intention to avoid the directions and mandates of the statute; and so we cannot sustain the second objection.

As to reservation of property.

The third objection rests mainly on the idea that, this being a general assignment of all the debtor's property for the benefit of his creditors, the withholding of the homestead property, especially that portion which was in excess of the legal homestead, was a fraud upon creditors. In so far as this homestead property is concerned (both as to the legal homestead and the excess), this was not an assignment of all the debtor's property, for this property was specifically and expressly reserved from the operation of the assignment. There is no rule compelling one to convey all his property in a deed of assignment. If he pretends to do so, and intentionally does not do so, and thereby misleads and deceives his creditors to their hurt, or any of them, then the case may be different. In this case every act done appears to have been done above board, and the objection cannot be sustained.

We see no objection to the giving of the second mortgage on the livery property to Kerr some time before the assignment, nor to his foreclosure of the same, nor to his taking possession of that property under the mortgage; and the appropriation of the proceeds of the sale under the second mortgage, after satisfying the senior mortgage, and the conveyance of the legal homestead and reconveyance back of the excess of the homestead lot, present no issues for our consideration in this proceeding, if such could be presented in any case.

Seeing no substantial error in the proceedings or judgment of the court below, the same is affirmed.

# MEEK v. PARKER.

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Opinion delivered January 16, 1897.

MECHANIC'S LIEN — EXTENT OF PROPERTY AFFECTED. — Work done and materials furnished for the improvement of two separate tracts of land will not create a lien on both tracts for the aggregate amount thereof, unless the work was done and the materials furnished under an entire contract.

SAME—FOR WHAT ALLOWED.—A mechanic's lien does not exist for the price of steel wrenches or rubber belting which are not in any manner attached to the land, though used in connection with a saw mill or dry kiln, under Sand. & H. Dig., § 4731, giving a lien to every person who shall "furnish any materials, machinery or fixtures for any building, erection or other improvement upon land" under a contract with the owner.

SAME—FOR WHAT ALLOWED.—Wheels and boxes designed and built especially for use in a certain dry kiln, which have no value apart from such kiln, and without which the kiln could not be used without altering its structure, though running on a tramway and not actually fastened thereto, are constructively attached to, and a part of, the building, within the meaning of the mechanic's lien act.

SAME—LEASEHOLD ESTATE.—One who has furnished materials for the improvement of land leased for a term of years under a contract with the lessee is entitled to a lien therefor on the leasehold estate.

SAME—WAIVER.—The right to a lien for materials furnished for the improvement of land is not lost by the acceptance of a note in settlement of the account, unless it was accepted in absolute payment of the debt; nor by a transfer of such note before maturity, where the payee takes it up at maturity.

Appeal from Bradley Circuit Court.

MARCUS L. HAWKINS, Judge.

STATEMENT BY THE COURT.

This action was brought by Parker & Waters against the Carpenter Lumber Company. The plaintiffs seek to establish a lien upon land of said company

for the value of materials furnished and repairs done for and upon buildings and improvements thereon. The property upon which it is claimed that the lien exists consists of two separate tracts of land, over a mile apart. One tract, of an acre and a half, upon which is located a planer and other improvements, is owned by said lumber company. The company held the other tract, of ten acres, under a lease for a term of years, and had located upon it a saw mill, boiler, engine, dry kiln, etc. The lumber company made no defense, but the appellant, J. R. B. Meek, as trustee for the Merchants & Planters Bank of Warren, Arkansas, was, upon his own motion, made a party defendant, and filed an answer. He claimed title by virtue of a deed of trust executed by said lumber company, conveying the property in question to him, as trustee to secure certain indebtedness due from said company to the bank. He denied that plaintiffs had any lien upon said property, as claimed by them. The trust deed under which Meek claimed the property was executed after the materials had been furnished and repairs done by plaintiffs. The finding and judgment was in favor of plaintiffs.

*Wells & Williamson* for appellant.

Section 4731, Sand. & H. Dig., refers solely to fixtures or improvements upon land—real property. It has no reference to personal property, the lien on which is prescribed by sec. 4766. The entire saw mill outfit was personal property, being located temporarily on land held by lease. 56 Ark. 52. Even conceding the saw mills, engines and boilers to be fixtures, yet the belting, wrenches and dry kiln wheels and boxes are not attached, nor realty nor fixtures, so as to bring them within the act. They are mere tools and implements.

2. There was nothing done at the time the affidavit was made. The note paid the account. 32 Ark. 733; 45 *id.* 313; 46 *id.* 552; 48 *id.* 267.

*Z. T. Wood* for appellee.

The word "improvement" is broad enough to include even wrenches. See 1 Bouvier, p. 613. The dry kiln wheels and boxes were a part of the dry kilns, and the latter could not be operated without them. The note was not accepted as payment, nor was the account merged. 48 Ark. 267. The note not having been paid, the rights of appellees existed as before the indorsement, and their lien related back. 32 Ark. 59; 56 *id.* 640; 52 Ark. 58.

Extent of property affected.

RIDDICK, J. (after stating the facts). The only question here is whether, under the facts proved, the plaintiffs are entitled to a lien. If they have a lien, it is not disputed that it takes precedence of the debt secured by the trust deed. The lien claimed by the plaintiffs was for work and materials furnished for improvements upon two separate tracts of lands. It is not alleged or shown that the materials for the separate improvements were furnished under an entire contract. But the court adjudged that the aggregate amount claimed by plaintiffs was a lien upon both tracts of land, and ordered them sold, with the improvements thereon, to pay said debt. The materials furnished for the improvement of one tract of land did not create a lien upon the other tract, when the same were not furnished under an entire contract. It is obvious therefore that the judgment is, to that extent, erroneous.

For what materials a lien allowed.

Among the materials furnished for which a lien is claimed were two steel wrenches, fifty feet of rubber belting, also certain "dry kiln wheels and boxes." It is contended that these articles were not "materials, machinery or fixtures furnished for any building, erection or other improvement upon land," within the meaning of our statute. The wrenches were not in any way attached to the real estate, nor were they a necessary

part of the machinery thus attached. They were only personal property, having no connection with the real estate, and for the price of which no lien attaches thereto. So far as the evidence goes, the same thing may be said of the rubber belting. It is true, there is an itemized account filed, upon which the price of this belting is charged; but there is nothing in the evidence to show that it was furnished for any "building, erection or other improvement upon land, or that it was attached to the land, building, or machinery in any way." There is therefore no evidence to sustain a lien for the price of the same.

Were plaintiffs entitled to a lien for the value of the "dry kiln wheels and boxes furnished by them?" Our statute provides that every person who shall "furnish any materials, machinery, or fixtures for any building, erection, or other improvement upon land, * * * * under or by virtue of any contract expressed or implied with the owner or proprietor thereof, * * * * shall have for his materials, machinery, or fixtures furnished a lien upon such building, erection, or improvement, and upon the land belonging to such owner or proprietor on which the same is situated, to secure the payment of such materials, machinery, or fixtures furnished." Sand. & H. Dig., § 4731.

This statute was not intended to give a lien upon personal property. To entitle the material man to a lien under this statute, the material or machinery furnished must as a rule be attached to or become a part of the improvement or building upon land, or must be used in making such improvement. But the testimony shows that these dry kiln wheels and boxes were designed and built expressly for use in the dry kiln of the lumber company. This dry kiln was a long shed boarded up on both sides and covered over the

top. It had a wooden tramway running through it from one end to the other, upon which these wheels were fitted and made to run. Each pair of wheels were connected by an iron axle. By placing a load of lumber upon two of these axles, supported by wheels, it could be pushed along the tramway into the dry kiln, and, after the lumber became dried, it could be pushed along the tramway to the end of the kiln, from which point it was hauled away in wagons. This dry kiln was constructed especially for the use of these wheels, and could not be used without them, unless one of the sides of the dry kiln was first removed, or in other words without altering its structure. The testimony does not show that these wheels and axles were of a guage used generally in dry kilns, and such as would have a value apart from this dry kiln; but, on the contrary, it shows that they were designed, made and fitted to the tramway of this particular dry kiln, and that, apart from it, they were of little or no value. It is a disputed question as to whether the rolling stock of a railroad should be considersd appurtenant to the same, and a part of the road. But railroads are generally built of a uniform gauge, so that cars and engines of a road may be used on other roads, and have a value apart from the roads upon which they are used. In addition to this, "it is scarcely reasonable to regard as realty property which is one week in New York and the next in California, which changes its locality by many miles every hour." 3 Wood, Railroads (Minor's Ed.), 1961.

But the use of these wheels and axles was confined to the tramway of this particular dry kiln, and we are of opinion that, although not actually fastened thereto, they were, in law, constructively attached, and a part of the building, within the meaning of the act above

quoted. We hold therefore that the plaintiffs are entitled to a lien for the price thereof upon the building and land, to the extent of the ownership of the lumber company. *Central Trust Co.* v. *S. & B. Coal, Iron & Ry. Co.*, 42 Fed. Rep. 106; *Gray* v. *Holdship*, 17 Am. Dec. 680, and note; *Dimmick* v. *Cook*, 115 Pa. St. 573; *Waycross Opera House Co.* v. *Sossman*, 94 Ga. 100. See, also, argument of Matt Carpenter in note to *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 645.

When lien enforced on leasehold estate.

The lumber company held the tract of land, upon which their saw-mill, boiler, engine, dry house, etc., was situated, under a lease for a term of years. It is contended that the improvements for which the materials were furnished, being placed upon leased land, must therefore be treated as personal property, and that no lien attaches to such land for materials furnished for the making of such improvements. But this contention cannot be sustained. "The estates of tenants for terms of years are liable for the improvements made by them upon the demised premises. The lien extends to their entire interest under the lease, but does not affect the reversion of the lessor, unless he, by some act of his own, has obligated his estate." Phillips, Mechanics' Liens, sec. 191; *White* v. *Chaffin*, 32 Ark. 59; *McCullough* v. *Caldwell*, 5 *ib.* 238; *Paulsen* v. *Manske*, 9 Am. State Rep. 532, and note.

Waiver of lien.

The last item upon the account of appellees was furnished April 2, 1894. The account not being paid on that day, the appellees accepted the note of the lumber company payable in thirty days in settlement of said account. They afterwards transferred this note to J. M. Bailey, but, the note not being paid at maturity, the appellees repaid to Bailey the amount of the note, and he re-assigned it to them. It is contended that this note was accepted in payment of the account, and that the

lien was thus waived. One of the appellees testified that, the account being due and unpaid, this thirty-day note "was accepted in payment" of the same. But this did not necessarily mean that the note was accepted in absolute payment of the account. "In those states where the common law prevails," says Mr. Phillips, "a note, unless it is taken in payment absolutely, will not discharge a mechanic's lien. It serves but to liquidate the demand, and leaves the party to seek his satisfaction upon the original contract." Phillips, Mech. Liens (3d Ed.), sec. 276. The witnesses did not say that the note was taken in absolute payment of the account, nor is this shown by the circumstances. The court, we think, properly held that the taking of this note was only for the purpose of liquidating the account, and did not affect the lien. The note itself purports to be only a promise to pay, not a payment, and, in the absence of evidence to show that it was taken in absolute payment of the account, it must be treated as only a conditional payment. *Weymouth* v. *Sanborn*, 43 N. H. 171, 80 Am. Dec. 144; *Berry* v. *Griffin*, 10 Md. 27, 69 Am. Dec. 123; *Glenn* v. *Smith*, 20 Am. Dec. 452. Our own decisions are not in conflict with this ruling, but, in our opinion, support it. *Brugman* v. *McGuire*, 32 Ark. 733; *Akin* v. *Peters*, 45 *ib.* 313; *Malpas* v. *Lowenstine*, 46 Ark. 552; *Henry* v. *Conley*, 48 *ib.* 267. Nor did the transfer of the note operate as a waiver of the lien. The only effect of such transfer was to suspend the right to sue until the note was returned to the appellees unpaid. The note was in the possession and control of the appellees at the time the suit was brought, and, before entering judgment, the court should have required the appellees to file said note that the same might be surrendered or cancelled; but, as no complaint was made on this point, we suppose that this was done.

It appears to us that the plaintiff is entitled to a judgment and lien upon the property for some amount,

but the record is not sufficiently full for us to enter a judgment here. For the error in rendering a joint judgment against the two tracts of land, and for the other reasons given, the judgment is reversed for a new trial, in accordance with this opinion.

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## RHEA *v.* BAGLEY

Opinion delivered January 23, 1897.

ADVANCEMENT—CONVEYANCE TO CHILD.—A conveyance of land to minor at the request of their father who purchased it constitutes an advancement, and they become entitled to possession of it from the time of the delivery of the deed.

DEED—ACCEPTANCE.—The acceptance of a deed to minors by their father is a sufficient delivery, the conveyance being beneficial to them.

PARENT AS NATURAL GUARDIAN—LIABILITY FOR RENTS.—A father who collects rents of land purchased and paid for by him, but conveyed to his minor children at his request, is liable to account to them therefor, although the statute (Sand. & H. Dig., § 3568) gives to him, as natural guardian, the custody of their estate, and provides that "when such estate is not derived from the person acting as guardian, such parent shall give security and account as other guardians," as the statute does not repeal so much of the common law as gave to the minor child the right to the rents and profits arising from property given him by his parents.

Appeal from Lawrence Circuit Court, Eastern District.

JAMES W. BUTLER, Judge.

*J. K. Gibson* and *J. M. Moore* for appellant.

The effect of the conveyance was to vest the title in the minors, and they acquired a present interest. 45 Ark. 481; 48 *id.* 17; 51 *id.* 530; 52 *id.* 188. On the execution and delivery of the deed to the father, the children became entitled to the rents and profits, and the

father was accountable as their natural guardian during his life for such rents, etc., and his estate is liable. 15 Grat. 513; 34 Ala. 581; 64 Ga. 768; 7 Cow. 36; 8 Fla. 144; 7 Wend. 354; 1 Blackstone's Com., marg. p. 461. Where a father makes a gift to an infant, and takes possession, or holds as natural guardian, his possession is that of the infant. 3 Mon. 35; 7 *id.* 97; 4 Greene (Ia.), 211; Thornton on Gifts, sec. 174. The rule is the same whether the gift is from the father or from a stranger. 8 Ark. 107; 10 *id.* 224.

*Chas. Coffin* for appellee.

All the circumstances show that an advancement was intended to take effect on the father's death. As the natural guardian, the father was not liable to an accounting for rents. Sand. & H. Dig., sec. 3568. The cases cited by counsel all refer to foreign acquisitions, or to estates acquired from sources other than the natural guardian, except 64 Ga. 768, which is not in point.

BATTLE, J. Moses B. Rhea purchased of Mrs. Mary A. Boas two lots, and paid for the same. She conveyed them, at the request of the purchaser, to his two minor sons, James M. and W. P. Rhea, by deed bearing date the first day of March, 1887, the father "remarking at the time that he gave the property to the boys." The sons having no curator or guardian, the deed was delivered to the father, and he took "charge" of the lots, "and collected all the rents arising from the same up to the date of his death," which occurred in March, 1893. After his death, James M. Rhea, and G. A. Henry, as guardian of W. P. Rhea, presented an account against his estate for the rents collected by him, amounting to $2,511, properly sworn to, which was disallowed by the probate court. On appeal to the circuit court, it was admitted by all parties as evidence

that the amount of rents collected by the deceased in his lifetime was substantially the amount claimed in the account presented. The claim was disallowed by the circuit court, and the plaintiffs appealed.

Effect of conveyance to child.

The conveyance of the lots to the two minor sons, at the request of the father, was an advancement. The title vested in them, and they became entitled to the possession of the lots from the time of the delivery of the deed to their father. *Robinson* v. *Robinson*, 45 Ark. 481; *Bogy* v. *Roberts*, 48 Ark. 17; *Eastham* v. *Powell*, 51 Ark. 530; *Kemp* v. *Cossart*, 47 Ark. 62; *White* v. *White*, 52 Ark. 188.

Acceptance of deed by father.

The acceptance of the deed by the father for the sons, they being minors, was a sufficient delivery, the conveyance being beneficial to them. *Eastham* v. *Powell*, 51 Ark. 530; Tiedeman, Real Property, sec. 814; Thornton, Gifts and Advancements, secs. 174 and 175; 2 Jones, Real Property, sec. 1276.

Liability of father for rents.

But it is said by the appellee that "Moses B. Rhea purchased the property, and paid for it, and took the deed in the names of his two minor sons, intending for it to take effect as an advancement at the time of his death, and that he never intended for them to enjoy the rents of the property during his life time; and his intentions were manifested by his actions." There is no evidence of any interest in the lots being conveyed to or retained by the father. But it is said that he remained in possession of the lots until his death, and erected a brick house on them. If this be true, it does not show an intention that any part of the estate or interest conveyed to the sons should not be an advancement.

At one time it was held that the father's remaining in possession, making improvements, and enjoying the rents after his purchase, were sufficient to show that no advancement was intended. That doctrine is now exploded. *Bogy* v. *Roberts*, 48 Ark. 17. In *Kemp* v.

*Cossart*, 47 Ark. 62, a father, as the agent of his son, purchased land, and caused it to be conveyed to the son, and paid a part of the purchase money, the son paying the remainder. The father took possession, and made improvements on it, at the same time representing that the land was his son's. The court said: "The natural and legal presumption is, the improvements were made by him as an advancement to his son."

But it is said that Moses B. Rhea was the natural guardian of the two sons during their minority, and as such was not accountable for the rents of the property conveyed to them. So far from this being true at common law, he had no right to intermeddle with the ward's property. Schouler's Domestic Relations (3d Ed.), sec. 285; 2 Kent's Com., marg. p. 220. It necessarily follows that he was not entitled to the rents and profits which accrued from the same.

The statute upon this subject provides: "In all cases not otherwise provided for by law, the father while living, and, after his death, or when there shall be no lawful father, then the mother, if living, shall be the natural guardian of their children, and have the custody and care of their persons, education and estates; and, when such estate is not derived from the persons acting as guardian, such parent shall give security and account as other guardians." But it does not repeal so much of the common law as gave the minor child the right to the rents and profits arising from property given him by his parents. As to such property, the father is only entitled to the care, and is relieved from the necessity of giving security and accounting to the probate court. The reason for this exemption is that, having given the property to the child, the presumption is, he will have regard and consideration enough for the interest of the child to take care of the property and its rents and profits, and honestly account for the same.

If appellants had been of age at the time Mrs. Boas executed the deed to them, they would certainly have been entitled to the possession of the lots and the rents and profits of the same, and could have held their father and his estate liable for the rents collected and converted by him. *Persoll* v. *Scott*, 64 Ga. 767. Did their minority withhold from them any of these rights? We think not.

We have disposed of the reasons given or shown why the claim of appellants should not be allowed, and find that the circuit court erred in disallowing it.

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

BUNN, C. J., (dissenting.) The sole question in this case is whether or not a father who made a gift of real estate to his minor children can be called to account for the rents and profits of the same accruing during their minority. It is needless, therefore, to discuss the several propositions made by the appellants, which, primarily at least, only point to the nature and character of the title by which the minor children hold the corpus of the estate—the subject of the gift. Thus, it cannot be denied that the conveyance of the vendor made to the sons at the instance of the father vests the title in the sons *in præsenti*. The cases of *Robinson* v. *Robinson*, 45 Ark. 481, *Bogy* v. *Roberts*, 48 Ark. 17, *Eastham* v. *Powell*, 51 Ark. 530, and *White* v. *White*, 52 Ark. 188, in so far as the issues made therein, announce correct principles of law; that is to say, that a gift from a father to his children is presumptively an advancement, rather than a trust or other conditional provision, and also that ordinarily a parol trust in opposition to the terms of the deed cannot be established by extraneous proof, although this principle is not without modification according to the facts in some cases. Sections 3480

and 3481, Sand. & H. Dig.; *Gainus* v. *Cannon*, 42 Ark. 503; *Bland* v. *Talley*, 50 *ib.* 71.

Nor is it necessary in this proceeding to cite authorities to establish a legal truism, such as that in a contest between the creditors of the father and his minor children to subject property given by him to them, of which he retains possession, to the payment of his debts, his possession is that of the children, and is therefore no badge of fraud, as is sometimes the case where one gives or sells property to a third party and retains possession. This was the only point in the cases of *Kenningham* v. *McLaughlin*, 3 T. B. Mon. 30; *Forsyth* v. *Kreakbaum*, 7 *id.* 97; *Young* v. *Gammel*, 4 Greene (Ia.), 211; *Dodd* v. *McCraw*, 8 Ark. 107; and *Danley* v. *Rector*, 10 Ark. 224,—cited by counsel in support of the doctrine. In the cases of *Evans* v. *Pearce*, 15 Grattan, 513; *Nelson* v. *Goree's Administrator*, 34 Ala. 581; *Persoll* v. *Scott*, 64 Ga. 768; *Jackson* v. *Combs*, 7 Cowen, 36; *Linton* v. *Walker*, 8 Fla. 144; *Hyde* v. *Stone*, 7 Wend. 354, the conveyances to the children were from third persons, and constitute in no sense gifts from the father or mother, acting at the time as natural guardian, and therefore, from the standpoint which I claim to discuss the case, these authorities have no application.

Our statute defining who shall be natural guardians of minors, and the extent of their authority as to the persons and estates of their wards, is section 3568, Sand. & H. Dig., which reads as follows, to-wit: "In all cases not otherwise provided for by law, the father while living, and, after his death, or when there shall be no lawful father, then the mother, if living, shall be the natural guardian of their children, and have the custody and care of their persons, education and estates; and when such estate is not derived from the person acting as guardian, such parent shall give security and account as other guardians." And section 3580 reads: "Where

a minor shall be entitled to, or possessed of, any estates not derived from the parent who shall be the natural guardian at the time, and it shall be suggested to the court that such parent is incompetent to take care of such estate, or is mismanaging or wasting the same, the court may issue a notice to such person to appear before it at a stated time, and show cause why a curator shall not be appointed or chosen; and if, on due notice, no sufficient cause be shown, the court shall appoint a curator for the management of such estate for the minor, if under fourteen years of age, or, if over that age, admit the minor to choose one in the same manner and subject to the same restrictions as provided for the choice or appointment of guardians for minors over that age." These sections were portions of the act approved April 22, 1873, and materially modified the pre-existing statute enacted and approved February 14, 1838, and which was simply a reaffirmance of the common law rule on the subject, so far as our customs and state of society would permit, and read as follows, to wit: "The father shall be the natural guardian of his child, shall have the care of his person and education, but in no case shall he have the care and management of his estate, unless he be appointed by the court for that purpose, when he shall give bond and security in the same manner as other guardians." Section 4, chapter 72, Revised Statutes.

It will be seen that the act of April 22, 1873—the law now in force—makes the father primarily the natural guardian of his children, and confers upon him, as such, the custody and care of their persons, their education and their estates, with this condition as to their estates: that if the same are derived from others than the person who is the natural guardian at the time, then such natural guardian, in order to be authorized to take the custody and management of the estate, must

first give security (bond), and afterwards account as other guardians; and the natural inference is that, on failure to give such security in such case, the natural guardian would be deprived of his otherwise lawful right and privilege to control the estate of his child. The converse of the proposition that he shall give security and account when the estate is not derived from himself is also true; that is to say, where the estate of his child is derived from himself, he is not required either to give security or to render an account. This, of course, does not apply to the corpus of real estate belonging to the child, for that is not a thing in itself to be secured by bonds and other money obligations.

Section 3580, Sand. & H. Dig. (being a portion of the act of 1873), negatively, at least, denies to the child, or any one acting for him, the right to move the proper court to appoint a curator of his estate in the hands of his natural guardian, and which was derived from him, even where he is guilty of mismanagement or waste. In respect to the property derived from him, the father, for instance, acting as natural guardian, has the unquestioned right to act as natural guardian, as long as he is *sui juris* as to the matters generally, and is not removable from office except for natural inability to act. He is not chargeable with mere mismanagement, or even waste, in respect to such property of his child as he has given him; nor is he required to give bond and security to indemnify his ward in such case for any loss that may occur by reason of his control and management of the property. The statute goes still further (as if in anticipation of the contention that, after all, being relieved of the necessity of giving bond and security does not relieve him of personal liability), and provides that he shall not be required to account for his management of the chattels of his ward derived from himself.

The very change in the law as it stood in 1838, by the act of April 22, 1873, but emphasizes the doctrine I have endeavored to present,—that there is no law by which a natural guardian can be held liable as the father is sought to be held in the case at bar. There is no question as to the constitutionality of the statute, as it now stands, nor does it contravene any principle of natural or inalienable right, and it has but one meaning, so far as I can see.

Where the father in his lifetime was not liable, his estate after him, of course, is equally free from liability. I think the case should be affirmed.

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## BERRY v. STATE.

Opinion delivered January 27, 1897.

EVIDENCE—DYING DECLARATION.—A statement by a dying person that he was poisoned by defendant, which he knew because defendant gave him a drink of whisky that tasted nasty, and because he shortly afterwards got sick, is the expression of an opinion, and inadmissible as a dying declaration.

Appeal from Lee Circuit Court.

H. N. HUTTON, Judge.

STATEMENT BY THE COURT.

The appellant, Lee Berry, was convicted of murder in the first degree, committed by poisoning; and appealed to this court.

On the trial of the cause, Dr. E. V. Chandler, a witness for the state, testified: "On the night of the 26th of last October I was called, in my professional capacity, between 8 and 9 o'clock, to visit Ed. Marsh" [the person alleged to have been poisoned]. "I reached his bedside about 9 o'clock, * * * * and found him

lying partly on the bed and partly on the floor. * * * When I got to him, his mind was perfectly clear, and I asked him what was the matter. He replied that he knew he was going to die, and that Lee Berry, the defendant, had given him a drink of whisky, about an hour before, which tasted 'nasty' and that he knew it contained poison because it tasted nasty, and because he got sick shortly afterwards, and that Lee Berry 'had given him his dose' in that drink of whisky." Here counsel objected to that part of the witness' testimony, as a part of the deceased's dying declaration, wherein he stated that the deceased said that defendant had given him his dose in that drink of whisky, and that he knew it contained poison. In each statement of the witness of the dying declaration of the deceased, he would include the same statement that deceased said that the defendant had poisoned him.

The court asked the witness, before passing upon the objection, if that statement of the deceased—that he was poisoned by the defendant—was before or after the statement of the deceased that he knew that he was going to die. The witness answered that it was after such statement. The court then overruled the objection, and the defendant excepted.

The same statement of the dying declaration of the deceased was repeated in the testimony of other witnesses, and objected to by defendant, as above set out, and, the objections being by the court overruled, the defendant each time excepted.

*Jas. P. Brown* for appellant.

No dying declarations are admissible, except in regard to such matters as the deceased could legitimately have testified about if he had got well, instead of having died. 1 Greenl. Ev. sec. 159, and note a. Opinions or beliefs are not admissible as dying declarations. *Ib.*

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

More latitude is given to the admissibility of dying declarations than to the evidence of a witness in testifying. 1 Greenl. Ev. sec. 161a. Its admissibility must be confided very much to the discretion of the court. 50 Am. Dec. 727. The statement that the whisky contained poison was not an inference or opinion, but a statement of a fact. 61 Miss. 161; 5 Tex. App. 141; 7 N. Y. 159; 35 Pac. Rep. 417; 15 So. Rep. 264; 36 S. W. Rep. 256; 29 At. Rep. 536.

HUGHES, J. (after stating the facts.) It appears from the declaration of the deceased, while *in extremis*, that the defendant had poisoned him, that it was made not from a knowledge of the fact which he had, or could have had, and that it was an expression of his opinion merely, based on the facts that the whisky which had been given him by the defendant tasted "nasty," and made him sick. This evidence was incompetent, and was calculated to prejudice the defendant. "A mere expression of opinion by a dying man is not admissible as a dying declaration, and it is immaterial whether the fact that the declaration is mere opinion appears from the statement itself or from other undisputed evidence, showing that it was impossible for the declarant to have known the fact stated." *Jones* v. *State*, 52 Ark. 347.

The declarations of the deceased are admissible only as "to those things to which he would have been competent to testify, if sworn in the cause. They must, therefore, in general speak to facts only, and not to mere matters of opinion." 1 Greenleaf, Ev. sec. 159; *State* v. *Williams*, 67 N. C. 12; *Whitley* v. *State*, 38 Ga. 70.

For the error in admitting the statement that deceased made—as part of his dying declaration—that defendant poisoned him, the judgment is reversed, and the cause is remanded for a new trial.

## SHORT v. PULLEN.

Opinion delivered January 23, 1897.

USURY—AGENT'S BONUS.—Where a husband as agent makes a loan of his wife's money at the highest legal rate of interest, and in addition takes a commission for himself without her knowledge, the loan is not usurious.

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

This is a suit on a promissory note. The defense is usury. The proof shows that appellees applied to one John C. Short, husband of the appellant, for the loan of four hundred and fifty dollars. Short did not have the money at the time, but informed appellees that he could get the money for them. The terms of the loan, as agreed upon between Short and appellees, were that appellees would have to pay 12½ per cent. for the use of the money. It was agreed between Short and appellees that they should give two notes, one for $450 with interest at ten per cent. per annum from date and one for $22.50, the amount of interest above ten per cent. The latter note was to be paid in lumber. This occurred in Arkansas. After this, Short returned to Illinois, where his wife lived, and induced her to let appellants have $450 at ten per cent. interest. Short and appellees appointed one Duncan to consummate the loan. Short sent to Duncan a check for $450 and two notes for appellees to sign. Duncan delivered the check to appellees, upon their signing the notes. One note was for $450 at ten per cent. per annum from date payable to appellant. The other was for $22.50, to be paid in lumber, and was made payable to John

C. Short. The note payable to appellant was sent to her by mail, and the other note was sent to John C. Short. The appellant (Mrs. Short), the proof shows, had no knowledge or information that John C. Short had contracted for a bonus or any greater rate of interest than ten per cent. and, according to her evidence, which is uncontradicted, did not know that appellees had given him any note. The proof shows that it was not "the intention of appellant to charge, take or receive of appellees more than ten per cent." The case was tried by the court, sitting as a jury, who found in favor of appellees, and rendered judgment accordingly.

*J. C. Head* for appellant.

There must be intent to take usury. The usury must be *proved.* 2 Rice, Ev. sec. 549. A commission taken by a husband for himself beyond the legal rate of interest, without the knowledge of the wife, or her consent, does not make the loan usurious. 33 Am. Rep. 140. A bonus taken by an agent without the knowledge or consent of the principal is not usury. 51 Ark. 548; 1 B. M. 534; 54 Ark. 578; 59 *id.* 366. The proof of usury is on defendant. 57 Ark, 256; See 116 U. S. 98.

WOOD, J., (after stating the facts.) The judgment is contrary to the law and evidence. *Gregory* v. *Bewly*, 9 Ark. 22; *Baird* v. *Millwood*, 51 Ark. 548; *Vahlberg* v. *Keaton*, *id.* 534; *Scruggs* v. *Scottish Mortg. Co.*, 54 *id.* 572; *May* v. *Flint*, 54 *id.* 578; *Blackburn* v. *Hayes*, 59 *id.* 366; *Holt* v. *Kirby*, 57 Ark. 256.

Reversed and remanded for a new trial.

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# FOSTER v. PITTS.

## Opinion delivered January 23, 1897.

MALICIOUS PROSECUTION—BURDEN OF PROOF.—In a suit for malicious prosecution, the plaintiff must prove both malice and the want of reasonable cause.

MALICE DEFINED.—Malice is any improper or sinister motive for instituting the suit. It need not spring from any spirit of malevolence, nor be prompted by any malignant passion.

PROBABLE CAUSE DEFINED.—To constitute probable cause for a suit in attachment, it must appear, not only that there were reasonable grounds for the belief, but also that defendant actually believed, that there were grounds for the attachment.

PUNITIVE DAMAGES—ACT OF AGENT.—Where a creditor authorizes his attorney to protect his claim in case of danger, and the attorney brings an attachment suit against the debtor maliciously and without probable cause, the creditor is liable for actual damages only, but not for primitive damages, unless, with knowledge of the facts, he has ratified the attorney's action.

SAME—INSTRUCTION DISAPPROVED.—An instruction which assumes the existence of elements of actual damages not in proof or authorizes the jury to assess punitive damages in such sum as, in their judgment, the plaintiffs are entitled to, without basing the amount on the evidence, or limiting it to the amount claimed in the complaint, is erroneous.

EVIDENCE—VALUE OF PROPERTY.—Where an attachment creditor has removed property from the state, the test for determining whether he has left enough to satisfy the claims of his creditors is to ascertain what the property remaining at the time of the attachment will bring at its fair market value, not what it will bring by process of law.

SAME.—Evidence of what per cent of notes and accounts could be collected in one or two years after an attachment suit was begun does not show their market value at the time of the attachment.

INSTRUCTION—WHEN NOT PREJUDICIAL.—Where appellant's attorney, in argument, was allowed to give an instruction a construction which deprived it of any prejudice to appellant, saying that if such construction was not right the court would correct him, and no correction was made, appellant cannot complain of the instruction, though without such construction it might have proved misleading.

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

*Chas. E. Warner*, *Ed. H. Mathes*, *J. B. McDonough* and *Rose*, *Hemingway & Rose* for appellant.

1. When an attachment is sued out under an honest and reasonable belief that plaintiffs are entitled to it, then they act without malice, and are not liable. 98 U. S. 195, 196; 111 Mass. 497, 498. One who acts honestly is not guilty of malice, though he may not act reasonably. Webb's Pollock on Torts (Enl. Am. Ed.), p. 392. This is not in conflict with the principle that malice may be presumed from want of probable cause. The presumption is not one of law, but of fact merely. Cooley, Torts, p. 185 and n. 3; 98 U. S. 187. Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive. Cooley, Torts, p. 185. And hence legal malice is not made out where an honest motive is shown. 4 Fed. Cases, 2170; S. C. Taney, 244; 98 U. S. 187.

2. What facts constitute probable cause is a question of law for the court; whether they are proved is a question of fact for the jury. 1 Wend. 345; 58 Mo. App. 35; 33 Minn. 192; 17 Fed. Cas. 993; 18 W. Va. 35; 39 Mo. 40; 98 U. S. 187; 11 Fed. Rep. 129; 1 Greenl. Rep. 135; 3 Allen, 393; 55 Fed. Rep. 217; 55 N. W. Rep. 45; 21 At. Rep. 556.

3. The seventh instruction given is full of errors in defining the measure of damages. (1) There was no proof in regard to "injury to the goods." 58 Ark. 195. (2) It did not restrict the recovery for injury to credit and business standing to the damage shown by the evidence to have resulted in that particular, nor to the amount claimed in the complaint, and there was no proof of such injury. (3) It stated that plaintiffs were entitled to recover for "*all expenses*" they were

put to by the attachment. 78 Mo. 296. (4) It left the assessment of vindictive damages to the unrestricted pleasure and free will of the jury, and submitted as an element of damage loss of time, which was not alleged.

4. A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the person accused is guilty of the offense charged, constitutes probable cause. 70 Ill. 408; 53 Ill. App. 53; 58 Mo. App. 37; 16 Minn. 161; 33 Minn. 189; 17 Fed. Cases, 993; 55 Fed. Rep. 217; 55 N. W. Rep. 45; 21 At. 557. See also 4 Cush, 238-9; 111 Mass. 497-8; 1 Greenl. 135; 57 Wis. 510.

5. It was error to admit testimony as to what could be made on notes and accounts in from one to two years. 34 S. W. Rep. 39. The true test was their market value.

6. Authority to act for another in business implies only authority to do lawful acts. 57 Wis. 510; 51 Ark. 545; 54 *id.* 572; 9 Johns. 118; 83 N. Y. 525-6.

7. Foster & Company are not liable for the malicious acts of their attorney, unless adopted or ratified by them. 2 Addison, Torts, sec. 872; 2 Hilliard, Torts, 411; 35 Ill. App. 182; 27 *id.* 410; 3 *id.* 41; 7 Ala. 628-9; 69 *id.* 378; 73 Ala. 195; Taney's C. C. Dec. 244; 4 Fed. Cas. 761; 69 Iowa, 472-3; Drake, Attachment, p. 182; 43 Tex. 50; 57 *id.* 465; 32 S. W. Rep. 142; 9 Johns. 118; 1 B. Mon. 96; 63 N. Y. 181; 147 U. S. 101; *ib.* 109, 110. This last case settles the law that while the principal cannot escape liability for the tort of his agent merely because it was wilful, he cannot be held, because of its wantonness, for more than actual damages, unless he participated in the evil intent. See 9 Heisk. 52; 42 Wis. 654; 56 N. Y. 44; 10 Wis. 388; 57 Wis. 510, 577; 3 R. I. 88; 26 At. Rep. 193, 196; 62 Fed. Rep. 469, 480; 16 Mich.

447; 21 Vroom, 481. There is no proof of injury to credit. 9 So. Rep. 818. The verdict is excessive.

*Oscar L. Miles* for appellees.

1. If an attachment is sued and levied without probable cause, and afterwards, before the institution of a suit for damages for the wrongful and malicious suing out of same, the attachment proceeding terminates in favor of defendant, a suit for malicious prosecution will lie against the principal. 14 Am. Dec. 600; 35 Md. 196; 36 *id.* 255; 45 *id.* 204; 16 U. S. 765; 25 *id.* 116; 13 *id.* 1036; 33 Ark. 316; 32 *id.* 770, 170; 62 Mo. 56. Mere suspicions, without any reasonable ground for believing them to be founded in fact, will not amount to probable cause. Real belief and reasonable grounds must unite to afford a justification. 12 Am. Dec. 265; 12 Pick. 324; 38 Me. 523; 52 *id.* 502; 111 Mass. 492; 66 Me. 202, 204.

2. The attorney who made out the affidavit and brought the suit maliciously and without probable cause, at a time when he has general authority to act for his client, is jointly liable. 56 Mo. 89; 36 Cal. 262; 35 Ala. 349; 5 B. Mon. (Ky.) 544; 7 Blackf. (Ind.) 234; 37 Md. 369; 38 Am. Dec. 228; 35 *id.* 204; 36 *id.* 583. The plaintiff has the means of knowing personally, or of being well advised whether he has probable cause for instituting the suit. 15 Ark. 355. See 32 *id.* 770, 170; 33 *id.* 316; 37 *id.* 162, for the reason of the rule that if there is no probable cause the jury are justified in presuming malice.

WOOD, J. This is a suit for malicious attachment. The complaint alleges in substance, that the firm of Pitts & Zeiler, merchants, owed the firm of J. Foster & Company the sum of $613.85, and that J. Foster & Company and Ed. Mathes, their attorney, maliciously and without probable cause had suit brought, and an attachment sued out and levied upon the property of

Pitts & Zeiler, which was dismissed, and terminated in their favor. They allege and pray for damages in the sum of $5,000 as follows: $1,000 for loss of business, $3,000 for injury to credit, $200 for expense of defending the suit, and $800 punitive. The answer denied all the material allegations of the complaint. The trial resulted in a general verdict for $3,000, and judgment accordingly, against all of the appellants.

Pitts & Zeiler, a firm of merchants at Webb City, in Franklin county, owed the firm of J. Foster & Company, jobbers, composed of Foster, Berry and Clarkson, the sum of about $600, about $400 of which was due the 1st of January, 1894. Foster sent the claim of his firm to Ed. Mathes, an attorney at law, living at Ozark, in Franklin county, a short distance from Webb City. Foster's instructions to Mathes were: "In case of any danger protect us." On the 1st of January, 1894, Mathes, without the knowledge of Foster & Company, brought suit, and had an attachment issued and levied upon a stock of merchandise of Pitts & Zeiler. Three days thereafter, Foster had Mathes to dismiss the suit, at Foster's cost.

Upon the questions of malice and want of probable cause, we would not disturb the verdict of the jury upon the evidence as to Mathes, and it is unnecessaay to set it all out as it affects him. Such of it as may be pertinent in passing upon the law will be recited.

Burden of proof in malicious prosecution.

1. "Malice" and the "lack of probable cause" are not convertible terms. Neither follows as a legal presumption from the other. The jury may infer malice, as a fact, from proof of want of probable cause; but they cannot infer a lack of probable cause from proof of malice. Both must be proved. Honesty of purpose precludes malice. Malice is any improper or sinister motive for instituting the suit. It need not spring from

Malice defined.

any spirit of malevolence, nor be prompted by any malignant passion. *Lemay* v. *Williams*, 32 Ark. 166; Cooley, Torts, p. 185; *Spengler* v. *Davy*, 15 Grat. 381; *Burkhart* v. *Jennings*, 2 W. Va. 242; *Commonwealth* v. *Snelling*, 15 Pick. 337; *Mitchell* v. *Wall*, 111 Mass. 492; *Stewart* v. *Sonneborn*, 98 U. S. 187; *Williams* v. *Hunter*, 14 Am. Dec. 597, note; *King* v. *Colvin*, 11 R. I. 582; *Bozeman* v. *Shaw*, 37 Ark. 160; *Frowman* v. *Smith*, 12 Am. Dec., 266, notes; Jaggard, Torts, 614–26.

Probable cause defined.

Many authorities hold that probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that there were grounds for the attachment. *Davie* v. *Wisher*, 72 Ill. 262; *Barrett* v. *Spaids*, 70 Ill. 408; *Munns* v. *DeNemours*, 17 Fed. Cas. 993; and other authorities cited in appellant's brief. Others hold that belief and reasonable grounds must unite to constitute probable cause. *King* v. *Colvin*, 11 R. I. 584; *Spengler* v. *Davy*, 15 Grat. 381; *Burkhart* v. *Jennings*, 2 W. Va. 242; Newell, Malicious Pros. p. 252; *Frowman* v. *Smith*, 12 Am. Dec. 266, and note. Cooley on Torts, * pp. 183, 211, and note.

The distinction may be more metaphysical than real. But we approve the latter rule. Under it, one, when sued for malicious attachment, could not say: "True, when I sued out the attachment, I had no knowledge of facts which would make a cautious person believe that the attachment would be sustained, and I did not so believe, but since that time facts have come to my knowledge which, had they then been known by me, would have justified such belief. Therefore there was probable cause." *Spengler* v. *Davy*, *supra*. In civil actions no public interest is involved. "The plaintiff has the means of knowing personally, or being well advised" of the facts (*Sexton* v. *Brock*, 15 Ark. 345); and it is but just that he should be required to believe

the facts, as well as that the facts themselves should exist, constituting probable cause. Cooley on Torts, p. 211. In this view, wherever there is a dispute about the facts, it is proper for the court to submit the whole question to the jury, telling them what facts constitute probable cause, and leaving them to determine whether such facts are established. *Chrisman* v. *Carney*, 33 Ark. 316. The court's charge upon malice and probable cause, as embodied in its fourth, thirteenth and fifteenth instructions, is in harmony with the law as announced *supra*. The fifth is not clearly expressed, and may as well have been omitted. But, taken in connection with the others, it could not have been misleading. The fourth, thirteenth and fifteenth given by the court present substantially the same question as was asked by appellants in their fifth and eighth requests, which the court refused. Therefore, if the instructions given were erroneous, appellants should not be heard to complain.

Liability of principal for acts of agent.

2. The court, in the latter part of its fourteenth instruction, told the jury that "if J. Foster & Company, previous to the bringing of the attachment suit, left their accounts with E. H. Mathes, as their attorney, with authority to bring an attachment suit against Pitts & Zeiler, without first themselves being informed of the ground thereof, and Mathes thereafter brought the attachment suit maliciously and without probable cause, both Mathes and J. Foster & Company are liable." When an agent of an individual acts maliciously, he is presumed to act without authority; and, while the agent is liable, the principal is not, for punitive damages, unless it appear that he aided, adopted, or ratified the malicious act of the agent with full knowledge of the facts. *Kirksey* v. *Jones*, 7 Ala. 622; 1 Shinn, Att. sec. 374.

Mathes was acting within the scope of his authority as an attorney at law (*Kirksey* v. *Jones*, *supra*), and of the authority given him expressly by his principals—to "protect in case of trouble"—when he sued out the attachment, although by so doing, "if there was no danger," he was abusing his authority by going contrary to instructions. Therefore, his principals are liable to appellees for any actual damages growing out of the attachment. *Railway Co.* v. *Hackett*, 58 Ark. 381; *Lake Shore, etc., Ry. Co.* v. *Prentice*, 147 U. S. 101; and authorities cited. There is no proof of any malice upon the part of J. Foster & Company. They knew nothing of the attachment until it had been served, and, with the first opportunity, dismissed same at their cost. The verdict was general. It is impossible to tell how much as punitive damages entered into it. But the jury were authorized by it to assess such damages, and it is reasonably certain from the amount of their verdict, under the proof, that punitive damages were assessed. The part of the instruction quoted is erroneous and prejudicial as to J. Foster & Company. It follows also that the verdict as to them was contrary to the court's eleventh instruction, as well as the latter part of the fourteenth which we have set out.

Instruction as to damages disapproved.

3. The court's seventh instruction was as follows: "The measure of damages in this case, if the jury find for plaintiffs, is that they are entitled to recover *for injury to the goods, * * * and for all expenses to which they have been subjected by reason of the attachment*, and also such further sum as in the judgment of the jury plaintiffs are entitled to as vindictive or exemplary damages * * * But plaintiffs are not entitled to exemplary damages unless they sustained actual damages. And by actual damages *is meant injury to plaintiff's goods; * * * * or were subjected to expenses in loss of time* or payment of money in preparing their

defense to the attachment suit. But if any one of these elements of actual damages occurs, then vindictive damages may also be allowed, if the jury think the plaintiffs are entitled thereto from the evidence." The instruction should have limited the damages, in case of recovery, to the various elements thereof in proof, and to amounts justified by the evidence, and within the sums claimed for each element or item of damage alleged. It does not do this. The elements of "injury to plaintiff's goods, and loss of time in defending attachment suit," which it introduces, are foreign to the proof. Yet the instruction assumes the existence of these elements of damage, and requires the jury to consider them, if they find for plaintiffs. Any verdict as to these would be abstract, and the amount of damage therefore discretionary and speculative. *Railway Co.* v. *Barry*, 58 Ark. 198. There is no guide or limitation as to the amount of damages to be assessed. Where a verdict is general based upon a complaint claiming various elements of actual damages in certain amounts, and also for punitive damages in a certain amount, an instruction which allows the jury to assess vindictive damages in such "sum as in their judgment plaintiffs are entitled to" is erroneous. Their judgment as to the amount should be based upon the evidence, and in no event should the amount be above that laid in the complaint. Unless thus restricted, their judgment might approve an amount in excess of that claimed, and one that might be oppressive.

Evidence as to value of property.

4. The true test, in determining whether an attachment debtor, who has shipped property out of the state, has enough left to satisfy the claims of his creditors is to ascertain whether the property remaining at the time of the attachment, at its fair market value, is sufficient. *Nesbit* v. *Schwab Clothing Co.*, 62 Ark. 22; S. C. 34 S. W. Rep. 79. Evidence as to what per cent. of notes and

accounts could be collected in one and two years after the attachment suit was begun did not show their market value at the time of the attachment. The witness, if he knew, should have been required to testify as to the market value of the notes and accounts at the time of the attachment. Having done this, he might then have been questioned as to how he arrived at such value. The testimony on this point, as elicited, was improper. The court's twelfth and seventeenth instructions are erroneous, inasmuch as they make the question of the sufficiency of the debtor's property remaining in the state to pay debts at the time of the attachment depend upon what the property will bring "by process of law." *Nesbit* v. *Schwab Clothing Co.*, *supra*. These would not be prejudicial, however, unless it could be said that appellee's property would be worth more at forced sale than at its fair market value. The reverse is generally true.

When instruction not prejudicial.

5. The twentieth instruction, if it was intended, as stated by the trial court, to apply only to the "general question of solvency, affecting the plaintiffs' right to make a voluntary conveyance of their property," was abstract, and calculated to mislead, for the right of plaintiffs to make a voluntary conveyance was not in issue, and there was no proof upon the subject. And it was not incumbent upon appellants to show that appellees were insolvent at the time of the attachment, in order to make good their defense. But one of the attorneys for appellants was permitted to construe the instruction to mean that appellees (plaintiffs) must have enough property in this state out of which all their creditors could make all their debts at the time of the attachment before they were legally solvent. When the attorney read the instruction, and put the above construction upon it, he told the

jury that the court would correct him if he was not correct, and the court did not correct him. In view of this state of the record, we do not see that appellants were prejudiced by the instruction, or the court's refusal to amend same.

6. The court's charge, except as herein indicated, was correct. The ruling of the court was correct as to the confidential communication set up in the seventh and eight grounds of motion for new trial.

As there must be a new trial, it is unnecessary to discuss the question of alleged improper conduct and remarks of counsel in their arguments to the jury. The law upon this subject has been often announced. *Union Compress Company* v. *Wolf*, *ante*, p. 174, and cases cited.

For the errors indicated, reversed and remanded for new trial.

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## DURRETT *v.* BUXTON.

Opinion delivered January 30, 1897.

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COUNTY CONTRACT—BUILDING OF COURT HOUSE.—The special act authorizing the county court to make an order for the building of a court house or jail whenever it shall think it expedient to do so (Sand. & H. Dig., §§ 839, 841) was not repealed by Sand. & H. Dig., § 1279, subsequently enacted, providing that "no county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended."

COUNTY TAX—APPROPRIATION.—The tax levied to build a court house is a special tax levied for a specific purpose, and the money arising therefrom becomes an appropriation by law for such purpose, and no other appropriation is required under Const. 1874, art. 16, § 12, providing that no money shall be paid out of the treasury until the same shall have been appropriated by law.

Appeal from Pike Circuit Court.

WILL P. FEAZEL, Judge.

*J. H. Crawford* for appellants.

A contract to build a court house without an appropriation therefor, in dollars and cents, is invalid. Sand. & H. Dig., secs. 1279, 1276, subd. 1, 1278, 1277, 6418; Const. 1874, art. 16, secs. 12, 13, and art. 5, sec. 29; 34 Ark. 307–310; 61 *id.* 74; 54 *id.* 645, 657, 659. As to what is necessary to constitute an appropriation, see 106 Cal. 113. See also 30 Ark. 609, 612; Cooley, Taxation, p. 280. The contract is illegal, and appellees are chargeable as trustees of the county's funds. 52 Ark. 545; 50 *id.* 447, 452; 59 *id.* 344, 357.

*W. C. Rodgers* for appellees.

There *was* an appropriation by the county court. One and a half mills were levied by the levying court to build the court house. This was a direct appropriation of the sum raised in dollars and cents to that purpose, and it could *be used for no other*, and 54 Ark. 645 does not militate against this contention. See 61 Ark. 74; 30 *id.* 609. Appellants are estopped, 3 De Gex, M. & G. 304, 310, 311; 74 Ind. 409, 413, 414; High, Inj. (2d Ed.) sec. 7; 26 Ga. 117, 120; 5 Ark. 107, 110; 115 Md. 613, 620; 3 Beav. 133; 12 *id.* 1, 3. The court house has been completed, and the injunction would be futile. 58 Mich. 286; 12 Fla. 100, 101, 26; 2 Green, Chancery (3 N. J. Eq.), 141, 146; 79 Ind. 109; 70 N. Y. 518; 43 Ill. App. 25, 30; 68 Ill. 121; 81 Cal. 148; 12 So. Rep. 834; 16 Wis. 692.

BATTLE, J. The court house of Pike county having been destroyed by fire, the county court of that county, composed of the county judge and justices of the peace, while sitting for the purpose of levying taxes and making appropriations, at the October term in 1895, levied on the taxable property of the county one and a half mills on the dollar for rebuilding the same. No other levy or appropriation for that purpose was made

by the levying court. Having determined to rebuild, the county court, at its April term in 1896, appointed a commissioner to prepare plans and specifications for the building, and to advertise for bids, which was done. Buxton & Wright, being the lowest bidders, were awarded the contract for $2,698.50, to be paid in specified instalments; all of which acts and doings were done under the order of the court, and were by it approved. This action was brought to prevent the building of the court house under this contract. On a final hearing the complaint was dismissed, and the plaintiffs appealed.

Validity of contract for building court house.

The validity of the contract for the building is assailed on the ground that there was no appropriation made by the county court, when organized for levying taxes and making appropriations, for such a purpose. This attack is based on section 1279 of Sand. & H. Dig., which provides: "No county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has been previously made therefor and is wholly or in part unexpended."

The applicability of this section to the case before us will be better understood by an examination of other sections of the act of March 18, 1879, of which it is a component part. After providing for the organization of the court for the levying of taxes and making appropriations, the act provides that the county judge shall submit a written report of "the condition of the poor house and the terms upon which the same may have been let out, and all other matters of a public nature connected therewith, and the condition of all of the public property of the county, including public buildings and records, and shall make such recommendations as may seem good to him, or as may have been submitted by the grand jury of the county." After this the act provides

that the court shall proceed to the making of appropriations for the expenses of the county or district for the current year in the following order:

"1. To defray the lawful expenses of the several courts of record of the county or district, and the lawful proceedings in magistrates' courts, stating the expenses of each of said courts separately.

"2. To defray the expenses of persons accused or convicted of crime in the county jail.

"3. To defray the expenses of making the assessment and tax books and collecting taxes on real and personal property.

