ARKANSAS REPORTS

Vol. 65

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

FROM JANUARY TO NOVEMBER, 1898.

T. D. CRAWFORD
REPORTER

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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME.

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

Rule 24—Applications for License

Applications for license to practice in the supreme court, when made by members of the bar of good character, and who are regular practitioners of good standing in the circuit courts, will be heard on any day the court may be in session. Applications from those not having license to practice in the circuit courts will be heard on the first Saturdays in October, January, April, and July, when the court is in session, and at no other time. Every such applicant, not having license, must also file with the clerk of this court his petition for license at least one week before the day on which the same is to be heard by the court.

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

COX *v.* PHELPS.

Opinion delivered November 13, 1897.

LIMITATION OF ACTION—PAYMENT BY ADMINISTRATOR of an unprobated debt of his decedent which is secured by mortgage will not arrest the running of the statute of limitations with reference thereto if there was no order of the probate court authorizing such payment, although that court subsequently allowed the administrator credit for the payment in his settlement with the estate.

Appeal from Pulaski Chancery Court.

DAVID W. CARROLL, Chancellor.

STATEMENT BY THE COURT.

This suit was begun February 13, 1894, to foreclose a deed in trust made to secure a note given by N. G. Hewitt for $6,000 on August 1, 1879, due three years after date, for money borrowed of Mrs. Mary G. Van Horn. The property conveyed in the deed is lot 12 in block 1 in the city of Little Rock.

N. G. Hewitt died in February, 1887, leaving a will, which was probated March 18, 1887. N. G. Hewitt paid the interest on this note up to the time of his death. The note was transferred to Mrs. Sarah R. Phelps, the plaintiff in this suit, and was never probated against the estate of N. G. Hewitt, upon whose estate the appellant, N. W. Cox, was administrator with the will annexed in the county of Pulaski in the State of Arkansas, where this suit was commenced.

The several defendants in their answers to the complaint pleaded the statute of limitations of five years, and set up other defenses not discussed here.

It appears from the evidence in the case that D. Reeve, who was indebted to N. G. Hewitt, and had been requested by Hewitt in his lifetime to pay the interest on this note for him, after the death of N. G. Hewitt, made two annual payments of interest on the note secured by the deed in trust. The latter of these two payments was made December 23, 1889. Both payments were made with money which Cox, the administrator of N. G. Hewitt's estate, furnished Reeve, which he was unable to repay to Cox as such administrator, and for which he gave Cox as administrator his receipt. For the amounts thus paid Cox charged the estate of Hewitt in his settlement of said estate by crediting himself as administrator therewith, which was approved by the probate court.

It is claimed by the appellees that these payments kept the debt alive, and from being barred by the statutes of limitations up to the time suit was commenced.

P. C. Dooley and *Rose, Hemingway & Rose*, for appellants.

The claim of appellees is barred by the statute of limitations. An administrator has no right to pay any debt which has not been duly probated against the estate; and his action in so doing is a *devastavit*, and does not bind the estate or suspend the running of the statute of limitations in favor of the estate. 14 Ark. 247; 55 *id.* 232; 20 Kas. 338; 53 N. Y. 444; 32 N. W. 685; S. C. 68 Wis. 555; 20 Atl. 536–537; S. C. 136 Pa. St. 211; 7 Gray, 274; *id.* 387; 13 *id.* 381; 16 O. St. 566; 6 Johns. Ch. 266; 12 Rep. 51; 29 N. E. 501–2; 53 N. Y. 443; 66 N. Y. 352; 18 Atl. 795; 9 S. W. 390; 5 S. E. 727; S. C. 28 So. Car. 285; 30 Ark. 407; 52 Conn. 435; 9 Johns. Ch. 360. Payment made by administrator under order of court will not take case out of bar of limitation, unless there be an assent of the parties whose rights are to be effected. Wood, Limitations, 97 and 101; 11 Barb. 554; 9 Md. 317; 36 N. Y. 88; 14 S. W. 380; S. C. 88 Tenn. 255; 97 Pa. St. 322; 46 Ark. 373; 49 *id.* 91; 51 *id.* 82 and 84. Even if, by force of the will, there was a trust in the personal representative, the heirs are not affected by the acts of such representative. 5 S. E. 727; 28 S. C. 285; 6 Johns. Ch. 360; 14 S. W. 380; S. C. 88 Tenn. 255; 16 O. St. 566–571; 6 Johns. 292.

If any agency to pay the debt subsisted, it was revoked by the death of Hewitt. 8 Wheat. 174; Mechem, Agency, 240. The statute applies to "mortgages" *or* "deeds of trust." Sand. & H. Dig., § 5094. Failure to protest a foreign bill for non-payment discharges the maker. 1 Dan. Neg. Inst., 7–9; 2 *id.* § 971; Benj. Chalm. Dig., 180; Byles on Bills, 444 (292); 3 Rand. Com. Pap. 1199; Tied. Com. Pap. 334; 2 Dan. Neg. Inst., 1075; Tied. Com. Pap. 355.

Dodge & Johnson for appellees.

The executor was really a trustee, and it was his right and duty to protect the equity of redemption by preventing a foreclosure. 10 Gratt. 651; Perry, Trusts, 347; 49 Pa. St. 484 (S. C. 88 Am. Dec. 510;) 130 Mass. 481; 98 N. Y. 309; 8 Paige, Ch. 152; S. C. 35 Am. Dec. 676; 55 Ark. 233; Wood, Limitations, §§ 188, 190. Part payment of principal or interest by a mortgagor or his agent forms a new starting point for the statute of limitations to run from. 12 Eq. Cas. 51; 1 De. G. & J. 1; 32 Conn. 288; 10 Cush. 72; 8 Metc. 87; 37 Iowa, 570. If this part payment be made *before the statute bar has attached*, it may be made by one of the joint debtors, and be binding on all. In this the case at bar is materially different from what it would be if the debt had already been barred before the payment was made. 10 Ark. 110; 11 Ark. 187; 19 Ark. 693; 5 Ark. 551; 20 Ark. 189; 10 Ark. 163; 14 Ark. 201; 14 Ark. 217; 12 Ark. 782; 12 Ark. 780; 61 Barb. 190; 45 Mo. 365; 35 Conn. 299; 20 Ark. 188, 189; 5 Ark. 551; 19 Ark. 693. Such part payment may be made by an executor or administrator. 13 O. St. 271; 20 Pa. St. 214; Angell, Lim. 278, 281; 1 H. Bl. 104; 2 Saund. 117; 1 Halst. 405; 1 McMul. Eq. 331; 1 McC. Ch. 175; 5 Serg. & Rawle, 232; Harper (S. C.), 355; 2 Eq. 567; 1 Har. & John. 109; 4 *ib.* 527; 5 Gill & Johns. 498; 8 *ib.* 135; 8 Mass. 134; 13 *ib.* 213; 7 Halst. 255; 3 Call, 248, 252; 9 D. & R. 40; 22 Eng. C. L. 385; Ryan & Moody, 416; 15 Me. 360; 16 Mass. 429; 13 Wend. 35; 2 Leigh, 534; 1 Harr. (Del.) 128, 209; 2 Harr. 204; 17 John. 331; 5 Binn. 573; 1 Minor (Ala.), 353; Const. Ct. S. C. 111; 2 Hayw. 7; 4 Cow. 494; 19 Wend. 493; 4 Mon. 36; 15 Johns. 3; 16 Mass. 429; 2 Leigh, 534; 61 Barb. 19;

36 N. Y. 88; 10 Md. 197; 16 Mass. 429; 66 Mass. 327; 6 John. 3; 12 B. Mon. 408· 4 Mon. 36; 9 Ala. 502; 20 Ala. 147; 17 Ga. 96, 99; 13 Gratt. 346; 52 N. H. 60; 3 N. H. 468; 11 N. H. 211; 3 Redf. Wills, 289 and note; 10 Humph. 211; 4 Harrington (Del.), 368; 36 N. J. L. 45; 2 Gr. Ch. (N. J.), 311; 7 Halst. 247; 25 Md. 587; 2 Smith's Lead. Cases, 388; 4 Strobh. (S. C.) 68; 61 Barb. 190; 104 N. Y. 648; 36 N. Y. 90; 8 N. Y. 362; 26 Barb. 316; 58 Mo. 90; 11 N. Y. 185. The failure to protest the order or draft did not discharge the mortgage. 28 Ark. 166; 49 Ark. 512. The order was not a payment of the original debt. 78 N. Y. 293, 298; 8 Johns. 389; 37 N. Y. 312; 1 Cow. 390; 4 N. Y. 314; 54 N. Y. 581, 586; 13 N. Y. 556; 43 O. St. 453; 32 St. Rep. 953; 80 N. Y. 100; 38 N. Y. 289; 2 Wash. C. C. 191; 128 N. Y. 19. If the holder had lost his right on account of failure to protest the bill or order, the subsequent payment of interest on the original note revived the liability. 36 Pa. St. 529; 16 N. H. 410; 5 Mo. 544; 32 Me. 72; 33 Md. 412; 5 Sm. & M. (Miss.) 51; 18 C. B. 357; 48 Barb. 148; 5 Johns. 248; *ib.* 375; 16 *ib.* 152; 8 *ib.* 384; Anth. N. P. 205; 3 N. Y. Leg. O. B. S. 33; 30 N. Y. St. Rep. 124; 71 N. Y. 14; 47 N. Y. 273; 71 N. Y. 14; 23 Wend. 383; 2 Camp. 188; 14 Mo. 59; 26 Eng. L. & E. 283; 2 C. B. 258; 2 Sand. 166; 73 Eng. Com. L. 1010; 20 Vt. 669; 20 How. 496; 39 St. Rep. 669; 20 How. 175. Payment by executor of interest on an unprobated demand is not a *devastavit.* Act of March 25, 1889, does not extend five year statute to make it cover a case like this. 34 Ark. 312. Appellants saved no exceptions below, and there is nothing before this court. 28 Ark. 77; 33 *ib.* 100; 16 Peters, 169; 4 Wall. 502; 4 Peters, 426; 56 Ark. 623; 31 Ark. 476; 34 *id.* 526; 36 *ib.* 263.

P. C. Dooley and *Rose, Hemingway & Rose*, in reply.

Executor is not a trustee. Perry, Trusts, 500; 2 Ohio, 127; 21 Wend. 430. No exception need be taken to a decree. 58 Ark. 123; 27 *id.* 58; 52 *id.* 283; 38 *id.* 477; 46 *id.* 17.

HUGHES, J., (after stating the facts.) Unless the payments made by D. Reeve with money of the estate of N. G.

Hewitt, furnished him by N. W. Cox, administrator of said estate, and for which Cox was allowed credit, as administrator, in his settlement of Hewitt's estate, by the probate court of Pulaski county, prevented the bar of the statute of limitations, this action was barred when the suit was begun. The inquiry then is, do these payments have the effect in law to prevent the bar of the statute of limitations? Is the plaintiff's right of action tolled, notwithstanding these payments?

"Actions on promissory notes and other instruments in writing not under seal shall be commenced within five years after the cause of action shall accrue, and not afterwards." Act Dec. 14, 1844 (Sand. & H. Dig., § 4827). This note was not under seal.

"Actions on writings under seal shall be commenced within five years after the cause of action shall accrue, and not afterwards. *Provided*, this act shall not apply to any instrument now in existence." (Sand. & H. Dig., § 4828,) Act March 29, 1889.

According to the statutes, the right of action on this note was barred within five years from its maturity, unless suit thereon was commenced within the five years, or unless the running of the statute was stopped by a payment thereon within the five years.

Section 5094, Sand. & H. Dig., provides that "in suits to foreclose mortgages or deeds of trust 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."

It will appear from the statement of facts that the note secured by the deed of trust was given August 1, 1879, and was due three years after date, that is, on August 1, 1882; that the last payment of interest was after N. G. Hewitt's death, in February, 1887, and was made by D. Reeve December 23, 1889, with money of Hewitt's estate furnished him by Cox, administrator of said estate, for which Cox was allowed credit in the settlement of said estate, which was approved by the probate court of said county. Cox furnished this money without any order of the probate court, and it does not appear that any application had been made to said court for an order, or

that any order by said court for the redemption of said lot from the mortgage was ever made. It does appear that said note was never probated, nor allowed as a debt against the estate of N. G. Hewitt, deceased.

Before an administrator can pay or allow any claim against the estate of which he is administrator, the claimant must append to his demand an affidavit of its justice, stating that "nothing has been paid or delivered toward the satisfaction of the demand, except what is credited thereon, and that the sum demanded, naming it, is justly due," etc. Sand. & H. Dig. § 114; *Ross* v. *Hine*, 48 Ark. 304; *Alter* v. *Kinsworthy*, 30 Ark. 756.

If the administrator could not allow or pay a claim at all unless the same was authenticated by law, could he by payment upon it stop the running of the statute of limitations?

"A part payment which will revive a debt barred by limitation, or form a new point from which the statute will begin to run, must be such as can be treated as an admission of the continued existence of the debt, and an implied promise to pay the balance." *Chase* v. *Carney*, 60 Ark. 497; *Taylor* v. *Foster*, 132 Mass. 33. "It was therefore necessary, by the rules of special pleading, to avoid the statute of limitations, to reply a new promise, under which it was competent to prove an acknowledgment of the debt. * * * It is not enough to prove an admission of indebtedness, if it is accompanied by circumstances which repel such inference, or even leave it in doubt whether the party intended to revive the cause of action." *Roscoe* v. *Hale*, 7 Gray, 275; *State Bank* v. *Woody*, 10 Ark. 642. In the case cited from 7 Gray it is held that "the payment of a dividend by an assignee under the insolvent laws will not take the residue of the debt out of the statue of limitations against the debtor." (Syllabus). "Proof of payment of part of a debt is, in legal effect, only evidence of an acknowledgment from which a promise to pay the remainder of the debt may properly be inferred." *Id.* p. 276. Wood, Lim. § 97; *Alston* v. *State Bank*, 9 Ark. 459. "The part payment must be under such circumstances as reasonably, and by fair implication, lead to the inference that the debtor intended to renew his promise of payment." *Taylor* v. *Foster*, 132

Mass. 33. "And it must have been made by the debtor in person, or by some one authorized by him to make a new promise in his behalf. And a payment made by a third person, without authority from the debtor to make it, cannot remove the statute bar, because it does not imply any acknowledgment of the debt by the debtor. Under this rule it is held that a partial payment by an assignee for the benefit of creditors will not remove the bar as to the assignor. * * * * * * Nor will a payment by an administrator, under surrogate's decree, take the debt out of the statute, as to the residue." Wood, Limitations, § 101. This is equally applicable to a part payment before the debt is barred, which might, if it amounted to a promise to pay the balance of the debt, form a new point from which the statute would commence to run. But if the administrator, under our probate system, could neither allow nor pay a debt not probated against the estate of which he is administrator (which is the case), how can it be said that the payment by Reeve for Cox, the administrator of Hewitt's estate, of the interest on this note prevented the bar of the statute attaching, when there was no order of the probate court authorizing such payment, or authorizing redemption of the lot from the mortgage? How could this be construed into an acknowledgment of the existence of the debt, from which a new promise to pay the balance could be fairly inferred? There was no authority in Cox to make the payment. There could be none to suspend the operation of the statute of limitations by a promise he was not authorized to make. His promise could not set aside the law. No promise could be inferred from such payment. The administrator has no concern with the real estate, unless needed by him as assets for the payment of debts. This was a debt he never could have paid legally, because it was not proved or allowed against the estate, having been barred as against the estate by the two years statute of non-claim when suit was brought.

The decree of the circuit court foreclosing the mortgage is reversed, and the cause is dismissed for the want of equity, as as to the parties appealing.

OPINION ON MOTION FOR REHEARING.

Filed May 21, 1898.

BUNN, C. J., (dissenting.) In his life time, Nelson G. Hewitt borrowed of Mrs. Van Horn $6,000, and, to secure the payment of the same, gave his deed of trust on a certain lot described in suit, situated in the business portion of the city of Little Rock. The money was borrowed to put a brick building on the lot mortgaged. The building was erected, and the lot, thus improved, was worth largely more than the amount of the mortgage debt,—perhaps several times more. Hewitt continued to pay, directly and through his agent, the annual interest until his death. He died, having made a will, with provision as to care of his property and its disposition at the end of a certain time, or the happening of certain events; leaving it to be managed and controlled in the meantime by certain persons therein named. The testator died at his then residence, in the state of New York, where also his executor and trustee reside. Letters of administration were taken out here, and the appellant, Cox, was appointed administrator. Before his death Hewitt had made Reeve (a debtor to him) his agent here to see to the payment of the interest on the mortgage debt, and taxes, etc. After his death, Reeve, finding that he could not pay the interest (being without means), prevailed on Cox, the administrator, to advance the necessary money to pay each of two instalments of interest, which he did, treating said payments as money paid for the benefit of the estate, and his payments of the same were duly approved and allowed by the probate court, in each of the two annual accounts.

The statute bar had attached to the mortgage debt (the same never having been probated against the estate of Hewitt) before the institution of this foreclosure proceeding, if the payment of the instalments of interest by Cox, the administrator, did not have the effect of fixing a new date from which the statute began to run on the debt. If, however, these payments had the effect of fixing the date of the last one from which the statute began to run, then the debt is not barred by the statute.

The rule with regard to the effect of partial payments, as affecting the running of the statute of limitations, is that they must be made by one having authority from the debtor, or by operation of the law in case of his death, as in this instance, to make them for the benefit of the estate or the creditors thereof; for one being required to make such payments, or at least being authorized to do so, can only make a new promise for the deceased when required to do so, or authorized by law to bind the estate by so doing. It is readily to be seen, therefore, that the question, and the only real question, in this case is *were the acts of Cox, as administrator, in paying these instalments of interest, legal, and therefore binding upon the estate of which he was the administrator?*

Naturally, we may say, the appellants appeal to our statutes on the subject of the allowance and payment of claims against estates, and the prohibition therein against administrators paying any other than those duly authenticated. I shall not stop to say more on this particular matter than that it is the settled law that no claim capable of assertion, either due or running to a certain maturity in the future, and which is the subject of a judgment of some court of competent jurisdiction, can be paid without such authentication. This leaves a numerous list of cases, however, which may be paid without such probation within the two years fixed as the statute of non-claim, because they cannot be asserted under the rule at any time within said two years, or for other reason do not come within the statutory definitions of claims to be probated. *Walker* v. *Byers*, 14 Ark. 246.

But the question of payment of *debts*, whether probated or not against an estate, is not involved in this case, but rather the question of the protection of property of the estate by the administrator.

When the annual interest, after the death of Hewitt, was coming due, Dodge, the trustee in the deed of trust, demanded the same of Cox, the administrator. This demand naturally carried with it the purpose of the trustee to forego foreclosure proceedings in case the demand was complied with, on the idea that the payment by Cox, as administrator, would "keep the debt in date," to use a common expression. The same idea

was doubtless entertained by Cox. The situation was this at that time: The interest was due, the debt and mortgage was still unaffected by the statute of limitations; and the trustee informed Cox that he would be compelled to resort to foreclosure proceedings unless the interest was paid; and Cox had no funds in his hands belonging to the estate with which to redeem from the mortgage, either at his own risk or under an appropriate order from the probate court, as provided by statute. If the mortgage property was greatly more valuable than the mortgage debt (which it was in this case), and a forced sale would be detrimental to the estate, which it plainly would have been under the circumstances, what was the lawful duty of the administrator in the emergency? Plainly, to do just what he did at the time,—protect the impotent estate from irreparable loss, by advancing his own funds, and trust to the probate court, a court of general jurisdiction of the subject, to reimburse him, and necessarily thereby to ratify and confirm his acts, which it did. Reducing the question down to its last analysis, the power of the probate court to approve of such an item in favor of the administrator is called in question, and not only so, but denied by the judgment rendered in this case heretofore by this court, and also by a denial of the petition to rehear.

It is not denied, but really insisted upon, that, if the administrator conceived it to be to the interest of his estate to prevent a forced sale of the mortgaged property, he should have filed his petition in the probate court, under section 198 of Sand. & H. Dig., and obtained leave to redeem from the mortgage by an expenditure of the necessary funds in hands belonging to the estate; or, in case he did not have funds sufficient to redeem without injury to creditors, he might have asked an order to sell the equity of redemption in the lands mortgaged.

The note secured by the mortgage, was in the following words: "$6,000. Little Rock, Ark., August 21, 1879. Three years after date, for value received, I promise to pay to the order of Mary C. Van Horn $6,000, without discount or defalcation, with interest upon the same at the rate of 10 per cent. per annum from date until paid, interest payable semi-annually, and principal and interest payable at the

law office of Dodge & Johnson, Little Rock, Arkansas, and secured by deed of trust on lot 12, block 1, City of Little Rock. (Signed) N. G. HEWITT."

In Hewitt's life time, the interest was paid up to December 3, 1887, and the two payments by Cox, the administrator, after the death of Hewitt of $602.25 and $600.75 were made on the 22d of December, 1888, and December 23, 1889, respectively.

It appears also that the insurance and taxes had been kept up and paid by Cox as administrator regularly since the death of Hewitt, and all the expenditures had been approved by the probate court without objections on the part of any one, and the query is, what authority was there in Cox, as administrator, to pay the insurance and taxes, more than there was to pay the interest on the mortgage? There can be but two answers to that query. The one is, none; the other is, if the taxes were not paid, there would be a forfeiture, by law, of the estate of the legatees or heirs; and to prevent that it was not wrong to appropriate the money belonging to creditors, forsooth, to protect the interest of the legatees or heirs; and if the insurance were not paid, these same heirs might suffer loss by fire, and not be indemnified by insurance; and so in that case they would sanction the payment of money belonging to others to save themselves harmless.

Neither was the payment of the two instalments of interest ever in any manner objected to, but only claimed to have been made without authority, and that only after the statute of limitations had barred the mortgage debt, unless these payments removed or postponed the statute bar, which it is claimed they did not, because made without authority.

There can be but one sound legal reason assigned why an administrator is not only not authorized, but also not bound, to protect an estate situated as was this by the payment of interest to prevent a sacrifice of the property. And that is that it is not for the interest of the estate for him to do so. Was it for the interest of the estate in this instance? The appellants (Cox and the heirs and legatees) contend that it was not, because, in effect, they say it turns out to be to the interest of the estate to hold these payments void, since this

theory cancels the debt, and therefore the mortgage lien, the subject of the statute bar, and appellants thus obtain the property without paying the debt—without paying for it—for the mortgage debt was for money used in creating the part of the property of the greater value,—the building thereon. The mistake in this is in viewing the action of the administrator, and measuring his duty, from the circumstances surrounding him at the time of the institution of this suit, when, according to the contention of appellants and the judgment of this court, the mortgage debt was barred, rather than defining his duty and measuring his acts at the time he performed them; that is, made the payments of interest. At that time it was manifestly to the interest of the estate that he should have paid the accrued interest. Looking at it through the "hindsights," however, it is equally manifest that it saved money to the heirs and legatees, not the estate, not to have kept the debt in date by partial payments or otherwise.

I am aware that the courts have nothing to do with the merely moral actions of men, and also that the acts of limitations are good legal defenses, when well pleaded, and applied properly; but I have yet to find a case where one, to prevent a sacrifice of his property, prevails upon his creditor to grant him time on his performance of a part of his contract, and is permitted afterwards to rid himself of the entire obligation because of the favor extended to him. There are some things so inherently wrong that the doing of them cannot be protected by limitations.

It is contended that, in order for the administrator to possess authority to pay the installments of interest, he must have procured an order of the probate court, under section 198 of Sand. & H. Dig., to enable him lawfully to do so. We have seen that he had no money in his hands with which to redeem, and, without the money in hand or in sight, he had no right to ask the court for an order to redeem. (An order would be necessarily of such a nature in terms as he could not comply with). It is also useless to ask an order to sell the equity of redemption; for, having no sufficient means, he could not be relieved by bringing on himself the burden of a forced sale in this way. Besides, the statute after all is

manifestly only cumulative, as it provides a mode of doing a duty which is only cumulative of a right and duty already existing, and inherent in the very nature of the office of administrator. Had there never been any such statute, an administrator lawfully in charge of an estate would have the right to redeem the property of an estate when such redemption would be for the benefit of the same, or its creditors, by payment, if he had sufficient funds on hand, or by foreclosure and sale thereunder to pay off the incumbrance, and to receive the balance over, as the value of the equity of redemption. Without a statute on the subject, he would redeem on his own motion, running the risk of the redemption turning out to be for the interest of the creditors or the estate or not. But whether or not the redemption was for the benefit of the estate could not be determined upon the probable contingency of the running of the statute of limitations, so as to create the statute bar in the future; for, if that were in contemplation, the administrator should refuse to pay at all, and thus put the incumbrancer on notice of what to expect. In such case it is presumed the latter would foreclose, and subject the property to forced sale, with all its consequences to the estate and its beneficiaries, without means to purchase or redeem.

The statute, while cumulative, as I have said, yet has this advantage to the administrator: If he is able to redeem, and does redeem, under the orders of the probate court, as in the statute provided, he will not be responsible to the estate or its creditors for any lack of the property realizing enough to repay the redemption money. Furthermore, the order to redeem, if essential at all, need not be obtained before the money is paid or redemption accomplished. Money paid to accomplish that end will be approved as a credit to the administrator by the probate court, if found to have been for the benefit of the estate, and such approval will stand as good as if a previous order had been made. On this identical subject, this court, in *Byers* v. *Stevenson*, 42 Ark. 559, said: "The claim never having been proved against the estate, the executor properly had nothing to do with it. The probate court might, indeed, upon the applica-

tion of any person interested in the estate, have ordered him to relieve the property from the incumbrance, if funds were in his hands available for that purpose;" citing the statute, Sand. & H. Dig., § 198, which is the very section which appellants say should have been followed in order to confer upon the administrator the authority to redeem. Continuing, this court said: "And it might well have sanctioned the payments made by him as beneficial to the estate, and not injurious to the creditors. But it refused to allow credit for the sum, etc." There can be nothing plainer than this language in the foregoing. The probate court might well have sanctioned the payment, and allowed credit therefor, and the administrator's act in making the payment would have thus been made valid and authoritative; and that, of course, would have carried with it the power to bind the estate by such payments in all respects as the same had been made by the deceased in his lifetime.

With the facts before us, we can not well see the necessity of an administration upon the Hewitt estate in this state, unless it was to preserve this very same property. The Reeve matter seems to have been useless.

I think, for the foregoing reason, as well as for some very cogent ones in addition, assigned by the counsel for appellees, the decree should have been affirmed in the first instance, and that the motion for a new hearing should be granted.

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SPRINGFIELD FIRE & MARINE INSURANCE COMPANY *v.* HAMBY.

Opinion delivered January 15, 1898.

JUDGMENT ENTRY—FINDINGS OF FACT.—Where a case is tried before the judge without a jury, the special findings of fact upon which the conclusions of law are based are not a necessary part of the judgment entry. (Page 17.)

JUDGMENT—GENERAL AND SPECIAL FINDINGS.—A judgment may be supported by a general finding, though it refers to a special finding of facts not set out in the judgment entry. (Page 18.)

Appeal from Nevada Circuit Court.

RUFUS D. HEARN, Judge.

Morgan & Thompson and *Scott & Jones*, for appellant.

The court erred in refusing to amend the record entry of the judgment, so as to show the findings of fact on which it was based. If such recital of facts appeared, and the judgment was not supported thereby, it could be corrected on appeal, without motion for new trial or bill of exceptions. 46 Ark. 18; 31 S. W. 140; 26 Ark. 536; 26 Ark. 662; 55 Ark. 334. The court below had the power to make the amendment asked. 40 Ark. 224; 53 Ark. 250; 59 Ark. 54; 134 U. S. 136–143 *et seq.;* Freeman on Judg. §§ 71 and 72; *ib.* §§ 2, 75 76, 77. Anything which is properly a part of the record, if omitted, can be inserted by amendment. 2 Sawyer (U. S. C. C.) 445; 2 Phillips, Evid. 134 (*156); 6 C. & P. 101. Under our code permitting the judge to try issues of fact, such findings take the place of the verdict of the jury, and are entitled to the same place in the record. 95 U. S. 117; 120 U. S. 641; 33 Ark. 97; 25 Ark. 562; 2 Ark. 14; 55 Ark. 354. The mere recital of the judge's special findings in the judgment entry brings such findings into the record without a bill of exceptions. 46 Ark. 18; 31 S. W. 740; 26 Ark. 354; 120 U. S. 20; 95 U. S. 117. The recital of the judge's findings in the record should be true and correct. 139 U. S. 222; When they are special, a general finding should not be recited. That such findings may be made part of the record otherwise than by order of court or bill of exceptions, see: 26 Ark. 536; *ib.* 662; 46 Ark. 18; 95 U. S. 117; 53 Ark. 250; 55 Ark. 354; S. C. 18 S. W. 573. Assignment of a policy as collateral security is such an assignment as renders it void. 67 Pa. St. 373, 375–378; May on Ins. § 380. The violation of the stipulation as to occupancy avoided the policy. 3 N. W. 500; 43 N. J. L. 468; May on Ins. 249e; 9 Lea (Tenn.), 507; 87 Tex. 229; 27 S. W. 122; 50 Conn. 420; 42 Ohio St. 519; 47 N. W. 350; 5 South. 768; 3 N. W. 500; 39 N. W. 87; 19 Ill. App. 70; 51 Tex. 89; 90 Pa. St. 277; 124 Ind. 132; 19 Am. St. 77.

C. C. Hamby, for appellees.

The court properly refused to make the agreed statement

of facts a part of the record by a *nunc pro tunc* order. (1) It is not proper to insert something in the record, by order *nunc pro tunc*, which was never a part of the record, as intended by the court. Freeman, Judg. § 68; 53 Ark. 250; 51 Ark. 231. (2) Nor is it proper to so insert any thing which is not, as of course, a part of the record proper. Authorities *supra*. The agreed statement of facts does not fall within this class. 2 Ark. 14; 36 Ark. 491; 59 Ark. 178; 55 Ark. 354; 2 Th. Trials, § 2781; Freeman, Judg., 3d Ed. § 2; 16 Pet. (U. S.) 176; 60 Ark. 250; 21 Ark. 399; 21 Ark. 404. No special findings were asked, no exceptions saved, and none are before this court. 34 Ark. 524; 59 Ark. 178. Courts will try to construe insurance policies so as to prevent forfeitures (10 Am. St. Rep. 821; 1 May, Ins. § 174–177), and so as to effectuate the meaning and intention of the parties. 72 N. Y. 117; 103 Mo. 59; 54 Ark. 376. The pledging of the policy as collateral was not an assignment, within the meaning of the clause in the policy avoiding same for assignment. 53 Am. Rep. 202; 27 Mo. 311; 32 Md. 421. Nor did the temporary vacancy, pending the moving in of a new tenant, avoid the policy. The insertion of an agreement that the house shall be occupied by tenants implies that the necessary time shall be allowed to make a change of tenants when desirable. 76 Wis. 269; 59 N. W. 700; 38 Neb. 146; 23 Atl. 718; 59 N. W. 17; 81 N. Y. 184; 29 N. E. 847; 63 Hun, 82; 17 N. Y. Supp. 858; 8 Atl. 424; 40 Am. Rep. 70; 44 N. W. 140–141; 72 Mich. 657; 27 Am. & Eng. Enc. Law, p. 29; 34 S. W. 395; 23 Atl. 718; 59 N. W. 17; 70 Iowa, 477.

RIDDICK, J. This is an action on a fire insurance policy to recover the value of a dwelling house insured, which had been destroyed by fire. The case was submitted to the circuit judge upon an agreed statement of facts, and he took the matter under consideration. He afterwards decided in favor of plaintiffs, and gave judgment against defendant for the sum of $900, and it appealed. Appellant was not present at the time judgment was rendered, and no exceptions were saved or motion for new trial made before the final adjournment of the term.

Afterwards the appellant filed a motion to amend the judgment entry so as to include the findings of fact made by

the circuit judge, and to make said findings a part of the judgment entry. When this motion was heard at the subsequent term, the circuit court made some corrections in the judgment entry, but refused to incorporate therein the special findings of fact made by him and upon which the judgment was based. The contention here is that it was error for the court to refuse to incorporate his special findings or conclusions of fact in the judgment entry, and whether or not this contention is sound is the question we are asked to determine.

After consideration thereof, we are of the opinion that this contention cannot be sustained. The cases from other courts cited by counsel for appellant, as we understand them, do not hold that the special findings of fact should be included in the judgment entry. Some of the courts hold that such findings, when signed by the judge and filed with the clerk, become a part of the record of the case, and may be considered without a bill of exceptions. *Seibert* v. *Minneapolis & St. L. R. Co.*, 58 Minn. 72; *Nobis* v. *Pollock*, 53 Hun (N. Y.), 441; *Taylor* v. *Keeler*, 51 Conn. 399; *Matthews* v. *Goodrich*, 102 Ind. 557; *Allen* v. *Bank*, 120 U. S. 20.

In the case of *Ins. Co.* v. *Boon*, 95 U. S. 117, cited by counsel for appellant, it was held that the special findings could, in certain cases, be reduced to writing, signed by the judge, and by a *nunc pro tunc* order made part of the record, at a term subsequent to the one at which the judgment was rendered.

We do not understand, from the opinion in this case, nor indeed from any of the cases cited by counsel on this point, that it was decided that the special findings should be incorporated in the judgment, but only that such findings should be signed by the presiding judge, and filed and made a part of the record, and that this might be done at a term subsequent to the judgment. There are many things properly considered and treated as a part of the record which have no place in the judgment entry, and to hold that such findings should be made a part of the record is very different from holding that they should be incorporated in the judgment entry. In this state, judging from the reported cases, the usual method of making such findings a part of the record has been by a bill of excep-

tions, or by inserting them in the judgment entry, and a casual reading of some of these cases might lead to the inference that one or the other of these methods should be adopted. *Bradley* v. *Harkey*, 59 Ark. 178.

There are other cases which hold that an agreed statement of facts or a finding of facts by the court may, when filed, be made a part of the record by an order of the court to that effect sufficiently definite to render its identification beyond question. *Ashley* v. *Stoddard*, 26 Ark. 653; *Boyd* v. *Carroll*, 30 *id.* 527; *Lawson* v. *Hayden*, 13 *id.* 316.

When read in the light of the circumstances upon which they were based, there is no real conflict between these decisions of our own court. Now, if the special findings of fact made in this case had been filed, and then by an order of the court identified and made a part of the record, we could have considered such findings. But they were neither signed nor filed nor identified and made part of the record by an order of the court. It is true that appellants asked that they be incorporated in the judgment entry, but this court has several times held that findings of fact may be reduced to writing after judgment. *Nathan* v. *Sloan*, 34 Ark. 524; *Apperson* v. *Stewart*, 27 *id.* 619. It follows from this ruling, we think, that it is not necessary to incorporate the findings of fact in the judgment entry.

It is said that the court could not make both a special finding of facts and a general finding in favor of plaintiffs, and that, without the special finding of facts, there is nothing to support the judgment in this case. We do not concur in this contention. The general finding recited in the judgment is only a statement of the court's conclusion that, upon the law and facts found, the judgment should be in favor of plaintiffs. Our statute expressly provides that in any case in which a jury renders a general verdict they may be required to find specially upon particular questions of fact (Sand. & H. Dig. § 5831); and we see no reason, when a case is tried before the judge without a jury, why he may not, in addition to his special finding of facts, state his general finding or conclusion in favor of either plaintiff or defendant. And such a general finding is sufficient to support the judgment when, as in this case, neither

the evidence nor the special findings of facts are properly brought before us for consideration. A finding of that kind would probably be implied from the judgment, even if not stated therein.

The appellant claims that the court adopted the agreed statement of facts made by the parties in this case as his special findings of fact. We have discussed the questions presented upon the supposition that this contention was correct, but a glance at this statement will show that it is not such a finding as could properly be included in the judgment entry. It is lengthy, and contains a recital of evidential or probative facts, and is not a statement of the ultimate facts contemplated by the statute. When findings of facts are brief, it may not be inconvenient or improper to include them in the judgment entry; but they were not so in this case, and we think the circuit court properly refused to have them inserted therein. If we should concede that the reasons upon which the circuit judge based this refusal were not sound, it would be a matter of no importance, for his conclusion was, we think, correct. As the circuit court was not asked to make his findings a part of the record in any other way than by inserting them in the judgment entry, we must hold that his refusal to do so was not error. There being nothing before us to show error in the judgment of the circuit court, the same is affirmed.

BUNN, C. J., (dissenting). This case goes off on a question of practice, and I dissent from the opinion of the court on that question.

The language of our Code of Civil Practice (section 5837, Sand. & H. Dig.) is as follows, to-wit: "Upon trials of questions of fact by the court, he shall state in writing the conclusions of fact found, separately from the conclusions of law."

It must be confessed that, were it not for the interpretation of this language given in a long and unbroken line of decisions, the same would appear to be very ambiguous. But these adjudications establish the fact that a statement of the conclusions of fact, as here used, means the same as is commonly known as a special finding of fact, in contradistinction to a general finding of fact, and this idea is emphasized by the expression, "separately from the conclusions of law." A concise state-

ment of the principle, with numerous references and explanatory notes, is to be found in the Encyclopedia of Pleading and Practice, vol. 8, pp. 932 *et seq.*, under the heading "Findings of Court." In order that it may be understood what are the special findings of fact, and how full they are required to be in the court's essential statement of the same, it may be well to say what the courts therein referred to say on the subject, namely: "A special finding is a statement of the ultimate facts on which the law must determine the rights of the parties." Anderson's Law Dictionary. In *Norris* v. *Jackson*, 9 Wall. 127, Mr. Justice Miller in delivering the opinion of the court, said: "This special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest."

This finding of fact by the court is considered in somewhat the same light as is the special verdict of the jury, and the question there is whether the facts thus found require a verdict for the plaintiff or defendant. That is to say, the statement should be full enough that the court can determine the sufficiency of the facts therein stated to sustain the verdict rendered for the plaintiff or defendant, as the case may be. The same rule is applicable to findings of fact by the court, when trying a case as a jury, so that the appellate or reviewing court can determine from the court's statement of facts whether or not its judgment thereon is sustained by the facts.

Having thus arrived at the true technical meaning of the language of our code on the subject, our next inquiry is, whether this statement of facts is mandatory upon the trial court, or is to be made only when requested by one or both of the parties, or may be made or not at the pleasure of the trial court? In Kentucky and other states where the code provision is different from ours, the court is required to make the statement of facts only when requested to do so by one or both of the parties, but it is useful to us to hear what the court of appeals of that state has to say in construing their own code provi-

sion. In *Owensboro* v. *Wier*, 95 Ky. 158, the court said: "But, say the appellees with earnestness, there was no statement by the court of its conclusions of fact found, separately from its conclusions of law." Section 332 of the civil code provides that 'upon trials of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally, for plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found, separately from the conclusions of law.'" The difference between the Kentucky code and our code on the subject is, in Kentucky the court must make the statement of its findings only when asked to do so by one of the parties, while with us there is no such conditional requirement, but the language of our court imports the same absolutely as does the language of the Kentucky code, after the court has been requested by one of the parties to make the statement of facts; and, upon this request being made, the requirement becomes mandatory upon the court (*Briggs* v. *Eggan*, 17 Kas. 590; *Major* v. *Major*, 2 Kas. 337; *Ulrich* v. *Ulrich*, 8 Kas. 402; *St. Louis, etc. Ry. Co.* v. *Piper*, 13 Kas. 505; *Gest* v. *Kenner*, 7 Ohio St. 75; *Cleveland, etc. Ry.* v. *Johnson*, 10 Ohio St. 591; *Thompson* v. *Russell*, 1 Oklahoma, 227); and a judgment will be reversed for a refusal to grant such right (*Evans* v. *Kappes*, 10 Iowa, 586; *Stansell* v. *Corning*, 21 Mich. 242; *Ogden* v. *Glidden*, 9 Wis. 46). The rule in Kentucky is also the rule in Indiana, Iowa, Kansas, Michigan, Tennessee and Wisconsin, and perhaps some other states.

In states with code provision like ours, a failure of the court to make a separate statement in the findings is regarded as reversible error. *Emeric* v. *Alvarado*, 64 Cal. 603; *Burger* v. *Baker*, 4 Abb. Practice Reports, 11; *Harris* v. *Hay*, 111 Penn. St. 564.

In some cases special findings are said to be unnecessary, and among these instances is named that of a trial upon an agreed statement of facts; but in this last instance the broad statement is misleading, for, as is said in *Laveaga* v. *Wise*, 13 Nev. 296: "When the statement and recitals in the judgment

show that there was no trial of any issue of fact, that no findings of fact were filed, and that the facts were settled by stipulation, the pleadings and stipulation are held to stand in the place of the findings, and authorize the court to consider the question whether or not the judgment is supported by the facts agreed upon." So, it seems that an agreed statement of facts by the parties does not excuse the court from the duty of stating his findings, but only relieves him of the burden of making another statement of facts than that made by the parties, which he is, in such cases, required to use in the place of his own statement, if he does not choose to make a statement for himself. In South Carolina this requirement of a statement of facts is not mandatory, but that is the only state in which it is not, in one way or another.

The constitution of this state of 1868 made it expressly mandatory upon the judges trying cases, but that provision was left out (not repealed) by the adoption of the constitution of 1874. But the code provision on the subject, made to conform to the provision of the constitution of 1868, is still retained.

It is evident, I think, from the authorities, and they are too numerous to even cite, that the statement of facts is mandatory upon the judges trying cases, sitting as juries. But this does not mean that the party aggrieved by the decision may not take his bill of exceptions, including a fuller statement of the evidence than is given by the court in its statement of the facts, and appeal; nor does it mean that the aggrieved party is precluded from taking his bill of exceptions, where the court makes no findings at all. But all that is meant to be said, and all that is necessary to be said here, is that it is the mandate of the law that the trial judge should have made and filed as part of the record his special findings of fact, and, neglecting to do this, he should have remedied the error by a favorable response to the petition for the *nunc pro tunc* order, for that is just what the court said he could and should do in the case of *Nathan* v. *Sloan*, 34 Ark. 524. And in case he would not or could not do this, where applicant is at no fault, as in this case, I think the judgment should be reversed and set aside, as having nothing upon which a judgment could be based; following the rule laid down in Pennsyl-

vania. *Harris* v. *Hay*, *supra; Sweigard* v. *Wilson*, 106 Penn. 213; *Commonwealth* v. *Equitable Beneficial Association*, 137 Pa. St. 412.

The Code of Pleading and Practice had for its principal object a simplifying of the system of judicial procedure, and one of these reforms, in my opinion, consisted in narrowing down as much as possible the uses and necessity of bills of exceptions; and to accomplish that end it becomes necessary to make as many things matters of record primarily as possible. In trials before juries, bills of exception, in the very nature of things, are essential to bring up the evidence and make it a part of the record, and to make part of the record in each case many things that would incumber the record proper; but it is a troublesome, cumbersome and unsatisfactory method at best, and a due consideration for the provisions of the code, and a more generous construction and application, I am sure, would greatly simplify things, and be more satisfactory.

I am aware that this court has said that the only way to bring an agreed statement of facts before this court is by bill of exceptions. That is true, if the trial court does not adopt it as its own finding of fact, but it should do the latter or make a finding of its own.

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MARKLE *v.* STACKHOUSE.

Opinion delivered January 29, 1898.

FIXTURE—SAW MILL.—A saw mill erected by a vendee on land subject to a vendor's lien becomes a fixture, and subject to such lien, where the manner of its annexation to the soil, and its adaptation to the use to which the soil is devoted, clearly establish that it was erected with the intention that it should be a permanent accession.

Appeal from Woodruff Circuit Court in Chancery.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

This was originally a suit at law aided by attachment, by the plaintiffs, the Stackhouse Brothers, against the defendant, the Woodruff Land and Timber Company. Under the writ of attachment, a certain saw-mill was levied upon, whereupon the intervener, S. M. Markle, filed an intervening petition, claiming that the lien of the attachment was subject to a vendor's lien and judgment thereon in his favor, and praying that the cause be transferred to the equity side of the court, which was accordingly done, the Woodruff Land & Timber Company having withdrawn its answer, and judgment having been entered against it.

In September, 1893, Markle sold to the Woodruff Land & Timber Company some seven sections of land in Woodruff and Cross counties, Arkansas, reserving a lien on the face of the conveyance for $24,150 of the purchase price. In February, 1895, he obtained a judgment against the Woodruff Land & Timber Company for so much of said indebtedness as had then matured, and a decree that it and the unmatured iudebtedness was a lien upon said real estate. Later the said real estate was sold under the said judgment and decree, and Markle bought it in, and obtained a deed therefor. While the Woodruff Land & Timber Company was in possession of the land, they erected thereon a saw mill, the subject of the present controversy.

The plaintiff brought this action against the Woodruff Company for breach of contract, suing out a writ of attachment in aid thereof, which was levied upon the said saw mill. The attachment was sustained, and judgment against the Woodruff Company had for $2,400.

The controversy is between the Stackhouse Brothers and Markle, the question being whether or not the vendor's lien established by the decree attaches to the saw mill. If it does attach, it is paramount to the lien of the attachment. The decree established a lien against the real estate, and the question is, therefore, whether or not the mill became a part of the realty. The case was submitted to the court on depositions. On the evidence the court found that the saw mill plant was not subject to the lien of the decree in favor of Markle, the inter-

vener, as vendor, and dismissed the intervening petition by the decree set forth above.

Whereupon the intervener prayed this appeal, which was granted.

Noble & Shields and *Wm. G. Pettus*, for appellant; *Rose, Hemingway & Rose*, of counsel.

The rules for determining whether or not a particular thing is a fixture are construed, as between vendor and vendee, most liberally for the vendee. 8 Am. & Eng. Enc. Law, 55; 22 N. H. 538. As between mortgage and mortgagee, the rules are construed in the same manner, with perhaps a somewhat more liberal application in favor of the mortgagee. 80 Ala. 103; 3 Barb. 299; Ewell, Fixtures, p. 274; 8 Am. & Eng. Enc. Law, (1 Ed.) 53; 1 Jones Mortg. § 428. Annexations made after the execution of a mortgage are subject to same rule as those made before. 8 Am. & Eng. Enc. Law, 50; Ewell, Fixtures, 274; Washburn, Real Prop. (5 Ed.) 25; 80 Ala. 103; Jones, Mortg. § 436; 64 Ark. 502. The question whether or not a particular thing has become a fixture is to be determined by the following tests: (1) Actual annexation to the realty or to something appurtenant thereto; (2) appropriateness to the use or purpose to which that part of the realty with which it is connected has been applied; (3) the intention of the party making the annexation to make a permanent accession to a freehold. 80 Ala. 105; 24 N. J. Eq. 260; 1 O. St. 511; 63 Ark. 625. The intention of the party making the annexation may be inferred: (1) From the nature of the article affixed; (2) from the relation and situation of the party making the annexation; (3) from the structure and mode of annexation; (4) from the purpose and use for which the annexation is made. 1 O. St. 511; 8 Am. & Eng. Enc. Law, 43. Machinery which constitutes the motive power in a factory, and such as is necessary to its business, are fixtures. 67 Md. 44; 45 O. St. 289; 150 Mass. 519; 130 Mass. 511; 147 Mass. 500; 42 N. J. Eq. 218.

P. R. Andrews and *N. W. Norton*, for appellees.

There is nothing in the manner of annexation to indicate

any intention of permanency. The decision of fixture cases must depend largely on the peculiar circumstances of each case, as evidencing intent. Custom must also be looked to. 63 Ark. 625; 56 Ark. 55.

HUGHES, J., (after stating the facts.) It would not be profitable to set out the evidence. As we find the law to be, the main question in a case of this kind is, what was the intention of the party who had the structure erected? Did he intend it to be a permanent annexation to the soil, or was it erected with a view to its removal?

As evidence of what the intention was, the manner of its annexation to the soil, and the adaptation of the plant to the use or purpose to which that portion of the realty with which it is connected is appropriated, are circumstances that are to be considered, and "derive their chief value as evidence of such intention," as held in Ewell on Fixtures, p. 22; *Choate* v. *Kimball*, 56 Ark. 55; *Bemis* v. *First National Bank*, 63 Ark. 629; *Monticello Bank* v. *Sweet*, 64 Ark. 502.

There is considerable conflict in the evidence as to matters going to show with what intention the mill was erected, and there was some testimony from which it might be inferred that the mill was erected with a view to its removal.

But we are of the opinion that the manner of its substantial annexation to the soil, and its adaptation to the use or purpose to which that portion of the realty to which it was annexed was devoted, taken with the other evidence in the case, furnish a clear preponderance of evidence that the mill was erected with the intention that it should be permanent, and that it was a part of the realty, and passed to the intervener by purchase of the land upon which it was situate, or was subject to his vendor's lien for the purchase money of the land.

Wherefore the decree of the circuit court is reversed, with instructions to enter a decree for the intervener in accordance herewith.

MR. JUSTICE BATTLE dissents.

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THOMAS MANUFACTURING COMPANY *v.* PRATHER.

Opinion delivered January 29, 1898.

1. CONTRACT—RIGHT OF THIRD PARTY TO SUE.—An agreement by an employer to furnish medical attendance to his employee in case of accident was not a contract made for the benefit of the physician who, at the employee's instance, subsequently rendered professional services to him when injured, nor can such physician sue thereon. (Page 29.)
2. SAME—WHEN NOT IMPLIED.—The fact that an employer had agreed to furnish medical attendance to an employee in case of accident, and that the employer knew and approved of the calling in of a physician by the employee when injured, is not sufficient to establish an implied contract on the part of the employer to pay for such physician's services, where the physician, at the time he was called in, looked to the employee, and not to the employer, for remuneration. (Page 31.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

Cockrill & Cockrill, for appellant.

There is no evidence that appellant made or ratified the contract sued on. Appellee can not maintain an action upon the contract sued on. To enable one not a party to a contract to sue thereon, the contract must be made for his benefit, as its object, and he must be the party intended to be benefited. 68 N. Y. 355; 72 Fed. 758, 764; 93 U. S. 149; 98 U. S. 123; 23 Fla. 160; 36 Kas. 246; 73 Cal. 522; 80 N. Y. 219; 69 N. Y. 280; 31 Minn. 254; 18 Fed. 520; 76 Fed. 130; 39 N. E. 601; 38 Pac. 620. The contract sued on was of no binding force at the time of the injury to the employee. The employee (Brown) executed a release from all liability to the appellee. That bars this action. A release or rescission by the original parties to a contract for the benefit of a third party destroys such beneficiary's right of action. Beach, Contracts, § 201; Lawson, Contracts, § 113 d; 25 O. St. 378; 47 Ind. 211; 30 Ind. 112; 80 Ind. 434; 30 N. Y. 432; 114 N. Y. 167; 56 Iowa, 349, 353; 80 Ky. 409, 417; 38 O. St. 543, 554; Wharton, Cont. § 821, and cases cited; Beach, Cont. § 493. There was

no consideration for the contract sued on. The payment of the weekly assessment was, in reality, his share of the premium on the accident policy. The items in appellant's statement made a sum total of $271, and the verdict for $300 was unsupported by evidence.

W. S. & Farrar L. McCain, for appellee.

Appellants made the contract sued on through an authorized agent; and the subsequent conduct of the officers of appellant company is such as to amount to a ratification, if the contract was unauthorized. Appellee is entitled to an action against appellant under the contract made for his benefit. 31 Ark. 411; Brandt, Suretyship, § 24; 48 Ark. 355; 36 Ark. 561; 39 Ark. 173; 48 Ark. 261; Jones, Mortg. § 748–9; 43 N. Y. 399; 64 N. Y. 117; 127 N. Y. 639; 93 U. S. 149; 20 Neb. 223; 24 Cent. L. J. 110; 36 N. J. Law, 143; 35 Wis. 171; 51 Ark. 210; 4 Wend. 419; 85 N. Y. 258; 46 Ark. 132. If one primarily bound engages, on a collateral consideration, with another that such other person shall assume his duties toward the one to whom he owes them, such collateral consideration cannot be withdrawn without the consent of the beneficiary of the contract. Brandt, Suretyship, §§ 282–5; 72 N. Y. 385; 112 Ill. 91; 43 Wis. 319; 15 Am. & Eng. Enc. Law, 841; 1 Jones, Mortg. § 764; Thomas, Mortg. § 602; Wiltsie, Mortg. Foreclosures, § 282; Kerr's Supp. to Wiltsie, § 230. Acceptance of a contract for one's benefit is presumed, where no burdens are imposed. 32 Ark. 399; 60 Ark. 26; *ib.* 503.

WOOD, J. Appellee, who was a physician and surgeon, sued appellant for $300, the alleged value of professional services rendered by him to one Brown, an employee of appellant. Appellee alleges that appellant, for a valuable consideration, entered into a contract with Brown, whereby it was to furnish him medical attendance in case of an accidental injury while engaged in appellant's business. That part of the contract which appellee claims was for his benefit, and upon which he bases his right to recover, is as follows: "This is to certify that we are insured in a large and reliable insurance company against accidents resulting in bodily injury or death to J. R.

Brown and other employees, so that we can agree that the above-named employee shall receive from us, in case of an accident received by him when actively engaged in our business, the following: (1) In case of an accidental injury a sum not exceeding," etc., * * * "*and furnish medical attendance.*" The answer denied liability.

The court found the following facts, so far as may be necessary to set them out, to-wit: "That the defendant company entered into a contract by which it, in case of accident, while in its employment, to one Brown, its employee, would, among other things, furnish him a physician; that on the 14th day of September, 1892, and while said contract was in force, said Brown was injured while in defendant's employment; that the plaintiff, a physician, was as such called in by Brown, and waited on him, and rendered him the service sued for, extending from September 16, 1892, to April 1, 1893, to the value of $300; that this employment of plaintiff as physician was known to defendant company, and by it through its officers fully approved." Appellant asked the court to find as a fact that "there was no agreement made by the Thomas Manufacturing Company with Brown to pay Dr. Prather, or any other physician, for medical attendance upon said Brown," which the court refused. And appellant asked the court to declare the following as the law: "A contract entered into upon the terms proposed in the card aforesaid would not inure to the benefit of the plaintiff, and if the court finds that the defendant made, and Brown accepted, the contract there proposed, the plaintiff cannot recover;" which the court refused, holding that "the contract entered into by defendant company with Brown, and services rendered by plaintiff, with the assent and approval of defendant company, created a liability to plaintiff." Exceptions to the ruling of the court upon these points present the only question we need consider, to-wit: *Was the contract for appellee's benefit?*

This court long ago ruled, in line with the doctrine which generally obtains in this country, that where a promise is made to one upon a sufficient consideration, for the benefit of another, the beneficiary may sue the promisor for a breach of his promise. *Chamblee* v. *McKenzie*, 31 Ark. 155; *Talbot* v.

Wilkins, *ib.* 411; *Hecht* v. *Caughron*, 46 *ib.* 132. This doctrine operates as an exception to the elementary rule of law that a stranger to a simple contract, from whom no consideration moves, can not sue upon it. *National Bank* v. *Grand Lodge*, 98 U. S. 123; *Mellen* v. *Whipple*, 1 Gray (Mass.), 317; *Greenwood* v. *Sheldon*, 31 Minn. 254. Therefore it should be applied cautiously, and restricted to cases coming clearly within its compass. The following prerequisites for the application of the doctrine were announced by the court of appeals of New York in *Vrooman* v. *Turner*, 69 N. Y. 280, viz.: "There must be—First, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two,—the promisee and the party to be benefited,—and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally."

In *Durnherr* v. *Rau*, 135 N. Y. 222, the court say: "It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance, and so within the contemplation of the parties." See, also, *American Exch. Bank* v. *Northern Pac. R. Co.*, 76 Fed. 130.

"Of course the name of the person to be benefited by the contract need not be given, if he is otherwise sufficiently described or designated. Indeed, he may be one of a class of persons, if the class is sufficiently described or designated." *Burton* v. *Larkin*, 36 Kas. 250.

Applying the foregoing principles to the contract under consideration, it is manifest, from the nature and terms of the contract, that neither the appellee individually, nor any of a class to which he belonged, was intended to be considered as primarily the party in interest. *Austin* v. *Seligman*, 18 Fed. 523; *Simson* v. *Brown*, 68 N. Y. 355, 361, 362; *Wright* v. *Terry*, 23 Fla. 160; *Greenwood* v. *Sheldon*, 31 Minn. 254; *Washburn* v. *Investment Co.*, 38 Pac. 620.

The clause, "we can furnish medical attendance," was solely for the benefit of Brown, and the purpose of making it upon the part of appellant was doubtless to induce him to

enter its service upon terms that would, to it, be advantageous. The most that can be said about it, so far as any physician was concerned, is that, upon the happening of the contingency which it contemplated,—the accidental injury,—the performance of the contract would result incidentally to his benefit. This would not entitle him to sue the company. *Chung Kee* v. *Davidson*, 73 Cal. 522.

Moreover, the contract here was "to furnish medical attendance," not to pay the wages or for the services of a physician whom Brown might employ. According to the express terms of the contract, the company did not surrender to Brown the right to bind it by a contract he might make with a physician, or constitute him its agent to employ a physician, and hence the company is not bound, according to the written contract, for the services of a physician whom Brown employed. But the court found "that this employment of plaintiff as physician was known to defendant company, and by it through its officers fully approved." This might be sufficient, in a suit brought by Brown against the company to recover of it the sum which he had paid his physician, to estop the company from denying that it had waived its right to furnish its own physician, provided the company knew that the physician was called by Brown in reliance upon his contract for it "to furnish him medical attendance." But this finding cannot avail appellee, for he is suing upon an express written contract, which, as we have seen, was not for his benefit.

It could not avail him upon any implied contract of the company to pay him for his services to Brown, for other facts show that there was no such contract. Appellee was employed by Brown, and in his testimony he says: "As to looking to any one for payment, of that I cannot say that I looked to any one but Brown. I did not look to the Thomas Manufacturing Company when I first went. I looked to the Thomas Manufacturing Company in general connection with the other company. When the people of the Thomas Manufacturing Company intimated to me that the company would pay, I did not feel that I would look to them especially. * * * I would have rendered the services to Brown that I did render regard-

less of whether the Thomas Manufacturing Company or Brown would have been responsible."

In *Cunney* v. *Railroad Co.*, 63 Cal. 501, the plaintiff, a physician, was, at the instance and request of certain parties wounded by a railroad accident, attending them, when the president of the railroad company, in the absence of the physician, told the wounded persons to employ whatever physician they chose, and the company would pay the bills. The physician was advised of this, but he testified that he attended the wounded until their recovery in pursuance of the original calling. It was held, in an action against the company upon contract for services performed, that there was no mutuality by contract between them, and no liability attached to the railroad company for the services performed by the plaintiff to the persons who employed them. Note to *Austin* v. *Seligman*, 18 Fed. 525.

As there could be no recovery by appellee upon the contract sued on, the other questions pass out.

Reversed and dismissed.

BUNN, C. J., (dissenting.) This is not a case in which Prather is suing the Thomas Manufacturing Company on a mere verbal or constructive obligation to pay him what Brown, a third party, one of the company's employees, owed him, for, if that were the case, and that merely, there would be no case in court, as it would come under the statute of frauds, which provides that, for one to be held for the debt of another, he must be held on some writing to that effect signed by himself or authorized by him to be signed for him.

This is a case under the equity doctrine that where two or more persons arrange and contract to create a fund for the benefit of a third person, in consideration of services to be performed by him in the future, or for the payment of a debt owing or to be owing to him, this third person may sue the person legally bound as the custodian of the fund, or who is responsible for the same, to recover so much thereof as will pay for his service or satisfy his debt. This person need not be named in the contract under which the fund is created, but it is sufficient if he is a member of a class of persons referred to in the contract.

I cannot concur in the opinion of the court that Brown is the beneficiary contemplated under the equity rule, for Brown is one of the original parties who have engaged to raise the fund, and in fact is the only contributor to that fund. He is therefore not a third party at all, but Prather, in my view of the case, is the beneficiary under the equity rule. In one sense, such a contract or arrangement is made for the benefit of all the parties interested, but, in the sense of the equity doctrine, the beneficiary cannot be a party to the contract; for, in that case, he need not resort to this rule to assert and secure his rights.

But, the court having concluded that Prather is not the beneficiary referred to expressly or by implication, it is needless to discuss his rights under the equity doctrine.

I think the judgment should have been affirmed.

BANK OF BLACK ROCK *v.* DECKER.

Opinion delivered January 29, 1898.

MORTGAGE—POSSESSION—NOTICE.—A mortgagee of a pile of lumber who takes possession of it merely by walking around it, and leaves it in the mortgagor's lumber yard, without placing on it any notice or mark to indicate his ownership, has no such possession as will supply the place of record notice to purchasers from the mortgagor. (Page 36.)

Appeal from Independence Circuit Court.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

Action by Bank of Black Rock against George W. Decker for conversion of 100,000 feet of lumber. The facts briefly stated are as follows: The Heckert Lumber Company, a firm composed of Charles and John Heckert, were engaged in the business of sawing, manufacturing and shipping lumber at Black Rock, Arkansas. The bank agreed to loan, and did loan, this company certain sums of money. To secure payment of these sums of money, the company executed to the bank the

following instrument of writing, to-wit: "This agreement, made and entered into by and between the Heckart Lumber Co. and the Bank of Black Rock, witnesseth: That whereas, the Bank of Black Rock has this day agreed to advance to the Heckart Lumber Co. $7.50 per thousand feet on 100,000 feet of flooring strips, to be sawed and piled in the mill yard of Heckart Lumber Co.'s mill in Black Rock, Arkansas, on or before the 15th day of February, 1893, in consideration of which advancement, we, the Heckart Lumber Co., do hereby sell and deliver to the Bank of Black Rock said 100,000 feet of flooring strips, and we hereby anthorize the said bank to sell, at private or public sale without notice, said flooring strips, if at maturity the notes given for this money advanced on said flooring strips remain unpaid. In witness whereof we have hereunto set our hands, this 21st day of January, 1893. [Signed] Heckart Lumber Co., per John Heckart."

This writing was acknowledged before Jay J. Bryan, notary public. It was filed for record December 3, 1893, and recorded December 30, 1893.

After this instrument was executed, but before it was recorded or filed for record, the lumber company sold and delivered the property in controversy to the defendant, Decker, who disposed of it for his own use and benefit. The other facts appear in the opinion. There was a verdict and judgment in favor of defendant, Decker, from which the bank appealed.

John K. Gibson and *Phillips & Campbell*, for appellant.

The admission, as evidence, of the contract and bill of sale dated November 5, 1892, was prejudicial error. The burden of proof is on the one alleging that a bill of sale, absolute on its face, is, in fact, a mortgage. It was error for the court to refuse so to instruct the jury. 19 Ark. 278. Delivery by the vendor, in a conditional bill of sale, to the vendee of the property therein described gives such vendee a good title, although the instrument was not acknowledged or recorded. Possession by the vendor of the property after such a sale does not invalidate the sale. 52 Ark. 385. If an article described in a bill of sale is too bulky for manual delivery, the title and property therein will pass without any further delivery than

such bill of sale. 60 Ark. 615; 31 Ark. 163. Defendant had no lien under the contract sued on, because it was neither acknowledged or recorded. It was error to give the second, third and fourth instructions for appellee. It was error for the court to instruct the jury that the delivery of possession must be of such a character as to put third parties upon notice of the change of control. 7 Ark. 197; Jones, Chatt. Mort. §§ 182–187; 7 Ark. 269; 17 N. H. 286; 19 Ark. 597; 30 Wis. 81; 60 Ark. 615; 2 N. Y. C. L. Rep. 896; 8 Ark. 213; 62 Ark. 592; 35 Ark. 304. The evidence is not sufficient to sustain the verdict.

Charles Coffin and *Jos. M. Stayton*, for appellee.

Appellant did not object to the introduction into evidence of the contract of November 5, 1892, and it is now too late. 23 Ark. 131. It was within the discretion of the court to allow this and also the introduction of the bill of sale of the same date. 38 Ark. 498; 40 Ark. 511. It was the duty of the court to declare the character of the instrument. The court properly refused the second instruction asked by appellant, because there was no delivery, and also because defendant had a lien by virtue of his contract before mentioned. If the vendee of property permits his vendor to use and sell the property after his purchase of it, an innocent purchaser from such vendor is protected. The acknowledgment to the bill of sale is void because taken by one who was a stockholder, director and the cashier of the appellant bank. 54 Miss. 361; 53 *ib.* 331; 20 Me. 413; 13 Mich. 329; 2 Sand. Ch. 630; 1 Devlin, Deeds, § 476, p. 470; Martindale, Conveyancing, § 256, p. 215; 54 N. W. 435; 61 Ill. 307; Jones, Chatt. Mort. § 249; 20 S. W. 142; 43 Ark. 420. The bill of sale was intended as a mortgage, and was void as to appellee, because of this defective acknowledgment. Appellant is estopped to claim under the mortgage, because they concealed the transaction from appellee.

John K. Gibson and *Phillips & Campbell*, for appellant, in reply.

The motion for certiorari should be quashed. 33 Ark. 117; 54 Ark. 373; 53 Ark. 250; 33 Ark. 830; 38 Ark. 568;

36 Ark. 592. The officer who took the acknowledgment was not a party to the instrument. The party to the instrument was not the individual stockholder, but the corporation. 4 Ark. 304. An agent for one of the parties to an instrument may take an acknowledgment. 56 Ark. 484; 46 Ark. 302. Even if the acknowledgement is defective, it is cured by the act of February 27, 1893. Acts 1893, p. 66; 43 Ark. 420.

RIDDICK, J., (after stating the facts.) This is an action brought by the Bank of Black Rock against George W. Decker, in which the bank alleged that he had converted to his own use certain lumber owned by it. The lumber in question was at one time the property of the Heckart Lumber Company, a partnership firm, engaged in manufacturing and selling lumber at Black Rock, Arkansas. This firm borrowed money from the bank, and, in order to secure payment of the same, the firm, on the 21st of January, 1893, executed to the bank what the cashier of the bank terms a bill of sale for the lumber. The instrument in question is set out in the statement of facts, and we think that, in legal effect, it was only a mortgage.

A month or two after the execution of the mortgage to the bank, the lumber company sold this lumber to the appellee, Decker, and it was shipped in his name, and disposed of by him. The right of the bank to recover in this action rests upon the mortgage executed to it by the lumber company. This mortgage was not filed for record until in December, 1893, long after the lumber had been sold to Decker, and disposed of by him. The bank, to obviate the necessity of record notice to Decker, undertook to show that the lumber had been delivered to it before the sale to Decker, and was in its possession at the time Decker removed it. There is no conflict in the evidence on this point. The lumber was stacked in square piles upon the yard of the lumber company near other piles of lumber owned by the company. The cashier of the bank and John Heckart, a member of the lumber company, went to the lumber, and Heckart formally delivered possession of the lumber, and the cashier "took possession by walking around it." "I did not," he said, "scale it, or place any marks or notice on it to indicate our ownership, nor do anything but walk

around it." After this constructive delivery of the lumber, the bank exercised no further control over it. It was permitted to remain upon the yards of the company for several months, without notice or mark of any kind to indicate or show the claim of the bank, and apparently, if not actually, in the control and ownership of the lumber company. Afterwards it was sold by the lumber company to Decker, or shipped by them in his name, and the proceeds paid to him. Under these circumstances, we are of the opinion that the bank did not have such possession of the lumber as to supply the place of record notice to third parties. The bank should either have recorded its mortgage, and thus given notice of its lien, or it should have taken and retained actual possession of the lumber, in order that subsequent purchasers might not be misled. This was not done. As actual possession of the lumber was not taken and retained by the bank, the constructive delivery and possession taken by walking around the pile of lumber amounted to nothing, so far as the rights of subsequent purchasers were concerned. *Steele* v. *Benham*, 84 N. Y. 634; *Anderson* v. *Brenneman*, 44 Mich. 198; Jones, Chattel Mort. (4 Ed.), §§ 186, 187, and cases cited.

As the bank did not have possession of the lumber, and as its mortgage was not recorded until after the transfer to Decker, the mortgage did not affect him. The mortgage, as to him, was no lien upon the property, and the transfer of the lumber to him cut off all rights of the bank in such lumber. *Dodd* v. *Parker*, 40 Ark. 536; *Martin* v. *Ogden*, 41 *id.* 186.

Counsel for appellant have presented to us several interesting questions concerning the rulings of the presiding judge upon the trial in the circuit court, but it is not material to discuss or decide those questions. It is not denied that Decker purchased the lumber from the lumber company, and paid for it. He testified that he knew nothing of the bank's claim to the lumber until after his purchase. The undisputed facts, as we see them, show that, as against Decker, the bank had no lien, and no right of action. The circuit judge would have been justified in directing a verdict for him, and the judgment in his favor seems clearly in accordance with the law and evidence, and must be affirmed.

DESHAZO v. STATE.

Opinion delivered February 5, 1898.

CRIMINAL LAW—FORMER CONVICTION—Where, on a prosecution for selling liquor without license, there is evidence of two such sales, and the state does not elect on which sale it will ask a verdict, and the jury were not directed to confine their consideration to one of the sales, a conviction therein is a bar to a subsequent prosecution for either of the sales. (Page 39.)

Appeal from Boone Circuit Court.

BRICE B. HUDGINS, Judge.

E. G. Mitchell and *Carmichael & Seawel*, for appellant.

In a former trial for an offense similar to the one charged in the indictment, evidence was offered tending to prove the commission of the offense charged in the case at bar. The state did not elect which charge it would rely on, and the jury did not specify for which offense they convicted the defendant. Hence the plea of former conviction is effectual in a trial under the aforesaid second indictment. 43 Ark. 68; 43 Ark. 372. Any evidence given and not excluded by the court is to be considered by the jury. 9 Ark. 389; 43 Ark. 68. Conflicting instructions were given, and the jury left free to adopt either. This is error. 57 Ark. 208; 55 Ark. 393.

E. B. Kinsworthy, attorney general, for appellee.

The burden was on appellant to show that conviction on the former indictment was a bar to the later one. 43 Ark. 372; 48 Ark. 34; 34 Ark. 160. To sustain a plea of former conviction, the evidence of the facts charged in the second indictment must have been such as would have supported a conviction under the first. Clark's Crim. Pro. 396, and cases; 46 Ark. 141; 43 Ark. 68.

BUNN, C. J. This is an indictment for selling liquor without license, to which the defendant pleaded not guilty and former conviction. Defendant shows in his testimony that at

a previous term of the trial court he was tried and convicted on another indictment for a similar offense; that in the progress of the trial on that indictment evidence was adduced of two unlawful sales by him, and that the state made no election of which sale it would prosecute and ask a verdict at that trial, but that, on the contrary, without direction or request, they considered all the evidence in the case; and that it is impossible to say upon what evidence or for which sale defendant was convicted at said first trial; and that the second sale testified to in that trial is the same as he now stands indicted for having made.

If the defendant's plea is sustained by the facts, he should have been acquitted. But, as he was convicted, there must either be a want of evidence to sustain the verdict, or else the jury were improperly instructed.

The first instruction given by the court on its motion reads as follows, to-wit: "Gentlemen of the jury, the defendant is on trial, charged with the crime of selling liquor without license. He pleads not guilty and former conviction. Now, it you find that when the defendant was on trial at a former term of this court, on a similar charge to this one preferred against him, the witness Lewis testified to [another sale] and that said sale was relied on by the state in that case in connection with another sale for a conviction, you will acquit the defendant."

There seems to be some necessary words left out of this instruction, both in the transcript and the abstracts, which we include in brackets. This instruction, in effect, makes the plea of former conviction effectual only in case the state is shown to have relied on the evidence of the second sale—that for which defendant is now being tried—for conviction in the first case. That is not the law, for what the state may have relied on cannot affect the consideration of the jury in the least, unless, before they retired to consider of the verdict, the state had made its election, or the jury in some way were directed to confine their consideration to the other sale—that is, the other than that for which defendant was tried in this case. It being otherwise impossible to know for which sale the jury has made up and rendered its verdict of conviction, the instruction was erroneous. *State* v. *Nunnelly*, 43 Ark. 68

The second instruction given by the court on its own motion, although expressed in a different way, has in it a kindred error, and this error is not cured by the instruction given at the request of the defendant, which is a good instruction.

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

PORCH v. ARKANSAS MILLING COMPANY.

Opinion delivered February 5, 1898

1. EXEMPTIONS—PARTNERSHIP CHATTELS.—A partner cannot, while the partnership continues, claim as exempt to him personal property belonging to the firm, under the statute providing that the personal property of any resident of this state "in specific articles to be selected by such resident" shall be exempt from seizure, etc. (Sand. & H. Dig., § 3716). (Page 42.)
2. SAME—BURDEN OF PROOF—The burden of showing that certain property is exempt is upon the claimant. (Page 45.)

Appeal from Carroll Circuit Court in Chancery, Western District.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

The appellee recovered a judgment against the appellant, procured the issuance of an execution thereon, and had the same levied upon the individual interest of the appellant in the fixtures and furniture in a drug store, which were the partnership property of the appellant and J. H. Crook. The appellant notified the officer who levied the execution that the property levied upon was owned by himself and J. H. Crook jointly as partners. The constable who levied the execution had the property levied upon appraised by three persons under oath, as required by law, and gave the defendant, Crook, notice of the levy, and Crook served notice on the constable, in writing, claiming that the property levied upon was partnership property, and that he was the owner of one-half of the same. The

constable returned the execution, and stated in his return the facts, and returned with the execution his inventory and the appraisement of the property levied upon to the justice of the peace who had issued the execution.

The appellee filed his complaint in equity to subject the appellant's interest in the property to sale to satisfy his debt, and alleged that the appellant, Porch, owned no property in Arkansas, except his interest in the drug store, and that, after paying all the firm debts of Porch and Crook out of the firm assets, there would remain enough that the half interest of said Porch would equal or exceed the chattels levied on by the constable. A copy of the appraisement was attached to the complaint of appellee. These proceedings were had under sections 3060 to 3065, inclusive, of Sandels & Hill's Digest (title "Execution.") The appraisement of the property amounted to $2,045.24. The indebtedness of the partnership was ascertained to be $1,346.32.

The appellant, Porch, claimed his exemption in the residue of all the property, which was in excess of the partnership indebtedness,—stating that he was a married man, the head of a family, a resident of the State of Arkansas; that all of the personal property owned by him, including his interest in the property of said co-partnership, and all the moneys, goods, accounts, credits or effects of any kind do not exceed in value the sum of five hundred dollars. Wherefore he claimed that the same are exempt to him, under the laws of the State of Arkansas, and are not subject to sale under the execution of the plaintiff; and concluded with a prayer for supersedeas, and that the plaintiff's complaint be dismissed for want of equity, and for general relief.

Plaintiff filed the following demurrer to the answer of Porch:

"The plaintiff, by its attorney, comes and demurs to the separate answer of said defendant, J. S. Porch, and says: First, said answer is not sufficient in law to constitute a defense to this action; second, said answer does not state what personal property, nor all of it, that is owned by defendant Porch, and claimed as exempt from levy and sale; third, said answer does

not set out said claim of exemption in specific articles of personal property, as required by law."

The court sustained the demurrer, and Porch saved proper exceptions. He declined to plead further, and the court gave judgment against him for $113, interest and costs, and ordered that the interest of Porch in the drug store, which was valued at $2,045.25, less the firm debts of $1,346.32, be sold.

Defendant excepted, and prayed an appeal, which was granted.

O. W. Watkins, for appellant.

The levy of execution gives no lien superior to the right of the owner of personal property to claim such property as exempt. 23 Ark. 287; 33 Ark. 462; 46 Ark. 47; 54 Ark. 193. One of a co-partnership has a right to claim his exemptions out of the assets of the firm, if they be in excess of the firm liabilities. 37 N. Y. 350; Thompson, Homesteads and Exemptions, § 216; 44 Mich. 86; 68 Cal. 32; S. C. 45 Am. Rep. 233; 44 Mich. 86; S. C. 38 Am. Rep. 232; 60 Mich. 433; 61 Mich. 362; S. C. 1 Am. St. Rep. 589; 41 Ark. 94; 54 Ark. 9; 57 Am. St. Rep. 437. Exemption statutes are to be liberally construed. 38 Ark. 112; Thomp. Hom. & Ex., § 731.

Geo. C. Christian, for appellee.

An individual debtor cannot claim exemptions out of partnership assets. Thompson, Hom. & Ex. §§ 194, 196, 197, 198, 199; 101 Mass. 105; 9 Kas. 30; 1 Phil. Rep. 353; 39 Wis. 574; 26 O. St. 317; 44 Pa. St. 442; 3 Lea (Tenn.), 75; 46 Ark. 43; 64 Mo. 355; 3 Dillon, 290. One claiming exemptions must designate specifically the articles claimed. 48 Ark. 213; Sand. & H. Dig., § 3721. The burden of establishing an exemption right is on the one alleging it; and he must bring his claim clearly within the limits of the statutory exceptions. 52 Ark. 547; 36 Ark. 298; 43 Ark. 20; 33 Ark. 459–464; 62 Ark. 542; 55 Ark. 447.

HUGHES, J., (after stating the facts). The precise question in this case has not been decided in this court.

Following the decided weight of authority, it is held in *Richardson* v. *Adler*, 46 Ark. 43, that "the members of an in-

solvent firm are not entitled to the exemptions allowed by law, out of the partnership property, after it has been seized to satisfy the demands of the creditors of the firm." The court said: "The interest of each partner in the partnership assets is his portion of the residuum after all the liabilities of the firm are liquidated and discharged. Property belonging to the firm cannot be said to belong to either partner as his separate property. It is contingent and uncertain whether any of it will belong to him on the winding up of the business, and the settlement of his accounts with the firm. 'Joint property is deemed a trust fund, primarily to be applied to the discharge of partnership debts, against all persons not having a higher equity;'" citing *Pond* v. *Kimbal*, 101 Mass. 105; *Gaylord* v. *Imhoff*, 26 Ohio St. 317; *Giovanni* v. *First National Bank of Montgomery*, 55 Ala. 305; *in re Handlin*, 3 Dill. 290.

As affecting the question involved, the statute of Ohio exempting personal property is substantially like ours, which 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." Sand. & H. Dig., § 3716; Const. art. 9, §§ 1, 2.

In the case at bar the appellant filed no schedule claiming his exemption in specific articles.

In the opinion in *Gaylord* v. *Imhoff*, the Ohio Supreme Court said: "Looking alone to the language of the section above quoted, we find nothing to justify the inference that the legislature, in passing it, was intending to provide for other than individual debtors, and for the exemption of their individual property from sale on execution; and, when construed in connection with the law relating to partnerships, as it had always stood and still stands, we are convinced that it could not have been the intention of the lawmaker to bring partners or partnership property within the operation of the section in any respect. Dealing with the statutory right, and excluding equitable considerations, which have no place here, our convic-

tions are based upon the fact that the right of exemption, and the mode of exercising it prescribed by the statute, are wholly inapplicable to partnership property or the rights of the partners therein, and inconsistent with the rights of their creditors in relation thereto. * * * The language of the section points unmistakably to property owned individually. The selection of the exempted property is to be made by the execution debtor, and the property selected is to be appraised and set off to the debtor. 'Partners are joint tenants in their stock in trade, * * * * and no partner has an exclusive right to the joint stock.' 3 Kent, 37."

It will be seen by examination of this opinion of the Ohio court and the case of *Richardson* v. *Adler, Goldman & Co.*, 46 Ark. 43, that Judge Smith, who delivered the opinion in the latter case, adopts and relies upon the reasoning and the principles laid down in the Ohio case. It seems to us that the reasoning in those cases applies to the case at bar with as much force as it does to those cases. We think the doctrine sound, and supported by the weight of authority.

In the case of *McCoy* v. *Brennan*, 61 Mich. 362, it is held that partners can, during the existence of the partnership, claim an individual exemption in partnership property, when taken under legal process for partnership debts. The same is held in *Chapman* v. *Kelly*, 60 Mich. 438. Some other states hold the same. The idea advanced to support, in part, these cases is that the exemption statutes should receive a liberal construction in harmony with their humane purpose. Such cases are *Stewart* v. *Brown*, 37 N. Y. 350, 93 Am. Dec. 578; *Blanchard* v. *Paschal*, 68 Ga. 32, 45 Am. Rep. 474; *Servanti* v. *Lusk*, 43 Cal. 238.

In opposition to the doctrine of these cases, the weight of authority sustains the rule that partners cannot, during the continuance of the partnership, claim an individual exemption in the partnership property. *Giovanni* v. *First National Bank*, 55 Ala. 305; *Bonsall* v. *Comly*, 44 Pa. St. 442; *Guptil* v. *McFee*, 9 Kas. 30; *Baker* v. *Sheehan*, 29 Minn. 235; *Prosser* v. *Hartley*, 35 *id.* 340; *State* v. *Bowden*, 18 Fla. 17; *State* v. *Spencer*, 64 Mo. 355; *Richardson* v. *Adler*, 46 Ark. 43; *Wise* v. *Frey*, 7 Neb. 134; *Gaylord* v. *Imhoff*, 26 Ohio St. 317;

White v. *Heffner*, 30 La. An. 1280; *in re Handlin*, 3 Dillon, 290; *Pond* v. *Kimball*, 101 Mass. 105.

The rule is said to rest upon the principle, well recognized in the decisions, that the title and ownership of partnership property is in the partnership, and neither partner has any exclusive right to any part of it.

Our constitution and statute provide that the debtor shall be entitled to claim his exemption in specific articles, to be selected by him. As we have seen, this he cannot do while the partnership continues, as the property does not belong to him individually. When the debts of the partnership are paid, if any surplus of partnership property remains, he can claim his exemption in his part of this surplus.

Had he asked that the creditors be brought in, and the partnership debts be settled, and account be had between him and his co-partner, and his interest in the surplus, after paying the debts of the partnership, ascertained, it is probable that the court should have done this.

The cases in our court to the effect that the debtor claiming exemption must claim specific articles are numerous. The burden to show that property, claimed as exempt, is exempt is upon the claimant. He must bring himself strictly within the statute.

The judgment is affirmed

BATTLE, J., (dissenting.) A partner is entitled to hold, exempt from sale under an execution issued on a judgment against him for a debt owing by him individually, so much of his interest in the assets of a partnership as is equal in value to the exemptions from sale under process allowed him by law.

"A partner has no specific interest in any particular chattel or asset, or part of the property of the firm; his only interest is in a proper proportion of the surplus of the whole after payment of debts, including the amounts due the other partners." *Richardson* v. *Adler*, 46 Ark. 43, 48; *Giovanni* v. *First National Bank of Montgomery*, 55 Ala. 305, 310; 1 Bates, Partnership, § 180: 1 Lindley, Partnership (2 Am. Ed.), star pages 339, 340; 1 Freeman, Executions (2d Ed.), § 125, p. 298.

"No private creditor of a partner can take by his execu-

tion anything more than that partner's share in whatever surplus remains after the partnership effects have paid the partnership debts." *Gaylord* v. *Imhoff*, 26 O. St. 317, 324; *Harris* v. *Phillips*, 49 Ark. 58, 59; 2 Freeman, Executions (2d Ed.), § 254a, p. 809.

"The debtor's right to claim his exemption is co-extensive with the creditor's right to seize and sell under his execution, except in the cases specifically excepted fnom the operation of the law." *Sannoner* v. *King*, 49 Ark. 299, 301. Mr. Freeman says: "That the property of a co-tenant may be exempt from execution ought not to admit of doubt. If the circumstances are such as would entitle him to exempt the whole chattel, were he the owner thereof, they must, upon principle, be potent to exempt his moiety. The object of the exemption law was not to exempt estates in severalty merely, but to make some provision for the better maintenance of persons in humble circumstances. If such a person owns but half of a cow or a horse, that much is as much within the letter and the spirit of the exemption laws as the whole would be." (1 Freeman, Executions, § 221, pp. 670, 671). Under the constitution of 1868, "every homestead, not exceeding one hundred and sixty acres of land, and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in any town, city or village; or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwelling and appurtenances thereon, owned and occupied by any resident of this state, and not exceeding the value of five thousand dollars," was "exempt from sale on execution or any other final process from any court." Under this provision of the constitution, this court held, in *Greenwood* v. *Maddox*, 27 Ark. 648, that when lands held in common are levied upon to satisfy an execution against one of the tenants, he can apply for partition, and after the division will be entitled to hold such part as may be set apart to him as his homestead, free and exempt from sale under execution, by fixing his dwelling thereon; and that he may have a sale under the execution stayed by injunction until his homestead could be ascertained and established. Under this decision, and the rules before stated, it is difficult to see why a partner is not entitled to select his exemptions from sales under executions, to satisfy

his individual debts, out of his interest in the assets of the firm, and have the sale under the execution stayed by injunction until his interest can be segregated, and his exemption therein selected and set apart.

Sections 3060, 3062–3065 of Sandels & Hill's Digest provide how the interest of a "debtor partner" in the assets of the partnership levied upon to satisfy an execution on a judgment for his separate debt shall be determined, and how it shall be subjected to the satisfaction of the execution. They provide as follows:

"Sec. 3060. Whenever a sheriff or other officer shall levy an execution upon property or effects held jointly or in partnership by the debtor in the execution with others, to satisfy the separate debt of such debtor, the sheriff or other officer shall not proceed to make sale thereof, except as hereinafter provided, if the person or persons, or any of them holding such joint or partnership interest with the debtor, shall assert an equitable or other claim thereto, and in writing notify the officer of the existence of such claim."

"Sec. 3062. When a claim is asserted by the joint owners or partners to the property levied upon, the officer shall not, by virtue of his levy, deprive the joint owners or partners of the possession of the property levied upon, except for the purpose of making an inventory thereof, and having the same appraised."

"Sec. 3063. The officer shall proceed to have the property levied upon appraised, as provided in section 3089. He shall return the inventory and appraisement, with the execution, to the office from which it issued; and, in his return, shall state all the facts connected with the levy by him, and the claims, if any, set up by the joint owner or owners."

"Sec. 3064. The execution creditor shall have a lien upon the property levied upon, such as is given by law to executions in the hands of the officer, and which shall continue until the levy is disposed of."

"Sec. 3065. Upon the execution being returned by the officer that he has levied the same upon the property in which the debtor was joint owner or partner, and that the same was claimed by the other joint owners or partners, the execution

creditors may proceed by equitable proceedings to subject, to the satisfaction of his execution, the interest of the debtor so levied upon."

These sections are almost copies of sections 3287–3292 of "Revision of 1860, Laws of Iowa," the difference in no wise affecting the sense or effect. In construing the Iowa statutes in *Richards* v. *Shaw*, 30 Iowa, 574, Mr. Justice Peck, speaking for the court, said: "These statutory provisions in no manner affect the rights of the partners of the creditor. They simply provide for the manner of the enforcement of a remedy before secured by the law against a partner for his separate debt. No relief can be given the creditor in the equitable action provided for, other or different than he would have been entitled to in such an action, before the statute, prosecuted by himself in a proper case, or by the partner of his debtor, or by the debtor himself, when either could resort to a court of chancery to settle their respective interests in a case where the debtor partner's interest is taken on an execution against him. The questions to be determined, and the relief to be granted in the equitable action contemplated by the statute above cited, are those that relate to the interest of the debtor partner in the property seized upon execution, and the satisfaction, in a way authorized by the law, of the judgment by the sale of such property. By the proceeding, the interest of the debtor partner in the property levied upon must be determined. His interest is measured by the rights of his co-partner, who has a lien upon the property for the amount of his share, and for moneys advanced by him beyond it for the use of the firm. *Pierce* v. *Wilson*, 2 Iowa, 20. His interest is also dependent upon the rights of the creditors of the firm, for they are entitled to first be paid from the partnership funds. *Pierce* v. *Wilson*, *supra; Hubbard* v. *Curtis*, 8 Iowa, 1. The interest of the debtor partner can only be ascertained by determining the rights of the co-partner and the indebtedness of the firm, which, it is evident, must be done in this proceeding. This, in the case of a levy of an execution against the debtor partner upon the firm property, is within the ordinary jurisdiction of equity, which is necessary to be exercised for the protection of all parties concerned, the creditors, the

partners, and the purchasers upon the execution. 1 Story's Eq. § 678. In this proceeding it is very clear that the court must, in order to determine the interest of the debtor partner, ascertain the interest and claims of his co-partner and the indebtedness of the firm, and, in order to do so, may require necessary parties to be brought in and answer in the proceeding. Having acquired jurisdiction of the matters involved and of the persons interested, in order to avoid multiplicity of suits, the court may proceed, after having declared the interest of the debtor partner, to grant full relief to all parties by declaring and enforcing their respective rights. It may direct the sale of the property levied upon, and enforce the delivery of its possession to the officer. The interest to be acquired by the purchaser may be determined, and all other matters settled, to the end that justice may be done, and future suits prevented. In cases demanding it the partnership may be fully settled and wound up, though this may not be necessary in all cases. In short, the court is authorized to ascertain the rights of all the parties interested, and, by its decree, do justice between them."

Under the statute the interest of the debtor partner cannot be sold until it is ascertained and fixed by equitable proceedings. In this proceeding his interest can be separated from the partnership assets, and it is the duty of the court to do so when the rights of any of the parties demand it; and especially is this the case when it becomes necessary to carry into effect the humane and remedial purposes of the law upon exemptions. Why should it not set apart to him his interest, so that he can select out of it the exemptions allowed him by law? The design of this law was to shield the poor, and not to strip them. Should the court refuse to protect the debtor partner when it is in its power to do so? He has a right to his exemptions. Having the right, he is entitled to the enforcement of it; and, being entitled to the enforcement of it, it is the duty of the court to grant him the relief. Grant him the relief—set apart to him his share in the assets of the partnership—and there is no obstacle in the way to his selecting his exemptions out of it; for he can do that at any time before the sale, upon giving the necessary notice. In a recent case this court held that a judgment in favor of a

plaintiff against a garnishee for the recovery of the amount owing by the latter to the defendant was no bar to the defendant selecting and holding the debt of the garnishee as his exemption; and that he could select and hold the money collected on the judgment against the garnishee, as his exemption, at any time before it is paid to the plaintiff, provided it does not exceed the amount allowed for that purpose. *Blass* v. *Erber*, *post*, p.112. In other cases this court has held that a judgment condemning property to be sold to pay a debt does not defeat the right of the defendant in the judgment to hold any part of it as his exemption, provided he selects it for that purpose before it is sold. *Robinson* v. *Swearingen*, 55 Ark. 55; *Bunch* v. *Keith*, 64 Ark. 654. This being the law, the debtor partner is certainly entitled to have so much of his interest, when separated from the assets of the firm, as will equal in value the exemptions allowed him by law, set apart to him, to hold free from sale to satisfy the execution levied on the same, when he demands it before the final decree in the equitable proceedings is rendered, as was done in this case.

This action was instituted under the statutes set out in this opinion. The debtor partner claimed his interest in the assets of his firm as his exemptions, and showed that it did not exceed $500, the amount he is entitled to hold free from sale under executions. Having ascertained this fact, the court should have set apart to him as his exemption, and enjoined the sale of it under the execution, and proceeded no further, as this was all that was necessary to be done.

The authorities cited in the opinion of the court do not sustain it. They hold that a partner cannot claim his individual exemptions in specific chattels constituting a part of the partnership assets. No such question is presented in this action.

The decree of the circuit court should be reversed.

BUNN, C. J., concurred in the dissenting opinion.

MERRILL v. SYPERT.

Opinion delivered February 5, 1898.

1. PAROL EVIDENCE—WRITTEN INSTRUMENT.—Parol evidence is admissible to prove that a certificate of acknowledgment was executed on a date other than that appearing on the face of it. (Page 53.)
2. SAME.—Parol evidence is properly admitted to explain a note sued on, where it is incoherent and irregular in the order of its contents. (Page 53.)
3. PROMISSORY NOTE—TIME OF PAYMENT.—Where a promissory note provides that the time of payment shall be extended upon the happening of certain contingencies, but does not name the time of extension, the law will presume that the parties intended performance of the contract within a reasonable time thereafter. (Page 53.)

Appeal from Howard Circuit Court.

WILL P. FEAZEL, Judge.

On December 20, 1892, Sypert brought suit against Merrill upon a note given by Merrill to Wright for the purchase of a mare, and assigned by Wright to Sypert, and an order was issued that the mare be taken from Merrill's possession, and held subject to the court's order. Baker, Ramage & Co. gave bond, and intervened for the mare, claiming under a prior recorded mortgage given to them by Merrill.

Upon the trial of the interplea, it appeared that the mortgage, relied upon by the interveners to establish their title, bore date as of December 20, 1892, but the certificate of acknowledgment bore date December 18, 1892. The court refused to permit the mortgage to be read in evidence because the latter date was a Sunday, whereupon the interpleaders offered to prove that the acknowledgment was made on December 20, 1892, and that the certificate of acknowledgment by mistake was dated December, 18, 1892. The court refused to admit such evidence, on the ground that the certificate could not be varied by parol evidence, and gave judgment against the interveners.

On the trial of the main action, the defense was made that

the note was not yet due, as by its terms the defendant was entitled to an extension of time. The note was written partly with pen and ink, and partly with a pencil. The form of the note is as follows, that part of the note written in pencil being italicised:

"Nashville, Ark., 2–13, 1892.

"On the 20th Nov. after date I promise to pay to the order of Levy Wright,

If I should have any accident, sickness or failure

.....Fifty-five Dollars,

Value received.

in the crop, I am not bound to pay this note

at maturity, the time to be extended.

J. A. MERRILL.

$55.00.

Test. M. C. McCRARY."

To sustain his defense, defendant introduced M. C. McCrary, who testified that he wrote the note, and that, as originally written, it was in words and figures as follows:

"No.... NASHVILLE, ARK., 2–13, 1892.

On the 20th Nov. after date I promise to pay to the order of Levy Wright,

.....Fifty-five Dollars,

Value received.

$55.00. Due.....";

that it was presented by Wright to Merrill for his signature; that he refused to sign the same; and that witness, by request of the parties, amended the note in pencil, so as to meet Merrill's objections, which amendments made the note read as it now appears. It was at the time distinctly understood and agreed by and between Wright and Merrill that, in the event of sickness in the family of Merrill, or accident, or failure of his crops, said note would not mature until one year later. Witness further testified that there had been sickness in Merrill's family, and a failure of his crops, so that his entire crop of cotton and corn was not sufficient to pay the note.

Thereupon the court declared the law to be that as the note in suit bore no definite date to which the time of payment was to be extended upon the happening of any of the contin-

gencies provided for therein, the conditions were void, and the note matured November 20, 1892. Judgment was rendered against the defendant for the amount of the note.

The defendant and the interveners have appealed.

D. B. Sain and *Williams & Arnold*, for appellants.

An acknowledgment taken on Sunday is valid. 85 Tenn. 355. The date of an instrument is only *prima facie* evidence of the true date, and the date can be contradicted by parol evidence. 14 Ark. 29; 62 Wis. 380; 22 N. W. 140; 61 Ark. 104; 130 Mass. 355; 51 Cal. 172; 1 Greenl. Ev. (14 Ed.) § 284 note; 38 Mich. 316; 21 S. E. 439; 84 Ala. 313; 30 Wis. 544; 38 Ark. 377; 37 Ark. 148; 53 Am. Dec. 436; 5 Am. & Eng. Enc. Law, p. 79; 7 *ib.* 91; 11 Ala. 147; 17 Am. & Eng. Enc. Law, 453. This does not contravene the rule against admission of parol to vary written evidence. 1 Greenl. Ev. (14 Ed.) § 282; 21 So. 488.

WOOD, J. 1. Parol evidence is admissible to prove that a certificate of acknowledgment was executed on a date other than that appearing on the face of it, without contravening the rule "that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a written instrument." The *factum* of the acknowledgment is not questioned, and the rejected proof was to show the true date, of which the date it bore was only *prima facie* evidence. *Hall* v. *Cazenove*, 4 East, 477; *Jayne* v. *Hughes*, 10 Exch. 430; *Randfield* v. *Randfield*, 6 Jur. (N. S.) 901; *Reffell* v. *Reffell*, 12 Jur. (N. S.) 910; *Gately* v. *Irvine*, 51 Cal. 172; *Shaughnessey* v. *Lewis*, 130 Mass. 355; 1 Greenl. Ev. § 284, note D; 5 Am. & Eng. Enc. Law, 79; 7 Am. & Eng. Enc. Law, 91. See also *Fisher* v. *Butcher*, 53 Am. Dec. 436; *Meech* v. *Fowler*, 14 Ark. 29; *Holt* v. *Moore*, 37 Ark. 148; *Smith* v. *Scarborough*, 61 Ark. 104.

2. The instrument sued on was incoherent and irregular in the order of its contents, as well as unusual in the manner in which it was written. Parol proof was properly admitted in explanation thereof, as same did not tend to contradict or vary the written contents. 1 Greenl. Ev. § 282.

This proof, as well as the writing itself, showed that, upon the happening of certain contingencies, the time for payment

therein expressed was to be extended, though the time of such extension was not named in the instrument. Time was not of the essence of this contract. As no time was stipulated for its performance, the law will presume, upon the happening of the events provided for, that the parties intended performance of the contract within a reasonable time thereafter. What such reasonable time is will depend upon the facts and circumstances surrounding the parties and influencing their conduct in entering upon the contract, as well as upon the nature and extent of the contract itself. *Griffin* v. *Ogletree*, 21 So. Rep. 488. The rulings of the learned trial court did not accord with these principles. Its judgment is therefore reversed, and the cause is remanded for new trial.

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PHOENIX INSURANCE CO. *v.* FLEMMING.

Opinion delivered February 5, 1898.

1. FIRE INSURANCE POLICY—WRITTEN AND PRINTED PORTIONS.—The written portion of a policy of fire insurance insuring benzine as part of a stock of merchandise overrides the printed portion of the policy forbidding it to be kept. (Page 57.)

2. SAME—CONSTRUCTION.—Benzine put up in bottles containing from two to six ounces each, to be sold for cleansing purposes, and amounting to about a gallon in all, was held, under the evidence in this case, to have been included in the term "drugs" and "chemicals" used in the written portion of a policy of fire insurance in describing the stock of merchandise insured. (Page 57.)

3. FORFEITURE—WHEN NOT WAIVED.—A forfeiture of a policy of fire insurance is not waived by the insurer making an examination of the insured's books of account after knowledge of the forfeiture if the policy provided that, in case of loss, the insurer could examine such books without waiving any condition of the policy. (Page 57.)

4. SAME.—Where, after stating that a policy of fire insurance was forfeited because fireworks were kept contrary to its provisions, the adjuster of the insurance company was asked by assured's attorney whether he required proofs of loss, to which he replied that the company would insist upon strict proof of loss, under the terms of the policy. *Held* that the agent's answer did not constitute a waiver of the forfeiture, if any existed. (Page 60.)

5. FORFEITURE—WHEN NOT WAIVED.—Proof that, about the time a policy of insurance on a stock of merchandise containing a condition against the keeping of fireworks was issued, one of the firm of agents who issued the policy purchased fireworks from insured's store is not sufficient to show a waiver of such condition, where it does not appear that the agent who issued the policy knew at the time he issued it that fireworks were kept there. (Page 61.)

Appeal from Phillips Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

Action upon an insurance policy issued by the defendant, the Phœnix Insurance Company, upon a stock of merchandise owned by plaintiffs for the sum of $1,500.

The presiding judge at the trial in the circuit court, among other instructions, gave to the jury the following, at the request of the plaintiff, to which the defendant objected: "3. And even if the agent did not have such notice, or give plaintiffs permission to keep these articles, still, if you find from the evidence introduced that, after the loss by fire, defendant's agent was informed of these facts, and with full knowledge thereof required plaintiffs to exhibit to him their books of account, and demanded of them proofs of loss, as prescribed by the policy, and, in pursuance of these demands, plaintiffs did produce to them their books, and afterwards made out, at inconvenience and expense, proofs of their loss for defendant, in that event a forfeiture of the policy, if there was one, was waived by defendant; and plaintiffs are entitled to a verdict on that issue. The reason of this rule of law is that, as soon as an insurance company ascertains the facts which they claim cause a forfeiture of the policy, it is their duty to notify the plaintiffs that they deny all liability under the policy; and if they fail to do so, but insist on proofs of loss, or examining his affairs, and putting to trouble and expense, the law estops them from afterwards claiming such forfeiture."

There was a verdict and judgment against the insurance company.

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

The second instruction given for appellees is erroneous,

because (1) it assumes as proved that the prohibited articles were in stock; (2) even had this been true, appellees knew the stipulation in the contract, and should not have acceded to it, if they did not desire to be bound by it. 62 Ark. 63; 58 Ark. 281; 50 Ark. 406; 26 Pac. 718; 2 S. E. 258. In the absence of fraud, appellees are bound by the agreement not to keep fireworks, etc. 151 U. S. 462; 104 U. S. 259; 60 Fed. 358; 96 U. S. 547. Demand, by appellant, of proofs of loss or examination of the affairs of appellees, after appellant knows of the facts which it claims work a forfeiture of the policy, do not constitute a waiver of such forfeiture. 47 N. W. 350; 16 S. W. 470; Ostrander on Fire Insurance, 754; 144 U. S. 439; 47 N. Y. 118; 1 May, Ins. § 232. Parol evidence is not admissible to show an agreement to allow the handling of extra-hazardous goods under a policy prohibiting such. The burden of showing a waiver of the forfeiture on condition was on the appellees. They must show that, by the acts or declarations of an agent duly authorized, a reasonable belief of waiver was induced in their minds. 136 N. Y. 551; 29 N. W. 521. Knowledge coming to an agent in his individual capacity, after the contract is made, does not affect the principal. Wood on Ins. § 403; 15 S. W. 34. Where waiver of the conditions of a policy is, by its terms, required to be in writing and indorsed on the policy, any waiver or change must be so evidenced. 141 N. Y. 219; 136 N. Y. 547; 133 N. Y. 356; 85 N. Y. 278; 73 N. Y. 10; 10 N. E. 522; 6 Gray, 169; 11 Cush. 265; 54 N. W. 21. The power to restrict by such a condition was upheld by the following cases: 54 N. W. 455; 46 N. W. 483; 42 Pac. 611; 32 N. W. 660; 15 Atl. 353; 35 N. W. 34; 4 Pac. 764: 8 Pac. 379; Ostrander, Fire Ins. 748. Stipulations which do not properly amount to conditions are governed by a different rule. 36 N. E. 662; 8 N. E. 285; 52 Ark. 11; 60 Ark. 538; 13 S. E. 236; 69 Fed. 71.

Stephenson & Trieber and *Quarles & Moore*, for appellees.

A general exception to a number of instructions is bad if any of them be good. 28 Ark. 8; 38 Ark. 528; 54 Ark. 16; 59 Ark. 312; 60 Ark. 250. If an instruction is not clear, it is the duty of the complaining party to call attention to it below. 58 Ark. 253; 62 *ib.* 203; 60 Ark. 333. Knowledge of agent,

at time of insurance of policy, that prohibited articles were in stock, estops the insurance company to reply on such a defense. 52 Ark. 11; 53 Ark. 215; 69 Fed. 71; 62 Ark. 562. Continuation of dealings with appellee waived any forfeiture. 53 Ark. 494. The printed portions of a policy are controlled by the written ones, in case of repugnancy; hence it was proper for the court to instruct the jury that the policy was not defeated by the keeping of benzine in such small quantities as are usually kept by drug stores. 17 N. Y. 194; 36 N. Y. 648; 93 Am. Dec. 544 and note; 53 Vt. 418; 12 Fed. 554; 32 Fed. 48; 54 N. Y. 90; 1 May, Ins. § 233; 64 N. W. 883; 47 N. Y. 114; 111 Cal. 503; 95 Ga. 601; 170 Pa. St. 151; Wood, Ins. §§ 63, 64; 11 Bissell, 309; 43 Pa. St. 350; 32 Fed. 47. When an agent or adjuster of an insurance company, with full knowledge of all the acts constituting the forfeiture claimed in the trial, puts the plaintiff to the inconvenience, trouble and expense of perfecting his proof of loss, such conduct waives proof of loss. Such conduct operates as a waiver of the conditions, and a written indorsement of such waiver is thereby rendered unnecessary. 53 Ark. 494; 52 Ark. 11; 60 Ark. 532; 62 Ark. 348; 69 Fed. 71; 62 Ark. 562; 49 Kas. 178; 63 Ark. 187; 63 *ib.* 204; 32 S. W. 214; 33 Kas. 497; 136 U. S. 408; 11 Am. & Eng. Enc. Law, 338; 92 N. Y. 51; 39 N. W. 76; 41 N. W. 60.

RIDDICK J., (after stating the facts.) This is an action upon a fire insurance policy to recover the value of property insured which had been destroyed by fire. The property is described in the written portion of the policy as a "stock of merchandise, consisting of drugs, stationery, liquors, tobacco, toys, and fancy articles, paints, oils, chemicals and such other goods, not more hazardous, such as is usually kept for sale in a drug store." The printed portion of the policy stipulated that the policy should be void if benzine or fireworks were kept, unless by agreement indorsed on the policy. No such agreement was indorsed upon the policy, and the evidence showed that both benzine and fireworks were kept in the store of plaintiffs. The insurance company contends that this avoided the policy.

As to the benzine, only a small quantity was kept in the

store. This was put up in bottles containing from two to six ounces each, to be sold to ladies for the purpose of cleansing gloves. It amounted to about a gallon in all. The testimony showed that it was customary for druggists to keep benzine bottled in small quantities to be sold for such purposes, and that, as one witness stated, "a drug store without it would be incomplete." The question arises whether this benzine was not included in the written description of the property insured; for, if it was a part of the property insured, it follows as a matter of course that its presence in the store did not avoid the policy. The written portion of the policy insuring the benzine as a part of the stock of merchandise would override the printed portion forbidding it to be kept. To hold otherwise would make the contract mean in effect that the company contracted to take pay and insure the owner of this benzine against its destruction by fire, but only on condition that no benzine was kept. The courts will not presume that the parties intended to make such an absurd agreement, but in such a case will presume that the intention was that the printed portions of the policy forbidding the keeping of benzine should not apply to the keeping of it bottled in small quantities as customary with druggists, but only to storing or keeping it in large quantities. *Faust* v. *Am. Ins. Co.*, 91 Wis. 158; *Mears* v. *Humboldt Ins. Co.*, 92 Pa. St. 15; *Hall* v. *Insurance Co.*, 58 N. J. 292; *Pindar* v. *Insurance Co.*, 36 N. J. 648; *Harper* v. *Albany Ins. Co.*, 17 N. Y. 197; *Archer* v. *Merchants Ins. Co.*, 43 Mo. 434; *Cushman* v. *Ins. Co.*, 34 Me. 487.

Now, the property insured is described as a stock of merchandise consisting, among other things, of "drugs" and "chemicals." The word "drug" is defined as any animal or mineral substance used in the composition of medicines; any stuff used in dyeing or in chemical operations; any ingredient used in chemical preparations employed in the arts. Webster's Dict., The Century Dict. The term "chemical" is defined as a substance used for producing a chemical effect, or one produced by a chemical process; a chemical agent prepared for scientific or economic use. Webster's Dict. The Century Dict. The definition of benzine given in Webster's International Dictionary is "a liquid consisting mainly of the lighter and more volatile

hydro-carbons of petroleum or kerosene oil, used as a solvent and for cleansing soiled fabrics." It is used in the arts as a solvent for fats, resins and certain alkaloids. Century Dict.

Without going into a discussion of the scientific or exact meaning of these terms, we will say that, in our opinion, the evidence shows that benzine kept in the quantities and for the purposes that the proof shows that it was kept by plaintiffs was included in the terms "drugs" and "chemicals," used in describing the property insured, and that the company intended to insure such benzine.

As the company writes the policy, the rule is to resolve doubts arising as to its meaning in favor of the assured. *Jones* v. *Ins. Co.*, 38 Fed. Rep. 19. Benzine put up in small quantities was a part of the stock asked to be insured. Bottled and corked in such quantities, it was probably not more dangerous than other chemicals. It was not necessary to give the particular name of each drug or chemical, or other article that went to make up the entire stock, and the company, in describing the property insured, has chosen to use general terms, which we think fairly include the benzine in the stock. For these reasons we are of the opinion that the policy was not avoided by the fact that benzine was kept bottled in small quantities as a part of the stock of drugs and chemicals. The agents of the appellant company seems to have been of this opinion also, for, after the fire, when they had examined the books, and knew the facts, they stated to plaintiffs that their policy was void because they kept fireworks, but said nothing of the benzine.

Was the policy avoided by the fact that fireworks were kept in plaintiff's store? We will first notice the contention made by plaintiffs that the forfeiture, if any existed, was waived by a demand, made on the part of the company after knowledge that fireworks were kept in the store, that plaintiffs should exhibit their books, and make out proof of loss. The policy provided that, in case of loss, the company should have the right to make an examination of the books of account kept by the assured, and that such examination should not be treated or considered as a waiver of any condition of the policy, or of any forfeiture thereof. For this reason the demand for the

oooks and the examination thereof cannot we think be treated as a waiver of the conditions of the policy.

After finding from an examination of the books that fireworks had been kept, the adjuster of the company stated to plaintiffs that their policy was void because fireworks were kept; but he offered to settle by compromise, and they made an agreement to appraise the goods, it being stipulated therein that such agreement and appraisement should not waive any of the conditions of the policy. After the appraisement, the adjuster again told the plaintiffs that their policy was void, and that the company would resist any effort to collect it by action at law, but offered to pay another sum in compromise. This offer being refused, the adjuster said that he would leave on the first boat for Memphis. He was thereupon interrogated by one of the counsel for plaintiffs as follows: "Mr. Boyd, in behalf of these companies you represent, you have had the books, and have gone through them. Do you require any further proofs of loss, or are you satisfied with everything?" To which Boyd replied: "We shall insist upon strict proof of loss, under the terms of the policy." Plaintiffs assert that this answer of Boyd waived all forfeitures.

Now, the positive denial of liability and assertion of the agent that the policy was void because fireworks were kept may have been a waiver of proof of loss, but we do not think that the forfeiture, if any had occurred, was waived by the reply of the agent quoted above. By the terms of the policy, the assured agreed to furnish proof of loss, and agreed that the loss should not be payable until such proof was furnished. Unless proof of loss was waived, the assured had no right of action against the company until the same was furnished, and, in order to determine whether the company would waive such proof, or for some other reason, the attorney for appellee propounded the above question. What the agent said was in reply to this question, and, when taken in connection with his previous assertion that the policy was void, and that the company would resist its enforcement, meant, in our opinion, nothing more than that the company did not intend to waive proof of loss.

In a recent case decided by the court of appeals of New

York it was said that "the rule is now established that if, in any negotiations or transactions with the assured after knowledge of the forfeiture, the company recognized the continued validity of the policy, or does acts based thereon, or requires the insured to do some act or incur some trouble or expense, the forfeiture is waived." The court further said that "while the later decisions all hold that such waiver need not be based upon a technical estoppel, in all cases where this question is presented, when there has been no express waiver, the fact is recognized that there exists the elements of an estoppel." *Armstrong* v. *A. Ins. Co.*, 130 N. Y. 560.

This seems to be a correct statement of the law upon this question. *German Ins. Co.* v. *Gibson*, 53 Ark. 494. Now, it will be noticed that the agent here made no demand or request that the assured should furnish proof of loss. He said nothing from which the assured could infer that if such proof was furnished the loss would be paid. It cannot be legitimately inferred from his reply, above quoted, that he intended to recognize the validity of the policy, for he had previously stated that the policy was void; nor was such reply calculated to mislead the assured in any way, and it cannot be taken as a waiver of the forfeiture, if any existed. We are therefore of the opinion that it was improper for the presiding judge to submit the question arising on this point to the jury, as he did in the third instruction given on the trial. While such an instruction might be properly given under a different state of facts, yet in this case there was no evidence upon which to base such an instruction, and it was calculated to mislead and was prejudicial to appellants.

But it is further contended by plaintiffs that there could have been no forfeiture of the policy on the ground that fireworks were kept, for the reason, as they contend, that the agent of the company who issued the policy knew at the time it was issued that fireworks were kept in stock by plaintiffs, and that the issuance of the policy under such circumstances was a waiver of the condition forbidding fireworks to be kept. We will proceed to consider the evidence bearing on that point, for, if the proof was conclusive that the agent of appellant knew at the time he issued the policy that fireworks were kept in the

store of assured, it would be presumed that the condition forbidding the keeping of such fireworks was waived, and the error above noticed would be harmless. It is now too well settled to require discussion that the issuance of a policy of insurance with knowledge of facts which by the terms of the policy render it void will be treated as a waiver of such ground of forfeiture. *Insurance Co.* v. *Brodie*, 52 Ark. 11.

And this is true, even though the policy contains a stipulation that the conditions of the policy shall not be waived by any officer or agent of the company unless such waiver be indorsed upon the policy. It is a general rule of law that the parties to a written contract may afterwards change or alter such contract by a parol agreement to that effect, and contracts with insurance companies furnish no exception to this rule. *Phœnix Ins. Co.* v. *Public Parks Am. Co.*, 63 Ark. 187; *Westchester Fire Ins. Co.* v. *Earle*, 33 Mich. 143; 2 Beach, Insurance, § 787.

The facts bearing on this point are as follows: The policy in question was issued by R. H. Crutcher & Co., a firm composed of R. H. Crutcher and one Friborg. This firm was the agent of the defendant company; and, in order to show that these agents knew at the time the policy was issued that fireworks were kept in the store, J. H. Flemming, one of the plaintiffs, was sworn as a witness. After stating that the policy was issued by Crutcher & Co., he was asked the following question: "Please state whether, at the time they issued this policy of insurance, they had notice and knew the fact that you kept fireworks for sale and on hand in that store?" To which he replied: "This policy was issued on the 24th day of December, I believe, at a time when our stock of fireworks was very large, and on exhibition, and Mr. Friborg bought fireworks from me during that Christmas, and knew we had them for sale."

Now, no express waiver of the condition forbidding the keeping of fireworks is claimed, and in order that a waiver of such condition may be implied from the issuance of the policy, it must be shown that it was issued with knowledge on the part of the agent that fireworks were kept, and the burden of proof to show this is on the plaintiff. But the witness in the

answer above quoted, which was all the testimony on this point, does not show that the agent had such knowledge at the time the policy was issued. It does not necessarily follow from the fact that fireworks were on exhibition, or that one of the agents, after the policy was issued, purchased fireworks at the store that the agent issuing the policy knew of the presence of such fireworks. The fact that one of the agents went to the store shortly after the policy was issued to purchase fireworks is a circumstance tending to show that he knew that fireworks were kept there, but the witness does not say that this member of the firm issued the policy. The agent of the insurance company was a partnership, and each member of the firm could act for the firm, and issue the policy. If, in the course of the negotiations for this policy, and before it was issued, plaintiffs had notified either member of the firm that they kept fireworks in their store, this would have been notice to the company, and it would have been bound; but no such notice was given. The knowledge of the fireworks shown here was acquired by the agent, not while acting for the company or his firm, but casually while attending to his own affairs. To make this knowledge affect the company, it must be shown that the agent afterwards, with this information present in his mind, issued the policy, or consented to its issuance, or did some act in the course of his duties as agent recognizing the continuing validity of the policy. *Distilled Spirits Case*, 11 Wall. (U. S.) 356. But this was not shown, or at least it was not so conclusively shown as to justify us in saying as a matter of law that the knowledge of the agent was established. We cannot, therefore, say that the error heretofore noticed was harmless, for the jury may not have found that the agent issuing the policy had notice of the fireworks, and may have based their verdict upon a belief that the forfeiture was waived by the statement of the adjuster that the company would insist upon strict proof of loss under the terms of the policy.

Several other rulings of the court have been called to our attention and considered, but, except as above stated, we do not discover that the court committed any material error.

We agree with counsel for appellant that instruction No. 2

given by the presiding judge is slightly defective in form, and it is possible that it might be misunderstood. We feel sure that if the attention of the judge had been called to the defect, it would have been corrected. It does not appear that his attention was called to it, or that appellant, during the trial in the circuit court, objected to the instruction on that ground, and a general objection is not sufficient to raise such a question in this court.

For the error indicated, the judgment is reversed, and a new trial ordered.

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

Opinion delivered February 19, 1898.

1. RAILROADS—DUTY IN OPERATING TRAINS.—A railway company, in operating its trains, is not bound to use the highest degree of care, diligence and skill, save as to passengers on its trains or those sustaining such relation to it. (Page 66.)
2. PASSENGER—WHO IS NOT.—One who has left the train and the depot platform, and is on the railroad track *en route* to her home, has ceased to be a passenger. (Page 67.)
3. INSTRUCTION—WHEN PREJUDICIAL.—An erroneous instruction is not cured by another instruction which is correct, if it cannot be said which influenced the jury. (Page 68.)

Appeal from Lawrence Circuit Court, Eastern District.

RICHARD A. POWELL, Judge.

Dodge & Johnson, for appellant.

The only class of persons to whom a railway company owes the exercise of "the highest degree of care, diligence and skill in running and operating its trains" is that of passengers. To all others it is owes only ordinary care, etc. 46 Ark. 555; 48 Ark. 493; 59 Ark. 103; 48 Ark. 493; Sand. & H. Dig., § 6207; 49 Ark. 257; 54 Ark. 431; 11 C. C. A. 554; 34 Ark. 625. The relation of passenger and carrier had

ceased at the time of the accident. Hence, the court should not have given an instruction declaratory of a principle applicable solely to passengers. Such error is not cured by an instruction explaining the duration of the relation of carrier and passenger, and limiting the duty of the carrier to the exercise of reasonable precaution. The instructions are contradictory, and the jury might have been guided by either of them. Such inconsistency is error. 61 Ark. 155; 37 Ark. 580; 37 Ark. 593; 41 Ark. 281. It is error to give instructions on a state of facts not in evidence. 42 Ark. 3–7; 16 Ark. 651; 23 Ark. 289; 23 Ark. 73; 57 Ark. 289; 60 Ark. 557. An instruction which directs the jury to determine whether or not a lookout was kept by appellant, and that, if not, and plaintiff was killed by reason of such neglect, defendant is liable, ignores the defense of contributory negligence, and is erroneous. 62 Ark. 238; 62 Ark. 158; 61 Ark. 559; 62 Ark. 168. It is also error to declare that "all" persons running a train must keep a constant lookout. 62 Ark. 185.

J. M. Moore, *J. K. Gibson* and *W. B. Smith*, for appellee.

The relation of carrier and passenger had not terminated at the time of the accident. It is the duty of a railway company to provide and keep free from danger modes of egress from its grounds and depot; and so long as the passenger is in a situation such that these duties to him continue, his rights as a passenger have not ceased. 40 Barb. 550; 26 Ia. 124; 46 Ark. 195, 198; 59 Ark. 129; 129 Mass. 364; 6 Am. & Eng. R. Cas. 75; 84 N. Y. 241; 26 N. J. Eq. 474; 7 Vroom (N. J.), 532; 60 Ark. 110. The objection that the appellee failed to allege that deceased was a passenger at the time of the injury should have been made, if at all, on the trial. 44 Ark. 488; 42 Ark. 57. Even if all relation of carrier and passenger had ceased, an instruction requiring the highest degree of skill and care in the management of trains is not erroneous. The terms of the statute require a very great degree of precaution, and ordinary prudence demands a care commensurate with the danger of the circumstances. Hence it was proper to say that the defendant was held to the exercise of the "highest degree of care, skill and diligence which a pru-

dent man would exercise, and which is reasonably consistent with its mode of conveyance and the practicable operation of its road." 36 Ark. 45; 69 Ill. 412; 27 Gratt (Va.) 455; 4 Bissell, 433; 50 Mo. 461; 8 Am. & Eng. R. Cas. 280; 34 N. Y. 622; 67 N. Y. 420; 1 Am. & Eng. R. Cas. 155; 15 Am. & Eng. R. Cas. 374; 52 N. Y. 215; 48 Cal. 420; 70 N. Y. 123; 23 Am. & Eng. R. Cas. 308; 15 Am. & Eng. R. Cas. 376; 58 Ark. 470; 8 Am. & Eng. R. Cas. 445; S. C. 88 N. Y. 13. Even if the first instruction was abstract, it did not affect the decision of the case, and was harmless error. 58 Ark. 471; 62 Ark. 228; 54 Ark 289; 56 Ark. 600; 8 Am. & Eng. R. Cas. 289. The deceased was not guilty of contributory negligence. 54 Ark. 165. Even if it were true that plaintiff's instructions were not strictly correct, defendants were more liberal than they should have been. Hence, defendant was not prejudiced. 46 Ark. 487; 59 Ark. 131; 46 Ark. 206; 8 Am. & Eng. R. Cas. 280.

BUNN, C. J. This is a suit for $15,000 damages to the next of kin for the killing of Rebecca Tackwell, plaintiff's intestate. Verdict and judgment for $1,500, and the defendant railway company appealed.

There is evidence to sustain the allegation that the deceased was killed by the negligent running and operation of defendant's train, and there is also evidence of contributory negligence on the part of the deceased which contributed directly to her death. This being true, and there being no question as to the admissibility of testimony offered in evidence, the case turns on the giving and refusing of instructions.

The first instruction given by the trial court at the instance of the plaintiff reads as follows, to-wit: "You are instructed that the defendant corporation is bound to use, in running and operating its trains on its road, the highest degree of care, diligence and skill which a prudent and cautious man would exercise, and which is reasonably consistent with its mode of conveyance and practical operation of its road." This instruction is not hypothetical in form, but seems to be intended as an assertion of an abstract proposition of law; but, even as an abstract proposition, it is erroneous; for, while it is appli-

cable and proper in the case of a passenger, it cannot be made to apply to the case of any other than a passenger or one sustaining the relation of a passenger to the railway company. It is in close accord with the direction of this court in the case of *Ry. Co.* v. *Sweet*, 60 Ark. 557, which was a case involving the killing of a passenger.

It is not the law that a railway company, in running and operating its trains, is bound to use the highest degree of care, diligence and skill, generally; for the railroad company owes no such duty to all the world, but only to a class of people, a very limited class in point of numbers,—passengers on its trains, or those sustaining such relation to it.

One of the principal questions in this case is whether or not the deceased, at the time of her death, was a passenger of defendant; and yet the instruction, in effect, was a declaration by the court to the jury that it made no difference whether she was a passenger, a traveler, or trespasser at the time, in so far as the degree of care, skill and diligence to be exercised by the defendant was concerned; for it made no distinction in favor of passengers, or against travelers and trespassers, in this regard.

The evidence showed that deceased, who had been a passenger on defendant's passenger train from Corning to Walnut Ridge depot, had left the train and the depot platform, and was on the railroad track *en route* to her residence in the town of Walnut Ridge, when she was run over and killed by the rear coach of said train, while the same was being moved backwards. The trial court, holding, in effect, that by this act she had ceased to be a passenger, gave the following instruction at the instance of the defendant, to-wit: "7. The relation of passenger to the defendant ceased after Mrs. Tackwell was safely discharged from the train at the place of her destination, and after she left the depot platform. If the evidence shows that the employees on the train that killed Mrs. Tackwell were in the ordinary discharge of their duties, and exercised reasonable diligence and precaution, the defendant is not responsible for unavoidable accident to the deceased, and your verdict will be for the defendant."

The fact that deceased had left the depot platform, and was on the railroad track *en route* to her home, is undisputed;

and she had ceased to be a passenger, under the rule which governs in such cases, and under which the instruction was given.

The error of the first instruction is thus made palpable, and, being radically wrong, its defect is not cured by any other instruction given; for, as in all such cases, it cannot be said certainly which of the instructions influenced the jury in making up their verdict.

Reversed and remanded for a new trial.

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KILLEAM v. CARTER.

Opinion delivered February 19, 1898.

LIMITATIONS—RECOVERY OF HOMESTEAD.—The statute of limitations begins to run against an action by the heirs to recover possession of their ancestor's homestead, from one who holds it adversely after it has been abandoned by the widow, not from the widow's death, but from the time such adverse possession was acquired. (Page 70.)

Appeal from Logan Circuit Court

JEPHTHA H. EVANS, Judge.

T. A. Pettigrew and *J. V. Bourland*, for appellant.

The right of entry, in the heirs, accrued on the widow's abandonment. The widow waived her homestead by failing to claim it in the probate proceeding. 33 Ark. 399; 48 Ark. 230, and cases cited; 136 Mass. 286. When the widow abandons the homestead, the period of limitation begins to run against the remainderman. 53 Ark. 403; Dembitz on Land Titles, p. 1354; 55 Ark. 562; *ib.* 572; 11 S. W. 809; Kerr, Real Property, §§ 562, 1878. Appellees had but one right of entry—that by inheritance—and this is barred by the seven year statute. 62 Ark. 316.

Rowe & Rowe, for appellees.

The statute does not run against a *feme covert.* Sand. & H. Dig., § 4815. Assignment and acceptance of dower is no waiver of homestead. 58 Ark. 298; 47 Ark. 455; 54 Ark. 9;

29 Ark. 280; 47 Ark. 504. The court, sitting as a jury, found that there was no abandonment. Findings of fact by trial courts are not to be disturbed if supported by any evidence. 46 Ark. 142; 51 Ark. 467; 56 Ark. 314; 40 Ark. 298; 45 Ark. 41; 45 Ark. 94; 53 Ark. 327; 54 Ark. 229; 56 Ark. 621. The widow had a homestead right. 47 Ark. 509; 29 Ark. 633; 30 Tex. 633; 29 Ark. 280. The statute would not commence to run against a remainderman until the death of the widow. 58 Ark. 512; Tiedeman, Real Prop. §§ 715, 389 and note 2; Tyler on Ejectment and Adverse Enjoyment, 117 and 118; Am. & Eng. Enc. Law § 3, p. 720 and note 1; 22 Ark. 572; 42 Ark. 357; 47 Ark. 510; Wood, Lim. Actions, 527 and 528, note 1; 60 Ark. 74; 58 Ark. 512; 53 Ark. 402; 80 Mo. 127. Homestead is an estate. 29 Ark. 291; Tiedeman, Real Prop. § 158; 60 Ark. 71. A sale of homestead would be void. 50 Ark. 330; 47 Ark. 545; 29 Ark. 633; 29 Ark. 280.

WOOD, J. Jeremiah Carter died in 1863, seized of 160 acres of land, which constituted his homestead. Several years thereafter, 106⅔ acres of this land was sold by order of the probate court in a proceeding to which the widow of Carter and his heirs were made parties. In this proceeding, the remaining 53⅓ acres were set apart to the widow as dower. Upon this latter portion was situate the mansion house in which Carter lived at the time of his death, and in which she and the minor children continued to live,—she until her death in 1891, and they presumably until of age.

The children had all become of age in 1875. The appellant, Killeam, went into possession of the land in controversy under deed obtained from the purchaser at the administrator's sale. Appellant knew that his deed came from the purchaser at said sale. He went into possession under his deeds claiming to be the owner in fee, made valuable improvements, paid the taxes, and occupied the said land continuously for fifteen years, which the widow all this while knew, yet she made no claim to the land herself, but said that it belonged to Killeam.

This suit in ejectment was brought by the children and heirs of Carter in 1893 to recover of appellant the 106⅔ acres of land mentioned *supra*. The answer denies all material

allegations of the complaint, and sets up the statute of limitations of seven years.

The undisputed facts show an abandonment of the homestead by the widow, of which the heirs must have had notice. They were parties to the suit wherein the land in controversy was sold, and the widow's dower assigned. They lived, presumably until of age, with the widow on the tract adjoining. The youngest lacked only about two years of majority when appellant went into possession under his first deed. Those of them who were minors when he took possession under this deed certainly had no right to suppose or believe that he was holding under the widow, for she could not invest another with any rights that would be adverse to them. Appellant, from the first, occupied the land openly, continuously and adversely to all the world, and this went on for a period of about eighteen years after the heirs had reached their majority, until the bringing of this suit. In the absence of any proof of facts or circumstances which would preclude inquiry or investigation by the heirs into the nature of appellant's tenure, we think the character of his possession was such as to put them upon notice, at least upon inquiry which would inevitably have led to a knowledge of the fact of his adverse holding and the express recognition of his claim of ownership by the widow.

The question, then, is, in case of abandonment of the homestead by the widow and notice thereof to the heirs, will the statute of limitations begin to run against them before her death? We are aware of the well-settled rule that a remainderman or reversioner expectant upon an estate for life, "though he may, if he will, take notice of any disseisin done to the tenant of the particular estate, is yet not bound to do so, but may wait until his right of entry accrues upon the death of the tenant for life." *Kessinger* v. *Wilson*, 53 Ark. 403; *Ogden* v. *Ogden*, 60 Ark. 74. But this doctrine has no application, even by analogy, to a reversioner expectant upon the homestead rights of a widow, having notice of the termination of such rights. The law wisely grants to the widow the privilege of occupying the homestead so long as she desires. But it is a privilege purely personal to her, which she can neither convey to nor share with another. She may enjoy the

rents and profits only so long as she intends it as a home. Strictly speaking, she has no estate in the land itself, but only the privilege of occupancy. Alienation by her confers no rights, but it means abandonment, and the termination of her right of homestead. Not so with an estate for life. That terminates only upon the death of the life tenant. The widow can only be considered a tenant for life upon condition that she do not abandon. When that occurs, her rights are forfeited, and, *eo instanti*, the rights of the reversioner accrue. Necessarily so. His rights as the owner in fee are only temporarily suspended by reason of her superior rights, and when these end his must begin. And he cannot postpone the assertion of them against an adverse holder, of whose claim he has notice, until the widow's death, unless that should occur within seven years after he has notice of her abandonment; for he should not, at most, be allowed to postpone the assertion of his rights beyond that time.

Judgment reversed, and cause remanded for new trial.

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JOHNSON v. DOOLEY.

Opinion delivered February 19, 1898.

BILLS AND NOTES—PROMISE TO PAY IN BONDS.—A note for $1,000, "payable in levee bonds of the state of Arkansas at par," is not an undertaking for the payment of money, but for the payment in such bonds absolutely, so that the payee, on the maker's default, is entitled to damages only to the extent of the value of such bonds, and not to the sum of money named, with interest. (Page 74.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

Dodge, Johnson, Carroll & Pemberton, for appellant.

A claim must be properly authenticated when presented to an administrator, in order to give a right of action thereon for his refusal of it. Sand. & H. Dig., §§ 114, 119; 30 Ark. 755; 48 Ark. 304; 48 Ark. 360. In a suit by an administrator,

neither party will be allowed to testify against the other, as to transactions with the deceased. Const. of Ark. § 2 of schedule; 26 Ark. 476; 31 Ark. 364; 30 Ark. 285; 43 Ark. 307; 51 Ark. 401; 52 Ark. 550; 54 Ark. 185. Express waiver of actual production does away with the necessity for it in a tender. 66 Me. 459; Clark, Cont. 641; 57 Conn. 105. If a new agreement or contract is accepted in satisfaction of a claim, the accord and satisfaction is good without performance. 3 Johns. (N. Y.) 243; 49 Am. Dec. 65; 11 Tex. 336; 1 Am. & Eng. Enc. Law (2d Ed.,) 243, and cases cited in note 2. The new agreement entered into by the parties took the place of the original one. 23 Vt. 561; 8 Vt. 141; Clark, Cont. 611; Lawson, Cont. § 395; 119 N. Y. 198; 39 Mich. 436;37 N. E. 456; 36 Pac. 1098; 82 Vt. 614 and cases cited; 28 Ark. 193. The suit should have been based on the new agreement, which was not a promissory note, but a contract for the delivery of goods. 3 McLain, 106; 14 Peters, 299; 11 Humph. 439; 3 Yerger, 435; 5 Grattan, 163; 23 Wend. 73; 6 Cowen, 108. The most to which the appellee can claim to be entitled to recover would be the value of the bonds, and not the amount of the original note. 4 Ark. 176; 3 Mon. 166; 5 Litt. 225; 5 Litt. 335; 4 Ark. 368. Hence, no such money judgment should have been rendered. 5 Ark. 262; *ib.* 481; Chitty, Bills, 152; Baily, 11; 4 Mass. 245; 5 Cow. 186; 10 Serg. & Rawle, 94; 3 Ark. 73; 5 Ark. 107; *ib.* 103; 6 *ib.* 358; Mar. & Yer. 225; 1 Rand. Com. Pap. § 96, and cases cited in note; *ib.* § 101; 5 Ark. 105; 1 Pars. Notes, 37 and 45; Story on Prom. Notes, §§ 17 and 18; 9 Ark. 58; 4 Ark. 534; *ib.* 147; 31 Ark. 319.

P. C. Dooley, for appellee.

The phrase in the note, "payable in levee bonds of the state of Arkansas, etc." simply gives the maker the privilege to so pay the note. If the option is not taken advantage of, it is forfeited, and the obligation becomes absolute for the payment of money. 5 Ark. 318; 4 Ark. 450; Hardin, 508; 2 M. Const. Rep. (S. C.) 447; Bac. Abr. title "Debt;" 4 Ark. 175; 5 Ark. 151; 9 Ark. 58; 30 Ark. 285; 8 Ark. 124; 2 Parsons, Cont. 163; 7 Ala. 175; 4 Yerger, 177; 5 Humph. 423;

14 Vt. 457; 3 Day, 327; 1 O. (Hammond), 524; 3 Sneed, 145; 4 Humph. 336; *ib.* 247; 5 Yerger (Tenn.), 435; 31 Ark. 319. An accord, to be a bar, must be received and accepted as a satisfaction. Accord without satisfaction is no bar, and, even if Mrs. Hewitt agreed to the alleged new agreement, it was never executed, nor was performance tendered to her. Hence it is no discharge of the first obligation. 33 Fed. 5; 2 Ark. 45; 4 Ark. 203; 54 Ark. 185; 33 Ark. 572; 64 Am. Dec. 143; 2 H. Black. 317; 4 Paige, 305; 44 Me. 121; 110 Mass. 202; 10 Allen, 516; 72 Me. 481; 1 Am. & Eng. Enc. Law, p. 95; 23 Wend. 342; 5 Johns. 392; 19 Wend. 408; 2 Miss. 584; 22 Wend. 325; 13 Mass. 424; 64 Me. 563; 57 N. H. 511; 12 R. I. 344; 38 Fed. 5; 4 Ark. 193; T. Raym. 203; 2 Keble, 690; 9 Rep. 79b; Croke, Eliz., 46; T. Raym. 450; T. Jones, 158; 2 Keble, 332; *ib.* 534; *ib.* 851; 2 Iowa, 553; 3 Johns. Cas. 243; 5 Johns. 386; 8 Ohio, 393; 7 Blackf. 582; 23 Wend. 342; 2 Pike, 45; 23 Wend. 342; 14 B. Mon. 457; 1 Gray, 245; 20 Wall. 289; 13 How. 355. The presentment to the administrator was sufficient to base suit on. 29 Ark. 243; 20 Ark. 424; 19 *ib.* 224; 25 Ark. 220; 13 Ark. 276; 21 Ark. 274.

WOOD, J. This appeal is from a judgment of the Pulaski circuit court in favor of appellee, based upon the following instrument: "$1,000. Keesville, N. Y., Aug. 3, 1882. On the first day of January, 1883, for value received, I promise to pay Laura S. Hewitt one thousand dollars, with interest, payable in levee bonds of the state of Arkansas, at par, and at Little Rock, in said state. N. G. Hewitt."

The case was tried by the court sitting as a jury, and the facts, as found by the court, are as follows: "The court finds the note executed August 3, 1882, and due January 1, 1883; that N. G. Hewett died February 6, 1887, and letters of administration were issued on his estate February 19, 1887; [that] the claim was presented in due form of law to the administrator on December 15, 1888, within two years of granting of letters; that the levee bonds and furniture, claimed to have been accepted under the agreement of December, 1886, were never, in fact, delivered and accepted in satisfaction of said note, and that the accord was never consummated, though it was agreed upon by the parties; and plaintiff is entitled to judgment for $1,000

interest at 6 per cent. from August 3, 1882." The court declared the law as follows: "The note is for $1,000, with interest at 6 per cent. from date, with right of maker to discharge in levee bonds at their face at maturity. Not having been so discharged, the maker was liable for the amount stated in money, and, this never having been paid or settled, the plaintiff is entitled to judgment for the full amount and interest from date, and judgment ordered accordingly.

The word "payable," when used in commercial transactions, and in instruments like the one in suit, means "to be paid," rather than "which may be paid." Century Dict. "Payable," 2. Both terms, when used in similar instruments, received an early construction by this court, which has not been departed from, and to which we adhere. In *Day* v. *Lafferty*, 4 Ark. 450, the suit was in covenant upon the following instrument: "$129.50. By the first of April next, we promise to pay Lorenzo D. Lafferty one hundred and twenty-nine dollars and fifty cents, for value received, payable in current Arkansas Bank Notes. Witness our hands and seals, this 24th December, 1870." A plea of tender was set up, and a demurrer was sustained to said plea by the lower court, one reason being "that tender was not made on the day of payment." In discussing this, the court, through Judge Dickinson, said: "We consider the law well settled that, if a party covenants to pay in specific articles, he must meet his contract at the time and in the manner specified. Tender cannot be made after the day, unless the damages are capable of being reduced to certainty by computation; nor can it be pretended that it is possible to do so, in this instance, without the intervention of a jury." In *Gist* v. *Gans*, 30 Ark. 309, Judge English, after quoting the above, said: "The effect of this decision is that the obligation sued on was not payable in money, but in bank notes, the value of which would have to be assessed as damages. In *Dillard* v. *Evans*, 4 Ark. 176, the suit was in debt on a note payable "in the common currency of Arkansas," and it was held that the note sued on was not an obligation for the direct payment of money." See also *Hudspeth* v. *Gray*, 5 Ark. 157; *Graham* v. *Adams*, 5 Ark. 262; *Hawkins* v. *Watkins*, 5 Ark. 481; *Wallace*

v. *Henry*, 5 Ark. 107; *Sims* v. *Whitlock*, 5 Ark. 103; *Wilburn* v. *Greer*, 6 Ark. 358; *Bizzell* v. *Brewer*, 9 Ark. 58.

In the case of *Gregory* v. *Bewley*, 5 Ark. 518, the writing sued on was as follows: "One day after date we or either of us promise to pay to Hawkins Gregory, executor of the estate of R. T. Banks, deceased, the sum of two hundred and twenty-seven dollars and twenty-five cents, with interest at the rate of ten per cent. per annum until paid, which may be discharged in Arkansas money." In *Hays* v. *Tuttle*, 8 Ark. 124, the writing sued on was a note in the ordinary form for forty dollars, with this closing sentence: "This note may be paid in the currency of Arkansas." In these cases it was held that the words "may be discharged," or "may be paid," imported an alternative condition in the writing by which the maker might discharge his obligation for the payment of money at maturity in the particular funds or property specified, but, if he failed to do so at maturity, the privilege was gone, and the obligation to pay in money or specie became absolute. There is no conflict between these cases and *Day* v. *Lafferty* and other cases, *supra*, but a clear distinction, which Judge Sebastian recognizes in *Gregory* v. *Bewley*, *supra*, as follows: "The obligation here sued on is distinguishable from the case of one payable primarily in common currency of Arkansas." Citing *Dillard* v. *Evans* and *Hudspeth* v. *Gray*, *supra*.

The obligation in the case at bar was payable primarily "in levee bonds of the State of Arkansas." There is nothing in the record to show that the term "payable" in the obligation sued on was used in any other than the sense in which that term is usually employed in ordinary commercial or other business transactions. The common acceptation of the term, when so used, is "to be paid," as indicated in the beginning of this opinion, and it does not signify any alternative condition, privilege or option, but the positive and absolute condition of payment at the time, place and in the specific funds named. The court therefore erred in its declaration of law.

We find no other error; but for this the judgment is reversed, and the cause is remanded for new trial.

BLANTON v. LITTELL.

Opinion delivered February 19, 1898.

1. ARBITRATION IN PROBATE COURT—EFFECT OF APPEAL—Where a matter in controversy in the probate court is submitted to arbitration by the agreement of the parties, and the award reported to the court, and judgment thereon rendered, an appeal to the circuit court does not abrogate the award, but brings up the case for trial *de novo;* and, if necessary, the circuit court may hear evidence to determine the contents of the agreement for submission or to identify the order of submission. (Page 78.)

2. AWARD—ABANDONMENT.—Where, after an award is made, the parties to the arbitration procure the appointment by the court of a special commissioner and the submission to him of the same matter in controversy, such conduct amounts, in the absence of evidence to the contrary, to an abandonment of the award. (Page 78.)

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

Philander Littell was the guardian of Mary Blanton. After his guardianship terminated, there was a controversy between him and the said Mary Blanton concerning the final settlement filed by him as guardian. While this matter was pending before the probate court, an agreement was made between them to submit the matters concerning which they differed to arbitration, and a rule of court naming the arbitrators and umpire, and submitting the matter to arbitration, seems to have been made, but such order of court was not entered of record. Afterwards the arbitrators made their award, showing that there was due from Mary Blanton to Philander Littell the sum of $55.43. Exceptions to the same were filed by Mary Blanton, but on what grounds the exceptions were made does not appear from the record. These exceptions were overruled, and the award was entered of record, and made the judgment of the probate court. Mary Blanton appealed to the circuit court. Afterwards the circuit court made an order referring the cause to a special com-

missioner to restate the account between the parties, and he was ordered to report at the next term of the court. The record does not show at whose request this order was made. At the next term of the court the special commissioner filed his report, containing a statement of the account between the parties, as stated by him, and showing due from Littell to Mary Blanton a balance of $1,355.50.

Afterwards Littell filed his motion, asking that judgment be rendered on the award made by the arbitrators in his favor, and that the report of the commissoner be disregarded. To support this motion, Littell introduced as evidence a pencil-written order signed by the probate judge, but not entered of record, submitting the matter in controversy between the parties to arbitration. In addition to this pencil-written order, the defendant also read to the circuit court the findings and award of the arbitrators and the judgment of the probate court upon said award.

The appellant, Mary Blanton, objected to the reading of the order signed by the probate judge, which had not been placed of record, and offered to show that said order was not the order under which the matter was submitted to arbitration. She also offered to show that there was a written agreement between the parties submitting the matters in controversy to arbitration, that the same had been lost, and she offered to show the contents of said lost writing. She also offered to show that Littell had abandoned the award. All of this evidence was rejected. The circuit court, holding that the parties could not abandon the arbitration by consent or otherwise, and finding that the award was not illegal on its face, gave judgment upon it. To all of which rulings the plaintiffs excepted in due form, and appealed

T. J. Oliphint, for appellant.

An agreement for re-arbitration waives an award, and, once it is repudiated, it cannot be restored. 26 Ill. 216; 23 Ill. 415; 3 Bush. 249; Russell on Awards (6 Ed.), 483; 2 Greene (Iowa), 260; 6 Mass. 70; 4 Me. 459; 9 Mass. 325; 8 Me. 290; 2 T. R. 781. A submission, being a contract, may be altered or amended at any time by consent of parties. Russell on

Awards, 82; Morse on Awards, 81; 17 Mass. 458; 37 Vt. 252; 15 Vt. 548; 3 Met. 576. That a written submission may be altered or amended by a subsequent parol agreement, see 9 Pa. St. 254; 20 Barb. 481; 6 Dana, 9; 1 Swan (Tenn.), 313; 6 Bing. 596; 17 Vesey, Jr., 419; 20 L. T., 318.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment of the circuit court rendered upon an award made by a board of arbitrators. The controversy between the parties arose in the probate court over the final settlement made by the appellee, Littell, as guardian of the appellant, Mary Blanton, and arbitrators to determine the matters in dispute were appointed by that court at the request of said parties. After the award had been made and reported to the probate court by the arbitrators, the appellant filed her exceptions to said report and award. These exceptions were overruled by the court, and judgment rendered upon the award, and she appealed to the circuit court.

The appeal from the probate court brought the case before the circuit court for trial *de novo*. It did not abrogate the award, but the circuit court had on appeal the same control over the award possessed by the probate court at the time the award was reported to said court, and before judgment had been entered thereon. It had the right to consider the exceptions to the award and report of the arbitrators filed by appellant, and to determine whether the award was valid and binding upon the parties. As the award rested upon the agreement of the parties, and the order of the probate court submitting the matter to arbitration, made in pursuance of said agreement, it was, of course, proper for the circuit court to know and understand the agreement and order. If, to determine the contents of such written agreement, or to identify the order of the probate court, it was necessary to hear evidence, the court should have heard it.

But, while we think the court might properly have heard the evidence offered by appellant on these points, we are not sure that, under the facts shown by the record, the refusal to hear it justifies a reversal of the judgment. It is conceded that there was an agreement to arbitrate the matters involved in this controversy, and that by consent of the parties the pro-

bate court submitted the matters to arbitration. The exceptions filed to the report and award do not appear in the record here, and we do not know what they set up, but no contention has been made here that the arbitrators exceeded their authority, or were guilty of conduct invalidating their award, and there is nothing to show or cause us to believe that the admission of the evidence offered by plaintiff would have affected the judgment of the circuit court in any way. We need not, however, consider that question further; for, in addition to the evidence noticed above, the appellant offered to show that Littell had voluntarily abandoned the award of the arbitrators. She offered to show that after the award had been made, and while the case was pending in the circuit court, he had consented and agreed to the appointment of a special commissioner to restate the account between the parties, and that such commissioner did restate the account. If this be so, it tended to show an abandonment by Littell of any rights held by him under the award; for, as parties may by agreement abandon and waive a settlement made by themselves, so in the same way they may waive or abandon a settlement or award made for them by arbitrators. *Rollins* v. *Townsend*, 118 Mass. 224. It is true that in this instance the probate court had rendered judgment upon the award, but the appeal brought the case before the circuit court for consideration and trial *de novo*. The circuit court, while the matter was pending before it, had power, for good cause shown, to set aside or recommit the award, and the parties might agree that this should be done, without a formal judgment of the court to that effect. If they procured the appointment of a special commissioner, and had the same matters in controversy submitted to him for determination anew, and had the account restated by him, this would, in the absence of evidence to the contrary, amount to an abandonment and waiver of the award, for such conduct on their part would manifest an intention and agreement to set aside and abrogate the award. *Rollins* v. *Townsend*, 118 Mass. 224; *Girdler* v. *Carter*, 47 N. H. 305; *Eastman* v. *Armstrong*, 26 Ill. 216; *Burnside* v. *Potts*, 23 Ill. 415; 2 Am. & Eng. Enc. Law (2d Ed), 790, 808.

For the reasons stated, we are of the opinion that the cir-

cuit court erred in refusing to hear and consider the evidence tending to show an abandonment of the award, before giving judgment upon the award.

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

BATTLE, J., absent, and not participating.

STATE v. BARNETT.

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Opinion delivered February 26, 1898.

INDICTMENT—REMOVING MORTGAGED PROPERTY.—Under Sand. & H. Dig., § 1868, prohibiting the removal from the county of any property on which there is a mortgage lien, it is unnecessary, in an indictment for removing mortgaged property from the county, to allege that the mortgage was recorded or filed for record. Page 81.)

Appeal from Independence Circuit Court.

RICHARD H. POWELL, Judge.

E. B. Kinsworthy, attorney general, for appellant.

The mortgage was good between the parties, without filing or recording, and the statute, making it an offence to remove mortgaged property, does not require the lien to be recorded. Hence the filing was not necessary. Sand. & H. Dig, § 1868; 49 Ark. 85; 54 Ark. 184; 9 Ark. 112; 18 Ark. 105. If filing had been necessary, the signing of the memorandum by the initials of the mortgagee was a sufficient compliance with the statute. Sand. & H. Dig., § 5102; 40 Ark. 431, 433; 9 Allen, 474; 14 How. (U. S.) 446; 1 Pet. 640; 131 Pa. St. 220; 6 Wend. 443; 33 Ill. 424; 1 Denio, 471, 479; 59 Ala. 164; 6 Hill (N. Y.), 443; Tiedeman, Com. Paper, § 12*a*, 265; 1 Randolph, Com. Pap., § 63; 1 Beach, Cont., § 578; Rap. & Lawr. Law Dict.

BUNN, C. J. This is an indictment for removing mortgaged property, and (omitting formal parts) it reads as follows: "The said J S Barnett, on the 1st day of November, 1896,

in the county and state aforesaid, then and there unlawfully, and with the intent to cheat and defraud one R C. Dorr, did remove beyond the limits of said county one sorrel mare, of the value of fifty dollars, upon which the said R. C. Dorr then and there had a lien by virtue of a certain mortgage with power of sale, which mortgage was duly executed and acknowledged by said J. S. Barnett on the 6th day of March, 1896, and delivered to said R. C. Dorr, and which was duly filed in the office of the recorder of said county, indorsed as follows: 'This instrument is to be filed but not recorded. R. C. D.' And the said R. C. Dorr had not given his consent to the said J. S. Barnett to remove said mare from said county, and the removal of said mare from said county by said J. S. Barnett was done with the felonious intent to defeat the said R. C. Dorr, the holder of said lien, in the collection of the debt secured by said mortgage." To which indictment the defendant interposed his demurrer as follows, to-wit: "Comes the defendant, and demurs to the indictment herein, and for cause he states: The said indictment does not state facts sufficient to constitute an offense, therefore he prays the judgment of the court." The demurrer was sustained, and the indictment was dismissed, and the state appeals.

The record does not show the specific grounds of demurrer, but there appears to be but one possible ground, and that is that the allegations of the indictment do not show that the mortgage was properly recorded or filed for record, in this; that the indorsement on it, "This instrument is to be filed but not recorded," was not signed by the name of the mortgagee, but only by certain letters, the initial letters of his name.

The statute under which this indictment was found (section 1868, Sand. & H. Dig.) does not, expressly or by implication, require a mortgage to be recorded or filed for record in order to create the lien therein referred to; the language of the section being as follows: "It shall be unlawful for any person to sell, barter, exchange or otherwise dispose of, or to remove beyond the limits of this state, or the county in which a landlord's or laborer's lien exists, or in which a lien has been created by virtue of a mortgage or deed of trust, any property of any kind, character or description, upon

which a lien of the kind enumerated above exists." This being true, it is unnecessary for us to consider the question whether or not the indorsement may be sufficient if signed by the initial letters of the mortgagee's name only, since, as between the parties to it, the mortgage and the lien thereof are good, whether it be recorded or not; and the statute manifestly prohibits the mortgagor from removing the mortgaged property out of the county, whether the mortgage be of record or not.

The court erred, therefore, in sustaining the demurrer to the indictment, and for this error its judgment is reversed, and the cause is remanded, with directions to overrule the demurrer, and to proceed not inconsistently herewith.

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STATE v. BOYCE.

Opinion delivered February 26, 1898.

1. PETIT LARCENY—INDICTMENT.—An indictment for petit larceny, a misdemeanor, need not allege that the stealing, taking, etc., was felonious. (Page 83.)

2. LARCENY—DESCRIPTION OF MONEY.—A general description of the money alleged to have been stolen is sufficient, under Sand. & H. Dig., § 1717. (Page 84.)

Appeal from Independence Circuit Court.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

Appellee was indicted at the spring term, 1896, of the Independence circuit court for petit larceny. The indictment, omitting the caption, reads as follows: "The grand jury of Independence county, in the name and by the authority of the State of Arkansas, accuse Joe Boyce of the crime of larceny, committed as follows, viz.: That the said Joe Boyce, on the first day of October, 1895, in the county and state aforesaid, then and there being, $3 in the gold and silver coin and paper currency of the United States of America and of the value of $3, and of the property of one Marshall Rogers, then and there

being found, unlawfully did steal, take and carry away, against the peace and dignity of the State of Arkansas."

Appellee filed a demurrer to said indictment, which demurrer, omitting the caption, reads as follows: "Now comes the defendant, and demurs to the indictment herein, and for cause he says said indictment does not state facts sufficient to constitute an offense; therefore he prays judgment."

The court sustained the demurrer to said indictment, to which ruling of the court appellant excepted, and prayed an appeal to the supreme court, which appeal was granted by the attorney general after examining the transcript in said case

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

As the indictment is for a misdemeanor, and the statute does not state that it must be "feloniously" taken, it is not necessary to use the word "feloniously" in the indictment. Sand. & H. Dig., §§ 1717 and 1698. 18 Ark. 363; 60 Ark. 19; 49 Ark. 449; 47 Ark. 100; 43 Ark. 178; 22 Atl. 46; 17 R. I. 698; 156 U. S. 464; 8 How. 41; 2 McClain, Cr. Law, § 802. If the word "feloniously' had been used in the indictment, it would have been surplusage. 1 Bish. Cr. Law, § 810; 1 Bish. Cr. Pro. § 537; 90 N. C. 710; 82 N. C. 656; 88 N. C. 654; 1 Cal. 60; 17 Minn. 50; 113 Pa. St. 469; 1 Metcalf, 258.

HUGHES, J., (after stating the facts.) The indictment in this case charges only petit larceny, which is only a misdemeanor, the value of the money stolen being stated at less than ten dollars. Sand. & H. Dig., § 1699. It was therefore unnecessary to charge that the taking, etc., was feloniously done. It is true that the definition of larceny, according to our statute, is as follows: "Larceny is the felonious stealing, taking and carrying, riding or driving away, the personal property of another." Sand. & H. Dig., § 1694. Since the passage of this statute, a distinction has been made between grand and petit larceny. See act March 22, 1881 (p. 144). The word "steal" has a uniform signification, and in common as well as legal parlance means "the felonious taking and carrying away of the personal goods of another." *State* v. *Chambers*, 2 Green (Iowa), 311.

"Theft" is a popular name for larceny. *People* v. *Donahue*, 84 N. Y. 442. See *Skipwith* v. *State*, 8 Texas App. 138,

The indictment charges that the defendant "unlawfully did steal," etc. This is sufficient. The general description of the money charged to have been stolen is sufficient, under § 1717, Sand. & H. Dig. (Act of 1893.)

Reversed, with directions to overrule the demurrer.

GIBSON v. BUCKNER.

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Opinion delivered February 26, 1898.

1. ATTORNEY'S LIEN—PARTITION.—An allotment of land in partition is not a "recovery" thereof, so as to entitle an attorney to a lien upon the same for his fee, under Sand. & H. Dig., § 4225, providing that where a judgment is for the recovery of real or personal property, the lien shall amount to an interest in such property to the extent of such lien." (Page 85.)

2. JUDICIAL NOTICE—OTHER SUITS.—A court cannot take judicial notice of its own records concerning the same subject-matter in a different case from that being tried. (Page 86.)

Appeal from Chicot Chancery Court.

JAMES F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

Appellee brought suit against appellant for $125, the amount of an alleged fee for services rendered appellant as an attorney in a certain suit for partition in the Chicot chancery court, in which certain lands were allotted her. The complaint describes the land allotted to appellant in the suit for partition, and alleges that appellee preserved a lien for his fee in said suit on the margin of the record of the decree therein rendered. It conclude with a prayer for judgment in the sum of $125, and that same be declared a lien upon the lands set apart to appellant in the suit for partition, etc.

The answer of appellant admitted the employment of appellee by her, through her husband, in the suit for partition. She says that appellee agreed to perform the services rendered

for $25, and claims that said amount is what she owes. The cause was submitted upon the pleadings and proof, and the testimony of R. A. Buckner, an affidavit filed in open court by consent, and the answer of appellant, which was, by consent, taken as her deposition in the case; and the court rendered judgment for appellee in the sum of $125, and declared same a lien upon the lands described in the complaint, and ordered same sold to satisfy said judgment. This appeal is from so much of the decree as declares the attorney's fee a lien on the lands described therein, and the order condemning said lands for the sale to pay said so-called lien.

William B. Streett, for appellant.

Appellee was not entitled to have a lien for services as attorney. Sand. & H. Dig., § 4225; 47 Ark. 86; 56 Ark. 324; 10 Bush. 406. In order to bind the wife by contracts made by him on her behalf, the husband must be shown to have been authorized to act for the wife. Such authority is not to be presumed from the marital relation alone, nor inferred from the knowledge of the action of the husband by the wife. 56 Ark. 217.

R. A. Buckner, for appellee.

A court will judicially notice its own record. 35 Wis. 308; 37 Ala. 32; 32 Tex. 570. An attorney's lien becomes an equitable assignment. 51 N. Y. 140; 38 Ark. 385; 4 Mad. 391. The lien follows funds recovered even if converted into land. 36 Ark. 591. A principal who persists in taking the benefits of his agent's fraud adopts the agent's acts as his own. 36 Ark. 532, 543; 2 Pars. Cont. (8 Ed.) p. 793. Appellant's answer denies amount of fee only. Failure to deny a material allegation is an admission of it. 1 Idaho, 673; 12 Cal. 407; 32 Cal. 131; 64 Mo. 165.

WOOD, J., (after stating the facts.) An allotment of land in a suit for partition is not a recovery thereof, in the sense of section 4225 of Sand. & H. Dig., so as to entitle an attorney to a lien upon same for his fee. In speaking of this section, this court, in *Hershy* v. *Duval*, 47 Ark. 86, said: "It is limited to cases where there has been an actual recovery, and cannot

be extended to professional services which merely protect an existing right or title to property." *Greer* v. *Ferguson*, 56 Ark. 324.

It is stated, however, in brief of counsel for appellee, that in the proceedings for partition judgment was given in favor of appellant and one Alice Hill against certain other parties for the sum of $233.34, and that said judgment, by agreement with the parties to said suit, was paid off or satisfied in land, whereby appellant was allotted, in satisfaction of her one-half interest in said judgment, land to the value of $116.67; and appellee has brought here by certiorari a copy of the decree and proceedings in the suit in partition which shows the above to be the facts. Counsel therefore contends that the chancellor who rendered the decree in this suit took judicial notice of the decree in the partition suit which he also rendered, and that his decree in the suit at bar declaring a lien on the lands was correct, inasmuch as the personal money judgment in favor of appellant in the partition suit was paid off in land, and he cites, to sustain his contention, *Porter* v. *Hanson*, 36 Ark. 591. Conceding that counsel for appellee is correct in this, the lien in that event could only be declared for the sum of $116.67, and only upon the specific lands which were set apart in satisfaction of that amount. But the question is not properly before us. It is not presented by the pleadings, and we do not determine it. There is nothing to show that the decree and proceedings in the suit for partition were in evidence in the suit at bar. A court cannot take judicial notice of its own records concerning matters of the kind under consideration in a different case from that being tried. *Lake Merced Water Co.* v. *Cowles*, 31 Cal. 215; *Baker* v. *Mygatt*, 14 Iowa, 131; *National Bank* v. *Bryant*, 13 Bush (Ky.), 419; *Banks* v. *Barnam*, 61 Mo. 76.

It is only in the same case that prior proceedings in the same court will be judicially noticed. *State* v. *Bowen*, 16 Kas. 475.

The decree declaring a lien on the lands mentioned in the complaint for the sum of $125 is therefore reversed, and dismissed, as to the lien, without prejudice.

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TRIMBLE *v.* TRIMBLE.

Opinion delivered February 26, 1898.

1. DIVORCE—DESERTION.—If a wife could desert her husband, within the meaning of the statute (Sand. & H. Dig., § 2505), while remaining an inmate of his home, there certainly is a strong presumption in such case that they are living together as husband and wife, which presumption it would require very clear and convincing evidence to overcome. (Page 88.)

2. DESERTION—WHEN SUIT PREMATURE.—When a divorce suit is brought upon the ground of a wilful desertion, and the evidence shows that the suit was commenced within a year after the desertion, the suit will be dismissed without prejudice. (Page 89.)

Appeal from Baxter Circuit Court in Chancery.

JAMES S. THOMAS, Judge, on exchange of circuits.

Felix M. Haney, *Sam. W. Williams* and *De E. Bradshaw*, for appellant.

Since the statute making abandonment a ground for divorce is in derogation of the common law, a complaint filed under it must strictly comply with all its requirements as to allegations. 2 Bish. Mar. & Div. § 598; Stewart, Mar. & Div. 258; 2 Bish. Mar. Div. & Sep. 1460, 1466; 10 Tex. 355; 19 Mo. 354; 1 Nelson, Divorce, 112; 20 Wis. 266; 1 Nelson, Div. 112; 4 Ia. 324; Bish. Mar. & Div. 1500. So long as the parties live together ostensibly as man and wife, they cohabit, and there is no desertion. 97 Mass. 327; Stewart, M. & D. 252, and cases; 1 Bish. M. & D. 1669–70, 1697; Stewart, M. & D. 254, sub-div. 3. There is no proof of desertion for one year; hence no divorce is grantable. Sand. & H. Dig., 2505; 1 Duv. (Ky.) 196; 19 Mo. 354; Stewart, M. & D. § 259; 20 Wis. 266; 2 Nelson, Divorce, § 734; 4 Ia. 324; 22 Kas. 699; 14 R. (Ky.) 628; 53 Ill. 394. Appellee's conduct was such that appellant was justified in leaving him. 37 Pa. St. 443; Stewart, M. & D. 257; 35 Mich. 461; 50 Mich. 90. Appellant should be granted a divorce on her cross-complaint. 44 Ark. 429; 38 Ark, 118; 33 Ark. 156.

M. N. Dyer & Son and *W. S. & Farrar L. McCain*, for appellee.

The averment of abandonment substantially conforms to the statute, and is sufficient. Bish. M. & D. § 1665; 31 Ia. 421. Such an objection could only have been made on motion to make the complaint more certain, made in the court below. 53 Ark. 49; 52 Ark. 378; 31 Ark. 379; 58 Ark. 7. The testimony fails to show any cause for desertion by appellant. When a wife, without any cause, physical or otherwise, leaves the bed of her husband, she has deserted him. 20 S. W. (Ky.) 605; 5 Colo. 55; 89 Ia. 471; 1 Nelson, Divorce, 114–7; 1 Bish. M. & D. § 16–76, *et seq.* If equity has acquired jurisdiction on other grounds, judgment may be rendered on a claim falling due during the pendency of the suit. 37 Ark. 605; 65 Vt. 623; 59 Ark. 441; 2 B. Mon. 148. Hence, it is sufficient if the year of desertion had elapsed at the time of rendition of the decree.

RIDDICK, J. This is a suit for divorce, brought by John N. Trimble against his wife, Elizabeth Trimble. It was commenced on the 6th day of August, 1895, and the ground upon which the divorce is sought is wilful abandonment for over one year. The parties were married in 1891. They were both past middle age, and each of them had been previously married. In July, 1894, there was a disagreement between them over the fact that the appellee, Trimble, refused to allow Lee Waggoner, a son of Mrs. Trimble by her former husband, to reside longer at appellee's home. This conduct on the part of Trimble caused strained relations between himself and wife. He testified that, from that time until she left, she refused to live with him as his wife, and refused to eat at the table with him. But she did not abandon his dwelling until in September afterwards. Now, if we should concede, as contended by counsel for appellant, that a wife could in law abandon her husband while at the same time remaining an inmate of his home, still the evidence here does not make out a case of that kind. Certainly, when a husband and wife dwell in a mutual home, there is a strong presumption that they are living together as husband and wife, and it should require very clear and convincing

evidence to overcome such presumption and show an abandonment under such circumstances. But Mrs. Trimble says she did not abandon appellee until the 10th day of September, 1895, and the testimony of appellee's own witness tends to support this statement. These witnesses say that Mrs. Trimble told them of the disagreement between herself and her husband, and asked them to effect a reconciliation, but stated that she did not see how she could live apart from her son, who was then about fifteen years old. Another witness introduced by Trimble testified that Mrs. Trimble stated to him that "she intended to give Mr. Trimble ample time to study about making Lee leave, and that if he did not let him come back she was going to leave herself." But this evidence does not show that Mrs. Trimble had abandoned her husband. It only shows that she was contemplating such a step. It tends to show that she had made up her mind to leave unless her son was allowed to return, but that she remained for awhile with the hope that her husband would relent and permit him to return. Finding at length that he would not recede from his position, she finally, on the 10th day of September, 1894, abandoned him and his home, and this action was commenced within less than a year afterwards. The general rule is that the cause of action must be complete before suit is commenced. (2 Nelson, Divorce, § 734.)

Without expressing an opinion upon the merits of the controversy, we hold that this action was prematurely brought. The decree of the circuit court granting a divorce is therefore reversed, and the suit dismissed, but without prejudice to a further action. The court did not err in refusing the application of the wife for a divorce, for her charges of misconduct against her husband were not sufficiently established by the evidence, but we direct that the dismissal as to her be also without prejudice.

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GALLAGHER v. JOHNSON (two cases).

Opinion filed March 5, 1898.

1. OVERDUE TAX SUIT—PROOF OF PUBLICATION OF NOTICE.—The overdue tax act of March 12, 1881, having provided that a notice of the pendency of overdue tax suits should be published, without regulating the manner of making proof of such publication, such proof is regulated by Mansf. Dig., §§ 4356, 4359, which relate generally to the publication of legal notices. (Page 93.)

2. PROOF OF PUBLICATION—SUFFICIENCY.—An affidavit of publication of a legal notice which fails to state that the paper in which the notice was published was "a newspaper printed in the county having a *bona fide* circulation therein for the period of one month next before the date of the first publication" of such notice is fatally defective, under Mansf. Dig., § 4356. (Page 95.)

3. OVERDUE TAX SALE—VALIDITY.—A sale of land in an overdue tax suit is void where the proof of publication of the warning order failed to show a compliance with the requirements of the statute governing the publication of legal notices. (Page 95.)

4. ADVERSE POSSESSION—REVERSION.—During the lifetime of a tenant for life, real estate cannot be held adversely to the reversioners. (Page 96.)

Appeals from Monroe Circuit Court.

JAMES S. THOMAS, Judge.

H. A. & J. R. Parker, for appellants:

The proceedings in the overdue tax sale are void, because: (1) The warning order and *pro confesso* decree are at variance as to the year for which the taxes on the north forty acres are alleged to be in default. 56 Ark. 419; 55 Ark. 30; Acts Ark. 1881, p. 65, §§ 2 and 3. The rates for the two years mentioned are different, and of this fact the court takes judicial knowledge. Acts 1877, p. 45; Acts 1875, Adj. Sess. p. 18; 23 Ark. 387; Hempstead, 563. (2) The proof of publication is defective and insufficient. 51 Ark. 34; Mansf. Dig., § 4356; 10 Fed. 891. This statute, being in derogation of common law, must be strictly followed. 27 Ala. 391; 1 Mich. 19; 27 Cal. 295; 51 Ark. 34; 10 Fed. 891; 40 S. W. (Ark.) 786; 59

Ark. 483; 55 Ark. 627; 61 Ark. 50; 55 Ark. 30; 52 Ark. 312. As to when variance from statute in notice of sale renders sale void, see: 139 U. S. 137; 30 Ark. 739; Cooley on Taxation, 335; Rorer on Judicial Sales, § 99; Freeman, Void Jud. Sales, § 19; 55 Ark. 213. Appellee derives his title from a life tenant; hence he is bound by the default and forfeiture of such life tenant. Manfs. Dig., § 5809. Nor is appellee's possession adverse to the remaindermen. 58 Ark. 510; 35 Ark. 84; 39 *ib.* 165; 43 *ib.* 427. Appellee derives title from the agent of the life tenant, who had purchased the land at a tax sale. Such agent could only hold the title as trustee for his principal. Mechem, Agency, §§ 821–2, 833; 57 Ark. 563. Appellee, by taking the private deed of the agent, is estopped to rely on the tax title. 44 Ark. 153; 7 Ind. 107; Herman, Estoppel, § 866. There could be no default for anything except what is in the complaint, and the complaint must show jurisdiction. 32 Ark. 445; 56 Ark. 419; Freeman, Judg. § 538–9; Black, Judg. § 84. If the order or decree is wrong, no confirmation can cure it. 91 Am. Dec. 621.

M. J. Manning and *J. P. Lee*, for appellee.

Confirmation of the report of the commissioner in the overdue tax proceeding adjudicates all objections to the sale and proceedings thereunder, in favor of the validity thereof. Acts 1881, p. 70, § 15. The *bona fide* purchaser is entitled to protection. 57 Ark. 428; 49 Ark. 216; 56 Ark. 553. The decree can not be assailed collaterally, if final and rendered by a court having jurisdiction. 55 Ark. 41; 50 Ark. 188. The decision is to the statute of limitations, made in the other case (3258), should be adhered to in all subsequent stages of this same case. 47 Ark. 362; Herman, Est. § 111, and cases. The title of appellants was barred by the statute of limitations. 34 Ark. 534; *ib.* 547; 48 Ark. 312; 49 Ark. 266; 50 Ark. 68; 59 Ark. 460; 58 Ark. 151; 53 Ark. 418.

BUNN, C. J. This (3259) is a suit in ejectment to recover the E. ½ of N.W. ¼ of section 34, T. 1 S., R. 2 W., in Monroe county, alleged to be wrongfully held by the defendant for one year next past, and damages in the sum of $——— for unlawful detention. The cause was determined in favor of

defendants, and plaintiff appealed. (The two cases are heard together, as they involve in part the same questions.)

It appears that Ambrose Gallagher, the son of Patrick Gallagher, and the brother of appellants James Gallagher and Mollie Wall, and uncle of appellant Kate Wall, and brother also of Augustus Gallagher (who is not a party to this suit), died in 1873, without issue, unmarried, and intestate, and owning the land in controversy. On the death of Ambrose Gallagher, as stated, the father, Patrick Gallagher, by operation of our statute of descents and distribution, became the owner of a life estate in the lands in controversy, and, as such life tenant, took possession of the same. In 1882 an overdue tax suit, involving the lands in controversy, was instituted in the circuit court of Monroe county, on the equity side of the docket, and final decree was rendered in this proceeding, under which the lands in controversy were sold by the commissioner of that court, on the 21st March, 1884, and one Parker C. Ewan became the purchaser thereof, and received his certificate as such, which in April following he assigned and transferred to the defendant, Joseph Johnson. The averments of the overdue tax bill, among others, were to the effect that the lands in controversy had been forfeited to the state for the nonpayment of the taxes of 1877, when in truth and in fact the forfeiture of one of the two 40-acre tracts was for the nonpayment of the taxes of that year, but the forfeiture of the other 40-acre tract was for the nonpayment of the taxes of 1875, and it is alleged and not denied that the rate of taxation for the year 1875 was somewhat greater than for the year 1877.

On the 19th of January, 1885, Patrick Gallagher, by quitclaim deed, sold his interest in the lands to one Montgomery, and the latter sold his interest thus acquired to said Parker C. Ewan on the 28th January, 1885, by quitclaim deed; and on the 21st April, 1891, Ewan bargained and sold to defendant, Johnson, for the consideration of $250, his interest in the lands, and on the 15th day of December following made him a quitclaim deed accordingly.

In the meantime defendant, Johnson, as we infer (for the date is not stated), after the two years time for redemption had

expired, went into possession under his certificate of purchase at overdue tax sale, assigned to him by Ewan as aforesaid, and had continued to hold possession up to the determination of this suit in the court below, and presumably still is in possession. He avers his possession to be adverse to the plaintiffs, setting up the several periods of peaceable and adverse possession, of two, five and seven years, as defenses, as well as his title acquired by purchase as aforesaid.

The contentions of plaintiffs were: That Ewan was the agent of both Patrick Gallagher, the life tenant, and of Kate Wall, one of the reversioners and plaintiffs, at the time of the overdue tax purchase, and therefore could not lawfully purchase in opposition to either; that, Ewan having purchased the life tenancy of Patrick Gallagher before the expiration of the period of redemption from the overdue tax sale, he then stood in the place of Patrick Gallagher, and that, occupying this attitude, it was his duty to redeem the lands, under the statute; that the overdue tax sale was null and void, because there was no sufficient proof of publication of the notice of the pendency of the bill, in this, that the affiant failed to state that his paper, in which said notice was published, was a paper of *bona fide* circulation in the county for the period of one month next before the first insertion of said notice therein; that said overdue tax proceedings were null and void also because the complaint stated that the lands had been forfeited to the state for the nonpayment of the taxes of 1877, when the decree of forfeiture and sale was partly for the forfeiture of that year and partly for the year 1875 as stated.

The statute providing for the publication of the notice of the pendency of the action in overdue tax proceedings reads as follows, to-wit: "The clerk of said court shall at once (after making and entering of record the order of publication) cause a copy of said order to be published for two insertions in some newspaper published in the county; and if there is no newspaper published in the county, he shall cause a copy of said order to be posted at the door of the court house of the county, or of the room in which the court is held; and such publication shall be taken to be notice to all the world of the contents of the complaint, filed as aforesaid, and of the proceedings had

under it." This act was part of the overdue tax act approved March 12, 1881. Nothing is said in the act as to the manner of making proof of this publication.

The act regulating generally the publication of legal notices in newspapers and the proof of such publication, which was in force at the time, is contained in Mansfield's Digest, sections 4356 to 4363 inclusive, and, so far as material in this discussion, is contained in sections 4356 and 4359, which read as follows, to-wit:

"4356. When a legal publication of any character is required by existing or future laws, or the order of any court, or the provisions of any deed of trust, mortgage or other agreement, or by any state, county, district, township or municipal officer, to be made by advertisement in a newspaper printed in this state, it shall be published in some daily or weekly newspaper printed in the county where the suit or proceeding is pending or where the land, property or subject of the proceeding or publication is situated. Provided, there be any newspaper printed in the county having a *bona fide* circulation therein, which shall have been regularly published in said county for the period of one month next before the date of the first publication of said advertisement."

"4359. The affidavit of any editor, publisher or proprietor, or the principal accountant of any newspaper authorized by this act to publish legal advertisements, to the effect that a legal advertisement has been published in his paper for the length of time and number of insertions it has been published, with a printed copy of such advertisement appended thereto, subscribed before any officer of this state authorized to administer oaths, shall be the evidence of the publication thereof as therein set forth." * * * *

It will be observed that the provisions of these sections, which were approved February 15, 1875, are in no wise repealed, modified or changed by the provisions of the overdue tax act, except in the matter of publication when there is no newspaper in the county, and also that, as has been stated, the latter act does not purport to regulate the manner of making proof of publication. We therefore conclude that the proof of publication of the notice of the pendency of the overdue tax

proceeding should have been made in accordance with the requirements of the general statute on the subject, which in terms is an act regulating the publication of legal notices required to be published under existing laws, and also under future laws.

This being settled, it remains for us to ascertain if the proof of publication in this instance was sufficient to give the court jurisdiction in the overdue tax proceeding. In *Lusk* v. *Perkins*, 48 Ark. 238, it was held by this court that "no presumption can be indulged in favor of the legality of the notice of an order of the county court for calling in county warrants. It is an order which seeks to conclude the rights of the parties by publication or constructive service, and a strict compliance with the requirements of the statute must be shown." That was a case of calling in county warrants for reissue or cancellation under a special statute enacted for that purpose; but the case is not essentially different in principle from the one now under consideration, for the order in this case and the decree to follow constitute a proceeding which seeks to conclude the owner in respect to the forfeiture and sale of his lands for the nonpayment of taxes. See, also, *Clark* v. *Strong*, 13 Ark. 491.

In *Gibney* v. *Crawford*, 51 Ark. 34, it was held by this court that the proof of publication was insufficient where it failed to show, among other things, that the newspaper in which the notice had been published had a *bona fide* circulation in the county, and had been published in the county one month next preceding the first insertion, and that "the statutes regulating the publication of legal advertisements obviously intended that this fact should be sworn to in the affidavit required to be made. Proof of them is a necessary part of proof of publication. Without it any affidavit made would be a nullity, and fail to be the evidence the statutes declare it shall be. It was held by this court in *Cross* v. *Wilson*, 52 Ark. 312, as expressed in the syllabus, that where the affidavit failed to state the facts which constituted the newspaper a paper in which legal notices can be published, it is fatally defective. Upon these authorities, we hold that the overdue tax sale to Ewan was null and void, the court not having acquired juris-

diction to decree the same. This leaves only the question of adverse possession of the defendant to be disposed of.

Having eliminated the overdue tax sale from the case, any adverse holding under any other title, color of title, or by mere possession, can be effectual only against the life tenant entitled to the possession; for until his death the reversioner have no right of action, and until then the statutes of limitation do not begin to run against them; and this suit was instituted soon after the death of the life tenant, Patrick Gallagher. This makes it unnecessary to dispose of the other questions raised by appellants.

Case No. 3258 is an equity case, to require the making of the overdue tax deed on the certificate of purchase assigned to defendant by Ewan as aforesaid, the same shown to have been lost. Deed decreed, and appeal therefrom taken by appellants. This deed falls within the decision herein annulling the overdue tax proceeding and sale.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the opinion herein.

BATTLE, J., not participating.

NOTE BY THE REPORTER.—The opinion of the court, in so far as it holds that there is no presumption of jurisdiction in favor of a decree of the chancery court in an overdue tax suit, seems to be open to criticism. It disregards the rule which the legislature has expressly provided in such case (Act approved March 12, 1881, § 18), and is in conflict with *Applegate* v. *Lexington, etc., Mining Co.*, 117 U. S. 255. See, also, *Hanger* v. *Barlow*, 39 Iowa, 539.

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

Opinion delivered March 5, 1898.

DAMAGES—FIRE.—If a railway company negligently suffers a fire to escape from its right of way, it is liable for the resulting damages, regardless of how the fire was started, whether negligent or otherwise. (Page 97.)

Appeal from Poinsett Circuit Court.

FELIX G. TAYLOR, Judge.

Samuel H. West and *J. C. Hawthorne*, for appellant.

The section men were not acting within the scope of their employment when they kindled the fire. Hence the railway company is not liable for resulting damages. 15 Am. & Eng. R. Cas. 135; 19 O. St. 110; Thompson, Negligence, 885, 886; Cooley, Torts, 133, *et seq.;* 38 Ark. 357; 40 Ark. 298; 59 Ark. 395.

E. L. Westbrooke and *N. F. Lamb*, for appellant.

A railway company may be rendered liable, in cases where damage results from fire, in any one of three ways: (1) by negligence in starting the fire; (2) by negligence in permitting combustible material to accumulate upon the right of way; and, (3), *by carelessly permitting fire to spread from the right of way.* 10 N. E. 577; 40 S. W. 438; 3 Elliott, Railroads, § 1229.

HUGHES, J. The appellee recovered a judgment against the appellant for damages done the property of appellee by fire, which appellee alleged in his complaint was kindled on the appellant's right of way by its servants, and negligently permitted to spread to and damage the farm of the plaintiff adjoining the right of way. The proof was that the servants of the appellant at work on the right of way of the railway company at about the hour of noon on the 14th of November, 1894, kindled a fire to warm their coffee, and left the fire burning in a pile of old railroad ties till noon of November 15, 1894, without any attempt to extinguish it, and that the fire spread to and damaged the farm of the appellee.

The only contention of appellant is that the servants of the railway company in setting the fire were not acting within the scope of their authority, and that there is no evidence showing that it was their duty to care for the right of way. If this contention be admitted to be correct, it does not follow that the railway company is therefore not liable. Though the fire was started by some one for whose acts the railway company was not responsible, yet if the company negligently permitted the fire to spread from its right of way to the adjoining farm of the appellee, and damage it, and the appellee

was free from contributory negligence, the railway company is liable.

In 3 Elliott, Railroads, § 1229, it is said: "The correct rule, and that held and declared by the weight of authority, is that if a company negligently suffers a fire to escape, it is liable, independently of how the fire was started, whether negligently or otherwise." Affirmed.

BUNN, C. J., not participating.

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FORDYCE v. EDWARDS.

Opinion delivered March 5, 1898.

1. INSTRUCTION—WHEN MISLEADING.—In an action by an engineer to re-recover from the railroad damages caused by a defective engine, an instruction that the plaintiff is not bound to inspect for latent defects is erroneous where the supreme court on a former appeal held the defects complained of to be patent. (Page 101)

2. MASTER AND SERVANT—ASSUMPTION OF RISK.—A locomotive engineer, in starting on a trip, assumes the risk of all existing patent defects in his engine. (Page 101.)

3. WHEN MISLEADING INSTRUCTION NOT CURED.—Instructions correctly defining an engineer's duty to discover patent defects in his engine before starting on a trip will not cure an instruction as to his duty on discovering defects during the trip which left out of consideration the question whether he used due care to discover the defects before starting on the trip. (Page 101.)

4. EVIDENCE—OPINIONS.—Opinions of witnesses as to what a prudent man would have done under the circumstances in which the engineer was placed are inadmissible. (Page 102.)

5. NEGLIGENCE—QUESTION FOR JURY.—Where, at the time a locomotive engineer took charge of an engine to make a trip, the engine was standing upon a depression in the track, it is a question for the jury to determine whether he was guilty of negligence in failing to discover that the pilot of the engine was raised too high. (Page 102.)

Appealed from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

Sam H. West and *J. M. & J. G. Taylor*, for appellants.

In instructing the jury as to what constitutes contributory negligence, it was the duty of the court to give to the jury the standard of conduct required of plaintiff. Instead of instructing the jury that plaintiff could recover if, while in the discharge of his duties, he was injured without "fault or negligence on his part," the court should have told them that plaintiff was held to the exercise of ordinary care and diligence. 42 S. W. (Ark.) 407; 65 N. W. (Mich.) 550; 60 Ark. 442. The instructions on the point of the degree of care demanded by the character of the defect are abstract, misleading and erroneous. In undertaking the employment, the plaintiff bound himself to take notice of all obvious or patent defects in the machinery furnished him. 22 S. E. 367; 60 Ark. 442; 24 Atl. 487; Bailey's Master & Serv. 157, 158. Plaintiff is required to show that the injury did not arise from an obvious defect which he knew of or could have known of by the exercise of ordinary care, or which was a hazard incident to the business. 21 Pac. 660; 8 S. E. (Va.) 370; 38 Am. & Eng. R. Cas. pp. 31–35 note; Wood, Master & Serv. § 382; Wharton, Negl. § 206; 122 U. S. 189; Bailey, Liability of Master & Serv., pp. 170–175; 2 Rorer, Railroads, § 1212–1216; 3 Elliott, Railroads, § 1308. Negligence constituting the proximate cause of the injury is pre-requisite to liability of appellants. 3 Elliott on Railroads, §§ 1268, 1310. A servant assumes risks ordinarily incident to his service. Wood, Mast. & Serv. § 387; 3 Elliott, Railroads, § 1288. The sixth instruction given for plaintiff was erroneous, in that it told the jury that if the engine was standing in such place that plaintiff could not discover the defect by the exercise of ordinary care, defendant was liable. The liability of defendant rests on the negligent character of its acts and conduct towards plaintiff. 28 S. W. 23; 3 Elliott, Railroads, §§ 1297, 1308. Where master and servant have the same means of knowledge, ordinary risks of service are assumed by the servant. 3 Elliott, Railroads, § 1288, p. 2029; 18 N. W. 584. The alleged defect in the machinery was not pleaded in the complaint, and the court erred in admitting testimony on this point. 22 S. E.

871; 3 Elliott, Railroads, § 1309; Black, Proof & Pldg. in Acc. Cas. p. 59; 54 Ark. 304; 70 Iowa, 594; 1 Black, Judgments, § 183.

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

If the defect complained of was not such a one as the plaintiff might have discovered by the exercise of ordinary care and diligence, he was entitled to recover. Whether such was the case, is a question for the jury. 60 Ark. 442. After discovering the defect, plaintiff did not lose his right of action by continuing on the locomotive. 60 Ark. 443; 57 Ark. 164. Instructions 1 and 4 given for appellee correctly declared the law of contributory negligence.

HUGHES, J. This is an appeal from a judgment for appellee in the sum of five thousand dollars against the appellants. The case was appealed once before, and was reversed and remanded for a new trial. The opinion is reported in 60 Ark. 428.

The appellee was a locomotive engineer in the employment of appellant, and was injured by the derailment of the engine caused by striking a horse. He alleged in his complaint that his injury was caused by the negligence of the appellants in furnishing him with a locomotive the pilot of which was raised so high above the track that the locomotive was dangerous to operate. This was held, on the first consideration here, to be a patent defect, to observe which the appellee was required by law to use ordinary care.

On the first trial, the circuit court, at the request of the appellee, gave the jury the following instruction numbered two (2): "The plaintiff had the right to presume that the engine furnished by the defendant was in good condition, and he was not required to inspect the same for defects; and if the jury find from the evidence that, during the course of the trip, he discovered that, owing to the use of an improper spring under the locomotive, the same had become more dangerous, then, by remaining in the performance of his duties, he did not assume the increased risk occasioned by such defect, unless the jury believe from the evidence that the increased risk was so haz-

ardous that a reasonably prudent man, situated as the plaintiff was, would not have continued in the performance of his duties." This court held on the first appeal that the first part of this instruction was erroneous, in that it in effect told the jury that the plaintiff was not required to take notice of obvious defects; while the law required that he should have used his eyes, and have made such inspection as ordinary care requires of one whose duty it is to take notice of obvious defects. It is, of course, well settled that plaintiff was bound to use ordinary care to observe patent defects in machinery he was operating, and if he failed to do so, and was injured by an accident resulting from such defects, he cannot recover damages for his injury, for he assumed the risk. (See authorities cited in *Fordyce* v. *Edwards*, 60 Ark. 442.)

On the second trial of this cause, the circuit court gave this same instruction, numbered 2, with an amendment to make it read that the plaintiff was not required to inspect the engine for latent defects. This interpolation of the word "*latent*" before the word "defects" was clearly erroneous, because the court had decided that the defect complained of was patent, and there was no question of a latent defect in the case. It might be argued that other instructions given cured this error; but, while there are others that militate against the idea couched in this one, we yet think it was erroneous, and calculated to confuse and mislead the jury, and for this cause, if there were no other errors, the cause should be reversed. But this instruction is clearly obnoxious to further objection.

The second instruction told the jury that "if the jury find from the evidence that, during the course of the trip, he discovered that, owing to the use of an improper spring under the locomotive, the same had become dangerous, then, by remaining in the performance of his duties, he did not assume the increased risk occasioned by such defect, unless the jury believe from the evidence that the increased risk was so hazardous that a reasonably prudent man, situated as the plaintiff was, would not have continued in the performance of his duties." This leaves out of consideration the question whether the appellee used ordinary care to discovor the defect complained of, before starting on his trip, and authorizes them to find for

the plaintiff if he discovered the defect after he had started on his trip, provided the danger therefrom was not so great as that a reasonably prudent man, situated as the plaintiff was, would not have continued in the performance of his duties; and this, notwithstanding there was a patent defect which the plaintiff ought to have discovered before starting on his trip, and which was the same he says he discovered only a short time before the accident which occasioned the injury complained of. The defect was patent, and he, under ordinary circumstances, ought to have discovered it before starting on his trip; and, if he did not, he assumed the risk incident to the operation of the engine in that condition, and the fact that he discovered it afterwards would not alter the case. This second instruction was the basis for the third, fourth and fifth for plaintiff. It is easy to see how this might have misled the jury.

In the third, fourth and fifth instructions given at the request of the defendant the court correctly charged the law as to the duty of the plaintiff to use ordinary care to discover this patent defect. But these did not explain or cure the error in the second instruction to which we have adverted.

In the trial the plaintiff introduced, over the objection of the defendant, to which he excepted, evidence to show that the reason why he could not discover the defect complained of was that, at the time he took charge of the engine, it was standing in a depression in the track of the railway, so that the defect would not appear to one using ordinary care in inspecting the engine. The defendants' objection to this evidence was that no allegation was made in the complaint as to this depression, and none that the plaintiff was prevented by it from discovering the defect by the use of ordinary care. As this cause must be reversed, and the plaintiff may amend his complaint in this behalf, we express no opinion as to this. The opinions of witnesses as to what a prudent man would have done under the circumstances were not admissible.

The court, in the sixth instruction given at the instance of the plaintiff, said: "If the jury find from the evidence that, at the time plaintiff took charge of the engine to make the trip on February 5, 1891, the engine was standing in a depression upon the track, then it is a question of fact for the

jury to determine whether this would have prevented him, by the exercise of ordinary care and diligence, from discovering the condition of the pilot at that time." This was held in *Fordyce* v. *Edwards*, 60 Ark. 442, to be a question of fact for the jury.

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

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WILLIAM FARRELL LUMBER COMPANY *v.* DESHON.

Opinion delivered March 5, 1898.

DEED—COVENANT—DAMAGES.—In case of a deed containing covenants against incumbrances, the covenantee, when sued on the purchase money note, is entitled to recoup any damages he may have sustained in consequence of a breach of such covenants; and since the covenantee may rely upon the covenantor to remove all incumbrances, he will not be chargeable with neglect if he fail to redeem from a tax forfeiture incurred by the covenantor until the state's title has been perfected. (Page 104.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

Appellee brought suit in the Pulaski circuit court upon the following instrument of writing: "Little Rock, Ark., September 20, 1893. Received of J. W. Deshon, trustee, three hundred and fifty dollars ($350) for land in Grant county, to be paid on or before two years. WM. FARRELL LUMBER CO."

This case was tried by the court sitting as a jury. The facts, as found by the court, are as follows: The note sued on ($350), of date September, 1893, was given for certain lands, in all 160 acres, described in deed which warranted the title to the defendant company and against incumbrances. At the time of the conveyance the land was incumbered by a lien for $40, for attorney's fees, and also to the extent of $4.67 on one 40 acre tract for taxes, which amount the defendant paid out to redeem. Also 120 acres of land were incumbered to

the extent of $14.01, as estimated by the court, for taxes, which was not redeemed by defendant, and for which defendant afterwards paid the state $151, but which, by the use of proper diligence on the part of defendant, it could have redeemed from tax forfeiture for the amount above stated, of $14.01. There is due on the note the amount stated on its face, $350, less incumbrances above set forth, amounting in all to $58.68, leaving balance due of $291.32, with interest at six per cent. from date of note, September 20, 1893.

The court declared the law as follows: "The defendant is entitled to a deduction, at the time of the execution of the note, only of such amount as it was then incumbered for, and is not entitled to an allowance for the additional expense it was put to by reason of its own negligence in failing to make the redemption of the 120 acres."

The court rendered judgment for appellee in the sum of $291.32.

J. A. Watkins, for appellant:

The deed under which appellant purchased warranted the title to the property "against all lawful claims whatsoever." Hence appellant was entitled to deduct the amount he had to expend in protection of his title against a sale for taxes before his purchase. 47 Ark. 295; 35 Ark. 348; 31 Ark. 319.

S. S. Wassell, for appellee.

Appellant was not compelled to pay the attorney's fee, since there was no lien therefor, as against the state. There has been no tender of the balance admitted to be due. 30 Ark. 505.

WOOD, J., (after stating the facts.) A covenant against incumbrances in a deed is one *in praesenti*. If incumbrances exist, the covenant is broken as soon as made. The breach of such a covenant is "single, entire and perfect in the first instance," and the right of action accrues at once. Rawle, Cov. for Tit. §§ 189, 205; 4 Kent, Com. 471; *Smith* v. *Jefts*, 44 N. H. 482. The covenantee, however, is not compelled to sue at once; and, if he sue before he has been disturbed or has suffered injury by reason of the incumbrance (not having paid

anything to remove or extinguish it), he can only recover nominal damages.

The rule as respects the measure of damages is to treat the covenant against incumbrances as a covenant of indemnity. Rawle, Cov. for Title, § 188; *Norton* v. *Babcock*, 2 Metc. 510. In case of a breach, the covenantee should recover the damages he may have sustained in consequence thereof. Accordingly, where a covenantee in a deed is sued by the covenantor (who covnants against incumbrances) on a note given for the purchase money of the land conveyed, the covenantee, if he ask it, should receive credit for such sum as he has had to pay in order to protect his title against any incumbrance made or suffered by by the covenantor. See *Morris* v. *Ham*, 47 Ark. 293.

Here the covenant against incumbrances was broken by reason of a forfeiture for the nonpayment of taxes which existed at the time of the executiou of the deed containing the covenant. The appellant redeemed one of the tracts, but, failing to redeem the other, the title to which became absolute in the state, and, in order to get title to this, it was compelled to purchase from the state, paying the sum of $151. Negligence cannot be predicated upon a failure by appellant to redeem from the tax forfeitures. True, it might have done so; but it was under no duty or obligation of that kind, and its right at law to stand on its covenant, and to recover damages for breach of same, cannot be affected by its failure or refusal to perform a duty which devolved upon another. Rawle, Cov. for Tit. § 181; *Burk* v. *Clements*, 16 Ind. 132; *Elder* v. *True*, 32 Me. 104; *Stewart* v. *Drake*, 14 N. J. L. 143; *Miller* v. *Halsey*, 14 N. J. L. 48. Appellee had broken his covenant, and it was his duty to see that no injury resulted to appellant's title by reason of said breach.

The court therefore erred in its declaration of law, and in refusing to allow the credit of $151, instead of $14.01.

There was no appeal by appellee from the allowance in favor of the appellant of the amount of attorney's lien.

Reverse the judgment, and remand the cause for a new trial.

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CENTRAL COAL & COKE COMPANY v. NIEMEYER LUMBER COMPANY.

Opinion delivered March 12, 1898.

1. EVIDENCE—COMPETENCY.—Where plaintiff seeks to hold defendant liable on the contract of a third person, upon the ground that defendant has held such third person out to be his agent in making such contracts, it is competent for defendant to prove that, after such alleged holding out and before the contract in question was entered into, defendant had mailed to plaintiff, postage prepaid, printed circulars showing that such third person was an independent contractor, and not the agent of defendant. (Page 109.)

2. SAME—GENERAL OBJECTION—EFFECT.—A general exception to the entire testimony of a witness is insufficient where a portion of the testimony is competent. (Page 110.)

Appeal from Miller Circuit Court.

RUFUS D. HEARN, Judge.

Hudgins & Estes and *Scott & Jones*, for appellants.

The agency of Landes was not proved. Nor was the statement made by the manager of appellant company sufficient to estop it to deny such agency. Estoppels *in pais* are not favored. 15 Ark. 316. They will always be limited strictly to the representation made. 49 Ark. 336. Hence, appellee would not have been warranted in presuming that Landes had authority to purchase on credit, from the mere fact of his agency, if it had existed at all. He who deals with a special agent must look to the extent and nature of his authority. 23 Ark. 411. The court erred in refusing to allow appellant to prove facts charging appellee with notice of the true extent of Landes' authority. Proof of such notice would destroy any estoppel in favor of appellee. Bigelow, Estoppel (3 Ed.), 319.

L. H. Byrne, for appellee.

Whether or not the manager of appellant company made the alleged statement as to Landes' agency was a question for the jury, and their verdict is conclusive thereupon. These

statements are sufficient to operate as an estoppel, whether they be true or false. 2 Bigelow, Estoppel, §§ 1077, 1078 and 1079, and cases cited; 33 Ark. 465; 34 N. Y. 30; 75 Cal. 159. The agency alleged by appellee is one implied from the statements of the manager of appellant company, and any testimony tending to show that appellee was informed, by a circular letter from appellant, of the real value and extent of Landes' authority would have no bearing on the question.

BUNN, C. J. This is a suit by the plaintiff, the Niemeyer Lumber Company, against the defendant, the Central Coal & Coke Company, for the sum of six hundred and ninety dollars, the price of a lot of cross-ties. The defendant answered, denying that the plaintiff had ever sold and delivered to it any cross-ties as alleged, and also that it owed plaintiff said sum, or any other sum. Trial and judgment for plaintiff for said sum and interest at 6 per cent. per annum from the 20th March, 1894, and defendant appealed.

The only material question in this case is one of fact, whether or not the ties were sold to defendant or to its agent, and the refusal of the trial court to admit certain testimony offered by defendant bearing upon that question.

The testimony of A. J. Niemeyer, on the part of the plaintiff, was to the effect that witness was the president of the plaintiff company during the years 1893, 1894 and 1895, and, while acting as such in the management of its business, he casually met the manager of the defendant company, one W. L. Whitaker, on the streets of the city of St. Louis, and proposed to sell his company a lot of cross-ties which the plaintiff had for sale along the Shreveport branch of the Cotton Belt Railroad in Arkansas and Louisiana; that Whitaker informed him that one H. L. Landes, of New Lewisville, Arkansas, was the agent of or represented his company in that locality, and referred him (Niemeyer) to him (the said Landes); that but few words were spoken between them, and that he did not pretend to remember the language used by Whitaker on the occasion, but from what he said he was impressed with the idea that he represented Landes as the agent of his company for the purchase of cross-ties in that locality.

Whitaker's testimony was to the same effect, as to the meeting and the nature thereof; but, as to what was said by him, he denies that he represented Landes to be the agent of his company, but that, on the contrary, he told Niemeyer that he could not purchase his cross-ties, because he, on the part of his company, had entered into a written contract theretofore with Landes, obligating it not to purchase any cross-ties in that locality except from Landes. The written contract was exhibited with the testimony of one Weatherby, a witness for the defendant, and identified by him. This contract shows, not that Landes was the agent of or represented the defendant company, but that he (Landes) had thereby agreed with the defendant company "that he would, within one year from the 1st of November, 1893, the date thereof, furnish and deliver to it 150,000 oak cross-ties on said branch road, free of all liens and incumbrances, the delivery to be made at the rate of 12,500 per month, and subject to inspection, and to furnish receipts in full from the timber owners, haulers and tie-makers with whom Landes should contract, and said receipts to be furnished on or before the 20th of each month, and to show payment in full for all labor performed or material for all ties delivered during the preceding month." Then follows the prices to be paid for the ties, and when to be paid.

The cross-ties purchased of Landes, to be delivered to the defendant company, for the month of February, 1894, which included the ties for which this suit was brought, were purchased by Landes, and proper receipts obtained therefor by him from the owners, as he reported to Whitaker by letter dated March 13, 1894, but Whitaker declined to honor his draft at the time for the price thereof, because Landes had not sent him or his company the receipts as provided in the contract, and, without the draft being paid, Landes was not able or did not pay for the cross-ties he had purchased from the owners thereof. Thereupon Landes went to St. Louis, and delivered the receipts of Niemeyer Lumber Company, dated "Waldo, Ark., February 28, 1894," and of others. This was March 27, 1894, and Whitaker appears then to have paid Landes for the February estimate. Landes, from some cause, failed to pay Niemeyer Lumber Company, notwithstanding its releases, etc., and

this suit was brought to charge the defendant company with the amount.

Niemeyer and Whitaker were the only witnesses to their conversation on the streets of St. Louis concerning this matter, and they differ widely as to their versions of it. The defendant offered to prove by a competent witness—the said Weatherby, who was its timber agent in the locality named—that on several occasions during the months of November and December, 1893, and of January and February, 1894, he had mailed, postage prepaid, printed circulars to the plaintiff company at Waldo, Arkansas, which showed the nature of the contract between defendant and Landes, and the relation existing between them. Landes says that, to the best of his recollection, he purchased the ties from plaintiff about January, 1894. The object of the testimony offered was to show that plaintiff had notice of the nature of the contract between defendant and Landes before it sold the ties to the latter. This, we think, was germane to the issue involved, and should have been admitted, as throwing light upon the question concerning which the testimony was quite indefinite and uncertain, to say the most of it. If the plaintiff had notice, before it sold to Landes, that he was purchasing really on his own account, or had such information as to put it on inquiry as to that fact, the giving of such notice to it was certainly material, under the circumstances of this case, since the evidence of Landes' alleged agency was somewhat uncertain, according to Niemeyer's own testimony.

There were no exceptions to the instructions, which are properly before us, and the objection to the manner by which the jury finally made up their verdict under the direction of the court need not be here discussed.

For the refusal of the court to admit the testimony offered, the judgment is reversed, and the cause remanded, with direction to proceed not inconsistently herewith.

ON MOTION FOR REHEARING.

Opinion filed May 21, 1898.

BUNN, C. J. The language of the bill of exceptions, touching the non-admission of the evidence offered, is as follows, to-wit:

"Defendant here offers to prove by witness Weatherby that in November and December, 1893, and in January and February, 1894, he, as the agent of Landes, had printed and distributed along the line of the St. Louis Southwestern Railway Co. from New Lewisville, Ark., and beyond, and along the line of the Shreveport branch, south of New Lewisville, to Shreveport, and had, during these months, at several times mailed to the A. J. Niemeyer Lumber Co., postage prepaid, directed to said company at Waldo, Ark., printed circulars, stating in brief the substance of the contract between H. L. Landes and the Central Coal & Coke Co., introduced in evidence, which circulars specifically set out the condition of said contract, that the Central Coal & Coke Co. agreed to receive no ties nor make any contract to purchase any other in the territory from New Lewisville, Ark., to Shreveport, La., along the line of the St. Louis Southwestern Railway Co. from the 1st of November, 1893, to the 31st October, 1894." And "plaintiff objected to the introduction of this testimony, which objection was sustained, and the plaintiff [meaning the defendant] then and there excepted to the ruling and judgment of the court, sustaining plaintiff's objection to the introduction of said testimony and in excluding said testimony."

The language of the objection is general, without specifying the ground of objection; as is also the language of the court in sustaining the same. All that portion of the *proffered testimony of Weatherby*, except the contents of the printed circulars, was admissible at all events, even under the strictest rule the plaintiff could appeal to, since, of itself, the whole of the proffered testimony was relevant and competent, if properly adduced. A wholesale rejection of it was therefore improper, in any view we may take of the question.

And, so, in our opinion heretofore rendered in the case, we said: "The object of the testimony offered was to show that the plaintiff had notice of the nature of the contract between defendant and Landes before it sold the ties to the latter. This, we think, was germane to the issue involved, and should have been admitted, as throwing light upon the question concerning which the testimony was quite indefinite and uncertain, to say the most of it. If the plaintiff had notice, before it

sold to Landes, that he was purchasing really on his own account, or had such information as to put it on inquiry as to that fact, the giving of such notice to it was certainly material, under the circumstances of this case, since the evidence of Landes' alleged agency was somewhat uncertain, according to Niemeyer's own testimony."

A correction of this decision is asked on the following ground set up in the motion for rehearing, to-wit: "That the court has misconceived the records and rulings of the Miller circuit court, in this, this court seems to have decided and reversed this cause solely upon the exclusion of the evidence of witness, T. B. Weatherby, on the point of his evidence as to certain printed circulars which had been mailed by one H. L. Landes, holding that the proof was material. The Miller circuit court excluded this evidence solely upon the ground that the defendant offered parol testimony as to the contents of the printed circular, and this proof was not competent, as the printed circular itself was best evidence, and upon this ground the testimony was objected to, and the same was excluded by the court."

The bill of exceptions failed to disclose to us that the sole and only ground of objection, and of the ruling sustaining the same, was that parol evidence was not competent to prove the contents of the circular; nor, indeed, does the bill of exceptions fairly declare what were the grounds of objection. As stated above, there were other items of the proffered testimony, not subject to the general rule governing the admission of writings in evidence. The objection to the evidence—to that which was competent and to that which was incompetent—was general, and reached only its relevancy and competency, and not the sufficiency of the foundation laid for its introduction; while the court might have properly sustained the objection to so much of the evidence as was offered to show the contents of the notice or circular, because parol testimony was not competent for that purpose until a sufficient foundation was laid, yet it appears (from the exclusion of all the testimony offered—the competent and the incompetent—upon the general objection) that it did not do so, but excluded it upon the ground that the whole of it was irrelevant and incompetent for any purpose, and not be-

cause of an insufficient foundation. Upon that view we held, in the opinion heretofore delivered, and now hold, that the court erred in excluding the testimony.

The motion is therefore overruled

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BLASS v. ERBER.

Opinion delivered March 12, 1898.

EXEMPTIONS—TIME OF CLAIMING.—Funds in the hands of a garnishee may be claimed as exempt by the debtor after judgment has been rendered against the garnishee fixing the funds in his hands. (Page 114.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

W. T. Tucker, for appellants.

The affidavit for appeal is defective. Sand. & H. Dig., § 5749. The requisite notice of filing the schedule was not given. Sand. & H. Dig., § 3718. Nor does the schedule state that the claim is for a debt of contract. This is necessary. Sand. & H. Dig., § 3716. A debtor must file his claim to exemptions before judgment against the garnishee, or he is too late. 62 Ala. 397; 52 Pa. St. 423; 37 Iowa, 129; 28 Ark. 485; 33 Ark. 464. The judgment against the garnishee is *res judicata*, and the debtor cannot go behind it to set up his claim of exemptions. 29 Ind. 507; 15 *ib.* 8; 91 *ib.* 385; 33 Ark. 454. So, after judgments of condemnation, it is too late to set up a claim of exemption. Drake on Attach. § 244a; Thompson, Homestead & Exemp. § 826; 13 Neb. 321; 2 Wallace, 237; 14 Iowa, 320. The case is analagous to those of failure to plead the defenses of payment, limitation, etc.; and by such failure these are waived. 33 Ark. 464; 17 *ib.* 465.

Fulk & Fulk, for appellee.

Any defect in the form of the affidavit for appeal was cured by the appearance and contest of appellants in circuit

court. 59 Ark. 117; 33 *ib.* 745; 52 *ib.* 318; 61 *ib.* 515. Failure to serve notice of schedule is waived by appearance and contest of the right to schedule. 46 Ark. 493; 50 Ark. 458; 46 Ark. 497. No objection was offered below that the schedule did not show a debt of contract, hence no objection will be allowed in this court. 55 Ark. 213. Judgment against the garnishee does not terminate the debtor's right to file his schedule and claim exemptions. 31 Ark. 652; 38 Ark. 112; 55 Ark. 55; 42 Ark. 410; 55 Ark. 101; 21 So. 995; 39 S. W. 241; Rood, Garnishment, § 86; 36 N. W. 139; 10 Pac. 89, 93. The debtor may claim his exemption at any date before sale. 33 Kas. 28; 10 Ala. 226; 52 Ala. 108; 74 Mo. 607; Thompson, Exemptions, § 839.

BUNN, C. J. This is a controversy over a claim of exemption of a debt involved in a garnishment proceeding, begun in one of the justice-of-the-peace courts of Pulaski county, where the claim of exemption was disallowed in part, and, on appeal to the second division of the circuit court, was there allowed, from which judgment of allowance the plaintiff in garnishment took the appeal to this court. Gus Blass & Co. in said justice's court recovered judgment against Mrs. Sarah Erber. Afterwards the plaintiff filed their complaint, and thereon their allegations and interrogatories against one A. Lofton, as garnishee, alleging that he was owing or had money in his hands belonging to Sarah Erber, amounting to the sum of one hundred dollars, and interrogatories accordingly were propounded. The writ of garnishment was issued and served, and made returnable on the 20th of April, 1896. On the 15th of April, 1896, Lofton, by his attorney, answered that he had funds in his hands belonging to Sarah Erber, amounting to the sum of one hundred dollars. Sarah Erber gave notice that she would file her schedule and claim of exemptions against this debt on April 20th, the return day of the garnishment, and on that day accordingly filed her schedule, claiming the $100 as exempt, and thereupon supersedeas was issued on that day. The notice bears no date, as we can see from the record, but presumably it was within proper time. On the same day, April 20th, Mrs. A. Lofton, answering for A. Lofton, the garnishee, stated that he was

indebted to the defendant, Sarah Erber, in the sum of $239, and thereupon the court rendered judgment against the garnishee for the sum of $85.80 in favor of the plaintiffs, Gus Blass & Co., which was less than the balance of the $239, after deducting the $100 exemption theretofore allowed the defendant, and a supersedeas was granted for $148 in favor of defendant. On the 6th day of May, 1896, the defendant filed a second schedule, in which she stated and claimed the $239 admitted to be owing her by the garnishee, but the court refused to issue supersedeas on this schedule and claim, and defendant appealed to the circuit court, where her claim was allowed, and plaintiff appealed to this court, as stated.

All questions of notice of filing schedule and claim of exemption were waived by plaintiff's appearance and contesting same. *Brown* v. *Doneghy*, 46 Ark. 497; *Garrett* v. *Wade*, *ib.* 493. The same may be said of the affidavit for appeal. *Elder* v. *Crabtree*, 59 Ark. 177.

The schedule and claim of exemption are in due form, the record showing the judgment was for a debt on contract, and the only question, therefore, left for our consideration is: Was the claim of exemption available, being filed after the rendition of the judgment against the garnishee, and thus fixing the funds of defendant in his hands? This is a mooted question, being determined in some jurisdictions apparently as against the validity of the claim, but in others in favor of it. The latter is the doctrine of the textbooks, and doubtless is supported by the weight of authority. At all events, it is the doctrine of this court, as announced in *Robinson* v. *Swearingen*, 55 Ark. 55, where the court used the following language on the subject: "As to executions, it is established that the claim [of exemption] may be asserted at any time before sale; and we think it apparent that no distinction was intended or made, either in the constitution or statute, between ordinary executions, 'other process,' and attachments not specific, as to the right of the claimant to assert his claim. A judgment sustaining an attachment, and ordering the attached property sold, follows an inquiry quite apart from the defendant's claim of exemption, and is conclusive only as to matters involved in the inquiry. We do not mean that the claim of exemptions may not be set up and determined prior to or along

with the issue upon the attachment, but simply that an ordinary determination of the latter does not include the former. There is nothing in the record by which it appears that the court inquired into or adjudged the defendant's claim of homestead in the order of sale, and we can indulge no presumptions to that effect. There being no adjudication of this right, the defendant was at liberty to assert it in a manner provided by statute at any time before sale, whereupon it becomes the duty of the clerk to issue supersedeas." That was a case of property taken under an order of attachment, and on final hearing ordered sold to pay the debt adjudged against the defendant; but, by strict analogy, the rule in case of property seized under the garnishment proceedings is necessarily the same, as to the time within which the exemption claim may be asserted; the equity of the rule being even stronger in the case of garnishment, where the defendant is not made a party, than in an attachment, where he is a necessary party, and is always made such.

Our attention has been called to the decision in the case of *Randolph* v. *Little*, 62 Ala. 396, in support of the opposite doctrine; but, on careful inspection, it will appear that the dissenting opinion in *Webb* v. *Edwards*, 46 Ala. 17, upon which *Randolph* v. *Little* is expressly based, was to the effect that evidences of indebtedness owing by a garnishee to the defendant in judgment, and other choses in action, were not the subject of exemption under the peculiar statutes of Alabama. The question of time when the claim should be filed was not discussed, and does not appear to have been relied on.

However that may be, the rule we have adopted, and the true rule, is that until the money or the proceeds of the property has been paid actually to the plaintiff, and thus appropriated towards the satisfaction of the judgment, the defendant has a right to assert his claim of exemption; but the money adjudged to be in the hands of or owing by the garnishee, or the proceeds of the property in his hands, when once paid towards the satisfaction of his judgment, cannot be recalled at the instance of the defendant.

Affirmed.

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WINCHESTER v. BRYANT.

Opinion delivered March 12, 1898.

1. REPLEVIN—INSTRUCTIONS.—Where, in a triangular contest between the plaintiffs, the defendants and the state as intervener, the right to the possession of certain staves and cord wood is at issue, and it was agreed first to submit to the jury the issue between the plaintiffs and the defendants, and subsequently to determine the state's rights, it was not error, upon the trial of the first issue, to refuse to charge the jury that if any part of the staves and cordwood was cut from land belonging to the state, and defendants were trespassers in such cutting, they could not find such staves and cordwood to be the property of either plaintiffs or defendants. (Page 120.)

2. SAME—INTERVENTION—PRACTICE.—Where it is a question whether certain property belonged to the plaintiffs, to the defendants, or to the state (which has intervened claiming it), and the issue between the plaintiffs and the defendants is first tried and determined against the plaintiffs, it remains to be determined whether the state was entitled to it, and therefore a judgment for the defendants on the verdict in their favor as against the plaintiffs, before the rights of the state are determined, is premature. (Page 121.)

Appeal from Columbia Circuit Court.

CHARLES W. SMITH, Judge.

Jesse B. Moore, for appellants.

The conclusions of a jury are final only in cases where the evidence upon which the verdict must turn is exclusively oral testimony, uncorroborated by rational or physical facts. The burden was on appellees to account for the disappearance of the staves, since it was a matter peculiarly within their knowledge. 6 Wall. 299; 4 Watts (Pa.), 361. The court erred in giving the first, second and third instructions asked by appellees; and, also, in refusing to give the second, fifth, sixth, seventh and eighth instructions asked by appellants. The right to redeem land forfeited to the state is not an estate in the lands. 21 Ark. 319; 52 Ark. 132. Timber severed before redemption belongs to the state. 14 Ark. 431. Cutting timber on state lands is a felony. Sand. & H. Dig., § 1774. Hence, the courts will not aid the violator of the law to reap

the fruits of his crime. Crawford's Dig. Ark. Rep. "Contracts," III, c.; 9 Am. & Eng. Enc. Law, 921. The court should rather hold the property for the true owner. Sand. & H. Dig., § 2401. A defendant in replevin should not be permitted to set up title in another and try the case without such other party. 20 Am. & Eng. Enc. Law, 1050, and notes; 4 Ia. 5; 15 *ib.* 296; 19 S. E. (S. C.), 1016. Even if the state had not interpleaded, the court would have been compelled to order it to be made a party. Crawford's Dig. "Parties," IV.; Sand. & H. Dig., § 5635. The state's rights should have been tried along with that of the other parties to the suit. Sand. & H. Dig., § 5636; 17 Am. & Eng. Enc. Law, 648, and notes; 36 Ark. 474. It was error to instruct the jury to disregard the state's rights in its verdict. 34 Ark. 291; 39 Ark. 188; 19 S. E. (S. C.) 1016.

W. D. Jameson, *Smead & Powell* and *Gaughan & Sifford*, for appellees.

Where there is any evidence to support the verdict of a jury, this court will not disturb it. 23 Ark. 208; *ib.* 32; 13 *ib.* 474; 23 *ib.* 112; 57 *ib.* 577; 63 *ib.* 536; 14 *ib.* 21. The peaceable possession of appellees gave them a better right than appellants had to the property in controversy. 40 Ind. 160; 4 Blackf. 309; 13 Ill. 619; 45 Ill. 619; 57 Ill. 38; 21 Wend. 209; 5 Barb. 516; 1 Pick. 357; 10 Col. 379; 5 S. & R. (Pa.) 132. Possession by defendants was *prima facie* evidence of title in them. 42 Ark. 310; 11 Ark. 721; 42 Ark. 65. To support replevin, plaintiff must show title in himself. 4 Ark. 94. Redemption, by the original owner of lands, from forfeiture of taxes relates back, so as to vest in him the title to timber severed in the interim. 30 Ark. 520.

Jesse B. Moore, for appellants, in reply.

The right of action for the timber cut on the land, during the time it was unredeemed, is one which exists separately and independently of the estate in the land; and it does not follow a re-conveyance of the lands. Sand. & H. Dig., § 489; 47 Ark. 51; 14 Ark. 431; 1 Chit. Pl. 75.

BATTLE, J. This action was brought by E. H. Winchester and others against L. R. Bryant and others, in the Union circuit court, to recover the possession of 30,000 staves of the

estimated value of $1,200, and of fifteen cords of wood of the estimated value of $22.50. Plaintiffs alleged in their complaint that these staves and cordwood were wrongfully cut and made by the defendants from trees standing and growing on their (plaintiffs') lands, to-wit, sections 21, 27, 28, 34, 35, and south half of section 26, in township 19 south, in range 10 west, and in Union county, in this state; and that the defendants have possession of and hold the staves and cordwood without right.

The defendants, L. R. Bryant and Henry Knox, answered and denied the ownership and right of possession of plaintiffs to the staves and cordwood; that their co-defendants had any interest in the same; and that they were cut on sections 21, 22, 27 and 28, in township 19 south and in range 10 west. They alleged the value of the staves to be $1,800, and of the cord wood to be $37.50, and that they were cut on the northwest quarter of section 26, in township 19 south, in range 10 west,—the lands of T. P. Poole,—and are their property. They further alleged that they were entitled to the possession of the same, and were wrongfully deprived of it by this suit; and asked for the return thereof, or the value as stated, and for $500 as damages.

The action was transferred, on application for change of venue, to the Columbia circuit court.

E. H. Leaming, "deputy timber inspector of District No. 1, composed of the counties of Bradley, Union and others," filed in the action what he called an interplea, and alleged therein that 27,000 staves, or other large number, and fifteen cords of wood, in controversy, were unlawfully cut and made by the defendants from trees standing and growing on the northwest quarter of section 26, in township 19 south, in range 10 west, and in the county of Union, and that the land, at the time the trees growing and standing thereon were cut, was the property of the state of Arkansas, and that the staves and cordwood belonged to the same owner; and asked that judgment be rendered in favor of the state for the same.

Upon the filing of this "interplea," the defendants asked that the "cause proceed to trial upon the issues to be joined between the interpleader and defendants," and the plaintiffs,

objecting, asked that it proceed to trial "upon the issues joined between the plaintiffs and defendants," and, the defendants consenting, the court ordered that it so proceed; and the latter issues, and no others, were tried by a jury.

The plaintiffs adduced evidence in the trial tending to prove that the staves and cordwood belonged to them, and the value thereof, and that they were entitled to the possession of the same.

On the other hand, the defendants adduced evidence tending to show that the staves and cord wood were cut and made from trees on the northwest quarter of section 26, township 19 south, in range 10 west, and no part of it was cut on plaintiffs' land; that the northwest quarter of section 26 formerly belonged to Pete Poole, and was forfeited by him to the state, at the time the timber was cut thereon, for more than two years, on account of the nonpayment of taxes; that Poole sold the timber on this land to the defendants, and agreed with them to redeem it; that, in pursuance of the authority given them and the sale by Poole, they cut the staves and cordwood; and that, some time after the same were cut and hauled away, Poole purchased or redeemed the northwest quarter of section 26 from the state under the act of the general assembly, entitled "An act to authorize the redemption of lands sold for taxes after they have been deeded to the state," approved April 9, 1891, and the acts amendatory thereof.

Instructions were given by the court to the jury, at the instance of plaintiffs, and at the instance of the defendants over the objections of the plaintiffs, and were asked for by the plaintiffs and refused by the court. We consider it necessary to set out only the instructions which were refused, and only two of those. They are as follows:

"(2.) The jury are instructed that if they believe, from the evidence, that any part of the staves in controversy were cut from the lands which then belonged to the State of Arkansas, and that the defendants were trespassers in such cutting, then they cannot find such staves to be the property of either party to this trial."

"(5). The court instructs the jury that if they find, from the evidence, that the defendants were trespassers on the said

northwest quarter of section 26, and that the title of said land was in the state of Arkansas, and that the defendants so entered [on said quarter section] and cut any part of the staves in controversy from said land, and that the state has interpleaded in thus suit for such staves; then the jury cannot find the title of such part of said staves in favor of either plaintiffs or defendants."

The jury returned the following verdict: "We the jury find for the defendants, Henry Knox and L. R Bryant, 27,000 of the staves in controversy, of the value of twenty-five dollars per thousand, of the aggregate value of $675.00, with interest thereon at 6 per cent. per annum from December 22, 1894; also fifteen cords of wood in controversy of the value of $1.50 per cord, of the aggregate value of $22.50 with interest at 6 per cent. from December 22, 1894."

A judgment was rendered in favor of the defendants, Knox and Bryant, against the plaintiffs for the 27,000 staves, if to be had, and, if not, for the sum of $697.50, and 6 per cent. per annum interest thereon from the 22d of December, 1894. This judgment was rendered subject to the right of the state of Arkansas, and was excepted to by the plaintiffs, and was stayed for sixty days.

Plaintiffs, after filing motion for a new trial, which was overruled, and a bill of exceptions, appealed.

Appellants earnestly insist that the verdict was contrary to the evidence. The testimony produced by the appellants and that introduced by the appellees were in irreconcilable conflict. If the latter be true, appellants were not entitled to the staves or cordwood. It was within the exclusive province of the jury to determine the truth of the evidence. We cannot set aside their verdict because we may be of the opinion that they erred in so determining. As against appellants, it was sustained by evidence, except as to the interest, and as to them should not be set aside as to the right to the staves and cordwood, and the value thereof.

The circuit court did not err in refusing the instructions asked for by the appellants. The state of Arkansas was virtually and in effect made and recognized as a party to the action, and claimed the property in controversy by virtue of her

title to the land on which the staves and cordwood were cut. Appellants and appellees elected to try the issues joined by them first, and then the right of the state to the property. The jury tried the issues as they were presented to them, and found against the appellants. Having elected to try the issues in the order and manner they were, appellants have no right to complain that they were so tried.

According to the evidence one of the three parties to the action, the plaintiffs, defendants or state, were entitled to the property. The jury found that appellants were not. Their verdict, to that extent, is sustained by the evidence. The only other question to determine was, was the state entitled to it? If it was not, then, according to the verdict, the appellees were entitled to a judgment for the property. But the court erred in rendering judgment in favor of appellees for the property before the state's right to the same was determined. Until then, it could not be adjudged, and it did not appear that the appellees were entitled to the judgment. As to whether the state or appellees were entitled to the property or its possession was not decided. The judgment upon the verdict should have been suspended until the state's right should be determined, and then rendered accordingly.

The appellees are not entitled, under any circumstances, to a judgment against appellants for interest on the value of the staves and cordwood from the 22d of December, 1894, as they were not taken from their possession until the 24th of December, 1894.

The judgment is set aside, and the cause is remanded with instructions to the court to proceed in accordance with this opinion.

HOWARD v. MANNING.

Opinion delivered March 12, 1898.

ADMINISTRATION—INTEREST.—It is error to direct an auditor, in stating the account of an administrator, to charge him arbitrarily with interest at 10 per cent. on all moneys received by him from ten days after receipt thereof, without any investigation as to whether it was just and reasonable to do so. (Page 124.)

Appeal from Yell Circuit Court, Dardanelle District.

JEREMIAH G. WALLACE, Judge.

J. M. Parker and *Rose, Hemingway & Rose*, for appellant.

It is only in cases where the administrator improperly permits funds in his hands to lie idle, or uses them for his own profit, that he is chargeable with interest. 2 Woerner, Adm. § 511; Perry, Trusts, § 468. An administrator can make payments only when so ordered by probate court. He is not required to pay out all moneys within ten days. Sand. & H. Dig., § 154, 155. If the administrator was chargeable with interest at all, it should be at the rate of 6 per cent per annum. 1 Suth. Dam. 128. The case should be remanded. 52 Ark. 283; 58 *id.* 298.

M. J. Manning, for appellee.

The administrator having injured the estate by his inaction, he is chargeable with interest. 50 Ark. 223, 224. The burden is on the administrator to exonerate himself. 20 Ark. 523; 36 Ark. 402, 403. Failure of an administrator to charge himself with interest on interest-bearing notes justifies the court in ordering a re-statement of the accounts. 30 Ark. 68. There being no bill of exceptions, the presumption is in favor of the judgment of the court. 44 Ark. 74. Depositions not incorporated in the bill of exceptions will not be considered in this court. 36 Ark. 262; 47 Ark. 230.

HUGHES, J. The appellant, as administrator of the estate of Richard Hood, deceased, filed his second annual settlement

of said estate in the probate court of Yell county. The appellee filed exceptions thereto, which were by the court overruled, and the account was confirmed by the probate court. Manning appealed to the circuit court. After hearing part of the evidence in the case, the circuit court referred the account to an auditor to be stated, with directions to charge the administrator with ten per cent. per annum interest upon all moneys received by him as administrator, commencing ten days after its receipt to compute the interest, and to credit the administrator with interest at the same rate on all sums paid out by him from the time the same was paid out. The auditor made the statement accordingly, charging and crediting interest as directed, and made his report to the court, which was approved and confirmed by the court, overruling all exceptions thereto, except one item of twenty-four dollars.

The appellant excepted to the order referring the account to an auditor, and to the direction to the auditor to charge interest as aforesaid, and his exceptions were overruled. He also filed exceptions to many items in the auditor's report, among them an exception to charging the interest as charged as aforesaid. The court overruled the exceptions to the report, except as to the item of $24, and directed the auditor to restate the account, leaving out said item, which was done accordingly, and the court thereupon approved and confirmed the said report, to which the administrator excepted, and appealed to this court.

Much evidence seems to have been heard by the auditor in stating the account, and by the court in considering the exceptions to his report, but none of it is preserved in a bill of exceptions, and we cannot know what it was. It is not presented for our consideration. But the order of the court in regard to the interest appears in the record, and is a part of it. The question is presented, therefore, whether there is error in this order, and in confirming the auditor's report in charging interest at the rate and for the time as charged, in accordance with the directions of said order. It seems that this order directing the auditor to charge interest at the rate of ten per cent. per annum from ten days after the accruing of each item of the account was made *in limine*, without investigation, and was arbitrary, and that the

auditor was left no power or discretion in the premises to do otherwise than obey the direction of the order, regardless of what might appear if he had been permitted to ascertain by evidence whether it was just and equitable so to charge the interest at the highest conventional rate from the time the order directed him to compute it.

Sandels & Hill's Digest provides:

"Sec. 103. If, on the return of any inventory, or at any other time, it shall appear to the satisfaction of the court that there is a surplus of money in the hands of any executor or administrator that will not shortly be required for the expenses of administration or the payment of debts; such court shall have discretionary power to order the executor or administrator to lend out such money on such time and such security as may be approved by the court."

"Sec. 104. All interest received by executors and administrators shall be assets in their hands; and if they lend the money of the deceased or use it for their private purposes, they shall be charged with interest thereon for the use of the estate."

"Sec. 105. The court shall exercise equitable control in making executors and administrators accountable for interest accruing to the estate on account of money loaned by them belonging to the estate, or otherwise, and for that purpose may take testimony or examine the executor or administrator on oath."

The probate court has the same power and discretion to compound interest as to fiduciaries under the supervision of the court as a chancellor has. *Price* v. *Peterson*, 38 Ark. 494.

The Missouri statute making executors and administrators liable for interest, and in regard to the discretionary power of the court in fixing the rate, etc., is, if not exactly, substantially the same as ours above quoted. The supreme court of Missouri, in a well considered opinion, in *Cruce* v. *Cruce*, 81 Mo. 683, says: "In *Hollister* v. *Barkley*, 11 N. H. 511, Chief Justice Parker remarks: 'Such interest is allowed in equity as is just and reasonable. N. Y. Ch. Rules, 79. And it is just and reasonable to allow interest on all sums which are due and payable, or from the time there should be a rest in the accounts.' * * * A trustee is accountable for all interest or

profits actually received by him from the trust fund, whether used in his private business or otherwise employed by him. * * * He is, at all events, accountable for such interest or profits as he might have obtained by the exercise of reasonable skill and exertion in the management of the fund, whenever the character of his trust or the relation which he holds to the fund requires him to make it productive. In all such cases he is, at least, accountable for such gains and profits, although the actual gains and profits may be less. * * * The burden of accounting for the actual gains and profits rests on the trustee. Perry on Trusts, § 471; *Jones* v. *Foxall*, 15 Beav. 388. If he fails or refuses to furnish evidence of them, he invites the rule which shall most nearly approximate his actual gains, and leaves no advantage or benefit to him by reason of his silence or refusal. * * * Where a trustee uses in his private business the trust fund, he is *prima facie* liable, at least, for the legal rate of interest for the use of money. *Jones* v. *Foxall*, 15 Beav. 388; *Rocke* v. *Hart*, 11 Vesey, 58; *Newton* v. *Bennet*, 1 Bro. Ch. side p. 362; *Williams* v. *Powell*, 15 Beav. 461. By legal rate, I allude to that rate which the law attributes to contracts, in the absence of stipulation upon the subject. Where it appears in proof that a higher rate could easily be obtained, the trustee should be accountable for such higher rate, always, of course, within the rates permitted by law. *Frost* v. *Winston*, 32 Mo. 489."

It is said in *Cruce* v. *Cruce*, 81 Mo. 683, that the practice in equity of charging trustees with interest is unfortunately by no means uniform, that "there never was an absolute rule governing the rate of interest or the liability to pay compound interest." *Barney* v. *Saunders*, 16 How. 542; *Fox* v. *Wilcocks* 1 Binney, 194; *Hook* v. *Payne*, 14 Wall. 252.

If an administrator negligently permits funds of the estate to lie idle, instead of applying them to the payment of debts or other liabilities of the estate, or, where that cannot be done, investing them safely, so as to yield interest for the estate, he is liable to be charged with interest at the usual rate, or at such rate as he might by reasonable skill and diligence have obtained, commencing from the time when the payment ought to

have been made. Woerner's Am. Law of Administration, § 511, and cases cited.

An administrator collecting money for an estate should report the same to the probate court as early as practicable, that the court may order it loaned out if it will not shortly be needed to pay expenses of administration or debts of the estate.

It was error to charge the administrator arbitrarily with interest at ten per cent., the highest legal rate, from ten days after it was received by him, without it appeared upon investigation that it was just and reasonable to do so; and for this error the judgment herein must be reversed and remanded for a new trial as to the order pertaining to interest, in accordance with the principle herein laid down.

As to other matters than the interest charges, the case must be affirmed, as there was much evidence taken in regard to them which is not presented by bill of exceptions, and we must therefore presume that as to these the judgment of the court is correct. Affirmed as to all matters except the order directing the auditor to charge interest at ten per cent. per annum on all sums received by him from the date of their receipt and the confirming of the auditor's report as to this, as to which the judgment is reversed, and the cause is remanded for a new trial.

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

Opinion delivered March 12, 1898.

NEGLIGENCE—INJURY TO EMPLOYEE AT TURNTABLE.—Plaintiff, an experienced employee of a railroad company, according to directions of his foreman, attempted to go on the pay car to receive his pay at a time when the turntable on which the car was standing was slowly moving. Another employee, in getting off the car, accidentally struck plaintiff, and caused him to fall, so that his foot was mashed between the rail of the turntable and the rail of the track. Plaintiff was not compelled to go on the car while on the turntable by fear of any penalty for failure to do so, since he would have been paid elsewhere before the car

left the station. *Held* that the company was not guilty of negligence. (Page 129.)

Appeal from Miller Circuit Court.

RUFUS D. HEARN, Judge.

Dodge & Johnson, for appellant.

Plaintiff was guilty of contributory negligence. The facts being admitted, it became a question of law as to whether there was negligence or not. 61 Ark. 555; 52 Ark. 410. It was error for the court to refuse to instruct a verdict for defendant. It was error to instruct the jury as to the duty of appellant to provide a safe place for the paying off of its employees, because, when the evidence shows that the plaintiff could and did see the danger in time to avoid it, he is held to have assumed the risk, if he did not attempt to so avoid it. 46 Ark. 388; *ib.* 567; 59 Ark. 479; 56 Ark. 192; *ib.* 178; *ib.* 237.

Scott & Jones, for appellee.

Appellant is liable, if it was negligent, notwithstanding the negligence of a fellow servant may have been the immediate or direct cause of the injury. 54 Ark. 289; 58 Ark. 217; 35 Ill. 217; 106 U. S. 700; 95 N. Y. 546; 10 Gray, 274; 3 Vroom, 151; 46 Wis. 497; 135 Mass. 575; 61 Ark. 152–3. It was not negligence *per se* on the part of appellee to attempt to board the car, even though he knew that the car was placed on the turntable for the purpose of being moved. The act must have been necessarily or inevitably dangerous. Wood, Mast. & Serv. (2 Ed.) 739–740; 76 Pa. St. 389; 46 Mo. 163; 7 H. & N. 937; 106 Mass. 282; 110 Mass. 240; 60 N. Y. 607; 49 N. Y. 521; 53 N. Y. 549; 52 Ark. 368; 62 Ark. 109; 60 Ark. 438; 37 Ark. 526; 46 Ark. 423. The instructions given covered the case.

HUGHES, J. The appellee was an employee in the car department of the appellant, at Texarkana, Ark., and was injured by having his foot mashed between the rail of a turn table and the rail of the railway, as he was attempting to board a pay car, which had been placed on the turntable preparatory

to being turned and resuming its way north on the railroad track. The appellee charges in his complaint that he was injured through the negligence of the appellant in failing to have a safe place in which to pay its employees; that he was invited by the appellant to go upon the pay car, while on the turntable, to receive his pay; that while attempting to go upon the car he seized the railings on each side of the car, and that he put his foot on a step for the purpose of going upon the car when some one of the employees going on or off the car struck his arm, and broke his hold upon the step, and as he stepped back his foot was caught between the rail of the turntable and severely mashed, etc.

The answer of the appellant denied negligence, charged that plaintiff assumed the risk of injury in going upon the car, and that he was guilty of contributory negligence. Verdict and judgment for appellee, and appeal to this court by appellant.

The evidence shows that the employees were being paid off on the pay car, while it was on the turntable, and that this had been customary; that the appellee had been in the service of the railway company at Texarkana for fifteen months before the accident, and that he was a man 49 years of age, and was experienced and familiar with the custom of paying employees in that way, and had been for fifteen months; that he had gone there to be paid, being directed to do so by his foreman; that there were many employees crowding on and off the car to receive their pay, as their names were called, which was customary; that, when the appellee's name was called, he made an attempt to go upon the pay car by seizing the railings, and that at the time there were persons on the platform hurrying off, and, by some one striking his arm, his hold upon the railings was broken, which caused him to step back, and, as he did so, his foot was caught and mashed between the rail of the turntable and the rail of the track. The turntable was moving slowly at the time his foot was caught, and, if not moving at the time he started to go upon the car, it was at that instant about to move round, and it appears that the appellee understood this. The proof tends to show that the car was moving, as he first attempted to board it. If he had

used ordinary care, he should have known this, and he is chargeable with knowledge of it.

The danger of attempting to board the car under the circumstances, if there was any, was such that one using ordinary care would have known, and, as it appears that the appellee knew the turntable was moving, or that it was just about to move, at the time he first started to make the attempt to board it, he assumed the risk of injury from such attempt. It is not apparent that there was any negligence upon the part of the railway company, and if he was injured through the negligence of any one, it was either through his own want of ordinary care, or the act of a fellow servant, in striking his arm and breaking his hold upon the railings. In either event the company was not liable. He was not impelled to attempt to go upon the car, while on the turntable, by the fear of any penalty for failure to do so, or fear of the loss of any right, as the evidence shows he could or would have been paid elsewhere before the car left for Texarkana.

Reversed and dismissed.

DANENHAUER v. DAWSON.

Opinion delivered March 12, 1898.

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1. MORTGAGE SALE—RIGHTS OF PURCHASER.—A purchaser of land at a sale under a power contained in a mortgage is entitled to possession of the premises during the period of one year after the sale allowed by the statute for redemption by the mortgagor until the right of redemption is exercised, and will not be liable for rents and profits received by him during that period, unless the mortgagor redeems the land. (Page 132.)

2. SAME—RIGHT TO REDEEM.—The statute which confers the right to redeem from sales under powers contained in mortgages (Sand. & H. Dig., § 5111) applies to all such sales, and not merely to sales at the second offering when, on account of a failure to bring two-thirds of its value at the first offering, the sale has been postponed. (Page 136.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

This action was brought in the Lee circuit court by appellee, Jack Dawson, against the appellant, F. C. Danenhauer, to recover possession of five acres of land in Lee county. Danenhauer filed an answer, alleging that he was the owner of said land, and denying the right of Dawson to recover possession thereof. The evidence at the trial showed that the land in controversy was in 1888 owned by F. Trunkey, who sold the tract of land, of which that in controversy was a part, to Dawson and certain other parties, and executed a deed conveying the land to them. Dawson and the other vendees agreed to pay $1,361.85 for the land. To secure the payment of this sum, they executed and delivered to R. D. Griffis, as trustee, a deed of trust conveying said land to him with power of sale, providing that if default was made in the payment of the debt the trustee should take immediate possession, and after advertisement sell the same to the highest bidder, and execute and deliver to the purchaser proper deeds, conveying the land to him. Dawson took possession of the land under his purchase, but paid no portion of the purchase price. F. Trunkey died, and, the purchase money not having been paid, the trustee on 16th April, 1895, sold the land under the power contained in the deed, and at the sale it was purchased by the heirs of Trunkey for the sum of $900, leaving a balance of the purchase price, amounting to over $600, unpaid. Shortly after the sale the trustee executed his deed conveying said land to the heirs who had purchased, and they sold the land to appellant, Danenhauer, for the sum of $650, one-half of which he paid in cash. They executed a written agreement to convey the land to him upon the payment of the remainder of the purchase money, and authorized him to take possession of the land, and Danenhauer took possession before the expiration of the year allowed to redeem. There is conflict in the evidence as to whether he obtained the same peaceably by consent of Dawson or forcibly took possession. The court in effect instructed the jury that, during the period allowed for redemption, appellee, the grantor in the deed of trust, was entitled to the possession of the mortgaged premises. The finding and judgment was in favor of plaintiff.

McCulloch & McCulloch, for appellant. *Norton & Prewitt, amici curiae.*

The plaintiff in ejectment must recover, if at all, on the strength of his own title. 47 Ark. 413. The right to possession follows the legal title, which, in case of a sale under mortgage, is in the purchaser. 7 Ark. 310; 18 *ib.* 166; 30 *ib.* 520; 32 *ib.* 478; 34 *ib.* 312; 43 *ib.* 469; *ib.* 504; Jones, Mort. §§ 19, 667, 668, 702 and 703; Pingrey, Mort. § 826; 57 Ala. 290. The rule is, of course, different in those states where a mortgage is construed as a lien, and not a conveyance. 15 Am. & Eng. Enc. Law, 731–738. Like the minor's right to redeem from tax sale, the mortgagor's right to redeem within the statutory period is not an estate, but only a privilege to defeat the purchaser's estate. 52 Ark. 132; 21 *id.* 319. A deed is to be construed more strongly against the grantor. Devlin on Deeds, § 848. The stipulation in the mortgage waived any right to possession which the mortgagor may have had. Jones, Mort. § 1542 *et seq.*

Jas. P. Brown, for appellee.

After sale, the right of possession remains in the mortgagor, subject to defeat by nonpayment of the amount for which the property was sold, together with interest. 57 Ark. 198; Dembitz, Land Titles, 769 and foot notes 247, 248; 1 Pingrey, Mortg. § 12; 18 Ark. 166; 30 Ark. 520; 31 *ib.* 429; 43 Ark. 504; 7 *ib.* 310; Jones, Mort. (5th Ed.) § 1051b; 43 Minn. 172; S. C. 45 N. W. 11; 53 N. W. 630; 6 N. W. 489, and cases cited. The equity of redemption cannot be waived in the mortgage itself. Jones, Mortg. § 251. Nor is such waiver by subsequent deed or contract favored. 3 Pom. Eq. 171; 26 Ala. 312; 28 Ill. 149; 32 Md. 185. A general finding for the plaintiff in ejectment entitles him to possession. 53 Ark. 411; 50 Ark. 506.

RIDDICK, J., (after stating the facts.) This is an action of ejectment brought by a grantor in a deed of trust against one holding under the purchaser of the premises at a sale made by virtue of the power contained in the deed. The land was purchased at the sale by the heirs of the beneficiary in the trust

deed. The trustee executed a deed conveying the land to them, and they sold to the defendant in this case. The grantor has not offered to redeem, and the question presented for our consideration is whether, as against the purchaser under the power contained in the deed, the grantor is entitled to the possession of the mortgaged premises during the statutory period allowed for redemption.

This deed of trust, being executed to secure a debt, was in legal effect only a mortgage (*Turner* v. *Watkins*, 31 Ark. 429); but in this state the legal title passes by the mortgage to the mortgagee, subject to be defeated by the performance of the conditions of the mortgage. *Whittington* v. *Flint*, 43 Ark. 504; *Ringo* v. *Woodruff*, 43 Ark. 469; *Fitzgerald* v. *Beebe*, 7 Ark. 310. As the debt secured by the deed in this case was past due and unpaid, if the mortgagee had taken possession of the mortgaged premises without a sale, it is plain, from the cases just cited, that the mortgagor could not maintain ejectment against him, or those holding under him, without first paying, or offering to pay, the debt secured by the mortgage. And certainly it cannot be said that the sale of the premises made under the power contained in the deed revested the title in the grantor, so as to empower him to bring ejectment and recover possession of the mortgaged premises, without offering to redeem or pay any portion of the mortgage debt. The purpose of this sale was to cut off the equity of redemption possessed by the grantor, and, but for the statute giving the right of redemption after sale, the grantor after such sale would have no further interest of any kind in said land. The statute confers upon the grantor the right to redeem at any time within one year after the sale under the mortgage or deed of trust, but upon the question of possession it is silent. It does not confer or attempt to confer upon the grantor any right to the possession of the premises during the period allowed for redemption. Sand. & H. Dig., § 5111.

Who then had the right to the possession of the premises during the statutory period allowed for redemption? The mortgagee has, after the sale, no lien upon the land by virtue of the mortgage, and no right to take possession for any unpaid balance of the debt; for the mortgage is discharged by the sale, and

the rights of the mortgagee, as to the land, pass to the purchaser. After the sale, and during the period allowed for redemption, "the purchaser at the sale takes the place of the mortgagee." *Dailey* v. *Abbott*, 40 Ark. 275. But there is this difference between the position of the mortgagee in possession and that of a purchaser. The possession of the purchaser is after the sale, when the foreclosure has already taken place, and when only the statutory right of redemption remains to the mortgagor. In the case of *Ruckman* v. *Astor*, 9 Paige (N. Y.), 517, Chancellor Walworth, speaking of the right of a purchaser at a foreclosure sale, when the statute permitted the mortgagor to redeem, said that the purchaser "was in the same situation as a mortgagee in possession after a decree for a strict foreclosure previous to the expiration of the time allowed by such decree for the redemption of the premises. There, in case the mortgage money mentioned in the decree with interest thereon is not paid within the time limited for that purpose, the equity of redemption is forever barred, and the mortgagee will be permitted to retain the rents and profits which he has received subsequent to such decree. But if the redemption takes place, as authorized by the decree, the mortgagee must relinquish the premises to the owner of the equity of redemption, and must account for the rents and profits while he held possession."

Now, without stopping to consider whether this extract from the opinion of the learned chancellor gives a correct view of the law concerning strict foreclosures, we think it illustrates the position of a purchaser holding under a mortgage sale during the year allowed by our statute for redemption. Such a purchaser occupies a double character, and may come to be treated either as a mortgagee in possession or as a holder of an absolute title, depending upon whether there has been a redemption or not. To speak more accurately, he holds as purchaser; but if there be a redemption, his rights will be determined by treating him as a mortgagee, to the extent of the price paid by him. If the mortgagor redeems, the defeasible title of the purchaser is abrogated. The purchaser will then, for the purpose of redemption, be treated as a mortgagee in possession, and will be entitled to the price paid by him, with interest, and must

account for the rents and profits. But if no redemption is made, then at the end of the period allowed for redemption the title of the purchaser becomes absolute, and when the conveyance is made it relates back to the time of the sale, and he can retain the rents and profits received by him subsequent to the sale. So it seems to us that, in order to recover possession, and call the purchaser to account for the rents and profits, the mortgagor must redeem. *Ruckman* v. *Astor*, 9 Paige, Ch. (N. Y.) 517; *Lathrop* v. *Nelson*, 4 Dillon, 194; *Dailey* v. *Abbott*, 40 Ark. 275; *Burk* v. *Bank of Tennessee*, 3 Head, 686; *Champion* v. *Hinkle*, 45 N. J. Eq. 162; *Childress* v. *Monette*, 54 Ala. 317; *Powers* v. *Andrews*. 84 Ala. 219.

We do not find any decision of this court in conflict with the conclusion at which we have arrived, but there are expressions in *Wood* v. *Holland* (57 Ark. 188) and in *Dailey* v. *Abbott* (40 Ark. 275) which are cited as sustaining the opposite view. But it must be remembered that those were cases in which redemptions were made. Taking those cases in connection with the facts upon which they were based and the questions determined, we find very little in either of them from which we should wish to dissent, but we do not feel called upon to discuss those cases, because in each of them a redemption had been made, and the question whether the mortgagor was entitled to the possession when no redemption was made was not before the the court. In this case the mortgaged property did not sell for enough to satisfy the mortgage debt by several hundred dollars. It was purchased by the creditor or beneficiary in the deed of trust, who received a deed from the trustee, and then in turn sold to the appellant. If we should hold that the mortgagee, and not the purchaser, had the right to the possession during the period allowed to redeem, the result, so far as this case is concerned, would be the same, for the appellant holds under the mortgagee or trustee. We do not know of any decision by this court in which it is said or intimated, in a case such as we have here where the mortgaged premises have sold for less than the mortgaged debt, and where the mortgagor is not offering to redeem, that he may still take from the mortgagee or the purchaser from him the possession of such premises during the period

allowed for redemption, and apply the rents and profits to his own use, and allow his debt to go unpaid.

There is nothing in the deed of trust under which the premises were sold in this case that prevents the creditor from subjecting the use of the premises, during the year following the sale, to the payment of his debt. On the contrary, it grants to the trustee in the fullest terms the power to take possession upon default, and to sell and execute a deed conveying the title to the purchaser. Nor do we find, in the statute which gives the right to redeem, anything that would justify such a ruling. Our statute, which defines the rights of a purchaser of land at a sale under execution, expressly provides that no conveyance shall be made to the purchaser nor possession delivered until the time for redemption has expired, but there is no such provision in this statute regulating sales under mortgages and deeds of trust. The bare right to redeem is given and nothing more. To hold that this statute gives the mortgagor the right to take possession of the premises, and appropriate the rents and profits during the year allowed to redeem, without redeeming or paying any portion of his debt, would, it seems to us, be putting something in the statute not authorized by its language. Before this statute was passed, a sale and conveyance under the power in a deed such as we have here vested an absolute title in the purchaser, and this effect should still be given to the sale, so far as is consistent with the purpose of the statute to allow a right of redemption. If the sale carries the right to the rents and profits, the purchase price will be enhanced to that extent, and the result will be a benefit to the mortgagee, and no great harm to the mortgagor, as the increased price goes to the payment of his debt, and, if there be an excess, it belongs to him.

It is said that it would put a cloud upon the title of the mortgagor to have a deed executed to the purchaser before the period of redemption expires. If this were true, the redemption would annul such deed, and the mortgagor has his remedy to remove the cloud; but we do not see that there is any necessity that a deed should be executed before such period has elapsed. By virtue of the legal title in the mortgagee, the purchaser can under him take and hold possession against the

mortgagor until the year for redemption has expired. When a deed is executed, it can, we think, by the doctrine of relation, properly be held to take effect from the day of sale. *Wagner* v. *Cohn*, 46 Am. Dec. 660: *Lathrop* v. *Nelson*, 4 Dillon, 194.

As to the contention of counsel who appear as *amici curiæ* that the right of redemption is not given when the property sells at the first offering, but only to a sale at the second offering, when, on account of a failure to bring two-thirds of its value at the first offering, the sale has been postponed, we are of the opinion that it cannot be sustained. There may be some ambiguity, but, taking the whole act together, we feel convinced that the right to redeem applies to all sales under mortgages or deeds of trust. If the object of allowing the right to redeem was to prevent an absolute sale of property at less than two-thirds of its value, it seems strange that the legislature, when the property fails to bring that amount at the first offering, should postpone the sale for a year, and then at the sale on the second offering allow another year in which to redeem, without regard to whether the property at the last sale brought more than two-thirds of its value or not. If the legislature did not intend to allow the right to redeem from a sale at the first offering because the land sells for two-thirds of its value, we feel certain that it would not have allowed the right to redeem from a sale at the second offering when the land was sold for two-thirds of its value or over. As no distinction in this respect in regard to the right to redeem from sales at the second offering is made, we conclude that the right to redeem was intended to apply to all sales.

Having concluded that the plaintiff in this case had no right to recover the possession of the mortgaged premises from the defendant without redemption, it follows that the judgment of the circuit court must be reversed, and the cause remanded for a new trial, and it is so ordered.

BATTLE, J., (dissenting). A statute of this state provides that real property sold under a power of sale in deeds of trust and mortgages "may be redeemed by the mortgagor at any time within one year from the sale thereof by payment of the amount for which said property is sold, together with ten per

cent. interest thereon and costs of the sale." Under this statute, is the purchaser entitled to the possession of the property sold before the expiration of the time for redemption? I think not. In his bid for the property at the sale, he agrees to pay what he is willing to give for it, provided it is not redeemed, and he gets it at the end of the time allowed for redemption. As a full and complete compensation to him for the money he has paid for the land, the law allows the amount paid and ten per cent. interest, in the event he fails to acquire title by reason of redemption. Until the time to redeem expires, the land stands as security to him for this amount and interest, in default of the payment of which within the year after the sale he becomes the owner of the land. Until then he has only an inchoate title, and his right to the posession does not accrue until it becomes complete. He is, consequently, not entitled to possession within the one year allowed to redeem.

The purchaser does not become subrogated to the rights of the mortgagee against the mortgagor. He is entitled to the land or the return of his money with interest, and no more. The mortgagee is entitled to recover of the mortgagor the remainder of the mortgage debt left unpaid after the amount received on account of the sale of the lands has been deducted. By reason of this unpaid balance, the purchaser acquires no rights. All the rights existing by virtue thereof belong to the mortgagee or his assigns. What those rights are is not necessary for us to determine in this case; for appellant had no right to the land except that acquired by the sale under the power contained in the deed of trust; and, in taking possession of it, he was not acting in the name of or for the trustee or beneficiaries in the deed of trust, for the purpose of enforcing the collection of the balance due on the mortgage debt, or by virtue thereof, but in his own behalf. This debt had never been assigned to him, and he therefore had no authority by virtue thereof to assert a right to the possession of the land for the purpose of appropriating the rents and profits accruing therefrom to the payment of the debt. He had no more right to do so than a purchaser at a sale under execution would have, by virtue of such purchase, to collect the balance due on the judgment on which the execution was issued. The appellee was, there-

fore, during the time allowed for redemption, entitled to possession of the land, as against the appellant.

BUNN, C. J., concurs with me.

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

Opinion delivered March 19, 1898.

1. MASTER AND SERVANT—FELLOW SERVANTS.—The foreman of a section gang is not a fellow servant with the men under his control, under Sand. & H. Dig., § 6248, providing that all persons engaged in the service of any railway corporation who are entrusted with the authority of superintendence, control or command of other persons in the employ of such corporation are not fellow servants with such employees. (Page 140.)