"4. To defray the lawful expense of public records of the county or district.

"5. To defray the expense of keeping paupers of the county or district.

"6. To defray the expense of building and repairing public roads and bridges and repairing and taking care of public property.

"7. To defray such other expenses of county government as are allowed by the laws of this state": and that "the court shall specify the amount of appropriations for each purpose in dollars and cents, and the total amount of appropriations for all county or district purposes for any one year shall not exceed ninety per cent. of the taxes levied for that year." Sand. & H. Dig., secs. 1276, 1277.

Under so much of the act as we have copied into this opinion it has been held by this court that a contract for building a county turnpike or bridge, made without a previous appropriation therefor by the levying court, is void. *Wiegel* v. *Pulaski County*, 61 Ark. 74; *Fones Hardware Co.* v. *Erb*, 54 Ark. 645. In the last case cited, which involved the building of a bridge, and to some extent the construction of the act, the court said: "It

is the policy of the act to require the concurring judgment of the levying court and of the county judge that a bridge should be built, before a contract for building it can be made. When the levying court makes an appropriation to pay for one, that signifies its favorable judgment; and the county judge may afterwards signify his by letting the contract. * * * * While we think that a contract cannot be made before there has been an appropriation for it, we do not think that, when an appropriation has been made, the contract will be limited to the amount appropriated. When the levying court appropriates any sum for the work, that signifies their judgment that the work should be done, and the county judge may then proceed to contract for it without further consulting them, the only limitations upon his power being found in other directions."

But in the act of March 18, 1879, although it undertakes to specify for what purposes appropriations shall be made, there is no mention of the building of court houses. The clerk, sheriff, treasurer and county judge of the county are required by it to make written reports for the purpose of furnishing information to the levying court to aid it in discharging its duties. The county judge is required to report the condition of the poorhouse, and all other public property of the county, including public buildings. Upon this information the levying court is only required to make an appropriation to defray the expenses of "repairing and taking care of public property." The failure to expressly provide for the building of court houses and jails is significant, and can be reasonably accounted for only on the theory that the legislature was of the opinion that the special act upon the subject then in force made sufficient provision, and that it intended that the special act should remain unrepealed.

Previous to March 18, 1879, when the act under consideration was enacted, there was a special act in force which provides that "there shall be erected in each county, at the established seat of justice thereof, a good and sufficient court house and jail," and that "whenever the county court shall think it expedient to erect any of the buildings aforesaid (court house and jail), the building of which shall not be otherwise provided for, and there shall be sufficient funds in the county treasury which may be appropriated to the erection of county buildings, or which are not otherwise appropriated, or if the circumstances of the county will permit such a court to levy a tax for the erection of buildings, such court may make an order for the building thereof, stating in such order the amount to be appropriated for that purpose;" and then provides how it shall be built. Sand. & H. Dig., secs. 839, 848. This act explains the failure of the former act to make express provision for the building of court houses, upon the theory we have stated.

Section 9 of the act of March 18, 1879, which is section 1279 of Sandels & Hill's Digest, which requires an appropriation before a contract can be made by the county court, does not repeal the special act. According to the interpretation of it in *Fones Hardware Co.* v. *Erb*, *supra*, it does not apply to those contracts the duty to make which is imposed by law upon the county court. It will hardly be reasonable to suppose that the legislature would require the permission of the levying court to make a contract which it had already made the bounden duty of the county court to enter into and perform. Its object is to prevent the county court from making unnecessary, improvident, and ruinous contracts. (*Fones Hardware Co.* v. *Erb*, 54 Ark. 645, 658; *Worthen* v. *Roots*, 34 Ark. 356, 369.) The building of court houses and jails are not the subjects of such contracts.

The special act referred to comes within the rule stated in *McFarland* v. *State Bank*, 4 Ark. 415, and approved in *Chamberlain* v. *State*, 50 Ark. 132, 138, and for that additional reason is not repealed by the act of March 18, 1879. Bishop on Written laws, secs. 126, 156; Sutherland, Statutory Construction, secs. 158, 159; Endlich, Interpretation of Statutes, secs. 223, 233.

Necessity of appropriation.

Appellants rely on section 12 of article 16 of the Constitution of 1874, which provides: "No money shall be paid out of the treasury until the same shall have been appropriated by law." The tax levied to build a court house by the Pike county court was a special tax levied for a specific purpose, and cannot be lawfully used for any other. The money arising from the collection of it became an appropriation by law for the purpose for which it was levied. *Worthen* v. *Roots*, 34 Ark. 360.

We therefore find that the contract in question is not affected by section 1279 of Sand. & H. Dig., or the act of March 18, 1879.

Decree affirmed.

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## *Re* OWENS.

Opinion delivered January 30, 1897.

CIRCUIT COURT—JURISDICTION TO ANNUL CONTRACT OF COUNTY COURT.—The circuit court has no jurisdiction upon its own motion to annul a contract made by the county court for the hire of county convicts.

Appeal from Lonoke Circuit Court.

GEORGE SIBLY, Special Judge.

STATEMENT BY THE COURT.

At the August term of the Lonoke circuit court, to wit: On the 17th day of August, 1896, a day of said

term, S. S. Glover, the sheriff of said county, reported to the court that J. H. Hicks, the contractor for the county prisoners, refused to pay costs and take the defendants convicted of misdemeanors in cases where the fine was less than twenty dollars. Whereupon an order was made commanding the sheriff to summons J. H. Hicks to appear before said court forthwith, to show cause why he should not pay costs and take the defendants convicted in misdemeanor cases where the fine imposed was less than twenty dollars. On the same day, in obedience to said commands, the said J. H. Hicks appeared before said court, and reported that he made a contract with the county judge of Lonoke county for the labor of persons convicted of misdemeanors, in which he was to take the labor of all persons convicted of misdemeanors and fined twenty dollars or more, and to pay the costs attending such convictions, and no others, except at his option. The court thereupon declared that said contract was without authority of law, and against public policy, and void; and further ordered and adjudged that all defendants convicted of misdemeanors in said court be disposed of by hiring out as provided by law; in default of the sheriff being able to hire out said convicts, that he dispose of them as is otherwise provided by law.

On the 18th day of August, 1896, O. U. Owens, as county judge of said county, was, by consent of court, made a party to this proceeding, and on the same day filed a motion to set aside said order. In the presentation of said motion the court had the contract brought into court, which was found to contain the provisions reported by said Hicks, *supra*. Said motion was then overruled by the court, but it amended the order previously made in words and figures as follows: "That said order is made in reference to defendants convicted of misdemeanors in this court, and for no other purpose or

intent, and that defendants convicted of misdemeanors in this court who fail or refuse to pay the fine and costs adjudged against them at once shall be hired out by the sheriff for a period of time not to exceed one day for every seventy-five cents of the fine and costs adjudged against each defendant." To the ruling and judgment of the court, said county judge excepted, and prayed an appeal, which was granted.

*Thos. C. Trimble* for appellant.

WOOD, J., (after stating the facts.) The court had no jurisdiction of the subject-matter. The proceedings in the court below could neither be styled a civil action nor a special proceeding. Sand. & H. Dig., secs. 5602, 5603. No one had brought suit or instituted proceedings to annul the contract entered into between J. H. Hicks and appellant. The court was without power to make the order upon its own motion. See *Ex parte* Cohen, 6 Cal. 318.

Reversed.

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## BROGAN v. BROGAN.

Opinion delivered January 30, 1897.

PROBATE COURTS—JURISDICTION.—The probate court has jurisdiction to determine whether or not the creditors of a decedent's estate have by laches lost the power to subject the real estate to the payment of their debts, where the question is incidentally involved in a proceeding to compel the administrator to make a final settlement of the estate. (BATTLE and HUGHES, JJ., dissenting.)

ADMINISTRATION—CREDITOR'S RIGHT TO SUBJECT LAND.—Creditors and administrators must apply for the subjection of lands to the payment of debts within a reasonable time, and if, without sufficient cause, they fail to do so, their rights in that respect will be barred.

SAME—LACHES.—Delay for more than seven years after the grant of letters of administration before attempting to subject land of an intestate to the payment of his debts, without other excuse than that the values of real estate in the city where the land was situated were declining during that time, is such laches as bars the relief sought.

SAME—ASSENT OF ADMINISTRATOR TO DELAY.—The fact that the administrator of an estate was one of its heirs and that he consented to delay the sale of its land will not excuse the creditors for laches in taking steps to have the land sold, as to heirs who did no assent thereto, but the coparcenary interest of the administrator may be subjected to the debts of the estate.

SAME—DELAY IN SUBJECTING LAND.—Where land of an intestate was in litigation, it is not an unreasonable delay for the administrator to wait three years after final judgment in the trial court, until the three years allowed for appealing have expired, before proceeding to subject the land to the payment of his intestate's debts.

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

Joseph Brogan, a resident of Sebastian county, died in 1873, leaving an estate of real and personal property. His brother, E. C. Brogan, who was also an heir, was appointed administrator of his estate in November, 1873. The assets of the estate have now been exhausted, with the exception of a lot in the city of Fort Smith, and a farm in the county of Sebastian, but a portion of the debts of the estate are still unpaid. This proceeding was brought October 10, 1894, in the probate court, by two of the heirs of Joseph Brogan, deceased. They alleged that, although the administrator still held possession of the unsold real estate, yet that the right to subject such real estate to pay debts had been barred by laches. They asked that the court compel the administrator to make and file a final settlement, to the end that the administration be ended, thus allowing the heirs to take possession of the real estate. The probate court

found that the right to subject the town lot had been barred by laches, but that the right to subject the farm tract still existed, and for this reason refused to order the administrator to make a final settlement. On appeal to the circuit court, it found that the rights of the creditors were not barred as to either tract, and for this reason also refused to order the administrator to make final settlement.

*Thomas Boles* for appellants.

Creditors must enforce their lien within a reasonable time, and they are responsible for unnecessary delay. Sand. & H. Dig., secs. 200 to 204; 37 Ark. 155; 56 *id.* 633. The delay is clearly unreasonable, and the administrator and creditors are chargeable with and guilty of gross laches. 56 Ark. 633; Rover, Jud. Sales, secs. 250 to 260; Mansf. Dig., secs. 188, 189 to 192; Woerner, Adm. sec. 469; 47 Ark. 471. The fact that the title is in litigation is no bar to ordering real estate sold to pay debts against the estate. 38 Ark. 388; Acts, February 15, 1877. The bar is complete. Cases *supra*, 46 Ark. 373; 2 Woerner, Adm. secs. 465; 7 Wheaton, 119; 23 Ill. 484; 57 *id.* 583; 130 U. S. 320; 10 Fed. Rep. 59.

*Jos. M. Hill* and *Preston C. West* for creditors, and *Grace & Forrester* for administrator.

The finding of the court below that the delay is *not unreasonable* is conclusive. 56 Ark. p. 638; 40 *id.* 298; 56 *id.* 621; 50 *id.* 267; 53 *id.* 161; 11 N. J. L. p. 57. Whether the delay was reasonable or not must be settled by the court in each particular case, in its sound discretion. 56 Ark. 639; 37 *id.* 155; 38 *id.* 388; 46 *id.* 373; 47 *id.* 471; *ib.* 277; 54 *id.* 174; 60 Ill. 282. It is not the duty of an administrator to sacrifice property at a sale, when it is in litigation or incumbered. 11 N. J. L. 44; 44 Ill. 202; 51 Ill. 308; 60 Ill. 277; 54 Ark. 174; 56 Iowa, 117.

Jurisdiction of probate courts.

RIDDICK, J. (after stating the facts.) This is a proceeding by certain heirs of an intestate to compel the administrator of his estate to make a final settlement and close the administration. Of the property of the estate there remains undisposed of only a town lot and a farm. As a reason for requiring a final settlement, it was alleged in the petition filed by the heirs that the rights of the administrator and creditors were barred as to this remaining real estate by laches and lapse of time. This allegation was denied by the administrator and creditors, who were allowed to become parties to the proceeding, and upon the determination of the issue thus made turns the decision of the question as to whether the administrator should be ordered to make a final settlement; for, if the administrator and creditors have lost the right to subject this real estate to the payment of the debts of the estate, there is no further need for an administrator, and a final settlement should be ordered, and the administration closed.

Probate courts have no jurisdiction to determine questions of title to real estate arising under claims of title adverse to the estate. But the probate court has the power to determine when an administrator shall make a final settlement, and it is the duty of the probate court to require an administrator to make final settlement when the assets of the estate have been fully administered. And when, in order to determine whether the administration should be closed, it becomes necessary incidentally to inquire and decide whether the creditors have lost the power to subject the real estate of the intestate to the payment of their debts, the probate court has the power to determine that question also. *Tryon* v. *Farnsworth*, 30 Wis. 577; *McWillie* v. *Van Vacter*, 35 Miss. 428, 72 Am. Dec. 127; Works, Courts and Jurisdiction, p. 441; Brown, Jurisdiction, sec. 146.

We will therefore proceed to consider whether the administrator and creditors have been guilty of such laches as to bar the right to subject this real estate to the satisfaction of debts probated against the estate; for, if so, a final settlement should be ordered. It is well settled that creditors and administrators must apply for the subjection of land to the payment of debts within a reasonable time, and if, without sufficient cause, they fail to do so, their rights in that respect will be barred. *Roth* v. *Holland*, 56 Ark. 633; *Killough* v. *Hinton*, 54 *ib.* 65; *Mays* v. *Rogers*, 37 *ib.* 155.

As to creditor's right to subject decedent's land.

Twenty one years had expired after the grant of letters of administration before the commencement of this proceeding in the probate court. This would defeat the lien of the creditors unless there be something to excuse the delay, for it has been decided by this court that a delay for "more than seven years is not reasonable, and therefore defeats the right of a creditor or an administrator in his behalf, unless there is something to excuse the delay." *Roth* v. *Holland*, 56 Ark. 633.

When such right lost by laches.

The excuse given here is that the title to the land was involved in litigation. As the farm and town lot are entirely separate, so that the price of one was in no way affected by the litigation concerning the other, we will consider the evidence in regard to the two separately. The town lot was sold under an order of the probate court in 1876, but, afterwards, in October of the same year, the court set the sale aside. The administrator did not again offer the lot for sale. On the 5th day of August, 1882, Ann Quinn brought suit against the administrator to recover this lot. This action terminated on the 6th day of February, 1885, by a judgment in favor of the estate. The administrator says he then waited three years for the time allowed for an appeal to expire. The record does not show

whether this suit brought by Ann Quinn was an action at law or in equity, nor what issues were involved. The large majority of cases determined in the circuit courts are never appealed. Many cases turn on questions of fact, which may be so fully established upon trial that the probability of affecting the result by an appeal is to remote to be considered. So we cannot say that an administrator should in every case wait three years after a judgment in favor of the estate for land before proceeding to subject it to the payment of debts when the opposing claimants show no disposition to perfect an appeal. But, if we add the three years allowed for an appeal, there will still be less than six years that the price of the lot could have been affected by this litigation; and of the twenty one years elapsed since the granting of letters there remain over fifteen years in which no such impediment existed.

Effect of the administrator's assent to delay.

As a further excuse for not selling, the administrator says, in substance, that, prior to the commencement of this suit by Ann Quinn, Fort Smith was only a small town, and real property was very low, and that he did not offer the lot for sale, because he knew he could not get anything like its value; that, after the law suit was ended and the time for appeal had expired, the "boom" in Fort Smith real estate was over, values were beginning to decline, and he did not wish to sell on a falling market. But if the fact that the values of real estate in a city were declining justified an administrator in withholding from sale a lot therein, why would not the fact that such values were advancing furnish a reason equally as cogent for withholding it from sale? And as real estate values are often either declining or advancing, it would, under such a rule, be difficult to get an estate wound up, and the heirs might be kept out of possession indefinitely. While an administrator should endeavor to sell the land of his intestate

at a fair price, he has no right to withhold it from sale for long periods, waiting for an advance in prices. No one can tell when a general advance or decline in prices of real estate will start; and administrators are not required to speculate upon land values in that way. The hazard of such an attempt is shown in this case. The evidence shows that during the "boom," or time when real estate values were high, this lot was worth $300 per front foot, and that in February, 1888, when the time for appeal had elapsed, and there existed no impediment to a sale, it was still worth $250 per front foot, but six years later was only worth $100 a front foot. In the mean time, interest upon the debts had been accumulating at ten per cent. per annum. The value of the lot is less than one half, while sixty per cent. has been added to the debts by the accumulation of interest. The fact that the administrator was one of the heirs, and that three of the creditors consented to the delay, does not in any way affect the rights of the non-assenting heirs.

In our opinion, no sufficient excuse is shown for the long delay of the administrator and creditors in subjecting this town lot to the payment of the debts of the estate, and the right to do so is now barred, except as to the interest of the administrator therein. The administrator cannot take advantage of his own laches, and, as he is one of the heirs, his interest in the lot is still subject to the debts of the estate.

When delay excusable.

As to the farm tract: The administrator obtained an order, and offered it for sale, in 1876, but no one offered to purchase on account of an impending law suit involving the title to this land. Afterwards, in 1877, the Theurer heirs brought suit to recover this tract of land, and this litigation was not settled until 1890. The adverse litigants had still three years in which to take an appeal to this court, and the

administrator, under the advice of his attorney, delayed offering the lands for sale until after the expiration of that time. Soon afterwards this proceeding was commenced. Under the evidence, we are of the opinion that the court did not abuse its discretion in holding that the excuse given for the delay was reasonable, and that the right of the creditors to subject this tract of land to their debt is not barred.

As the farm tract of land is still subject to the lien of creditors of the estate for the payment of their debts, it follows that the judgment of the circuit court refusing to order a final settlement was right. But, in so far as the judgment of that court directed that the lot in the city of Fort Smith be sold for the payment of debts of the estate of Joseph Brogan, the same is modified, and the order for the sale of said lot is set aside and vacated, except as to the interest of E. C. Brogan therein. In other respects the judgment of the circuit court is affirmed.

BATTLE and HUGHES, JJ., dissent for the reason that they are of opinion that the probate court had no jurisdiction to determine the question as to title of land presented in this case.

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## DAVIS v. ARKANSAS FIRE INSURANCE COMPANY.

Opinion delivered January 30, 1897.

FRAUDULENT CONVEYANCE—EVIDENCE.—The positive testimony of two witnesses that a transfer of cotton by a debtor was made *bona fide* for the purpose of paying a valid debt will not be overturned by proof that the transferee was a son-in-law of the debtor, that the transfer was made after the debtor was sued by a creditor and that the transferee permitted the debtor to direct and superintend the sale of the property.

SAME—RELIEF IN EQUITY.—The statute of 1887 which dispenses with the necessity of obtaining a judgment before commencing a suit to set aside a fraudulent conveyance (Sand. & H. Dig. § 3134) does not dispense with the necessity of proving the debtor's insolvency, under the rule that equity will not lend its aid when the remedy at law is full and adequate.

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

STATEMENT BY THE COURT.

Suit in equity by Arkansas Fire Insurance Company against Zeb Ward, Oscar Davis, and J. E. Joyce & Company to set aside a transfer of cotton alleged to be fraudulent, and to subject said cotton to the satisfaction of plaintiff's judgment.

On the 11th day of December, 1893, previous to the commencement of this suit in equity, the Arkansas Fire Insurance Company brought suit at law against Zeb Ward, one of the defendants to this suit, and afterwards recovered judgment against him for the sum of $5,000. The transfer of cotton which the insurance company seeks to set aside by this suit in equity was made by Zeb Ward to Oscar Davis, two days after the commencement of the action at law. The other circumstances under which this transfer of cotton was made were as follows: A son of the defendant Zeb Ward owed the German National Bank of Little Rock $3,227.50, for which sum the bank held his note. The defendant Oscar Davis, a son-in-law of defendant Zeb Ward, was indorser upon this note of the son. Zeb Ward, claiming to be indebted to his son in the sum of $2,500 for the rent of a farm, transferred, with consent of his son, certain bales of cotton to Oscar Davis, to secure him as indorser upon said note; the proceeds of the cotton, when sold, to be applied to the payment of the note. The cotton was in the possession of defendants Joyce & Company, who were commission merchants, and held a lien upon

the cotton for supplies advanced. The cotton was transferred on their books from Ward to Davis, but they still held possession of it. Davis afterwards told Joyce & Company to obey any directions of Ward in regard to the sale of the cotton, and, when sold, to make "the check with account of sales either to the order of himself or Ward." Davis testified that he did not intend by this to allow Ward to appropriate the proceeds of the cotton, but, as Ward was interested in the cotton, he intended only to permit him to direct the sale of it for the benefit of himself (Davis).

The chancellor found the issues in favor of plaintiff, that the transfer was fraudulent, and rendered a decree in its favor from which an appeal was taken to this court.

*Ratcliffe & Fletcher* for appellant.

The complaint fails to allege *insolvency*, and is bad. 11 Ark. 411: 29 *id.* 612; 31 *id.* 546; 51 *id.* 390; Sand. & H. Dig., secs. 3134, 5919; 56 Ark. 481. The facts constituting the fraud must also be alleged. 51 Ark. 390. Fraud must be proved. 9 Ark. 482. Mere embarrassment is no proof that a conveyance is fraudulent. 26 Ark. 23; 17 *id.* 146; 51 *id.* 390.

*S. R. Cockrill* and *Ashley Cockrill* for appellee.

This suit was properly brought in equity. 42 Ark. 236; 18 *id.* 583; 44 *id.* 381; 56 *id.* 476; Sand. & H. Dig., secs. 3060, 3065. The burden was on Davis to show title to the cotton. 58 Ark. 556–564; 55 *id.* 59. The pledge or mortgage was void as to creditors: (1) There was no delivery or change of possession. 47 Ark. 210; 54 *id.* 305. (2) Even a recorded mortgage is void as to levying creditors where the mortgagor has power to sell. 44 Ark. 310; 50 *id.* 97; 46 *id.* 122. Here there was at least legal fraud, if not actual. 47 Ark. 405. A heavy indebtedness of the grantor, together with a sale to a

relative, of necessity form strong badges or indicia of fraud. Wait, Fr. Conv. sec. 239. Proof of actual insolvency is not necessary. The property of a solvent debtor may be seized where he is attempting to put it beyond reach of process by transfer to a friend or relative. 55 Ark. 59, 60, 64. Davis was not a purchaser for value; his debt was past due. 31 Ark. 88. The burden was on him to show that the debtor's intention was innocent, and that he had abundant means left to pay his debts. 55 Ark. 59, 60, 64, etc.; *ib.* 116; Wait, Fr. Conv. sec. 95. There was no consideration for the sale to Davis. 65 N. W. Rep. 349.

Sufficiency of proof of fraud.

RIDDICK, J., (after stating the facts.) The question before us is whether the evidence is sufficient to support the finding of the chancellor that the transfer of the cotton was fraudulent and void as to the creditors of Ward. The appellee first contends that the decree should be affirmed, for the reason that Davis showed no interest in the property. But if there was no evidence on this point, this contention could not avail, for the reason that the complaint of appellee alleged that the cotton had been transferred to Davis by Ward, and the object of this suit is to set that transfer aside. The answers of both Ward and Davis admit that this transfer was made, and allege that it was made in good faith, and for a valuable consideration. It stands therefore admitted that Ward made a transfer of the cotton to Davis. There is no conflict on this point, but the dispute concerns the purpose and object of such transfer. Ward testified that, being indebted to his son in the sum of $2,500 for rent of a farm, with the consent of his son he turned this cotton over to Davis, to secure the payment of a note given by his son to the German Bank, and upon which Davis was indorser. If this be true, the conveyance was made upon a

valuable consideration, for, if Ward owed his son money, it was immaterial whether he paid it direct to his son or to the creditors of his son, if his son consented to such payment. We think the evidence clearly shows that the son owed the bank; that Davis was indorser upon his note; and that Davis, since the commencement of this suit, has paid the note, amounting to over $3,000. As to whether Ward owed his son, there seems more room for doubt. But Ward testified that he did owe his son for the rent of a farm, and there does not seem anything to contradict him on this point. This transfer of cotton to his son-in-law, Davis, following soon after the commencement of a suit against Ward, coupled with the fact that he continued with consent of Davis to direct and superintend the sale of the cotton, was calculated to cast suspicion upon the transaction; yet we are unable to agree that, standing alone, it was sufficient to overturn the testimony of Davis and Ward, and justify a finding that the transfer was fraudulent. The fact that Davis permitted Ward to direct and superintend the sale of the cotton is not altogether inconsistent with an honest purpose, for the cotton was not transferred to secure a debt Ward owed Davis, but to secure the payment of a debt his son owed the bank, and for which Davis was liable as indorser. Under these circumstances it is not unreasonable that Davis should be willing to have Ward act as his agent in the sale of the cotton.

When relief granted in equity.

There seems to us to be a failure of proof on another point. It was not shown that Ward was insolvent, or that this transfer tended in any way to hinder and delay the insurance company in the collection of its judgment. Courts cannot take judicial notice of insolvency, but it must be proved. The proof shows that several judgments had been rendered against Ward, but there is nothing to show the amount or value of property he

owned. He may, so far as this evidence discloses, have been a very rich man, and the property transferred may have in no way impaired his ability to pay his indebtedness. Formerly, the rule was that the creditor must first recover judgment at law, and have execution issued and returned *nulla bona*, before he could come into equity to ask that a transfer of property made by his debtor should be set aside as fraudulent. The courts of equity required the creditor to show in this way that the ordinary legal remedies were inadequate. The statute of 1887 dispenses with the necessity of obtaining a judgment before commencing a suit to set aside a fraudulent conveyance, and provides that in such cases "insolvency may be proved by any other method." Secs. 3134 and 5919, Sandels and Hill's Digest. The former decisions requiring judgment, execution and return of execution unsatisfied were based on the rule that equity will not lend its aid when the remedy at law is full and adequate. It would therefore seem that, following the same reason, it is still necessary to show that the remedy at law was inadequate, by showing that the debtor has not other sufficient means from which the claims of the creditor may be satisfied, or showing other facts sufficient to call for the interference of a court of equity. But, apart from that question, in the absence of proof that the debtor was insolvent, it would require much stronger evidence to overcome the testimony of the debtor that the conveyance was made in good faith and for a valuable consideration. The fact that a debtor is insolvent is not of itself sufficient to establish a fraud in a conveyance made by him, but the financial condition of the debtor at the time of the transfer and afterwards, when taken in connection with other facts in proof, is generally an important circumstance in determining whether the transaction was fraudulent or not.

Our conclusion is that the evidence is not sufficient to sustain the finding that the transfer was fraudulent. The judgment of the chancery court must therefore be reversed, and the cause remanded, with an order that the complaint be dismissed for want of equity.

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## GROW v. COCKRILL.

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Opinion delivered February 6, 1897.

NATIONAL BANK—AUTHORITY.—A national bank is not authorized to act as a broker in lending the money of others.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

STATEMENT BY THE COURT.

The appellant, Jennie Grow, had a credit in the First National Bank of Little Rock, in February, 1892, and on the 15th of that month wrote to H. G. Allis, then president of that bank, addressing him in his individual capacity, however, and made inquiry of him as to how much the bank would pay as interest for the loan of her money, or language to that effect. This letter seems to have been answered on the 24th by W. C. Denny, who was then cashier, and he informed her, among other things, "that the bank would pay four per cent. interest on deposits, giving their (the bank's) certificate for the same, which is not subject to check. If the certificate is cashed before the expiration of the time mentioned—six months—the interest is forfeited. I can give you a very secure loan for $800 for a year, secured by stock of this bank at par, interest payable semi-annually. If you care to avail yourself of this loan, let me hear from you."

On May 2d appellant wrote again, asking if the loan could still be made as stated in Denny's letter of February 24th, and quoted last above; also as to the rate of interest she could get, and also saying she had about $900, including the amount in bank, then amounting to $500.

Denny answered this letter on the 5th of May, saying: "Replying to your favor of the 2d inst., have to say, if you will send us enough to make $1,000, we can get you a loan for one year at 9 per cent., secured by the stock of this bank, interest payable semi-annually."

On May 16, 1892, appellant wrote, saying: "I send in to-day's mail check to Mrs. Kimbrough, who will hand you five hundred dollars, and take the five hundred dollars I now have in your bank, making one thousand dollars, and loan out and give the note the party gives you loaned it to, to Mrs. Kimbrough, * * * *. Please let me hear from you." P. S. "You wrote your bank would secure the loan." Signed. "J. Grow."

This letter was answered by Denny on the 21st May, saying: "I have your favor of the 16th inst., stating that Mrs. Kimbrough would deposit $500 with us, making your balance $1,000, which you desired us to lend for you. It seems that you are mistaken about the bank securing the loan. I believe I stated that I could get you a loan for $1,000, secured by the stock of this bank at par, which is good security. We would not lend your money, unless we knew it was perfectly safe. I can assure you you need have no fear on that point. The $500 has not yet been delivered; but as soon as we have it on hand, we will make the loan, and notify you, and deliver Mrs. Kimbrough the note."

This correspondence is given in full, in order to show the exact nature of the transaction between the appellant and these bank officials, as well as the relation of the parties to the loan, which was on the 2d of

June, 1892, made in accordance with the tenor of this correspondence.

The appellant, during the period of this correspondence, was residing in Caldwell, Kansas, and wrote her letters from that place. It seems that she subsequently moved to Washington City. The Mrs. Kimbrough was an aunt of appellant, residing in Little Rock, and the "Cousin Clif." mentioned subsequently in testimony and letter was T. C. Powell, then residing in Little Rock, a good business man, and one well acquainted with such business as he was called upon to transact by and for appellant. He has since died.

Mrs. Kimbrough testified that appellant, from Washington City, in May, 1892, wrote to her as follows, to wit: "I enclose drafts for $500. I have $500 in the First National Bank. Take these there to be cashed. * * * I wrote them [the bank people] you will hand them $500, and to give you the note from the party they loan it to. Tell Cousin Clifton all about it. It is $1,000 they are to loan out, including the $500 I have in bank." Witness, proceeding further, stated: "I got my nephew, Clifton Powell, an insurance man, to help me, and go with me to the bank when I deposited the $500. It was not fixed that day, as they said the man they were going to loan it to was out of town. I had no more to do with it. Mr. Powell is dead. The note and collateral were delivered to him, and he sent them to my niece (appellant). Mr. Powell is the 'Cousin Clif.' mentioned in the letter, and he went with me to see the matter was arranged according to plaintiff's letter."

G. R. Brown testified, in substance, that on June 2, 1892, Denny brought the note in suit to him to sign, saying that Mrs. Grow had some money in bank which Allis wanted to borrow, and he (Allis) desired me to make the note for it. Witness answered, "All right, if he will put up the security." He did not own the stock,

never got the money, and never knew anything more about it. He said the bank failed in February, 1893, and, previous to that event, he had signed accommodation paper for Allis amounting to several hundred thousand dollars. Witness stated that when he made the note in suit on the 2d June, 1892, he was the owner of $25,000 worth of property, but that when the bank failed in February following, Allis failed, and that made him (witness) insolvent.

The testimony of Clement H. Yost, a former book keeper of the bank, shows that on 2d June, 1892, appellant had to her credit in the bank $1,000, and that on that day Allis' account was credited with $1,000; that Allis' account, at that time, was overdrawn to the amount of $23,249; that he had no way of telling from the books why Mrs. Grow was debited with $1,000, or why Allis was credited with $1,000, on that day; that the certificate of stock was genuine, and that it was shown upon the books that it belonged to Allis, and that he purchased the same from Roots, and that Allis' irregular transactions wrecked the bank.

Nick Kupferle testified as to the market value of the bank stock on June 2, 1892, and until October following; as to Allis' misconduct in the management of the bank, and the ignorance of the same on the part of the directors, of whom he was one.

The affairs of the bank, after its failure, were placed in the hands of appellee, as receiver, and he is sued in this action as such. Judgment for defendant, and plaintiff appealed to this court.

*Dan W. Jones & McCain* for appellant.

The answer constituted no defense. Bank officials, having undertaken to lend money for depositors, cannot become borrowers, or interested with the borrower. 26

Ark. 445; 16 *id.* 345; Mechem, Agency, secs. 66, 67. The entire correspondence shows that the bank officials acted as officials, and not as *individuals*. Boone, Banking, secs. 110, 115; 5 Wheat. 326.

*S. R. Cockrill* and *Ashley Cockrill* for appellee.

The action *ex contractu* is not sustained by any proof, and fails. The president and cashier have no power to bind the bank, except in the discharge of their ordinary duties, and the bank is not liable for their torts. A national bank has no power to act as broker. 6 Pet. 51; Boone, Banking, secs. 119, 353; *ib.* 682, 101; 152 U. S. 346; 42 Md. 581; 89 Pa. St. 324; 92 U. S. 122; 42 N. E. Rep. 567; 28 S. W. Rep. 303; Cooley, Torts, 119; 65 Fed. Rep. 932; 77 *id.* 129; L. R. 9 Q. B. 301.

BUNN, C. J., (after stating the facts.) The complaint, in brief, charges that the bank and its president, contemplating insolvency, and desiring to keep plaintiff's money from being checked out of the bank by her, combined with its cashier, and entered into a conspiracy to deceive her, and to induce her to allow her money to remain in the bank, to be used by its president; and to accomplish this scheme the cashier, with the connivance of the president of the bank, wrote to appellant, at Washington, D. C., proposing to lend out her money on good security, and, she assenting to this arrangement, these bank officials induced Brown to execute the note to her for the $1,000, and assign the stock certificate to her as collateral security to the note, they pretending to her that the bank had loaned her money to Brown, that he was solvent, and that he owned the bank stock, and that the same was good security; with many specifications thereunder.

Brown and the receiver each filed a separate answer, specifically denying each allegation and charge affecting him and the bank respectively.

None of the material allegations of the complaint controverted by the separate answer are sustained by the evidence (the whole of which we have substantially set forth in our statement of facts); nor does it appear from the testimony that the bank officials conspired together to deceive appellant as charged, for in the correspondence between them she seems to have taken the initiative, and their letters appear as letters usually do in such cases. The loan, as it was finally made, viewed in the light of subsequent events, may and doubtless does give rise to inference as to motives actuating the parties from the beginning. But that is all, and that is scarcely sufficient to base a judgment upon. Moreover, appellant having given authority to these people to take her money from the bank, and pay it over to the borrower, whoever he might be, it does not appear just how she, alone, can complain of the mere manner in which her account was balanced upon the books, or because Brown, the borrower, chose to let Allis use the money, or have the same credited to his account. The loan itself seems to be all that may be questioned, and this Powell, the confidential agent and relative, seems to have regarded as proper, although he himself might have been deceived. On the coming in of the testimony, Brown was let out of the case by the plaintiff, and the court sitting by consent as a jury, found for the receiver; whether on the law, or facts, or both, does not appear, as there were no special findings, but presumably on both, judging from the grounds of the motion for new trial.

After all, the facts still remain that within about six months next after the loan was made, the bank was wrecked by the misconduct of its president, and its stock (including the collateral stock held by the plaintiff) was rendered worthless. Brown was made insolvent, and it appears that appellant must lose her entire

debt, unless, in this proceeding, she can show the bank is liable for the tortious acts of its officials in dealing with her, if they were guilty of such at all; and, of course, this liability of the bank, if any exists, grows out of the relation it had with its president and cashier, and the connection it had constructively, through them, with the transaction with appellant; and this is the only proposition we have to consider.

We do not regard the plaintiff as suing on the note from Brown, or as seeking to make the stock available, for it does not appear that the note is declared on in the complaint as evidencing a cause of action *ex contractu*, but the note and certificate of stock seem only to be a part of the history of the transaction of the bank officials and plaintiff. The case is therefore relieved of the imputation that it rests on inconsistent causes of action. We think it rests solely on the principle that one is civilly bound for the tortious acts of his agent, committed within the scope of his business and authority. The general rule is, "the principal is liable for the wrongful, fraudulent, or deceitful act of the agent committed within the scope of his authority," but "we must distinguish between the authority to commit a fraudulent act, and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, neither negligence nor fraud is within the scope of the agency; but, tested by the connection of the act with the property and business of the agency, fraud in taking the very property is as much within the scope of the agency as negligence in allowing the others to take it. The proper inquiry is whether the act was done in the course of the agency, and by virtue of the authority of the agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent." Mechem, Agency, sec. 739. The line

between the tortious acts of the agent when committed within the scope of his authority as such agent, and those when committed without the scope of his agency, as those acts may or may not affect the principal, is rather sharply and forcibly drawn in the case of *Foster* v. *Essex Bank*, 17 Mass. 479.

Again, it must not be lost sight of that, while the principal is responsible for the tortious acts of his agent committed while in the exercise of his authority as such, yet the principal is subject to another principle, and that is, the acts of the agent must be such as the principal has a right to require of him, or he will not be liable by operation of law, unless he has made himself actually liable otherwise.

The services the cashier undertook to render for the appellant seem to have been a mere gratuity—done as an accommodation to her—if not deceptively. There is no showing that the bank, by its charter, had authority to transact such business as that of loaning the money of its depositors or other people in general. Such authority we have failed to find in the national banking law, and the decisions on the subject, or rather the decisions involving analogous facts, all seem to be to the effect that the business of a broker (and a broker's business is to loan the money of others, or borrow for others, and such like) is not a business in which a national bank can lawfully engage, since it is not mentioned in the national bank act, and the act is strictly construed as against the grantee corporation, as to powers conferred as in all cases of private corporate grants of power.

In the case *Weckler* v. *First National Bank of Hagerstown*, 42 Md. 581, suit was brought against the bank for damages growing out of the purchase of certain bonds, which the teller of the bank had sold him, and falsely represented to be what they really were not,

to the injury of plaintiff, the complaint averring that the bank was engaged in buying and selling these bonds, and was therefore liable for damages occasioned by the false representation, in relation thereto, of the teller, one of the agents in the transaction of its business. The plaintiff was defeated in his suit, the court holding that the bank had no authority to transact that kind of business, and the teller was therefore not acting within the scope of his authority and business when he committed the torts complained of. To the same effect is the ruling in the case of *First National Bank* v. *Hoch*, 89 Pa. St. 324, and that in the case of *Dresser* v. *Traders' National Bank*, 42 N. E. 567.

We have been unable to find a case exactly on all fours with the case at bar as to the subject-matter of the transaction, a case where the bank officials were engaged in making loans for other people to third parties, and gratuitously; but, involving acts of the same class, the cases are quite numerous.

The case really is between appellant on the one hand and the stockholders (if they really have any interest left in it) and other creditors. We are unable to find any ground upon which we would reverse the judgment, and the same is therefore affirmed.

BATTLE, J., did not participate in the decision of this case.

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

Opinion delivered February 6, 1897.

DANGEROUS PREMISES—CONTRIBUTORY NEGLIGENCE.—One who enters a freight house by a door 22 inches higher than the platform in front of it and in coming out falls, in consequence of the absence of a step, is guilty of contributory negligence, and is not entitled to recover for the injuries received by the fall.

Appeal from Lonoke Circuit Court.

JAMES S. THOMAS, Judge,

*Dodge & Johnson* for appellant.

Appellee is barred by his contributory negligence. He knew the locus, and knew it was dangerous for him, and not intended for passengers. 60 Ark. 442; 53 Hun, 420; 102 N. Y. 219; 11 Cent. Rep. 206; 137 Pa. St. 352; 39 Fed. 596; 57 Conn. 422; 35 Oh. St. 631; 24 *id.* 638; 25 Mich. 274; 47 Ark. 322; 60 Ark. 110; 58 Fed. Rep. 341; 57 Ark. 78; 55 *id.* 484; 41 Am. & Eng. R. Cas. 185.

*J. E. Hendricks* and *Williams & Bradshaw* for appellee.

There was no contributory negligence *per se.* He was directed or invited to go where he did by the agent of the company, and was using ordinary care in attending to a lawful business, and the defendant was negligent in sending him over a dangerous place. The question was properly submitted to the jury, and they have said there was no contributory negligence, 30 N. Y. S. 1077; 10 Wis. 281; 59 Ark. 131; 2 Jaggard, Torts, 976; 59 Ark. 224; 31 S. W. Rep. 72; 60 Ark. 438; 28 S. W. Rep. 54; 106 Mass. 461; Whart. on Negl. secs. 304 to 308; Beach. Cont. Negl. 25, 26, 29, p. 7; 117 U. S. 621; 108 *id.* 288; 13 Pet. 181; 93 U. S. 291; 13 Wall.

401; 17 *id.* 667; 1 Blackst. 39; 12 Wall. 254; 109 U. S. 478; 22 Wall. 341; 128 U. S. 93; 61 N. W. Rep. 313; 1 Sand. Pl. & Ev. 495; 4 Ark. 110; 2 Tidd's Pr. 794; 3 Pet. 96. One who acts under the directions of a conductor is not guilty of such contributory negligence as to bar his right to recover. 49 Ark. 182; 46 *id.* 423; 45 *id.* 256; Whart., Negl. sec. 219; 53 Ark. 466. A man does not take the risk of any danger merely because in a general way he is aware of the causes of such danger. 154 Mass. 60, 65; 27 N. E. Ref. 995; 100 Mass. 156–8; 110 *id.* 131; 131 *id.* 169; 136 *id.* 1–5; 143 *id.* 197; 9 N. E. 608; 18 N. E. Rep. 217; 151 U. S. 73. Nor is previous knowledge of danger conclusive evidence of contributory negligence; defect or damage is not *necessary appreciation of risk.* 2 Jaggard, Torts, pp. 870, 871 and notes, 267, 268 to p. 871 and p. 884 and note 331. It is not contributory negligence to go over a dangerous place or road, if a man of reasonable intelligence would reasonably *believe* that he could go there. 2 Jaggard, Torts, 963, note 629; 38 Minn. 61; 35 N. W. 572; 138 Ill. 465; 28 N. E. Rep. 1091; 29 *id.* 1069; 27 *id.* 161; 12 Q. B. 430–9; 55 N. W. Rep. 819; 58 *id.* 881; 28 N. Y. Sup. 471; 77 Hun, 137; 37 N. E. Rep. 133; 25 At. Rep. 43; 61 N. W. 313; 2 Jaggard, Torts, p. 966, note 635.

BATTLE, J. J. C. Forbes instituted an action against the St. Louis, Iron Mountain & Southern Railway Company for the recovery of damages occasioned by a fall received by him in stepping from the defendant's freight house on to a platform. He recovered a judgment for $1,000, and the defendant appealed.

The strongest evidence in favor of appellee upon which the judgment could have been based was his own testimony. He testified in behalf of himself substantially as follows: He was 77 years old. On the 24th day of March, 1894, he went to Austin, in this state, to get a box of strawberry plants which had been sent to

him by express. He went into the office of the agent of the express company to pay the charges against the same, and learned they were $1.95. He handed the agent two dollars, and the agent, after going to a safe, left the office, and appellee, thinking he was going to get the box of strawberry plants, followed. The agent went across the railroad, and as he did so, said to appellee: "Parson, you will find your box in there," pointing to the room of the freight house of appellant. Appellee entered the house at the open door, which was proved to be six or eight feet wide, and about twenty-two inches higher than the platform in front of it. In entering he caught hold of the side of the door, and pulled himself up into the freight house. Upon this point he was interrogated and answered as follows:

"Ques. When you went in, didn't you have to pull up? Ans. Yes sir. Q. Why did you have to pull up? A. Because there was no step there. Q. You saw that fact? A. I did not realize it at that time. Q. You had to pull up to get in the freight room because there was no steps there? A. Don't know. Q. You supposed that step got there in the meantime? A. No sir, I did not. I don't remember how I got in."

It was proved that there were no steps there. He testified that when he entered, he got his box, and started to go out the back door, and, finding it closed, turned to the door through which he had just entered, and, carrying the box before him, stepped out on to the platform, and, as he did so, fell, the box falling on him; and he received the injury of which he complains. According to his own statement, if it be conceded that the appellant was guilty of negligence in failing to provide steps to the door, he was guilty of contributory negligence, and is not entitled to recover.

The judgment of the circuit court is reversed, and final judgment will be rendered in favor of appellant.

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# HAIZLIP v. ROSENBERG.

Opinion delivered February 6, 1897.

LANDLORD AND TENANT—LIABILITY FOR DEFECTIVE PREMISES.—In the absence of a covenant to repair, a landlord who rents the upper story of a building containing water fixtures in good condition at the time of the lease, and gives the tenant exclusive possession and control thereof, is not liable to a tenant of the lower story for damages caused by some defect in such water fixtures occurring during the term of the lease.

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

STATEMENT BY THE COURT.

This action was to recover $186.75 for rent of a store-house in Pine Bluff. Appellees admitted the possession and rental value as claimed, but set up a counterclaim for $290 damages, caused, as they allege, through the carelessness and negligence of the appellant in permitting "water fixtures in an unoccupied closet, situated above the store-room which appellees rented, to be and remain defective and insufficient for the purpose of carrying off water, whereby it ran down upon the goods of appellees, to their damage as above stated. In her reply appellant denied liability for the damage claimed, and alleged that at the time it occurred she had rented out to other tenants the upper story of the building, including the water closet, and that at the time of such rental the closet and water pipes were in good order, and that she was under no obligation to keep same in good condition.

The proof showed that the upper and lower stories of the brick store of appellant had been rented to separate tenants, the upper story to a cotton buyer, and

the lower to the appellees. There was a water closet in the upper story for the use of the tenant occupying said story, and one for the use of the tenants in the lower story, outside the building, in the yard. The water for the supply of the building was through a main pipe attached to the main of the water works. This pipe went through the closet in the yard, through the store, and up into the water closet upstairs.

The proof tended to show that the overflow was caused by the breaking of the stem of the ball-cock inside the tank of the water closet up stairs, which caused the ball-cock to get out of place, so that when the pressure of water was turned on, it overflowed the tank and ran down into the building. It was shown that the overflow pipe in the tank was pretty well corroded, so that the water could not run through. The witness testified that this pipe might have been fixed and cleared, and that if this had been done the overflow might or might not have happened. A stick was found under the ball-cock, and the stem to the ball-cock was corroded. There had not been a pressure of water which had reached the up stairs closet for a month or six weeks prior to the overflow. The strong pressure of the water may have broken the stem of the ball-cock, or the piece of wood under the ball-cock may have broken it. Just how the stem to the ball-cock was broken is left in doubt.

The only way of approach to the closet upstairs was by the front stairway through the cotton room of the upstairs tenant. The building, upstairs and down, was in first-class condition at the time it was rented. There was no fault about the construction of the water fixtures in the water closet. There was no contract with the tenants that appellent was to keep the water fixtures in repair. The appellant did not know, and

had no actual notice, that the water fixtures were in bad repair before or at the time of the overflow.*

Judgment for the appellees in the sum of $103.83.

*N. T. White* for appellant.

The third and fourth prayers for plaintiff correctly state the law of this case. 74 Me. 315; 43 Am. Rep. 591; 67 N. Y. App. 425; Taylor, Landlord & T. (6 Ed.) sec. 175, and note; 67 Mich. 336; 60 Ga. 612; 58 *id.* 204; 8 Ill. App. 378; 4 Rob. (N. Y.), 553; 1 Thomp. Negl. 91;

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*NOTE—The court, upon the motion of defendants, instructed the jury as follows:

"1. The court instructs the jury, that if they find from the evidence that the water pipes in the building of the plaintiff were arranged for the entire building, which was rented in tenements, and got out of repair, then the plaintiff, as landlord of the whole building, is the one who should repair them, and it is not necessary for the defendants, Rosenberg & Miller, to show that the plaintiff, Millie Haizlip, had actual notice or knowledge of the defect; it was the duty of the plaintiff, or her agent who rented the building for her, to use due care to see that the water pipes and fixtures so arranged for the entire building did not get out of repair, and ignorance of defects in such fixtures or pipes would be no defense to the counter-claim of Rosenberg & Miller.

"2. It is the general rule of law governing landlords and tenants that there is no implied warranty on the part of the landlord that the premises rented by him are in good condition; this rule, however, does not apply to water pipes that are meant for general use by all the tenants of the building which is rented to the several tenants, and for which no one of the tenants is responsible for want of repairs of such pipes. The landlord is bound to keep such parts of the premises as are intended for the common use of all the tenants in such a state of repair that they can be safely used. So, if the jury find from the evidence that the plaintiff, or her agent in charge of renting a building for her, did not use due care to keep the water pipes in the building in such condition that they would not overflow and become clogged up, so that they would cause the water to flow out in the building, and flood the goods of other tenants, whereby damages was sustained by them, she would be responsible for such damage, and the jury are authorized to deduct such damages from the rent they may find to be due to plaintiff in this case, and if such damages exceed the rent, they may find a verdict for the defendant over and above the rent sued for." (Reporter.)

Sh. & Redf. Negl. pp. 512, 513, 514. The landlord was not bound by his lease to make repairs, and the tenant took the premises "for better or for worse." 51 Ark. 48; 33 Cal. 341; 45 N. Y. 119; 2 Wall. 491; Taylor, Land. & T. (6 Ed.), secs. 327-8-9, etc.; *ib.* secs. 173 and 175; 54 N. Y. S. C. 406.

WOOD, J. In the absence of a statute, or a covenant to repair, a landlord who rents the upper story of his building containing a water closet, with water fixtures properly constructed and in good condition at the time of the lease, and who gives to the tenant the exclusive possession and control thereof, is not liable to a tenant of the lower story for damages caused by some defect in the water fixtures of said water closet, accruing during the term of said lease. The court erred in its charge. 2 Wood, Landlord & Tenant, sec. 381, note; *Freidenburg* v. *Jones*, 63 Ga. 612; *Jones* v. *Freidenburg*, 66 Ga. 505; 1 Taylor, Landlord & Tenant, sec. 172, 175a; *Gocio* v. *Day*, 51 Ark. 46; and authorities cited in brief for appellant.

Reversed and remanded for a new trial.

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## SCHOOL DISTRICT NO. 15. *v.* SCHOOL DISTRICT OF WALDRON.

Opinion delivered February 13, 1897.

SCHOOLS — FORMATION OF NEW DISTRICT — DIVISION OF SURPLUS.— Under Sand. &. H. Dig. § 6992, providing that, on the formation of a new school district from the territory of an existing district, in case there be a surplus fund on hand, it shall be entitled to a proportionate part of such fund, a newly formed district is not entitled to share in a tax voted by the old district to sustain the schools for the ensuing year, but not levied at the time of the formation of the new district, but only in the surplus remaining after paying all the expenses of the year's schools. (HUGHES, J., dissenting.)

Appeal from Scott Circuit Court.

PRESTON C. WEST, Special Judge.

*A. G. Lemon* and *Daniel Hon* for appellant.

The county court has no power to levy a school tax; it must be voted by the electors of each school district. When so levied, it becomes a fund to be placed to the credit of the district levying and paying it, and is not subject to be apportioned to any district subsequently created by law out of part of its territory. Const. Ark. art. 14, sec. 3; Sand. & H. Dig., sec. 7033; 32 Ark. 496; 32 Ark. 131; 33 *id.* 716; 38 *id.* 271; 42 *id.* 100; 93 Cal. 414. There is no statutory remedy given to recover, in a proceeding commenced in the county court. 60 Ark. 124; 40 Mich. 551. There is no provision for apportionment or division of a fund between a common school district and a special school district. 21 Am. & Eng. Enc. Law, p. 847. It is only when there is a *surplus* that this can be done (Sand. & H. Dig., sec. 6992, 6994), and these sections do not apply to this case. 60 Ark. 124. There was no *surplus*, the entire fund having been lawfully contracted away. When the tax was voted, it was the duty of the directors to provide for schools, unless otherwise instructed at the annual meeting. 45 Ark. 121; Sand. & H. Dig., sec. 7029; 18 Mo. App. 266; 46 Ohio St. 595; 44 Ohio St. 278; 33 Ark. 497. A school tax cannot be appropriated to any other purpose, nor to any other district, etc. Const. art. 14, sec. 3. The fact that a portion of the tax was paid by tax payers residing or owning property in the school district of Waldron does not change the law. The word "*district*" only refers to the body corporate, and not to territory. Sand. & H. Dig., sec. 6986; 18 Mo. App. 266; 93 Cal. 414. 60 Ark. 124 settles only the question of the legality of the formation of appellee district, but not the question involved here, and it is not

*res judicata.* Bouvier, Law Dict. vol. 2, p. 457. The county court had no jurisdiction. 15 Ark. 381; 57 *id.* 299. Appellee's remedy, if any, was by suit in equity. 40 Mich. 551. The county court having no jurisdiction, the circuit court acquired none on appeal. 6 Ark. 182.

*S. R. Cockrill* and *Miles & Miles* for appellee.

The county court alone has power to levy county taxes. Const. art. 7, sec. 30; Sand. & H. Dig., sec. 1276, subd. 8; 42 Ark. 100; 34 *id.* 188, 193–4; 36 *id.* 641; 33 *id.* 716. The vote to levy the tax was only an unexecuted power to levy; no lien on property, etc., until the county court made the levy. This was done after the creation of appellee. 93 Cal. 411; 5 Pick. 332; 5 Gray, 413. "*Assessment,*" as used, means levy by the county court. 46 Ark. 77–8. School District No. 15 had no power to collect the tax. 4 Mass. 537; 5 Gray (Mass.), 413; Const. Ark. art. 14, sec. 3. The county court had jurisdiction. Const. art. 7, sec. 28; Sand. & H. Dig., secs. 6992 to 6995, etc.; 54 Ark. 468; 4 N. Y. 425–432. An apportionment like this has often been sustained. 91 Pa. St. 182; 34 At. Rep. 33; 64 Ind. 275; 54 Iowa. 77. The appeal in 60 Ark. 124 was pending in this court when this tax was levied. The reversal of a judgment restores parties litigant to the same condition in which they were prior to its rendition. 2 Freeman, Judg. secs. 481–2; 34 Ark. 569, 580.

BUNN, C. J. This proceeding was commenced by petition on the part of appellee, in the Scott county court, at its July term, 1895, against appellant, for a distribution of funds alleged to be in the treasury of the county to the credit of appellant, but which, it was alleged, belonged in fact to appellee in part, and were the subject of apportionment between appellant and appellee districts. The prayer of the petition was

granted by the county court, and an order of apportionment entered, from which respondent appealed to the circuit court, where the judgment of the county court was sustained, and judgment entered accordingly. From this judgment, also, the respondent, district No. 15, appealed to this court.

On the third Saturday in May, 1894, as the law provided, the qualified electors of School District No. 15, as then constituted, met and, among other things, voted a school tax to defray the expenses of a school for a portion of the ensuing school year. It appears from the record that, at the time of said election, the tax thus voted was estimated to be sufficient to produce the sum of $800, which, added to the school revenue to be derived from other sources, and soon to come in, amounted in the aggregate to the estimated sum of $1,200, estimated to be sufficient to defray the expenses of operating the schools for six months.

Presumably, the directors of appellant district No. 15, in compliance with the law (section 7049 of Sand. & H. Dig.), made their estimate to the annual meeting of the district on the said third Saturday in May, 1894, of the expenses of the district for that year, including the expenses of a school for the period of three months for the next year, after deducting the probable amount of school moneys to be apportioned (the state fund and so forth), and also submitted an estimate of the expenses per month of continuing the school beyond the term of three months; and an estimate of whatever else might be necessary for the comfort and advancement of said school. These estimates are required to be made by the directors to the assembled electors of the district at the time of the annual meeting aforesaid, to the end that the electors may be the better enabled to vote intelligently on the subject of how long the school should continue during the year, and the rate of taxation necessary to

insure the desired object. These estimates therefore form the basis—the only basis—for the taxation thus sought to be had upon the property of the district.

In September, 1894, the directors of appellant district contracted with a sufficient number of teachers, and during the term expended other funds sufficient to have the school continue for the period aforesaid, and these incidental expenses and contracts for the teaching force absorbed nearly all the revenues which actually come into the county treasury to the credit of appellant district. The school was taught, beginning the latter part of September, 1894, and closing in March, 1895, having been patronized and attended by students residing in the town of Waldron and the adjacent territory included in said district No. 15, although the record shows a portion of the children in the town of Waldron attended the school conducted under the auspices of the friends of appellee school district a portion of the year.

It appears that the appellant district No. 15, before the formation of appellee separate school district of Waldron, included all the territory, no more, no less, afterwards included in both districts; that is to say School District No. 15 was the original district, which included, besides a suburban territory, the town of Waldron.

When the annual school election at which the tax aforesaid was voted on the third Saturday in May, 1894, was held, the special School District of Waldron had no existence, and of course it did not enter into the estimates, except as it was a part of the original district No. 15, and the tax was voted in the name of the latter and for its benefit, and was so extended on the tax books against the property of the original district, and, it appears, was collected and turned into the treasury to the credit of said district No. 15, to be drawn out upon the warrant of its directors. It appears also from the

record that the appellee district, the special School District of Waldron, was organized on the 7th day of July, 1894, and that, at the instance of certain persons in Waldron and in the remainder of district No. 15, the attorney general of the state instituted proceedings in the nature of *quo warranto* against the special district to have its organization declared invalid, and that, upon final hearing on appeal, this court, in January, 1895, held the organization of the special School District of Waldron to be valid. *Beavers* v. *State*, 60 Ark. 124.

The present proceeding, although begun in the summer of 1895, has for its object the apportionment by the county court of the entire current revenues of School District No. 15, derived from taxation and otherwise, as aforesaid, for the school year of 1894–1895, and is based upon section 6992 of Sand. & H. Dig., which reads as follows, to wit: "In case there be a surplus fund on hand at the time of the formation of said (new) district, it shall be entitled to a proportionate part of said fund, the same to be ascertained and determined by the county court of the county in which said new district may be created, as in the judgment of said court may be considered right and proper." This section, we conceive, is made applicable to special school districts, as well as to common school districts, by the provisions of section 7113 of Sand. & H. Dig.

In the case of the organization, by the county court, of a new district out of the territory of an old one, it will be seen from the statute quoted that it is only the *surplus*, or funds in excess of what is reasonably necessary to operate the schools of the old district, that are subject to apportionment by the county court clothed in such case with power to do what is right and proper in the premises.

The tax voted by the electors of the original district No. 15, on the third Saturday in May, 1894—the annual

school meeting—became a source of revenue to that district to be appropriated to the objects named by the electors of that district, and subject alone to be drawn upon by its directors for such designated purposes. There was no other contingency than such as might arise from changing and varying valuation of property on the tax books. The report of the election presumably was duly made to the county court, and that court had no discretion in the matter. Its duty was to ascertain the rate voted by the electors of the district, and then cause the extension to be made on the tax books—a purely ministerial function, refusing to perform which it doubtless could have been compelled to perform. *Maddox* v. *Neal*, 45 Ark. 121.

Equally incumbent upon the directors of School District No. 15 was it to see that the school was taught as directed by the electors, and consequently to make all necessary contracts with teachers, and to pay incidental expenses that might become necessary to attain the object in view.

When the tax was placed on the tax books—"levied," as it is termed, it related back to the election on the subject, and took effect from that event, in so far as it concerned the interest of the district and the conduct of the officers managing and controlling its affairs. The directors, after the election, might anticipate the revenue thus to be derived, in making contracts with teachers and in making contracts for other things pertaining to the conduct of the schools for the current term. In fact, such is nearly always a necessity.

The appellee never in fact became an operative organization until its organization was declared to be valid by this court in January, 1895, a little before the school of the old district No. 15, would close. The statute authorizing the county court to apportion a surplus of the common fund on the formation of new

district, which we have quoted, makes only the surplus fund on hand apportionable by the county court. The fund sought by the petition of appellee to be apportioned is not a surplus fund. On the contrary, it is the fund voted, collected and set apart to sustain the school for the current year, of School District No. 15, against which and on the faith of which the directors had the right to contract and obligate themselves officially; and to that extent the fund was already devoted, and must be appropriated to the faithful performance of these contracts and obligations; and to that extent they are not surplus funds, but funds legitimately pledged and from the beginning bound.

Our opinion is, therefore, that if there remained a surplus or excess of the funds derived as aforesaid in the county treasury, after all the expenses of the year's school had been paid, that surplus, whatever it might be, should be apportioned as provided in the section quoted, for that, and that alone, is to be regarded as the surplus referred to therein.

Reversed and remanded.

RIDDICK, J., being absent, did not participate.

HUGHES, J., (dissenting.) The vote of the tax by the electors of School District No. 15 was regular, and authorized the county court to levy the tax voted upon all the property then in that district, but it was not a completed levy until the action of the county court levying the tax, but was inchoate and incomplete till then. This tax was voted in May, 1894. On the 15th of July, 1894, the School District of Waldron was legally organized out of territory which before its organization constituted part of School District No. 15. October 1, 1894, the county court levied the tax, which had been voted in May, 1894. At the August term of the circuit court of Scott county in 1894, the organization of the

School District of Waldron was declared illegal and void. In January, 1895, this decision was reversed, and it was held that the School District of Waldron was legally organized on the 7th of July, 1894.

The effect of this is that the School District of Waldron was all the time from July 7, 1894, a lawfully organized school district. But for the supposition which the county court erroneously indulged by reason of the erroneous decision of the circuit court that the School District of Waldron had no existence, we must presume that the five-mill special tax voted by the electors of School District No. 15, as constituted when it included the territory, population and taxable property of the School District of Waldron, afterwards formed, would have been levied in the name of the School District of Waldron. In contemplation of law, it would seem that it was levied for that district, though levied in the name of School District No. 15. This tax was collected in 1895, and paid into the treasury of Scott county on July 13, 1895. Of course, this tax could not be distributed till it was collected and paid into the treasury, and at the time it was collected and paid in there was no longer any question about the legality and existence of the special School District of Waldron. This had been settled by the supreme court in January, 1895. And, upon any distribution thereafter made, the School District of Waldron should have had allotted to to it the taxes that had been levied upon the property in the bounds of that district.

As a matter of law, it could make no difference that a contract for a school had been made to be discharged out of the taxes by School District No. 15, which school the children of the School District of Waldron attended. If School District No. 15 saw fit to maintain a school of its own volition, and allow the children of the School District of Waldron to attend it, it is difficult to see how

this would in law excuse district No. 15 from accounting to the School District of Waldron for money of the latter which it had collected and used, however it might appear according to natural equity and justice.

It is said in the opinion of the court that the county court had power to distribute the surplus only, and that there was no surplus. But the whole fund was on hand when the money was paid into the treasury. District No. 15 having appropriated the whole, there could be no surplus afterwards. If the School District of Waldron was entitled to part of a surplus, on the theory that its property paid part of the tax, why was it not entitled to its share of the whole, according to what the property within its bounds had paid? If one come into possession of money which belongs to another, it is no answer to the demand of the owner to say that the party who received the money had obligated himself to pay it out, or had paid it out, in settlement of his own obligations. The whole theory of the law of taxation in this state is that those who pay the taxes shall be entitled to control and have the benefit of the expenditure of them.

It does not appear in this case that the School District of Waldron consented to the expenditure of the money collected off the property within its bounds, by virtue of the tax, by School District No. 15. It matters not that the School District of Waldron levied no tax; those who voted the tax were afterwards erected into a special school district. They paid the tax levied upon their property. Shall the fact that they were, after the tax was voted, but before its levy was completed by the county court, and long before the tax was collected, organized into a separate district deprive them of their just share of the tax? Suppose district No. 15 had made no contracts to absorb this money, is there any doubt that the School District of Waldron

would be entitled to its share of it? What difference can it make in law that School District No. 15 had made such contracts? They were its contracts, and it had no right, in my opinion, in strict law, to expend that part of the tax that had been levied upon the property of and paid by the citizens in the territory out of which the School District of Waldron had been formed before the tax levy of the tax was completed by the action of the county court levying the tax voted. If the county county court had the power to make the distribution it did make, then I am of the opinion that the judgment should be affirmed. But I am not satisfied that the remedy of the School District of Waldron against district No. 15 was not an action for money had and received.

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

Opinion delivered February 13, 1897.

EVIDENCE—COMPETENCY.—Evidence which is incompetent when standing alone may be rendered competent by subsequent testimony.

APPEAL—NEW TRIAL.—Error in excluding evidence is waived by failure to make the exclusion a ground of motion for new trial.

SAME—WHEN ERROR CURED.—Error in admitting oral evidence of the time at which a railway agent agreed that horses shipped over its road would be delivered at their destination under a written contract is cured by an instruction that the only obligation of the company as to the time of forwarding the horses was to do so within a reasonable time.

DAMAGES—MARKET VALUE.—The measure of damages for injuries to horses in shipment is their depreciation in value by reason of such injuries at the market of their ultimate destination, although beyond the line of the railroad company liable for the injuries, where it undertook to carry the horses with the knowledge that they were to be delivered at such point.

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

*Dodge & Johnson* for appellant.

The court erred in ruling out the written contract of shipment. 46 Ark. 238, 240–6; 50 *id.* 397. The clauses exempting from liability were reasonable and valid. Cases *supra;* 57 Ark. 112; 11 So. Rep. 791; 24 S. W. Rep. 355; 18 S. E. Rep. 88; 59 Fed. Rep. 879; 8 C. C. App. 341; 24 S. W. Rep. 354; 21 *id.* 77: 78 Tex. 374; 14 S. W. Rep. 666. It is legitimate for a carrier by contract to provide a reasonable time within which notice of claim for loss, etc., shall be given as a condition for liability. 21 Wall. 264; 54 Miss. 566; 28 Am. Rep. 388; 5 Hurl. & Norm. 867; 30 S. W. Rep. 1113; *ib.* 500; 39 N. E. Rep. 426. Plaintiff's statement that defendant was to deliver the horses at Tyler by Thursday was hearsay, and contradictory of the written contract, and was incompetent. 27 N. E. Rep. 588; *ib.* 208. As the contract was silent as to the time of shipment, the law imports an obligation to ship within a reasonable time, and without unnecessary delay. 91 Ill. 613; 31 Minn. 85; 16 A. & E. R. Cas. 149; 27 *id.* 36. The court erred only in its charge as to the measure of damages. The market value at Texarkana, the place of delivery, should have governed, and not that of Tyler, Texas.

*Scott & Jones* for appellee.

The contract excluded was exactly like the one in 57 Ark. 127, and contained the unreasonable stipulations. The written contract being void, parol testimony was admissible to show the place and time of delivery. There is no error in the instructions. 56 Ark. 594; U. S. Rev. Stat. sec. 4386; 12 S. E. Rep. 363; Thompson, Charging the Jury, sec. 82.

BATTLE, J. Deshong brought this action against the St. Louis, Iron Mountain & Southern Railway Company. He stated in his complaint that the railway company entered into a contract with him on the 21st of March, 1893, and thereby agreed, for a consideration paid to the defendant, to carry safely and in a reasonable time twenty-four horses (a car load) from the city of St. Louis to the city of Texarkana, and to deliver them at the latter place to a connecting carrier for carriage to Tyler, in the state of Texas, their place of destination; that the horses were delivered to the railway company at 6 o'clock p. m. on the 21st day of March, 1893, but "were not delivercd at Texarkana to the connecting carrier until 10 o'clock p. m. March 24, 1893; that there was an unreasonable delay in the transportation of said stock from St. Louis to Texarkana, and that, during all the time said animals were being transported, they were confined in the car in which they were loaded, without water or being unloaded for exercise or rest, and without other food than that placed by plaintiff in the car at St. Louis; that thereby the said horses became, from their long unreasonable confinement, feverish, resulting in crowding, pressing and trampling, one against the other, causing the same to be damaged." The complaint then set up specifically the kind of injuries received, which consisted of bruises, scratches and cuts upon the various horses in the car, and prayed for damages in the sum of $600.

"The defendant, answering, admitted that the animals were received at six o'clock p. m. on March 21, 1893, under contract to be carried by defendant to Texarkana, Arkansas, there to be delivered to a connecting carrier for transportation to Tyler, Texas. It denies that there was any delay in shipment for any unreasonable length of time, or longer than the schedule time of

defendant's train. It denied that said stock was unreasonably or negligently kept upon its cars during said journey, but charges that defendant railway company had made all necessary arrangements to unload, water, rest and feed said stock at its yards in Little Rock, a point nearly half way between St. Louis and Texarkana, when the plaintiff specifically and specially urged and requested the defendant not to unload, rest and feed his stock, or to delay the same at Little Rock or elsewhere, but that they be only watered at said point, and carried on to their destination without delay; that the request of said plaintiff was complied with; that the horses were watered fully and sufficiently at Little Rock, as requested by plaintiff, and immediately forwarded to Texarkana. Defendant further denied the specific injuries alleged, and charged that the same, if there were any, were not caused by any act of carelessness or negligence on the part of the defendant, but that the stock were bruised, scarred or disfigured, if injured at all as charged, by the innate viciousness of said animals, and not from any act of omission or carelessness on defendant's part. Defendant further denied that plaintiff was damaged in the sum of $600, or in the sum specifically named in his complaint, and denied all responsibility for the injury to said stock."

A jury tried the issues of fact, and returned a verdict in favor of the plaintiff for $400. The court rendered judgment in his favor against the defendant for that amount, and the railway company appealed.

The following facts were proved by the evidence adduced at the trial: On the 21st of March, 1893, the appellee delivered to appellant, in St. Louis, twenty-four horses to be transported over its railway to Texarkana, and there delivered to a connecting carrier, to be forwarded to Tyler, Texas, their place of destination. They were loaded in a car of appellant, and left St.

Louis at 8.05 o'clock p. m. on the 21st of March, 1893, and arrived at Little Rock, Ark., on the 23d of March, at 3.05 a. m. (when it should have arrived at 7.35 p. m. on the evening before if it had been on regular time), and arrived at Texarkana at 3.15 on the afternoon of the 23d of March, 1893, and were unloaded into the stock yards at 3.30 of the same evening. They remained on the car from the time they were placed in it until they reached Texarkana, where they arrived in a damaged condition. There was evidence tending to prove that the damage was occasioned by the negligence of the appellant, and that the extent of it was as much as $400, the amount of the verdict.

Competency of evidence.

In the course of the trial, the depositions of three witnesses were read as evidence to show that the horses arrived at Tyler in a damaged condition, and the extent of the injuries. Appellant objected. Evidence was afterwards adduced, tending to show that the horses were damaged before they left Texarkana, and were not injured thereafter. This made the evidence as to their condition when they reached Tyler competent. The order in which the evidence was adduced should have been reversed, but no injury was done on account of the time at which it was presented. *Cox* v. *Vise*, 50 Ark. 283.

When error waived.

While appellee was testifying in behalf of himself, he stated that the contract between himself and appellant as to the transportation of the horses was in writing. The contract contained limitations upon the liability of appellant as a common carrier. The court permitted a portion of the contract to be read as evidence, but excluded the limitations. The appellant excepted, but did not make the exclusion a ground of his motion for a new trial, and thereby waived his exception.

When error cured.

While testifying, appellee stated that the agent of appellant said that, if he would ship his horses over

their railway, "they would deliver them at Tyler by Thursday evening." To so much of this testimony as relates to the delivery of the horses the appellant objected. As the contract was in writing, it should not have been admitted. But its evil effects were avoided by an instruction given to the jury in the following words: "6. The court instructs the jury that defendant was not bound to ship plaintiff's horses by any special train, nor in any given time, nor in the speediest manner, nor did it contract that its trains would run on schedule time. Its only obligation as to the time of forwarding this was to forward them in a reasonable time; and if they find from the testimony that said horses were delivered at Texarkana within a reasonable time after their shipment at St. Louis, defendent would not be responsible for damages occasioned by their being on the car for such time."

As to proof of market value.

The court, over the objection of the defendant, instructed the jury as follows: "If the jury find for the plaintiff, the measure of damage is the difference in the actual cash market value of the animals injured immediately before and immediately after said injury, with 6 per cent. per annum interest thereon from the date of said injuries." The objection of appellant to this instruction is, it did not inform the jury by what market they should be governed in determining the value of the horses and the damage to them in transportation, whether the market of St. Louis, Little Rock, Texarkana, or Tyler. It says the market of Texarkana should have governed, because it was the place where it was to deliver the horses to the connecting carrier. But this does not seem to us to be a correct measure. The depreciation of the horses by reason of the injuries according to the market of Tyler, the ultimate destination,—the cost of transportation having been paid,—was the actual loss sustained by appellee.

This was the natural consequence of the injuries according to the usual course of things, and is as direct and proximate as it would have been had the appellant undertaken to deliver the horses at Tyler. The appellant undertook to carry them to Texarkana, with the knowledge that they were to be delivered to their owner at Tyler; and the loss sustained according to their market value at the latter place was in the reasonable contemplation of both parties. For these reasons the damages occasioned by the negligence of the appellant should have been assessed upon the basis of the market value of the horses at Tyler. *Sisson* v. *Cleveland & T. R. Co.*, 14 Mich. 489; *East Tennessee, etc., R. Co.* v. *Johnston*, 75 Ala. 596; *Cutting* v. *Grand Trunk R. Co.*, 13 Allen, 381, 389; *Fox* v. *Boston & Maine R. Co.*, 148 Mass. 220; *Northern Trans. Co.* v. *McClary*, 66 Ill. 233; 3 Sutherland, Damages (2d Ed.), sec. 932. See *N. Y. etc. R. Co.* v. *Estill*, 147 U. S. 591, 614–617.

The value of the horses as it would have been had they been transported with proper care, and their depreciation on account of the injuries, were estimated according to the Tyler market by all the witnesses, who testified in respect thereto, except the appellee, and he did not state by what market he was governed. According to his testimony, he was damaged at least $630, and the jury assessed them at $400. So it is apparent the jury were not governed by his estimate. The fair inference is that they assessed the damage upon the basis of the Tyler market. That being true, the appellant was not prejudiced by the omission to inform the jury that they should be governed by the market at Tyler.

Judgment affirmed.

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# CAMPBELL v. CLARK.

Opinion delivered February 13, 1897.

GUARDIAN'S ACCOUNT — SURCHARGING. — For a guardian to obtain credits in his final settlement with the probate court for sums not expended by him for the benefit of the ward is such a fraud as will justify a court of equity in restating and correcting the settlement.

GUARDIAN AND WARD—WARD'S SUPPORT.—As a rule, where a ward lives with her guardian as a member of his family, receiving board and clothing and rendering the ordinary household services required by parents of their children, such services will be presumed, in the absence of a clear showing to the contrary, to be a sufficient compensation for the ward's support.

SAME—INVADING PRINCIPAL OF ESTATE.—A guardian is not entitled to an allowance in excess of the income of his ward's estate without previously obtaining an order of the probate court therefor, under Sand. & H. Dig., § 3604, providing that without the direction of the probate court, "the guardian shall not be allowed, in any case, for the maintenance and education of the ward, more than the clear income of the estate."

SAME—INTEREST.—A guardian who pays out for clothing and other necessaries of his ward more than he receives credit for should not be charged with more than six per cent. interest on the amount found to be due from him.

Appeal from Woodruff Circuit Court in Chancery.

GRANT GREEN, JR., Judge.

STATEMENT BY THE COURT.

Suit in equity to surcharge and correct final settlement made by a guardian, which settlement had been confirmed by the probate court.

James H. Campbell, guardian of Lucy Clark, a minor, filed in October, 1888, his final settlement of such guardianship. In said settlement he charged himself with the amount on hand November 1, 1884, date of the last preceding settlement, to wit: $498.90, with interest on said sum at rate of six per cent. from that date. He asked

and obtained a credit of $150 dollars for each of the years 1885, 1886, 1887 and 1888, as an allowance for board and clothes furnished by him to his ward, making a total credit of $600. The credits thus allowed were more than sufficient to absorb the whole estate of the ward, and left a balance due the guardian of $26.35.

It was alleged by Lucy Clark in her complaint that this annual credit of $150 was greatly in excess of the income of her estate, and that the same had never been paid out or expended by her guardian for her benefit, and that these facts were fraudulently concealed from the probate court by said guardian. The circuit court found that these allegations were sustained by the evidence, and ordered that the settlement of said guardian be surcharged and restated accordingly. From this judgment the guardian appealed.

*N. W. Norton* for appellant.

The order of allowance is conclusive where no abuse is shown. Sand. & H. Dig., secs. 219, 3604; 30 Ark. 520; *ib.* 312. The allowance of $150 and the rate of interest were matters ruled on by the probate court, and hence not reviewable in chancery. 42 Ark. 191; 51 *id.* 1; 43 *id.* 171; 8 *id.* 268; 20 *id.* 527; 34 *id.* 64; 36 *id.* 383. The confirmed settlements of the probate court cannot be disturbed in chancery, except for fraud or other recognized ground of chancery jurisdiction. 40 Ark. 219. There was no fraud here.

*J. N. Cypert* for appellee.

A failure to charge interest is a fraud, as is the charging an allowance of $150 per annum when no such sum was expended. No more than the income of the ward can be expended in maintenance. Sand. & H. Dig., sec. 3604.

RIDDICK, J., (after stating the facts.) The contention in this case is that the guardian fraudulently

obtained a credit of $150 for each of the four years covered by his final settlement.

As to surcharging guardian's account.

The circuit court found, not only that these credits exceeded the income of the ward's estate, but also that the guardian had never expended the sums for which he obtained credit on his final settlement. The evidence does not in our opinion show that the guardian induced the probate court to approve the settlement complained of by a statement that such court had previously authorized him to expend for the maintenance of his ward sums in excess of the income from her estate. The question we must consider therefore is whether the evidence supports the finding of the chancellor that the guardian obtained credits in his final settlement for sums not expended by him for the benefit of the ward, for, if he did, this would be such a fraud as would justify a court of chancery in restating and correcting such settlement. *Dyer* v. *Jacoway*, 42 Ark. 186; *Jones* v. *Graham*, 36 Ark. 383; *Reinhardt* v. *Gartrell*, 33 *ib.* 727.

As to ward's support.

The appellee, Lucy Clark, during the years that her guardian was allowed these credits for her board and clothing, was living with Mrs. Hopkins, a sister of the guardian. Neither Mrs. Hopkins nor appellant testifies that she made any charge for board of appellee, or that anything was paid by appellant for such board. It is true, they both testify that Mrs. Hopkins procured her supplies from the store of W. P. Campbell & Bro., of which firm appellant was a member; but they do not testify that these supplies were furnished as a consideration for the board of appellee. On the contrary, the statement of Mrs. Hopkins that she "never made out any bill or charge for board," and her further statement that she "always felt that she was doing a great deal for the child," would lead to the inference that she never expected pay for such board. The appellee testified that, while living with Mrs. Hopkins, she worked

the same as a servant, attending to household duties generally, and that the value of her services during this time was sufficient to pay for her board and clothing. Counsel for appellant contends that the services she rendered were only such household duties as prudent parents require their daughters to learn and do, and that, as her home was with a family supported from the guardian's store, it was the same as if she had lived with the guardian. But the supplies were furnished Mrs. Hopkins, not by the guardian, but by a firm of which he was a member, and it is not shown that they were furnished as a consideration for the board of the ward, or that Mrs. Hopkins did not pay for these supplies in some other way. If, however, we should adopt the view of counsel that the ward during these years must be considered as a member of the guardian's family, he would be in no better situation; for the rule is, when the ward lives with the guardian as a member of his family, receiving support on the one hand and on the other rendering the ordinary household services required by parents of their children, that such services will be presumed, in the absence of a clear showing to the contrary, to be a sufficient compensation for the board of the ward. In such a case, the relation is said to be *quasi* parental, and the guardian cannot charge the estate of the ward for board, nor the ward recover for services rendered. *Otis* v. *Hall*, 117 N. Y. 131, 22 N. E. 563; *Doan* v. *Dow*, 8 Ind. App. 324, 35 N. E. 709; *Marquess* v. *La Baw*, 82 Ind. 550; *Folger* v. *Heidel*, 60 Mo. 285; *Horton's Appeal*, 94 Pa. St. 62; Tiffany's Domestic Relations, 313.

Right of guardian to invade the principal of ward's estate.

This final settlement of appellant covers a period from the eleventh to the fifteenth year of the ward's age. It is not unreasonable to believe that a girl of that age might earn her own board. Her estate consisted of only a few hundred dollars in money, and it was the duty of her

guardian to have endeavored to find her a home where she could earn her board, thus avoiding the necessity of invading the principal of her small estate. If he failed in this, he should have submitted the matter to the probate court, and allowed it to determine whether it was necessary to expend a portion of the principal of the estate for the maintenance of the ward, and to direct the expenditure, as required by our statute. Sand. & H. Dig. § 3604. So far as this statute forbids a guardian from invading the principal of the ward's estate without first obtaining the order of the court having probate jurisdiction, it is only declaratory of existing law, it having been long settled that no guardian has the right to expend more than the income of his ward's estate without proper judicial sanction, though the court, before the passage of this act, could approve such use by the guardian, without previous application for leave, where the court would have authorized it if application had been made. *In re Bostwick*, 4 Johns. Ch. 100; *Villard* v. *Robert*, 2 Strobh. Eq. (S. C.) 40; Schouler's Dom. Rel. (5th Ed.) § 338, and cases cited; Tiffany's Dom. Rel. § 164, and cases cited.

But on this point the language of our statute is direct and positive—that unless the direction of the probate court is obtained to expend more than the income of the ward's estate, "the guardian shall not be allowed in any case for the maintenance and education of the ward more than the clear income of the estate." Sand. & H. Dig. § 3604. The language of this statute could not well be made stronger than it is, and we are of the opinion that it was intended to be, and is, mandatory. This statute, in our opinion, takes from the probate court the discretion to approve the expenditures of a guardian for the maintenance and education of his ward, so far as they exceed the income of the ward's estate, unless such expenditures have been made under the

direction of the court. *Boyd* v. *Hawkins*, 60 Miss. 277; *Ex parte George*, 63 Miss. 143; *Jones* v. *Parker*, 67 Tex. 76.

The appellant did not submit such matters to the probate court, nor obtain its direction for such expenditures, but proceeded to deal with the estate of his ward in a very loose and irregular way. He invested the funds of his ward in his own business, filed no annual settlement, and seems to have kept no account against his ward. His first settlement was filed at the expiration of two years from the commencement of his guardianship, and shows that he was then allowed credit for $375.75 for maintenance of his ward, leaving a balance on hand of $498.90. Four years later, he filed his second and final settlement, showing that the whole estate of his ward, principal and interest, had been absorbed. In this last settlement, covering four years, he is credited each year with $150. He filed no vouchers or receipts of any kind, but asked and obtained this allowance as a lump sum for board, clothes and all expenses. While it is probable that no actual fraud was intended, yet this method of dealing with the estate of a ward cannot be approved; for, when no accounts of expenditures are kept, and no vouchers filed, it is difficult, if not impossible, for either the probate court or the ward, when she arrives at age, to tell in what way or for what purpose the estate has been expended. If such methods of keeping accounts were allowed, the door would be open for the perpetration of all manner of frauds against the estates of minors. Under the evidence in this case, we cannot disturb the findings of the chancellor that nothing was paid out for the board of the ward. Not only the fact heretofore noticed, that neither appellant or Mrs. Hopkins directly testify that anything was paid for board, but the further circumstance that no agreement was made with Mrs. Hopkins

for payment of board, that the ward was required to perform household services, that this charge for board was made after the lapse of several years, all tend to support the finding of the court in this regard, and it must stand.

The result of our conclusion that the circuit court was right in finding that this allowance of $150 was based in part on a fraudulent claim for board is to set aside the whole allowance, for, as the appellant filed with his settlement neither itemized account or voucher, we have no means of ascertaining what portion of the $150 was allowed for board, and what for other expenditures. The circuit court was therefore justified in setting the allowance of the probate court aside, and restating the account, by giving such credits only as the probate court should have allowed in the first instance. As the guardian never procured an order from the probate court directing him to invade the principal of his ward's estate, the court, under the mandatory provision of our statute, was right in holding that his credits could not exceed the income of the estate. It was shown that the guardian expended for clothing and other necessaries of ward more than the income of the estate, and the circuit court correctly charged him with the principal of the ward's estate shown to be in his hands at date of his first settlement, and allowed him the interest thereon to cover his expenditures for the ward.

Liability of guardian for interest.

The probate court charged the guardian with six per cent. interest for use of funds in his hands, and we see no reason to disturb that ruling. The guardian paid out for the use of the ward much more than he received credit for, and he should not, we think, be charged with more than six per cent. on amount found due from him.

The decree of the circuit court will be modified to the extent that only six per cent. interest will be charged the guardian on sums found due from him at date of

his final settlement. With this modification, the decree of the circuit court will be affirmed, and a decree entered here against appellant for the sum of $493, found due by circuit court, with six per cent. interest thereon from October 28, 1888, date of his final settlement as guardian.

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## REDD v. STATE.

63 457
73 412

Opinion delivered February 20, 1897.

ACCOMPLICE—WHO IS.—A witness jointly indicted with two defendants on trial is an accomplice where the indictment against him is undisposed of, and there is evidence tending to connect him with the crime charged, though such evidence is meagre and unsatisfactory; and his testimony, uncorroborated, is insufficient to support a conviction of the defendants.

EVIDENCE—NON-EXPERT TESTIMONY.—Upon the question whether deceased was murdered or committed suicide, it being shown that he held a knife loosely in his hand when found dead, it was error to admit the evidence of non-experts that certain persons supposed to have committed suicide with knives, and whose bodies they afterwards saw, each held a knife tightly grasped in his hand, in the absence of other proof that they had committed suicide—even if such evidence were otherwise admissible.

SAME—WHEN PREJUDICIAL.—The error of admitting incompetent evidence tending to convict defendant of the crime of murder is not cured by proof of his extrajudicial confession, since the confession would not support a conviction unless corroborated by evidence that the death was caused by a criminal agency.

SAME.—The error of admitting non-expert testimony tending to prove that a suicide would be likely to hold the knife with which he killed himself tightly grasped in his hand is not cured by introducing expert testimony to the same effect.

INSTRUCTION—WEIGHT OF EVIDENCE.—It is error to instruct the jury that confessions, "when deliberately and voluntarily made, are deemed to be among the most effectual proofs of the guilt of the defendant."

SAME—CONFESSION OF ACCOMPLICE.—It is error in a murder case to instruct the jury that if they believe that the defendants, or either of them, confessed to the killing of the deceased, and that both of the defendants participated in the killing, they may convict, as the confession of one defendant is no evidence against the other.

Appeal from Drew Circuit Court.

MARCUS L. HAWKINS, Judge.

*H. King White* for appellant.

Frank McCoy was an accomplice. Sand. & H. Dig., sec. 1451. And defendant could not be convicted on his uncorroborated testimony. *Ib.* sec. 2230. Instructions Nos. 11 and 12 asked by defendant are the law. 122 Ill. App. 79.

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

BUNN, C. J. This is an indictment for murder in the first degree, tried and determined in the Drew circuit court at its fall term, 1896, resulting in the conviction of both the defendants of the crime charged against them, and judgment and sentence accordingly, from which they appealed to this court.

On the 13th day of May, 1896, W. F. Skipper, a saw mill operator and merchant of Baxter, in said county, was found dead on the lower bank of Bayou Bartholomew, between said town and his saw mill, lying with his face downwards, and resting upon his crossed hands with palms down. There were two wounds, one as if made by a sharp knife across the throat, severing the jugular vein, and the other by a pointed instrument, penetrating the carotid artery. A pocket knife, with one blade open, was found in his right hand, but at the time the muscles of the hand were relaxed, so that the knife rested loosely in the hand. Two pools of blood from the wounds in the neck, one on either side, and under the arms, were discovered. In the bayou, just opposite where the body was found,

there was a raft of saw logs destined for the mill below but which had in some way or for some reason been stopped at that point, and perhaps some of the logs had been detached, and were separated from the raft, but lay near by. The bayou had been somewhat swollen at the time of the death of Skipper, but when a particular examination of the locality was made, a few days afterwards, the water had fallen eighteen inches or two feet, and many tracks of persons wading in the water before the fall appeared in the wet ground after the water had receded therefrom. Among these tracks appeared those of the deceased; at least tracks answering to the peculiarly shaped shoes he wore at the time of his death. There were spots of blood also found on and about the logs, which indicated that persons about the time of the death had stood or walked on these logs. Various other indications of a struggle were observable at and near the place, and detailed in evidence. The higher or second bank of the bayou hid the body from the view of those passing along the neighboring road.

The first question to be solved was whether the deceased was murdered or came to his death by his own hands. In favor of the theory that it was a suicide, the evidence was quite meagre, and all having reference to the state of physical health of the deceased, and his pecuniary embarrassments, claimed by the defense to be circumstances sufficient to account for the suicide. On the other hand, the position of the body when found, the testimony of an expert physician and surgeon as to the contraction and relaxation of the muscles of the hands of one committing suicide by cutting his throat, and some testimony of non-experts as to whether the muscles were contracted or relaxed in isolated, but similar, cases coming under the witnesses' observation, all, it was claimed by the prosecution, went to show more or less

conclusively that the deceased had not committed suicide, and was therefore murdered. The testimony, however, upon which the verdict in this case is mainly founded is certain confessions and statements of defendant Redd, made to and detailed by others as witnesses on the trial, and, as to defendant Johnson, certain circumstances detailed by witness McKay, and sayings and conduct of Johnson testified to by McKay and others, which it was thought tended to incriminate that defendant.

The motion for new trial, omitting the usual formal grounds, sets forth the following grounds: inadmissibility of the testimony of W. F. Slemons; also the inadmissibility of the testimony of L. E. Morgan and that of W. C. Spain; the error of the court in giving the tenth instruction asked by the state, and in overruling the tenth and twelfth instructions asked by the defendant; and that the verdict was contrary to the evidence.

For the purpose of determining the question whether or not the deceased came to his death by murder or suicide, the expert testimony of a physician was taken as to whether or not, in similar cases, the muscles of the hands would be apt to remain rigid or relax after death, the fact in this case being that the pocket knife found in the hand of deceased was loose, and not held by a rigid grasp. In addition to this expert testimony, and apparently in support of it, the non-expert testimony of W. F. Slemons and L. E. Morgan was introduced to prove by them, in the particular cases of suicide they had witnessed, committed in the same way as this one, if suicide at all, whether the muscles of the hands were contracted or relaxed after death.

While there are authorities which apparently sanction the introduction of such non-expert testimony, yet we think, upon the whole, such testimony is inadmissible, but that in the present case, however, the error

was not prejudicial as to the case against Redd, especially since the confessions of that defendant probably furnished the only grounds upon which he was convicted, and his confession, as a matter of course, included the fact of the murderous killing, as well as the connection of that defendant with it.

As to the objection to the giving of the tenth instruction asked by the state, we do not think it well made, as that instruction substantially announces the law on the subject.

We think there was no prejudicial error in refusing the tenth instruction asked by the defendant, as the first and second instructions given by the court on its own motion, according to the uniform ruling of this court, substantially covered all the ground sought to be covered by the instruction refused.

The twelfth instruction asked by the defendant, and refused by the court, really has no evidence to support it, as it does not appear that any of the witnesses testified in consideration of an immunity from prosecution of charges pending against them, unless we are permitted to judge by inference alone. Besides, we think the instructions given fairly submitted the case to the jury.

We think the statements made by defendant Redd to witnesses Henry and McCoy, and overheard by witness Spain, were voluntarily made, and his confessions and other statements made to these witnesses and detailed by them on the trial amount to sufficient evidence to justify the verdict of the jury against him, even treating the testimony of McKay as that of an accomplice.

As to who is an accomplice.

The question as to whether or not McKay was an accomplice was not submitted to the jury by the trial court, and is not raised expressly in the record, but was raised in argument before us on the question of sufficiency or want of evidence, and we do not feel at liberty

to disregard it in a case of such serious consequences. It is the unquestioned rule that where that question in any case is submitted to the jury, its finding on the subject is final, unless the testimony shows conclusively that the witness was an accomplice. The question moreover is one of mixed law and fact. *Edmonson* v. *State*, 51 Ark. 115; *Melton* v. *State*, 43 Ark. 367.

The question not having been submitted to the jury, and in view of the fact that witness was jointly indicted for this offense with the two defendants on trial, that the indictment against him is still undisposed of in any way, and the extraneous evidence adduced on the trial tending to connect the witness with the commission of the crime of murdering Skipper, although somewhat meagre, and not at all satisfactory, as may be admitted, we, or at least a majority of us, are of opinion that the witness McKay is to be regarded as an accomplice, and his testimony is admissible under the rules governing that of an accomplice.

The language of the statute on the subject, as digested in Sandels & Hill's Digest, is as follows:

"Section 2911. 'When two or more persons are indicted in the same indictment, either may testify in behalf of or against the other defendant or defendants." Act approved March 2, 1893.

"Section 2246. Where two or more persons are indicted in the same indictment, and the court is of opinion that the evidence in regard to a particular individual is not sufficient to put him on his defense, it must, on motion of either party desiring to use such defendant as a witness, order him to be discharged from the indictment, and permit him to be examined by the party so moving. The order is an acquittal of such defendant, and a bar to another prosecution for the same offense." Criminal Code, § 233.

"Section 2230. A conviction cannot be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. Provided, in misdemeanor cases a conviction may be had upon the testimony of an accomplice." Criminal Code, § 240.

The testimony of witness McKay, as concerns defendant Johnson, was to the effect that while Redd, Johnson, and others of the mill hands had been previously taking their meals at his boarding house, yet at the time of the death of Skipper none were eating at his house except Johnson; that, on the day previous to the death of Skipper, Johnson, who was the engineer at the mill of Skipper & Lefew, told him (witness, whose residence it seems was on the road leading from the town of Baxter, where Skipper's store was located, to the saw mill, a short distance up the Bayou Bartholomew from Baxter) "to tell Mr. Skipper that there were some logs down the drift [which] were about to get away, and to tell him the next morning when he passed my (witness') house." This is the basic evidence upon which defendant Johnson was sought to be shown as connected with the murder of Skipper. The theory of the prosecution was that this direction by Johnson through McKay to Skipper was part and parcel of the general scheme to lure the deceased to the secluded spot where he was murdered.

Witness McKay said further, in this connection, that about 6 o'clock a. m. of the day Skipper's body was found, Johnson came to his house for breakfast, and seemed to be in a great hurry, so much so that he finally went off without his breakfast, saying that he had some work to do at the mill that day. He went off just as witness was sitting down to the table to eat breakfast.

Witness said about 8 or 9 o'clock a. m. the same morning Johnson and another man passed by his house in a cart going towards Baxter from the mill when Johnson asked him if he wanted to talk to Redd; and that he saw no more of him during the day until at supper time (Johnson explains his stay in Baxter until the afternoon), when Johnson told witness not to say anything to any body concerning him about the logs.

We think the testimony of McKay is not corroborated so as to show the connection of Johnson with the killing, as required by the statute, and that, therefore, the verdict of guilty thereon was not authorized.

Affirmed as to Redd, and reversed as to Johnson.

## On Rehearing as to Redd.

Opinion delivered April 24, 1897.

Riddick, J. The conviction of appellant Redd for the murder of Skipper was based upon circumstantial evidence, and upon confessions said to have been made by him. The body of Skipper was found lying on the bank of the bayou in Drew county, of this state. There was a wound in the left side of the throat. The body lay face downward. The forehead rested on the crossed hands, and in the right hand was a knife held loosely, with blood upon the open blade. On the ground, under the arms, was a pool of blood which had flowed from the wound in the throat. The medical expert who described this wound said that it was about an inch and a half long, made downward and forward with a sharp knife, which seemed to have jumped and cut the skin about the thirty-second part of an inch, and then went in, and severed the external jugular vein and partially severed the carotid artery. A short distance from the body of the deceased, his vest was found hanging in a tree with his watch in the pocket. His hat was gone,

but his clothing was not torn, nor were there any other wounds upon the body indicating a struggle.

Admissibility of non-expert testimony.

Afterwards the defendant Redd was indicted jointly with Johnson and McKay for the murder of Skipper. Upon the trial counsel for the state undertook to show by the testimony of experts, and by proof of certain facts and circumstances, that the death of Skipper was not caused by himself, but by the hand of another. For this purpose, they introduced a medical expert, who testified that, in case of suicide by stabbing, the deceased would be likely to hold the knife tightly grasped in the hand, so that after death it would be extracted with difficulty. To further substantiate this theory that in suicide by stabbing the knife would be held tightly clasped in the hands of the deceased, the state introduced two non-expert witnesses. One of whom testified that he saw a Mr. Meek after his death by suicide, as he was informed, and that in his hands was a knife tightly clasped. In seeming contradiction to this statement, the witness, so the record shows, then added: "When I was there, he did not have the knife in his hands." The other witness testified as follows: "I saw Richard Jeter after he was killed. It is supposed that he killed himself in the night. It was one o'clock the next day when I saw him. He had a dagger in his hands grasped perfectly tight, and it took some effort to remove it." The appellant objected to the testimony of these two witnesses, and moved to exclude it; which motion being overruled, he excepted. We feel fully convinced that this testimony was improperly admitted. If we should concede that the fact that another person who had committed suicide by stabbing himself still held the knife tightly clasped in his hands after death, was proper evidence for the jury to consider in this case—a proposition we consider at least doubtful—yet it is clear that the testimony here was based on nothing but

hearsay. No witness testified that these men, found after death with knives in their hands, committed suicide, but only that it was supposed they had done so. This testimony, being based, not upon a fact of which the witnesses testified from their own knowledge, but only upon supposition, was clearly hearsay and incompetent. But it was allowed to go to the jury as competent evidence tending to show that in this case the deceased did not commit suicide. The jury might infer from this evidence that, as Skipper did not hold the knife tightly clasped in his hand, he therefore did not commit suicide. The evidence was calculated to effect their opinion upon a vital point in the case.

When evidence prejudicial.

But it is argued on the part of the state that the admission of this testimony could not have been prejudicial, for the reason that the jury must have believed the confession of appellant admitted as evidence, and, if that confession was true, Skipper did not commit suicide. But this contention is not sound, for, if such confession was made, it was extrajudicial, and, to sustain a conviction, it must be corroborated by other evidence tending to prove the *corpus delicti*. In a case of homicide, the *corpus delicti* consists of two fundamental facts: (1) The death of the person alleged to have been killed; (2) the fact that a criminal agency was the cause of such death. In this case the death of Skipper is admitted, but it was still necessary to show by evidence outside of the confession that his death was the result of the criminal agency of another, for such fact cannot be established by the confession alone, and the presiding judge so instructed the jury in this case. *Pitts* v. *State*, 43 Miss. 472; Wharton's Criminal Evidence (8th Ed.,) § 633; 1 Greenleaf, Ev. § 217. In order to cover this point, and show that Skipper was killed by another, and not by his own hand, the testimony of the two witnesses just referred to was

introduced. The error in admitting this testimony was not cured by the proof of the confession, for it was introduced to corroborate the confession.

If it be said that this evidence was harmless, for the reason that the jury may have reached the same conclusion from the testimony of the physician on this point, we must answer that they may have done so, but we are not able to say that they did do so. The testimony of one witness may make no impression, but that of another may carry conviction. We cannot look into the minds of the jury to discover what effect this testimony had upon their conclusions as to the guilt of the defendant; but, as it was incompetent, was admitted against the objection of appellant, and bore upon a material point in the case, we must hold that its admission was prejudicial error, and entitled the appellant to a new trial. Elliott's Appellate Procedure, § 632.

Instruction as to weight of confession.

We are further asked to hold that the circuit judge erred in giving to the jury instruction No. 10;* but it is not necessary to pass on this question further than to say that a majority of the judges are of the opinion that such instruction would be better given in another form. It states among other matters that confessions, "when deliberately and voluntarily made, are deemed to be among the most effectual proofs of the guilt of the defendant." This portion of the instruction is taken from Greenleaf on Evidence, but the learned author, in making this statement, was not stating a rule of law, but was discussing the question as to what weight should be

* NOTE.—Instruction No. 10, given at plaintiff's instance, is as follows: "The court instructs the jury that, while the law recommends caution in receiving confessions of guilt, yet, when deliberately and voluntarily made, they are deemed to be among the most effectual proofs of the guilt of the defendant; and if you believe from the evidence that the defendants, or either of them, confessed to the killing of W. F. Skipper, as charged in the indictment, and that both of the defendants participated in the killing, you may convict."

attached to confessions as evidence of guilt. His discussion of this question is marked by great wisdom and judgment, and has called forth frequent approval; but under our practice, where the judge is forbidden from expressing to the jury opinions as to the weight of evidence, this extract from his discussion is of doubtful propriety as an instruction to a jury. It is true that the circuit judge does not say that the confession here was deliberately and voluntarily made, but the jury might infer that the intention was that they should give great weight to such confession, provided it was deliberately and voluntarily made. Yet, even if the confession be deliberately and voluntarily made, it is still for the jury, and not the judge, to determine what weight to give it. But this instruction is subject to another objection more serious than the one noticed, for it says to the jury that if "you believe that the defendants, or either of them, confessed to the killing of Skipper, as charged in the indictment, and that both of the defendants participated in the killing, you may convict." The jury might understand from this language that if either of the defendants made a confession, and the jury believed from such confession that both were guilty, they should convict both. And the jury did convict both Redd and Johnson, who were tried together; but the judgment as to Johnson has been heretofore reversed, for want of evidence to support it. We therefore think that if there is another joint trial, this instruction should not be given again in its present form.

Admissibility of confession of accomplice.

In a case such as we have here, where the confession is established mainly by the testimony of two negroes, both in jail, one charged with the same crime of which appellant is charged, and the other charged with larceny, we think the jury should be told that the first question for them to determine in reference to the confession is whether they believe from the evidence that

defendant has made a confession. In determining that matter, they should consider the testimony of the witnesses who testify to such confessions, their character and interest in the matter, and the reasonableness or unreasonableness of their testimony; and if, after a consideration thereof, they believe that the defendant has made a confession, it is for the jury then to determine the weight to give such confession. In arriving at their conclusion on that point, it is proper for them to consider the person to whom the confession is made, whether it was deliberately and voluntarily made, and all other circumstances surrounding such confession, in order properly to determine what weight and importance to attach to the same; and when two defendants are tried together, the jury should be told that the confession of one defendant is no evidence against the other defendant.

It is further said that the circuit court committed error in permitting the witness Lefew to give to the jury the inferences and conclusions he drew from certain facts in proof, but no objection was made to such testimony before the circuit court, and none can be made here.

We have not set out the evidence in this case further than was necessary to understand the points of law discussed, and express no opinion concerning it. After due consideration, we have concluded that the motion for rehearing should be sustained, and that defendant Redd, as well as Johnson, should be granted a new trial; and it is so ordered.

BATTLE and HUGHES, JJ., concur.

WOOD, J., is of opinion that the court committed error in giving instruction No. 10, and concurs in the judgment for that reason only.

BUNN, C. J., dissents.

## DAVIS *v.* STATE.

Opinion delivered February 20, 1897.

RAPE—INSTRUCTION.—Where the court has instructed the jury that force is a necessary element in the crime of rape, and that the proof must show beyond a reasonable doubt that the woman did not consent, and that her resistance was not a mere pretense, but was in good faith, and that, if by acts of violence she was so much in fear of her life or bodily harm that she was unable to resist, that would be equivalent to force, it was not error to refuse to further instruct the jury to the effect that there must have been "the uttermost resistance" on the part of the prosecutrix.

EVIDENCE—HEARSAY.—Testimony of the officer arresting defendant charged with rape that the prosecutrix described the ravisher to him, and that upon that description he identified and arrested defendant, is inadmissible.

Appeal from Pulaski Circuit Court, First Division.

ROBERT J. LEA, Judge.

*Ashley Cockrill* for appellant.

The court erred in admitting the testimony of the constable, Beller, that the rapist was described to him by the prosecutrix, and that he identified him by that description, and arrested him. *Lewis* v. *State*, 61 Ark. 494. Also in allowing him to testify as to what prosecutrix said and did when he arrested defendant and took him in her presence. 34 S. W. Rep. 274; 28 *id.* 810. It was error to refuse to instruct the jury that if prosecutrix yielded at any time during the assault, or was passive, or ceased to resist, and her mind was not so overpowered with fear, they should find for defendant. 36 Mich. 203; 110 Mass. 405; 53 Mo. 65; 43 Cal. 447; 35 Ind. 506; 82 Va. 653; 17 Sup. Ct. Rep. 210. The prosecutrix must resist to the extent of her ability. 59 N. Y. 374; 126 *id.* 283; 1 Parker, Cr. Rep. 625; 19 Neb. 330; 32 N. Y. 525, 531, 540; 3 Hill, 309, 316, 317; 7 Carr. &

P. 318; 13 Mich. 427, 433; 53 Mo. 65; 19 Wend. 134–5; 47 Wis. 523; 11 Neb. 276; 58 N. W. Rep. 22; 6 Cal. 221; 27 Fla. 387; 42 Pac. Rep. 953.

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

BUNN, C. J. This is an indictment for rape, tried and determined in the Pulaski circuit court, first division, and resulting in a verdict and judgment of guilty, from which, in due form, defendant appeals to this court.

The principal, and the only material, controversy in this case is: First, as to the court's instruction on the subject of the character and continuity of resistance exhibited by the injured party, necessary to show that the rape was really and in fact against her will, as defined and required by the statute; and, secondly, whether or not the trial court improperly admitted the testimony of the officer who made the arrest, in so far as he referred in his testimony to the description the injured party gave him of the person who committed the offense, before the arrest was made, and the identity of the defendant with the crime established in that way.

Instruction as to rape properly refused.

Defendant complains that the court should have given the second instruction asked by him, which is as follows, to wit: "You are instructed, as a mattter of law, that force is an essential element in the crime of rape. There must be proof of actual penetration made against her will. There must be on her part the uttermost resistance. Opposition by mere words is not enough. She must resist up to the point of being overpowered by actual force, or her will must be so overcome by fear and terror so extreme as to preclude resistance. If you under all the evidence have a reasonable doubt that such resistance was exercised, you will find the defendant not guilty of rape. In considering the amount of resistance, you are to take into consideration all the surrounding circumstances, such as the relative

strength of the parties, their relative ages, the outcry or want of outcry, the physical power still possessed by the prosecutrix after the alleged resistance; and if, after considering all the evidence, you have a reasonable doubt of defendant's ability to have committed the crime, if the prosecutrix, by the use of all her powers of resistance, could have prevented the connection at any time before it was actually made, you will find the defendant not guilty of rape."