2. CONTRIBUTORY NEGLIGENCE.—A section hand who was injured while assisting to remove a hand car from the track in front of an approaching train, under directions of his foreman, was not guilty of contributory negligence in relying upon such directions, as he had a right to presume that the foreman, who was in a situation to devote his whole attention to the approaching train and the efforts of his men to get the hand car off the track, could determine better than he what was best to be done under the circumstances. (Page 141.)

Appeal from Woodruff Circuit Court.

HANCE N. HUTTON, Judge.

Dodge & Johnson, for appellant.

A railway company is not an insurer of its servants against danger, and when a servant has undertaken a service, he is presumed to have assumed all risks necessarily incident thereto. He is held to the exercise of ordinary care in avoiding danger; and where the danger is one which was as apparent to him as to his section boss, the orders of his section boss do not excuse him for incurring such danger. He is guilty of contributory negligence, even if we grant the section boss to be a vice-principal. 31 S. W. 706; *ib.* 525; 2 N. E. 115; 37 N. W. 84; 72 Tex. 40; S. C. 11 S. W. 1041; 30 S. W. 95; 72 Tex. 159;

S. C. 12 S. W. 172; 23 S. W. 642; 59 Tex. 22; 66 Tex. 733–6; 46 Ark. 388; 59 Ark. 479; 56 Ark. 192; 58 *ib.* 178; 150 Mass. 423; 56 Ark. 237; 63 N. W. 568; 67 N. W. 1098. Before a witness can be impeached by proof of previous contradictory statements, a foundation must be laid by interrogating him particularly and minutely as to the making, time, place and circumstances of the alleged statements. 37 Ark. 328; 8 Ark. 572; 15 *ib.* 359; 16 *ib.* 569; 52 Ark. 308. Hearsay evidence was admitted, and this is error. 61 Ark. 55; 1 Greenl. Evid. § 99; 57 Ark. 519; 22 S. W. 213; *ib.* 213. The court erred in modifying the eighth instruction asked for by appellant. Negligence of the master cannot be predicated upon the simple fact that he ordered the servant to do the work; and the addition of a proviso that "the order must be made with care and prudence" destroyed all the force of the declaration of law. 31 S. W. 707. If, to obey an order of the master, the servant must subject himself to a risk obvious to himself, he is guilty of contributory negligence in undertaking to carry out such order. 56 Ark. 192; 58 Ark. 226; 2 Am. Neg. Cas. 578–580.

Grant Greene, Jr., *John T. Hicks* and *W. B. Smith*, for appellee.

If the law was correctly given to the jury, their verdict will be upheld, if there was any evidence to support it. 18 Ark. 497; 57 *ib.* 577; 51 *ib.* 330; 24 *ib.* 252; 34 *ib.* 632. Damages arising from the negligence of the master or vice-principal cannot justly be regarded as risks ordinarily incident to the employment, and, as such, assumed by the servant when he undertook the employment. 108 Mo. 332; 6 L. R. A. 587. The care required of plaintiff is to be judged from the standpoint furnished by the facts of the particular case and the emergency in which he acted. Hence, if the jury held that he was not guilty of contributory negligence, under the circumstances, such decision is conclusive. 154 Mass. 465; 108 Mo. 322; 46 Ark. 438; 17 L. R. A. 291. Where the master orders the servant to do a service, he will not be denied his remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would

have obeyed the order to undertake the service. 96 Mo. 212–13; 62 Mo. 232; 108 Mo. 332; 24 L. R. A. 719; 2 Thom. Neg. 975; 31 S. W. 706. It is competent to show the bias and interest of a witness by proving his statements disclosing it. 56 Ark. 550; 52 *ib.* 274; 53 *ib.* 388.

BUNN, C. J. This is a suit for personal damages by Rickman against the railroad company. Damages laid at $20,000; judgment for $1,500; and defendant appealed.

Plaintiff was a section hand under the control of one McDougal, as foreman. On the 28th January, 1895, some time about or just after nightfall, it being a cold, snowy and dark night, McDougal, with plaintiff and three other section hands and a citizen, after quitting work for the day, left Russell station on a hand car, to go to their station house at Bald Knob, a short distance south of Russell, on the railroad. While at Russell they could see the headlight of an engine at Bald Knob, and a train was due to pass up about that time. It was suggested by one of the hands that they had better wait until the coming train should pass, but the foreman said, "No," that the engine, whose light was then in view was standing at Bald Knob on a side track. And so, boarding the hand car, they started for Bald Knob. It pretty soon became evident that the train from Bald Knob was approaching, and another of the hands suggested that they had better stop, and take off the hand car at the next crossing, which they were about then to arrive at. The foreman said, "No, we will go to the next crossing, and then get off." But, before they reached the next crossing, the coming train had approached so near that the foreman ordered them to slow up and get off, and take the hand car off, or words to that effect. This was all done hurriedly. The foreman stood a little way from the hand-car, directing the hands to take it off quick. One of them fell, and plaintiff took his place in the effort to lift the car off. At this juncture the approaching engine struck the hand car, knocked it off, and broke the leg of plaintiff, who did not let go of the car in time to save himself, as the others did.

Under recent statutes (Sand. H. Dig., § 6248–9), a foreman of a section gang is not a fellow servant of the men be-

longing to the gang under him, for the reason that they are under his control and direction in the performance of their duties. There is no doubt in this case but that the foreman, in operating the hand car and controlling its movements, was acting in a very imprudent and hazardous manner, and was guilty, therefore, of negligence.

The plea that the plaintiff was guilty of contributory negligence—all the defense left—is not established by the evidence. What the defendant did was manifestly done in obedience to the order of the foreman to get the car off quick. Plaintiff has a right to presume that the foreman, who was in a situation to devote his whole attention to the approaching train and the efforts of his men to get the hand car off the track, could better determine than he what was best to be done under the circumstances. We do not think the danger was so apparently imminent but that he could reasonably rely upon the direction of the foreman. He did so, and was injured. He should not be charged with contributory negligence under the circumstances.

The negligence of the foreman, acting for the company, did not consist so much in what he did at the place of the accident as in running the hand car into a situation in which nice chances must necessarily have to be taken in order to extricate himself and the others from peril, and by which the injury occurred. See *Railway Company* v. *Harrell*, 58 Ark. 472, under side heading, "As to negligence of trainmen."

There does not appear to be any reversible error in the instructions, taken all together, nor in the admission of the testimony of one of the witnesses complained of.

The judgment is affirmed.

BAKER v. YORK.

Opinion delivered March 19, 1898.

CONSTRUCTIVE SERVICE—PROOF OF PUBLICATION.—An affidavit of publication of notice, in a proceeding to call in and cancel county warrants, recited as follows. "I, M., publisher and proprietor of," etc., "a weekly newspaper published at," etc., and having a *bona fide* circulation in said county for more than six months next preceding the date hereof, do solemnly swear," etc. *Held* that the recitals as to affiant's connection with the paper and as to its circulation were mere statements without the sanction of an oath, and that the affidavit did not comply with the statute, and the judgment rendered on such notice was void. (Page 143.)

Appeal from Stone Circuit Court.

RICHARD H. POWELL, Judge.

Yancey & Fulkerson and *Morris M. Cohn*, for appellant.

The notice of the order of cancellation must conform strictly to the requirements of the statute authorizing and regulating its publication. Sand. & H. Dig., § 1004; 33 Ark. 740; 48 Ark. 238; 51 Ark. 34; 61 Ark. 259, 265. And the proof of the making and manner of publication must also conform to the statute. Sand. & H. Dig., § 4685; 51 Ark. 34, 42; 55 *ib.* 218; 54 *ib.* 627, 643; 61 Ark. 259, 265; 10 Fed. 891. The proof of publication was jurisdictional, and, it being defective, the county court could take no valid action. Nor could it cure the defect by amending the affidavits. 51 Ark. 317, 323; 36 Ark. 268; 20 Ark. 636; 23 Ark. 18; 55 Ark. 30; 51 Ark. 224, 231; 1 Wall. 627; 43 Ark. 107, 111; Wait, Fraud. Con. § 415, 416; McNamara on Nullities, 4; 50 Cal. 388; 36 Iowa, 202, 206; 96 U. S. 195; 55 Miss. 243; 40 N. J. L. 383; 20 Grat. (Va.) 109; 79 Pa. St. 407; Freeman, Void Jud. Sales, § 56; 43 Ark. 111; 49 Ark. 230, 231. There was no legal session of court on the day of the order. Hence the proceedings were void. 27 Ark. 414, 417; 2 Ark. 229, 252.

J. K. York, pro se.

The proof of publication of the notice was legal and sufficient. The court had power to amend its record to make it speak the truth. 13 Ark. 419, 420; 40 Ark. 231, 232; 14 Ark. 206; 17 Ark. 100, 105. There is scarcely any limitation as to the time at which an officer's return may be amended. 22 Am. & Eng. Enc. Law, 201, 6a; 16 Me. 124; 46 Mo. 311; 86 Va. 232; 112 Ill. 29; 13 Ill. App. 294.

BUNN, C. J. This is a proceeding to compel a sheriff and collector of taxes to take in payment of the county taxes due by the appellant certain county treasury warrants or scrip, which had been called in and cancelled by a previous proceeding and order of the county court.

The only question necessary for us to consider is as to the sufficiency of the nature of the proceeding in the county court to authorize it to annul the warrants involved, on the failure of their holder to present the same for examination as required by the order of the court. This proceeding to call in scrip is statutory, is not according to the course of the common law, and seeks to conclude the holders of scrip by constructive service, and a strict compliance with the requirements of the statute must be shown. *Lusk* v. *Perkins*, 48 Ark. 238; *Gibney* v. *Crawford*, 51 Ark. 34; *Crudup* v. *Richardson*, 61 Ark. 259.

The proofs of publication in the two newspapers, as acted upon by the county court at its October term, 1895, are not copied in the record, and we have only a statement of their contents to enable us to judge of their sufficiency. It is virtually admitted, however, that these proofs of publication in neither case showed all the facts that should have been shown to give them any validity; and hence, at the succeeding January term, they were, at the instance of the sheriff, sought to be amended. "I, S. A. McCullough, publisher and proprietor of the Stone County Democrat, a weekly newspaper published at Mountain View, Stone county, Ark., and having a *bona fide* circulation in said county for more than six months next preceding the date hereof, do solemnly swear that the annexed and foregoing advertisement has been printed in said newspaper three times in succession; the first insertion appearing in volume 14,

No. 29, dated 18th day of July, 1895, and the last inertion in volume 14, No. 31, dated 1st day of August, 1895." All that part preceding the words "do solemnly swear" were added by amendment. The proof of publication by J. M. Watkins, chief accountant of the Batesville Printing Company, is substantially the same as the other, except that he states the circulation of his paper was as required by law. In each case all that part showing the paper to be such as the law designates for publishing legal notices, and the connection the affiant has with it, was added by the amendment, and preceded the oath, and were therefore mere statements without the sanction of an oath, the oath being expressly confined to the facts pertaining to the date and insertion of the publication of the order.

The proofs of publication were not in compliance with the statute, and the judgment rendered on such notice was void as to the warrants involved herein.

Reversed and remanded, with direction to grant prayer of petitioner.

WOOD, J., being in doubt as to the insufficiency of the proofs of publication as amended, does not concur in the decision of the court on that ground. But he is of opinion that the proofs of publication could not have been made after the expiration of the term of the county court at which the order cancelling the warrants was made, and on that ground concurs in the judgment of reversal.

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LITTLE ROCK TRACTION & ELECTRIC COMPANY v. WALKER.

Opinion delivered March 19, 1898.

1. STREET RAILWAY—LIABILITY FOR MALICIOUS PROSECUTION BY EMPLOYEE.—A street railway company is not liable for the acts of its conductor in maliciously prosecuting a passenger for violating a city ordinance making it a misdemeanor for any person to ride on a street car without paying fare, in the absence of authority from the company to the conductor to institute such prosecution. (Page 148.)

2. PRINCIPAL AND AGENT—WHEN AUTHORITY NOT IMPLIED.—The fact that a street car conductor has authority to put people off his car for refusing to pay fare will not justify the inference that he also has authority to arrest and prosecute them therefor. (Page 149.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

Rose, Hemingway & Rose, for appellant.

In an action for malicious prosecution, both malice and want of probable cause are essential elements. 33 Ark. 316. An agent of a corporation can bind his principal within only the real or apparent scope of his authority. Hence, to hold a principal liable in a suit for malicious prosecution by an agent, express authority of such agent to institute the criminal prosecution complained of must be shown. 78 Md. 394; 28 Atl. 615; 34 Am. Rep. 311; S. C. 51 Md. 290; 15 Fed. 200; 39 N. Y. 381; 6 Exch. 314; 7 Exch. 36; 2 L. R. Q. B. Cases, 534; L. R. 5 C. P. 445; L. R. 6 Q. B. 65; 1 Biddle, Ins. § 118.

J. H. Harrod, for appellee.

The questions of malice and want of probable cause were for the jury, and their verdict is conclusive thereon. To hold a corporation responsible for the acts of its agents, it is not necessary to show express authority. The authority may be implied. 122 U. S. 597; Pierce, Railroads, 279; 98 N. C. 34; 10 S. W. 744; Thomp. Corp. § 6312. The principal is liable for the acts of his agent if they are within the real or apparent scope of his authority. It is not a question of whether the agent was of high or low degree. 78 Ala. 85; Mechem, Agency, § 311; 9 Philad. 189; 15 Nev. 176. A corporation may be held liable for assault and battery, false imprisonment or malicious prosecution. 32 N. J. L. 328; 37 Ala. 560; 32 N. J. L. 334; 130 Mass. 443; 15 Nev. 167; Cook, Corp. Law (2 Ed.), § 698; 133 Mass. 563; 47 N. Y. 274; 3 S. E. 923; 93 Cal. 562; 90 N. Y. 77.

BUNN, C. J. This is a suit for malicious prosecution by Albert Walker, the appellee, against the street car company of Little Rock. Judgment for plaintiff, and the defendant appeals.

Walker was a passenger on one of defendant's cars, known as the "West Ninth car," running from the west on Ninth street to the junction of the several car lines at the crossing of Ninth and Main streets, having paid his fare. When his car arrived at the junction, and was stopped, as usual, on the east track on Main street, and just north of Ninth street, plaintiff alighted from the same; and he took his seat at the near-by corner of the sidewalk to await the arrival of the Fifteenth street car, coming from the south along the east track on Main, and going to the union depot. While at this corner, plaintiff was engaged in conversation with a woman, subsequently a witness in the case, and the Fifteenth street car came up, and stopped the usual distance—fifteen or twenty feet—in rear of the Ninth street car on the same track as aforesaid. Then the Ninth street car moved off down Main street, and in the usual interval of time the Fifteenth street car followed. The plaintiff neglected to board the latter, as he intended, until, as he testifies, it had started and was moving off slightly; as his companion testifies, until the car had gone fifteen or twenty feet; and, as the conductor on the car testifies, after it had gone half way to Eighth street. Elsewhere plaintiff also stated that he boarded the Fifteenth street car at Ninth and Main, and that then the transfer man said, "Transfer one."

When the conductor passed through the car collecting fares, he accosted plaintiff sitting in the rear end, and demanded his fare, which he refused to pay, saying that he was a "transfer," meaning that he was entitled to be transferred, having come to the junction as a paid passenger from West Ninth, and that he was entitled to continue to his destination without paying additional fare. There arose a controversy between him and the conductor, who contended that he had not got on the car before it left the junction, and that therefore he had not been transferred. The conductor, being a new man in the business, consulted with the motorman, who was an experienced man, as to what to do in the premises, and was informed that the rule was to put the passenger off if he refused to pay his fare, and this in fact seems to have been the rule. So at Fourth street the conductor called to his aid Rainwater, a policeman, and directed him to put Walker off, as he

testified, but, as the policeman testified, directed him to arrest him and take him off. The policeman arrested plaintiff accordingly, and, on arriving at Markham street, took him to the office of the police judge at the city hall, which is near by; and on the following day the plaintiff was tried on a charge preferred by the policeman for violating a city ordinance which made it a misdemeanor for any person to ride on a street car without paying his fare. And the conductor and the transfer agent, whose post was at the junction aforesaid, were summoned and testified, and the plaintiff was discharged, and then brought this suit against the street car company for malicious prosecution, as stated.

The proof of the rules of the defendant company is very indefinite and unsatisfactory, but we gather this much from the testimony: That transfers of passengers from the cars of one line to another were allowed to be made only at the junction named; that a passenger alighting from an incoming car remained in the vicinity until the arrival of the car to which he asked to be transferred, and, having been within the view of the transfer agent from the time he alighted from the other car, on his boarding the latter car, the transfer agent signaled or called to the conductor thereon that one was transferred, or whatever the number might be, and the conductor in this way was directed to demand no additional fares from these transferred passengers. Whether it was allowable for a passenger to board the second car after it had been put in motion, the witnesses do not inform us, except inferentially. From one of the questions put to the transfer agent and answered by him, one would infer that when a passenger alighted from an incoming car, the transfer agent called out "transfer the party." Such a direction would be nonsensical, until the car to which he wished to be transferred should arrive, and we presume that is what was meant.

However this may be, we will assume, for the sake of the argument, at least, that the police judgment was based upon a proper construction of the testimony, and that the plaintiff was entitled to ride on the Fifteenth street car to his destination without paying the additional fare, and that his ejectment from the car was wrongful, and that his subsequent prosecu-

tion was also wrongful; and even, for the sake of the argument, we will say that the arrest and prosecution were at the instance of the conductor, and that from his conduct in relation thereto malice may be inferred. This brings us squarely to the only strictly legal proposition in this case, and that is, was the defendant company liable for the acts of its employee, the conductor, in this regard?

The defendant's contention is, in effect, that it is not liable unless there is proof of its express authority to its employee to arrest and prosecute delinquent passengers for a violation of the law on the subject. In determining what may be regarded as express authority, we may include, for the purposes of this discussion, not only authority given in express words, but such authority as necessarily follows by implication from the express language conferring the authority.

Central Railroad Company v. *Brewer*, 78 Md. 394, was a case wherein a person, on entering a street car, deposited in the fare box a coin resembling a five cent piece or nickel, and shortly thereafter was informed by the driver that he had dropped a "lead nickel" into the box (pointing it out to him), and was requested to redeem it, and he refused to do so; and he, after leaving the car, was arrested at the instance of the superintendent of the company, and held to bail, and tried on a charge of passing counterfeit money. Upon the evidence the United States commissioner before whom the preliminary trial was had discharged him, and he then brought suit for malicious prosecution and false arrest. The trial court having given four several instructions at the instance of the plaintiff, the defendant asked the following instruction, which was not covered by any of those given, and the same was refused, to-wit: "(2.) That there is no evidence in the case legally sufficient to prove that any of the officers or agents of the defendant corporation were authorized by the company to have the arrest made, which is complained of in the complaint, or that the company subsequently adopted and ratified the acts of said officers or agents, and the verdict must be for the defendant." After disposing of the various other questions involved, the supreme court of Maryland held that the company was not liable for the acts of the superintendent in causing the arrest

and prosecution of the plaintiff, there being shown no express authority from the company to him to do so, nor ratification by it afterwards, as was assumed in the instruction askednd a refused. To the same effect are *Carter* v. *Home Machine Co.*, 51 Md. 290; *Pressley* v. *Mobile & G. R. Co.*, 15 Fed. Rep. 199; *Mali* v. *Lord*, 39 N. Y. 381; 1 Biddle, Insurance, § 118, and the following English cases, to-wit: *Eastern Counties R. Co.* v. *Broom*, 6 Exch. 314; *Roe* v. *Birkenhead, etc. R. Co.*, 7 Exch. 36; *Poulton* v. *London & S. W. R. Co.*, L. R. 2 Q. B. 534; *Edwards* v. *London & N. W. R. Co.*, L. R. 5 C. P. 445; and *Allen* v. *London & S. W. R. Co.*, L. R. 6 Q. B. 65—all cited in appellant's brief.

There is in the case at bar no proof of an express authority from the company to the street car conductor to prosecute a passenger for refusing to pay his fare. Moreover, there is no connection whatever between his authority to put a delinquent passenger off his car (given expressly under the rules of the company), and thus prevent a further imposition on the part of the passenger, and the authority to arrest him and prosecute him for a violation of the criminal laws in attempting to ride on the car without paying his fare. Nor can the limited authority of a car conductor from the company to put a delinquent passenger off be enlarged by his calling to his aid a policeman whose general powers as such are to make arrests and prosecute for violation of the municipal law.

Nothing else being said, in such a case, the policeman is called in to aid the conductor in the execution of the conductor's powers, and not those belonging to his office generally. Of course, the conductor could have, independently and on his own responsibility, caused the arrest to be made, and could have prosecuted; but could he do so as conductor of the street car, is the question here, and the authorities cited are to the effect that he could not do so, and bind his company, without express authority being shown.

As a matter of fact, the conductor in this instance, in all probability, never intended to do more than act upon the advice of the experienced motorman (that is, put the plaintiff off the car), and never had the idea of prosecuting, maliciously or otherwise; and all the play between himself and the policeman

as to their use and understanding of the words "put off" and "arrest' amount to nothing more than an illustration of the fact that we give meaning to words according to the lingo of our several callings, and as habit and association have determined. But we express no fixed opinion as to the facts.

The plaintiff's counsel cite many authorities which they contend are in contradiction to the doctrines of the Maryland and other decisions cited. But, after a careful examination of all of them, we find no real conflict between the principles they announce and the principles of the cases cited by appellant. The difference is always between the state of facts or the state of pleadings.

In concluding their argument and citation of authorities, they say that "every phase of the question, and every principle invoked in this case, has been passed upon by the court of appeals of New York, and decided against the contention of appellant's counsel," in the case of *Lynch* v. *Metropolitan Elevated R. Co.*, 90 N. Y. 77. In that case Lynch purchased a ticket for a passage upon defendant's railway, and entered one of its cars. Before reaching his destination he lost his ticket, and when, after getting off at the end of his journey on the train, he attempted to pass through the gate of the enclosure of the depot, he was stopped by the gate-keeper, and informed that he could not pass until he showed his ticket or paid his fare, which appears to have been the rule of the company. He explained the purchase and subsequent loss of his ticket to the gate-keeper, who then sent for a police officer, and directed him to arrest the plaintiff, which he then and there did, and took him to the police station, where the gate-keeper lodged a complaint against him, and he was locked up over night; and, on the hearing the next morning, the gate-keeper appeared in the prosecution, but the plaintiff was discharged. "The railway company had given orders to the gate-keeper not to let passengers out until they either paid their fares or exhibited their tickets." In an action for false imprisonment by the plaintiff against the company, the court held "that the detention was unlawful, that the railway company was responsible for the acts of the gate-keeper, and that Lynch was entitled to recover." There was no doubt in that case but that the detention was not only unauthorized

by any law, but was in violation of all law; and the first proposition, that the imprisonment was false, followed as a matter of course. The court had found that the gatekeeper did exactly what the company had expressly ordered him to do under such circumstances, and, of course, could but hold that the company was liable. The gatekeeper was simply acting in the plain line of his authority and duty to his master, and that made the latter liable. The circumstances of the prosecution seems not to have been commented upon, except as an incident of the false imprisonment, probably given only as a part of the whole transaction. Whether the gate-keeper had express authority to prosecute or not is not shown in evidence, and that fact was not necessary to a judicial determination of the case, as it was one of false imprisonment, and not of malicious prosecution. The most that could have been made of the defense by the company was a plea of *ultra vires*, which is no defense in such cases.

There is error in the 2d instruction given on part of the plaintiff, in which it is assumed, in effect, that the authority to arrest and prosecute for the criminal offense grows out of the authority to put off the car for refusing to pay fare, there being want of proof of express authority to prosecute.

Reversed and remanded.

WOOD. J., dissents, holding that, in order to maintain a suit of this kind against the corporation, it is not necessary to show that its agent, who instigated the malicious prosecution, or at whose instance it was brought about, had any express authority from the corporation to do the act complained of, but that such authority may be and will be implied if the agent in doing the act is acting within the scope of his real or apparent authority.

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COLONIAL & UNITED STATES MORTGAGE COMPANY *v.* SWEET.

Opinion delivered March 19, 1898.

FORECLOSURE SALE—REOPENING—INCREASED BID.—Where a mortgagee of land negligently failed to attend the foreclosure sale, he is not entitled, before confirmation, to have the sale set aside upon the offer of a large advance upon the purchaser's bid, if the sale was regular, and the land brought its market value. (Page 154.)

Appeal from St. Francis Circuit Court in Chancery.

HANCE N. HUTTON, Judge.

W. G. Weatherford and *Norton & Prewitt*, for appellant.

Chancery court has power to, and should, on application made before confirmation of a commissioner's or master's sale, reopen the bidding and let in a bid which is in advance of that of the purchaser at such commissioner's sale. 3 Daniell's Ch. Pract. 1284 (3d Am. Ed.); 6 Heisk. (Tenn.) 539; 6 Lea, 190; 3 Tenn. Ch. 728, 268, 344, 237; 1 Tenn. Ch. 51; 3 Tenn. Ch. 228. Those courts which hold that mere advance of bid is not sufficient to authorize reopening of bids, hold that the slightest circumstance of mistake, surprise or fraud will be sufficient to base such action upon. 117 U. S. 180; 32 Ark. 392; 44 Ark. 503; 47 Ark. 419; *ib.* 518; 53 *ib.* 113; 56 *ib.* 240.

Jas. P. Clarke, for appellee.

A court will not set aside a judicial sale, fairly and regularly made, where the property brought its market value. The court has a discretionary power as to the acceptance of the offer made to the commissioner, and its action in this behalf will not be set aside, unless there is an affirmative showing of abuse of discretion. 129 U. S. 82; 5 Wallace, 662; 145 U. S. 349.

BATTLE, J. The Colonial & United States Mortgage Company instituted an action against S. E. Sweet, in the St. Francis circuit court, to recover a sum of money due it on cer-

tain promissory notes, and to foreclose a mortgage executed to secure the payment of the same. It recovered a judgment against Sweet on the notes for $3,981.67, and a decree appointing a commissioner and ordering him to sell the lands described in the mortgage and thereby conveyed as a security, and that the sale be made for the purpose of paying the judgment. The commissioner, in pursuance of the terms of the decree, advertised the lands to be sold, and notified the attorney of plaintiff of the day of sale. At the request of plaintiff's attorney, N. F. Lemaster agreed to attend the sale, and bid the amount of the decree for the lands in the name of and for plaintiff. The commissioner attended at the time and place appointed, and sold the lands to Walter Sweet at one minute before 3 o'clock in the afternoon, for the aggregate sum of $2,500, he being the highest and best bidder. Before he commenced the sale, the commissioner again notified the attorney of plaintiff by telegram of the fact that the land would be sold according to the notice. Lemaster had entirely forgotten the sale until he was shown the telegram, when he immediately, at ten minutes past twelve o'clock on the day of sale, delivered a dispatch to the telegraph operator at Memphis, Tenn., to be sent by telegraph to Forrest City, Ark., distant from Memphis about forty or forty-five miles. It was addressed to the commissioner, and requested him to bid the full amount of the decree for the lands, and that he make the bid for plaintiff's attorney. No reply to his telegram was received by the commissioner until six minutes after three o'clock in the afternoon of the day of sale.

At the term of the court following the sale the commissioner made a report of his proceedings; and thereafter the purchaser asked the court to confirm the sale, and order the commissioner to convey the lands to him, and the plaintiff moved the court to allow him to advance the bid of the purchaser to the full amount of the decree. Evidence showing the facts was submitted by both parties. The clear preponderance of it showed that the lands were sold at their market value. The fairness and regularity of the sale was unimpeached by evidence. The court found that the sale was fair and regular, and made in conformity to the terms of the decree; "that no

unfair or improper conduct is imputable to the purchaser or commissioner;" that the lands were sold for their market value; and confirmed the sale, and ordered the commissioner to convey the lands to the purchaser. Plaintiff appealed.

Did the court err in refusing to allow appellant to advance the bid of the purchaser? In *Graffam* v. *Burgess*, 117 U. S. 180, 191, Mr. Justice Bradley, speaking for the court, said: "It was formerly the rule in England, in chancery sales, that, until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price ten per centum. * * * But Lord Eldon expressed much dissatisfaction with this practice of opening biddings upon a mere offer of an advanced price, as tending to diminish confidence in such sales, to keep bidders from attending, and to diminish the amount realized. * * * Lord Eldon's views were finally adopted in England in The Sale of Land by Auction Act, 1867, 30 and 31 Vict. c. 48, § 7. * * * In this country Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal that a sale will not be set aside for inadequacy of price, or unless the inadequacy be so great as to shock the conscience, unless there be additional circumstances against its fairness; being very much the rule that always prevailed in England as to setting aside sales after the master's report had been confirmed."

It is well settled by the weight of authority that there is no duty resting upon a court to set aside a sale of land for the purpose of allowing an interested party to advance the bid of the purchaser, where the sale is in accordance with the decree directing it, and the property sold has brought its market value, and the purchaser and those conducting or controlling it have committed no fraud, unfairness or other wrongful act injurious to the sale, and there is no occurrence, or "special circumstance, affording, as in other cases, a proper ground for equitable relief;" and that appellate courts should not interfere with or set aside orders of the court confirming it. 4 Kent, Comm. (13 Ed.) marginal p. 192; 2 Jones, Mortgages (5 Ed.), §§ 1640, 1670, 1676, and cases cited; 1 Sug. Vend. (7 Ed.) Perkins' Notes, 93; *Babcock* v. *Canfield*, 36 Kas. 437;

Adams v. *Haskell*, 10 Wis. 123; *Duncan* v. *Dodd*, 2 Paige, 99. *Am. Ins. Co.* v. *Oakley*, 9 Paige, 259.

Appellant cites Tennessee cases to show that the sale in question should be set aside for the purpose of allowing it to advance the bid of the purchaser. But "in Tennessee, before confirmation, the rule is now settled that a simple advance of 10 per centum, without any circumstance whatever of fraud, accident or mistake, shall be sufficient to open the biddings, and that the practice must be liberally applied to effectuate the purpose of procuring the largest possible price." *Click* v. *Burris*, 6 Heisk. 539; *Glenn* v. *Glenn*, 7 Heisk. 367; *Lucas* v. *Moore*, 2 Lea, 1; *Atkison* v. *Murfree*, 1 Tenn. Ch. 51; *Vaughn* v. *Smith*, 3 *id.* 368; *Atchison* v. *Murfree*, 3 *id.* 728. This doctrine is contrary to the rule almost universally adopted in this country.

The sale in question was made in accordance with the decree authorizing it; the property sold brought its market value; the conduct of the commissioner in respect to it is beyond censure; the action of the purchaser is unimpeached by evidence; the sale is untarnished by an irregularity or unfairness; the mortgagor does not complain; the mortgagee (the appellant) failed to attend the sale through his own negligence, and failed to acquire the lands, but is entitled to receive under the sale their equivalent in value, and is thereby fully indemnified for his failure to attend. We think the order of the court confirming it should be affirmed, and it is so ordered.

HELENA *v.* DWYER.

Opinion delivered March 19, 1898.

ILLEGAL TAX—RECOVERY.—Money paid to a city collector under an illegal ordinance imposing a license tax, and subjecting delinquents to a fine for failure to pay the same, is not recoverable as a compulsory payment where there was no actual or threatened exercise of force to compel such payment. (Page 158.)

Appeal from Phillips Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

The appellees, Dwyer Brothers, brought suit in the Phillips circuit court against the appellant to recover certain sums of money which were paid by them at various times from January, 1893, to February 1, 1895, as a license for keeping a meat market in the city of Helena, amounting in the aggregate to the sum of $109.

The complaint, among other things, alleges that these various amounts were paid to the said defendant (appellant) against their will, illegally and under protest and duress of law, as a license to them for keeping a meat market in said city; that the amounts were collected at different times by the collector of said city, who was also the chief of police thereof, under an ordinance passed by said city; that they were compelled to pay said sums in installments, from time to time, whenever called upon by said city officers, to prevent being arrested and subjected to the payment of a fine upon their failure to pay the same, there being a penalty attached to said ordinance which subjected one to the payment of a fine and arrest who failed to pay the same when called upon by the proper officers of said city; that the ordinance was unconstitutional and contrary to the laws of the state; and that the city had no right to collect the same.

The appellant answered, denying the illegality of the ordinance, and charged that the various sums paid to appellant by appellee were paid freely and voluntarily, without question, fraud, mistake, threats of arrest, or duress of any kind whatsoever, and were also paid prior to the repeal of the ordinance referred to.

The section of the ordinance prescribing the penalty for violation of same is as follows: "Be it ordained, that any violation of this ordinance shall subject the offender to a fine of not more than $25 for each offense, to be adjudged by the mayor or jury trying the case." This is the only part of the ordinance necessary to set out, as the appellant does not contend here that the ordinance was valid, but only contends that the payments by appellees were voluntary.

The court found the facts to be as follows: "That, while the ordinance provided a failure to pay the license rendered the offender liable to a criminal prosecution and a penalty, the amounts sued for were paid to enable plaintiffs to carry on their legitimate business, and not be adjudged criminals; that the amounts were paid to F. D. Clancey as city collector, and not as chief of police; that he, as such collector, had no authority to make arrests; that the amounts were paid without objection or protest, but for the reason that their failure would subject them to arrest and prosecution for a failure to pay; that appellees were never threatened with arrest or arrested at the time the payments were made."

Appellant asked the court to declare the law as follows: "The payment by the plaintiffs must have been made under compulsion, under protest, and to prevent the immediate arrest and detention of his person, and not voluntarily made," which the court refused, but declared the law as follows: "That the payments made by plaintiff were made under a legal duress and compulsion, and, in law, not voluntarily; that an ordinance which requires the payment of an amount of money before going into business, when paid, becomes a payment under duress of law, and the party paying is entitled to recover the same back by suit at law."

R. W. Nicholls, for appellant.

Mere apprehension of legal proceedings is not sufficient to make a payment compulsory. Such a payment cannot be recovered on the ground of duress. 4 Waite's Actions & Def. 191; 62 Ark. 626, 627; 49 Ark. 70; 21 Mich. 483; 25 Mich. 456; 34 Mich. 170; 50 N. W. 959; 45 Am. Rep. 479; 2 Dillon, Mun. Corp. 947; 20 Pa. St. 235; 6 R. I. 235; 20 Mo. 143; 46 Cal. 589; 4 Met. 599; 97 U. S. 181; 30 Me. 404; 5 Gill (Md.), 244; 33 Barb. 147; 13 Am. Rep. 220; 6 Gray, 579; 98 U. S. 531.

Tappan & Porter, for appellees.

An ordinance in restraint of trade and for revenue is illegal and void. 43 Ark. 365; 46 Ark. 361; 15 Wall. 75; 49 Ark. 74; 56 *ib.* 374; 52 Ark. 301; 40 Am. Rep. 55; 85

Am. Dec. 282. One who has illegally been compelled to pay money as a condition precedent to the exercise of a legal right can recover such payment. 49 Ark. 74; 86 N. Y. 472; 60 N. Y. 478; 12 N. Y. 112; 45 Mich. 569; 12 Pick. 7; 4 Metcalfe, 189; 3 Cush. 572.

WOOD, J., (after stating the facts). Judge Dillon says: "The coercion or duress which will render a payment of taxes involuntary must in general consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means, or reasonable means, of immediate relief, except by making payment." 2 Dillon, Mun. Corp. § 943. Again he says: "Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot, without statutory aid—there being no coercion, no ignorance or mistake of facts, but only ignorance or mistake of the law—be recovered back from the corporation, either at law or in equity, even though such tax, license fee, or fine could not have been legally demanded and enforced." *Id.* § 944.

Judge Cooley enumerates, as one of the conditions upon which illegal and void taxes paid to a municipal corporation may be recovered, the following: "It must have been paid under compulsion, or the legal equivalent." Cooley, Tax. p. 805. And he defines a compulsory payment as follows: "A payment made to relieve the person from arrest, * * * or to prevent a seizure when it is threatened." *Id.* p. 84. The principles here announced were approved by this court in *Town of Magnolia* v. *Sharman*, 46 Ark. 358. It will be seen, by applying these principles to the facts as found by the court in the present case, that the court erred in its declaration of law, and in refusing to declare the law as asked by appellant. We are of the opinion that the payments made by appellees, under the facts stated, cannot be construed otherwise than as voluntary payments. See *First Nat. Bank of Americus* v. *Mayor, etc.*, 68 Ga. 119, and numerous cases cited in brief of appellants.

Reversed and remanded for new trial.

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WILLIAMS v. THE STATE.

Opinion delivered March 26, 1898.

1. EXECUTION—TO WHOM MONEY COLLECTED PAYABLE.—Where, in a suit brought by the state for the benefit of a county and of certain school districts, it appears of record that a certain firm of attorneys appeared for and represented the plaintiff, the sheriff will be protected in paying to such firm the money collected by him under execution in favor of plaintiff, and will not be liable to the penalty prescribed by Sand. & H. Dig., § 4252, for a failure to pay over money collected upon an execution on demand, whether such firm of attorneys was duly authorized to represent the plaintiff or not. (Page 168.)

2. PAYMENT INTO PUBLIC TREASURY—CONSTRUCTION OF STATUTE.—Sand. & H. Dig., § 7192, which requires that "the sheriff or other officer collecting any money due to the state shall pay the same into the public treasury," etc., has reference solely to the state herself, and not to any of her political dependencies or subdivisions. (Page 172.)

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

John Gatling, *Fletcher Roleson* and *Norton & Prewitt*, for appellant.

The statutory proceeding for summary judgment must be strictly construed. 25 Ark. 353. The statute authorized the sheriff to pay the money to the attorneys of record, and he is not liable to summary judgment, unless he fails to pay the amount collected on execution, on demand of the plaintiff or his attorneys. Sand. & H. Dig., § 4252. There was nothing irregular in the employment of the attorneys. The state, though the nominal, is not the real plaintiff. 39 Ark. 172; 30 Ark. 71; 17 Am. & Eng. Enc. Law, 512, and notes, and note 3, p. 513. The prosecuting attorney had no authority to make the demand. "Public treasury," as used in § 7192, Sand. & H. Dig., refers only to the state treasury. It has no application to county treasuries. 27 Ark. 628. The summary proceeding, with its penalties, can only be used where the conduct is dishonest, oppressive or clearly illegal. 31 Atl. 611; 23 Atl. 35; 18 So. 297.

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

The attorneys to whom the payment was made were not legally authorized to receive it. The law authorizing a contract with a county or state must be strictly pursued, or the contract will not be binding. 4 Am. & Eng. Enc. Law, 359. To charge a county for services, there must be some legal authority for the rendering of same. 4 Am. & Eng. Enc. Law, 366; 9 Ind. 296; 97 Ind. 176; 28 Howard (N. Y.), Pr. 22. The county court has exclusive jurisdiction to authorize contracts and to order payment of claims against the county. Sand. & H. Dig., § 1233; 44 Ark. 225; *ib.* 318; 47 Ark. 80. The attorneys to whom payment was made were unauthorized by law, and they cannot by contract be made legal representatives of the county. Sand. & H. Dig., § 1237; 31 Ark. 266; 56 Ark. 581; 57 Ark. 487; 54 Ark. 645; 57 Fed. 1030; 36 Ark. 646; 61 Ark. 74. It was the duty of the prosecuting attorney to attend to this suit. Sand. & H. Dig., §§ 6013, 6014 and 6015. The county court had no authority to employ counsel other than that provided by law. 18 S. W. 1142; 24 Barb. 226; 8 Kas. 487; 12 Neb. 244; 10 Neb. 193; 68 Ind. 575; 69 Ind. 441; 22 Wis. 69. Nor had the treasurer such right. 50 Ark. 566. Nor could the prosecuting attorney delegate his authority. 1 Am. & Eng. Enc. Law, 595. The county is simply an agent of the state, and the money collected by the sheriff belonged, not to the county, but to the state. 42 Ark. 54; 32 Ark. 51; 34 Mo. 546; 8 Cal. 98; 25 Ill. 187. It matters not whether the money belonged to the county, the school fund, or the state. Appellant should have paid it into the treasury, and not to any attorney, authorized or unauthorized. Sand. & H. Dig., § 7192. The demand made by the prosecuting attorney was sufficient. Sand. & H. Dig., § 6013. After such demand, judgment against the sheriff was proper. Sand. & H. Dig., §§ 4245 to 4254, inclusive.

John Gatling, *Fletcher Roleson* and *Norton & Prewett*, for appellant on motion for rehearing.

The right of the sheriff, who has collected moneys for a litigant, to pay same to his attorney of record, and be thereby

discharged, is the same whether the litigant be a person, a *quasi* municipal corperation, or a municipal corporation. 39 Ark. 50. Sec. 7192, Sand. & H. Dig., has no application to any money except such as is payable into the state treasury. 27 Ark. 628. All summary proceedings like the one at bar are based upon contempts. The courts exercise this jurisdiction to prevent dishonesty of their officers, and, if no such dishonesty appears, the complaining party will be left to his action at law. 4 Black. Comm. 283; 10 Wall. 491; 27 Fed. 195; 31 Atl. 611; 14 Atl. 397; 19 Pa. St. 95; 1 Curtis (U. S. C. C.), 186; 2 Wils. 371; 2 Moore, 665; 1 Bing. 102; 4 Burr. 2060; 2 Blackstone, Rep. 780; 1 Chitty, Rep. 661; Murfree, Sheriffs, §§ 969, 970. In the absence of misconduct on the part of the sheriff, he is entitled to a discharge. That the county was really liable for the fee, see 55 Ark. 419. It was not the duty of the prosecuting attorney to attend to such cases for school districts. Sand. & H. Dig., § 7087.

HUGHES, J. The appellant, as sheriff of St. Francis county, collected upon an execution in his hands, in favor of the state, the sum of $9,448.44 of J. B. Wilson and others. He paid to the plaintiff in the execution, of the amount by him collected, the sum of $8,340.42, leaving a balance in his hands of $944.83, which amount he paid to Norton & Prewitt, attorneys of record for the plaintiff in the execution, and took their receipt for the same. Upon notice, the prosecuting attorney for the district moved for and obtained a summary judgment against the appellant sheriff and the securities on his bond for the amount paid to Norton & Prewitt, having made demand therefor previous to giving notice of his intention to move for judgment. The judgment was for the sum of $944.83, as principal, and the further sum of $566.88, being damages computed at the rate of ten per cent. per month from the time demand was made, and for all costs. The sheriff appealed to this court.

The case was tried before the court upon the following agreed statement of facts:

"In this cause it is agreed that the suit styled '*State of Arkansas* v. *J. B. Wilson et al.*,' in which the execution issued

was instituted by H. F. Roleson, then prosecuting attorney, and Norton & Prewett, at the instance and request of J. W. Aven, incoming treasurer of St. Francis county, against J. B. Wilson, the outgoing treasurer of said county, and the sureties on his bond as such treasurer. That likewise, at the instance and request of said incoming treasurer, they acted for him in the county court (prior to the bringing of said suit in the circuit court), where they had a balance struck against said outgoing treasurer, and an order on him to pay over, and, after all the money had been made on said execution except 2 per cent., they again litigated the said J. B. Wilson about the unpaid 2 per cent. in a cause which is now in the supreme court of the state of Arkansas. That the execution went into the hands of the defendant, W. E. Williams, on the judgment recovered against the said J. B. Wilson and his bondsmen, was sued out and placed in his hands by Norton & Prewitt, and when this defendant had in his hands the sum of $1,230.05, a balance collected on said execution, the said Norton & Prewitt, as attorneys of record in the cause in which the execution issued, demanded that he pay said sum to them, which he did, but, before doing so, he asked the advice of lawyers in good standing,—M. T. Sanders of Helena, and R. J. Williams of Forrest City, and the attorney general of the state, J. P. Clarke, all of whom told this defendant that, if Norton & Prewitt were attorneys of record in the cause in which the execution issued, it would be proper to pay it to them. He did then pay it to them, and took their receipt, a copy of which is exhibited. H. F. Roleson, the prosecuting attorney, was not in the county when the execution was sued out, and the money collected and paid over. Afterwards, J. P. Clarke, the attorney general, told this defendant that when he (the attorney general) told him (defendant) that it would be right to pay Norton & Prewitt, he supposed that Norton & Prewitt had been employed by the county court. It was at the instance and request of said J. W. Aven that H. F. Roleson engaged in the case and prosecuted it, and at the instance and request of said Aven that Norton & Prewitt engaged in the case and prosecuted it. Norton & Prewitt turned over to the treasurer the amount they receipted defendant for, less $944.83, which they retained as attorney's fee for counsel engaged in

the case. And the parties being unable to agree as to whether or not any demand had been made upon the defendant other than the demand of Norton & Prewitt, which he complied with. John T. Hicks testified: 'A few days prior to the filing of the notice herein, which appears to have been filed on the 27th of September, 1895, I approached the defendant, W. E. Williams, and said to him that, as attorney for the state, I desired to make formal demand for the money involved in this controversy, and asked him if he would waive a demand in writing, and he remarked at the time that he would waive a more formal demand, or words to that effect.' W. E. Williams testified that he remembered having a conversation with John T. Hicks on the subject, but he could not remember that any demand was made on him, or that he was requested to or agreed to waive written or formal demand. This was all the testimony.

"JOHN T. HICKS, prosecuting attorney.
"JOHN GATLING.
"H. F. ROLESON, and
"NORTON & PREWITT, for defendant."

The defendant moved the court for a new trial, and for cause said:

"1. That the court erred in holding that Norton & Prewitt could not be attorneys of record in the case in which the execution issued (State of Arkansas *v.* J. B. Wilson.)

"2. That the court erred in holding that the receipt of Norton & Prewitt to the defendant was insufficient to protect defendant, in whole or in part.

"3. That the judgment of the court is contrary to the facts.

"4. That the judgment of the court is contrary to law."

A majority of the court is of the opinion that the prosecuting attorney was the proper person to make demand upon the sheriff, as he was the representative of the state in the suit which was brought in the name of the state for the use of the county and the school districts. We think, also, that there is evidence tending to show that the sheriff waived a more formal demand than that which was made upon him by the prosecuting attorney to pay over the money. We are of the opinion that it

was the duty of the sheriff to pay over the money to the county and the school districts for which it had been collected, and that the receipt of Norton & Prewitt did not protect him against the payment of the principal of the same, with lawful interest thereon from the time it was collected.

Under the head of "State, suits by," in section 7192 of Sandels & Hill's Digest, it is provided that "the sheriff or other officer collecting any money due to the state shall pay the same into the public treasury and obtain a quietus therefor, and not to the attorney general, or any other attorney or agent employed in the collection of the same, or to any other person, unless otherwise directed by law." There is a difference of opinion as to whether this applies to other than money collected for the state exclusively. But, at all events, it was the duty of the sheriff to pay this money to the county and school districts for which it had been collected.

It was not competent for the sheriff to credit the claim of the attorneys, or pay it, without direction so to do from the proper authority. The money should have been paid into the proper custody, and, if the attorneys were entitled to fees, their fees should have been allowed by the proper authority, and have been paid by warrants on the proper treasuries. It is within the exclusive jurisdiction of the county court "to audit, settle and direct the payment of all demands against the county." Sec. 1173, Sand. & H. Dig.; sec. 28, art 7, const. 1874. As to the manner of auditing and paying claims against the county, see sections from 1235 to 1241, inclusive, of Sandels & Hill's Digest. By section 7651 of Sandels & Hill's Digest it is made the duty of the school directors of any school district "to draw orders on the treasurer of the county for the payment of wages due teachers or for any lawful purpose," etc. All demands against a county are required by statute to be presented to the county court, properly verified, for allowance or rejection. Section 811, Sandels & Hill's Digest. The county court has exclusive original jurisdiction of claims against the county. *Shaver* v. *Lawrence County*, 44 Ark. 225.

By sec. 7184, Sand. & H. Dig., it is made the duty of the prosecuting attorney, in any district where a suit is brought

in favor of the state, or any suit is brought in which the state is interested, to prosecute the same.

It is apparent that the sheriff was bound by law to pay all the money collected on the execution to the county and school districts for which it had been collected, and that he and his sureties upon his official bond are bound to pay the sum collected, with lawful interest from the time of its collection. But are they liable, under the circumstances of this case, for the penalty of ten per cent. per month for failure to pay it over strictly in accordance with law? Having paid it to the attorneys of record, who were employed by the treasurer (who was entitled to the custody of the fund) to prosecute the suit, and having been associated with the prosecuting attorney therein, and, as the evidence shows, having paid it to the attorneys of record upon the advice of eminent lawyers that he would be justifiable in paying it to them, are they legally liable for the penalty of ten per cent. per month? It is not pretended that the sheriff or the counsel acted in bad faith, or that the counsel did not render valuable services in the case. There was no failure or refusal to pay over, but a payment, through an honest mistake, to persons apparently entitled to receive the money—attorneys of record for the plaintiff in the case. A sheriff is liable to have a summary judgment rendered against him and his sureties, "for failing to pay over money collected upon an execution, on demand of the plaintiff, his agent or attorney," * * * "for the amount so collected and ten per cent. per month damages from the time such demand was made." (Sec. 4252, Sand. &. H. Dig., subdiv. 2.) Are we to say that nothing will mitigate the rigor of this highly penal and severe provision of the statute? A majority of the court have not so concluded.

There really was no failure to pay by the sheriff, within the meaning and spirit of the statute subjecting a sheriff to a penalty of ten per cent. per month for a failure to pay over money collected by him on an execution. There was no corrupt motive, no inexcusable negligence or ignorance of law, upon his part. Mr. Murfree, in his work on Sheriffs, § 945, says: "Many statutes prescribe penalties against sheriffs, in the event of neg-

ligence and misconduct in office. Statutes of this character are so highly penal that very slight circumstances are sometimes held to exempt officers from their operation. He who would invoke such statute must bring himself within both the letter and spirit of the law." It is held in Kentucky that "if the failure to return an execution be occasioned by such casualties, or inadvertences, or mistake, or omissions, as men of ordinary prudence are subject to, and there has been no improper motive in the case, a good cause is made out under the statute." *Bassett* v. *Bowmar*, 3 B. Monroe (Ky.), and cases cited. Our court holds otherwise. We think the circumstances of the case at bar do not bring it within the principle and spirit of our statute, and that they ought to protect the sheriff against the infliction of the same penalty imposed by the statute upon a sheriff for failure to pay over money collected.

The judgment of the circuit court giving the penalty of ten per cent. per month is reversed, and the cause is remanded, with directions to so modify the judgment in this case as to exclude all interest save at the rate of six per cent. per annum from the date when the money was collected. In other respects the judgment is affirmed.

MR. JUSTICE BATTLE dissents.

OPINION ON MOTION FOR REHEARING.

Delivered May 28, 1898.

WOOD, J. This appeal is from a judgment for $1,511.71, aggregate amount of principal and damages by way of penalty, recovered by appellee against appellant in a proceeding for summary judgment instituted by John T. Hicks, prosecuting attorney for the first judicial district. The facts forming the basis for the contention of the respective parties, and upon which the cause was heard, are as follows: The State of Arkansas recovered of Jno. B. Wilson *et al.* the sum of $9,410.43, of which, the sum of $8,100.38 belonged to the several school districts of St. Francis county, and $1,310.55 belonged to St. Francis county.

The above amount was collected by the sheriff on execution. Other facts appear in the following statement, to which

the parties agree: "In this cause it is agreed that the suit, styled '*State of Arkansas* v. *J. B. Wilson et al.*,' in which the the execution issued, was instituted by H. F. Roleson, then prosecuting attorney, and Norton & Prewitt, at the instance and request of J. W. Aven, incoming treasurer of St. Francis county, against J. B. Wilson, the outgoing treasurer of said county, and the sureties on his bond as such treasurer; that, likewise at the instance and request of said incoming treasurer, they acted for him in the county court (prior to the bringing of said suit in the circuit court), where they had a balance struck against said outgoing treasurer, and an order on him to pay over, and, after all the money had been made on said execution except 2 per cent., they again litigated the said J. B. Wilson about the unpaid 2 per cent. in a cause which is now in the supreme court of the state of Arkansas. That the execution which went into the hands of the defendant, W. E. Williams, on the judgment recovered against the said J. B. Wilson and his bondsmen, was sued out and placed in his hands by Norton & Prewitt, and when this defendant had in his hands the sum of $1,230.05, a balance collected on said execution, the said Norton & Prewitt, as attorneys of record in the cause in which the execution issued, demanded that he pay said sum to them, which he did, but, before doing so, he asked the advice of lawyers in good standing,—M. T. Sanders of Helena, and R. J. Williams of Forrest City, and the attorney general of the state, J. P. Clarke,—all of whom told this defendant that, if Norton & Prewitt were attorneys of record in the cause in which the execution issued, it would be proper to pay it to them. He did then pay it to them, and took their receipt, a copy of which is exhibited. H. F. Roleson was not in the county when the execution was sued out, and the money collected and paid over. Afterwards, J. P. Clarke, the attorney general, told this defendant that when he (the attorney general) told him (defendant) that it would be right to pay Norton & Prewitt he supposed that Norton & Prewitt had been employed by the county court."

It was at the instance and request of said J. W. Aven that H. F. Roleson engaged in the case and prosecuted it, and at the instance and request of said Aven that Norton & Prewitt

engaged in the case and prosecuted it. Norton & Prewitt turned over to the treasurer the amount they receipted defendant for, less $944.83, which they retained as attorney's fee for counsel engaged in the case.

The cause is submitted upon the motion for summary judgment, the answer thereto and the agreed facts. *Can a summary judgment be rendered against appellant under the facts of this case?* is the only question for our consideration.

From sections 4245 and 4252 we excerpt the following: Judgments and final orders may be obtained, on motion, by plaintiffs in execution against sheriffs and their sureties, for failing to pay over money collected upon an execution, on demand of the plaintiff, his agent, or attorney; judgment [shall be] for amount so collected and ten per centum per month damages from the time such demand was made. This act was passed in 1857, and it is invoked by appellee to sustain the summary judgment. In 1875 the following was enacted: "All moneys collected by the sheriffs shall be paid to the person entitled to receive the same or his order, or his attorney of record." Sand. & H. Dig., § 3318. Construing the above sections together, it is clear that a summary judgment can now only be rendered against a sheriff when he has failed to pay over money collected to the person entitled to receive same, or his order, or attorney of record. Section 4252, *supra*, prescribes the penalty for failing to pay over money collected upon an execution upon demand, and designates the proper parties to make demand, while section 3318, *supra*, names the parties to whom the sheriff shall pay over the money. The parties entitled to receive the money were the county and the school districts, or their "attorney of record."

It is agreed that appellant paid over all the money collected by him. He paid $1,230.05 of it to Norton & Prewitt upon their demanding same of him. From this amount Norton & Prewitt deducted the sum of $944.83 as their fee for services rendered in the case, and turned the balance into the county treasury. So the simple question, at last, which determines the controversy is: were Norton & Prewitt attorneys of record in the case wherein judgment was obtained and execution issued, upon which the sheriff (appellant) collected the money? Or,

to put the question in a different form, does the record of the case in which the money was collected show that Norton & Prewitt were attorneys for the plaintiff in whose favor the judgment was rendered? The record of the judgment upon which the execution was issued and the money collected (exhibited with the answer) recites: "Now, on this day comes the state by H. F. Roleson, Esq., prosecuting attorney for the first judicial circuit, and Norton & Prewitt, his attorneys," etc. In the statement of facts agreed upon appears the following: "When this defendant (appellant) had in his hands the sum of $1,230.05, a balance collected on said execution, the said Norton & Prewitt, *as attorneys of record in the cause in which the execution issued*, demanded that he pay said sum to them," etc. So the answer is as simple and easy as the question: Norton & Prewitt were *attorneys of record*. This is purely a question of fact, and indeed there seems to be no controversy as to the fact that Norton & Prewitt were attorneys of record for the plaintiff who recovered the judgment upon which execution issued whereby the money was collected. That should properly end this case, for it shows that appellant has complied with the very letter of the statute requiring him to pay over money collected (Sand. & H. Dig., § 3318); and surely it would be a travesty upon justice to visit upon him the severe penalties denounced by § 4252, *supra*, when he has done the very thing which he is commanded and required to do.

But, notwithstanding the record of the case in which the execution issued shows that Norton & Prewitt were attorneys for the state in that case (about which there is really no dispute), it is nevertheless insisted that appellant is liable, for the reason that the relation of attorney and client in said case did not, and could not, in fact exist between the appellee and Norton & Prewitt. The state in that case was only a nominal party, the suit running in her name only because the bond of the defaulting treasurer was made to the state. The funds sued for belonged to the county and school districts. We are by no means prepared to concede that these corporations could have no attorney except the prosecuting attorney, and that the relation of attorney and client could not exist between them and Norton & Prewitt. This court, in *Conway County* v. *Little*

Rock & Fort Smith R. Co., 30 Ark. 50, recognizes that there might be other attorneys for counties than the prosecuting attorney; and, as to school districts, they are independent corporations managed by a board of directors, and they may contract and be contracted with, sue and be sued. Sand. & H. Dig., § 6986. They may sue each other. *School Dist. No. 15* v. *School Dist. of Waldron*, 63 Ark. 433. Therefore, were the question before us, it might be pertinent to inquire how could the prosecuting attorney, if he is the only attorney a school district can have, bring a suit for one district against another, and defend the suit which he has brought, and thus be representing the plaintiff and defendant at the same time and in the same suit?

But, upon the undisputed facts of this record, we do not conceive that the question as to whether or not Norton & Prewitt sustained with the state the contractual relation of attorney and client in the suit wherein the execution issued is germane to this controversy. The state is not suing Norton & Prewitt for money improperly paid to and received by them as attorneys. Nor are Norton & Prewitt suing the state for a fee. Therefore we cannot properly and do not pass upon the question, in this proceeding, as to whether the relation of attorney and client actually existed between Norton & Prewitt and the state or the county and school districts, who are the real parties in interest.

The names of Norton & Prewitt were signed to the complaint as attorneys for the plaintiff (state). They so appear in the record of the proceedings and in the judgment. They had the execution issued, and placed the same in the hands of the sheriff. In *Conway County* v. *Little Rock & Ft. Smith R. Co.*, *supra*, it is said: "It was natural to suppose that the attorney who had obtained the judgment was the proper party to whom payment should be made." "Ordinarily," continues the court, "an attorney is authorized, by virtue of his retainer, to collect the judgment and execute, in the name of his client, a proper acquittance therefor. His authority does not cease upon the rendition of judgment, but continues until the money is made, unless he is sooner discharged. We are not aware of any rule of law that should vary the practice when the client

happens to be a municipal or *quasi* municipal corporation." This furnishes a simple, reasonable and just rule for all parties involved. As to the owner of the judgment, since he has trusted or permitted the attorney of record to conduct the litigation to a successful termination, and has received the benefit of his labors in that capacity, he can therefore trust him to receive the money collected by the sheriff. As to the attorney, it places him, with reference to the fruits of his labors, in dignified and honorable trust relationship to his client. And as to the sheriff, while it devolves upon him the responsibility of looking to the record to ascertain whom it shows to be the attorney in the case, it provides him a safe and convenient method for paying over the money to the proper parties. Such is the reason and the letter of the statute. The policy of these summary statutes is to punish only where there has been some plain neglect of duty enjoined by the statute or the order of the court. The statutes are declaratory of the power inherent in courts of justice over their own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of the law. *In re Paschal*, 10 Wall. 491; 4 Blackstone, Comm. p. 283, star page 284; *in re Pitman*, 1 Curtis (U. S. Ct. Ct.), 186. See, also, in this connection, *Mundy* v. *Strong*, 31 Atl. 611.

He who would avail himself of the remedy by amercement for official deficiency under a summary statute must come within both the letter and spirit of the law. *Moore* v. *McCliff*, 16 Ohio St. 50.

It is not pretended that the sheriff, in paying over the money to the attorney of record, was acting in bad faith. On the contrary, the record shows him most faithful and diligent in his efforts to conform to the requirements of the law. While this would not have exonerated him had he failed entirely, it argues the righteousness of the rule which courts have adopted to seize the slightest circumstance to relieve a conscientious and vigilant officer, who has scrupulously endeavored to do his duty, of the rigorous penalty usually denounced by such statutes. Murfree, Sheriffs, § 947, and authorities cited.

It was never intended that resort should be had to sum-

mary proceedings where there has been no palpable dereliction on the part of the officer; where he has not subjected himself to the penalties prescribed. The statute was not enacted as a substitute for the ordinary action at law to recover as for a debt or for money had and received. The procedure is altogether different; the rights and defenses may not be the same. *Custer* v. *Agnew*, 83 Ill. 194; Murfree, Sheriffs, § 969.

Section 7192 of Sand. & H. Dig., which requires that "the sheriff or other officer collecting any money due to the state shall pay the same into the public treasury and obtain a quietus therefor, and not to the attorney general or any other attorney or agent employed in the collection of the same, or to any other person, unless otherwise directed by law," has reference solely to the state herself as the sovereign, and not to any of her political dependencies or subdivisions. The "public treasury" there referred to is the state treasury. The above section therefore has no application here, as the money collected belonged to the county and school districts, and could not go into the state treasury.

The judgment is therefore reversed, and the cause is dismissed

BUNN, C. J., concurs in the judgment, and thinks the cause should be dismissed without prejudice.

HUGHES, J. I dissent from the reasoning and from the conclusions of the court in this case upon the following grounds:

First. Because, in all suits for or against the state or county, it is made the duty of the prosecuting attorney to prosecute or defend. He alone is the attorney in such cases. The state was the plaintiff here. Sand. & H. Dig., §§ 6013, 6014, 6015.

Second. Where the county has an attorney on salary, whose duty it is made by statute to prosecute and defend all suits for or against her, there is no power or authority in the county court to employ an assistant attorney. The following cases are clear upon this proposition: *Butler* v. *Sullivan Co.*, 18 S. W. 1142; *Ramson* v. *Mayor*, 24 Barb. 226; *Clough* v. *Hart*, 8 Kas. 487; *Platt County* v. *Gerrard*, 12 Neb. 244; *Cuming Co.* v. *Tate*, 10 Neb. 193; *High* v. *Commissioners*, 68 Ind. 575.

There being no power to employ Norton & Prewitt, there

could be no ratification of their employment, as he who deals with a corporation must know the extent of its power and authority. It therefore follows that Norton & Prewitt were not, in contemplation of law, the attorneys of either the state or the county, but volunteers. The prosecuting attorney was the attorney of the state and county. Norton & Prewitt were in the suit at the instance of Aven, who it is not pretended had any authority to employ them. Nor had the county court or the school districts made any order to employ them, nor any appropriation to pay for their services. They were therefore never employed in the case by any competent authority. To permit an unauthorized person to employ and pay lawyers for the county and school districts, without consulting either, would destroy all the safeguards the law hath thrown around the fiscal system and interest of such municipal corporations, and is not to be tolerated. It is the duty and prerogative of the county court and of the school districts to audit and settle all claims against them.

The theory of the appellants, which is adopted by the court, is that, in this summary proceeding, it is not competent for the court to render judgment for the money which the sheriff collected on execution and failed to pay over to the proper party, because the appellant is entitled to have his rights in the premises settled in an ordinary action at law, and is entitled to a jury trial. This is fallacious and untrue. At common law these summary proceedings would lie against an officer, and it is only where the common law secured the right of trial by jury that a party can complain that the statute attempts to deprive him of such right. The right to trial by jury was not violated in this case.

Under the head of Summary Remedies on Official Bonds, in 2 Am. & Eng. Enc. Law, it is said: "In many states judgment may be rendered on an official bond on motion. * * * Such statutes are not unconstitutional as infringing the right to a trial by jury. The existing law enters into and becomes part of a bond, and if the law authorizes summary proceedings at the time the bond is executed, the parties are liable to the operation of the law." To the same effect are *Lewis* v. *Garrett*, 5 How. (Miss.) 434; *Wells* v. *Caldwell*, 1 A. H. Marshall

(Ky.), 441; *Burke* v. *Levy*, 1 Randolph (Va.), 2; *Vanzant* v. *Waddel*, 2 Yerger (Tenn.), 260; *McWhorter* v. *Marrs*, 1 Stew- (Ala.) 63; *Johnson* v. *Atwood*, 2 Stewart, 225; *Bank of Columbia* v. *Okely*, 4 Wheat. 235.

In the case of *Lewis* v. *Garrett*, 4 Howard (Miss.), 454, upon re-argument of this point, the supreme court of that state said: "The power to convict and punish in such cases in a summary way was considered to be inherent in the court, and as essential to the maintenance of its just authority and the due administration of the public justice of the country. This right was shown to be as ancient as the common law itself. As an officer of the court, the sheriff was always liable to punishment in this way. The constitution, in guarantying to the citizens of this state the right of trial by jury, did not intend to disturb the ancient and well-established jurisdiction of the several courts of the country, nor to change entirely the modes of trial, as they are regulated by the common law."

No jury trial was demanded. Had it been, there would have been no impropriety in granting it in the case at bar. There was no reason why the court should turn the plaintiff out to come into the same court, on the same cause of action, against the same defendants. *Burke* v. *Levy*, 1 Randolph (Va.), 2.

Neither the principal nor the sureties on the sheriff's bond had any right to complain. *Lewis* v. *Garrett*, 5 How. 434. The sheriff knew that the prosecuting attorney represented the state and county in the suit.

For the reasons set forth in the original opinion of the court in this cause, and the additional reasons herein, I am of the opinion that the motion for reconsideration should be overruled.

BELDING *v.* SLOAN.

Opinion delivered March 26, 1898.

COMMON PLEAS COURT—PRACTICE ON CHANGE OF VENUE.—Under Acts 1875, p. 123, § 22, permitting actions pending before justices of the peace to be changed to the court of common pleas in certain counties, it was provided that, upon a change of venue being taken, "neither party shall be permitted to file in said court any new or additional cause or any new or additional counter-claim or set-off, * * * but said cause shall be tried upon its merits as though still in the justice's court." *Held* that the defendant could not file in the court of common pleas, nor in the circuit court on appeal, a set-off or counter-claim which he had not filed nor offered to file in the justice's court. (Page 176.)

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

The appellee, Sloan, brought an action upon an account against appellant, Belding, before a justice of the peace of Garland county. Upon the day set for trial the parties appeared, and, on motion of Belding, "a change of venue" was taken to the court of common pleas of said county. When the case was called for trial in that court, Belding offered to file a set-off and also a counter-claim against the plaintiff, Sloan, but the court refused to permit him to do so. On the appeal to the circuit court, Belding again offered to file his set off and counter-claim, but the court refused his request, on the ground that he should have filed them before the justice of the peace. Upon a trial there was a finding and judgment against Belding, from which judgment he appealed.

Greaves & Martin, for appellant.

The act of the legislature establishing the court of common pleas in Garland county prohibits the filing of any "new" or "additional" defense in the court of common pleas, on a change of venue from justice court. This, however, does not apply to a case where *no* defense or counter-claim was filed in

justice court. In such case, the defendant is at liberty to file his counter-claim in the common pleas court. Acts of 1875, p. 123, §§ 21, 22, 18 and 4. For proper definition and construction of "new" and "additional," see Century Dict. "New," (5), (11), and (22); Rapalje & Lawrence's Law Dict. "New and Improved;" Anderson's Dict. of Law, "New;" 16 Am. & Eng. Enc. Law, 489; 1 *ib.* (2 Ed.) 608; Cent. Dict.; Rap. & Lawr. Law Dict., Anderson's Dict. Law, words, "Addition" and "Additional.' This court has construed a statute similar to the one at bar, in the manner for which we contend here. Sand. & H. Dig., § 4447; 35 Ark. 448; 44 Ark. 376; 46 Ark. 259; Sand. & H. Dig., § 1124; 48 Ark. 349; 64 Ark. 395.

Wood & Henderson, for appellee.

The defendant failed to file his counter-claim in the justice court, and it cannot be filed in the court of common pleas. Acts 1875, p. 127, §§ 18, 20 and 22; 35 Ark. 448; 44 Ark. 376; 46 Ark. 259; 48 Ark. 349.

RIDDICK, J., (after stating the facts). We are of the opinion that the judgment of the circuit court should be affirmed. The statute of 1875, which permits actions pending before justices of the peace to be changed to the courts of common pleas in certain counties named in the act, contains this provision: "Upon a change of venue being taken as provided in the preceding section, neither party shall be permitted to file in said court any new or additional cause, or any new or additional counter-claim or set-off; nor shall either party be required to file any additional pleading, but said cause shall be tried upon its merits as though still in the justice's court." Acts 1875, p. 123, § 22. Under this statute, we think the circuit court properly ruled that Belding could not file in the court of common pleas a set off or counter-claim which he had not filed or offered to file before the justice of the peace.

Affirmed.

HOT SPRINGS RAILROAD COMPANY *v.* DELONEY.

Opinion delivered April 2, 1898.

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d87 166
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1. CARRIER—TICKET—LIABILITY FOR EJECTING PASSENGER.—A passenger on defendant's train presented to the conductor a ticket which, by mistake of defendant's ticket agent, was improperly made out. The conductor, acting under orders, refused to accept the ticket, and, on defendant's refusing to pay fare, the train was stopped about a mile from the initial station, and plaintiff was compelled to walk back and take passage on a later train. *Held* that defendant was liable for the damages suffered by plaintiff, such as for the delay in completing his journey, for the time and trouble of having to walk back to the station, and for such humiliation as he was made to undergo. (Page 181.)

2. SAME—EXPULSION.—Where a conductor informs a passenger that he must pay fare or get off, and, on his refusal to pay, stops the train for him to get off, the passenger is justified in treating such conduct as an expulsion. (Page 182.)

3. EXPULSION OF PASSENGER—DAMAGES—MENTAL ANGUISH.—A passenger wrongfully expelled from a train cannot recover from the railway company damages for mental anguish caused by the resulting delay in reaching his sick brother. (Page 182.)

Appeal from Saline Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Jno. M. Moore and *W. B. Smith*, for appellant.

Actions *ex delicto* and *ex contractu* cannot be joined. Sand. & H. Dig., § 5703; Newman's Plead. & Pract. 167; 33 Ark. 316; 58 Ark. 136; Bliss' Code Plead. (2 Ed.) §§ 129, 130. The action is in tort. 58 Ark. 138; 34 W. Va. 65. A passenger's ticket is conclusive evidence, to the conductor, of his right to ride. If the ticket, on its face, does not entitle him to ride, and he refuses to pay his fare, the conductor is justified in putting him off. 34 W. Va. 95; 14 Lea, 128; 21 Ore. 121; 52 Fed. 197; 127 U. S. 396; 23 Fed. 328; 37 Mich. 342; 54 Wis. 234; 56 N. Y. 295; 15 N. Y. 455; 41 La. An. 732; 29 Ohio St. 214; 36 Com. 291; 62 Ark. 259; 106 N. C. 168; 135 Mass. 407; 14 Lea, 146–8; 62 Ark. 259.

As to right to eject: 45 Ark. 368–372; *ib.* 527. Evidence of the condition of plaintiff's sick brother, at the time he reached him, was incompetent. 58 Ark. 205; 41 *id.* 382; 37 *id.* 594. Damages are not recoverable for mental pain and anguish, independently of any physical injury. 64 Ark. 538.

Wood & Henderson, for appellee.

The railway company is responsible for the mistake of its ticket agent, and is liable to respond in damages for consequent injuries. 9 S. W. 451; 18 S. W. 1066; 21 S. W. 951; 24 Am. St. Rep. 309; 22 Am. St. Rep. 499; *ib.* 490; 11 *ib.* 434; 25 N. E. 439; 32 N. E. 96; 18 Am. Rep. 220; 45 Am. Rep. 464; 16 Am. Rep. 750; 16 Atl. 67; 50 Am. Rep. 307; 137 Mass. 293; 8 Am. Rep. 305; 40 N. W. 689; 8 Am. St. 859; 64 Mich. 631; 70 Fed. 585; 143 U. S. 60; 43 Pac. 320; 63 N. W. 584; 47 N. W. 49; 36 S. W. 174; 21 Atl. 97; 79 Hun, 33; 21 S. E. 1022; 33 S. W. 1028.

J. M. Moore and *W. B. Smith*, for appellant, in reply.

The scope of the duties of the conductor and the ticket agent were entirely different, and if the conductor, in putting appellee off the train, was acting within the scope of his duties, the company is not liable therefor, although the expulsion was the result of the wrong and fault of the ticket agent. 58 Ark. 138. If the plaintiff had sued for damages for the breach of contract, no special damages would be recoverable. 48 Ark. 509.

BUNN, C. J. This is a suit for damages for being expelled from defendant's passenger coach. Damages laid at $2,500. Judgment for $400, and defendant appealed, because of errors in giving and refusing instructions, and in the admission of improper testimony, and because the verdict is contrary to law and testimony, and is excessive.

The complaint, in substance, states that the plaintiff purchased two passenger tickets for passage of himself and brother from Hot Springs to Atkins, in this state, paying the full and regular price therefor, from the defendant's ticket agent at Hot Springs, who had authority to sell tickets over defendant's line to Malvern and the connecting line extending thence to Atkins;

that in a short time he boarded defendant's regular passenger train, intending to make his journey aforesaid, but that, having gone about one mile, the conductor of the train, to whom he had presented the tickets aforesaid, refused to accept them in payment of their fares to Malvern, and demanded that they pay their fares to said point, accompanying the demand with the threat or announcement that, unless plaintiff did so, he would put them off the train. After some parleying between them, the conductor stopped the train, and the plaintiff and his brother got off, and walked back to the Hot Springs depot, and then had the tickets corrected by the ticket agent; that they were thus delayed in their journey until the next train went out, which occurred eight or ten hours later; that the occasion of their journey was a receipt of a telegram just before the purchase of the tickets, informing them of the dangerous illness of another brother, residing at Atkins, and that, when they did reach him, he was in an unconscious state, and died sometime afterwards, having never revived so as to recognize them. Plaintiff claimed damages because, by reason of the negligence of the ticket agent in not delivering him his ticket to Malvern, he was put off the car by the conductor, and at a different place than a regular stopping place or station; because he was thereby made the butt of laughter and ridicule by his fellow passengers, and thereby suffered great indignities and mortification; because he was put to the trouble of walking back to Hot Springs depot; because of the delay; and because during the delay he suffered mental anguish over the condition of his brother.

The answer of the defendant denied all negligence and improper conduct on the part of the conductor; denied that plaintiff was expelled from the cars, but, on the contrary, alleged that he got off voluntarily; and denied that plaintiff was injured in any manner.

The evidence sustains the allegations in the complaint, except as to what occurred between plaintiff and the conductor, and in that it is conflicting; and it also shows that the deceased brother at Atkins had been unconscious a day or two before his brothers arrived.

The suit is treated by the parties as one for tort, and not

for a breach of contract, and we will so treat it also. The contention of appellees is that, having purchased and paid for the tickets over appellant's and the connecting roads, and having boarded the train relying upon his ticket to insure him passage to Malvern as well as from thence to Atkins, he had the right to stand upon the contract thus made between appellant and himself, and to remain and be transported on said train, notwithstanding the mistake of the ticket agent of appellant in failing to deliver to him the coupon or portion of the ticket calling for passage from Hot Springs to Malvern, and that his expulsion by the conductor was therefore unlawful. On the other hand, the appellant contends that the conductor could only rely upon the face of the ticket to determine his duty in the premises, and that the representation of the passenger to the effect that he had in fact paid his fare, and that the ticket agent had made a mistake in not delivering him a proper ticket, was no evidence upon which he could lawfully act in his efforts to enforce the reasonable rules of the appellant company. The court below adopted the view of the appellee, and instructed the jury accordingly.

Whether, under such circumstances as are detailed in the testimony of this case, a conductor, collecting tickets and fares, is justified in relying solely upon the fact and appearance of the ticket to determine his duty as to the acceptance of the same, and as to his expulsion of a passenger for refusing to pay fare, in case of his rejection of the same, has given rise to one of the most protracted discussions in all the domain of the law pertaining to the relative duties of carriers and passengers; each side to the controversy naturally contending for a more or less rigid application of the peculiar rule contended for by them. It may be of interest to present here at least a partial list of cases relied upon by both parties to the controversy, for the purpose of giving a better insight into the real nature of the controversy. In support of appellee's view, the following citations are made: *St. L., A. & T. R. Co.* v. *Mackie*, 9 S. W. Rep. 451; *Mo. Pac. R. Co.* v *Martino*, 18 S. W. Rep. 1069; *G. C. & F. R. Co.* v. *Rather*, 21 S. W. Rep. 957; *K. C. etc. R. Co.* v. *Riley*, 24 Am. St. Rep. 309; *Ga. R. & B. Co.* v. *Dougherty*, 22 Am. St. Rep. 499; *Head* v. *Ga. Pac. R. Co.* 11 Am. St.

Rep. 438; *B. & O. R. Co.* v. *Bambrey*, 16 Atl. Rep. 67; *Hufford* v. *G. R. etc. R. Co.* 8 Am. St. Rep. 859; *U. Pac. R. Co.* v. *Pauson*, 70 Fed. Rep. 585; *N. Y. L. E. & W. R. Co.* v. *Winter*, 143 U. S. 60; *Sloan* v. *S. Col. R. Co.* 43 Pac. Rep. 320; *L. & N. R. Co.* v. *Gaines*, 36 S. W. Rep. 174; *Phila. W. & B. R. Co.* v. *Rice*, 21 Atl. Rep. 97; *Muckle* v. *Rochester R. Co.*, 79 Hun, 33; *Trice* v. *C. & O. R. Co.*, 21 S. E. Rep. 1022; *Gulf City & S. R. Co.* v. *Halbrook*, 33 S. W. Rep. 1028; *Railway Co.* v. *Dean*, 43 Ark. 529, and others cited by appellees' counsel. In support of appellant's contention, its counsel cite *McKay* v. *O. R. R. Co.*, 34 W. Va. 65; *L. & N. R. Co.* v. *Fleming*, 14 Lea (Tenn.), 128; *Peabody* v. *O. R. Co.*, 21 Ore. 121; *Poulin* v. *Canadian Pac. R. Co.*, 52 Fed. Rep. 197; *Mosher* v. *St. L., I. M. & S. R. Co.*, 127 U. S. 396; *ib.* 23 Fed. Rep. 328; *Frederick* v. *Marquette R. Co.*, 37 Mich. 342; *Yorton* v. *Milwaukee R. Co.*, 54 Wis. 234; *Townsend* v. *N. Y. C. & H. R. Co.*, 56 N. Y. 295; *Hibbard* v. *N. Y. & Erie R. Co.*, 15 N. Y. 455; *McGowan* v. *Morgan's La. & T. R. & S. Co.*, 41 La. An. 732; *Shelton* v. *L. S. & Mich. R. Co.*, 29 Ohio St. 214; *Downs* v. *N. Y. & N. H. R. Co.*, 36 Conn. 287; *St. L. & S. F. R. Co.* v. *Brown*, 62 Ark. 254; *Rose* v. *W. & N. R. Co.*, 106 N. C. 168; *Bradshaw* v. *S. Boston R. Co.*, 135 Mass. 407.

Some modifications of the rule, as contended for by each party to the controversy, have been attempted, but efforts to reconcile the two have not, so far, been crowned with any great degree of success. There is this much to be said, however, and that is that the tendency of more recent decisions is towards at least a conservative view of the principle contended for by appellee's counsel; and we adopt that in this case, to wit, that, notwithstanding the conductor has only carried out the company's rules and regulations, and these are reasonable, and he therefore may be exonerated from blame personally, yet, as the company, through its ticket agent acting for it, was guilty of doing that which produced all the injury the plaintiff may have suffered from being put off the train, it is liable for such, and cannot shield itself behind the faithfulness of its servant the conductor, for its negligence in not delivering a proper ticket to the plaintiff, and has not only injured the plaintiff, if indeed he was injured, but placed the conductor in the attitude of

participating in the wrongdoing, while yet performing his duty personally, while of course ignorant of the wrong done to the plaintiff, if any was done.

In the case at bar, the only error committed by the conductor personally, so far as the evidence shows, was in putting plaintiff off the train at another place than a regular stopping place or station, but for this error of itself, if unattended by unnecessary force or ill treatment, the damages would be only nominal. *St. L., I. M. & S. R. Co.* v. *Branch*, 45 Ark. 524.

The conduct and manner of the conductor in informing the plaintiff that he would have to pay his fare, for the reason that his ticket did not call for his passage to Malvern, or else get off the train, was equivalent to an expulsion, in the legal sense, and the plaintiff was required to do no more than he did do as a protest against the expulsion, and did right in getting off the train when the same was stopped for that purpose; and not only so, but might not have been justified in making greater resistance, at least further resistance such as might have occasioned further injury to himself. We think, therefore, that plaintiff is entitled to all damages that may have grown out of his expulsion, such as for the delay in completing his journey, for the time and trouble of having to walk back to the Hot Springs depot, and for such humiliation as he was made to undergo by being put off. These damages are all, however, only compensatory, unless the element of malice, recklessness or wantonness entered into the motive with which the injury was done, if done at all.

In the course of the trial, the court, at the instance of the plaintiff, gave the following instruction over the objection of the defendant, to-wit: "7. If you find for the plaintiff, you will assess his damages at a sum that will compensate him for the humiliation and inconvenience suffered by him, if any, by reason of being expelled from defendant's train; and if, at the time of being expelled from said train, he was on his way to the bedside of a sick brother, in answer to a telegram informing him that his said brother was bad sick, and he notified the conductor in charge of said train of that fact at the time of being expelled from said train, then, if he suffered mental anguish on account of the delay in reaching his said brother,

caused by his being expelled from said train, he is also entitled to compensation for such suffering caused by such delay, if any." The mental suffering sought to be made an element of damage in the foregoing instruction has no direct connection with the tortious act which is the basis of the action, but, on the contrary, is remotely connected therewith, and is too remote to enter in the suit as an element of damage. The subject of mental suffering alone as a cause of action was discussed at some length in the recent case of *Peay* v. *Western Union Telegraph Company*, 64 Ark. 538.

The instruction, for the reason stated, should not have been given, and for this error the judgment is reversed, and the cause remanded, with instructions to proceed not inconsistently herewith. It is unnecessary to consider other matters complained of as errors.

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LITTLE ROCK, HOT SPRINGS & TEXAS RAILWAY COMPANY *v.* SPENCER.

Opinion delivered April 2, 1898.

RAILROAD—MECHANIC'S LIEN ACT—CONTRACTOR.—Under the statute providing that "every mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery, fixtures or other thing toward the equipment, or to facilitate the operation of any railroad, shall have a lien therefor upon the roadbed," etc. (Sand. & H. Dig., § 6251), a contractor who furnishes the labor and appliances to build the roadbed of a railway, and pays for the same, but does not personally labor or work upon such roadbed, is not entitled to a lien thereon. (Page 186.)

Appeal from Garland Chancery Court.

LELAND LEATHERMAN, Chancellor.

Cockrill & Cockrill, for appellants.

Sand. & H. Dig., § 6251, creates a charge against property without the assent of the owner; and it must be strictly construed. 54 Ark. 522, 525; 51 Ark. 309, 315; 27 Ark.

564; 42 S. W. 1147; 43 Ark. 168; 59 Ark. 81, 84. The statute applies only to those who themselves "do or perform work or labor;" and it cannot be construed to include contractors who do not perform any of the work themselves, but simply act through others. 90 N. Y. 213, 218–19; 39 Mich. 594; 27 Mo. 39; 49 Ga. 506, 511, 512; 3 Wash. Ter. 444; 1 Jones, Liens, 725; 4 Watts & S. 257; 14 How. 434; 3 L. R. A. 549; 16 Wis. 72; 43 Ark. 168; 2 Mont. 443; 41 Me. 397; 81 N. C. 340; 12 Bush, 75. Appellees cannot assert a lien as assignees of the claims of those who did the work, because: (1) Under the laws of Arkansas such liens are not assignable. 31 Ark. 597; 27 Ark. 564; 31 *ib.* 561, 566; 39 *ib.* 344; 52 *ib.* 58, 60; 18 *ib.* 142. (2) Those who did the work had no lien, because they were not in privity with the railway company. 59 Ark. 81. The contract of appellees was made with an agent acting for an undisclosed principal. Their election to hold the agent is conclusive, and discharges the principal. 60 Ark. 66; 16 Ark. 477; Mechem, Agency, § 698; 54 N. H. 561, 573. The burden of proving the agency was on appellees, and, failing in this, their case fails. Mechem, Ag. §§ 706, 289.

Greaves & Martin and *Rose, Hemingway & Rose*, for appellees.

One who contracts with a railroad company to build part of its road, and does build it, is a "builder," within the meaning of the act of 1887, and, as such, entitled to a lien. Sand. & H. Dig., § 6251. For definition of "builder," see Anderson's Law Dict. p. 146; Standard Dict. 749; 1 Century Dict. p. 712; 49 Ga. 511. Statutes are to be so construed as to give effect and meaning to every word, if possible. 11 Ark. 44; 17 Ark. 608, 651; 46 Ark. 159, 163. A *contractor* is a "builder." 41 Fed. 551, 553; 12 Mont. 344; 52 Fed. 241, 244, 245; 3 Ct. Cl. 297, 304; 71 N. Y. 413; 27 Mo. 39; 49 Ga. 511; 3 Wash. Terr. 444; 14 How. 434, 444; 39 Mich. 594, 595; 49 Wis. 169; 27 Mo. 39; 12 Mont. 344; 23 Ark. 327; 104 U. S. 176. The statute, even if we grant a strict construction, must be so construed as not to render meaningless the words that are found in it. 11 Ark. 44; 17 *ib.* 608, 651; 46 *ib.* 159, 163. But such statutes should be so interpreted as

to secure the classes named in the act. 32 Ark. 69; 104 U. S. 177; 94 U. S. 545. Words are to be construed according to their ordinary and natural meaning. 47 Ark. 404, 406. Accepting benefits of a contract ratifies it. Mechem, Agency, § 148; Story, Ag. § 253; Wharton, Ag. 89; 10 Wend. 271; 40 N. E. 328; 12 Wall. 681; 54 N. W. 592; 44 N. E. 97; 24 S. W. 252. The general rule of law is that a principal is liable on all contracts made by the agent acting within the scope of his authority, and the presumption is that the intention was to bind the principal. 1 Am. & Eng. Enc. Law (2 Ed.), 1137; Mechem, Ag. 558; 44 N. Y. 349. The burden is on the principal to show that credit was given exclusively to the agent. 44 N. Y. 349; 1 Am. & Eng. Enc. Law (2 Ed.), 1138; 68 N. Y. 400; 15 Wend. 498. It was competent to show that the one who made the contract did so as an agent. 62 Fed. 112; L. R. 6 C. P. 486, 498; 116 Mass. 398; 78 N. Y. 580; 64 N. Y. 357, 363; 134 Mass. 169; 1 Wall. 234, 241, 242; 116 U. S, 671, 680; 21 How. 287; 12 Atl. 646; 14 Kas. 557; Story, Agency, § 154; Mechem, Agency, §§ 446, 449; 33 Ark. 107, 113; 14 Kas. 557; 14 Ill. App. 141. Acceptance by appellants of the work done under the agent's contract estops them to deny his authority. Story, Ag. § 253; Mechem, Ag. § 148; Wharton, Ag. § 89; 84 Fed. 80, 83.

HUGHES, J. This is an appeal from a decree in chancery declaring a judgment a lien upon the roadbed, etc., of the appellant railway. The judgment was for an amount due for building a part of the road. The lien was decreed under the following statute: "Every mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery, fixtures or other thing toward the equipment, or to facilitate the operation of any railroad, * * * shall have a lien therefor upon the roadbed, buildings, equipments, income, franchises, and other appurtenances of said railroad," etc. Sandels & Hill's Digest, § 6251.

It is contended by the railway company that the appellees made no contract with it, but contracted with one Nelson (as

agent for whom it did not appear), and that Nelson was not authorized to contract for the company. Without discussing the evidence in this behalf, suffice it to say that we find from it that this contention is not maintained, and that there was a contract made by the company, through its agent, Nelson, for the building of that part of the road for building which the appellees claim that the railway should pay. It appears from the evidence that the appellees had the work done as contractors, that they furnished the labor and appliances necessary for the work, and paid for the same; but it does not appear that they personally did any labor or work upon the railroad.

Were they entitled to a lien upon the road, under the section of the statute quoted?

It is not an easy undertaking, frequently, to distinguish between the kind of work and labor which is entitled to a lien, and that which is mere professional and supernumary employment, and not fairly coming within the meaning of the terms used in the statute. It has been held that an architect who furnishes plans and superintends the erection of a building acquires a lien thereon as for work and labor. *Stryker* v. *Cassidy*, 76 N. Y. 50; *Mut. Benefit L. Ins. Co.* v. *Rowand*, 26 N. J. Eq. 389.

In determining the question under consideration, it is important to look closely to the act of the legislature, and to consider the policy of such legislation and the intent of the legislature in passing the act in question. The act is entitled "An act to protect employees and other persons against railroad companies." It will be observed that the act gives a lien only to such a mechanic, builder, artisan, workman, laborer, or other person, *who shall do or perform any work or labor* upon or furnish any materials, machinery, fixtures or other thing toward the equipment or to facilitate the operation of any railroad," etc. We emphasize the words "who shall do or perform any work or labor."

In *Balch* v. *N. Y., etc., R. Co.*, 46 N. Y. 521, it is held that "the term 'laborer' cannot be construed as designating one who contracts for and furnishes the labor and services of others, or one who contracts for and furnishes one or more teams for work, whether with or without his own services, or

the services of others to take charge of the teams while engaged in the service." *Gurney* v. *Atlantic, etc., R. Co.*, 58 N. Y. 358; *Aikin* v. *Wasson*, 24 N. Y. 482. In the *Lehigh Coal & Nav. Co.* v. *Cent. R. Co.*, 29 N. J. Eq. 262, it is held that the right of preference under such a statute "is personal, inhering alone in the person who actually performs labor or service."

Section 6251 of the digest, above quoted, was intended to secure and protect only the personal earnings of laborers, mechanics, builders, artisans, workmen, or laborers, or other persons who do or perform any work or labor upon any railroad, or furnish any material, machinery, fixtures, or other things toward the equipment, or to facilitate the operation, of any railroad. It does not apply to a contractor who does not actually perform any work or labor. So far as he may actually labor, he may come within the scope and meaning of this statute. That the purpose of this statute was to give a lien to those named in it for the work and labor by them actually performed is apparent. But its provision is limited to such as actually perform work or labor. They are usually poor men, dependent on their daily earnings, and can ill afford to lose this, or indulge in the uncertainties of litigation. The employer or contractor is, as a rule, just the opposite, and, for this reason, the object or purpose of a lien law for one by no means makes an argument for the other. *Mohr* v. *Clark*, 3 Wash. Ter. 440; *Aikin* v. *Wasson*, 24 N. Y. 482. "The right conferred by a lien in favor of laborers is personal, and cannot be availed of by one who furnishes labor." 2 Jones, Liens, § 1630.

Considering the language of the statute and the purpose of its enactment, we are constrained to hold that the judgment and decree in the case, in so far as it declares a lien upon the roadbed, etc., of this railway, is erroneous.

So much of the decree of the chancery court as declares a lien upon the roadbed, etc., of the appellant railway is reversed, and, as to this, the cause is dismissed. In all other respects the decree is affirmed.

WOOD, J., (dissenting.) First. I insist that, as the law now stands, neither the day-laborer upon, nor the contractor and builder of, uncompleted railroads has any lien. Let us

see. In *Tucker* v. *Railway Co.*, 59 Ark. 81, the plaintiff, Tucker, sued the company, setting up in his complaint that "he was a *laborer and contractor* under one Wilson, who had taken a contract from the company to clear off and grub the right of way, and grade its branch road about one mile in length; *and as such performed work* amounting to the sum of $317.90, of which Wilson paid him $150, leaving the balance sued for as aforesaid"—concluding with the formal prayer for judgment, lien, etc. The cause was heard upon demurrer to the complaint, and this court, in affirming the ruling of the lower court sustaining the demurrer, placed its decision upon the following grounds: First, that the statute itself, in such cases, gives the limit beyond which the right to a lien does not exist; that the allegations of the complaint show plaintiff to have been a sub-contractor, and, as such, he was not specifically named in the statute as one of the beneficiaries." "Secondly, there must be a privity of contract between the parties (plaintiff and defendant), otherwise there can be no right of action in the one against the other." The allegations of the complaint showed Tucker to have been a sub-contractor; they also showed that he was a "*laborer, and as such performed work and labor.*" So that, on demurrer, while Tucker was not entitled to a lien as a sub-contractor, not being specifically named as such in the statute, he *was* entitled as a laborer or workman who performed *work and labor*, for the statute expressly mentions such. Therefore, the distinctive ground of the decision in *Tucker* v. *Railway Co.* was that there was no privity of contract between the plaintiff, Tucker, and the defendant company. In the case at bar this court says: "Section 6251 of the digest, above quoted, was intended to secure and protect only the personal earnings of laborers, mechanics, builders, artisans, workmen, or laborers, or other persons who do or perform any work or labor upon any railroad, or furnish any material, machinery, fixtures, or other things toward the equipment, or to facilitate the operation, of any railroad. It does not apply to a *contractor* who does not actually perform any work or labor. * * * The right conferred by a lien in favor of laborers is personal, and cannot be availed of by one who *furnishes* labor."

In *Tucker* v. *Railway Co.*, *supra*, Judge Bunn, speaking

for the court, says: "It is a matter of common knowledge, and of the current history of the times, that the act of 1887 was passed to prevent the worthy, and in many respects defenceless, classes of persons named therein from being deprived of the fruits of their labor." And Judge Hughes, for the court, in the present case, says: "That the purpose of this statute was to give a lien to those named in it for the work and labor by them actually performed is apparent. * * * They are usually poor men, dependent on their daily earnings, and can ill afford to lose this, or indulge in the uncertainties of litigation. The employer or contractor, as a rule, is just the opposite, and, for this reason, the object or purpose of a lien law for one by no means makes an argument for the other." After all this, one would naturally expect, in the "round-up" of decisions, a construction that would secure to these "worthy poor and defenceless classes" a lien for their labor. As strange as it may seem, such is not the case at all. The judges (except Judge Battle) hold that the statute applies to non-completed as well as to completed railroads. Every one knows that railroads are constructed through contractors or builders, who take the contract, and do the work, not literally with their own hands, for that would be impossible, but through mechanics, artisans, laborers and workmen, whom the said contractors or builders employ. There is no privity of contract between these laborers and the railway company. Then, under the decision in *Railway Co.* v. *Tucker*, *supra*, how are they to secure the lien which the court says was the purpose of the law to give them? But that is not so bad. I assented to *Tucker* v. *Railway Co.* There are strong reasons for the position there taken, and that the act only applies, as held by Judge Battle, to completed railroads. But little, if any, harm would result to laborers, etc., upon non-completed railroads under *Tucker* v. *Railway Co.*, because these, who generally work by the day, are usually paid off by the contractor or builder, and, if not, it is within their power to protect themselves from heavy loss by ceasing to work at any time they choose if their daily wages are not paid. Then, too, laborers, workmen, etc., for completed railroads usually have privity of contract with the company. No, be it understood, that I have

no objection whatever to the decision in *Tucker* v. *Railway Co.;* and if the present law were construed to embrace contractors, who are really the ones who need it most, *Tucker* v. *Railway Co.* might still stand. But, in order to preserve consistency in the law and in deference to the last announcement by this court, which must be received as the law, I am willing for *Tucker* v. *Railway Co.* to be overruled. And I have protested, and do now, most earnestly, that, in order that the present decision be not shorn of its power to secure those whom this court designates as a "worthy but defenceless class," who work and labor upon non-completed railroads, in the lien which the court declares was the purpose of the law to secure to them, *Tucker* v. *Railway Co.* should be overruled, and must be, before any practical results can come to them.

Second. But to my mind the worst feature of the present inconsistent state of the law is that, not only is the laborer deprived of his lien, for lack of privity as we have shown, but likewise the contractor or builder; because, according to the construction here given the act, the contractor is nowhere included within its provisions, except for his own personal labor. I submit that this construction is erroneous, for the following reasons:

1. In arriving at the intention of the legislature, consid-sideration should be given to the act as a whole. The conclusion reached by the court that the legislature intended to provide the laborer and workman a lien, because they are "usually poor men, dependent on their daily earnings, and can ill afford to lose this, or indulge in the uncertainties of litigation," and the deduction that the legislature did not intend to provide a lien for the employer or contractor, who is, as a rule, just the opposite, are, both alike, in the light of the whole act, illogical and unsound. Had the act only named "laborers," or a class who only labor in person, there would have been reason for such a conclusion. In the olden times, when the policy of such legislation was to provide for those only who were supposed to need the especial protection of the sovereign, statutes were passed giving a lien to "laborers," "servants," or "apprentices," thus designating a class who only labor with their own hands, and are usually poor. Hence, we find decis-

ions, based upon such statutes, declaring the purpose of such laws to be the protection of this "worthy but defenceless class." We are not surprised, therefore, on turning to the decision from which the court takes its quotation declaring that the purpose of our statute was to protect mechanics, builders, artisans, laborers and workmen only to the extent of the *actual manual labor performed by them*, to find that it was just such a decision, based on a statute which gives a lien only to "any person who shall do labor upon any farm or land." Of course, every one knows that a statute intending to give a lien to a man who labors on a farm, a farm hand, was intended to be personal, but builders and contractors do not usually or necessarily do their work in person. The court in the very decision points out the distinction where it says: "There is a clearly defined line between the contractor, the employer, and the laborer, and although each may labor in his own way, the class to which the laborer belongs is plain, and the contractor or employer certainly does not come within it." See the case *Mohr* v. *Clark*, 3 Wash. Ter. 444.

But the enumeration of the various other classes, to-wit: mechanics, builders, artisans, material furnishers, and those sustaining loss and damage, shows that the intention of our legislature was not to provide a lien for laborers and workmen, because they are "usually poor and dependent upon their daily earnings," but because they, like the various other classes named, have contributed to the value of the finished product—the railroad—upon which the lien is given. The comprehensive enumeration of the statute convinces me that the legislature intended to give a lien to all those whose work and labor done upon, or materials furnished for, had enhanced the value of the railroad. As was said by Judge Andrews in *Stryker* v. *Cassidy*, 76 N. Y. 50: "Mechanics' lien acts were originally enacted for the especial protection of this class of persons [laborers], but their scope has been greatly extended. * * * The general principle upon which the lien acts proceed is that any person who has contributed by his labor, or by furnishing materials to a structure erected by an owner upon his premises, shall have a claim upon the property for his compensation." *Avery* v. *Clark*, 25 Pac. (Cal.) 919; 15 Am. & Eng. Enc. Law,

7; Phillips, Mech. Liens, § 35; *Cullins* v. *Mining Co.*, 2 Utah, 219, 222. That eminent jurist, Judge Caldwell, who knows as much as, and perhaps more than, any one else in the state of the history and purpose of this law, says: "It covers nearly or quite all the liabilities of the company in this state." *Central Trust Co.* v. *Ry. Co.*, 41 Fed. Rep. 551, 553.

Surely, there are no more meritorious liabilities of the company than the debt due the builder of the roadbed, the substructure, so to speak, of the whole institution.

It is inconceivable to me that the legislature should have intended to provide for the contractor who might furnish cross-ties, timber, lumber, stone, iron, engines and cars, all to go upon and over the roadbed, and not give a lien also to the *contractor* who had furnished the roadbed itself. The contractor who furnishes the various appointments incident to the building of roadbeds for railroads, such as teams, wagons, barrows, shovels, scrapers, axes, picks, etc., and the men to use them, is no less deserving of protection, and no more able to protect himself, than the "Iron Barons," "Steel Kings," and "Rolling Stock Magnates," who are given a lien under this law. The legislature that would make a discrimination at once so unjust and unreasonable would, in the very act, lay at its door an impeachment for besotted ignorance or gross partiality. Ours cannot be justly convicted of either in the present enactment, for the spirit of the law shows an intention to provide for the contractor who builds the roadbed, and the very letter shows that this intention was carried out under the term "builder."

2. If the contractor who builds the roadbed of a railroad is not provided for under the term "builder," as used in the act, or in the words "other persons," then he is not provided for at all. As we have seen, we would naturally look for some provision for his benefit in an act of such broad sweep as that under consideration, and an act making no provision for him would certainly be out of the trend of enlightened modern legislation upon the subject; for, as is said by a distinguished author: "The party most generally secured is the contractor." Phillips, Mech. Liens, § 40. And by another: "At the present day statutes generally allow a lien to contractors, either by express terms or necessary implication." Boissot, Mech. Liens,

§ 218. Now, what is the most natural and obvious import of the term "builder," as used in the statute? Mr. Webster defines the word "build" as follows: "To erect or construct, as an edifice or fabric of any kind; to form by uniting materials into a regular structure; to fabricate; to make; to raise." As defined by literary and law lexicographers, "builder" is "a person whose business is to construct buildings, vessels, bridges, canals, or railroads, by contract. See contractor." And. Law Dict. p. 146. "One who builds; especially, one who follows the occupation of building, or who contracts or directs the actual work of building." Stand. Dict. 249. "One who builds, or whose occupation is that of building; specifically, one who controls or directs the work of construction in any capacity. *In the practice of civil architecture, the builder comes between the architect who designs the work and the artisans who execute it.*" I. Cent. Dict. 712. Civil architecture is the art or science of building various structures "for the purposes of civil life." Webst. Dict. verbo, "Architecture." We are talking about roadbeds for railroads; that is a structure used for purposes of civil life. What reason is there for saying that the builder thereof is not the one who comes between the civil engineer who designs and lays off the work and the artisans who execute it? None whatever. On the contrary, there is every reason why we should adopt the meaning of the word as used in *building terminology*. We are strictly within the domain of *civil architecture*, where the commonly accepted meaning of the word "builder" is as stated above. If I were to ask any of my brother judges, or the learned counsel for appellants, "who built their houses or was the builder thereof," none of them would think of naming the various carpenters, masons, glaziers, painters, etc., who might have been employed to work or labor upon the same, but each would answer, giving the name or names of some of the numerous contractors or builders in the city who took the contract, and built their houses. So, too, if I were to ask any railroad official, or any one else acquainted with the facts, "who built the roadbed of the Little Rock, Hot Springs & Texas Railway," none of them would think of giving the names of the numerous negroes, Irishmen, or Americans, who grubbed the way, dug the ditches, threw up the em-

bankment, etc., but every one would give the names of Spencer and Manney, and such other contractors as made the contracts, furnished the necessary means, men and implements, and had the different sections of the roadbed built. These were the *real builders* of the roadbed. The men in their employ to do the work were simply laborers or workmen who worked upon same, but they were not the builders thereof.

Again, the word "builder" has been used, by lawyers, judges and courts, as synonymous with "contractor," when used in connection with construction or building contracts. This, too, without exception, so far as I know. Mr. Anderson thus defines "Contractor:" "One who agrees to construct a portion of a work, as a railroad," and as we have seen, he defines "builder" as "one whose business it is to construct * * * railroads." See Anderson's Law Dict. *s. v.* "Builder" and "Contractor." In *Gray* v. *Walker*, 16 So. Car. 143, where a contractor sought to establish a lien, he is designated by the reporter (Shand) in the syllabus only as a "builder." So likewise in *Parker* v. *Bell*, 7 Gray, 429, and *Weeks* v. *Walcott*, 15 Gray, 54. In Mr. Lloyd's work on "Law of Building and Buildings," "builder" and "contractor" are used interchangeably, and "builder" is used only in the sense of "contractor." See pp. 45, 54, 55, 82, 83, 84, 85.

In *Calkin* v. *U. S.*, 3 Ct. Claims, 297, under a statute giving a lien for a debt contracted by the "builder" of any ship or vessel, it was held that the man who contracted with the owner for the building of the ship or vessel was the "builder" thereof.

A statute of Montana is as follows: "Every mechanic, builder, lumberman, artisan, workman, laborer, or other person or persons that shall do or perform any work or labor upon, or furnish any materials, etc., shall have a lien for his work or labor done, etc." Exactly like ours. One Wortman contracted with Kleinschmidt to build a granite block (which, of course, he could not do in person) for $26,710. After completing the work, Wortman sued Kleinschmidt for a balance due on his contract, and asked for a lien under the statute. Kleinschmidt contested the claim, and denied the right of Wortman to a lien, as is shown by the following excerpt from the opinion of the court: "Kleinschmidt by his pleadings and testimony asserted

that Wortman was not entitled to recover any amount, and that if judgment were entered against him *the law would not authorize the creation of a lien upon his property to secure its payment.*" The court, in discussing the question, calls Wortman a "builder," and, after deducting a certain amount from the claim for extras, which it refused to allow on account of a failure on part of Wortman to comply with his contract as to these, allowed the balance which it found to be due under the contract, and declared a lien to exist for same, saying: "The respondent is entitled to a lien upon this property under the statutes to secure the payment of the sum which is due from Kleinschmidt." And one of the judges, in a separate opinion, in which he concurred with the court as to respondent's right to a lien under this statute (but dissented as to other points), said: "Taking the definitions, both literary and legal, it is plain that, in reference to a building and the law of building, a 'builder' is practically in effect a 'contractor.' " The case is precisely in point. *Wortman* v. *Kleinschmidt*, 2 Mont. 316.

Under a statute of New York (Laws of New York, 1862, p. 956), giving a lien on vessels for a debt "contracted by the master, owner, charterer, *builder*, or consignee, on account of work done or materials furnished," J. S. Pierce & Co., a firm of boat builders, *contracted* with the owner of a certain vessel to repair same. They procured certain castings and machinery from another, and had the work done. The court of appeals, in allowing a lien to the one who had furnished materials and done work upon the vessel, says: "It is quite apparent that Pierce & Sons were the *builders* of the canal boat, within the meaning of the acts of 1862." So I conclude that the word "builder," as used in our statute, is tantamount to "contractor." I dare say no case can be found, where the word "builder" is similarly used in the statute, that holds the contrary. The court cites none, counsel for appellants cite none, and from this fact (with their known ability for exhaustive research), I feel warranted in saying *there are none*. The only one they cite where the word builder is similarly employed is *Blakey* v. *Blakey*, 27 Mo. 39, and they say that case holds that "the contractor had no lien," and cite *Savannah & Charleston R.* v.

Callahan, 49 Ga. 506, and *Mohr* v. *Clark*, 3 Wash. Ter. 444, "to the same effect."

A brief review of *Blakey* v. *Blakey*, *supra*, will discover that, instead of being an authority against my contention, it supports it. The syllabus is: "Where a builder contracts to build a house, he can have no lien for services rendered in superintending his own men." Here the "contractor" is called "builder." The facts of the case were that plaintiff sought to establish a lien for materials and for work done by different carpenters for a certain number of days at $2.50 per day for each hand in building a house for defendant, and also for *114 days service of self* in working and superintending the building from May 1st up to 23d of December, 1856, at $3 per day $342." The defendant asked this instruction: "That the plaintiff is not entitled to recover in this action for superintending the work in the building." In holding this to be a correct instruction, the court says: "It appears that the workmen were employed by the plaintiff as his hands, and that, instead of charging a given sum for the work, he charged the defendant $2.50 for every day each workman was engaged, though he did not pay any of them that much. If the plaintiff contracted to build the house for a certain price, or for whatever the job might be worth, it is difficult to understand on what principle he could charge the defendant for superintending his own hands; and if he undertook to employ workmen for the defendant, and to superintend them, he ought not to be paid for services as superintendent, and to speculate at the same time on the wages of the workmen." Continuing, the court says: "The law gives the mechanic, builder, etc., who may do or perform any work upon or furnish material a lien for the work done and materials furnished, but * * * it cannot be stretched to cover, *besides the value of the work done and the materials furnished, a claim for services performed by the builder for himself in superintending his own workmen.*" The legitimate conclusion from this is that the contractor, called in the opinion *builder*, would be entitled to a lien for the value of *the work done by the hands in his employ* according to his contract; but not for personal services in merely superintending them. This latter was but a part of his undertaking, for which

he received pay when the work done by the men in his employ was paid for. This, it seems to me, is cogent authority for my position. There is no pretense that the claim of Spencer & Manney is for personal services rendered by them; it is only for the contract price of the section of roadbed built by them through their employees.

A brief analysis of the *Savannah & Charleston R. Co.* v. *Callahan*, 49 Ga. 506, cited for appellants, will likewise discover a strong authority for appellee. Plaintiffs, who contracted for building, and had built, a certain portion of a railroad, sought to establish a lien for the balance of the contract price. The defendant "denied that the plaintiffs had any lien as *mechanics and laborers*, in contemplation of the law, but alleged that they were contractors." The constitution of 1868 of Georgia declares that "mechanics and laborers shall have liens upon the property of their *employers* for labor performed or materials furnished." The statute of 1869, providing a summary remedy for enforcing these liens, prescribed: "*Laborers and mechanics* shall have a lien upon the property of their employers for labor performed and for materials furnished." It will be observed that no provision was made for *builders* or for *contractors*. The supreme court held that contractors did not come within the provision of the constitution and statute. In its opinion it defines a mechanic as "a person whose occupation is to construct machines, or goods, wares, instruments, furniture and the like,"—not one who builds houses or railroads. "Laborer" the court defines: "One who labors in a toilsome occupation; a man who does work which requires little skill, as distinguished from artisan." Citing Webst. Dict. The court then defines *builder* to be "one who builds, one whose occupation it is to build, an architect, a shipwright, a mason." The court evidently used *builder* here as synonymous with *contractor*, because the argument was to show that *contractors* were not embraced in the terms *mechanics and laborers*, as used in the constitution and statutes, and the court defined *builder*, in order to show that the *contractor* who built the railroad was not so included; otherwise, there could have been no object in defining the term *builder*.

We have already shown that *Mohr* v. *Clark* was based upon a statute giving a lien to those who *labor on a farm.*

One other case cited by appellant's counsel, which I regard as supporting the contention of appellees, is *Winder* v. *Caldwell*, 14 How. 434. The statute made "all and every dwelling house, or other building, subject to the payment of the debts contracted for, or by reason of any work done, or materials found and provided by any brickmaker, bricklayer, stonecutter, mason, lime merchant, carpenter, painter and glazier, iron monger, blacksmith, plasterer, and lumber merchant, or any other person or persons employed in furnishing materials for, or in erecting or constructing, such house or other building." The statute is most comprehensive in the protection of the classes which the whole acts shows it was obviously designed to protect, to-wit: those "whose personal labor or property have been incorporated in the building, and not the agents, supervisors, undertakers, or contractors who employed them." Of course, it was held that *contractors* were not embraced in such a statute, for the statute sedulously avoided all reference to *builders* or *contractors*, or any terms that could possibly be construed as meaning those who stood in this relation to the owner. The court said. "It was not the merit of the contractor that gave rise to the system. * * * Such persons have an opportunity and are capable of obtaining their own securities"—thus showing that the policy of this law was to protect those only who are not able to protect themselves. The court further said: "The contractor is neither within the letter nor the spirit of the act." How different is our statute, where he is certainly within both the spirit and the letter (under the alternative expression "*builder.*") But the court does say one thing pertinent to the case at bar when it used the expression, "does a master-builder, undertaker, or contractor come within the letter or spirit of the act?" —thus using these terms synonymously. The terms *master-builder* and *builder* mean the same thing. See Lloyd's Law of Building and Buildings, § 85. A *master-builder* is "a contractor who employs men to build." Stand. Dict. *verbo* "Master." In the syllabus of this case also the contractor is called *builder* in one place and *master-builder* in another.

I have examined critically other cases cited, to-wit:

Smallhouse v. *Kentucky etc. Co.*, 2 Mont. 443; *Ames* v. *Dyer*, 41 Me. 397; *Whittaker* v. *Smith*, 81 N. C. 340; *Foushee* v. *Grigsby*, 12 Bush, 75; and *Jones* v. *Shawhan*, 4 W. & S. 257. It is sufficient to say that they are all based upon statutes containing restrictive words which control them; none of them provided for *builder* or contractor; and the whole of the acts showed that it could not have been the intention of the legislature to include them. These cases are therefore not in point.

It is a well recognized canon of construction that the whole act, and all of its parts, must be considered, and every word given, if possible, a different meaning. To "deny a word or phrase its known or natural meaning in any instance, the court ought to be quite sure that they are following the legislative intention." *Wilson* v. *Biscoe*, 11 Ark. 44, 48; *Phillips Co.* v. *Pillow*, 47 Ark. 404; Sutherland, Statutory Const., § 279, pp. 361–2. The word *builder* has a well defined, "known, and natural meaning;" it is unambiguous. We have no warrant for changing it. Especially should we not do so, when the obvious intention of the legislature was to provide for the *contractor*, under said term.

It is argued that, as the word "*builder*" and also the words "*contractor and sub-contractor*" occur in the general law of mechanics' liens (Act April 25, 1873; Sand. & H. Dig. § 4731), and that, as "contractor"and "sub-contractor" are omitted from the act under consideration, the intention of the legislature in the latter act was to leave out contractors and sub-contractors. *Non sequitur*. The legislature that passed the law under consideration saw, doubtless, that it would be guilty of inexcusable redundancy in using the words contractor and sub-contractor after having employed the word *builder* and the other words in the statute; for the word *builder* included contractor, and the other words included all sub-contractors. "All persons are considered sub-contractors except those who have contracts directly with the owner or his agents." 15 Am. & Eng. Enc. Law, p. 47; Acts 1895, p. 226. That is the reason why the legislature of 1887 left off these words. For the same reason the legislature of 1895 left out the words "contractor" and "sub-contractor" in the "Mechanics' Lien Law"—the last enactment upon the subject—in naming the persons who were

given the lien. The first section of that law reads: "Every mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work upon or furnish any material, * * * etc., for any building, * * * etc., under and by virtue of any contract with the owner or proprietor, or his agent, trustee, contractor, or sub-contractor, shall have a lien, etc." Under this section the *builder* or *contractor* under contract with the owner, his agent, or trustee, has a lien for work done, and the other persons, *sub-contractors*, have a lien for work done under the contract with the contractor, or, if furnishers of material, etc., they have a lien under contract, either with the contractor or the sub-contractor. Now, while neither contractor nor sub-contractor, *eo nomine*, are given a lien in the first section, yet other sections show they were intended to be included. Sections 10, 18. How were they included? Why, under the terms "mechanic, builder, artisan, workman, laborer, or other person." The legislature of 1895, like the legislature of 1887, seems to have understood the word *builder* in its true sense, and used it accordingly as synonymous with *contractor*. It is asked why it did not use *contractor?* I answer, because builder meant the same, and was just as good. But I have no doubt that it would have used contractor, could it have foreseen that supreme judges and eminent lawyers, or even lesser lights, would differ so greatly about the plain meaning of so very familiar and common a term in building nomenclature as that of *builder*. If *builder* does not mean *contractor*, it was superfluous nonsense to have used it at all; for every phase of work and labor incident to the building of railroads was covered by the other words,—mechanics, artisans, workmen, and laborers.

3. The court emphasizes the words "*who shall do or perform any work or labor*," and concludes from these that the statute, to use the court's language, "does not apply to a contractor who does not actually perform any [manual] work or labor. So far as he may actually labor, he may come within the scope and meaning of this statute." The court here concedes that the contractor may be included, provided he performs labor in person. In other words, the contractor is provided for only as a *laborer*. In support of this position, the court cites

Aikin v. *Wasson*, 24 N. Y. 482; *Balch* v. *N. Y. etc. R. Co.*, 46 N. Y. 52; *Gurney* v. *Ry.* 58 N. Y. 358; *Lehigh Coal, etc., Co.* v. *Ry.* 29 N. J. Eq. 252. It would be but commendable consistency to cite, in favor of the position assumed by the court, only cases based upon statutes giving a claim or lien to laborers, or those only who do toilsome manual service under the direction of others; and the cases cited in point at all are just such cases.

In *Aikin* v. *Wasson*, the plaintiff, a contractor, sued a stockholder of a railroad, under a statute which provides "that all the stockholders of every such company shall be jointly and severally liable for all the debts due or owing to any of its *laborers and servants* for services performed for such corporations." The court said: "The word 'servants' is qualified, and to some extent limited, in its meaning by its association with the word 'laborers.' The court further said: "It is obvious from the nature and terms of this and other provisions of the act, as well as from a general policy indicated by analogous statutes, that the legislature intended to throw a special protection around that *class of persons who should actually perform the manual labor of the company.*"

In *Balch* v. *N. Y., etc., R. Co.* the court, in construing the same act, said: "The terms 'laborer' and 'labor' were used in their ordinary and usual sense; and the provision was intended to secure the common laborer, one who earned his daily bread by his toil, a compensation for his own work." Continuing, the court cites the case of *Coffin* v. *Reynolds*, 37 N. Y. 640, and says: "In the latter case the meaning of the same terms used in an analogous statute was restricted, and held not to include skilled artificers, or those rendering service requiring skill, or such as are not regarded as common, ordinary labor." But in *Gurney* v. *Ry.*, also cited, the question applicable here arose upon an order of the special term of the supreme court appointing a receiver, and directing him to pay "debts owing to the *laborers and employees* of the said defendants for labor and service actually done in connection with the defendant's railways." In passing upon and allowing the claim of an attorney who had rendered service in connection with the defendant's railway, the court of appeals, after citing and commenting upon prior

cases, and among them *Aikin* v. *Wasson*, *supra*, said, *inter alia*: "It will be observed, in the first place, that the word *employee*, used in the order, is not found in any of the statutes involved in these cases. This is a word of more comprehensive signification than *laborers and operatives*. * * * In those cases (*Aikin* v. *Wasson* and others) the courts held that it was the policy of the legislature to *protect those only who are the least able to protect themselves, and who earn their living by manual labor for a small compensation, and not by professional services; and this supposed legislative policy exerted a controlling influence upon the courts. In this case it was entirely different.*" So, say I, of the case at bar. Our statute not only includes "laborers," the special class mentioned in the case cited, but also includes mechanics, builders, artisans, workmen and various *material furnishers*. No one can say that the other classes of persons mentioned in our statute are limited by the term "laborers," upon the principle of *noscitur a sociis*. And the very decisions cited to maintain this position show that, had they been based upon a statute like ours, with a broader purpose and a more extended enumeration of classes, the decisions themselves would have been in favor of my position. Indeed, later decisions of the same state based upon different statutes are altogether different. *Stryker* v. *Cassidy*, 76 N. Y. 50, and *Gurney* v. *Ry.*, *supra*.

The case of *Lehigh Coal Etc. Co.* v. *Ry.*, cited by the court, was based upon a statute which "in its broadest sense includes only laborers and employees, and them only to the extent of their wages." Of course, it was held that a contractor was not included in such a statute; for, he is neither a laborer nor, in a strict legal sense, an employee, nor does he work for wages. But see *Mutual Ben. L. Ins. Co.* v. *Rowand*, 26 N. J. Eq. 389, where it was held that an architect came within the purview of an act giving a lien "to any person for labor performed, etc."

If, as I contend, contractor is included in the statute, there can be no doubt that the legislature intended to give him a lien for his work and labor performed, in the manner in which contractors usually do or perform their work and labor upon railroads. And how is this? Why, it would be impossible for contractors to build railroad beds with their own hands within

the time and in the manner required for such work. Their work involves the finished product of what they undertake. This is the sense in which the words "who shall do or perform any work or labor upon" are used. The words "work" and "labor" here are used to denote the result of what is done, and not the manner of its doing. Under the construction placed upon the words by the court, even if the word "contractor" were used, instead of "builder," still the contractor would have to do the work and labor with his own hands to entitle him to a lien. If the legislature intended to provide for the contractor, in what more simple or appropriate words could they have done so? What else could they have said? The maxim *qui facit per alium facit per se* applies with peculiar force in a case of this kind, where the work to be performed by the contractor can only be done by him through the instrumentality of those in his employ.

Under a statute which contains "mechanics," "artisans," "builders," or, its equivalent, "contractors," it is not necessary, before establishing a claim for lien, to show that the work was done with the claimant's own hands. Kneeland, Mechanics' Liens, § 3; *Hogan* v. *Cushing*, 49 Wis. 169; *Blakey* v. *Blakey*, 27 Mo. 39; *Lester* v. *Houston* (N. C.), 8 S. E. 366; *Hughes* v. *Torgerson* (Ala.), 11 So. Rep. 209; *St. Johns & H. R. Co.* v. *Bartola* (Fla.), 9 So. Rep. 853; *Central Trust Co.* v. *Ry.*, 54 Fed. 723, 727; *Newgass* v. *Ry.*, 72 Fed. 712, 716; *Perry* v. *Ry. Co.*, 56 Minn. 306; *Couper* v. *Gaboury*, 69 Fed. 7; *Trustees* v. *Sanford*, 17 Fla. 162; *Malone* v. *Mining Co.*, 76 Cal. 578, 585, 586; *Sweet* v. *James*, 2 R. I. 270, 286; *Lybrandt* v. *Eberly*, 36 Penn. St. 347; *Singerly* v. *Doerr*, 62 Penn. St. 9, 13; *Hatch* v. *Faucher*, 15 R. I. 459, 461; *Stryker* v. *Cassidy*, 76 N. Y. 50, 53.

The learned counsel for appellants do not controvert this, as I understand, but only contend that contractor is not included in our statute. They say: "When the statute expressly gives the contractor a lien, there is no room for construction." This is precisely what our statute does, as I have attempted to show, under the term "builder." Having concluded that a contractor is embraced in the statute under the term "builder,"

I need not attempt to show that, if not so included, he is brought within the act under the term "*other person.*"

In the preparation of this opinion I have been greatly assisted by the able briefs of counsel for appellees, and have made liberal drafts upon the same. Indeed, I could not have wished to add anything thereto, for I regard the arguments therein made as exhaustive and unanswerable.

I would not have entered upon this task but for the earnest conviction that the court had fallen into error in the construction of this statute, which, taken in connection with *Tucker* v. *Ry. Co.*, *supra*, results in its annihilation, so far as both contractors and laborers on non-completed railroads are concerned. If neither contractors, nor mechanics, artisans, laborers and workmen were given a lien, they were intended to be; and if this opinion does no more than call the attention of the legislature to the present somewhat anomalous state of the law, it will, I trust, have served some useful purpose.

EVANS *v.* SPEER HARDWARE COMPANY.

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Opinion delivered April 2, 1898.

1. ACCOMMODATION NOTE—NOTICE.—Knowledge that a note is in the hands of one of the joint makers, to be negotiated for his benefit, is sufficient to give notice that the other makers signed for accomodation merely. (Page 209.)

2. SAME—EFFECT OF SIGNING.—One who signs negotiable paper for accommodation confers authority on the party accommodated to bind him in favor of third persons by the issue of the paper. (Page 209.)

3. SAME—INDORSEMENT.—An indorsement without recourse of an accommodation note by the payee, who has no interest therein, for the purpose of enabling the note to be negotiated is not contrary to the usages and customs of commercial transactions. (Page 209.)

4. BONA FIDE HOLDER—CONSIDERATION.—One who takes negotiable paper in payment of an antecedent debt, before maturity, and without notice, actual or otherwise, of any defect therein, receives it in due course of business, and is a holder for value. (Page 210.)

5. SAME—ACCOMMODATION PAPER.—The *bona fide* holder for value of accommodation paper taken in the regular course of business may enforce it

against the makers, although he knew when he received it that it was accommodation paper. (Page 210.)

6. ACCOMMODATION NOTE—TRANSFER.—An accommodation note, put into the hands of the party accommodated solely for the purpose of enabling him to raise money, although made negotiable and payable at and to a particular bank, which is named as the payee, is good against the makers in the hands of a third party who in good faith received the same before due, and for value, paying for the note the money which it called for. (Page 211.)

7. SAME—DIVERSION OF PROCEEDS.—The fact that the accommodation makers of a note signed it for the purpose of raising money to pay certain debts of the accommodated party, and that the latter diverted the proceeds so raised, will not constitute a defense in favor of the accommodation makers, as against a *bona fide* holder of the note. (Page 212.)

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

Appellee brought suit on the following note. "Fort Smith, Ark., January 16, 1895. No. 1209. Due April 16, 1895. $300.00. Ninety days after date, without grace, we, or either of us, promise to pay to the order of Merchants' National Bank of Fort Smith, Ark., three hundred dollars, for value received, negotiable and payable without defalcation or discount, at the Merchants' Bank, Fort Smith, Ark., with interest from due at the rate of ten per cent. per annum, until paid. Demand, notice and protest waived. Ed. Hiner, D. B. Castleberry, J. H. Evans."