The court gave on its own motion the following instruction, numbered 4, to wit: "Force is a necessary element in the crime of rape. The carnal knowledge must be had by him against the will of the person alleged to have been raped. The proof must show, beyond a reasonable doubt, that the woman did not consent, and that her resistance was not a mere pretense, but was in good faith. As before stated to you, it must be against the will of the party; that is, by force. If the carnal knowledge was had actually by force, or if the woman submitted from terror or dread of greater violence, the intimidation becomes equivalent to force. The word 'force' is taken in its ordinary acceptation. I mean by it common physical force. If by acts of violence the woman is so much in fear of her life or bodily harm that she is unable to make resistance, that is equivalent to force." This instruction, we think, fairly submitted the question of force and resistance to the jury. We are aware that some authorities are to the effect that superlative words, like "uttermost resistance," "resistance to the last extreme," and such like, should be employed. But we think the instruction, as given by the court in this instance fully covers the point, and that the court committed no error in refusing the instruction asked by defendant. We think the court's instructions on the whole were very fair to the defendant.

Evidence held to be hearsay.

The objection to the testimony of the constable, Beller, we think was well made. Witness stated: "I am a white man, and constable of Hill township. I heard about the rape Saturday, but did not go to see Mrs. Reynolds until Sunday morning. When I arrested the defendant, I took him out to Mrs. Reynolds' house. I didn't arrest him until Sunday afternoon. Mrs. Reynolds described the person who had raped her to me. The minute I heard the description, I knew exactly who the scoundrel was. I didn't go to his house to arrest him. I didn't go there Saturday night, because I had a reason for not going there at night. I didn't go to his house to arrest him Sunday morning because I had to go to see Mrs. Reynolds. I didn't stay at Mrs. Reynolds' more than fifteen or twenty minutes. Ques. Did Mrs. Reynolds describe the person who raped her to you? Ans. Yes, sir. Q. Does the defendant here tally with that description? A. Yes, sir. (The defendant objected to the above question, the court sustained his objection, and the prosecuting attorney puts the question in the following form). Q. Did Mrs. Reynolds describe the person who had raped her to you? A. Yes, sir. Q. Did you, according to that description, arrest this boy (pointing to the defendant)? A. Yes, sir. (The defendant objected to the above question and answer, the court sustained his objection, and the prosecuting attorney then put the question in the following form). Q. Did Mrs. Reynolds describe the boy who had raped her to you? A. Yes, sir. Q. Did you arrest this boy? A. Yes, sir. (The defendant at the time objected to the above question and answer, the objection was overruled by the court, and the defendant, at the time, saved his exception to the court's action in allowing the witness to testify to the above. The exceptions were noted by the court). As soon as I brought the defendant to Mrs. Reynolds, she recognized him, and sprang from

her bed, and says: 'That is the dirty scoundrel. Let me get at him.' She jumped up in bed, and I pulled the boy away from her."

It is frequently the case, if not in most cases, that an officer, in the performance of his duty to apprehend criminals, is compelled to procure all available information as to description and identity both from injured parties and others. Otherwise, it would be impossible to determine whom to arrest. The objection, therefore, is not that the woman in this case described the party who had raped her to him. The objectionable thing is his detailing, as a witness at the trial, the fact that the injured party had given him the description of the ravisher, and that upon that description he identified and and arrested him. Such testimony is simply strengthening and bolstering up the testimony of the injured party. The rule on this subject is that the officer making the arrest, as in this case, should testify on the stand no further as to his reason for seeking and arresting the criminal than that there was an outcry or information furnished him in other ways of the commission of the crime, and that thereupon he proceeded to search for and apprehend the criminal. Whatever information he may obtain as to the description and identity of the alleged criminal is for his use in making the arrest, but not for his use as a witness; for it is but hearsay after all.

In the late case of *Lewis* v. *State*, 61 Ark. 494, we held that such testimony as to the identity of stolen property is not admissible. The same rule applies in a case like this, especially where the defendant is nearly always liable to be convicted on the testimony of one person. The ravisher being entirely unknown to the injured party, and the defendant having testimony tending to prove an alibi, the question of identity became one of nicety, and it was prejudicial to cast the weight

of the improper testimony in the prosecution's end of the scales.

If the last of the objectionable questions and answers had been the first and only ones propounded to and made by the witnesses on the subject, there probably would have been no legal objection to them; but, being connected with the preceding objectionable questions and answers, as they were, it is impossible to say, that the state did not succeed in presenting to the jury the very fact that the court was endeavoring to keep from them.

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

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## DARTER v. HOUSER.

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Opinion delivered February 20, 1897.

TAX-SALE RECORD—PAROL EVIDENCE.—Where the clerk's record of a tax-sale recites that the land was bid in for taxes and for a lump sum as penalty and costs, parol evidence is admissible to show what was included in the costs.

TAX-SALE—EXCESSIVE COSTS.—A sale of land for taxes is void where the clerk's fee of twenty-five cents for the certificate of purchase was included as part of the costs of sale, under the revenue act of 1883, requiring such fee to be paid to the collector by the purchaser.

Appeal from Lawrence Circuit Court in Chancery, Eastern District.

JAMES W. BUTLER, Judge.

This was an action of ejectment, based on a tax deed executed by virtue of a sale for non-payment of taxes for the year 1887. The defense was that the sale was void because the land was sold for a larger amount of costs than was chargeable against it. Defendant

asked that his answer be taken as a cross-bill, and that plaintiff's deed be removed as a cloud upon his title. Upon defendant's motion, the cause was transferred to equity. On the hearing a decree was entered in plaintiff's favor, from which this appeal is prosecuted.

*J. K. Gibson* and *J. M. Moore* for appellants.

1. The land was sold for illegal charges, and the tax title is void. 56 Ark. 93; 60 *id.* 36.

2. The delinquent list was not posted in the clerk's office for twelve months, as required by law. 55 Ark. 194; *ib.* 216; Cooley on Tax. p. 334; 9 Tex. 420–1; 15 *id.* 453; 61 Pa. St. 413; 48 Mo. 536.

*Charles Coffin* for appellee.

1. The evidence shows that no illegal charges entered into the sale. The law requires the collector's fee of 25 cents for the certificate of purchase to be *taxed as costs of sale*, and hence it is not illegal. 61 Ark. 36 is wrong, and should be overruled. Sand. & H. Dig., secs. 6607, 6613, etc.

BUNN, C. J. This case is governed by the cases of *Goodrum* v. *Ayers*, 56 Ark. 93, and *Cooper* v. *Freeman Lumber Co.*, 61 Ark. 36.

Parol evidence to explain the tax record.

The register book of the county clerk, as well as the certificate of purchase of the land at the tax sale, shows that at the sale the land in question was bid off by appellee for 75 cents taxes and 85 cents penalty and costs, making in the aggregate the sum of $1.60. The testimony of the clerk and sheriff—introduced not to contradict the record of the sale but to explain it, and therefore admissible—showed that a part of the 85 cents charged as costs was the 25 cents charged for the certificate of purchase.

Tax sale void for excessive costs.

At the time this tax sale was made, the revenue act of 1883 was in force, and governed such sales. Under that act, the 25 cents for the certificate of purchase

was not a part of the costs of sale, but was a fee to be paid by the purchaser to the collector making and delivering to him the certificate. Having been included in this instance as part of the cost of sale, it was an overcharge, and, under the rulings in the case cited, the sale and subsequent proceedings thereunder are made void.

By the act of 1893,—doubtless to meet the difficulty suggested in the Goodrum-Ayers Case—the 25 cents for the certificate of purchase is made a part of the cost of sale, but this case arose before the passage of the latter act, and is governed as stated by the act of 1883.

The prayer of the defendant's cross-bill should be granted, and the cloud upon his title removed. Reversed and remanded, with instructions to enter a decree in accordance with this opinion, upon the answer and cross-bill.

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## KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY *v.* BECKER.

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Opinion delivered February 20, 1897.

INSTRUCTION—READING STATUTE TO JURY.—Where the question in issue is what constitutes a fellow servant, it is error to read to the jury the statute defining a fellow servant without explanation, it being susceptible of more than one interpretation.

BURDEN OF PROOF—FELLOW SERVANTS.—A fireman injured by the negligence of an engineer who is shown to have been in the common service of defendant and working to a common purpose in the same department is presumed to be a fellow servant with the engineer, and has the burden of proving the contrary.

FELLOW SERVANTS' ACT—CONSTRUCTION.—A fireman and engineer on the same engine are fellow servants if neither exercises superintendence or control over the other, under the act of February 28, 1893, providing that employees engaged in the common service in the same department and working together to a common purpose are fellow servants if they are of the same grade, neither being entrusted with any superintendence or control over the other.

Appeal from Craighead Circuit Court, Jonesboro District.

FELIX G. TAYLOR, Judge.

*Wallace Bratt*, *I. P. Dana* and *Olden & Orr* for appellant.

Appellee knew of the defect. He took the risk, and, on the evidence, the court should have directed the jury to return a verdict for defendant. 57 Ark. 461. See Shearman & Redf. Neg. (4 Ed.), sec. 11; 46 Ark. 555; 21 S. W. Rep. 648; 23 *id.* 643; 59 Tex. 22; 33 S. W. Rep. 722; 30 *id.* 759; 22 *id.* 162; 150 Mass. 423; 23 N. E. Rep. 227; 46 Ark. 567; 26 S. W. Rep. 592; 33 Kas. 660. The danger was obvious to the employee. 33 Kas. 660; Wood, Master & S. sec. 382; 1 Shearman & Redf. Neg. (4 Ed.), sec. 222; 2 Thompson, Neg. p. 1053, sec. 48; Pierce, Railroad, 373, 382; 61 Ia. 714, 715; 19 S. E. Rep. 756; Ray, Neg. Imposed Duties, 133; Bailey, Master's Neg. p. 503; 119 Pa. St. 70; 103 Mo. 52-59; 50 N. W. Rep. 363; 113 Mo. 570, 580; 98 Mass. 575; 129 Mo. 41. Who are fellow servants is a mixed question of law and fact. Where the facts are undisputed, it is purely a question of law for the court. 3 Mees. & W. 1; 1 McMullin, 385; 4 Met. 49; 20 Oh. 416; 112 U. S. 377; 64 Wis. 475; 28 W. Va. 269; 46 Tex. 550; 9 Heisk. (Tenn.) 866; 25 So. Car. 128; 116 Pa. St. 628; 96 N. Car. 455; 16 Neb. 254; 108 Ill. 288; 69 Ga. 137; 50 Conn. 433; 22 Ala. 294; 24 Am. & Eng. R. Cases, 443; 85 Mo. 588. Arkansas adopted the *superior servant* limitation by act February 28, 1893, sec. 1. And the *different department* limitation by sec. 2 of said act. The appellee in this case and the engineer were in the *same* department, and were fellow servants, under this act, and the burden was on plaintiff to show they were not fellow servants. 61 Mo. 532; 55 Mo. App. 569, 574; 58 N. Y. 217, 222; 77 Mo. 410; 24 S. W. Rep. 251; 19 C. B. (N. S.) 361. A

fireman is fellow servant not only with the engineer of his own, but of all other engines. 49 Mich. 495; 4 Bush, 507; 3 Wood (U. S.), 527; 73 Lea, 423; 67 Ala. 206; 11 S. W. Rep. 867; 34 N. J. L. 151; 48 Ala. 459; 26 Fed. Rep. 837. It was error to read the statutes of Arkansas to the jury, and leave them to place their own construction on them. 10 Mich. 250; 29 Ill. 317; 31 S. W. Rep. 333; 33 S. W. 716. Under the Arkansas act, the burden is still on the the plaintiff to show that the injured party was not a fellow servant. 33 S. W. Rep. 716; 61 Mo. 532; 109 Mo. 350; 115 *id.* 165; 112 *id.* 45, 86; 31 S. W. Rep. 333; 24 *id.* 728; 55 Mo. App. 567. It was error to refuse prayers Nos. 16 and 17. 36 S. W. 462; 35 *id.* 364; 37 Kas. 731. Under the act the engineer and fireman are still fellow servants. Cases *supra*, and 112 U. S. 377; 149 *id.* 368; 26 Fed. Rep. 837; 6 Heisk. (Tenn.) 347; 13 Lea, 423; 22 Ala. 294; 67 *id.* 206; 49 Mich. 495; 42 *id.* 34; 73 Tex. 85; 31 S. W. Rep. 333; 33 *id.* 716. An engineer has no superintending control over the fireman; they are working to a common purpose, in the same department, of the *same grade*, and hence are fellow servants under the act. See cases, *supra*, and sec. 6249, Sand. & H. Dig.

*N. F. Lamb* and *E. F. Brown* for appellee.

Appellee was not negligent in not discovering the defect, and appellant could have discovered it by the exercise of reasonable care. The law on these points is covered fully by the charge of the court. 46 Ark. 555; 21 S. W. Rep. 648; 30 S. W. Rep. 759; 35 Ark. 602; 150 Mass. 432; 26 S. W. Rep. 592. The fact that a servant in the discharge of his duties did not discover a defect is not evidence that the master by proper inspection should not have done so. 144 U. S. 417; 8 Gray, 131; 10 *id.* 280; 34 Wis. 318; 28 Mich. 448; 107 U. S. 454. The jury found Becker was not negligent. 52 Ark.

368. A railway company must exercise ordinary care and diligence in furnishing reasonably safe machinery and appliances to its employees. Bailey, Master's Liability, p. 101; 54 Ark. 289; 59 *id.* 465. Engineer and fireman not fellow servants under act February 28, 1893. 58 Ark. 217; 54 *id.* 289; 58 *id.* 66, 78. But if they were fellow servants, if the company owed the employee any duty, and failed to discharge it, by which it has in any manner contributed to the injury, it is liable by reason of its own negligence, notwithstanding the negligence of a fellow servant may have been the immediate cause of the injury. 54 Ark. 289, 299; Bailey's Master's Liability, p. 439; 48 Ark. 333. Since the passage of the act, a fireman and engineer are not fellow servants. 48 Ark. 331, 346; 31 Ill. App. 306; 129 Ill. 535; 70 Ga. 678; 20 Oreg. 285; 5 Dak. 523; 23 S. C. 228; 9 Heisk. 27; 31 Am. & Eng. R. Cases, 329. Under said act five conditions must exist to make employees fellow servants: (1) They must be engaged in the common service; (2) they must be working together to a common purpose; (3) they must be of the same grade. (4) in the same department; and (5) neither must have command over the other. All these must concur. In this case they were not of the *same grade*, and the engineer had control, superintendence and command over the fireman. 30 S. W. 89, (92); 33 *id.* 373; 32 *id.* 246; *id.* 799, 1035; 24 *id.* 477, (979); 43 Fed. Rep. 383, (389). Under the act the burden of proof as to who are fellow servants is still upon the company as it was before the passage of the act. 37 N. E. Rep. 11.

BATTLE, J. This action was brought by William Becker against the Kansas City, Fort Scott & Memphis Railroad Company to recover damages for personal injuries. The plaintiff was a fireman in the service of the defendant, and was engaged in operating one of its

trains between Thayer, Missouri, and Memphis, Tennessee. On the evening of April 21, 1894, his engine, No. 30, with George Bennett as engineer, left Thayer for Memphis, and reached the latter place early in the morning of the next day, and, returning, left Memphis on the following evening, and reached Afton, Ark., at daylight the next morning, where it ran on a side track, and stopped to await the arrival of a passenger train. While there, plaintiff alighted for the purpose of putting out the head light. Before he returned to his place, the passenger train arrived, and his engine backed out; and as it did so, and while it was moving, he attempted to get upon it. In doing so, he placed one of his feet upon a step attached for the purpose of enabling the engineer and fireman to get upon it, and arose from the ground, when the step turned, and he fell. His left foot and ankle were thrown across one of the rails of the railway track, and were run over by the engine, and crushed so badly that they had to be amputated. These injuries are the cause of the damages for which he sues.

He bases his right to recover upon the failure of the railway company to maintain the step, which caused his fall, in a secure condition. This step was fastened to the lower end of an iron or steel rod, which was 1¼ inches in diameter and about two feet long, and passed through a solid iron beam, and was fastened and held in place by means of a tap at the top. When in proper position, it faced out at right angles to the side of the engine. When loose, it could be turned out of place, but could be fastened and made secure by means of the tap at the top of the rod. Plaintiff insists that it was the duty of the defendant to fasten the rod so that the step attached to it would not turn when the firemen or engineer stepped or leaped upon it, and to maintain it in such condition, and, for the failure to do so, is liable to him for damages. To show that the defendant was

guilty of culpable negligence in the failure to discharge this duty, evidence was adduced in the trial of this action tending to prove that the engine was taken on the 18th of April, 1894, to its shops at Thayer for inspection and repair, and that on the 20th of April, at Memphis, the step was discovered to be loose, and on the 21st of April, at Thayer, and was loose on the 23d of the same month, when the plaintiff was injured. On the contrary, evidence was adduced by the defendant to show that the step was not loosened at the shops when the engine was there for repair on the 18th of April, and the inspector did not notice that it was loose or turned; that it was the duty of the engineer to examine it on every trip to see if it was loose, which could be ascertained by striking it with a hammer or shaking it; and that he was furnished with a wrench to fasten it if it was loose; and that he examined it on the evening of April 22, 1894, at Memphis, by striking it with a hammer, and found it apparently "all right."

The plaintiff testified that firemen received from $60 to $110 a month, and that an engineer's salary was from $100 to $200 for the same time; and that the defendant promoted firemen to engineers according to seniority.

Under this evidence, a question arose as to the fireman and engineer being fellow servants. Upon this question the court instructed the jury, over the objections of the defendant, as follows:

"The jury are instructed that if they find from the evidence that the plaintiff was injured by his own negligence, you will find for the defendant; but if you find that the plaintiff was not injured by his own negligence, but by the negligence of some one else, then it will be necessary for you to find by whose negligence he was injured; and if he was injured by the negligence of his fellow servant, he cannot recover, and I will read

you the law of fellow servants, which is as follows (Sand. & H. Dig.):

"'Section 6248. All persons engaged in the service of any railway corporation, foreign or domestic, doing business in this state, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice principals of such corporation, and are not fellow servants with such employee.

"'Section 6249. All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being entrusted by such corporations with any superintendence or control over their fellow employees, are fellow servants with each other; *provided*, nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation fellow servants with other employees of such corporation engaged in any other department of service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow servants.'"

"And, before you can find for the plaintiff, you must find that the negligence of the person that caused his injury was not a fellow servant with the plaintiff, under the rule just read you from the statute."

And the court refused to instruct the jury, at the request of the defendant, as follows:

"(16) That, without proof of facts that would take Bennett and Becker out of the rule, they were in law fellow servants; and the burden of proving they were in different departments, or that one had the superintendency or control of the other, or were of different grades, is on the plaintiff, Becker; and unless he has so

shown, the defendant would not be liable for the negligence of Bennett in failing to inspect the step at Memphis.

"(17) The court instructs the jury that if you find from the evidence that the engineer, Bennett, who had charge of engine 30 on the trip on which Becker was injured, was provided with the necessary tools to tighten the step in case it got loose, and that it was his duty to so tighten it, and to examine the engine to see if it was safe, and failed to do so, then this neglect was that of a fellow servant, for whose negligence the defendant would not be liable."

The jury returned a verdict in favor of the plaintiff for $5,000, and the court rendered judgment accordingly.

Reading statute to jury.

The circuit court erred in giving the statutes, without explanation, as an instruction to the jury. They were susceptible of more than one interpretation, as shown by the contention of counsel in this case, and parts of them were not applicable to the facts before the jury. It was the duty of the court, and not of the jury, to interpret the statutes. The instructions of the court should be susceptible of only one construction.

Burden of proof.

The court erred in refusing instruction numbered 16, which was asked for by the defendant. Upon the plaintiff devolved the burden of proving his cause of action. The fireman and engineer were in the common service of the defendant, working together to a common purpose, in the same department, as shown by the evidence. The presumption is they were fellow servants, and it devolved on the plaintiff to show that they were not, in order to make the defendant liable to him for the damages he suffered from the negligence of the engineer. This court cannot take judicial notice of the supremacy or subordination of one to the other, if any exist. *McGowan* v. *St. L., I. M. & S. R. Co.*, 61 Mo.

528, 532; *Brown* v. *Missouri, Kansas & Texas R. Co.*, 67 Mo. 122.

Construction of fellow servants' act.

The instruction numbered 17, which was asked for by the defendant, does not accurately state the conditions upon which the defendant was or was not liable to a fireman for damages occasioned by the negligence of the engineer. If they were fellow servants, it was not. The question is, were they fellow servants? The decision of this question involves to some extent the construction of the second section of an act entitled "An act to define who are fellow servants, and who are not fellow servants," approved February 28, 1893, which provides that "all persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being entrusted by such corporations with any superintendence or control over their fellow employees, are fellow servants with each other; *provided*, that nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation fellow servants with other employees of such corporation engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow servants."

As the fireman and engineer in the case before us were unquestionably engaged in the common service of the defendant, in the same department, and working together to a common purpose, they were fellow servants, if they were of the same grade. The question then, for us to decide is, what do the words "of same grade" mean as used in the second section of the act of February 28, 1893? We are relieved of every difficulty in the decision of this question by the act itself. Immediately following these words are the following:

"Neither of such persons being entrusted by such corporations with any superintendence or control over their fellow employees." It seems to us the latter words can serve no purpose unless it be to explain the words "of same grade" which precede them. If this was not their purpose, they were entirely useless and without a purpose, for the idea conveyed by them is already expressed in the words "of same grade." The words "of the same grade," without qualification, may be of broader signification, and difficult to explain. But we think that the words following were intended to and do explain what is meant by them. In that way only can we give to all these words some effect, as they were doubtless intended to have.

In *Gulf, C. & S. F. Ry. Co.* v. *Warner*, 35 S. W. Reporter, 364, the Supreme Court of Texas construed a similar statute in the following words: "That all persons who are engaged in the common service of such railway corporation, * * * and who, while so employed, are in the same grade of employment, and are working together at the same time and place, and to a common purpose, neither of such persons being entrusted by such corporation * * * with any superintendence or control over their fellow employees, or with the authority to direct any other employee in the performance of any duty of such employee, are fellow servants with each other," etc. In construing it, the court said: "They must be 'in the same grade of employment.' 'Grade' means the rank or relative positions occupied by the employees while engaged in the common service. This definition, however, gives us no certain means of determining whether given employees are in the same or different grades, for it furnishes no test by which their respective ranks or relative positions in the common service can be ascertained. In the absence of a statutory test, the grade would have depended upon the test

which might have been adopted by the courts, such as authority one over the other, order of promotion, skill in the service, compensation received, etc. We are of the opinion that the legislature anticipated and settled this difficulty in the construction of the word 'grade' by the use of the clause 'neither of such persons being entrusted * * * with any superintendence or control over their fellow employees, etc., as explanatory of what was meant by the clause 'in the same grade'; thus adopting the most natural test of grade in the construction of the statute—authority one over the other while 'engaged in the common service.' Probably the most serious difficulty in arriving at the conclusion that one clause was intended as merely explanatory of the other is the fact that the explanatory clause does not immediately follow the one it explains, but this objection is removed when we consider that, in the original section, as enacted in 1891, the qualifying clause immediately follows the words 'same grade', and was evidently intended to explain their meaning," etc.

If, therefore, neither the fireman nor the engineer had superintendence or control of the other, they were fellow servants, otherwise they were not; and, if fellow servants, the defendant is liable to neither for damages caused by the negligence of the other in the performance of his duties. *St. Louis, I. M. & S. R. Co.* v. *Gaines*, 46 Ark. 555; *Railway* v. *Rice*, 51 Ark. 467.

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

# BENCH v. STATE.

Opinion delivered February 20, 1897.

FORGERY—VARIANCE.—Where an indictment for forgery of a lost instrument sets out its substance, without alleging that defendant destroyed it, it is error to charge the jury that a misdescription of the instrument is immaterial, under Sand. & H. Dig., § 2086, providing that where a written instrument, the subject of an indictment for forgery, "has been withheld or destroyed by the act or procurement of the defendant, and such destruction or withholding is alleged in the indictment and proved on the trial, a misdescription of the instrument is immaterial."

VARIANCE—MATERIALITY.—Whether evidence that the name signed to a forged instrument was "G. H. Arnel" is materially variant from an allegation in the indictment that the name signed was "George H. Arnel" is a question for the jury, where the instrument was set out by its substance, and not by its tenor.

Appeal from Marion Circuit Court.

BRICE B. HUDGINS, Judge.

STATEMENT BY THE COURT.

The appellant, John Bench, was indicted for forgery and for uttering and publishing a forged instrument of writing. The indictment alleged that said Bench "did falsely and feloniously forge and counterfeit a certain writing on paper, which said writing is lost and destroyed, by reason whereof the persons are unable to set it out by its tenor, but it is and then was in substance as follows: 'On or before the 20th day of August, 1895, I promise to pay John Bench or bearer seven dollars and fifty cents ($7.50), for value received, with interest from maturity at 10 per cent. until paid. (Signed) George H. Arnel.' With the intent to defraud the said George H. Arnel and one George Cravens, against the peace and dignity of the state of Arkansas." Another count in the indictment charged the

defendant with uttering and publishing the same instrument knowing it to be forged, and in that count the description of the instrument is the same as that set out in the first count. The evidence showed that the instrument claimed to have been forged was signed "G. H. Arnel." The defendant was convicted on both counts of the indictment, and after judgment appealed.

*S. W. Woods* and *J. C. Floyd* for appellant.

There was a variance between the allegations of the indictment and the proof, and the court erred in its instruction on the question. The variance was material. 8 Am. & Eng. Enc. Law, 505, e; 57 Mo. 205; 3 Gr. Ev. sec. 108; 1 *id.* secs. 63, 70; 2 C. & Ker. 57; 148 Ill. 504; 10 Neb. 590; 65 Mo. 490; 20 Ohio, 49; 58 Ark. 342; 3 Rice, Ev. sec. 119, *et seq.*; 1 Gr. Ev. secs. 56, 58; 32 Ark. 609.

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

The indictment set up the fact that the note was lost, and for this reason could not be set out by its tenor, but simply its substance. Had the indictment set out the note by its tenor, the variance would have been fatal; but as it was only set out in substance, the variance is not material. 1 Wharton's Prec. Ind. & Pleas. sec. 292; 79 Ind. 541; 15 Wend. (N. Y.) 53.

Variance in describing lost instrument.

RIDDICK, J., (after stating the facts.) The judgment in this case must be reversed for the reason that the circuit court in our opinion erred in reading to the jury section 2086 of Sand. & H. Dig. The instrument alleged to be forged having been destroyed, it was set out in substance as signed "George H. Arnel." The evidence showed that it was signed "G. H. Arnel." On this point the circuit judge, as part of his charge to the jury, read the section above named, which is as follows: "When a written instrument, which is the subject of an

indictment for forgery, larceny or other offense has been withheld or destroyed by the act or procurement of the defendant, and such destruction or withholding is alleged in the indictment and proved on the trial, a misdescription of the instrument is immateral." There was evidence tending to show that the instrument in question was destroyed by the defendant, but this section cannot apply in this case, for the indictment does not allege that the instrument was withheld or destroyed by the act of the defendant, and this statute applies only when such fact is both alleged in the indictment and proved on trial. The circuit judge probably overlooked the fact that such allegation was not contained in the indictment.

Materiality of variance.

The instrument, being destroyed, was not set out by its tenor, but by its substance only. It was therefore a question for the jury to say whether the name "G. H. Arnel" was intended by the defendant to stand for and represent "George H. Arnel," and whether it was in substance the same name. If so, there was no material variance. Bishop's New Crim. Pro. sec. 685, and cases cited.

There are decisions that hold that an allegation of the whole name and proof of initials will necessarily constitute a fatal variance, but most of these were made in cases where the instrument was set out by its tenor, and not by its substance, and the reasons on which they are based do not apply here.

Other questions were discussed by counsel, but in our opinion no other ground for reversal is shown. For the error indicated, the judgment is reversed, and the cause remanded.

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# ARKANSAS MIDLAND RAILWAY COMPANY *v.* GRIFFITH.

Opinion delivered February 27, 1897.

OPINION EVIDENCE—VALUE OF SERVICES.—Plaintiff in an action for personal injuries may testify as to the value of his services as a farmer, without showing that he or any one else within his knowledge has ever hired farm labor, where he states the amount necessary to make a living for himself, implying that he has made a living.

EVIDENCE—MORTALITY TABLES.—In an action to recover for a permanent personal injury, it is not error to admit the mortality tables in evidence to prove plaintiff's expectancy of life, although his condition and health are below the average, and he is not an insurable risk, where the jury are instructed to consider the tables as qualified by the evidence as to plaintiff's physical condition.

CARRIER—PRESUMPTION AS TO NEGLIGENCE.—An instruction that "when a passenger being carried on a train is injured without fault on his part, the law presumes that there was negligence on the part of the carrier, and the carrier must remove the presumption by evidence," though it is too broad, is not prejudicial where the injury occurred by reason of a broken rail and a defective cross tie, which derailed the train.

SAME—REBUTTING PRESUMPTION OF NEGLIGENCE.—To rebut the presumption of negligence on the part of a carrier arising from an injury to a passenger in an accident caused by a broken rail and a defective cross tie, the carrier must show that it had exercised the proper degree of care to discover the defect, and to remedy it when discovered, and it is not sufficient to show that it did not know of the defect.

SAME—PASSENGER ON FREIGHT TRAIN.—The common law rule is that one who boards a freight train is not entitled to the rights of a passenger, notwithstanding any conduct of the conductor towards him, unless the railroad company has by its conduct led the public to believe that passengers will be carried on such trains for hire or otherwise. But, under the statute providing that local freight trains shall carry passengers (Sand. & H. Dig. § 6284), one who boards a freight train with the consent of the conductor and pays his fare to him has a right to presume that the train is a local one.

Appeal from Prairie Circuit Court, Southern District.

JAMES S. THOMAS, Judge.

*J. J. & E. C. Hornor* for appellants.

1. The court should have excluded the testimony of appellee as to the value of his services. He was not an expert, and if he was no foundation was laid. 34 Am. & Eng. R. Cas. 424; 27 *id.* 307. Appellee was not insurable, and the tables of life expectancy were inadmissible. The second and third instructions for appellee are erroneous in this: The jury is authorized to find negligence by reason of any break in the rail, or defect in the tie, without regard to the place on the track where the defect existed, or without regard to the fact whether these defects were sufficient to cause the derailment. 52 Ark. 524. While the law demands the utmost care for the safety of passengers, it does not require the company to exercise all the care, skill and diligence of which the human mind can conceive. Under the fourth instruction, appellant was required, at all hazards and events, to keep its track in repair, without qualification. This was error. It was error to charge the jury that the tables of mortality could be considered in determining the duration of the injury and the disability of plaintiff. Patterson, Ry. Acc. Law, p. 371. Appellee was not a passenger. The train was a freight train, and the burden was on appellee to establish the fact that appellant consented to receive appellee as a passenger. No custom of carrying passengers were shown. 57 N. Y. 387; Patterson, Railway Accident Law, sec. 215; Thomas on Neg. p. 219; 58 Am. & Eng. R. Cas. 9.

*J. H. Harrod* for appellee.

No foundation was necessary for Griffith's testimony. He testified that he was a farmer by occupation, and it was proper to show what his time was worth. Equally untenable is the objection to the life tables. A

mere admission of incompetent testimony will not reverse a judgment which is right on the whole record. 44 Ark. 556; 43 *id.* 219. The instructions are in the main questions which have been settled by this court. The first and second by 34 Ark. 613; the third is approved in 56 Ark. 600; the others are elementary law. The verdict is not excessive. 83 Ky. 675.

BUNN, C. J. This is an action for damages for personal injuries received by plaintiff and appellee while a passenger on one of defendant's and appellant's trains, and by reason of the negligence of the latter.

The venue was changed on the application of plaintiff from the Monroe circuit court to the circuit court of the southern district of Prairie county. Trial and judgment against defendant for $3,000.80, substantially the amount claimed, and defendant appealed to this court.

The motion for a new trial contains ten several grounds, upon each of which appellant claims the case should be reversed, and is as follows, viz. (omitting the first three which are in the usual form): "(4) Because the damages assessed by the jury are excessive in amount and not warranted by the testimony. (5) Because the court erred in overruling the motion of the appellant to exclude from the jury the testimony of the appellee as to the value of his services, said motion having been made before said plaintiff left the witness stand, and no foundation was laid for the the introduction of the testimony, and the same as given by said appellee was incompetent, irrelevant and inadmissible. (6) Because the court erred in permitting the appellee to read, as evidence to the jury, tables of mortality, showing that the expectancy of one aged 62 years is seven years, the proof in this cause having disclosed that the plaintiff was, at the time of the accident, a man of feeble health and his physical condition below the average. (7) Because the

court erred in overruling the motion of the appellant to exclude from the consideration of the jury said tables of mortality, the testimony of Dr. P. E. Thomas having disclosed that at the time of the accident appellee was not in such physical condition as to render him an insurable risk. (8) Because the court erred in instructing the jury, on motion of appellee and against the objection of appellant, as follows: (Here follow six several instructions given by the court at the instance of appellee and over the objections of appellant). (9) Because the court erred in refusing to instruct the jury, on motion of appellant, as follows: 'If the jury find from the testimony that the plaintiff is such a man as, from his physical condition, would not be insurable, then they will disregard any evidence as to the probable duration of his life obtained from the tables of mortality introduced in evidence.' (10) Because the court, on its own motion and against the objection of appellant, gave to the jury the following instruction: 'In determining the duration of the injury and disability of the plaintiff, if you find that he has sustained such, you may take into consideration the expectancy of his life, as shown by the tables introduced, when considered in connection with the evidence as to his physical condition at the time of the injury and the other evidence in the case.' "

First, then, we are of opinion that there was evidence sufficient to warrant the verdict of the jury, and the same does not appear to be contrary to the law as given by the court to the jury. As to the fourth ground, if damages were recoverable at all, we have no sufficient evidence to justify us in reversing the judgment because the amount assessed is excessive, or to direct a remittitur to be entered.

Admissibility of opinion evidence.

The fifth ground is that the court should have excluded plaintiff's testimony, in so far as it shows the value of his annual services as a farmer, because his

testimony is only his opinion as to such services and their value, and he was not shown to be an expert, whose opinion alone can be taken and given in evidence in such matters. The argument of appellant's counsel on this objection is that the testimony fails utterly "to show that appellant had ever hired a laborer to do farm work, or that any one else within his knowledge had ever hired farm labor. He could, therefore, be a farmer without being able to testify as to the cost of the services of other persons engaged in farming pursuits, such as he was engaged in, at that time and place." In answer to this, it may be said that the plaintiff was not called upon to make proof of the value of the services of a farm laborer or laborers (although, as the work of a farm laborer may be, and frequently is, a part of a farmer's work, to that extent, and no further, a farmer's knowledge of the value of a farm laborer's services may help him in putting a value upon his own), but the sole question to be settled by the testimony was what his services as a farmer—not a farm laborer—were annually worth. If, in order to make this kind of proof, it is essential to show instances wherein persons had been hired as farmers, or wherein a value had been actually placed upon a *farmer's* services, it would be rarely the case that the object of the inquiry could be attained, since the instances are rare where such services have been valued, so as to make this valuation of general application. When the plaintiff (as showing his method of arriving at the value of his services annually) testified that it required about $300 for him to make a living, implying that he made a living for himself and those dependent upon him, he exhibited a practicable method of calculation far above and far more accurate than any the mere theorists have been able to discover.

The opinion of a non-expert witness is admissible in evidence as to matter of common knowledge among

people of his particular calling or vocation. It is proper for such witness also to state the facts upon which his opinion is founded, in order that the jury may be aided in determining as to the correctness of his conclusions. *Railway Co.* v. *Lyman*, 57 Ark. 519; *Phillips* v. *Terry*, 5 Abb. Prac. (N. S.) 327.

We think the fact stated by witness in this case, that it took $300 to make a living for himself, followed by the natural inference that he made a living, was sufficient to warrant his opinion on the subject. Moreover, as said by the court in *Clark* v. *Baird*, 9 N. Y. (5 Selden), 183: "The facts on which such an opinion is based, like those on which the value of a given article of property depends, are of such a character as not to be capable of being transferred to the minds of a jury so completely and intelligibly as to enable them to form a definite determination for themselves." In the same opinion it is also said that "a person conversant with the growth of grass, and accustomed to compare its appearance, in different stages of such growth, with its ultimate yield to the acre, may well be said to have such knowledge of that subject as to make him competent to testify how much, in his opinion, a given piece examined by him will yield per acre."

Mortality tables as evidence.

The objection that the court erred in permitting the tables of mortality to be read in evidence, and in refusing to instruct the jury, as asked by defendant, as to the physical condition of the plaintiff at the time of the injury (shown to be below the average), we think was not tenable. The tables contain, by common consent, the most accurate estimate of the probable duration of human life under given conditions and when the subject is in reasonable good health—denominated the condition and health of the average. The question is whether we can still make the tables of service in making the calculation, notwithstanding it is shown that

plaintiff's condition and health were below the average, and that, in fact, he was not an insurable risk. This is an element of uncertainty that must necessarily be found in the case of one of feeble health and not insurable, in all cases, whether we call to our aid the mortality tables or not. When we do so, however, when, by reason of enfeebled physical condition, the standard tables are not strictly applicable on that account, yet they are more or less efficient aids in arriving at an approximation of the truth, and that is the best that can be hoped for after all.

The ground sought to be covered by the refused instruction, we think, was fairly covered by the instruction given on the court's own motion, by which, in effect, the court told the jury to take the calculations of the tables, but only as qualified by the evidence as to the physical condition of the plaintiff and all the other evidence in the case bearing on the subject.

This disposes of the objections made in the motion for a new trial down to the eighth, and thus leaves the eighth to be disposed of, but which, on account of its peculiar wording, involves the first six of the instructions given at the instance of the appellee over the objection of the appellant.

Presumption as to negligence.

It is undoubtedly true that, viewed abstractly, the first of these instructions is erroneous, for it cannot be maintained as an abstract proposition that "when a passenger, being carried on a train, is injured without fault on his part, the law presumes that there was negligence on the part of the carrier, and the carrier must remove the presumption by evidence;" because the injury may proceed from something entirely disconnected from the condition or operation of the road and trains,—something over which the carrier has no control. But, considered as applying to the facts of this case, we see no error in it, because, there having been a derailment by

reason of a broken rail, and *that* occurring by reason of a defective cross tie, producing a state of things from which plaintiff received his injury, while a passenger on one of the cars so derailed, the presumption of negligence did arise as stated in that and the third of these instructions; nor is it a sufficient defense, as said in the third one, to show that defendant did not know of the defect. The company must show that it had exercised the proper degree of care to discover the defect, and of course to remedy it when discovered, and thus prevent the accident as far as possible.

How presumption rebutted.

The fourth instruction, given at the instance of the appellee, is objected to because, as it is claimed, the word "neglect" therein used has the meaning of "failure" in the connection in which it is used, and because, if the word "failure" were used instead of the word "neglect," the instruction would be erroneous. The proposition last stated is true, but, using the word "neglect" as the court did, the instruction is a proper one.

Rights of passenger on freight train.

The contention that plaintiff was not a passenger on the train, the same not being a passenger train, and that, being on a train not designed for the carriage of passengers, he was there without right, and that the conductor's receiving his fare did not make the company liable to him as a passenger for any injury he might receive, gives more serious concern than any of the others. The common-law rule, or, rather, the rule unaffected by statute, is, or seems to be, that one boarding a freight train cannot claim to be a passenger, notwithstanding any conduct of the conductor towards him, unless the company has by its management led the public to believe that passengers will be carried on such trains for hire or otherwise, and the company has not made it otherwise liable to him as a passenger. The following authorities cited by appellant's counsel are in point: Patterson, Railway Accident Law, § 215; Thomas on Negligence,

page 219; *Atchison & T. R. Co.* v. *Headland*, 58 Am. & Eng. R. Cases, 4. But our statute on the subject of local freight trains somewhat changes the rule on the subject. It is contained in Sand. & H. Digest, section numbered 6284, and is as follows: "Local freight trains on all railroads or railways in this state shall carry passengers from and to any and all of their stations." What kind of freight train, whether local or through freight, the train in this case was, is not shown; but it is shown to have been a freight train, and not a passenger train, and, in the absence of a statute on the subject, it may be that plaintiff could not have been considered as properly on the train,—that is, that he was not a passenger,—for it was easy for him to determine that the train was a freight, and not a train designed for carrying passengers. But since the state compels the company to carry passengers on one of its two kinds of freight trains, and since these are not easily distinguishable by persons unacquainted with the workings of railroads and trains, it is but just to presume that the persons in charge of these trains are clothed with authority and rest under the duty to designate, to such as apply for passage, whether or not a particular train will carry passengers, and that in this the conductor acts for and as the agent of the company; for the convenience of the public is the great end in view, and this cannot be secured without some method of giving essential information to persons interested. The conductor therefore having permitted plaintiff to board the train, and having received his fare, the plaintiff had a right to presume that the train was a local feight,—one which the law compels to carry passengers.

This disposes of all the questions we deem it necessary to discuss. The court gave all the instructions, except one, asked by the appellant, and, we think, upon

the whole, the case was fairly submitted to the jury, both as to the negligence of appellant and contributory negligence of the appellee, and the damages to be assessed, and whether or not they should be assured, as well as on all other matters suggested.

The judgment is therefore affirmed.

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## BREATHWIT *v.* ROGERS.

Opinion delivered February 27, 1897.

MALICIOUS PROSECUTION—WHO MAY BRING.—One who intervenes in an attachment suit to claim the property attached cannot sue the attachment plaintiff for a malicious prosecution.

Appeal from Cleveland Circuit Court.

MARCUS L. HAWKINS, Judge.

*W. S. Amis* for appellant.

Applying the test laid down in Jaggard, Torts, p. 603, appellee has no standing in court. The original suit must be terminated. *Id.* p. 610; Drake on Att. sec. 730; 14 Am. & Eng. Enc. Law, p. 28. The plaintiff must have been the defendant in the original proceeding. Jaggard, Torts, p. 612; 18 S. W. Rep. 354. See 2 El. & Bl. 216; 91 Ky. 135; 15 S. W. Rep. 60; *ib.* 57. What Breathwit said or did was not an injury to her title. 18 S. W. Rep. 354. Each of the instructions given for plaintiff were erroneous and prejudicial. The jury should decide the question of malice. 32 Ark. 175; 37 *id.* 163; 33 *id.* 321. Malice is an essential element, and must be alleged and proved. Want of probable cause without malice is not sufficient. Jaggard, Torts, p. 624; 37 Ill. App. 28; 10 So. Rep. 865; 2 Q. B. 718; 14 Am. & Eng. Enc. Law., p. 61; 19 S. W. Rep. 71.

*Met L. Jones* for appellant, also.

Malice and want of probable cause both must exist. Probable cause is a mixed question of law and fact, and may reasonably be left to the jury. When a party has a good cause of action, and prosecutes it under process from a court of competent jurisdiction, there is no presumption of malice. 33 Ark. 316; 32 *id.* 166; 59 Ill. 68. An action will not lie for levying on real estate, where there is no ouster, and no disturbance of possession.

*D. H. Rousseau* for appellee.

In order to maintain an action for maliciously attaching the plaintiff's goods, it is not necessary to prove that defendant, in suing out the attachment, acted dishonestly, or with actual malice. If there was no probable cause, the jury may presume malice. 32 Ark. 166; 37 *id.* 160; 32 *id.* 770; 2 Green. Ev. sec. 456. In seeking advice of counsel, one must act honestly, and act upon the advice given, and must make a full statement. 32 Ark. 166; 81 Ala. 220; 71 Ill. 475; 50 Mo. 83; 12 Pick. (Mass.) 324.

BATTLE, J. Mrs. Rogers sued William Breathwit for damages which were alleged to be the result of a malicious prosecution without probable cause. Her action was founded upon the following facts: On the 23d of May, 1893, William Breathwit instituted an action, in the Cleveland circuit court, against Jerry M. Lacy, and sued out an order of attachment, directed to the sheriff of Cleveland county, commanding him to attach and safely keep the property of the defendant, Lacy, and to summon Michael Lavelle and Bettie Lavelle as garnishees. In obedience to this order, the sheriff levied upon certain real estate, and summoned Michael and Bettie Lavelle as garnishees. On the 6th of June, 1893, Mrs. Rogers instituted this action; and on the 14th of the same month filed a complaint in the

action against Lacy, and claimed the real estate which was attached as the property of Lacy; and, on the 27th of July following, the real estate was adjudged by the court to be her property; and, on the same day, the garnishees, in answer to interrogatories propounded to them, said that they, or either of them, were not indebted to Lacy in any sum, and had no property of his in his or her possession or control. It does not appear that Breathwit was dissatisfied with their answers, or instituted any further proceeding against them.

Upon this statement of facts, Mrs. Rogers was not entitled to recover in the action instituted by her against Breathwit, for the reason that he had not instituted any malicious prosecution against her. He did not make her a party to the action against Lacy. Not being a party to it, she could not have been affected by it until she made herself a party to it by claiming the property attached; and she did not make him liable for a malicious prosecution without probable cause by her own conduct. *Duncan* v. *Griswold* (Ky.), 18 S. W. Rep. 354; Jaggard, Torts, p. 612. The proceeding against the garnishees amounted to nothing more than an inquiry, as it was not prosecuted further after their answers.

The judgment of the circuit court is therefore reversed, and final judgment will be entered in favor of defendant.

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## BLACK v. TOMPKINS.

Opinion delivered February 27, 1897.

USURY—BUILDING ASSOCIATION LOAN.—An agreement by a borrowing member of a building and loan association to pay monthly instalments as dues on his stock, and also to pay legal interest on the amount of the loan in monthly instalments, until the stock shall attain to par value, is not usurious.

Appeal from Drew Chancery Court.

JAMES F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

This is a suit in equity to foreclose a mortgage given to secure a loan made by a building association. H. P. Tompkins was the owner of ten shares of stock in "The American Building, Loan & Tontine Savings Association," of the par value of $100 per share. He borrowed from said association the sum of $500 on his ten shares of stock; transferred the stock to the association, and promised to continue to pay to said association, as he had been doing, $6 per month from and after the date of said loan as assessments or dues on said stock; and also to pay to said association interest on said $500 at the rate of 6 per cent. per annum in monthly instalments until paid stock should attain to full or par value. To secure the payment of said dues and interest, he and his wife, Ellen Tompkins, conveyed to plaintiff, R. J. Black, as trustee of said association, certain real estate situated in the town of Monticello, Ark. Tompkins afterwards died, and default was made in the payment of said dues and interest. This suit was brought to foreclose said trust deed.

The defendants set up the plea of usury. The evidence showed that Tompkins borrowed the money from the association to pay off a mortgage upon his homestead. The chancellor found that a greater rate of interest than 10 per cent. was contracted for, and that the deed was void for usury. A decree was thereupon entered cancelling the trust deed.

*Geo. Gillham* for appellant.

*Z. T. Wood* for appellee.

Appellant's association was not a *bona fide* building association; usurious *interest* was exacted; and the taking stock, etc., was a mere device or shift to cover

usury. 56 Ark. 320; 55 *id.* 270; 47 *id.* 287. Authorities and precedents for the decree in this case are not lacking. 35 Pa. 470; 84 *id.* 212; 7 Neb. 173; 75 N. C. 292; 77 *id.* 145; 24 Conn. 153; 48 Iowa, 390; 55 *id.* 424; 12 Rich. Eq. 124; 15 S. C. 462; 2 Coldw. 418; 14 Lea, 677; 41 Md. 418; 1 Cent. Rep. 486; 64 Md. 338; 51 *id.* 201; 61 *id.* 600; 68 *id.* 52; 25 Ohio St. 208; 29 *id.* 92; 81 Tex. 369; 19 W. Va. 684; 69 Ala. 419; 54 Ark. 56.

PER CURIAM. The question of law involved in this action was decided in *Reeve* v. *Ladies' Building Association*, 56 Ark. 335, and *Taylor* v. *Van Buren Building Association*, *ib.* 340. According to the opinion in those cases, there was and is no usury in the contracts sued on.

The decree of the chancery court is therefore reversed, and the cause is remanded, with instructions to the court to foreclose the mortgage sued on; ascertaining the amount due thereon according to the rule stated in *Roberts* v. *American Building & Loan Association*, 62 Ark. 572.

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## BOND *v.* STATE.

Opinion delivered February 27, 1897.

CARNAL ABUSE—ACCOMPLICE.—In the crime of carnally abusing a female person under the age of consent, such female is not an accomplice, within the rule requiring the testimony of an accomplice to be corroborated.

TRIAL—PRESENCE OF DEFENDANT.—It is not reversible error, in the absence of the defendant in a felony case, to grant his request for a change of venue.

APPEAL—PRESUMPTION.—The failure of the record on appeal to show affirmatively that the defendant in a bailable felony case was present when the verdict was rendered is not ground for reversal, as it will be presumed either that defendant was voluntarily absent on bail, or that he was present when the verdict was rendered.

Appeal from Clay Circuit, Western District.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

The appellant was convicted of carnally abusing a female under the age of sixteen years, and appealed to this court. The injured girl was introduced as a witness, and testified against the defendant, who asked the court to instruct the jury that she was an accomplice, and that he could not be convicted upon her testimony alone, unless the same was corroborated. This the court refused to do, to which refusal the appellant excepted. There was a change of venue in the case, and the record fails to show that the appellant was present when the order for the change was made. The record does not show affirmatively that the defendant was present when the verdict was returned into court by the jury. These are all the grounds in the motion for new trial. It does not appear from the record whether the defendant was on bail when the trial was had, or whether he was in jail; whether his absence when the verdict was returned was voluntary or enforced.

*N. F. Lamb* for appellant.

1. A defendent cannot be convicted of carnal abuse upon the uncorroborated testimony of the prosecutrix. 13 S. W. Rep. 392; Whart. Cr. Ev. sec. 388; 98 N. Y. 630, 632; 54 Barb. 306; 39 Cal. 393; 12 S. E. 574; 8 So. Rep. 821; 16 S. W. Rep. 511; 51 N. W. Rep. 1146; 20 S. W. Rep. 756; 31 N. E. Rep. 798; 15 So. Rep. 66; 110 N. Y. 118; 50 N. W. Rep. 758; 36 N. Y. Sup. 398; 67 N. W. Rep. 611; 36 S. W. Rep. 585; 22 S. E. Rep. 863; 42 Pac. Rep. 1; 25 S. W. Rep. 27; Parkers's Cr. Rep. 455.

2. The court erred in receiving the verdict in the absence of defendant. He must be present when any

substantive step is taken. Sand. & H. Dig., sec. 2185; 24 Ark. 620, 627. Returning the verdict is a substantive step. 5 Ark. 431; 10 *id.* 318. These decisions have been overruled as to the voluntary or willful absence of the defendant, but in other respects are still the law. 55 N. W. 566; 1 Bish. Cr. Pr. secs. 271 2; Wharton, Cr. Pl. & Pr. secs. 747, 750, 540, 545, 547, 549; 8 Pac. Rep. 620; 61 N. W. Rep. 907; 19 S. E. Rep. 161. The record must affirmatively show his presence. 24 Ark. 620; 44 *id.* 331; 1 Chitty, Cr. Law, 337, 411, 414; 11 So. Rep. 172; 27 Mo. 332; 55 N. W. Rep. 566.

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

1. Appellant asked for the change of venue, and his presence was not necessary. 45 Ark. 165; 44 *id.* 331.

2. A child under sixteen, carnally abused, cannot be an accomplice. She cannot consent. S. & H. Dig., sec. 1865; 27 S. W. Rep. 83; 11 Gray, 93; 116 Mass. 343; 22 Minn. 238; 155 Mass. 274; 29 N. Y. 523; 98 N. Y. 630; 5 N. Y. Cr. Rep. 120; 39 N. J. L. 598; 9 Tex. App. 237; 124 Mass. 21; 50 Conn. 92; 22 Pick (Mass.) 476; 36 Ala. 242. One whose connection with the forbidden act does not render him liable to indictment therefor is not an accomplice. Cases *supra*.

3. The record does not show defendant was absent, and, in the absence of such showing, he will be presumed to have been present. 52 Ark. 404; 38 *id.* 568; 26 *id.* 647; 26 *id.* 398; 46 *id.* 67.

HUGHES, J., (after stating the facts.) Section 1865 of Sandels and Hill's Digest provides that "every person convicted of carnally knowing or abusing any female person, under the age of sixteen years, shall be imprisoned in the penitentiary for a period not less than five nor more than twenty-one years."

Victim of carnal abuse not an accomplice.

A girl under sixteen years is not an accomplice, within the meaning of the law, in case of carnal abuse of herself. She is incapable of consenting. Obtaining

carnal knowledge of a girl under sixteen years of age with or without her consent is punishable under this statute. While it has been held that, in cases of seduction, bastardy, adultery and abortion, the defendant cannot be convicted upon the uncorroborated testimony of the injured party alone, because she is an accomplice, these authorities will not apply in a case of carnal abuse of a female under sixteen years of age, because she cannot be an accomplice, but is a victim. *Whitaker* v. *Commonwealth* (Ky.), 27 S. W. 83.