The complaint declares that said note on January 30, 1895, was indorsed by the said Merchants' Bank without recourse, and that said note, before the maturity thereof, and for value, became the property of plaintiff (appellee), that it was past due, and that defendants (appellants), though often requested, refused to pay same. The prayer was for the amount of the face of the note, with interest at ten per cent. from maturity. Ed. Hiner did not answer, and judgment was rendered against him by default. The answer of Evans and Castleberry admitted that they executed the note sued on, but denied that appellee was an innocent holder thereof for value, denied that it was a holder at all as against the appellants, and declared the facts to be substantially as follows: "That they signed said note

as sureties for Hiner, for his accommodation merely, no consideration moving to them; that they became such sureties for the purpose of aiding Hiner to borrow said sum from the Merchants' Bank, with an agreement and understanding with him that the money so borrowed should be applied to the payment of certain debts, part of which was owing to Evans, and the remainder were debts upon which Evans and Castleberry, or one of them, were sureties for said Hiner; that Hiner offered said note to the Merchants' Bank, and it declined to accept it, and afterwards Hiner took it to plaintiff, and it took it as a security or a payment for a debt owing it by Hiner, upon which these defendants were not securities, and paid said Hiner a sum of money, amount unknown to the defendants, no part of which was applied to the payment of any of the debts upon which defendants were security, and which were agreed to be paid from the proceeds of the note. That the Merchants' Bank never had any title, right, interest, or claim to said note, which fact was well known to plaintiff when it acquired the same. That the action of Hiner in negotiating said note to plaintiff was without the knowledge, authority or consent of Evans and Castleberry, and has never been ratified. The defendants aver that the plaintiff is not an innocent purchaser for value, in the due course of trade, of said note, but took the same with knowledge that these defendants were sureties for Hiner, with knowledge that the note was being diverted from its original purpose, and did not acquire any right of action thereon as against these defendants."

Counsel for appellant states the facts as follows: Hiner applied to Evans and Castleberry to become his sureties on note for $500. It was finally agreed that they would become his sureties on note for $300 to American National Bank, and did so, but the bank refused the notes. From the proceeds of the money so derived, Hiner was to pay certain other debts that Evans and Castleberry, or either of them, were sureties on, and gave them a mortgage of indemnity on 360 acres of land, indemnifying them for their suretyship upon said note to American National Bank, and three other notes therein specified, and any other matters upon which they might become his sureties, and also for any extensions or renewals of their present suretyship, or

anything in lieu thereof. At about the same time Hiner executed the mortgage and note to American Bank, he got Evans to indorse his note to Paris Bank for $100, due in ten days, which was to have been paid from the proceeds of note to American National Bank. After American National Bank refused to take the note, Hiner brought it back to Evans and Castleberry, and told them he could get the money from the Merchants' Bank at Fort Smith, and Evans wrote a note payable to Merchants' Bank, and he and Castleberry signed it with Hiner. No instructions or restrictions were given, the note was expressly payable to order of Merchants' Bank, and nothing was said about getting the money elsewhere. Hiner presented it to Merchants' Bank. It declined to take the note. Then he took it to Speer Hardware Company, and it agreed to take the note if he would pay a bill he owed them, and, upon his agreeing thereto, either Hiner or C. E. Speer (the testimony differs as to which, and it is immaterial) had the cashier of Merchants' Bank indorse the note without recourse. The bank had no interest in the note when it made that indorsement, and that fact was known to plaintiff. It was purely an indorsement so as to show title on the face of it. Speer Hardware Company deducted about $88 or $89 from the $300 note, and paid Hiner the difference. Hiner paid no part of the surety debts, nor performed any part of his obligations agreed upon as a condition to signing the note, according to the testimony of Evans and Castleberry, except a payment of the Bank of Paris note.

To this should be added that, according to the understanding between Hiner and appellants, the latter were interested in the application of the proceeds to be realized from the note, but the appellee had no notice of this fact, nor of any understanding between Hiner and appellants as to how the proceeds of the note were to be applied by Hiner, nor that they had signed upon any conditions. The note was transferred to appellant before maturity, the indorsement being as follows: "Without recourse, Merchants' Bank, Fort Smith, Ark.; C. S. Smart, cashier."

Verdict was for the full amount of the note, with interest, and judgment entered accordingly, which this appeal seeks to reverse.

Hill & Brizzolara, for appellants.

The note, being diverted from its original payee, is not binding upon the sureties, unless such diversion is ratified. 16 Ohio, 283; 10 Johns. 182; 9 Wheat. 703; 18 Ohio St. 353; 36 Vt. 536; 16 Pick. 574; 24 Iowa, 15; 32 Iowa, 22. Where a note is given to raise money for any special purpose, any diversion releases sureties (9 Wend. 170; 10 Johns. 198; 37 Ia. 618; 73 N. Y. 279), unless the holder can show that he received it in due course of trade and without notice. 10 Johns. 231; 15 Johns. 270; 6 Wend. 615; 65 N. Y. 438. The note was not a general letter of credit. Anderson's Law Dict. 613. There was no ratification, by the sureties, of the act of the maker in negotiating the note to a party and for a purpose other than that contemplated by the contract of suretyship. No conduct or silence of appellants induced any change in situation of or any damage to appellee; hence, no estoppel. Bigelow, Estoppel, 588–596, and notes. Where there is an agency, ratification may be inferred from acceptance of benefit; and where there is no agency, estoppel may arise from such acceptance. Mechem, Agency, §§ 148–150; Bigelow, Estoppel, 683–687. Ratification is a question of intention, express, or implied. 32 Pa. St. 347; Mechem, Agency, §§ 110, 146–7. There having been no agency or contract, any confirmation of the unauthorized sale would have to be on a new consideration. 55 Ark. 423; 82 N. Y. 327; 16 Mich. 259; Mechem, Agency, §§ 62–63; Ewells' Evans, Agency, * 62 and 63.

Ira D. Oglesby, for appellee.

Appellants did not restrict the negotiation of the note to any party; hence they are bound by it in the hands of any one to whom the holder negotiated it. 48 Ark. 454; 11 Conn. 388; 5 How. (Miss.) 301; 10 B. Monroe, 266; 5 Wend. 66; 112 Ind. 207; 17 Johns. 176; 71 Maine, 270; 38 N. H. 166; 36 Vt. 554; 10 Johns. 198; 10 Wend. 315; Daniel, Neg. Inst. § 792; 30 S. W. 637; 28 S. W. 348. Ratification is equivalent to prior authority. Mechem, Agency, § 135. As to what amounts to ratification, see Mechem, Agency, § 148, 153, 154, 157; 79 Am. Dec. 385 and note p. 387.

WOOD, J., (after stating the facts.) There is nothing upon the face of the note to show the status or relation of the signers to each other. Appellants are not indorsers. They do not sign as sureties, but appear upon the face of the paper as makers. The proof, however, shows that appellants are makers for the accommodation of Hiner. The note was in Hiner's hands, to be negotiated for his benefit, which appellee knew. This was sufficient notice to it of the character of the instrument. 1 Am. & Eng. Enc. Law, 367.

Can appellee, the holder of accommodation paper, having knowledge of its character when it was received, recover of appellants, the makers of such paper? One who signs negotiable paper for accommodation confers authority on the party accommodated to bind him, the accommodation party, in favor of third persons by the issue of the paper. And when such paper has been negotiated, the maker is bound to the payee, indorser, or holder from the date of the instrument, according to the rules of the law merchant. 1 Am. & Eng. Enc. Law (2d Ed.), pp. 340, 350.

The note in suit was a negotiable promissory note, signed by appellants, and turned over to Hiner "for the purpose of getting money on it." They gave it to him to get the sum of $300 from the bank, but, in the language of one of the appellants, "it was immaterial where he [Hiner] got the money from; they had no objection to where he got the money, and made no restriction; did not tell him from whom he should get it; nothing was said about it." The note was indorsed by the payee in blank. This transferred the legal title. The note thereafter passed by mere delivery to the one who paid value, the same as if payable to bearer, and the holder thereof had full authority to demand payment of it. Story, Prom. Notes, p. 184. It was immaterial whether the indorsement was procured by Hiner or by the appellee, and that appellee knew the bank had no interest in the note, and only made the indorsement to show title on the face of it. This was done to enable Hiner to do just what the makers designed he should do,—"raise money on it." The bank declined to take it, and signified the fact that it had no interest in it, and was willing for any one else to take it, by indorsing it in blank without re-

course, and delivering it back to the maker in this shape, to be negotiated to whomsoever he pleased. We cannot say that the indorsement was out of the usual course, *i. e.*, "contrary to the usages and customs of commercial transactions." Tied. Com. Paper, § 294; *Kellogg* v. *Curtis*, 69 Me. 212; Daniel, Neg. Inst., § 778.

Was appellee a *bona fide* holder for value? The general manager of appellee, who made the negotiation for the note, was informed by Hiner, who had the note, "that the note was made to get money to pay his indebtedness to appellee and other money he owed." There was no infirmity upon the face of the note itself. It had not reached maturity. There was nothing in the circumstances of its holding or transfer to excite suspicion, or to give notice of anything except the character of the instrument. Appellee took it to enable Hiner to do what he informed appellee the makers designed that he should do. Appellee paid Hiner in cash the sum of $212 or $213, and applied the balance of the note on Hiner's debt to it. This court in *Tabor* v. *Merchants National Bank*, 48 Ark. 454, said that "one who takes negotiable paper in payment of an antecedent debt, before maturity and without notice, actual or otherwise, of any defect thereto, receives it in due course of business, and becomes, within the meaning of commercial law, a holder for value." The *bona fide* holder for value of accommodation paper taken in the regular course of business may enforce it against the makers, although he knew when he received it that it was accommodation paper. 1 Am. & Eng. Enc. Law (2 Ed.), 360, note 6.

We are of the opinion therefore that appellee is a *bona fide* holder for value of the note in suit, and as such entitled to recover the full amount sued for.

The foregoing, however, is based upon the assumption that the note was not fraudulently put in circulation, or diverted from the purpose designed by its makers. The appellants contend that, as payee bank declined to discount the note, its transfer thereafter was a diversion, and that therefore the note has no validity in the hands of appellee. The learned counsel for appellants has pressed this view with his characteristic vigor of argument and diligence in the citation of authorities.

The cases which he cites from Ohio and Massachusetts support the proposition for which he contends (*Clinton Bank* v. *Ayres*, 16 Ohio, 283; *Adams Bank* v. *Jones*, 16 Pick. 574), and there are others to same effect; so that it may be said that the authorities are not in accord upon the proposition.

But the weight of authority and the better reason maintain the doctrine we here announce, that an accommodation note put into the hands of the party accommodated solely for the purpose of enabling him "to raise money," although made negotiable and payable at and to a particular bank, which is named as the payee, is nevertheless good against the makers in the hands of a third party who in good faith received the same befor due and for value, paying for same the money which the note calls for. *Winters* v. *Ins. Co.*, 30 Ia. 172; *Laub* v. *Rudd*, 37 Ia. 618; *Bank of Burlington* v. *Beach*, 1 Aik. (Vt.) 62; *Keith* v. *Goodwin*, 31 Vt. 268; *Bank of Montpelier* v. *Joyner*, 33 Vt. 481; *Bank* v. *Bingham*, 33 Vt. 621; *Bank* v. *Richards*, 35 Vt. 281; *Farm. & Mech. Bank* v. *Humphrey*, 36 Vt. 554; *Bank* v. *Hyde*, 4 Cowen, 567; *Powell* v. *Waters*, 17 Johns. 176; *Smith* v. *Moberly*, 10 B. Mon. 271; *Meeker* v. *Shanks*, 112 Ind. 207; *Dunn* v. *Weston*, 71 Me. 270; *Bank* v. *Rand*, 38 N. H. 166; *Utica Bank* v. *Ganson*, 10 Wend. 315; *Moreland* v. *Bank*, 30 S. W. (Ky.) 384; *First Nat. Bank* v. *Wood* (Tex.), 28 S. W. 384; *Gilbert* v. *Duncan*, 29 N. J. L. 133; *Purchase* v. *Mattison*, 6 Duer, 587; *Reed* v. *Trentman*, 53 Ind. 433; *Morris* v. *Morton*, 14 Neb. 358; *Lord* v. *Bank*, 20 Penn. St. 386; *Perkins* v. *Ament*, 2 Head (Tenn.), 110. See, also, following text writers: 1 Dan. Neg. Ins. § 792. 2 Pars. Notes & Bills, p. 28; 1 Am. & Eng. Enc. Law (2 Ed.), 381; Bigelow, Bills & Notes, p. 457.

The testimony of appellants themselves makes it clear that they did not make the discount of the note by the bank a condition precedent to the validity of the note. Simply naming the bank as payee did not have that effect. The reasoning of the Ohio court in *Clinton Bank* v. *Ayres*, *supra*, which holds the contrary doctrine, is as follows: "The makers [sureties] might be willing to loan their credit and become indebted to some particular creditor, but not to another. They might be willing to lend their name to procure a loan from a party who would

advance to their principal the full face of the note, when they would be entirely unwilling to go security to one who was their personal enemy, or who would exact harsh terms or heavy interest of their principal. They might have been willing to aid him in procuring a loan of ready cash, when they would have been unwilling to become his surety for an old debt," etc. This reasoning is not satisfactory to us, for when one makes his paper negotiable he contracts with reference to the law applicable to such paper. Even had the bank in the case at bar discounted the note, the next instant, by an indorsement such as we have here, it might have passed it into the hands of the very persons with whom, according to the reasoning of the Ohio case, the makers were unwilling to contract.

In *Keith* v. *Goodwin*, 31 Vt. 274, it is said: "When a note is executed for the purpose of raising money in the market, although made payable to a particular firm or bank, it is well understood that this is generally regarded by business men as rather a formal than a substantial part of the note. If the note were made payable at a particular bank to the order of the makers, it would be much the same thing. So, too, if made payable to bearer generally. The name of the person to whom the note is payable is mere form. It is understood that it is going into the market as money, and in exchange for money to any party who will make the discount. If negotiated at the bank, it may pass into other hands the next hour." This is the sound doctrine, where the law merchant is untrammelled in its operations by statutory enactment.

But it may be said that the note was used in part to pay a pre-existing debt of $88 or $89, and that this constituted a material diversion. If this were true, it could only defeat appellee's right of recovery *pro tanto*. But the payment of the antecedent debt by Hiner, under the circumstances, was not a diversion. The *gravamen* of appellants' case, as they show by their proof, is not that the Speer Hardware Company purchased the note, for they were willing for any one to purchase who would pay the money for it, but that Hiner failed to pay over the proceeds according to promise. Had Hiner paid over the $212 or $213, all the debts which he agreed to pay as the condition upon which appellants signed would have been fully paid. He

agreed to pay, for one of the appellants, a sum amounting to $190, and for the other, a sum amounting to $50; besides, for both, interest on certain notes, amount not stated. He paid the amount of $120. So that the balance on the debts which Hiner agreed to pay as a condition upon which the appellants signed the notes does not equal the amount which Hiner received from the appellee after paying to it his debt. Appellants are not prejudiced, therefore, by reason of appellee's not paying to Hiner the sum of $88 or $89, but by reason of Hiner's failure to apply the $211 or $212 to the debts which he promised appellants to pay.

Moreover, appellee had no notice of any limitations upon the use of the note. In fact, there were none, except that it was to "raise money." If appellee had paid to Hiner the sum of $300 in cash, and Hiner had immediately paid back to appellee the sum of $88 or $89, the amount of his debt, no one could contend that this would defeat appellee's right to recover. What actually took place was tantamount to this. Hiner informed appellees that the real purpose of the note was to raise money to pay off his debt to appellee and other debts; so appellee deducted the amount of its debt, and paid Hiner the balance. Appellee was in no sense responsible for the misappropriation of the proceeds of the note by Hiner. Appellants trusted Hiner with the note to raise the money. They must be held to have trusted him to make proper application of it. *Tabor* v. *Merch. Nat. Bank*, 48 Ark. 454: *Brooks* v. *Hey*, 23 Hun, 372; *Gray* v. *Bank of Kentucky*, 29 Pa. St. 365; *Moreland* v. *Bank*, 30 S. W. (Ky.) 637; *Dunn* v. *Weston*, 71 Me. 270. Especially is this the case as against one who had no notice that the accommodation makers were interested in the application of the proceeds. As was said in one of the above cases, to hold otherwise "would be against the plainest principles of equity, as well as subversive of the commercial law." See, also, *Stoddard* v. *Kimball*, 6 Cush. 469; *Goodman* v. *Simonds*, 20 Howard, 343, and note the same case, in Bigelow's Bills and Notes.

In this view of the case, the other interesting questions pass out, and the judgment must be affirmed. It is so ordered.

MILLS *v.* PRYOR.

Opinion delivered April 2, 1898.

1. LANDLORD'S LIEN—WHAT PROPERTY EXEMPT.—The statute giving a landlord a lien on "the crop grown on the demised premises in any year for the rent that shall accrue for that year" (Sand. & H. Dig., § 4794) impliedly exempts all other property of the tenant from the lien, including crops not grown the year the rent accrues. (Page 215.)
2. REPLEVIN—WHEN LIES.—Under Sand. & H. Dig., § 6384, allowing replevin to lie in case of seizure under execution or attachment of property "that is by statute exempt from such seizure," a tenant may recover by replevin property seized under a specific attachment to enforce a landlord's lien to which the property seized was not subject. (Page 215.)

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

W. S. & Farrar L. McCain and *J. C. Head*, for appellants.

The defendant in an attachment cannot bring replevin against an officer holding the goods under the attachment. Sand. & H. Dig., §§ 397 and 6384, clause 5; 4 Ark. 525; 52 *ib.* 195.

RIDDICK, J. The appellee, Pryor, rented land from one Hawkins during the years 1889 and 1890. He paid the rent for the year 1889, but failed to pay the rent for the year 1890, and Hawkins, the landlord, sued out a specific attachment against the crop to recover the rent due for the year 1890. This writ came to the hands of appellant as sheriff of Little River county, and was by him levied, not only upon the crop grown by Pryor in 1890, but upon sixty bushels of corn grown in 1889, which had been kept separate from the corn grown in 1890, and upon which the landlord, Hawkins, had no lien. The appellee, Pryor, brought this action of replevin to recover the sixty bushels of corn from the sheriff, alleging in his affidavit that the corn was by statute exempt from seizure under the attachment. His right to bring replevin is

denied, and whether that was a proper remedy in this case is the question we are asked to determine.

Our statute permits one against whose property an execution or attachment has been issued to bring replevin to recover property seized under such execution or attachment, if such property is exempt by statute from such seizure. Sand. & H. Dig., § 6384. The purpose of the statute was to afford a speedy remedy by which property thus unlawfully seized and detained can be recovered. It may be that the main object of this statute was to protect residents of the state in their right to hold property which the law expressly exempts from execution and attachments, but it seems to us that the case of the plaintiff here comes also within the language and meaning of the act. *Meadow* v. *Wise*, 41 Ark. 285; *Little* v. *Bond*, 49 *ib.* 114; *Dunham* v. *Wyckoff*, 20 Am. Dec. 696, and note; *Wilson* v. *Stripe*, 61 Am. Dec. 138. This corn was certainly not subject to the attachment under which it was seized. The landlord's lien act provides that the "landlord shall have a lien upon the crop grown upon the demised premises in any year for rent that shall accrue for such year;" and, under certain circumstances, it authorizes a specific attachment against the crop to enforce the lien. Sand. & H. Dig., §§ 4794, 4802. In giving a lien upon the crop for rent that accrues the year the crop is grown, the statute impliedly exempts all other property of the tenant from such lien, and from the specific attachment by which it is enforced. Without any straining of terms, it can, we think, be said that this corn was by statute exempt from seizure under the writ of attachment held by appellant.

There are strong reasons why the right to bring replevin should be allowed in such a case as this. Tenants of farm lands are not, as a class, opulent, and it is not improbable that the plaintiff in this case had an actual present need for the use of this corn. The landlord had no lien upon it, and the sheriff had no more right to seize it under the specific attachment than he had to take a mule of the tenant or the property of some third person. *Meadow* v. *Wise*, 41 Ark. 285.

The taking and detention were both unlawful, and, although there were other remedies open to the tenant, we think that under the statute he had the right to bring replevin.

The judgment of the circuit court awarding the property to him is therefore affirmed.

MEEHAN v. WATSON.

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Opinion delivered April 9, 1898.

ACTIONS—CONSOLIDATION.—A cause of action on an account by a firm against a defendant should not be joined with an action to recover rents by a member of such firm against the same defendant, pending in the same court, under Sand. & H. Dig., § 5707, providing that "whenever several suits shall be pending in the same court by the samo plaintiff against the same defendant for causes of action which may be joined, or where several suits are pending in the same court by the same plaintiff against several defendants, which may be joined, the court in which the same may be prosecuted may, in its discretion, order such suits to be consolidated into one action." (Page 216.)

Appeal from Woodruff Circuit Court in Chancery.

GRANT GREEN, JR., Special Judge.

STATEMENT BY THE COURT.

Appellants, Meehan & McGowan, sued appellee in the circuit court upon a mutual running account for an alleged balance due of $714.49, embracing transactions between the parties of about three years duration, amounting in the aggregate to over $4,500; and about the same time Charley Meehan brought suit before a justice of the peace for an alleged balance due for rents of $199.53, which cause was brought into the circuit court by appeal by the appellant, Chas. Meehan.

At the August term of the Woodruff circuit court, 1895, at which term said suits stood for trial, appellee filed an answer to appellant's complaint, denying the indebtedness alleged and stating that upon a fair accounting the balance would be in his favor.

Appellee, by way of counter-claim and cross-complaint, stated that Charles Meehan and John W. McGowan were partners under the firm name of Meehan & McGowan, and as such carried on a general mercantile business, and each of them were

engaged in farming and renting land in their individual capacity; that for three years appellee rented land from Charles Meehan, obtaining supplies from the firm of Meehan & McGowan and delivering to them all the products of his farming operations to be applied in the payment of rents for each year, the balance to be applied to the payment of his supply account; that, during the time of doing business with said parties, appellee did a large amount of improvement, and performed labors for Charles Meehan, at his request, amounting to over five hundred dollars; that the account between appellee and appellants, in their individual character and as a firm, were kept by the firm of Meehan & McGowan, and that the firm account and the individual account were so intermingled as to render them intricate, and so confused as to make it impossible for appellee to obtain adequate relief in a court of law; that there had never been a settlement of the matters of account between the parties; that said Charles Meehan had struck an arbitrary balance in his favor of $199.53, to prevent appellee from pleading a set-off of proceeds of crops against the rents, which crops and produce had been received by the firm and misappropriated to the account of Meehan & McGowan. Appellee further alleged that the produce delivered to Meehan & McGowan for the payment of rents was more than sufficient to pay all the rents due; that many of the items charged to appellee in the account of Meehan & McGowan should have been charged to Charles Meehan, being furnished for the improvements made on his farm; and the items of loaned money were usurious and fraudulent, being for more than ten per cent. per annum interest. Appellee prayed in his cross-complaint that the case of Meehan & McGowan and the case of Charles Meehan be consolidated and transferred to the equity docket, and that an account be taken and stated between the parties, and that the account of Meehan & McGowan be purged of all the usurious items, and the appellee have judgment for all items which may be due him from Charles Meehan and from Meehan & McGowan, and for general relief.

After hearing the motion to transfer to equity, the court ordered that the two cases be consolidated and transferred to the equity docket.

The appellants failing to deny the cross-complaint, the court directed a reference to the master to state the account between the two parties.

Norton & Prewittt, for appellants.

Where the amount in controversy is above the amount of the jurisdiction of a justice of the peace, the circuit court acquires no jurisdiction on appeal. 57 Ark. 257; 48 Ark. 353. It was error to consolidate the causes, because there was a diversity of parties plaintiff. Sand. & H. Dig., § 5763, *et seq.* It is intricacy and complication of accounts that justifies the assumption of jurisdiction by the chancellor. 48 Ark. 426.

J. N. Cypert, for appellee.

The intricacy and complication of accounts was such as to give a court of equity jurisdiction. 48 Ark. 426.

HUGHES, J., (after stating the facts.) Section 5707 of Sandels & Hill's Digest provides that "whenever several suits shall be pending in the same court by the same plaintiff against the same defendant, for causes of action which may be joined, or where several suits are pending in the same court by the same plaintiff against several defendants, which may be joined, the court in which the same may be prosecuted may, in its discretion, order such suits to be consolidated into one action."

We do not think this case comes within the above statute, because the plaintiffs are not the same in the two cases, and the issues are not the same. We think the court erred in ordering the two cases consolidated.

Reversed and remanded, with directions to try these cases separately.

DAVIES v. ROBINSON.

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Opinion delivered April 9, 1898.

1. RECOVERY OF TAX LANDS—COSTS.—Where a plaintiff brings suit to recover land which has been sold for taxes, and recovers, but fails to make the affidavit required by Sand. & H. Dig., § 2595, the rule as to the awarding of costs is as follows: All costs which were incident to the maintenance of plaintiff's suit for possession should follow the judgment for possession, and go against defendant; and all costs which were incident to the judgment in favor of defendant for taxes, improvements, etc., should be adjudged against plaintiff. (Page 221.)

2. UNNECESSARY COSTS—DISALLOWANCE.—The circuit court may exercise its discretion in determining whether costs incurred by either party are unreasonable or unnecessary, and its judgment thereon will not be disturbed on appeal, unless there has been a manifest abuse of such discretion. (Page 221.)

Appeal from Drew circuit Court.

MARCUS L. HAWKINS, Judge.

John C. Connerly, for appellants.

In courts of law the costs must follow the judgment. Sand. & H. Dig., chap. 31, § 787.

William B. Street, for appellee.

The statute regulating costs applies only to "reasonable and necessary" costs, and it is within the sound discretion of the court to refuse to allow to the prevailing party costs which he has caused to accumulate unnecessarily. 17 Ark. 361. The "final judgment," contemplated by § 788, Sand. & H. Dig., was in this case the adjudication as to taxes, improvements, costs and interest, as provided for in § 2597, *ib*. These matters arise under the cross-complaint (in which the defendant becomes plaintiff), and hence are properly assessed against the plaintiff.

WOOD, J. This suit was ejectment for a tract of land in Chicot county. The defendant set up possession of the land by virtue of a donation deed, and set up by way of cross-com-

plaint a claim for improvements and taxes. A change of venue was taken at the instance of plaintiffs to the Drew circuit court, where judgment was rendered awarding possession of the land in controversy to the plaintiffs, and also a personal judgment in favor of defendant against plaintiffs in the sum of $245, for improvements and taxes, and for all costs. The plaintiffs filed a motion to retax the costs, which was overruled. This appeal is from the judgment awarding all costs in the action against plaintiffs.

Section 787, Sand. & H. Dig., is as follows: "If the plaintiff recover judgment, he shall have judgment for costs against the defendant." Section 788: "If the plaintiff shall be non-suited, or discontinue his action after the appearance of the defendant, or final judgment shall go against him, then the defendant shall have judgment for costs against the plaintiff." This is the general statute in reference to the costs in suits, passed December 21, 1850. In 1857 an act was passed entitled "An act to quiet land titles in this state." This act appears at page 695, Sand. & H. Dig. Section 2595 is as follows: "No person shall maintain an action for the recovery of any lands, or for the possession thereof, against any person who may hold such land by virtue of a purchase thereof at a sale by the collector, or commissioner of state lands, for the non-payment of taxes, or who may have purchased the same from the state by virtue of any act providing for the sale of land forfeited to the state for the non-payment of taxes, or who may hold such lands under a donation deed from the state, unless the person so claiming such lands shall, before the issuing of any writ, file * * * an affidavit that such claimant hath tendered * * * the amount of taxes and costs first paid for such lands, with interest, * * * and the amount of taxes paid thereon by the purchaser subsequent to the sale, * * * and the value of all improvements made on such lands by the purchaser, * * * and that the same hath been refused, etc."

Section 2596 regulates the proceedings if the affidavit of tender is not made before suit commenced.

And section 2597 regulates the proceedings in the rendition of the judgments, and reads as follows:

"If judgment shall be given against any such person, or his assigns, who hold any such lands, in favor of any person claiming the same, no matter by what manner of title, said judgment shall only be for the possession of the premises in question; and damages shall be assessed in favor of said defendant for the amount of all taxes, costs and interest hereinbefore provided for, together with the value of all improvements made thereon after the expiration of the period allowed for the redemption of lands sold for taxes, for which judgment shall be entered in favor of said defendant, and the same shall be a lien upon such lands until satisfied."

Construing this latter act in connection with the general law upon the question of costs, *supra*, we are of the opinion that the costs in this case should have been adjudged as follows: All costs which accrued and were necessarily incident to the maintenance of the plaintiff's suit for the possession of the land in controversy should follow the judgment for possession, and go against the defendant. And all costs which accrued and were incident to the judgment in favor of defendant for taxes, improvements, etc., should be adjudged against plaintiffs. In other words, the court, in the adjustment of costs in a case like this, should, so far as practicable, treat the complaint and the answer thereto, which raise the issue as to the title and right to the possession, as an independent suit, and likewise the cross-complaint for taxes, improvements, etc., and award the costs as they would have accrued had the cases proceeded independently. In this view of the case, the general act and the special act, *supra*, may stand together. It was not intended that the special act, in cases coming under it, should repeal the provisions of the general law on the subject of costs, even in these cases. The judgment in favor of appellants for possession is a final judgment on that branch of the suit, and the judgment in favor of appellee for taxes and improvements is a final judgment, as joined in that issue.

Of course, the court should not allow to appellants or appellee on either branch of the case costs which either of them has caused unnecessarily and unreasonably to accumulate in the prosecution of the respective issues which they sought to maintain. The circuit court may exercise its discretion in determin-

ing what has been unnecessary or unreasonable cost caused by either party, and its judgment in the premises will not be disturbed by this court, unless there has been very manifest error and abuse of power. *Meadows* v. *Rogers*, 17 Ark. 361.

Reversed and remanded, with directions to the circuit court to retax the costs in a manner not inconsistent with this opinion.

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SNAPP v. STANWOOD.

Opinion delivered April 16, 1898.

MONEY HAD AND RECEIVED—WHEN LIES.—The agent of a landlord, without authority, accepted in part payment of the rent due to the landlord a note due to the latter which the tenant had purchased, and, after settling with the tenant, purchased from him the crop upon which the landlord held a lien for the rent. *Held* that the agent was liable to the landlord for the amount of the note, as for money had and received. (Page 224.)

Appeal from Woodruff Circuit Court.

HANCE N. HUTTON, Judge.

P. R. Andrews and *N. W. Norton*, for appellant.

Appellant cannot be held liable for money had and received where the proof shows affirmatively that he did not receive it. 22 Ark. 68; 23 Ark. 300; 11 Ark. 269. Refusal to so instruct was error on the part of the trial court.

R. D. Campbell, for appellee.

An action for money had and received may be maintained, not only in case of actual receipt by defendant of *money* belonging to plaintiff, but in case of receipt of anything treated as or standing in lieu of money. 22 Ark. 68; 23 Ark. 294; 44 N. H. 291; 61 N. H. 339; 2 Greenl. Evid. § 118; 6 Gill, 81. Appellant had a right to instructions, properly framed, upon this point; but he is bound by the language he uses in the instructions, and if they stated the law incorrectly, they were properly refused. 51 Ark. 88; 13 Ark. 317; 23 Ark. 730.

Appellant disobeyed the instructions of his principal in accepting, as satisfaction of the debt, property other than money; hence he is not in a position to object to the form of action. 7 Cow. 68; 2 Greenl. Evid. § 118. An agent empowered to collect money cannot accept anything else in satisfaction of the demand. Mechem, Ag. § 375, and cases; 1 Am. & Eng. Enc. Law, 357–8, and cases; 56 Ark. 375. If such an agent accepts anything in satisfaction of the debt except money, he will be chargeable for money. 11 Johns. 464; 7 Cow. 668; 14 Mass. 122.

BUNN, C. J. This is a suit by Mrs. Stanwood against her agent, Snapp, for the sum of $224, the amount of rents alleged to have been collected by him from one Middlebrook, the tenant on the farm of plaintiff in Woodruff county for the year 1895.

Plaintiff resided at Russellville, Arkansas, and her agent, Snapp, was, and for some years had been, as such, renting out her said farm, and collecting the rents annually, with no other authority. It appears that Snapp had collected the rents for the year 1895, but, in part payment of the same, had taken a note purporting to have been executed and delivered by plaintiff on the 23d December, 1890, to one Coody, for the sum of $145.39, due and payable 1st December, 1891. This note had been sold and transferred, by indorsement, by Coody to T. E. Stanley, who, two or three weeks before the settlement between Snapp and Middlebrook, aforesaid, sold and transferred by indorsement the note to Middlebrook, on a credit, it seems; and Middlebrook also indorsed the note when Snapp received the same in part payment of said rents.

It appears, also, that, at the time of the settlement of the rents as stated, Snapp purchased all the cotton crop of Middlebrook for that year, and that Stanley was present at the time for the purpose of collecting from Middlebrook the purchase price of the note, and presumably succeeded in doing so, Middlebrook being the better enabled to pay him by reason of the reduction of the rent debt out of the proceeds of his crop.

Immediately after this settlement, Snapp rendered his account to Mrs. Stanwood, showing the acceptance and credit

by the amount of the note; and she as promptly rejected and repudiated said settlement for that reason, and at once notified him, with the declaration that if he (Snapp) did not pay her the amount of the note, which he had received and deducted without authority, she would sue him for the same; and, failing to do so, she did afterwards instituted this suit for money had and received against him. Judgment for plaintiff, and defendant appealed.

The only material question in this case is whether or not the facts sustain a suit for money had and received by the defendant to the use of the plaintiff. In *Hutchinson v. Phillips*, 11 Ark. 269, the rule is stated thus by this court: "To maintain assumpsit for money had and received, plaintiff must show that defendant has actually received his money, or prove such facts as raise a fair presumption that he has received it." But that is the syllabus. The language of the court in the same connection relaxes the rigid rule, where it says: "There are cases where money is considered as received or advanced when it is not actually done." And "it is not necessary in all cases to give positive evidence that the defendant had received money beloning to the plaintiff. When, from the facts found, it may be fairly presumed he has received the plaintiff's money, the action for money had and received is maintainable." In the case at bar, Snapp hesitated about taking the note in part payment of the rent, until assured by Stanley that his indorsement made it good; and, besides, Snapp purchased all the cotton crop of Middlebrook (for what price it is not stated), and upon this crop it is presumed Mrs. Stanwood had a lien for her rent. In *Peay* v. *Ringo*, 22 Ark. 68, this court said again: "To maintain *assumpsit* for money had and received, it must appear that the defendant received the money due the plaintiff, or something which he had received as or instead of money, or which he had converted into money before suit." Whether or not the thing received by the agent was received as money or in lieu of money, or when the agent will be regarded in any case as having converted into money, are questions of fact. This fact has in effect been determined by the trial court, in this case; and therefore errors, if any, must be sought for in instructions given and refused.

The first, third and fourth instructions asked by the defendant and refused by the court fail to suggest what may be termed, for convenience, the relaxation of the rigid rule announced in some cases, and were therefore properly refused. The second instruction asked by the defendant, and refused by the court, was properly refused, because it was not based upon the evidence; for the plaintiff promptly repudiated the unauthorized act of her agent, as soon as she was informed of it, and as promptly notified him of her rejection of his settlement containing the acceptance of her note, and defendant cannot be allowed to show her ratification by her mere after silence.

We see no error in the three several instructions given on behalf of plaintiff; at least we see no reversible error in the same.

The judgment is therefore affirmed.

McCOOK v. NORTHUP.

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Opinion delivered April 16, 1898.

1. CARRIER—RULE REQUIRING TICKET—REASONABLENESS.—A rule of a railroad company forbidding freight conductors to permit passengers to ride on their trains from ticket stations without having provided themselves with tickets is reasonable. (Page 227.)
2. SAME—RIGHT TO EXPEL PASSENGER.—Under Sand. & H. Dig., § 6192, providing that if any passenger shall refuse to pay his fare, it shall be lawful to put him out of the cars at any usual stopping place the conductor may select, neglect of a passenger to procure a ticket before entering a freight train, when required by a rule of the company, amounts to a refusal to pay fare, and justifies an expulsion only at regular stations. (Page 227.)

Appeal from Crawford Circuit Court.

JEPTHA H. EVANS, Judge.

L. F. Parker and *B. R. Davidson*, for appellant.

A railway company has a right to make a rule requiring passengers to purchase tickets before entering freight trains;

and if any one, having notice of such rule, nevertheless enters a freight train without procuring a ticket, he is not a passenger, and not entitled to be treated as such. 11 Ohio St. 457; 1 Am. & Eng. R. Cas. 278; 2 *ib.* 278; 55 Ind. 369; 77 Ind. 507; 59 Ill. 110; 63 Ill. 304; 27 Md. 277. The conductor had a right to expel the passenger, if he had notice of the rule, and failed to purchase a ticket. 34 Am. & Eng. R. Cas. 256, 264, note. The rule was reasonable, and should have been so declared, as asked by defendant's instructions. 52 Ark. 406–410; 49 Ark. 357; 55 Ark. 134–138. The counsel for appellee used improper language in his concluding argument. 26 S. W. 998; 26 S. W. 307; 85 Tex. 205; 69 Fed. 530; 56 Fed. 994–1000; 10 Ga. 522; 29 Atl. 777; 66 Me. 564; 72 Tex. 643–53; 41 N. H. 317.

BUNN, C. J. This is a suit for $1,000 damages for being ejected from defendant's local freight train. Verdict for $50, and defendant appeals.

The evidence shows that plaintiff, residing in the town of Van Buren, on the 1st day of February, 1896, in response to a business telegraphic message, boarded the caboose of the local freight train of the St. Louis & San Francisco Railroad, managed and controlled at the time by defendant, as receiver, and his servants and employees, at the depot in Van Buren, en route to Fort Smith; that, having gone but a short distance, the conductor demanded his ticket, but, having no ticket, the plaintiff offered to pay his fare in cash, which the conductor, acting under the rules, refused to take, and ejected plaintiff from said train.

The plaintiff's testimony tends to show that he was ignorant of the rules of the company regarding the procurement of tickets, and of the want of authority in the conductor to take cash fare from one getting on at a ticket station such as Van Buren was; and also that he was expelled from the coach in a rough and rude manner, the conductor using towards him at the time profane and insulting language; and that he suffered physically thereafter on account of his expulsion, etc.

The evidence on the part of the defendant tended to show that plaintiff approached the conductor on the arrival of his

train at the Van Buren depot, and, in answer to inquiries, ascertained from him that his was a local freight train, that it carried passengers, that plaintiff would have to get a ticket from the depot agent, that the conductor was not allowed to take fare under the circumstances; and that, after being so informed, the plaintiff had seven minutes in which to procure his ticket before the train would move out; that when he demanded a ticket of plaintiff after he had boarded the caboose, and the train had gone as far as the foot of the bridge—a short distance—and the plaintiff failed to produce his ticket, he told him he would have to get off, as he (the conductor) had to obey the rules; that the Cannon Ball train would be along in a few minutes, and would overtake and pass them before reaching Fort Smith (which it did), and he could go back to the depot, get his ticket, and board that train; that plaintiff got off, and went back to the depot accordingly, and was not ejected at all, except in that way, and that no force was used, and no profane and rough language was used on the occasion.

The defendant also introduced in evidence the following rule of the defendant, referred to in the conductor's testimony, to-wit: "No. 79. Freight conductors are strictly forbidden to permit passengers to ride on their trains from ticket stations who have not provided themselves with tickets. From persons getting on freight trains, that are allowed to carry passengers, at non-ticket stations, and without proper transportation, conductor will collect fare to first ticket station only, notifying passenger that he must provide himself a ticket at such station to destination. This rule is imperative." It was also shown in testimony on part of defendant that this rule was kept posted up at the proper place in the depot, and that plaintiff was informed of it by the conductor before he boarded the train.

In the progress of the trial, defendant asked the court to declare that the above rule was reasonable, and a rule the operator of the road had a right to make, which the court refused to do. This request was made in two other forms, but refused in each, and the defendant reserved exceptions. The rule is but a reasonable one, and the duty of the court was to so declare.

Whether a failure on the part of a passenger to exhibit his ticket under such circumstances will authorize his expulsion, or not, is a question somewhat difficult of solution, owing to the peculiar statutes on the subject. In the case of regular passenger trains, a passenger cannot be expelled for not presenting a ticket, if he offers to pay cash fare; nor can he be expelled at another place than a usual stopping place, for refusing to pay fare. However, in *Hobbs* v. *Texas & Pac. R. Co.*, 49 Ark. 357, this court said: "Our statutory restrictions upon the company's right to put persons off their trains is confined to the single instance of a passenger who refuses to pay fare. [Citing the statute.] Beyond this the common-law right is not impaired. The appellant was not put off for non-payment of fare." In that case the company's right to expel a passenger was sustained because the company's rule forbade passengers from riding on such trains, and therefore because the plaintiff was violating the rule of the company in riding on the train at all. In the case at bar, the rule did not, and could not lawfully, forbid the plaintiff from riding on this local freight; and the sole difficulty in the way was whether, failing to produce a ticket, as the rule required, he could be expelled as one in violation of the lawful rate, or was his failure to procure and present a ticket to be regarded as a refusal to pay fare, and he thus be immuned from expulsion.

Under a statute of Illinois, identical in language with ours, in the case of the *C. B. & Q. R. Co.* v. *Parks*, 18 Ill. 460, the supreme court of that state said: "It is objected, first, that the company had the right to remove persons from the cars who refused to pay their fare, before the passage of this law; and as this statute does not in terms prohibit the putting out of such a person at any convenient and safe place other than a usual stopping place, the right which is claimed formerly to have existed, to put the passenger out at any other than a usual stopping place, still remains unimpaired by the act. This we do not think a sound construction of the act. It was the evident intention of the legislature to regulate the subject of which the section treats, without reference to the question whether it abridges or enlarges existing rights"—citing *Terre Haute & St. Louis R. Co.* v. *Vanatta*, 21 Ill. 188.

In the case of the *Illinois Central Railroad Company* v. *Whittemore*, 43 Ill. 420, that court said: "But a railroad company may expel a passenger from its train, at a place other than a regular station, for the violation of any reasonable rule other than that of non-payment of fare,"—just what was said in *Hobbs* v. *Texas Pac. R. Company*, *supra*, by this court; and yet, in the same case last quoted from, the Illinois supreme court also said: "The statute forbids the expulsion of a passenger at a place other than a regular station (meaning 'usual place' as designated in the statute) only in case of a refusal to pay fare. And neglect by a passenger to purchase a ticket before entering the train, when required by the rule of the company, in substance amounts to a refusal to pay fare, and justifies an expulsion only at a regular station (usual stopping place.)" This doctrine on the subject appears to be the best that can be offered under the circumstances.

Since the particular question whether or not the plaintiff was, as a matter of fact, in the legal sense, put off at a place other than a usual stopping place, is not presented for consideration in this case, we refrain from any discussion of the same, as we do from a discussion of what is proper notice of a rule such as appears in evidence.

For the error of the court in refusing to declare the rule of the company reasonable and lawful, the judgment is reversed, and the cause remanded for a new trial.

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ADLER-GOLDMAN COMMISSION COMPANY *v.* HERREN.

Opinion delivered April 16, 1898.

MORTGAGEE IN POSSESSION—LIABILITY FOR RENTS AND PROFITS.—Where a prior mortgagee of land instituted foreclosure proceedings, without making a junior mortgagee a party, and purchased the land, and went into possession, he is not regarded as in possession under his mortgage, and will not be accountable for rents and profits to the junior mortgagee, on a bill by the latter to redeem from such purchase. (Page 231.)

Appeal from Randolph Circuit Court in Chancery.

JOHN B. MCCALEB, Judge.

STATEMENT BY THE COURT.

Herren sold land to Jones for $1,000, one-half down, remainder to be paid one year thereafter, but at the time executing to Jones a general warranty deed to the land reciting payment in full of the consideration. Jones mortgaged the land to appellant, subject to Herren's lien for the balance of the unpaid purchase money. Herren foreclosed his vendor's lien on the land, without making the appellant a party to the proceedings. The land sold under this decree was purchased at the sale by Herren for the sum of $450. Herren took immediate possession of the land under said sale. Afterwards appellant foreclosed its mortgage on the land, without making Herren a party to its suit, had land sold under its decree, and became the purchaser of same at sale. Herren then brought suit in the circuit court to quiet his title to the land, as against appellant, obtained decree as prayed, from which decree appellant prosecuted an appeal to this court, where said decree was reversed, and remanded with directions that it proceed as a suit by the commission company against Herren to redeem.

When the case went back, the commission company filed a supplemental answer and cross-complaint, setting up that Herren had received from the rents of the land the amount of his debt and $400 besides, and praying for an accounting.

A demurrer was sustained to this answer and cross-complaint, and a decree was rendered in favor of Herren for the full amount of his original debt and interest. From this the commission company has appealed.

Rose, Hemingway & Rose, for appellant.

A vendor who holds a lien on property stands substantially in the attitude of a mortgagee. 14 Ark. 628; 29 *id.* 363; 30 *id.* 155; 33 *id.* 345; 52 Ark. 381; 55 Ark. 326. Upon a redemption, a junior mortgagee has the same right that the mortgagor possessed, to require the senior mortgagee to account for rents and profits. 2 Jones, Mortg. §1118; 10 Atl. 880; S. C. 42 N. J. Eq. 297; 32 Atl. 812; 15 La. 524; 11 So. 640; 29 Ill. App. 445; 24 Conn. 1. Nor could appellee gain anything by taking a deed from the mortgagor. 10 So. 76; S. C. 68 Miss. 787.

S. A. D. Eaton, for appellee.

A vendor's lien is a remedy, and not a right of property; hence it is not analagous to a mortgage. 28 Ark. 269; 41 Ark. 525. By foreclosure, the lien-holder became the owner in fee of the land, subject only to the right of redemption by junior incumbrancers who were not parties to the foreclosure proceedings. 60 Ark. 510; 57 Ark. 69; 54 Ark. 273; 54 Ark. 81; 149 Ill. 60. But the foreclosure operates to place the lien-holder in the place of the mortgagor, and entitles him to the rents and profits of the lands. 79 Ill. 514; 122 Ind. 244; 38 S. W. 1065. There having been no interest left in the mortgagor after the foreclosure, the junior incumbrancer could gain nothing by a proceeding against such mortgagor, without joining the lien-holders. 149 Ill. 60.

HUGHES, J., (after stating the facts.) Was Herren, the senior mortgagee and purchaser of the equity of redemption from Jones, the mortgagor, accountable for the rents while in possession?

It is well settled that a mortgagee in possession is accountable for rents. But was Herren in possession as a mortgagee? He had bought at the sale under his foreclosure of his mortgage, and had also bought Jones' equity of redemption. If he held under his foreclosure sale only, it may be that he would be accountable for rents, but when he holds as a purchaser, and not as mortgagee, he stands, as to his possession, as the mortgagor would, if in possession. *Ten Eyck* v. *Casad*, 15 Ia. 524. It seems clear that the mortgagor, if in possession, would not be accountable for rents. "If one who is a prior mortgagee afterwards acquires the equity of redemption, subject to a second mortgage, and then takes possession, he is not regarded as a mortgagee in posssession, and as such accountable for the rents and profits to the junior mortgagee." *Rogers* v. *Herren*, 92 Ill. 583; *Gray* v. *Nelson*, 41 N. W. Rep. 567 (77 Ia. 63.)

"A junior mortgagee redeeming from a senior mortgagee who has been in possession may compel an accounting. His right does not rest on any obligation of the senior mortgagee to him, for there is no contract between them, but upon the fact

that the senior mortgagee is under obligation to account to the mortgagor, and the junior mortgagee in equity stands in the place of the mortgagor." The junior mortgagee has no right, therefore, to compel an accounting when the mortgagor has no such right; for it is through the mortgagor, and the equity existing between him and the senior mortgagee, that he is entitled to compel an application of the rents and profits to the satisfaction of the senior mortgage. For these reasons, it is well settled that, in order to charge the mortgagee with rents and profits, it must be shown that he has occupied the mortgaged premises under his mortgage. If the title of the mortgagor has been divested, and the mortgagee has been in possession under a title derived from the mortgagor, he is not chargeable with the rents and profits of the mortgaged premises." 2 Jones, Mortgages, § 1118a. *Gaskell* v. *Viquesney*, 122 Ind. 244; 23 N. E. 791, and cases cited.

The judgment of the circuit court is affirmed.

BUNN, C. J., concurs in the judgment of the state of facts, but not in the reasoning leading to the conclusion.

TAYLOR *v.* TOMLINSON.

Opinion delivered April 16, 1898.

1. EXEMPTION—WHEN NOT WAIVED.—Where a debtor appeals from the decision of a justice refusing a supersedeas for property claimed as exempt from seizure, and subsequently dismisses his appeal, and judgment is rendered in the circuit court for a return of the property to the officer, such dismissal and judgment do not preclude him from subsequently instituting other proceedings to have his exemptions set apart to him. (Page 234.)

2. SAME—WHERE SCHEDULE FILED.—Where the process under which property was to be sold was issued by a justice, the schedule of exemptions claimed should also be filed with the justice. (Page 235.)

Appeal from Clay Circuit Court, Western District.

FRANCIS JOHNSON, Special Judge.

STATEMENT BY THE COURT.

On the 30th of October, 1894, appellant obtained judgment in a justice's court against appellee in the sum of $105.65, on which an execution issued November 16, 1895, and was returned as levied on certain personal property of appellee November 26, 1895. Appellee filed with said court a schedule of his personal property, including the property levied on, claiming same as exempt, and asked for a supersedeas. The justice disallowed his claim, and refused the supersedeas, and from the judgment of the justice appellee appealed to the circuit court, executing an appeal bond which bound appellee, in case his appeal was dismissed in the circuit court, to deliver to the proper officer the property levied on, or to pay the value thereof. In the circuit court the appellee dismissed his appeal, and the circuit court rendered judgment against him for a return of the property levied on or its value, and ordered a sale of the property by the constable, in case same was returned to him, to satisfy the original execution in his hands. After this (January 18, 1896) appellee gave notice that on January 23d he would file a second schedule of his personal property, which had been levied on by the constable, and claim same as exempt. On January 27th the proceedings on this second schedule was dismissed by the justice for want of jurisdiction, all parties being present, the justice holding that the question of exemption of this property had been already adjudicated. Supersedeas of the renewed execution was denied, and the execution was quashed and ordered returned, and it was returned, and the property delivered to the appellee by the constable. After this (February 6, 1896) the clerk of the circuit court issued an order of delivery, which was executed by the sheriff, and the property originally levied on was turned over to the constable. On the 17th of February, 1896, upon motion of appellant, the order of the justice quashing the execution was set aside, and the execution was returned to the constable. Again the appellee asked and the justice refused to issue supersedeas; whereupon appellee again appealed to the circuit court. The circuit court held that the justice should have issued the supersedeas, and accordingly ordered same, and this appeal was taken.

Cate, Hughes & Cate, for appellant.

Appellee, having dismissed his appeal to the circuit court, and permitted a judgment against him and his surety on the appeal hond, is estopped to claim an exemption which he failed to claim in justice court. 28 Ark. 485; 40 Ark. 352; 47 *ib.* 400; 30 N. E. 711. The judgment on the appeal bond bars further claim of exemption. 28 Ark. 85; Van Vleet, Former Adj. p. 702.

WOOD, J., (after stating the facts.) 1. The judgment of the circuit court is correct. The judgment of the justice on the first application for supersedeas is as follows: "Comes the defendant, C. A. Tomlinson, and files before me a schedule in exemption, as required by law; also the original notice of said schedule to the plaintiff; and, it appearing to the court, from the return of the sheriff thereon, that said notice was served by delivering a copy thereof to the oldest member of the family of said plaintiff at home, and it appearing to the court that the oldest member at home, and to whom said copy was delivered, was not of the age required by law, it is therefore held that said plaintiff did not have sufficient notice, and supersedeas refused." While the record does not disclose any reason given by appellee for dismissing his appeal in the circuit court, it was doubtless for the reason that he concluded that the judgment of the justice determining that he had not given notice to the opposite party as required by law (Sand. & H. Dig., § 5891), was correct. Appellee had the right to dismiss his appeal, and his action in so doing cannot be held as an abandonment or waiver of his exemptions. If he had not given notice to the opposite party as the law requires, which the judgment of the justice finds, and the dismissal of the appeal concedes, he acted wisely in dismissing same; for the court had no jurisdiction of the person of the appellant, and any judgment that might have been rendered in said court on said appeal, as against him, would have been void. The dismissal of the appeal by appellee, and the giving of notice to appellant that he (appellee) would file another schedule before the justice, was tantamount to taking a

non-suit and the commencement of new proceedings to secure his exemptions.

The rendition of the judgment against appellee and his bondsman, after a dismissal of the appeal,—conceding same to have been regular,—did not estop appellee from new proceedings to obtain his exemptions. Appellee bound himself, in case of a breach of the bond by dismissal of his appeal, to deliver the property, or its value, to the proper officer. This he complied with by delivering the property to the proper officer when called for. The only purpose of the bond was to have the property or its value forthcoming, subject to the execution for the debt of appellant, in the event the property was held not to be exempt. As we have seen, the dismissal of the appeal did not determine that question, and such an issue could not spring out of a breach of the bond.

2. It is said that it was the duty of appellee to file his schedule and claim his exemptions before the clerk. The execution under which this property was held was issued by the justice, and not by the clerk. Sand. & H. Dig., § 3718. The order of delivery issued by the clerk in pursuance of the judgment of the court on the bond commanded the sheriff to take possession of the property, and deliver them to the constable, and the constable was ordered by said judgment to sell the property under the original; so that process under which the property was about to be sold was issued by the justice. It was therefore proper to file the schedule with the justice.

Affirm.

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

Opinion delivered April 16, 1898.

1. INJURY AT RAILROAD CROSSING—PRESUMPTION.—Under Sand. & H. Dig., § 6349, making railroads "responsible for all damages to persons or property done or caused by the running of trains in this state," an instruction that if plaintiff's intestate was struck and killed by defendant company's engine, it was *prima facie* proof of negligence on the part of the company, is a correct statement of the law. (Page 237.)

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2. RAILROAD CROSSING—DUTY TO LOOK OR LISTEN.—As a general rule, it is the duty of a person approaching a railroad crossing to look or listen; and an instruction that "it is a question of fact for the jury to find, from the circumstances of each particular case, whether or not the party injured acted as a reasonably prudent man in undertaking to cross the track without first listening and looking for approaching locomotives," is erroneous, where no exceptional circumstances are in evidence. (Page 238.)

Appeal from Johnson Circuit Court.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

Action by Frankie P. Blewitt, administratrix, against the Little Rock & Fort Smith Railway Cnmpany to recover damages for the killing of G. F. Blewitt. Blewitt was struck and killed by an engine of appellant moving upon a switch or "Y" at or near a public crossing in the town of Coal Hill, about 1 o'clock a. m. of a dark night. The engineer was not on the engine at the time of the accident, and it was being operated by the fireman. A watchman, named Parker, was sitting on the pilot beam of the engine. The fireman did not see Blewitt, and the first notice he had that a person was on the track was a scream by Parker. The engine was stopped, and Blewitt was found under the pilot, and lived only a short while after being taken out. Parker was absent, and did not testify at the trial. The fireman who was operating the engine testified that the headlight upon the engine was burning, and that he was keeping a lookout, and said that he did not know why he failed to see Blewitt.

There was evidence tending to show that there was no headlight on the engine at the time of the accident, and some evidence tending to show that Blewitt had been drinking, and was under the influence of intoxicating liquor at the time he was struck. There was a verdict and judgment in favor of plaintiff.

Oscar L. Miles and *Dodge & Johnson*, for appellant.

Appellee was guilty of contributory negligence to such an extent as bars his recovery. 36 Ark. 371; 36 Ark. 46; 48 Ark. 125; 98 U. S. 439; 46 Ark. 388; 46 Ark. 535; 61 Ark.

555; 62 Ark. 164; 61 Ark. 620; 64 Ark. 364; 36 Ark. 371; 36 Ark. 46; 46 Ark. 333; 46 Ark. 522; 49 Ark. 263; 62 Ark. 250; *ib.* 235; 62 Ark. 170; Beach, Cont. Neg. § 27; 32 Iowa, 467; 4 Am. & Eng. Enc. Law, p. 17, 4 note, 3; Pierce, Railroads, 323; 7 Am. & Eng. R. Cas. (N. S.) 115; 61 Md. 168; Beach, Cont. Neg. (2 Ed.) 391; 46 Ark. 522; 1 Dillon, 579; 47 Ark. 502. The facts being undisputed, negligence and contributory negligence became questions of law, and the court should have directed a verdict for defendants. 61 Ark. 555. No presumption of negligence arises from the killing. 58 Ark. 472; 48 Ark. 480; 2 Thomp. Neg. 1232; 49 Ark. 264. It is negligence to fail to look and listen for approaching trains, before venturing on a railway track. 56 Ark. 427; 61 Ark. 549; 62 Ark. 157; 62 Ark. 335; 62 Ark. 245. The court erred in refusing to give the instructions numbered 4, 5, 10 and 11, asked by appellant. They properly declared the law relating to accidents at public crossings, and should have been given. 54 Ark. 431; 56 Ark. 42; 62 Ark. 156. The verdict is far in excess of any reasonable expectation as to what deceased would have done for his family had he lived. 57 Ark. 384.

Geo. A. Mansfield, for appellee.

The presumption is in favor of the correctness of the instructions. 57 Ark. 304; *ib.* 90. The testimony does not show deceased to have been guilty of contributory negligence. Defendant's engineer was negligent. 54 Ark. 214. The instructions of the court fairly cover the case, and are correct. The verdict is not excessive. 57 Ark. 377.

RIDDICK, J., (after stating the facts.) This is an action by the administratrix of the estate of T. F. Blewitt against the railway company to recover damages for having caused his death. The circuit judge instructed the jury that if Blewitt was struck and killed by an engine on appellant's railway, this was *prima facie* proof of negligence on the part of said company. The company contends that this was error, but the same question was considered in the case of *St. L., I. M. & S. R. Co.* v. *Neely* (63 Ark. 636), recently determined by this court; and it was ruled in that case, under section 6349, Sand. & H.

Dig., which makes "railroads responsible for all damages to persons or property done or caused by the running of trains in this state," that the fact that a person in a street is injured by the fall of a door from a car in a moving train is *prima facie* evidence of negligence on the part of the railway company. There is no difference in principle between that case and the one we have here on this point, unless it be in the fact that there were no cars attached to the engine at the time of the accident in this case; but that is a matter of no importance, for the engine and tender was a train, within the meaning of the statute above referred to. *Hollinger* v. *Canadian Pacific R. Co.*, 21 Ont. 705; 26 Am. & Eng. Enc. Law, 528, note 5; *Railway Company* v. *Taylor*, 57 Ark. 136,

We therefore conclude that the charge of the circuit judge on this point was correct, for the reason that the statute upon which his ruling was based makes no distinction between injuries to persons and those to property. We have frequently held that, under this statute, a *prima facie* case of negligence is made against the railway company by proof of injury to livestock from a moving train or engine; and the same presumption arises from an injury to a person. *St. L., I. M. & S. R. Co.* v. *Neely*, 63 Ark. 636; *Railway Company* v. *Taylor*, 57 Ark. 136.

We will next notice the exception to the charge of the presiding judge in reference to the duty of Blewitt to look and listen for approaching trains before attempting to pass the crossing. In his charge to the jury on this point, the judge said that the rule requiring a person about to cross a railroad track to look and listen for approaching trains was not an inflexible rule of law, but, he said, "it is a question of fact for the jury to find from the circumstances of each particular case whether or not the party injured acted as a reasonably prudent man in undertaking to cross the track without first listening and looking for appoaching locomotives." In other words, the presiding judge left it to the jury to say whether, under the facts of this case, Blewitt was required to look and listen for approaching trains before attempting to cross the track.

The law is now well settled that one approaching a railroad crossing must look and listen for approaching trains, and

when, by the due exercise of care in this respect, the danger could have been discovered and avoided, no recovery can be had. *Railway Company* v. *Cullen*, 54 Ark. 431; *Railway Co.* v. *Tippett*, 56 Ark. 439; *Martin* v. *Little Rock & Ft. S. R. Co.* 62 Ark. 158; Elliott, Railroads, § 1166. This is a rule of law, and only in exceptional cases is it proper to submit to the jury the question as to whether the failure to exercise such precaution is excusable. 2 Woods, Railroads, 154; 3 Elliott, Railroads, § 1166. We see nothing in this case to excuse Blewitt from the exercise of such care. He was not invited to cross the track by the company or its agent. He lived near the crossing, and knew that engines frequently passed there at night. Although the night was dark, objects could be distinguished for short distances. There is conflict in the evidence as to whether the headlight upon the engine was burning at the time Blewitt was struck; but if we assume that the engine was being operated without a headlight, and that the darkness prevented Blewitt from seeing the engine, yet certainly there was no reason why he should not have listened; for, if he could not see, there was all the more reason that he should have made a vigilant use of his sense of hearing. We are therefore of the opinion that the circuit judge erred in the declaration of law above referred to. The charge given by the presiding judge seems to have been carefully prepared, and on most points the law was well stated; but the error noticed occurs in several portions of the charge, and in a modification of an instruction asked by appellant, and we think was prejudicial.

The theory of counsel for appellee is that Blewitt exercised due care, and heard the engine, before attempting to cross the track, but, upon looking for it, was misled by the fact that no signal was given for the crossing, and no headlight was burning on the front of the engine, and that, supposing under these circumstances that the engine was moving in another direction, he attempted to cross, and was killed; but we need not discuss the case on that theory, for we cannot say that the jury based their verdict on such a finding. Under the instructions given, the jury may have believed that Blewitt neither looked or listened, and may have based their verdict on a conclusion of their own that it was not his duty to look and listen. The

jury should have been told as a matter of law that it was the duty of Blewitt to look and listen for approaching engines and cars before attempting to pass the crossing, and that, if the facts and circumstances in proof showed that he was guilty of carelessness in this respect, contributing to his injury, no recovery could be had.

The facts in this case are peculiar; but, as the judgment must be reversed, and as the evidence does not appear to have been fully developed at the recent trial, it is unnecessary to express an opinion concerning the evidence, or upon the question as to the sufficiency of the same to sustain the verdict. We do not discover in the charge of the judge to the jury any material error, except as noticed.

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

SUN MUTUAL INSURANCE COMPANY v. DUDLEY.

Opinion filed April 23, 1898.

1. FIRE INSURANCE—NONWAIVER CONTRACT—EVIDENCE.—In an action on a policy of fire insurance, where the insured claimed that the insurer waived all grounds of forfeiture by asking for proofs of loss, it is competent for the insurer to introduce in evidence a nonwaiver contract signed by the insured after the loss, providing that any action taken, request made, or information received, by the insurer while investigating the cause of the fire, the amount of loss or damage, or other matters relative to the claim, "shall not, in any respect or particular, change, determine, waive, invalidate or forfeit any of the terms, conditions or requirements of the policy." (Page 248.)

2. SAME—COVENANT AS TO KEEPING BOOKS.—A policy of fire insurance contained a covenant that the insured would keep a set of books showing a complete record of business, including all purchases and sales, together with the last inventory. Insured kept a cash book, showing the daily sales, and the last inventory, but no record of purchases. *Held* not a compliance with the covenant. (Page 249.)

3. SAME—FORFEITURE.—It is not necessary for an insurer to say or do anything in order to be entitled to the benefit of a forfeiture of its policy until sued thereon, provided the assured, under the circumstances, can not reasonably infer therefrom that the insurer does not intend to

insist or rely upon it; mere silence, without additional circumstances, being insufficient to warrant such inference. (Page 250.)

4. PRACTICE—WITHDRAWING INTERROGATORIES FROM JURY.—The court should not withdraw special interrogatories from the jury upon the ground that they could not agree as to the answers thereto if they could not find a general verdict without agreeing upon such answers. (Page 250.)

Appeal from Hempstead Circuit Court.

RUFUS D. HEARN, Judge.

Williams & Arnold, for appellants.

The evidence totally fails to show that plaintiff complied with the conditions of his policy; hence any instruction based on an assumption of such compliance is erroneous. 57 Ark. 461; 42 Ark. 57. The fulfillment of the requirement in the policy as to the keeping of a complete record of the business was a condition precedent to recovery of the insurance, and a strict compliance with its terms was necessary. 58 Ark. 575; 62 Ark. 348; 151 U. S. 452; 1 May, Ins. §§ 175, 176 and cases cited; 61 Ark. 214; 1 Wood, Fire Ins. 448. Therefore, any evidence tending to show a substantial compliance with these requirements was erroneous. The court erred in refusing to allow appellants to introduce in evidence the agreement, signed by appellee, to the effect that none of the acts done or statements made by the insurers, in endeavoring to ascertain the amount of the loss, should constitute a waiver of the conditions of the policy. Such an agreement is valid, and estops the insured to claim a waiver of conditions. 43 N. W. 59; 49 Pac. 555; 33 Pac. 633; 65 N. W. 742; 35 S. W. 955; 66 N. W. 525; 31 N. W. 616; 2 Biddle, Ins. § 1054, p. 329; 38 S. W. 1119; 71 N. W. 272; 3 Mo. App. 56; 35 N. Y. Supp. 374; 11 R. I. 139; 78 Ky. 150. Any instruction based on the assumption that the company waived the forfeiture was erroneous. 29 N. W. 521.

Jas. H. McCollum, for appellees.

The courts do not favor forfeitures, and will not declare them where they can reasonably avoid it. 1 Joyce, Ins. § 220; May, Ins. (3 Ed.) §§ 170, 174 and 367; 53 Ark. 494; 96 U. S. 577; 34 Am. St. Rep. 565; 45 Am. St. Rep. 361. The ob-

ject of the "iron safe" clause in a policy of insurance is to enable the insurer to arrive at the amount of the loss. 3 Joyce, Ins. § 2063; 61 Ark. 207; 62 Ark. 43. Any method of compliance which does not injure the insurer or prejudice his rights is good. 50 Am. St. Rep. 832; May, Ins. § 175. Any doubt as to the construction of the clause is to be resolved in favor of the assured. 54 Ark. 376; May, Ins. § 175. Whether or not assured complied with clause was a question for the jury. 58 Ark. 565. If the insurer, after becoming aware of the facts that worked a forfeiture of the policy, failed to claim same, and so acted as to induce the assured to believe such forfeiture is waived, and such assured, relying on the acts and instructions of the insurer, made out proofs of loss, at an expense, such forfeiture will be treated as waived. 53 Ark. 494; 7 Am. St. Rep. 495; 11 *ib.* 51; 15 *ib.* 739; 25 Am. St. Rep. 133; 54 *ib.* 550; 3 Dak. 80; 35 S. W. 955. The non-waiver agreement ousts the courts of their jurisdiction to declare a waiver when the facts are such as to constitute such. Hence, it is void, as being against the policy of the law. Joyce, Ins. §§ 904, 2530, 2531 and 3330; 8 Am. St. Rep. 913, and note; 35 Am. St. Rep. 793; 22 L. C. P. Ed. U. S. Sup. Ct. Rep. 365. The contract was without consideration, and therefore invalid. Lawson, Cont. § 91.

BATTLE, J. On the 17th of February, 1894, the Sun Mutual Insurance Company of New Orleans issued to C. R. Dudley a policy insuring him against "all direct loss or damage by fire, to an amount not exceeding $700, on his stock of merchandise in the town of Hope," in this state, for a period of one year from the 18th of February, 1894. On the 7th of November, 1894, C. R. Dudley, with the consent of the insurance company properly given, transferred the policy and all the property protected thereby to Dudley Bros., a firm composed of C. R. Dudley and R. E. Dudley. On the 13th of January, 1895, the stock of merchandise was destroyed by fire, and afterwards, on the 30th of January, 1895, Dudley Bros. transferred the policy to Val. Duttenhoffer & Sons, Jarvis, Phillips & Co., and Gauss-Shelton Hat Co. On the 17th of May, 1895, Dudley Bros. and their assigns commenced an action against the

insurance company and the sureties on its bond, filed with the auditor of this state, in the Hempstead circuit court, upon the policy, to recover damages occasioned by the fire.

The policy sued on contains this covenant: "The assured under this policy hereby covenants and warrants to keep a set of books showing a complete record of business transacted, including all purchases and sales (cash sales need not be itemized except by daily totals), together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fire proof safe at night, and at all times when the store mentioned in the policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where said business is carried on; and in case of loss, whether the store be open for business or not, the assured warrants and covenants to produce such books and inventory, and, in the event of a failure to produce the same, this policy shall be null and void, and no suit or action at law shall be maintained thereon for any such loss."

The policy further provides that the insured, as often as required, shall produce for examination all books of account, bills, invoices, or other vouchers, or certified copies thereof, if the originals be lost, at such reasonable place as may be designated by such defendant company or its representative, and shall permit extracts thereof and copies to be made."

The defendants, denying any liability under said policy, alleged, among other things, as a defense, that "the said plaintiffs, Dudley Bros., did not keep a set of books showing a complete record of business transacted, including all purchases and sales, together with their last inventory of said business; that said plaintiffs, Dudley Bros., have failed and refused to produce to said defendants such books as are contemplated by such provision in said policy, or books of any kind whatever; that said provision in said policy is a warranty, and, the same having been broken, the policy is void; and that plaintiffs, Dudley Bros., though called upon to do so, have failed to produce for examination either the said books of account, the original bills and invoices of goods alleged to have been bought since the issuance of said policy, or certified copies thereof, and

that, by reason of said failure on the part of said plaintiffs, said policy is null and void."

The issues in the action were tried by a jury.

In behalf of the plaintiffs, C. R. Dudley testified that the goods destroyed were of the value of $5,345.66, and that the insurance on them amounted to $4,000, including the policy sued on. He further testified "that the only book kept relating to the business prior to August or September, 1894, was what he called a 'cash book,' but it contained nothing except a record of the totals of daily cash sales. In August or September, 1894, he began to keep a bill register, in which was entered the date and amount of invoices of goods purchased, the maturity of the bills, from whom purchased, and when paid," but nothing more. "He (and his firm) kept this register and the original invoices in lieu of merchandise account, the bills representing the debit side and the cash, the credit side." His firm, Dudley Bros., "took an inventory of the stock December 24, 1894," and thereafter purchased and received no goods, and kept no books except the cash book, and "the invoices and bill register were not kept in the safe, but were laid aside as of no use, and were on a desk in the store the night of the fire, and were destroyed. The only book produced when called for by the adjusters was merely the memorandums of totals of daily cash sales, and this was the only book kept in the safe after the inventory was taken."

He also testified as follows: "After the fire I talked with Mr. Balfour Klein, representing the defendant, and one Mr. Meyers, representing the other insurance companies, whose policies we held on this stock. I told them that all the books I had was the cash book and the inventory. They did not claim the forfeiture of the policy at the time, but before they looked at the books they asked me to sign the non-waiver agreement. This was immediately after they reached here, and before they had begun to examine into the question of loss, and I signed the non-waiver agreement. After I made and signed the non-waiver agreement, I gave them my book and inventory; also my policy. I produced the cash book and inventory, and told them that they were all I had. They asked me a few questions, and told me they would take the matter

under consideration, and the next day they told me from what they could see they would be willing to pay us fifteen hundred dollars ($1,500), and that they would take the responsibility upon themselves. This I refused to accept. They told me to get up proofs of loss, and send them in, and the policies might be paid. They did not say that the policy had been forfeited. I then employed a justice of the peace by the name of Wallace, and he got up the proofs of loss. By the conduct of these adjusters I was led to believe that they would pay me, if I would prepare and send in proofs of loss. They told me that, before they proceeded to business, I must sign the paper. After I signed the paper or non-waiver contract, they asked me to produce the books, and said that if my loss was just they would pay the policies."

The defendants introduced Balfour Klein, who testified as follows: "Before investigating the amount of the loss, we asked C. R. Dudley to sign the non-waiver contract, and if he had not done so we would have gone home without having investigated his loss at all. We then took the cash book and inventory, which have been introduced in evidence, and that was all he produced to us, and we told Mr. Dudley that they were not sufficient. We told him that we would make him a compromise offer of fifteen hundred dollars ($1,500) in order to avoid a law suit; and at the same time told him we did not admit any liability, but that this was done simply as a matter of compromise. He did not accept it, and we withdrew the offer. This terminated the interview with Dudley Bros., or either of them, and nothing else has taken place between us except correspondence. I have with me the non-waiver contract signed by Dudley Bros., which I here produce." Thereupon the defendants asked leave to read said non-waiver contract to the jury, but the court refused to allow said defendant to read said contract to the jury, and excluded the same, to which ruling and order of the court the defendants at the time excepted. Said agreement is as follows: "It is hereby mutually stipulated and agreed by and between Dudley Bros., party of the first part, and the insurance company or companies whose name or names are signed hereto, each acting for itself, party of the second part, that any action taken, request made, or information received,

by said party of the second part in or while investigating and ascertaining the cause of fire, the amount of loss or damage, or other matters relative to the claim of said party of the first part for property alleged to have been lost or damaged by fire on the 13th day of January, 1895, shall not in any respect or particular change, determine, waive, invalidate or forfeit any of the terms, conditions or requirements of the policies of insurance of the party of the second part held by the party of the first part, or any of the rights whatever of any party hereto. The intent of this agreement is to save and preserve all the rights of all the parties hereto, and permit an investigation of the claim and the determination of the amount of the loss or damage, in order that the party of the first part may not be unnecessarily delayed in their business, and that the amount of their claim may be ascertained and determined without regard to the liability of the party of the second part, and without prejudice to any rights or defense which said party of the second part may have. C. R. Dudley, of and for Dudley Brothers. G. L. Meyers, Adjuster Southern Insurance Co., Germania Insurance Co. W. B. Klein, Adjuster. Sun Mutual Insurance Co. Palatine Insurance Co."

Klein further testified: "I never requested or told Dudley Brothers, or either of them, to make out proofs of loss. I never made such request of any person insured in my life. This non-waiver agreement was to prevent anybody's rights from being waived by reason of investigating the books and question of loss."

Thereupon the defendant introduced J. T. Hicks, and others, "who testified, in substance, that they were experienced book-keepers, and knew the custom of keeping books at Hope, Arkansas, where the business was run on a cash basis, and that they knew of no one keeping such books as were read in evidence in this cause. That the books kept by the plaintiffs, Dudley Bros., did not show a complete record of business transacted, including purchases and sales, or anything else except the aggregate of the daily cash sales of Dudley Bros. There could be no complete record of a mercantile business without a merchandise account. That there was no way to ascertain the condition of the business of Dudley Bros. from the record

kept by them. That there was nothing to indicate what was done with the cash taken in; no record of money paid to creditors; neither was there any record of purchases. They kept no expense or freight account. That no complete record could be made from these books. That the expense of a business would have to be known to arrive at the profits, and that the profits would have to be known in order to estimate the value of the stock remaining on hand."

The plaintiffs were allowed to ask the following question of witness J. T. Hicks:

"Q. If Dudley Bros. made an inventory of their stock on December 26, 1894, and received no goods thereafter, and kept an account of all cash sales from that time until the fire, could it not be ascertained what was the value of their stock?"

The defendants objected to this question, but the court overruled the defendant's objection, to which the defendants at the time excepted, and said witness answered as follows:

A. "If the inventory had been correctly taken, and the cash book correctly kept from that time, the difference between the two, making allowance for the gross profits and expenses, would approximate the value of the stock at the time of the fire. I kept a merchandise account, and each month credited the same with the amount of the cash sales. I kept a cash book and a ledger. The only way I could keep up with my business was to keep a merchandise account or bill ledger as well as cash sales. I kept all my invoices, bill ledger and cash sales, as well as my last inventory, in my safe." The defendants objected to this answer, and saved exceptions.

Other evidence was adduced, but it is not necessary to set it out in this opinion.

Many instructions were given by the court to the jury over the objections of the defendants, and many were asked for and refused. So many as are necessary to present the questions which these instructions give rise to are as follows:

"7. You are instructed that the provision in the policy requiring Dudley Bros. to keep a set of books showing a complete record of their business transactions, and to keep said books in a fire-proof safe, as provided in said policy, was not complied with by keeping the last inventory of December 26,

1894, and the record of cash sales from the date of said inventory until the fire occurred."

"9. You are instructed that it was not necessary for the defendant or its agent to say or do anything in order to claim the benefit or advantage of a forfeiture of the policy sued on, if such forfeiture has been shown, and it was not necessary for the defendant to deny liability on said policy, or claim such forfeiture until the answer herein was filed."

These instructions were asked for by the defendants, and refused by the court.

The court required the jury to answer the following questions:

"1. Did the plaintiffs, Dudley Bros., keep such a set of books, and produce the same, as required under the 'iron-safe clause' contained in the policy introduced in this case?

"2. If you answer that such a set of books was not kept, as required under the 'iron-safe clause,' state whether or not you find that the agent of the defendant waived such failure within the meaning of the instructions of the court on the subject of waiver."

The jury retired, and, after remaining out about two hours, returned into court, and announced that they could not agree as to the answers which should be given to the interrogatories, and the court withdrew the interrogatories, over the objections of the defendants, and shortly afterwards the jury returned into court with a verdict in favor of the plaintiffs for $516.25. The defendants appealed.

The first question presented for our consideration by this statement of facts is, did the court err in excluding the agreement in writing entered into by Dudley Bros. and the insurance companies? An insurance company has the right to judge and act for itself as to the conditions upon which it will insure against losses by fire and other causes. The owner of property is not bound to accept insurance upon any particular conditions, but, if he does, he cannot defend against a breach thereof upon the ground they are immaterial. Having entered into the contract of insurance as evidenced by its policy, the insurance company has the right to rely and insist upon all its terms and conditions, and take advantage of all forfeitures incurred by

the breach of any of its conditions. To protect itself in the exercise of this right, it may enter into an agreement with the assured to the effect "that any action taken, request made, or information received," by it, "in or while investigating and ascertaining the cause of the fire, the amount of loss or damage, or other matters relative to the claim" of the assured "for property alleged to have been lost or damaged by fire," "shall not in any respect or particular change, determine, waive, invalidate or forfeit any of the terms, conditions or requirements of the policy," "or any of the rights whatever of any party thereto." In this case the insurance company undertook to protect itself against a claim of waiver and estoppel by such an agreement, and offered it as evidence; and the court excluded it, and erred in so doing. It was competent, relevant, material and admissible for the purpose of aiding the jury in determining whether there had been a waiver of the forfeitures claimed by the defendants, and should have been admitted for that purpose. *Phœnix Ins. Co.* v. *Minner*, 64 Ark. 590.

The court also erred in allowing the plaintiffs to prove that the value of the stock of merchandise destroyed by the fire could be ascertained from the inventory of their stock made by Dudley Bros. on the 26th of December, 1894, and the account of cash sales kept by them from that time until the fire, provided the inventory and cash book were correct. The assured covenanted that they would keep a set of books showing a complete record of business transacted, including all purchases and sales, together with the last inventory of said business; and it is stipulated in the policy that it shall be void in the event the assured fails to produce such books and inventory in case of loss, and no action can be maintained thereon for such loss. This condition is both useful and valid. Its object is apparent. It was to enable the insurance company to ascertain the extent of any loss occasioned by fire during the life of the policy, and to test the accuracy of the statement or inventory furnished by the assured for that purpose. By such a set of books the amount and value of the goods acquired while the policy was in force could be ascertained; and, in the event any doubt as to the correctness of the books in this respect should arise, the insurance company might be enabled

to ascertain from the persons shown by the books to have sold the goods the sales actually made; and the amount disposed of and on hand would be made to appear. They were necessary to protect the insurer against the errors and dishonesty of the assured. Without them it would be left without adequate means to protect itself against false statements and inventories furnished by the assured in case of loss. Any set of books which failed to furnish the information required to be contained in the books which the assured covenanted to keep would not meet the requirements of the contract of insurance, and prevent a forfeiture of the policy, because the policy provides that it shall be void in the event such books are not kept. For that reason, if no other, the evidence that the value of the stock destroyed could be ascertained from the inventory of the 26th of December, 1894, and the account of cash sales kept by Dudley Bros. from that time until the fire was incompetent; and it was prejudicial to the defendants, because it was calculated to lead the jury to believe there was no forfeiture of the policy on account of a failure to keep such books.

The court erred in refusing to give the instruction numbered 7, which was asked for by the defendants, for the reasons already given.

As to the instruction numbered 9, which was refused, it is sufficient to say that it is not necessary for an insurer to say or do anything in order to claim and be entitled to the benefit or advantage of a forfeiture of its policy until sued thereon, provided the assured, under the circumstances, could not reasonably infer therefrom that the insurer did not intend to insist or rely upon it. Mere silence, without additional or accompanying circumstances, would not be sufficient to warrant such inference. Without this qualification, the instruction should not have been given.

The court should not have withdrawn the interrogatories from the jury after they announced that they could not agree as to the answers that should be made to the same. It is obvious that they were not authorized to return a verdict in favor of the plaintiffs, in the absence of interrogatories, until they had agreed that there was no forfeiture on account of the failure to keep books, or, if there was, it was waived by the in-

surance company. These were the facts, and the only facts, they were required to find in order to answer the interrogatories. We do not, however, decide that the court did or did not commit a reversible error in withdrawing the same.

For the errors in excluding and admitting evidence and in the refusal to instruct the jury, which we have indicated, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

DUFFY v. HARRIS.

Opinion delivered April 23, 1898.

HOMESTEAD—WIDOW—FORFEITURE BY MISCONDUCT.—Under the constitution (art. 9, § 6), which provides that "if the owner of a homestead die, leaving a widow but no children, and said widow has no separate homestead in her own right, the same shall be exempt," etc., a wife who deserts her husband, and lives in adultery in another state, does not thereby forfeit her right to the homestead upon her husband's death. (Page 253.)

Appeal from Lee Circuit Court

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT

To an action of an ejectment brought by the appellee, the widow of Dan Harris, deceased, against the appellant, the daughter of said Dan Harris, to recover possession of the homestead of the deceased, the appellant answered in substance that the appellee had, before the death of said Dan Harris, wilfully deserted and abandoned her husband, the said Dan Harris, and the homestead in suit, wholly without provocation, and removed, against his protest and earnest entreaties, to the state of Tennessee, where she continuously resided, until after the death of said Dan Harris on said homestead; that plaintiff, as the defendant believed, had, while so absent, lived in adultery; that, though earnestly and persistently persuaded by her husband to return to her home, she persistently refused and failed to do

so, until after the death of the said Dan Harris; that she, the appellee, by such conduct had forfeited her right to the homestead.

Upon motion, so much of the answer as set up abandonment and desertion of Dan Harris, and her alleged immoral and unchaste conduct, was stricken out, over the protest of the defendant, to which she excepted. The grounds of the motion were that said portion of the answer constituted no defense, and was wholly irrelevant to the issue.

The court gave judgment for appellee. Defendant moved for new trial, which was denied, to which she excepted, and appealed to this court.

Jas. P. Brown, for appellant.

A wife who has wrongfully deserted her home and husband, and taken up her residence in another state, cannot claim homestead after his death. 8 Tex. 312; 18 S. W. 436; 9 Tex. 630; 45 Tex. 559; *ib.* 588; 87 Tenn. 78; S. C. 10 Am. St. Rep. 623; 86 Mich. 283. The New Hampshire decisions (43 N. H. 308; 40 N. H. 249; 37 N. H. 436); hold differently, but the difference is due to the fact that in New Hampshire the homestead during life is an incohate right, resembling dower, and ripens upon the death of the husband; while in other states it is wholly dependent on the keeping together of the family for whose benefit it is created. Thompson, Homesteads and Exemptions, §§ 75, 585. It would be against the policy of all homestead laws to allow such a claim. 1 Bish. Mar. D. & Sep., § 38; 34 Am. St. Rep. 868, and cases in note; 43 La. An. 350; 42 Ark. 539. Dower and homestead are not similar rights, and are not governed by the same rules. 36 Ark. 545; 37 Ark. 298; 58 Ark. 302. Homestead is simply a privilege, and may be renounced by the wife's acts. 2 Kent, 146; 1 Bish. M. D. & S. §§ 1228–1234. The reasons for a rule failing, the rule ceases. 62 Ark. 146. Homestead laws are enacted for the benefit of only those who are domiciled in the state. 87 Tenn. 78; S. C. 10 Am. St. Rep. 623; Thomp. Hom. & Ex. § 91.

McCulloch & McCulloch, for appellee.

Art. 9, § 6, const. of Ark. [1874] makes the widow's right of homestead depend upon her legal status as wife and widow, and not upon her *de facto* relations to the family or occupancy of the property, thus bringing it squarely within the doctrine announced in the New Hampshire cases. 43 N. H. 308; 40 *id.* 249; Thomp. H. & E. § 3, 73-77; 29 Ark. 290; 27 Miss. 704; 12 Cal. 327; 20 La. An. 383; 46 Ark. 159.

HUGHES, J., (after stating the facts.) The homestead provision for the widow (Const. 1874, art 9, § 6) is as follows: "If the owner of a homestead die, leaving a widow but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow, and be entitled to half the rents and profits till each arrives at twenty-one years of age—each child's right to cease at twenty-one years of age—and the shares go to the younger children, and then all go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate."

It would seem that the language of this section of the constitution settles the question involved in this suit. The appellee had never been divorced from her husband, and she was unquestionably his widow. How then can she be debarred of her homestead right, without reading into the constitution an exception or provision it does not contain, to the effect that if the wife abandon her husband, and is guilty of immoral and unwifely conduct, she shall forfeit her right thereby to the homestead. We think such a construction unwarranted and untenable. We are aware that it has been held otherwise in Texas and some other states. *Trawick* v. *Harris*, 8 Tex. 312; *Earl* v. *Earl*, 9 Tex. 630; *Sears* v. *Sears*, 45 Tex. 559; *Prater* v. *Prater*, 87 Tenn. 78; *Farwell Brick Co.* v. *McKenna*, 86 Mich. 283. On the other hand, we find that in the case of *Meader* v. *Place*, 43 N. H. 308, and cases therein cited, it is held that the

abandonment by the wife of her husband, and living apart from him in another state, does not forfeit her right to the homestead upon the death of the husband.

In this state it is held that the domicil of the wife follows that of the husband, and we understand this to be the rule, and that the fact that she abandons her husband, and lives apart from him in another state, will not form an exception, nor cause her to forfeit her right to the homestead. She is not a non-resident, while her husband is a resident. Her legal status, as to this, is governed by that of the husband. *Meader* v. *Place*, 43 N. H. 308; *Johnston* v. *Turner*, 29 Ark. 280, and cases; Thompson, Homesteads and Exemptions, §§ 73, 77; *Atkinson* v. *Atkinson*, 40 N. H. 249.

"The wife, though living separate, might have returned to her duty at any time." He owed her protection and support, as long as the relation of husband and wife existed by law, and the desertion of the wife could not alter his legal status. He was still the head of a family, entitled to a homestead; and, as long as the relation of husband and wife existed *de jure*, the appellee was his wife, and at his death was his "widow," and entitled, under the constitution, to the right of homestead. Const. 1874, art. 9, § 6; *Gates* v. *Steele*, 48 Ark. 539; *Stanley* v. *Snyder*, 45 Ark. 429.

A majority of the court is of the opinion that, under the constitution and laws of this state, the appellee is, in law, the widow of Dan Harris, and that she has not, by her abandonment of him and living apart from him in another state, forfeited her right to his homestead, however reprehensible her conduct morally may have been.

The judgment of the circuit court is therefore affirmed.

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

Opinion delivered April 23, 1898.

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1. RAILWAY—STATION PLATFORM—INSTRUCTION.—The giving of an instruction to the effect that it is the duty of a railroad company to keep its station platforms in *safe* condition for the use of passengers is not cause for reversal where no specific objection was taken to the court's failure to limit or explain the meaning of the term "safe." (Page 257.)

2. SAME—INSTRUCTION.—In an action to recover from a railway company damages sustained by a passenger while stepping from a train, where the only issue was whether or not the injury was caused by stepping upon a defective platform, the defendant asked the court to instruct as follows: "If you find from the evidence that plaintiff's fall was occasioned by her taking too short a step to reach the platform, your verdict will be for the defendant." The court modified the above by adding, "provided you find that the same was the cause of the accident, and that the defendant was not negligent on its part, which was the proximate cause of the injury complained of." *Held* that the instruction should have been given as asked; that the modification was prejudicial in permitting the jury to find defendant liable, though the injury resulted from a cause other than stepping upon a defective platform, and in excluding consideration of the defense of contributory negligence. (Page 261.)

Appeal from Clay Circuit Court, Western District.

FELIX G. TAYLOR, Judge.

Dodge & Johnson, for appellant.

Railroad companies are not insurers of the safety of persons rightfully on their platforms. The only duty they owe such persons is to use ordinary care to keep their platforms, etc., in safe condition. 48 Ark. 493; 61 Ark. 155; 55 Ark. 432; *ib.* 19; 13 Peters, 181; Thomp. Car. of Pass. 124, 183, 199; 56 N. Y. 655; 11 Allen, 312. The duty of exercising the highest degree of care, and diligence continues only during the transportation on the cars. Thomp. Car. Pass. 104; 57 Ark. 298. There is an utter failure to prove any actionable negligence with respect to the safety of the platform. Incompetent testimony was admitted.

Annie Barnett, appellee, pro se.

Railway companies are bound to keep in a *safe condition* all their platforms, etc., to which passengers have a right and naturally do resort to, in their approach to or exit from the company's cars. Whit. Smith Neg. 390; 26 Ia. 124; 37 Ark. 517; 2 Wood, Railways, 1170; 46 Ark. 195, and cases cited; 48 Ark. 125; 19 S. W. 182; 29 S. W. 860; 2 So. 586; 5 Am. & Eng. Enc. Law (2 Ed.), 572, 586, 587, and notes; 76 Fed. 519. Sufficient foundation was laid, in appellee's testimony, upon which to base a hypothetical question to an expert. 1 Greenl. Ev. § 440; 1 Cent. Rep. 625; 108 Pa. St. 395; 9 Car. 601. Testimony founded on facts known to witness is not incompetent. 61 Pa. St. 404; 1 Cent. Rep. 143; 110 Pa. St. 339; 17 N. Y. 350; 2 L. R. A. 669, and note; 39 S. W. 550; 63 Ark. 391. The fact that the platform was defective and that the plaintiff was injured was sufficient to cast the burden on appellant to prove that it was not negligent. 21 S. W. 883; 54 Ark. 213; 15 S. W. 610; 5 Am. & Eng. Enc. Law (2 Ed.), 522. There being no error in the instructions, this court will not disturb the findings of fact. 48 Ark. 495; 37 S. W. 867.

WOOD, J. This suit is to recover damages for personal injuries produced by the alleged negligence of appellant in keeping a defective platform. The answer denied negligence, and charged appellee with contributory negligence. The evidence on behalf of the appellee tended to show that, as she debarked from one of appellant's trains at Corning station, she was injured in stepping upon a plank of the platform which was loose and tilted to one side, thereby letting her fall. The plank was at the edge of the platform. It lay straight with the track. One of the witnesses testified: "The plank was loose; gave down an inch over the sleeper; would tilt towards the track." Another testified: "If a person stepped right on the edge of the plank, it would raise a little—not a great ways—because the nails had just worked loose. The plank was a solid two-inch plank, but a little loose." On behalf of appellant the evidence tended to prove that the plank was not loose. One witness testified "that he weighed 198 pounds, and the next morning after the injury stepped upon

the plank, and it would not tilt with him. He examined it, and found it sound." Other witnesses testified that they inspected the plank, and did not find anything the matter with it. With the evidence thus conflicting, we would not disturb the verdict upon the question of fact as to the defective platform. But the jury should have been properly instructed as to the degree of care that railroads owe their passengers to protect them from injury by reason of defective platforms.

1. The court instructed the jury as follows: "That it is the duty of the railroad company to keep the platform at its various station houses in good repair and *safe condition* for the use of those who have a legal right to go upon them. And if you find from a preponderance of the evidence that the injury complained of in this case was directly caused by the failure of the defendant railroad company to keep the platform of the depot in repair, then you will find for the plaintiff."

In *McDonald* v. *C. & N. W. R. Co.*, 26 Ia. 124, Judge Dillon, speaking for the court, said: "They [railroads] are bound to keep in safe condition all portions of their platforms and approaches thereto, to which the public do, or naturally would resort." Our own court in *Tex. & St. L. R. Co.* v. *Orr*, 46 Ark. 195, uses this exact language, and in *St. L., I. M. & S. R. Co.* v. *Cantrell*, 37 Ark. 517, and *L. R. & F. S. R. Co.* v. *Cavenesse*, 48 Ark. 125, this court has apparently sanctioned the rule in the broad terms as above quoted. An examination of the facts of the Arkansas cases, however, will show that this court was not called upon to discuss, nor did it have in mind, the care which should be exercised by a railroad to furnish its passengers safe platforms at its stations for entrance to and exit from its trains. In *Tex. & St. L. R. Co.* v. *Orr* the injury was produced by an "open ditch and trestle," the existence of which the railway knew, and the railroad did not pretend to deny that it was negligence to thus keep it, provided the passengers were justified in passing over the route in which the said ditch and trestle lay. In *St. L., I. M. & S. R. Co.* v. *Cantrell*, and *L. R. & F. S. R. Co.* v. *Cavenesse*, *supra*, the injuries complained of were not produced by defective platforms at all. In none of these cases, therefore, was the exact question we have here involved.

In speaking of the duties of masters to servants or railroads to passengers, text writers and judges often use expressions like these, to-wit: "They are bound to furnish *safe machinery, safe appliances, safe places to work, safe platforms,*" etc. Hutch. Car. § 516; *Penn. R. Co.* v. *Henderson*, 51 Pa. St. 315; *Liscomb* v. *Ry. & Trans. Co.*, 6 Lans. 75; *Toledo, etc. R. Co.* v. *Grush*, 67 Ill. 262; *McDonald* v. *C. & N. W. Ry. supra; Tex. & St. L. R. Co.* v. *Orr.* and *L. R. & Ft. S. R. Co.* v. *Cavenesse, supra;* Ray, Neg. Imp. Duties, 91; *Wallace* v. *Wilmington & N. R. Co.*, 18 Atl. Rep. 818; 2 Wood, Railways, pp. 1340, 1341, 1344.

But in none of the works or adjudicated cases does the word "safe," when thus used, have an absolute or unqualified meaning; for that would make these classes of persons guarantors or insurers of the safety of their servants, employees and passengers. Every legal tyro knows that such is not the law. "Accidents, strictly speaking, are those things which human prescience and prudence can neither foresee nor forestall. Our own court in *L. R. & F. S. R. Co.* v. *Cavenesse, supra*, shows clearly that the word "safe," when used as above, does not have an absolute or unqualified meaning; for, while it is said "that it is the duty of the carrier to keep its stations and approaches thereto in good condition, and to provide *safe* and convenient means of entrance and departure," it is also said that carriers of passengers are not insurers of the safety of their passengers, as they are of goods, at common law. While lawyers understand this, jurors may not. So, to prevent any misapprehension of the term "safe," when employed as above, the trial court, if requested, should so define it as to present the real duty of railroads to their passengers in the matter of shielding them against dangers growing out of the use of station platforms. *What is that duty?* Railroads, according to the decided weight of authority, must exercise ordinary care in providing station platforms that will secure their passengers, in so far as such care can do so, against any injury that may result in the use of them. 1 Fetter, Car Pass. § 47; *Kelly* v. *Manhattan Ry. Co.*, 112 N. Y. 443; 20 N. E. Rep. 383; *Lafflin* v. *Buffalo R. Co.*, 106 N. Y. 136; *Taylor* v. *Penn Co.*, 50 Fed Rep. 755; 4 Elliott, Rail-

roads, § 1590, cases cited; Hutchinson, Car. § 521a; *Moreland* v. *Boston & P. R. Co.*, 141 Mass. 31.

Such "ordinary care" is that which a man of ordinary prudence would exercise under the circumstances to accomplish the end in view, namely, the safety of the passenger. As was said in *Central R. & B. Co.* v. *Ryles*, 84 Ga. 420, 11 S. E. 499, ordinary care "is a relative, and not an absolute term. The degree of care and foresight which it is necessary to use (in any given case) must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is to be anticipated and guarded against." *St. L., I. M & S. R. Co.* v. *Hecht*, 38 Ark. 357; Bailey's Master & Servant, "Care," § 963 *et seq.*, 4 Elliott, Roilroads, p. 2479. It will thus be seen that even the ordinary care which requires a degree of prudence and vigilance commensurate with the perils to be apprehended and the injuries to be avoided may require a high degree of care, because, as the sequel in this case shows, assuming that the verdict was correct, the danger was great. Passengers are invited by railroads upon their station platforms for the purpose of making entrance to and exit from their trains. There is always more or less noise and confusion incident to the running of trains. Then the jostling and scurrying to and fro of the crowds, passengers and others, coming and going, altogether, make the circumstances quite unpropitious for passengers to make minute or extended investigations for their own safety. They do not have to do so. They may naturally and properly expect that the railroad has used every reasonable and prudent precaution to make their platforms safe, and may rest upon that assurance, only exercising ordinary care to prevent injury to themselves in the use of them.

Measured by the law as thus announced, the instruction above quoted was susceptible of misconstruction by the jury, inasmuch as they might have concluded therefrom that the railroad was bound to provide a platform that was absolutely safe. The court, however, doubtless used the term "*safe*" in the instruction in the qualified sense it is understood by the profession, and meant that it should be so understood by the jury, Appellant's counsel, it is true, objected to the instruction, but they must have

known the meaning which the court intended the request should convey. Yet they did not ask the court to limit or explain the meaning of the term "safe," as used in the above instruction. We think, under the circumstances, to have made their objection avail here, they should have done so. This would have been but fair to the trial judge, and, had he refused, then appellant would have been in proper attitude to press for reversal on account of the ruling of the court upon the above instruction.

2. Appellant also asked the following instructions: "(10) If you find from the evidence that plaintiff's fall was occasioned by her taking too short a step to reach the platform, your verdict will be for the defendant. (11) Unless you find that plaintiff's fall was occasioned by her stepping upon the platform, and the plank tilting, thereby causing her foot to slip off, your verdict will be for the defendant." The court refused the eleventh and gave the tenth in a modified form, as follows: "(10) If you find from the evidence that plaintiff's fall was occasioned by her taking to short a step to reach the platform, your verdict will be for the defendant, provided you find that the same was the cause of the accident, and that the defendant was not negligent on its part, which was the proximate cause of the injury complained of."

After waiving her claim of right to recover on the ground that the platform was not sufficiently lighted, and after the court had instructed the jury that the defendant owed no duty to assist persons off of its trains, the only issues left under the pleadings and proof were as to whether or not the defendant had permitted a plank upon its platform to become loose, which caused the injury to the plaintiff when she stepped upon same, and whether or not the plaintiff stepped far enough to reach the platform. If the plaintiff stepped far enough to reach the platform, then the proximate cause of her injury, taking the verdict of the jury as correct on the facts, was the loose plank upon the platform. If she did not step far enough to reach the platform, then her failing to do so was the proximate cause of her injury and not the loose plank upon the platform. It is apparent, therefore, that the giving of the tenth instruction in its modified form was erroneous and prejudicial. The proviso or

modification added to it by the court neutralized the effect intended by the first part of the instruction, and deprived appellant of its defense of contributory negligence under the proof. It is not contended by appellee that the platform was too far from the steps of the car for her to step upon, nor that she was in any other manner injured through the negligence of appellant than in its permitting the plank upon its platform to become loose upon which she stepped in getting off the train. It is obvious that, if appellee did not step upon the platform at all, the loose plank could have nothing to do with her injury. But, under the modified instruction, the jury, although they might have found that appellee did not step far enough to reach the platform, were yet authorized to find some other proximate cause of the injury.

While it might not have been reversible error to have refused the tenth and eleventh instructions, in view of other instructions on negligence and contributory negligence given by the court, it was manifest error to give the tenth instruction with the modification. But the tenth and eleventh requests as asked by the appellee presented the law upon the direct issues raised on the questions of negligence and contributory negligence, and the court might well have given them.

For the error in giving the tenth instruction as modified by the court, the judgment is reversed, and the cause is remanded for new trial.

MASONS' FRATERNAL ACCIDENT ASSOCIATION v. RILEY.

Opinion delivered April 30, 1898.

1. ACCIDENT POLICY—INTENTIONAL KILLING—EVIDENCE.—In an action upon an accident policy, which provided that the insurer should not be liable on account of death resulting from injuries intentionally inflicted upon assured by himself or another, where it is shown that insured was found dead from gunshot wounds near the residence of S., defendant may prove that insured and S. had previously disagreed and disputed about a business transaction. (Page 268.)

2. EVIDENCE—RES GESTAE.—Where the defense to an action on an accident policy was that insured was intentionally killed by another, it is competent to show that, a few minutes after the killing, S. surrendered to an officer, saying that he had killed insured while retreating; but proof of what S. said on the day after the killing, being to the same effect, is too remote; so also as to his testimony when he was subsequently put upon trial for killing insured. (Page 268.)

3. SAME—ADMISSIBILITY.—In an action on an accident policy it is not admissible to introduce in evidence an indictment of a certain person for killing insured, to show that such killing was intentional; nor is it admissible for the same purpose to introduce the record of a pardon of that person for such killing. (Page 268.)

4. INSTRUCTION—WHEN MISLEADING.—An instruction that the jury "will indulge in no presumptions, but they will try the issues between the parties strictly according to the evidence introduced, and that no suppositions shall be indulged in by them," is misleading where the evidence as to a material issue was partly circumstantial. (Page 268.)

5. FRATERNAL ASSOCIATION—BENEFIT CERTIFICATE—LIABILITY.—A fraternal accident association which by its certificate undertakes to pay a certain sum on the death of insured, provided the amount realized by the association from one assessment of two dollars on all holders of certificates assessable at the date of the accident shall be equal to that sum, is *prima facie* bound, when the right to recover is shown, to pay the maximum amount of its liability, as shown in the contract, and the burden is on it to prove that a less amount would have been realized by an assessment. (Page 269.)

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

Irving Reinberger and *N. T. White*, for appellants.

The proper proceeding, under the terms of the policy, would be a suit in equity for specific performance of the contract to make an assessment for the payment of the policy. 24 Fed. 685; 114 Ill. 108; 72 Ia. 191; 50 Mo. 29. If an action at law were proper upon such a contract, the complaint fails to state facts sufficient to constitute a cause of action, because: (1) It fails to allege a breach of the covenant to make the assessment, etc. 3 Enc. Pl. & Pr. 653; 5 *ib.* 369, 370; 3 *ib.* 655; 5 *ib.* 376; 60 Cal. 341; Bacon, Ben. Soc. § 453, and cases; 94 Mo. 35; 89 Cal. 599; 48 Conn. 98; 20 Ill. App. 595; 24 Fed. 685. (2) It fails to recite with particularity the ultimate facts relied upon as tending to prove that the shooting was accidental. 4 Enc. Pl. & Pr. 605. In the inquiry as to

whether death was accidental or designed, facts apparently collateral become relevant if they tend to show motive in any one for the act. Jones, Evidence, §§ 138, 142. So with any circumstance tending to strengthen or weaken either of these theories. 42 Ark. 542; Jones, Ev. §§ 138, 142; 32 S. W. 31. Acts and declarations which are explanatory of a transaction, and which take place either at the time of the main event, so as to emanate directly from the state of mind which induced the main event, or which take place subsequently, but under circumstances which show them not to be premeditated or concocted, are admissible in evidence as part of the *res gestæ*. 43 Ark. 99; 1 Taylor, Ev. (7 Ed.) § 588; 48 Ark. 338; Whart. Evid. § 258–267; 116 Ind. 566; 43 Ark. 293; Jones Ev. § 351; 8 Wall. 401; 2 Bing. 99; 32 S. W. 31; 2 Dill. (U.S.) 154; 85 Ga. 751; 61 Ill. App. 140; 2 Cinn. Sup. Ct. Rep. 98; S. C. 4 Bigelow, L. & A. Rep. 366; 40 S. W. 910; Starkie, Evid. 47; 24 Pick. 244, 245. Declarations against interest of declarant are admissible. Jones, Ev. § 327; 5 Am. & Eng. Enc. Law, 36; Steph. Ev. art. 28. Confessions of guilt are presumed to be true. Starkie, Evid. (9 Am. Ed.) 744. It is revelant to put in evidence any circumstance which tends to make the proposition at issue more or less reasonable, or which tends to show motive, where it is material. Whart. Ev. § 21; Steph. Ev. art. 1; *ib.* 7; *ib.* 12; Jones, Ev. § 141–2; 147 U. S. 150; 11 Pa. St. 307. It was also error for the court to refuse to allow appellant to prove testimony of the slayer of insured, given on his trial for the killing, because the appellee and his *cestui que trust* were privy in law to the state in the prosecution. 1 Greenl. Ev. § 164; 14 Ind. App. 611; 81 Ga. 668. The letter of appellant, replying to notification of death of insured, should have been admitted. 15 Am. & Eng. Enc. Law, 684. The first instruction given for appellee is erroneous, because it makes appellant liable for the natural death of insured, when its contract of insurance was against accidental death only. 87 Ky. 300; 38 Mo. App. 385. It was error for the court to tell the jury that they were not allowed to indulge any presumption as to whether deceased was murdered or not. The presumption of crime or violence was one of fact, and the jury was entitled to consider all facts and circumstances introduced in evidence,

in arriving at their conclusion. 1 Ph. Ev. (C. & H. notes,) p. 598; 1 Greenl. Ev. (14 Ed.) § 14; Best's Ev. (Am. Ed.) § 303; 127 U. S. 667; 34 S. W. 801. Fraud may be established by indirect evidence. 15 Tex. 219; 64 Ala. 525; 5 B. Mon. 43; 51 Ill. 327; 48 Ill. 323; 49 *id.* 62; 25 Mich. 367; 47 Tex. 138; 6 Mo. App. 6. Death by intentional homicide is not to be regarded as incidental. 30 S. W. 879; 80 Fed. 368; 12 N. Y. 472. It was also error to instruct the jury that the measure of damages was the maximum amount named in the certificate. The contract of the insurer was to pay as much (not exceeding a certain limit) as should be raised by assessment on the members at a certain rate. This was the measure of their liability, if they were liable. 24 Fed. 685; 68 Md. 465; 64 N. H. 291; 11 N. Y. Supp. 462; 55 Hun, 574; 46 Hun, 426; 51 Hun, 495; 29 N. Y. Supp. 421; Sand. & H. Dig., §§ 5761, 5782; 4 Ark. 534; 2 N. Y. Supp. 481. Appellee's proof actually established appellant's defense of death by intentional homicide; hence the court should not have allowed a recovery by appellee. 57 Ark. 461; Bliss, Life Ins. § 259; 41 S. W. 9; 30 *ib.* 879; 127 U. S. 667; 38 Mo. App. 385; 77 Cal. 246; 15 Col. 351; 98 Mich. 338; 63 N. W. 276.

BATTLE J. This action was instituted by W. Riley, as administrator of J. H. Culpepper, deceased, against the Masons' Fraternal Accident Association, and is based on the obligation of the association, called a certificate, whereby it constituted J. H. Culpepper one of its certificate holders, and agreed to pay to his executors or administrators the sum of five thousand dollars in the event he should die from bodily injury caused by external, violent, and accidental means, within ninety days after the accident so causing it, upon condition, however, that this sum was not to be paid unless the amount "realized by the association from one assessment of two dollars, made and assessed upon all assessable holders of certificates assessable at the date of the accident," should be equal to such sum; and, in the event it should not, the sum so realized should be paid, and nothing more; and it was provided that the association would not agree or be liable to pay any sum of money on account of death resulting, wholly or partly, directly

or indirectly, from injuries intentionally inflicted upon Culpepper by himself or any other person.

Plaintiff, among other things, alleged that Culpepper was accidentally killed on the 10th of October, 1892; that, at the time of the accident, "there were more than twenty-five hundred of assessable certificates of the defendant association liable to assessment for the purpose of accumulating a fund to an amount sufficient to pay the plaintiff and the beneficiaries in said policy the said sum of five thousand dollars;" and that no part of the five thousand dollars has been paid.

The defendant answered "that it is provided in the contract sued on that its liability should not cover death resulting, wholly or partly, directly or indirectly, from injuries intentionally inflicted upon the insured by himself or any other person, and that the insured had come to his death wholly and directly from injuries intentionally inflicted upon him by on Isreal Stewart. That by the terms of the contract defendant is not liable to pay, nor plaintiff entitled to receive, a greater sum than might be realized by defendant, not, however, exceeding $5,000 from one assessment, of not exceeding $2, levied upon each and all assessable holders of its assessable certificates at the time of the insured's death; and that defendant denies that the sum of $5,000, or any other sum, was or could be raised by one such assessment."

E. D. Culpepper testified: He was the father J. H. Culpepper. He last saw his son alive between 11 and 12 o'clock a. m. on the 10th of October, 1892. He, the son, was on horseback, on the Boyd place, immediately opposite Pine Bluff, on the Arkansas river. He next saw his son, J. H. Culpepper, twenty or thirty minutes later, lying dead, face downward, on the ground, near the residence on the Boyd place, then occupied by Isreal Stewart, with gunshot wounds on his body, extending from lower part of shoulder blades to back of his head, behind the ears. Shortly before this, he (witness) heard the report of a gun. At this time he was eighty or ninety yards from the residence. As soon as he could walk in the gate, some five or six steps, he saw the head of Stewart extended beyond the door case, looking out the door, but could not see any other portion of his body. He saw no one else.

His son's body then lay about twenty steps from Stewart. The defendant offered to prove by the witness that his son and Stewart had previously disagreed and disputed about some mules, and the court would not permit it to do so, and it excepted.

J. L. Goree testified that he examined the body of J. H. Culpepper after he was dead, and that he died from wounds inflicted with a gun by some one other than the deceased; that the wounds ranged upwards, and indicated that they were inflicted while deceased was leaning forward.

The defendant, having proved that Israel Stewart died before trial in this action, offered to prove by A. J. Stewart what Israel Stewart said to him about the killing in a conversation which occurred on the day after Culpepper was shot, and the court refused to admit the testimony.

It also offered to prove by J. T. Murdaugh that Israel Stewart walked across the bridge over the river at Pine Bluff, with a gun on his shoulder, and, delivering to him his gun, and saying, "I am your prisoner," surrendered, and witness took him and confined him in jail. At this time Stewart was very much affected and fatigued, and told witness that J. H. Culpepper had abused and attacked him, and upon resistance fled, and he (Stewart) shot him with a shotgun, and killed him while he was retreating. And the court refused to admit the testimony.

The defendant offered to prove the same thing by H. King White, and that it occurred on the 10th of October, 1892, about thirty minutes after the killing; and that he heard Stewart testify in a trial for killing Culpepper, and that he testified to the same thing he related, as before stated; and the court excluded the testimony.

Defendant also offered in evidence the records of the circuit court of Jefferson county, Arkansas, showing that at its September term, 1892, Israel Stewart was indicted for the murder of J. H. Culpepper in said county, on October 10, 1892, that a bench warrant was issued for his arrest, and he was arrested thereunder; that on November 1, 1892, he was arrainged upon said indictment, and pleaded not guilty thereto, and that,

on the same day, upon his application, the venue of the prosecution was changed to Arkansas county. The court excluded these records, and defendant excepted.

Defendant also offered in evidence, and the court excluded, a duly certified copy of the record of pardons by the governor of the state of Arkansas, showing the pardon of Isreal Stewart of and from the consequences of his sentence by the Arkansas circuit court, at its March term, 1893, to the state penitentiary for five years, for the killing of J. H. Culpepper, and the defendant excepted.

The court instructed the jury, over the objections of the defendant, as follows; "The court instructs the jury that in the trial of this case they will indulge in no presumptions, but they will try the issues between the parties strictly according to the evidence introduced; and that no suppositions shall be indulged in by them." And refused to instruct the jury, at the request of the defendant, as follows: (2) "The court instructs the jury that even if the insured, J. H. Culpepper, did not die from any cause excepted in the certificate, and all the conditions thereof have been complied with by the plaintiff and those he represents, still the only obligation on the defendant is to levy and collect an assessment to meet the plaintiff's claim in accordance with the terms of the certificate sued on; and that if the defendant has failed to levy or collect such an assessment, the jury can award the plaintiff only nominal damages. And the jury are further instructed that they cannot award plaintiff even nominal damages, unless they also believe from the evidence that the plaintiff demanded and defendant failed to lay such assessment, and that the burden of proving such a demand and failure is upon the plaintiff." (3) "Even though the jury believe from the evidence that J. H. Culpepper did not come to his death by any means excepted in the certificate sued on, and that all of the conditions thereof have been complied with by him and his representatives, still the jury cannot award the plaintiff a greater sum, not, however, exceeding $5,000, than they shall believe from the evidence was or could be realized from an assessment levied and collected in accordance with the terms of the certificate; and the burden of proving the levying of such assessment, and the amount realized, or which could

have been realized, thereunder by the defendant, is upon the plaintiff."

The jury returned a verdict in favor of the plaintiff for $5,821.66, and, judgment having been rendered against the defendant for that amount, it appealed.

The court erred in excluding the testimony of E. D. Culpepper to the effect that his son and Israel Stewart had disagreed and disputed about some business transaction. It was competent to show the existence of ill feeling between them, and for the purpose of throwing light upon the manner of the killing of Culpepper, and for the purpose of showing that Stewart had a motive for killing him, or that there might have been a difficulty between them which resulted in the intentional killing of the former by the latter.

The testimony of White and Murdaugh to the effect that Stewart, within thirty minutes after the killing, seemingly very much affected, surrendered himself, and stated that he had killed Culpepper while retreating, should have been admitted. In connection with the testimony of E. D. Culpepper, the testimony excluded as to the disagreement and disputes of J. H. Culpepper and Stewart, and the testimony of Goree that the wounds indicated that they were inflicted while Culpepper was leaning forward, tending to point to Stewart as the party who had killed Culpepper, and that he had done so intentionally. The statement of Stewart, within thirty minutes after the kill ing, at the time he surrendered, derives a degree of credit from the circumstances and facts of the case, independently of any credit that could be given to Stewart, and by its credit so derived points to the guilty party and the manner of the killing, and for this reason was admissible. *Greenfield* v. *People*, 85 N. Y. 75; *Woolfolk* v. *State*, 81 Ga. 565; *Standard, etc., Ins. Co.* v. *Askew*, 32 S. W. Rep. 31; 1 Starkie Evidence, 47.

The other testimony excluded was too remote, detached from, and disconnected, with, the killing, and should not have been admitted.

The court erred in instructing the jury that they should not indulge in presumptions, but should try the issues strictly according to the evidence introduced. This was misleading, and calculated to lead the jury to believe that an intentional

killing of Culpepper could not be proved except by direct and positive evidence. This is not true. It may be shown by circumstantial evidence, and the jury may infer it from facts and circumstance proved which justify the inference.

As to the burden of proving the amount realized, or which could have been realized, by an assessment levied according to the terms of the contract sued on, the authorities are not agreed. We are of the opinion that, where the party suing on such contracts is entitled to recover, the society or association which agrees to make the assessment upon its members, and to pay the amount realized, not exceeding a certain amount, to the beneficiaries named in the contract, is "*prima facie* bound to pay the *maximum* amount of its liability, as specified in the contract, and the burden is on the society to prove that a less amount would have been realized by an assessment." It would be difficult, if not impossible, for the beneficiaries in such contracts, or their representatives, to show the number of the assessable members of the society, and the amount that could be realized by an assessment upon them. These are facts within the peculiar knowledge of the society. Its books should show the number of its members, and they are in the posssession of its officers. If the members are such in numbers that an assessment would not produce the maximum, that fact ought to be in the knowledge of its officers, "and they should set it up in an answer, and make good the answer by proof, as they readily could, if true." Any other rule would make such contracts, as said in *Lueders* v. *Insurance Company*, 12 Fed. Rep. 465, "a mere delusion and snare." *Elkhart Mutual Ass.* v. *Houghton*, 103 Ind. 26; *Lueders* v. *Insurance Company*, 12 Fed. Rep. 465; Niblack, Accident Insurance and Benefit Societies (2 Ed.), §§ 340, 343, and cases cited; 2 Bacon, Benefit Societies and Life Insurance (2 Ed.), § 453.

The instructions asked for by the appellant were properly refused by the court.

For the errors indicated, the judgment of the circuit court is set aside, and the cause is remanded for a new trial.

BALL-WARREN COMMISSION COMPANY v. WILLS.

Opinion delivered April 30, 1898.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WITHHOLDING ASSETS.—Where an insolvent debtor signed and acknowledged a deed of assignment of all his goods in his storehouse for the benefit of his creditors, and immediately thereafter, and before such deed was delivered, fraudulently removed a valuable part of such goods from the storehouse, the deed is tainted with the fraud. (Page 273.)

Appeal from Pope Circuit Court.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

This was a suit by attachment. W. J. Stowers intervened, and claimed the property attached, under a deed of assignment. The issue raised by the interplea was tried by the court, which found the facts as follows:

"The deed of assignment relied on by the interpleader, W. J. Stowers, as evidence of his title to the property in controversy, was executed on the 24th day of November, 1893, by the defendant, F. J. Wills. The Bank of Morrilton, of which the said Stowers is the cashier, was a large creditor of said F. J. Wills, together with others. The said Wills contemplated making a partial assignment of his property for the benefit of his creditors (said bank and others mentioned in said decree of assignment). About noon on the 24th day of November, 1893, W. L. Moose, attorney of said Wills, called on said W. J. Stowers, advised him of what Wills was about to do, and asked said Stowers if he would accept a deed from said Wills conveying his property to him (Stowers) as assignee for the benefit of the creditors of Wills named in said deed. The said Stowers then and there signified his willingness to accept such deed, and afterwards, about 4 o'clock p. m. of the same day, the said F. J. Wills, intending to complete the title to the property and choses in action mentioned and described in said deed of assignment to W. J. Stowers for the benefit of his creditors, in

the order mentioned in said deed, signed and acknowledged the same before J. W. Massey, a notary public, and left said deed with said Massey, intending that he should deliver the same to said Stowers; but Charles C. Reid, attorney for said Wills, instructed said Massey not to deliver said deed to said Stowers until he (Reid) examined the schedule of the property made part of said deed, to ascertain if they were correct; and, not being notified of any errors in the schedule, said Massey delivered said deed to W. J. Stowers between 7 and 8 o'clock the evening of the same day above mentioned, pursuant to the order of the attorney of F. J. Wills. It was the intention of the said Wills, when he acknowledged and left said deed with said Massey, that the said Massey should deliver it to Stowers, and to pass title *in presenti* to said Stowers to all of his general stock of merchandise and articles of trade in his storehouse at Morrilton, and all other property and choses in action thereby undertaken to be conveyed. After the said Wills had delivered said deed to Massey, intending him (Massey) to deliver it to Stowers, but before Massey actually delivered the deed to Stowers, Wills fraudulently spirited away two or more wagon loads of goods from said storehouse conveyed by said deed, with the intent to delay, cheat and defraud his creditors in the collection of their debts, without the knowledge, consent or connivance of said Stowers, or other of his creditors embraced in and provided for by said deed of assignment. The court further finds the defendant Wills, for some weeks prior to the execution of the deed of assignment, shipped about twenty-two wagon loads of goods to one W. F. Kirkland, at Damascus, Ark., for the fraudulent purpose of cheating and delaying his (defendant's) creditors, but that his fraud in thus shipping his goods was prior to the execution of the deed of assignment, and did not enter into it. [To the finding of the court that the fraud did not enter into the assignment, the plaintiff excepted.] The fraud of Wills in spiriting away the goods from the storehouse after he had signed and acknowledged the deed and left it with J. W. Massey, intending for him to deliver it to Stowers, was a fraud perpetrated by him subsequent to the execution of the deed of assignment, and wholly unconnected with it, and did not in any manner enter into the

assignment, and said deed is valid, and was made for the benefit of *bona fide* creditors, and conveyed the property in said deed described, and for the purposes therein set forth and contained. To the ruling of the court that the fraud of Wills in spiriting away the goods from the storehouse after he had delivered the deed to Massey did not enter into and vitiate the deed of assignment, the plaintiff excepted."

The deed of assignment purported to convey "all goods, wares and merchandise now in the storehouse occupied by me (Wills) in block four (4) fronting at Moose street, and in the warehouse in the rear thereof, all in the town of Morrilton, Ark.;" also certain lands specifically described, and certain notes and accounts described in a schedule attached to the deed.

Carroll Armstrong and *J. M. Moore*, for appellant.

An assignment is void when it is part of a scheme to defraud creditors, and is calculated to promote that object. 59 Ark. 562. The presumption of fraud may grow, not alone from the face of the instrument, but from concurrent acts, surrounding circumstances and prior and subsequent conduct of the parties to the instrument. 41 Ark. 192; 46 Ark. 405, 411. The assignment was void because of the intentional withholding of assets. 46 Ark. 405; 53 Ark. 81, 87.

Moose & Reid and *Ratcliffe & Fletcher*, for appellees.

The assignment did not defraud any one, and cannot be held fraudulent, whatever may have been the motive. Bump, Fraud. Conv. §§ 171, 333. A fraudulent disposition of property invalidates a subsequent assignment only when the deed of assignment is part of a scheme to defraud creditors, and the provisions of the deed are calculated to promote that object. 4 U.S. App. 72; 59 Ark. 271. This was a specific assignment, and therefore it had no tendency to deceive or defraud creditors, as it might have had, had it purported to be a general assignment. Bump, Fraud. Conv. § 330. The taking of the goods from the stock before or after the delivery of the deed of assignment did not enter into the assigment. 54 Ark. 129; 59 Ark. 503.

WOOD, J., (after stating the facts). The natural and, to us, irresistible conclusion to be drawn from the facts, as found by the court, is that the deed of assignment was but a part of a scheme to defraud creditors, and that it was well calculated to subserve that purpose. We do not think the deed itself in this case can properly be divorced from the fraudulent acts which immediately precede and follow its signing and acknowledgement. The deed is but an emanation of that same fraudulent intention and disposition which gave rise to the frauds found by the court. We need not expect to find fraud advertised in the face of a deed of assignment that has been made to defraud creditors, for that would defeat the very purpose of its making, which is, by a fair and honest outward show, to hide the rottenness within, to allay the suspicion of creditors, and thus to forestall inquiry into, and the uprooting of, fraudulent practices. *Probst* v. *Welden*, 46 Ark. 405, 411. Hence it is that the deed itself must always be passed upon in the light of its environments. Concomitant and prior and subsequent acts of fraud, when so closely connected as to contaminate the deed, should be given their legitimate force. *Martin* v. *Ogden*, 41 Ark. 192.

Although the court finds that it was the intention of the assignor, when he acknowledged and left the deed with the notary public, that same should convey title *in presenti* to the assignee, there was in fact no delivery of the deed to the assignee until same passed into his hands at 7 or 8o'clock p. m. of the day the deed was executed. After the deed was acknowledged (4 o'clock p. m.) and left with the notary for delivery, the agent of the assignor instructed the notary to hold same to give him an opportunity to examine the schedule made part of the deed to see if the same were correct. It thus appears that the assignor reserved and had control over the deed until it was in fact delivered into the hands of the assignee. At the time the deed was acknowledged the assignor represented to the assignee, in the face of it, that it conveyed title to all the stock of goods in the store he was then occupying, and two or three hours later, when the deed was delivered, the store contained some two wagon loads less of goods than it did when the deed had been signed and acknowledged, the said goods having in the mean-

time been abstracted by the assignor without the consent or knowledge of the assignee. This conduct of the assignor was certainly a withholding of assets for his own benefit, which he pretended to be conveying for the benefit of creditors. He pretended that he was conveying to the assignee all the stock that was then in the storehouse, when, in truth and in fact, he was not conveying them all, but withholding a valuable part. And the circumstances lead to no other reasonable inference than that he knew, at the time he signed the deed representing that it conveyed all of a certain stock of goods, that said deed would not in fact convey all of said goods, because he, the assignor, intended that, before the deed should be delivered, a considerable and valuable portion of the goods should be taken away for the assignor's own benefit. This was a gross and palpable fraud, which was contemplated in the making of the assignment, entered into it, and vitiated the whole transaction. The fraud of the assignor avoids the assignment, and although there are deserving creditors who must suffer by reason of the setting aside of the assignment, there are also deserving creditors who will suffer if it is not declared void. So they must all be left where the law places them after the fraudulent assignment is wiped out.

Reversed and remanded, with directions to enter judgment for appellant upon the finding of facts.

HAGLIN v. APPLE.

Opinion delivered May 7, 1898.

1. FALSE IMPRISONMENT—PLEADING.—A count in a complaint which alleges that in a certain proceeding defendants falsely imprisoned the plaintiff, and deprived him of his liberty for about 53 hours, which imprisonment was unlawful, with force, without probable cause, and on a pretended charge of contempt before a justice of the peace, and alleges that plaintiff was damaged in a certain sum, sets out facts sufficient to constitute a cause of action for false imprisonment. (Page 278.)

2. MALICIOUS PROSECUTION—PLEADING.—A count in a complaint for malicious prosecution which fails to state explicitly that the prosecution complained of was without probable cause, and had terminated in plaintiff's favor, does not state a cause of action. (Page 278.)