Granting venue in defendant's absence.

The defendant having asked for the change of venue, it was not reversible error to make the order for the change in his absence. *Polk* v. *State*, 45 Ark. 165.

Presumption on appeal as to defendant's presence.

Is the fact that the record does not affirmatively show that the defendant was present when the verdict was returned into court by the jury ground for reversal in this case?

Section 2185, Sandels & Hill's Digest, provides: "If the indictment be for a felony, the defendant must be present during the trial. If he escapes from custody after the trial has commenced, or, if on bail, shall absent himself during the trial, the trial may either be stopped, or progress to a verdict, at the discretion of the prosecuting attorney, but judgment shall not be rendered till the presence of the defendant is obtained." Before the passage of this statute, it was held in *Brown* v. *State*, 24 Ark. 620, "that, in prosecutions for felony the defendant must be personally present at each and every trial when any step is taken by the court in his cause, and that the record must affirmatively show the fact,"—citing *Sweeden* v. *State*, 19 Ark. 209; *Sneed* v. *State*, 5 Ark. 431; *Cole* v. *State*, 10 Ark. 518. In *Bearden* v. *State*, 44 Ark. 331, this ruling is approved, and it is said the defendant is not called upon to show prejudice, but that it is sufficient if it appears he might have lost an advantage or been prejudiced by the proceedings.

But in the Bearden case it affirmatively appears that the defendant was absent when the proceedings complained of were had.

The old rule that, in a felony case, the judgment will be reversed unless the record affirmatively shows that the defendant was present when every substantive step was taken in his case is still adhered to in many states. And this is the common-law rule. See Clark's Cr. Procedure, sec. 148, p. 424, and cases there cited. But we see from the above section (Sandels & Hill's Dig., § 2185) that, while it is the right of the defendant on trial for a felony to be present when any substantive step is taken by the court in his case, yet, if he abscond after the trial commences, or, if on bail, he absent himself during the trial, the trial may progress to a verdict in his absence. It does not appear here that the defendant was not on bail, and that his absence was not voluntary. The offense was a bailable offense, and the record entries, while they show nothing as to the absence or presence of the defendant, are in such language as that it might be inferred that he was present. If on bail, he was not required to be present when the verdict was rendered; and, if voluntarily absent, he cannot complain that the verdict was received in his absence. Under this statute (sec. 2185, Sand. & H. Dig.), if his absence was not voluntary, but enforced, he should show the fact, for, until the contrary is shown, it will be presumed that the defendant was present, or that he was voluntarily absent. "All reasonable intendments will be made in order to support the verdict where the record contains nothing sufficient to justify its overthrow, and this doctrine is nothing more than a reasonable application of the general rule that a breach of sworn duty must be clearly shown." Elliott, App. Pro. sec. 724.

"Where the record shows the presence of the accused at the opening of the trial, it has been held that

it will be presumed that he was present throughout the entire proceedings." Elliot, App. Pro. secs. 291, 725; *Welsh* v. *State*, 126 Ind. 71; *People* v. *Sing Lum*, 61 Cal. 538; *Carper* v. *State*, 27 Ohio St. 572; *Bend* v. *State*, 23 Ohio St. 349; *Bartlett* v. *State*, 28 Ohio St. 669. "The general presumption is that the judgment of a judicial tribunal is supported by whatever is essential to its validity and effectiveness, * * * * where their lack of support does not appear affirmatively." Elliott, App. Pro. sec. 718. "*Omnia præsumunter rite et solemniter esse acta donec probetur in contrarium.*" Co. Litt, 355.

It would have been an easy matter, if the defendant was prevented from being present, by confinement in jail or otherwise, at the time the verdict was returned into court, for him to have shown the fact, and embodied the evidence in his bill of exceptions. This he did not do, and we must presume that he was voluntarily absent, or that he was present when the verdict was returned.

Let the judgment be affirmed.

BUNN, C. J. I concur in the judgment of affirmance in this case, but, as to the question of the presence or absence of the defendant when the verdict was rendered, I do so for a somewhat different reason than that assigned in the opinion of the court, because I am of the opinion that the record shows that the defendant was on bail at the beginning of his trial, and not in custody of the sheriff, as it would necessarily have shown had he not been on bail; and the presumption is that his status continued the same throughout the trial, the contrary nowhere else appearing. If on bail, it was not irregular to receive the verdict of the jury, although he may not have been present in court at the time, since, by reason of his being on bail, he was in the full

enjoyment of his personal liberty to go and come at will, provided he had committed no breach of his bond, so as to forfeit his liberty. He was presumptively present; and if he were not actually present, he should affirmatively show he was absent, and not voluntarily absent.

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## HOLLAND v. QUITMAN COLLEGE.

Opinion delivered February 27, 1897.

DEMURRER—WAIVER—PLEADING OVER.—Although the remedy for recovering the statutory penalty from a person who fails to satisfy a judgment of record within sixty days after receiving satisfaction thereof otherwise than upon an execution is by a complaint in an ordinary suit, the error of proceeding by motion is waived where the defendant pleads over after a demurrer filed by him is overruled.

Appeal from Cleburne Circuit Court.

BRICE B. HUDGINS, Judge.

STATEMENT BY THE COURT.

The appellee filed a motion in the Cleburne circuit court, showing that appellant on the — day of February, 1893, obtained judgment in said court against appellee; that said judgment was paid at its maturity, but was not marked "Satisfied," and stood thus upon the record for more than sixty days; that on or about the — day of February, 1895, appellee paid to an attorney for appellant, $11.04, unjustly claimed by appellant as a balance due on said judgment; that said amount was paid to procure a satisfaction of said judgment. The prayer of the motion is for judgment of forfeiture against appellant for $150 and costs, and for a return of the $11.04 unjustly demanded by appellant. A demurrer in short to this motion was overruled, and appellant

responded, admitting that he had on the — day of February, 1893, obtained judgment against appellee for the sum of $336.20, but says that said judgment should have been for $346.20, and that same was by oversight entered for $336.20. Appellant denies that said judgment was promptly paid off, but says that appellee filed a stay bond in the sum of $336.20, after an execution had been issued, and that said stay bond was given to the sheriff of the county; that appellant was a non-resident, and that appellee paid to the sheriff the said sum of $336.20, which the sheriff forwarded to appellant, and appellant supposed that the sheriff had duly credited said amount on the judgment; that appellee afterwards sent to appellant his (appellant's) note to one Rollow for $14.50 as a payment on said judgment, and on the 31st day of January, 1895, paid him the sum of $11.04 balance due on said judgment; that thereupon appellant wrote to the clerk of the circuit court to satisfy the judgment, which was done. Appellant denies any damage, and prays to be discharged with cost.

On the issues thus joined the cause was submitted to the court sitting as a jury, who found that appellant obtained a judgment in the Cleburne circuit court, at its Februaay term, 1893, for $336.20; that an execution was issued on said judgment May 5, 1893, which was stayed on the 26th for six months; that the sheriff returned the execution accordingly; that at the expiration of said six months said sum was promptly paid by the appellee to the sheriff of Cleburne county without an execution on the stay bond, and that the sheriff promptly turned over the said money to appellant, who failed to satisfy the record of said judgment, as prescribed by law, although requested to do so. The court thereupon rendered judgment for the appellee in the sum of $100, which we are asked to reverse.

*Green & Hicks* for appellant.

Sand. & H. Dig., sec. 4230, leaves out the words "to be reversed in an action of debt founded on this act." See Rev., St. Ch. 84, sec. 19, 20; Gould's Dig. secs. 21, 22, Ch. 96. This is not among the actions named in the statute in which a summary judgment can be had upon motion. Sand. & H. Dig., secs. 4245, 4253. A complaint should have been filed and summons issued. Code, sec. 58. The judgment was satisfied by execution. When the stay bond was returned, it was the duty of the clerk to satisfy the judgment. Sand. & H. Dig., secs. 4248, 3081, 3082, 3083. There is no distinction between delivery bonds and stay bonds. 7 Ark. 33; 11 *id.* 578; 25 *id.* 524; *ib.* 606; *ib.* 124; 26 *id.* 235; 32 Am. Dec. 310; 26 *id.* 695; 35 Am. Dec. 428; 58 Ark. 132; 29 *id.* 472.

WOOD, J., (after stating the facts.) The remedy for failing to satisfy a judgment, as prescribed by sec. 4229, Sand. & H. Dig., is by complaint in an ordinary suit, and not by motion for judgment summary. Sand. & H. Dig., § 4245. But the motion of appellee, treated as a complaint in an action founded on sec. 4230, Sand. & H. Dig., is sufficient on demurrer. The appellant, by his demurrer, entered his appearance, and by pleading over he abandoned any ground of demurrer except want of jurisdiction and failure to state cause of action. *Fordyce* v. *Merrill*, 49 Ark. 277; *Chapline* v. *Robertson*, 44 Ark. 202. The court had jurisdiction of the subject-matter. So the only question remaining is, was the verdict contrary to the law and the evidence? The findings of the court are supported by the evidence, and the court was correct in holding, upon the facts, that the judgment of appellant against appellee was not satisfied by the return of an execution. Secs. 4228, 4229, Sand. & H. Dig. Therefore the judgment must be affirmed.

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# WHITE v. SMITH.

Opinion delivered February 27, 1897.

APPEAL—PRESUMPTION AS TO FINDINGS.—The findings of a chancellor, made partly on oral evidence not reduced to writing nor preserved in the record, will be presumed on appeal to be correct.

PARTNERSHIP—FRAUD—RELIEF.—A secret agreement between a partner and one who sells a patent right to the partnership whereby land conveyed by his co-partners in payment of their shares of the purchase price was conveyed to him by the vendor without consideration, so as to give him an unfair advantage over his co-partners, is a fraud on their rights, and justifies a decree dissolving the partnership, setting aside the conveyance, and revesting title in the co-partners on condition that they pay their just proportion of the amount actually paid by him for the patent right.

SERVICE OF PROCESS—CONCLUSIVENESS OF RECITAL IN DECREE.—The statutory presumption in favor of the recital in a record of service of process (Sand. & H. Dig. § 4191) is not overcome by the fact that the record contains a copy of the summons without any return of service indorsed thereon. (BUNN, C. J., dissenting.)

Appeal from Pope Circuit Court in Chancery.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

The facts in this case are as follows: One G. W. Lake was the owner of a patent right to make, use, and vend a certain roof paint in the state of Texas and other states. The appellant, John W. White, and the appellees, R. H. Smith and C. P. Hall, formed a partnership for the purpose of purchasing said patent right. After the formation of this partnership, they purchased from Lake the right to make, use and vend this paint in Texas.

The consideration which they agreed to pay for this patent covering the state of Texas was three thousand dollars. White paid his portion of this consideration in

cash. Smith and Hall, for their part of the consideration, conveyed to Lake a store house and lot in the town of Russellville, valued at $2,000. Lake afterwards conveyed this store house to White for an alleged consideration of $1,500. Smith and Hall suspected that White had obtained an unfair advantage in the purchase of the patent right, and brought this suit in equity, alleging that they were induced to enter this partnership, and purchase the patent right, through the fraud of defendants White and Lake; that Lake and White colluded together for that purpose, and that it was agreed between them that White, for his services in inducing Smith and Hall to enter the partnership and purchase the property, should be allowed a secret advantage. They alleged that White received for the one thousand dollars paid by him not only a one-third interest in the patent right, but also the store house and lot conveyed by Smith and Hall to Lake. White denied the allegation of fraud, and testified that he paid the one thousand dollars in good faith for a one-third interest in the patent right purchased, and, further, that he executed his note for $1,500 as a consideration for the purchase of the lot from Lake. It was stipulated in this note for $1,500 that it was payable out of first money received by White from his interest in the patent right purchased. The circuit court found that the allegations of the complaint were true; that the plaintiffs were fraudulently induced by White and Lake to enter the partnership, and transfer their town lot for a two-thirds interest in the patent right, under the belief that the price of the patent right was $3,000; that, in fact, Lake secretly agreed with White to accept $1,000 in full payment of the patent right; and that, for this sum paid by White, Lake conveyed to him a one-third share in the patent right, and also the house and lot which he obtained from Smith and Hall. The circuit court found

in effect that the note for $1,500 given by White to Lake was only a blind, and not intended to be paid. The court therefore dissolved the partnership on account of the fraud of White and Lake, set aside the conveyance of the town lot, and revested the title in Smith and Hall, upon condition that they return to White two-thirds of the $1,000 paid for it and the patent. The court ordered the note for $1,500 cancelled, and the patent right sold, and proceeds divided between Smith, Hall and White. From this decree White appealed.

*Jeff Davis* for appellant.

The judgment against Lake was without any proof of service on or appearance by Lake. There is no proof of fraud, or of any secret advantage. 68 U. S. 648; 1 Wall. 518 to 531; 1 Lindley on Partn. star p. 313. So if appellant bought the property, and obtained an advantage, of course he will have to account for their share.

*R. B. Wilson* and *Dan B. Granger* for appellees.

Fraud is amply proved, and the decree should be affirmed, as oral testimony was heard, and it is not embodied in the bill of exceptions. 45 Ark. 240; 38 *id.* 477. The findings are correct, and the dissolving the firm for fraud and restoring appellees to their rights is in accord with the authorities. Collier on Partnership, 179, 180; 1 Lindley on Part. (Am. Ed.) 303; 2 *id.* 480–484; 10 B. Mon. (Ky.) 429; 127 Mass. 167; 17 Am. & Eng. Enc. Law, 1101. The record shows that Lake appeared. 49 Ark. 411. There was proof of service outside the second entry. But the recitals are sufficient. Sand. & H. Dig., sec. 4191; 49 Ark. 411.

Presumption on appeal where evidence is not brought up.

RIDDICK, J., (after stating the facts.) We are of the opinion that the decree of the circuit court should be affirmed. The record shows that the case was heard partly on evidence taken orally at the bar of the court,

and this oral evidence was not reduced to writing or preserved by bill of exceptions, and is not contained in the transcript upon which the case was submitted for decision here. The findings of the circuit court must be presumed to be correct until such presumption is overturned by an affirmative showing to the contrary; and, in the absence of a portion of the evidence upon which the court based its findings, we must presume that those findings are correct. "This presumption prevails after decree rendered to the extent of curing every defect in the allegations of the pleading which, by reasonable intendment, may be considered as having been proved." *Hershy* v. *Baer*, 45 Ark. 240.

Relief from partner's fraud.

It can fairly be inferred from the pleadings in this case that White, having entered into a partnership with Smith and Hall for the purpose of buying a patent right, obtained, through collusion with Lake, the owner of the patent right, a secret advantage over his co-partners; that the $1,000 paid by White was the full consideration paid by him for the patent right and store house and lot; that the note for $1,500 was, by agreement with Lake, executed only as a blind, with the secret understanding that the same was not to be paid, and that this advantage was given to White by Lake for his influence in inducing his co-partners, Smith and Hall, to enter the partnership and purchase said patent right. An arrangement of this kind, by which one partner obtains an unfair advantage at the expense of his co-partners, is a fraud upon their rights, and would justify a decree such as was entered by the court in this case. *Howell* v. *Harvey*, 5 Ark. 270, S. C. 39 Am. Dec. 376; *Densmore Oil Co.* v. *Densmore*, 64 Pa. St. 43; 1 Bates, Partnership, § 304; 17 Am. & Eng. Enc. Law, 1101.

We can agree with counsel for appellant that, so far as the record shows, there is little evidence to support the finding and decree that the note executed by

White to Lake for $1,500 was without consideration and void; but we must presume that the oral evidence, not preserved in the record, was sufficient to support this finding also.

Effect of recital of service of process.

It is further said that there was no service of process upon defendant Lake, that he did not appear, and that the court was without jurisdiction to render a decree cancelling and declaring void the note for $1,500, owned by him. Lake was a necessary party, and if the court was without jurisdiction as to him, the decree should be reversed, for in such a case the effect of the decree would be to take property from White for the purchase of which he had executed his note, and yet leave him subject to a suit upon such note. But the decree of the circuit court recites that Lake, "being regularly served with process, failed to appear." This recital in the record that the defendant Lake was regularly served with process is, under our statute, even on appeal, *prima facie* evidence of that fact, and must be taken as true, unless there is something in the record to contradict it. Sand. & H. Dig., 4191; *Coons* v. *Throckmorton*, 26 Ark. 60.

There appears in the record a copy of a summons directed to the sheriff of Pope county, and commanding him to summon Geo. Lake, John W. White, Lalla White and F. N. Hopkins to answer a complaint in equity filed by plaintiffs. There is no return on this summons, but it is the fact of service of process, and not the return thereof, that gives the court jurisdiction over the person of a defendant. Works, Courts and Jurisdiction, p. 287, § 39. It may be that the summons was served, but the sheriff neglected to make a written return thereof, or it may be that an *alias* summons was issued and served, but not copied in the record. There were three other defendants included in the summons besides Lake, and each of them appeared and answered, and it is not denied

that they were served with process. On the contrary, the appellant testified that he and Lake were both served. We therefore conclude that the sheriff either failed to make a written return of the summons, or that, if made, such return was omitted from the record. This does not contradict, but tends rather to support, the recital in the record that Lake was served with process, and we must presume such recital to be correct, and that the court had jurisdiction of the defendant.

The judgment is therefore affirmed.

BUNN, C. J., being of opinion that the record affirmatively shows that Lake was not served, dissents from the opinion of the court.

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## JOHNSON v. ROTHSCHILDS.

Opinion delivered February 6, 1897.

PARTNERSHIP—WHEN EXISTS.—Whether a partnership exists in any particular case depends upon the intention of the parties, and is to be determined from the facts and circumstances in proof.

SAME—PARTICIPATION IN PROFITS.—Participation in the profits of a business is evidence of a partnership, and may be conclusive unless there are circumstances disproving the existence of that relation.

SAME—CASE STATED.—Where a father gave the profits of his business to his sons, upon an agreement that, in consideration of his leaving his original capital in the business, he should receive a share of its profits, without agreement that his capital should be repaid in any event, a finding of the chancellor that he was a partner with his sons will not be disturbed.

Appeal from Hot Springs Chancery Court.

CHARLES P. ROBERTS, Special Chancellor.

STATEMENT BY THE COURT.

On the 2d day of January, 1893, the firm of B. & H. Berger, merchants at Malvern, Arkansas, made an

assignment for the benefit of their creditors, preferring in said assignment, amongst others, several of their relatives, to the amount of $27,115.

Among the claims preferred was one in favor of their father, Leopold Berger, for $12,781.31. This amount consisted of $7,600, which Leopold Berger loaned to Ben Berger, which the firm is said to have assumed, and the sum of $5,181.31, being the amount said to be due from B. & H. Berger to Leopold Berger, as shown on the books of the firm, which originally was $4,000 said to have been loaned by Leopold Berger to B. & H. Berger at the time he claims to have retired from the firm in 1879.

The business in which they were engaged was begun by Leopold Berger in 1876 or 1877, on a capital of $4,000, which continued in his name until Henry Berger became of age in 1879, when the name of the firm was changed to that of B. & H. Berger. At this time it appears that Leopold Berger gave his sons, Ben and Henry Berger, the accumulated profits of the business, and left in it his original capital of $4,000, and continued to buy goods for the firm, with apparently unlimited authority to do so, with the understanding and agreement that he was to receive a per cent. of the profits of the business.

It appears that, less credits for amounts drawn out by Leopold Berger previously, his interest, with profits added, amounted on September 30, 1888 to $8,141, which, reduced by the credits, left the said sum of $5,181.31 due on the 20th of September, 1892. It appears that in 1888 Leopold Berger became an invalid, and unable to participate actively in buying for the firm.

For the sum of $5,181.31, the firm of B. & H. Berger, on the 20th of September, 1892, gave to Leopold Berger a note. This was three months and about a third before their assignment on the 2d of January, 1893.

It does not appear that when Leopold Berger is said to have withdrawn from the firm in 1879, and left his capital stock in the business, except the amount he gave to his sons, there was any promise, agreement or understanding exacted or had, between B. & H. Berger and Leopold Berger, that the sum left was to be repaid at all events, or at any time; but it appears that it was left on the security of the business, and not on the personal responsibility of B. & H. Berger.

On the 21st of February, 1892, the main store house and stock of goods of the firm was consumed by fire, and the firm lost heavily, though it received $32,000 on policies of insurance, and, shortly before this note was given to Leopold Berger, as above stated,—in August or September, 1892,—they had bought a large stock of goods of Ben Berger, upon which they sustained loss, and had assumed some $17,000 of Ben Berger's indebtedness, including a note to Leopold Berger,—other than the note above mentioned,—for $7,600.

After the fire they had erected a store house at a cost of $12,000, thus diminishing their available assets, and kept their employees at a cost of $3,000 till their house was completed, and in the meantime their business was not paying expenses. They estimate their indebtedness at the time of the fire at $41,000 and their assets at $69,226.

They commenced buying goods immediately after the fire, and while they owed at that time about ninety different firms, at the time of the assignment they owed one hundred and forty different firms, and had increased their indebtedness $69,692, in the aggregate to the sum of $100,692.

On the 18th of August, 1879, Leopold Berger published in a paper at Malvern, Arkansas, the following notice, towit:

"FIRM CHANGED."

"I have this day sold out the Red Store in Malvern, Arkansas, to my sons, Ben and Henry Berger. Thanking the people for past favors, I hope the same patronage may be bestowed on my successors. I will continue to buy for B. & H. Berger, and keep them supplied with the best and cheapest goods produced in this country. St. Louis, August 18, 1879. L. BERGER."

It appears that nothing was paid to B. &. H. Berger, but that L. Berger gave them his accumulated profits of the business, leaving in it, to be used as a part of the capital of the firm, his original capital of four thousand dollars, and that he was to receive a per cent. of the profits of the business, and was to do the buying for the firm.

After 1888, there does not seem to have been any material change in the business, except that, his health having failed, L. Berger ceased to be active in the business. As before, he seems to have left it to his sons to give him what the business would justify as his share of the profits.

In reference to selling out the business to his sons, L. Berger, when asked on cross-examination, "What was the price agreed upon for said business so sold by you to them?" answered: "There was no price agreed on at all, as I did not sell the business to them, as I have just stated."

Henry Berger admitted that he had testified in the federal court that L. Berger was a silent partner of B. & H. Berger; that he did not know how he would be considered; that up to 1887 part of the profits were allowed him; that after 1887 or 1888 he could not participate any further in the buying, and took no active part in it, and that he withdrew and left his money for the interest; that "he withdrew from the business actively."

After the assigment was made, and T. T. Johnson was appointed receiver, the appellees attached the property of the firm, and, the goods, etc., having been sold by order of the court, intervened and attacked the assignment for fraud, and now insist, among other grounds, that L. Berger was a partner of B. & H. Berger at the time of the assignment, and that he was preferred in the assignment for the amount of his capital in the business. The court held the assignment void for fraud, and the appellants brought the case to this court.

*Morris M. Cohn*, *S. R. Cockrill*, *Rose*, *Hemingway & Rose*, *Dodge & Johnson* and *N. P. Richmond* for appellants.

To the objection that Leopold Berger was a partner at the time of the assignment, there are two answers: (1) The evidence establishes that he was not a partner, and *never* was. (2) No such issue was presented in the court below. The mere participation in profits does not render one a partner. 44 Ark. 425.

*Jos. Loeb*, *G. W. Murphy*, *W. E. Atkinson*, *J. H. Harrod*, *Hamby & White*, *J. Erb*, *J. H. McCollum*, *Hugh McCollum*, *E. H. Vance*, *Jr.*, *C. V. Teague*, and *Wood & Henderson* for appellees.

The facts in this case bring L. Berger within the rule laid down by the modern doctrine as to what will constitute a partnership, and establish that he was a partner of the firm, and his preference avoided the assignment. 57 Am. Rep. 552; 71 Ill. 148; 28 Ohio, 319; 22 Am. Rep. 94, 387; 17 Am. & Eng. Enc. Law, 850, 877, 881, and notes; 16 So. Rep. 392.

Test of partnership.

HUGHES, J., (after stating the facts.) Up to the year 1860, the rule in England and America was that participation in the profits of a business was a conclusive test of a partnership. But this rule was overthrown by the case of *Cox* v. *Hickman* in the House of

Lords in England (8 H. L. C. 260), and the final test was declared to be "whether the business has been carried on in behalf of the person sought to be charged as a partner, *i. e.*, did he stand in the relation of the principal toward the ostensible traders by whom the liabilities have been incurred, and under whose management the profits have been made?"

This is the settled rule in England, and has been very generally adopted in this country. *Culley* v. *Edwards*, 44 Ark. 427. In the case of *Pooley* v. *Driver*, 5 Ch. Div. 458, decided in England after *Cox* v. *Hickman*, and in other cases, it is held "participation in profits, or the right to participate in profits, is cogent evidence, and, standing alone, may be conclusive evidence of a partnership, but in case of a party who has not acted as a principal in the business, and therefore is not ostensibly a partner, may be explained and overcome by other circumstances." *Wild* v. *Davenport*, (N. J. L.) 57 Am. Rep. 556.

In the case of *Cox* v. *Hickman*, Lord Cranworth put it in this way (8 H. L. C. 306): "It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner is whether he is entitled to participate in the profits. This no doubt is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such claim. But the real ground of the liability is that the trade has been carried on by persons acting in his behalf. * * * * It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that which entitles him to the one makes him liable to the

other, namely, the fact that the trade has been carried on in his behalf, *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made."

Participation in profits.

In commenting upon this statement of Lord Cranworth, it is said in *Pooley* v. *Driver:* "Now what Lord Cranworth means there is quite plain. He says in fact that the participation in the profits is sufficent proof of partnership if there is nothing to get rid of it. If you find an association, and a contract made by the members of the association that the trade is to be carried on, and that they are to share the profits in certain proportions, then that makes a partnership, unless you can show from the surrounding circumstances some other relation. It is not impossible to show some other relation, but, as he says, it is very difficult to do so. It is often conclusive by itself—not always." And further, it is said: "Now a dormant partner means a person who does not take an active part in the conduct of the business, and who may be, and often is, prohibited from taking such active part. Therefore, when the inquiry is whether a man is a dormant partner, it does not appear to me to aid that inquiry by saying that there are provisions preventing his taking an active part in the conduct of the business, or that there are provisions which make it optional for him to take an active part in the business or not. It only shows he is not an active partner."

It is contended that the money that Leopold Berger had in the business of B. & H. Berger was only a loan. It is said that the profits paid him were for interest on the money loaned the firm. Sharing profits does not constitute a lender a partner, "though it is a cogent test for trying the question," and is conclusive unless there

are some circumstances altering the nature of the contract. *Pooley* v. *Driver*, 5 Ch. Div. 486.

In *Dubos* v. *Jones*, the supreme court of Florida says: "To constitute a loan in such a case the money advanced must be returnable in any event. It is not a loan, if repayment is contingent upon the profits, for in such case it is made, not upon the personal responsibility of the borrower, but upon the security of the business. Neither must the transaction be a mere device to obtain the benefits of a partnership, without incurring its responsibilities, for in such case, whatever else the parties may call it, it will be construed to be a partnership." *Dubos* v. *Jones*, 16 So. Rep. 392; *Harvey* v. *Childs*, 28 Ohio St. 319; S. C. 22 Am. Rep. 387; *Pooley* v. *Driver*, 5 Ch. Div. 358.

So it seems it is not so much what is said as what is done that constitutes a partnership.

Mr. Lindley in Vol. 1, star page 12, says: "Where no statute interferes, an agreement to share profits is *prima facie* an agreement for a partnership, and accordingly it has been held that, unless an intention to the contrary can be shown, persons engaged in any business or adventure and sharing the profits derived from it are partners as regards that business or adventure." Citing *Pooley* v. *Driver*, *supra*. This is not in any sense in conflict with *Cox* v. *Hickman*, *supra*; 1 Lindley on Partnership, *page 26, note c. Parsons on Partnership, sec. 46, says: "The result of the English cases seems to be the abandonment of any artificial test of partnership, and the adoption of what must be regarded as the true principle, that parties become partners only by agreeing to enter into an association which the law regards as a partnership. The agreement, either express or implied, to form such an association is the only method by which one can become a true partner. Whether such an association is intended to be formed is

a question of fact in each case." In sec. 54 Mr. Parson says: "The true test of partnership, then, is the intention of the parties. * * * * * The intention to form a partnership may be expressed in the contract, or it may be gathered from all the acts and from all the circumstances which are available for the interpretation or construction of the contract." See also 1 Lindley on Partnership, *page 10. He says: "But an agreement to share profits and losses may be said to be the type of a partnership contract," etc.

Never until September 20, 1892, after the firm was evidently, if not insolvent, in a precarious condition financially, did Leopold Berger, as far as the evidence shows, demand or receive any note or promise for the repayment of the money he claims to have loaned B. & H. Berger, and he was an experienced business man. If he was a partner, it was a convenient thing to do, when the firm was in a condition that it soon became necessary for it to make an assignment, to take a note for the amount of capital he had in the firm as for so much loaned money for which he might be preferred when the assignment was made, and thus save the amount of his capital, and avoid making his valuable property in St. Louis liable for the debts of the firm. The note was taken in September, 1892; the assignment was 2d January, 1893.

The facts in the case afford cogent evidence, and, taken altogether, we think, a clear preponderance of evidence that L. Berger was a partner with B. & H. Berger, in their business at Malvern, from 1879 to the time of the assignment in 1893, and that the preponderance of the evidence sustains the decree of the chancellor, that the assignment was fraudulent and void, and the decree must be affirmed. It is so ordered.

BUNN, C. J., and BATTLE, J., dissent.

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# WILLIAMS v. STATE.

Opinion delivered March 6, 1897.

CONFESSION—ADMISSIBILITY.—The decision of the question whether or not a confession was voluntary devolves upon the trial court, and its discretion will not be controlled by the supreme court unless it is abused.

PRACTICE—CHALLENGE OF JUROR AFTER ACCEPTANCE.—Under Sand. & H. Dig., § 2213, providing that "the challenge to the juror shall first be made by the state, and then by the defendant, and the state must exhaust her challenges to each particular juror before such juror is passed to the defendant for challenge or acceptance," it is an abuse of discretion in a murder case to permit the state to interpose peremptory challenges to jurors who have been accepted by both parties after the defendant has exhausted his peremptory challenges, in the absence of any showing that defendant was not prejudiced. (RIDDICK, J., dissenting.)

Appeal from St. Francis Circuit Court.

H. N. HUTTON, Judge.

*John Gatling* and *N. W. Norton* for appellant.

1. The indictment is uncertain. Sand. & H. Dig., sec. 2077; 27 Ark. 493; 26 *id.* 323; 34 *id.* 265; 54 *id.* 549.

2. It was error to allow the state to challenge peremptorily, without showing cause, the jurors McDaniel and Casteel after they had been accepted. Sand. & H. Dig., secs. 2203, 2213; 32 N. E. Rep. 1105; 137 N. Y. 29; 15 S. E. Rep. 556; 19 S. E. Rep. 797; 58 Ark. 361; 4 S. W. Rep. 86; 12 So. Rep. 582; 12 So. Rep. 688; 18 Can. S. C. 407; 7 So. Rep. 337; 10 At. Rep. 794.

3. The confessions of defendant were not admissible. 50 Ark. 305.

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

1. The indictment charges but one offense. It contains all the requisites of a good indictment.

2. There was no error in excusing the jurors; and appellant was not prejudiced. There were no valid objections to any juror that tried the case. He had no right to any particular juror. He was only entitled to an impartial jury, and there is no contention that the jury was an impartial one. 58 Ark. 360; 44 Ark. 117; 30 *id.* 328, 343; 35 *id.* 639.

3. Whether the confessions were admissible or not was a question for the court to pass on, and there was no abuse of discretion. 28 Ark. 121; *ib.* 531; 50 *id.* 305.

BUNN, C. J. This is an indictment for murder in the first degree, found by the grand jury at the March term, 1896, of the St. Francis circuit court, and tried and determined at the September term, 1896. The trial resulted in the conviction of the defendant of murder in the first degree as charged, and judgment, and in due course defendant appealed. To the indictment defendant interposed a demurrer, and the same was overruled by the court, and exceptions were taken and noted.

The crime was committed in the night of the 23d October, 1895, at the home of the deceased, Grant McGowan, and as to the circumstances attending the the homicide the testimony of Maggie McGowan, wife of the deceased, may here be copied from the bill of exceptions, and is as follows: "I know Bill Williams, the defendant. He married my husband's sister. I am the wife of Grant McGowan. He is dead. He was shot He was shot in the bed with me and the children; shot in the head. He was shot through the top of the head. My husband went to bed about 8 o'clock. I went to bed a little after 9. He slept in the southwest corner. I was right by the side window. I heard a noise at the window before I went to bed, but did not pay any attention to it. When I went to lay down, I heard a noise

like a cat scratching. The light was turned down low. I did not hear any other noise. I had so often heard noises that I paid no attention to it. One standing on the ground could not see in, after I fixed the curtain. The blaze of fire was the first thing I saw on the pillow. I called my husband, I reckon, a dozen times. I laid my hand on him and shook him, and then I heard the blood dropping on the floor. Then I called Swartz, the hired man. When Swartz came in the room, I told him I believed my husband was dead, and he said, 'No, No.' He then turned up the light, and went out into the hall, and fired a pistol. Ben Thomas came in, I believe with sister. Bill Williams came. He was there about an hour. This was on the 23d day of October, 1895, and in this county and state. I know my husband and the defendant, Bill Williams, were not very friendly. They had fallen out about some cotton. Williams' wife was dead then. He had six children. My husband had charge of the place. Bill Williams had just moved there in the spring." On cross-examination she said: "I did not hear the gun fired; it did not wake me. The defendant's children are yet living; two in Tennessee. Mr. Freeland has one. The baby is two years old. Bill Williams' wife died last April a year ago."

R. L. Freeland testified, also, as follows: "I know the defendant. Grant McGowan is dead. I never looked at the wound very particularly. He was shot in the head. The top of his head was shot off. His brains bespattered the head of the bed, and the ceiling of the room overhead. He died from the effects of the wound. The piece of canvass which was tacked over the broken pane of glass in the window, in the north end of the room, was cut horizontally and perpendicularly, and it was also burned. When I got there, the yard was full of men standing around and talking. McGowan was

washed and dressed then. The defendant was there. I talked with him. I asked him if he had any idea who it was that killed McGowan, and he said he had not. He stayed there most of the day. I said something about getting blood hounds. I wanted it known that I was going to get blood hounds, thinking that some one might leave and give a clew. Defendant and I married sisters. There was a pane of glass out of the window, and a piece of canvas was over it. The canvas looked like it had been cut, and it was burnt. At the head of the bed I found some shot holes in it. It was about a month before defendant was arrested."

This was substantially all the testimony in the case, except the confessions of the defendant testified to by some of the witnesses, which, if admissible, might be sufficient to justify a verdict of the jury, if they were properly instructed in relation thereto. The inadmissibility of these confessions in evidence is brought in question by the defendant.

Admissibility of confessions.

"The rule of law applicable to all cases only demands that the confessions should have been made voluntarily, and the evidence to this point is addressed to the judge trying the case, who admits or rejects them, as appears right in his discretion, and his judgment is not a subject of reversal unless arbitrarily abused." *Runnels* v. *State*, 28 Ark. 121.

Most of the cases touching the subject, which have been adjudicated in this court, have involved the admissibility or weight of the testimony of accomplices testifying as to the confessions of the defendant, and for that reason are not strictly applicable.

The general rule as laid down by Wharton in his work on Criminal Evidence (sec. 658) is: "The real question is, whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from the fear of the threat, or

hope of profit from the promise." The proper answer to this question in any case determines the question whether or not the confessions were voluntarily made, and this determination devolves upon the court trying the case; and it is said by all that this discretion of the trial court to determine it will not be controlled by the appellate court, unless it is abused. The evidence of the confessions, like any other evidence, ought nevertheless to be the subject of appropriate instructions to the jury, so that they can consider and pass upon the weight of this evidence, and whether or not it is entitled to any weight. Thus it is said in *Ray* v. *State*, 50 Ala. 104, a defendant may show that his confessions, detailed in evidence by witnesses, were uttered in jest. This is only an illustration, for there may be many circumstances surrounding the making of a confession which may very much effect the confession, and these are for the consideration of the jury under instructions.

As to the admission of the evidence of the confessions, we see no reason to disturb the ruling of the trial court. There were no objections to the instructions of the court, and they were therefore not copied in the transcript, and we cannot say how far they went to cover the evidence of the confessions. All we can do is to suggest that proper instructions should be given the jury in that regard.

Right to challenge juror after acceptance.

In the course of the formation of the jury, L. O. McDaniel of the regular panel was accepted by both parties, and took his seat in the jury box, he being the second juror accepted. On the next day, after about forty more persons had been examined, and seven more jurymen were selected therefrom, making nine, accepted up to that time, on the motion of the prosecuting attorney, he was permitted to challenge McDaniel peremptorily, and he was then discharged from the jury, leaving eight in the box. Thereafter J. B. Casteel was

accepted by both parties, and took his seat in the box; and subsequently, several persons having been examined, and two of them having been accepted and taken their seats in the box, making ten, on motion of the prosecuting attorney, he was allowed to peremptorily challenge the said Casteel, and he also was thus discharged, leaving nine jurymen accepted. At this time the defendant had exhausted his twenty challenges, and could not exercise the right of peremptory challenge, as to the number of persons from among whom the three remaining jurymen were to be selected. The defendant had properly excepted to the discharge of the two that had been accepted, and this is made a ground for reversal.

The impaneling of juries is a matter largely in the discretion of the trial court, and this discretion will not be controlled where the statute has been substantially complied with, and where it appears that there is no error prejudicial to the defendant. Furthermore, this court has had several occasions to say that no one is entitled to the services of any particular person as a juryman, and in ordinary cases we have found that, even where errors have been committed in the impaneling of juries, they have seldom been considered as prejudicial errors.

Our statute provides that the state shall have ten, and the defendant twenty, peremptory challenges in felony cases; and "the challenges to the juror [whether for cause or peremptory] shall first be made by the state, and then by the defendant; and the state must exhaust her challenges to each particular juror, before such juror is passed to the defendant for challenge or acceptance." Section 2210–2213, Sand. & H. Dig.

It is said, referring to a section of the law enacted before the adoption of the code, in *Whitehead* v. *Wells*, 29 Ark. 99, that "an objection to the qualification of a juror must be made before he is sworn or impaneled."

There is no reason why the same does not hold good in cases of peremptory challenges. Indeed, there is greater reason for the rule in the latter cases. Where the court refuses to sustain a challenge for cause, and the defendant then makes a peremptory challenge, and does not thereby exhaust his peremptory challenges, he cannot avail himself of the error in not sustaining the challenge for cause. *Benton* v. *State*, 30 Ark. 328. Nor can a defendant "complain of an error of the court in deciding incompetent jurors to be competent, and forcing him to a peremptory challenge of them, when the panel has been completed without exhausting the peremptory challenges to which he was entitled." *Wright* v. *State*, 35 Ark. 639. All these decisions recognize the propriety of leaving to the trial court an enlarged discretion in the matter of impaneling juries, and yet, in every case which has come under our observation, whether or not the defendant has exhausted his peremptory challenges has been made a matter of importance, and we have failed to find a case where the error complained of has been held not prejudicial, where jurors are yet to be selected, and the defendant had exhausted his challenges.

In South Carolina where the statutes are much like our own, a controversy arose as to the point in the course of the examination of a juror beyond which the privilege of the state to retract an acceptance of, and to make a peremptory challenge to, a juror would cease. On this subject the supreme court of that state said: "The second question raised by appellant involves the practice in the courts of general sessions in this state, as far as fixing the period, in the ceremony of presenting a juror to the prisoner, beyond which a prosecuting officer cannot exercise the right of peremptory challenge to a juror. There is no statutory regulation governing the matter. It belongs to that class of cases where the practice long established in this state may be said to

furnish the rule. Really, it would seem, from the nature of the case, that any period preceding the announcement by the prisoner of his acceptance of the juror should be sufficient, for, if the prisoner is once allowed to announce his acceptance of the juror by saying to the clerk 'swear him,' the right of challenge by the state is precluded." *State* v. *Haines*, 15 S. E. Rep. 556. In that state, it seems, the jurors are sworn severally as each one is accepted. The case is not strictly in point, because of a difference in custom in the two states, but it shows the importance attached to the matter.

In the case at bar, the basic fact of the defendant's contention is that the state asked to be allowed to make the challenge, without assigning any reason or cause whatever for the change in the composition of the jury selected that far. As has been said, the courts in this state are accorded the largest discretion in such matters; but whenever it becomes necessary to exercise a discretion, ought it not, in cases like this, to be exercised upon cause shown, rather than arbitrarily? We would not assume to control the discretion of the trial court in determining a matter of this kind, presented to it upon a showing that the due administration of the law demanded that the juror be discharged, provided the change was made on conditions that would prevent detriment to the defendant.

It is true that we cannot certainly say just how the discharge of these jurymen was prejudicial to the defendant. Indeed, we may not be able to say positively that it was prejudicial to him at all; but at the same time we cannot say that it was not detrimental to him, and in fact we are rather inclined to think it was. But this uncertainty is, of itself, a strong argument against the propriety of such a procedure; and, in view of the fact that the defendant is condemned to suffer capital

punishment, we are unwilling to sanction such a doubtful method of selecting the jury that has convicted him. He is entitled to the benefit of his twenty challenges, and nothing that smacks of restricting or curtailing that right should be allowed to influence the result of his trial.

The demurrer to the indictment, was properly overruled, and, as other errors complained of will probably not occur on a new hearing, we deem it unnecessary to say anything concerning them.

Reversed and remanded.

WOOD, J. I concur in the judgment, because the manner of challenging jurors, as disclosed by the record, was contrary to sections 2213 and 2193, Sandels & Hill's Digest, and prejudicial to appellant.

RIDDICK, J., (dissenting.) It is said by this court in *Maclin* v. *State*, 44 Ark. 117, that "the erroneous rejection of one who is summoned for jury service lays no sufficient foundation for a new trial." The same principle has been announced in many other cases decided by this court. *Vaughan* v. *State*, 58 Ark. 361, and cases cited. The reason for this rule is that a defendant has no right, before the jury are sworn, to be tried by any particular juror. All that he can demand is an impartial jury; and in order that such a jury may be secured, and the right of both the state and defendant protected, it is essential that the presiding judge should be entrusted with a large discretion in the matter of rejecting from the jury those whom he may deem improper or incompetent to serve as jurors.

There is nothing here to show that the defendant was not tried by an impartial jury. The jury had not been sworn, and he had no vested right to be tried by the rejected jurors. Even if it be conceded that their rejection was improper, still this, of itself, does not, in

my opinion, justify this court in reversing the judgment, for it is not shown that any prejudice resulted to defendant. Thompson & Merriam on Juries, sec. 271, and cases cited.

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## ST. LOUIS, ARKANSAS & TEXAS RAILWAY COMPANY *v.* TRIGG.

Opinion delivered March 6, 1897.

REMOVAL OF CAUSE—ACTION AGAINST RECEIVER.—An action in tort against a railway company and its receivers appointed by a federal court is removable from a state to a federal court, as involving the construction of a federal statute.

SAME—WHO MUST UNITE IN APPLICATION.—Under the act of Congress permitting the "defendant or defendants" to remove a cause from a state to a federal court, all the defendants must unite in the application.

ACTION FOR NUISANCE—PARTIES.—A railway company may be joined with the receivers of its property as defendants in an action for maintaining a continuing nuisance.

OVERFLOW—DAMAGES TO RENTED LAND.—In an action to recover damages caused by the flooding of plaintiff's land and crops, no recovery can be had for damages to crops on such part of the land as was rented out to tenants who paid their rent.

Appeal from Clark Circuit Court.

RUFUS D. HEARN, Judge.

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

1. The court erred in denying the petition for removal. 50 Ark. 388; 69 Fed. Rep. 417; 141 U. S. 327; act March 1887, as corrected by act August 13, 1888, U. S.; 59 Fed. Rep. 523: 145 U. S. 593; 152 U. S. 454; 104 U. S. 126.

2. There is no testimony to support the judgment in this case.

*Scott & Jones* for appellee.

1. If appellants ever had a right to remove the cause, they are estopped by taking a change of venue and going to trial. Dillon, Removal of Causes (5 Ed.), sec. 154; 67 Wis. 210; 21 Fed. Rep. 1; 13 Blatch. 224.

2. The receivers have no right to a removal. The action was for a tort by the railway company and the receivers jointly, and there is certainly no federal question as to the railway company. 38 Fed. Rep. 865; 118 U. S. 264; Dillon, Removal (2 Ed.), § 43; 45 U. S. 41; 4 McCrary, 426; 117 U. S. 275; 118 *id.* 596; 146 *id.* 117; 21 Fed. Rep. 593; 8 Blatch. 73; 151 U. S. 56. There was no federal question in the case. Dillon, Removal, (5 Ed.), sec. 78; 92 U. S. 723; 91 U. S. 380; 4 Sawy. 178. The act of Congress gives the right to sue the receivers, and there is nothing in the constitution of the United States that conflicts with it. 40 Fed. Rep. 526; 41 *id.* 551. The state court has the right to look into the question of removal, and compare it with the statute. 95 U. S. 186; 59 Ga. 17; 130 Mass. 431; 117 U. S. 430; 131 *id.* 240; 148 *id.* 255; 160 *id.* 556.

3. Both of the appellants contributed to the nuisance by increasing the height of the obstruction, and both are liable. Webb's Pollock on Torts, 508.

Right to remove action against receiver.

W. S. McCain, Special Judge. This was an action in tort against the Texas & St. Louis Railway Company, and against the receivers of that company's property, to recover damages caused by the flooding of appellee's land and crops. The receivers held their appointment from the federal court, and on that ground they filed an application to remove the cause to the United States circuit court. We conclude that, under the ruling in *Texas & Pacific Railway Co.* v. *Cox*, 145 U. S. 593, the cause was removable, as being one involving the construction of a federal statute. See, also, *Jewett* v. *Whitcomb*, 69 Fed. Rep. 417; *Rouse* v. *Hornsby*, 161 U. S. 588.

Who must unite in application.

All the defendants, however, did not unite in the application for removal. This was essential. The language of the statute is that the "defendant or defendants" may remove the cause. Another clause of the same section allows "one or more of the defendants to remove," but appellees do not claim any right to remove under this last clause. Some of the federal judges, we find, have held that the phrase "defendant or defendants" is the same as if the language of the statute was "the defendants or any of several defendants," but we think this interpretation does some violence to the language of the act, and it is contrary to its spirit and policy.

The supreme court of the United States have not passed on this question, so far as we are able to find, but a majority of the federal decisions support the view which we take of the statute. The following are among the several cases *pro* and *con* on this point: *Ruckman* v. *Palisade Land Co.*, 1 Fed. Rep. 367; *State* v. *Ill. Cent. R. Co.*,16 Fed. Rep. 881; *Mutual Life Ins. Co.* v. *Champlin*, 21 Fed. Rep. 85; *Mayor* v. *Steamboat Co.*, 21 Fed. Rep. 593; *Stanbrough* v. *Cook*, 38 Fed. Rep. 369; *Landers* v. *Felton*, 73 Fed. Rep. 312; Dillon, Removal of Causes, sec. 15 b.

Parties in action for nuisance.

The wrong, or at least a part of the wrong, complained of by appellee was that appellants were guilty of maintaining a continuing public nuisance, and, looking at it in that light, we think it was no error to unite the railway company as a defendant in the same action with the receivers. This view of the case was antagonized by the first and third declarations of law asked by appellants, and hence there was no error in refusing them.

We have had little difficulty in reaching a satisfactory conclusion as to the legal questions presented by the record, but the facts of the case have given us more

trouble. The extraordinary rise in the river was such an obvious and proximate cause of the breaking of appellee's levees, and the destruction of his crops, that we can hardly yield to the claim that the real cause of appellee's loss was anything so remote as the faulty construction and maintenance of a railroad embankment some miles distant.

Damages recoverable for overflow.

A majority of the court, however, are agreed that there is some evidence tending to show that the appellee's damage was caused by this negligent conduct of appellants, and that a finding for the appellee by the trial judge should not, therefore, be disturbed. We think, however, that the amount of damages allowed to plaintiff is excessive. This amount is not in excess perhaps of all the damage done to the land and crops, but about half the place was rented out to tenants who paid their rent, and appellant would not be entitled to recover for damage done to the crops of the tenants. The place contained about 300 acres, and about half of this was rented out at the rate of 50 pounds of lint cotton per acre, and the rent thus realized, with cotton at $8\frac{1}{2}$ cents per pound, amounted in the aggregate to about $600. For his interest in the crop on the remainder of the place, and for the damage done to his levees and fences, we think $1,500 as much as the testimony will warrant. So the judgment will be reversed, unless appellee will enter a remittitur for all over $1,500.

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## SCANLAN v. GUILING.

Opinion delivered March 6, 1897.

APPEAL—MATTERS NOT APPARENT OF RECORD.—The action of the trial court in permitting the defendant in an attachment case to amend his affidavit controverting the grounds of attachment, and in refusing a continuance to plaintiff thereafter, will not be disturbed on appeal where the record does not show the nature of the amendment.

WRONGFUL ATTACHMENT—SET-OFF.—Where attached property has been sold, and the proceeds applied to the payment of plaintiff's judgment, the amount so applied should be deducted from the damages recoverable by defendant on the dissolution of the attachment.

EXEMPTIONS—CLAIM.—*Prima facie*, all personal property is subject to sale on execution, and a defendant cannot be allowed exemptions unless they are claimed in the manner provided by statute.

Appeal from Van Buren Circuit Court.

ROBERT J. LEA, Judge.

STATEMENT BY THE COURT.

The appellant, Scanlan, brought suit against the appellee, Guiling, before a justice of the peace, and sued out an attachment, under which two horses, a wagon and harness belonging to Guiling were seized. When the parties appeared before the justice, Guiling confessed judgment for the amount of his debt to Scanlan, but resisted the attachment. On a trial in the justice's court, the attachment was sustained, and Guiling appealed.

No supersedeas bond was given by Guiling, and the attached property was sold, and proceeds applied to the satisfaction of the judgment and costs. Upon trial of the attachment issue in the circuit court, the finding was in favor of Guiling, and the attachment dissolved,

and damages assessed against plaintiff in the sum of $240. The other facts are sufficiently stated in the opinion.

*J. F. Sellers* for appellent.

The rule as to the measure of damages asked by appellant is the expressly endorsed by this court. 37 Ark. 614; 55 *id.* 329; *ib.* 622; 34 *id.* 707; 51 *id.* 19. No question of offsetting one judgment against the other arose in this case, nor was there any claim of exemption. Mansf. Dig., sec. 3006. One may waive his right to exemptions, and does so by a failure to make the claim as prescribed by law. 33 Ark. 454; 46 *id.* 352; 41 *id.* 249; 50 *id.* 253; 49 *id.* 114. *Prima facie*, all personal property is subject to sale on execution. 52 Ark. 547. The damages are excessive. Waples, Attachment, sec. 296.

*J. H. Harrod* for appellee.

Appellant's prayer for instruction should have been refused, for three reasons: (1) This not the way to set-off a judgment. (2) His right to off-set could not be raised at that time. (3) He has no right to set-off his judgment, and thus deprive Guiling of the exemptions to which he was entitled under the law. 47 Ark. 464.

Presumption as to matters not apparent of record.

RIDDICK, J., (after stating the facts.) The first contention is that the circuit judge abused his discretion in permitting the defendant, during the progress of the trial, to amend his affidavit controverting the grounds of attachment, and also in refusing a continuance to plaintiff after such amendment was made. But this contention cannot be sustained, for there is nothing in the record to show the nature of this amendment. So far as the record discloses, the amendment may have been only a matter of form, and not of substance. Such questions are left largely in the discretion of the trial

judge, and, in the absence of an affirmative showing to the contrary, we must presume that there was no abuse of discretion.

As to right of set-off.

The circuit judge instructed the jury that they should assess the damages at the value of the property attached at the time of seizure, with 6 per cent. interest to the date of trial. The plaintiff contended that, from the value of the property and interest thus found, there should be deducted the amount of plaintiff's judgment against defendant, but the circuit court refused to so instruct the jury, and it is said this was error. The attached property had been sold, and the proceeds applied to the satisfaction of plaintiff's judgment against defendant. In so far as the proceeds of the sale had been applied to the payment of this judgment, the defendant had received the benefit of the same, and it was therefore proper that, from the total value of the property and interest, this sum should be deducted, and a judgment rendered for the balance. *Blass* v. *Lee*, 55 Ark. 329, 334, *Popplewell* v. *Hill*, 55 *id.* 622.

Right to exemptions.

It is said that the effect of such a ruling would be to deprive Guiling of his exemptions; but if he was entitled to exemptions in this case, still there is nothing in the transcript before us to show that he had claimed his exemptions, as required by the statute. *Prima facie*, all personal property is subject to sale on execution, and defendant cannot be allowed exemptions unless they are claimed in the manner provided by statute. *Blythe* v. *Jett*, 52 Ark. 547; *Weller* v. *Moore*, 50 *ib.* 253; *Settles* v. *Bond*, 49 *ib.* 114; *Guise* v. *State*, 41 *ib.* 249.