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

Action by Haglin against Apple and others for malicious prosecution and false imprisonment. The complaint contained two counts, as follows:

(1) "The above named plaintiff, complaining of the defendants above named, says: That on the 8th day of January, 1895, the defendants wrongfully and maliciously, intending to injure, humiliate and degrade this plaintiff, as well as to oppress and extort money or property from him, caused and procured M. D. Vance, justice as aforesaid, to issue a summons in a civil cause then pending before him, wherein Ike Apple was plaintiff, and this plaintiff, Alva R. Haglin, the defendant, commanding this plaintiff to immediately come before said justice, and show cause why he should not be punished for contempt in refusing to permit the execution of an order of said court to take pos session of certain property in said case, as well as to be examined on oath concerning said property. That he immediately appeared before said court, and answered promptly, truthfully, and without evasion, all questions propounded to him concerning said property. That, notwithstanding his appearance and answers as aforesaid, said defendants did, on the 12th day of January, 1895, maliciously and with intent as aforesaid, counsel, advise and procure said justice to wrongfully adjudge plaintiff to be in contempt of court, because he did not deliver to said constable certain property, which was wearing apparel, and most of which he then had in court upon his person, and wrongfully and maliciously, and with intent as aforesaid, counseled, advised and procured said justice to sentence him, the plaintiff, to pay a fine of ten ($10) dollars and costs, and to be confined in the Sebastian county jail, Fort Smith district, for the period of five (5) days. And said justice delivered him to the constable, who wrongfully held him in custody for the space of five hours, and then delivered him to the sheriff, who wrongfully received him in jail, and held him in custody for forty-eight hours. That in so doing the defendants acted maliciously and without probable cause. That on the 14th day of January, 1895, this plaintiff was

brought before Judge J. H. Holland upon a writ of *habeas corpus*, and the legality of his imprisonment was inquired into, and said judgment directing his imprisonment was held to be absolutely void, and he was released, and said imprisonment is at an end. That he was forced to and did employ attorneys to procure his release, and to expend his attorney's fees and other necessary expense, the sum of three hundred and four dollars and forty cents ($304.40.) That he was otherwise damaged in the sum of ten thousand ($10,000) dollars. The premises considered, he prays judgment for $10,304.40 damages and costs.

(2) "The plaintiff above named, further complaining of the said defendants for cause, says: That in the proceedings hereinbefore referred to, and on the 12th day of January, 1895, the defendants falsely imprisoned the plaintiff, and deprived him of his liberty for a great length of time, to-wit: for about fifty-three hours, which imprisonment was unlawful and with force, and without probable cause, and on a pretended charge of contempt of the court of M. D. Vance, J. P., as aforesaid, in failing to deliver certain goods to the constable aforesaid. That he was forced to expend $304.40 to secure his release, and was otherwise damaged in the sum of ten thousand ($10,000) dollars. The premises considered, he prays judgment for the sum of $10,304.40 for his costs herein, and for all proper relief."

A demurrer was sustained to the complaint, and plaintiff has appealed.

Thos. E. Ward, for appellant.

If a pleading defectively states a good cause of action, or defectively pleads a good defense, the remedy is by motion to make more definite and certain, and not by demurrer. Sand. & H. Dig., § 5754; 31 Ark. 657; 32 Ark. 136; 33 Ark. 405.

Hill & Brizzolara, for appellees.

A complaint, seeking damages for malicious prosecution, must allege that said prosecution was malicious and without probable cause, and the words "falsely and maliciously" are not sufficient. 14 Am. & Eng. Enc. Law; 42, notes 3 and 4; *ib.* 43, notes 1 and 2; 106 Mass. 300; 38 Kas. 567, 571; 36 Conn. 56;

3 Metc. (Ky.) 192; 29 Cal. 644; 109 Mass. 158; 44 Vt. 124; 28 Ill. 308; 12 Kas. 109; 36 N. Y. 11; 42 Ill. 143; 4 Wait's Act. & Def. 347, 349; 66 Mo. App. 231; 48 Pac. 663; 85 Mo. 237, 242; 10 N. Y. 236; 11 Kas. 554, 562; 23 Ill. 526; 10 Johns. (N. Y.) 106; 2 Denio, 617, and note; 6 Barb. 83; 7 Tex. 603; 16 So. 871; 14 Am. Dec. 597, and note; 15 Gratt. 381; 2 W. Va. 242; 4 Wait's Act. & Def. 342, 347; Addison on Torts (Wood's Ed.), §§ 852, 855; 47 Pac. 861; 1 Hilliard Torts, pp. 480, 481, note; 2 Greenl. Evid. § 454; 81 Am. Dec. 479, note; 43 N. Y. Supp. 907; 46 Cent. Law Jour. 238, and notes; Newell, Mal. Pros. 397; 8 Wait's Act. & Def. 871–873; 40 S. W. 63; 17 So. 193; 71 N. W. 558; 32 Ark. 763; 7 C. C. A. 351; S. C. 58 Fed. 534; 33 Ark. 316; 63 Ark. 387. Malicious motive is not material, unless there be also want of probable cause. 32 Ark. 763; 1 Am. & Eng. Enc. Law, 179, § 2, note 3; 5 Col. 1. The complaint must connect the defendant with the act complained of. 17 Ala. 832. As to jurisdiction of justices of the peace to fine and imprison for contempt of court, see: Sand. & H. Dig., §§ 691–2; Rapalje on Contempt, § 155; Church on Habeas Corpus, § 356; 9 Am. & Eng. Enc. Law, 215; 42 N. Y. Supp. 955. The judgment of the justice punishing plaintiff for contempt was not appealable, and the writ of *habeas corpus* could not be converted into a writ of error. 14 Ark. 538; *ib.* 544; 22 Ark. 149; 9 Ark. 259; 48 Ark. 283; 51 Ark. 215; 55 Ark. 275; 60 Ark. 93. The imprisonment was under legal process; hence no action lay for false imprisonment. 7 Am. & Eng. Enc. Law, 663, note 5. A complaint for false imprisonment should aver that the imprisonment was caused or procured by defendant. 8 Enc. Pl. & Pr. 848, note 1. To charge the justice, and those acting with him, for false imprisonment, it must appear that said justice assumed an unwarranted jurisdiction. 5 Ark. 67. Appellee is not liable for the acts of the justice and the officers who committed and confined appellant, under the allegations of the complaint. 7 Gray, 53; 38 Minn. 308; 19 Vt. 551; 10 Am. St. Rep. 326; 7 Cow. 247; 7 Am. & Eng. Enc. Law, 680, note 2, and 681, note 1; 56 N. W. 970. A rule for contempt is the judicial

act of the court issuing it, and therefore cannot be made the foundation for an action for false imprisonment. 23 S. E. 673.

BATTLE, J. The facts set out in the second count of the complaint are sufficient to constitute a cause of action. *Akin* v. *Newell*, 32 Ark. 605. The facts stated in the remainder of the complaint, in connection with the second count, do not show that plaintiff had no cause of action.

The first count is defective in not explicitly showing that the prosecution complained of was without probable cause, and had terminated iu favor of the plaintiff. But this may be amended if the plaintiff may deem it advisable to do so.

The judgment of the circuit court is reversed, and the cause is remanded, with directions to the court to overrule the demurrer.

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WHITE v. BEAL & FLETCHER GROCER COMPANY.

Opinion delivered May 7, 1898.

1. FINDING—SUFFICIENCY OF EVIDENCE.—A finding of the court that, at the time a creditor company brought suit by attachment against its debtors, it had no knowledge that the debtors had purchased goods from it with fraudulent intent not to pay for them is unsupported where uncontradicted testimony shows that, at the time the president of the company made the affidavit for attachment, he knew all the facts as to such fraud that he afterwards knew. (Page 283.)

2. FRAUD—ELECTION OF REMEDIES.—A creditor who has brought suit to recover the amount due for goods fraudulently purchased from him and concealed may, upon subsequently finding such goods, abandon the suit on the debt and sue for possession of the goods if, at the time the suit on the debt was brought, he did not know where the goods were, and had no means of information which, if prosecuted, would have led to such knowledge. (Page 283.)

3. EVIDENCE—TAX ASSESSMENT.—The book of assessments is competent to show the value of personal property, and is entitled to receive such credit as the jury may give it. (Page 284.)

4. FRAUD—EVIDENCE—OTHER SUITS.—In a suit by a vendor to recover personal property alleged to have been fraudulently purchased on credit with intent not to pay for it, it is not admissible to prove that other

vendors have sued defendant and recovered personal property so purchased. (Page 284.)

5. SAME—OTHER ACTS.—Another act of fraud by a person is admissible to prove the particular act of fraud charged against him only when it is shown that the two are so connected as to make it appear that he had a common purpose in both. (Page 284.)

6. FINDING OF FACTS—OBJECTION.—Under Sand. & H. Dig., § 5839, providing for a new trial where the verdict or decision is not sustained by sufficient evidence, the objection that the court's finding of facts is not sustained by evidence may be made by motion for new trial, no exception at the time the finding is made being necessary. (Page 285.)

7. MOTION FOR NEW TRIAL—SUFFICIENCY.—A motion for new trial upon the ground that the findings of the court were contrary to the evidence is sufficient to raise the question whether they were sustained by sufficient evidence. (Page 285.)

8. FINDING OF FACTS—EXCEPTION.—Under a statute providing that, "upon trials of questions of fact by the court, it shall state in writing the conclusions of fact found separately from the conclusions of law" (Sand. & H. Dig., § 5837), the fact that the two are blended together does not make it necessary to except to the conclusions of fact. (Page 285.)

9. APPEAL—FINDINGS.—Where the court's finding of facts, upon which the judgment is based, is unsupported by evidence, the supreme court will not examine the evidence to see if there was evidence to uphold the judgment. (Page 286.)

Appeal from Conway Circuit Court.

JEREMIAH G. WALLACE, Judge.

Carroll Armstrong, *J. M. Moore* and *W. B. Smith*, for appellants.

Plaintiff knew or had the means of knowledge of the facts that authorized a rescission of the contract of sale, at the time it sought to affirm it. Hence it is bound by its election, and cannot disaffirm the sale and maintain replevin. 155 U. S. 38; 111 Mass. 272; 31 Mich. 312; 2 Smith, Lead. Cas. 1372, and notes; 5 Met. 49; 125 Ind. 381; 149 Mass. 141; 113 N. Y. 450; 45 Ark. 141; 52 Ark. 467; 31 Mich. 311; 115 N. Y. 387; 23 Wis. 500. Fraud in a particular transaction under investigation cannot be proved by evidence of other acts of fraud. The rule is the same as that which applies to the proof of negligence, for which see: 58 Ark. 454; 39 Ark. 278; 54 Ark. 621.

Ratcliffe & Fletcher, for appellee.

The affidavit for attachment does not point to any knowledge, by appellee, of the fraudulent character of the contract of purchase. 104 N. Y. 106. Election, to be binding, must be made with full knowledge of material facts. 13 Cal. 133–142; 50 Cal. 332; 22 O. St. 398; Kerr, Fr. & Mist. 452; Bish. Cont. 680; Bigelow, Fraud, 434–438; 37 N. E. 760; 27 Atl. 619; 33 Hun, 169; 22 O. St. 388; 3 Pick. 495; 45 Ark. 141; Big. Fraud, 30 *et seq.*, 2 Story, Eq. Jur. § 1097; 2 Gr. Ch. 509; 22 S. W. 813, 817; 28 S. W. 870, 873; 5 Met. 51; 2 Story, Eq. Jur. § 1098; 7 Enc. Pl. & Prac. 366; 50 Ark. 322; 53 Mich. 444; 51 Conn. 455; 42 Ga. 521; 30 Ia. 465; 31 Kas. 248; Kerr, Fr. & Mist. 453. Facts specifically found by a court, sitting as a jury, and not excepted to, are conclusive. 25 Ark. 562; 33 Ark. 97; 34 Ark. 524. Appellee is not estopped to set up the fraud to avoid the sale, as against attaching creditors. 47 Ark. 247. Estoppels are not favored. 15 Ark. 319; 4 Mass. 181; 1 Greenl. Ev. 22. The evidence complained of all tended to show fraud in the purchase of the goods, and was properly admitted. 109 Mass. 457; 18 N. Y. 589; 58 Vt. 315; 49 Vt. 355; 1 Greenl. Ev. § 53; 59 Vt. 247; 23 How. (U. S.) 172; 24 Vt. 525; 9 Gray, 97; 7 Wall. 132; 54 Ark. 554; 64 Ark. 12.

BATTLE, J. On the 31st of October, 1894, Overstreet & Son purchased from Beal & Fletcher Grocer Company goods and merchandise, on a credit, at the aggregate sum and price of $420.17, which, added to the sum they were already owing to the Grocer Company, made their indebtedness to it amount to about $1,000. On the 6th of November, in the same year, they failed in business. On the 8th of the latter month the Grocer Company sued Overstreet & Son for the amount of their indebtedness, including the $420.17, and caused an order of attachment to be issued against them, upon the ground that they had sold, conveyed and otherwise disposed of their property, and suffered and permitted it to be sold, with the fraudulent intent to cheat, hinder and delay their creditors, and were about to sell and convey their property with such intent. Afterwards, about three or four days, the Grocer Company

brought an action against B. G. White, sheriff, to recover the possession of the goods and merchandise sold on the 31st of October, 1894, they having been seized by the sheriff under orders of attachment sued out by creditors of Overstreet & Son, and being then held by him by virtue of such seizure.

Did Overstreet & Son fraudulently create the debt contracted by the purchase of the goods on the 31st of October, 1894, and, if so, did Beal & Fletcher Grocer Company elect to enforce the collection of the debt by process of law, with a knowledge of the facts necessary to know in order to enable it to make an intelligent choice of remedies, or did it so elect after such knowledge could have been acquired by it by the exercise of reasonable diligence after it was put upon inquiry or notice as to such facts? These were the issues tried in this action.

The evidence adduced at the trial tended to prove the following facts: Overstreet & Son were merchants, and did a mercantile business at Plummerville, in this state, for many years. During this time they contracted many debts, amounting to a considerable sum. They became insolvent, their liabilities largely exceeding their assets. While in this condition, on the 3d of August, 1894, they represented to the manager of Bradstreet's Mercantile Agency, at Little Rock, Arkansas, that their assets amounted to $46,000, and their liabilities to $12,500; and on the 4th of October, 1894, represented to R. G. Dun Mercantile Agency, at Little Rock, that their assets amounted to $37,100, and their liabilities to $6,600. These reports were evidently made for the purpose of obtaining credit from the merchants patronizing the agencies. Beal & Fletcher Grocer Company were subscribers of the R. G. Dun Mercantile Agency. When it sold goods to Overstreet & Son on the 31st of October, 1894, it regarded them as solvent. It based this opinion upon the report to the R. G. Dun Mercantile Agency and the information received from its agents. At the time they purchased the goods, on the 31st of October, Overstreet & Son represented to the traveling salesman of the Grocer Company that they were "in good shape, and thought the worst time of the business had blown over, and everything was all right," and thereby induced the salesman to believe they were solvent and to sell them the goods. On the 6th of November following,

they sold what was represented to be their entire stock of goods to one of their creditors, to pay their indebtedness to him. A part of their goods, including a portion of those purchased from the Grocer Company on the 31st of October, was found, by the sheriff, concealed in the house of a colored man, about a mile from Plummerville, and was seized under the order of attachment sued out by their creditors.

The order of attachment sued out by the Grocer Company on the 8th of November was based on the affidavit of J. T. Beal, its president, in which he swore that Overstreet & Son had sold and conveyed and otherwise disposed of their property, and suffered and permitted it to be sold with the fraudulent intent to cheat, hinder and delay their creditors, and were about to sell, convey, and dispose of their property with such intent. He (Beal) testified in the trial of this action that he knew as much, at the time he made this affidavit, about the disposition of property by Overstreet & Son, with the intent to cheat their creditors, as he did afterwards, except he had not discovered what disposition had been made of the goods his company sold on the 31st of October; that, after making the affidavit, he saw goods on a wagon, and recognized them as the goods sold by his company, and learned that they had been concealed; and that thereupon he went to Little Rock, in order to employ an attorney, and sent Mr. Cryer to identify the goods. Cryer testified that he identified the goods in controversy as a part of those sold on the 31st of October, "about two days after the failure."

The plaintiff in this action, the Grocer Company, was allowed to, and did, introduce as evidence, over the objection of the defendant, the book containing the assessment of personal property, in order to show the assessments of Overstreet & Son, and of each of them, and proved that other parties had sold them goods about the time they failed, and afterwards replevied the same.

The court, sitting as a jury in the trial, found that Overstreet & Son purchased the goods in controversy from plaintiff, with the fraudulent intent not to pay for the same; that plaintiff, at the time it brought the attachment suit against "Overstreet & Son, had no knowledge that said Overstreet & Son had

purchased said goods with the fraudulent intent not to pay for the same; and that said plaintiff is not estopped by said attachment suit from reclaiming the goods in controversy," and rendered judgment accordingly. The defendant filed a motion for a new trial, which was overruled, and he appealed.

Among the grounds set up in the motion for a new trial, the defendant alleged that the finding of facts by the court was not sustained by any evidence. Beal, the president of the Grocer Company, testified that he knew all the facts as to the fraudulent disposition of property by Overstreet & Son at the time attachment proceedings were instituted by his company that he afterwards knew, except that he had not ascertained where the goods it had sold then were. No other evidence was adduced to show that the debt contracted by the purchase of the goods on the 31st of October was fraudulently created, except that which showed a fraudulent sale of property by Overstreet & Son, and was necessary to sustain the attachment of the Grocer Company, and this was known to Beal at the time he made the affidavit upon which the attachment was based. That being true, the finding of the court that the Grocer Company, at the time it sued out the order of attachment, had no knowledge that Overstreet & Son purchased the goods in controversy with the fraudulent intent not to pay for them is unsupported by evidence; and the findings of facts by the court are not sufficient to sustain the judgment.

If, with a knowledge of all the facts necessary to enable it to elect intelligently between the remedy allowed to enforce the payment of the debt contracted by the purchase of the goods on the 31st of October, 1894, and that provided for the recovery of the goods, appellee instituted the action to collect the debt, it thereby ratified the sale, and could not thereafter institute and maintain an action to recover the goods. Before it could, however, act judiciously or intelligently in the selection of remedies, it would be necessary for it to ascertain whether the goods could be found and identified. Unless this could be done, a rescission of the sale and an action to recover the goods would be of no avail. If, therefore, the Grocer Company did not have this information at the time it brought the suit to recover the amount due on the debt, or was not put upon notice or

inquiry which, if prosecuted with reasonable diligence, would have led to the acquisition of the same, and afterwards found the goods and identified them, it was not bound by the action it had first instituted, but could sue for the possession of the goods, and recover them by making the necessary proof. *Butler* v. *Hildreth*, 5 Metc. (Mass.) 51; Bigelow, Fraud, 434–438.

There is no contention that the Grocer Company was put upon notice or inquiry as to any facts it did not know when it instituted the first action. The court did not find as to when it ascertained that the goods could be found and identified, and we are unable to determine whether it acquired this information before, after, or at the time the action for the price of the goods was commenced. We cannot therefore say that the judgment of the court was sustained by the undisputed facts, and upon that ground affirm it.

The book of assessments was competent evidence to show the value of the personal property of the firm of Overstreet & Son and its members, and is entitled to receive such credit as the jury might give to it. *Winter* v. *Bandel*, 30 Ark. 362.

The evidence as to the institution of suits for the recovery of property sold to Overstreet & Son by other creditors was incompetent, and should have been excluded

As to the evidence of sales made to Overstreet & Son by other creditors about the time the goods in controversy were sold by the Grocer Company, it is sufficient to say that the general rule as to such evidence is that another act of fraud by a person is admissible to prove the fraud charged against him only when there is evidence to show that the two are so connected as to make it appear that he had a common purpose in both,—that the same motive may be reasonably imputed to him in both. *Jordan* v. *Osgood*, 109 Mass. 457; *Hall* v. *Naylor*, 18 N. Y. 589; *Bradley Fertilizer Co.* v. *Fuller*, 58 Vt. 315.

The judgment of the circuit court is reversed, because the finding of facts were, in the manner before stated, not supported by any evidence; and the cause is remanded for a new trial.

ON MOTION FOR RECONSIDERATION.

Opinion delivered May 21, 1898.

BATTLE, J. The appellee moves the court to reconsider its judgment on the ground, among others, that the defendants, the appellants here, did not except to the findings of facts by the circuit court.

The special findings of fact by the court were within the issues joined by the parties in the action, and all the facts so found were essential, and, if true, were sufficient to sustain the judgment of the court, and there was no necessity or reason for finding any other fact or facts. The only objection to it is that it was not sustained by the evidence. This objection could be presented only by a motion for a new trial. No exception was necessary for that purpose. *Gardner* v. *Case*, 111 Ind 494, 498; *Dodge* v. *Pope*, 93 Ind. 480, 483; *Tarkington* v. *Purvis*. 128 Ind. 182, 188; 2 Elliott's General Practice, § 980. The statutes of this state provide that findings of facts by courts may be set aside upon motion for a new trial, when unsupported by sufficient evidence. Sand. & H. Dig., § 5839.

A motion was filed in this case to set aside the judgment of the court, and for a new trial, on the ground, among others, that the findings of facts by the court were contrary to the evidence. That was sufficient to raise the question as to whether or not the findings were sustained by sufficient evidence. *Obermier* v. *Core*, 25 Ark. 562; *Woodruff* v. *McDonald*, 33 Ark. 97; *Nathan* v. *Sloan*, 34 Ark. 524; *Fordyce* v. *Russell*, 59 Ark. 314, and *Dunnington* v. *Frick Co.*, 60 Ark. 250,—cited by appellee,—do not militate against this view. In the case last mentioned, the court, sitting as a jury, found the facts, and then declared the law upon the facts so found. No exception was taken to the declarations of law, and the court held that, as there was no exception taken, the declaration could not be reviewed here. It did not hold that an exception, in addition to a motion for a new trial, was necessary to raise a question as to whether the findings of facts were sustained by sufficient evidence. The statute provides: "Upon trials of questions of fact by the court, it shall state in writing the conclusions of fact found separately from the conclusions of law." Sand. & H. Dig., §

5837. The fact that they are blended does not make it necessary to except to the conclusions of fact.

To show that there should have been specific exceptions taken to the conclusions of fact in this case, appellee cites *King* v. *Ritchie*, 18 Wis. 554; *Thomas* v. *Mitchell*, 27 Wis. 414; *Mead* v. *Chippewa County*, 41 Wis. 205; *Allen* v. *Hutchinson*, 45 Wis. 259; *Lucas* v. *San Francisco*, 28 Cal. 591; *James* v. *Williams*, 31 Cal. 211. In the states in which these decisions were rendered, there are statutes which provide for exceptions to conclusions of fact by the court. 2 Sanborn & Berryman's Annotated Statutes of Wisconsin, § 2870; *Lucas* v. *San Francisco*, 28 Cal. 591, 596. The decisions were presumably based upon them (*King* v. *Ritchie*, *supra; Lucas* v. *San Francisco*, *supra*); but we have no such statutes in this state.

Appellee undertakes to show that undisputed facts sustain the judgment of the circuit court, independently of the findings of the court. We do not think so. If we are right, we cannot supply a finding as to such facts to uphold the judgment. *Smith* v. *Los Angeles Immigration & Land Co-operative Association*, 71 Cal. 289.

The motion for reconsideration is denied.

MEYER *v.* MISSOURI GLASS COMPANY.

Opinion delivered May 7, 1898.

ATTACHMENT—LEVY.—A constable acting under a writ of attachment, upon being denied the use of the key by the owners of a store, stationed himself near the store at night, declared that he had levied upon the goods in the store, and said that he would break and enter the store in the morning. *Held* not a valid levy of the goods in the store, as against a sheriff who levied upon the goods next morning by taking them into his custody. (Page 289.)

Appeal from Miller Circuit Court.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

This is a contest between certain creditors of the firm of Sheppard Bros. concerning the priority of their attachment liens. The facts are as follows: The appellants, Meyer, Bannerman & Co., A. C. Pitts, and the First National Bank of Atlanta, Texas, were the creditors of the partnership firm of Sheppard Bros., which firm was engaged in mercantile business at Era, Ark. On the 7th of December, 1895, appellant brought their several suits against said firm in the circuit court of Miller county, and procured writs of attachments against its property, which were placed in the hands of one Bramble, a deputy sheriff. On the same day appellees, Missouri Glass Co., Goddard-Peck Grocer Co., and Rothschilds Bros., also creditors of said firm, brought suits before J. O. Reeves, a justice of the peace, and procured writs of attachment, which were placed in the hands of H. W. Foster, a constable. These several writs of attachment in the hands of the constable and sheriff were afterwards levied upon a stock of goods belonging to said Sheppard Bros. in their store at Era. Upon the question as to whether the writs in hands of the constable were levied prior to those held by the sheriff, the constable testified as follows: After stating that, in company with one Pruitt, an attorney, he went to the residence of Sheppard Bros., at 2:30 a. m. December 8, 1895, and read the writs of attachment to them, he said: "I then demanded the key to the store, and they refused to give it to me. I told them that we would take charge of all the goods in front of the store, and all the goods in stock inside. When they refused to give me the key, I told them that we would break open the door, and they replied: 'Go ahead, and break open the door.' The store was locked. It was dark, and we had no light. It was so late in the night that we concluded to wait until daylight, intending to break open the door at daylight, when we could see to take the stock. I had nothing to break open the door with, and could not find anything in the dark. The goods in front of the store (consisting of certain stoves and plows, etc.) were the only goods we could see. We levied upon the goods in front of the store, and announced a levy upon the stock inside.

It was cold, and we made a fire in front of the store, and stayed there. In about an hour Bramble, the deputy sheriff, came with A. C. Pitts, one of the plaintiffs. Pitts went to where Sheppard Brothers lived, and got the key, gave it to Bramble, and he went in, and took possession of the goods. Bramble put up his notices, and then I put up mine. I told Bramble I had levied upon the stock before he took possession of it. I left him at the store."

Bramble, the deputy sheriff, testified that he went to the store, found no one in possession, got the key, entered the store, and levied upon the stock, and held possession of same. "When I got there," he said, "Pruitt and Foster, the constable, were by a fire a short distance from the store."

The circuit court found that the levy made by the constable was prior to that made by the sheriff, and gave judgment accordingly.

Williams & Arnold, for appellants.

To constitute a valid levy of attachment upon personal property capable of manual delivery, the officer must take it into his exclusive control and out of the posession of the defendant; and, further, it must be within his view and subject to his touch. Sand. & H. Dig., § 336; 40 S. W. 780; 8 Conn. 321; 21 Am. Dec. 674; 19 Wend. 495; 14 *id.* 123; 3 *id.* 446; 11 *id.* 548; 2 Hill, 666; 90 Am. Dec. 378; 65 *id.* 330; 76 *id.* 309; 14 Cal. 47; Freeman, Executions, 260, 262–3; 9 Am. Dec. 39; 17 F. H. 246; 2 N. H. 317; 45 F. H. 339; Drake, Attach. (5 Ed.) §§ 255–7–8; 22 S. E. 47; 23 S. E. 685; 40 Am. Dec. 292; 22 *id.* 425; 25 *id.* 167; 8 *id.* 321. It was error for the court to refuse to make special findings of law and fact, upon request. Sec. 11, art. 7, const. Ark.; 30 Ark. 355.

Figures & Pruitt and *T. E. Webber*, for appellees.

It is in the discretion of a court, trying a case without a jury, to make a general finding instead of a special finding. 30 Ark. 355–8; 49 U. S. App. 122; S. C. 79 Fed. 575; 67 N. W. 350; 64 Minn. 439; 41 Pac. 695; 151 N. Y. 282. The findings of fact may be reduced to writing after judgment. 27 Ark. 619; 33 *ib.* 645–50; 34 *ib.* 526; The findings of fact

are in the bill of exceptions and are part of the record before this court. 33 Ark. 97; 28 Ark. 75; 42 Ark. 41. The failure of the court to write out special findings would be immaterial, if the consideration of the whole record showed no grounds for reversal. 45 So. Car. 503; S. C. 23 S. E. 516; 43 So. Car. 506; S. C. 24 S. E. 288; 40 U. S. App. 579; 77 Fed. 58. If the judgment is not inconsistent, it will be allowed to stand. 76 Fed. 257; 50 Ark. 314; 43 Ark. 296; 46 *ib.* 542. If the constable's acts amounted to a levy, the judgment of the court is right. 60 Ark. 394. An officer in making a levy must take the articles under his exclusive control. 52 N. H. 185; 2 *ib.* 68; 2 *ib.* 317; 5 *ib.* 433; 16 *ib.* 129; 12 *ib.* 506; 25 Me. 176. But the nature of the possession and custody which the officer is required to keep depends upon the nature and position of the property. 14 Pick. 410; 35 Ala. 673; 35 Ill. 450; 2 Freeman, Execut. §§ 260–3; 1 Baxt. 245; 98 N. C. 286; 83 Va. 459; 99 N. C. 21; 150 Mass. 513. The test of validity of the levy is whether the acts of the officer would make him a trespasser, but for the protection of his writ. 63 N. W. 376. An attachment levy upon personalty is sufficient if the officer's acts divest defendant's possession and give to the officer the claim of dominion, coupled with the power to exercise it over the attached property. 49 Pac. 790; 71 N. W. 1012; 67 Mo. App. 457; 69 N. W. 1011; 41 W. Va. 191; S. C. 23 S. E. 685; 43 Pac. 571; 40 S. W. 701.

RIDDICK, J., (after stating the facts). We are of the opinion that the constable did not make a valid levy upon the goods in the store prior to that made by the sheriff. The stock of goods was capable of manual delivery, and to make a valid levy thereon it was necessary for the officer to take the same into his custody. Sand. & H. Dig., § 336.

The custody of the property in such a case must be an actual possession; there must be actual control with power of removal. It is not sufficient for the officer to take a constructive possession, or to declare that he has taken possession and levied upon the goods, when in fact they are in a locked storehouse, to which another holds the key, and into which the officer has not effected an entrance, so that he can see the goods,

and ascertain their kind and quantity. *Haggerty* v. *Wilber*, 16 Johns. (N. Y.) 287; *Rix* v. *Silknitter*, 57 Iowa, 262; *Evans* v. *Higdon*, 1 Baxter (Tenn.), 245; Rorer, Judicial Sales, § 1005; 8 Enc. Pl. & Prac. 531, and cases cited.

In this case the constable, being denied the use of the key by the owners of the store, levied upon certain chattels in front of the store. He then stationed himself near the store, declared that he had levied upon the goods in the store, and said that he would break and enter the store in the morning. These facts show an unmistakable intention to make a levy, but an intention to levy is not sufficient. There must be a real levy by taking actual possession and control of the goods; and, in the absence of such a possession, a declaration by the officer that he has levied amounts to nothing. The goods here were in a locked storehouse, to which the owner held the key. The constable had not effected an entrance into the store, thus showing conclusively that he had not gained control of the goods with power of removal. He had no means of knowing what goods were in the store, and, if they had been destroyed or stolen, he could not have described them. If the constable believed that he had levied upon the goods inside of the store to which he had not obtained access, and had not seen, he was mistaken. Although this mistake was one that even a lawyer, called to act on the spur of the moment, might make without subjecting himself to just criticism, it was fatal to the claim of priority made by the appellees.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

BARTLETT *v.* MEYER-SCHMIDT GROCER COMPANY.

Opinion delivered May 7, 1898.

1. PARTNERSHIP—PREFERENCE OF INDIVIDUAL CREDITORS.—The equity of the creditors of an insolvent firm to be paid out of the firm assets, in preference to creditors of individual members of the firm, cannot be extinguished by a preference of creditors of the latter class in a general assignment by the firm for the benefit of creditors. (Page 291.)

2. SAME—FRAUD.—A preference by an insolvent firm, in a deed of general assignment, of a debt of a member of the firm is to that extent a withholding of firm assets for the private benefit of one of its members, and is a fraud upon the rights of the firm's creditors. (Page 294.)

Appeal from Independence Circuit Court in Chancery.

RICHARD H. POWELL, Judge.

Yancey & Fulkerson, for appellants.

An insolvent firm may, by assignment, prefer an individual debt of a member thereof to the debts of the firm. 42 Ark. 423; 52 Ark. 556; 54 Ark. 449; 60 Ark. 18; 99 U. S. 119; 64 Miss. 141; 52 Ill. 471; 116 N. C. 499. There was no duress in the signing of the note. 18 Ark. 214; 49 Ark. 70.

H. S. Coleman and *J. W. Butler*, for appellees.

Partnership creditors have an equity, superior to that of creditors of individual partners, to have the firm assets applied to the payment of their debts; and although, during the continuation of the partnership, the firm might lawfully transfer firm assets to an individual partner's creditor, yet they will not be permitted to make such a disposition of their property by assignment. Burrill, Assign. 295; 17 Am. & Eng. Enc. Law, 1090; 42 Ark. 455; 99 U. S. 119; 150 U. S. 385; 59 Ark. 577.

WOOD, J. Appellees, who were creditors of the firm of Bartlett & Durham, brought this suit to set aside the provisions of a general assignment made by said firm for the benefit of creditors, with preferences. The court found "that the preferred debt of Mary A. Bartlett was an individual debt of E. C. Bartlett, one of the partners, and that the property assigned was partnership property." This finding is correct. The legal question therefore is, can an insolvent firm, in a general assignment for the benefit of creditors, provide for the payment, out of the firm assets, of creditors of the individual members of the firm, in preference to creditors of the firm?

1. When one makes an assignment for the benefit of creditors, he brings the assets included therein under the control of a court of chancery. If the assignment is valid, the court must administer the assets, through the assignee, accord-

ing to its provisions. If, for any cause, the assignment be void, then the property embraced therein is administered for the benefit of all the creditors *pro rata*, as under the provisions of a general assignment without preferences. Acts of 1895, p. 162. Therefore, if the provisions of the assignment contravene well established principles of equity, a court of chancery will not enforce them, but will proceed to dispose of and distribute the property for the benefit of all the creditors, *pro rata*, who in equity are justly entitled to same.

"It was," says Judge Kent, "a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner." "The basis of the general rule is that the funds are to be liable on which the credit is given." 3 Kent, Comm. * 65.

In *Bulger* v. *Rosa*, 119 N. Y. 465, the court say: "There can be no controversy as to the rule of law governing the relations between an insolvent firm and its creditors and their mutual rights in respect of the firm property. The partnership, as such, has its own property and its own creditors, as distinct from the individual property of its members and their individual creditors. The firm creditors are preferentially entitled to be paid out of the firm assets. Whatever may be the true foundation of the equity, it is now an undisputed element in the security of the firm creditors."

In *Hollins* v. *Brierfield Coal & Iron Company*, 150 U. S. 385, the court, through Judge Brewer, said: "Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of the funds in preference to individual creditors, as well as superior to any claims of the partners themselves." This is an old and firmly established doctrine of equity, recognized generally in the works on Partnership and Equity Jurisprudence, and in the adjudications of many courts. Story, Part. § 376; Pars. Part. § 246, 382, *et seq.*; Collyer, Part. § 920; Smith, Prin. Eq. § 547 (2);

2 Lindley, Part. § 692; 2 Bates, Part. § 825; 2 Pom. Eq. Jur. § 1046; Story, Eq. Jur. §§ 1207, 1253; 2 Beach, Mod. Eq. Jur. 788; Bisp. Eq. Prin. § 515; *Inbusch* v. *Farwell*, 1 Black (U. S.), 566; *Murrill* v. *Neill*, 8 How. 414; *Crooker* v. *Crooker*, 52 Me. 267; *Treadwell* v. *Brown*, 41 N. H. 12; *Fall River Whaling Co.* v. *Borden*, 10 Cush. 458; *Hill* v. *Beach*, 12 N. J. Eq. 31; *Simmons* v. *Tongue*, 3 Bland, 356; *Converse* v. *McKee*, 14 Tex. 20; *Murray* v. *Murray*, 5 Johns. Ch. 72 *et seq.; McCulloh* v. *Dashiell*, 1 Har. & G. 99; *Giovanni* v. *Bank*, 55 Ala. 310; *Davis* v. *Howell*, 33 N. J. Eq. 72; *Ex parte Crowder*, 2 Vernon, 706; *Ex parte Cook*, 2 P. Wms. 500; *Ex parte Hunter*, 1 Atk. 223, 327, 328; *Ex parte Elton*, 3 Vesey, 242, note; Bishop, Insolv. Debt. § 167.

It would unnecessarily incumber this opinion to trace the history and reason of this doctrine of equity from its origin, through various fluctuations, and to its final establishment in England, whence it came to this country. This has been exhaustively and ably done in *Murray* v. *Murray*, *McCulloh* v. *Dashiell*, and *Murrill* v. *Neill*, *supra*, and in a learned note beginning on star page 265 of vol. 3 Kent's Com., to which we refer any who may have the interest, curiosity and patience to pursue the subject. It is enough for us to know that the rule exists, and that, upon the whole, it is reasonable, convenient, and just. But it is contended that the rule cannot be enforced here, for the reason that the equities of the individual members of the firm, whence this equity of the firm creditors is derived, has been extinguished by the assignment, to which each member of the firm assented; and the following cases are cited to support this contention: *Jones* v. *Fletcher*, 42 Ark. 423; *Feucht* v. *Evans*, 52 Ark. 556; *Reynolds* v. *Johnson*, 54 Ark. 449; *Hudgins* v. *Rix*, 60 Ark. 18.

We are aware that the court is committed to the doctrine, announced in some of these cases, that the equity of partnership creditors can only be worked out through the equity of the partners. But we have never held that the equity of the partners, and hence the derivative equity of firm creditors, was or could be extinguished by an assignment made by an insolvent firm for the benefit of creditors. In none of the above cases was an assignment for the benefit of creditors involved. That makes the difference, and it is marked. *Case* v. *Beaure-*

gard, 99 U. S. 119, quoted from and cited as a leading case in the Arkansas decisions, *supra*, is strong authority for the position that the equity of firm creditors would be enforced in case of an assignment; for, says the court in that case, speaking of of the enforcement of this equity: "It is indispensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court, and in the course of administration, brought there by the bankruptcy of the firm *or by an assignment, or* by the creation of a trust in some mode,"—precisely what has been done in this case. In *Giovanni* v. *Bank*, 55 Ala. at p. 310, it is said: "When the partnership property is drawn within the jurisdiction of a court of equity, that court regards it as a trust fund for the payment of partnership debts, and subrogates the partnership creditors to the rights of the partners *inter sese*." "Courts regard partnership property, after an insolvency or dissolution of the firm, and in the proceeding for winding up its affairs, as a trust fund for the benefit of the firm creditors." 2 Pom. Eq. Jur. § 1046, and authorities cited.

Under our statute a general assignment by a firm for the benefit of creditors, although its provisions as to preferences cannot be enforced, nevertheless operates as a winding up of the partnership business, and is, in effect, a dissolution of the partnership, and a calling upon the chancery court to administer its assets according to equitable rules. 2 Bates, Part. § 483; *Allen* v. *Woonsocket Co.*, 11 R. I. 288; *Simmons* v. *Curtis*, 41 Me. 373; *Wells* v. *Ellis*, 68 Cal. 243; *McKelvy's Appeal*, 72 Pa. St. 409. Such a conveyance neither creates nor destroys equities. These are left as they were when the assignment was made. The very fact of the assignment is a declaration by the firm that its business career has closed, and the law is invoked to wind up its affairs. Before, the firm has been acting for itself. Now, what it does is for the benefit of creditors, and it is not authorized, as a firm, to benefit any but its own creditors. The above is the rule which a court of equity would enforce in an assignment for the benefit of creditors, simply because it is a rule of equity, and regardless of any actual or intentional fraud.

2. But such an assignment as this must be held as

actually and intentionally fraudulent. It contravenes our statute concerning fraudulent conveyances. Sand. & H. Dig., §§ 3471–2. It purports to be an assignment by a firm for the benefit of creditors, but it is in fact an assignment for the benefit of one of the individual members of the firm. It directs that the firm assets shall pay the individual debts of one of its members. This is equivalent to a gift to him or his creditor, and is to that extent a withholding of firm assets for the private benefit of one of its members, and, of course, hinders, delays and defrauds firm creditors. From these facts an intent to defraud creditors will be conclusively presumed. Such is the law in New York and other states where statutes against fraudulent conveyances like our own were modeled after the 13th of Elizabeth. The doctrine has our unqualified approval. *Kirby* v. *Shoonmaker*, 3 Barb. Ch. 46; *Wilson* v. *Robertson*, 21 N. Y. 592; and other cases cited in Burrill on Assignments, p. 236.

Affirm the decree.

STANDARD LIFE & ACCIDENT INSURANCE COMPANY *v.* WARD.

Opinion delivered May 14, 1898.

1. ACCIDENT INSURANCE—WARRANTY.—Where an application for accident insurance represented the applicant's occupation to be "ice dealer and proprietor of transportation company, office work only," and such representation is warranted by the applicant to be true, a policy granted upon such application is void if the applicant was also engaged in the business of buying and selling cattle. (Page 298.)

2. OCCUPATION—CATTLE BUYING.—The business of buying and selling cattle, when pursued systematically, continuously and extensively, is an occupation. (Page 299.)

3. POLICY—CONSTRUCTION.—An accident policy contained a clause to the effect that, should the insured engage in other business or avocation, and be injured, he will be indemnified according to a schedule of prices fixed by the rules of the conpany governing such cases. *Held* that such clause only sanctions the future pursuit of other callings than those named in the application, and is not a waiver of a breach of the warranty that the callings named in the application are the callings engaged in at the time of making such application. (Page 299.)

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

Dodge & Johnson and *Carroll & Pemberton*, for appellant.

The policy is void, because the insured made false warranties as to the character of his occupations. The insurance company had a right to prescribe the conditions precedent of its contract, and the breach of any of these conditions precedent was sufficient to defeat the policy. 4 H. L. Cas. 484; 67 Fed. 462; 35 N. E. 105; 62 N. W. 1057; 58 Ark. 528. Also, the phrase "office work," used in the appellee's application, means such work as is commonly done in an office. Stand. Dict., word, "Office." The evidence fails to show that appellee was disabled during the length of time for which he was awarded indemnity. It was error for the court to instruct the jury that the meaning of the clause in the policy granting indemnity during the continuance of an injury "*wholly, immediately and continuously* disabling the insured from the transaction of any and every kind of business pertaining to his occupation" was that such indemnity should be paid while the insured was disabled so as to "*substantially*" prevent him from attending to his business. 57 Wis. 174; 5 Lans. 77; 46 Ia. 631; 43 Ill. App. 148; 148 Mass. 153; 53 Hun, 84; 21 Pittsburgh L. J. 25.

BUNN, C. J. This is a suit to recover on an accident policy the sum of $193, at the rate of $25 per week from the 21st November, 1894, to the 15th January, 1895, as an indemnity for injuries received on the 21st November, 1894, and suffered during the period aforesaid, and for being thus incapacitated, during that time, from transacting business. The suit was brought on complaint, with account attached, and the policy exhibited, in one of the justice-of-the-peace courts of Sebastian county, and, the defendant having filed its answer, judgment was for plaintiff for full amount of claim, and defendant appealed to the circuit court of the Fort Smith district of said county, and judgment was again for plaintiff, and defendant appeals to this court.

The portions of the application which are expressly made part of the policy, and of the policy, essential to the discus-

sion and determination of the cause, are as follows: "I [that is, the plaintiff] hereby apply for insurance against bodily injuries, to be based upon the following statement of facts, all of which I hereby warrant to be true; if found untrue, in any respect, then in every such case the policy issued hereon shall be null and void. * * * (3). My occupations are fully described as follows: Ice dealer and proprietor of transportation company, office work only. * * * I hereby agree that this application and warranty, together with the premium paid by me, shall be the basis of the contract between the company and me, and I accept the policy which said company shall issue upon this application, subject to all the conditions, provisions and classifications contained in such policy referred to herein." And the policy begins thus: "The Standard Life and Accident Insurance Company, in consideration of the warranties in the application for this policy, and of a premium of twenty dollars, hereby insures Joseph N. Ward," etc.

The evidence shows that the appellee, Ward, in addition to being engaged in the office work of the occupations of ice dealer and of a transfer business, had been for years, "off and on," as he puts it, in the cattle business, at the time of making the application and receiving the policy, and was then and afterwards engaged in said cattle business, and, in fact, the injury received by him for which he claims the indemnity was received while engaged in supervising or assisting in the details of this cattle business; that this business consisted in purchasing cattle in large or small lots, as opportunity presented itself, and in selling the same for profit, as he best could; that this business, for the year covered by the policy in suit, involved the buying and selling of about 1,500 cattle, and amounted to the sum of $15,000 or $20,000, and had been considerable in other years; and that the particular manner of receiving his injury, was as follows: Some of the cattle so purchased by him having become afflicted with bore worms, he had directed his veterinary surgeon to cut them out, and while the surgeon was thus engaged on one of the animals, which had been thrown for that purpose, but which was restive and more or less uncontrollable, plaintiff, standing by, was asked by the surgeon to assist in restraining the animal by holding down and confining its head,

and, while so engaged, was gored by the beast just above the ankle, and was badly hurt, so much so that he was confined to his room until the 23d day of December following, and was incapacitated from doing work in his said occupations to any material extent until the 15th January next following.

Upon the facts we think the disability to work was complete, in the sense of the law, for the time charged for.

We are of the opinion, however, that the cattle business in which plaintiff had been engaged at the time of taking out the policy and when he made the application, was, in truth, an occupation in the sense of their contract of insurance; and, as he failed to state his engagement in the same in his application, that failure avoided the contract, since it was stipulated that such should be the effect of an untrue statement, the same being covered by the warranty. Were this failure to name the cattle business as one of the applicant's occupations a mere misrepresentation, unintentional, or made merely for the purpose of inducing the company to insure the applicant, then he might show its immateriality, and, that being shown, the policy would not be invalidated. But in this case this failure to state applicant's occupation, or rather his statement to the effect that the ice and transfer business was his only occupation, falls within the terms of his warranty to the effect that all his statements in this regard were true, and that the policy should be void if they were found to be untrue in any respect, and renders the policy null and void, and the verdict of the jury determining otherwise was without evidence to support it. The insurance company had a right to fix the terms and the conditions upon which it would insure appellee, and the latter had the right to accept or reject the insurance on these terms and conditions; but, having accepted the same, it was a contract between them, and, being in violation of no principle of law, nor in contravention of the policy of the law, must be enforced according to its terms and meaning; and the courts have the right neither to make contracts for parties nor to vary their contracts to meet and fulfill some notion of abstract justice, and still less of moral obligation. In support of these statements, we cite the following cases, also cited in appellant's brief, to-wit: *Anderson* v. *Fitzgerald*, 4 H. L. Cases, 484;

Fidelity & Casualty Co. v. *Alpert*, 67 Fed. Rep. 462; *Standard L. & A. Ins. Co.* v. *Martin*, 33 N. E. Rep. 105; *Murphey* v. *American M. A. Assn.*, 62 N. W. Rep. 1057.

There is a clause in the policy to the effect that, should the insured engage in other business or avocation, and be injured, he would be indemnified according to a schedule of prices fixed by the rules of the company governing such cases; and this seems to be regarded by some as in some way waiving the warranty as to naming the occupation, but, as we view it, that clause only sanctions the future pursuit of other callings than those named in the application, and by no means waives the breach of the warranty that the callings named are the callings engaged in at the time of making the application.

The question of greatest difficulty of solution in all cases like this is to determine what business engagements really constitute an occupation, in the sense of the law, as applied in the construction of such contracts. There are cases where this becomes the all-important question, and where the question of fact is so involved as to be submitted as a question to the jury. Thus in *Standard Life & Accident Association* v. *Fraser*, 76 Fed. Rep. 705, the applicant in his application stated that he was the "proprietor of a bar and billiard room, not tending bar." It was shown on the trial that he occasionally, at meal times, relieved his barkeeper to permit him to go to his meals. Now, the question was whether this occasional tending bar, to relieve for the time being the barkeeper, was a business or occupation, within the meaning of the warranties of the policy contract. The trial court had instructed the jury in that case that "it was for them to say what was the occupation of the insured," and said: "The phrase in the policy was intended to describe the occupation—the regular business—of the applicant; and if you find from the evidence that the said Fraser was not engaged in the business or occupation of tending bar as a business or occupation, you should disregard this defense." The federal court of appeals found no fault with that instruction, and thus, the question being one for the jury, the finding and judgment were affirmed. We will not stop to question that decision, if indeed it is questionable, for it might have been properly held that the mere occasional help extended to another

without fee or reward, but gratuitously, was not in truth the following of a business or occupation.. But that is not like this case, for the cattle business, when systematically, continuously and extensively followed, as in this case shown, is an occupation of itself, as we think.

Reversed and remanded.

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65 [87 300 199]

ARKANSAS SOUTHERN RAILROAD COMPANY v. LOUGHRIDGE.

Opinion delivered May 14, 1898.

1. RAILROAD—AUTHORITY OF CONDUCTOR TO EMPLOY SURGEON.—Where a railway employee is injured, while in the discharge of his duties, at a point distant from the company's chief offices, and there is urgent necessity for the employment of a surgeon to render professional services, the conductor, if he is the highest agent of the company on the ground, has authority to bind the company by the employment of a surgeon to render the services required by the emergency. (Page 303.)
2. JUROR—COMPETENCY.—Under the statute which provides that "no person shall serve as a petit juror who is related to either party to a suit within the fourth degree of consanguinity or affinity," a verdict in an action by a physician for professional services will not be set aside because of the relationship of a juror to another physician, who assisted in performing the services, and was in some way interested in the result of the suit, where such relationship was known before the trial. (Page 305.)

Appeal from Union Circuit Court.

CHARLES W. SMITH, Judge.

Jesse B. Moore and *Morris M. Cohn*, for appellants.

There is no evidence that appellee was employed by appellant or any one acting for it. The appellant was not bound to furnish medical attention for the person injured; nor could any conductor or general manager bind it by a contract for same, without authority from the board of directors. 48 Ark. 188; 8 Ark. 227; 20 Ark. 251; 23 Ark. 411; 31 Ark. 212; 34 Ark. 246; 39 Ark. 580; 40 Ark. 251; 41 Ark. 177; 42 Ark. 188; 51 Ark. 483; 53 Ark. 208, 377; 62 Ark. 33, 40; 54 Mo. 177; Bish. Cont. § 1066; 72 N. W. 997. If any verdict was justi-

fied for medical attention in this case, it should have been a joint verdict, in favor of appellee and the physician who assisted him. 10 C. B. 739; 1 Exch. 644. One of the jurors was related to one of the parties interested in the verdict; hence the verdict can not stand. 32 Me. 310; 47 Me. 593; 28 Ga. 439; 60 Ga. 550.

W. D. Jameson and *Bradshaw & Williams*, for appellee.

The conductor of appellant's train asked appellee to attend to the injured boy. This raised an implied promise to pay for such services. The jury so found, and, their finding being supported by evidence, this court will not disturb it. 16 Ark. 237; 23 Ark. 112–159; 17 Ark. 331–335; 25 Ark. 89. The necessity of the occasion authorized the conductor to contract for necessary medical attention. 22 Am. & Eng. R. Cas. 371; 98 Ind. 358; 49 Am. Rep. 752; 29 Md. 420; 1 Am. & Eng. R. Cas. 343; 24 Kas. 228. The physician whom appellant procured to help him was not a necessary or proper party to an action against the railway company. Even if he had been, appellant waived the right to object on this ground by going to trial without objection and answering the complaint. 30 Ark. 399; 54 Ark. 525. Error in permitting testimony, improper but not prejudicial, to go to the jury, is not reversible. 17 Ark. 404; 20 Ark. 216. It was not error for the court to refuse a new trial on the ground of newly discovered evidence, because there was no affidavit filed in regard to it. Sand. & H. Dig., § 5842. Also, because the application did not show that the evidence was not cumulative, or would not tend to prove facts directly in issue on the trial. 2 Ark. 33; *ib.* 133; *ib.* 346; 11 Ark. 671; 26 Ark. 496. This court will not control the discretion of the trial court as to granting or refusing such applications for new trial, unless the record shows an abuse of such discretion. 54 Ark. 364; 41 Ark. 229.

BUNN, C. J. This is a suit, tried in the Union circuit court, to recover the value of services rendered by the appellee as physician and surgeon in attending upon a brakeman of appellant company, who had fallen from the cars near Cargile in

Union county, and had one leg crushed, and was otherwise hurt and bruised.

Defendant's train, proceeding northward, had approached near Cargile, one of its stations, when Bascom Williams, a brakeman employed in running the train, was thrown from the cars, and was wounded as stated. The appellee, a regular practicing physician, residing in El Dorado, a few miles north of Cargile, happened to be a passenger on the train at the time. When the accident occurred, the train stopped, and the conductor, Walsh, hurried to the scene of the accident to ascertain what was the matter, having heard that a man was hurt, and, in passing through the passenger coach, requested appellee (as appellee states) to go with him, and look after the wounded man, not knowing, as we infer, at the time, who had been hurt, nor the nature of his hurt; and the appellee did so. The conductor denies having made the request of appellee to go and look after the wounded man, but says he went on his own accord. The other evidence is somewhat conflicting as to this, and it was a question for the jury, and they determined it in favor of plaintiff.

Appellee found the said Bascom Williams, with one leg crushed, and otherwise wounded and bruised, and bleeding profusely. He soon got the hemorrhage under control, and sent for Dr. Kelly, the company's regularly employed physician. It became necessary for appellee to go at once to his office in Eldorado to procure the necessary instruments and appliances and professional assistance, and return to amputate the broken limb. Cargile, who seems to have been nothing more than a stockholder in the railroad company, perhaps a director at most, being informed of appellee's desire and intention to proceed to El Dorado for the purposes stated, immediately sent him forward on the engine, and at El Dorado the appellee engaged the services of Dr. W. J. Pinson, another regular practicing physician of that place, and they returned to the scene of the accident, and immediately amputated the broken limb; but, finding the bruises extending higher than at first appeared, for want of sound skin to make the necessary flap, a second amputation was made. The patient died the following day.

Some doubt seems to have been entertained as to whether

the company was liable for the services thus rendered, and considerable negotiation seems to have been had on the subject. C. C. Henderson, the general manager of the company, at one time promising to assist in paying the bill, to the extent of fifty dollars, not as a liability however, but as a voluntary contribution, as we infer.

The main question, as may be readily seen, is whether or not the railroad company is responsible in any case for the contracts of an employee not made in the line of his employment, and he having no express authority to make them; and, if so, under what state of circumstances this liability attaches to it. This is a mooted question, but the weight of authority seems to sustain the doctrine that in case of an emergency the employment (of a physician for instance) by the highest railroad official present is the act of the company, and it will be liable for the value of the services rendered to one in the employ of the company injured by the running of its trains.

In *St. Louis, A. & T. R. Co.* v. *Hoover*, 53 Ark. 377, Hoover, a physician, at the instance of the conductor of defendant company's train, rendered medical services to a passenger injured by the running of the train, and sued the company for the value of his services. This court said in that case: "Neither a conductor, station agent, nor solicitor of a railway company is authorized, in ordinary cases, to contract for surgical attendance upon a passenger or employee injured in operating the train of the railway company, so as to bind the company [citing a list of authorities.] It has been held that where such injury is done at a point distant from the chief offices of the company, and there is urgent necessity for the employment of a surgeon to render professional services to an injured employee, the conductor, if he is the highest agent of the company on the ground, has authority to bind the corporation by the employment of a surgeon to render the services required by the emergency. [Citing authorities.] The authority existing in such cases is exceptional; it grows out of the present emergency and the absence—and consequent inability to act—of the railway's managing agent; its existence cannot extend beyond the causes from which it sprang."

The reason given for the exceptional rule is the absence

and consequent inability to act of that one of the railway's agents capable of and authorized to make contracts for the company. That is a secondary reason, but it may not be the basic reason, for ordinarily even one authorized to make contracts generally is not authorized to make contracts to assume for the company liabilities properly resting upon another. But the rule is not, on that account, to be disregarded. It has other reasons to support it. A very able opinion on the subject is to be found in *Terre Haute, etc. R. Co.* v. *McMurray*, 90 Ind. 358, where the facts are very much like those in the case at bar; the court holding the company liable under the peculiar circumstances. *Marquette, etc., Ry. Co.* v. *Taft*, 28 Mich. 289, was a case where a laborer engaged in the company's service was injured by the train. The trial court had rendered judgment for the defendant, and on appeal the judgment was affirmed, but under the rule that a judgment will be affirmed unless a majority of the judges are for reversal. In that case, Graves and Campbell, JJ., were for affirmance, on the grounds that "no officer of the company could bind it to pay for surgical services rendered an employee. Chief Justice Christiancy and Justice Cooley were for reversal, for the reason stated by Judge Cooley thus: "We think it their [the company's] duty to have some officer or agent at all times competent to exercise a discretionary authority in such cases, and that, on grounds of public policy, they should not be suffered to do otherwise." The court was thus equally divided. The two cases are very instructive, and they and the cases cited therein give a very full understanding of the scope of the controversy and the reasoning on each side. In the course of his argument in the latter case, Judge Cooley said: "We shall not stop to prove that there is a strong moral obligation resting upon any one engaged in a dangerous business to do what may be immediately necessary to save life or prevent an injury becoming irreparable, when an accident happens to a person in its employ. We shall assume this to be too obvious to require argument."

It may be that it is the legal as well as the moral duty of the company, under such circumstances, to do all it can to prevent an injury to one of its servants from having its worst consequences, just as it is its duty to do all it can to prevent

the injury in the first instance, when informed that the danger is impending. Whatever may be the reason, it is a case in which some one should act, and without delay, and the equities are in the idea that the employer is under a greater obligation to do so than any one else not otherwise bound. The liability should not be extended beyond the exigencies of the occasion, and the extraordinary rule should be most strictly construed, and applied with the greater caution, and all the conditions upon which it is based should appear in every case when it is applied.

The objection to T. J. Babb, as a juryman, on account of his relationship to Dr. Pinson, under the statute (Sand. & H. Dig., § 4256) is also untenable, since Pinson, although in some way interested, as we might say, in the result of the suit, is yet no party to it, and, besides, his interest is too uncertain to say that a verdict should be set aside for that reason. Furthermore, his relationship might have been brought out on his voir dire, as Pinson's connection with the matter was as well known at first as at last.

The newly discovered evidence concerning the declarations and admissions of the plaintiff would be merely cumulative of the other evidence going to show plaintiff's doubts as to the liability of appellant for his fee.

We think that the emergency under which the conductor acted in requesting the appellee to go and see the injured man (meaning to attend him) was such as to make his act binding upon the company, under the rule; that the charge was reasonable; and that the other objections, if tenable, do not constitute reversible errors. The judgment is therefore affirmed.

McCANN v. SMITH.

Opinion delivered May 14, 1898.

65	305
68	283
65	305
70	328
65	305
73	226
f73	352
77	194
77	326
65	305
f78	16

1. LIMITATION—DONATION DEED.—Sand. & H. Dig., § 4819, provides that no action for the recovery of any forfeited lands shall be had against any person who may hold such lands under a donation deed, unless it appear that the plaintiff was seized or possessed of the lands within two

years. *Held,* that two years' adverse possession is not a bar to such an action where only a part of it was under the donation deed. (Page 308.)

2. RECOVERY OF DONATED LAND—IMPROVEMENTS.—One holding forfeited land under a donation deed from the state is entitled, upon a judgment being had against him by the owner for the possession of the same, to recover the value of the improvements made by him on the land after a certificate of donation was issued to him before the deed from the state was executed, as color of title is not made a condition of recovery in such case by the terms of the statute (Sand. & H. Dig., §§ 2595, 2597). (Page 309.)

3. SAME.—The original owner of land forfeited for taxes, on recovering it. is bound to pay for all improvements placed thereon in good faith after expiration of the period of redemption by one holding under the forfeiture, notwithstanding there was no default in the payment of the taxes. (Page 311.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

This is an action commenced on June 12, 1896, by appellee against appellant for possession of a tract of land in Lee county. The plaintiff had judgment below.

The complaint showed a perfect chain of title. Defendant claims title under a donation deed issued to him by the commissioner of state lands, dated February 20, 1896, upon a certificate of donation issued to him December 27, 1892, and proof of improvements, residence, etc. The state's ownership was based upon a forfeiture for taxes of 1883, 1884 and 1885. The forfeiture was conceded to be void by reason of the fact that the taxes for that year had been paid by appellee in apt time; but the forfeiture and certificate of donation and deed executed to defendant were all regular upon their faces and on the record, and defendant has had actual and adverse possession continuously since his entry under his donation certificate—a period of more than four years up to the commencement of the suit. Defendant pleaded the two years statute of limitation, and also asked reimbursement for improvements in the sum of $529 made in good faith while in possession under his donation certificate.

The court held (1) that to sustain his plea of limitation defendant must show possession under his donation deed for a period of two years before commencement of the action—that

the period of possession under the certificate of donation could not be coupled with the possession under the deed issued thereon, so as to make out the two years' period of limitation; and (2) that a claim for improvement under Sand. & H. Dig., § 2590, could not be sustained where the possession was held under a certificate of donation—that a certificate of donation was not "color of title" in the meaning of that statute. From the judgment of the court defendant has prosecuted this appeal.

McCulloch & McCulloch, for appellant.

In order to sustain his plea of limitation, it is sufficient if defendant shows that he was holding under a donation deed from the state at the time of the institution of the suit, and that plaintiff had been out of possession and seisin for two years next before commencement of the suit. Sand. & H. Dig., § 4819; 57 Ark. 526. The same liberal construction should be given to this act as to other statutes of limitation. 53 Ark. 418; 57 Ark. 523; 58 Ark. 151; 60 Ark. 163; *ib.* 499. The holder of land under a donation certificate from the state has sufficient "color of title" to entitle him to betterments. 60 Ark. 163; 48 Ark. 183. The certificate has as much force to give color of title as has a deed with words of grant.

Edwin Bevens, for appellee.

In all the cases cited by appellant the adverse possession was for two years or more, after the execution of the deed of donation. See, also, 59 Ark. 460; 43 *id.* 398; 53 *id.* 423. The statute of limitations governing this case was passed before such a thing as a "donation certificate" existed in this state; hence the possession contemplated by it could not have been possession under a donation certificate. Act January 10, 1857. Possession under the donation *deed* is required. 140 U. S. 546. The act is to be strictly construed. 43 Ark. 398. The *certificate* of donation was not color of title under the "Betterment Act." Teid. R. Prop. p. 531, § 696; 3 Wash. Real Prop. 154; 47 Ark. 528.

BATTLE, J. Two questions are presented for our consideration and decision.

First. Is two years' adverse possession of a tract of land held by a donee, first under a certificate of donation, and then under a donation deed by the state, sufficient to bar an action against him, when the possession under the deed has not continued two years, and it is necessary to add it to that held under the certificate to make the two years' adverse possession?

Second. Is a donee, holding land under a donation deed executed to him by the state, entitled, in an action against him by the owner for the possession of the same, to recover the value of the improvements made by him on the land after a certificate of donation was issued to him, and before the deed was executed, when the land was sold or forfeited to the state after the taxes for which it was sold or forfeited had been previously and in due time paid, and the owner recovers a judgment against him, in such action, for the possession of the same?

1. The statute, so far as it relates to this case, provides as follows: "No action for the recovery of any lands, or for the possession thereof, against any person or persons, their heirs or assigns, * * * *who may hold such lands under a donation deed from the state*, shall be maintained, unless it shall appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the lands in question within two years next before the commencement of such suit or action."

The possession necessary to bar the "plaintiff, his ancestor, predecessor, or grantor," must be held under the donation deed. Suppose a trespasser should hold adverse possession for two years, and the grantee in a donation deed for the land should oust him, and the original owner should bring an action against the grantee for the land before he has been in possession one year; the action would not be barred, although the plaintiff was not seized or possessed within two years next before the commencement of the action. So in this case the action is not barred. It is the adverse holding under the donation deed for two years that bars. Until the deed is executed, the grantee therein acquires no right, title or interest in the land, and acquires none by adverse possession. Sand. & H. Dig., § 4575, *et seq.*

2. Section 2595 of Sandels & Hill's Digest, so far as

it relates to this action, provides as follows: "No person shall maintain an action for the recovery of any lands, or for the possession thereof, against any person * * * * * who may hold such lands under a donation deed from the state, unless the person so claiming such lands shall, before the issuing of any writ, file in the office of the clerk of the court in which suit is brought an affidavit setting forth that such claimant hath tendered to the person holding such lands in the manner aforesaid, his agent or legal representative, the amount of taxes and costs first paid for said lands, with interest thereon from the date of payment thereof, and the amount of taxes paid thereon by the purchaser subsequent to such sale, with interest thereon, and the value of all improvements made on such lands by the purchaser, his heirs, assigns or tenants, after the expiration of the period allowed for the redemption of lands sold for taxes, and that the same hath been refused."

Section 2597 of the same digest provides: "If judgment shall be given against any such person, or his assigns, who hold any such lands, in favor of any person claiming the same, no matter by what manner of title, said judgment shall only be for possession of the premises in question; and damages shall be assessed in favor of said defendant for the amount of all taxes, costs and interest hereinbefore provided for, together with the value of all improvements made thereon after the expiration of the period allowed for the redemption of lands sold for taxes, for which judgment shall be entered in favor of said defendant, and the same shall be a lien upon such lands until satisfied."

In *Kelso* v. *Robertson*, 51 Ark. 397, it was held that no one was required by section 2595 to tender any taxes, penalty and costs for which his lands were sold, which he had paid previously to the sale, before he can bring suit for possession. He is not required to pay them, because he has already done so. But that may not be true as to the improvements. If it is not, shall the person holding under a donation deed from the state, who has made the improvements upon the land in good faith, be entitled to nothing for them because the owner paid the taxes, for which the land was sold or forfeited to the state, before such sale? Shall the owner take his improvements without compensating him for the same?

In Blackwell on Tax Titles (§ 1022) it is said: "The Pennsylvania statute of April 3, 1804, declared: 'That no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the sale thereof for taxes, as aforesaid; provided, always, that where the owner or owners of such lands, sold as aforesaid, shall, at the time of such sale, be a minor or minors, or insane, and residing within the United States, five years after such disability is removed shall be allowed such person, or persons, their heirs or legal representatives, to bring their suit or action for recovery of the lands so sold; but where the recovery is effected in such case, the value of the improvements made on the land so sold, after the sale thereof, shall be ascertained by the jury trying the action for recovery, and paid by the person or persons recovering the same, before he, she, or they shall obtain possession of the land so recovered.'"

In *Gilmore* v. *Thompson*, 3 Watts, 106, the court held that a sale of land which was subject to assessment for taxation, for taxes which had been previously paid by the owner, was void, but the purchaser was entitled to compensation, under the act of 1804, for the improvements he had made upon it in good faith. Chief Justice Gibson, in delivering the opinion of the court, said: "The provision for compensation under the act of 1804 was restrained to no particular case within the limitation of five years. On the contrary, it was extended to every recovery for irregularity in the assessment, process, or sale. The same provision was repeated in the act of 1815, when the legislature narrowed the ground of recovery to cases where the tax had been paid previously to the sale, or subsequently by redemption. Why, then, should not the provision for compensation be as broad under either act as the right of recovery, which is put by the latter on the same footing, whether it rests on previous or subsequent payment of the taxes? It was introduced to protect all *bona fide* purchasers, without distinction, who should expend their money or their labor in confidence of the title. * * * Nothing can be fairer in the abstract than the principle of compensation; and, though it may be abused in its application, it is the business of those who preside over the deliberations of

juries to look to that,—certainly not to restrain the obvious design of the legislature for fear of such abuse. In the case before us, the facts of double assessment and payment were unknown to the defendant; and, as they were such as he might fairly contest, compensation was justly allowed him for all expenditures previous to the trial." See *Coney* v. *Owen*, 6 Watts, 435; *McKee* v. *Lamberton*, 2 W. & S. 107; *Cranmer* v. *Hall*, 4 W. & S. 36; *Rogers* v. *Johnson*, 67 Pa. St. 43, 47.

Judge Cooley, in his work on taxation, in speaking of the statutory requirements as to the payment of taxes, penalties and costs by the owner, before he can bring an action for the recovery of his land sold for the same against the purchaser, says: "The legislature can have no more authority to compel the landowner to pay a lawless exaction to a third person than it has to compel a like payment to the state directly. The one as much as the other would be robbery. If the landowner performs all his duty to the state, nothing which the tax officers can do without his consent, and in the direction of depriving him of his freehold, can raise against him an equity requiring him to do more. The rule *caveat emptor* applies to the purchaser. He takes all the risks of his purchase, and, if he finds in any case that he has secured neither the title he bid for nor any equitable claim against the owner, the state may, if it see fit, make reparation itself; but it has no more authority to compel the owner of the land to do so than to exercise the like compulsion against any other person."

After this, in speaking further of the restrictions that can be imposed upon the owner's right to recover his land which has been sold for taxes, he says: "The requirement that payment shall be made of the fair value of betterment which an adverse claimant has made in good faith upon the land, and which the party making them must now lose, is one that, under ordinary circumstances, is eminently just and proper. No serious question of the right of the legislature to make such requirements can well arise, and, if it could, it must now be considered as conclusively settled by the decisions in its favor. The requirement is at this time generally made." Cooley, Taxation (2 Ed.), pp. 553, 554.

The requirement of sections 2595 and 2597 of Sand. &

H. Dig., which make it the duty of the owner to pay for improvements, is based upon the equity and justice of the claim of the party, who has made them in good faith, to compensation for the same, and not upon the legality or nonpayment of taxes. The legislature evidently intended to encourage the purchase of lands sold for taxes, and to protect those making improvements on lands so purchased in good faith, by securing to them compensation for the same, in the event they should for any reason fail to hold the land. Color of title is not made a condition to this right by sections 2595 and 2597.

Our answer to the second interrogatory propounded in the beginning of this opinion is that he is, provided he has made the improvements in good faith, and the owner is entitled to rents and profits.

The judgment of the circuit court is reversed, in so far as it is inconsistent with this opinion. In other respects it is affirmed, and the cause is remanded for further proceedings.

SHERWOOD v. WILKINS.

Opinion delivered May 14, 1898.

1. LIMITATIONS—MATURITY OF NOTE.—A mortgage given to secure three notes, maturing at different dates, provided that, upon a failure to pay any of the notes, or interest on them, when due, the mortgagee might, at his option, declare the whole sum of principal and interest due. *Held* that, in the absence of such a declaration, the statute of limitation would begin to run against any one of the notes when it matured according to its terms, and not on a default in the payment of interest. (Page 314.)

2. FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS.—The constitutional provision that no foreign corporation shall do business in the state "except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served" (art. 12, § 11) is not self-executing, and no penalty attached to its violation until the legislature acted. (Page 315.)

3. USURY—COMMISSION TO BORROWER'S AGENT.—A commission to a borrower's broker for procuring the loan, paid by the borrower without the lender's knowledge, does not render the loan usurious. (Page 315.)

Appeal from Cross Circuit Court in Chancery.

FEXLIX G. TAYLOR, Judge.

Watson & Fitzhugh and *T. E. Hare*, for appellants.

Where a mortgage provides that, on default of any payment of interest, the whole sum shall become due, and the mortgage may be foreclosed, limitations begin to run when the note matures according to its terms, and not on default in payment of interest. 116 Cal. 232; *ib.* 220. It is no defense that the Freehold Company is a foreign corporation, and has not complied with § 11, art. 12, of the constitution. 60 Ark. 325. To charge appellant with usury, knowledge on their part of the usurious contract must be proved. 54 Ark. 40; *ib.* 573; 38 S. W. 15.

Norton & Prewett, for appellees.

If the lending company was innocent of the usurious nature of the contracts which were being made for it, this fact was peculiarly within its knowledge, and if it would use such innocence as a defense, it must show it. 19 Ark. 146; 32 Fed. 122; 17 S. E. 455; 1 N. W. 613; 2 Atl. 374. In this case, knowledge was imputable to the lending company. 38 S. W. 1113; 51 Ark. 534.

HUGHES, J. The bill in this cause was filed in the circuit court of Cross county to foreclose a trust deed executed by the appellees to Sherwood, as trustee, to secure their three notes, payable to appellants, the American Land-Mortgage Freehold Company, Limited, as follows: One note for $166, due December 26, 1886; one note for $166, due December 26, 1887; one note for $168, due December 26, 1888. Attached to the last-mentioned note was an interest coupon for $13.31, due at the same time with the note, to-wit: December 26, 1888. All of said notes and the trust deed were executed on the 26th day of December, 1883. The bill was filed December 22, 1893. The trust deed and notes were filed as exhibits to the bill.

The defendants by their answer set up three defenses: (1) Usury; (2) the statute of limitation of five years; (3) that the complainant, the Freehold Company, was a foreign corpora-

tion, and had not complied with section 11, article 12, of the constitution of the state of Arkansas, providing that foreign corporations shall do no business in this state except while it maintains therein one or more known places of business, and an authorized agent or agents, in the same, upon whom process may be served.

The testimony adduced by the defendants failed to establish the first defense.

As to the second defense, to-wit, the statute of limitations of five years, it is conceded that the bar had attached as to the two notes for $166 each, one due December 26, 1886, and the other due December 26, 1887.

As to the third and last note, to-wit: the one for $168, due December 26, 1888, and the interest coupon for $13.31, due on the same date, the bar had not attached, as the five years from the maturity of the note and coupon last referred to did not expire until four days after the bill was filed. Defendants claim, however, in their answer, that, even as to this last note, the statute of limitations is a good defense, because, under the terms of the trust deed, the plaintiffs had a right of action upon all of said notes upon the failure of the defendants to pay the one maturing in 1886, at maturity. We think it clear, however, that this contention cannot be maintained. The language of the trust deed is that, "should said first parties fail to pay any of said money hereby secured, either principal or interest, when the same becomes due, or to conform to, or to comply with, any of the foregoing conditions or agreements, the principal sum of money hereby secured may, without notice to said first party, at the option of the said third party (the Freehold Company) or his assigns, and at his option only, be declared due and payable at once," etc. In the absence of proof to show the appellant company had exercised this option, it will not be seriously contended in this court that the statute of limitations began to run before the maturity of the notes, according to their tenor. It has been expressly held that, even where a mortgage provides that, in default in payment of interest, the whole sum of principal and interest shall become due, and the mortgage may be foreclosed, limitations begin to run when the note matures according to its terms, and not on

default in payment of interest. *Mason* v. *Luce*, 116 Cal. 232; *Richards* v. *Daley*, *ib.* 336.

The third defense, that the Freehold Company is a foreign corporation, and had not complied with section 11 of article 12 of the constitution, is disposed of by the opinion of the court in the case of *St. Louis, Arkansas & Texas Railway Company* v. *Fire Association of Philadelphia*, 60 Ark. Rep. 325. In regard to that section of the constitution, Mr. Justice Battle, delivering the opinion of the court, says: "It is not self-executing. It does not provide how the agent shall be designated, or how the place of business shall be made known. The Commercial Company had no right to say upon what agent process may be served. The legislature alone had the right. Until it exercised it, there was no penalty for the violation of the constitution in that respect." 60 Ark. Rep. 325. The notes and trust deed in this case were given in December, 1883, and the act of the legislature carrying into effect the constitutional provision under consideration was not passed until April 4, 1887. The appellant company very promptly complied with the requirement of this act.

In regard to the question of usury, the evidence shows that the appellee employed T. E. Hare as his agent, and agreed to pay him a commission of twenty per cent., or one hundred dollars, to procure the loan for him, and that Hare was not the agent of the company, and that it knew nothing of the contract between Hare and the appellee. It follows, therefore, that the fact that the appellee, without the knowledge of the company, agreed to pay his agent, Hare, for services rendered him, a sum as commission, which, added to the interest, would have made the loan usurious, had the company authorized or knowingly permitted it, if Hare had been its agent, would not make the loan usurious. *Banks* v. *Flint*, 54 Ark. 40; *May* v. *Flint*, 54 Ark. 573; *Sherwood* v. *Haney*, 63 Ark. 249.

The decree as to the two notes for $166 each, due respectively December 26, 1886, and December 26, 1887, is affirmed. But as to the note for $168, due December 26, 1888, and the interest coupon thereto for $13.31, due the same date, the decree is reversed, and the cause is remanded, with directions to

foreclose the deed in trust for the amount of the note and coupon last mentioned.

ATKINSON v. BURT.

65 316
189 353

Opinion delivered May 14, 1898.

1. MORTGAGE—ENFORCEMENT—FURNISHING STATEMENT OF ACCOUNT.—Under the statute which provides that, before any mortgagee shall proceed under his mortgage to replevy personal property, he "shall make and deliver to the mortgagor a verified statement of his account," etc. (Sand. & H. Dig., § 5110), the failure of a mortgagee to deliver such a statement before bringing replevin for mortgaged personal property is matter of defense merely in that suit, and will not invalidate the proceeding on collateral attack. (Page 318.)

2. SAME—VALID AND USURIOUS DEBTS.—Where a mortgage is given to secure two distinct and separate debts, one of which is usurious and the other free from usury, the mortgage stands as security for the debt that is unimpeachable for usury. (Page 319.)

3. INSTRUCTION—MORTGAGEE IN POSSESSION.—It is error to instruct the jury that if a mortgagee obtained possession of the mortgaged chattels by means of a writ of replevin issued by a justice of the peace not having jurisdiction, his subsequent possession was also unlawful, since he was entitled to possession, though the manner of obtaining it may have been unlawful. (Page 319.)

4. ACCOUNT RENDERED—BURDEN OF PROOF.—While the rendering of an account may be considered an admission of its correctness, it is error to instruct the jury that an account rendered is *prima facie* correct, and that the burden is on the party rendering it to impeach its correctness. (Page 319.)

5. EVIDENCE—BOOK ENTRIES.—Entries in a book of accounts are not admissible until it is shown that the book was correctly kept, and that the entries therein were contemporaneous with the facts recorded. (Page 319.)

Appeal from Lincoln Circuit Court, Star City District.

JOHN M. ELLIOTT, Judge.

STATEMENT BY THE COURT.

Burt sued Atkinson and others for taking from his possession some cotton, corn, two horses and a wagon, and other personal property. Atkinson answered, denying that he wrong-

fully took the property, but said that he had a mortgage upon it to secure a debt of $484.49, and that Burt delivered the property to him voluntarily. The other defendants filed general denials. Burt replied, setting up that the debt was usurious.

After hearing the testimony in the case, the court gave to the jury, at the instance of the plaintiff, the following instructions:

"(1) The court instructs the jury that if they find from the evidence that defendant, J. G. Atkinson, had a mortgage on the property in controversy, and obtained possession of said property under and by virtue of the order of delivery issued by defendant, Adams, as justice of the peace, without first having rendered to the plaintiff, Burt, a duly itemized account of all the transactions under said mortgage and between them, verified by the affidavit of said Atkinson, the jury will find for the plaintiff, and assess his damages at such sum as they may believe to be the value of the property so converted.

"(2) If the jury find from the evidence that any portion of the debt secured by the mortgage and account made thereunder was usurious, and more than ten per cent. interest per annum was demanded, received or charged by the defendant, Atkinson, they will find for the plaintiff, and assess his damages at the value of the property alleged to be converted.

"(3) If the jury find from the evidence that the suit instituted in the justice court was for the recovery of property of a greater value than $300, and the defendants obtained possession of said property under the writ of replevin issued in said suit, then such writ could not justify the defendants, or any one of them, in taking possession of such property, and their possession was unlawful and wrongful.

"(4) If the jury believe from the evidence that the defendant, Atkinson, rendered plaintiff an itemized and stated account of the transactions between them, then the burden of proof devolves on the defendant, J. G. Atkinson, to show, by a preponderance of the testimony, that there was a mistake or fraud in the statement so rendered."

Rose, Hemingway & Rose, for appellants.

It was error for the court to refuse to allow appellant to

introduce his account books in evidence. 1 Whart. Ev. § 678; 10 Ark. 398. It was error to charge the jury that they should find for the defendant, if they found that plaintiff had failed to file an itemized account before suing. Sand. & H. Dig., § 5110. This tends to work a forfeiture, which is not favored by the law. Endlich, Int. Stat. § 341. The mere rendering of an account is only an admission, whose weight is to be determined by the jury. 1 Am. & Eng. Enc. Law, 111; 1 Greenl. Ev. §§ 202, 209. A mortgagee is entitled to possession, and, even where it is acquired under a process void for want of jurisdiction, such possession is not unlawful. 18 Ark. 166; 43 *id.* 504, 519; 42 Ark. 242. The mortgagor's only remedy is to redeem. 34 Ark. 346. It was error to instruct the jury that if part of the indebtedness secured by the mortgage was usurious, the entire mortgage was void. 53 Ark. 538; 39 *id.* 326. Even if appellant got possession wrongfully, he is entitled to collect his debt. 51 Ark. 19; 57 Ark. 87.

D. H. Rousseau, for appellee.

Appellant was not entitled to have his account books in evidence. 10 Ark. 389; 57 Ark. 402. Appellant brought suit in a court having no jurisdiction; therefore, he became a trespasser, and his conversion of the property was wrongful. 36 Ark. 268. The mortgage was void because the debt was usurious in part. 32 Ark. 346; 35 Ark. 217. Appellant's books were worthless to establish anything, and he should not even have been permitted to use them to refresh his memory. 2 Rice, Ev. 827b, 834–835. The account rendered by appellant was binding on him and the burden is on him to show any mistake therein. 2 Rice, Ev. 837b; 1 Am. & Eng. Enc. Law (2 Ed.), 460.

HUGHES, J., (after stating the facts.) The first instruction is erroneous. By failing to furnish Burt, the appellee, with an itemized, verified statement of his account before bringing suit, the appellant, Atkinson, did not forfeit his debt secured by the mortgage given by the appellee, Burt, to secure its payment. The statute imposes no such forfeiture for such a failure. The statute is as follows: "Before any mortgage, trustee or other person shall proceed to foreclose any mortgage,

deed of trust, or to replevy under such mortgage, deed of trust or other instrument, any personal property, such mortgagee, trustee or other person shall make and deliver to the mortgagor a verified statement of his account, showing each item, debit and credit, and the balance due. *Provided* if the mortgagor disposes, or attempts to dispose, of any of the property mortgaged, or absconds, or removes from the county, such statement shall not be necessary." Sand. & H. Dig., § 5110. This might have been pleaded to a suit to foreclose, or to a suit for the possession of the property. But it could not work a forfeiture of the appellant's mortgage, or cause the loss of the debt secured thereby.

The second instruction is erroneous, because it told the jury that, if any part of the indebtedness secured by the mortgage was usurious, the entire mortgage was void. The mortgage was made to secure future advances, as well as a note given for advances prior to its execution. They were distinct and separate debts. One might be usurious, and the other free from usury. The mortgage would stand as security for the debt unimpeachable for usury.* *Riggan* v. *Wolf*, 53 Ark. 538; *Lund* v. *Fletcher*, 39 *id.* 326.

The third instruction is erroneous, because by it the jury were told that, if the justice had no jurisdiction, the writ could not justify the seizure, and Atkinson's possession was unlawful; thus ignoring Atkinson's right to possession under his mortgage, because the manner of obtaining it was wrong. He was entitled to possession, and, though the manner of obtaining it may have been wrong, his possession itself was not unlawful. *Kannady* v. *McCarron*, 18 Ark. 166; *Whittington* v. *Flint*, 43 *id.* 504, 519; *Jones* v. *Horn*, 51 Ark. 29; *Cocke* v. *Cross*, 57 Ark. 87.

The fourth instruction is erroneous, because it told the jury, in effect, that the account furnished Burt by Atkinson

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*NOTE BY THE REPORTER. It was held otherwise in *Marks* v. *McGehee*, 35 Ark. 217, 219, where the court, per Eakin, J., said: "The mortgage was a conveyance and a security, and by it a greater sum or value was attempted to be secured than was allowed by law. That, by force of the statute, made it void, *and the court could not convert it into an instrument of different terms, so as to make it stand as a surety for the sums from which the usury could be eliminated.* The transaction was, as a whole thing, void in itself."

was *prima facie* correct, and that the burden was on Atkinson to impeach its correctness. The merely rendering an account might be considered an admission that it was correct, to be considered by the jury for what it was worth, but it does not make *prima facie* proof of its correctness.

An objection was made to the introduction of Atkinson's mercantile books as evidence, which was overruled, but should have been sustained, because no foundation was laid for their introduction. This, however, was in favor of the appellant, and he could not complain of it. But, as the case must be reversed and remanded for errors in the instructions as above indicated, we mention this. Before allowing the entries in the book to be read, the court should have required a showing that the book was correctly kept, and that the entries therein were contemporaneous with the facts recorded. *Railway Co.* v. *Murphy*, 60 Ark. 342.

For errors in giving the instructions as above set out, the judgment is reversed and the cause is remanded for a new trial.

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MISSOURI PACIFIC RAILWAY COMPANY *v.* YARNELL.

Opinion delivered May 14, 1898.

1. EVIDENCE—COPY OF CONTRACT.—Where a copy of a written contract, purporting to be the original, is filed as an exhibit to the complaint, and the original is in the hands of defendant, the latter cannot at the trial object to the introduction of the copy in evidence; it being provided by Sand. & H. Dig., § 2929, that "when a writing purporting to have been executed by one of the parties is referred to in and filed with a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit before the trial is begun." (BATTLE, J., dissents.) (Page 324.)

2. CONTRACT—EFFECT OF BREACH.—Failure of one party to a contract to comply with its terms releases the other party from compliance with it. (Page 324.)

Appeal from Woodruff Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

The appellee, as assignee of A. F. Smith, recovered a judgment against the appellant, for $392, for failure of the appellant to comply with the following contract:

"Agreement made this twentieth (20th) day of November, A. D. 1890, by and between A. F. Smith, of Bald Knob, Arkansas, of the first part, and the Missouri Pacific Railway Company, of the second part, to-wit:

"The said A. F. Smith, of the first part, agrees to furnish to the party of the second part piling, free on board cars on the St. Louis, Iron Mountain & Southern Railway, commencing November 20, 1890, and ending December 31, 1891, in amounts and at prices as follows:

"Cypress Piling. Specifications: Must be red or black cypress, straight, sound, clear of knots, bark taken off, to have not less than ten (10) inches of heart in the top or small end, well trimmed, and to be cut off square at both ends. To the amount of two hundred and fifty thousand (250,000) linear feet, if needed, at following prices: For lengths up to and including thirty (30) feet, at seven (7) cents; over thirty (30) and including thirty-five (35) feet, at eight (8) cents; over thirty-five (35) and including forty (40) feet, at nine (9) cents; over forty (40) and including sixty (60) feet, at twelve (12) cents; over sixty (60) feet, at thirteen (13) cents per linear foot. And the said party of the first part agrees to keep on hand at side tracks, ready for loading, not less than twenty (20) car loads of the above described piling of assorted lengths.

"Oak Piling. Specifications: Must be live, sound white, post or burr oak; those thirty (30) feet long and over to be ten (10) inches, and those under thirty (30) feet long to be twelve (12) inches in diameter at top or small end; must be straight, bark peeled off, well trimmed, cut off square at both ends, and otherwise first class in every respect. To the amount of two hundred thousand (200,000) linear feet, if needed, at prices as follows: Lengths up to and including thirty-five (35) feet, six and one half ($6\frac{1}{2}$) cents; lengths over thirty-five (35) feet, seven (7) cents per linear foot.

"And the said party of the first part agrees to keep on

hand at side tracks, ready for loading, not less than twenty (20) car loads of the above described piling of assorted lengths. The piling to be furnished under this agreement shall be furnished and loaded promptly as orders are received from ths wood, tie and timber agent of said second party for same; the proper invoices and bills of lading for such material shall be forwarded promptly after each shipment to the said agent of said second party. It being understood that the piling above provided for shall be ordered shipped only as requisitions for such are received from the several departments of the Missouri Pacific Railway, and all to be inspected at destination. Failure of said party to carry out the provisions of this agreement shall operate as sufficient cause for cancelling this agreement at the option of said second party, and in the event of such cancellation fifteen (15) days' notice in writing shall be given to said first party.

"And the said The Missouri Pacific Railway Company agrees to furnish the said A. F. Smith with orders for the above described piling, from time to time as requisitions for same are received, and to pay for the same at the office of said second party in the City of St. Louis each month as readily as it is possible to adjust accounts.

"In witness whereof, said parties have hereunto set their names the day and year above written.

[Signed] "A. F. SMITH, Contractor.

"The Missouri Pacific Railway Company,

[Signed] "By N. T. SPOOR,

Wood, Tie and Timber Agent."

A typewritten copy of this contract was attached to and exhibited with the complaint, and purported in the complaint to be the original.

The appellant answered generally, and denied that it made such a contract with the appellee, but did not verify the answer by affidavit, nor did it file an affidavit, as required by the statute, denying the genuineness of the exhibit or that it executed the contract. The contract was declared upon in the complaint as the one exhibited with the complaint, and not as a copy of the original. When the copy was offered to be read in evidence, the appellant objected, his objection was overruled, and

the copy of the contract exhibited with the complaint and referred to as the original was read to the jury, to which the appellant excepted.

Among others the court was requested by the appellant to instruct the jury as follows:

"(3) In this case, by the terms of the alleged contract sued on, the plaintiff's assignor agreed to keep on hand on the sidings of the Iron Mountain Railway certain quantities of oak and cypress piling, so that the same could be loaded and shipped as needed by the defendant. If you find from the evidence that plaintiff's assignor failed to keep on hand at said sidings piling agreed to be so kept, then your verdict must be for the defendant, [unless you further find that the defendant had the power under the contract to terminate it. In that event, the failure of the defendant to terminate the contract would be a condonement or healing of the breach,]"—which the court refused, but modified said instruction by adding thereto that part in brackets, and gave it as so amended, to which appellant excepted.

There was evidence in the case tending to show that the appellee, the plaintiff below, had not complied with the contract upon his part.

Dodge & Johnson, for appellant.

The original of the contract sued on not having been filed with the complaint, in accordance with § 5753, Sand. & H. Dig., the rule laid down in § 2929, *ib.*, does not apply to render it incumbent upon the defendant to deny same by affidavit before trial. It was not competent to admit a copy of the alleged contract to prove the original, without satisfactorily accounting for the original. 1 Greenl. Ev. §§ 82, 84, 87, 88. The burden was on appellee to show delivery in compliance with terms of contract. This was prerequisite to recovery. The evidence does not sustain the allegation of appellee, that appellant had requisitions for timber but refused to turn them over to appellee. It was error to instruct the jury that it was necessary for appellant to exercise its option to terminate contract upon violation of it by appellee. The violation discharged the contract.

S. Brundridge, Jr., and *W. B. Smith*, for appellee.

Appellant did not deny the genuineness of the contract sued on, before trial, by affidavit, nor were the allegations of its answer, denying its genuineness, sworn to. Hence there was no error in allowing its introduction into evidence. 35 Ark. 198. This court will not reverse a judgment for want of evidence to sustain the verdict, so long as there is any evidence to support the verdict. 48 Ark. 497; 57 Ark. 577; 51 Ark. 330; 24 Ark. 252; 34 Ark. 632.

HUGHES, J., (after stating the facts.) As the appellant did not deny the genuineness of the contract sued upon under oath before the trial began, he could not upon the trial object to the introduction in evidence of the copy. The proof showed that the original was in the possession of the appellant; and he should have made his objection that only a copy, and not the original, was exhibited with the complaint before the trial. By his failure to do so, he waived his objection, and should not have been allowed to take an unlooked-for and unfair advantage of the appellee by having it excluded upon the trial, and thus leave appellee with no opportunity to lay the proper foundation to introduce secondary evidence. The statute provides that "when a writing purporting to have been executed by one of the parties is referred to in and filed with a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit, before the trial is begun." Sand. & H. Dig., § 2929.

The court erred in modifying the third instruction as asked by the appellant, and giving it as modified, over the objection of appellant. The obligations of the contract were mutual, and, if the appellee failed to comply with it, he could not hold the appellant to a compliance. This is too plain to require argument or authorities. The failure of one party to a contract to comply with its terms releases the other party from compliance with it.

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

BATTLE, J., dissents from so much of the opinion as holds that it was competent to read the copy of the contract in evidence.

BAGNELL *v.* WALKER.

Opinion delivered May 28, 1898.

MORTGAGE—PAYMENT.—To a bill to foreclose a mortgage it is no defense that the mortgagor delivered to his agent the amount of the mortgage debt, with interest, to be transmitted to the mortgagee, if such agent failed to transmit the money to the mortgagee. (Page 329.)

Appeal from Sharp Circuit Court in Chancery.

RICHARD H. POWELL, Judge.

Sam H. Davidson for appellants.

A remittance of money by mail is at the risk of the party sending it, unless he was authorized by express direction or previous usage to so remit it. 17 Ark. 428. In the absence of other satisfactory proof of authority to receive payment, possession of the note or security, by the alleged agent, is necessary to the protection of one paying to him. 19 Ill. App. 17; 2 Sandf. Ch. 325; 68 N. Y. 130; 18 Iowa, 500; 35 S. W. 997; 55 Ark. 347; 98 Ill. 156; 161 Mass. 101; *ib.* 96; *ib.* 164; 89 Mo. 553; Jones, Mortgages (4 Ed.) 964; 162 Mass. 72; 64 N. W. 414; 41 Pac. 1068; 63 N. W. 362. Payment of a negotiable note to the original payee, after the note has been assigned, is no defense to an action by the assignee against the maker. 29 Ark. 497; 21 Ark. 393; 13 Ark. 151; 31 Ark. 429; Jones, Mortgages (2 Ed.), § 840; 1 Jones, Mortg. (4 Ed.) §§ 956 and 847; 89 Mo. 553; 25 Kas. 625; 23 Fed. 165. The following authorities hold the same of non-negotiable instruments. 51 How. Pr. (N. Y.) 407; 14 Ill. 51; *ib.* 198. Even in cases where payment is made direct to the indorsee or payee of a draft or note who has not possession of it, but gives a receipt for it and agrees to surrender the paper, the

maker or payor is not protected against a *bona fide* holder of the paper. 18 Am. & Eng. Enc. Law, 190, note 2, and cases; 64 Ga. 544; 54 Ga. 52; 23 Kas. 482; 20 Pick. 545; 71 Ia. 155; 45 Wis. 189; 85 Tenn. 737; 1 Dan. Neg. Inst. (3 Ed.) §§ 769 and 769a; 51 Cal. 227; 31 Ark. 20; 41 Ark. 242. Authority to collect interest on a mortgage does not authorize the agent to collect the principal also. 1 Jones, Mort. § 964; 2 Sandf. Ch. 325; 68 N. Y. 130; 103 N. Y. 556; 50 N. Y. 410; 15 Ia. 459; 46 Ia. 797; Mechem, Agency, § 379; 28 N. J. Eq. 13; 26 Ill. App. 433. The maker was not entitled to notice of the transfer of the paper. 6 Cold. (Tenn.) 467; 22 Mich. 360; 2 Cow. 246; 14 Am. Dec. 475. The assignee was subrogated to the mortgage security. 26 Ark. 151; 15 Am. & Eng. Enc. Law, 844, 855.

P. H. Crenshaw, for appellee.

Banks v. *Flint*, 54 Ark. 40, is conclusive of every point raised in this case. Appellant is estopped to deny the agency of those who so held themselves out, with his acquiescence. Payment to the agent is payment to the principal, whether the agent's authority is express or implied.

BUNN, C. J. This a bill to enjoin appellant Davidson, as trustee in a certain deed of trust, from selling certain property therein contained, for the security of a debt alleged to have been paid. On final hearing, the temporary injunction was made perpetual, and Davidson, as also Bagnell, one of the parties defendant, appealed to this court.

The complaint set up that the note secured by the deed of trust was usurious, and furthermore that the note had been, in fact, paid.

The answer denied each of said allegations, and, with appropriate allegations, was made a cross-bill, praying the foreclosure of the deed of trust.

The chancellor held that there was no usury in the note or deed of trust, and that question is eliminated from the controversy here. The chancellor found, however, that the debt had been paid, and decreed accordingly for plaintiffs, dismissing defendants' cross-bill, and making the injunction perpetual. The

question therefore of the payment of the debt is all that is left for our consideration.

In May, 1890, Walker appointed, in writing sworn to by him, the Wilson & Toms Investment Company of St. Louis his agent to effect a loan for him of $1,000, drawing 7 per cent. interest per annum, due in five years, on certain real estate in Sharp county then owned by him, and which is the same as that involved in this litigation. The loan was effected. The note was executed, payable to one W. F. Leonard, for $1,000, bearing 7 per cent. interest from date, payable on the 1st of January and July of each year, and the note due and payable at the end of five years, after which time it bore interest at the rate of 10 per cent. The deed of trust was at the same time executed and acknowledged by Walker and wife, and delivered to George W. Toms, as trustee, and the money was paid by the company through the Bank of Mammoth Springs, Ark., whose cashier, H. G. King, had assisted Walker in borrowing the money. The note was assigned, for value, by Leonard to Bagnell some time in August, 1890; but of this Walker was not informed until some time in 1895, so far as the evidence discloses. The deed of trust was put on record soon after its execution.

Walker continued regularly to pay the semi-annual interest coupons, through the Mammoth Spring Bank and the Investment Company, until the latter went out of business in October, 1893, and was succeeded by the Central Trust Company of St. Louis. On the 10th of October, 1893, Walker sold the land in controversy to his co-plaintiff, G. P. Clay, gave him a warranty deed, and put him in possession at once; and on the following day sent, through Thomas H. Caleb, to the Mammoth Spring Bank, the sum of $1,036 (a sum sufficient to pay off the mortgage note and interest which would accrue thereon up to the 1st of January, 1894), and caused the same to be deposited in that bank for that purpose, and took his deposit receipt, in which was explicitly stated the object for which the fund was deposited. King, the cashier of the bank, presumably in obedience to instructions from Walker, addressed a letter to L. M. Hall (who, it appears, had become trustee in the deed of trust after the death of Toms, the original trustee named therein), in which Walker proposed to pay off the mort-

gage note and interest coupon, due 1st January, 1894, a year in advance of the maturity of the note, if the holder of the same would permit him to do so. This letter was turned over to Leonard, then the secretary of the Central Trust Company, and he communicated the proposition to Bagnell, and Bagnell agreed to it, but seems never to have heard anything more from it until more than a year afterwards, when, on demand, Walker refused to pay the coupons for July, 1894, and January, 1895, claiming that he had paid the note and interest to January, 1894, according to the proposition which had been accepted.

It appears that, after Bagnell (who was still unknown to Walker, and to King also) had agreed to accept the proposition through Leonard, King, cashier of the Mammoth Springs Bank, forwarded the $1,036 to the Central Trust Company, successors to the Wilson & Toms Investment Company, as stated, to be paid in settlement of the note and interest to 1st January, 1894, and in satisfaction of the deed of trust. No part of this sum appears to have ever been paid to Bagnell, except $35, the amount of the interest coupon due January 1, 1894, which was paid to Bagnell; nor does it appear that Bagnell ever knew, or had any information from which he might have been required to ascertain, that this money had ever been paid by Walker to the bank, or sent by it and paid to the Trust Company.

In January, 1895, or about that time, Bagnell notified Walker, direct, of the non-payment of the interest coupons of July, 1894, and of January, 1895, and demanded payment of them. Walker refused, and claimed that he had paid the debt according to the agreement heretofore stated; and, Hall having declined to act further as trustee, Bagnell appointed Davidson to act as such, and he was proceeding to foreclose the deed of trust, in accordance with the power in him vested therein, by sale of the property, but was enjoined from proceeding further by this suit.

All the interest coupons which had been paid were paid Bagnell through the Bank of Mammoth Springs and the Investment Company and the Central Trust Company, its successor, and these coupons, in each instance, were held by Bagnell until the money was actually paid, and then they were

sent direct to Walker. When the coupon of January, 1894, became due, it was paid by the Central Trust Company, which, in answer to inquiry by Bagnell, about that time, informed him that Walker had decided not to pay the principal for the present.

The money was paid by Walker, but never received by Bagnell. There is no proof that King, the cashier, or the Investment Company, or the Trust Company, was either the agent of Bagnell, or that he had anything to do with either, except as from time to time he would receive interest payments made through them by Walker. Nor do there appear any circumstances or complications of circumstances in evidence by which we can say that Bagnell, by his conduct, misled Walker into paying the money to others than himself. It was the duty of Walker to have paid the money only on the surrender of the note and coupons due; and if he entrusted this act of precaution to King, or either of the brokerage companies named, they became his agents in so far, and Bagnell was not responsible for their failures or defaults. The question is one of fact, the principle of law applicable being well known and well established, and the facts do not show that Bagnell is liable for the loss thus occasioned to one or two parties more or less innocent.

The cross bill should not have been dismissed, nor should the chancellor have found that Walker had paid the debt, for there was no evidence to support such finding.

The decree of the court as to dismissal of the cross-bill is reversed, and the prayer of the cross-bill is granted, and the cause remanded with directions to foreclose the deed of trust.

WOOD, J., (dissenting.) I am of the opinion that the evidence was sufficient to support the decree of the court. I cannot say that the finding of the chancellor is clearly against the weight of the evidence, and therefore I think the decree of the court below should be affirmed.

MOORE v. STATE.

Opinion delivered May 28, 1898.

APPEAL—STENOGRAPHER'S NOTES—BILL OF EXCEPTIONS.—The act of March 16, 1897, required the official stenographer to report all oral proceedings, and provided that his transcribed notes should be taken as a part of the transcript, and that "either party demanding a bill of exceptions shall be charged" a specified fee therefor. *Held*, that the stenographer's notes can be made available on appeal only by being made a part of the bill of exceptions. (Page 332.)

Appeal from Lawrence Circuit Court, Western District.

RICHARD H. POWELL, Judge.

Ed. Moore, pro se.

The verdict is wholly unsupported by the evidence, and should be set aside. The stenographer's report contains all the evidence, and it is sufficient for the purpose. Acts Ark. (1897) 64–65.

E. B. Kinsworthy, attorney general, for state.

This court will not reverse a judgment for lack of evidence to support the verdict, unless there is an entire absence of it. 43 Ark. 317; 18 Ark. 303; 43 Ark. 367; 51 Ark. 115; 47 Ark. 567. The certified copy of the stenographer's notes can not take the place of a bill of exceptions. Acts 1897, pp. 64-66; 55 Wis. 682. The trial judge must sign the bill of exceptions. 114 Ind. 340; 132 Ind. 260; 111 Ind. 384; 161 Pa. St. 320; 12 Ind. 560; 108 Ind. 387; 154 Pa. St. 587; 17 Pac. 561; 37 Ark. 370. There being no bill of exceptions, this court cannot consider the sufficiency of the evidence. 45 Ark. 143; 41 Ark. 225; 47 Ark. 230.

BATTLE, J. Ed Moore was accused and convicted of burglary in the circuit court of the western district of Lawrence county; and has brought to this court, by writ of error, the record and proceedings in the prosecution against him. He asks for a reversal of the judgment rendered upon his conviction, because, he says, the evidence adduced at his trial was insufficient to sustain a verdict of guilty. This is the only error of which he complains. To show what evidence was ad-

duced, he brings here a report of the same, as made out and filed by the stenographer of the court. No bill of exceptions was filed. Can we act upon the stenographer's report?

The act entitled, "An act for the appointment of a court stenographer," approved March 16, 1897, authorizes the judge of each judicial circuit of the state to appoint a competent official stenographer for his circuit, and, when appointed, makes him an officer of the court. His duties, as defined by the act, are as follows:

"Sec. 2. The duty of the stenographer shall be to attend all terms of the circuit court held within and for the circuit for which he is appointed, and he shall, when so requested by either party, make a stenographic report of all *oral* proceedings had in such court, including the testimony of witnesses with the questions to them, *verbatim*, the oral instructions of the court, and any further proceedings or matter, when directed by the presiding judge or upon the request of counsel so do to, and whenever during the progress of the cause any question arises as to the admissibility or rejection of evidence or any other matter causing an argument to the court, such argument shall not be recorded by the stenographer unless requested by the counsel in said cause, but he shall briefly note the objection made and the ruling thereon and any exception taken by either party or his counsel to such ruling.

"Sec. 3. It shall be the duty of such stenographer to furnish within twelve days from the conclusion of the trial thereof, or from the time of the demand, if made after the trial, a longhand or typewritten copy of the proceedings so taken in shorthand with a caption showing the style of the case, its number, the court in which it was tried, and when tried, and sign, certify and file the same in the office of the clerk of the court in which the case was tried."

Section six of the act provides that "either party demanding a bill of exceptions shall be charged at the rate of five cents per each one hundred words transcribed by the stenographer, the same to be charged by the clerk and collected by the sheriff as costs in the case and paid into the county treasury," etc.

And section eight provides: "The transcribed notes of the stenographer mentioned in section six of this act shall be

taken as a part of the transcript, and no clerk shall make any additional charge for same other than the five cents per hundred words mentioned in section six of this act."

The act does not dispense with or make unnecessary a bill of exceptions in any case wherein it was required before its enactment, but, on the contrary, provides that "either party demanding a bill of exceptions shall be charged at the rate of five cents per each one hundred words transcribed by the stenographer," thereby implying that it is to be made a part of the bill of exceptions. Section eight provides that it shall be taken as a part of the transcript filed in this court. So it is necessary for a party, in order to make it a part of his bill of exceptions, to state therein that such a report was filed; and he may, or may not, as he sees fit, direct the clerk where to incorporate the same when he makes the transcript to be filed in this court, as by saying at the proper place in the bill of exceptions, "Here the clerk will insert the stenographer's report," or by using words of similar import. In either case he should further state that it contains all the evidence adduced at the trial, and if not all, state the evidence it does not contain. The clerk should not copy the report, but insert it in the transcript according to such directions, or, if no such directions be given, place it in the transcript in a suitable place.

It is necessary that the report should be brought here in the manner indicated, for the stenographer is required to report so much of the evidence as is oral, and no other. Whenever it is necessary to bring the evidence on record in cases other than equitable actions, it should be shown that all of it has been set out, and this could not be done by a stenographer's report; for it is not evidence of that fact, because the stenographer is not authorized nor required to report written, record or documentary evidence. The same is true as to written instructions. Then, too, the trial court should protect itself and the parties concerned against a false or imperfect report of the evidence and instructions, and the most appropriate means provided for that purpose is a bill of exceptions. Hence, as the stenographer's report is not sufficient to perform the office of a bill of exceptions in respect to the evidence or instructions, it is obvious that it was never intended to do so, and can be made available

only by being made a part of the bill of exceptions in the manner indicated.

Judgment affirmed.

PARKER v. NORMAN.

Opinion delivered May 28, 1893.

CONTRACT—PAROL EVIDENCE.—Where C wrote a letter to A, guarantying to the latter that B would repay a loan of $3,000 made to him by A, and beneath this letter B wrote a guaranty that he would ship to A 800 bales of cotton, or pay a commission of one dollar per bale on the deficit, the letter and indorsement together constituted one contract, to vary which parol evidence is inadmissible. (Page 335.)

Appeal from Union Circuit Court.

CHARLES W. SMITH, Judge.

Jesse B. Moore and *Morris M. Cohn*, for appellants.

Parol evidence is not admissible to add to or vary the terms of a written contract. 4 Ark. 179; 5 Ark. 651; *ib.* 672; 9 Ark. 501; 13 Ark. 496; 15 Ark. 543; 21 Ark. 69; 24 Ark. 201; 24 Ark. 269; 25 Ark. 191; *ib.* 309; 29 Ark. 544; 30 Ark. 186; 33 Ark. 150; 38 Ark. 334; 45 Ark. 177; 51 Ark. 441; 61 Ark. 81; 35 Ark. 156; 62 Ark. 330. The contract is a binding one. 59 Ark. 366. Appellee assented to the correctness of the balance stated by appellant by drawing on him for the amount. 41 Ark. 502; 47 Ark. 541; 53 Ark. 155; 55 Ark. 376.

Smead & Powell, for appellee.

As a general rule, when a contract is reduced to writing in plain, definite and unambiguous terms, and is accepted by the parties as the sole evidence of their contract, neither party can introduce oral evidence to alter or vary the terms and meaning. 24 Ark. 210; 24 Ark. 269; 25 Ark. 291; 25 Ark. 309. However, where the writing does not contain the complete contract of the parties, parol evidence is admissible to supplement the writing and explain the entire contract. 4 Ark.

183; 15 Ark. 543; Anson on Cont. 318; Lawson, Contr. § 375; 2 Wh. Ev. 927; 1 Greenl. Ev. 284; 6 E. & B. 370; 101 Ind. 375; 34 Mich. 113; Lawson, Contr. § 371; 27 Ark. 510; 55 Ark. 112; 106 Ind. 567; 55 Mich. 453; 111 U. S. 584; 56 Vt. 449; 78 Mo. 391; 2 Wh. Ev. § 1015; 1 Greenl. Ev. § 284a; 58 N. Y. 380; 6 L. R. Ex. 70. There was no error in the court's instructions. No instruction as to account stated was asked by appellant, while in the lower court; hence he cannot now complain of the omission. 60 Ark. 613; 47 Ark. 196.

BATTLE, J. John C. Norman sued John M. Parker & Co. for $520, alleging that it was a balance the defendant owed him on 280 bales of cotton sold by them for him. The defendants denied owing him any sum, but alleged that they were commission merchants doing business in the city of New Orleans, in the state of Louisiana; that in the spring of 1893 plaintiff applied to them for a loan of $3,000; that they loaned him the $3,000, and he agreed to return the same and eight per cent. per annum interest thereon, and to ship to them at New Orleans, during the fall and winter of 1893 and 1894, 800 bales of cotton, to be sold by them, in their capacity of commission merchants, on commission, and to pay them one dollar on every bale he failed to ship according to his agreement, in lieu of the commission they would have received had the contract been performed; that he shipped only 280 bales, which they sold, and reserved out of the proceeds of the sale $520, the amount due them on the contract for 520 bales of cotton he failed to ship according to agreement; and this is the $520 sued for in this action.

The issues in the action were tried by a jury. The following are the facts as shown by the evidence adduced at the trial: In the years 1893 and 1894 the plaintiff was engaged in the mercantile business in New London, in this state, and the defendants were engaged in the business of commission merchants in the city of New Orleans, in the State of Louisiana. In February, 1893, plaintiff applied to the defendants, at their office in New Orleans, for a loan of $3,000, and they agreed to loan him that amount at eight per centum per annum interest, provided E. R. Perry would indorse his note for that amount,

and he would ship them 300 bales of cotton in the fall and winter of 1893 and 1894. Afterwards plaintiff handed to the defendants a letter of E. R. Perry, which was as follows:

"New Orleans, Feby. 10, 1893.—Messrs. J. N. Parker & Co.—Gents: Mr. John C. Norman states you will advance him on the present year's business three thousand dollars ($3,000). I will guaranty the payment of same. Resp'c'ty, E. R. Perry."

The defendants then wrote beneath the letter, and the plaintiff signed, the following contract:

"I guaranty shipment of at least eight hundred bales of cotton, and, failing to ship that much, agree to pay a commission on deficit of one dollar per bale. Feby. 10, '93. [Signed] J. C. Norman. Witness, Jno. D. Carpenter."

On the next morning, February 11, 1893, the defendants requested the plaintiff to execute his note for $3,223.50, to the order of E. R. Perry, due on the 15th of December, 1893, and secure Perry's indorsement thereon, which he did, and delivered the note so indorsed to the defendants, and they loaned him the $3,000. In part performance of his agreement, plaintiff shipped to the defendants 280 bales, which they sold, and, plaintiff failing and refusing to ship to them any other cotton, they reserved out of the proceeds of the sale of the 280 bales one dollar a bale on so much of the 800 bales which he failed to ship, which was 520, and sent him a statement of his account with them, showing a balance of $187.72 in his favor, which they afterwards paid on a draft drawn on them by Norman in favor of I. S. West & Co.

During the progress of the trial plaintiff was allowed to adduce evidence, over the objections of the defendants, to prove that the defendants agreed to loan him $10,000 in addition to the $3,000 to buy cotton, at the time he agreed to ship the 800 bales.

Plaintiff recovered a verdict and judgment against the defendants for $682, and they appealed.

Parol testimony is admissible to explain a written contract, but not to add to or vary it. Here it was shown that appellants agreed to loan the appellee $3,000, provided, among other conditions, Perry would indorse his note for $3,000 and eight per

cent. per annum interest thereon. Upon that agreement being made, appellee procured the letter of Perry. This part of the contract was performed by appellee executing the note to the order of Perry and securing the indorsement of Perry, and by appellants loaning the $3,000. The only part of the agreement in controversy is that which relates to the shipment of the 800 bales of cotton. This agreement was written beneath Perry's letter, in which he undertakes to guaranty the payment of $3,000 to be loaned by appellants to appellee, and on the same paper. Both were a part of the same transaction, and constituted only one contract. There were only three parties to the transaction, appellants, appellee and Perry. It is clear that Perry undertook to do nothing, except to guaranty the payment of the $3,000. Appellants were commission merchants, whose business was to sell cotton on commission. Appellee agreed in writing to ship the 800 bales, and, failing to ship, promised to pay one dollar a bale on the deficit. Explained by the circumstances we have related, the written contract shows that appellee, in consideration of the loan, agreed with the appellants to ship them the 800 bales, and to pay the one dollar a bale to them on so much thereof as they should fail to ship. In the absence of a contract to the contrary, the cotton was to be of the crop produced next after the contract was made, and was to be shipped within the time cotton is usually shipped for market. The effect of the evidence as to the $10,000 was to add to and vary the written contract, and was clearly inadmissible.

Reversed and remanded for a new trial.

AMERICAN CENTRAL INSURANCE COMPANY *v.* WARE.

Opinion delivered May 28, 1898.

1. INSURANCE—KEEPING BOOKS.—A policy of fire insurance stipulated that assured should keep a set of books showing a complete record of business transacted. Assured conducted a cash business, but occasionally small balances not paid were treated as cash, and recorded as such. *Held* that the policy was complied with when such sales were so recorded, thereby showing the amount of depletion of the stock. (Page 339.)

2. SAME.—In a business conducted on a cash basis, small credit sales were occasionally charged in a pocket memorandum book kept by a clerk, from which they would be erased; and the amount entered as a cash sale when paid. *Held* a sufficient compliance with the requirement of a policy of insurance that assured should keep a set of books showing a complete record of business transacted. (Page 340.)

3. SAME—MODE OF KEEPING BOOKS.—Under the provision of an insurance policy requiring assured "to keep a set of books showing a complete record of business transacted," such record should be kept in such a manner that a person of ordinary intelligence, acquainted with book-keeping, could understand it. (Page 341.)

4. SAME—MISREPRESENTATIONS AS TO LOSS.—A policy provided that "any fraud or concealment or any misrepresentation in any statement touching the loss, or any false swearing on the part of the assured or his agent in any examination or in the proofs of loss or otherwise, shall cause a forfeiture of all claim under this policy." *Held* that an accidental omission or innocent misrepresentation of fact, on the part of the assured, in the proof of loss will not avoid the policy. (Page 341.)

5. SAME—FAILURE TO PRODUCE BOOKS.—While a wilful refusal by the assured to produce his books of account to the adjuster, as agreed, will avoid the policy, yet if, through inadvertence or oversight, the assured failed to produce one or more books to the adjuster, this would not preclude a recovery where the adjuster had declined to examine further other books which had been produced because he claimed to have discovered fraudulent entries in them. (Page 342.)

Appeal from Benton Circuit Court.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

Action upon a policy of insurance against loss by fire upon a stock of goods. The policy was issued on the 8th day of April, 1896, and the goods insured were destroyed by fire on the 7th day of May, 1896.

The policy contained the following provisions:

"IRON SAFE CLAUSE.—The assured under this policy agrees to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit (cash sales need not be itemized except by daily totals), and agrees to take an itemized inventory of stock on hand at least once every year, and to keep such books and inventory securely locked at night in a fireproof safe, and at all other times when the store described in this policy is not actually open for business, or in some secure place not exposed to a fire

which may damage or destroy the building where said business is carried on; and, in case of loss, whether at the time of the fire the store be open for business or not, the assured agrees to produce such books and inventories; and, in the event of failure to produce the same, this policy shall be null and void, and no suit or action at law shall be maintained thereon for any loss or claim. * * * Any fraud or concealment, or any misrepresentation in any statement touching the loss, or any false swearing on the part of the assured or his agent in any examination, or in the proofs of the loss or otherwise, shall cause a forfeiture of all claim under this policy."

The answer set up that the plaintiffs failed to keep a set of books showing a complete record of the business transacted as required by the policy, and, further, that they were guilty of fraud, misrepresentation and false swearing in making out their proof of loss. The evidence at the trial sufficiently appears in the opinion. There was a verdict and judgment for plaintiffs for the sum of —— dollars, and defendant appealed.

Rose, Hemingway & Rose, for appellant.

The court erred in instructing the jury that, if the books of the insured were kept in such a manner that those who kept them or understood the system of keeping them could tell the state of the business, this was a sufficient compliance with the "iron safe" clause of a fire insurance policy. Ostrander, Ins. §§ 299, 300, p. 653; 61 Ark. 214. The court also erred in declaring that a false statement in the proofs of loss, to avoid the policy, must have been knowingly made. Courts cannot make contracts for the parties. 34 S. W. 464. Also, the policy was avoided by failure of appellees to keep a complete and true record of their business transactions. 58 Ark. 565, 575; 34 S. W. 462, 464. The court erred in instructing that failure to produce account books, according to agreement and condition of policy, to avoid the policy, must have been intentional. 58 Ark. 595; 61 Ark. 207; May, Ins. § 156; 34 S. W. 462–5.

Ira D. Oglesby, for appellees.

Whether there is a reversible error in an instruction is to be determined by reference to the facts in each particular case.

61 Ark. 212. The books kept by appellee were such that they could easily be understood, and the court did not err in its instruction relative thereto. 58 Ark. 565; 21 S. E. 1006; 58 Ark. 575. The books presented a complete record of the business, and fulfilled the requirements of the policy. 35 S. W. 1060 [reversing 34 S. W. 462]; 68 Fed. 708. If appellee increased, on his books, the cash sales, after the issuing of the policy, this could not prejudice appellant. 15 So. 932.

RIDDICK, J., (after stating the facts.) This is an action against an insurance company to recover the value of a stock of goods destroyed by fire. The main question presented is whether the plaintiffs complied with certain provisions of the policy upon which the action is founded, and by which they were required to keep a set of books showing a complete record of the business transacted, and, in case of loss, to produce such books. After the policy was issued, the plaintiffs conducted their business upon a system of sales for cash, except in case of sales to employees, and except in some instances where the purchaser, not having the exact amount of cash to make payment, desired a short time in which to obtain it. As to the sales to employees, a complete record of such transactions was made, and subsequently carried into the ledger, and no reversal of the judgment is asked for on account of any failure in that respect. The sales for cash were also properly recorded, and there was no failure on the part of plaintiffs to comply with the provisions of the policy in regard to such sales. But the bill of exceptions states that in certain instances "where a small balance, such as 25 or 50 cents, was not paid by the purchaser," the transaction was treated as a cash sale, and a ticket for such small balance was made against the purchaser, and put in the drawer as cash, and the whole amount of the purchase price was entered upon the books as a cash sale, and no further record was made against the purchaser. Those transactions were, as above stated, treated as cash sales; and it is plain, we think, that, so far as the insurance company is concerned, they were properly recorded as cash sales. The plaintiffs, it must be remembered, were not offering to sell on credit, except to their employees, and they kept no open accounts against other persons. They were proposing to sell for cash only, but, as must sometimes happen when business of that kind is

carried on in a small town, a customer would not have the exact change to make payment, and would lack a small balance. Then, when the customer happened to be one with a reputation for honesty, the sale would be made and treated and recorded as a cash transaction, and the amount of the purchase price carried into the total amount of cash sales for that day. Now, it is obvious that the insurance company had no further interest in the matter. It had no interest in the payment of the purchase price, but only in the record of the transaction, and the record, so far as it was concerned, and so far as the policy required, was complete when the price for which the goods sold was placed on the books, so that the company might, should it become necessary, ascertain the extent to which the stock of goods had been depleted by the sale. It is not pretended the plaintiffs were not acting in good faith. The only object in each instance of this kind was to extend a small favor to a customer by giving him a few hours or days to secure the cash to make the payment. They did this by treating the matter as a cash sale, and recording it as such, and by placing a ticket for the balance due against the purchaser in the drawer as so much cash. The record states that these transactions only involved small sums, and whether these tickets were afterwards taken up and paid is a matter of no concern to the insurance company. That was a matter between the merchants and their customers, which did not in any way affect or injure the company, and of which it has no right to complain.

Nor can we concur in the contention that some of the business transacted by the clerk Moffit was not properly recorded. This clerk, at times when a customer purchased an article and lacked a small balance to make payment in full, would, upon the purchaser promising to pay it in a day or two, enter the balance against the purchaser in a small memorandum book, until the purchaser would come in and pay it, when the entry would be erased, and the amount of cash paid placed in the drawer, and counted as a cash sale on that day. The book in which these entries were made was kept most of the time in the clerk's pocket, but contained no entries except those in regard to the business of plaintiffs. The total of these entries did not exceed $30, most of which had been paid before the fire. Now,

these sales were regarded as cash sales; but, the full amount of the price not being paid down, to protect plaintiffs, the entry of the unpaid balance was made against the customer on another book than the cash sales book. When this balance was paid, which was generally in a day or two, it was recorded as a cash sale on that day. The fact that these balances were recorded in a separate book, and only placed upon the books in which the cash sales were recorded when actually paid, is a matter of no moment; for the two books, taken together, constituted a complete record of the business transacted, and that was all plaintiffs undertook to do.

We see nothing in the statement of facts which would justify the supposition that this memorandum book kept by the clerk, Moffit, was not the property of the plaintiffs. It was kept by him as clerk of plaintiffs, and it contained only entries in regard to business of plaintiffs. The fact that it was of small size, and carried most of the time in the clerk's pocket, raises no presumption that it was the private book of the clerk, and the court we think, did not err in refusing to submit to the jury the question as to whether this book was kept by plaintiffs or not, for there was no evidence to the contrary.

We agree with the contention of appellant that, under the provision of the policy requiring appellees "to keep a set of books showing a complete record of business transacted," the record of the business should be kept in such a manner that a person of ordinary intelligence, accustomed to accounts and acquainted with bookkeeping, could understand it. But the jury, under the charge of the circuit judge given in this case, must have found that the books kept by appellees presented a complete record of the business transacted. There was nothing before the jury tending to show that these books were kept in an abstruse, complicated and unintelligible manner, and we do not think that the jury could have been misled by the instruction given on this point.

The proof of loss made out by appellees, and presented to the appellant company, stated the amount of the last inventory to be $4,711.47, when in fact the correct amount of said inventory was $4,450. It also stated that the aggregate amount of goods purchased by appellees after the last inventory to be

$1,634.21, but the evidence showed the amount of such purchases to be $1,732.21. It is contended that these errors in the proof of loss avoided the policy by reason of the following provision contained in the policy, to-wit: "Any fraud or concealment, or any misrepresentation in any statement touching the loss, or any false swearing on the part of the assured or his agent in any examination or in the proofs of loss or otherwise, shall cause a forfeiture of all claim under this policy." Now the bill of exceptions states that the evidence tended to show that such discrepancies "were due to a *bona fide* mistake, and were not intentional." The circuit judge instructed the jury that a misrepresentation of that kind did not avoid the policy, unless it was knowingly made, and that if it occurred through oversight or inadvertence, it did not affect any right that plaintiff might have under the policy. This instruction was correct. The provision of the policy above quoted does not refer to an accidental omission or an innocent misrepresentation of fact on the part of the assured. To avoid the policy, the false statement must have been knowingly and wilfully made, thus showing an intention to deceive and to perpetrate a fraud upon the insurer. *Little* v. *Phœnix Insurance Co.*, 123 Mass. 380; *Tulb* v. *Liverpool & London & G. Ins. Co.*, 106 Ala. 651; 2 May, Ins. 477.

The adjuster for the defendant, after the fire, made some examination of the inventory, invoice and books kept by plaintiffs. During the course of this examination, he discovered certain incorrect entries in books kept by plaintiffs prior to the issuance of the policy, and thereupon he abandoned the adjustment, and declined to make further examination. The defendant company now contends that the plaintiffs failed to produce all of their books to the adjuster. The plaintiffs admitted that they failed to produce the memorandum book kept by the clerk, Moffit, but the evidence on their part tended to show that this was the result of inadvertence and wholly unintentional. The evidence of plaintiff tended to show that all the other books were produced to the adjuster, while on the part of defendant there was evidence to show that a book called the blotter was not produced. The court told the jury that it was the duty of the plaintiffs to produce their inventory and books, but that if,

through inadvertence or oversight, the plaintiffs failed to produce one or more of their books to the adjuster, this would not preclude a recovery. We see no error in this instruction.