It is not so much a question here of setting off one judgment against another, for it seems that the judgment of plaintiff had been paid, but an application of the rule that when the property of the defendant has been sold under attachment, and such attachment is afterwards dissolved, and defendant claims damages

against plaintiff on account of the attachment, then the plaintiff is entitled to have such damages reduced, to the extent that he can show that the defendant received the benefit of the proceeds of such attachment sale.

As we are not able to determine from the record before us what the amount of such credit should be in this case, the case must be remanded; but, as the error pertains only to the assessment of damages, and not to the dissolution of the attachment, the judgment dissolving the attachment will be affirmed, but the judgment against plaintiff for damages is reversed, and the cause remanded for a new trial thereon.

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## SCHOOL DISTRICT NO. 11 *v.* SCHOOL DISTRICT NO. 20.

Opinion delivered March 13, 1897.

"CITIZEN" DEFINED.—The word "citizen," as used in Sand. & H. Dig., § 6984, to denote the persons who may sign a petition for a change of the boundaries of a school district, is synonymous with "elector."

STATUTE—EFFECT OF REPEAL ON EXISTING SUITS.—The act of April 1, 1895, § 5, repealing Sand. & H. Dig., § 6984, which permitted citizens to sign petitions for change of the boundaries of school districts, applies to proceedings on such a petition pending in the circuit court on appeal from the county court at the time of passage of the act, as no private rights are involved.

SCHOOL DISTRICT—PETITION FOR CHANGE OF BOUNDARIES.—Sand. & H. Dig., § 7064, providing that any person whose children and property have been transferred to a district other than that in which he resides may vote in the former, does not make him an "elector and resident," within section 6989, *ib.*, so as to render him competent to sign a petition to change the boundaries thereof.

SAME—PETITION—WITHDRAWAL OF NAME.—One who has signed his name to a petition for change of the boundaries of two school districts should be permitted, on application to the county court while the petition is pending, to erase his name therefrom, on a showing that he signed it under a misapprehension of the facts induced by misrepresentations.

SAME—PETITION FOR CHANGE OF BOUNDARIES—EVIDENCE.—Evidence that some of the petitioners on a petition to change the boundaries between two school districts were not in fact electors residing in either of the districts, as required by Sand. & H. Dig., § 6989, is admissible.

Appeal from Cross Circuit Court.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

This is a controversy between two school districts, on petition of what appears to be a majority of the citizens of each of the districts, to transfer a sixteenth section from district No. 11 to district No. 20, which of course was a change of the boundary line between them. An order for the change was made in the county court, and district No. 11 appealed to the circuit court, where the matter was tried *de novo*, and before a jury, resulting in an affirmance of the order of the county court; and from this judgment district No. 11 appeals to this court.

The grounds for a new trial are: "(1) That the court erred in holding that persons who were not electors could be counted on plaintiff's petition. (2) That the court erred in refusing to allow defendant to introduce proof to show that the plaintiff did not have a majority of the electors of the two districts on its petition. (3) That the court erred in holding that the Bamsons could not be heard in this court to say that they signed the plaintiff's petition under misapprehension as to the true facts, and to show cause why they should be allowed to withdraw from said petition, notwithstanding they raised the question in the county court. (4) That the court erred in refusing to instruct the jury that the plaintiff could not recover, unless from the proof it appeared that plaintiff had, as signers to its petition, a majority of the citizens of district No.

11. (5) That the judgment was contrary to law. (6) That the judgment was contrary to the testimony."

In the course of the hearing of the petition and counter-petition in the county court, M. E. Bamson, W. B. Bamson and W. E. Bamson filed their petition to be permitted to take their names from plaintiff's petition, alleging that they had signed the same under a misapprehension of the facts, which had been falsely represented to them by the persons getting up the petition for plaintiff; also alleging that they were all three unable to read.

*O. N. Killough* and *Norton & Prewett* for appellant.

Only the *electors* on the petition could be counted. Mansf. Dig., sec. 6171, 6175; Sand. & H. Dig., sec. 6984. The judgment in this case was rendered after the former law was repealed, and a repealed law must be considered as a law that never existed, except as to actions begun, prosecuted and concluded while it was an existing law. Sedgw. St. & Const. Law, 130. See also Acts 1887, p. 286; 54 Ark. 134. It was error to refuse to allow proof that the signers to appellee's petition were not a majority of the electors of the two districts, and also to refuse the Bamsons the right to have their names stricken off the petition for cause.

*T. E. Hare* for appellee.

Sections 6984 and 6989, Sand. & H. Dig., are not repugnant. The former section applied to old established districts; the latter to the formation of new districts. 54 Ark. 134. Mere similarity in the two statutes is not enough to effect a repeal. 111 Ind. p. 112; 48 N. Y. 540. See 8 Wall. (U. S.) 105; 29 So. C. 476. The court properly submitted the question of fact as to whether the Bamsons signed the petition on misrepresentations of Burton or not to the jury, and they found against them. The repeal of the act did not

affect this proceeding. Sand. & H. Dig., § 7203; 44 Ark. 273, 280. The law was not retroactive. 86 Conn. 397; 59 N. H. 35; 18 Abb. Pr. 143; 11 Heisk. (Tenn.) 682; 48 Ark. 515.

"Citizen" defined.

BUNN, C. J., (after stating the facts.) From the common understanding as to the meaning of the words, "citizen" and "electors," as used to denote persons who may sign petitions in the matter of the arrangement of school districts, and from the fact that some other word than "citizen" is employed in other matters, whenever the desire is to include other than electors, we are of the opinion that the two words, as employed in the acts involved in this litigation, are substantially synonymous, that is to say, the word "citizen" means "an elector," in such connection.

Section 6984 of Sandels & Hill's Digest, which had been substantially the law since 1875, was repealed expressly by the fifth section of the act approved April 1, 1895 (page 83, Acts of 1895); and the law now in force on the subject is section 6989 of Sandels & Hill's Digest, which is part of the act approved April 18, 1887, and in which the word "elector" is used instead of "citizen," as appears in the section repealed, to wit, section 6984 of the Digest.

Effect of repeal of statute.

Section 5 of the act of 1895 was passed and took effect on the 1st April, 1895, eight days before the final hearing of this cause on the 9th April, 1895, and the inference is that the proceeding in the county court, and the appeal to the circuit court, were all had before the passage of the repealing act. The contention of appellee in this regard is that the repeal of section 6984 by the act of 1895 did not effect suits pending at the time the repealing act was enacted, and the case of *Files* v. *Fuller*, 44 Ark. 273, is cited in support of this view. That case, however, involved private rights, and in

such cases these rights cannot be invaded or affected by repealing acts of the legislature, except, perhaps, as in mere change of remedies, and then only where the remedial act does not prejudice the private right.

In the case at bar, the two sections are parts of laws regulating the mode of procedure to accomplish a public purpose, through one of the agencies of government—the common school system—where no private rights are involved, and therefore where no private right is or can be invaded. Besides, as we have said in defining the world "citizen," for the purposes of this case there is no essential difference between the section repealed and the one repealing it, since there is no question here whether the districts involved are, one or both, new districts, or both are old districts, and since the majority claimed is a majority of the whole territory of the two districts.

Who may petition for change of boundaries.

By the provisions of section 7064, Sandels & Hill's Digest, any person whose children and property have been transferred to a district other than that in which he resides may vote in the former—the one to which he has been transferred—on questions of school taxation and for directors, but the privilege is extended no further; for, in order to be competent to sign a petition to change boundaries between districts, one must be an elector and resident in one of the districts to be affected by the change, by the provisions of section 6989 of the Digest.

Right to withdraw name from petition.

Without deciding whether or not a signer of a petition should be privileged to have his name taken off the petition as a matter of right and without a good cause shown, especially when the request to that end is made after the petition has been considered and acted upon in the county court, yet, as the application was made to the county court in this instance, and reiterated in the circuit court on appeal, with an offer to make a good

showing therefor, we think the three Bamsons should have been permitted to erase their names from the petition, on such showing having been made.

The court should have admitted the offered testimony on the part of the defendant tending to show that some of the petitioners on plaintiff's petition were not in fact electors residing in one or the other of the districts.

Evidence held admissible.

Such being the law of the case, we deem it unnecessary to discuss the instructions severally. Suffice it to say that, except as to Nos. 2 and 3 given at the instance of plaintiff, and those upon the court's own motion, in the main, the instructions given were erroneous, and with the exception of No. 4, which is covered by No. 2 for plaintiff, the refused instructions express the law substantially.

The judgment is reversed, and the cause remanded, to be proceeded with not inconsistently with this opinion.

HUGHES, J., did not participate in the consideration of this case.

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## GRIFFITH v. MAXFIELD.

Opinion delivered March 13, 1897.

SALE OF LAND—SUFFICIENCY OF TITLE.—Under a contract to convey "a good and sufficient title in fee simple," a vendee is entitled to receive a marketable title to the bargained property unclouded by a reasonable doubt as to its sufficiency to enable him to hold the property in fee simple.

SAME—WHEN VENDEE MAY REFUSE TITLE.—The fact that lands of an intestate were purchased at administrator's sale partly for the benefit of the administrator is such a defect in the title as justifies a subsequent purchaser in refusing to accept it under an agreement to furnish him "a good and sufficient title in fee simple," especially where minor heirs of the intestate are interested in the lands.

SAME.—An outstanding dower interest which is not barred by adverse possession for the statutory period is such a defect in the title as will justify a purchaser entitled to receive a "good title in fee simple" in refusing to accept such title.

SAME—RESCISSION—SUFFICIENCY OF COMPLAINT.—The failure of a complaint for rescission of a contract of sale of land to tender the rents and profits derived from the land is not a ground of demurrer where it does not appear from the complaint that plaintiff received any rents and profits.

Appeal from Independence Circuit Court in Chancery.

RICHARD H. POWELL, Judge.

*Yancey & Fulkerson* for appellant.

The complaint stated a good cause of action. The deed tendered did not convey "a good and sufficient title in fee simple," as conditioned in the bond for title, for the following reasons: (1) George Maxfield's widow was entitled to dower. Her husband and Theodore Maxfield were tenants in common. Sand. & H. Dig., sec. 2520. It does not appear that the widow was barred by seven years' adverse possession. 30 Ark. 640; 48 *id.* 277. And if Theodore Maxfield had acquired the widow's interest by adverse possession, this is not such a title as the bond contemplated. It must be a *marketable* title. Waterman, Spec. Perf. sec. 412, and note, 411, 410. (2) The sale of the interest of the children of George Maxfield was void. Sand. & H. Dig., sec. 109; 49 Ark. 242; 54 *id.* 635; 42 *id.* 28; 8 Wheat. 421; Hempst. 225; 20 Ark. 321; 23 *id.* 622; 26 *id.* 445; 30 *id.* 44; 33 *id.* 575; 34 *id.* 575. Appellant cannot be compelled to accept a title based on a fraudulent sale, and then be remitted to a suit on the covenants of warranty. Treating this as a collateral attack on the probate order of sale and confirmation, the rule that a judgment cannot be collaterally attacked, applies only to parties and privies, and does not extend to strangers. 12 Vt. 619; 1 Black, Judgm. secs. 260,

293; Freeman, Judgm. sec. 336. In the event of an eviction, appellant could only recover, on a suit on the warranty, the purchase money and interest, but would lose all his improvements. 43 Ark. 439. (3) The vendee has a right to demand such title as he contracted for, clear of doubt or suspicion. 11 Ark. 75; 21 *id.* 239; 44 *id.* 145. See also 44 Ark. 197; 51 *id.* 333; 60 *id.* 42; 7 *id.* 154; Rawle, Cov. Title (5 Ed.), 41.

*H. S. Coleman* for appellee.

The bill was properly dismissed, as plaintiff nowhere offered to "do equity"; he remained quietly enjoying the rents and profits, with full notice prior to purchase. A judicial sale was made of Geo. Maxfield's interest, and this put the statute of limitation to running. 22 Ark. 263; 29 *id.* 650; 33 *id.* 294. A demurrer only admits such allegations as are material and well pleaded. Freeman on Judgments, sec. 336, wholly fails to sustain the appellant's contention that he is in a situation to collaterally attack the probate judgment. How was he defrauded by that judgment? The widow and heirs of George Maxfield have never claimed to own a half interest in the land. The deed by the administrator to appellee is regular on its face, contains all necessary recitals, and conveys a complete title. Sand. & H. Dig., sec. 725. The members of the firm of Theodore Maxfield & Bros. had no interest in the land after the execution of the bond for title and the payment of the purchase money. 13 Ark. 533; 27 *id.* 61; 27 *id.* 160; 27 *id.* 632; 39 *id.* 375; 36 *id.* 456. The sale was before the death of either of the members of the firm, and the legal title was in Theodore Maxfield.

Sufficiency of title in sale of land.

BATTLE, J. Upon the payment of the sum of $600, and 6 per cent. per annum interest thereon from the 26th day of August, 1889, the appellant, Griffith, was entitled to a marketable title to the bargained property

unclouded by a reasonable doubt as to its sufficiency to enable him to hold the property in fee simple. His vendors agreed to convey to him such a title upon the condition stated, and he was not bound to take anything less.

In *Vought* v. *Williams*, 120 N. Y. 253, the court said: "It is an established principle of law that every purchaser of real estate is entitled to a marketable title free from incumbrance and defects, unless he expressly stipulates to accept a defective title. * * * * A marketable title is one that is free from reasonable doubt. There is reasonable doubt when there is uncertainty as to some defects appearing in the course of its deduction, and the doubt must be such as affects the value of the land, or will interfere with its sale. A purchaser is not to be compelled to take property the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and, if he wishes to sell it, be reasonably sure that no flaw or doubt will arise to disturb its market value." *Dobbs* v. *Norcross*, 24 N. J. Eq. 327; *Swayne* v. *Lyon*, 67 Pa. St. 436; *Yeates* v. *Pryor*, 11 Ark. 76; *Gill* v. *Wells*, 59 Md. 492; *Close* v. *Stuyvesant*, 132 Ill. 607; *Butts* v. *Andrews*, 136 Mass. 221; Waterman, Specific Performance, sec. 412.

It is said in Sugden on Vendors, p. 385, that, to enable equity to enforce a specific performance against a purchaser, "the title to the estate ought, like Cæsar's wife, to be free from suspicion." This statement is not accurate. To defeat the enforcement of a specific performance against a purchaser, there must be something more than mere speculation, theory or possibility. The doubt as to the sufficiency of the title must be "such as would and ought to induce a prudent man to pause and hesitate; not based on captious, frivolous and astute niceties, but such as to produce real *bona fide* hesitation in the mind of the chancellor."

"In *Pyrke* v. *Waddingham*, 10 Hare, 1, which was a bill by a vendor for specific performance" [we quote from *Close* v. *Stuyvesant*, 132 Ill. 618], "the question as to title turned upon the construction to be given to a particular will, and the vice chancellor was strongly of the opinion that the title was good; but, as he was unable to found his opinion upon any general rule of law, or upon reasoning so conclusive as to satisfy him that other competent persons might not entertain a different opinion, or that the purchaser taking the title might not be exposed to substantial, and not merely idle, litigation, he refused a decree of specific performance. It was there held that a doubtful title which a purchaser will not be compelled to accept is not only a title upon which the court entertains doubts, but includes also a title which, although the court has a favorable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favor of the title should turn out not to be well founded; if doubts as to the title arise upon a question connected with the general law, the court is to judge whether the general law on the point is or is not settled; and if it is not, or if the doubts as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the court can satisfactorily investigate, specific performance will be denied. The rule thus laid down as to the species of doubt which ought to prevent a court from enforcing specific performance was adopted in the later case of *Mullings* v. *Trinder*, L. R. 10 Equity, 449." See *Butts* v. *Andrews*, 136 Mass. 221.

In *Close* v. *Stuyvesant*, 132 Ill. 607, the plaintiff filed a bill in chancery to enforce the specific performance of a contract to exchange lands. The lands which

the plaintiff agreed to convey in exchange were entered under the pre-emption and homestead laws of the United States. The defendant alleged by way of defense that the several parties who made the entries of the lands did so by the procurement and for the benefit of the plaintiff; and "that they resided on said lands only for a sufficient time to make a merely colorable and formal compliance with the law, and then filed their final proofs, and obtained certificates of entry, and immediately conveyed the tracts entered by them, respectively, to the plaintiff, in pursuance of a previous agreement and undertaking between him and them, made prior to the date of the final proof." The court said: "If the circumstances under which said entries were made were such that, under the law as it is administered by the General Land Office, they are liable to rejection and cancellation, that liability alone is doubtless such a defect of title as a court of equity ought not to compel the defendant to assume."

When vendee may refuse deed.

In view of the law as stated, was the deed tendered by the appellees to the appellant a sufficient compliance with their contract? They and Edward Maxfield and John Fred Maxfield composed the firm of Theodore Maxfield & Bros. As such firm, they sold to appellant a town lot for a stipulated sum, and agreed to make him "a good and sufficient title in fee simple" to the lot when he paid the purchase money, which he did. Appellees tendered a deed executed by Theodore Maxfield and his wife, by which they undertook to convey the lot to him. He refused to accept the deed, "because [neither] at the time said deed was executed, nor at any other time, was or is Theodore Maxfield, grantor in said deed, seized of the title to the land mentioned in said deed, * * * because said land was a part of a certain tract of land conveyed on January 5, 1872, by John Kingsberry to George R. Maxfield and * * * Theodore

Maxfield, who owned and occupied the same as tenants in common, and were so occupying said land on the 24th day of March, 1887, when the said George R. Maxfield died intestate, leaving surviving him his widow, Sallie Maxfield, and his children * * * Leah, Fannie, Nellie and Cora, who are now living, and all minors, save and except Leah, who is twenty years of age;" and because Sallie Maxfield, as the widow of Geo. R. Maxfield, is entitled to the one-third part of the lands of which her husband was the owner, of which the lot purchased is a part, and her dower has never been assigned; and for the additional reason that Geo. R. Maxfield was the owner of one undivided half of said lot. Soon after his death, appellee, Charles W. Maxfield was appointed administrator of his estate. In August 1887, he, as such administrator, procured an order to sell certain lands of his intestate's estate, the said lot being a part, to pay debts, and on the 30th of September, 1887, sold the same to Theodore Maxfield, for the benefit of the firm of Theodore Maxfield & Bros., of which the administrator was a member. On the 9th of January, 1888, the administrator conveyed the lands to Theodore Maxfield, who conveyed the same to the administrator and the other members of said firm. Appellant has been notified that this sale is fraudulent and void, and that the widow and heirs of George R. Maxfield are claiming one-half of the lot which was sold to him.

According to this statement of facts, the sale by the administrator is subject to be set aside upon the application of the heirs of George R. Maxfield, deceased. This is a defect in the title of appellees to the lot which is reasonably calculated to impair its market value, and interfere with its sale, and expose the holder thereof to litigation. If it be conceded that Theodore Maxfield could convey the title acquired at the administrator's sale, this defect would still exist. The fact that the lot

was purchased in part for the benefit of the administrator would still render the sale voidable. The minority of the heirs of George R. Maxfield, except one, makes the defect more injurious, and the title more objectionable.

Another defect in the title tendered by appellees is the dower interest of the widow of George R. Maxfield, deceased, in the lot. Appellees insist that this defect has been cured by the statute of limitations. But there is nothing in the complaint to show that the widow is barred from recovering her dower by an adverse possession which continued for the statutory period.

Sufficiency of complaint seeking rescission.

The title tendered to appellant was not such as he contracted for, and he was not bound to accept it. Appellees have not performed the conditions upon which he paid the purchase money; and he is, therefore, entitled to specific performance or recission of his contract, according to the prayer of his complaint. But appellees insist that he is not entitled to a recission until he offers to restore the rents and profits derived from the lot, and he has failed to make such a tender in his complaint. This is true. But there is nothing in the complaint that indicates that he received any rents and profits or used the lots. The complaint shows a cause of action, and the demurrer should have been overruled.

The decree of the circuit court is, therefore, reversed, and the cause is remanded with instructions to the court to overrule the demurrer.

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# STANLEY v. WILKERSON.

Opinion delivered March 20, 1897.

WITNESSES—TRANSACTIONS WITH DECEDENT.—Where the plaintiffs in a suit against an administratrix make an assignment for the benefit of their creditors, and a receiver of the assigned property is substituted as plaintiff in their stead, one of the original plaintiffs, though contingently interested in the result of the suit, is not incompetent to testify as to transactions with intestate, under Const. 1874, sched., § 2, providing that, in actions by or against an executor or administrator, neither "party" shall be allowed to testify against the other as to any transactions with the testator or intestate.

EVIDENCE—ACCOUNT BOOKS.—Where the memorandum books of salesmen have been destroyed, and the salesmen are dead, items of account in the journal and ledger, correctly transcribed each day from the salesmen's books by the bookkeeper, and authenticated by his testimony, are admissible as secondary evidence.

Appeal from Woodruff Circuit Court.

GRANT GREEN, JR., Judge.

*P. R. Andrews* and *N. W. Norton* for appellant.

1. It was error to exclude the entries upon the journals of W. P. Campbell & Bro., the bookkeepers being dead, and the original books of entry burned. 57 Ark. 415; 18 Wall. 540, 541.

2. It was error to refuse to allow J. H. Campbell to testify, after his interest in the suit ceased, and he was *no longer a party*. 43 Ark. 307; 46 *id.* 378. Even interest does not disqualify. 46 Ark. 306.

*J. N. Cypert* for appellee.

The entries upon the journal were not original entries, and were not admissible. J. H. Campbell, one of the original plaintiffs could not testify. He was incompetent, and no transfer of claim or interest could render him competent.

BUNN, C. J. This litigation was commenced in the Woodruff probate court, at its January term, 1892, by the filing of a duly authenticated account against Josephine Wilkerson, administratrix of the estate of her deceased husband, L. B. Wilkerson, which had been disallowed by her as such administratrix. Upon the hearing, the probate court allowed the account, amounting then to the sum of $829.81, with legal interest from the 26th day of February, 1891, and from this judgment of allowance the administratrix appealed to the circuit court.

Pending the appeal, plaintiffs, W. P. Campbell & Bro., made a general assignment of their property for the benefit of their creditors to T. E. Stanley, who, it appears, was then appointed receiver by the Woodruff circuit court in chancery, to take charge and dispose of said property under the orders and directions of said chancery court. This fact having been suggested in this cause, then on appeal as stated, the circuit court directed that the receiver be made party plaintiff herein, and that this case proceed in his name.

The claim of W. P. Campbell & Bro., who had been merchants for a long time in Augusta, in said county of Woodruff, was a running mercantile account, covering a period of many years, which seems to have been the subject of a settlement (not payment, however), on the 1st day of December, 1880, when the sum of $1,218.12 appears from the account to have been the balance in favor of W. P. Campbell & Bro. From this time forward until January 1, 1889, the transaction between the parties continued without interruption, when the balance in favor of the merchants (taking into consideration the balance on the settlement aforesaid) appears to have been the sum of $829.81, the amount claimed.

The matters and things involved were referred to a commissioner to take testimony and state an account between the parties, who made due report of his actions in the premises, showing a balance in favor of W. P. Campbell & Bro. of $834.78, to which report the administratrix filed exceptions; and upon the issues thus made the cause was heard by the court, and judgment was rendered sustaining the exceptions, and a disallowance of the claim *in toto;* and the plaintiff appealed to this court.

The judgment of the circuit court was, in effect, for want of evidence to establish the account, which consisted of depositions taken by the commissioner.

During the hearing, in order to prove the correctness of the account, plaintiff offered to introduce as a witness James H. Campbell, one of the firm of W. P. Campbell & Bro., who had instituted the proceedings, and in whose name the same had progressed until ordered to proceed in the name of Stanley, the receiver, as aforesaid. Defendant administratrix objected to the competency of James H. Campbell as a witness. The objection was sustained, and he was not allowed to testify, and thereupon judgment was rendered as stated, and this refusal to permit Campbell to testify raises the first question demanding our consideration.

When witness may testify as to transactions with intestate.

The court's ruling was evidently based on the provisions of section 2 of the schedule of the constitution of the state, which reads: "In civil actions, no witness shall be excluded because he is a party to the suit, or interested in the issue to be tried: provided that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party; provided, further, that

this section may be amended or repealed by the general assembly."

In construing this provision of the constitution, in *McRae* v. *Holcomb*, 46 Ark. 310, Smith, J., speaking for this court said: "The office of a proviso is to restrain or modify the enacting clause of a statute. Hence the general rule of law, which has always prevailed, and become consecrated almost as a maxim in interpretation of statutes, that when the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso covers special exceptions only out of the enacting clause; and those who set up any such exceptions must establish it as being within the words as well as within the reason thereof,"—citing and quoting from *United States* v. *Dickson*, 15 Pet. 165.

In *Potter* v. *National Bank*, 102 U. S. 163, also cited in *McRae* v. *Holcomb*, *supra*, the supreme court of the United States, in construing a federal statute almost identical with our constitutional provision, said: "The first clause of that section shows that there was in the mind of congress two classes of witnesses—those who were parties to the issue, that is, parties to the record; and those interested in the issue to be tried, that is, those who, although not parties to the record, held such relations to the issue that they would lose or gain by the direct legal operation and effect of the judgment. A witness may be interested in the issue without being a party thereto, a distinction which seems to have been recognized in all the statutes to which reference has been made. But whether a party to or only interested in the issue, the witness is not to be excluded in the courts of the United States, upon either ground, except that in actions in which judgment may be rendered

for or against an executor, administrator, or guardian, no party to the action can testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. The proviso of section 858 excludes only one of the classes described in its first clause,—those who, technically, are parties to the issues to be tried,—and we are not at liberty to suppose that Congress intended the word 'party,' as used in that proviso, to include both those who, according to the established rules of pleadings and evidence, are parties to the issue, and those who, not being parties, have an interest in the result of that issue."

In the case at bar, J. H. Campbell, as one of the firm of W. P. Campbell & Bro., was, of course, interested in the issue to be tried,—at first interested without contingency, and, after the suit was ordered to progress in the name of the receiver, who was also assignee, he was interested on contingency merely; but this court said in the case of *McRae* v. *Holcomb*, *supra*: "But mere interest in the issue to be tried does not disqualify."

Had Campbell been called to testify before Stanley was made a party, and the suit ordered to progress in his name, there is no doubt that he would have been incompetent; for up to that stage of the proceeding he was not only directly interested in the result of the trial of the issue, but was a party to the suit, and of course the suit was then, as it was finally, a suit in which judgment might be rendered for or against the administratrix, she being the defendant therein. After the substitution of the receiver as plaintiff, W. P. Campbell & Bro. were not parties, technically, to the proceeding, not only because the suit had been ordered to progress in the name of the receiver, but really because the subject of litigation was no longer the property of the insolvent

firm, but was absolutely and irrevocably that of the assignee.

But, be that as it may, from the cases we have cited, it is not the interest in the issue to be tried that renders incompetent, but the being a party of record to that issue, which the proposed witness had ceased to be at the time he was called to testify; and a majority of the court is of opinion that his competency or incompetency is to be determined relatively to his status at the time he was proposed and objected to as a witness, without any reference to his previous relation to the record, as he had ceased to be a party to the litigation. The court therefore erred in refusing to permit him to testify upon the ground stated.

Account books as evidence.

The proof of the correctness of that part of the account made previous to December 1, 1880, at which time the balance in favor of plaintiff was $1,218.12, as made before the commissioner, consisted of the account itself, as transcribed in the journal and ledger books of W. P. Campbell & Bro., both of which were in evidence, and also of depositions of persons who had been bookkeepers during the period in which the account that far had run. It was shown that at sometime the store house of the plaintiffs had been destroyed by fire, and with it the blotters and salesmen's memorandum books had also been destroyed. These salesmen's books were of course, technically and strictly speaking, the books of original entries, and the items of account appearing in the journal and ledger (which were saved from the burning), if in truth correct, were merely transcribed from the salesmen's books.

Section 2893, Sand. & H. Dig., is not applicable to the case at bar, for its provisions only extend expressly to the books of deceased merchants and traders, but the rule at common law applicable to books of either party is substantially the same as indicated in that statute.

Thus, "at common law, partly from the necessity of the case, because of the incompetency of a party to testify as a witness, entries made by him personally in his own books were considered admissible as evidence forming a part of the *res gestæ*. But to render them admissible, it must be affirmatively shown that the books are books of first or original entry, were regularly kept in the course of business, and that no other books of account bearing upon the same transaction were kept at that time. The entries must have been made at the time they purport to have been made, and contemporaneously with the transactions they describe, or to which they refer. * * * The formal character of the books, whether ledger or sales-books, is immaterial, so far as their admissibility is concerned, if it be shown that they were fairly and honestly kept, are books of original entry, and are free from material alterations, interlineations, or other circumstances calculated to arouse suspicion." Underhill, Ev. p. 81. The common law rule in some respects has been modified or relaxed, notably as to the matters of entries by the employer and those by the employees. *Id.* p. 85.

The books of the original entry being destroyed, the plaintiff in this case was put to the necessity of showing that they had existed, and had been destroyed; also that fair transcripts from them were in existence, in the shape of the journal and ledger. This, we think, he fairly did by the bookkeepers as to the periods covered by their services, respectively, each one testifying to the mercantile and orderly manner in which their books were kept, and that at the end of each day they each (the bookkeepers, witnesses) transcribed from the salesmen's books the items of that day's sales and transactions, and further that these salesmen were dead. The salesmen's books—the books of original entries—would have been the primary evidence

of the transaction of sales, etc., and the salesmen would have been the proper witnesses to testify to the correctness of these books if living; but the one being destroyed and the other dead, the next best evidence attainable was the secondary evidence of the bookkeepers as to the existence and orderly character of these salesmen's books, and we think it was sufficient to justify a judgment, in the absence of preponderating evidence to the contrary. Further than this we need not go, but thus far it is necessary for us to go, since the evidence seems to have been treated as wholly insufficient to sustain any part of the claim of the plaintiff. So much as to the evidence upon which the exception to the first finding of the commissioner was tried, and from what has been said it is thought the rules of law applicable to other items of account, and the evidence necessary to sustain them, will readily be applied on a rehearing of this cause.

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

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

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Opinion delivered March 20, 1897.

RES JUDICATA—ACTIONS IN DIFFERENT RIGHTS.—A judgment of recovery in an action by an administratrix for the wrongful death of her intestate, brought for the benefit of the widow and next of kin, is not a bar to an action for the benefit of the estate, to recover for the personal injury done to the intestate.

PLEADING—CONSTRUCTION.—Where a complaint may be treated as stating a cause of action either *ex contractu* or *ex delicto*, and the action would be barred if treated as *ex delicto*, it will be treated as *ex contractu*.

INSTRUCTION—NEGLIGENCE.—In an action to recover from a carrier for injuries to a passenger killed by derailment of a car, where no negligence was complained of or shown by the evidence, except the failure to maintain the track in a safe condition, it is reversible error to charge that if the injuries were caused by the negligence of defendant in the maintenance of its track "or in the operation its train," without the passenger's fault, the jury should find for plaintiff.

SAME—DAMAGES.—It is error to instruct the jury, in an action by an administrator to recover for injuries to her intestate resulting in death, that, in estimating the damages, they might consider the amount for which the estate was liable for medical attention, where there is no proof of the amount due for such services, and where it is not shown that a claim therefor was probated within two years after letters of administration were taken out.

Appeal from Lincoln Circuit Court, Varner District.

JOHN M. ELLIOTT, Judge.

*Dodge & Johnson* for appellent.

1. There has been a recovery in this case once, and there is no evidence to sustain an additional verdict. 60 Ark. 550; Sand. & H. Dig., sec. 5908; 53 Ark. 126. There were no *debts* due by the deceased intestate, as none had been probated within *two years*.

2. There was one issue of defendant's negligence, and one only, presented by the pleadings and proof. That was negligence predicated on the failure to keep a *safe track*. In the first instruction and others the court told the jury they could find for plaintiff if they believed defendant was negligent in the "operation of its train." This was prejudicial error. 52 Ark. 524; 14 How. 486; 97 Mass. 361; 56 Ill. 138; 34 A. & E. R. R. Cas. 405; 2 Wood, Rys. pp. 1074–1079; Hutch. on Car. secs. 502–529; Patterson, Ry. Acc. Law, sec. 247; 93 U. S. 291; 34 A. & E. R. Cas. 556.

3. It was error to instruct the jury that they might find for plaintiff for medical attention and funeral expenses, as there was no *proof* of either.

4. The action is *ex delicto*, and barred.

*N. T. White*, *White & Wooldridge*, and *Rose*, *Hemingway & Rose* for appellee.

1. The evidence shows the existence of bills for both medical attendance and funeral expenses. There was no evidence that these claims had not been presented and allowed, or that they were barred. The plea of limitation is personal. Wood, Lim. sec. 7; 13 Hun, 1130. The estate was bound for these expenses. Appellant cannot complain if the estate enjoyed generous treatment from its creditors; that in no way reduced the loss. 57 Ark. 306, 312. There is nothing to show that the jury made any allowance for these items.

2. No error of the court in instructing the jury as to negligence could have prejudiced it. The train left the track where the rails were rotten. The law presumed negligence. The court might have charged that defendant was negligent. 60 Ark. 550.

3. The action was *ex contractu*, and the limitation is three years. 41 Ark. 476; Patterson's Ry. Acc. Law, sec. 341; 3 Am. & Eng. R. Cases, 444–446; Pomeroy, Remedies, etc., 567; Cooley on Torts, pp. 90, 91, *et seq.;* Bliss, Code Pleading, sec. 152; 58 Ark. 136; 61 N. Y. 583; 59 N. Y. 156, 162; 3 Gr. Ev. sec. 208; 31 Ohio St. 537, 543; 40 Pac. 779.

BATTLE, J. This action was instituted by Ada H. Sweet, as adminstratrix of the estate of Frank Sweet, deceased, against the Iron Mountain & Southern Railway Company. She alleges in her complaint, among other things, as follows: "That on the said 18th day of September, 1890, the defendant received the plaintiff's intestate, Frank Sweet, into one of its cars, for the purpose of carrying him therein, and upon said railroad, as a passenger from Walnut Lake to the city of Pine Bluff, in Jefferson county, in this state, for the sum and price of $1.25 then paid to the defendant by the

said plaintiff's intestate. That the track of defendant's road between Fairfield and Pine Bluff in said county and state, and especially at a point about three miles east of Pine Bluff, and between Pine Bluff and Fairfield station, was at the time defective and unsound, and unfit to be used for that purpose, which defendant did [know], or might and should then and thereafter have known, by due care, but, not regarding their duty, they carelessly and negligently suffered it to be used, although the ties which held the rails in place were rotten and unsound, and in such condition as to be actually dangerous to the traveler over said road; and while said car was proceeding with the plaintiff's intestate thereon at the point last aforesaid, it was, by reason of such defect in the said track, and the unsoundness thereof, thrown from the track, and said car wrecked, and the said Frank Sweet caught therein and bruised and mangled in a most horrible manner, from the effects of which the said Frank Sweet did languish and live for a period of ten hours after he was bruised and mangled, as aforesaid, before dying, and that, during the said ten hours he so lived, he suffered great bodily pain and mental anguish. That his death aforesaid was caused by the injuries received in the manner as stated aforesaid, and by reason thereof his estate has been damaged in the sum of ten thousand dollars."

The defendant answered and admitted that its train was derailed, and that plaintiff's intestate was injured, but denied all the allegations in the complaint charging it with negligence, and that the intestate suffered pain or mental anguish. It alleged that the deceased was guilty of contributory negligence, and that by reason thereof he lost his life. It further answered by saying that "there was and now is another action pending in the Desha circuit court, at the Watson district of Desha county, Ark., between the same

parties and for the same cause of action set forth in the complaint to this action, which said suit is now on appeal to the supreme court of the state of Arkansas; that, at the trial of the said action, proof was introduced by the plaintiff to the jury impaneled to try the said cause of the mental anguish and bodily pain suffered by the plaintiff's intestate on account of the injuries received as herein alleged, and that under said proof a verdict was rendered for the sum of $10,000." And pleaded the statute of limitations of one and two years.

As to *res judicata.*

The issues of fact in the action were tried by a jury. Evidence was adduced in the trial tending to prove the allegations of the complaint, that the funeral expenses of the deceased amounted to $210 or $215, and that the deceased incurred a debt in his last illness for the services of a physician, but the amount thereof was not shown. Evidence was also adduced tending to prove that an action was instituted by plaintiff against the defendant for the benefit of the widow and next of kin of the deceased for damages to them which were caused by the same injuries on account of which plaintiff sues in this case, and that the jury returned a verdict in favor of plaintiff for $10,000, and that it was instituted before the commencement of this action. But they were instituted to recover different damages, and neither is a bar to the other.

This action was commenced within three years after the injuries mentioned in the complaint were received.

Among other instructions the following were given over the objections of the defendant:

1. "If the jury believe from the evidence that the injury and death of the plaintiff's intestate was caused by the careless and negligent conduct of the defendant in the care and maintenance of its track, or in the operation of its train, without fault on his part, they will find for the plaintiff."

5. "If the jury find for the plaintiff, in estimating the damages they may take into consideration the bodily pain and suffering and mental anguish of the deceased from the time the injuries occurred until his death, and also the amount paid by plaintiff, or for which the estate of the deceased is liable, for medical and surgical attention consequent upon the injuries received and for funeral expenses."

A verdict was returned, andj udgment was rendered, in favor of plaintiff for $2,500, from which, after a motion for a new trial was overruled, defendant appealed.

Construction of pleading.

The complaint sets out a cause of action *ex contractu*. It is true that there are no allegations of promises or agreements, but they are implied. There was no necessity for stating implied promises. The cause of action is shown by the facts from which they are implied. The allegations will support an action in either form, *ex contractu* or *ex delicto*. The former not being barred, we will not hold that appellee was not entitled to relief, if it be conceded that it would be barred when treated as in the latter form.

Instruction as to negligence disapproved.

The first instruction was not correct. It says: "If the jury believe from the evidence that the injury and death of the plaintiff's intestate was caused by the carelessness and negligent conduct of the defendant in the care and maintenance of its track, or in the operation of its train, without fault on his part, they will find for the plaintiff." The error consists in the use of the words "or in the operation of its trains." No negligent conduct on the part of the defendant is complained of, or shown by the evidence, except the failure to maintain the track in a safe condition. None was shown in the operation of the train. The fact that the injury was caused by the train running over a defective track does not show negligence in the operation of the train.

The injury was the result of both causes, but the negligence was in the failure to maintain the track in a safe condition. The same defect exists in other instructions, but its evil effects were avoided by other instructions, which are unnecessary to mention.

Instruction as to damages disapproved.

The instruction as to damages was erroneous in this: it told the jury that, in estimating damages, they might take into consideration, among other things, the amount for which the estate of the deceased was liable for medical and surgical attention, and for funeral expenses. The estate was not liable for such attention and expenses, if a claim for the amount due therefor was not probated within two years after the date of the letters of administration of appellee. And, moreover, the amount due for, or value of, the medical and surgical attention is not shown. The giving of this instruction is a prejudicial error. *Railroad Company* v. *Barry*, 58 Ark. 198; *Foster* v. *Pitts*, *ante*, p. 387.

Reversed and remanded.

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## POLK v. SIMON.

Opinion delivered March 20, 1897.

DEED—CONSTRUCTION—PROPERTY CONVEYED.—Where the owner of a dower interest in land is also assignee of a decree foreclosing a mortgage of the land, a mortgage by her of "all her right, title and interest" in the land does not operate as an assignment of the decree, since, by the assignment thereof to her, she acquired no estate in the land, but merely the debt secured by the mortgage and the right to foreclose it, which she could transfer only by assignment of the decree.

Appeal from Clay Circuit Court, Western District, in Chancery.

L. L. MACK, Special Judge.

*G. B. Oliver* for appellants.

1. A widow cannot transfer her dower before it has been assigned, so as to confer on her vendee a right of action for the dower interest. 21 Ark. 62; 31 *id.* 334; 30 *id.* 775.

2. The execution of the mortgage to "all my right title and interest in and to" the land did not assign the judgment she held against the land.

3. The heirs of Hardesty should have been made parties.

*J. Simon pro se.*

1. Mrs. Miller had a right to mortgage her dower interest, even before it was assigned. Jones on Mort. (5 Ed.) sec. 136; 119 N. Y. 324; 24 N. E. Rep. 177; 34 S. W. Rep. 256.

2. The judgment was not a personal judgment, but simply a decree of foreclosure of a mortgage, and is a lien on and interest in the land, and subject to the mortgage. The mortgage operated as an assignment. Black, Judgments, sec. 947.

3. The non-joinder of parties must be objected to by demurrer or answer. Jones on Mort. (5 Ed.) sec. 1410.

BATTLE, J. Mary E. Miller was the owner of a dower interest in certain lands which had never been assigned. The plaintiff alleges in his complaint on file in this action that she was also the owner of a judgment against the same land, and gives no other description. W. D. Polk, one of the defendants, admits in his answer that he is the owner of said judgment, and that he purchased it from Mrs. Miller. She, also, being a defendant, admits that she had a judgment against the land, but had sold and assigned it. No other description of the judgment is given in the pleadings or evidence. In the decree in this action it is described as "a judgment of foreclosure of the equity of redemption of the heirs

of J. H. Hardesty, deceased, to" said land recovered by Sheeks Stephens Store Company in the circuit court for the western district of Clay county, on the 9th day of January, 1891, and assigned by it to Mary E. Miller. After the acquisition of the dower interest and the judgment, she was indebted to the plaintiff, J. Simon, and, in order to secure the same, executed to him a mortgage in which the property conveyed was described as follows: "All my right, title, and interest in 40 feet off of the north side, the entire length of lot 20 in block 22 in the town of Corning;" it being the land before mentioned. No mention of the judgment was or is made in the mortgage. The assignment of the judgment to Polk was made after the mortgage was acknowledged and recorded. This action was brought by Simon against Mrs. Miller and Polk to purchase the mortgage. In the prayer of the complaint the court was asked to subject Mrs. Miller's judgment interest in the land to the payment of the debt secured by the mortgage in the event her dower interest was not sufficient for that purpose. Upon the hearing, the court found that Mrs. Miller, by virtue of the assignment of the judgment to her, become vested with an equitable estate in the land, which was susceptible of a conveyance, and that she conveyed this interest to plaintiff by the mortgage; and decreed accordingly.

Did the court err in its findings? In this state a mortgage on realty is a conveyance of an estate in lands and a security for a debt. We have held that an assignment of such mortgage, without words of grant, will not convey the mortgagee's legal title, but only an equitable interest in the land (*Lanigan* v. *Sweany*, 53 Ark. 185), which is only a right to hold the land as a security for the payment of the mortgage debt. Without the legal estate, the assignee stands in the attitude of the mortgagee in those states in which it is held that

he is not vested by his mortgage on real estate with any estate in the land except such as is necessary for the realization of the debt due to him; that is to say, the land stands as a mere security for the debt, and subsists as an estate only to the extent that it is subservient to such purpose. In the states in which it is so held, the mortgage is an incident of the debt, and cannot be assigned separately; and it is held that any assignment of the mortgage interest in the lands, without the debt, is a nullity. *Purdy* v. *Huntington*, 42 N. Y. 334, 346, and cases cited.

In Iowa a mortgage conveys no interest or estate in the land covered thereby. In *Swan* v. *Yaple*, 35 Iowa, 248, it is held that a deed made by the holder of the mortgage conveying all his "estate, title and interest" in the real estate mortgaged will not operate as an assignment of the mortgage, nor pass any interest in the land to the purchaser. This is a logical sequence of the rule that a mortgage on realty conveys no interest or estate in the land, and is only a security.

The rule stated applies to all cases where the mortgage on real estate is a mere security. It applies to the facts in this case. Here Mrs. Miller had only an assignment of a decree foreclosing a mortgage. She acquired no interest or estate in the land by the assignment, but only the debt secured by the mortgage and the right to foreclose it under the decree. She could only hold the land as a security. This interest she could not convey, except by an assignment of the decree; and she did not attempt it. She could not convey the legal estate vested in the mortgagee, for she did not have it. She did have a dower interest in the land, and that is all the interest she mortgaged. 1 Jones, Mortgages (5th Ed.), sec. 136; *Weaver* v. *Rush*, 62 Ark. 51.

The decree of the circuit court, to the extent it affects the assignment of the decree of foreclosure to

Mrs. Miller, is therefore reversed, and in other respects is affirmed, and the cause is remanded for proceedings consistent with this opinion.

BUNN, C. J., and RIDDICK, J., dissent.

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## FAYETTEVILLE BUILDING & LOAN ASSOCIATION v. BOWLIN.

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Opinion delivered March 20, 1897.

LIMITATION—MORTGAGE DEBT—CONSTRUCTION OF STATUTE.—The statute providing that when any payment is made on any existing mortgage indebtedness before it is barred by the statute of limitation, it shall not operate to revive said debt, or to extend the operation of the statute of limitations, unless the mortgagee shall, prior to the expiration of the statutory period, indorse a memorandum of such payment with date thereof on the margin of the record of the mortgage (Sand. & H. Dig., § 5094), is prospective in operation, and does not apply to payments made before passage of the act. (BATTLE, J., dissents.)

Appeal from Washington Circuit Court in Chancery.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

Appellee, The American Baptist Home Mission Society, held a note of the First Colored Baptist Church, of Fayetteville, executed through its trustees on 22d day of April, 1886, for $300, due one year after date. The note was secured by a mortgage on the land in controversy, which mortgage was duly recorded on the 1st day of July, 1886. On the 9th day of July, 1889, the said church, through its trustees, executed to appellant building and loan association a deed of trust on the land in controversy to secure appellant in the sum of $500. This deed of trust was duly recorded on

the 15th day of July, 1889. Afterwards, default being made, said land was duly sold, under the power contained in said deed of trust, to appellant, who, upon the deed thus obtained, brought suit in ejectment for the land in controversy against the church and certain of its trustees.

Appellee, the American Baptist Home Mission Society, filed its interplea, claiming the property under its mortgage, asking for a transfer to equity, a foreclosure of its mortgage, etc. The cause was transferred to equity.

The court found "that payments had been made on the indebtedness to appellee from December 16, 1886, to March 26, 1891, but that none of said payments had been indorsed upon the margin or elsewhere of the record of said mortgage. The court found that there was still due on said note and mortgage $351.30, and that the said mortgage of interpleader (appellee) was prior in time and superior to that of the building and loan association (appellant), and accordingly rendered a decree in favor of appellee.

*E. B. Wall* for appellant.

The interpleader was barred by the act of March 25, 1889. The case of *Duke* v. *State*, 56 Ark. 460, was based on a different statute, that of March 31, 1887.

WOOD, J., (after stating the facts.) The only question presented is the construction of the act of March 25, 1889, which is as follows: "In suits to foreclose or enforce mortgages or deeds of trusts, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given. *Provided*, when any payment is made on any such existing indebtedness, before the same is barred by the statute of limitation, such payment shall not operate

to revive said debt or to extend the operations of the statute of limitations with reference thereto, so far as the same affects the rights of third parties, unless the mortgagee, trustee or beneficiary shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk." Sand. & H. Dig., sec. 5094.

"In all cases in existing mortgages where the debt or liability would be barred by the terms of this act, or where the debt or liability exists* would be barred in less than one year from the date of this act, the party in whose favor said debt or liability exists shall be allowed one year from the date of the passage of this act to bring an action to enforce the same." *Ib.* sec. 5095.

"It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." Cooley, Const. Lim. 455. "The reason for the rule," says Mr. Black, "is the general tendency to regard retrospective laws as dangerous to liberty and private rights, on account of their liability to unsettle vested rights or disturb the legal effect of prior transactions." Black, Interp. Laws, sec. 103, p. 251.

The language of the act shows that the payments that were to be indorsed on the margin of the record were payments made after the passage of the act. Had the legislature designed this provision to apply to past payments, as well as future, they would doubtless have said "when any payment is made, or any payment already made," etc. Had such been the purpose of the legislature, it would not have been difficult to use apt

*This word "exists" in the statute seems to be superflous. (Reporter).

words to express it. Black, Interp. Laws, sec. 103. The language of the act shows that it was intended to apply to existing mortgages.

The note to appellee which the mortgage was given to secure, if unsealed, being executed April 22, 1886, would not have been barred until five years thereafter, had no payments been made on same. But the court found "that payments had been made from December 16, 1886, to March 26, 1891." Under this general finding we must conclude, to uphold the decree, that payments were made on the debt before the passage of the act which kept said debt alive until the interplea was filed. The interplea was filed on the 24th day of May, 1893, so that a payment made on the note any time after the 24th day of May, 1888, up to the time of the passage of the act of March 25, 1889, although not indorsed on the margin of the record of the mortgage, would have kept the debt, and hence the mortgage, from being barred by the statute when the interplea was filed.

Affirm the decree.

BATTLE, J. dissents.

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## WELLS, FARGO & COMPANY'S EXPRESS v. CRAWFORD COUNTY.

Opinion delivered March 20, 1897.

STATUTES—CONSTRUCTION.—It is the duty of the courts to give to a statute such a construction, if possible, as will enable it to take effect.

TAXATION—EXPRESS COMPANIES.—The act of April 8, 1893, regulating the assessment and collection of taxes from express and other companies, provides, as a rule of assessment, that the board of railway commissioners shall fix the sum at which the property of any such corporation shall be assessed in this state by taking the same

proportion of the aggregate value of its capital stock as the number of miles of railway in this state over which such company carries on its business bears to the aggregate number of miles of railway within and without the state. *Held*, that the act should not be construed as forbidding the board of commissioners to receive other evidence of the true value of an express company's property in the state, or to assess it at its true value, although it may be greater or less than the sum found by applying the statutory rule.

SAME—It is no objection to an assessment of the property of a foreign express company for taxation that the amount assessed against it in this state exceeds the amount of its tangible property here; for the value of the property of the company in this state, considered as part of its whole plant, and in connection with the uses to which it is put, may be more than the aggregate value of the separate articles of property owned by the company here, when not considered in connection with the use to which the property is put.

EQUITY—RELIEF AGAINST EXCESSIVE ASSESSMENT.—In the absence of fraud, intentional wrong, or error in the method of assessment, a court of equity has no jurisdiction to grant relief against an excessive assessment by the board of railway commissioners.

TAXATION—CLASSIFICATION OF PROPERTY.—The legislature has power to classify property for the purposes of taxation, and to provide for the valuation of different classes by different methods.

SAME—VALUATION.—The property of express companies may be valued as a unit for the purpose of taxation, and a proportion of the whole, fairly and properly ascertained, may be taxed by each state in which it does business.

SAME—PRESUMPTION AS TO ASSESSMENT.—On a bill to enjoin the collection of taxes assessed against an express company engaged in interstate commerce, it will be presumed, in the absence of a contrary showing, that the board of commissioners took into consideration the fact that part of its capital stock was based on business done on water ways and on realty situated in other states.

PRACTICE—RELIEF FROM EXCESSIVE TAXES.—Under the rule that he who asks equity must do equity, one who asks to be relieved from a county tax in excess of the constitutional limit of five mills should tender the amount of taxes legally due.

Appeal from Crawford Circuit Court in Chancery.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

Bill for injunction against the collection of tax alleged to be illegal. Wells, Fargo & Company's Express filed its complaint in the Crawford circuit court, alleging, in substance, that it is a corporation organized under the laws of the state of California for the purpose of doing a banking business and express business by land and water; that it is carrying on an express business in the state of California, and in and between many of the states of the United States, and also with foreign countries; that it owns certain specific articles of personal property in Crawford county, not exceeding in value $218; that it owns a safe carried on each of the passenger trains which pass through the county, but that the aggregate value of all these safes is not greater than $120, and that it does not own the trains or cars, and has no interest therein; that it has owned no personal property in said county, other than that mentioned, within one year; that there is placed on the tax books of said county against plaintiff an alleged assessment of personal property amounting to $4,292, and a tax has been extended amounting to $67.25, and a warrant is attached to said books, authorizing the collector to collect such tax; that there has been no assessment of plaintiff's property other than by the state board of railroad commissioners, made under the act of April 8, 1893; that the capital stock of said corporation not only includes and represents the value of hundreds of miles of express business transacted upon navigable waters, but includes its banking capital and valuable real estate owned in other states, and that the capital stock affords no adequate means of arriving at the value of personal property within the state; that the assessment so made is higher than the assessment of other property of equal value, and that the assessment so

made is not equal and uniform throughout the state; that the assessment amounts to taxing plaintiff for the privilege of doing business in the state; that the act is contrary to the constitution of the state and of the United States, and contrary to the interstate commerce law. It was further alleged that there was levied, as part of said tax, five mills for general county purposes and one half mill to pay a judgment against the county for indebtedness incurred since the adoption of the constitution of 1874; that, unless restrained and enjoined, the sheriff and collector will seize and sell the property of the company, to its great and irreparable injury, wherefore it prays for an injunction, etc.

To this complaint the appellee Stewart, sheriff and collector, filed a demurrer on the ground that it "does not state facts sufficient to constitute a cause of action against the defendant, either in law or equity." The circuit court sustained the demurrer, and dismissed the complaint, and adjudged costs against the appellant company.