The plaintiffs by a provision in the policy agreed that they would produce their books and inventories, and if they had failed to produce them, no action could have been maintained on the policy; but they did produce all of their books at the trial, and the only contention here is that there were not produced to the adjuster. The policy does not say that all the books shall be produced the moment they are demanded by the adjuster, or that an accidental omission to produce all of the books when first demanded shall avoid the policy. A wilful refusal without excuse to produce the books to the adjuster would no doubt avoid the policy, but plaintiffs were entitled to a reasonable opportunity to produce their books. In this case the adjuster did not complete the examination of these books presented to him. He discovered, he supposed, evidence of fraud in the entries made by plaintiff, and declined to make further examination. It would have availed nothing to have offered him the books after the declination, for he did not want them, and it would be exceedingly technical and unwarrantable to hold that an accidental omission to produce one or more of the books at the commencement of the examination by the adjuster avoided the policy.

Finding no error, the judgment is affirmed.

SCHOOL DISTRICT OF FORT SMITH *v.* BOARD OF IMPROVEMENT.

Opinion delivered May 28, 1898.

1. TAXATION—SCHOOL LAND.—Land belonging to a school district, but not used for school purposes, is not exempt from a tax for local improvement. (Page 348.)

2. SCHOOL LAND—ENFORCEMENT OF LIEN FOR TAXES.—A decree enforcing a lien for improvement taxes against land belonging to a school district, but which is not used exclusively for school purposes, is not incorrect in ordering a sale of the land if the sum adjudged as a lien thereon be not paid within ten days. (Page 350.)

3.—DE FACTO COLLECTOR—AUTHORITY.—The authority of a *de facto* collector in taking the necessary steps to fix a lien upon land for an improvement tax cannot be questioned in collateral proceedings. (Page 351.)

4. SUIT TO ENFORCE TAX.—ATTORNEY'S FEE.—Sand. & H. Dig., § 5341, 5345, provide for a suit to enforce a lien for local improvement taxes against delinquent land, and that "upon default a decree shall be rendered against such property for the amount of such assessment, penalty and cost, and an attorney's fee," but no attorney's fee is expressly provided where the suit is contested. *Held* that the legislature intended that an attorney's fee should be allowed in all cases where judgment is recovered against the land. (Page 351.)

5. ATTORNEY'S FEE—ALLOWANCE.—The allowance of an attorney's fee in a suit to collect local improvement taxes is within the discretion of the trial court; and while it was error for that court to include compensation for the attorney's services to be rendered in the supreme court on appeal, yet if the services were rendered, and the compensation was not unreasonable, the error was not prejudicial. (Page 352.)

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

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

The Board of Improvement of Sewer District No. 1 of Fort Smith, Ark., brought suit against a large number of tracts of land within its district as delinquent for the improvement taxes for the year 1896. Among other defendants was the School District of Fort Smith and various tracts of land owned by it. The complaint is drawn in strict conformity to sections 5340, 5341, 5342, 5343, 5344, 5345, Sandels & Hill's Digest.

The school district filed demurrer and answer to this complaint. The answer set forth: (1) A denial of the assessment of the property set forth in the complaint, and a denial that such assessment was delivered to the city clerk; and denies that the officer authorized by law to collect the same published notice of the collection, and that return was made by the proper officer of the delinquent list. (2) That it is a public corporation, and its property is not subject to the taxes of plaintiff district.

The court found in favor of the plaintiff, and rendered judgment against the property of the school district, and by default against the other property embraced in the complaint belonging to other defendants.

In addition to the tax and penalty found due against each of the tracts, the court fixed a commissioner's fee of $2 and an attorney's fee of $5, to be included in the costs. The school district excepted to the findings and judgment; the other defendants did not. The commissioner's fee was put at $1 per tract if paid on or before sale, and $2 if sold. The usual order of foreclosure and sale was made. The decree is in strict conformity to sections 5345, 5349, 5350, 5351, Sandels & Hill's Digest.

Subsequently, the school district filed a motion for correction of the judgment, and to set the same aside, so far as concerned the commissioner's and attorney's fees.

The court modified the commissioner's fee by making it $2 in case of sale, and no fee when property was paid on before sale, and changed the attorney's fee from $5 for each tract to $175 for prosecution of the case in circuit and supreme court.

The case, as between appellee and the school district, was tried upon the following agreed statement of facts, treated herein as a bill of exceptions, to-wit:

"On the hearing of this cause it was agreed that Sewer District No. 1 of the city of Fort Smith was regularly organized, and improvement district taxes for sewer purposes were regularly extended against the property in the sewer district for the year 1896, as required by law, including the property of defendant school district, as hereinafter described. Such taxes were regularly made up, and, with a warrant for their collection, the tax list was delivered to Milton P. Boyd, collector of plaintiff district, as required by law. That, pursuant to the warrant of the city clerk and the statute in such cases provided, the said Boyd gave the notice required by law for the collection of said taxes, and opened his office and the books at the time and place specified in said notice. That, all of the time specified in said notice, the collections were properly made by said Boyd, he was recognized by the public, by the Board of Improvement of Sewer District No. 1, by the city clerk and county clerk as the collector of said district, and did collect about the usual amount of taxes which are collected each year by the collector before the penalty attaches. That during the year 1895 the improvement districts of the city of

Fort Smith, including plaintiff board, joined in a suit in equity against the city of Fort Smith, the city collector and the city clerk, seeking to enjoin the city from proceeding, the collector from acting as collector of improvement taxes, and the city clerk from delivering the warrant and tax list to the city collector. That, by said judgment and decree of Sebastian circuit court for the Fort Smith district, the city clerk was enjoined from delivering the tax book and warrant to the city collector, and the city collector was enjoined from collecting improvement taxes, and the city of Fort Smith was enjoined, through its officers and agents, from collecting or receiving any part of the improvement taxes. That the said judgment was based upon the ground that the act of 1895, requiring these collections to be made by the city collector in cities of the first class, was unconstitutional and void. That, subsequent to the decree aforesaid, the defendant therein appealed the said case to the supreme court of Arkansas, and said injunction was dissolved on the day before the time for the collection of the taxes of 1896 expired. That, on the day that the time expired, the city collector sought by mandamus to have the custody of the said tax list, and the court aforesaid refused said petition for mandamus on the ground that the mandate of the supreme court had not been filed. That a few days thereafter said mandate was filed, but after the date of the time for collecting the taxes of 1896 had expired. When said mandamus was issued, the city collector got said books, and advertised that he would then collect the taxes; and, within a few hours after such advertisement appeared, the Sebastian circuit court enjoined him from collecting said taxes, upon the ground that the time for collection had expired. That said Boyd had been elected collector of plaintiff district at its organization in 1888, and had continued from that time to collect the taxes, under and by direction of the board, as its collector. That for 1896 he completed the full time allowed by law without let or hindrance from any one, and, as soon as the time expired, made his return of the delinquent property, and all of the property hereinafter described was so returned; and he attached the penalty of 20 per cent., and the board ordered suit. Subsequently the city collector also made a return of this property, among

others, as delinquent. That Boyd made return several days before the court ordered the tax book delivered to the city collector. That, during all the time fixed by the law for the collection of 1896, the city collector was under injunction from Sebastian circuit court from collecting these taxes. That the School District of Fort Smith owns the property in the judgments described, but none is used for school houses or grounds attached or part of the school houses or enclosures for school purposes. Nearly all of it is vacant and unoccupied lots and blocks, and the remainder improved lots and blocks, which are rented, and the revenue therefrom turned into the school district for school purposes. That all of said lands have been acquired by purchase at mortgage foreclosure sales and execution sales for the recovery of money loaned by said district, and at public sale made under act of Congress donating the old Military Reserve to the city as trustee for the school district. The school district owns a fee simple title to all the land in the judgment described, and has not paid the sewer taxes, nor offered to Boyd, or the city collector, either, to pay the sewer taxes for the year 1896."

Chas. E. Warner, for appellant.

The act of 1881, authorizing the organization of improvement districts and the assessment of real property for local improvements, does not apply to school lands. 56 Ark. 354, 359; 49 Conn. 89; 1 Desty on Taxation, § 12; 2 Dill. Mun. Corp. § 773. The judgment was for a sale of the property, and that is fatal to it. 56 Ark. 354. One is not bound to obey a *de facto* officer. 8 How. Pr. 365; 55 Barb. 385; 23 Wend. 501; 35 Col. 21. The allowance of an attorney's fee was error. Potter's Dwarris on Const. of Stat. 255.

Hill & Brizzolara, for appellee.

The exemption from taxation extends only to the property in actual and exclusive use for school purposes. Sec. 5, art. 16, Const. 1874; 56 Ark. 445; Sand. & H. Dig., §§ 5321, 5330; 62 Ark. 481, 488; Dill. Mun. Corp. (3 Ed.) § 773. Nor does the immunity from sale for taxes apply to property held by a municipal corporation in its private, rather than its public, capacity. The immunity from sale under execution extends only

to cases where the property is necessary to enable the corporation to discharge its duties to the public. 2 Dill. Mun. Corp. (4 Ed.) § 576; 2 Morawetz, Priv. Corp. § 1125; 2 Beach, Pub. Corp. § 1422; 12 Fed. 292; 15 Cal. 631; 3 Woods, 103; S. C. 18 Fed. Cas. 111; 105 U. S. 600; 1 Duval (Ky.), 295; 15 W. Va. 131; 23 La. Ann. 61. "The levy of a municipal tax by *de facto* officers is valid as to third parties until ousted by direct proceedings for that purpose." 1 Desty, Taxation, 510; 43 Ark. 243; 22 Ark. 569; 25 Ark. 336; 55 Ark. 81; 49 Ark. 439; 42 Ark. 582; 52 Ark. 356; 43 Ia. 243; 24 *id.* 459, 474. If the penalty and costs were illegal, the objector should have made a tender of the legal part of the taxes levied. 46 Ark. 73.

WOOD, J., (after stating the facts). 1. The first question is, does the act of 1881, authorizing the organization of improvement districts, and the assessment of real property for local improvement, include within its provisions lands belonging to the public schools, but which are not used exclusively for public purposes?

Section 5321 of Sand. & H. Dig. provides for the assessment by the council of any city of the first or second class, or any incorporated town, of *all real property* within such city, or within any district thereof, for the purpose of making any local improvements of a public nature.

Section 5330 of Sand. & H. Dig. provides that "the words real property, whenever used in this act, shall have the same meaning and specification as are attached to said words in the act providing for the collection of state, county, and city revenue."

The term "real property," in the act providing for the collection of the general revenue, means and includes, "not only the land itself, whether laid out in town lots or otherwise, with all things therein contained, but also all buildings, structures and improvements, and other fixtures of whatever kind thereon, and all rights and privileges belonging or in anywise appertaining thereto." Sec. 6401, Sand. & H. Dig.

The fact that the legislature enacted, in the law creating improvement districts, that the term "real property," as therein used, should have the same meaning as said term in the general

revenue law, shows that the design was to have assessments in local improvement districts embrace the same property as was subject to general taxation. The only *real property* of school districts exempt from taxation under the general revenue law, as interpreted by our decisions, is such as is used actually and exclusively for public purposes, and the property here involved was not so used. *School District of Fort Smith* v. *Howe*, 62 Ark. 481. See also *Brodie* v. *Fitzgerald*, 56 Ark. 445.

We therefore answer the question propounded in the beginning in the affirmative.

The case of *Board of Improvement* v. *School District*, 56 Ark. 354, which appellant relies upon as supporting its contention, is not in conflict with the doctrine here announced. The question involved in that case was the liability of a public school building to assessment for local improvement. As was said by this court in *School District* v. *Brodie*, *supra:* "It is necessary that a school district should have a school building and grounds. If such property was taxed and sold for non-payment of taxes, the public would have to pay other taxes in order to replace the same, for it is absolutely essential that a school district should own a school house." And this court in *Board of Improvement* v. *School District*, *supra*, applied the presumptions that arise in favor of exemptions from general taxation of property owned by the state and its municipalities, and which is held by them for governmental purposes, to local assessments or taxation for local improvements. These exemptions from general taxation which obtain, presumptively, under the law (Cooley on Tax. 172) are expressly recognized and declared to exist under our constitution and statutes. Const. Ark., art. 16, § 5; Sand. & H. Dig , § 6414.

In *Board of Improvement* v. *School District*, above, it is said: "There is nothing in the act to require the inference that it was intended to embrace public property held by the government, the state, or any of the state's subordinate agencies, *and used for public purposes*." It thus appears that this case, instead or being out of harmony with the doctrine we here announce, inferentially, at least, supports it by recognizing that the condition of the exemption for public property held by the state's subordinate agencies was that it should be "used for public

purposes." At all events, the above case only decides that a public school building, used for *public purposes*, owned by a school district, is not the subject of taxation for local improvements. But the case we have here is that of property owned by a school district which is not used for public purposes. Therefore this case is not ruled by *Board of Improvement* v. *School Dist.*, 56 Ark. 354, as contended by counsel.

2. It is contended that the judgment is invalid because it directed a sale of the property.

The statute provides that the "assessment shall be a charge against and a lien on the lands named therein from the date of said ordinance" fixing the assessment. It provides for a decree against the property in case of default; for the assessment, penalty, and cost, and for an attorney's fee; and for condemnation and sale of the lands for the sum adjudged, if same be not paid within ten days after the decree of condemnation. Sand. & H. Dig., § 5335, *et seq.* The decree ordering the sale conforms to the statutory requirements, and, unless these are void, the judgment is valid, and should be enforced in the manner prescribed. There is no constitutional inhibition against the mode of enforcing such a decree against these corporations, and nothing in such manner of enforcement unwise, inexpedient, or that can be said to contravene public policy. The lands in suit, as shown by the agreed statement, are not actually and exclusively being used for public purposes, and, under the decision of this court in *School Dist. of Fort Smith* v. *Howe*, *supra*, must be deemed to be held by the school district "in its commercial capacity, as a private corporation." "It is a general principle of law," says Judge Pardee in *Hart* v. *New Orleans*, 12 Fed. Rep. 292, "that the private property of municipal corporations—i. e., that which is not necessary to the performance of the functions of government—may be seized and sold for the payment of debts." Judge Dillon says: "In some of the states it is held that the private property of municipal corporations, that is, such as they own for profit, and charged with no public trusts or uses, may be sold on execution against them. In other states, either by statute or on general principles, it is declared that judgments against municipal corporations cannot be enforced by ordinary writs of execution, and that the remedy of the credit-

or is by mandamus to compel payment, or the levy of a tax for that purpose. Questions of this kind are influenced much by local legislation.". 2 Dillon, Mun. Corp. (4 Ed.) § 576; 2 Mor. Pr. Corp. § 1125; 2 Beach, Pub. Corp. § 1422; *Hart* v. *New Orleans*, 12 Fed. Rep. 292; *Holladay* v. *Frisbie*, 15 Cal. 631; *New Orleans* v. *Morris*, 3 Woods, 103; *Brown* v. *Gates*, 15 W. Va. 131. Our legislation favors a sale by a commissioner. Sand. & H. Dig., § 5350. See on this subject authorities cited in brief of counsel for appellee.

3. The judgment for penalty and costs was correct. The statute expressly authorizes such a judgment. Sand. & H. Dig., §§ 5340, 5341, 5345. The facts stated in the record show beyond question that Boyd was the *de facto* collector at the time he made his return showing that he had affixed a penalty; and, as such, his acts were clearly authorized, and bound the property. Such acts cannot be questioned in collateral proceedings. *Barton* v. *Lattourette*, 55 Ark. 81, and cases cited; 1 Desty, Tax. 510; Welty, Law of Assessments, § 13; Cooley, Tax. 253, 255, and authorities cited.

4. Was it error to allow an attorney's fee of $175? This presents the most difficult question in the case. Section 5341 directs the board of improvement, in case property is returned delinquent, to cause a complaint in equity to be filed in the court having jurisdiction of suits for the non-payment of liens on real property, for the condemnation and sale of the property "for the payment of said assessment, penalty and costs of suits." Section 5345 provides that "summons shall be issued, and the defendant shall be required to appear and respond within five days after service, and upon default a decree shall be rendered against such property, for the amount of such assessment, penalty and costs, and an attorney's fee." Section 5349 provides: "If the decree is in favor of the board, and for the condemnation of the land, it shall be for the penalty and costs of suit, as well as for the amount of the assessment." Section 5350 provides that the decree of condemnation shall direct "that only so much property shall be sold as will pay the assessment, costs and penalty, and no more." The intention of the legislature, to be deduced from the consideration of these several sections together, is the law; and we are

of the opinion that, when so considered, they show an intention to provide for an attorney's fee, to be taxed as a part of the costs in these cases. The board is directed to bring suit, which requires the services of an attorney in all cases, whether judgment be had by default or otherwise. It is true that the provision for an attorney's fee, *eo nomine*, only occurs in section 5345, where it is mentioned *inter alia* for which the judgment shall be rendered on default. The express mention of it here shows clearly an intention to provide for it. Having mentioned it once, if it was the intention of the legislature to provide for it as a part of "the costs of suit," it was unnecessary to repeat it in other sections, where the "costs of suit" are expressly named, which included it. It would be unreasonable to suppose that the legislature intended to provide for an attorney's fee in cases of default, but did not intend to provide for it in cases where the parties appeared and resisted. And this, we think, furnishes a strong argument for the conclusion that the design of the legislature was to include the attorney's fee, expressly mentioned in section 5345, in the terms "costs of suit" and "costs" in the subsequent sections. Whether the owner of the property does or does not appear and contest, the judgment is to be a lien upon the property for the assessment, penalty, and "costs of suit." Judging of the intendment from the language, connection, and purport of all the sections, we think an attorney's fee is provided for in all cases where the board recovers judgment.

As to the amount taxed by the court in this case, we can not say that it was excessive. This court, in *England* v. *Files*, 45 Ark., at page 535, said: "A wide range of discretion is vested in the courts exercising equity jurisdiction in matters of costs." In the exercise of this discretion, the court should, and doubtless did in this case, fix the fee at an amount which it deemed a just and reasonable compensation for the services rendered. In view of the importance of the litigation, the issues raised and settled by it, the labor which necessarily devolved upon counsel to conduct it to a successful termination, all of which passed under the observation of the chancellor who tried the cause, we do not see that he abused his discretion by making an unreasonable allowance. It was improper for the trial court

to tax up as a part of the costs below an attorney's fee for services to be rendered in this court on appeal. That is a matter of which this court would have exclusive cognizance when such services had been rendered here. But such services have now been rendered, and, unless we should consider the whole amount allowed by the trial court for services in both courts excessive, which we do not, it is clear that the substantial rights of the appellant have not been prejudiced.

The decree is affirmed.

MILLER COUNTY *v.* GAZOLA.

Opinion delivered June 4, 1898.

CONSTRUCTIVE NOTICE—PROOF OF PUBLICATION.—An order of the county court barring county warrants not presented for reissuance pursuant to an order calling in same will be quashed on certiorari where the proof of publication of the notice calling in the warrants was made by "an accountant," and not, as the statute requires, by the "chief accountant" of the newspaper in which the notice was published. (Page 354.)

Appeal from Miller Circuit Court.

RUFUS J. HEARN, Judge.

L. A. Byrne, for appellant.

A sheriff cannot impeach his own return in a collateral proceeding. The remedy is by an action for a false return. 2 Ark. 26; 4 Ark 184; 11 Ark. 368. Besides this, the return is strictly legal and regular. Sand. & H. Dig., § 1004. All the essentials of the statute, regulating the proof of publication of notices, were complied with. Sand. & H. Dig., § 4685. Any objection upon this score is lost to appellee, because not interposed in the lower court.

Williams & Arnold, for appellee.

The call was ineffectual to bar the warrants not presented, because it does not appear that notice of the call was given as required by law. 10 Fed. 891. The sheriff is not the judge of the legality of service, but must state the facts. 12 Pick

206. The return is defective, because: (1) it nowhere states that the three publications were made *successively*. Sand. & H. Dig., § 1004; 33 Ark. 740; 39 Ark. 61. (2) It does not appear that the affidavit was made by the proper person. Sand. & H. Dig., § 4685; 10 Fed. 894; 39 Ark. 61. A sheriff's return may be amended. 33 Ark. 778; 50 Ark. 448; 43 Ark. 341. In proceedings by certiorari, acts of ministerial officers are only *prima facie* regular. Sand. & H. Dig., § 1126.

BUNN, C. J. This is a petition for the writ of certiorari to bring up and quash the judgment, orders and proceedings of the Miller county court, whereby it called in its county warrants for the purpose of examination, reissuance or cancellation, and wherein it outlawed certain warrants belonging to the petitioner because he failed to present them for that purpose, as required in said order, the petitioner alleging that he had no legal notice of the pendency of said proceedings. The petition and answer set forth the full record, and evidence *dehors* the record was also taken and presented, and, a demurrer to the sufficiency of the record notice being interposed, the case, in effect, went off on that. Judgment for petitioner, and the county appealed.

The proof of publication of the notice calling in the warrants, by J. E. Daniels, *an* accountant of the Gazette Newspaper, was not in accordance with the statute, which requires the *chief* accountant, and not *an* accountant, to make the affidavit. This court has said time and again that this statute must strictly be complied with, or else the proceedings thereunder will be null and void. We are not at liberty to say *an* accountant is the same as the *chief* accountant. The affidavit, therefore, does not show on its face that the affiant is one whom the law authorizes to make it for the purposes intended, and the failure to comply with the statute in this particular is fatal to the proceedings subsequently had upon such defective notice.

None of the other objections raised to the proceedings in the county court may be well founded, in a proceeding by certiorari where the record connot be contradicted, and where the record shows no defect, but it is unnecessary to consider any of them, since the judgment must be affirmed for the error in the proof of notice referred to.

Affirmed.

MERRILL v. HARRIS.

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Opinion delivered June 4, 1898.

HOMESTEAD OF MINOR—SALE BY PROBATE COURT.—A probate court in which a guardianship of certain minors is pending has the power to order the sale for their benefit of the homestead left them by their surviving parent. (Page 356.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

Hill & Auten, for appellant.

The only possible excuse for the sale of the homestead of a minor is to obtain funds for his education and support. Sand. & H. Dig., §§ 3606 *et seq*. The only case where the probate court has jurisdiction over the homestead is in cases where it exceeds the limit. Sand. & H. Dig., §§ 3698–3701. It can neither be sold to pay debts, nor be partitioned. 49 Ark. 75; 53 Ark. 504; *ib*. 400; 51 Ark. 429; 56 Ark. 563. The probate court has no right, either by statute or constitution, to deal with homestead estates. 51 Ark. 563; Const. Ark. § 34, art. 7; 53 Ark. 400; 52 Ark. 219. Creditors cannot reach a homestead estate of minor children; nor can they waive or abandon it. 29 Ark. 633; 47 Ark. 510; 37 Ark. 316. This sale is void, because: (1) if the sale of the right is valid at all, it, *ipso facto*, terminates the estate, and nothing is left to be conveyed by the guardian. 47 Ark. 452; 51 Ark. 432; 49 Ark. 504; (2) there is no rule by which a division of the proceeds could be effected; (3) creditors have rights which must be respected. 53 Ark. 400; Waples, Hom. & Ex. p. 643.

Ratcliffe & Fletcher, for appellees.

Homestead descends to minor heirs in all respects as does other property, except that it is exempt from sale for the debts of the ancestor. It is to be used for the benefit of the minor, as a means of his support and education, when necessary. 29 Ark. 636; 47 Ark. 510. The case of *O'Connor* v. *Hindman*,

54 Ark. 627, recognizes the jurisdiction of the probate court to sell homestead property, when necessary for the support or education of the minor owner. The statute and the constitution give to the probate court the right to sell the real estate of minors, "or any portion thereof." The court having the power to sell, all presumptions are in favor of the rightful exercise of the jurisdiction. 52 Ark. 341; 11 Ark. 519; 33 Ark. 575; 33 Ark. 727; 34 Ark. 63. Appellee claims under the same title as do the heirs in this case; hence they can not be heard to object to the title on the ground that rights of creditors were disregarded, if such rights had any validity. 41 Ark. 17; 44 Ark. 517.

BUNN, C. J. The only question presented by this record is, "has a probate court, in which a guardianship of minors is pending, the power to order the sale of the homestead left them by the mother (the surviving parent) for the benefit of said minors.

Lucy M. Fulton died seized and possessed of lots 1 and 2 in block 17 in the city of Little Rock, and occupied the same and the improvements thereon as her homestead until the day of her death, her husband having died previously. So far as this record shows, she left no other property and no debts, and no children except her minor sons, Chester and Freddie, named in the caption, who were 19 and 17 years respectively at the institution of this suit. After the mother's death, and before the institution of this suit, the duly appointed and acting guardian of these minors, presumably on proper showing, was ordered and directed by the probate court to sell in the usual manner the said homestead property as that of the estate of said minors, and for their benefit; and the sale was accordingly made, and one W. H. Halliburton became the purchaser, and he subsequently sold to appellee Harris, who took immediate possession under his deed, and was in possession at the institution of this suit, which is a suit in ejectment to eject him from the premises. The foregoing facts appear in the complaint, to which the defendants interposed a general demurrer, raising the question stated at the outset, which demurrer was sustained, and the plaintiff appealed to this court.

This is a new question in this court, so far as we have been able to ascertain, and withal a question which, from the very nature of things, has not been very often presented in any of the courts, and for that reason precedents are not numerous. All the cases, without exception, we believe, which have been called to our attention by the appellant's counsel, are cases of sales or attempted sales under the orders of probate court, at the instance of administrators, to pay debts of the deceased owners of the homestead property; and none of them are cases where the object of the sales was to appropriate the proceeds to the support and education of the minor or minors, or for his or their benefit in any way. That the homestead, during the holding of the widow or the minority of any of the children, cannot be sold to pay the debts of the father's estate goes without further controversy in this state; and the same is to be said of the sale of the homestead left by the mother, as in this case, for her acts during the minority of her children or any of them. But the question is, can the probate court, in any case, lawfully order the sale of such homestead for the benefit of the minor children, who enjoy it as a descended or transmitted homestead from the deceased homesteader?

In *Morton* v. *McCanless*, 68 Miss. 810, the supreme court of Mississippi said: "The whole object of the exemption law of 1865 was to preserve the property from creditors, and not to affect the power of the courts to deal with the property as that of the children and heirs of the exemptionist." Such is the view we take of it. The Mississippi law on the subject, while different from ours in some particulars, yet is so far like ours as to render the same principles applicable in all essential particulars. There are several other cases from the same court, which either directly or incidentally sustain the same doctrine. The supreme court of Georgia expresses some doubt as to the power in the probate (chancery) court to sell; but, if it exists, it exists only as cases of sale of other property of the minor. *Sloan* v. *Nonce*, 45 Ga. 310. See also, as to sales of interests of remainderman, *Jenkins* v. *Faby*, 73 N. Y. 355; *Cooper* v. *Hepburn*, 15 Grattan, 551; *Bell* v. *Clark*, 2 Metcalf, 573; *Thaw* v. *Ritchie*, 136 U. S. 519.

In discussing this identical question, with the foregoing

decisions, as well as others on the subject in mind, Woerner, in his work on "The American Law of Guardianship," (§ 75) after a general reference to the subject of minor's rights in the homestead, and the sale thereof, has this to say: "Under this aspect of the question, and remembering that a homestead right descending from a deceased parent may be the only property owned by a minor, it would appear that a court having jurisdiction over the estate of such minor should be possessed of the power to order the sale of such homestead rights, if it be necessary for his education, maintenance or well being." Following the argument of the author, suppose, as in the case at bar, there were no debts, no other property, and that there was but one child, and he or she, as the case may be, the only child and heir; and, upon that, suppose that the rents and profits of the homestead place were nothing, or not enough to support and educate the child, and that there was no one willing or bound to occupy the premises with the minor, and thus assist in his support and education. In other words, suppose the homestead right was unavailable or utterly inadequate for the purpose. Can it be the law that the probate court, or the court of general, original and exclusive jurisdiction of minors and their estate, cannot sell the property and thereby give it the only real value it has so far as the minor is concerned? We cannot think such is the law. The constitution does not, in terms, seek to do more than protect from the grasp of creditors. There is neither expressly nor by implication a restriction upon the powers of the probate court in respect to this class of the property of minors. The case we have supposed presents the question fairly, and in such a case we cannot see how but one answer can be given. If one case could exist wherein the probate court would possess the power, that is all that is necessary to solve the question. To carry the discussion further than that would simply be to discuss questions pertaining to the proper or improper exercise of the court's discretion in the instances as they may arise, accordingly as the facts may determine.

In the present case there is no controversy as to an abuse of the discretion of the court, and we therefore affirm the judgment of the court below.

BATTLE, J., (dissenting.) The order of the probate court in question, which directed the sale of the homestead of minors, is a nullity.

What is a homestead? In *Williams* v. *Dorris*, 31 Ark. 466, Chief Justice English, in defining it, said: "It is the place of a home or house; that part of a man's landed property which is about and contiguous to his dwelling house. A homestead necessarily includes the idea of a house for a residence, or mansion house. The dwelling may be a splendid mansion, a cabin, or tent. If there be either, it is under the protection of the law, but there must be a home residence before it, and the land on which it is situated, can be claimed as a homestead." *Tillar* v. *Bass*, 57 Ark. 179.

The homestead law creates no new estate, but protects the occupant in the use and occupancy of the land set apart as a homestead during the time of such occupancy. *Chambers* v. *Sallie*, 29 Ark. 412; *Booth* v. *Goodwin*, *id.* 637. Hence "an estate held in common with others is sufficient to support a homestead exemption, without exclusive possession by the tenant who claims the privilege." *Robson* v. *Hough*, 56 Ark. 621; *Thompson* v. *King*, 54 Ark. 9; *Sentell* v. *Armor*, 35 Ark. 49; *Sims* v. *Thompson*, 39 *id.* 301; *Ward* v. *Mayfield*, 41 *id.* 94; *Stull* v. *Graham*, 60 *id.* 461. A leasehold estate is sufficient for that purpose (*Robson* v. *Hough*, 56 Ark. 621); or an equitable title (*Rockafellow* v. *Peay*, 40 Ark. 69). In the case last cited the court said: "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." All these cases prove that the homestead interest is a mere right to use and occupy land as a home or residence.

Upon the fact that the right to a homestead is a personal right to occupy the place of residence as a home, this court held, in *Garibaldi* v. *Jones*, 48 Ark. 230, that the sale of the homestead by the widow was an abandonment of it. In that case the court said: "One of the objects of the constitution is to secure to the widow and orphans the family roof-tree as a fixed home during the widowhood or life of the widow and minority of the children. It would be clearly against the policy and spirit of the constitution, in thus providing a home for her,

to permit her to alienate it, and to allow others to enjoy the benefits of the homestead of a deceased husband and father, which were only intended for the widow and orphan. If she could do so, the exemption which passes, under the constitution, to the widow and minor children upon the death of the husband and father would not be a reservation of a homestead, but a reservation of lands of a certain quantity or value, irrespective of its uses."

In nearly every case, if not all, an abandonment of a homestead with no intent to return to it as a residence produces a forfeiture. Ordinarily, a lease for life is conclusive evidence of an abandonment and forfeiture. *Gates* v. *Steel*, 48 Ark. 539.

In *Booth* v. *Goodwin*, 29 Ark. 633, a question arose as to how minors could occupy a homestead so as to maintain their right to it. The court said: "The intention of the legislature evidently was to extend to the child or children the same protection of the property from sale by the creditor which had been extended to their parents; and as it is our duty, as far as possible, to carry this intent into effect, we must necessarily give to the term 'occupied' such a liberal construction as will uphold, not defeat, the humane intent of the legislature, and must hold that an infant is incapable, either by act or declaration, of abandoning or waiving his homestead right. Not to do so would be to defeat the provisions of the statute as to them. Actual occupancy of the infant upon the homestead place is not necessary; is not required of an infant. It is the duty of his guardian to take possession of the homestead place, and to rent or lease it for the benefit of his ward, as a means for his support and education, and this must have been the possession and occupancy contemplated by the legislature, because it is the only one consistent with the condition of the minor child or children."

The minor children do not create the homestead. It descends to them. During minority they are incapable of waving or abandoning it by act or declaration. As it is a mere occupancy, how can they utilize and enjoy it? The question is answered by *Booth* v. *Goodwin*, *supra*,—by their guardian taking possession and renting or leasing it for their benefit, as a means for their support and education. In this way it is held and oc-

cupied by them. The occupancy of their guardian or tenant is their occupancy. In case of a sale it would not be so held, but would be abandoned and forfeited.

The constitution intends and directs that the homestead of the father shall be preserved for the benefit of the minor children, in a particular manner, during their minority, and that is by occupancy or renting. It does not authorize any other disposition to be made of it. It provides that "if the owner leaves children, one or more, said child or children shall share with said widow, and be entitled to half the rents and profits, till each of them arrives at twenty-one years of age, each child's rights to cease at twenty-one years of age, and the shares to go to the younger children, and then all go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate." Const. 1874, art. 9, § 6. Under this section they are entitled to reside upon it, and to one-half of the rents and profits if there be a widow, that is to say, to rent it till each of them arrives at twenty-one years of age.

In *Kessinger* v. *Wilson*, 53 Ark. 402, the court said: "The land was set apart by the law to appellants (minors), when their father died, as a home and means of maintenance during their minority. Until the younger of them reached the age of twenty-one years, it could not have been lawfully sold to pay the debts of their father's estate, or partitioned between them. It was not subject to sale, but might have been rented to raise means for their support. Until the younger reached his majority, it remained set apart as 'a place, a sanctuary, to which he or she might return to find the shelter, comfort and security of a home' during his or her minority."

In *Sansom* v. *Harrell*, 51 Ark. 429, the order in question was made by the probate court for the purpose of vesting a homestead in a widow, under a statute which provides: "When any one shall die, leaving a widow or children, and it shall be made to appear to the probate court that the estate of the deceased does not exceed three hundred dollars, the court shall make an order that the estate vest absolutely in the widow or children, as the case may be." Mansf. Dig., § 9. The husband of the

widow left minor children surviving him at the time of his death. This court held the order void, and said: "The constitution sets it apart as a home and sanctuary for the widow and children, and, for the purpose of preventing any other person invading it under a claim of right, or interfering with them in the undisturbed enjoyment of the shelter, comfort and security of it as a home, *guards and protects it against sales and transfers*. The same reason which makes it unlawful to sell the land constituting it for the payment of the debts of the deceased owner, subject to the homestead rights of the children, during their minority, makes it unlawful to vest it in the widow, subject to the same rights of the children, during their minority. One endangers the quiet, security and comfort of a home provided in the homestead as much as the other, and both equally violate the spirit and manifest intent of the constitution."

The homestead right of minor children, and the estate in the lands, which constitute the homestead, inherited by them in addition thereto, it was held in *Kessinger* v. *Wilson*, *supra*, are like two separate and distinct estates vested in different persons and following in immediate succession. Their right to the enjoyment and possession of the same cannot exist at one and the same time; and neither merges in the other. The probate court cannot authorize the sale of the homestead right. For that is a personal right and a sale of it is an abandonment which forfeits it. Neither can it order the sale of the estate inherited in addition to it, subject to the same, for the same reason it cannot be sold for the payment of the debts of the deceased owner; and that is, "'one endangers the quiet, security and comfort of a home provided in the homestead as much as the other, and both equally violate the spirit and manifest intent of the constitution."

The object of the constitution as to homesteads is not the protection of the impecunious, and no others. It protects the family homes of all classes. It conserves only the homesteads owned and possessed by a resident of this state "who is married or the head of a family." Upon the death of the owner, it gives it to the widow for her life, and the minor children during their minority. From this it appears that the policy of the constitution "is to foster families as the factors of society, and

thus protect the general welfare." "To save them from disintegration," as said in Waples on Homesteads and Exemptions, "and secure their permanency," the constitution "seeks to protect their homes from forced sales so far as it can be done without injustice to others." It "protects homes as the pillars of the state edifice, and thereby fosters the sentiments of patriotism and independence, and the spirit of free citizenship." "There is," said Tarbell, J., "unquestionably, no greater incentive to virtue, industry, and love of country than a permanent home, around which gather the affections of a family, and to which the members fondly turn, however widely they may become dispersed." In fostering these sentiments and affections for the purpose of accomplishing its object, the policy of the constitution in preserving the homestead of the father for his minor children during their minority is further advanced by giving to the children an opportunity, when all of them have arrived of age and becomes *sui juris*, to acquire the homestead lands, in the event it becomes necessary to sell the same, and thereby hold them in the family. A sale of such lands during the minority of the children tends to defeat the magnificent policy of the constitution, and should be treated by all courts as void.

It follows that the probate court cannot sell the fee in the land without defeating the spirit and intent of the constitution. It seems to me that no argument or authority is necessary to prove that the constitution, from which it derives its jurisdiction, did not vest the probate court with the authority to defeat its policy or violate any of its provisions.

KANSAS CITY, PITTSBURG & GULF RAILROAD COMPANY *v.* STATE.

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Opinion delivered June 4, 1898.

CARRIER—BAGGAGE.—Samples of merchandise carried for the purpose of making sales of goods of the same class are not "baggage," within the act of April 19, 1895, making it a misdemeanor for a railroad to charge more than a fixed sum for transporting excess baggage. (Page 365.)

Appeal from Benton Circuit Court.

EDWARD S. MCDANIEL, Judge.

J. McD. Trimble, *Jno. A. Eaton* and *C. M. Rice*, for appellant.

Where a passenger contracts and pays for the transportation of goods at first-class freight rates, it is immaterial that such goods are checked as baggage. 127 Ill. 598; S. C. 20 N. E. 662; 4 Elliott, Railroads, §1650. The contract in this case fixed the character of the goods as freight. 4 Elliott, Railroads, § 1650; 20 Am. St. Rep. 228. The check is a mere token, and does not, of itself, constitute a contract of carriage. 16 Am. & Eng. R. Cas. 188. Samples of a traveling salesman are not baggage. 6 Hill, 586; 126 Mass. 121; 98 Mass. 83; Sand. & H. Dig., § 6215; 2 Am. & Eng. R. Cas. (N. S.) 23, *et seq.;* 4 Elliott, Railroads, §§ 1646–7; 63 Ark. 344. The trunks and their contents were not the property of the passenger, and therefore were not baggage. Hale on Bailments, 389 and 390, and cases; 4 Elliott, Railroads, 1647; 20 O. St. 260; 19 Wend. 534; 42 N. Y. 326; 41 Miss. 671; Fetter, Carriers of Pass. 600; 44 N. H. 325. The act of the legislature (p. 209, acts of 1895), under which this indictment was returned, is void for the reason that it provides for unusual punishments, and is unreasonable.

E. B. Kinsworthy, attorney general, for appellee.

Appellant, knowing the character of the goods offered for transportation, received same *as baggage*, and is now estopped to deny that they were baggage. 63 Wis. 100; 17 Fed. 209; 1 Dak. 351; 32 Kas. 55; 65 N. Y. 375; 34 Kas. 502; 29 S. W. 196; 63 Ark. 344; 60 Ark. 433; 4 Elliott, Railroads, § 1649; 29 S. W. 196. This being true, the conviction was proper. Acts of Ark., 1895, p. 209.

BATTLE, J. An act entitled "An act to regulate charges on excess baggage on all railroads propelled by steam or electricity in this state over five miles in length," approved April 19, 1895, provides:

"Section 1. It shall be unlawful for any railroad in this state, over five miles in length, run by steam or electricity, to

charge more than twelve and one-half per cent. of the cost of a first-class fare between all points in this state, per hundred pounds, for excess baggage, over (150 lbs.) one hundred and fifty pounds; provided, that the minimum charge for excess, where the same does not exceed 200 pounds, shall not be less than twenty-five cents.

"Sec. 2. Any such railroad violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction be fined in any sum not less than $10 nor more than $25."

The Kansas City, Pittsburg & Gulf Railroad Company was indicted for, and convicted of, a violation of this act, and was fined in the sum of ten dollars.

The facts upon which the conviction was based are as follows: George T. Lincoln, a traveling salesman, purchased of the Kansas City, Pittsburg & Gulf Railroad Company a ticket for transportation over its road from Siloam Springs, in Benton county, in this state, to Gentry, a station in the same county, and paid twenty cents for the same, the price of first-class fare. He had with him four trunks, which contained clothing of various kinds, and weighed in the aggregate 970 pounds. He carried this clothing with him, and used it as samples in making sales of goods of the same description. The railroad company allowed him transportation for 150 of the 970 pounds free of additional expense, and charged and received from him one dollar and twenty-five cents for the transportation of the remaining 820 pounds from Siloam Springs to Gentry. The sum received was the amount charged for like articles, when shipped as first-class freight, was a freight rate, and not an excess baggage rate. The trunks were checked like baggage, and accompanied Lincoln upon the same train. The defendant's railroad exceeded five miles in length, and was operated by steam.

Were the four trunks and their contents "baggage," within the meaning of the act of April 19, 1895?

What is baggage, within the rule of the carrier's liability, depends much upon the reason why the passenger is allowed transportation for it as such. There can be but one, and that is because it is necessary or conducive to his convenience and

comfort. It is necessary to him, and for that reason it is impliedly, if not expressly, included in every contract of the carrier to transport passengers. "The impossibility of traveling," says Chief Justice Cockburn, "without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveler has led from the earliest times to the practice, on the part of carriers of passengers for hire, of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger." Hence courts and authors, in defining what is baggage, have embraced this idea in their definitions. Judge Story says that "by baggage we are to understand such articles of *necessity* or *personal convenience* as are usually carried by passengers for their *personal use*, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale, and the like." Story, Bailments, § 499. "Baggage," says 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." Mr. Justice Field, in *Hannibal Railroad* v. *Swift*, 12 Wall. 274, said that 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." Upon the same principle, the statutes of this state provide: "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."

Accordingly it has been frequently held, as we do now,

that merchandise carried for sale, or samples of merchandise carried for the purpose of making sales of goods of the same class, do not come within the description of baggage. *Humphreys* v. *Perry*, 148 U. S. 627; *Alling* v. *Boston & Albany Railroad*, 126 Mass. 121; *Miss. Central Railroad Co.* v. *Kennedy*, 41 Miss. 671, 678; *Macrow* v. *Great Western Ry.*, L. R. 6 Q. B. 612; *Hawkins* v. *Hoffman*, 6 Hill, 589; *Hutchings* v. *Western & Atlantic Railroad*, 25 Ga. 61; *Texas, etc., R. Co.* v. *Capps*, 16 Am. & Eng. R. Cas. 118; *Michigan Central R. Co.* v *Carrow*, 73 Ill. 348; *Strouss* v. *Wabash, etc., Ry. Co.*, 17 Fed. Rep. 209; *Pennsylvania Co.* v. *Miller*, 35 Ohio St. 541; *Southern Kansas Ry Co.* v. *Clark*, 52 Kas. 398; *Hutchings* v. *Western, etc., R. Co.*, 71 Am. Dec. 160; Hutchinson, Carriers, §§ 679, 685; Thompson, Carriers of Passengers, 510.

It is true that it is said in *Kansas City, Fort Scott & Memphis Railroad Co.* v. *McGahey*, 63 Ark. 348: "When a passenger presents to the carrier for transportation 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." But the act of April 19, 1895, does not apply to goods and chattels which do not come within the description of baggage. The carrier becomes liable for them as baggage by accepting them as such, by his own acts, and not from any obligation to transport them as baggage, which the law imposes upon him. Such property he is not bound to receive except upon the payment of the rates he is allowed to charge for the transportation of the same as freight.

In this case the railroad company was not bound to receive and transport Lincoln's trunks as baggage. It was entitled to compensation for carrying them at the rate it is lawful to charge for the transportation of such property as freight. It received nothing more, and is not guilty of violating the act of April 19, 1895.

Reversed and remanded for a new trial.

MOSS v. STATE

Opinion delivered June 4, 1898.

WEAPON—RIGHT TO CARRY ON HIGHWAY.—One who owns the fee in land subject to a highway easement is not entitled to carry a pistol on such highway, as upon his own premises. (Page 369.)

Appeal from Hot Spring Circuit Court

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

This appeal is from a conviction for carrying a pistol as a weapon.

The evidence below showed that Enoch Moss, the husband of appellant, owned forty acres of land in the county of Hot Springs, Arkansas, upon which he and his wife, Lydia Moss, appellant herein, resided as their home. Enoch Moss had two dwelling houses on this land, one in which he lived himself; the other, about 150 yards off, he had rented to a man by the name of Rogers. The public road ran across his homestead in front of these houses. The houses were on the south side of the road. There is no evidence as to how much land Enoch Moss had rented to the man Rogers. The evidence simply shows that he had rented to him the house in which he lived and also land to work. On the 4th of September, 1897, the evidence tends to show that appellant took a pistol, and went from her house along the public road in front of the house occupied by Rogers, but did not go upon the premises rented by Rogers. During the entire time she had the pistol she was on the land owned by her husband.

The court instructed the jury as follows: "(1) While the defendant has a right to carry a pistol as a weapon on her own premises, that right would not give her the privilege to carry such a pistol as a weapon along the public road up to and immediately in front of a tenant's house. You are instructed that the premises of the husband are the premises of the wife." Appellant excepted to this instruction, and asked the court to

give instruction No. 2, which is as follows: "(2) The jury are instructed by the court that if they believe from the evidence that the defendant had a pistol, and was in the public road, which road was on the forty-acre tract of land owned by defendant's husband, and upon which tract of land their dwelling house was situated, and that the defendant did not go upon the land of Robert Rogers, then the court instructs you that the premises of the husband are the premises of the wife, and if the defendant did not go off of said premises, then your verdict should be for the defendant." The court refused to give this instruction, and appellant excepted.

E. H. Vance, Jr., for appellant.

The premises of the husband are the premises of the wife. 29 Ark. 280. It is no violation of the law to carry a pistol as a weapon upon one's own premises. Sand. & H. Dig., § 1498. Therefore carrying a pistol on a public road, situated on the premises where defendant lives, is no offense. 25 S. W. 627; 28 S. W. 199. When a person owns the land bounding a road on both sides, he is presumed to own the fee in the roadbed, and the road is an easement over his premises. 9 Am. & Eng. Enc. Law, 374, 375.

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

A landlord has no right to carry a pistol on the tenant's premises. 55 Ark. 186. This would also prohibit his carrying it on the road in front of the tenant's house, if one can be said to have the right to carry a pistol on the road in front of his own premises. In order to be protected, appellant must show that she was on her own premises. 49 Ark. 174. One has not a right to carry a pistol on the unimproved lands adjoining his farm. 56 Ark. 559.

WOOD, J., (after stating the facts). One who carries a pistol as a weapon upon a public highway is subject to the penalty denounced by section 1498, Sand. & H. Dig., although he is the owner of the freehold over which the highway runs. The easement which the public has in the highway is superior to any right which the owner of the fee has. He can do nothing, by virtue of his ownership in the fee in the soil, antago-

nistic to the right of the public to use the highway as such. The public is in possession of the highway, and has the right to pass to and fro upon it *ad libitum*. This right is to be enjoyed by the public without interruption or molestation in any manner from the owner of the freehold. Could it be said that any member of the public would have this right, if the owner of the freehold over which the public road ran could go upon the same carrying his pistol as a weapon? We think not. This would clearly give the owner of the soil the right to use the highway in a manner inconsistent with the right of the public to use it "with none to molest or make afraid." If this were the law, it would put it in the power of the owner of the soil to prevent the use of the highway to any one who might chance to be an enemy, except under perpetual menace and dread.

We are aware that the supreme courts of Texas and North Carolina hold the opposite, upon the theory that a public highway over a man's land, along side or in front of the premises of which he has possession, is his premises. We think these decisions overlook the fact that a public highway belongs to the public for the purposes of travel. They ignore the policy of these statutes, as police regulations to protect the public from acts of violence incident to the use of pistols as weapons. The policy of our law is to conserve the public peace. In what more important place can this be done than upon the public roads and streets, which are set apart to the public, and must be used by it? This court has already recognized the rule that, to constitute one's premises under this law, one must be in the actual possession and have control of or the management of the land which he so claims. *Lemons* v. *State*, 56 Ark. 559. This the owner of the freehold does not have where he has rented same (*Jones* v. *State*, 55 Ark. 186), or where it has been dedicated to the use of the public, and where his right to the use of it must be consistent with and subordinate to the public use. To construe the law as it is construed by the Texas and North Carolina courts, we submit, would defeat, in part, the very purpose which the legislature had in view.

We conclude that the appellant was not within the exception named in the statute as one on her own premises, and,

finding no error in the judgment of the court, the same is affirmed.

BATTLE, J., dissents.

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KAHN v. LUCCHESI.

Opinion delivered June 11, 1898.

APPEAL—OBJECTION TO EVIDENCE.—A specific objection to evidence waives all other objections not specified. (Page 373.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge

Morris M. Cohn, for appellant.

(1) Where one is sought to be held liable for the tort or negligence of another, by virtue of a guaranty against such tort or negligence, this promise or guaranty must be in writing and signed by the party to be charged. Sand. & H. Dig., § 3469, second clause; Browne, Stat. of Frauds, § 155 and cases, 2 Day, (Conn.) 457; 63 N. C. 198; 33 Kas. 580; 12 Ark. 194; 21 Atl. 601; 45 Ill. App. 155; 49 Ill. App. 509; 41 N. E. 164; 50 Ind. 130; 60 Conn. 71; *ib.* 468; 31 N. E. 539. Hence testimony of a verbal agreement of this character was inadmissable. Appellant was entitled to an instruction on this phase of the case. 52 Ark. 45–47.

(2) This testimony was improper, for the further reason that the theory of joint negligence and joint liability for negligence, which formed the basis of the complaint, is inconsistent with the theory of a guaranty. 88 Mich. 103; 26 Pac. 735, 738.

Whipple & Whipple and *James Coates*, for appellee

Original undertakings are not within the statute of frauds. 12 Ark. 174. Nor are cases where the promise to pay the debt of another is found on a new consideration (81 Va. 777), or where the leading object was the benefit of the promisor. 45

O. St. 239. The statute applies only to promises made to the person to whom another is answerable. 11 Ad. & Ex. 446; 1 Addison, Cont. 310. The debt or liability guarantied must be exclusively that of another, to fall within the statute. 22 L. J. (N. S.) Exch. 97; 1 Addison, Cont. 309. He who directs an act to which a tort is incidental is liable for the tort. Wharton, Neg. § 186; *ib.* 185, 178; 16 Wall. 566; 51 Am. Dec. 205, note; 95 Wis. 573; 4 Ohio N. P. 229; 70 Ill. App. 93; 135 Mo. 558; 53 Ark. 503.

BUNN, C. J. This is a suit by Cæsar Lucchesi against Herman Kahn, W. D. Holtzman, and the estate of Dennis McGann, for damages in so excavating for and erecting a division wall, and the temporary structures necessary for the work, as to cause the same to fall and injure plaintiff's goods. Damages laid at $2,000. In the progress of the trial the cause was dismissed as against Ellen McGann, administratrix of the estate of Dennis McGann, and progressed alone as against Herman Kahn and W. D. Holtzman. Verdict for one hundred and fifty dollars for plaintiff, and Kahn alone appealed to this court.

The complaint in this case is for an injury to plaintiff's property occasioned by the negligence of the defendants,—a tort pure and simple—while in the progress of the trial evidence was adduced tending to show that Kahn was responsible for the damages to the plaintiff by his special contract with the plaintiff to the effect that he would guaranty him against all damage done by him by the erection of the division wall, with the aid of the temporary support suggested and caused to be erected by him.

The evidence in support of the tort was conflicting, that is, there was evidence going to show that Holtzman did this work as an independent contractor, which, if found to be true, it is contended by defendants, would relieve Kahn of a joint liability. On the other hand, there is evidence from which it might well have been inferred by the jury that, not only was this particular work not included in the general contract to erect the building, but that Holtzman, in performing it, was acting under the immediate and special direction of Kahn. In

other words, the inference may have been that they were so related as that both were liable.

The evidence being thus conflicting, the new element was injected into the case by the introduction of testimony going to show that Kahn had guarantied plaintiff against all loss if he would consent to the erection of a temporary wooden partition wall, to serve until a permanent partition wall could be erected; and that, having got his consent, defendants put up the wooden structure, and were building the permanent partition wall, but did it so carelessly that it collapsed and fell before completion, and broke down the wooden partition, and injured plaintiff's goods. Defendants objected to the admission of the testimony as to this guaranty, but not for the reason that it was irrelevant, not being responsive to the issues made by the pleadings, but because by it plaintiff sought to make Kahn liable on a parol contract to answer the debt or failure of another. The particular objection was overruled, as it should have been, because the guaranty of Kahn, if anything, was an original undertaking of his own. But the making of the objection specified had the effect of waiving all other objections, and hence there was no error in not rejecting the evidence on other grounds not specified in the objection made.

The judgment is therefore affirmed.

GRAY v. PATTERSON.

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Opinion delivered June 11, 1898.

1. HOMESTEAD—WHEN NOT LOST.—A homestead estate, when once acquired, and still occupied by the owner, is not defeated or lost by the death of his wife, and removal of his children from the premises. *Stanley* v. *Snyder*, 43 Ark. 429, followed. (Page 376.)

2. SAME—ABANDONMENT.—A finding that the owner of a homestead has not abandoned it is supported by evidence that, on account of his advanced age and his inability to procure some one to live with him, he took up his abode with his daughter, but with the constantly expressed desire to return and live at his home. (Page 376.)

3. SAME—FRAUDULENT CONVEYANCE.—A creditor cannot complain that his debtor has made a fraudulent conveyance of his homestead. (Page 377.)

Appeal from Independence Circuit Court in Chancery.

RICHARD H. POWELL, Judge.

Neill & Neill, for appellants.

Services rendered to one member of a family by another do not constitute a valuable consideration for a transfer. Bump, Fraud. Conv. (3 Ed.) 232, and cases; Sand. & H. Dig., § 3464; 8 Am. & Eng. Enc. Law, 767, note. Therefore the conveyance, being a voluntary one, is in fraud of creditors. Appellee cannot set up any consideration other than that mentioned in the deed. 44 Ark. 180; 30 Ark. 417. When one entitled to a homestead ceases to be the head of a family, the homestead fails. 42 Ark. 541; 24 Ark. 157; 43 Ark. 435. Even under the opinion of the majority of the court in *Stanley* v. *Snyder*, 43 Ark. 429, the homestead claimant must continue to reside on the land as his home. 43 Ark. 434.

Yancey & Fulkerson, for appellee.

The homestead right continues in the head of the family, even after the family have ceased to exist. 43 Ark. 432; 12 Allen, 34; 48 Ark. 542. Nor is the homestead claimant required to actually live *on* the land. 55 Ark. 55; Thomp. on Hom. & Ex. § 272. Abandonment depends upon intent, and it is a question of fact. 55 Ark. 55; 37 Ark. 284; 22 Ark. 405. Creditors have no rights in the debtor's homestead; hence there can be no transfer of it, in fraud of creditors. 43 Ark. 434; 52 Ark. 101; 56 Ark. 156.

BUNN, C. J., The plaintiffs, Gray Bros., by bill in chancery seek to set aside a conveyance made by defendant James A. Meacham to his daughter and co-defendant, Elizabeth A. Patterson. Decree for defendants on the complaint, answer and testimony in the cause, and the plaintiffs appealed to this court.

The complaint was filed at the fall term, 1895, of the Independence circuit court in chancery, setting up substantially the following facts, to-wit: That plaintiffs obtained judgment against defendant Meacham in justice of the peace court, on 17th August, 1895, and in due course, after execution issued and returned *nulla bona*, caused a transcript of said judgment

to be lodged and filed in the circuit court of said county; that after the debt was contracted, but before said judgment for the same was rendered, to-wit, on the 10th March, 1894, said Meacham conveyed to his said daughter, for the consideration named in the deed of $800, the following lands lying and being situate in said county, to-wit: The N. E. ¼ of the N. W. ¼ of section 1, in township 14 north, of range 6 west, the N. W. ¼ of the S. W. ¼ and the E. ½ of the S. W. ¼ of section 36, township 15 north, of range 5 west, containing in all 160 acres, and that the same was all the property he owned at the time, of any material value; that the said Elizabeth A. Patterson, at the time of said conveyance to her, had full knowledge of the existence of said indebtedness of her father, the said James A. Meacham, to the plaintiffs, and that the consideration named in said deed from him to her was a mere pretended consideration, and that said conveyance was made in fraud of Meacham's creditors, the plaintiffs among the number. Prayer to set aside the conveyance, and subject the said lands to plaintiffs' said judgment, which at the institution of this suit amounted to $205.

The answer admits the partnership of plaintiffs, that they obtained judgment against Meacham in justice of the peace court, and that a transcript of same was filed in circuit court, as stated in the complaint, but denies that the consideration of the deed from Meacham to Patterson was a pretended consideration, and, on the contrary, avers the same to have been *bona fide;* that it was the estimated value of the expenses and services to be borne and performed by Patterson in the care and maintenance of her father, the said Meacham, during his natural life, which was the real consideration, and which she obligated herself to defray and perform for that purpose for him. It denies all knowledge of said indebtedness at the time of the making of said conveyance from Meacham to said Elizabeth A. Patterson, his daughter as aforesaid. It sets up that said Meacham, as the husband and father and head of a family, had occupied said lands as his homestead for more than fifty years next preceding the filing of the same; that a large family of children had been reared thereon, had died, married and gone from the paternal roof, and finally the wife and mother died,

and defendant Meacham, in his advanced age, being about eighty-five years old, after remaining alone upon the homestead about one year after the death of his wife, as a matter of necessity (being unable to care for himself, and failing to induce same to live with him) took up his abode with his said daughter; that it was his constantly expressed desire to return and live in his old home, which was near by, but, failing to procure any one to live with him there, he finally made the arrangement with the daughter indicated, conveying to her his said homestead lands as his part of the agreement to that end.

The questions presented by this record are: Did Meacham lose his right of homestead by the death and removal of all his family and dependents? Did he subsequently abandon his said homestead after the death and separation of his family, so as to leave the same subject to the payment of his debts; and, if so, what was the act of the abandonment; and, in either case, what was the effect of his action upon his creditors? In other words, did he ever and in fact abandon his homestead until the sale thereof; and, if not, was the sale void as against creditors?

In *Stanley* v. *Snyder*, 43 Ark. 432, the court said. "The existence of a family being necessary to the acquisition of a homestead, does a continuation of the right depend on a continuation of the family relation? The decided weight of authority is that a homestead estate, when once acquired, and still occupied by the owner, is not defeated or lost by the death of his wife or the arrival of his children at the years of maturity. Thus, the Massachusetts statutes of 1855 limited the homestead exemption to a 'householder having a family,' and continued it to the widow and children after his death, but contained no provision as to its continuance in the husband after the death of the wife and departure of the children. Nevertheless, where the owner of certain premises lived upon them with his wife and son at the time of the passage of the act, it was held that he acquired under the statute a homestead estate therein, which was not affected by the subsequent death of his wife and the coming of age and departure of his son, so long as the father continued to occupy the premises as his home. 'Any other construction' (says the supreme court of Massachusetts), 'would render a husband, who had been deprived of his family by accident or dis-

ease, or by their desertion without any fault of his, liable to be instantly turned out of his homestead.' " And, construing further: "The constitution, which contains our homestead statutes, has not in express terms anticipated and provided for every possible phase of the question. It therefore devolves upon the courts to construe and apply the law to new cases, as they arise. Interpreting the law according to its spirit, and following the current adjudications, we hold, though with some hesitation, that when the association of persons which constitute the family is broken up, whether by separation or the death of some of the members, the right of homestead continues in the former head of the family, provided he still resides at his old home." The expression, "provided that he still resides at his old home," is to be taken in its legal sense, and not in its literal sense; for it does not mean to make the continuation of the homestead right dependent upon actual occupancy, but upon such occupancy as a homesteader may successfully show in answer to a charge of homestead abandonment, according to the principle laid down in the books. Thus, although not in the actual occupancy of the homestead, yet, if his absence therefrom is only temporary for business or pleasure,—and we may add for necessity or convenience,—it is still an occupancy. *Euper* v. *Alkire*, 37 Ark. 283; *Flask* v. *Tindall*, 39 Ark. 571; *Marr* v. *Lewis*, 31 Ark. 203; *Brown* v. *Watson*, 41 Ark. 309. But, this being a question of fact, and determined in favor of appellee by the court below, upon evidence sufficient to sustain its findings, the same will not be disturbed here.

Taking this view of the matter, Meacham's homestead right continued up to the time of its sale to his daughter, and therefore we are only called upon to consider whether the plaintiffs and appellants can complain of the sale in any event. The case of *Chambers* v. *Sallie*, 29 Ark. 407, arose under the constitution of 1868, upon which a judgment, as in that case, was a lien upon the homestead, and the issuance of an execution thereon was only postponed until the homestead right ceased, when it could be levied, and the homestead sold thereunder. The homesteader could not defeat this judgment lien by sale of the homestead under that constitution. But no judgment is a

lien upon the homestead under the present constitution, and this court has said, time and again, that the sale of the homestead is no concern of the creditor; and whatever may be our personal views of the matter, it is settled law, and it were better that it be not re-opened for discussion. *Bogan* v. *Cleveland*, 52 Ark. 101; *Bennett* v. *Hutson*, 33 Ark. 762; *Turner* v. *Vaughan*, 33 Ark. 454; *Carmack* v. *Lovett*, 44 Ark. 180; *Stanley* v. *Snyder*, 43 Ark. 429; *Pipkin* v. *Williams*, 57 Ark. 242; and *Campbell* v. *Jones*, 52 Ark. 493.

This, in our opinion, settles this case. Decree is therefore affirmed.

BATTLE, J., (dissenting). James A. Meacham occupied the land in controversy as a homestead until January, 1891, when he left it. His wife having died in 1890, and his children having ceased to reside with him, he never returned. He was then about eighty-five years old and feeble. Needing the constant attention of some one to protect him against injuries from falling, he moved to his daughter's, Elizabeth Patterson's, and resided with her until his death. Old, feeble and rapidly growing feebler, alone, his wife dead, his children gone, and with a few years in expectancy, it is unreasonable to presume that he intended to return to the old homestead. Why should he return when the same causes that drove him from it still existed, and perhaps would never end? What use had he for a homestead? Why should he longer linger there in the evening of life? He had not the strength or means to make it any longer useful or desirable to him as a home. He was too old and poor, having no other property. The sequel proves that he had abandoned it. After he had ceased to occupy it for more than three years, in March, 1894, he conveyed the land that had constituted it to his daughter, Elizabeth A. Patterson, in consideration that she would take care of and support him for the remainder of his life. All these facts prove to me that the land in controversy had ceased to be his homestead long before he conveyed it to his daughter.

Meacham was in debt. The land in controversy was all the property he owned. The conveyance of it to his daughter in consideration that she would take care of and support him for the remainder of his life was in legal effect a conveyance in

trust for himself, and is fraudulent and void as to existing creditors. *Woodall* v. *Kelly*, 85 Ala. 368; *Annis* v. *Bonar*, 86 Ill. 128; Bump on Fraudulent Conveyances (4 Ed.), § 199, and cases cited. But it is said that the land constituted his homestead at the time he conveyed it to his daughter. Admit this to be true, and it is still fraudulent as to existing creditors. No insolvent debtor is entitled to hold any land as free and exempt from sale under execution or other final process, except the land constituting his homestead. When he abandons the homestead, the land ceases to be exempt. He cannot continue the exemption by conveying the land to another to hold in trust for him. As said in *Annis* v. *Bonar*, 86 Ill. 128, "the law allows no man, beyond the * * * exemption of the statute, by any form of contract or mode of disposition of property, whatever it may be, to secure the use of the property to himself, to the exclusion of his creditors."

When an owner ceases to occupy his homestead, and conveys the land constituting it to another, in consideration that the grantee will support and maintain him for his natural life, he thereby sets it apart to other uses than a homestead, and the grantee thereafter holds in trust for him land which by the abandonment ought to be subject to sale for the payment of his debts. After the conveyance, he stands in no other relation to such land than he does to land that he never held as a homestead, and has conveyed to another for the same purpose. The fact that the land once constituted his homestead does not change the legal effect of the conveyance. The grantee in both cases holds the land for the grantor's benefit, and the effect of the conveyance, if allowed to stand, would enable the grantor to place property, for his own benefit, beyond the reach of his creditors, that he is not entitled to hold exempt from seizure and sale under final process; and would thereby enable him, if insolvent, to defraud his creditors. Such being their effect, it follows that the conveyances are fraudulent and void as to the creditors of the insolvent grantor.

The question I have considered and discussed in this opinion was not presented or decided in *Bogan* v. *Cleveland*, 52 Ark. 101; *Bennett* v. *Hutson*, 33 *id.* 762; *Turner* v. *Vaughan*, 33 *id.* 454; *Carmack* v. *Moret*, 44 *id.* 180; *Stanley* v. *Snider*, 43 *id.*

429; *Pipkin* v. *Williams*, 57 *id.* 242; and *Campbell* v. *Jones*, 52 *id.* 493,—cited in the opinion of the court. In none of these cases did an insolvent debtor, by a conveyance to another, set apart the land which constituted his homestead for his use and benefit, to be held in trust for him after it had ceased to be his homestead.

The decree of the circuit court ought to be reversed.

WOOD, J., concurs with me in this opinion.

ADLER-GOLDMAN COMMISSION COMPANY *v.* PEOPLE'S BANK.

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f69 280

Opinion delivered June 11, 1898.

ASSIGNMENT—ELECTION.—By attacking an assignment as fraudulent, a creditor preferred therein is held to have elected to renounce the benefit of his preference, and, upon the assignment being sustained, he cannot claim the benefit of such preference, even though he was advised by the assignee's counsel that such action would not have this effect. (Page 382.)

Appeal from White Chancery Court.

THOMAS B. MARTIN, Chancellor.

Rose, Hemingway & Rose, for appellant.

Where a party has his election between two inconsistent modes of procedure, his choice of either mode estops him from subsequently pursuing the other one. Appellant has elected to treat the assignment in this case as void; hence he cannot now be heard to claim under its terms. Big. Est. (5 Ed.) 673; 30 Ark. 453; 32 Ark. 346; 47 Ark. 320; 53 Ark. 513; Burrill, Assign. (6 Ed.) § 384; 10 N. H. 108–111; 43 N. H. 421; 43 Mo. 583; 11 Wheat. 78; 2 Heisk. 41; 17 S. W. 1030; 33 Pa. St. 40; 101 Pa. St. 474; 104 Pa. St. 351; 111 Mass. 272; 44 Fed. 467, 469. An election may sometimes be avoided on the ground that it was made under a mistake of fact, but this does not apply to a case where the election was made upon the advice of the attorneys who drew the assignment. If such advice had been given by appellants themselves, there would arise no

estoppel. Big. Est. (5 Ed.) 572. Declarations made by the grantor after a conveyance cannot affect the rights of the grantee or beneficiaries. 5 Ark. 13; 6 Ark. 109; 24 *id.* 111; 14 *id.* 304; 10 *id.* 428; 11 *id.* 249; 40 *id.* 237; 43 *id.* 320. Wrong advice of counsel is not an available plea for appellees in this case. 17 S. W. 1030.

Jas. H. Harrod and *S. Brundidge*, for appellees.

The bringing of a suit by a preferred creditor to test the legality of a deed of assignment will not defeat his right to claim under the deed and share in the assets if the assignment is sustained. Burrill, Assign. (6 Ed.) § 426; 1 Edw. Ch. 195; 13 L. R. A. 472

BATTLE, J. On the 2d day of January, 1895, A. F. Smith made an assignment of all his property to A. W. Yarnell for the purpose of securing, in the order named, the following creditors: First, the People's Bank; second, J. C. Caldwell and J. M. Crabtree; third, the Adler-Goldman Commission Company, the amount of whose debt exceeded the value of the property assigned; and fourth, all other creditors.

Rice, Stix & Co., unpreferred creditors of Smith, caused the property assigned to be attached to secure their debt, and thereupon the People's Bank, Caldwell, and Crabtree sued out orders of attachment, and caused them to be levied upon the same property. The assignee claimed the property, and the assignment was sustained. From this order the attaching creditors prosecuted an appeal to this court, where it was docketed as "*Rice, Stix & Co.* v. *A. F. Smith;*" and the decision of the court below was affirmed. After the cause was remanded, the assignee filed his report in the chancery court, setting up the foregoing facts, advising the court that the Adler-Goldman Commission Company, which had accepted the assignment, and proved up its claim under it, had notified him not to pay over the amount due the People's Bank, Caldwell, and Crabtree, under the assignment, on the ground that they had forfeited their preference by attacking the assignment and attaching the assigned property, and he asked the instructions of the chancery court.

The People's Bank, Caldwell, and Crabtree filed their response, in which they say that, before their attachment suits were brought, they consulted the attorneys of the assignee as to the propriety and effect of their attaching the assigned property, and that said attorneys, who had prepared the assignment, advised them that, as a matter of precaution, they had better attach, and that attaching would not affect their preference; and that, acting on this advice, and on that of their attorney, they brought said attachment suits and have in no other way declined to accept the provisions made for them in the deed.

On the final hearing, the assignee, the People's Bank, Caldwell, Crabtree, and the Alder-Goldman Commission Company appeared by their attorneys; and the Alder-Goldman Commission Company objected to the People's Bank, Caldwell, and Crabtree sharing as preferred creditors in the distribution of the assigned property; but the court ordered that the assignee carry out the assignment according to its terms, paying the debts of said parties in preference to that of the Alder-Goldman Commission Company, and from this decree the latter appealed.

Appellees were under no obligation to accept the provisions made for them by the assignment. They could have rejected or accepted it, but could not do both. They should have elected which they would do.

Mr. Bispham says: "It was said by Sir William Grant, in *Kidney* v. *Coussmaker*, 12 Vesey, 156, that the doctrine of election did not apply in the case of a creditor. This *dictum* is true enough if confined only to those cases in which property is charged by will with debts, for in such a case the creditor may claim the benefit of the charge, and still seek satisfaction of his debt out of other assets. But the rule is, nevertheless, not of universal application; for it has been decided that when a creditor decisively acquiesces in a certain disposition of the debtor's property, he will not be allowed to enforce the collection of his debt by proceedings by which that disposition may be violated. Thus, if a creditor accepts a dividend under an assignment for the benefit of creditors, he will not afterwards be allowed to avoid the assignment, in order to render assets

covered thereby liable to execution for his debts." Bispham's Eq. § 306.

Mr. Perry says: "By accepting the trust (under an assignment for the benefit of creditors), a creditor made trustee waives all claims and liens upon the property inconsistent with the deed. [Citing *Harrison* v. *Mack*, 10 Ala. R. 185.] So creditors who accept the benefit conferred under such deed, and receive dividends or other advantages thereby, cannot set up rights inconsistent with the deed; nor can they, after receiving such advantages, impeach it and procure it to be set aside, but they must comply with its provisions." 2 Perry, Trusts, § 597.

Mr. Burrill says: "In the case of a voluntary assignment, where the assignor creates his own trusts, a creditor who comes in to claim a share of the fund under it must be content to take such share of it as the assignor intended to give him, and cannot claim that which was intended to be given to the assignee in trust for others. A creditor of the assignor, whether provided for by the assignment or not, who wishes to repudiate the trusts of the assignment on the ground that they are illegal and a fraud upon the honest creditors of the assignor, must apply to set aside the assignment as fraudulent and void against him as a creditor, instead of coming in under the assignment itself as a preferred creditor or otherwise." Burrill, Assignment, p. 527, note 1.

In *Irwin* v. *Tabb*, 17 Serg. & Rawle, 442, Chief Justice Gibson said: "The books are full of cases which show that a party shall not contest the validity of an instrument from which he draws benefit, or affirm it in part and disaffirm it in part." And in *Frierson* v. *Branch*, 30 Ark. 453, this court held: "A creditor who elects to accept the benefit of a provision contained in a deed of assignment cannot attack provisions contained in it in favor of other creditors on the ground of fraud. He must either accept or reject it *in toto*."

Having accepted the benefits of an assignment, a creditor cannot impeach or repudiate it, on the ground that it is illegal or fraudulent. So, having repudiated it, it would seem, he cannot afterwards take under it. The reason of the rule in both cases is the same, and that is, he is not entitled to two inconsistent and adverse rights. One is necessarily a denial of the

other. In such case he must generally elect which he will take, and an election of one is the surrender or rejection of the other. Having made an election with a knowledge of the facts, he is bound by it, and cannot withdraw it without consent.

The right of a creditor to share the benefits of an assignment is based in part upon his assent. This is one of the conditions upon which he takes under the assignment. No express assent, however, is necessary to be given to enable him to share its benefits. "This rule is said to be founded on the established principle of the common law that it is not necessary to the creation of a trust by a deed in favor of any person that the *cestui que trust* should be either a party or assent to it;" for, if the trust be to his benefit, the law presumes his assent to it until the contrary be shown. But this presumption is not absolute or conclusive. He is not deprived of his free agency. He is not bound to accept the provisions of the assignment. He is still at liberty to reject them. If he does so, his election is final, and he cannot claim under it. He cannot repudiate it, and then claim its benefits. *Valentine* v. *Decker*, 43 Mo. 583; *Farquharson* v. *McDonald*, 2 Heisk. 404; *O'Bryan* v. *Glenn* (Tenn.), 17 S. W. 1030; *Leinkauff* v. *Forcheimer*, 87 Ala. 258; *Jones* v. *Burgess*, 19 South. 851; Burrill, Assignments (6 Ed.), §§ 441, 454.

In this case the appellee refused to accept the benefits of the assignment when, with a knowledge of the facts, they sued out the orders of attachment, and caused the same to be levied on the property assigned. They prosecuted their attachments to a judgment against them in the circuit court, and then appealed to this court, where the judgment of the court below was affirmed. They thereby renounced and rejected the benefits of the assignment, and cannot now claim or receive the same. The fact that they were advised to sue out the attachments did not destroy or render nugatory the effect of the attachments.

The decree of the chancery court is reversed, and the cause is remanded, with instructions to the court to enter a decree in accordance with this opinion, and for further proceedings.

LITTLE ROCK & FORT SMITH RAILWAY COMPANY v. WIGGINS.

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167 231

Opinion delivered June 11, 1898.

1. AGENCY—APPARENT AUTHORITY.—A finding that certain payments of money on matured notes to a supposed agent of a creditor were binding on the creditor will be supported by evidence that such agent, within the debtor's knowledge, had previously acted as agent for the creditor in accepting similar payments from the debtor and others, and that his acts were either authorized or ratified by the creditor. (Page 387.)

2. SAME—EXTENT OF AUTHORITY.—An agent, having authority merely to accept payment at maturity of notes due his principal, has no implied authority to alter the contract by accepting payment of a note before its maturity. (Page 387.)

Appeal from Crawford Circuit Court in Chancery.

JEPHTHA H. EVANS, Judge.

Dodge & Johnson and *S. R. Allen*, for appellant.

An agent's authority cannot be proved by his own declarations. 46 Ark. 226; 31 Ark. 217. Nor by general reputation. Mechem, Ag. § 101; 76 Ala. 572. The authority of the agents of a corporation is limited, and those dealing with such agents are bound to ascertain the extent of their authority. 48 Ark. 192; Mechem, Ag. §§ 276–289; 32 La. Ann. 656; 63 Tex. 381. Payment to agent will not bind principal, where purchaser has express or implied notice that payment must be made direct to principal. 34 N. Y. 419; 89 N. Y. 577; 39 O. St. 104. Discretionary power cannot be delegated to a subagent. 35 Ark. 198; 2 Am. & Eng. Enc. Law (2 Ed.), 972, and cases. The rule is even more strict as to corporations. *Ib.* 976, and notes. An agent must have special authority to receive payment of a debt before it is due. 68 N. Y. 141; 1 Stark. 185; 13 East, 437; 39 N. Y. 121–122; 50 N. Y. 415; Story, Agency, § 98; 2 Am. & Eng. Enc. Law, 1029; 10 Am. Ry. Rep. 502; 58 Hun, 66; 89 Ga. 223.

S. A. Miller, for appellee.

The agent had authority to receive payment on the contract

before same was due. An agent's acts within the real or apparent scope of his authority bind his principal. 42 Ark. 97; Mecham, Ag. § 287; Story, Ag. §§ 73, 127, 130; 65 Tex. 460. A general agent's authority is co-extensive with the business to be transacted. 1 Am. & Eng. Enc. Law (2 Ed.), 1022. An agent may release, vary or waive a contract when his authority has not been withdrawn. 54 Mo. App. 272.

HUGHES, J. This was a bill in equity for specific performance. Plaintiff states that on the 1st day of October, 1886, he contracted with appellant in writing to purchase of it the northwest quarter of the northeast quarter of section 2, township 9 north, range 32 west, for $140, paying $35 down, and agreeing to pay appellant at the land department of the Little Rock & Ft. Smith Railway, at Little Rock, Ark., as follows: October 1, 1887, $6.30; October 1, 1888, $41.30; October 1, 1889, $4.20; October 1, 1890, $39.20; October 1; 1891, $2.10; October 1, 1892, $37.10. Alleges payment.

Defendant answers, admitting the contract, and admits payment of it all but the last three payments, and claims there is due $92, and prays judgment by way of cross-complaint, and asks same be declared a lien on the property, and, in default of payment, same be ordered sold, etc.

Decree for specific performance, and appeal by railway company.

There is evidence in the case tending to show that the payments of the several amounts of the purchase money had been made by the appellee to J. M. Weaver, who, he supposed, was the agent of the appellant, and was authorized to receive the same. The evidence on the part of the railway shows that the three last payments had never been received by it, and that Weaver had no authority originally to receive any deferred payments on land sold by the railway company. But there is evidence tending to show that Weaver had, on several occasions, collected these deferred payments, and remitted them to the company, and that the company had neither done nor said anything in these instances to repudiate his action or authority. There is in evidence a letter from the commissioner of the appellant's land department, addressed to Weaver as agent, in

which he is requested to collect some small balances due the company in other cases. There is also some testimony tending to show that various blanks pertaining to the sale of lands of the company were sent out from the land department to Weaver as agent, and that other persons, before the date of the payments herein referred to had been made, were known to have made small payments to Weaver, which were recognized by the railway company.

Considering all the facts and circumstances in proof, we cannot say that the court erred in holding, as it must have held, that the appellant company was estopped to deny that Weaver acted as agent of the company in receiving these deferred payments, and was bound by his actions within the scope of his apparent authority.

But the last payment received by Weaver was received by him nearly twelve months before it was due, according to the contract between Wiggins and the company. He had never been permitted to hold himself out as having authority to do this. He had never done it, so far as appears, before, nor had any of the company's agents ever exercised any such power or discretion. Besides, this last payment of $39 was made the 13th of October, 1891, and was not due till the 1st of October, 1892, and at the time the payment was made Weaver had ceased to have any connection with the appellant company, as he had been discharged by G. L. Myers, the agent of the company, in September, 1891. At all events, if it could be said that the company could be estopped to deny his agency on the 13th of October, 1891, when the payment of $39 was made to him, it has not been shown that he had any semblance of authority to receive this $39 nearly twelve months before it was due. He had no power to assume to alter the company's contract, and exercise its discretion, or manage its business in this behalf, and there is nothing to induce any one to believe he did have. Besides, the appellee failed to pay to him even the full amount due, which was $39.20, the amount paid being only $39.

We cite only a few of many cases to be found in the reports of different states to support this proposition. In the case of *Smith* v. *Kiddy*, 68 N. Y. 131, in which it was contended that payment of a mortgage for $2,400 had been

made, the court, discussing the authority of the attorney as agent to receive payment of the mortgage before maturity, said (page 141): "In regard to the $2,400 mortgage, this case presents the further feature that, at the time of the payment, the mortgage had still four years to run. No authority to change the terms of the contract can be implied from the fact that it was originally made through the attorney; and there is no evidence in this case of any such authority. Even though an agent have authority to receive payment of an obligation, this does not authorize him to receive it before it is due,"—citing *Campbell* v. *Hassel*, 1 Stark. 185; *Parnther* v. *Gaitskell*, 13 East, 437, 438; Story, Agency, 98; *Doubleday* v. *Kress*, 50 N. Y. 415; *Fellows* v. *Northrup*, 39 N. Y. 121, 122; 2 Greenl. Ev. § 65. "In order to discharge the makers by such payments, it would be necessary to prove either express authority or a general agency from which authority could be inferred, or establish a ratification by the principal." *Holland* v. *Van Beil*, 89 Ga. 223. Neither express authority, general agency, nor ratification appear in this case. In the case of *Schermerhorn* v. *Farley*, 58 Hun, 66, it is "held that the payments of the principal prior to the time that the principal sum secured by the mortgage became due were not good as against the plaintiff, as no authority had been conferred by him, either upon the firm or its clerk [who received the payments] to anticipate the day of payment by receiving any part of the principal sum before it became due."

We therefore conclude that the last payment of the purchase money due the appellant upon the land involved herein has not been made, and that the amount of the same is still due the company, with interest, according to the contract, and that the railroad company has a lien upon said land for its payment, and is entitled to foreclosure of the same.

The decree of the chancery court of Crawford county, except as to this last payment of purchase money, is affirmed, but, as to this payment, it is reversed, with directions to enter a decree in accordance with this opinion.

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GOSSETT v. STATE.

Opinion delivered June 11, 1898.

CRIMINAL EVIDENCE—REFUSAL TO TESTIFY.—Defendant, on trial for stealing two barrels of whisky, testified that he had two gallons of whisky about the time the barrels were stolen, but refused to tell where he got them, on the ground that his answer would tend to convict him of illicit distilling, for which crime he was under indictment. The court declined to compel him to answer where he got the whisky, but permitted the prosecuting attorney to argue that his refusal to answer was evidence of his guilt. *Held* an improper argument. (Page 391.)

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

The defendant, Bill Gossett, was charged in this case with, and convicted of, stealing two barrels of whisky, a barrel of vinegar and two boxes of cigars. The theory of the state was that the property was taken from cars on the Little Rock & Memphis Railroad. There was testimony tending to show that the whisky, vinegar and cigars had been shipped from Memphis on said railroad; that, before the train arrived at Little Rock, the door of the car containing the property was found to be open, and the property was missing. One witness for the state testified that, about the time the property disappeared, he saw the defendant and certain other parties in the woods with two barrels of whisky, a barrel of vinegar, and cigars, and that they said that they had taken them from the train. There was testimony tending to impeach the testimony of this witness. The defendant testified in his own behalf, and denied fully any connection with or knowledge of the taking of said property. He was asked if he had whisky in his possession about the time the property was said to have been stolen, and he answered that he did have about two gallons. Being asked where he got the whisky, he replied, in effect, that he had been accused of illicit distilling, and did not on that account wish to tell where he obtained the whisky, but stated that he would an-

swer the question if the court required him to answer. As the defendant was under indictment in the federal court for illicit distilling and as he stated he did not want to answer on that account, the circuit judge declined to compel him to answer, but informed him that he could answer if he wanted to answer. The defendant thereupon refused to answer. In his argument to the jury, the attorney for the state insisted that the refusal of the defendant to tell where he got the two gallons of whisky, which he admitted he had in his possession, was evidence of his guilt in this case. To this argument the defendant objected, and, his objections being overruled, the defendant excepted, and afterwards made this a ground for new trial.

Norton & Prewitt, for appellant.

A witness is not compelled to answer a question tending to incriminate him. 58 Ark. 473. Hence, when the court had extended this protection to a witness, it is error for the prosecuting attorney to comment upon the failure of witness to answer such question. 8 S. W. 739; 22 S. W. 369; 46 Pac. 153; 67 N. W. 1052; 30 S. W. 390. The jury were exposed to improper influence against defendant. In cases of exposure of jury to outside influence, when such is shown, it devolves upon the state to show that the jury were not influenced thereby. 57 Ark. 8. The uncorroborated testimony of one who has knowingly received stolen goods, as to the fact of the theft, is insufficient to sustain a conviction. 37 S. W. 423.

E. B. Kinsworthy, attorney general, for state.

The record fails to show whether the alleged improper statements of counsel for state occurred in the opening or closing argument. The presumption is that they occurred in the opening argument, and were answered by counsel for appellant. The sound discretion of the trial court must govern arguments of counsel, and this discretion is reviewable here only in cases of gross abuse, such as does not appear in this case. 34 Ark. 658; 18 Tex. App. 564; 50 N. W. 570; 71 N. W. 504; 105 Ind. 499; 22 S. W. 1021; 50 Mo. 520; 92 Ind. 477. The affidavits filed to show that improper influence was brought to bear on the jury do not prove such. Under our statute the jury can be examined to establish no other ground for new trial

than that the verdict was made by lot. 29 Ark. 293; 59 Ark. 132; 35 Ark. 109; 37 Ark. 519. Where the court is satisfied that improper influences had no bearing on the verdict of the jury, it is proper to overrule a motion for new trial based on that ground. 26 Ark. 334; 34 Ark. 341; 29 Ark. 248.

RIDDICK, J., (after stating the facts.) We are of the opinion that the argument of the attorney for the state was improper. The defendant denied fully any knowledge of the stolen property or any connection with the taking thereof. He admitted that he had about two gallons of whisky in his possession about the time the two barrels of whisky were said to have been stolen from the cars, but objected to telling how he obtained it, on the ground that his answer would tend to convict him of the crime of illicit distilling, and, the defendant being at that time under indictment in the federal court for illicit distilling, the circuit judge sustained his objection, and refused to order him to answer.

When the accused testified in his own behalf, his testimony is the subject of fair comment on the part of the state's attorney, the same as the testimony of other witnesses. (1 Thompson, Trials, § 646.) If the attorney for the state had only called the attention of the jury to the fact that defendant had not told from whom he obtained the two gallons of whisky, and asked them to consider his failure to tell in weighing his testimony, we are not sure there would have been ground for objection; but he went much further than this, and insisted that the refusal of defendant to answer on the ground that his answer would tend to convict him of another crime was evidence of his guilt at the time charged here. He put defendant in the same position as if he had refused to testify because his answer would convict him of the crime under investigation, or as if he had refused to answer without cause. But defendant had already testified that he had no knowledge of the whisky stolen, and knew nothing about it, and there was nothing to show or tending to show that his refusal to testify was based on any other ground than the one stated by him, except the testimony of the witness for the state. On the contrary, the defendant, after having stated his grounds for refusing to answer, expressed a

readiness to answer the question if ordered to do so by the court. We are therefore of the opinion that the jury had no right to draw a conclusion of guilt from his refusal to answer a privileged question. His refusal to answer under such circumstances might affect his credibility as a witness, but was no evidence of his guilt of the crime charged. (1 Thompson, Trials, § 989; *People* v. *Wilson*, 55 Mich. 506.)

The argument of the prosecuting attorney to that effect was improper, and the ruling of the court refusing to interfere and stop his argument was erroneous, and, we think, under the facts of this case, prejudicial to defendant. We are aware that courts should proceed with caution in reversing a judgment of conviction on account of an improper argument of an attorney, but it will be noticed that we have here, not only an improper argument, but, as we think, an erroneous ruling of the court allowing and permitting such argument. If the guilt of the defendant was entirely clear, we might not feel justified in ordering a new trial, but the connection of defendant with the crime rested entirely upon the testimony of one witness for the state, between whom and defendant there was shown to have existed a state of bitter enmity, and whose testimony was contradicted, and who was impeached in other ways. It was still a question with the jury whether they would believe him or not; but, as the jury, under the argument and ruling of the court thereon, may have treated the failure of the defendant to answer the question above referred to as a tacit confession of his guilt, and based their verdict upon such refusal, we think the judgment should be reversed, and a new trial had, and it is so ordered.

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FIELDS v. DANENHOWER.

Opinion delivered June 11, 1898.

1. MORTGAGE SALE—REDEMPTION.—Under the statute providing that real property sold under a power contained in a mortgage "may be redeemed by the mortgagor at any time within one year from the sale thereof by payment of the amount for which said property is sold, together with

ten per cent interest thereon, and costs of sale" (Sand. & H. Dig., § 5111), the redemption of land sold for less than the mortgage debt restores the land to the mortgagor relieved of both the sale and the mortgage lien. (Page 395.)

2. SAME—SUFFICIENCY OF TENDER.—Where mortgaged land was sold to the mortgagee under the power contained in the mortgage for a sum less than the amount of the mortgage debt, and it was a controversy between the parties to the mortgage whether a redemption from such sale would relieve the land from the mortgage lien, a tender of the amount necessary to redeem under the statute is invalid when it was made upon condition that the mortgagee should waive any claim to a lien upon the property by virtue of the mortgage. (Page 400.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

Action of ejectment by F. C. Danenhower against Richard Fields and Jack Dawson to recover possession of a tract of land held by defendants.

The land was formerly owned by F. Trunkey, and he sold and conveyed the land to defendants, Field and Dawson, upon credit, for the sum of $1,381. To secure payment of the purchase price, Fields and Dawson executed and delivered a deed of trust to R. D. Griffis, as trustee, with power of sale. The debt not being paid, the trustee sold the land under the power contained in the deed, and, Trunkey having died, the land was purchased by his widow and heirs for the sum of $900, leaving several hundred dollars of the purchase price still unpaid. The trustee conveyed the land to the widow and heirs of Trunkey, and they in turn sold and conveyed the land to Danenhower. Within one year from the date of the sale by the trustee, the attorney of defendant Fields, who had purchased the interest of Danenhower in the land, tendered to the attorney of Danenhower and the Trunkeys, who was authorized to receive same, $1,000, to redeem the land from the sale under the deed of trust. But this tender was made on the condition that the attorney for Danenhower and the Trunkeys would execute a receipt for his clients releasing the lands from all liens held by either Danenhower or the Trunkeys.

The attorney for Danenhower and the Trunkeys admitted that Danenhower and the Trunkeys had no other claim or lien

on the land except such as were claimed by virtue of the trust deed, and admitted that the $1,000 was sufficient to cover the amount of the purchase price for which said land sold at the sale under the trust deed, together with interest at ten per cent. thereon and costs of sale, and offered to accept the same as a redemption from said sale, but contended that, to release the land from the lien of the mortgage, it was necessary to tender, not only the amount for which the land was sold under the trust deed, interest and costs, but also the balance of the mortgage debt remaining unpaid; and he declined to execute the receipt or accept the tender on the conditions imposed, solely because the effect of the execution of the receipt and the acceptance of the tender would be the absolute redemption of said lands from the mortgage lien.

The answer of the defendants set up this tender as a defense to the action of ejectment, stated that thay had at all times been ready and willing to pay it, and offered to bring the money into court. The finding and judgment of the circuit court was in favor of plaintiff.

Jas. P. Brown, for appellant.

Payment or tender of the amount brought by land, at a foreclosure sale under a mortgage, with interest and costs thereon, at any time within a year after foreclosure is sufficient to affect absolute redemption (Sand. & H. Dig., § 5111); and this redemption is of the title itself, and hence does not revive the old equity of redemption and its accompanying mortgage lien. 10 S. W. 642; 15 N. W. 421; 6 N. W. 274; 7 N. W. 578; 22 C. C. A. 16; Jones, Mort. § 1051c; 57 Ark. 533. Where there is no controversy between the debtor and creditor as to the amount due, but only as to a legal right which might inure to the debtor by virtue of his making the payment, the fact that the debtor demanded, at the time of tender, a receipt showing full redemption from the lien of the mortgage, does not invalidate the tender. A legal right may be demanded by way of condition. 7 N. W. 188; 23 N. E. 282; 118 N. Y. 165; 22 N. E. 155; 115 N. Y. 297; 39 N. Y. 486; 3 N. E. 189; 5 Am. St. Rep. 435; 84 Wis. 218; 54 N. W. 500; 59 N. H. 46; 33 S. W. 596.

McCulloch & McCulloch, for appellee.

One who redeems after a foreclosure sale must pay the whole amount of the mortgage debt, although the land sold for a less sum. Jones, Mort. § 1075; 53 Ark. 69; 57 Ark. 198; 40 S. W. 704; 57 Ark. 533; Kerr's Supp. to Wiltsie, Mortg. Foreclosures, pp. 1627–8, 1635; Pingrey, Mort. p. 2011, § 2175: *ib.* p. 2020, §2184; 14 Wall. 491; 4 Paige, 58; 23 Minn. 13; 6 Mich. 522; 7 Cush. 220; 7 Gray, 148; 130 U. S. 684; *ib.* 43; 74 Ind. 479; 116 Ind. 268; 14 Ill. 263; 12 So. 163; 16 O. St. 193; Rorer, Jud. Sales, § 1178; 29 N. E. 563; 29 N. E. 35; 70 Iowa, 589; 9 Cal. 413; 52 Cal. 644. The agreement on the face of the mortgage, whereby the mortgagors waived their *statutory* rights to redeem, is binding upon them. Jones, Mortg. § 1542 *et seq.; ib.* § 1051. A tender coupled with a condition is no defense. 2 Benj. Sales, § 1074 *et. seq.*, and note; 1 Add. Cont. § 357, and note; 2 Wharton, Cont. § 997; 34 Vt. 201; 39 *id.* 51; 43 Vt. 439; 52 Minn. 83; 107 Mo. 50; 25 Am. & Eng. Enc. Law, 912; 7 Wait, Act. & Def. 588; Jones, Mort. § 900; 1 Cranch, 321; 55 Ind. 397; 12 Mass. 450; 4 Pick. 51; 9 Metc. 42; 38 Fed. 926.

RIDDICK, J., (after stating the facts). This case presents the following question: When land is sold under a power contained in a mortgage for an amount less than the debt secured by the mortgage, does the redemption allowed by the statute from such sale leave the premises still subject to the mortgage lien, or does such redemption restore the land to the grantor relieved of both the sale and the mortgage lien? In other words, can an absolute redemption be effected in such a case by tender of the amount for which the property sells at the mortgage sale, together with interest and costs of sale, or is it necessary that the full amount of the mortgage debt shall be paid?

The statute provides that real property sold under a mortgage "may be redeemed by the mortgagor at any time within one year from the sale thereof by payment of the amount for which said property is sold, together with ten per cent. interest thereon and costs of sale." Sand. & H. Dig., § 5111. If the effect of a redemption under this statute, when the property has

sold for less than the mortgage debt, is to restore the mortgage lien, it is obvious that there is no limit to the number of sales that may be made under the same mortgage. So long as any balance of the debt remained unpaid, and the mortgagor redeems, the mortgagee may, if this be the meaning of the act, continue to sell the property, thus piling up the costs against the mortgagor.

Mortgages and deeds of trust to secure debts can, in this state, be drawn so that the creditor may bid at the mortgage sale (*Ellenbogen* v. *Griffey*, 55 Ark. 268), and this is now usually done; but, under such a construction of the statute, the creditor would be encouraged to bid less than the value of the property; for in that event, if the mortgagor redeemed, the creditor could still hold and sell the property for any balance remaining unpaid, while, if the necessities of the mortgagor prevented him from redeeming, the creditor would obtain the property for less than its value, and have the remainder of the debt as a personal claim against the mortgagor.

There is little reason why a creditor should be allowed thus to subject the property of his debtor to repeated sales under his mortgage; and a construction which permits it should not be adopted unless clearly required by the language of the statute. *Hervey* v. *Krost*, 116 Ind. 268. On the contrary, it would seem to be good public policy to allow the creditor to sell only once under his mortgage, and to make it to his interest to secure a fair price for the property at such sale. *Anderson* v. *Anderson*, 129 Ind. 572. Poverty may prevent the debtor from bidding the value of this property, for he must pay or secure the price he bids; but the creditor is usually in a position to make the property bring its value, at least to the extent of the debt for which he exposes it for sale. If the mortgage does not permit him to bid at the sale, he can foreclose in a court of equity, and thus place himself in a position to make the property bring its value. It is not therefore unjust, as between him and the mortgagor, to presume that the amount for which he permits the property to sell represents its true value. And this is the basis upon which rests the redemption statute. For the purpose of redemption, the statute conclusively presumes that the price for which the property

sells at the mortgage sale represents its actual value, and it allows the mortgagor, within a reasonable time after the sale, to redeem and reclaim the property by substituting therefor its money value, as determined by such facts.

There is nothing in the statute to support the contention that when a redemption is made the mortgage lien is restored, and remains upon the property for any unpaid balance of the debt. We do not believe that the legislature intended any such result. Previous to the passage of this act allowing a redemption, the mortgage lien did not exist after the sale under the power contained in the mortgage. After such sale, the mortgage was *functus officio*, except as a part in the chain of title from the mortgagor to the purchaser at the mortgage sale, for the mortgage lien was exhausted and discharged by the sale. *Makibben* v. *Arndt*, 88 Ky. 180. Now, the statute does not attempt to make any change in the law in this respect, but, recognizing that the mortgage lien was terminated by the sale, and that afterwards there was not a mortgagee holding under a mortgage, but a purchaser holding under a sale, it provides for redemption from such sale only. The language of this statute granting the right to redeem upon payment of amount for which the property sells, with interest and costs of sale, means, we think, an absolute redemption, and the mortgage lien is not revived by such redemption. *Anderson* v. *Anderson*, 129 Ind. 573; *Hervey* v. *Krost*, 116 *ib.* 268; *Makibben* v. *Arndt*, 88 Ky. 180; *Todd* v. *Davey*, 60 Iowa, 532.

Counsel for appellee contend that the case of *Wood* v. *Holland* (53 Ark. 69, S. C. 57 Ark. 198) is opposed to this view, but we do not think so. In that case, as in this, there had been a sale of land on credit, and the vendee had executed a mortgage to a trustee to secure payment of the purchase money. The land was sold by the trustee under a power contained in the deed, and purchased by the vendor for less than the debt secured by the mortgage. The vendor took possession of the land under his purchase at the mortgage sale. Afterwards the mortgagor commenced a suit in equity to redeem, and to compel the vendor "to account for the rents and profits, and for other relief." The court, in its first opinion in that case, upon which the two later opinions were based, conceded the

right of a mortgagor under our statute to redeem land sold under a mortgage by tendering the amount bid with interest and costs, whether the debt secured be for the purchase money or not; but the court said that "when the party goes into a court of equity to redeem, he must offer to pay the whole purchase money due." *Wood* v. *Holland*, 53 Ark. 69.

The court did not, in that opinion, nor in either of the two subsequent opinions rendered in said case, state the reason for requiring the plaintiffs to pay the whole amount of the purchase money when he goes into a court of equity to redeem. But in the case of *German National Bank* v. *Barham*, 57 Ark. 536, it was said that courts of equity in such cases required the payment of the whole debt, upon the principle that he who seeks equity must do equity;" and this seems to be the correct basis for the decisions in *Wood* v. *Holland*, *supra*. While it may seldom be necessary for a mortgagor to resort to a court of equity to enforce his right to redeem after sale, that being a right conferred by statute, and concerning which he has a remedy at law, yet if, by reason of the fact that an account must be stated, or if, for the purpose of removing a cloud from his title, or to obtain other equitable relief, he comes into a court of equity to redeem, he must submit to such conditions as are imposed by the general rules of equity. And it is an ancient rule of equitable jurisprudence that a court of equity will not confer its equitable relief upon the party seeking its aid unless he will concede and provide for all the equitable rights justly belonging to the adversary party, and growing out of the subject-matter of the suit. (1 Pom. Eq. Jur. § 385.) Now, in the case of *Wood* v. *Holland*, the mortgagor was asking the aid of a court of equity to allow him to redeem, and to compel the creditor to account for the rents and profits of land, while on his part he was offering to pay less than half the purchase money he owed the creditor for the land he sought to redeem. The land was the subject-matter of the action to redeem, and, the creditor having a legal demand against the mortgagor for the price of the land, it was right, and in accordance with the rules of equity, that the court should refuse to lend its aid to the mortgagor in the matter of redeeming and reclaiming the land, and calling the creditor to account, until he had offered to pay the balance due for the land.

Anthony v. *Anthony*, 22 Ark. 479; *Ruddell* v. *Ambler*, 18 *ib.* 369; *Loney* v. *Courtnay*, 25 Neb. 580; *Comstock* v. *Johnson*, 46 N. Y. 615; *Booth* v. *Hoskins*, 75 Cal. 271; Pomeroy, Eq. Jur. §§ 385, 393. Whether this rule would be applied to other mortgages than those to secure the purchase money of the land mortgaged is immaterial to consider.

The appellant in this case is not asking the aid of a court of equity. He is a defendant in an action at law, and therefore the decision in *Wood* v. *Holland* does not support the contention that he cannot redeem without paying the whole debt, for the decision in that case is, we think, based on the rule that "he who asks equity must do equity."

To avoid confusion, it must always be remembered that the question here concerns the statutory right to redeem after sale, and has no reference to the equity of redemption before sale,—a right originating with courts of equity, and enforced only upon equitable principles. In actions to enforce the mortgagor's equity of redemption before foreclosure, the rule is that the whole debt must be paid. "The debt being a unit, no party interested in the premises can compel the mortgagor to accept a portion, and to relieve the property *pro tanto* from the lien." 3 Pom. Eq. Jur. § 1220. The same rule is applied, even after foreclosure, when one having an interest in the mortgaged property—such, for instance, as a junior incumbrance—is not made a party to the foreclosure proceedings, and afterwards comes into court for the purpose of enforcing his equity of redemption. He must pay or tender the whole mortgage debt. In such cases, "the party offering to redeem proceeds upon the hypothesis that as to him the mortgage has never been foreclosed, and is still in existence. Therefore he can only lift it by paying it." *Collins* v. *Riggs*, 14 Wall. 491; *Hosford* v. *Johnson*, 74 Ind. 479. But the rules applied by courts of equity in enforcing the equitable rights of redemption before foreclosure, and the decisions based thereon, have little bearing upon the question here, which is one of statutory construction only. After considering the able argument of counsel for appellee, and the many cases cited by him, our conclusion, as before stated, is that the contention of appellants on this point is correct. He tendered a sum sufficient to cover

the amount for which the property sold at the sale under the mortgage, with interest at ten per cent. and costs of sale, and this was all the law required.

But this tender was made upon the condition that appellee and the Trunkeys should waive their claim to a lien upon the property for any further sum by virtue of the mortgage. Appellant Fields demanded that Danenhower and the Trunkeys should sign a writing in which was the following stipulation: "We hereby agree with said Richard Fields that, by virtue of his payment of said sum of $1,000 to us, all the liens or other claims on said lands ever held by us, or either of us, as the representatives of the said Frank Trunkey, deceased, are released, and the said Fields redeems said lands free from any further lien or claim of interest thereon or therein by us or either of us." The appellees and the Trunkeys admitted that they had no claim against the land, except that existing by virtue of the mortgage and the sale thereunder. But the mortgage was executed by appellants to secure the purchase price they had agreed to pay for the land. At the sale under the mortgage the land sold for much less than the amount due for the purchase price, and appellee and the Trunkeys in good faith contended that the appellants could not redeem without paying the full amount due for the land. There was a difference of opinion between the parties as to the law on this point, and the object of appellant Fields in requiring the receipt and agreement was to compel both appellee and the Trunkeys, in the event they accepted the tender, to abandon their claim of a lien against the land for the balance of the purchase money. This balance represented a considerable sum; and while, in view of the unsettled state of the law on that point, we can appreciate the caution which led appellant to impose this condition, we yet have reached the conclusion that it was one he had no right to impose, and it rendered the tender of no effect. It is well established that a tender must be without conditions to which the creditor can have a valid objection. *Noyes* v. *Wyckoff*, 114 N. Y. 204; *Moore* v. *Norman*, 52 Minn. 83; S. C. 38 Am. Dec. 526; *Wood* v. *Hitchcock*, 20 Wend. (N. Y.) 47; Jones, Mortgages, § 900; 25 Am. & Eng. Enc. Law, 912; Benj. Sales (Bennett's Ed.), 733.

If appellant had only asked appellee to sign a receipt showing the amount of money paid, this would have been a condition to which appellee would have had no reason to object, for it would have barred none of his rights. But appellants had not paid the mortgage debt in full, and there was no statutory or legal requirement that appellee and the Trunkeys should enter a satisfaction in full on the record, or grant a release, or agree that they would not prosecute their claim for a lien for the balance due. Whether the acceptance of the sum tendered would revest the title of the land in the mortgagor freed from the mortgage lien for the unpaid balance of the purchase money was a question which appellee and the Trunkeys had the right to litigate; and to demand of appellee that, in accepting the money tendered, he and the Trunkeys should sign an agreement which would estop and prevent them from litigating that question was a condition which appellants had no right to couple with his tender. *Noyes* v. *Wyckoff*, 114 N. Y. 204.

For these reasons, we are of the opinion that the circuit court correctly ruled that appellants did not make a valid tender, and that no redemption was made. The judgment in favor of plaintiff was therefore right, and is affirmed.

BUNN, C. J., (dissenting). I concur in the opinion of the court in this case, in so far as it sustains the mortgagor's right to redeem by paying the sum bid at the foreclosure sale and the percentage and costs provided by statute; but I dissent from that portion of the decision which holds that the tender made by the mortgagor was insufficient and therefore unavailable.

The case of *Noyes* v. *Wyckoff*, 114 N. Y. 208, is relied upon to sustain the decision of the court. The court of appeals of New York said: "The tender is best tested by the effect its acceptance would have had upon the defendant, and it needs no argument to show that, had it been accepted, it must have been upon the terms offered, viz., in payment of the debt and extinguishment of the lien of the chattel mortgage, for the words used have no other meaning. This was a condition which plaintiff had no right to attach to the acceptance. He could not say, 'I offer you this money in pay-

ment of your debt, but if you take it you must extinguish your lien upon the iron ore.' Whether its acceptance would extinguish the mortgage was a question which the defendant had a right to litigate, and to demand that, in accepting the money offered, defendant should create an estoppel, which would prevent him from litigating the amount due on the mortgage, was a condition which the plaintiff could not attach to the offer, and which, being coupled with it, made the tender bad." That was a case where the defendant held a chattel mortgage on a quantity of iron ore lying upon the farm owned by the mortgagor, to secure a debt or rather several debts of uncertain amounts. The mortgagor sold the farm to a third party, afterwards plaintiff in this suit, subject to existing liens. The plaintiff-purchaser tendered the defendant-mortgagee $3,000 in payment and extinguishment of the lien of the mortgage, and defendant refused to accept it. It was conceded, in an action for the conversion of the ore (which had in fact been appropriated by the defendant), that the tender was sufficient in amount, but the refusal to accept it was because of insufficiency in form. Held, that the tender was insufficient, because it stipulated for an extinguishment of the lien, as well as for the satisfaction of the debt, which question of lien the plaintiff had a right to litigate, and thus the tender was coupled with a condition. The reasoning of the court would be applicable to every case of ordinary tender in payment of debt, for in every case the creditor has a right to litigate the question of amount, unless he considers that the amount of the tender is correct; and yet, if he refuses to accept a tender of the proper amount, he will lose in the question of tender, and will be compelled to take the tender and pay costs not covered by the tender. The distinction attempted to be drawn between rules governing the tender of the debt, and the tender of the amount to secure which the mortgage lien exists, involves a nicety which I feel incapable of exactly comprehending. After all, it may be that the court in that case only meant to hold that, notwithstanding the admission of the correctness of the amount of the mortgage lien being fully covered by the tender during the progress of the trial, yet, since the amount of the lien was undeter-

mined when the tender was made, the purchaser had the right to litigate, and that therefore the tender was not good.

In *Halpin* v. *Phenix Ins. Company*, 118 N. Y. 175, a later case, the same court said: "It is claimed that the tender was not effectual to entitle plaintiff to the judgment, for the reason that it was conditioned on the execution by defendant of a satisfaction of the mortgage. The cases cited by the learned counsel for the appellant do not sustain this claim. The distinction must be observed between cases in which terms are added not embraced in the contract or which the acceptance of the tender would cause the creditor to admit, and those [cases] in which the conditions are such as the debtor, on payment of the debt, has a right to insist upon and to which the creditor has no right to object." Such undoubtedly is the true rule.

In this state, when a mortgage debt is paid, it carries with it the satisfaction of the mortgage lien; and hence, by statute, the mortgagee, at the demand of the mortgagor, is required to indorse in writing, signed by himself or his duly authorized agent, on the margin of the record of the mortgage, a satisfaction of the same in full, and a neglect to do so subjects him to a penalty. The execution of such a quittance, receipt or release was all that was contained in the alleged condition accompanying the tender in the case at bar, and the condition, of course, was no more than the mortgagee was bound by law to perform in any event. The statutes referred to are §§ 5096, 5097 and 5098, Sand. & H. Dig.

The controversy, stripped of all mere technical coatings, is whether or not, in order to redeem his land from the foreclosure sale to the purchaser, the mortgagor should be required to pay the amount of the bid, the costs and statutory percentage, or the amount of the mortgage debt, costs and interest. The purchaser contended that he should pay the latter sum, and because he did not tender that sum his tender was refused, and for no other reason. This court has decided that his tender was for the proper amount, and it is inconsistent to hold the tender insufficient, I think. So far as the mere form of the tender is concerned, it is not perceived that the case of a tender made to the mortgagee as purchaser

is different, in effect, from that of a tender to a third party as purchaser. I think the tender should have been held good.

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DILLARD v. STATE.

Opinion delivered June 18, 1898.

1. ASSAULT WITH INTENT TO KILL—INDICTMENT.—An indictment for assault with intent to kill, which alleges that the assault was made unlawfully, feloniously, wilfully, and with malice aforethought, is sufficient. (Page 405.)

2. DEFENSE—AGREEMENT TO DISMISS.—The fact that a former prosecuting attorney, upon the recommendation of the grand jury, agreed to dismiss a prosecution, is no ground for dismissing it. (Page 405)

3. SAME—WANT OF PROSECUTION.—Under Sand. & H. Dig., § 2161, providing that a person indicted for an offense, and not brought to trial before the end of the third term of court in which the indictment is pending, shall be discharged "unless the delay happen on his application," *held* that before a prisoner would be entitled to discharge for failure to prosecute he must have demanded a trial, or at least resisted postponement. (Page 406.)

4. SPECIAL JUDGE—POWER TO ADJOURN COURT.—A special judge trying a cause in which the regular judge is disqualified has power to adjourn the court to a subsequent date, if not in conflict with the term of any other court in the circuit, and to convene the court at such adjourned term. (Page 407.)

5. EVIDENCE—WHEN IMMATERIAL.—On a trial for assault with intent to kill, it was not prejudicial error to exclude evidence as to the size of ball with which the person assaulted was struck, as it is immaterial, if he was assaulted, to prove whether he was hit or not. (Page 408.)

6. SAME—SUFFICIENCY.—A conviction of an assault with intent to kill will be set aside where the evidence shows that the assault was committed by defendant during the progress of a riot, and while he was acting under the influence of passion and excitement caused by provocation apparently sufficient to make the passion irresistible. (Page 408.)

Appeal from Prairie Circuit Court, Southern District.

THOMAS C. TRIMBLE, Special Judge.

H. King White and *J. G. Thweatt*, for appellant.

The state should be held to its agreement, made pursuant to the recommendation of the grand jury, to *nolle prosequi* this

case. The delay in bringing defendant to trial was not caused by "the application of defendant," and he should be discharged. Sand. & H. Dig., § 2161. All that is required of a duly qualified expert is that he state his opinion. 61 Ala. 98; 34 Ark. 520; 55 Ark. 593, 599. The court erred in excluding evidence of threats, made by the conspirators immediately before the killing. 43 Ark. 289; 48 Ark. 333. The court erred in overruling the defendant's plea to the jurisdiction of the court.

E. B. Kinsworthy, attorney general, for appellee.

The evidence shows that appellant never asked for a trial, and that the cause was continued from time to time, either by consent or upon application of appellant. No abuse of discretion being shown, the presumption is in favor of the trial court's actions. Sand. & H. Dig., §§ 2157 and 2163; 26 Ark. 323; 54 Ark. 243. The special judge has the same power and authority in trying the case for which he is elected as the regular judge could have. Const. Ark. § 21, art. 7; 34 Ark. 569. The indictment need not allege that the assault was committed with premeditation. Sand. & H. Dig., § 1477; 55 Ark. 439. It was appellant's duty to have submitted to the arrest. (18 Am. St. Rep, 89); and he is guilty of assault with intent to kill for shooting the officer to prevent arrest. 34 Minn. 361; 37 Kas. 369; 61 Ark. 592.

HUGHES, J. The appellant was indicted by the grand jury of Monroe county for assault with intent to kill, committed, as the indictment alleges, on the first day of September, 1888, upon J. W. B. Robinson, who at the time was the sheriff of the county, and was attempting, as some of the testimony tends to show, to arrest the appellant, who was engaged in a fight.

The appellant contends that the indictment was insufficient because it did not charge that the assault was committed with premeditation. The indictment alleges that the assault was made unlawfully, feloniously, wilfully, and with malice aforethought. This is the language of the statute, and is sufficient.

The appellant also contends that the case against him ought to have been dismissed, because a former prosecuting attorney, upon the recommendation of the grand jury that it

with other cases ought to be dismissed, had agreed to dismiss it. Of course, there is nothing in this contention.

Appellant also moved the court to dismiss the prosecution against him for the reason that he was not brought to trial within three terms of the court in which he was indicted. This motion was made under section 2161 of Sandels & Hill's Digest, which is as follows: "If any person indicted for any offense, and held to bail, shall not be brought to trial before the end of the third term of the court in which the indictment is pending, which shall be held after the finding of such indictment and holding to bail thereon, he shall be discharged, so far as relates to said offense, unless the delay happen on his application."

The cause, on application of appellant, had been removed from Monroe to Prairie county, where it was tried. When it was called for trial in Prairie county, evidence was heard upon this motion, and it appears that there was no order of record in said cause at the March or September term, 1894, March or September term, 1895, March or September term, 1896, or March term, 1897; thus showing that seven terms of the court had passed without any steps having been taken in the case. But it appeared in evidence that the former prosecuting attorney, in consequence of the agreement above, had told the appellant not to appear in court again, that his case would be dismissed, and that, relying thereon, the defendant (appellee) had not been at the court since 1892, until the term at which he was tried, being the September term, 1897, at which term he was notified to appear. So it appears that the appellant was consenting to or acquiescing in the delay, and made no demand for a trial or disposition of the case against him.

In the case of *Stewart* v. *State*, 23 Ark. 720, where this statute is considered, discussed and construed, the opinion was delivered by Mr. Chief Justice Watkins, with his usual clearness and ability, and the conclusion was reached that "the spirit of the law is that, for a prisoner to be entitled to his discharge for want of prosecution, he must have placed himself on the record in the attitude of demanding a trial, or at least of resisting postponements." Said the learned Chief Justice: "We cannot shut our eyes to the fact, known to all who are

acquainted with the administration of justice, that where the crime is of magnitude, delays diminish the chances of conviction, and with that hope are usually sought or acquiesced in by the accused." We think the case of *Stewart* v. *State, supra,* is conclusive upon the question under consideration here, and so adjudge. There was no error in refusing to dismiss the cause on motion of the defendant.

The defendant (appellant) was arraigned, and pleaded "Not guilty," before the change of venue from Monroe to Prairie county. The Hon. James S. Thomas, judge of that court, being disqualified to try the case, the Hon. T. C. Trimble was elected special judge to try the same. The regular judge opened the court at the term when the trial was had, and the Hon. T. C. Trimble, special judge, sitting to hear the case, on the 8th day of October, 1897, adjourned the court to October 25, 1897. The appellant, by leave of the court, withdrew his plea of not guilty, and filed his plea to the jurisdiction of the court, on the ground that the special judge had no power to convene the adjourned session of the court. The next term of court in that circuit did not begin until November, so the adjournment did not interfere with any other term of court, and was ordered by the special judge elected on account of the disqualification of the regular judge, who had opened the term. The record is silent as to the presence or absence of the regular judge on the 25th of October, when the adjourned session was convened. But if he was absent, the special judge had the power to open the court and try the cause. Having been elected to try this case, he was the judge of the court for that purpose, and had the same power and authority in that case that the regular judge would have had, had he not been disqualified, and had he been trying the case. But when the term ends, the authority of a special judge ceases. Const. of Ark. art. 7, § 21; *Fishback* v. *Weaver*, 34 Ark. 569.

There was no error in excluding from the jury the testimony of D. B. Renfro, Willis Parks, J. W. Walker and R. N. West, because there is no evidence tending to show the connection of J. W. B. Robinson with the matters testified to by them. The testimony of these witnesses tended to show that threats had been made previous to the fight by one Pope

Montgomery, and that Walls, who was killed in the fight, had previously had the pistol of Parks, and refused to give it up, saying that he would have a use for it on Saturday, the day of the riot.

Dr. R. M. West was introduced as an expert to testify as to the size of the ball with which J. W. B. Robinson was shot, and gave his opinion that he was not shot with a 44 caliber ball, but stated that he could not say certainly. The court excluded this testimony. It is our opinion that if this evidence was material, it ought to have been admitted. But what difference could it make, in a prosecution for assault with intent to kill, whether the party assaulted was hit or not, if the evidence showed the assault with the intent to kill? There was positive testimony that J. W. B. Robinson was shot at with a pistol three times, and was shot down the last time, by the appellant, though there is some confusion and conflict of testimony on this last shooting. The defendant would be equally guilty if he made the assault with intent to kill by shooting at the party assaulted, whether he hit him or did not hit him. "An assault is an unlawful attempt coupled with present ability to commit a violent injury upon the person of another." Sandels & Hill's Digest, § 1472. There was no error, prejudicial to the defendant, in excluding the testimony.

We come to consider the only remaining question in the case. Is the evidence sufficient to sustain the verdict of guilty of assault with intent to kill? Before the jury could have properly found this verdict, they must have found, from the evidence in the case, that, had death ensued from the assault made by the appellant upon Robinson, the appellant would have been guilty of murder. *Lacefield* v. *State*, 34 Ark. 275.

"Section 1639 (Sand. & H. Dig.) Murder is the unlawful killing of a human being, in the peace of the state, with malice aforethought, either express or implied."

"Sec. 1641. Express malice is that deliberate intention of mind unlawfully to take away the life of a human being which is manifested by external circumstances capable of proof."

"Sec. 1642. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing manifest an abandoned and wicked disposition."

The evidence in this case shows that on Saturday, the 1st of September, 1888, there was a political meeting at the town of Clarendon, in Monroe county, where the alleged offense is said to have been committed. Excitement was at white heat between the adherents of two opposing candidates for sheriff of the county. The appellant was the warm supporter of Capt. J. W. Walker, one of the candidates. J. W. B. Robinson was the other candidate. A general riot occurred between the adherents of these two candidates, in which the appellant took part. In the fight which occurred between him and others, he shot and killed Walls, and was himself shot twice, cut eight times with a knife, and otherwise beaten and bruised. While he was engaged actively in this fight, and about the time he was shooting at Walls, J. W. B. Robinson, the sheriff, rushed up and pushed himself into the crowd, called on Dillard to halt, and surrender, three or four times, according to Robinson's testimony. Robinson says: "He simply looked at me. I then pulled my pistol, but the trigger was hung fast, and would not fire. * * * I threw the pistol on him, ran on him, and thought I would try to bluff him. * * * Instead of running, he fired at my breast. I then wheeled to make my escape from him. About the time I reached the alley, he fired at me again, and struck my shoe heel. As I ran down the alley, some forty or fifty yards, he fired at me again, and struck me just below the hip bone. * * * When the defendant shot me, I was running from him."

There is testimony in the case tending to show that Robinson, when he rushed on Dillard, fired at him; and Dillard, in his testimony, says that Robinson shot him. There is also testimony tending to show that when Robinson fell in the alley he had his pistol in his hand. There is testimony tending to show that, as Robinson and Dillard ran into the alley, several shots were fired up the alley, and that when Dillard emerged from the alley his face was quite bloody; and he says that he was sick and dazed when he went into the alley; says that when Robinson shot him, finding Robinson was not going to stop, he fired; that he was very sick, and could not remember what he did after that.

There seems, from the evidence, to have been a general fight;

Dillard being the object of most of the assaults made with clubs, knives and pistols, many of which took effect upon him, as the evidence shows there were many bruises upon his body, eight knife wounds, and two wounds from pistol shots. It was a full-grown riot, of large proportions and fatal consequences. We are of the opinion that the evidence clearly shows that, in pursuing and shooting at Robinson, Dillard was acting under the influence of passion and excitement, caused by provocation apparently sufficient to make the passion irresistible, and that if his shooting at Robinson had resulted in Robinson's death, he would not have been guilty of murder, but of manslaughter only, and that therefore he is not guilty of assault with intent to kill. "While it is true that every person is presumed to contemplate the ordinary and natural consequences of his acts, such presumption does not arise where the act fails of effect, or is attended by no consequences; and where such act is charged to have been done with a specific intent, such intent must be proved, and not presumed from the act." *Lacefield* v. *State*, 34 Ark. 280.

For the want of evidence to sustain the verdict, the judgment is reversed, and the cause is remanded for a new trial.

RUFFNER v. PHELPS.

Opinion delivered June 18, 1898.

STREET—RIGHT TO COMPEL OPENING.—A purchaser of land, which includes part of a street closed by consent of the town council before his purchase, cannot maintain a suit against his vendor, who owned the other portion of the inclosed street, to compel him to open the street, without proving that he has suffered special injuries on account of its being closed. (Page 412.)

Appeal from Lawrence Circuit Court in Chancery, Eastern District.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

In 1874 W. M. Ponder, who was the owner of the land on which is situated the present town of Walnut Ridge, Lawrence county, made a plat of the town defining blocks, lots, streets and alleys. Among others was defined "Vine street," involved in this suit. The plat was duly recorded. In 1880, upon the petition of W. M. Ponder *et al.*, the town of Walnut Ridge, including the area covered by the plat *supra*, was incorporated. After the plat was recorded, Ponder sold off lots, and in his deeds recognized, in describing the land, the various subdivisions of blocks, lots and streets. No lots were sold on the part of Vine street involved in this suit, which was never opened nor used as a street. In 1886 the council of Walnut Ridge, by a vote of a majority of its members, to-wit: W. M. Ponder, A. C. Phelps and H. R. Wrenn, consented to the closing of Vine street. In 1887, W. M. Ponder sold a tract of and, including that part of Vine street in controversy, to S. Ruffner, describing same by metes and bounds. Ruffner enclosed the entire tract, including that part of the street involved, and same remained enclosed until 1891, when he sold a portion of it, including eight feet of "Vine street," to A. C. Phelps, who took from his vendor, Ruffner, the following obligation: "Whereas, I have this day sold and conveyed to A. C. Phelps, the following property situate in the town of Walnut Ridge, Lawrence county [describing it by metes and bounds, said description embracing in the tract eight feet of Vine street]. Now, said real estate includes alleys and parts of streets of said town which are now *closed and unused*, now, if at any time said streets or alleys, or either, are opened, by authority of law, I hereby agree to pay and refund to the said A. C. Phelps such sums as will be in proportion to the amount paid for said land. Given under my hand this 8th day of September, 1891."

After this an order was made by the town council, upon application of Phelps, to reopen said street; and, in pursuance of said order, Phelps opened the eight feet of Vine street included in his purchase from Ruffner. But Ruffner refused to open that part of the street on his land, to-wit, about 52 feet, the whole street being 60 feet wide. This suit is brought by Phelps to compel Ruffner to open up said portion of the street,

and to restrain him from further obstructing same. The court rendered a decree to that effect, and this appeal was taken.

Jas. K. Gibson and *Chas. Coffin*, for appellant.

The remedy in cases of public nuisance affecting a common right is by a proceeding instituted by some public officer, on behalf the public. Hence a private individual, as such, cannot maintain an action to open up a public street. 40 Ark. 83; 41 Ark. 526; 50 Ark. 486. He must allege and prove special damages. 50 Ark. 486. Appellee is estopped to ask that the "street" be opened, for the reason that, as a member of the council, he voted to close the street, and his purchase of the abutting property was subsequent to, and made with full knowledge of, these facts. 3 Wash. R. Prop. 70; 51 Ark. 491; 18 O. St. 169. A vendee cannot dispute his vendor's title. 47 Ark. 219; 10 So. Rep. 797; 3 Wash. R. Prop. p. 120, § 51. No lots abutting on the "street" in question have been sold, and there never has been an acceptance by the proper authorities. Dill. Mun. Corp. p. 630; 63 Ark. 5.

Jos. W. Phillips, *J. N. Beakley* and *S. D. Campbell*, for appellee.

The owner of the land placed on record a town plat containing the lots, blocks, streets, alleys, etc., filed a petition in county court asking that the town be incorporated, and sold lots to various persons, describing it according to the plat. This was a sufficient dedication. 25 Am. & Eng. Corp. Cas. 268. The proof shows special damage to plaintiff. Hence, he is entitled to maintain his action. 40 Ark. 83.

WOOD, J., (after stating the facts). A purpresture is an encroachment upon the street, which the municipality may or may not tolerate at its option, if same be not also a public nuisance. But if said encroachment be such as to inconvenience the public, the municipality or any individual especially injured thereby may abate and restrain same by injunction. *Wellborn* v. *Davies*, 40 Ark. 832; Coke, Lit. side p. 277b; 1 Wood, Nuis. §§ 81, 97, *et seq.;* 1 High, Inj. § 761, *et seq.; Barnham* v. *Hotchkiss*, 14 Conn. 311; 1 Story, Eq. Jur. § 921, *et seq.*

We do not decide, but it may be conceded, that the inclosure complained of is not merely a purpresture but also a public nuisance. Still, under the peculiar facts of this case, appellee cannot invoke the aid of a court of equity for its abatement. As was said by Judge Storrs in *Bigelow* v. *Hartford Bridge Co.*, 14 Conn. 565, at page 580, speaking of the right of an individual to have an injunction to abate a public nuisance which he alleged was particularly and specially injurious to him: "It is a power which is extraordinary in its character, and to be exercised generally only in cases of necessity, or where other remedies may be inadequate, and even then with discretion and carefulness."

Now, the proof does not show that appellee has suffered any injury on account of the failure of appellant to open up Vine street. Appellee, when a member of the city council, had voted for the closing of Vine street. He knew, therefore, that the street had been closed by the consent of the city, and that it was closed at the time of his purchase. He purchased his tract of land, including a part of Vine street itself, with Vine street inclosed; and it does not appear that he paid any more for the land than it was worth at the time of his purchase. True, appellee testified that he thought the property, without the street, was worth less than he gave for it, but could not form any estimate of how much less; and he nowhere shows that the basis of the valuation of the land at the time of his purchase was upon the understanding or expectation that the street was to be opened. The presumption would be, in the absence of proof, that the land was sold for what it was worth in the condition it was in at the time of the sale, and not at what it might be worth at some time in the future with its conditions changed. There is no proof to overcome this presumption. We can easily understand how appellee would have been injured had he purchased of appellant a tract of land upon or adjoining which was an open street, which appellant afterwards closed, provided the closing of same reduced the value of the land. But as appellee purchased the tract with the street already closed, and at a value fixed accordingly, he is not injured by the failure or refusal of appellant to open the street. It would be manifestly unjust to permit appellee to speculate upon the

opening of the street at the expense and detriment of appellant. If appellee contemplated compelling appellant to open up "Vine street" at the time of the purchase, that fact should have been communicated to appellant, so that he might have valued and sold his land with reference thereto. Moreover, the fact that appellee purchased the tract with the Vine street inclosed and eight feet of said street, paying for said portion of Vine street the same price he paid for the other portion of the tract (as shown by the obligation), proves that he recognized the rights of appellant to sell the same *inclosed*, and thus to deal with the same in a manner inconsistent with the easement of the public. We must deal with the purchase just as it appears. Appellee purchased an entire tract described by metes and bounds, and it included eight feet of Vine street. We are not to presume that he could have bought the tract at all without also purchasing the eight feet of Vine street. Appellant might not have been willing to sell any of the tract had not appellee agreed to take the eight feet of Vine street, and to take it, too, as it was, inclosed, and obstructing the public easement.

Whatever might be the rights of the municipality in the premises, it is clear that appellee, in a solemn transaction in which appellant parted with valuable property, has recognized rights in appellant as against the municipality or the public, and, but for such recognition, the trade might not have been consummated. We therefore think that appellee is not in a position to dispute with appellant the right to keep Vine street closed. The public is not complaining, and appellee cannot in circuitous fashion substitute himself for the public, and thus do indirectly what he could not do directly on account of his prior conduct.

Reversed and dismissed.

JAMES v. STATE.

Opinion delivered June 18, 1898.

PENAL BOND—DAMAGES.—A recovery against a surety in a penal bond may so far exceed the amount of the penalty as is necessary to cover interest upon the penalty from the date of the breach. (Page 417.)

Appeal from Jefferson Chancery Court.

JAMES F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

This is an action upon a guardian's bond executed by G. W. Davis, as guardian of Clara T. Davis, in the sum of six thousand dollars. Upon a final settlement of the accounts of said guardian, he was found to be indebted to his ward in the sum of $5,924.91, and on the 9th day of June, 1892, judgment was rendered against him for that amount. Davis failed to pay the judgment, and this action was commenced against one of the sureties on said bond, and also against the appellants, who are the heirs of Thomas S. James, another surety upon the bond of said guardian, to charge and subject certain lands descended to them as heirs of said James with the payment of the sums due from the guardian. The appellants resisted the payment of said demand, and, after a litigation of several years, a decree was, on the 8th day of February, 1897, rendered against them, to the effect "that the plaintiff have and recover out of the lands described the sum of $6,000, the penalty of the bond sued on, and the further sum of $1,567, as damages, with six per cent. interest per annum on both of the said sums from date hereof until paid." This appeal was taken from that decree. (For fuller statement of facts see *State* v. *Buck*, 63 Ark. 218).

Bridges & Wooldridge and *Crawford & Hudson*, for appellant.

The statutes of this state relative to penal bonds are of two classes: (a) Those in which the exact amount of money to be paid to avoid the penalty can be ascertained by inspec-

tion of the bond (Sand. & H. Dig., §§ 5475–5477); (b) Those which do not definitely show on their face the amount of money to be paid, but which secure the performance of certain duties. (Sand. & H. Dig., §§ 5478–5495.) In cases of the latter class, the penalty of the bond is the measure of any recovery thereon, and the debt bears interest only after judgment. 46 Mo. 377; 4 Selden, 148, 153; 6 T. R. 104; 2 Bl. 1190; 3 Cow. 151; 8 B. Mon. 112; 3 Brown, Ch. 496; 3 *ib.* 489; 8 Ala. 656; *ib.* 285; 5 Conn. 587; 8 Ala. 444; 3 Cow. 151; 13 Mich. 195; 46 Mo. 377; 5 Peters, 273; Cooke (Tenn.), 296; 60 N. Y. p. 142; 2 Ark. 382; 5 Peters, 385; 19 Ind. 267; 1 G. Green (Ia.), 467; 77 Mich. 480; 72 Ill. 71; 5 Tex. 248; 34 Pac. 918; 66 Vt. 168; 92 Mo. 111; S. C. 4 S. W. 420; 38 N. Y. Sup. Ct. 428; 24 Ark. 271. This is also the common law rule. The rule applies to guardians' bonds as well as to administrators' bonds.

Austin & Taylor and *Rose, Hemingway & Rose*, for appellee.

The amount to which the ward was entitled had been settled by probate court, and that settlement was binding alike on the guardian and his sureties. 2 Brandt, Sur. & Guar. §§ 638–9; 48 Ark. 261; 50 Ark. 102, 105. After the surety makes default by refusing to pay the liability thus fixed on him, he is chargeable with interest from the date of such default. This is true both (*a*) by statute and (*b*) common law. (*a*) For constructions of statutes similar to Sand. & H. Dig., § 5491, see: 59 Wis. 553; 98 Mass. 515; Rev. Stat. Mass. chap. 100, § 809; Pub. Stat. Mass. chap. 171, §§ 8, 9 and 10; Genl. Stat. Mass. chap. 133, §§ 9 and 10; 12 Allen, 243; 103 Mass. 398–401; 86 N. E. (N. Y.) 331, 333, 334, 337, 338. (*b*) For common-law rule, see cases *infra*, bearing in mind that, at the time of the early English cases, all interest was usurious and not recoverable, and observing the distinction between these cases and those decided since interest came to be allowable. 2 Suth. Dam. 14, 15, and notes; 6 Paige, Ch. 88–92; 2 Saund. 107; Ry. & Mood. 105; 2 T. R. 388; 11 Am. & Eng. Enc. Law, 383, 384; 4 Wait, Act. & Def. 127; 22 Vt. 438; 5 Cow. 331; 62 Me. 54; 9 Pick. 368, 385; 5 Cow. 331, 334; 22 Vt. 437; 3 Cow. 393, 425; 36 Ark. 355; 43 Ark. 275; 46 Ark. 87, 95; 51

Ark. 198, 203; 52 Ark. 487, 488; 2 Suth. Dam. 14 and 15, and notes; 2 Sedg. Dam. § 678; Murf. Off. Bonds, § 680; 1 Brandt, Sur. & Guar. § 112; 73 Me. 384; 4 Cliff. 618; 73 N. Y. 292, 304; 34 Kas. 42, 45; 2 Dall. (Penn.) 252; 124 N. Y. 24; S. C. 26 N. E. 331, 337; 9 Mont. 126, 138; 28 La. Ann. 274; 14 Ore. 293, 297; 2 Strobh. (S. C.) Law, 113; 10 Col. 265; 12 How. 159; 8 N. H. 491; 1 R. I. 404; 43 Miss. 666, 676; 22 W. Va. 381; 45 Ala. 364, 369; 82 Ga. 33, 43; 59 Wis. 543, 553; 18 B. Mon. 614; 4 Day (Conn.), 30; 26 Conn. 42, 50; 1 Vt. 266; 1 Mass. 308; 12 Allen, 243; 98 Mass. 514; 15 Mass. 154; 1 Gall. 348, 360, affd. in 9 Cranch, 104; 1 Paine, 661, affd. in 12 Wheat. 511; 95 U. S. 600, 613, 614; 5 Ark. 140, 156; 41 S. W. 420.

RIDDICK, J., (after stating the facts). The question in this case is whether, in an action against the sureties upon a guardian's bond, a judgment can be rendered for an amount greater than the penalty named in the bond.

The penalty of the bond in question in this case was $6,000, and in September, 1892, at the time this action was commenced, the amount due from the guardian to his ward, as adjudged by the circuit court, was, with interest, over the amount of said penalty.

The guardian failed to pay any portion of the sum adjudged against him, and as this sum, with interest to the commencement of this action, exceeded the penalty named in the bond, the sureties, by the terms of the bond, were at that time liable to the full extent of the penalty named therein. Had they promptly paid that amount, nothing further could have been recovered of them, for the utmost extent of their liability on account of the default of the guardian was the sum named in the bond; but they refused to pay, and resisted the claim, and afterwards judgment was rendered against them for the amount due at the commencement of the suit, with interest thereon. They now contend that the court erred in adding this interest; for, by reason thereof, they are made to pay an amount greater than the penalty named in the bond. But, as it was the legal duty of the sureties to have paid the sum demanded in 1892, when the action was commenced, and, as they

refused to do so, and resisted the action, it was, in our opinion, lawful for the court to adjudge against them, not only the sum for which they were liable at the beginning of the action by reason of the default of their principal, but also interest thereon by way of damages for their own failure to perform the stipulations in their bond by payment of the sum found due from the guardian when demanded.

"It may be a reasonable doctrine," says the court of appeals of New York, "that a surety who has bound himself under a fixed penalty for the payment of money, or some other act to be done by a third person, has marked the utmost limit of his liability. But when the time has come for him to discharge that liability, and he neglects or refuses to do so, it is equally reasonable and altogether just that he should compensate the creditor for the delay which he has interposed." *Brainard* v. *Jones*, 18 N. Y. 35. As tersely stated by another court, "the penalty of the bond is payable because the principal did not fulfill his obligation; the interest is the penalty upon the sureties for not fulfilling theirs." *Wyman* v. *Robinson*, 73 Me. 384. In other words, while the law favors the surety, and will not extend his liability on his contract beyond the strict terms thereof, yet when, by the terms of such contract, the surety becomes liable for the payment of money, and fails or refuses to pay after the same becomes due and is demanded, he subjects himself, under general rules of law, to the payment of damages for this failure on his part. In such a case he must pay interest to the creditor to compensate him for the unlawful withholding of the money due, although the interest, added to the amount due at the commencement of the action, exceed the penalty named in the bond or contract.

We are not able to concur in the contention of counsel for appellants that the statutes of this state prescribe a rule different from that stated above. We are satisfied they do not, and that reason, as well as the weight of judicial authority, is in favor of the decree of the chancellor. It is the misfortune of appellants that the insolvency and default of the guardian has made their property liable for a large amount due from him; still the appellee was clearly entitled to the decree, and it is therefore affirmed.

MATTHEWS v. LANE.

Opinion delivered June 25, 1898.

PROBATE COURT—APPEAL—REQUISITES.—Under Sand. & H. Dig., § 1149, providing that appeals may be taken to the circuit court from final judgments of the probate court by filing an affidavit and prayer for appeal with the clerk of the probate court whereupon the probate court shall order an appeal, it is necessary, to invest the circuit court with jurisdiction, that it appear that the affidavit and prayer for appeal were presented to the probate court, and that the appeal was granted. (Page 421.)

Appeal from Craighead Circuit Court, Jonesboro District.

FELIX G. TAYLOR, Judge.

E. F. Brown, for appellants.

Appellant, having filed the affidavit for appeal required by statute, had taken all steps necessary to confer jurisdiction upon the circuit court. Sand. & H. Dig., § 1149; 35 Ark. 302; 51 Ark. 344; 13 S. W. 250. The probate court should have been made to enter up, *nunc pro tunc*, the order granting the appeal. 43 Ark. 33; Am. Dig. (1893) p. 135, § 302. The same strictness of rule is not applied to appeals from probate to circuit court as from circuit to the supreme court. 7 Ark. 170.

John K. Gibson and *J. C. Hawthorne*, for appellee.

The bill of exceptions was not filed or made part of the record, hence there is nothing before this court to enable it to review the decision of the court below. 46 Ark. 17; 44 Ark. 482; 2 Ark. 14; 25 Ark. 503. The affidavit for appeal is not shown to have been either presented to, or passed upon by, the probate court. Hence it is no part of the record. 38 Ark. 594.

BUNN, C. J. The note sued on this case was executed by the deceased, W. W. Constant, and delivered to H. H. Hadley, on the 10th day of January, 1889, due and payable twelve months after date, with 6 per cent. interest from date; principal $1,000. On the 24th day of August, 1894, the note was

assigned and transferred to appellant, W. B. Matthews, by Hadley, for value.

On the 28th of May, 1895, Matthews presented the note for allowance to W. T. Lane, the appellee, the then administrator of the estate of Constant, who had died in the meantime, and the same was disallowed, and the same was filed in the probate court for suit, and Lane, the administrator, answered at the July term, 1895, and with his answer filed his counterclaim, to which Matthews filed his response, and, on motion of Lane, Hadley was made a party defendant.

Without date or file marks, a petition of Matthews appears in the record, made to the circuit judge, asking an order on the probate judge requiring him to perfect his record of the July term, 1890 [1895], of the probate court, showing that he had in fact at said term taken the appeal, and that a minute of the same had not been made, as should have been done. The affidavit for the appeal appears in the record as of the date of 24th July, 1895, but it does not appear to have been presented or filed in the probate court.

On the 30th September, 1896, in term time, Lane filed his motion in the circuit court to dismiss the appeal, and, on hearing of the same, the court held that no appeal had been granted in the case, and the appeal was thereupon dismissed, over the objection of Matthews. No action appears to have been taken on the petition for writ of mandamus on the probate judge, and the record does not show that an appeal was taken. The dismissal of the appeal disposed of the case in the circuit court, and from that order this appeal was taken, the proceeding in the probate court, including the evidence, being presented in the transcript sent up to this court. No final action seems to have been taken on the petition for the writ of mandamus against the probate court to compel it to make its records speak the truth, and thereby to show that this appeal was taken in due form; and we are unable to see whether or not there was any connection whatever between this petition and the subsequent motions of defendant to dismiss, if, indeed, any such connection would change the status of things. On the motion to dismiss the appeal, or on the petition for writ of mandamus, we cannot say which, evidence was taken to show what really did occur in the probate court at the time the ap-

peal is alleged to have been taken; but this evidence is too indefinite and uncertain to serve as a correction of the record in the latter case, and equally so to supply a record in the former case, if such, indeed, were at all allowable.

Berry v. *Singer*, 9 Ark. 128, was a case of appeal from the circuit to the supreme court, and in that case this court said: "This is a motion filed by appellee to dismiss the appeal. The reason urged in support of the motion is that there is no showing of record that the appeal ever was allowed by the circuit court. The statute declares that the circuit court shall make an order allowing an appeal upon the performance of certain conditions therein specified. It is the order granting the appeal, and not the prayer for it, that operates to transfer the jurisdiction from the circuit to the supreme court. This being a question of jurisdiction, no presumption can be indulged; so that, although the record should affirmatively show that every prerequisite had been complied with, yet no jurisdiction could attach without an order expressly allowing the appeal." And in *Neale* v. *Peay*, 21 Ark. 94, this court said: "It was decided in *Berry* v. *Singer*, 9 Ark. 128, that where, on appeal from the circuit court to this court, the record shows that the party appealing complied with all the prerequisites required by statute to entitle him to an appeal, but fails to show that the appeal was granted, this court will dismiss for want of jurisdiction. No good reason has been or can be given why the same rule should not apply to appeals from the probate court to the circuit court, the statutes regulating each being similar in their provisions, so far as regards the point in controversy,"—citing Gould's Digest, pp. 137, 867, for the regulation of appeals in both courts. The same rule as to appeals from the probate court continues to this day, substantially. Sand. & H. Dig., § 1149.

In *Sykes* v. *Lafferry*, 26 Ark. 414, this court said: "Under the code, there are two ways in which an appeal may be prosecuted: 1st. By a motion made during the term at which the judgment or final order was rendered. 2d. Upon application of either party to the clerk of the supreme court, in term time or in vacation. The record does not declare the fact that there was any motion for an appeal in the court below, nor that there has been application to the clerk of this court to

grant such appeal. True, the papers are marked "Filed January 24, 1870," but that does not constitute an application for an appeal. There should be a formal petition to that effect, and a granting of the same by the clerk, in order to invest the court with jurisdiction to hear and determine the case on its merits. Therefore the case is dismissed." See, also, *Adams* v. *Hepman*, 27 Ark. 156.

Judgment affirmed.

NICKLACE v. DICKERSON.

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Opinion delivered June 25, 1898.

1. PLEADING—SUFFICIENCY OF DENIAL.—A denial in an answer in ejectment that defendant "derived" title from a common source will be treated as a denial of an allegation in the complaint that she "claimed" title through a common source, in the absence of a motion to make the answer more specific. (Page 424.)

2. EJECTMENT—ANCESTOR'S POSSESSION AS EVIDENCE.—One seeking to recover in ejectment, relying upon the fact that her ancestor died in possession without color of title, must show actual possession in such ancestor. (Page 425.)

3. PLEADING—AMENDMENT TO CONFORM TO PROOF.—Where without objection proof is made of the untruth of an allegation in the complaint not denied specifically in the answer, the answer will be treated as amended to conform to the proof. (Page 426.)

4. ADVERSE POSSESSION—BURDEN OF PROOF.—The burden is on the party claiming title by adverse possession to show that his possession was actual, hostile, open and exclusive, and continued without break for the full period prescribed by the statute. (Page 426.)

Appeal from Randolph Circuit Court.

JOHN B. MCCALEB, Judge.

J. C. Hawthorne, for appellant.

The court erred in refusing to compel plaintiff to file muniments of title as exhibits. Sand. & H. Dig., § 2528; 38 Ark. 181. Had plaintiff shown that her ancestor died in posession under color of title, defendant would have to show a better title. 31 Ark. 334; 40 Ark. 108; 62 Ark. 51. The court

erred in instructing the jury that "every material allegation set out in the complaint, and not specifically denied in the answer," should be taken as confessed, and that evidence tending to disprove such facts should be disregarded. Thomps. Trials, § 1027, and cases. The evidence not being objected to, the court should treat the answer as amended. 43 Ark. 451; 44 Ark. 524; 62 Ark. 262. It was error for the court to give the fifth instruction asked by plaintiff. 47 Ark. 215; 47 Ark. 413. Any visible or notorious acts, which clearly evidence an intention to claim ownership and possession, will suffice to establish a claim of adverse possession. 10 Peters, 432; 30 Ark. 655; 40 Ark. 237; Sedg. & W., Trial of Title, 312. Possession under color of title once being proved, it is presumed to continue until the contrary is proved. 34 Ark. 598; 38 Ark. 371; 48 Ark. 277; 49 Ark. 266. The sixth instruction asked by appellant should have been given. 53 Ark. 418. The facts do not support the verdict, and it should have been set aside.

S. A. D. Eaton, for appellee.

Failure to deny, in answer, any material allegation of the complaint admits such allegation. Sand. & H. Dig., § 5761; 41 Ark. 17. The evidence shows possession in appellee's ancestor at the time of his death. The presumption of ownership arising from such possession must be rebutted by the other party, before plaintiff is required to file muniments of title. 21 Ark. 62; 33 Ark. 150. The fifth instruction given for appellee was correct. 27 Ark. 77; 49 Ark. 266, and cases. The tax deeds introduced by appellant being void for jurisdictional defects in sale, to claim under them she must show actual possession under such deeds for at least two years. 57 Ark. 523; 58 Ark. 151.

HUGHES, J. The appellee on the 7th day of December, 1893, instituted this action in the Randolph circuit court, and alleged that her ancestor, Wm. T. Skinner, died seised and possessed of the north half of the southeast quarter, the northeast quarter of the southwest quarter, and the west half of the southwest quarter, of section 1, which he occupied as a homestead; the northwest quarter of the northwest quarter of section 12; and the northeast quarter of the northeast quarter of

section 11, township 18 north, range 2 east, and that she occupied one hundred and sixty acres thereof as a homestead; that her father had been in actual possession of all the land for more than seven years prior to his death; that James Russell, as administrator of her father's estate, sold and conveyed the lands to one James M. Pennington, who afterwards, through mesne conveyances, conveyed to the appellant.

The defendant answered, and denied having information sufficient to form a belief as to whether W. T. Skinner died intestate in February, 1867; and denied that he was, at the date of his death, either seised or possessed of the land mentioned in the complaint, or that he was in possession thereof for any period of time; and alleged that she was the owner thereof, and derived title under certain documentary evidence (which she filed as exhibits), and was entitled to retain possession. She denied that she held the lands under a sale made by the administrator of plaintiff's ancestor. She pleaded that she had been in adverse possession of the lands more than seven years next before commencing the suit, and that she had been in possession of a portion of it under a tax deed for more than two years.

The defendant, February 7, 1894, filed a motion, in which she denied that she derived title to the lands under a sale made by the administrator of the plaintiff's ancestor, and moved the court to compel the plaintiff to make profert of her title. The court refused to compel the plaintiff to file copies of deeds or exhibits of title, to which rulings exceptions were saved. The plaintiff alleges in her complaint that the defendant *claims* title to the lands in controversy through the same source as the plaintiff, and contends that the defendant in her answer does not deny this. The defendant, in her answer, denied that she *derived* title from the common source of title. This was not a denial of the allegation of the complaint that the defendant *claimed* title to said lands through the same source as the plaintiff. But, as it is uncertain whether the defendant *intended* this as a denial that she claimed title from a common source, and there was no motion to make the answer more definite and certain, the statement in the answer that the defendant denied that she *derived* title from the common source we treat as a denial

that she *claimed* title through the same source as the plaintiff. After the evidence was in, and the court had instructed the jury, they returned a verdict for the plaintiff for all the lands described in her complaint, and the court, after overruling a motion for a new trial, to which the defendant excepted, rendered a judgment in accordance with the verdict, from which the defendant appealed to ahis court.

The plaintiff filed no deeds or evidences of title with her complaint, and sought to rely upon the fact, which she alleged, that her father was in the actual possession, seised of the land in controversy. There were 280 acres of land described in the plaintiff's complaint, for all which she recovered a judgment. There is no evidence in the record tending to show that the plaintiff's father was ever in possession of any of this land, save a part of one forty-acre tract, and four acres upon another forty acres. There was some testimony that the plaintiff's father died on the northwest quarter of the southwest quarter of section 1, which he occupied as a homestead, and that all the cleared land and improvements were upon this tract, except four acres cleared in the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 11. There is also some evidence tending to show that there were in all forty or forty-five acres in cultivation. There are no deeds showing color of title in the plaintiff's ancestor, and no evidence otherwise of the extent of his actual possession, nor the extent of the boundaries of his occupancy of any of the land as a homestead.

The plaintiff in her complaint alleged that the defendant had been in possession claiming the lands for four years when she brought her suit. Before she was entitled to recover, it was necessary for her to show that her ancestor died in possession, which would be sufficient, unless a better title was shown by the defendant to be in some one else, either under the statute of limitation or through conveyances. Relying upon the fact that her father died in possession without color of title, the plaintiff, in order to recover any of said lands, was required to show actual possession—*possessio pedis*—and her recovery would be confined to such actual possession. There would be in such case no evidence of the extent of the claim of ownership of her father, or his intention to claim ownership, except his actual possession.

There could be no constructive possession without color of title. *Carnall* v. *Wilson*, 21 Ark. 62; *Ferguson* v. *Peden*, 33 Ark. 150; *Wheeler* v. *Ladd*, 40 Ark. 108; *Weaver* v. *Rush*, 62 Ark. 51.

In the absence of evidence tending to show that the plaintiff's father was in the actual possession of all of said land, or was in the actual possession of some of them, claiming title to all of them, by a conveyance of all of them to him, thus showing a constructive possession, we are at a loss to understand how it could be held that the plaintiff was entitled to recover all of them. If it be proved that her father died in the actual possession, claiming title to the lands, and the extent of that possession be shown, this would entitle her to recover to the extent of such actual possession, but no further, unless it was shown that her father was claiming under color of title, in which event her right would be coextensive with the boundaries described in the deed under which her father claimed and held possession. There is no evidence in the case showing the extent of the actual possession of the ancestor of the appellee, the plaintiff below, nor any deed or conveyance to him, or anything showing color of title in him necessary to constitute constructive possession, and for this reason the judgment is reversed, and the cause is remanded for a new trial.

We think there was error in the fourth instruction given for the plaintiff, to the effect that every material allegation set out in the complaint of the plaintiff, and not specifically denied in the answer of the defendant, shall be taken and considered for the purpose of this suit as true and confessed, and you will disregard any evidence tending to disprove such allegations. If proof is made without objection, upon trial, of the untruth of an allegation in the complaint not denied specifically in the answer, the court should treat the answer as amended to correspond with the proof. *Sorrels* v. *Self*, 43 Ark. 451; *Davis* v. *Goodman*, 62 Ark. 262.

In order to constiute title by adverse possession, it must be shown that the possession was actual, hostile, open and exclusive, and continued without break for the full period prescribed by the statute. The burden to show this is upon the party claiming title by adverse possession. *Ringo* v. *Woodruff*, 43 Ark. 486.

From what has been said, it will be seen what the court's view of the law is, without further discussion of the instructions in the case. Of course, it is always understood that a plaintiff in ejectment must recover upon the strength of his title, and cannot rely upon the weakness of his adversary's title.

GACKING v. SCHOOL DISTRICT OF FORT SMITH.

Opinion delivered June 25, 1898.

SCHOOL DISTRICT—TRANSFER OF CHILDREN.—An order transferring the children of a resident of a school district to an adjoining school district for school purposes is abrogated by a subsequent order so changing the boundaries of the district of which he was a resident that it no longer adjoined the district to which the transfer was made. (Page 428.)

Appeal from Sebastian Circuit Court, Fort Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

The appellant, John W. Gacking, filed his petition in the circuit court of Sebastian county, praying for a writ of mandamus to compel the School District of Fort Smith to receive his child in its school without payment of tuition. He alleged the following facts as a basis of his petition. In December, 1895, Gacking lived in Sebastian county, in school district 21, which district adjoined the school district of Fort Smith. On 6th of December, 1895, the county court made, on petition of Gacking, an order transferring the children of Gacking from school district 21 to the school district of Fort Smith for educational purposes only. Afterwards, in 1896, the county court divided school district 21, in which Gacking resided, and created another school district (79); and the residence of Gacking is in said new district 79, which does not adjoin the school district of Fort Smith, but is separated therefrom by the old district 21. After the creation of the new district 79, the school district of Fort Smith refused to receive the child of Gacking as a student in its school.

The circuit court sustained a demurrer to the petition stating above facts, and dismissed the action, and Gacking appealed.

Winchester & Martin, for appellant.

The transfer being properly made, it applied as well to a single school district as to any other. Sand. & H. Dig., § 7113; 63 Ark. 438.

Chas. E. Warner, for appellee.

Section 7113, Sand. & H. Dig., does not apply to single school districts. These schools differ materially from those organized under the general school laws of the state. Sand. & H. Dig., §§ 7088–7113; *ib.* §§ 6930–7087; 60 Ark. 124. Statutes are to be construed so as to avoid conflicts and implied repeals. 41 Ark. 151; 15 Ark. 584; 60 Ark. 124. The special school district act confers general powers on the board of directors to control the schools in such districts. Their consent is required in the administration of the schools. 49 Me. 346; 56 N. W. 234. Appellee's petition shows that he is not a resident of an *adjoining* school district. This is fatal to it. 10 Ill. App. 343; 122 Pa. St. 653.

RIDDICK, J., (after stating the facts.) We are of the opinion that the circuit court did not err in sustaining the demurrer to the petition of Gacking, and dismissing the action. We deem it unnecessary to determine whether the statute which empowers the county court to transfer the children of residents of one school district to an adjoining district for educational purposes (Sand. & H. Dig., § 7062) applies to single school districts of towns and cities; for, if we concede that the statute affected such districts, yet the county court, by the terms of the statute, can compel a school district to receive children from another district only when they are transferred from and reside in an adjoining district. Now, at the time the children of plaintiff were transferred to the school district of Fort Smith, plaintiff lived in an adjoining district; but afterwards a new district was made, and this new district, in which he now resides, does not adjoin the Fort Smith district. If the order transferring the children of plaintiff to the school

district of Fort Smith was valid when made, it was annulled or suspended by the subsequent order of the same court creating a new district, which includes the residence of plaintiff, and which does not adjoin the school district of Fort Smith. By the creation of such district so as to include the home of plaintiff, he and his children became members of the same, and the courts have no power to compel a non-adjoining district to receive his children in its schools. Sand. & H. Dig., § 7062. The transfer order mentioned above could not be effective after plaintiff ceased to reside in an adjoining district, and he is in the same situation as he would have been had he voluntarily moved his residence to a school district not adjoining that of the city of Fort Smith.

For these reasons, the judgment of the circuit court is affirmed.

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

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Opinion delivered July 9, 1898.

RAILROAD—LIABILITY FOR KILLING DRUNKEN TRESPASSER.—In a suit against a railroad for killing a drunken trespasser on its track, the court instructed the jury that the railroad is liable if the trainmen failed to keep a constant lookout, when, by keeping such lookout, they could have discovered deceased's condition in time to prevent injuring him. *Held*, (1) that the instruction was abstract, since there was no evidence to show that, if such lookout had been kept, his condition could have been discovered in time to prevent injuring him; (2) that the instruction was erroneous in making the railway company liable for failure of the trainmen to keep a lookout, notwithstanding the contributory negligence of the deceased. (Page 431.)

Appeal from Cross Circuit Court.

FELIX G. TAYLOR, Judge.

Dodge & Johnson, for appellant.

Those in charge of the train might reasonably have expected deceased to get off the track upon the giving of the

usual danger signals; and, until they discover the fact, they did not owe him any greater degree of care because of his being drunk. 46 Ark. 673; 25 Mich. 279; 36 Ark. 46; 36 Ark. 376; 49 Ark. 262, 263; 47 Ark. 497; 69 Miss. 631. The unimpeached testimony of all the eye-witnesses shows no negligence, and a finding of negligence is unwarranted. 41 Ark. 163; 78 Ky. 621; 22 S. W. 603; 69 Miss. 231. The evidence proves contributory negligence. 26 Ark. 3; 46 Ark. 106; 26 Ark. 377; 46 Ark. 388; 46 Ark. 513. The third instruction for plaintiff is erroneous, in that it entirely ignores the defense of contributory negligence. 62 Ark. 235; 62 Ark. 245; 62 Ark. 164.

Rose, Hemingway & Rose, for appellee.

The killing being proved, the burden was on the appellant to excuse it and show absence of negligence. Sand. & H., Dig., 6349; 63 Ark. 636; 45 S. W. 548. The jury had a right to say that the improbable story of those in charge of the train was not true, and did not disprove negligence. 54 Ark. 214; 45 Ark. 295.

BUNN, C. J. This is an action for damages for negligently killing plaintiff's intestate—First, for the benefit of the estate; and, second, for the benefit of the widow and next of kin of the deceased. The verdict of the jury was for the defendant company on the first count, but for the plaintiff on the second count in the sum of $1,500. On the first count the damages were laid in the complaint at $5,000, and on the second count at $10,000.

The testimony shows that on the first of March, 1894, one of defendant company's trains was being run northward on the Bald Knob branch of the Iron Mountain railroad, and, on approaching the town and station of Wynne, struck, ran over, and instantly killed plaintiff's intestate, Walters, while he was approaching the train on the track. C. C. Cradock, at the time of the accident fireman on the engine, as a witness for plaintiff, testified, in substance, that at the lower end of the railway yards at Wynne there was a sign-post, marked 'Switch Limits. Slow.' This was reached by the engine about 300 feet before the engine struck the deceased, which occurred about one-half

mile before reaching the station at Wynne. When the engine passed that post, it was running at the rate of about twenty miles per hour, and when it struck deceased it was running at the rate of fifteen or eighteen miles per hour, and was evidently slowing up at the time of the accident. Witness saw Walters walking on the track directly towards the engine, and the engineer saw him about the same time. He was about 200 or 300 yards away when they first saw him, but was 50 or 60 yards from them when, by his staggering, they saw that he was drunk. Previously the engineer had sounded the whistle at the limit post, giving it a long sound, and, we infer, began to slow up. When they saw the man was apparently drunk, the engineer at once sounded the whistle four or five times, and put on the brakes. Witness, continuing, states: "He [the engineer] commenced that whistling when he was, I guess, 50 or 60 yards from the man. I guess the man could have got off in the 50 or 60 yards. He could have got off the track on either side. About two steps would have taken him off. With the brake lever the engineer threw the brake on. This as soon as he saw he was intoxicated,—just instantly. I do not think the engineer could have done anything else to avoid the accident. I could not tell which way the man was looking, but think he was looking down. Our train made a kind of rumbling noise. I did not know this man was drunk until I saw him stagger, as I have said." This witness was substantially supported by the others.

The evidence in support of the charge of negligence of the railroad employees in charge of the train is, to say the most of it, of the most unsatisfactory character, and, to some of us at least, it is not exactly clear; but, with proper instructions, the jury might not have reached a different verdict.

The first instruction given at the instance of the plaintiff applies solely to the first count, which, by the verdict and judgment of the court, is eliminated from this controversy. The second has reference to the measure of damages under the second count only, and it is not necessary to consider it here.

The third is a copy of section 6207 of Sand. & H. Dig., on the subject of keeping a constant lookout, which, from the uncontroverted testimony in this case, was perhaps needless, if

not abstract and misleading; and, seemingly to cure any errors in giving it, the court, on its own motion, gave the following, also over the objection of the defendant: "The law makes it the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the tract of any and all railroads; and, if any person or property shall be killed or injured by the neglect of any employees of any railroad to keep such lookout, the company owning and operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout. This law does not apply where adult persons go upon a railroad track, where they have no right to be, and carelessly allow a train to strike them; but, if you find from the evidence that the deceased, G. L. Walters, was so badly intoxicated as to be insensible of danger, and that the employees of the defendant in charge of the train that struck and killed said Walters failed to observe the above rule of law by keeping a constant lookout, and that, if they had kept such lookout, they could have discovered said Walters' insensible condition in time to prevent injuring him, you will find for plaintiff."

In saying that the lookout statute "does not apply when adult persons go upon a railroad where they have no right to be, and carelessly allow a train to strike them," the trial court did so, apparently, in recognition of the fact that this court has said in *St. Louis, etc., R. Co.* v. *Leathers*, 62 Ark. 235, and other cases, that the recent lookout statute does not do away with the defense of contributory negligence. But, in what follows, the court destroys or confuses all that it said in this statement. In the first place, the latter part of the instruction gives to a trespasser who is drunk an immunity from the charge of contributory negligence which a sober person would not enjoy; and in the same connection the court tells the jury that they might find from the evidence that if the trainmen had kept a constant lookout, as required by statute, they could have discovered Walters' intoxicated condition in time to prevent injuring him. That the trainmen kept the constant lookout in this case goes without controversy, unless all testimony is to be arbitrarily disbelieved. That it necessarily follows from the keeping of such

loookout that the trainmen could have discovered the intoxicated condition of the deceased is not law, nor do the facts in this case warrant such a conclusion. Before this part of the instruction should have been given, there should have been something in the evidence going to show some conduct or movement on the part of the deceased not usual in a person of sound mind and in a normal condition, or some circumstance showing that the condition of the deceased should have been known in time for the trainmen to avoid the injury, before the act of staggering, of which the trainmen speak as the first indication they saw of the drunkenness of the deceased; for the undisputed evidence is that as soon as they saw this "staggering" they immediately applied the brakes, blew the whistle (which had just ceased to blow for the station), and did everything they could to avoid the accident.

The trainmen testify that they saw the deceased walking on the track approaching them some 200 or 300 yards ahead. Considering the time of day,—about dusk,—when the engine headlight had already been lighted for the night's run, this distance was sufficiently great to indicate that the proper lookout was being kept, and certainly to show that deceased could and would have got off in time had he been in proper condition; and this they had a right reasonably to expect him to do at any time before they saw his condition, especially as the whistle for the station was sounded, as we take it, between the time they first saw him and when they observed that he was drunk, or appeared to be drunk. The trainmen say that, from the time they first saw the deceased, they saw nothing unusual in his conduct or movements until, at a certain point and at a certain time, they saw him apparently turn to get off the track, and then suddenly going back on the track "staggering," and this indicated to them that he was intoxicated, or something unusual was the matter with him, and, being so impressed, they undertook to stop the train, as stated.

In *St. Louis, I. M. & S. R. Co.* v. *Leathers*, 62 Ark. 238, in approval of the doctrine of *Johnson* v. *Stewart*, *ib.* 164, this court said: "We adhere to the ruling in that case respecting the effect of the statute upon the doctrine of contributory negligence. In our opinion, it makes the failure to keep a constant

lookout, by the employees of a railroad company, negligence, and puts the burden upon the railroad company to establish the fact that it kept such lookout. This is the extent of the change made in the law by statute, which, in our opinion, does not, in such case as this, abrogate the doctrine of contributory negligence."

One of the doctrines not abrogated by the "lookout statute" is thus enumerated in *St. L., I. M. & S. R. Co.* v. *Wilkerson*, 46 Ark. 513: "If the employees of a railroad company in charge of its train see a man walking upon the track at a distance ahead sufficient to enable him to get out of the way before the train reaches him, and are not aware that he is deaf or insane, or from some other cause insensible of danger, or unable to get out of the way, they have a right to rely on human experience, and to presume that he will act upon the principles of common sense and motive of self-preservation common to mankind in general, and will get out of the way, and to go on without checking the speed of the train until they see he is not likely to get out of the way, when it would become their duty to give extra alarm by bell or whistle, and if that is not heeded, and it becomes apparent that he will not get out of the way, then, as a last resort, to check its speed, or stop the train, if possible, in time to avoid disaster. If, however, the man seen upon the track is known to be, or from his appearance gives them good reason to believe that he is, insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, they have no right to presume that he will get out of the way, but should act upon the hypothesis that he might not or would not, and they should use a proper degree of care to to avoid injuring or killing him. Failing in this, the railroad company would be responsible for damages if, by the use of such care, after becoming aware of his negligence, they could have avoided injuring him." In other words, this is the old doctrine, applied to the particular state of facts, that, while a railroad company owes no duty to a trespasser on its track, yet, after becoming aware of the trespasser's negligence and danger, it is the duty of the trainmen to do everything reasonably in their power to prevent injury. And, in treating of the phase of case where the insensibility to danger is produced

by intoxication, in the same case, this court said: "Lee had no legal right to be on that part of the railroad track of appellant where he was walking at the time he was killed. It was not a public crossing, and was no part of a public highway. It was made solely for the running of the cars and and train of appellant, and the fact that persons did walk upon it, however frequently, did not change its character, and convert it into a highway for footmen. Being on the private property of appellant, he was where he should not have been, and was bound to use every precaution, every diligence, every care, against any danger which might have happened to him there." "This was his duty. The fact that he was drunk did not excuse one [him] for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Men must be content, especially when they are trespassers, to enjoy the pleasures of intoxication *cum periculis*. When they make themselves drunk, and in that condition wander upon a railroad track, and sustain an injury, they will not be heard to plead their intoxication as an answer to the charge of negligence, or as a reason why the railroad company should be held responsible to them for damages."

Had this man been sober, and not been discovered to be drunk, the defense of contributory negligence would have been without controversy, under the circumstances; and so it is that the testimony of the trainmen at last, to the effect that they believed the deceased was intoxicated, is all that justifies a discussion of the case. That being so, the only question of controverted fact was whether or not the trainmen saw his drunkenness in time to save the deceased by the use of proper effort and exertion. The proposition that they might have seen his condition before they did is not an established fact in the case, because there is no proof of prior indication of drunkenness, and no circumstances showing the condition of deceased might have been discovered sooner, and it is not a question of law, for it was stated thus by this court in *Johnson* v. *Stewart*, 62 Ark. 164: "But he seems to have overlooked the fact that the use of the words 'or by reasonable diligence might have been discovered' in the instruction asked by plaintiff in that case, and which are similar to the modifications added by

the court to the third request of appellant in this case, added a qualification so important and far-reaching as to even overturn the very doctrine of contributory negligence, which he was announcing; for it must be seen that, if this principle be sound, it sweeps away every duty and obligation of the plaintiff to exercise ordinary care for the protection of himself and property. He may be reckless of danger, and heedless of consequences, either deliberately or carelessly putting himself or property in front of moving trains; and yet, if it can be shown, in case of injury, that it might not have happened if the defendant had exercised ordinary care to discover the situation, the plaintiff may still recover. In other words, it matters not how careless or reckless the plaintiff may be in contributing to his own hurt, the defendant, nevertheless, is liable if he has also been negligent. This would be erroneous and unjust. The true rule, which no amount of amplification can simplify, is that whenever the negligence of the plaintiff contributes proximately to cause the injury of which he complains, the defendant is not liable."

In this case, and under the particular facts of it, there is no necessity of going to the extent of either of the decisions we have just quoted. All that is necessary to say is that, while the law puts the burden upon the railroad company of showing in any case that a constant lookout was kept, yet when that is shown to have been done, and when it is also shown that the plaintiff has been guilty of contributory negligence, it does not follow that the burden is any further upon the defendant. In other words, applying the rule to this case, where it is shown that the plaintiff was intoxicated, there is no burden on defendant to show when its servants discovered his condition, or under what state of facts they might have discovered it.

In this case there is no proof of circumstances from which the trainmen should have seen deceased's drunken condition, before they claim to have done so, and the jury had no right to assume the existence of any such circumstances; and still less was it right in the court to instruct them, in effect, that they could arbitrarily say that the trainmen might have seen the drunkenness of deceased sooner, by the exercise of due care, for no amount of care could discover indications of drunkenness

where none are shown to have appeared, or may not have appeared.

The judgment is reversed for the errors in the instruction named, and the cause remanded for a new hearing not inconsistent herewith.

BATTLE, J. (concurring.) I think the judgment of the circuit court should be reversed on account of the instructions held to be erroneous in the opinion of the court, and for no other reason.

PIKE v. THOMAS.

Opinion delivered July 9, 1898.

1. ADMINISTRATOR—CONTRACT FOR LEGAL SERVICES—COMPENSATION.— Sand. & H. Dig., § 217, providing the compensation to be paid to attorneys for the prosecution of suits, applies to those claims which are collectible by the method provided for the collection of ordinary debts in the courts, and not to claims against the United States, which can be collected only through congress and the court of claims. (Page 442.) 65 437 / 72 514

2. SAME—POWER TO BIND ESTATE.—While an administrator, as a rule, cannot enlarge the liability of the estate he represents by his contracts, yet where services have been rendered by an attorney in performance of his contract with an administrator, which are of value to the estate, and the administrator is insolvent, an action will lie in equity to enforce payment for such services out of the assets of the estate. (Page 443.)

Appeal from Clark Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

Dodge & Johnson and *J. H. Crawford*, for appellant.

An attorney has a lien upon the amount he recovers, to the extent of the fee for which he has contracted. 15 How. 415; 91 U. S. 253; 130 U. S. 395; 36 Ark. 604; 42 Ark. 402; 33 Ark. 234, 235; 38 Ark. 385. A plea to the jurisdiction of the court of equity can not be raised, for the first time, upon appeal. 15 How. 415; 1 Dan. Ch. Pr. 555; 143 U. S. 93; 150 U. S. 515; Sand. & H. Dig., §§ 5615, 5617, 5618; 37 Ark. 185; 26 Ark. 54; 52 Ark. 411; 32 Ark. 562; 31 Ark. 411. It was

the duty and the right of the administrator to employ an attorney; and since he had no funds in his hands with which to pay such attorney, he had a right to make the fee a charge upon the amount of the recovery. 73 N. Y. 131; 6 N. Y. 567; 63 N. Y. 645; 8 Hun, 4; 38 Ark. 139; 4 Pa. St. 150; 6 Fla. 257; 110 U. S. 42; 50 Fed. 666; 35 Ark. 247; 61 Ark. 410. A constructive trust exists in favor of the attorney. 2 Story, Eq. Jur. § 964; 1 Perry, Trusts, §§ 13, 166, 235; 1 Lewin, Trusts, § 13; 1 Pomeroy, Eq. Jur. § 155; Bishp. Eq. 118; 2 Pomeroy, Eq. Jur. § 627; 42 Ark. 195; 1 Perry, Trusts, 195.

John E. Bradley, for appellee.

The claim was a chose in action in the hands of the administrator, and, as such, part of the estate. Sand. & H. Dig., § 57; 4 Ark. 173. The amount of the fee is governed by Sand. & H. Dig., § 217. The claim against the estate was disallowed in an action at law (62 Ark. 223), and is now *res judicata*. 1 Am. & Eng. Enc. Law, 825.

BATTLE, J. Yvon Pike, as administrator of the estate of L. H. Pike, deceased, brought an action against C. L. Thomas, in his individual capacity, and as administrator of the estate of Louis Thomas, deceased. He alleged in his complaint that his intestate, Luther H. Pike, in his lifetime, entered into the following contract with C. L. Thomas, as administrator of Louis Thomas, deceased:

"Whereas, I, Charles L. Thomas, as administrator of the estates, respectively, of Louis Thomas, deceased, and H. H. Carter, deceased, of Arkadelphia, in the county of Clark, in the state of Arkansas, have employed Luther H. Pike, attorney and counselor, of Washington, D. C., to take charge of and prosecute to its final determination, in such lawful manner as he may deem best for my interests, the certain claims against the United States for $2,625 and $866.50, respectively, that were presented to the commissioners of claims, under the act of congress of March 3, 1871,—the one on behalf of the estate of said Louis Thomas, the other by said H. H. Carter,—and were disallowed by it; said attorney to defray the further prosecution of said claims out of his own proper means, without reclamation therefor. Now, therefore, I do hereby agree, in

consideration thereof, to pay to him a sum of money equal to 50 per centum of the amounts that may be recovered on said claims, the payment of which is hereby made a lien upon the said claims, and upon any drafts, money or evidence of indebtedness which may be paid or issued thereon. In witness whereof, I have hereunto set my hand and seal this 28th day of July, A. D. 1886.

"[Seal.] CHARLES L. THOMAS.

"Witnesses:

"J. P. HART,

"A. M. CROW."

He further alleged that his intestate had performed his part of the contract, and recovered on the claim of C. L. Thomas, as administrator of Louis Thomas, deceased, the sum of $1,338; that this sum was paid to the defendant on the second day of December, 1892, by the United States, without passing through the hands of Luther H. Pike, deceased, or his administrator; and that the same still remained in the hands of the defendant, as administrator; and that he had a lien on the same for the services rendered by his intestate; and asked for the enforcement of the same.

The defendant, C. L. Thomas, as administrator of Louis Thomas, deceased, answered, and admitted the execution of the contract, the performance by Luther H. Pike, in his lifetime, of his part, the recovery of the $1,338, the receipt of the same by himself, and that the same was still in his possession, none of it having been paid out. He admitted that the estate of Thomas was still unadministered; and alleged as a defense that the contract was illegal, and was not binding upon him as administrator.

The deaths of Louis Thomas and Luther H. Pike are admitted; and the fiduciary capacity of Yvon Pike and C. L. Thomas is not disputed. It was admitted that, at the time the contract sued on was entered into, or since, no assets of any kind whatever, except the funds in controversy, belonged to the estate of Thomas; "that congress appropriated the money to pay the $1,338, and ordered it to be paid directly to the defendant, as administrator, and it was so paid and received by defendant, without its passing through the hands of the attor-

ney, L. H. Pike;" and that no valid order was ever made by any court of record directing the administrator of Thomas to pay L. H. Pike any sum for his services.

Luther H. Pike, in his lifetime, testified that he was a practicing attorney in the city of Washington, in the District of Columbia, and for many years had been prosecuting claims before congress, the court of claims, the executive departments, and United States commissioners. He explained the course necessary for him to take in order to collect the defendant's claim, as follows: "Congress, by act of March 4, 1871, created a commission of three members, generally known and designated as the 'Southern Claim Commission,' whose jurisdiction was to investigate the claims of persons in those states that had been declared in insurrection, who claimed they had been loyal to the government of the United States during the war of 1861–5, and had furnished or had taken from them stores and supplies for the use of the army of the United States; and to report to congress for its action the result of the investigation." Under the act of congress of March 3, 1883 (known as the "Bowman Act,") "the claimant had to go to congress, and get his claim referred to the court of claims. This was accomplished by a bill and petition prepared and presented by the attorney of the claimant being referred to the proper committee of either the senate or house of representatives, and by the attorney obtaining the order of the committee sending the claim to the court of claims. The first step in the court of claims was the preparation and presentation of a printed petition and copies for the claimant. The next was the taking of new and additional testimony. That done, the attorney prepared a brief for the trial of the question of loyalty, that fact being made jurisdictional. This brief consisted of all the evidence on loyalty, and the attorney's comments or arguments upon the same. Upon the attorney for the defense filing his brief on loyalty, that question was argued and submitted to the court, though, by agreement, this question was generally submitted without argument. If the finding of the court was in favor of loyalty, then the attorney prepared a brief upon the merits. This consisted of a request for findings of facts, and all the evidence upon the property furnished or taken, when, where, by

whom, and its value. * * * When the government's attorney filed his brief on the merits, the case was argued and submitted; and, upon the court filing its findings of fact favorably, the attorney secured from the clerk's office a certified copy of it, filed the same with the committee that sent the case to the court of claims, thereby again bringing the claim before congress for appropriation of the money to pay the amount allowed by the court of claims. But, as the court's finding was not a judgment, but merely advisory to congress, and as congress had reserved the right to further investigate, the attorney had to attend to the reference of the claim to a subcommittee and the securing of a favorable report, and then work to secure the desired appropriation by congress."

As to the compensation received by attorneys for such services he says: "The rate of amount of compensation depends, in the first place, upon the amount and time of its payment. It is not worth while to speak of a retainer in cash, with balance during or at the conclusion of the prosecution of the claim. I am not aware of any such cases, and if there were any such the number is so small as not to create a rule."

"Section 823 of the United States Revised Statutes authorizing contracts for fees contingent upon success, the contracts have been almost universally of that character, either for 33⅓ per cent., if the claimant paid current expenses of the prosecution, or 50 per cent. if the attorney paid them. The two principal considerations upon which such rates were established and stand are: (a) Uncertainty as to the length of time the attorney may have to be engaged in the prosecution of the claim, and the amount of labor and the time he may have to invest in it. * * * (b) Uncertainty as to the amount that may be recovered, there being the possibility of the amounts claimed being cut down to such a small figure as to make the attorney's percentage not fairly remunerative for his investment of time, labor and expenses paid in money."

He further testified that he undertook the collection of defendant's claim for $2,625, upon the terms stated in the contract sued on, it having been previously investigated and disallowed by the Southern Claims Commission, and the defendant

having no money to defray the expenses of the prosecution; that he prosecuted it under the Bowman Act; and that he performed all the acts which he testified was necessary to be done in order to collect such claims, and was engaged three years in so doing, and expended over $175 in payment of the expenses of the prosecution. The facts to which he testified are undisputed.

Upon this evidence and the pleadings, the circuit court refused to grant any relief against the administrator of Thomas, or the fund in question, but rendered a judgment against C. L. Thomas, in his individual capacity, for the sum of $882.87, it being one-half of the $1,338 collected and six per cent. per annum interest thereon from the 2d day of December, 1892, the day on which the $1,338 were paid, to the date of the judgment; and the plaintiff appealed.

When Luther H. Pike undertook to collect the claim of the administrator of Thomas against the United States, there were no assets belonging to the estate except that claim. The question was, should the estate lose the entire claim, or pay one half of the amount collected thereon for the collection of the amount that should be recovered? The administrator wisely decided to pay the one half. $1,338 were collected. Pike's administrator demands one-half of this amount. He is entitled to it. His intestate earned it by valuable services. His demand is eminently just, and should have been promptly paid by the administrator of Thomas, and the latter, had he done so, should have been allowed a credit for it, by the probate court, in his account with the estate of his intestate.

It is true that section 217 of Sandels & Hill's Digest provides: "When it shall become necessary, in the opinion of the court, for any executor or administrator to employ an attorney to prosecute any suit brought by or against such executor or administrator, the attorney so employed shall receive, as a compensation for his services, eight per centum on all sums less than three hundred dollars and on all sums over three hundred and less than eight hundred dollars, four per centum, and on all sums over eight hundred, two and a half per centum." But this section has application to those claims which can be collected, if collectible, by the method provided for the collec-

tion of ordinary debts in the courts, and not to the claims against the United States, which can be collected only through congress and the court of claims, as was the claim of the administrator of Thomas. *Turner* v. *Tapscot*, 30 Ark. 320. The compensation fixed by the statute shows that the general assembly which enacted it did not have in mind any claim except ordinary debts, which, as a general rule, could be collected without any great expenditure of labor, time or money.

But we have repeatedly held that an administrator has no power to bind an estate by his contracts. In *Tucker* v. *Grace*, 61 Ark. 410, Judge Riddick, speaking for the court, said: "An administrator has no power to enlarge, by his contract, the liability of the estate he represents. Whether he contracts as an administrator or not, it is his own undertaking, and not that of the decedent, and he incurs a personal liability. An attorney employed by the administrator of an estate has no claim against the estate, although his services may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him." The same rule was laid down in *Pike* v. *Thomas*, 62 Ark. 223, which was a suit by Luther H. Pike against C. L. Thomas, as administrator of Louis Thomas, deceased, upon the same contract upon which this action is based.

While an administrator, as a general rule, cannot enlarge the liability of the estate he represents by his contracts, there are exceptions to this rule. Where services have been rendered by an attorney in performance of his contract with an administrator, which are of value to the estate, and the administrator is insolvent, an action will lie in equity to enforce the payment for such services out of the assets of the estate. Equity grants relief in such cases upon the ground that the administrator has a charge against the estate for the disbursements made by him, which are reasonable in amount, and for services which he had the right to contract for in the proper discharge of the duties imposed upon him, although a reimbursement of the same would not leave a surplus sufficient to pay the creditors of the deceased. Inasmuch as the remedy against the administrator is of no value on account of his insolvency, equity transfers to the attorney the right to collect out of the assets of the estate the amount

due him for his services which the administrator would have had, had he paid it with his own money. *New* v. *Nicoll*, 73 N. Y. 127; *Clapp* v. *Clapp*, 44 Hun, 451; 2 Woerner, Administration, § 356.

In this case it is not alleged in the pleadings nor shown by the evidence that the administrator is insolvent. Unless this be shown, it does not appear that appellant is entitled to any relief in equity against the estate; for, if the administrator can be forced to pay the amount due him, he has an adequate remedy at law, and no right to subrogation to the rights of the administrator against the estate.

The decree of the circuit court is therefore, affirmed, without prejudice to the right of appellant to institute an action in equity to be subrogated to the right of the administrator against the estate, in the manner indicated, as to one-half of the $1,338, the amount due on the contract sued on, the estate not being liable for interest on account of the default of its administrator in the payment of the same.

BUNN, C. J. This is a suit in equity based on the contract set forth in the opinion of the court. Under this contract, Pike prosecuted said claim in congress, and through the court of claims, and finally had it allowed, to the extent of $1,338, for the estate of Louis Thomas, deceased, of which he claimed as his fee one-half, to-wit: the sum of $669. By some rule of law, the whole amount recovered was required to be and was paid, not to Pike, the attorney of record of Charles L. Thomas, as administrator, but to the said Charles L. Thomas himself, as administrator of Louis Thomas, deceased, and said administrator still holds the same.

There is no sort of question as to the justness of the claim, and, more than this, the fund would evidently have been lost to the estate had it not been for the services of Pike, or of some other person performing similar services as he did. It also appears that, under the contract, Pike has spent a considerable sum of his own money, some of which he was able to recall, but some he made no memorandum of, not thinking that it would be important to preserve evidence of the same.

Thomas, the administrator, having become possessed of the

sum aforesaid, and as aforesaid, refused to pay Pike his share of it as his fee under the contract, refused also to petition the probate court of the proper county to order its payment out of said fund or the assets of the estate. Pike then filed his petition in the probate court, setting up the facts, and asked an order upon the administrator to pay over to him the said sum of $669. Upon the hearing, the probate court adjudged that the petitioner, Pike, was entitled to the sum of $57.45,—doubtless an amount he had expended out of his own funds in his efforts to realize on the claim of the estate against the government. Pike appealed to the circuit court, when the judgment of the probate court was sustained, and the additional sum of $69.96, was allowed; and from the judgment of the circuit court he appealed to this court, where the cause was reversed and remanded, without prejudice, on the ground that the probate court had no jurisdiction to hear and determine an adversary suit between a claimant and the administrator, on a contract between them. The reversal without prejudice was suggestive of a proper remedy for the petitioner in another jurisdiction; and so, when the cause was remanded, he brought his suit in equity against the administrator, as such, to enforce his attorney's lien on the fund, and also against the administrator individually; and the decree was against the administrator individually, but for the estate on the question of the lien, and Pike appealed again to this court.

The decision of *Pike* v. *Thomas*, 62 Ark. 223, *supra*, was based on the decision of *Tucker* v. *Grace*, 61 Ark. 410,—that particular part of it which says: "It is proper practice, where an administrator refuses to pay for such services, for the attorney to bring suit against him individually, and not in his representative capacity" (meaning to bring suit before a court having jurisdiction over controversies between individuals); and this doctrine grew out of the rule announced in the books to the effect, as therein stated, that "an attorney employed by the administrator of an estate has no claim against the estate, although his services may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him." Granting, for the sake of argument at least, that the authorities are correct in sustaining that theory, yet

cases in which it is at all applicable are common-law cases, or cases at least wherein, by suits against the administrators as such, the estates are sought to be made liable generally; for in such suits the claims are necessarily against the assets of the estates generally. Such were the cases of *Pike* v. *Thomas* and *Tucker* v. *Grace*, above referred to, and relied upon by the court in its decision herein. It is unnecessary to refer further to *Pike* v. *Thomas*, since that is but this case, as it appeared here on a former appeal, and because the point decided therein is not, and cannot, be controverted here. Nor need there be any controversy over the real meaning of *Tucker* v. *Grace*, for it only meant, after all, that suits against administrators for services rendered in behalf of estates at their instance should be against them individually in courts having common-law jurisdiction. Take the cases upon which that decision is based, and which are cited in support of it, and the distinction I am seeking to point out is clearly made. Thus *Underwood* v. *Milligan*, 10 Ark. 254, was a case where Underwood, for attention to and care of cattle belonging to the estate, sought to have his claim allowed and classed against the estate, over the objection of the administrator. Of course, he suffered defeat in the end. And so it will be found that not a single one of the cases therein cited and relied on have any element of equitable jurisdiction, but all involve simple claims at law.

The plaintiff, Pike, in the case at bar, claimed a lien on the fund he recovered for the estate, not only by the express terms of his contract with the defendant, but by law, which presumably they endeavored to embody in their contract. Pike does not seek to bind the estate generally, on the contract of the administrator. On the contrary, he seeks to recover not the estate's property, not a debt against the estate, to be settled out of its assets, but he seeks to recover from the administrator that which is his own, and which the latter wrongfully withholds from him, at the instance of general creditors, who seek to enjoy the benefits resulting from plaintiff's labors honestly expended, and at the same time to deprive him of any remuneration for the same, by a supposed rule which leaves him remediless. But it is said in the decision of the court

that, had the plaintiff alleged and proved the insolvency of the administrator, the decree would have been in his favor. That idea is involved in some of the decisions cited, and, for the purposes of the cited cases, is doubtless correct; but it will strike the most casual observer that to say in one breath that an administrator cannot bind the estate in his charge by his contracts with third persons, and then in the next breath to say that the estate will be bound if it so happens that the administrator is or becomes insolvent, is a little peculiar. Why an estate, not otherwise bound, should be made to pay, because the administrator of it cannot or ought not finally to be made to pay, is to my mind making the estate bound at all events; for it is also said that where an administrator performs his contracts with third parties, and they are for the benefit of the estate, and pays what is due on them, the probate court will make an allowance out of the assets of the estate to indemnify him, and that, too, when he is not insolvent. What authority has the probate court to make such an allowance in the one case, and an equity court to subject the funds of the estate to answer the default of the administrator in the other, if by his contract the administrator cannot bind the estate? The truth is, we come back to the point from which we started. The administrator cannot bind the estate in law, but he may do so in equity. If that be true, insolvency of the administrator is not the basis of recovery,—at least not the only ground upon which a recovery may be had,—but a fixing of a lien is also a matter of equitable jurisdiction, and that is just what is asserted here.

The idea that one who produces a thing has a lien upon it for the value of his labor expended thereon in bringing it into existence now pervades the law everywhere, and in most instances has been made the subject of statutory enactment, and so it is that the law provides that where an attorney saves a property to his client, he has a lien upon it for his services. Whether his services have or have not been rendered by authority of law in any case is a subject of inquiry, and ought to be determined on principles of equity when the law falls short in its provisions.

The result of the decision of the court in this case is that, on the cause being remanded, the controversy will be renewed

by a complaint in which the insolvency of the administrator will be alleged and shown, if such be the fact; in which case the claimant will succeed in his suit. If, however, the administrator is not insolvent, he will be made to pay the judgment already against him; and he will immediately seek indemnity out of the assets in his hands, and, according to the rule, the probate court will afford him the relief out of the general assets. In other words, the estate will pay the amount at last, unless plaintiff is estopped by some act of his own before the matter has been carried that far. The question then is, why this circumlocution? Why this useless and expensive procedure, when the same end might be answered by a simple decree to the effect that, as the complainant has saved so much to the estate, and his demand for services in that behalf is reasonable, that much of the fund will be paid over to him without further trouble and delay. I think such should be the decree in this case.

EATON v. LANGLEY.

Opinion delivered July 9, 1898.

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1. REPLEVIN—FORM OF JUDGMENT.—A successful plaintiff in an action for the recovery of personal property is entitled to judgment for delivery of the property, or its value, if a delivery can not be had; and his right to this judgment is not affected by the fact that he failed to claim a delivery of the property before judgment, but ordered the sheriff to return the order of delivery without service. (Page 450.)

2. SAME—DAMAGES.—In replevin for standing timber cut by an innocent trespasser and converted into cross-ties, the owner is entitled to judgment for delivery of the timber so converted, notwithstanding its value has been increased six times; but, if delivery cannot be made, the measure of the damages recoverable is the value of the cross-ties less the labor expended on them, provided such expense does not exceed the increase in value. (Page 451.)

Appeal from Greene Circuit Court.

FELIX G. TAYLOR, Judge.

Block & Sullivan, for appellant.

The change from standing timber to cross-ties was not such a change of identity as will prevent the original owner from maintaining replevin, whether the change was wrought innocently or wilfully. 44 Ark. 210; 55 Ark. 307, 310; 78 Ky. 481; 37 Mich. 332; 70 *id.* 309; 115 N. C. 85. The recovery of the property is the primary object of the suit, and the alternative judgment for its value is not to be rendered for the purpose of allowing the wrongdoer to elect to deliver the property to pay for it. 50 Ark. 303. The facts are fully before this court, and judgment should be pronounced here. 56 Ark. 213; *id.* 8.

Luna & Johnson, for appellee.

Where the trespass is the result of inadvertence or mistake, the value of the property, when first taken, is the measure of damages. 106 U. S. 230; 22 Mich. 311; Sedg. Meas. Dam. § 538; 26 Am. & Eng. Enc. Law, 676; 20 *id.* 1128; 93 Am. Dec. 739; 42 Minn. 541; S. C. 44 N. W. 1027. It is the duty of this court, under § 1064, Sand. & H. Dig., to remand for new trial all cases except those where the evidence discloses that the action could not be maintained or a defense made. 56 Ark. 50; *id.* 255; 57 Ark. 461.

BATTLE, J. P. A. Eaton alleged in his complaint that he was the owner of five thousand cross-ties, of the value of $750; that they were in the possession of H. G. Langley; that he was entitled to the immediate possession of the same; and asked for the possession thereof, or, if that could not be obtained, their value. After filing with the clerk of the circuit court the affidavit required in such cases, he sued out an order for the delivery of the cross-ties to himself; also a summons for Langley. He caused the summons to be served upon the defendant, but directed the sheriff to return the order of delivery without service, which was done.

The defendant answered the complaint by denying the allegations therein and alleging that he was the owner of the ties.

The issues in the action were tried by the judge and jury. Upon the evidence adduced, the jury found a special verdict,

and the judge filed his conclusions of fact, both of which are stated by the judge as follows:

"From the evidence in this case the court finds as follows: (1) That the ties in controversy were cut by the defendant from the east half of section thirty-five, township seventeen north, range three east. (2) That the plaintiff was the owner of said land and the timber thereon at the time the ties in controversy were cut. (3) That said ties were cut without authority from the plaintiff or any one representing him, and that in so cutting the said timber the defendant was a trespasser. (4) That the defendant in cutting said timber was acting under a *bona fide* belief that he was the owner of the said timber, and had a right to cut it, and that he was an innocent and not a wilful trespasser therein.

"And from the answers of the jury to the special interrogatories the court finds: (5) That, at the time this action was begun, the defendant had 3,500 cross-ties, which he had made from said land while the plaintiff was the owner thereof, under the foregoing circumstances. (6) That said ties, at the beginning of this action, were of the value of 12½ cents each. (7) That the timber from which the same were made, while standing, was of the value of 2 cents per tie."

Upon these findings of facts the court rendered a judgment as follows: "It is therefore ordered, considered and adjudged by the court that the plaintiff have and recover of and from the defendant the sum of seventy dollars and all costs of this cause, and that, further, in case the sums of money above mentioned, together with the said costs, are not paid within ten days from this date, the plaintiff shall have and recover of the defendant the possession of the 3,500 cross-ties situated on the east half of section thirty-five in township seventeen north, range three east, and for which writ of delivery in this case may issue."

After filing a motion for a new trial, which was overruled, and a bill of exceptions, the plaintiff appealed.

In an attempt to sustain the judgment of the circuit court, appellee insists that this is not an action of replevin or detinue, "but is in the nature of an action of trover or trespass under the common law." But the name of it is immaterial. The code abolished all forms of action. Let its name be what it may, it

is unquestionably an action to recover the possession of specific personal property. In such actions the statute provides that the "judgment for the plaintiff may be for the delivery of the property, or for the value thereof, in case a delivery cannot be had, and damages for the detention." Sand. & H. Dig., § 6398. The right to this judgment is in no wise affected by the issue or failure to issue an order of delivery, which is only necessary to enable the plaintiff (upon the execution of the proper bond) to obtain the immediate possession of the property at the beginning or during the progress of the suit, or force the defendant to give bond for its retention, and for no other purpose. Sand. & H. Dig., § 6383, *et seq.*

The cross-ties in controversy are the product of the timber of appellant and the labor of the appellee. The latter, honestly believing that he was the owner of the timber, converted it into the cross-ties. The material used in making each tie, as it was in the tree, was worth two cents, and, as it is, is worth twelve and a half cents. Under these circumstances, is appellant the owner of the ties, and entitled to their possession?

As a general rule, an owner cannot be deprived of his property without his consent or operation of law. "If unauthorized persons have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must be a limit to this right." Mr. Justice Blackstone lays down the rule very broadly that if a thing is changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted. 2 Bl. Com. 404. Many authorities have followed this rule, while others have held that, in the case of a wilful appropriation, no extent of conversion can give to the wilful trespasser a title to the property, so long as the original materials can be traced in the improved article. *Weatherbee* v. *Green*, 22 Mich. 311.

In *McKinnis* v. *Railway*, 44 Ark. 210, and *Stotts* v. *Brookfield*, 55 Ark. 307, it was held that the owner of timber which had been taken and converted by a wilful trespasser into cross-ties may recover the ties or their value in an action of replevin

against the trespasser. In the latter case the court said: "While it is difficult to draw from the authorities a rule by which we may determine with certainty what change in the original property converted will destroy its identity, so that replevin will not lie for its recovery, it is settled that the conversion of timber into cross-ties is not such a change, whether the change has been wrought by a wilful or an innocent wrongdoer." But there was no occasion for saying what was said as to innocent wrongdoers. In that case the defendant entered upon the land of plaintiff, and, without his authority or consent, knowing at the time his claim of ownership of the same, cut timber therefrom, and converted it into the cross-ties in controversy. Upon that fact the judgment of the court was based. In neither of these cases was any rule laid down by which the identity of the property can be ascertained.

The authorities generally agree in holding that when a party has taken the property of another in good faith, and, in reliance upon a supposed right, without intention to commit wrong, converted it into another form, and increased its value by the expenditure of money and labor, the owner is precluded from following and reclaiming the property in its new form, if the transformation it has undergone has converted it into an article substantially different. But they have not agreed upon any rule by which it can in all cases be ascertained whether this transformation has or has not taken place. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title. * * * But cloth made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, it is said, may be reclaimed by their owner in their new and original shape. * * * Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses." *Wetherbee* v. *Green*, 22 Mich. 318, 319. But the supreme court of Michigan (Mr. Justice Cooley delivering the opinion of the court) said that the test of the senses is unsatisfactory, and that "no test which satisfies the reason of the law can be applied in the adjustment of questions of title to

chattels by accession, unless it keeps in view the circumstances of relative values." It said: "It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might perhaps be traced without trouble into a church organ, or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument a hundred or a thousand times the value of his original materials, when the party who, under like circumstance, has doubled the value of another man's corn by converting it into malt, is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved articles is the point in issue, the question how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the men whose timber was used in making it, not because the timber cannot be identified, but because, in bringing it to its present condition, the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant." *Wetherbee* v. *Green*, *supra*, 319, 320.

Wetherbee v. *Green*, 22 Mich. 311, was an action of replevin by the appellee against the appellant to recover a quantity of hoops made out of the timber of the former by the latter in good faith, under what he supposed to be good authority. The timber in the tree was worth only $25, and the hoops made out of it were worth $700. The court held that the owner could not recover the hoops, but was entitled to the damages sustained by reason of the unintentional trespass. This decision was

based upon the reason that the hoops were made in good faith, and upon the fact that the value of the timber, as compared to the value of the labor expended in making them, was insignificant.

In *Isle Royale Mining Co.* v. *Hertin*, 37 Mich. 332, the parties were owners of adjoining tracts of timbered land. In the winter of 1873–4 the Hertins, in consequence of a mistake respecting the boundaries, went upon the lands of the mining company, and cut a quantity of cord-wood, which they hauled and piled on the bank of Portage Lake. The next spring the mining company took possession of the wood, and converted it to their own purposes. The wood on the bank of the lake was worth $2.87½ per cord, and the value of the labor expended by the Hertins in cutting and putting it there was $1.87½ per cord, nearly double the value of the timber. After the mining company had taken possession of the wood, the Hertins brought an action against the mining company for the value of their labor expended in converting the timber into cord-wood and placing it upon the bank of the lake. The court held that they were not entitled to recover. Chief Justice Cooley, the same judge who delivered the opinion in *Wetherbee* v. *Green*, *supra*, in delivering the opinion of the court, said: "It is on all hands conceded that where the appropriation of the property of another was accidental or through mistake of fact, and labor has in good faith been expended upon it, which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant as compared with the new product, the title to the property in its converted form must be held to pass to the person by whose labor in good faith the change has been wrought, the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine, and its aim is so to adjust the rights of the parties as to save both, if possible, or as nearly as possible, from loss. But where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owners so gross and

palpable as to be apparent at the first blush. Perhaps no case has gone further than *Wetherbee* v. *Green*, 22 Mich. 311, in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of $25, and converted them into hoops worth $700, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established. But there is no such disparity of value between the standing tree and the cord-wood in this case as was found to exist between the trees and the hoops in *Wetherbee* v. *Green*. The trees are not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the young trees standing to the wood cut. The cord-wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed, as a rule, that a man prefers his trees cut into cord-wood rather than left standing, and if his right to leave them uncut is interfered with, even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake, and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one be vigilant and careful of the rights of others if such were the law? Whether mistaken or not is all the same to him, for in either case he has employment, and receives his remuneration; while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake." See *Grant* v. *Smith*, 26 Mich. 201; *Gates* v. *Rifle Boom Co.*, 70 *id.* 309.

Judge Cooley, in his work on Torts, lays down the rule upon this subject in the same words it is stated in *Isle Royale Mining Co.* v. *Hertin*, *supra*. Cooley, Torts, (2 Ed.) pp. 59, 60.

Professor Schouler, in his work on Personal property, sums up the modern doctrine upon this subject as follows: "Where

the trespass was not wilful, but accidental, as through some mistake of fact, and the materials taken can still be identified, and the labor and materials of the trespasser are not shown to have gone further than the appropriated materials towards producing the present valuable chattel, the owner of the materials is still entitled to the chattel. But where no element of wilfulness or intentional wrong whatever appears on the part of him who applied another's materials, and the identity of those materials has finally disappeared in the new product, or where it can be shown that his own labor and materials contributed essentially much more to the value of the present chattel than those materials which he took without intending a wrong, he shall keep the chattel as his own; making, however, due compensation to the owner of the materials for what he took." 2 Schouler's Personal Property (2d. Ed.), § 37.

On account of the conflict of opinion upon this subject, and the fact that this court is free from the restraints of precedents in respect thereto, we are at liberty to select the rule which is sustained by authority, and is in our opinion the wisest and most just. The rule stated by Judge Cooley comes nearer approaching this standard. The increased value of the original materials furnishes no guide by which the merit of the laborer who has given them their new form can be determined. The increased value is the joint result of the original material and the work and materials expended by the laborer in creating the new form. They may be equal, or the former may exceed the latter in value; and the increased value may exceed the aggregate value of the original materials and that expended upon them. Independent causes may contribute to the increased value. For instance, transportation to a market where the original material is scarce and in great demand may greatly increase its market value, or may diminish such value by the transfer to the place where the supply is greater and the demand is less than it is in the market from which it was shipped. So it cannot be said that the transportation added the increased value. Other causes—supply and demand—affect the value. So may labor change the original material into a new form, and increase the demand for it in that shape, and thereby enhance its value. Why, then, should the person who has made the expenditure

be entitled to the difference between the aggregate value of his expenditure and the original material and the value of the article in its new form? He can lose no more than the value of his labor or other expenditure. His right to the property in its new form should not, therefore, in any case be dependent upon its increased value, but upon the relative values of the original materials and his expenditures upon the same; and this should be considered only when the identity of the original article is susceptible of being traced; and then only when he has acted in good faith and converted it into something substantially different, and the value of the original article, as compared with the value of that expended upon it, is so insignificant as "to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush." In addition to the relative values the injury inflicted upon the owner by the trespasser, and the injustice of taking from the former his property, against his will, at its market value, should be considered and compared with the hardship the latter may suffer by the loss of his labor and other expenditures, in determining whether this appropriation would be such gross and palpable injustice as to give the innocent trespasser the right to the property in its converted form, as in *Isle Royale Mining Co.* v. *Hertin*, 37 Mich. 332. In this manner the rights of parties would be more nearly protected, and justice at the same time administered.

The value of the cross-ties in controversy was twelve and a half cents a tie. The value of each in the tree was two cents. The value of the labor expended upon them is not shown, but assuming it to be the increased value of ten and a half cents a tie, the difference between it and the value of the original material is not so great as to make the value of the latter, as compared with that of the former, insignificant, and to make the appropriation of the cross-ties by the original owner to his own use, without compensation, appear, under the circumstances, gross injustice at the first blush. The disparity is not so great as it was in *Wetherbee* v. *Green*, *supra*, in which trees of the value of $25 were cut and taken by one from the land of another and converted into hoops of the value of $700, which was twenty-eight times the value of the trees, while the cross-

ties in this case were about six times; and yet the supreme court of Michigan, in *Isle Royale Mining Co.* v. *Hertin*, *supra*, said that "perhaps no case has gone further than *Wetherbee* v. *Green*."

In considering the justice of permitting the appellant to appropriate the cross-ties to his own use, the invasion of his rights and the injury done to him by appellee should not be overlooked. The trees belonged to him. They were standing upon his land, and he had the right to hold them as they were. No one had the right to take them from him, convert them into ties, and force him to accept their value at the time of the conversion. He may have preferred to have them to stand; and, if left standing for a few years, they might yield him great profit, and the enhancement of their value by the labor of appellee might be a poor compensation for the wrong done. But whether he wished to sell or not, it would be gross injustice to permit appellee to force him to sell. He is entitled to the protection of the laws. Deny to him the right to the cross-ties, and force him to accept the value of his timber when appropriated by a trespasser, as it was at the time of the conversion, and he has no adequate protection, The injury inflicted by the trespasser would be borne in part by the innocent owner, and the guilty would escape. "Such a doctrine," as said by Chief Justice Cooley, "offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake."

Assuming the trees to be the property of appellant, and taking into consideration the great wrong committed by appellee in cutting them, the deprivation to the appellant of the right to use the same as it might please him, the probable loss occasioned thereby, the fact that the identification of the original material was unaffected by the labor expended, the encouragement that would be afforded to trespassers by allowing them to enjoy the fruits of their labor upon a mere showing of mistake, the protection a contrary policy would afford to the owner of standing trees against heedlessness, carelessness, pretended mistakes, and trespasses, and the importance of pursuing such course to secure such protection,—and comparing the injury inflicted upon the appellant by the appellee, and the

injustice of taking from the former his property against his will, with the hardship the latter may suffer by the loss of his labor, we think it would be lawful and right to allow appellant to recover the cross-ties, and to impose upon the appellee the the consequences of his own carelessness.

But appellant has not obtained possession of the cross-ties. In the event he cannot do so, he is entitled to the value of the property he has lost. How is this value to be estimated? This question is not beset with the difficulties which attend the right of recaption. When the appellant sued for the possession of the cross-ties, he was entitled to their possession, unless he had lost his property by the wrongful act of another. If entitled to retake it in its new form, it must be taken as he found it, though enhanced in value by the labor of appellee. The ties cannot be restored to their original form. The appellee cannot force the appellant to become a debtor to him for the value of his labor, nor demand compensation for his voluntary additions to the value of the trees converted into ties, without the assent of the appellant. He cannot impose any conditions upon the right to retake them. The question, therefore, being whether the appellee shall lose his labor, or the appellant lose the right to take his property, the law decides in favor of the latter. But, in determining the compensation the appellant shall receive as the value of his property which has been wrongfully converted, the difficulty does not arise. The value of the property of the owner, which has been converted, can be ascertained and fixed without including therein the labor expended upon it. Hence the law protects the unintentional trespasser in such cases by limiting the right of the owner to recover. *Peters B. & L. Co.* v *Lesh*, 119 Ind. 98; *Heard* v. *James*, 49 Miss. 236; *Herdic* v. *Young*, 55 Pa. St. 176; *Single* v. *Schneider*, 30 Wis. 570; 2 Sedgwick, Damages (8 Ed.), § 534; *Isle Royale Mining Company* v. *Hertin*, 26 Am. Rep. pp. 525, 530. As to the extent of this limitation, the authorities are not agreed. But we think that, inasmuch as this is an exception to the general rule, made for the purpose of protecting the unintentional trespasser, it should be allowed to prevail only to the extent it is necessary to give protection, and that the owner, in actions for the possession of personal

property in the new form into which has been converted inadvertently, under a *bona fide* but mistaken belief of right, "in case a delivery cannot be had," is entitled to recover the value of the property in its new form, less the labor and material expended in transforming it, provided the expenditures do not exceed the increase in value which was added to the transformation, in which event he should recover the value of the property in its new form, less the increase. *Weymouth* v. *Chicago & Western Railway Co.*, 17 Wis. 550. Some courts hold that the owner, in such cases, should recover the value of his property in its new form, less the expense incurred in converting it into such form and increasing its value. *Goller* v. *Fett*, 30 Cal. 482; *Naye* v. *Yappen*, 23 Cal. 306; *Herdic* v. *Young*, 55 Pa. St. 176. But we do not think this is a correct rule in all cases, for the expense may in some cases exceed the increase in value, and in that event the rule would require the owner to pay for something that he never received.

According to this opinion, two errors appear in the record in this action. One is in the form of the judgment. If the appellant was the owner of the property in controversy, he was entitled to a judgment for its possession, and for its value, according to the rule before stated, "in case a delivery can not be had." Sand. & H. Dig., § 6398. On the contrary, the judgment rendered is for the value of the property determined by the court, and then for its possession in the event the value is not paid. The other error is the failure to fix the value according to the rule we have stated.

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

BUNN, C. J., (dissenting). This is an action of replevin, as contended by appellant, but an action of trespass or trover, as contended by appellee, brought by appellant against appellee for the recovery of a lot of cross-ties, or the value thereof, in the one case, and damages for the conversion thereof, in the other case. As the names of actions amount to nothing under the civil code, we have necessarily to resort to the language and prayer contained in the pleadings, and the intention of the plaintiff as therein shown, in order to determine what is the real object of his suit. In this case there is the form and

prayer of a replevin suit, but the service of the writ, restricted to the office of a summons merely, at the instance of the plaintiff, indicates that it was not intended by him as a possessory action, but one for money damages only. Where a complaint is for replevin, and the property is not taken by the officer because it cannot be found, there is no reason to presume that the plaintiff intends to prosecute his action otherwise than by replevin; but when the record shows that he prosecutes his action voluntarily otherwise than in replevin, the case is, or may be, quite different.

What object could the plaintiff have in directing the sheriff to make no seizures of the property mentioned in the writ in his hands, unless he intends merely to recover the damages he has suffered, or unless it be that he is afraid of his case, and declines to become responsible for the seizure and detention of the specific property named in the writ? He certainly has the right to avoid this liability, but he cannot wait until judgment is pronounced, and then demand a seizure, and thus make sure of his case, because the law does not tolerate such a lying-in-wait. The statute on the subject (section 6387 of Sand. & H. Dig.) reads thus: "The plaintiff in an action to recover the possession of specific personal property, may, at the commencement of the action, or at any time before judgment, claim the immediate delivery of the property, as herein provided." And section 6396, *ib.*, reads: "An order may at any time before judgment, be directed to any other county for the delivery of the property claimed."

When the court comes to render judgment, it does not go about it to inform the successful party beforehand of the nature and scope of that judgment, but renders it on the record and the evidence before it, regardless of the effect it may have upon the one or the other of the parties. The court, in a case like this, will dispose of the property shown to be in the hands of the sheriff, or such as has been delivered by him to the one or the other of the parties; and this showing is made by his return, and that only. In this case the return showed that there was no property in the hands of the sheriff, and that there had been none by virtue of the writ. No judgment of seizure or caption could therefore be rendered, for the writ in the case had

served its purpose, and the judgment cut off all aliases. "If the owner of standing timber cut into logs by an innocent trespasser sees fit to bring trespass or trover for its value, instead of reclaiming his property, he thereby elects to receive a just compensation for said timber." *Gates* v. *Rifle Boom Co.*, 70 Mich. 309.

Aside from the effect of the pleadings, proceedings and judgment in the case, the right of recovery in any form of action is involved, and to discuss this question it is necessary to recall the facts in evidence. One James M. Smith, of Dayton, Ohio, became the purchaser and owner of the forty-acre tract of land from which the cross-ties in controversy were cut, by purchase from one Hathway, who lived at the time of the purchase from him in Pegua, in the same state. The purchase was by deed dated November 4, 1894, and filed for record in the recorder's office of Green county, this state, December 19, 1894. Appellant, Eaton, purchased this land from Smith by deed dated December 3, 1894, and recorded in said office December 26, 1894. This deed from Smith to Eaton was defectively acknowledged, in this: that the certificate of acknowledgment did not contain the word "consideration," required by statute. The omission of this word made it necessary to establish the deed by extraneous proof, before it could be used as such; and not only so, but it was, in that shape, incapable of being put on record for the purposes of record preservation and notice to the world. *Little* v. *Dodge*, 32 Ark. 453; *Shryock* v. *Cannon*, 39 Ark. 434; *Jacoway* v. *Gault*, 20 Ark. 190; *Johnson* v. *Godden*, 33 Ark. 600; *Griesler* v. *McKennon*, 44 Ark. 517; *Wright* v. *Graham*, 42 Ark. 140. It is, moreover, in proof that the defendant never had any actual notice of Eaton's claim or ownership of the land from which the ties were cut until sometime after he had cut the same and hauled them away. In the progress of the trial, when the defendant exhibited the timber contract from Smith to Rogers, under which he claimed by purchase from Rogers, its execution was put in issue by the plaintiff, and, the subscribing witnesses not being present, and not having proved the same, the court held, in effect, that the contract was not proved, notwithstanding the testimony to that effect by other witnesses present, and

that therefore the same was not admissible in evidence. Thus the defendant failed to prove his title to the timber, but this exclusion of his contract did not exclude it for other purposes than that named in the objections to it—evidence of title. It still could be used to show the *animus* of defendant's possession, and the extent of it, just as could be shown by a void deed.

The controversy then narrows down to right of possession. Each one claimed under a defective paper title—defective as against the other—and the burden was on the plaintiff to show the superior right to the possession of the timber. The defendant's purchase was first in point of time, and his possession was exclusive and uninterrupted for the time he had occasion to hold it; and he had during the time neither actual nor constructive notice of plaintiff's claim or title. Should not the plaintiff have taken some notice of his occupancy? Had he done so, and made proper inquiry, he would have received actual notice of defendant's claim, which antedated his own. Failing in this, did the plaintiff establish his right to the crossties, and show his right in replevin? Much difficulty arises in cases where an innocent trespassser (as in this case) has cut timber from another's land and manufactured it into another and more valuable form. When the owner attempts to replevy his property in the new form, he is confronted with several difficulties. First, the difficulty of identification; and, that being obviated or overcome, then arises the question of value to fix the amount of the alternative judgment.

Prima facie, when one claiming to be the real owner and entitled to the possession is entitled, not only to the specific property replevied, but also to its value, in case the property cannot be delivered to him, and in the case of an appropriation by a wilful trespasser, the alternative judgment should be for the value of the property in the form most advantageous to the owners. But in the case of timber taken by an innocent trespasser the equitable doctrine now very generally prevails to the effect that while the owner is entitled to his timber, and the true value of it in the alternative, yet the innocent trespasser is entitled to a reduction on the alternative judgment to the extent of the value of his labor bestowed upon the property to put it in the new shape, and thereby increase its value. This

rule naturally leaves an option to the defendant to restore the property to the plaintiff, or pay the equitable damages to him. There is no doubt as to the general application of this equitable rule, the only question in any case being whether or not the facts justify its application; and, if the facts in this case call for the application of the rule, the judgment should be affirmed; otherwise not.

In *Wetherbee* v. *Green*, 22 Mich. 320, Judge Cooley, in delivering the opinion of the court, said: "No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstances of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred fold is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value. There may be complete changes with so little improvement in value that there could be no hardship in giving the owner of the original materials the improved article; but in the present case, where the defendant's labor, if he shall succeed in sustaining his offer of testimony, will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances." That was a case where timber of the value of twenty-five dollars had been converted into hoops by an innocent trespasser, and the hoops were of the value of seven hundred dollars, denoting an increase of twenty-eight fold; and upon the facts the court said: "We are of opinion that the court erred in rejecting the testimony offered. The defendant, we think, had a right to show that he had manufactured the hoops in good faith, and in the belief that he had the proper authority to do so; and if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass."

In that decision Judge Cooley emphasizes two essential things to be established by the defendant claiming the benefits of the equity rule: First, the defendant must show that he is in fact an innocent trespasser, if trespasser at all; second, he must show that the timber was changed by a substantial change of identity, and, therefore, that the remedy of the plaintiff is an action for damages for the unintentional trespass. The court in that case also plainly says that much depends upon the degree of increase of value by the defendant's labor, as to whether he will be entitled to the equity under the rule or not. In other words, that a great ratio of increase might entitle him to the relief, while a less ratio of increase in the value of the property might fail to insure him the relief sought. In the one case, the increase would require the plaintiff to rely upon trespass or trover as his remedy, while the other would leave him to pursue his remedy for the possession of the property specifically, as in replevin. This certainly does not leave the matter at the option of the plaintiff. While the court in that case was in the main correct, yet there does not appear to be any very sound reason in making the defendant's equitable right dependent upon the degree of increase in value he has given to the property; for, if the increase is material, his right attaches, and the mere degree of the increase is a circumstance more or less important in view of the financial condition of the defendant, as well as in respect to the benefit conferred upon the plaintiff by the defendant's labor, and in changing the condition of the property. Sedgwick on Damages defines the rule thus: "If the property has been altered and increased in value, the rule would again depend on the character of the conversion. If that were wilful, then the value of the article so increased would be the rule. But that should never be where the act was *bona fide*; and in such case the true rule would be to allow the defendant for whatever value his labor had actually conferred upon the property." The increase in value being material, it seems to be the right of the innocent trespasser to have the benefit of it, in the adjustment of the equities in the cases, without other conditions.

The supreme court of Michigan seems to be in conflict with itself on the subject, for in the more recent case of *Gates* v.

Rifle Boom Co., 70 Mich. 309, we find this language: "The owner of standing timber is not only entitled to the timber, but he has a right to it as it is, and to keep it uncut if he so desires. No man, however innocently he may do it, can go upon his land and convert the standing trees into logs, and charge him for the labor thus expended against his will, and perhaps his real benefit. He may prefer to have the timber to stand, and, if left standing a few years, it may bring him an immense profit. There is no injustice in holding that the trespasser must lose the labor he has expended in converting another's trees into logs. Such trespasses, though casual and not wilful, are ordinarily, as was the trespass in this case, the result of negligence upon the part of the trespasser, and there is no good reason why he should be recompensed for labor and expenses incurred in the trespass when it might have been avoided by proper diligence. The owner has a right to reclaim his logs, but, if he sees fit to bring an action of trespass or trover, instead of regaining his property, he voluntarily puts himself within the rule of damages prevailing in such actions, and thereby elects to receive only a just and fair compensation for his property as it was before the trespasser intermeddled with it." This leaves the matter at the option of the plaintiff, whether he will adopt one action or the other. The conflicting character of that decision is somewhat destroyed, it is true, by the statement that the trespasser, though not a willful trespasser, was yet a negligent one, and in so far not an innocent one, such as entitled him under the rule we are now considering.

But, assuming that the court was discussing the case as coming under the equitable rule, the decision makes the right of the defendant altogether subject to the option of the plaintiff, whether he chooses to bring trespass or trover, in which the defendant's equities may be enforced, or replevin strictly, in which his equities will be ignored.

I think the rule laid down by Sedgwick is the correct rule, and that which expressed the reason of it from the beginning; and in trying to give other reasons for it, and assigning outside conditions upon which it will be enforced, courts have only succeeded in confusing the subject.

For reasons good as to each of the grounds of contention, I think the judgment should be affirmed.

DeLoach Mill Manufacturing Company *v.* Little Rock Mill & Elevator Company.

Opinion delivered July 9, 1898.

1. Attachment—Intervention—Estoppel.—One who intervenes in an attachment suit, claiming part of the attached personal property, is not estopped by a judgment in the original suit, but may prosecute his claim to the property or its proceeds as an independent proceeding. (Page 469.)
2. Judgment—When Satisfaction Set Aside.—Where a plaintiff purchases at his own execution sale property supposed to belong to defendant, and satisfies his judgment against the latter *pro tanto*, he will be entitled to have such satisfaction set aside upon being compelled subsequently to account to a third person as the owner of such property. (Page 470.)

Appeal from Miller Circuit Court.

Rufus D. Hearn, Judge.

STATEMENT BY THE COURT.

The Little Rock Mill & Elevator Company brought an action upon an account for $1,540.60 against the Texarkana Grain, Lumber & Machinery Company, on April 29, 1893, and sued out a writ of attachment, which was levied upon the saw mill and one corn mill belonging to the appellants, and upon other property of the defendants in the attachment. All the property was sold by the sheriff under an order of sale made by the judge in vacation of court, and at said sale the said mills were purchased by the plaintiff below (who is the appellee) at $475, but were not paid for.

Before other steps were taken in the case, the Deloach Mill & Manufacturing Company, the appellant here, filed an interplea, claiming title to the property, at the June term of court following, which was sworn to, and prayed for the proceeds of said sale of said mills. This interplea was not answered then.

The defendant in the original suit, the Texarkana Grain, Lumber & Machinery Company, answered the complaint in the original suit, admitted the debt, but denied the grounds for the attachment, and claimed damages for the wrongful attachment. The court gave judgment for the debt, but discharged the attachment, and gave the defendant to the original suit damages for $200 difference between the value of property attached and what it sold for, and ordered that the damages be credited on the judgment, and directed the sheriff to pay the proceeds of the sale of the attached property to the defendant, or its attorney. The attorney who represented the defendant also represented the interpleader.

The plaintiff gave bond, and appealed to the supreme court, and matters stood in *statu quo*, with reference to proceeds of sale, until after the judgment of the circuit court was affirmed in April, 1895. No answer had been filed to the interplea, which, at the November term, 1895, by consent of parties, was continued until the January term, 1896. At the June term, 1896, the plaintiff filed an answer to the interplea, not denying the ownership of the interpleader, but setting up as a defense only the facts that there had been a trial between the plaintiff and defendant in the original suit, and judgment for the plaintiff, and that the interpleader was estopped to claim the proceeds of the sale of the mills, because judgment had been rendered for the value of the property interpleaded for and damages for the detention thereof against the plaintiff in the attachment suit, and said judgment had been satisfied by said plaintiff. They said that said interpleaders were, during all the stages of the proceedings prior to and under said judgment, parties to said suit, and made no objection to the judgment and orders of the court therein, although they were cognizant of such proceedings. They submit to the answer that the interpleaders are estopped, and that the matters and issues involved are *res judicatae*.

Williams & Arnold, for appellant.

An interplea must be answered, or its allegations are admitted. 48 Ark. 446; 33 Ark. 611; 47 Ark. 31; 57 Ark. 545; Boone, Code Pl. § 159; 50 Barb. 397. Appellant is not estopped by the judgment against the original defendant.

Wells, Res. Adj. and Stare Decisis, 175; Freeman, Judg. 256; Beach, Judg. §§ 624, 629; 4 Wall. 236; 94 U. S. 606; 26 Am. Rep. 388–390; 38 Ark. 329; 15 Ark. 128; 11 Ark. 180; 60 Ark. 444. All the interpleader can recover in this suit is the proceeds of the sale. 53 Ark. 134. It was error to credit the amount of the judgment on the price bid at the sale by plaintiff. This satisfaction of the judgment is void, and should be set aside. 38 Ark. 28; Freeman, Executions, §§ 54, 352; Freeman, Judg. § 478.

L. A. Byrne, for appellee.

Appellant, having failed to insist on its rights before sale of the attached property and payment to the plaintiff, cannot now do so. Sand. & H. Dig., § 372. Appellant is also estopped by acquiescence. 52 Ark. 468; 57 Ark. 638; Bigelow, Estop. 118, 121; Herman, Estop. §§ 125, 242, 288, 1063.

HUGHES, J., (after stating the facts.) The question of estoppel was the only question considered and decided by the circuit court between the interpleader and the original plaintiff. The interpleader's title seems to have been admitted. It was not disputed. There was no answer denying it. Was the interpleader estopped? The interpleader was not a party to the original suit.

Speaking of an interplea, in *Berlin* v. *Cantrell*, 33 Ark. 611, Chief Justice English said, in substance, that it was in the nature of a cross action for the property claimed, and was the interpleader's suit, in which, in legal effect, the interpleader was the plaintiff. Chief Justice Cockrill said, in *Sannoner* v. *Jacobson*, 47 Ark. 31, that the intervening suit is a separate one. "As such is its nature, we think the pleadings in it must be governed by rules applicable to similar pleadings in other actions. Boone, Code Pleadings, § 159. Our conclusion, therefore, on this point is that the court erred in refusing to require a written answer to the interplea of the appellant." *Rosewater* v. *Schwab Clothing Co.*, 58 Ark. 446, 451.

"In order that a judgment may constitute a bar to another suit, in must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits."

Hughes v. *United States*, 4 Wall. 236. It must either appear on the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. When the record leaves the matter in doubt, extrinsic proof is admissible to show that the same point was adjudicated in the former suit. *Russell* v. *Place*, 94 U. S. 606; 1 Freeman, Judgments, § 256.

Chief Justice Watkins, in *Hershey* v. *Clarksville Institute*, 15 Ark. 128, said: "According to what seems to be the proper construction of the statute concerning attachments, the claimant, other than the defendant, of personal property seized under the writ, and who has been summoned as garnishee, may prosecute his claim to the property as an independent proceeding, and without reference to any controversy between the parties, the determination of it not affecting the right of property between the defendant in the attachment and the claimant or third persons." *Mitchell* v. *Woods*, 11 Ark. 180. The interpleader in the case at bar fully put the plaintiff on notice by filing his interplea.

The statute (Sand. & H. Dig., § 372) provides: "Any person may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or of any attached debt, present his complaint, verified by oath, to the court disputing the validity of the attachment, or stating a claim to the property, or an interest in or lien on it under any other attachment or otherwise, and setting forth the facts upon which such claim is founded, and his claim shall be investigated."

The interpleader filed his claim to the proceeds of the sale of his mills, in accordance with this statute. His title to the property was never denied or controverted. The interpleader was not estopped to claim the proceeds, which amounted to $474, and it is entitled to this amount, with interest thereon.

The satisfaction of the plaintiff's judgment *pro tanto* may be set aside as to the proceeds of the interpleader's property, to which the defendant in the attachment had no title, it having been procured without gain to the plaintiff or loss to the defendant. The satisfaction *pro tanto* was apparent, but not

real. *Jones* v. *Arkansas Mech. & Agl. Co.*, 35 Ark. 28; Freeman, Executions, §§ 54, 352.

The judgment is reversed, and cause is remanded for further proceedings consistent with the opinion.

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STEWART v. MURRELL.

Opinion delivered July 9, 1898.

TENANCY—NOTICE TO VACATE.—In the absence of a local custom to the contrary, a tenant from month to month must give 30 days' notice of his intention to vacate the leased premises. (Page 472.)

Appeal from Pulaski Circuit Court, Second Division.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

This is a suit by Mrs. M. B. Murrell, appellee, against J. M. Stewart, appellant, for the rent, for the month of February, of a dwelling house in this city. There was evidence tending to show that the renting was by the month; that the rent was payable in advance; that appellant, the tenant, before the end of January, notified the appellee, the landlord, of his intention to vacate the premises at the end of that month; that he did so vacate, and had moved out before the last day of January. The court instructed the jury as follows: "You are instructed, as a matter of law, that fifteen days' notice of an intention to quit must be given by a tenant by the month to his landlord, to relieve him of liability for the rent of the next succeeding month; and, unless you find that such notice was given, you will find for the plaintiff for one month's rent." The appellant duly excepted to the giving of this instruction. The court refused the declarations of law asked by appellant, as they proceeded upon theory opposite to that announced in the court's instruction. The appellant duly excepted. The jury found for the plaintiff (appellee here.) Appellant filed his motion for a new trial, alleging as error the instruction

given, and the refusal of the court to give the several declarations of law asked by appellant. The motion for a new trial was overruled, and appellant appealed. The bill of exceptions does not profess to contain all the evidence.

The facts upon which the case was tried are substantially as follows: Mrs. M. B. Murrell, through her agents, Parker & Cates, rented to J. M. Stewart a dwelling house, No. 1600 Lousiana street, in the city of Little Rock, by the month at $40 per month. Stewart took possession on or about the 16th of September 1891, and paid his rent for September, October, November and December, 1891, and January, 1892. On January 28, 1892, Stewart notified Mrs. Murrell, through her agents, of his intention to vacate the premises. He commenced to move on the 29th of January, and got entirely out on the 30th.

Ashley Cockrill, for appellant.

The court erred in instructing the jury that notice of fifteen days was necessary to terminate a monthly tenancy. 4 Hun, 451; Gear, Landl. & Ten. § 32; 7 C. & P. 56; Wood, L. & T. *p 127, note; 14 Abb. Pr. 130; 10 Pa. St. 41; 14 Ct. Cl. 319; 24 How. Pr. 347. Reasonable notice is all that is required, and what is reasonable notice is a question for the jury. Wood, L. & T. § 46; *ib.* p. 110; 2 Rich. (S. Car.) 346; 3 Burr, 1609; 44 S. C. 526; 37 N. Y. Supp. 59; 4 Hun, 451; 6 N. Y. Supp. 617; 127 N. Y. 175; 28 N. E. 25; 19 How. Pract. 29; 47 N. Y. 679; 8 Cow. 13; 64 Barb. 476; 48 Barb 551; Gear, L. & T. § 32, notes 10 and 16.

W. E. Atkinson, for appellee.

Formal notice is necessary to terminate a tenancy from month to month, 1 Washb. R. Prop. (5 Ed.) 634–637, ¶¶ 4, 8, 10, 13, 23. The length of notice required is measured by the length of time between the rent payments. *Ib.* ¶¶ 24, 26. See, also, 1 Tay. L. & T. §§ 54–58; Woodf. L. & T. 339, and note.

HUGHES, J., (after stating the facts). The only question in this case is, did the court commit a reversible error in its instruction to the jury "that fifteen days' notice of an intention to quit must be given by a tenant by the month to his

landlord to relieve him of liability for the rent of the next succeeding month; and, unless you find such notice was given, you will find for the plaintiff for one month's rent?"

The appellant contends that reasonable notice only is required, and that what is reasonable notice is a question of fact for the jury under the circumstances of the case, and to support this contention cites Wood on Landlord and Tenant, § 46, p. 126, which is as follows: "Where no definite term is agreed upon, and the rent is fixed at so much a week, month, quarter or half-year, the tenancy is weekly, monthly, quarterly or half-yearly, according to the circumstances, and the custom, if any, in the locality where the premises are located, and, in the absence of any stipulation to the contrary, they may at least be terminated by a reasonable notice to quit. As to what is reasonable notice is to be ascertained from the custom of the place, if there is any, or, if not, then by the circumstances of the case." And again at page 110, Wood says: "There is some uncertainty as to the length of notice required to determine a quarterly or monthly or weekly tenancy. It does not appear to have ever been decided that, in the case of an ordinary weekly or monthly tenancy, a month's or week's notice to quit must be given. A tenant, who enters upon a fresh week, may be bound to continue until the expiration of that week, or to pay the week's rent, but that is very different thing from giving a week's notice to quit."

In Gear on Landlord and Tenant, p. 85, § 32, it is said: "A notice to quit is necessary to determine any periodical tenancy, unless terminated by agreement, or the landlord elects to eject a tenant who has disclaimed the tenancy. * * * The right to notice to quit is mutual between landlord and tenant. * * * A tenant from month to month is entitled to thirty days' notice to quit, unless the statute allows a shorter period of notice. The notice must be for a full month before the day on which a new holding would begin, and terminate at the expiration of a monthly period." See cases cited to § 32 in note 15, p. 89.

We have no statute regulating the length of notice required in such case, and we are therefore governed by the common-law rule. In the case of *Steffens* v. *Earl*, 11 Vroom, 133,

it is said that "in cases of tenancies for periods running less than a year, the rule enunciated by the text-writers is that the notice must be regulated by the letting, and must be equivalent to a period. Taylor on Land. and Ten. § 478; Archb. on Land. and Ten. 87. How the rule arose is uncertain. It certainly did not have its origin in any resolution of the courts. * * * It seems, however, to have very early shaped itself into a custom. The habit of giving and requiring reasonable notice, in cases of tenancies, not for a single term, but for recurring periods, which reasonable notice, when the periods were from year to year, was, according to Lord Ellenborough, very early held to be six months, was, probably by a custom equally as old, in tenancies for less periods established as now stated by the books. By strict relativeness, the rule of a half year's notice in tenancies from year to year would only require a half month's or a half week's notice in cases of monthly or weekly tenancies. The briefness of the latter, and the length of the former kind of tenancies, was the probable reason why the rule was not uniform. Whatever the reason of the rule, it seems to have been well grounded in the general understanding of the English people. The cases cited by the books of authority in support of the rule already stated are merely recognitions of what was obviously a custom, and, as such, the cases would seem to have as much weight as authority as if they had expressly ruled the point."

While there is some conflict in the cases, the decided weight of authority seems to be as stated in *Steffens* v. *Earl*, *supra*. There was no evidence of a local custom in this case. There was no error prejudicial to appellant in the instruction given by the court as above quoted, though in fact erroneous in that it fixed the notice required to be given in a tenancy from month to month by the tenant to the landlord of the tenant's intention to quit at fifteen days, whereas the law fixes it at thirty days.

The judgment of the circuit court is affirmed.

REDD v. STATE.

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Opinion delivered July 9, 1898.

1. EVIDENCE—ADMISSIBILITY.—On the second trial of a felony it was agreed that the testimony of a deceased witness at the first trial was as read from the bill of exceptions prepared for the first appeal. In the midst of this testimony, the bill of exceptions contained this recital in parenthesis: "At this point attorneys for defense objected to the witness testifying, whereupon the pardon was produced, restoring him to citizenship." *Held* that the facts set forth in the above recital were no part of the testimony of the deceased witness, and could not be read, under the agreement. (Page 480.)

2. JUDGMENT—CONCLUSIVENESS.—A ruling on a former trial as to the competency of a witness is not *res judicata* on a second trial. (Page 481.)

3. DECEASED WITNESS—COMPETENCY.—The party against whom the testimony of a deceased witness in a former trial is offered is allowed to make every objection which could be made if the witness were in life and personally offered for the first time. (Page 482.)

4. PAROL EVIDENCE—PARDON.—It is not admissible to prove a pardon by parol evidence, without showing that the pardon itself, or a certified copy of it, could not be introduced. (Page 482.)

5. PARDON—EFFECT.—A pardon which recites that it is a "full and free pardon of and from the offenses of burglary and larceny, or burglary or larceny, either grand or petit, and of all felonies of which he [the grantee] may have heretofore been convicted in any court or courts of this state," is sufficient as a pardon of the offenses of burglary and larceny, both grand and petit, no matter in what county conviction for these offenses may have been had. (Page 483.)

6. SAME—SURPLUSAGE.—A recital in a full and free pardon that it is given for the purpose of restoring the grantee to citizenship is superfluous. (Page 485.)

7. SAME—DELIVERY—ACCEPTANCE.—Delivery of a pardon to an attorney representing the grantee is sufficient, and an acceptance will be presumed. (Page 485.)

8. WITNESS—OATH.—A witness who was sworn when testifying in chief need not be resworn on being subsequently recalled. (Page 486.)

9. TRIAL—ARGUMENT OF COUNSEL.—A statement by the prosecuting attorney to the effect that "every voice in the court house would bear out the conclusion that the testimony was sufficient" to support a verdict of guilty, while improper, was not prejudicial where the court admonished the counsel to confine himself to the evidence, and charged the jury to try the case according to the law and the evidence. (Page 486.)

10. SAME—INSTRUCTION—ALIBI.—An instruction to the effect that the defendants could not avail themselves of an alibi unless it was shown that at the time of the killing they were at some other place than the place of the commission of the crime charged is not open to the objection that it meant that, in order for one of the defendants to avail himself of an alibi, he would have to show an alibi for the other defendant also; especially where no specific objection was taken. (Page 487.)

11. HANDWRITING—PROOF BY COMPARISON.—A witness who has read a letter from one of the defendants, admittedly in his handwriting, may be permitted to testify that, in his opinion, another writing is in the handwriting of such defendant. (Page 488.)

Appeal from Drew Circuit Court.

MARCUS L. HAWKINS, Judge.

H. King White and *Jos. W. House*, for appellants.

The court erred in permitting James Robinson to testify in this case, because he had been convicted of an infamous crime, and his competency had never been restored by a proper pardon. As to general purpose and effect of a pardon, see: 18 How. 307; 44 Ark. 122; 49 Ark. 176. A conditional pardon, before the condition is complied with, does not restore competency as a witness. Bish. Cr. Law, § 915, subhead 2; 30 Am. Rep. 395; 23 Am. Dec. 150; 8 W. & S. 98; 49 Am. Rep. 684; 17 Am. St. Rep. 832; 53 Am. Rep. 397; 8 Ct. Cl. 460; 7 *ib.* 443; 7 *ib.* 50; 47 Am. Dec. 557; 135 Mass. 48; 19 Am. Rep. 679; 10 S. E. 611; 53 Am. Rep. 397; 1 Parker, Cr. Rep. 52, 57. In order to restore competency, the pardon must be full and free. Whart. Cr. Ev. § 365; 18 How. 307; 24 Pick. 280. Delivery and acceptance are essential to effectiveness of a pardon. 1 Bish. Cr. Law, § 907; 7 Peters, 150; 8 Blatchf. 89, 96; 10 Ark. 284; 26 Ark. 74; 3 Benedict, 307; 84 Am. Dec. 433. If a witness, when sworn, is incompetent to testify, but, subsequently, his competency is restored by a pardon, he must be sworn again before he can testify. 1 Leach, C. C. 128; *ib.* 237; 8 Ore. 178; 58 Hun, 482; 1 Bish. Cr. Law (6 Ed.), § 914; Whart. Cr. Ev. (9 Ed.) 361. The pardon of witness John Henry was not properly proved. Mere proof of the granting of a pardon, without proof of its scope, its delivery, etc., was not sufficient to make witness competent. Whart. Cr. Pl. & Pr. § 535. Facts disqualifying witness being

shown, the party introducing him must show that his disability was properly cured or removed. 50 Ark. 157; 6 Abb. Pr. (N. S.) 341; 14 Mass. 234; Weeks, Dep. § 515; 17 Ohio, 51; 56 Tex. 119; 29 Ia. 485; 48 Ark. 133. Testimony of an absent or deceased witness, at a former trial, cannot be proved by bill of exceptions taken at that trial. 54 Ill. 432; 102 Ill. 555. Merely having once seen writing of a person does not render competent a witness' opinion as to genuineness of writing alleged to be that of said person. 24 Ill. 595; 50 Cal. 462. It was error for the court to permit counsel for state, in his closing argument, to tell the jury that "if you do find the defendants guilty, every voice in this court house will bear you out in the conclusion that the testimony was sufficient." Remarks and arguments calculated to subject the jury to the stress of outside influence and sentiment are improper and prejudicial. 44 Wis. 282; 49 Ind. 34; 14 S. W. 566; 30 N. W. 630; 79 N. Car. 589; 4 N. E. 911; 52 N. W. 873; 38 Kas. 53; 36 O. St. 201; 82 Mo. 67; 66 Mo. 588; 100 Ind. 268; 48 Ark. 131; 61 Ark. 130. Nor should counsel comment upon evidence which has been ruled out, or facts not in evidence. 15 Neb. 20; 66 Mo. 165; 70 Tex. 67; 5 Atl. 838; 61 Ia. 559; 22 Mo. App. 97; 24 *ib.* 65. The eighth instruction given for the state was erroneous because it made proof of an *alibi* for both defendants necessary to the availability of the plea for either. 63 Ark. 457. It was improper for the jury to be allowed to mingle with the crowd, and observe the sentiment against defendants, before reaching their verdict. 57 Ark. 1; 12 Ark. 782; 34 Ark. 341; 21 Kas. 480. The verdict is totally unsustained by the evidence, and should be set aside. 24 Mo. App. 339; 18 Ill. App. 222; 29 Kas. 81; 37 Ia. 316; 2 Ark. 360; 5 Ark. 407; 6 Ark. 86; *ib.* 428; 10 Ark. 638; *ib.* 491; 26 Ark. 309; 39 Ark. 491. In criminal cases, where the verdict is greatly against the weight of the evidence, a new trial will be granted. 13 Ark. 712; 34 Ark. 632, 639, 640.

E. B. Kinsworthy, attorney general, for appellee.

The governor may annex any condition to a pardon, so it be not illegal, immoral, or impossible. 10 Ark. 284. Pardons, like deeds, are construed most strongly in favor of the grantee.

10 Ark. 284; Bish. New Cr. Law, § 908; Whart. Cr. Pl. & Pr. § 523. Where a pardon contains a condition subsequent, it goes into effect immediately, and so continues until condition broken. 8 W. & S. 197; 1 Bish. New Cr. Law, § 914; 10 Ark. 284. If an impossible condition is annexed to a pardon, the condition is void, and the pardon absolute. 61 Ark. 364; 1 Bish. New Cr. Law, § 915; Whart. Cr. Pl. & Pr. § 533; 4 Call (Va.), 35. The prosecuting attorney was the agent of Robinson in securing his pardon, and hence could accept same for him. 23 Tex. App. 287; 66 Mo. 266; 73 Ala. 517. The circumstances show delivery and acceptance. 18 Tex. App. 498. Placing the pardon in the hands of a third party, with the intention that he should deliver it, was a sufficient delivery. 3 Wash. Real Prop. pp. 288, 289; Tied. Real Prop. §§ 813, 814; Jones, Real Prop. § 1272; Williams, Real Prop. pp. 189, 191. The pardon being for the grantee's benefit, acceptance is presumed. Whart. Cr. Pl. & Pr. § 583; 31 O. St. 206. Appellant waived all objection grounded upon failure to re-swear witness after he was pardoned, by failure to object at the time. Whart. Cr. Ev. § 359; 3 Rice, Ev. 259. A convict is not utterly incapable of taking an oath. Sand. & H. Dig., §§ 2910, 2912; 49 Ark. 176. An oath is binding upon him. 10 Ohio, 220; 10 Johns. (N. Y.) 167; 23 N. Y. 85; McLean, Cr. Law, § 865; 2 Whart. Cr. Law, §§ 1280 and 1254. The extent to which a cross-examination may be permitted is largely within the discretion of the court, and abuse of this discretion must appear to constitute error. Clark's Cr. Proc. 550; 7 Am. & Eng. Enc. Law, 108, 109; 61 Ark. 52; 3 Rice, Ev. § 219; 37 Ohio St. 178; 121 Mo. 201; 121 Ind. 423; 88 Wis. 545; 131 N. Y. 650. A witness may be cross-examined as to his interest in the case. 18 Ore. 440; 3 S. Dak. 134; 40 Neb. 11; 7 Am. & Eng. Enc. Law, 112, 113. Having once seen a person write is sufficient to entitle a witness' opinion as to the genuineness of writing said to be that person to go to the jury. 1 Greenl. Ev. § 577; Whart. Cr. Ev. §§ 551–553; 3 Rice, Ev. 109; 9 Ill. 89. It was not error to allow the prosecuting attorney to express his belief that the witnesses for defense were "a lot of liars." 58 Ark. 353; 34 Ark. 658; 66 N. W. 41; 22 So. 497; 104 Ind. 467; 105 Ind. 499. The subject and

range of the argument of counsel is a matter within the sound discretion of the trial court, and all presumptions are in favor of the proper exercise of this discretion. 4 Am. & Eng. Enc. Law, 875; 34 Ark. 650; 22 S. W. 1021; 55 Mo. 520; 92 Ind. 477; 55 N. W. 753. The arguments used by counsel for state were proper. 50 N. W. 570; 71 N. W. 504; 22 S. W. 1021; 36 S. W. 550; 75 Mo. 357; 124 Ill. 218; 2 Enc. Pl. & Pr. 713, 714; 2 West. Rep. 345; 28 N. Y. 327; 102 Ind. 550; 4 N. E. 870, 876; *ib.* 63, 68; 9 Pac. 622; 22 S. W. 1021; 36 *ib.* 550; 8 West. Rep. 393; 5 N. E. 203; 27 N. W. 147; 11 N. W. 703; 50 *ib.* 570; 75 Ind. 215, 219; 105 Ind. 469, 480; 40 Ill. 488, 501; 76 Mo. 121, 125; 53 Mo. 509, 514; 79 Mo. 461; 75 *ib.* 357; 87 *ib.* 615; 56 Miss. 299, 308; 20 Kas. 650, 651–5; 27 Ga. 649; 68 Ala. 476; 27 N. W. 147; 11 *ib.* 174; *ib.* 703; 6 N. E. 126; 9 Pac. 407; 69 Wis. 32; 7 Lea (Tenn.), 232; 14 Lea, 424; 95 Ill. 394, 405; 2 Ell. Genl. Pract. § 693, p. 821; 4 Am. & Eng. Enc. Law, p. 875–9, and notes. This court will not reverse for want of evidence where any evidence supports the verdict. 43 Ark. 317; 18 Ark. 303, 366; 43 Ark. 367; 51 Ark. 115; 47 Ark. 367.

H. King White and *Jos. W. House*, in reply.

The condition in this pardon of Robinson is a condition precedent. 64 Cal. 31. A pardon must recite the indictment, the judgment and conviction, to be effective. 43 Cal. 439; 37 Am. Rep. 463; 5 Ind. 359; 1 Jones, Law (N. C.), 1; 2 Hawk. Pl. Cr. ch. 37, § 8, p. 533; 4 Bl. Comm. p. 339. Even if the pardons were sent to the prosecuting attorney to be delivered to the grantee, they are not good until they are accepted by the grantee. 11 Barb. 34; 1 Allen, 255; 12 Johns. 419; 6 Am. Dec. 146; 12 Am. Dec. 196; 3 Wash. Real Prop. 292. There is no presumption that a pardon is accepted because it is intended for the benefit of the grantee. 4 Gilm. 159. A pardon to restore citizenship does not restore competency as a witness. 43 Cal. 439. It was incumbent upon the prosecution to show that a pardon was granted to, delivered to and accepted by witness Henry. 14 Mass. 234; 50 Ark. 157. Where a record of a lost writing was kept, the writing

cannot be proved by parol, but only by a certified copy. 28 S. W. 536; Underhill, Ev. § 208; 18 Tex. App. 521, 522.

WOOD, J. This appeal is from a conviction of murder in the first degree.

First. One of the grounds of the motion for new trial is as follows: "Because the court erred in permitting the prosecution to read to the jury, as evidence in the case, the testimony of John Henry, given at a former trial of this case; the same being irrelevant, incompetent, and no proper foundation having been laid for the introduction of same." Witness H. W. Wells read from the bill of exceptions prepared for the first appeal what counsel on both sides agree was the testimony of John Henry. In the midst of this testimony, as set forth in said bill of exceptions, occurs this recital in parenthesis: "At this point attorneys for defense objected to the witness testifying, whereupon the pardon was produced restoring him to citizenship, so the witness was permitted to testify and proceeded as follows," etc.: "The defendant at the time objected to the testimony of the said John Henry being read to the jury, on the ground that no proper foundation had been laid therefor, and because the said Henry had been convicted of a felony, and it was not shown that he had ever been pardoned."

(1) Without setting it out in detail, it suffices to state that the testimony of Henry tended to connect the defendants with the crime charged, and was therefore relevant.

(2) The state showed that since the first trial John Henry had moved to Mississippi; also, that he had been killed. Therefore the proper foundation was laid for the introduction of his testimony taken at a former trial.

(3) Was it competent? The defendants proved that on the 1st of October, 1892, John Henry was sentenced to the penitentiary for the crime of grand larceny. The rule is well settled that the testimony of a witness, since deceased, taken at a former trial, "is open to all the objections which might be taken if the witness were personally present." *St. Louis, I. M. & S. R. Co.* v. *Harper*, 50 Ark. 159; 1 Greenl. Ev. § 163. If witness Henry had been present at the trial, and the defendants had objected to his testimony, showing that he had been ren-

dered incompetent to testify by reason of conviction of an infamous crime, it would then have devolved upon the state to show that his competency had been restored by the pardon of such offense before said witness could testify. Under the rule *supra*, the testimony of the witness at the former trial stands in lieu of the witness himself, and precisely the same proof should be made as to the competency of this evidence as should be made if the witness were present in person to testify. What is the effect of the recital in the bill of exceptions in the former trial, which was read in evidence on this trial as a part of the testimony of John Henry, to-wit: "(At this point the attorney for the defendants objected to the witness testifying, whereupon the pardon was produced, restoring him to citizenship)"? It is argued in the able brief of the attorney general that this recital shows that John Henry was a competent witness at the time he testified at the first trial, and therefore his evidence was competent on the second trial, unless it had been shown by the defendants that he had been rendered incompetent since his evidence was taken at the first trial. We do not consider this position tenable for several reasons:

(*a*) This was a mere parenthetical recital in the bill of exceptions, in the midst of what purported to be, and what counsel agreed was, the testimony of John Henry; but the facts set forth in this recital were no part of John Henry's testimony, and the facts which this recital disclose were not agreed to by counsel, and could not be proved by reading from the bill of exceptions in the former trial. *Stern* v. *People*, 102 Ill. 555; *Roth* v. *Smith*, 54 Ill. 432.

(*b*) If these facts could be established that way, the effect would only be to show that John Henry was held competent to testify at the former trial, which is proved as well, without the recital, by the fact in evidence that he did testify.

(*c*) What was ruled as to the competency of the witness John Henry at the first trial is not *res judicata* on the second trial. The reversal and remand of the first case for new trial sent the whole case back to be tried *de novo*. The defendants on the second trial could raise anew any objection to the competency of John Henry as a witness that they raised on the first trial, and every objection which could have been raised. For

instance, if they had overlooked any fact at the first trial which, if known, would have rendered his testimony incompetent, they had the right to bring forward such fact on the second trial, in order to have his testimony, taken on the first trial, declared incompetent.

(*d*) This brings us back to the rule, announced in the beginning, that "the party against whom the testimony of a deceased witness in a former trial is offered is allowed to make every objection which could be made if the witness were in life and personally offered for the first time." *House* v. *Camp*, 32 Ala. Rep. 541.

The record in regard to the proof of pardon is as follows: "H. W. Wells, prosecuting attorney, testified: Question. State whether you know John Henry was pardoned before he testified, and by whom? Answer. Yes, sir; he was pardoned. (The defendants objected to this question and answer, and asked that it be excluded from the consideration of the jury. The court overruled their objection, and the defendants excepted.) Question. What became of that pardon? Answer. I obtained the pardon, and made profert of it in the case when John Henry was being examined before the court; and after the court was over I gave the pardon to John Henry, and I have never seen it since." The best evidence of a pardon under our law is either the original or a certified copy. Section 2880, Sand. & H. Dig., provides: "Copies of official acts of the governor and * * * of all records deposited in the office of the secretary of state and required by law there to be kept, certified under his hand and seal of office, shall be received in the same manner and with like effect as the original." Section 3166 of Sand. & H. Dig. is as follows: "The secretary of state shall keep a full and accurate record of all the official acts and proceedings of the governor." Section 3168 provides: "He shall keep a seal of office, surrounded with the words 'Seal of the Secretary of State, Arkansas,' and shall make and deliver, to any parties requiring same, copies of any * * * commissions or other official acts of the governor, and all rolls, records, etc., deposited in his office and required there to be kept, and certify said copies under his hand, and affix the seal of his office thereto."

It is an old, familiar, and wise rule of law that oral evi-

dence can not be substituted for any instrument which the law requires to be in writing, so long as the writing exists, and is in the power of the party. 1 Greenl. Ev. § 86; Whart. Ev. § 63. Here the nature of the fact to be proved, to-wit, a pardon, disclosed the existence of some evidence of that fact in writing, of an official character, more satisfactory than oral proof, and therefore the production of such evidence, or a showing why it could not be produced, was demanded, before any oral evidence of the fact could be admitted. 1 Greenl. Ev. § 85, and authorities cited in note *d*. The rule, so far as we know, is without exception, and the authorities uniformly so declare it. *Brown* v. *State*, 28 S. W. Rep. 536; *Hunnicutt* v. *State*, 18 Tex. App. 499–520; Underhill, Cr. Ev. § 208.

The wisdom of such a rule is clearly demonstrated in this case by the general and indefinite manner in which it was attempted to prove the pardon by oral evidence; the witness simply stating that he obtained *a pardon* for John Henry, and that John Henry *was pardoned*, leaving to inference that the pardon was for the specific offense of which said Henry had been convicted. Mr. Wharton says: "When it is sought to rehabilitate a convict by means of a pardon, the pardon must accurately cite the conviction." Whart. Cr. Pl. § 535.

If it be conceded that the original was lost, still it was not shown to have been beyond the power of the state to produce a certified copy of the pardon. As appellants showed that John Henry, if present, was incompetent to testify, and the state has offered no evidence, such as the law requires, to controvert that fact, it follows that the court erred in permitting the testimony of such witness taken at a former trial to be read to the jury; and, as such evidence was prejudicial, the error in admitting it entitled appellants to a new trial.