*L. F. Parker* and *B. R. Davidson* for appellant.

1. A court of equity has jurisdiction to enjoin the collection of an illegal tax. Sand. & H. Dig., sec. 3778; 27 Ark. 625; 30 *id.* 278–281; *ib.* 101; *ib.* 609; 34 *id.* 603; 28 *id.* 271; 30 *id.* 129.

2. The law is unconstitutional, and contrary to state constitution, the constitution of the United States, and the interstate commerce law. It is virtually a tax on the privilege of doing business in thiss tate. Art. 16, sec. 2, Const., provides that property shall be taxed according to *value*, that the valuation shall be equal and uniform, and that no one species of property shall be taxed higher than another species of equal value. No privilege, except those named in the constitution, can be taxed by direct or indirect methods, and any law

that seeks to tax property at more than its true value is void. 2 Ark. 291; 13 *id.* 752; 44 *id.* 134. Any mode of taxation that causes one to pay more taxes on property than another on property of like value renders the assessment void. 101 U. S. 143; 127 U. S. 193. All property must be taxed according to its true value. 5 Ark. 204; 46 *id.* 327. The legislature cannot discriminate between different classes of property. There must be uniformity in the rate and mode of assessment, so that there will be equality of burden. 25 Ark. 289; 27 *id.* 202–210; 49 *id.* 337; 101 U. S. 143–158; 48 *id.* 370–378, 382. Sand. & H. Dig., secs. 6455, 6457, the commissioners to *arbitrarily* fix the value of the personal property of express companies by reference to the railroad mileage over which the company does business. But to apply this rule to an express company which carries on business over *water ways*, and does a banking business, and owns real property in other states, upon all of which its capital stock is based, makes its assessment higher than the assessment of other property, and hence not equal and uniform, and violates the constituton.

3. The constitution limits the county levy to five mills, and an excessive levy renders the whole tax void. 32 Ark. 496.

*Chew & Fitzhugh* for appellees.

1. The fact that appellant's property was assessed by the board of railroad commissioners, while that of private persons was assessed by the assessor, does not render the act invalid. 52 Ark. 535; 49 *id.* 518; 46 *id.* 312; 120 U. S. 97; 92 U. S. 578; 101 *id.* 153; 115 *id.* 321.

2. *All* property within a state, whether engaged in interstate commerce or not, may be taxed by the state. 18 Wall. 206; 105 U. S. 460; 7 Wall. 71.

3. It was *clearly* the intention of the act to tax the property within this state, and the method provided has been upheld by the courts. 125 U. S. 530; 141 *id.* 18.

4. No offer was made by the company to pay the five mill tax, which was conceded to be legal. Cooley, Taxation, 763; 92 U. S. 575; 3 Dillon, 25; 106 U. S. 196; 35 Ark. 505; 32 *id.* 496; 30 *id.* 278; Cooley, Taxation, 537.

*E. B. Kinsworthy*, Attorney General, for appellees.

The act is not unconstitutional. 141 U. S. 18–39; *ib.* 40. The mere allegation that the tax law is illegal or invalid is no reason for interference by injunction. 11 Wall. 108; 92 U. S. 575; 139 *id.* 591; *ib.* 658, 153 *id.* 252.

RIDDICK, J., (after stating the facts.) The main question that we are asked to determine in this case concerns the validity of an act of the general assembly of this state approved April 8, 1893, entitled "An act to assess and collect taxes from certain corporations." (Acts 1893, p. 232.*)

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*Secs. 1 and 2 of act of April 8, 1893, are as follows:

"Section 1. That it shall be, and it is hereby made, the duty of every sleeping or dining car company, express company, or telegraph company, incorporated by the laws of this or any other state, and carrying on business in this state, on the first Monday in July, 1893, and every second year thereafter, to make out and file with the board of railroad commissioners of this state a statement showing in detail the following: First. A certified copy of the articles of incorporation under which the said company is organized and carrying on business, said copy is to be filed but once unless the board shall otherwise direct. Second. The amount of capital stock subscribed, whether designated as common or preferred stock or by any other name or description, showing the par value of each share, and the market value thereof at the time the said certificate is required to be made. Third. The total number of miles of railway, within or without this state, over which such sleeping or dining car company runs its cars, or such express company carries on its business; and the number of miles of line within and without this state which any such telegraph company employs in the transaction of its business. Fourth. The number of miles of railway in this state over which any such sleeping or

This act requires that express companies and certain other corporations doing business in this state shall on the first Monday in July, 1893, and every second year thereafter, file with the board of railroad commissioners of this state a statement or certificate, verified by oath, showing in detail, among other things, the amount of capital stock subscribed, the par value thereof, and the market value of the same at the time the certificate is required to be filed. Such certificate

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dining car company may be running its cars, and over which any such express company may be carrying on its business; and the number of miles of line which any such telegraph company may employ in this state in the transaction of its business. The statements contained in any such certificate shall be sworn to by a general officer of such corporation whose service therein makes it his duty to be personally informed about the matters to be included in such certificate. False swearing in making any of the statements required to be set forth in said certificate is hereby declared to be perjury, and shall be punished as such. If the board of railroad commissioners shall have reason to believe that any statement contained in any such certificate filed with them is false in any material matter, it is hereby made their duty to procure other information about the matters to be contained in such certificate. The said board shall also have power, and it is hereby made their duty, to resort to other sources of information, in the event any such corporation shall fail or refuse to file the certificate aforesaid.

"Section 2. When such certificate shall have been filed with said board, or such other information obtained, the said board shall proceed to ascertain the value of the entire capital stock, or of each and every one of the corporations aforesaid, and shall thereupon fix the sum at which the property of any such corporation shall be assessed in this state for purposes of taxation, by taking the same proportion of the aggregate value of the capital stock of any such corporation as the number of miles of railway in this state over which such sleeping or dining car company or express company carries on its business, or as the number of miles of line employed in this state by any such telegraph company in the transaction of its business bears to the aggregate number of miles of railway within as well as without this state over which such sleeping or dining car company or express company carries on its business; or in the case of any such telegraph company, the number of miles of line employed in this state bears to the entire number of miles employed by it within as well as without this state." (Rep.)

must further show the number of miles of railway in this state over which such express company does business, and also show the total number of miles of railway within or without this state over which such business is carried on by the company. The act provides that, when such certificate shall have been filed, or the information obtained, the board shall proceed to ascertain the value of the entire capital stock of such company, and shall thereupon fix the sum at which the property of any such express company shall be assessed in this state for the purposes of taxation by taking the same proportion of the aggregate value of the capital stock of any such corporation as the number of miles of railway in this state over which it carries on business bears to the aggregate number of miles of railway within as well as without the state over which such company does business. The act further provides that the aggregate value of the property of such corporation thus ascertained to be taxable in this state shall be duly apportioned between the counties in this state through which such company carries on its business.

The complaint alleges and the demurrer admits that the business of appellant in this state is carried on over railroads exclusively, but that a large proportion of its business outside of the state is carried on over waterways, and not over railroads, and that the value of its capital stock is based in part upon this business over waterways. It is also alleged that appellant company owns no real property in this state, but owns real property in other states of great value, and that the value of its capital stock is based in part upon this real estate. Appellant therefore contends that, as applied to its property, the rule of assessment set out in the statute violates the provision of our constitution requiring that all property shall be taxed according to its value, and

violates also the rule of equality and uniformity contained therein. The provision of the constitution referred to is as follows: "All property subject to taxation shall 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. No one species of property, from which a tax may be collected, shall be taxed higher than another species of property of equal value." Const. 1874, art. 16, sec. 5.

It may be conceded, without argument, that if the construction placed upon this act by appellant is correct,—if it arbitrarily compels the board of railroad commissioners to assess the property of this company by taking the same proportion of the value of its total capital stock as the railroad mileage over which it does business in this state bears to the total miles of railroad over which it carries on its business, the result would, under the facts alleged in the complaint, be a very unequal and unjust valuation of the property of appellant in this state. It would, in effect, tax appellant for property not situated in this state, and that plainly the legislature had no power to do. In *Peay* v. *Little Rock*, 32 Ark. 31, it was said that the valuation and assessment of property "cannot be arbitrarily determined either by law or by an ordinance." Again, in *L. R. & F. S. R. Co.* v. *Worthen*, 46 Ark. 312, 330, it was said "that the legislature cannot, under the guise of regulating the duties of assessors, exempt property from taxation." If the legislature cannot exempt property from taxation under the pretense of regulating the assessment, it follows, from reasons equally as cogent, that they cannot tax property of appellant beyond the state under the pretense of regulating the assessment of its property located and taxable in the state. As was decided in

*L. R. & F. S. R. Co.* v. *Worthen*, *supra*, "the legislature cannot discriminate between different classes of property in the imposition of taxes. Its only discretion is in the ascertainment of values, so as to make them equal and uniform throughout the state."

As to construction of statutes.

To this extent we can agree with the contention of counsel for appellant, but is the construction for which they contend the proper one to place upon this provision of the statute? Does the statute compel the board to follow an arbitrary rule in the assessment of appellant's property? "It is the duty of the court to uphold a statute when the conflict between it and the constitution is not clear, and the implication, which must always exist, that no violation has been intended by the legislature may require it, in some cases where the meaning of the constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. For, as a conflict between the statute and the constitution is not to be implied, it would seem to follow that the court, if possible, must give the statute such a construction as will enable it to have effect. This is only saying in another form of words that the court must construe the statute in accordance with the legislative intent, since it is always to be presumed the legislature designed the statute to take effect, and not to be a nullity." Cooley, Const. Lim. (6th Ed.) 218; *Slack* v. *Jacob*, 8 W. Va. 612; *Tabor* v. *Cook*, 15 Mich. 322; *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 309.

The constitutional provisions invoked in this case, that all property subject to taxation shall be taxed according to its value, that such values shall be made equal and uniform throughout the state, and that no one species of property shall be taxed higher than another of equal value, are clear and beyond dispute. We must

presume therefore that the legislature knew these provisions, and did not intend that the statute should conflict with the constitution. The legislature knew that it had no power to tax appellant on property situated beyond the limits of the state, and we must presume that there was no intention to do so. The object of the legislature in the passage of the law was to compel appellant and certain other corporations to pay upon their property in this state their due proportion of taxes, and no more. Our constitution provides that "all laws exempting property from taxation other than is provided in this constitution shall be void;" that "the power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state may be a party." Const. 1874, art. 16, secs. 6 and 7.

Statute taxing express companies construed.

The intention of the legislature in the passage of this act was in line with these provisions of the constitution, and it is our duty to give the act such a construction as will enable it to have effect, if it be possible to do so without doing violence to its language. It will be noticed that there are no negative words employed in the statute, and nothing which absolutely forbids the board of railroad commissioners from considering other evidence than the facts which the act requires to be certified by the company itself. The act requires that these companies shall file such certificate on the first Monday in July of every second year, beginning with the year 1893, and provides that when the certificate is filed the board shall proceed to assess the property of the corporation. As we understand the act, it is the duty of the board of railroad commissioners to meet on the day named for the purpose of receiving such certificates and making the assessment. There is nothing in the act forbidding such corporations from presenting to the board other facts tending to show the true value of their

property in this state, in addition to those which the statute requires them to certify. We therefore conclude that they have the right, when they file such certificate, to present to the board other facts also which may tend to show the true value of their property in this state, and that it is the duty of the board to consider such evidence, as well as all other information before them, and to assess said property at its true value, although it may be greater or less than the sum resulting from the application of the rule mentioned in the statute. In other words, we hold that this provision of the statute must be taken as mandatory only to the extent that, in the absence of other evidence, the board must presume that the result ascertained by it represents the true value of the corporate property in this state, but that, in addition to the facts required to be certified, the board has the right to consider, and it is their duty to consider, all other facts within their knowledge bearing on the question of the value of the property to be assessed.

Validity of assessment of express company's property.

It does not follow from this that the assessed value of the company's property taxable here must necessarily correspond with the total value of the safes, horses, wagons, office furniture and other articles of property owned by the company in this state, when considered separate and apart from the whole property, and apart from the uses to which such property is put. One object of this statute was to require that the property of such corporations should be assessed as a "unit profit-producing plant," and that their property in this state used in carrying on the corporate business should be assessed at its value when considered as a part of such unit or whole plant. The mere fact, therefore, that the assessment of the property of the company in this state was greater than the aggregate value of the safes, wagons and other articles of property owned by the company in this state, when considered only as safes,

wagons, etc., and apart from the use to which they are put, would not in itself justify us in concluding that the assessment was illegal and excessive. Much less does the allegation that the aggregate value of the articles of personal property owned by the company in Crawford county is less than the sum apportioned by the board to said county as the value of the property of appellant taxable in such county justify such a conclusion; for the value of the property of the company in this state, considered as part of a whole plant, and in connection with the uses to which it is put, may be more than the aggregate value of the separate articles of personal property owned by the company here, when not considered in connection with the use to which the property is put. "The value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated." And it is the duty of the board to assess the property of the company at its true value, although that value may be in part due to the fact that such property is a portion of a large "profit-producing plant." *Pittsburg, etc. Ry.* v. *Backus*, 154 U. S. 444. In other words, the allegation that the value of the tangible property of the company is less than the amount of the assessment is not sufficient, for the property of the company may be in part intangible, and that also is subject to taxation, and may be included in the assessment. *Adams Express Co.* v. *Ohio State Auditor*, 17 Sup. Ct. Rep. 604.

When relief given against assessments

But we may go further, and say that, the assessment of the property of this express company having been committed by law to the board of railroad commissioners, a complaint for relief in equity is insufficient which only alleges that the valuation by the board is excessive; for, in the absence of fraud, intentional wrong, or error in the method of assessment, the finding by the board cannot be overturned by evidence going only to

show an error of judgment in the valuation of the property. The courts are powerless "to give relief against the erroneous judgments of assessing bodies, except as they may be specially empowered by law to do so." Cooley, Taxation (2d Ed.), 748; *Pittsburg Railway Co.* v. *Backus*, 154 U. S. 421.

Right to classify property for taxation.

The method provided for the assessment of this property was legal; for the legislature has the power to classify property for the purpose of taxation, and to provide for the valuation of different classes by different methods. Const. 1874, art. 15, sec. 5; *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 52 Ark. 529. The same reason exists for the separate classification of the property of express companies used in carrying on their business as exists in case of railway property. *State* v. *Jones*, 51 Ohio St. 492; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; 2 Elliott, Railroads, sec. 740, and cases cited. Without such classification, the property of such companies could not be assessed as a unit, and the legislature has the power to require that the value of such property be ascertained by considering it in that way.

Mode of valuation.

It has been many times held, both by the supreme court of the United States and by state appellate courts, that the property of railroads, telegraph, sleeping car and express companies engaged in interstate commerce may be valued as a unit for the purpose of taxation, and that a proportion of the whole, fairly and properly ascertained, may be taxed by the state in which it is situated. *Sanford* v. *Poe*, 17 Supreme Court Rep. 305; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1; *Pittsburg Railway Co.* v. *Backus*, 154 U. S. 421; *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18; *W. U. Tel. Co.* v. *Attorney General of Mass.* 125 U. S. 530; *State* v. *Jones*, 51 Ohio St. 492.

In the recent case of *Sanford* v. *Poe*, *supra*—a case involving the validity of an Ohio statute regulating the

assessment for taxation of the property of telegraph, telephone and express companies in that state—Chief Justice Fuller, who delivered the opinion of the court, said: "No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture than that of railroad, telegraph and sleeping car companies to road bed, rails and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture, the contracts for transportation facilities, and the capital necessary to carry on the business, whether represented in tangible or intangible property in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others."

It results from our view of the meaning of this statute, and from the law as above stated, that we do not find it to be in conflict with the constitution of this state. But, had we adopted the view of appellant, and concluded that the intention of the legislature was to adopt an arbitrary method of assessment, and to prevent the board of railroad commissioners from considering any other fact beyond those which the statute requires the certificate to furnish, the result would not have been very different; for, if this provision of the act was in conflict with the constitution, that would not necessarily compel the court to declare the whole act void. When a part of a statute is unconstitutional, but the remainder is not, the parts will be separated, if possible, and that which is constitutional will be sustained. *L. R. & F. S. Ry.* v. *Worthen*, 46 Ark. 312; *State* v. *Marsh*, 37 Ark. 356; Cooley, Const. Lim. 209; Black's Const. Law. 62.

The substance of the act under consideration is that it gives power to the board of railroad commissioners, and makes it their duty, to assess the property of certain corporations therein named for taxation; further, that it requires said corporations to furnish certain facts to the board as a basis for making the assessment, and, in effect, makes it the duty of the board, in determining the value of the property of said corporations, to consider the entire property of such corporation as a unit. As these matters were clearly within the power of the legislature, it follows that the substantial portions of this act are valid. If then it be conceded that the legislature, after having authorized the board of railroad commissioners to assess this property, and after having lawfully provided that said board in making the assessment should consider the property as a unit, went further, and undertook to compel the board to arrive at the value of the property in this state by the application of an arbitrary rule, which, as applied to the property of this company, would result in an unequal and excessive valuation of its property, it would be the duty of the board to ignore the statute, so far as it conflicted with the constitution, and assess said property at its true value, in obedience to the higher mandate of the constitution. *L. R. & F. S. Ry.* v. *Worthen*, 46 Ark. 312. The rejection of such provision would not justify either the courts or board in treating the whole act as void. The substantial portions of the act being left, it would still be a complete law, capable of being executed so as to carry out the legislative intent that the property of these corporations should be assessed and its value ascertained by this board, and to this extent it would be the duty of the court to uphold it, in order that such corporations may be compelled to bear their due proportions of the public burdens. *St. Louis, I. M. &*

*S. R. Co.* v. *Worthen*, 46 Ark. 312; *State* v. *Marsh*, 37 *id.* 209.

Presumption as to assessment.

Being of the opinion that the statute is valid, and that it was the duty of the board in making the assessment to consider any legitimate evidence tending to show the actual value of the property assessed, it follows that, in the absence of any showing to the contrary, we must assume that the board, in making the assessment of the property of appellant, gave due consideration to the fact that a large proportion of its business outside of the state was carried on over waterways, and also to the other facts alleged, and that it assessed said property in this state at its actual value, and no more. The appellant does not allege in its complaint that the board refused to consider such facts, or refused to allow it a hearing on the question of the value of the property, or that there was fraud or error in the method of assessment; nor does it allege that its property in this state considered as a part of the whole property, and in connection with its use, was assessed at more than its true value. The complaint was defective in these respects, and did not state a good cause for injunction.

Practice as to relief from excessive taxes.

The complaint further alleged that there was levied, as part of the tax complained of, five mills for general county purposes, and in addition one half mill to pay judgment against the county for indebtedness incurred since the adoption of the constitution of 1874. The contention on this point is that the constitution limits the county levy to five mills, and the excessive levy of half mill renders the whole tax void. But we are of opinion that this contention cannot be sustained. The county had the right to levy the five mills for general county purposes. "He who asks equity must do equity," and the appellant should have tendered the five mills which had been properly levied. *Worthen* v. *Badgett*, 32 Ark. 536; 2 Elliott, Railroads, sec. 752, and cases cited.

We are therefore of opinion that the court did not err in sustaining the demurrer and dismissing the action.

The judgment is affirmed.

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## McPHERSON v. SIMMONS.

Opinion delivered March 27, 1897.

DRAMSHOP KEEPER'S BOND—GAMBLING IN ROOM ATTACHED TO SALOON.—In an action upon the statutory bond of a dramshop keeper to recover sums alleged to have been lost at gaming in a room attached to the dramshop, the jury should be instructed that, in order to hold the defendants liable on the bond, they must find that the dramshop keeper had control of the room where the gaming was carried on, and that such control may be shown by facts and circumstances going to show a collusive renting or a retention of control by a participation in the business.

TRIAL—QUESTION OF FACT.—Whether or not a room on a second floor indirectly opening into the dramshop on the first floor is attached to it is a question of fact for the jury.

Appeal from Jackson Circuit Court.

SAMUEL PEETE, Special Judge.

STATEMENT BY THE COURT.

This is a suit by appellee against appellants as principal and sureties on a bond executed under the provisions of section 4870, Sand. & H. Dig., which reads as follows, to wit: "Each applicant for a dramshop or drinking saloon shall present his petition to the county court of the proper county, setting forth the place where such dramshop or drinking saloon is to be kept, verified by his affidavit, and shall enter into bond to the state of Arkansas, in the penal sum of two thousand dollars, conditioned that such applicant will pay all damages that may be occasioned by reason of liquor sold at his

house of business, and shall further pay to any person all such sums of money as may be lost at gaming in his said saloon or dramshop, or any room or building attached thereto under his control, which bond shall have two good securities thereto to be approved of by the court."

The answer admits that D. W. McPherson & Co., composed of D. W. McPherson and W. R. O'Neal, were dramshop keepers in what was known as the "Pearl Saloon" in the town of Newport, and that they, with their sureties, executed the bond sued on; that the defendants had no knowledge of plaintiff having lost the sums of money sued for at gaming in the rooms named by him, but deny that he lost such snms at faro or poker in any room then attached to their saloon and under their control.

It appears from the testimony that D. W. McPherson & Co., for the purpose of keeping a dramshop or drinking saloon therein, rented from one Joseph P. Morrison, the owner, a two-story building (the building in question) for the years 1893 and 1894 (except one room up stairs reserved by Morrison as a sleeping room for himself) for the monthly rental of $110. D. W. McPherson, one of the firm, testifying in explanation, says he tried to rent only one room—the saloon room—which was the main and front room on the ground floor, but the owner would not rent to him unless he would take all the building less the one room reserved as stated, and that thus he was compelled to rent all the building. They made due application to the county court, made the bond sued on, and were granted license to keep said dramshop in said building. There were two rooms on the ground or lower floor of the building—the saloon or main room in front, and fronting on the street, and the rear room used then as a club room, but used at the time as a restaurant, and reaching back to a rear yard.

The upper or second story was cut up into seven or eight smaller rooms, one of these being the room reserved by Morrison for his own use. Two of them were let to cotton buyers, and three of them were let for the month of February, 1894 (that is from the 8th February to the 9th March), for the sum of $30 to one J. W. Hughey, who used the same exclusively for the purpose of gambling and the running of gaming devices. These three rooms were the rear rooms of the upper story, and all of the rooms of that story opened into a hall which extended the length of the building. A stairway led from this hall down to the street in front; a side door opening near the lower landing into the front part or vestibule of the saloon room, which last, McPherson says, was kept closed, and only used for his personal convenience in leaving the saloon at late hours when other doors were locked. Another stairway led from the rear end of the hall above, presumably through a door, down on the outside and rear end of the building to the back yard.

There is evidence showing that plaintiff bet at faro, and also at poker, in the rooms used for gaming, and lost the sums claimed; and that, during his visits there to engage in this pastime, D. W. McPherson, the keeper of the saloon below, personally brought up drinks of liquor for those engaged in the games. The defendants however deny that they had any control over these rooms during the times they were let to Hughey as stated, but that during all the time Hughey had exclusive possession and control of the same; and they say that there was no reservation in the lease to him whereby defendants could assert any control over them, or language to that effect. They say that the three rooms had no furniture in them, other than was furnished by Hughey, and that they were not run in connection with the business of the saloon.

Whether or not, the defendants, McPherson & Co. knew, at the time of renting the rooms to Hughey, that he was going to use them for the purpose of gaming, does not appear from the direct statements of the witnesses, but was left as a question to be determined from facts and circumstances surrounding, and inferences necessarily or reasonably to be drawn therefrom; and so also, whether or not these defendants, after the renting, actively participated, encouraged, or advised the carrying on of the business of unlawful gaming therein.

*M. M. Stuckey* and *J. M. Bell* for appellants.

If appellee is entitled to recover, it is by virtue of sec. 4870, Sand. & H. Dig. 55 Ark. 49. A penal statute should be *strictly construed*, and cannot be extended by implication. 20 Ohio St. 8; 56 Ark. 47; *ib.* 226; 53 *id.* 424; 38 *id.* 521. The rented rooms were not *under the control* of appellants. Wood, Land. & Ten. sec. 538; Tiedeman, Real Prop. sec. 172, 182; 6 Jones, (N. C.) L. 73; 14 Grat. (Va.), 679; 11 Am. & Eng. Enc. Law, 725, note. Nor was the room "attached," in the sense of the statute. 23 Ala. 40; 13 Tex. App. 160; 6 Jones (N. C. L.), 73.

*Jos. W. Phillips* for appellee.

The court properly refused to give instructions 3, 4 and 5 for appellants. Sand. & H. Dig., secs. 4870–3. Appellants still had control of the rooms, as the lease for gambling purposes was void. Wood, Land. & Tenant, sec. 226, 551; 55 Ark. 360. The keeping of a gaming house is a nuisance *per se*. Wood, Nuisances, sec. 49; 13 Ark. 700; 15 *id.* 72; 22 *id.* 252. And this was an injury to the *reversionary* interest, which they could abate. 18 Ark. 259; 12 Am. St. Rep. 891. One cannot shield himself from responsibility for money lost at gaming by leasing to another. 36 Ark. 629. There

was ample evidence to sustain the verdict, and the case comes fairly within the statute. Even if the court's charge was erroneous, the verdict ought to be upheld. 35 S. W. Rep. p. 212.

BUNN, C. J., (after stating the facts.) The only questions in this case are questions of law arising upon the instructions given and refused, and mainly on the instruction numbered 1 given by the court on its own motion, and particularly that part of it relating to the duty and liability of the landlord as applied to the facts of the case.

Liability on bond of dramshop keeper.

So far as we can ascertain, there has been but one other case in this court wherein a recovery on a dramshop keeper's bond was sought, and in that case (*Grant* v. *Owens*, 55 Ark. 49) only the question as to who was the proper party plaintiff was involved. We have been unable to find a like case adjudicated in other jurisdictions. Hence we are left to deduce the principles from decisions of analogous cases arising under statutes of similar objects and meaning; and it is thought that, for all practicable purposes, statutes denouncing penalties upon landlords in cases of rooms or buildings used for illicit traffic in intoxicating liquors may be regarded as strictly analogous to cases arising, as this one does, on the laws against gaming, in so far as the particular question of the relation, duties, and liability of the landlord are concerned.

Black, in his work on "Intoxicating Liquors," sec. 382, says: "Unless the statute expressly declares the contrary, the owner of premises upon which liquor is unlawfully kept for sale is not guilty of an offense if he leased the premises for a lawful purpose, and did not affirmatively assent to such unlawful use, and he is not bound to interfere and invoke the law when he subsequently finds that the tenant is making such unlawful

use of the premises; for the mere failure to prevent, or attempt to prevent, the illegal keeping or sale of liquor does not subject him to the penalties of the statute. But in several of the states the statutes are such as to impose a responsibility upon the landlord, when the tenant unlawfully keeps or sells liquor, if he leased the premises for that purpose, or if, with knowledge of the fact, he authorizes, suffers or permits the unlawful acts of the tenant. In regard to the bringing home such knowledge to the lessor, it is said that knowledge sufficient to excite the suspicion of a prudent man, and put him upon inquiry, is equivalent to knowledge of the ultimate fact. And it is not essential to show that the lessor witnessed, or had knowledge of the particular sales upon which the tenant was convicted. It is enough to allege and prove that the lessor had knowingly permitted the occupant to use the premises for purposes violative of the liquor law, when he might have prevented it. Hence, to convict one under these statutes, it is essential that he should have had such control over the property as to be in a position to prevent or stop the illegal acts of the tenant. For this reason, one to whom property has been conveyed by deed absolute in form, but in fact a mortgage, and who has neither the possession nor right of possession, cannot be guilty of permitting the premises to be used for the maintenance of a liquor nuisance. So a lessor cannot be convicted, unless the lease reserves his control of the building, although the same statute provides that the owner may, in cases of the kind, recover possession by entry or action."

Our statute (Sand. & H. Dig., sec. 4881) imposing penalties upon landlords for the illicit or clandestine sale of liquors on their premises was construed by this court in *Crocker* v. *State*, 49 Ark. 60. In that case the lower court had refused to instruct the jury, in effect, that the defendant could not be convicted without proof that he

knew, at the time of leasing, that Jones was going to engage in the clandestine sale of intoxicating liquors, but charged the jury, in effect, that, if the tenant used the premises for an illicit purpose, it was the right and duty of the landlord to put an end to the lease, and that his failure to take active measures to stop the traffic, after he had knowledge of it, was allowing the spirits to be sold, within the meaning of the statute.

The statute (Sand. & H. Dig., sec. 4881) under which that prosecution was had, like the statute under which this suit was brought, only fixed liability on the landlord where it was shown by the facts and circumstances that he retained or had control of the premises (in this case it must be the rooms) where the unlawful business was carried on. Moreover, under that statute, it being a criminal statute, all participants in the selling of the liquor are subject to indictment, while under the statute now under consideration the landlord is liable on his bond only where it is shown in some way he had a control over the rooms, and not merely because he participated. In commenting on the action of the lower court in that case (*Crocker* v. *State*) this court said: "But the court went too far in instructing the jury that the mere non-interference of the landlord, after he became aware that the tenant was violating the law, involved him in the guilt of his tenant. The enforcement of a law rests primarily upon the officers and the courts. The law is not so unreasonable as to require the private citizen to embroil himself in personal difficulties, contentions and law suits for the public good."

In the case of *State* v. *Keisler*, 6 Jones (N. C.), 75, a landlord was indicted for permitting gaming in a room of his tavern which had been let by the landlord to a shoemaker for the purpose of his trade. The question there turned on the question whether or not the landlord had control of the shop at the time the gambling

was engaged in. A judgment of guilty was entered by consent, and the case appealed to the supreme court, where the consent judgment was reversed for failure of proof that the landlord had control of the room, but in conclusion the court said: "Had that (room) or any other part of the tavern been let, by collusion, for the purpose of a gaming establishment, then it might not have been protected from the operation of the statute, and both the landlord and the players and abetters might have been indicted." That ruling is applicable to the present case in so far only as it declares that a collusive renting for the unlawful purpose is a circumstance tending to show that the landlord, in fact, never parted in good faith with the control of the room.

Without desiring to express an opinion as to the evidence, or as to the weight of evidence in this case, we are free to say that on a question of a sufficiency or insufficiency of evidence to support the verdict, and that only, we would not disturb the verdict of the jury; for the jury may well have found from the facts and circumstances in evidence that the defendants (dramshop keepers), as landlords, knew at the time of the renting for what purpose Hughey was going to use the rooms, and that the purpose was unlawful gaming; and further, from the facts and circumstances, the jury may have found that, after being informed of the purpose for which the rooms were being used, they participated with Hughey in the unlawful business therein, to the extent and in such a manner as to show that they had an interest in the business other than that of mere players at the games, and so as to show they were exercising in that way a certain control of the rooms, either solely or jointly with Hughey. At the same time, we are unable to say that the jury could not have found otherwise in any event. Therefore, this is hardly a case in which the verdict of the jury and judgment thereon ought to

be sustained, notwitstanding the instructions were erroneous as material principles of law.

The instructions given by the lower court on its own motion should have pointedly told the jury that, in order to hold the defendants liable on the bond, they must find from the evidence that the dramshop keepers had control of the rooms where the gaming was carried on, and that this may be shown by the facts and circumstances in evidence going to show a collusive renting or a retention of control by a participation in the business, as we have stated. Failing to so instruct the jury, they were not properly instructed, and the error was fatal.

The defendant asked instructions nnmbered 3, 4 and 5, and all were refused by the court, and this is made ground for a new trial. By number 3 the defendants sought to have the court declare to the jury that, by reason of the relative situation of the three rooms to the saloon room, and also by reason of the fact that the three rooms were not adapted to the dramshop or drinking saloon business, the same were not attached to the saloon or bar room. The instruction number 4 simply declares an abstract proposition of law governing in ordinary cases between landlord and tenant, and the same may be said of number 5. All three were properly refused by the court.

As to whether room was attached to saloon.

Whether the rooms were attached to the saloon part of the building was a question of fact to be determined upon the evidence, and there is nothing in the conformation of the building to preclude the idea of these rooms being attached, in the meaning of the statute; and this fact of being attached does not altogether rest upon the manner of ingress and egress to and from the rooms, and between them and the saloon room. In the physical sense, the rooms were attached to and were really a part of the building, and the saloon or bar-room had the same relation to the building, and it is shown how one could

be entered from the other, and we think this question was submitted to the jury in the instruction given by the court.

For the error in the instruction given by the court, as suggested above, as regards the control of the room by the landlord, the judgment is reversed, with instructions to proceed not inconsistently with this opinion.

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## COFFIN v. BATESVILLE CITY RAILWAY COMPANY.

Opinion delivered March 27, 1897.

STREET RAILWAY—MORTGAGE SALE—REMOVAL—DAMAGES.—A street railway company is not entitled to recover damages from a purchaser of its road bed under a mortgage sale who tore up the track and sold the material prior to the expiration of the period of redemption where the road bed was worth only what its materials were worth in the market, and such value did not exceed the price paid by the purchaser under the mortgage.

Appeal from Independence Circuit Court in Chancery.

JAMES W. BUTLER, Judge.

*Dodge & Johnson* for appellant.

*H. S. Coleman* for appellee.

BATTLE, J. Maxwell Coffin purchased the track of the Batesville City Railway Company, and all the interest the railway company had in a certain tract of land which contained 3.02 acres, and the car stables thereon, and three cars. The purchase was at a sale made by a trustee in the exercise of the power contained in a deed of trust executed by the railway company to secure a debt. Coffin paid $1,050, for the property, but acquired no title to or interest in the 3.02 acres and the stables. The track purchased was the street railway

constructed in the town of Batesville in this state. After purchasing the property, he destroyed the track by tearing it up, and sold the iron rails thereof, and the cars. After this the railway company brought this action against him, and claimed the right to redeem all the property purchased, except the three cars, and asked for the enforcement of the right, and offered to pay into court, "as a condition precedent to the entering of record of any decree of redemption, such sum of money, if any, as may be due the defendant as purchase money, after he shall have been held to account" for the damages caused, and the rents and profits received, by him, and the value of the cars; and, if the latter item exceeded the amount due the defendant as purchase money, asked for judgment for the excess.

Upon the hearing the court found that the railway taken up by the defendant was real estate; that the plaintiff had a right to redeem within a year by paying the amount of the purchase price, $1,050, and 10 per cent. interest thereon, and cost of sale, amounting to $146; that the value of the property taken up and removed was $1750; that the plaintiff was entitled to recover of the defendant the difference, $554; and rendered judgment accordingly. And the defendant appealed.

As the appellant tore up and removed the rails, which constituted the track, and sold them and the cars, and acquired no interest in the 3.02 acres, the only matter in controversy is the right to redeem the street railway, and, if such a right exists, the value of the redemption. As the street railway has ceased to exist, and the materials which composed it have been removed and sold, the only question necessary for us to decide is the difference between the value of the railway and the amount necessary to reedem, if the right of redemption be conceded. It is sufficient to say, upon this question, that

we have compared and carefully considered all the evidence in the record, and find the value of the railway, as shown by the clear preponderance of the evidence, to be what the materials, iron rails and cross ties, were worth in the market, and that such value did not exceed the price paid for them by the appellant at the sale under the deed of trust. That being true, appellee was not entitled to recover anything as damages by reason of the right to redeem, if any existed. As the recovery of damages seems to be the whole object of the suit, it is unnecessary to decide any other question.

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

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## BANK OF COMMERCE *v.* WRIGHT.

63 604
89 135
90 514

Opinion delivered March 27, 1897.

PROMISSORY NOTE—TRANSFER—VALUABLE CONSIDERATION.—A pre-existing indebtedness, without more, is not such a valuable consideration for a transfer of a negotiable promissory note made for accommodation only, before its maturity, to a transferee having no notice of its character, as to make such transferee a *bona fide* holder for value.

SAME—SUFFICIENCY OF CONSIDERATION.—A transfer of negotiable promissory notes as collateral in lieu of notes which the transferrers had been permitted to withdraw, upon their promise to turn over the proceeds to the transferee, which promise they had failed to keep, is upon a sufficient consideration to constitute the transferee a holder for value.

SAME—SUFFICIENCY OF CONSIDERATION.—Extension of the time of payment of an existing debt is a sufficient consideration to constitute the transferee of a note as collateral security for such debt a holder for value.

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

The Bank of Commerce held the note of Reinman & Simon for a considerable amount, and to secure its payment they transferred to the bank as collateral security two notes of W. H. Wright made to them for $1,250 each, before their maturity, in lieu of notes of J. E. Biscoe which the bank had held as collateral to the debt of Reinman & Simon to it, but which they had obtained of the bank, before the time when the Wright notes were deposited with it, for the purpose of collecting the same and paying the proceeds to the bank. They failed to pay over the proceeds, and, having been pressed by the bank, transferred to the bank as collateral security these two notes executed to them by W. H. Wright, which were accommodation notes, and for which, it appears, Wright received no consideration. These notes were negotiable at the German National Bank of Little Rock. The note of Reinman & Simon, to secure the payment of which these Biscoe notes were transferred to the bank as collateral, bore date in February, 1892. On the 18th of March, 1892, after the Biscoe notes were obtained from the bank by Reinman & Simon, upon the understanding that they were to collect the same and pay over the proceeds to the bank, and after the Wright notes had been transferred to the bank as collateral security, the bank allowed Reinman & Simon to renew their note to it, as follows, to wit:

"$4,425. Little Rock, Ark., March 18, 1892.

"Thirty days after date, we promise to pay to the order of the Bank of Commerce forty four hundred and twenty-five dollars for value received, negotiable and payable without defalcation or discount at the Bank of Commerce, with interest after date at the rate of 10 per cent. per annum until paid, having deposited or pledged with said bank, as collateral security for the payment of

this or any other liability or liabilities of the undersigned already or hereafter contracted to said bank, the following: One note of A. M. Woodruff for $3,375, two notes of W. H. Wright for $2,500, one note of Kelley & Wilson for $800. Now, in the event of the non-payment of this note at maturity, the holder thereof is hereby vested with full authority to use, transfer, hypothecate, sell or convey the said property, or any part thereof, or to cause the same to be done at public or private sale, with or without notice or demand of any sort, at such place and on such terms as the said holder hereof may deem best, and the holder of this note is authorized to purchase said collateral, when sold, for his own protection; and the proceeds of such sale, transfer, or hypothecation shall be applied to the payment of this note, together with all protests, damages, interest, costs, and charges due upon note by or incurred by reason of non-payment when due, or in the execution of this power. The surplus, if any, after payment of this note, together with all charges above stated, shall be paid to the drawer of this note, or, at the election of the holder thereof, be paid on any other obligation of the drawer hereof, whether as principal debtor or otherwise, held by the holder hereof, and if the proceeds of the above shall not be sufficient to pay this note, the drawer hereof agrees to make good any deficit. If, at any time before the maturity of this note, said collateral should depreciate below their present value, which is estimated at ——, the holder hereof is hereby authorized to sell said collateral at any time before the maturity of this note.

Due April 17-20, 1892. Reinman & Simon."

The note of Reinman & Simon being due and unpaid, Wright was sued upon his notes transferred to the bank by Reinman & Simon, and answered. He denies indebtedness on the notes, and contends that they were

accommodation notes, and that he received no consideration for their execution; that they were transferred to the bank to secure a pre-existing indebtedness, and that the bank gave no new consideration for the transfer, and that the pre-existing indebtedness of Reinman & Simon to the bank was not a valuable consideration; that the bank was not a *bona fide* transferee for value. He also shows an agreement between himself and Reinman & Simon that the notes were to be negotiated in St. Louis, and not in Little Rock, and contends that there was a diversion, by reason of their having negotiated them in Little Rock. It was shown that the bank had no notice of the fact that the Wright notes were accommodation notes, or of the agreement above mentioned. The plaintiff moved the court to give the jury the following instructions, to wit:

"1. If the jury believe from the evidence that the Bank of Commerce received the two notes in suit from Reinman & Simon, the payees therein, before maturity, without notice at the time that they had been given by Wright for the accommodation of the payees, whether in substitution of other collaterals or otherwise, in pledge for an actual indebtedness owing by said Reinman & Simon to the bank, they will find for the plaintiff. And it will be no defense to the suit of said bank herein to show that said notes were diverted from the use for which they were intended, if such was the case, unless said bank knew of said diversion at the time said notes were delivered to it."

"2. It was no diversion of said notes, within the meaning of the law, that, though given to be negotiated in St. Louis, they were in fact negotiable in Little Rock."

But the court refused to give the first instruction, to which ruling of the court the plaintiff at the time excepted. And the court gave to the jury the following

written instruction: "The court instructs the jury that if they find that the debt for which the Wright notes were given as collateral was a pre-existing debt, and that no new consideration at the time of receiving such notes was given by the bank, but they were accepted simply as such additional security for the debt then held against Reinman & Simon, then the bank would not be a holder for value, and against it Wright may plead any equitable defense he had against Reinman & Simon. And if they further find that the notes in suit were accommodation notes, as between Wright and Reinman & Simon, and they paid him no valuable consideration for them, then the bank cannot recover." To the giving of which instruction the plaintiff at the time objected, but said objection was overruled. To which ruling the plaintiff at the time excepted, and asked time to note its exceptions of record, which was given.

And the court supplemented its written instruction with the following verbal remarks to the jury:

"A holder, for a valuable consideration, of commercial paper before maturity, such as Wright's notes in this case on their face, takes it free from any equitable defenses as between prior parties. And if you should find that the bank gave any new consideration for it, such as extension of time granted on the original debt, or the relinquishment, at the time and as a consideration for such notes, of other security it held, this would make it a holder for value, and protect it against prior equitable defenses between the parties. For instance, if the bank at the time gave up the Biscoe notes from Reinman & Simon, this would be a valuable consideration, and would protect the bank. But if the bank had, before that time, surrendered to Reinman & Simon the Biscoe notes, on a contract to return them or the proceeds, and Reinman & Simon had failed, as they agreed, to return

the Biscoe notes, and had turned in these notes afterwards, as an independent transaction, this would be simply furnishing them as collateral security on a then existing indebtedness of Reinman & Simon to the bank, and would not make the bank the holder of this paper for a valuable consideration, and would not protect the bank against prior equities."

Judgment having been rendered for defendant on the verdict, a motion for a new trial was interposed. The motion for a new trial sets out the causes herein complained of. It was overruled. And this appeal has been taken to correct the error in the court below.

*Morris M. Cohn* for appellant.

The appellee was a *bona fide* holder for value before maturity of the note sued on, within the law merchant. Colebrooke, Col. Sec. sec. 18, *et seq.*; 42 Ark. 22; 13 Ark. 150; 102 U. S. 14; 16 Pet. 1; 102 U. S. 23, 24, 27, etc.; 1 Wharton, Cont. sec. 532. Appellee failed to make out a case of *diversion.*

*S. R. Cockrill* and *Ashley Cockrill* for appellee.

The transfer of accommodation paper as collateral security for a pre-existing debt does not protect a pledgee, who gives no consideration therefor, against the equities of the maker. 98 Pa. St. 250; 65 N. W. Rep. 349; 13 Ark. 150; 21 *id.* 18; 2 Am. Lead. Cases, 243; Edwards, Bills and Notes, *322; *ib.* 321; Tiedeman, Com. Paper, sec. 158, p. 259; 32 Minn. 409. By pledging the notes in Little Rock, the payees violated the agreement that they should only be discounted in St. Louis, and the accommodation maker can set this up as a defense against a holder who took the notes for a pre-existing debt. 69 N. Y. 502; Edwards, Bills and Notes, *320, 321; 131 N. Y. 506; 126 *id.* 60; 16 Oh. 283.

Existing debt as consideration.

HUGHES, J., (after stating the facts.) There was no error in the court's refusal to give the first instruction asked for by the defendant. While the decisions are at variance upon the question whether a pre-existing indebtedness, without more, is a valuable consideration for the transfer of a negotiable promissory note made for accommodation only, before its maturity, without notice that it is accommodation paper by the transferee, so as to make the transferee a *bona fide* holder for value, our court has taken position on that question. In the case of *Bertrand* v. *Barkman*, 13 Ark. 159, the court, through Scott, J., said: "There can be no doubt of the general proposition of law in reference to commercial notes that, when it is shown, in an action against the maker by the holder, that it was without consideration, * * * * * the holder, to protect himself against the equities of the maker, must show that he acquired the paper before it matured, and that he is a *bona fide* holder for a valuable consideration, or, to speak more technically, it must have been received in 'due course of trade, for value.' This proposition is so indisputably fixed that it is unnecessary to resort to reasoning or to cite authority to sustain it." Further on he says: "When, however, the note is transferred by way of indemnity against probable future loss, or from an existing liability, or of collateral security for a pre-existing debt, it is not such a holding for value as comes within the rule."

Consideration held sufficient.

This is, according to our decisions, the settled rule. Yet in this case was there not a new consideration? Reinman & Simon had agreed that they would collect the Biscoe notes, and pay the proceeds to the bank, and, having failed to turn over the proceeds of the Biscoe notes to the bank, upon being threatened by the bank, they placed the Wright notes as collateral in lieu of the

Biscoe notes, which they had been permitted to withdraw, or the proceeds. In the opinion of a majority of the court, this was a sufficient consideration moving from the bank to Reinman & Simon to fix the liability of Wright to the bank, and to constitute the bank a *bona fide* holder for value.

Besides, the uncontradicted proof is that the notes of Wright were held as collateral by the bank at the time the note of Reinman & Simon was renewed, and the time extended for its payment, and the fact that they were placed as collaterals, by the terms of the renewal note, furnishes indisputable evidence that the extension of time was induced by the collaterals given, and that it was so understood at the time by the parties. The bank was entitled to recover judgment on these notes against Wright.

The written instruction given by the court is correct, and accords with the authority of *Bertrand* v. *Barkman*, *supra*, and the principle above laid down. The first paragraph of the oral instruction given by the court is correct, but the other part of the instruction was calculated to mislead the jury; for it appears that when the note of Reinman & Simon was renewed, and the time extended by the bank for its payment, these notes were continued as collateral security, and, we think, were an inducement to the bank to extend the time for payment, and were so designated and understood by Reinman & Simon. Reversed and remanded for a new trial.

Wood, J., dissents.

# HENRY v. CROOM.

Opinion delivered March 27, 1897.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT CONSTITUTES.—An insolvent merchant sold his stock of goods to his creditor, and directed the latter to sell certain cotton in his possession, agreeing that the proceeds of the cotton should be applied toward the payment of his debt, and that any balance due the creditor should be credited on the price of the stock of goods, and that if any balance remained to the credit of the debtor, it should be paid to other creditors, as specified. *Held*, that the transaction did not constitute an assignment for the benefit of creditors.

Appeal from Pope Circuit Court.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

This is an action in replevin brought in the Pope circuit court by appellee, John A. Croom, against Silas A. Henry, as sheriff, to recover a stock of goods, wares and merchandise. The circumstances out of which the action arose are as follows: Henry and Walter Croom were engaged in a mercantile business at Atkins, Pope county, Arkansas, under the firm name of Croom & Bro. They became indebted to the Ball Warren Commission Company of St. Louis to the extent of about seven thousand dollars. Being unable to obtain a further extension of credit, they on the 3d of December, 1894, sold out their stock of goods to said commission company for the consideration of 60 cents on the dollar of the cost price of said goods with freight added. The commission company, two days afterwards, sold the stock of goods to John A. Croom, a brother of Walter and Henry Croom, but who had no business connection with the firm of Croom & Bro. Soon afterwards the stock of goods was levied upon by the sheriff under an

attachment sued out by the Jerome Hill Cotton Company against the members of the firm of Croom & Bro., and this action was brought by John A. Croom to recover the goods. The case was submitted to a court without a jury. Upon the trial, the bill of sale given by Croom & Bro. to the Ball Warren Commission Company was read in evidence, the same being in words as follows: "For value received, and in consideration of a debt due to the Ball Warren Commission Company of St. Louis, Mo., we hereby bargain, grant and sell and convey to the said Ball Warren Commission Company all the stock of goods, wares, merchandise, fixtures and other property now in the store houses occupied by us in the town of Atkins, Pope county, Arkansas, in which we have been carrying on a general merchandise business, which said stock of goods, wares, etc., are to be inventoried by said Ball Warren Commission Company at cost and estimated freight added, and is sold to them at 60 per cent. of said inventory. Witness our hands and seals this third day of December, 1894, at Atkins, Ark.

(Signed) "CROOM BROS.
"H. W. CROOM.
"W. R. CROOM."

At the time of this sale of the stock of goods, the Ball Warren Commission Company had in their possession 177 bales of cotton belonging to Croom & Bro., which had been previously shipped to them by Croom & Bro. The evidence tended to show that, at the time the commission company purchased the stock of goods, it was agreed with Croom & Bro. that this cotton should be sold by the commission company, and the proceeds applied to the credit of Croom & Bro. on their debt due the company, and that the balance due the company should be paid from the money due Croom & Bro. for the stock of goods. It was also agreed that, if any balance remained to the credit of Croom & Bro. after

the payment of their debt to the commission company, it was to be applied, first, to the payment of certain named creditors of Croom & Bro. If there was still a balance after the payment of these creditors, it was to be paid to the other creditors of Croom & Bro.

The evidence further showed that the price paid by the commission company for the stock of goods was a fair one, and the full value of the goods. After the proceeds of the cotton and the stock of goods had been placed to the credit of Croom & Bro., there remained a balance of $542 due from the commission company to Croom & Bro. The finding of the circuit court was in favor of plaintiff, John A. Croom, and judgment was rendered accordingly.

*James B. McDonough*, for appellant; *Davis & Son* and *J. E. Joyner* of counsel.

(1) The sale of the goods was a part of a scheme to defraud creditors. 50 Ark. 314; 57 *id.* 614.

(2) The transaction was an assignment and void. 4 Thomps. on Corp. secs. 4875, 4955, 5028; 38 N. E. Rep. 20; 52 Ark. 41; 53 *id.* 105; 54 *id.* 6, 234, 428; 59 *id.* 275; Tiedeman, Sales, sec. 93, and note; Burrill, Assignments, sec. 4, and cases. If there was a *trustee*, and if there was a disposition of property to *him* to raise a fund to pay debts, the transaction was an assignment. 52 Ark. 30; 53 *id.* 101; 52 *id.* 49; 54 *id.* 6; *ib.* 229, 428; 18 S. W. Rep. 55; 55 *id.* 579; 58 *id.* 295; 59 *id.* 470; 60 *id.* 160; Burrill, Assignments, sec. 4; 167 Mo. 11; 19 Ore. 251; 82 Ga. 1; 5 Ohio St. 218; 10 Wis. 386; 65 N. W. Rep. 494.

*Bullock & Hart* for appellee.

1. There was no fraudulent scheme. 60 Ark. 432; 56 *id.* 414.

2. The transaction was a sale, and not an assignment. 53 Ark. 105; 59 *id.* 271; 54 *id.* 235; 39 *id.* 571;

56 *id.* 314; 33 S. W. Rep. 636; 31 Mo. 301; 39 N. W. Rep. 769.

RIDDICK, J., (after stating the facts.) The first contention is that the sale of the stock of goods in question was a part of a scheme for the purpose of defrauding the creditors of Croom & Bro., and that both John A. Croom and the Ball Warren Commission Company by its agent advised and participated in such fraud. But the finding of the circuit court was against this contention. The court found that the sale was made in good faith, and that the price paid was the full value of the goods. Without discussing the evidence, we need only say that in our opinion it was sufficient to support the finding of the court. *Robson* v. *Tomlinson*, 54 Ark. 229.

The next contention is that this sale of the stock of goods was, in effect, an assignment for the benefit of creditors, and void for non-compliance with our statute regulating assignments. The contention on this point is that the agreement that the commission company should sell the cotton, and pay the proceeds on the debt of Croom & Bro., and that the balance due the company should be paid out of money due for purchase price of stock of goods; that this agreement, when taken in connection with the further agreement that if any balance due Croom & Bro. was left after payment of the debt due the commission company, it should be paid to creditors of Croom & Bro., makes the transaction an assignment for the benefit of creditors. But with this contention we are not able to agree. The fact that the consideration of a sale is to be applied in part to the payment of other debts than that of the vendee does not necessarily render the transaction an assignment for the benefit of creditors. A brief consideration of the facts of this case will show that this transfer of goods was not an assignment, within the meaning of our statute regulating

voluntary assignments for the benefit of creditors. First, as to the cotton which Croom & Bro. directed the commission company to sell, and apply the proceeds in part payment of their indebtedness to such company: We consider it altogether immaterial whether this direction to sell the cotton was given by Croom & Bro. at the time they shipped the cotton, as the circuit court found to be the fact, or, as counsel for appellant contend, given later at the time of the sale of the stock of goods. While the evidence seems to support the finding of the court on this point, we regard it as a matter of no moment, for this direction in reference to the cotton cannot constitute an assignment, for the reason that there was never any transfer of the title to the cotton by Croom & Bro. to the commission company. An assignment is a transfer of property to a trustee to be disposed of by him to raise a fund to pay debts. In an assignment the assignor parts, not only with possession, but with the title to the property. *Goodbar* v. *Locke*, 56 Ark. 315. But in this case there was no transfer of their title to the cotton by Croom & Bro. The cotton was held by the commission company as the cotton factor and agent of Croom & Bro., and was sold and transferred by them as the agent of Croom & Bro. The direction to their agent to sell the cotton was not a transfer of the title to the cotton. The transfer of this cotton by Croom & Bro. was not to the Ball Warren Commission Company, but to the purchaser from such company. The title to the cotton remained in Croom & Bro. up to the time of the sale by the commission company, and could have been levied upon by the creditors of Croom & Bro., subject of course to any valid lien held by the commission company. It would be going much too far to hold that an insolvent merchant could not direct his cotton factor to sell cotton, and apply the proceeds upon his debt without making an

assignment; for authority given to one as the agent of another to sell property and apply the proceeds does not constitute an assignment. *Wood* v. *Adler-Goldman Com. Co.*, 59 Ark. 270; *Banning* v. *Sibley*, 3 Minn. 389; *Beans* v. *Bullitt*, 57 Pa. St. 221; Burrill on Assignments (6th Ed.), sec. 5.

Second, as to the stock of goods: It was not transferred to the commission company to be held in trust and disposed of to raise a fund to pay debts, but was sold to the company for a stipulated price. It is true, the total amount to be paid was not agreed upon at the time the bill of sale was executed, but, as "that is certain which can be made certain," the agreement to pay 60 per cent. of the invoice price of the goods was in effect the same as if the total price had been named, for it could be ascertained by calculation. The commission company did not take the goods as a trustee, but as an absolute owner by purchase. Now, if we should conclude that the agreement made by the commission company that it would apply the purchase price, first, to the payment of the amount due it, and, if any balance remained due Croom & Bro., would pay that to the other creditors of Croom & Bro., constituted, in effect, an assignment of such balance for the benefit of creditors, that would not necessarily affect the sale of the goods. In the absence of fraud, it would be only an assignment of this surplus arising from the proceeds of the sale, and would not affect a sale made in good faith and for a valuable consideration.

But the evidence in this case shows that the Ball Warren Commission Company did not hold this money in trust for the creditors of Croom & Bro., but as agent for Croom & Bro. This balance was placed to the credit of Croom & Bro. upon the books of the commission company. The fact that the company was required to pay this balance to the creditors of Croom & Bro. did

not constitute an assignment of such balance to the company, but was only a direction as to the mode of payment. After this direction was given, the money still remained the property of Croom & Bro. until actually paid out by the company, and the circuit court correctly held that the facts in proof did not show an assignment. *Flask* v. *Tindall*, 39 Ark. 571; *Becker* v. *Rardin*,, 107 Mo. 111; *Green & Button Co.* v. *Remington*, 72 Wis. 648; *Johnson* v. *McGrew*, 11 Iowa, 151; Burrill on Assignments (6th Ed.), page 10, and cases cited in note 3.

There were other points argued by counsel, but as they were mostly disputed questions of fact, which were settled by the findings of the circuit court, we deem it unnecessary to discuss them. Being of the opinion that, on the whole case, the judgment is right, it is affirmed.

WOOD, J., being absent, did not participate.

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## READ *v.* STATE.

63 618
86 130

Opinion delivered March 27, 1897.

INDICTMENT—REPUGNANCY.—Where an indictment for forgery of an order, in stating the purport of the order, alleges the name of the drawee to be Pendergrass, and the order set out *in hæc verba* in the indictment shows that the drawee's name is written therein "Pendergrapp," the repugnancy is not fatal where it is alleged that the order was forged with fraudulent intent to defraud said Pendergrass.

Error to Phillips Circuit Court.

H. N. HUTTON, Judge.

*Sanders & Fink* for appellant.

A plea of guilty to a bad indictment confesses no crime. 12 Ark. 170. The indictment is bad. Const.

art. 2, sec. 8; 29 Ark. 147. There is a repugnancy between the instrument set out and the averments as to its purport, which is fatal. 32 Ark. 609; 37 *id.* 116; 5 *id.* 349, 350; 31 S. W. Rep. 377; 36 *id.* 947; 32 *id.* 899; *ib.* 983; 34 *id.* 921. *Tenor* imports an exact copy. Roscoe, Ev. title "Forgery," 58 Ark. 242. The rule "*idem sonans*" has no application. The names are distinct and different in letters and sound. 5 Ark. 72; 6 *id.* 196; 3 Arch. Cr. Pl. & Pr. 536, *et seq.* The judgment should have been arrested. Sand. & H. Dig., sec. 2271–2273.

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

When the instrument is set out, it is not necessary to allege that the party intended to defraud any particular person. Sand. &. H. Dig., sec. 1593; 21 S. W. Rep. 729; Bish. St. Cr. sec. 335; 1 Wharton, Cr. Law, sec. 740; 2 Bish. Cr. Proc. sec. 416; 97 Mass. 570; 9 Yerg. 392; 68 Mo. 286. Hence a variance between the name of the party addressed in the instrument forged is not fatal. 1 Johns. (N. Y.) 320. Evidence could have been introduced to show that Pendergrapp was meant for Pendergrass. 26 S. W. Rep. 500; *ib.* 354; 2 Pick. (Mass.) 47; 59 N. H. 36; 92 N. C. 768; 64 Wis. 432.

BATTLE, J. On the 29th day of October, 1895, Jim Read was indicted in the Phillips circuit court for forgery, in the following words and figures: "The grand jury of Phillips county, in the name and by the authority of the state of Arkansas, accuse John Read of the crime of forgery committed as follows, to wit: The said John Read, in the county aforesaid, on the 26th day of October, 1895, then and there, did unlawfully, wilfully and feloniously make, forge and counterfeit a certain paper writing, purporting to be an order from one Mose Dortch, to one Lee Pendergrass, payable to one Fred Brown, for the sum of fifteen dollars, which said false and forged writing is of the tenor, purport and effect

following, to wit: 'October 26, 1895. Mr. Pendergrapp, please send me $15 by Fred Brown, and I will ship some cotton down next week, and pay you. Your truly friend. Mose Dortch.' And the false and fraudulent making and counterfeiting of the paper writing aforesaid, by the said John Read, was done with the fraudulent and felonious intent then and there to cheat and defraud said Lee Pendergrass, and to obtain from him, the said Lee Pendergrass, the possession of the money and property of him, the said Lee Pendergrass, and to cause him to be injured in his estate, against the peace and dignity of the state of Arkansas.

"II. And the grand jury aforesaid, in the name and by the authority aforesaid, accuse John Read of uttering a forged instrument committed as follows, to wit: The said John Read on the 26th day of October, 1895, in the county of Phillips aforesaid, then and there, unlawfully, wilfully and feloniously did utter, publish, and put off as true to one Lee Pendergrass a certain false, forged and counterfeit paper writing, purporting to be an order from one Mose Dortch to one Lee Pendergrass, payable to one Fred Brown, for the sum of fifteen dollars, which said false and forged writing is of the tenor, purport and effect following, to wit: 'October 26, 1895. Mr. Pendergrapp, please send me $15 by Fred Brown, and I will ship some cotton down next week, and pay you. Your truly friend, Mose Dortch.' He, the said John Read, then and there, well knowing the same to be false and forged and counterfeit, with intent fraudulently to obtain from said Lee Pendergrass possession of his money and property, and to cause him to be injured in his estate, against the peace and dignity of the state of Arkansas. John T. Hicks, Pros. Atty."

The court, having ascertained that the name of the defendant was Jim Reed, ordered that subsequent proceedings in the case be against him in that name. In

that name he pleaded guilty to the indictment, and the court assessed his punishment at two years in the penitentiary, and rendered judgment against him accordingly.

He brings the record of his indictment and conviction, by writ of error, to this court, and asks that the judgment against him be reversed, and says the indictment is fatally defective, and does not sustain the judgment, because there is a repugnancy between the instrument set out in the indictment according to its tenor and the averment as to its purport, in this: it is averred that the order forged purported to be directed to Lee Pendergrass, and as set out according to its tenor it was directed to "Mr. Pendergrapp." To sustain his contention he cited *McClellan* v. *State*, 32 Ark. 609.

In the case cited, this court held that a repugnancy between an instrument set out in an indictment for forgery and the averment as to its purport is fatal to the indictment. This decision was based upon the law as it existed at the time of the enactment of our "Code of Criminal Practice in Criminal Cases." The court seems to have overlooked or failed to consider the changes made by the code.

Under the code no particular form of indictment is required to be followed. The constitution of the state says it shall conclude: "Against the peace and dignity of the state of Arkansas." Further than this no particular form of words is required to be used. The code says: "The indictment *must contain*: 'First. The title of the prosecution, specifying the name of the court in which the indictment is presented and the names of the parties. Second. A statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended.'" That it must be *direct* and *certain* as regards: "First. The party charged. Second. The offense charged. Third. The

county in which the offense was committed. Fourth. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense." That it is *sufficient* if it can be understood therefrom: "First. That it was found by a grand jury of a county impaneled in a court having authority to receive it, though the name of the court is not accurately stated. Second. That the offense was committed within the jurisdiction of the court, and at some time prior to the time of finding the indictment. Third. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case." And that "no indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits." Sand. & H. Dig., secs. 2090, 2074, 2076.

If it be conceded that there is a repugnancy in the indictment in this case as claimed, it cannot affect the judgment under these statutes. To prevent such an effect, they were enacted. As said in *Myers* v. *State*, 101 Ind. 379, "the purpose of the statutes was and is to free the criminal practice from some of the technical rules of the common law which have outlived their usefulness, and which ought to have passed away with the necessities that brought them into being." Their purpose is plainly evinced in the statute which declares: "No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not *tend to the prejudice of the substantial rights of the defendant on the merits.*"

In the case before us the instrument forged is set out *in hæc verba*, and it is alleged that the forgery thereof "was done with the fraudulent and felonious intent then and there to cheat and defraud said Lee

Pendergrass," etc. The allegation that the instrument purported "to be an order from one Mose Dortch to one Lee Pendergrass" is substantially saying and clearly means that the "Mr. Pendergrapp" mentioned in the order is Lee Pendergrass; otherwise, the forgery could not have been done with the intent to cheat and defraud Lee Pendergrass.

In the state of Indiana they had statutes which provided that an "indictment is sufficient if it can be understood therefrom: * * * 'Fifth. That the offense charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case,'" and that "no indictment * * * * shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment, or other proceeding be stayed, arrested, or in any manner affected, for any of the following defects: * * * * Sixth. For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged * * * Tenth. For any other defect or imperfection which does not tend to the predjudice of the substantial rights of the defendant upon the merits." In *Myers* v. *State*, 101 Ind. 379, the defendant was accused of forging and counterfeiting "a certain order, purporting to have been made and executed by one Vincent T. West, for the payment of property, goods and chattels to him, the said George Myers, which said false, forged and counterfeit order is to the following tenor, to wit: 'Mr. Roberts, please let Mr. Myers have $3.00 of groceries. Dr. West.'" and it was alleged "that the Dr. West mentioned in the said order was intended to and did mean Vincent T. West; that the Mr. Roberts mentioned in said order was intended to and did mean William F. Roberts; that the Mr. Myers mentioned in said order was intended to and did mean George Myers, the defendant; that the

said George Myers forged said order as aforesaid, with intent then and there and thereby, falsely, feloniously, and fraudulently, to prejudice, damage and defraud the said Vincent T. West," etc. In that case, as in this, it was contended that there was a repugnancy between the instrument set out and the averment as to its purport, but the court held that there was no defect in that respect that could "by any possibility affect the substantial rights" of the defendant upon the merits; and that the indictment was sufficient under the Indiana statutes mentioned.

In *State* v. *Bibb*, 68 Mo. 286, the defendant was accused of forging a receipt, purporting to be the receipt of Charles W. Jeffries. The receipt was set out *in hæc verba*, and appeared to have been signed by C. W. Jeffries. The court said: "There is no question of variance, as there might have been if the receipt had not been fully set out in the indictment. The allegation that it purported to be the receipt of Charles W. Jeffries is substantially an allegation that C. W. and Charles W. Jeffries were the same person."

These cases sustain the view we take of the law in this case. We hold that the indictment in question is not insufficient, under the statutes of this state, on account of repugnancy, and that if there be a defect in it in this respect, it could not have affected the substantial rights of the defendant upon the merits.

*McClellan* v. *State*, *supra*, in so far as it conflicts with this opinion, is overruled.

Judgment affirmed.

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# BEMIS *v.* FIRST NATIONAL BANK.

Opinion delivered April 3, 1897

FIXTURES—SAW MILL MACHINERY.—A deed of land on which a saw mill and a planer were situated conveyed the land "together with all the mills, machinery, tools, fixtures, appurtenances pertaining to the same," reserving a vendor's lien. The mill site had long been in use as such, and it was the custom to regard all machinery attached to the building thereon as part of the realty. The machinery was removable without injury to the land, but without it the land was of little value. *Held*, that the parties intended that the mills and machinery should be treated as fixtures, and subject to the vendor's lien.

DEED—MERGER OF RIGHTS.—A conveyance of land in fee by a vendee to his vendor holding an express vendor's lien will not be held to merge the lien in the title in fee, so as to let in the intervening rights of an attaching creditor, when such was not the intention of the parties to the deed.

Appeal from St. Francis Circuit Court in Chancery.

GRANT GREEN, JR., Judge.

*R. J. Williams*, and *McCulloch & McCulloch* for appellant.

Bemis, by paying the notes, became subrogated to whatever lien the original payee may have had on the property. 3 Pom. Eq. Jur. sec. 1419; 40 Ark. 132; 44 *id.* 504; 50 *id.* 205, and cases cited. No lien by attachment could intervene, so as to cut off appellant's lien, even if it were true that the deed was executed in payment of the debt and discharge of the lien. 39 Ark. 531; 54 *id.* 153; 55 *id.* 542. The notes were a lien on the whole property; the machinery, saw mill, etc., being fixtures. 56 Ark. 55; Ewell on Fixtures, p. 22; 1 Washb. Real Pr. pp. 20, 25; 77 N. C. 188; 96 *id.* 265; 105 *id.* 322; 15 Col. 29; 150 Mass. 519; 80 Cal. 245; 6

N. H. 229; 85 Tex. 136; 93 Tenn. 577; 13 S. W. Rep. 419; 148 Ill. 163. The clause in the deed of Coy to Blinn reserving a lien is sufficient to constitute an equitable mortgage, to which appellant is subrogated, on *all* the property, even if the machinery be treated as personalty. 60 Ark. 595; 52 *id.* 439; 51 *id.* 433; 33 *id.* 387; 3 Pom. Eq. Jur. sec. 123, and note. It was improper to order a sale of the property until appellant's rights had been determined. Sand. & H. Dig., secs. 372, 374.

*Norton & Prewett* for appellee.

There was no lien on the property. It was *personal* property. 56 Ark. 55. At least, by far the greater part was personal property, and the real and personal was sold for a *lump* sum. In cannot be said what part of the purchase money was for the personal and what for the real property. In such case there is no lien. 2 Jones, Liens, sec. 1072; 4 So. Rep. 417; 6 *id.* 429; 2 *id.* 648; 45 N. W. 867; 14 So. Rep. 475; 45 Ark. 136; 52 Ark. 450; 2 Jones on Liens, sec. 1070. The doctrine of merger is applicable in this case. 45 Ark. 382; 15 Am. & Eng. Enc. Law, 314; 91 N. Y. 470; 7 N. Y. Ch. Rep. (Law. Ed.) bot. p. 800. There was no equitable mortgage; but if there was, it was never recorded. 11 Ark. 112; 54 *id.* 179; 60 *id.* 595.

BUNN, C. J. This is an attachment by the appellee against one H. Blinn on a promissory note transferred to it, in the St. Francis circuit court at its October term, 1891, in which appellant, Bemis, was interpleader, claiming an interest in and lien upon the attached property. On application of interpleader, the cause was transferred to the chancery docket. Decree for plaintiff, and interpleader appealed.

The property attached, in brief, was "a lot in Madison, Arkansas, described as 'court-house square,' and certain other lots in said town, including the site of

Blinn's saw mill at Madison, it being on what is or was known as 'River Front,' a strip of land lying between the eastern boundary of the town of Madison, as platted, and St. Francis river, and the complete saw mill and planing mill outfit belonging to defendant, Blinn, on said real estate, consisting of five boilers, one engine, saw mill with saws, shafting, pulleys, fixtures, etc., and the planing mill, consisting of one engine and boiler, and planing machine and shafting, pulleys, belting, fixtures, etc." This was a portion of the same property that had been previously sold under the orders of the Pulaski chancery court by receiver L. W. Coy, in a proceeding pending therein, wherein the Merchants' National Bank was plaintiff and the Van Etten Lumber Company was defendant, to the appellant, Bemis, for $11,250, who however permitted one H. Blinn to assume and enjoy his bid. Blinn executed his two notes aggregating that amount to Coy, as receiver, the same being endorsed by Bemis, who subsequently was compelled to pay them, and therefore claimed to be subrogated to the rights of receiver Coy, and therefore that he in effect had a vendor's lien on the property.

Whether or not the property (that is to say, that portion other than the lands themselves) was real estate or personal property became an important question, because the part that was undoubtedly and unquestionably real estate was of little value comparatively; and because, if the valuable part was real estate, there was a vendor's lien, and, if personal property, there was no vendor's lien, strictly speaking.

This suit was instituted on the 27th December, 1890, and the order of attachment was delivered to the sheriff the same day, and became a lien on all the property of the defendant in the county subject to execution, as provided by statute. On the 16th January, 1891,

Blinn, for the nominal consideration of one dollar, conveyed the same property to Bemis by deed which on its face is an absolute deed in fee, but which they claim was to operate as a mortgage to secure an additional indebtedness from Blinn to Bemis of about $8,000.

At the April term of the court, Bemis filed his interplea, claiming an interest in the property, and the cause was determined in the lower court as stated, and from the decree therein rendered this appeal was taken.

The first question that is presented by the record is whether or not the mill and planer and machinery attached thereto were real estate or personal property; all being attached to the buildings on the ground in the usual way.

What are fixtures.

At common law, real estate or property comprehended every thing included in the terms "lands," "tenements," and "hereditaments"; that is, the surface of the earth, and everything attached thereto. The difficulty, in any case, is in determining whether a piece of property, where movable and yet attached, is the one or the other species of property; and the general rule has never been changed, but more particularly explained in modern times. Thus, while a building and things fastened for use in it are *prima facie* real estate, because they answer the general definition of the common law, yet many circumstances are liable to intervene by which the classification of these articles coming under the head of "fixtures" may become personal property.

In *Choate* v. *Kimball*, 56 Ark. 55, this court applied the following rules taken from the authorities, and generally recognized as proper explanations of the general rule, to wit: (1) "Real or constructive annexation of the article in question to the realty." (2) "Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected." (3) "The intention of the party making the annexation to make

the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of annexation, and the purpose or use for which the annexation has been made." It is unnecessary to discuss the first two definitions, since, for all practical purposes of this case, they are comprehended in the third statement, and of this, Ewell, in his work on fixtures, page 22, says: "Of these three tests, the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others (the first and second statements) seem to derive their chief value as evidence of such intention."

In the case of *Choate* v. *Kimball*, *supra*, this court said: "Without making a detailed recital of the facts in this case, it may be stated that the annexation was sufficient to meet the requirements of the first test; but that the articles could be removed without any injury to the freehold or any material injury to themselves, and that the articles were appropriate and adapted to the use of the realty with which they were connected, but that they were equally appropriate and adapted to the use of other saw mills. The articles may or may not have been fixtures within the first and second tests, and whether they were or were not must be determined by an application of the third." The same, in substance, may be said of the machinery and necessary appliances of the mills in question, and of any other saw mill, and in making this statement we need not assent to or dissent from the statement that it is material whether the articles are so attached as that they may be detached without injury to the freehold, or to themselves, for the mere manner in which the articles are attached may

evidence, not so much the intention of making the annexation permanent or temporary, as an intention to provide the more conveniently for mere possible changes." Applying the third test to the facts in that case, this court held the articles to be personal property, but solely on evidence to the effect, as stated in the opinion, that it was the custom in the locality to regard and treat all such as personal property, and that the mortgage served to express a reference to the existence of this custom in this: that, after an enumeration of the "lands," it contained the word "also," which strongly indicates that what follows in description is exclusive of what has preceded. Neither is such a custom shown by a preponderance of the testimony to have existed in the locality of the property involved in this action. On the contrary, the evidence shows that this mill site had peculiar adaptation and advantages as such, and had been long in use for that purpose, and that it is the custom to regard sites of this character as permanent, and all the machinery attached to the buildings thereon as a part of the realty. Nor is the separating and discriminating word "also," or the like, used in the description in the conveyances of the property under consideration in this case. Therefore, instead of that case being in support of the contention of the appellee in this case, it is rather against it; for surely if in any case there is proof of custom, and the decision is based on that proof alone, the implication is that, had such proof been made, the decision would have been to the reverse, and a like reasoning governs as to the presence or absence of such words as "also" in the connection in which it was used in that case. The corresponding language in the deed from Coy to Blinn is: "Now therefore, be it known that I, L. W. Coy, receiver, in consideration of three thousand seven hundred and fifty dollars, * * * * * * * do hereby grant, bargain and sell unto the said Horace

Blinn, and unto his heirs and assigns, forever, the following described lands, * * * * together with all the mills, machinery, tools, fixtures, appurtances pertaining to the same. To have and to hold the same unto his heirs and assigns, forever." This means substantially (according to our view of it) the same as the expression "and all the improvements thereon," a phrase of common use in our western country to denote whatever has the character of a physical fixture at the time, and is generally comprehended in the words "appurtenances," "hereditaments," etc., and in this case made to come under the last designation expressly in the *habendum* clause.

The tax books introduced in evidence, giving them whatever weight they are entitled to, in the most liberal view of such testimony, do not show that the mills and machinery pertaining to the same were assessed as personal property. They only show there was assessed as personal property the "materials and manufactured articles," which means, in reference to the saw mill business, logs and lumber and articles made therefrom.

In this case there was a union of title in Coy, as receiver, and also in Blinn, as the vendee of Coy. There is not shown to have been any expression of intention of either party to treat the property as personal property. The language of description in the several conveyances no where shows an intention to classify the property as being of two classes, and, in fact, none of those circumstances which affirmatively show that in the reservation of a vendor's lien the parties meant otherwise than that all was to be treated as realty, since otherwise the reservation would have been a nullity, in the strictly legal sense. It is plain that to treat all the property as real estate was the intention of Coy and Blinn, as expressed in the deed from the one to the other, and there is nothing to show a different intention between Blinn

and Bemis. We therefore are of opinion that the property in controversy was real estate, and the subject of a vendor's lien under the statute and in equity.

What was in reality the nature and object of the conveyance of January 17, 1891, and what was the intention of the parties in making and accepting the same, necessarily rests upon the facts and circumstances in proof, and the evidence as to these, in the very nature of things, is mostly, if not altogether, derived from the parties to the deed of that date. The consideration expressed in that deed being merely nominal, from the nature and description of the property the necessary inference is that the actual and real consideration was different and much greater. The contention of appellee is that the deed is an absolute deed, and that the consideration was the payment by Bemis for Blinn of the purchase money notes to Coy; and that in fact the subrogation rights of Bemis to the vendor's lien held by Coy against the property had been merged in the deed, and that the claim of Bemis therefore rested solely on the deed of 16th January, 1891; and, as that was made subsequent to the lien of the attachment upon the property in the county (mills, machinery, etc.), Bemis' title was subject to that lien.

The deposition of Blinn was taken in Bowie county, Texas, some two or three years after the deed was executed by him to Bemis, in which he stated that Bemis took the deed in satisfaction of everything he (Blinn) owed him (Bemis), and that it was an absolute conveyance. A short time afterwards his depositions were retaken at the same place, and then he stated that the deed was not in fact intended as an absolute deed, but as a security, and not for the whole of his indebtedness to Bemis, but for the $7,000 or $8,000 he owed Bemis in addition to the purchase money notes which Bemis had paid Coy for him as stated; and in explanation of the

discrepancy between the two statements he said that what he meant in his first deposition by "an absolute conveyance" was that it was a "*bona fide* transaction and not a pretense." He also stated that the deed was a security for the additional debt only, and that neither on delivering the deed to Bemis nor at the time had the latter surrendered the purchase money notes. Moreover, his previous statements made to outside parties were to the same effect as his corrected testimony.

Bemis' testimony was that the deed was a security, and, in effect, a mortgage, and was given as a security for the additional indebtedness only, and had no connection with or reference to the vendor's notes.

It may be true, and is true, that the testimony of a witness who has made contradictory statements, and of course of one who has testified differently on a previous occasion, is more or less weakened, according to circumstances, unless the contradiction is satisfactorily explained; and yet explanations are always in order, and a witness should not even be denied the privilege of correction at any time before his testimony has been used, or the rules of procedure has given a discretion to the trial court to exclude it, and the discretion has been exercised.

As to merger of rights.

It is admitted in argument, and cannot be successfully controverted, that a merger will never be presumed against the interest of the party taking the deed, but it is claimed that "this rule applies only in the absence of evidence tending to show a merger." That is a mild way of stating it. Mergers are not favored either in courts of law or of equity, and it requires evidence to show that the interest of him who holds both rights will *not be prejudiced*, before the rule allowing a merger will be applied; and it is hardly sufficient that the evidence tends to show a case for the application of the rule.

We do not intend by this discussion to admit that the evidence shows this to be a case where a merger can be made; but, rather, to show how far the courts will lean towards the real interest of the holder of the two rights, and, in doing so, how strong the evidence must be to sustain the merger.

In *Smith* v. *Roberts*, 91 N. Y. 475, the court of appeals of New York said: "But while a merger at law (the case at bar is in equity) follows inevitably upon the union of a greater and lesser estate in the same ownership, it does not so follow in equity. There the doctrine is not favored, and the estates will be kept separate where such is the intention of the parties, and justice requires it; and that intention will be gathered, not only from the acts and declarations of the party, but from a view of the situation as affecting his interest, at least prior to the presence of some third person's rights. The evidence in the case before us indicates very strongly both the intention of Smith and the understanding of Benjamin that no merger should take place, and the mortgage remains a subsisting security and a lien upon the one-quarter owned by Benjamin. The evidence relied on is two-fold. It is beyond contradiction that the interest of Smith was strongly against a merger, and that circumstance indicates his intention that none should occur."

The same is undoubtedly to be said of the interest of Bemis in the case at bar being against a merger. It cannot be assumed that under the circumstances he voluntarily released his rights under the subrogation, and took a conveyance which was subject to the rights of a third party, which would materially lessen, if not altogether destroy, his rights, holding under the deed only. His interest determines his intention to be otherwise. Besides, the retention of the purchase money notes after

the deed was given him by Bemis is a strong circumstance which, in the absence of explanation, goes to show their intention to be against a merger.

Finally, we think the testimony of both Blinn and Bemis shows an intention to hold the rights under the subrogation to remain in Bemis, and that the deed was in fact a mere security for the additional indedtedness of Blinn to him. This being the case, there of course could be no merger, for a mortgage (the deed intended as a mortgage) is not superior as a security to the equitable rights of the holder of the purchase money notes, especially in view of the reservation of the lien in Coy's deed, under the statute in such cases provided.

The other questions, whether or not there was an equitable mortgage, and the failure to record the deed in the county of the owner's residence, it is needless to discuss. The plaintiff is not an innocent purchaser, and the claim of the interpleader was presented in time to advise it of the nature of it, and before any vested rights had attached in it.

Reversed and remanded with directions that, if either party should claim a foreclosure of the liens, the property involved will be sold, and the proceeds distributed according to priority as herein indicated.

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

Opinion delivered April 3, 1897.

RAILROADS—RIGHT OF WAY IN STREET.—Where a municipal corporation grants to a railroad company a right of way along a street without abandoning its use as a street, the public has the right to use the street as well as the railroad company, and the rights of each therein must be exercised with due regard to the rights of the other.

SAME—INJURY BY TRAIN—NEGLIGENCE.—Under the statute making railroads "responsible for all damages to persons and property done or caused by the running of trains in this state" (Sand. & H. Dig., § 6349), the fact that a person in a street is injured by the fall upon him of a door from a car in a moving train is *prima facie* evidence of negligence on the part of the railroad company.

Appeal from Cleveland Circuit Court.

MARCUS L. HAWKINS, Judge.

*Dodge & Johnson* for appellant.

The accident happened upon the premises and right of way of defendant. Neely was a trespasser, and negligence must be alleged and proved. The only duty on the company was to avoid injury after discovering that he had placed himself in a position of peril. All the cases absolve defendant from negligence where there was no *scienter*, no information or knowledge to put defendant on notice of the probability of an accident occurring. 64 Iowa, 762; 28 A. & E. R. R. Cas. 404; 3 *id.* 498; 29 Oh. St. 364; 8 A. & E. R. Cas. 544; 59 Pa. St. 129; 10 Allen (Mass.), 372; 99 Mass. 216; 158 *id.* 312; 6 A. & E. R. Cases, 5; 83 Ill. 510; 1 Dillon, 579; 97 Mass. 276; 66 N. Y. 243; 41 *id.* 526; 16 C. C. A. 303; 81 Ia. 426, 430; 108 N. Y. 205; 18 S. E. Rep. 782; 66 N. Y. 243; 142 Mass. 296. The burden was on plaintiff to

show want of ordinary care on part of defendant. 52 N. Y. 476; 65 N. Y. 348; 80 *id.* 243; 64 Ia. 762; 75 Me. 380; 53 N. H. 448; 38 N. J. L. 346; 113 Pa. St. 152; 47 Mich. 584; 54 *id.* 66.

*John E. Bradley* for appellee.

The city ordinance only granted the right of way to the railroad company to use the street *in common with the public.* 16 Pick. (Mass.) 522; Tiedeman, Real Prop. (2 Ed.) sec. 607; 12 Ia. 246; 34 *id.* 249; 24 Am. & Eng. Enc. Law, pp. 45, 46, 47, and notes; 52 N. J. L. 55; 9 Am. & Eng. Enc. Law, p. 411, and notes; 23 *ib.* 946-7-8-9, etc.; 112 Ind. 59; 31 A. & E. R. Cas. 432; 28 *ib.* 655; 58 Am. Rep. 512. The proof of negligence is ample. 54 Ark. 209; 4 L. R. A. 420; 8 *id.* 798; 116 U. S. 642.

BATTLE, J. On the 21st of December, 1893, the St. Louis, Iron Mountain & Southern Railway Company was operating and moving one of its freight trains on and along Elm street in the town of Warren, in this state. At this time James F. Neely was returning from his residence to his office on the same street. While the freight train was passing him, a car door fell upon him from its place in a car in the train, and inflicted a serious injury. For the damages suffered from this injury he brought an action against the railway company, and recovered a judgment for $500; and defendant appealed.

Two legal questions are presented for our consideration. They are, first, was appellee, Neely, a trespasser upon appellant's right of way, at the time he was injured? and, second, was the burden upon him to show that his injury was the result of the negligence of the railway company?

As to railroad's right of way in street.

The railway company contends that he was upon its right of way, and had no right to be there, when he was hurt. It bases this contention upon an ordinance of the

incorporated town of Warren, which granted the right of way to its predecessor, the Little Rock, Mississippi River & Texas Railway Company, through the street where the injury occurred. But there is no evidence that the street was vacated or abandoned by the town, or that the public ceased to use it as a highway. On the contrary, the evidence shows that it was continuously and frequently used as a street by pedestrians, and sometimes by wagons. Under these circumstances, the public still had the right to use the street, as well as the railroad company. These rights in most respects were equal and mutual, except that, "as the company can not so readily stop its trains or cars, and is confined to its track, it has the right of way of passage thereon, and persons who are upon the track must leave it, and give way until the train or car has passed." The rights of each must be exercised with a due regard to the rights of the other, in a reasonable and careful manner. *Louisville, etc. R. Co.* v. *Phillips*, 112 Ind. 59; *Bryson* v. *Chicago, etc. R. Co.*, 89 Iowa, 677; 3 Elliot on Railroads, secs. 1093, 1094, and cases cited.

Liability of railroad for injury by train.

Appellant further contends that, before appellee is entitled to recover, he must show, by positive proof, that the door of the car fell by reason of its negligence. But a statute of this state provides: "All railroads which are now or may be hereafter built and operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state." In *L. R. & Ft. S. R. Co.* v. *Payne*, 33 Ark. 816, this court held that the effect of this statute, in cases where stock has been killed or injured by the running of trains, is to make the railroad company responsible for the damage caused thereby, unless it be shown by the company that it was using due care at the time, or that the damage was not the result of its negligence. In *Tilley* v. *St. L. & San*

*Francisco Ry. Co.*, 49 Ark. 535, it was held that, according to the ruling of the court in the former case, the statute is equally applicable to injuries by fires, and that when it is proved, in an action against a railroad company for damages caused by a fire, that the fire originated from its engine, it devolves upon the company to exonerate itself from the charge of negligence. In *Railway Company* v. *Taylor*, 57 Ark., 136, it was held, that, "where the driver of a team of mules was using the right of way of a railroad company between its main and side tracks for the purpose of unloading freight from one of its cars, having gone there upon invitation of the company, and one of the mules was struck and killed by a passing engine, * * * the killing made a *prima facie* case of negligence, which cast upon the company the burden of showing that it had used due care." In the last case the court said: "If the plaintiff * * in developing his case had shown that he was wrongfully using the track of the railway as a highway for his mules and vehicle, and had shown no other fact save that the property was injured by the defendant's moving train, he would not have established a *prima facie* case under the statute, because, upon the case thus proved, he could recover only for a wanton injury, and the statute raises no presumption of wantonness. *St. Louis, etc. Railway* v. *Monday*, 49 Ark. 257, 264–5. But in this case the plaintiff adduced evidence tending to show that, at the time of the injury, he was using the right of way between the main and side tracks by the license and invitation of the company. If that was true, he was not a trespasser, but was there as of right, and the company owed him the duty to observe ordinary care to preserve his property from injury. The fact of injury is therefore evidence of the want of such care; that is, of negligence."

The reasoning upon which these cases rest is applicable to the case before us. For the statute makes railroad companies responsible for damages to persons as well as to property, when they are done or caused by the running of their trains. Under the same circumstances, therefore, when the party injured is in no fault, the company should be liable for injuries to the person. Here the appellee was upon a public street at the time he was hurt. He was no trespasser. The railway company owed him the duty to employ reasonable means and exercise reasonable care to avoid injuring him. At the same time it was his duty to use reasonable care in protecting himself. The fact that he was injured by the running of appellant's train is *prima facie* evidence of its negligence.

We find no error in the record prejudicial to appellant.

Judgment affirmed.

BUNN, C. J., (dissenting.) I concur in the opinion of the court in this case, in so far as it gives damages to the plaintiff in the amount stated, because it appears from the evidence that the railway company, without proper remonstrance or affirmative action to prevent the use of the short cut or by-path by pedestrians, upon which the plaintiff was passing when injured, may have, impliedly at least, invited persons to make use of the path.

But I do not concur in the court's opinion in so far as it defines the right and tenure by which the railway company occupied the street as a right of way.

The right of a railway company to what is generally termed a right of way, in the rural or suburban districts, is exclusive, although it may be but an easement, for there are easements and easements, almost as numerous and varied in their characteristics and effects, as

there are instances in which they exist. *Jackson* v. *R. & B. Railroad Co.*,25 Vt. 159; *Hurd* v. *R. & B. Ry. Co.*, 25 Vt. 116; *Conn. & Pass. River Ry. Co.* v. *Holton*, 32 Vt. 43; Redfield on Railways, 127, note 15, page 11; Elliott on Railways, vol. 3, also section 1152.

The subject of railroad rights of way over and along the streets of towns and cities has been for a long time a fruitful theme of discussion by courts and jurists. Many of the cases are cases of grants to street railways, which in the very nature of things have little or no application to cases of railways over which steam engines run, or in other words ordinary railroads. A street railway is never exclusive in its occupancy of a street. The nature of its business, and the patronage it seeks, and the manner of operating its cars, all make it more profitable for itself and more convenient for the public that its occupancy of the street be not exclusive, but rather joint with ordinary travel and traffic.

It may be admitted that a municipality has no authority to grant to a railroad a right of way over its streets at all, without authority from the legislature. The authorities go to the extent of saying that even the legislature cannot confer this authority upon cities and towns to grant rights of way over any of their streets, where the abutting owners own the deed to the center of the streets, or, more accurately speaking, where the fee in the land occupied by the streets is owned by private individuals, who have given the easement for the purposes of streets only.

Attempts have been made to adopt the same rule where there is no private interest in or ownership of a street, but where it is the property of the public purely; but these attempts are scarcely more than expression of the opinion of authors who think such ought to be the rule. The rule now is that the legislature can authorize a city or town to grant a right of way to a railroad company over

any of its streets owned by the public, and whether this grant be exclusive of a similar grant to any other railroad seems to be a matter to be determined by the language of the grant.

Much of the discussion of this subject goes no further than to the inquiry whether or not the grant can be made lawful by an act of the legislature, without some provision therein which provides for the payment of compensation, as in condemnations under the law of the right of eminent domain. But all that only goes to show that the right of way may be claimed by the railroad companies as a matter of right, upon complying with the terms of the law.

I am of opinion that, in any case, it ought to be held as contrary to public policy to grant a joint use to railroad companies and the public generally over a street, especially where the grant to the railroad, as in the case at bar, is expressly of the whole street. But, be this as it may, I am of the opinion that the right and tenure by which appellant company holds the street in Warren, seeing that the grant by the town has been ratified by the legislature, depends upon whether the public or abutting owners owned the fee in the ground taken up by the streets, and by the construction to be placed upon the act and the grant, whether they be in full or restricted by express words; and, as we have no evidence of the ownership of the street, the question cannot be decided, as I think, on this record.

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# ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* STANFIELD.

Opinion delivered April 3, 1897.

DOGS—LIABILITY FOR KILLING.—Dogs are personal property for the negligent killing of which a railway company is liable.

NEW TRIAL—SUFFICIENCY OF MOTION.—A motion for new trial on the ground of newly discovered evidence is not sufficient where it fails to state facts showing that due diligence was used.

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

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

Dogs were not property, except in a qualified and restricted sense, by the common law, and our statute has not changed the character of such property. A railroad is not liable for killing a dog unless it be done wantonly or maliciously. 75 Ga. 444; 58 Am. Rep. 476; 10 Rich. Law, 52; 69 Ga. 447; 14 S. W. Rep. 691. A new trial should have been granted for newly discovered evidence, under secs. 5842-3, Sand. & H. Dig.

WOOD, J. This suit was brought before a justice of the peace for the alleged negligent killing of an "Irish setter dog," valued at $95. Appellant appeals from a judgment of the circuit court for $80. The demurrer to the complaint presents the question, "Is the railroad liable for the negligent killing of the dog?"

The dog is property.

Under sec. 12, art. 22, of the constitution, and sec. 6349, Sand. & H. Dig., railroads are "responsible for all damages to property done or caused by the running of trains." Dogs are property. As was said by the supreme court of New York: "Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic. In many ways they are put to useful

service, and, so far as pertains to their ownership as personal property, they possess all the attributes of other personal property." *Mullaly* v. *People*, 86 N. Y. 365. Much learning, ancient and modern, may be found in the books, more entertaining than useful, upon the question as to whether dogs are the subject of larceny. At the common law they were not so regarded, for the reason, as assigned by Mr. Blackstone, that they do not serve for food, have no intrinsic value, and are kept for the whim and pleasure of their owners. 4 Blackst. Com. 235; 2 Blackst. Com. 393.

Following the common law in this respect, the supreme court of Georgia held, in *Jemison* v. *Southwestern Railroad*, 75 Ga. 444, that railroads are not liable for the negligent killing of dogs. See also *Wilson* v. *Ry.* 10 Rich. Law (S. C.), 52. But the common law rule, even in cases of larceny, "is extremely technical, and has no sound basis to rest upon." *Mullaly* v. *People*, *supra*. Except in cases of larceny, however, the dog was property at the common law, and the owner had his remedy by civil action for the loss or destruction of same. 4 Blackst. Com. 236. Such is the general doctrine in America. *Harrington* v. *Miles*, 11 Kas. 481; S. C. 15 Am. Rep. 355, and authorities cited.

Moreover, under our statutes, and the decision of this court in *Haywood* v. *State*, 41 Ark. 479, it is evident that the doctrine of the common law as to the larceny of dogs could have no place. Secs. 1694–8, Sand. & H. Dig. We are unwilling to extend a doctrine, archaic and unsound even in criminal cases, to civil cases having no analogy. The statute makes no exception as to dogs, and we can make none.

We find but few adjudications upon the question, and none with facts exactly similar. The supreme court of Texas supports our view in *Hanks* v. *Ry.* 78 Tex. 300. See, also, 3 Elliott, Railroads, sec. 1190;

*Fink* v. *Evans*, 95 Tenn. 413; *Jones* v. *Bond*, 40 Fed. Rep. 281, S. C. 40 Am. & Eng. R. Cases, 191.

If the appellant be liable at all, it is not contended that there was an error in the charge of the court, nor that the verdict was excessive. The evidence to support the verdict is sufficient here.

Sufficiency of motion for new trial.

2. The motion for a new trial because of newly discovered evidence is not sufficient, for the reason that it fails to state the facts upon which the court could determine that appellee had used due diligence. *Bourland* v. *Skinner*, 11 Ark. 671; *Peterson* v. *Gresham*, 25 *id.* 380; *Merrick* v. *Britton*, 26 *id.* 496; *Runnels* v. *State*, 28 *id.* 121.

Affirmed.

BUNN, C. J., did not particpate.

# APPENDIX.

## I.

## OPINIONS NOT REPORTED.

Edwards *v.* Havener; appeal from Greenwood district of Sebastian circuit court; Edgar E. Bryant, judge; reversed and dismissed December 12, 1896; per Wood, J.

Spratlin *v.* Halliburton; appeal from Arkansas chancery court; James F. Robinson, chancellor; reversed and remanded; per Wood, J.

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## CASES DISPOSED OF ORALLY.

Gate City National Bank *v.* Sunny South Lumber Co.; appeal from Lafayette circuit court; Charles W. Smith, judge; affirmed October 17, 1896; Bunn, Ch. J.

Hill *v.* Pipkin; appeal from Sebastian circuit court; Edgar E. Bryant, judge; affirmed October 17, 1896; Hughes, J.

Southern Stave & Lumber Co. *v.* Powell; appeal from Pulaski circuit court; Robert J. Lea, judge; dismissed on motion of appellant October 17, 1896; *per curiam*.

Hollinger *v.* State, appeal from Drew circuit court; Marcus L. Hawkins, judge; affirmed October 24, 1896; Hughes, J.

Kansas City, F. S. & M. Railroad Co. *v.* State; appeal from Sharp circuit court, Richard H. Powell, judge; affirmed October 24, 1896; Wood, J.

Texarkana Water Co. *v.* State; appeal from Miller circuit court in chancery; Rufus D. Hearn, judge; appeal dismissed by consent October 24, 1896; *per curiam*.

Remington *v.* Equitable Building & Loan Association; appeal from Garland circuit court; Alexander M. Duffie, judge; affirmed orally October 31, 1896; Bunn, Ch. J.

Cotton & Perry *v.* Atkinson; appeal from Sebastian circuit court; C. J. Frederick, special judge; affirmed orally November 7, 1896; Battle, J.

St. Louis, I. M. & S. R. Co. *v.* Holt & McClure; appeal from Clark circuit court; Rufus D. Hearn, judge; affirmed November 7, 1896; Hughes, J.

Durden *v.* Sebastian county; appeal from Sebastian circuit court; Edgar E. Bryant, judge; appeal dismissed November 7, 1896; *per curiam.*

Rice, Stix & Co. *v.* Smith; appeal from White circuit court; H. N. Hutton, judge; affirmed November 14, 1896; Wood, J.

Casey *v.* Adams; appeal from Miller circuit court; Rufus D. Hearn; judge; affirmed November 14, 1896; Riddick, J.

Meyer *v.* Weis; appeal from Drew circuit court; Marcus L. Hawkins, judge; affirmed November 14, 1896; Riddick, J.

Palatine Insurance Co., *ex parte;* prohibition to Sebastian circuit court; Edgar E. Bryant, judge; writ of prohibition refused November 23, 1896; *per curiam.*

Stephens *v.* Tyler; appeal from Clay circuit court; William H. Cate, judge; affirmed November 28, 1896; Hughes, J.

Stuttgart Improvement Co. *v.* Marion County Savings Bank; appeal from Arkansas chancery court; James F. Robinson, judge; affirmed November 28, 1896; Wood, J.

Mulvane State Bank *v.* Bryant; appeal from Howard circuit court; Will P. Feazel, judge; affirmed November 28, 1896; Wood, J.

Hodges *v.* Farr; appeal from Crittenden circuit court in chancery; Felix G. Taylor, judge; compromised and appeal dismissed, November 28, 1896; *per curiam.*

American Employee's Liability Insurance Co. *v.* Fordyce; appeal from Pulaski circuit court; Joseph W. Martin, judge; dismissed by consent November 30, 1896; *per curiam.*

Scott *v.* State; appeal from Monroe circuit court; James S. Thomas, judge; affirmed December 5, 1896; Bunn, Ch. J.

Scott *v.* State; appeal from Monroe circuit court; James S. Thomas, judge; affirmed December 5, 1896; Bunn, Ch. J.

McHaskell *v.* State; appeal from Jefferson circuit court; John M. Elliott, judge; affirmed December 5, 1896; Wood, J.

Martin *v.* State; error to Franklin circuit court; Jephtha H. Evans, judge; affirmed December 5, 1896; Riddick, J.

Stewart *v.* McBryde; appeal from Lincoln circuit court; John M. Elliott, judge; dismissed for non-compliance with rule nine, December 7, 1896; *per curiam.*

Sayer *v.* Horn; appeal from Arkansas chancery court; James F. Robinson, judge; dismissed for non-compliance with rule nine, December 7, 1896; *per curiam.*

Martin *v.* Manning; appeal from Monroe circuit court; Jacob Trieber, special judge; compromised and dismissed, December 7, 1896; *per curiam.*

Harris *v.* State; appeal from Lee circuit court; H. N. Hutton, judge; affirmed December 12, 1896; Battle, J.

Williams *v.* State; appeal from Clark circuit court; Rufus D. Hearn, judge; affirmed December 12, 1896; Hughes, J.

Thornton *v.* Arkansas National Bank; appeal from Garland chancery court; Alonzo Curl, special judge; dismissed for non-compliance with rule nine, December 14, 1896; *per curiam.*

Little Rock & F. S. Ry. Co. *v.* Hackney; appeal from Johnson circuit court; Jeremiah G. Wallace, Judge; compromised and appeal dismissed, December 21, 1896; *per curiam.*

Thomasson *v.* State; appeal from Clark circuit court; Rufus D. Hearn, judge; affirmed January 2, 1897; Wood, J.

Sandefur *v.* Moon; appeal from Little River circuit court; Will P. Feazel, judge; dismissed for non-compliance with rule nine, January 4, 1897; *per curiam.*

Union County *v.* Hamilton; appeal from Union circuit court; Charles W. Smith, judge; affirmed January 9, 1897; Battle, J.

Dillehay *v.* State; appeal from Lee circuit court; H. N. Hutton, judge; affirmed January 16, 1897; Wood, J.

Johnson *v.* State; appeal from Ashley circuit court; Marcus L. Hawkins, judge; affirmed January 23, 1897; Battle, J.

Blythe *v.* Davis; appeal from Miller circuit court; Rufus D. Hearn; judge; dismissed on motion, January 23, 1897; *per curiam.*

Fink, receiver, *v.* Deaton; appeal from Lonoke chancery court; Thomas B. Martin, chancellor; dismissed for non-compliance with rule nine, January 25, 1897; *per curiam.*

Fink, receiver, *v.* Ross; appeal from Lonoke chancery court; Thomas B. Martin, chancellor; dismissed for non-compliance with rule nine, January 25, 1897; *per curiam.*

Johnson *v.* State; Appeal from Clay circuit court; Felix G. Taylor, judge; affirmed January 30, 1897; Bunn, Ch. J.

Lain *v.* Tennessee Industrial Co.; appeal from Desha circuit court; John M. Elliott, judge; affirmed January 30, 1897; Battle, J.

Grounds *v.* State; appeal from Hempstead circuit court; Rufus D. Hearn, judge; affirmed January 30, 1897; Hughes, J.

Rosewater *v.* Baird; appeal from Carroll circuit court; Edward S. McDaniel, judge; affirmed January 30, 1897; Hughes, J.

Dixon *v.* State, appeal from Hempstead circuit court; Rufus D. Hearn, judge; affirmed January 30, 1897; Wood, J.

Flippin *v.* State; appeal from White circuit court; H. N. Hutton, judge; affirmed January 30, 1897; Riddick, J.

Glover *v.* Sims; appeal from Lonoke chancery court; David W. Carroll, chancellor; affirmed February 6, 1897; Bunn, Ch. J.

Flatt *v.* State; appeal from Benton circuit court; Edward S. McDaniel, judge; affirmed February 6, 1897; Bunn, Ch. J.

Sherwood, trustee, *v.* Reeves; appeal from Faulkner chancery court; Thomas B. Martin, chancellor; affirmed February 6, 1897; Hughes, J.

Sullivan *v.* Nixon; appeal from Chicot circuit court; Marcus L. Hawkins, judge; affirmed February 13, 1897; Wood, J.

Webb *v.* Burns, appeal from Pope circuit court; Jeremiah G. Wallace, judge; affirmed February 13, 1897, Wood, J.

Smith *v.* State; appeal from Washington circuit court; Edward S. McDaniel, judge; affirmed February 20, 1897; Battle, J.

Southwestern Arkansas & Indian Territory Railroad Co. *v.* Dickinson; appeal from Clark circuit court; Rufus D. Hearn, judge; affirmed February 20, 1897; Hughes, J.

Lacefield *v.* Mainard; appeal from Pulaski chancery court; David W. Carroll, chancellor; affirmed February 20, 1897; Wood, J.

Rutherford *v.* State; appeal from Benton circuit court; Edward S. McDaniel, judge; affirmed February 20, 1897; Wood, J.

Callaway *v.* State; appeal from Clark circuit court; Rufus D. Hearn, judge; affirmed February 27, 1897; Battle, J.

St. Louis & San Francisco Railway Co. *v.* Gramlick; appeal from Sebastian circuit court; Edgar E. Bryant, judge; affirmed February 27, 1897; Battle, J.

Creswell *v.* Mathews; appeal from Izard circuit court; B. F. Williamson, special judge; affirmed February 20, 1897; Hughes, J.

Graham *v.* State; appeal from Washington circuit court; Edward S. McDaniel, judge; affirmed February 27, 1897; Riddick, J.

Davidson *v.* Huggins; appeal from Franklin circuit court, Jephtha H. Evans, judge; affirmed March 6, 1897; Bunn, Ch. J.

Mellard *v.* Cheshire Prov. Institution; appeal from Garland chancery court; Leland Leatherman, chancellor; affirmed if remittitur entered March 6, 1897; Battle, J.

Hynson *v.* Archer; appeal from Fulton circuit court in chancery; John B. McCaleb, judge; affirmed March 13, 1897; Battle, J.

Hobgood *v.* Bragg; appeal from Jackson circuit court; Samuel Peete, special judge; affirmed March 13, 1897; Hughes, J.

St. Louis, I. M. & S. Ry. Co. *v.* Orr; appeal from Hempstead circuit court; Rufus D. Hearn, judge; affirmed March 13, 1897.

Grubbs *v.* Paris Medicine Co.; appeal from Sebastian circuit court; Edgar E. Bryant, judge; affirmed March 20, 1897; Bunn, Ch. J.

Muskegon Lumber Co. *v.* Schollemeiar; appeal from Jefferson circuit court; John M. Elliott, judge; affirmed March 20, 1897; Hughes, J.

Mixer *v.* Horn; appeal from Arkansas chancery court; James F. Robinson, chancellor, affirmed March 20, 1897; Hughes, J.

Sidway *v.* Pace; appeal from Boone circuit court; Brice B. Hudgins, judge; affirmed March 27, 1897; Bunn, Ch. J.

Ouita Coal Co. *v.* Flynn; appeal from Pope circuit court; Jeremiah G. Wallace, judge; affirmed March 27, 1897; Wood, J.

St. Louis, I. M. & S. Ry. Co. *v.* Young; appeal from Faulkner circuit court; James S. Thomas, judge; affirmed on remittitur being entered, March 27, 1897; Wood, J.

Trounstine *v.* Crozier; appeal from Pope circuit court; Jeremiah G. Wallace, judge; affirmed April 3, 1897; Bunn, Ch. J.

Scott-Force Hat Co. *v.* Griffin-Crawford Dry Goods Co.; appeal from Washington circuit court; Edward S. McDaniel, judge; affirmed April 3, 1897; Battle, J.

Priest *v.* Boyd; appeal from Benton circuit court in chancery; Edward S. McDaniel, judge; affirmed April 3, 1897; Hughes, J.

Union Compress Co. v. Graham; appeal from Independence circuit court; John B. McCaleb, judge; affirmed April 3, 1897; Wood, J.

St. Louis, Southwestern Railway Co. *v.* Greer; appeal from Nevada circuit court; Rufus D. Hearn, judge; affirmed April 3, 1897; Riddick, J.

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