Second. Was it error to admit the testimony of witness James Robinson? He claimed to have been an eyewitness to the alleged murder of W. F. Skipper. This witness was shown to have been convicted of the crimes of burglary and grand and petit larceny. No less than three pardons were produced for him when he was first offered, and two others when he was re-examined. After Robinson had first testified, appellants moved to exclude his testimony for incompetency growing out of the con-

viction of petit larceny, of which they alleged he had never been pardoned. The state then produced the third or last pardon, which is as follows: "Whereas, James Robinson, of Drew county, Arkansas, has been duly convicted in a certain court or courts of this state of certain offenses, including those of burglary and larceny; now, therefore, I, Daniel W. Jones, Governor of Arkansas, by virtue of the power and authority in me vested by the constitution of this state, do hereby grant unto the said James Robinson full and free pardon of and from the offences of burglary and larceny, or burglary, or larceny, either grand or petit, and of all felonies of which he may have heretofore been convicted, in any court or courts of this state; hereby fully absolving him of and from all such judgments of such courts, and all the effects and consequences thereof; this pardon being for the purpose of restoring said Robinson to citizenship." Proper exceptions were saved to the reading of this pardon. Since a conviction of petit larceny disqualifies as a witness (*Hall* v. *Doyle*, 35 Ark. 445), unless the above pardon was good for that offense, the testimony of Robinson was incompetent. But, if it was a good pardon for petit larceny, it was also good for the other offenses of burglary and grand larceny, of which Robinson is shown to have been convicted; for all these offenses are described with the same certainty. Was it a good pardon?

(1) A pardon must be construed most strictly against the king or the state, and most beneficially for the subject. 4 Bl. Comm. *401. Like any other grant, if its meaning be in doubt, it is taken more strongly against the grantor. 1 Bish. New Cr. Law, § 908; *Ex parte Hunt*, 10 Ark. 284: Whart. Cr. Pl. & Pr. § 523, and authorities cited. It can be clearly understood from this pardon that the governor intended to pardon James Robinson of the offenses of burglary and grand and petit larceny, no matter in what county conviction for these offenses may have been had. These particular offenses are designated in the pardon, and these were the particular offenses of which it was shown James Robinson had been convicted. If it is possible to show that the pardon was intended to cover and does cover the offense of which the witness was convicted, the pardon, if in other respects valid, is sufficient. *Com. use of Lawson*

v. *Ohio & Penn. R. Co.*, 1 Grant (Pa.), Rep. 329; 1 Bish. Cr. Law, § 906; *Martin* v. *State*, 21 Tex. App. 1; *Hunnicutt* v. *State*, 18 Tex. App. 500. If appellants had shown that Robinson had been convicted of some other offenses than those named in the pardon, it may be that the terms "and of all felonies of which he may have been heretofore convicted," used in the pardon, would not have covered such offenses. In such a case the pardon may not have been allowed, upon the theory that the governor "was not acquainted with the heinousness of the crime, but deceived in his grant." 2 Hawkins, Pl. Crown, c. 37, § 8533; *State* v. *Foley*. 15 Nev. 64; *State* v. *McIntire*, 1 Jones (N. C.), 1; *State* v. *Leak*, 5 Ind. 359. But no imposition or fraud upon the governor could reasonably be inferred from the language of this pardon. He knew the nature of the crimes named which he was pardoning, and what a conviction thereof meant.

(2) The pardon was full and free for the offenses named, and as such, in the eyes of the law, removed every vestige of infamy from the witness which had attached by reason of the convictions mentioned. It placed him *in statu quo* in his relations to the state. The words, "for the purpose of restoring said Robinson to citizenship," were superfluous. *State* v. *Foley*, *supra; Ex parte Hunt, supra.*

(3) Delivery and acceptance are essential to a valid pardon. 1 Bish. Cr. Law, § 907; *United States* v. *Wilson*, 7 Pet. 150. On this point H. W. Wells testified as follows: "I received this pardon in yesterday's mail. It has been in my possession ever since. It was procured by telegraphing." The pardon was absolute. It is manifest that the governor intended to grant it. He had parted with all control over it, and, as it was highly beneficial to the grantee, an acceptance of it, we think, in the absence of any proof to the contrary, must be presumed. Whart. Pl. & Pr. § 533; *Elsberry* v. *Boykin*, 65 Ala. 336; 2 Greenl. Ev. § 297. Robinson testified under this pardon. Without it, he could not have testified at all. The circumstances show delivery and acceptance. *Hunnicutt* v. *State*, 18 Tex. App. 520. H. W. Wells was an attorney. He made application for the pardon for James Robinson, and it was delivered to him for Robinson. It may reasonably be inferred

from this that he was representing Robinson. "The principles," says the supreme court of Alabama, "applicable to the delivery of a pardon and of an ordinary deed of gift must be considered as analogous. In the case of a deed, its delivery is generally said to be complete when the grantor has parted with his entire control or dominion over the instrument, with the intention that it shall pass to the grantee or obligee, and the latter assents to it, either by himself or his agent. The delivery may as well be made also to a stranger for the benefit of the grantee." *Ex parte Powell*, 73 Ala. 517. Therefore James Robinson was a competent witness. There is nothing in the fact that he was not sworn when recalled. He had been sworn in the case before, and, even if he had not been sworn, no objection was raised to his testifying without being sworn. See authorities cited in brief of attorney general. What we have said upon the subject of the delivery of the pardon of James Robinson applies equally to the pardon of John Henry.

Third. We find no error in the court's ruling upon the questions presented in the third, fifth, sixth, seventh and tenth subdivisions of appellants' brief. Most of these are not likely to arise upon another trial, and have already been often passed upon by this court,—such, for instance, as the proper foundation for the introduction of the testimony of a witness taken at a former trial, the legitimate scope of cross-examination, the remarks of counsel in argument, and the improper conduct of jurors. We would not be understood, however, as licensing a repetition of some of the remarks made by counsel, by failing to condemn same. Those made by counsel to the effect that "every voice in the court house would bear out the conclusion that the testimony was sufficient" to support a verdict of guilty were highly improper, as were also those which referred to the insurance company. Remarks which may be construed as appealing to the prejudices or passion of juries, to have their verdicts influenced by the sentiment and opinion of the idle or interested spectator, or, indeed, by any other considerations than such as are grounded upon the facts and law of the case being tried, deserve the severest excoriation from the presiding judge, and will result in a reversal of the judgment here, where it seems reasonable or probable that such

remarks had any effect in producing the verdict. But, when objection was made to the remarks of counsel in regard to the insurance company, the court admonished the counsel to confine himself to the evidence, and the counsel who had made the remarks asked the jury not to consider that part of his argument. As to what was said about the voice of every one in the court room approving the sufficiency of the evidence to sustain a verdict of guilty, that was but the mere expression of the opinion of the counsel. It was in bad form, to be sure; but jurors must be presumed to be men of intelligence, and scrupulous of the oaths which they take to try cases according to the law and the evidence. The court, in a very full and fair charge for appellants, called the attention of the jurors to their duty in this respect. He told the jury that it was their duty to give the defendants the full benefit of the presumption of innocence, which was an essential and substantial part of the law of the land, and to acquit the defendants unless they felt "compelled to find them guilty as charged, by the *law* of the land and the *evidence in the case* convincing them of their guilt as charged, beyond all reasonable doubt." The court also took away from the jury by an instruction any consideration whatever of any insurance company in connection with the case, and in many other instructions fully protected every right of the appellants to have the case tried according to the law and the evidence. So we are of the opinion that the remarks of the counsel, under the circumstances, did not in any manner influence the verdict.

Fourth. We find no error in the charge of the court. It was as liberal to appellants as they could have asked. The only instruction of which they complain here, when fairly construed, does no more than tell the jury that the defendants could not avail themselves of an *alibi* unless it was shown that they were at some other place than the place of the commission of the crime charged at the time of the killing. This instruction, when taken in connection with the one on the subject of *alibi* asked and given on behalf of appellants, we do not think could possibly have misled the jury. The defendants were both on trial at the same time, and the instructions was designed to apply to both, or to each one independently, according as one

or both should claim alibi. It did not mean, as contended by counsel, that, in order for one to avail himself of an alibi, he would have to show also an alibi for the other. Moreover, the objection urged is nothing more than a mere criticism of the verbiage. If counsel desired to have the idea they contend for here more specifically presented, they should have prepared a request in the language they desired, and asked the court to give it.

(5) The court did not err in permitting witness Lephiew to testify that he saw the plat introduced on the former trial, and that the handwriting on said plat was similar to the handwriting of Redd, and that he thought it was Redd's handwriting. Lephiew had seen and read a letter which Redd admitted he wrote. That was sufficient to establish at least a *prima facie* acquaintance of Lephiew with the handwriting of Redd, and was sufficient to admit his testimony. The weight to be attached to such testimony depends, of course, upon the credibility of the witness, and his familiarity, or lack of it, with the handwriting about which he testifies. 1 Greenl. Ev. § 577; Whart. Cr. Ev. 551, 553; 3 Rice, Ev. p. 109; *Woodford* v. *McClenahan*, 9 Ill. 89.

(6) The twenty-seventh and twenty-eighth grounds of the motion for new trial are as follows: "That the verdict was contrary to the evidence, and was the result of passion and prejudice pervading the minds of the inhabitants of Drew county." The prosecution has proceeded upon the theory that Skipper was murdered by appellants. The defense upon the theory that Skipper committed suicide, but, if murdered, that they were not the guilty agents. These are purely questions of fact, and, inasmuch as there must be a new trial for the error of law mentioned *supra*, the majority refrain from expressing any opinion concerning them. Speaking for myself, only, upon this point, after a careful examination of this large record, which I necessarily had to make in preparing this opinion, my conclusion is that, under the rule announced by this court in *Richardson* v. *State*, 47 Ark. 567, there is evidence to support the verdict here, both as to the *corpus delicti*, and as to connection of the defendants with the crime charged. For the

error in admitting the testimony of John Henry, the cause is reversed, and remanded for new trial.

NEW ENGLAND MORTGAGE SECURITY COMPANY v. REDING.

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Opinion delivered July 9, 1898.

MORTGAGE FORECLOSURE—LIMITATION.—Where a mortgage contains a covenant to pay the debt secured, the period of limitation to a suit to foreclose it is ten years, as in case of suits on sealed instruments, although the note which witnesses the debt is not under seal, and consequently is governed by the statute of five years. (Page 490.)

Appeal from Johnson Circuit Court in Chancery.

JEPHTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

Action to foreclose a deed of trust or mortgage executed by defendants. The deed contained, among others, the following stipulations: "But this conveyance is made in trust for the following purposes only, that is to say: That whereas, the party of the first part is justly and lawfully indebted to the party of the third part in the sum of three hundred dollars, for that amount loaned by the party of the third part to said party of the first part, which is evidenced by the promissory note of said party of the first part for said sum bearing even date with these presents; * * * and whereas, said parties of the first part desire and intend by this deed more effectually to secure and make certain the payment thereof; * * * said first parties agree to pay to said third party, or order, at the office of the Corbin Banking Company, in New York, three hundred dollars on the 5th day of March, 1889, with interest thereon from date until paid at the rate of eight per cent. per annum, payable annually according to the one promissory note and coupons thereto attached of the said John A. and Isabel Reding. * * * Now, if the said first parties shall pay off and discharge said indebtedness in manner provided, and comply and conform with all the agreements and stipulations herein set forth, then

this conveyance is to be entirely void. * * * But should said first parties fail to pay any of said money hereby secured, either principal or interest, when the same becomes due, then the trustee may sell, etc."

The other facts sufficiently appear in the opinion.

Watson & Fitzhugh, for appellants.

Where a mortgage contains an express promise to pay the debt secured by it, this is a covenant under seal, and the five year limitation does not apply. 43 Ia. 103; 1 Jones, Mortg. § 72, note 5; *ib.* § 353; 148 Ill. 658; 2 L. R. A. 141; 98 Ind. 37; 106 Ind. 335 and 336; 2 Jones, Mortg. §§ 1225, 1207; 61 Ark. 119, 120.

A. S. McKennon, for appellees.

The promise relied upon by appellant adds nothing to the promise in the notes to pay the debt. 61 Ark. 116; 64 Ark. 305.

RIDDICK, J., (after stating the facts.) This action was brought by the appellant, the New England Mortgage Security Company, to foreclose a mortgage executed by John A. and Isabel Reding. The defendants, for answer, pleaded the five years' statute of limitations, and, a demurrer being filed thereto, the same was overruled by the circuit court, the answer was sustained, and afterwards a final decree was entered against plaintiff, dismissing its action.

The only question to determine is whether the statute of limitations of five or ten years applies to plaintiff's action. The mortgage was executed on the 5th day of March, 1884, to secure the sum of three hundred dollars which plaintiff loaned defendants, and which defendants agreed to repay on the 5th day of March, 1889, with interest. Defendants made two separate written agreements to pay the debt, one contained in a promissory note, and one in a mortgage, both of which were executed on the same day. The note was not under seal, but the mortgage was under seal. The plaintiff founded this action upon the covenant contained in the mortgage, and contends that, as the mortgage was under seal, the statutory period of

limitation applicable to it is ten, and not five, years, as determined by the circuit court.

Our statute provides that "in suits to foreclose or enforce mortgages or deeds of trust it shall be sufficient defense that they have not been brought within the period of limitations prescribed by law for a suit on the debt or liability for the security of which they were given." Sand. & H. Dig., § 5094. The object of this statute was to prevent foreclosures after the right to sue upon the debt secured by the mortgage had been barred. It makes no attempt to change the statute of limitations in reference to the debt itself, but affects only the right to foreclose. In order, then, to determine whether the right to foreclose is barred, it is only necessary to consider whether, apart from the statute above quoted, the plaintiff's right to recover a personal judgment is barred. Now, this mortgage was executed prior to the act of 1889 reducing the period for bringing actions on writings under seal from ten to five years, and that act does not apply. Sand. & H. Dig., § 4828.

The mortgage contains an express covenant on the part of defendants that they will pay to the plaintiff the sum of three hundred dollars with interest thereon from date until paid at the rate of eight per cent. per annum; and, as this promise was under seal, the right of plaintiff to sue upon it was not barred until after ten years from the time his cause of action accrued. *Holiman* v. *Hance*, 61 Ark. 119; *Vaughan* v. *Norwood*, 44 *ib.* 101; *Harris* v. *Mills*, 28 Ill. 44, S. C. 81 Am. Dec. 259; *Brown* v. *Cascaden*, 43 Iowa, 103; 2 Jones, Mortg. §§ 1207, 1225. So long as either of the obligations executed by defendants promising to pay the debt secured by the mortgage was not barred, the mortgage itself was not barred.

The decision in case of *American Mortg. Co.* v. *Milam*, 64 Ark. 305, is not in conflict with our conclusion here. In that case the plaintiff alleged that the mortgage was executed to secure a promissory note. The defendant pleaded that the note was barred, and upon this issue the case was determined in the circuit court. When the case came here, the court held that the plaintiff must stand by the issues as presented in the circuit court; and, taking the allegations of the complaint as true against the plaintiff, the court held that, the note being barred,

the right of action upon the mortgage was barred. In this case the plaintiff, as before stated, founded his action, not upon the note, but upon the covenant in the mortgage. As the promise to pay was under seal, and as the action here was commenced in less than ten years after the same accrued, we are of the opinion that the circuit court erred in holding that it was barred by statute of limitations.

The judgment of circuit court is reversed, and the case remanded, with an order that the demurrer to the answer of defendant be sustained, but with leave to amend if they so desire.

PRAIRIE COUNTY v. FINK.

Opinion delivered October 1, 1898.

RAILROADS—HIGHWAY CROSSINGS.—Sand. & H. Dig., § 6263, provides that "wherever any railroad corporation has constructed or shall hereafter construct a railroad across any public road or highway of this state, now established or hereafter to be established, such railroad corporation shall be required to so construct such railroad crossing, or so alter the roadbed of such public road or highway, that the approaches to the railroad bed, on either side, shall be made at no greater elevation or depression than one perpendicular foot for every five feet of horizontal distance," etc. *Held* that the county, and not the railroad company, is liable for the construction of the approaches to the railroad's roadbed of a public highway laid out after the railroad was constructed. (Page 494.)

Appeal from Prairie Circuit Court.

J. S. THOMAS, Judge.

STATEMENT BY THE COURT.

E. R. Screeton and twenty-six other citizens of Prairie county filed a petition asking the county court of Prairie county to open up a new road from the town of Hazen in said county to a point on the DeVall's Bluff and Hazen road, which petition in every way complied with the requirement of the statutes. Said petitioners filed the bond and proof of publication required, and the court appointed three viewers to view out said road.

Said viewers were notified by the clerk of their appointment, took the oath as required by law, and, after viewing said road, reported that the same should be established. Said new road, as established by said viewers, crossed the Little Rock & Memphis railroad, of which appellee, Rudolph Fink, is receiver. Rudolph Fink, as receiver, at his own request, was made a party to the record, and filed a petition showing that it would cost him, as said receiver, the sum of $81.66 to build the crossing and approaches and put up a signboard at said crossing, and asked the court to allow him damages for that amount. The viewers did not find that appellee would be damaged by the opening of said road. The court approved the report of the viewers, and the said new road was opened and established according to the recommendations of said viewers. Appellee appealed to the circuit court from the order of the county court refusing to allow him the damage asked.

In the circuit court appellant demurred to the petition of appellee asking for said damages, and the court overruled the demurrer, and allowed the damages asked. To which ruling of the court the appellant, Prairie county, at the time excepted, and appealed to this court.

E. B. Kinsworthy and *T. E. Brown*, for appellant.

Every railroad company takes its right of way subject to the right of the public to extend highways across it. 30 O. St. 604; 105 Ill. 388; 140 Ill. 315–318; 24 N. Y. 345. Nor can courts inquire into the expediency of the taking. Cooley, Const. Lim. 537; 71 Ill. 333; 2 Mich. 432; 80 Ky. 149. Damages cannot be claimed by citizens or corporations for expense or injury resulting from obedience to a police regulation. 54 Ark. 608; 105 Ill. 388. The railway company is bound to construct and maintain the crossing. Sand. & H, Dig., § 6263; 79 Me. 386; 117 Ill. 203; 91 Ind. 121.

Rose, Hemingway & Rose, for appellee.

Where the highway is laid out after the railroad is constructed, the company is entitled to all damages and expenses incurred by them in building and maintaining a suitable crossing. 14 Gray, 154; 26 N. W. 159; S. C. 58 Mich. 541; 28 N. W. 532; S. C. 61 Mich. 507; 51 N. W. 934; S. C. 90 Mich.

385; 45 Kas. 716; 46 Kas. 104; 29 Pac. 1084; S. C. 48 Kas. 576; 102 Mo. 633; 66 Mich. 42; 51 N. J. Law, 428; Rorer, Railroads, 554. There is no obligation resting on the company to build the crossings when the public is seeking to make a road across the established tracks of the company. 45 Kas. 543; 79 Mo. 98.

HUGHES, J., (after stating the facts). Does the statute make the railroad liable? Section 6263 of Sandels & Hill's Digest governs this case, and is as follows: "Section 6263. Wherever any railroad corporation has constructed or shall hereafter construct a railroad across any public road or highway of this state, now established or hereafter to be established, such railroad corporation shall be required to so construct such railroad crossing, or so alter the roadbed of such public road or highway, that the approaches to the railroad bed, on either side, shall be made and kept at no greater elevation or depression than one perpendicular foot for every five feet of horizontal distance, such elevation or depression being caused by reason of the construction of said railroad; *provided*, wherever there may be a cut of sufficient depth in the roadbed of any railroad at the crossing of any public road or highway, such railroad may be crossed by a good and safe bridge, to be maintained in good repair by the railroad company or corporation owning or operating such railroad."

It seems clear to us that the statute makes the railroad liable where the railroad crosses the county road, and not where the county road crosses the railroad. This is the unambiguous language of the statute. The legislature probably might make the railroad liable in such a case; we do not find that it has done so.

The judgment is affirmed.

THOMPSON v. BRAZILE.

Opinion delivered October 1, ~~1889.~~ 1898

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1. PLEADING OVER—WAIVER.—Pleading over to a complaint waives an objection raised by demurrer that it improperly joins two causes of action, but not an objection that the complaint fails to state a cause of action. (Page 497.)

2. PLEADING—BREACH OF COVENANT OF WARRANTY.—A complaint for breach of a covenant of warranty of title must allege an eviction. (Page 498.)

Appeal from Jackson Circuit Court, in Chancery.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

The facts in this case are as follows: The appellee, Ida Brazile, purchased from R. W. Martin and W. J. Thompson a certain eighty-acre tract of land lying in Jackson county, and took possession of the same under a deed from them. Afterwards one Joseph Walker brought an action of ejectment against appellee, Mrs. Brazile, to recover possession of said land, claiming title under a tax deed made in pursuance of a sale for non-payment of taxes. For defense to said action, appellee set up, among other things, the fact that she had purchased the land from Martin and Thompson, and that Martin had since died; and asked that Thompson be made a party defendant. Thompson was made a defendant, and afterwards Mrs. Brazile filed a cross-complaint against him, alleging the execution of the deed from R. W. Martin and W. J. Thompson to her, and that the said grantors covenanted in said deed that they "would forever warrant and defend the title to said land against all lawful claims whatever, except against the heirs of W. W. Brazile, deceased." She further alleged that, if there had been any forfeiture of the land for nonpayment of taxes, the forfeiture occurred long prior to the execution of the deed aforesaid. Wherefore she prayed that Thompson be required to answer and defend the original suit, and that, if plaintiff prevailed in said

suit, she have judgment against Thompson for $400, the amount paid for said land and for other relief. The appellant, Thompson, appeared, and moved to set aside the order making him a party defendant. He also demurred to the cross-complaint filed against him by Mrs. Brazile. The motion and demurrer were both overruled. Thompson afterwards filed an answer and cross-complaint, alleging that the covenant of warranty in the deed was the result of a mistake in the execution of the deed, and praying that the cause be transferred to the equity docket, and that the deed be reformed.

The issues arising in the original action between Walker and the defendants, Brazile and Thompson, were tried by the circuit court, and judgment rendered in favor of Walker for the possession of the land. Afterwards the cause as to the remaining issues between Brazile and Thompson was transferred to the equity docket.

Upon the hearing the court refused to reform the deed, found that there was a breach of the covenant of warranty in the deed, and gave judgment against Thompson for the sum of $400 for breach of said warranty and for costs, from which judgment Thompson appealed.

Sam W. Williams and *De E. Bradshaw*, for appellant.

Damages for breach of a covenant cannot be recovered against a co-defendant in law. 31 Ark. 345. No action lies on a covenant of warranty until eviction. 36 Ark. 456. There is no averment of breach of warranty, and the grantees, or those claiming under them, are liable for the taxes. 30 Ark. 95, and cases cited. The cross-complaint of appellant alleges that appellee derives title from the heirs of W. W. Brazile, and, as it is not denied, it stands confessed. 30 Ark. 362; 31 Ark. 345; 41 Ark. 17. Appellant had a right to defend by showing that appellee's grantor was the one liable for the taxes. 59 Ark. 16; 44 S. W. 1026. Even if the legal effect of the words in the deed was a covenant against taxes, which grantee was really liable for, it was a mistake, and the deed should have been reformed. 1 Story, Eq. § 162; 1 Dan. Neg. Inst. 156; 25 Ark. 370; 48 Ark. 498; 51 Ark. 390; Jones, Mortgages, 97; 46 Ark. 174; 30 S. W. 34; 149 N. Y. 51; Boone, Real Prop.

§ 323. Since appellant was one of two tenants in common, his warranty could make him liable for no more than one-half of whatever damage grew out of a breach of said warranty. 2 Pingrey, Real Prop. §§ 1443–5; Rawle, Cov. for Tit. pp. 453, 454, and notes; 81 Mich. 318.

Phillips & Campbell and *M. M. Stuckey*, for appellee.

Appellant withdrew his demurrer to the motion and cross-complaint of appellee, and filed an answer thereto, thereby waiving all objection to being made a party to the suit. The words "grant, bargain and sell" imply a warranty and a covenant of seisin. Sand. & H. Dig., § 696. The covenant of seisin was broken. 33 Ark. 640. Equity cannot correct mistakes of law. Fetter, Eq. 118, 126; 41 Ark. 495. The warranty was a joint and several obligation. Sand. & H. Dig., § 4186.

RIDDICK, J., (after stating the facts). This litigation was commenced by an action of ejectment brought by one Walker against the appellee, Ida Brazile, to recover from her a tract of land of which she held possession. Mrs. Brazile had purchased the land from appellant, W. J. Thompson, and one R. W. Martin, who had since died. She procured an order making Thompson a party defendant with her, and then filed a cross-complaint against him, praying that he be compelled to defend the action of ejectment, and that, in the event the plaintiff recovered judgment against her for the land, that she have a judgment against Thompson on the covenant of warranty contained in his deed.

It is not clear that she could properly have her rights against Thompson, arising on covenants in his deed, adjudicated in the action of ejectment brought by Walker against her. The two matters were not sufficiently connected. *Hughey* v. *Bratton*, 48 Ark. 167; *Trapnall* v. *Hill*, 31 Ark. 345.

But Thompson did not stand on the demurrer filed by him to said counterclaim. After the same was overruled, he filed an answer and a cross-complaint, and by so doing he waived his demurrer; but it was still necessary that the cross-complaint of Mrs. Brazile should state a cause of action, and that the facts in proof should warrant a judgment against Thompson. *De Loach Mill Mfg. Co.* v. *Bonner*, 64 Ark. 510; *Fordyce*

v. *Merrill*, 49 *ib.* 277; *Chapline* v. *Robertson*, 44 *ib.* 202.

Now, the cross-complaint alleged that the deed from Thompson to Mrs. Brazile contained a covenant of warranty, but it did not allege an eviction. On the contrary, both the pleadings and the evidence showed that Mrs. Brazile, at the time this cross-complaint was filed, was still in possession of the land, and that there had been no eviction, and consequently no breach of the covenant of warranty. Neither the facts alleged nor those established by the evidence warranted a judgment against Thompson. *Dillahunty* v. *Railway Company*, 59 Ark. 629; 3 Washb. Real Prop. 506.

It is true that counsel for appellee say that the deed in question contained a covenant of seisin as well as one of warranty, and contend that this covenant was broken so soon as deed was executed, but no such question was presented in the circuit court. The cross-complaint against Thompson sets up only a covenant of warranty. The decree of the court recites that there was a covenant of warranty and a breach thereof, and is founded upon such supposed breach. As neither the pleadings nor the evidence support this finding, the judgment against Thompson on the cross-complaint of Mrs. Brazile is reversed, and the action against him is dismissed, but without prejudice to a future action.

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SANDERS *v.* BROWN.

Opinion delivered October 8, 1898.

1. JURISDICTION—LIEN ON LAND.—A suit for the recovery of a sum less than $100 is within the original jurisdiction of the circuit court if it involves the decision of the question whether the amount sued for is a lien upon land. (Page 501.)

2. COVENANT AGAINST INCUMBRANCES—LOCAL ASSESSMENTS.—Under Sand. & H. Dig., § 5335, an assessment for a local improvement within a city, though payable in several annual instalments, constitutes a lien upon the lands affected from the date of the ordinance providing for it, and is covered by a covenant against incumbrances. (Page 502.)

3. TAX.—LOCAL ASSESSMENT IS NOT.— A local assessment is not a "tax," within an exception in a covenant of warranty of the taxes for a certain year. (Page 503.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

Carmichael & Seawel, for appellant.

This is an action on a personal covenant, and does not involve the *title* to land. 1 Ark. 313; 7 Ark. 132. Hence the justice had jurisdiction to try it, even though, in determining the suit, he had to examine questions touching the title to land. Murfree, Jur. Just. §§ 200, 374 and 178; 52 Mich. 50; 48 Mich. 175; 40 Ark. 78; 63 N. W. 920; 54 Ark. 16; 55 Ark. 147; Const. § 40, art. 7; Sand. & H. Dig., §§ 4317–22. The amount in controversy being only $61, the circuit court had no jurisdiction. 37 Ark. 120; 35 Ark. 287; 24 Ark. 177; 47 Ark. 241; 38 Ark. 200. Each yearly assessment became a lien on the property on the day on which it began to run. 74 N. Y. 183; 17 N. Y. 383; 95 N. Y. 373; 32 Pa. St. 287; 36 Cal. 104; 21 Iowa, 570; 33 Cal. 292; 12 N. Y. 140, and cases cited. The date of the contract, and not of the deed, governs. 34 N. W. 286. Following the general rule as to taxes, the lien did not attach until December, 1893, which was after the contract. Sand. & H. Dig., § 6555; 35 Ark. 348. The case was once dismissed on its merits; and hence its issues were *res judicatæ*, and the appellant should have been allowed to prove such dismissal. 2 Black, Judg. §§ 722, 724, and cases cited.

Rose & Coleman, for appellee.

The assessment became a lien from the date of the ordinance. The word "taxes" does not include assessments for local improvements. Cooley, Tax. 207, and cases; 11 R. I. 381; 37 English Rep. 630; 2 Leigh, 178; 84 N. Y. 108; 48 Ark. 370; 56 Ark. 337. The issue in this case was whether the assessment was a lien upon the lands conveyed. Hence the circuit court had jurisdiction. 31 Ark. 486. As the justice had no jurisdiction, a dismissal on that ground did not bar a a subsequent action in the circuit court. Const. art. 7, § 40; 44 Ark. 484; 31 Ark. 486; 43 O. St. 530; 31 N. E. 882.

BUNN, C. J. By deed dated January 1, 1894, for the consideration of $16,000 cash, therein expressed, Brown purchased of Sanders lots No. 10, 11 and 12, and the north half of lot No. 9, in block 125, in the city of Little Rock, the same at the time and since the 18th March, 1890, forming a part of street grading improvement district No. 24, upon all the real property in which the city council, under existing laws, had assessed five years' improvement tax, to be paid in annual instalments of one per centum each, the instalments in the present instance each amounting to the sum of $61. The defendants claim that the trade, afterwards consummated by the execution and delivery of the deed as aforesaid, was really made in November, 1893. The warranty clause of the deed is as follows, to-wit: "And we hereby covenant with the said B. J. Brown that we will forever warrant and defend the title to said lands against all lawful claims whatsoever, except the taxes of the year 1893, which the grantee is to pay." After the formation and organization of the improvement district, to-wit: on the 14th April, 1890, the city council assessed the real property therein as aforesaid. The last of the five assessments or instalments was due on the first day of June, 1894, which the defendant and warrantor refused and failed to pay, and which the plaintiff was compelled to pay, and did pay. Presumably this last instalment was for the time between June 1, 1893, and June 1, 1894. At least that seems to be the contention of the defendant; and, if so, he contends it was covered by the exception in the covenant as being the taxes of 1893, unless the word "taxes," in fact and in truth, has no reference to improvement district assessments.

The defendant having failed to pay said last assessment, due 1st June, 1894, as aforesaid, the plaintiff on the 23d June, 1894, paid the same, as he claims, under compulsion, which appears to be true, to M. L. Volmer, the collector of said district. On 23d June, 1894, plaintiff sued defendant for the $61 so paid by him as aforesaid before Tom Parsel, Esq., one of the justices of the peace of Pulaski county; and on the 11th July, 1894, the return day, the cause was submitted to the court sitting as a jury, and the same was taken under advisement until the 16th July, when the court rendered judgment

for plaintiff, as against defendant, for the amount claimed; and on the 23d July, defendant filed his affidavit and bond, and took an appeal to the circuit court.

On appeal, a general demurrer to the complaint was interposed by the defendant, on the ground that the justice of the peace had no jurisdiction to hear and determine the cause, and that, consequently, the circuit court on appeal was without jurisdiction; and this demurrer was sustained, and, on failure of the plaintiff to plead over, the cause was, on a subsequent day, dismissed at plaintiff's cost. On the 1st day of December, 1896, the plaintiff brought suit against the defendant upon the same cause of action as previously in the justice of the peace court.

The answer of defendant in substance raises the following issues of fact, viz.: whether the sale of the lots was made on the 9th November, 1893, or the 1st July, 1894; and, if the former, whether the assessment sued for was at that time a lien on the lots; and the following issues of law: whether the word "taxes" in the exception in the warranty includes improvement assessments; and whether, as contended by defendant, the former proceedings in justice of the peace court, and on appeal therefrom, were *res judicatæ*, and estopped the plaintiff from a recovery in this action.

On the trial, over the objection of defendant, the court excluded from the jury the record of the proceedings in the justice of the peace court, and on appeal therefrom, except the bench docket entries of the circuit judge, showing the disposition of the case therein, which it allowed to to go to the jury; also the collector's receipt, at the instance of the plaintiff and over the objection of the defendant. Thereupon the court directed the jury to return a verdict for plaintiff for the amount claimed; the defendant excepted, and filed his motion for new trial, which being overruled, he appealed.

The circuit court had jurisdiction to hear and determine this cause, notwithstanding the amount claimed is less than $100, for the reason that the question whether or not the amount claimed was a lien on real estate was raised by the defendant, and a justice of the peace cannot determine that question. Constitution, art. 7, § 40.

The improvement district was duly organized in March,

1890; and immediately the commissioners assessed the property therein at the rate of five per centum, to pay the expenses of the same; and this assessment became at once a lien on the property so assessed, which could be only satisfied by a full payment of the whole amount thus to be expended. It is true this assessment, under the statute, could only be paid in annual instalments, neither of which should exceed one per centum of the assessed value of the property, and, consequently, the whole assessment necessarily ran over a period of five years; yet this provision was merely for convenience, and to distribute the burden over a space of time greater than one year. See Sand. & H. Dig., §§ 5334 and 5335. And if the amount so raised by these partial payments under this general assessment was found to be, at the end of the five years period, insufficient to pay the expenses of the improvement or money borrowed therefor, then, on proper showing, the lots could be held further. On this subject the statute is as follows, to-wit: "Sec. 5366. If the assessment first levied [meaning for the whole estimated costs of the improvement] shall prove insufficient to complete the improvement, the board shall report the amount of the deficiency to the council, and the council shall thereupon make another assessment on the property previously assessed, for a sum sufficient to complete the improvement, which shall be collected in the same manner as the first assessment"—that is, in annual instalments, if the assessment amounts to more than one per centum of the value of the property.

It makes no difference whether we denominate the lien one lien for the whole amount of estimated costs, or split it up into annual instalment liens, and call each one a lien; for the statute makes the lien, or the aggregation of liens, relate back and commence from the passage of the ordinance organizing the district, and thus every one of the annual instalments remaining unpaid at the time of the execution of the deed and the covenant against incumbrances was a lien for so much, and was covered by the covenant. Burroughs, Taxation, under head of "liens," pp. 488, *et seq.*, gives some general idea of the nature of this lien. Such is the position assumed in *Blackie* v. *Hudson*, 117 Mass. 181. A seemingly contrary doctrine is put forth in *Dowdny* v. *Mayor, etc., of New York*, 55 N. Y. 186; but the distinction

grows out of the difference in the relative dates of the creation of the lien or that from which it begins to exist. Under the peculiar statute of New York, the date from which the lien existed was the matter in controversy. Our statute settles this.

The warranty was against incumbrances, but it contained an exception expressed in the following language, to-wit: "Except the taxes of the year 1893, which the grantee is to pay." This is the year for which the assessment in controversy was made, the same being due July 1, 1894. The plaintiff contends that the word "assessment" is not included in the word "taxes," but that the two mean different things; and in this we are of opinion that he is correct. *McGehee* v. *Mathes*, 21 Ark. 41. The "assessment" sued for, not being covered by the exception to the warranty, the plaintiff was not bound to pay the same, but the defendant was, under the warranty.

This disposes of all the questions raised. The judgment is affirmed.

COLE v. METTE.

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Opinion delivered October 8, 1898.

1. EQUITY JURISDICTION—RECOVERY OF LAND.—Courts of equity have no jurisdiction of suits brought merely to recover possession of land and to establish one legal title against another conflicting legal title, even though a question concerning the priority of liens be involved. (Page 505.)

2. DEED—PARTNERSHIP AS GRANTEE.—A conveyance of land to Mette & Kanne, a partnership composed of Lewis Mette and George Kanne, is sufficient to convey the legal title to such partners. (Page 506.)

3. LAW AND EQUITY—EFFECT OF IMPROPER TRANSFER.—Transfer to equity of a cause properly triable at law, over appellant's objection, is prejudicial error where there was a question of fact to be submitted to the jury. (Page 507.)

Appeal from Greene Circuit Court in Chancery.

FELIX G. TAYLOR, Judge.

C. Wall, for appellants.

A deed made to a partnership, the title of which expresses the name of no person, vests no title. 36 Ark. 456; 1 Dev. Deeds, § 208. Amendment of this defect after ejectment brought by the partnership does not support the action. 36 Ark. 456; 59 Ark. 391; 52 Ark. 411. Further than this, the deed was unavailing, because it was never acknowledged in its amended form. It was not entitled to record, hence its execution should have been proved at the trial. Sand. & H. Dig., § 1717; 38 Ark. 181. It was error to transfer this cause to equity. 56 Ark. 391; 40 Ark. 155; Const. art. 2, § 7; 32 Ark. 553; 47 Ark. 205; 56 Ark. 391; 11 S. W. 953; 6 S. W. 362; 56 Ark. 358; 113 U. S. 550.

Luna & Johnson, for appellees.

The mortgage deed did not convey the wife's right of homestead. 21 S. W. 433; 30 S. W. 41; 57 Ark. 242. Upon the abandonment of the homestead by the judgment debtor, the lien of the judgment attaches, and takes precedence of a subsequent mortgage. 9 Am. & Eng. Enc. Law, 494, note 2; 61 Ia. 160; 7 S. W. 36; 29 Ark. 412; 28 Ark. 485. The debtor's title vested in the execution purchaser, by reason of neglecting to assert his homestead right. 55 Ark. 139; 17 S. W. 712. The burden is on the one claiming that he intended to retain his exemption in apparently abandoned property. Waples, Homest. & Ex. The judgment lien related back to the date of rendition. 50 Ark. 108; 6 S. W. 511. Hence the appellees had a vested right, which could not be disturbed by the legislature. 58 Ark. 117; 23 S. W. 648; 60 Ark. 269; 30 S. W. 39; 1 Freeman, Judg. § 4. It was proper to transfer this cause to equity. 36 Ark. 456; 28 Ark. 458; 30 Ark. 568; 3 S. W. 356; 39 S. W. 504; 10 S. W. 622; 30 Ark. 278; 37 Ark. 286. The deed to the partnership sufficiently described the grantees. 28 Ark. 75. It was proper to allow the sheriff to amend his deed. 35 Ark. 1107.

RIDDICK, J. The controversy in this case concerns the title to two lots in the town of Paragould, and the improvements thereon. The litigation was commenced by an action of ejectment brought by appellees, Louis Mette and George Kanne, to

recover of appellants, Cole and Wall, possession of such lots. Appellant Cole was at one time the owner of the lots, and Mette & Kanne base their right to recover upon a sheriff's deed made in pursuance of a sale of such lots under an execution against Cole. On the other hand, the appellant Wall denied the validity of the title set up by appellees, and claimed to be the owner of the land by virtue of a mortgage executed by Cole, which had been foreclosed, and the lots purchased by Wall. Both parties set up a legal title to the land, but the circuit court, on motion of Mette & Kanne, and over the objection of Cole and Wall, transferred the case to the equity docket. The case was there heard, and judgment rendered in favor of Mette & Kanne for the possession of the lots. Wall and Cole appealed, and the first question presented arises on the exceptions of appellants to the order of the court transferring the case to the equity docket.

Counsel for appellees, as a reason for the transfer of the case to the equity docket, assert that a question of priority of liens was involved. But courts of equity do not have jurisdiction of suits brought merely to recover the possession of land, and to establish one legal title against another conflicting legal title, even though a question concerning liens be involved. It avails nothing that in such a contest the owner of one legal title undertakes to establish its superiority over the opposing legal title by showing that the execution lien and sale upon which it is based were prior, in point of time, to the mortgage lien and sale upon which the title of his adversary is based. Such matters furnish no ground of equity jurisdiction, for, to call forth the interposition of a court of equity, it is imperative that equitable relief be asked. *Ashley* v. *Little Rock*, 56 Ark. 391; *Fussell* v. *Gregg*, 113 U. S. 550. The equitable doctrine of priorities, of which counsel speak, has no application in a contest between opposing legal titles to the same tract of land, such as we have here. 2 Pomeroy, Eq. Jur. §§ 679, 681, 735.

Counsel for appellees cite the case of *Percifull* v. *Platt*, 36 Ark. 456, as supporting the jurisdiction of the court of equity in this case. That was an action of ejectment in which the plaintiff recovered judgment at law. The plaintiff had only an equitable title, and the judgment was reversed on that ground;

this court holding that he could not support the action of ejectment upon an equitable title, but must seek his remedy in chancery. In the case at bar the plaintiffs have, or at least claim, a legal title, and in this respect the two cases are easily distinguished.

In saying that the appellees claim under a legal title we do not forget the contention of appellants that the deed of the sheriff was not sufficient to vest a legal title in appellees, for the reason that in such conveyance they were described only by their firm name of Mette & Kanne, and we will now proceed to state our grounds for not concurring in that contention.

It was decided by this court in *Percifull* v. *Platt*, *supra*, that if a partnership name contained the name of one partner only, a conveyance to the partners by their firm title would vest the legal title in the one partner whose name appeared in the firm name, and that if the deed be to a partnership name, which includes the name of no party, it passes nothing at law. But in this case the partnership name contains the surname of both partners, and, although their christian names are omitted, we still think the deed sufficient in form to vest the legal title in such partners. If there be any uncertainty in the description, it is what the law denominates a latent ambiguity, and parol evidence may be introduced to remove the same and indentify the grantees. The law on this point can hardly be better stated than it was by the supreme court of Vermont in *Morse* v. *Carpenter*, 19 Vt. 613. "There is," said Chief Justice Royce in that case, "an important difference between a description which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable, on that account, of different applications. To correct the one is, in effect, to add new terms to the instrument; while to complete the other is only to ascertain and fix the the application of terms already contained in it. Indeed, the most usual and approved description of the grantee,—that which gives his christian and surname and the town in which he lives,—may prove to be imperfect, as others bearing both those names may be living in the same town. And if the christian name or place of residence be omitted, the description is only rendered the more imperfect; it is less certain than it might be, or usually is,

made. But a grantee is still designated, though imperfectly, and, for aught that the deed discloses, the party accepting the conveyance may be the only person answering the description given. In all these cases, a resort to extraneous facts and circumstances may become necessary, in order to ascertain the individual to whom the description was intended to apply; but it is not perceived that the greater or less probability of this should, in either case, affect the validity of the deed." The law, as thus announced by the learned court, is fully sustained by later decisions. *Beaman* v. *Whitney*, 20 Me. 413; *Menage* v. *Burke*, 43 Minn. 211; S. C. 19 Am. St. Rep. 235; *Sherry* v. *Gilmore*, 58 Wis. 324; *Jones* v. *Neale*, 2 Pat. & H. (Va.) 339; 1 Jones, Real Prop. § 244; 1 Dembitz, Land Titles, page 335.

It has been held that a deed to one person, describing him by his surname only, is not for that reason void (*Fletcher* v. *Mansur*, 5 Ind. 267), and there are stronger reasons why a deed to two partners by their firm name, when the same consists of a union of their surnames, as in the case of appellees, Mette & Kanne, should not be held void on account of ambiguity as to the grantees; for the union of their surnames alone in the deed indicates that the parties mentioned were partners doing business under that firm name, and serves to point out and identify the persons thus described. When we consider how easily the grantees could be identified in such a case, we see the futility of the argument against the validity of the deed to Mette & Kanne. We therefore hold that this deed was sufficient in form to vest the legal title in the partners, Lewis Mette and George Kanne.

The case then stands that we have here a plain action of ejectment to recover possession of land. No equitable relief was required, and none was asked by either party. It follows, therefore, that the court erred in transferring such cause from the law to the equity docket.

The facts, as presented in the transcript before us, show that the decision of the controversy as to the title to this land turns mainly on the question whether Cole had abandoned his homestead in the premises before the levy and sale upon which the deed of Mette & Kanne was based, and under which they claim. With the exception of this question of abandonment, there seems to be no dispute as to the facts, and little room for

doubt as to the law. But this was a question of fact that the appellants had the right to submit to a jury, and the transfer to equity over their objections, by which they were deprived of this right, was prejudicial error. *Ashley* v. *Little Rock*, 56 Ark. 391; Sand. & H. Dig., § 5617.

The judgment is therefore reversed, and the cause remanded for trial at law.

INMAN v. STATE.

Opinion delivered October 15, 1898.

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1. CARNAL ABUSE—REPEAL OF STATUTE.—The act of December 17, 1838, provided that "every person convicted of carnally knowing or abusing unlawfully any female child *under the age of puberty* shall be imprisoned in the penitentiary for a period not less than five nor more than twenty-one years." The act of April 1, 1893, re-enacted the above statute, except that for the words "under the age of puberty" it substituted the words "under the age of sixteen years." *Held* that the prior act was repealed by the later. (Page 509.)

2. SAME—SUFFICIENCY OF INDICTMENT.—An indictment which alleges that defendant "unlawfully and feloniously did make an assault on one Daisy Wise, a female child *under the age of puberty, to-wit: of the age of fourteen years*," etc., sufficiently alleges that such female child was under the age of sixteen years. (Page 509.)

3. WITNESSES—DIVORCED WIFE.—A divorced wife may testify against her former husband as to such facts as did not come to her knowledge while the marriage relation existed. (Page 510.)

Appeal from Lawrence Circuit Court, Western District.

RICHARD H. POWELL, Judge.

P. H. Crenshaw, for appellant.

The indictment is not in proper form. Sand. & H. Dig., §§ 2089, 2090. There is no repugnancy between Mansf. Dig., § 1571, and the carnal abuse act of 1893. Hence, both should stand. Bish. Stat. Cr. §§ 169, 171. A confession, to be admissible, must be voluntary. 1 Leach, 293, *note a*; 1 Greenl. Ev. §§ 214, 218 and 220; 50 Ark. 311. As to who are "persons in authority," who are within the meaning of the rule, see:

Roscoe, Cr. Ev. (10 Ed.) 46; 1 Dears. C. Cas. 245; 85 Mo. 145. Husband and wife are not competent witnesses for or against each other, either before or after the termination of the relation. 55 Md. 462, 467; 33 Ind. 176; 9 R. I. 361; 11 Am. Rep. 270; Bish. St. Cr. § 613; 39 S. W. 462; 40 S. W. 313; 59 N. W. 322; Sand. & H. Dig., § 2916; 1 Greenl. Ev. §§ 334, 337, 340; 31 Ark. 689; 37 Ark. 67; 43 Ark. 307; 33 Ark. 259; 33 Ark. 816; 34 Ark. 663; 62 Ark. 32.

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

The act of 1893 repeals § 1571, Mansf. Dig. 47 Ark. 488; 27 Ark. 419; 10 Ark. 588; Suth. state const. § 143. The indictment is sufficient. 63 Ark. 621. A divorced wife can testify to any matters which come to her knowledge by means other than by virtue of the relation itself. 59 Mo. App. 470; 65 Vt. 344; 38 Mich. 117; 1 Greenl. Ev. §§ 338, 343; 9 Am. & Eng. Enc. Law, 807; Sand. & H. Dig., § 2916; 29 Am. & Eng. Enc. Law, 628; 13 Ind. 253.

HUGHES, J. The appellant was indicted for and convicted of the crime of carnal abuse of a female under the age of sixteen years, and appealed to this court. The indictment charges that the said George Inman, on the 1st day of June, 1896, in the county, district and state aforesaid, unlawfully and feloniously did make an assault on one Daisy Wise, a female child under the age of puberty, to-wit: of the age of fourteen years, and her, the said Daisy Wise, unlawfully and feloniously did carnally know and abuse, against the peace and dignity of the state of Arkansas."

Though the indictment is in a form not to be approved, it sufficiently charges the offense to have been committed upon a female under the age of sixteen years, as it charges that it was committed upon a female child under the age of fourteen years. But it is contended that this indictment was framed under section 1571 of Mansfield's Digest, which was the act of December 17, 1838, which is digested in Mansfield's Digest as follows: "Sec. 1571. Every person convicted of carnally knowing or abusing unlawfully any female child under the age of puberty shall be imprisoned in the penitentiary for a period not less than five nor more than twenty-one years." It is

contended that this statute is still in force, and was not repealed by the act of April 1, 1893, which is as follows (as found in Sandels & Hill's Digest): "Sec. 1865. Every person convicted of carnally knowing or abusing unlawfully 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." It appears that the latter act covers the entire subject-matter of the former, making the act committed the same offense, and affixing the same punishment, using the same language, except that the "age of sixteen years," is substituted for the "age of puberty." The rule of construction is that where a later act of the legislature covers the entire ground of the subject-matter of a former act, and it was evidently intended as a substitute for the former, the prior act will be repealed by the later, though there may be no express words to that effect. *Pulaski County* v. *Downer*, 10 Ark. 589; *Blackwell* v. *State*, 45 Ark. 92, and cases; *Wood* v. *State*, 47 Ark. 488. There is no error in the judgment of the court that the act of 1893 (Sand. & H. Dig., § 1865) repealed the act of 1838 (Mansf. Dig., § 1571), and that it governs the case.

It is contended that there was error in permitting the divorced wife of the appellant to testify against him. The offense was committed before the marriage, which had been dissolved by a decree of divorce before the wife testified as a witness. She was not his wife when the offense was committed, and had been divorced when she testified. She did not testify to any facts or communications that came to her knowledge or which were received by her by virtue of or while the marriage relation existed. A divorced wife is incompetent to testify against her husband only as to such facts as come to her, and such communications as are made to her by the husband, while the marriage relation existed. As to facts that do not come to her knowledge while the marriage relation exists, she is a competent witness against her husband. *Toovey* v. *Baxter*, 59 Mo. App. 470; *French* v. *Ware*, 65 Vt. 344; *People* v. *Marble*, 38 Mich. 117. Our statute (Sandels & Hill's Digest, § 2916, subdivision fourth), provides: "The following persons shall be incompetent to testify: * * * Husband and wife for or against each other, or concerning any

communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterwards, but either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent." While the marriage relation exists, husband and wife are, under this statute, incompetent to testify for or against each other; and after that relation ceases they are incompetent to testify for or against each other as to such communications as were made by one to the other during the marital relation; but, as to such facts as did not come to them while that relation existed, they are competent witnesses for or against each other after that relation ceases. *Woolley* v. *Turner*, 13 Ind. 253; 29 Am. & Eng. Enc. Law, 628; Sand. & H. Dig., § 2916, subdiv. 4. The wife can testify to any injury to her person, either before or after marriage, and while the marriage relation exists. 1 Greenl. Ev. § 343.

We think it is clear from the evidence that the defendant was guilty.

Finding no reversible error, the judgment is affirmed.

BLASS v. GOODBAR.

Opinion delivered October 15, 1898.

1. FRAUD—PLEDGE OF EXCESSIVE AMOUNT.—The fact that the value of a stock of goods pledged to secure a valid debt is nearly four times greater than the debt raises no presumption of fraud, though it is a circumstance to be considered in determining the good faith of the parties, where the transaction is attacked as fraudulent. (Page 516.)

2. SAME—PLEDGE.—The fact that a pledge was given in part to secure a note on which the pledgee was merely an indorser for the pledgeor, and that the note was further secured by a mortgage, will not render the pledge fraudulent. (Page 518.)

3. ASSIGNMENT FOR CREDITORS—PLEDGE.—A conveyance by an insolvent firm of a stock of goods by way of pledge to a creditor will not constitute an assignment for the benefit of creditors where there was no agreement that such creditor should act as trustee for other creditors. (Page 519.)

Appeal from Faulkner Chancery Court.

THOMAS B. MARTIN, Chancellor.

STATEMENT BY THE COURT.

The insolvent firm of L. B. Griffing & Co., on October 17, 1895, executed the following pledge: "Gus Blass & Co.—We hereby pledge to you the goods and property in our dry goods store at Conway, this day delivered into your possession, to hold in pawn for the account, ($3,211.32) thirty-two hundred and eleven dollars and thirty-two cents, which we owe you, due and to become due, and to hold further as indemnity for your liability as our indorsers on a note for ($1,500) fifteen hundred dollars, given by us to E. E. Slade, dated August 16, 1894, bearing 10 per cent. interest from date, and due January 1, 1896, and now held, as we understand, by the Bank of Conway. If you realize your money out of the goods and property before all the account falls due, your are to give us an equitable discount on amounts you realize before maturity, at the rate of 10 per cent. per annum. L. B. GRIFFING & CO.
"Attest: J. D. COLLIER.

"Dated at Conway, Ark., Oct. 17, 1895."

This pledge and the property mentioned therein were immediately and simultaneously delivered to Gus Blass & Co. All except the last item mentioned in the pledge was past due when the pledge was executed.

On the same night (for the pledge to Blass & Co. was executed at night) after the pledge and property described therein had been delivered to Blass & Co., L. B. Griffing and J. D. Collier, partners as L. B. Griffing & Co., executed four several deeds of trust, with W. W. Martin named therein as trustee, to secure certain debts, which they owed other creditors whom they wished to prefer. These trust deeds were all substantially in the same form, as follows: "We, L. B. Griffing and J. D. Collier, partners as L. B. Griffing & Co., hereby bargain, sell and mortgage to W. W. Martin, trustee for Jesse E. Martin, our entire stock of groceries and other personal property which we have in the corner house, known as the J. E. Martin house, in Conway, Arkansas, and also the stock of dry doods and other property which we have this day pledged to Gus Blass & Co.,

in the Hill, Fontaine & Co. building, in Conway, Arkansas. This mortgage is given subject to the rights of Gus Blass & Co. in the stock of dry goods, and subject also to a prior mortgage this day given to W. W. Martin, trustee for the Bank of Conway. To have and to hold as security for two notes aggregating $1,400, given, one for $1,100 and one for $300, during the year 1895, by us to J. E. Martin, said notes being subject to a credit by a contra account against J. E. Martin, as shown by our books, for about $160.

"Witness our hands, this 17th day of October, 1895.

"L. B. GRIFFING.

"J. D. COLLIER."

The *cestuis que trust* and amounts respectively secured by these several trust deeds were as follows: J. E. Martin whom the firm owed $1,400; one Carter, a note of $500, on which the trustee, Martin, was indorser; the Bank of Conway, a note held by it, which Griffing & Co. had executed to one Slade for $1,500 with interest, on which note Gus Blass & Co. were indorsers, being the same note mentioned *supra*, in the pledge to them; and to Zettleton Manufacturing Co., a debt due it of—— dollars.

These several trust deeds were delivered to the trustee about six o'clock of the morning after the night they were executed; also, at the same time, the contents of said grocery store named in said deed were delivered to the trustee, who took possession of same. These trust deeds were filed for record at 6:30 o'clock, a. m., on the same day and after their delivery. A few minutes after these trust deeds were filed for record, two or three mortgages were executed to other creditors, among them Mrs. Griffing, by Griffing & Co., covering the same property included in the pledge and deeds of trust, and also a small amount of property not embraced therein. But these mortgagees did not obtain possession of any of the property named in the pledge or deeds of trust *supra*. As indicated in the trust deeds, Griffing & Co. had two stores, a dry goods store and a grocery store, in separate buildings, and across the street from each other. On October 17, 1895, after the pledge and deeds of trust had been delivered, and possession of the property therein mentioned had been taken, respectively, by the pledgees

and the trustee, and after the trust deeds had been recorded, appellees, Goodbar & Co., brought suit by attachment, and had same levied upon the said property in the two stores, the sheriff taking possession of said property. On the next day, the 18th, trustee Martin brought this suit to foreclose one of these deeds of trust, and to have the other deeds of trust and mortgages and the pledge to Gus Blass & Co. foreclosed. Griffing & Co., Gus Blass & Co. and other parties, mortgagees, as well as all the attaching creditors, were defendants in this suit to foreclose, and entered their appearance, and agreed to the appointment of a receiver. H. B. Ingram was appointed such receiver, and he qualified, and took possession of the goods, as such receiver, and was directed to sell same at public auction on November 16, 1895. On the 15th November, 1895, Gus Blass & Co., under the terms of a certain compromise agreed upon by the parties, by which all the creditors except Goodbar & Co. were eliminated from the case, were permitted to enter into bond with said Goodbar & Co., which should stand in lieu of the goods attached, and to take possession of the said goods. That bond is as follows: "Whereas, Goodbar & Co. have a suit pending in the circuit court of Faulkner county, Arkansas, against L. B. Griffing and J. D. Collier, composing the firm of L. B. Griffing & Co., for $518.30, in which suit an attachment was issued and levied upon certain goods and property, which goods and property were afterwards placed in the hands of a receiver of the Faulkner chancery court in the case of W. W. Martin, trustee, and others, plaintiffs, against L. B. Griffing & Co. and other defendants. Now, if said attachment shall be sustained, and if it shall be finally adjudged that said Goodbar & Co. are entitled to have their money paid out of the assets of said L. B. Griffing & Co. now in the hands of the receiver, and that the attachment of Goodbar & Co. is a lien on said property superior to that of Gus Blass & Co., and to the lien of those creditors of said L. B. Griffing & Co., to whom they gave mortgages on said property, then we, the undersigned, agree and bind ourselves to pay said Goodbar & Co. the full amount of their said claim, with interest and costs of suit; otherwise this obligation shall be null

and void. November 15, 1895. L. B. Griffing. J. D. Collier. Gus Blass & Co."

Griffing & Co. traversed the attachment pending in the circuit court, and Gus Blass & Co. intervened therein, and, by consent, the attachment issue in the cause was transferred to equity, and there consolidated with the present suit. Gus Blass & Co. filed in this consolidated case in chancery their answer, interplea and cross-bill, in which they set out all the facts *supra*, and claimed title to the goods under receiver's sale to them, approved by the chancellor. They adopted the traversing affidavit of Griffing & Co.; denied any fraud on the part of Griffing & Co., or any knowledge of it on their part, or on the part of the trustee or creditors in the trust deeds; and denied any grounds of attachment, or that the property was subject thereto. Appellees filed an answer, setting up that the pledge to Blass & Co. and the mortgages to W. W. Martin, trustee, and the other mortgages were fraudulently made to secure fictitious debts, and claiming a lien on the goods by attachment, and asking to have same enforced. The decree was in favor of appellees sustaining the attachment, and declaring the lien created thereby superior to the lien of Gus Blass & Co.

W. S. & Farrar L. McCain, for appellants.

This case is not analogous to 52 Ark. 30, and the facts do not warrant the court's decision that there was an attempted assignment. Appellee had a right to take all the security he could get, so long as he acted solely with the intent to secure his own debt, even though he knew his debter was intending to hinder other creditors. 61 Ark. 442. Pawned or pledged personal property is not liable to attachment in an action against the pledgeor. 42 Ark. 236; Jones, Chat. Mortg. § 555.

P. H. Prince, for appellees.

In deciding whether or not a conveyance operates as an attempted assignment, the test is, was it the intention of the parties to divest the debtor of his title and appropriate the property to raise a fund to pay debts? 58 Ark. 293; 52 Ark. 30; 53 Ark. 101; 60 Ark. 26. The disproportion of the debt to the security taken stamp the transfer as a fraud. 23 Ark. 258; 56 Ark. 414. Appellees never agreed to any compromise

which now estops them to object to the fraud in the transfer. Actual notice to a purchaser of the vendor's fraudulent intent is not necessary where the circumstances are or should be sufficient to put him on his guard. 50 Ark. 320; 55 Ark. 582; 32 Ark. 251; 32 Fed. 310.

WOOD, J., (after stating the facts). First.The most painstaking examination of this record fails to discover any fraud upon the part of Gus Blass & Co., either actual or constructive. The matters pressed here for actual fraud are all consistent with honest conduct, and only comport with the efforts which we would naturally expect an honest and vigilant creditor to put forth to collect his debt. The *bona fides* of the Blass claim is nowhere called in question. That being true, the other matters urged as evidence of fraud do not prove it. It is insisted, for instance, that the time of night the goods were delivered to Gus Blass & Co.; the character of the instrument that evidenced the transfer; the disparity between the amount of the debt and the goods pledged for its payment; the fact that the pledge included $1,708.75, for which Blass & Co. were only indorsers; and that, after all the goods had been attached, Gus Blass & Co. "took the lead," as counsel express it, in getting up a compromise, at 45 cents on the dollar, with the attaching creditors, except Goodbar & Co., by the terms of which Blass & Co. were first to be paid in full, and then the mortgagees, and then, if any, balance to go to Griffing & Co.—all these things, it is urged, when taken in connection with all the circumstances, bear the earmarks of actual fraud upon the part of Blass & Co. But not so. Undoubtedly Griffing & Co. in the impending financial collapse desired to have Gus Blass & Co. fully protected, and hence notified them of the situation, and they, as prudent creditors, 'stood not upon the order of their going,' but made haste to reach their debtors, and to secure their own claim, and indemnify themselves against certain loss upon that for which they were sureties. They adopted the most expeditious and efficient means and methods for accomplishing their purpose. That is all there is about the transfer being at night, and being evidenced by an unrecorded pledge with delivery of possession, instead of by a recorded mortgage.

The transfer of some nineteen thousand dollars' worth of

goods in pledge to secure the payment of an amount approximating only $5,000 is not *prima facie* or *per se* fraudulent. It is a circumstance to be considered in determining the good faith of the parties to the transaction. Inasmuch as a pledge, and also a mortgage of property, removes the property so pledged or mortgaged beyond the reach of other creditors under the ordinary process of execution, the placing under pledge or mortgage of an amount grossly in excess of what would be necessary, under any and all contingencies, to meet the debt intended to be secured might tend to show a purpose, upon the part of the debtor making and the creditor receiving such a pledge or mortgage, to hinder and delay other creditors in the collection of their debts. Therefore, where a fraudulent disposition of property is charged, it is always proper to consider the question of excess, in connection with other circumstances, to determine whether the debtor, in making the conveyance to one creditor, was seeking some undue advantage for himself against other creditors, in which the favored creditor was assisting him. *Bennett* v. *Union Bank*, 5 Humphreys, 612–617; *Burgin* v. *Burgin*, 1 Ired. L. (N. C.) 453–459; *Ford* v. *Williams*, 13 N. Y. 577; S. C. 67 Am. Dec. 83; Bump, Fraud. Conv. § 58; Wait, Fraud. Conv. § 238a, and authorities cited. The fact that the amount pledged greatly exceeded the debt does not show any fraud in the present instance. The pledge of the dry goods to Gus Blass & Co. immediately transferred the possession of the same to them, and, as to said goods, immediately took it out of the power of Griffing & Co. to use them any longer for their own profit. The language of the pledge indicates that Gus Blass & Co. were to proceed immediately to use the goods in pawn for the payment of their debt, and it is not shown or even pretended that, during the short interval in which Gus Blass & Co. had the possession of the goods, they used or attempted to use and dispose of same in any manner detrimental to or inconsistent with the rights of other creditors. It is not shown that they sought to collect any more than their own debt, or in any manner to assist the debtor in gathering unto himself forbidden gains. Likewise it may be said of the proceeding under the trust deeds and mortgages. The effort under these was simply to collect in the legal way the debts which had been provided for in said deeds.

The fact that $1,708.75 was included in the pledge for which Blass & Co. were only liable as indorsers was not evidence of a fraudulent purpose in taking the pledge, and could not render the same nugatory and void on that account. Griffing & Co. were notoriously and hopelessly insolvent. It was only a matter of time, and of a very short time at that, when Blass & Co. would have the note to pay. They only purported, in the pledge, to indemnify themselves in the event of their having the note to pay. It was a perfectly legitimate transaction, indicating foresight rather than fraud. The fact that the same amount was also included in a mortgage to secure the Bank of Conway could not affect Gus Blass & Co. with fraud, even if it had been any evidence of a fraudulent purpose upon the part of Griffing Co. It remains that there could, in law, properly be but one satisfaction of the note, and there was no possible chance for any creditor to be defrauded because Gus Blass & Co. had provided indemnity for themselves in case of its payment. For, the moment Blass & Co., the first preferred creditors, paid off the note, that would extinguish the note, and *eo instanti* the mortgage given to the bank to secure it. So far as the compromise is concerned, the creditors are supposed to be dealing with each other "at arm's length." We see nothing that Blass & Co. might have done in connection therewith that could be regarded as a badge of fraud on their part. Certainly, no creditor was forced to accept any compromise, and the one complaining here has not done so as to the paying off of its debt for 45 cents on the dollar. The other provisions of the compromise, by which Blass & Co. for a certain price bought the goods from the receiver and executed to appellees a bond which was to take the place of the attached property, appellees assented to. We fail to comprehend how any kindly offices that might be extended by a favored creditor to his debtor who had preferred him, in bringing about a compromise with other creditors who had not been preferred, could be regarded as even tending to show actual fraud upon the part of the preferred creditor in the transfer of property which had been previously made to him. This is the most that could be said of the compromise.

The suggestion or contention that the pledge of Blass &

Co. may be tainted with fraud, for the reason that Griffing & Co. a short time thereafter executed to Mrs. Griffing a mortgage which was indeed fraudulent, is an obvious *non sequitur*; for a creditor may know, at the time he takes his conveyance or transfer, that his debtor has an intent to defraud other creditors, but that does not prevent him from collecting his own debt, and, so long as he does not wilfully or intentionally, or by gross and inexcusable carelessness, assist his debtor to defraud another—his sole purpose being to collect his own debt—any transfer or conveyance made with that end in view will be upheld.

Second. Was there constructive fraud? It is insisted that the pledge to Gus Blass & Co. and the deeds to Martin, trustee, and the other mortgages, taken altogether, constitute an assignment for the benefit of creditors. We do not so construe them. It would be doing violence to the plain language and tenor of the instruments themselves to so construe them. They lack essential elements for an assignment. "Conveyances directly to creditors, in payment or by way of security for their own debts solely," says Mr. Burrill, "are not generally assignments for the benefit of creditors." Burrill, Assignments, § 3. The pledge to Gus Blass & Co. was made to them direct, no trustee was named or contemplated, and the transfer was to enable them solely to pay off their own debt. After they were paid, the property remaining was subject to various other mortgages and deeds of trust, to be sure, but there was no stipulation in the pledge, nor was any understanding otherwise shown, that Gus Blass & Co., after they were paid, should hold and manage the balance of the property as a trustee to raise money to pay other debts. The doctrine "that one or more instruments, in whatever form or by whatsoever name, when executed with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely to the trustee to raise a fund to pay debts, shall constitute an assignment," was announced under the peculiar facts in the case of *Richmond* v. *Mississippi Mills*, 52 Ark. 31. In *Fecheimer* v. *Robertson*, 53 Ark. 101, this court, through the same learned judge, shows that the case was not to be extended to cover cases not brought strictly within the facts upon which it was decided. Speaking of *Richmond* v. *Missis-*

sippi Mills, *supra*, Judge Sandels says: "Richmond's agreement that Taylor should assume charge for himself and twelve others not represented or consulted, and that a man suggested by Richmond should be manager for all, together with many other circumstances indicating the intention of the parties, made it clear that the transaction in that case was an assignment." See other cases cited in *Fecheimer* v. *Robertson*, *supra*. The facts of the case under consideration are altogether different from those of *Richmond* v. *Mississippi Mills*, and bear a nearer resemblance to the facts in *Fecheimer* v. *Robertson*. Certain it is that, so far as Gus Blass & Co. were concerned, they were trustees for nobody, acted for themselves, and themselves alone, and not in conjunction with any other creditor. Nor was there any concert of action among any of the various creditors.

It appears, from the terms of the compromise to which Goodbar & Co. assented, and the provisions of the bond filed in pursuance thereof, that said bond was to stand in lieu of the attached property, if Goodbar & Co. should establish "a lien on said property superior to that of Gus Blass & Co. and to the lien of those creditors of said L. B. Griffing & Co., to whom they gave mortgages on said property." Conceding that the attachment should be sustained, we have been unable to find warrant for the ruling of the learned chancellor that the lien created by the attachment in favor of Goodbar & Co., appellees, is superior to that of Gus Blass & Co.

As to the ruling of the court sustaining the attachment against Griffing & Co., it suffices to say that there is evidence to support the finding of the chancellor in that particular.

Reversed and remanded, with directions to enter a decree in favor of Gus Blass & Co. for the proceeds of the attached property, and in favor of Goodbar & Co. for costs in the attachment against L. B. Griffing & Co., and for such other and further proceedings as may not be inconsistent with this opinion.

GEARY v. PARKER.

Opinion delivered June 11, 1898.

UNLAWFUL DETAINER—FAILURE OF LESSOR TO PAY RENT.—Mansf. Dig., § 3348, provides that "when any person * * * shall lawfully and peaceably obtain possession [of demised land], but shall fail or refuse to pay the rent therefor when due, and after demand made in writing for the delivery of possession thereof, * * * such person shall be guilty of unlawful detainer." Under a lease which provided that the rent should be payable quarterly in advance, the lessor, upon the lessee's failure to pay a quarter's rent in advance, made demand upon him for delivery of possession. Within three days after such demand the lessee tendered the full amount of the rent for the ensuing quarter. In a subsequent action of unlawful detainer the court instructed the jury that if any rent was due at the time the written demand for possession was made, they should find for the lessee. *Held* erroneous.

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Greaves & Martin and *Geo. L. Basham*, for appellants.

The court erred in permitting the original answer of defendants to be read in evidence, because: (1) It had been displaced by the filing of an amended answer. 33 Ark. 253; 37 Cal. 154; 51 Cal. 222; 71 Cal. 126; 76 Cal. 340; 41 Fed. 172; 2 How. (Miss.) 824. (2) Because it was not signed or verified by the defendant *himself*. 2 A. K. Marshall (Ky.), 428, 828; S. C. 12 Am. Dec. 431; 133 U. S. 473; 135 Mass. 28; 62 U. S. 397; 115 U. S. 363; 54 Mass. 253; 95 Mass. 460. The court erred, also, in admitting parol evidence to establish a reservation of part of the demised premises as free from rent. 35 Ark. 559; 55 Ark. 115; 50 Ark. 539. Appellant did not exert himself to demand rent for that portion of the premises. 53 Ark. 200; 54 Ark. 508. Nonpayment of rent is not a cause for forfeiture of a lease, unless it is expressly so provided. 41 Ark. 532. A tender of rent due, before the action was brought, leaves the landlord without right to further prosecute his suit for unlawful detainer, based upon the failure to pay the rent when due. 36 Ark. 28; 17 Fed. 776; 59 Ark. 405; 6

Lawson's Rights Rem. & Pr. 4675; Taylor, Landl. & Ten. §§ 391–394, 633, 634–729; 65 N. Y. 314; 73 Ind. 168; 81 Va. 118; Woodfall, L. & Ten. 414–417; 130 Pa. St. 235. Tender is a proper plea, under the modern usage of pleading, in such cases as this. 25 Cal. 348; 76 Cal. 131; 77 Cal. 253; 20 Ia. 495; 18 Conn. 81; 56 Miss. 672; 116 Ind. 511; 24 Neb. 131.

Wood & Henderson, for appellees.

The bill of exceptions was never filed as a record in this case. This is imperative. 58 Ark. 110. Where there is an exception in gross to a number of instructions given by a trial court, this court will not review or reverse the rulings of the trial court thereon, if any of the instructions are good. 28 Ark. 18; 32 Ark. 224; 39 Ark. 339; 38 Ark. 539; 43 Ark. 391; 54 Ark. 19; 60 Ark. 256; 59 Ark. 314. So, if any part of instructions asked be bad, an exception in gross to the refusal to give them will avail nothing. 23 N. E. 470; 21 N. E. 470; 8 So. 413; *ib.* 669; 3 *ib.* 695; 5 So. 89; 30 Pac. 166; 48 N. W. 1095; 46 N. W. 352; 29 Pac. 439; 26 Pac. 6; 51 N. W. 1080; 16 So. 858; 17 S. E. 980; 7 W. Va. 232; 32 N. E. 798; 8 Enc. Pl. & Pr. 257–271, and notes. The first instruction asked by appellee was undoubtedly correct and proper. It told the jury that failure or refusal of the tenant to pay rent when due and demanded, by the landlord, in writing, was sufficient to support an action of unlawful detainer. See Mansf. Dig., § 3348; 57 Ark. 302. The statute abrogates the common-law rule requiring demand for the rent to be made upon the premises, at a convenient hour, etc. 1 N. W. 825; 32 Atl. 184; 28 Pac. 762; 34 N. E. 833; 75 Am. Dec. 164; 2 L. R. A. 526. To defeat a cause of action by tender, the tender must be pleaded in the answer, and kept good by bringing the money into court for the complainant. 25 Am. & Eng. Enc. Law, 932; 30 Ark. 505; 33 *ib.* 340; 34 *ib.* 582; 38 *ib.* 329; 4 *ib.* 450. Appellee's right of action was complete upon demand in writing, for possession, after rent due and refusal of appellant to yield possession. Also, the tender was insufficient because it did not include the interest due on the rent (46 Ark. 87; 36 Ark. 355) and the costs expended by appellee in serving the notice to quit. 28

Pac. 762; 25 Am. & Eng. Enc. Law, 910 and note; 77 Am. Dec. 468 and notes on pp. 474–484; 9 L. R. A. 55; 33 N. E. 518; 21 Atl. 1006. Therefore the court did not err in giving appellee's second and fourth instructions. The occupancy of the room by appellee's mother and wife was intended to be gratuitous, and can not now be made the basis of a claim for rent. 33 Ark. 215. The instructions asked by appellant were properly refused. The allegation in the complaint of demand for rent, before suit, is not denied. Hence it is to be taken as true, and instructions based upon failure make such demand were properly refused. Sand. & H. Dig., § 5761; 35 Ark. 105; 46 *ib.* 132; 50 *ib.* 562; *ib.* 261. The original answer was never withdrawn, and was properly read to the jury. Nothing in said answer was prejudicial to appellant, since his tender admitted that he owed the rent. 25 Am. & Eng. Enc. Law, 941, and note. There was no error in allowing parol evidence of an understanding after the execution of the lease.

Rose, Hemingway & Rose, for appellant, in reply.

The fact that the original answer was read *as evidence* is conclusive that it was no longer a part of the pleadings, and that such was the understanding of both parties at the trial. 1 Thomps. Trials, § 1027. Neither party may occupy inconsistent positions with respect to the same thing. 54 Ark. 304; 59 *id.* 312; 44 *id.* 524. It was error to allow the reading, in evidence, of the original answer. 58 Ark. 490; 13 Metc. 255. Inconsistent defenses are allowed. 35 Ark. 556. The error complained of was prejudicial. 119 U. S. 99; 110 U. S. 50. 5 Wall. 807; 17 *id.* 630–639. Having made the plea of tender the basis of one of their instructions, appellees can not deny its presence in the case. 57 Ark. 632. Where the suit is for property, and a tender has been made, it is not necessary to bring the money into court. 74 Cal. 250; 21 N. Y. 343; 100 *id.* 248. In a motion for new trial, it is not necessary that exceptions be taken separately. 59 Ark. 465.

G. W. WILLIAMS, Special Judge. On the 9th of November, 1889, the appellee, Parker, leased lot No. 3 of block 58 of the city of Hot Springs to the appellant, John Geary, for a

term of fifteen years, at an annual rental of $70, payable quarterly in advance, the appellant having the option at any time within the fifteen years of purchasing it for $1,100. An action of unlawful detainer was brought by the appellee, the complaint alleging that the appellant entered into possession and then so continued, but that he failed and refused to pay the rent which became due on the 9th of November, 1890, to-wit: $17.50; that he refused to recognize appellee's rights, and abandoned the contract; that on December 16, 1890, appellee made written demand on appellant for the possession of the lot, which he refused; that, by reason of the failure just named, the appellee was entitled to immediate possession.

The appellant interposed a general demurrer, which the court sustained, but, on appeal to this court by the present appellee, this ruling of the lower court was reversed on February 18, 1892. See *Parker* v. *Geary*, 57 Ark. 301.

The appellant, on March 25, 1891, before the case was remanded, filed an answer and motion to transfer to the equity docket, which motion was overruled on April 4, 1894. On May 12, 1893, the appellant filed an answer, denying that he failed and refused to pay the rent due on the 9th of November, 1890, or at any other time, or that he refused to recognize appellee's rights, or had abandoned the contract. On the next day he filed what he termed an "amendment to the substituted answer to plaintiff's complaint." In this he denies that he was indebted to the appellee in the sum of $17.50, or any other sum, for rent, and that demand was made upon him for rent upon said date. He denied that he failed to pay rent, and that the appellee was entitled to possession at the date of the notice, or at the time of bringing suit. He also alleged that the appellee failed to put him in possession of all the property, having withheld a house occupied by appellee's wife and mother; that the house had a rental value of $4 per month; and that a greater sum was due him on account thereof than $17.50. The appellee filed a motion to strike this amended answer, on the ground that it was filed after the trial began and during cross-examination of the appellee; also that the alleged eviction of a part of the premises "should not at this stage of the trial be presented as an issue in the case."

It is contended by the appellee that no exceptions were reserved specifically to the instructions given by the court. In the bill of exceptions they were reserved as follows: "To which ruling of the court in giving each and every one of said instructions so numbered first, second, fourth and fifth defendant at the time excepted." In the motion for the new trial, as follows: "Because the court erred in giving to the jury, over the objection of the defendant, instructions numbered one, two, four and five, as asked for the plaintiff." The cases in our reports cited by counsel in support of their contention are those in which the exceptions were reserved at the time in the bill of exceptions to the instructions *en masse*, followed in the motion for new trial in the same manner, or, having been properly reserved in the bill of exceptions, were abandoned by failure to make them a ground of the motion for a new trial. There seem to be none to the effect that, where specifically reserved in the bill of exceptions, a failure to as specifically note them in the motion for a new trial will be an abandonment, if they are referred to in a general manner in the motion. The real reason for requiring specific exception is that the attention of the trial court may be called to the particular error complained of. The exception here is to "each and every one." The word "every," as defined in Anderson's Dictionary of the Law, is: "Each one of all; includes all the separate individuals which constitute the whole, regarded one by one." The law does not require that an objection to an instruction shall be more specific than this. An exception to an instruction need not state the point of exception. *McCreery* v. *Everding*, 44 Cal. 246; *Shea* v. *Potrero, etc. R. Co.*, 44 Cal. 414. Specification of the instruction, so as to designate it, is sufficient. *Rogers* v. *Mahoney*, 62 Cal. 611. The attention of the trial judge having been directed to each instruction separately by the original exceptions, the motion for the new trial should be taken in connection therewith. The reason of the rule will thus be followed. The instructions stand in separate paragraphs, and each enunciates some rule or rules of law. In the language of the court in *Davenport etc. Co.* v. *City*, 13 Iowa, 237: "If any one was improperly refused, therefore, there was a ruling upon the law or proposition as there stated; and as that particular proposition

was called to the attention of the court, and insisted upon by the party asking it as the law governing the case, there is no chance for surprise, nor any fair ground for claiming that the mind of the judge was not called to what it was that counsel would not have him hold." In the case of *Atkins* v. *Swope*, 38 Ark. 528, 539, looking at the language of the court, it appears that the objection first made was general, and the motion was no better. The court say: "The first ground of the motion for the new trial is that the court erred in giving the first, second, etc., instructions asked by defendants. The objection made to giving these instructions was general, embracing all of them in gross." The objections were sufficiently specific.

Some of the instructions given, to which exceptions were reserved, told the jury that if they found that any sum of money was due at the time of bringing the suit, they must find for the appellant. In determining the soundness or unsoundness of such instructions, we are called upon to consider and construe section 3348 of Mansf. Dig., the statute in existence when the suit was brought. It is as follows: "When any person * * * shall lawfully and peaceably obtain possession [of lands and tenements], but * * * shall fail or refuse to pay rent therefor when due, and after demand made in writing for the delivery of possession thereof, * * * such person shall be guilty of unlawful detainer."

The appellee contends that, under the statute, if the appellant failed to pay upon the day rent fell due, and he was notified in writing to vacate, the right of enforcement of the suit for unlawful detainer became inviolate, and that no tender, made after notice and prior to suit, could avail to defeat the right. There was no condition of forfeiture in the lease for non-payment. The decision of this court when the case was here before is cited as upholding this construction. The complaint there was good upon its face, but the answer and evidence present defenses which did not then appear.

It was shown by the evidence that the parties to the contract acted harmoniously for one year. When the appellant took possession, he assumed to pay an unpaid balance of a mortgage on the land and also the taxes, which should be deducted from his rents. These he paid, but just what amount

on the mortgage is not clearly shown. He paid $10 taxes on April 10, 1890. The appellant produced receipts as follows: $49.90, November 18, 1889; $16.00, May 19, 1890; 50 cents, June 12, 1890; 50 cents, July 4, 1890; 50 cents, August 4, 1890; $2.60 October 2, 1890. These aggregate $70, the sum due for rent one year. The appellant claimed that the sum paid for taxes did not enter into any of the receipts, and that he was due an additional credit on this account.

The appellee says he did not know who paid his taxes for that year, but knows that the appellant had credit for it in his receipts.

The appellee went to the house of appellant on November 10, 1890, and demanded rent for one year in advance, but subsequently modified his demands to rent for one quarter in advance. The appellant told him that he would meet him up town in a few days, and settle, but, failing to do so, he called again, and received substantially the same answer, and he called the third time, and asked for a copy of the lease, as he desired some lawyer to look at it, and the appellant promised to come up town in a few days, and go to his lawyer, and have the lease explained. This is the version of the appellee. The appellant says that when the 9th of November arrived he had not received credit for the taxes he had paid; that the appellant came and wanted to get the lease, claiming that there was a mortgage in there that ought not to be on it, and that he made no demand for rent at that time, and appellant sent him away, with the understanding that when he came up to town they would go before the lawyer who drew up the lease, and have him explain the points in dispute. On the 16th of December, 1890, the appellant was served with a notice to vacate the premises, and on the 19th of the same month this suit was instituted. Between the service of the notice and the beginning of the suit the appellant, who was sick, sent his wife with $17.50 to the appellee and tendered it to him, and they went over to the office of appellee's lawyers, under whose advice he refused to accept it.

It is apparent, from the conduct of the parties, that the amounts and dates of payment had no reference to the dates stipulated in the lease throughout the entire year. Notwithstanding this, the appellee claims the right to enforce the con-

tract to the strict letter of the beginning of the second year, without any prior warning to the appellant of his intention to do so, except the notice to vacate, the serving of which, it is claimed, forfeits the rights of the appellant beyond all retrieve, though he is willing to pay and offers to pay all that is demanded of him within less than three days after service and before suit has been instituted. This is claimed because the statute mentions no period of warning to be given. We think the decision in *Little Rock Granite Co.* v. *Shall*, 59 Ark. 409, is in point, and the appellee could not, under the circumstances, ask for a strict enforcement of the contract unless there is something in the statute which would give him this right. We also think that the instructions asking the jury to find for the appellee if any sum was due from the appellant disregarded the claim of the appellant that he thought a settlement was necessary between them at the beginning of the second year, and that he was entitled to a credit in addition for taxes. If he was really of that opinion, and was actuated in delaying payment until they could come together, this would excuse a prompt payment, of itself, unless the statute prevents it. The jury could have passed upon this, but the instructions prevented. They could have said whether his claim was made in good faith, or was a mere subterfuge.

But the appellee contends that any such defenses were eliminated by the tender, which admitted that the money was due. A tender does admit that the sum tendered would be paid, and he would be compelled to pay it, but the admission reaches no further. It does not necessarily admit the existence of the grounds upon which plaintiff bases his right of recovery. That is to be determined by the pleadings. *Griffin* v. *Harriman*, 74 Iowa, 436. Here the appellant claims that he tendered the money simply because it was claimed, and he was sick in bed, and could not attend to business, and in his pleadings denied that he really owed it.

While the statute names no period of time to elapse after the service of notice to vacate, to be allowed the tenant, yet the question remains, whether it was intended that the notice was to serve as an actual and immediate forfeiture of the lease the instant it was served, or whether it was given in order to

give him a reasonable time in which to pay or to vacate, and as a notification that the forfeiture would be claimed. "Whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute." Bac. Abridg. tit. Statutes (I); *People* v. *Utica Ins. Co.*, 15 Johns. 380; *Reniger* v. *Fogossa*, Plowd. 18; *Partridge* v. *Straunge*, *id.* 88; 2 Inst. 64; *King* v. *Younger*, 5 T. R. 449; *Margate Pier* v. *Hannam*, 3 B. & Ald. 266; *Edwards* v. *Dick*, 4 *id.* 212. In *Jackson* v. *Collins*, 3 Cow. 89, 95, a statute prohibited sheriffs or their deputies, in whose hands executions were placed, from bidding in lands at such sales. A deputy, who was the owner of the judgment, bought in the land at the sale through the officer acting at the sale as his trustee. It was held that the sale was good, although the statute made no exception in such cases.

In Lieber's Hermeneutics, 103, it is said: "There are considerations which ought to induce us to abandon interpretation, or, in other words, to sacrifice the direct meaning of a text to considerations still weightier; especially not to slaughter justice, the sovereign object of laws, for the law itself, the means of obtaining it." Then, as illustrating the idea of the consequences of seeing only the letter of the law, the following case is given: When Lord Bentinck was Governor General of India, he abolished flogging in the native army, not having authority to do the same in the British army in the east. If a sepoy professes the Christian religion, he thereby becomes subject to the British military laws proper, evidently to raise him. A Christian sepoy deserted from his regiment, returned shortly afterwards, was tried by a court-martial, and sentenced to be corporeally punished. The commanding officer thought himself prohibited from confirming the sentence by Lord Bentinck's order abolishing corporeal punishment in the native army. He referred the subject, however, for the opinion of the judge advocate general, who gave it as his opinion that the sentence was correct, and might be carried into effect, as the general order does not extend to Christian drummers or musicians (to which prescribed trade the unfortunate individual happened to belong) and *only affects native soldiers, not professing the Christian reli-*

gion. The judgment, according to the letter of the law, was right, but it led to the monstrosity that the profession of the Christian religion should entitle the sepoy to three hundred lashes when the object in making him subject to the English laws was intended to be a benefit to him.

If the object of the legislature was to declare that all rights under the contract were forfeited by non-payment, it seems reasonable to suppose that they would have given the lessor the right to immediate eviction. What object the service of notice to quit could have, if he had this right, it is hard to perceive. To hold that the mere service of the notice gave this right is to attribute more potency to the serving of a paper than to the failure of payment. The notice could not have been to appraise the lessee that rent was due, because he was bound to know this from his contract. The remedy is not made a summary one. *Crow* v. *Morris*, 15 Ga. 303. The conclusion is irresistible that, in requiring a notice, it must have been to serve some purpose, and this purpose must have been to give the tenant time to fulfill his contract before suit would be brought. The legislature left the length of time to the determination of the jury, but, since that statute, have seen fit to take this away from the jury, and make the length of time arbitrary, just as they have done in the service of summons and other notices. The main object, to which all others were subsidiary, was to secure the prompt payment of rent. In *Tuttle* v. *Bean*, 13 Met. 275, where money was tendered on the day that notice was served, the court said: "As the main object of the statute apparently is to secure and enforce the payment of rent, there is, perhaps, good ground to hold that if the full amount of rent is tendered at any time before proceedings are commenced, under the landlord and tenant act, it is a good bar to such complaint."

Whether the reading of the first answer of the appellant in evidence was erroneous or not, we see no injury resulting therefrom. The following authorities probably have a bearing upon it. Newman, Plead. & Prac. 540, 551, 687; Bliss, Code Plead. § 342 *et seq.*; Pomeroy, Action and Defenses, § 724; *Fain* v. *Goodwin*, 35 Ark. 109.

The evidence introduced concerning the occupancy of the house by the wife and mother of appellee was not improper,

nor in conflict with the written contract. If the appellant acquiesced in their occupancy after the making of the contract, it was a matter between him and them, and the jury had the province of determining whether he did or not.

For the errors indicated this case is reversed and remanded for a new trial.

BUNN, C. J., concurs.

RIDDICK, J., (concurring). I concur in the above opinion, and in the judgment of reversal, on the ground that the court erred in telling the jury that if any rent was due plaintiff which defendant had failed to pay at the time the written demand for the possession of the premises was made, they should find for plaintiff. The defendant claimed to have made a tender, before suit was brought, to plaintiff of all sums due. Yet, under the instructions of the court, this tender, however full, was of no avail, if made after the demand for possession. If the full amount due plaintiff was tendered to him before suit was brought, I think he had no right of action.

BATTLE and HUGHES, JJ., dissent.

WOOD, J., disqualified.

BATTLE, J., (dissenting.) Under the statutes of this state, a landlord has the right to dispossess a tenant, when he is guilty of an unlawful detainer, by bringing an action against him for the recovery of the land demised. What is an unlawful detainer? The statute in force at the commencement of this action, so far as it is applicable to this case, is as follows: "When any person shall wilfully and with force hold over any lands, tenements or other possessions after the determination of the time for which they were demised or let to him, * * * or shall fail or refuse to pay the rent therefor when due, and after demand made in writing for the delivery of the possession thereof, by the person having the right to such possession, his agent or attorney, shall refuse to quit such possession, such person shall be deemed guilty of an unlawful detainer." Mansfield's Digest, § 3348.

The court, in its opinion in this case, assumes that this

statute needs interpretation, and, construing it, says: "Whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute;" and quotes approvingly from Lieber's Hermeneutics, 103, as follows: "There are considerations which ought to induce us to abandon interpretation, or, in other words, to sacrifice the direct meaning of a text to considerations still weightier; especially not to slaughter justice, the sovereign object of laws, for the law itself, the means of obtaining it." The case of the sepoy, in which the letter of the order of the Governor General of India abolishing flogging in the native army was "slaughtered," and the unfortunate sepoy was sentenced to be corporeally punished, when according to the letter of the order he was not subject to the punishment imposed upon him, is cited to illustrate the wisdom of the quotation. Comments on the illustration are unnecessary.

The rule for interpreting statutes is not correctly stated in the opinion of the court. In the interpretation of statutes, "the legislature must be understood to mean what it has plainly expressed, and this excludes construction." "It has," says Mr. Endlich in his work on the "Interpretation of Statutes," "been distinctly stated, from early times down to the present day, that judges are not to mould the language of statutes in order to meet an alleged convenience or an alleged equity; are not to be influenced by any notions of hardships, or of what in their view is right and reasonable, or is prejudicial to society; are not to alter clear words, though the legislature may not have contemplated the consequences of using them; are not to tamper with words for the purpose of giving them a construction which is supposed to be more consonant with justice than their ordinary meaning. * * * Their duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words. * * * The business of the interpreter is not to improve the statute; it is to expound it. Whilst he is to seek for the intention of the legislature, that intention is not to be ascertained at the expense of the clear meaning of the words. The question for him is, not what the legislature meant, but what its language means. * * * It is clear that, to give it a con-

struction contrary to, or different from, that which the words import or can possibly import, is not to interpret the law, but to make it; and judges are to remember that their office is *jus dicere*, not *jus dare*. Every departure from the clear language of the statute is, in effect, an assumption of legislative power by the court." Endlich on Interpretation of Statutes, §§ 4, 7, 8; *Wilson* v. *Thompson*, 56 Ark. 110; *Railway Company* v. *B'Shears*, 59 Ark. 243; *Memphis & Little Rock R. Co.* v. *Adams*, 46 Ark. 159; *Collins* v. *Karatopsky*, 36 Ark. 330.

In *Reynolds* v. *Holland*, 35 Ark. 59, this court said: "The rule to be applied in this view is: First. That the intention is to be sought in the whole of the act taken together, and in other acts *in pari materia*. If the language be plain, unambiguous, and uncontrolled by other parts of the act, or other acts or laws upon the same subject, the courts cannot give it a different meaning to subserve a public policy, or to maintain its constitutional validity. The question for the courts is not what would be wise, politic and just, but what did the legislature really mean to direct. This narrow circle embraces and circumscribes the whole ambit of the court, although within that it may move very freely in catching the intention. It may disregard the literal meaning of the words, when it is obvious from the act itself that the use of the word has been a clerical error, or that the legislature intended it in a sense different from its common meaning."

In construing the statute in question, this court holds, in its opinion delivered in this case, that a tender of payment of the rent due (according to the opinion of two of the judges, within a reasonable time after the demand for possession required by the statute, and, according to the opinion of another, at any time before the commencement of an action of unlawful detainer for the possession of the demised premises) prevents the holding of the tenant from becoming unlawful, and deprives the landlord of his right of action. In so holding the court converts the demand that the statute provides shall be made for possession into a demand for rent. How did it reach this conclusion? In arriving at it, it says: "While the statute names no period of time to elapse after the service of notice to vacate, to be allowed the tenant, yet the question remains, whether it

was intended that the notice was to serve as an actual and immediate forfeiture of the lease the instant it was served, or whether it was given in order to give him a reasonable time in which to pay or to vacate, and as a notification that the forfeiture would be claimed. * * * If the object of the legislature was to declare that all rights were forfeited by non-payment, it seems reasonable to suppose that they would have given the lessor the right to immediate eviction [which they did do]. What object the service of notice to quit could have, if he had this right, it is hard to perceive. To hold that the mere service of the notice gave this right is to attribute more potency to the serving of a paper than to the failure of payment. The notice could not have been to apprise the lessee that rent was due, because he was bound to know this from his contract. The remedy is not a summary one. *Crow* v. *Morris*, 15 Ga. 303. The conclusion is irresistible that, in requiring notice, it must have been for some purpose, and this purpose must have been to give the tenant time to fulfill his contract before suit would be brought."

The conclusion reached is in direct conflict with the statute, and is based upon premises that are not true. The statute does not provide that any notice shall be given the tenant. It provides that a tenant, in cases like this, who (1) shall fail or refuse to pay rent for the land demised to him when due, and (2) after *demand* made in writing for the *possession* thereof by the landlord shall refuse to quit such possession, shall be deemed guilty of an unlawful detainer. In that event what is the remedy provided by the statutes for the landlord? An action of unlawful detainer for the recovery of the land demised. What is the relief? A judgment for possession (Mansfield's Digest, §§ 3351, 3361 and 3362). Upon the failure or refusal to pay the rent when due the tenant forfeits the right to the possession, and the landlord becomes entitled to it. This is the reason he is authorized by the statute to demand it. He would have no right to do so, if he was not entitled to it. Having this right, the statutes provide that he may demand it, and, in the event the tenant refuses to deliver it, sue for and recover it in an action of unlawful detainer. This shows clearly that the

object of the statutes is not to enforce the payment of the rent, but the demand for possession.

The rent in this case was due on a specified day, and no demand for it, or notice, was necessary, or required by the statute. The tenant was informed by his contract when it would and did become payable. Hence the statute did not provide that any demand for rent shall be made, or notice that it is due shall be given; and it is not necessary in any case, unless made so by the terms of the contract of the landlord and tenant, as where the rent is made payable on demand.

In Minnesota a statute provides: "When any person holds over any lands or tenements * * * after the termination of the time for which they are demised or let to him, * * * or after any rent becomes due, according to the terms of such lease or agreement, * * * the party entitled to possession may make complaint thereof to any justice of the peace of the county, and the justice shall proceed to hear, try and determine the same," etc.; and further provides: "If, upon the trial of any complaint under this chapter, the justice or jury shall find that the defendant or defendants or either of them, are guilty of the allegations in the complaint, the said justice shall thereupon enter judgment for the complainant to have restitution of the premises," etc. Genl. St. ch. 84, §§ 11, 9. This statute clearly means that an action of unlawful detainer may be be brought against the tenant, if he fails to pay the rent when due and thereafter holds the demised premises, and is the same as the statute under consideration in that respect. In construing the Minnesota statute in *Spooner* v. *French*, 22 Minn. 37, the court said: "The statute, section 11, gives the right to these proceedings (an action for possession by the landlord) when the tenant holds over * * * after any rent becomes due. No other thing is required by the statute. * * * No demand of the rent is contemplated by the statute." See *Wright* v. *Gribble*, 26 Minn. 99, to the same effect.

In the case before us the parties agreed upon the conditions upon which the tenant should hold the land let to him, and that was, upon payment of the rent at the times stipulated. The statutes of this state provide for the protection of the landlord, in such cases, against the holding of the

land by the tenant after he has failed to comply with the conditions. They provide, as before stated, that the landlord may recover the land of the tenant, in the event he fails or refuses to pay the rent when due, and refuses to deliver the possession of the land after a demand in writing therefor by the landlord. The statutes impose no other condition upon the landlord's right to recover. This court has, however, added another in this case, and that is, the failure or neglect of the tenant to pay the rent, according to the opinion of two judges, within a reasonable time after the demand for possession, and, according to the opinion of one, before the commencement of an action by the landlord to recover the land. In adding the last condition the court, in my opinion, has departed from the clear language of the statute, and assumed legislative power.

There was no waiver of the forfeiture in this case by the landlord. The forfeiture accrued on account of the non-payment of the rent due on the 9th day of November, 1890, for the months of November and December in 1890, and of January in 1891. The amount due them, in advance, for these three months, was $17.50. It appears that no payments were made for rent after the 9th of November, 1890. The tenant offered to pay the $17.50 after that time, but the landlord refused to accept it. Notwithstanding these facts, this court relieves the tenant of the forfeiture, and cites *Little Rock Granite Co.* v. *Shall*, 59 Ark. 409, to support its action. In that case this court held that a court of equity could relieve a tenant, upon equitable grounds, of a forfeiture which it was *stipulated in the lease* the tenant should suffer in the event he failed to perform his covenants. In this case the forfeiture is statutory, and no court can lawfully relieve against it; for to do so, as said by Mr. Justice Matthews in *Clark* v. *Barnard*, 108 U. S. 436, "would be in contravention of the direct expression of the legislative will." *State* v. *McBride*, 76 Ala. 51, 59, 60.

My conclusion is that appellee, Parker, or his grantees, are entitled to the possession of the land in controversy.

HUGHES, J., concurs with me in this opinion.

BREWSTER v. WESTERN UNION TELEGRAPH COMPANY.

Opinion delivered October 15, 1898.

1. TELEGRAM—DAMAGES FOR FAILURE TO DELIVER.—The measure of the damages to be recovered for the negligent delay of a telegraph company in delivering a message directing the purchase of a certain number of cattle of a specified grade is the difference between the contract price of the cattle and that which it would have been necessary to pay at the same place in order by due diligence, after delivery of the telegram, to purchase the same number and grade of cattle. (Page 539.)

2. SAME.—In an action by a firm to recover damages of a telegraph company for failure to deliver promptly a message to a member of the firm directing him to purchase a certain number of cattle, on which he held an option, provided they came up to a specified grade, the market value of the cattle at the place where they were to be purchased was not proved, nor was it shown that the cattle would have come up to the required grade. *Held*, that the court properly instructed the jury that under the facts the plaintiffs could recover only the price paid for the telegram. (Page 540.)

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

STATEMENT BY THE COURT.

The appellants, A. Brewster, W. Z. Tankersley, and J. M. Fain, were partners under the firm name of J. M. Fain & Co., and engaged in the business of buying and selling cattle. Brewster and Tankersley lived at Pine Bluff, Ark., while Fain made his home at Jennings, La. On the 8th day of May, 1895, Fain made, for said J. M. Fain & Co., an agreement with one T. D. Langley to purchase of said Langley two hundred head of cattle at $12 per head; but this contract was subject to the approval of Brewster and Tankersley, the partners of Fain. It was agreed between Langley and Fain that Fain should communicate with his partners, and notify Langley if said contract was accepted on or before noon of May 14, 1895, and that, if Langley was not notified of the acceptance within that time, said contract would be declared off. Fain at once wrote to Brewster and Thankersley, and informed them of the terms of

the contract. They, on the 13th of May, delivered to the defendant company a message addressed to Fain, at Jennings, La., directing and authorizing him to close the trade for the two hundred head of cattle, and paid said company the sum of 75 cents for the transmission of said message. The company failed to deliver the telegram until 7 o'clock p. m. of the 14th of May, 1895. The time given for the acceptance of the contract expired before the telegram was delivered, and plaintiffs failed to get the cattle. Appellants brought this action against the telegraph company to recover damages for negligently failing to deliver said telegram in due time. On the trial in the circuit court, the presiding judge directed the jury to return a verdict in favor of plaintiffs for only the price paid for the telegram. Plaintiffs appealed from the judgment rendered upon the verdict thus returned. The other facts appear in the opinion.

Bridges & Wooldridge, for appellants.

Damages are recoverable for negligence of a telegraph company in the transmission and delivery of messages. 53 Ark. 439; Crosw. Electricity, §§ 574, 576, 578, 586. The measure of damages in this case is the difference between the amount of the offer and the market value of the cattle when the offer expired. 37 Ia. 220; 60 Me. 26; 64 Wis. 531; 16 N. Y. 489; 44 N. Y. 263; 98 Mass. 239; Crosw. Elec. § 625; 66 Miss. 161; 67 Miss. 386; 58 Ark. 29; 19 S. W. 336; 31 S. W. 432; 39 S. W. 1021; 19 S. W. 554; 33 S. W. 1025; 42 S. W. 119; Thomp. Elec. §§ 335–6–7 and 8; Gray, Communication by Teleg. § 85; 25 Am. & Eng. Enc. Law, 848; 31 Fed. 134; 2 Thomps. Neg. 848; 90 Ga. 254. The second instruction given for defendant was erroneous. Defendant was liable for any damages of which its negligence was the proximate cause. Thomps. Elect. §§ 346, 318; Gray, Com. by Teleg. § 99; 25 Am. & Eng. Enc. Law, 854; 16 *id.* 428, 433; 61 Md. 74, 619; 2 Thomp. Neg. 1083.

Rose, Hemingway & Rose, for appellee.

There was no error in the instructions given for appellee. Plaintiffs were bound to prove the amount, as well as the fact, of their damage. Sand. & H. Dig., § 5761. The evidence fails to furnish data whereby the jury could assess any dama-

ges. (1) The loss must be one which would probably not have occurred but for the act complained of. 57 Ark. 402. (2) There must have been a binding contract for the sale of the cattle. (3) There must be proof of the market value of cattle directly after the offer expired. There was nothing in the telegram to put the company on notice of its importance. The damages recoverable in such a case as plaintiffs allege would be only such as were the natural and necessary consequences of the act complained of, and such as they might, by reasonable effort, have avoided. Broom's Leg. Max. 201; 1 Sedg. Dam. §§ 201, 202, 205; 3 Suth. Dam. 300; 1 *id.* chap. 6; 106 Mass. 468; 45 N. Y. 744; 66 N. Y. 92, 98; 7 Greenl. (Me.) 51; 83 Ala. 542; 80 Fed. 878, 880; 105 U. S. 224, 229; 2 Greenl. Ev. 267, note 3; 9 Ark. 394, 401, 402, 403; 45 N. Y. 744; 98 Mass. 239.

RIDDICK, J., (after stating the facts.) This is an action against a telegraph company to recover damages alleged to have been caused by negligence on the part of said company in transmitting and delivering a telegram. The plaintiffs claim that, by reason of the negligence of the defendant company in the matter of delivering said telegram, they lost the right to purchase a certain 200 head of cattle from one Langley. It is conceded that the facts established make out a case of negligence against the telegraph company, and the only real controversy between the parties relates to the question of damages. The circuit judge, on motion of the defendant, instructed the jury that the plaintiffs under the facts could recover only the price paid for the telegram; and whether this was a correct ruling is the question we are asked to consider.

Now, the contract which plaintiffs claim to have made with Langley gave them an option to accept and purchase a lot of cattle owned by him at $12 per head, this option to expire at noon on the 14th day of May, 1895. If the telegram had been received in due time, and plaintiffs had accepted the offered purchase, they would at that time have owned the cattle, and would have paid out the contract price thereof. The telegram was delivered on said day, but not until 7 o'clock p. m., some hours after the time allowed for the acceptance of the contract

had expired; so plaintiffs lost the right to purchase the cattle, but retained the money they had agreed to pay for the same. It is manifest, therefore, that plaintiffs were not injured unless on the 14th day of May, at the time the telegram was delivered, the market value of cattle of the grade purchased was at that place greater than the contract price, or, unless, on account of the scarcity of cattle, or for some other reason, plaintiffs could not, by the use of due diligence, after the delivery of the telegram, have purchased the like number and grade of cattle for the contract price. The law requires that a party should exercise due diligence to avoid injury to himself, and the measure of damages in such a case is the difference between the contract price of the cattle and that which plaintiffs would have been compelled to pay at the same place in order by due diligence, after delivery of the telegram or notice of the failure to deliver it, to purchase the same number and grade of cattle. It is a matter of no moment that some days subsequent to the delivery of the telegram there was a rise in the market value of cattle, and that, if plaintiffs had purchased cattle at the contract price, they might have obtained profits from such rise in value; for the law does not permit the recovery of such uncertain and speculative damages. *Squire* v. *Western Union Tel. Co.*, 98 Mass. 232; *True* v. *International Tel. Co.*, 60 Me. 9; *Hibbard* v. *Western Union Tel. Co.*, 33 Wis. 558; *Western Union Tel. Co.* v. *Hall*, 124 U. S. 444; *Western Union Tel. Co.* v. *Fellner*, 58 Ark. 29.

Applying the rule above stated to the facts of this case, it will be seen that plaintiffs did not prove more damages than they recovered; for they did not show what the market value of the cattle was on the 14th day of May, the time when their right of action was complete, but undertook to establish the value thereof on the 16th day of May, and afterwards. We need not discuss this question at length, for the evidence bearing on that point was subject to another defect still more radical. No witness had seen the 200 head of cattle that Langley agreed to sell at $12 per head, or knew what their market value was. Fain, the only witness who testified concerning that matter, said that he saw about fifty head of the cattle. "I saw enough of the cattle," he says, "to close the trade, provided

all the cattle came up, which they did or would have done." But this statement that the cattle "did or would have come up" to the grade required is pure guess work on the part of the witness, for he had not seen them. Having seen only a fourth of the cattle, he could not tell what the market value of the two hundred head was, either on the 14th of May, or at any other time, and could not show that plaintiffs were injured by failing to purchase said cattle at the price named in the contract.

Not only is it true that the evidence fails to show that the market value of these cattle on the 14th day or May exceeded their contract price, but the conduct of plaintiff Fain indicates that he even was doubtful as to the matter. Plaintiffs do not, as we understand, claim that there was any sudden rise in the value of cattle between the time the telegram should have been delivered and the time when it was delivered, for those two periods were separated only by a short interval. They claim that they had secured on the 8th day of May the right to purchase these cattle on or before noon of May 14th at $12 per head, and that this was a valuable right; that the value of cattle commenced to advance about the 1st day of May, and continued to rise for several months, and that these cattle on the 14th day of May, at the time the option to purchase expired, were worth much more than the contract price. But Fain was a member of the firm, and it is not denied that he had the authority to purchase cattle without consulting his absent partners. Indeed, he seems to have done most of the buying for the firm. This being so, it seems reasonable to believe that, if he had been fully convinced that the market value of the cattle was much greater than the contract price, he would not have suffered the option to expire, but would have closed the trade, although he had not received the telegram. Yet he declined to assume the responsibility and accept the offered sale. This indicates that he did not feel sure that the cattle were at that time worth more than the price named, but desired to purchase with a view to future profits. It indicates that he was not certain, at the time he permitted the option to expire, that there would be a profit in such purchase, and desired his partners to share the responsibility of making it. Afterwards, when the price of cattle rose, he saw the loss his firm had sustained by not mak-

ing the purchase, and sued the telegraph company to recover damages. But it was not within the meaning of the contract made with the defendant company that it should in any event be liable for such uncertain and speculative damages, and they cannot be recovered.

Again, it is not certain that plaintiffs would have purchased the cattle, even had the telegram been delivered in due time. This is not a case where a plaintiff has telegraphed his agent to go in the market and purchase a certain number of cattle, and afterwards the price of cattle rises, and, by reason of a delay in delivering such message, the agent is compelled to pay a greater price than he would have paid had the message been promptly delivered. The purchase which plaintiffs say they lost here was the purchase of a certain lot of cattle. The contract with Langley giving them an option to purchase such cattle was not in writing, and nothing had been paid on it, and it is apparent from the evidence that it amounted only to an agreement that Langley would sell a certain 200 head of cattle owned by him at $12 per head, and that plaintiffs would take the cattle at that price if the absent partners approved the purchase, and if the cattle came up to a certain grade or standard. In other words, Langley did not agree absolutely to sell 200 head of cattle of a certain grade, but only that he would sell a certain 200 head of cattle owned by him, with an option on the part of Fain to reject the offer if his partners failed to approve, or if the cattle did not come up to a certain grade. The evidence shows that the other partners approved the purchase, but it does not show that the cattle offered by Langley came up to the grade required. It is possible that plaintiffs could have established this fact by the testimony of Langley, or of some other witness who knew the condition of the cattle, but they did not do so. Fain, as he states, "saw enough of the cattle to close the trade, provided all the cattle came up." We understand from this that one of the conditions of the contract was that the cattle should come up to a certain grade, and that, before closing the trade and paying the purchase money, he would have ascertained that fact by an inspection of the cattle. He made no such inspection, and introduced no evidence to show the grade of the cattle, but asks a judgment against the defendant company upon the bare

supposition entertained by him that such cattle would have come up to the grade required, and that he would have accepted the offered sale, had the telegram been delivered in due time. As he had seen only a small portion of the cattle, he not only could not know that the cattle would have come up to the grade required, but he did not even know that Langley owned such cattle. The allegation that plaintiffs would have purchased the cattle had the telegram been delivered in time rests therefore upon conjecture, and is not made sufficiently certain by the proof to sustain a judgment for damages greater than recovered. *Western Union Tel. Co.* v. *Fellner*, 58 Ark. 29; *Western Union Tel. Co.* v. *Hall*, 124 U. S. 444.

For the reasons stated, we conclude that the judgment of the circuit court is right, and the same is affirmed.

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

Opinion delivered July 9, 1898.

1. CORPORATION—WHEN NOT BOUND BY OFFICER'S ACT.—The president of a bank corporation cannot bind it by the negotiation in its name of notes in which he is payee, as his interest conflicts with that of the bank. (Page 546.)

2. NATIONAL BANK—POWERS.—As a national bank cannot engage in the business of a broker, its officers have no authority to negotiate in its name notes which do not belong to it. (Page 546.)

3. ACCOMMODATION NOTE—DEFENSE.—In a suit against the accommodation maker of a note by a bank which has discounted it, it is no defense that the bank knew that the maker signed for accommodation merely. (Page 547.)

4. COLLATERAL SECURITY—RIGHT OF ASSIGNOR TO SUE.—One who has assigned a promissory note as collateral security has such an interest as entitles him to sue the maker, especially where the assignee has surrendered the note to him in order that such suit may be brought. (Page 548.)

5. COSTS—RULE IN EQUITY.—Ordinarily, costs in equity, as at law, are to be adjudged against the losing party, but where there are equitable circumstances demanding a departure from this rule, the chancellor

will tax the winning party with a portion, or even the whole, of the costs. Thus, where mutual accounts between plaintiff and defendant were confused and complicated, a condition for which neither was more responsible than the other, the fee of the master for adjusting such accounts will be divided between the two parties. (Page 549.)

Appeal from Pulaski Chancery Court.

P. C. DOOLEY, Special Chancellor.

Rose, Hemingway & Rose, for appellant.

It was error to allow plaintiff to take judgment on notes loaned it for the purpose, because: (*a*) Suits must be brought in the name of the real party in interest (Sand. & H. Dig., § 5623); (*b*) no one but the *holder* and *owner* of the paper could bring suit on it (3 Rand. Com. Pap. § 1656; Byles on Bills, 2; 52 Ark. 418); (*c*) the one who brings the action must be the holder *at the time of bringing the suit* (Byles on Bills, 403; 36 Ark. 456; 21 *id.* 186; 1 Am. & Eng. Enc. Law, 180). Upon insolvency, all rights of set-off are at an end. 3 Thomp. Corp. § 3786. A debt being once proved, the burden of showing payment is on the party pleading it. 7 Ark. 35; Barbour, Payment, 293. Funds deposited in a bank and belonging to two or more persons, not partners, must be checked out by all the depositors, or the bank must show that the funds were applied to the purpose for which they were deposited. Morse, Banks, 290, 299. An indorser's action against his principal is only for the amount he pays. 3 Rand. Com. Pap. § 1431. An account stated affords *prima facie* evidence of correctness, but it is not conclusive. 18 N. Y. 292; 50 Ark. 218; 62 Am. Dec. 91. A defendant can reserve the subject matter of his counter-claim for a separate action if he sees fit. Pom. Rights, Rem. & Pract. § 804.

Cockrill & Cockrill, for appellee.

Where notes are pledged as collateral at the time suit is brought on them, the title to them never having been parted with, the pledgeor may bring suit on them. 32 Ark. 56; 2 Dan. Neg. Trust, § 1201; 2 Pars. Bills and Notes, 436, note 1; 59 Ark. 251. The railway company has no claim against the bank for the proceeds of the notes negotiated by the bank because (1) the notes created no liability upon the railway com-

pany; (2) the railway company is estopped by its acquiescence in the disposition of the funds (117 U. S. 96, 114–115; 46 Ark. 129); (3) the bank had no knowledge that Allis and Brown were misappropriating the funds. Where an agent acts outside the scope of his duties, or for his own interest, his knowledge and actions do not bind his principal. 37 Atl. 550; 35 Atl. 1003; 63 Ark. 418, 425; 46 Ark. 537, 539–540; 152 U. S. 346, 352–353. A national bank has no power to engage in brokerage business. 63 Ark. 418, 425. The facts of the case exclude the theory of novation. 63 Ark. 367, 373.

Jno. McClure, for appellee.

A national bank has no authority to act as a broker in the negotiation of notes, and is not bound by the acts of its officers in such transactions. 63 Ark. 425; 42 Md. 581; 89 Pa. St. 324; 37 Atl. 550; 35 Atl. 1053. Receivers are estopped by the same acts as their principals would be. 9 Biss. 253.

McCain, Special Judge. This is an appeal from the Pulaski chancery court. Two suits were consolidated in the court below. One of these was a suit brought by Nick Kupferle, as trustee, on an account which H. G. Allis had or claimed to have against the Electric Street Railway Co., and which he had assigned to Kupferle as collateral security for his indebtedness to the First National Bank of Little Rock. The amount claimed in this suit was $157,500. The other suit was an action brought by the receiver of said bank against the same defendant for an amount claimed to be due on several overdrafts and promissory notes aggregating a little over $110,000. The street car company, by answer filed in each case, disputed the correctness of the claims sued on, denied any liability on either claim, averred that the receiver was not the holder or owner of certain of the notes embraced in his suit, and by way of counter-claim asked for judgment over against the receiver for the proceeds of certain notes alleged to have been negotiated by the bank for the street car company.

The chancellor appointed a master to state an account between the parties, and, on the coming in of the master's report,

the receiver was awarded a decree against the street car company for $106,850.26. Both parties appealed.

1. We conclude that the street car company has no right to complain of the chancellor for refusing to give judgment over against the receiver on the counter-claim. The contention of counsel on this point is plausible, but underlying it there is the fallacy that, in negotiating the notes in question, the action of Allis was the action of the bank. Allis was president of the bank, it is true, but he was also payee of the notes, and he was personally interested in their negotiation. This of itself made him a stranger to the bank, so far as the handling of these notes was concerned. An agent can not prostitute the name of his principal to the service of his own personal ends; and this rule applies with full force to the official of a corporation in making use of the corporate name. *Am. Surety Co.* v. *Pauly*, 170 U. S. 133; 1 Morawetz, Corporations, § 517.

Not only so, but it was held by this court in *Grow* v. *Cockrill*, 63 Ark. 418, that a national bank can not engage in the brokerage business. It follows that officers of the bank had no authority to negotiate notes which did not belong to the bank. But it is said that the bank got the proceeds of the notes when they were discounted, and that for this reason the bank ought to account for the amount received. It is true that Allis deposited the proceeds of the notes in the bank, or, which is the same thing, he had the amount passed to the credit of the bank by its metropolitan correspondents, to whom he remitted the proceeds. To deposit money in bank is the same in legal effect as to place an amount with its approval to its credit in another bank. But the bank did not in this case get the proceeds of these notes, because Allis deposited the same to his own credit. It is no answer to this to say that he ought not to have done this, or that the bank ought not to have allowed him to do this. When you go to deposit money in bank, it must be a very extraordinary case in which the bank can challenge your right to say whether the deposit offered shall go to your credit or to that of some one else. As Allis in this case had unlawfully used the name of the bank in procuring the money on the notes, the bank official making the entry might well have refused to credit Allis with the deposit, and might have placed it

to the credit of bills payable or re-discounts; but we are not satisfied that there was anything in the circumstances of the case to require the bank to credit the amount to the street car company over the objection of Allis or without his direction.

It is said that the bank knew that this paper in Allis' hands was accommodation paper. We are not certain that the bank did know this, but, if it did, that was the most satisfactory evidence that the street car company intended him to have the money. If you intrust a friend with your negotiable note, either for his accommodation or your own, you would hardly be allowed to complain that some one had discounted the paper for your friend, and allowed him to have the proceeds.

But, even conceding this, counsel say it was wrong for the bank to allow Allis to check out the money without Brown also signing the checks, as the latter was a joint payee with Allis in some of the notes. This is a matter of which it would seem that Brown alone could complain, but we may be sure that Allis did not get any money on a note payable to Allis and G. R. Brown without Brown's signature to the note, and an inspection of the notes filed show that they bear Brown's indorsement. This indorsement puts an end to any further demand for Brown's signature.

We need not discuss what are the duties, if any, of a bank when it finds a trustee depositing trust funds and checking them out in his own name. We do not think the street car company have made a case calling for the determination of that question. It is a circumstance not to be overlooked in this connection that all these transactions took place long before either one of the corporations ceased to do business, and renewal notes were given by the street car company after they knew, or had an opportunity to know, what had been done with the proceeds of the original notes. What we have said disposes of the contention that the street car company is entitled to judgment against the receiver on the counter-claim. If we are wrong in our conclusion on this point, however, it would not follow that the street car company should have the affirmative relief claimed, since the chancellor allowed the street car company credit for this amount on the account sued on by Nick Kupferle as trustee, and if the claim of

Nick Kupferle were found to be just, then a credit on this is all that the street car company could ask.

2. Counsel insist that the receiver of the bank should not be allowed to recover in this action on certain notes embraced in the decree, because these notes at the commencement of the suit were, as the receiver admits, in the hands of a St. Louis bank which claimed to hold them as collateral security for a debt due the latter bank. It seems that, after the suit was commenced, the St. Louis bank and the receiver reached an agreement, by which the notes were returned to the receiver, and the latter filed them in court for cancellation when the decree herein was taken. This defense, it must be agreed, is extremely technical, so much so that counsel seem to concede that, if all the parties were solvent, this plea would hardly merit attention, but the apology offered for the interposition of this defense is that the insolvency of the corporation destroyed the right to make a transfer of claims to be used as a set-off. Since we have determined, however, that the street car company is entitled to no affirmative relief against the receiver, it has nothing to lose on this score.

This court held in *Key* v. *Fielding*, 32 Ark. 56, that where commercial paper is assigned as collateral, the assignee takes it as trustee of an express trust. Such a trustee, under our statute, may sue in his own name, but the assignor still has an interest in the paper assigned, and he is not an improper party plaintiff in a suit on the paper. If in this case the St. Louis bank had refused to surrender the notes to the receiver for cancellation, the receiver might have made the St. Louis bank a party, so as to adjust the rights of all parties, but the course pursued by the chancellor under the circumstances was proper, and accomplished the ends of justice.

3. As to whether the plaintiff receiver was entitled to recover on the account assigned to Kupferle is a question which seems to be full of difficulty. From what the receiver and his counsel say in their brief, we infer that the property of the street car company has all been consumed by mortgages foreclosed since the commencement of this suit. They accordingly express themselves as being indifferent as to the amount of the judgment obtained against the street car company. The court

is pressed for time with important litigation, and, taking counsel at their word, we decline to go into the questions raised by the appeal on this branch of the case, as it seems to be a matter of no practical interest or importance. We therefore grant the street car company the relief asked on this point, and modify the decree to the extent of the judgment entered on the Kupferle account.

If we are correct in the conclusions we have reached, as to the street car company's set-off or counter-claim, there seems to be no other defense to the notes sued on except the counter-claim of $6,124, which was allowed by the master and approved by the decree of the lower court. We therefore deduct the sum $39,780.01, allowed on the Kupferle account, from the judgment of $106,850.26, rendered by the chancellor, leaving a balance of $67,070.25, for which amount the decree and judgment of the court below is affirmed.

The chancellor allowed the master a fee of $800, and adjudged the same as cost against the street car company. No complaint is made of the amount of the allowance, but the street car company insist that the chancellor erred in taxing it as an item of cost against the street car company. Ordinarily, costs in equity, as at law, are to be adjudged against the losing party, but where there are equitable circumstances demanding a departure from this rule, the chancellor will tax the winning party with a portion, or even the whole, of the costs. *Trimble* v. *James*, 40 Ark. 393.

The large amount allowed to the master in this case without objection indicates that he must have expended quite an amount of time and labor in examining and adjusting the accounts between the two corporations. It can hardly be said that either of the two corporations were to blame for the confusion and complications in their account, since both of them were the victims of Allis' domination and fraudulent conduct of their affairs. The master seems to have been appointed by consent. His investigation extended to the books and papers of both corporations, and in the books and papers of both were found inaccuracies, not to say frauds and falsehoods. In view of these circumstances, and the large amount of the allowance,

we think it would be equitable to require each party to pay half the master's fee, and it is so adjudged.

BATTLE, J., disqualified.

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O'NEAL v. KELLEY.

Opinion delivered October 1, 1898.

1. SURETY—DISCHARGE BY ALTERATION.—The sureties upon the bond of a building contractor are discharged by an alteration in the terms of the contract, made without their consent, whereby the contractor was bound to erect a larger and more expensive building within the limit of time fixed in the original contract. (Page 552.)

2. SAME.—A surety will be discharged by any material and unauthorized alteration of his contract, and it is immaterial that the principal assured the obligee that the alteration would not affect the original contract, or that he failed to carry out the contract as altered. (Page 553.)

Appeal from Miller Circuit Court.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

The facts in this case are as follows: The plaintiff, Michael Kelley, on the 28th day of April, 1894, entered into a contract with defendant, C. A. O'Neal, by which O'Neal, for the sum of $2,000 to be paid by Kelley, agreed to furnish materials and erect for said Kelley a two-story brick house in the city of Texarkana. The contract required that the building should be constructed according to specifications named therein, and that it should be completed and turned over to Kelley free of all liens, on or before the 1st day of July, 1894. The defendants, C. C. Dorrian, H. Wolf, W. L. Snow and T. J. Wheeler, became sureties on the bond of O'Neal for the performance of such contract. O'Neal having failed to perform his contract, Kelley brought this action on his bond to recover the sum of $1,000 as damages suffered by him on account of such failure. The sureties set up that there had been a material alteration of the contract. On this point Kelley

testified at the trial as follows: "The contract called for a building 96 feet long for lower story, and 75 feet long for upper story. After the Webber building had given away, I said to O'Neal: 'I wish the upper story of my building had been the same length as the lower story, because I was afraid we would have the same trouble they were having with the Webber building. Mr. O'Neal said it would only take a little extra work, and would in no way affect the contract to make the change. I told him I did not want to do anything that would change the contract, and, if it could be done so as not to change the contract, to figure it up, and say how much it would cost. He did so, and said it would cost me $25, and I gave him a check immediately. The only extra work was the ceiling, flooring and upper joists. The longitudinal walls were already there, and I estimated that $25 was a reasonable price for extra work, and therefore paid it." There was a judgment against the defendants for the sum of $500, from which they appealed.

King & Searcy, for appellant.

A surety can not be held beyond the precise terms of his contract. 13 N. Y. 232; S. C. 64 Am. Dec. 545; 60 N. Y. 158; 61 N. Y. 356; 9 Wheat. 720; 6 How. 292; 36 N. Y. 460; 15 Ill. 22; 11 N. E. 232; 23 Mo. 244; 36 Minn. 439; S. C. 31 N. W. 861; 65 Tex. 258; 22 S. W. 620; 11 S. W. 608; 38 S. W. 100; 32 S. Car. 238. Any variation, made without his consent, discharges him. Brandt, Sur. § 79; 32 L. R. A. 565; 28 S. W. 439; 24 S. W. 200; 11 N. E. 232; 36 N. Y. 450; 93 N. Y. 274; 13 N. Y. 232; 48 Ark. 426; 31 N. W. 861; 65 Tex. 258; 22 S. W. 620; 38 S. W. 100. The burden was on the plaintiff to show that the alteration did not injure sureties. 27 Ark. 108. This rule of law has been applied to builder's contracts, as well as any others. 23 Mo. 248; 36 Minn. 439; S. C. 31 N. W. 861; 22 S. W. 620; 11 S. W. 608; 49 Cal. 131; 38 S. W. 100.

J. D. Cook, for appellee.

The evidence shows that the acts of Kelley were authorized by the sureties. Said sureties were only entitled to claim credit for delay caused by extra work. 56 Ark. 405.

RIDDICK, J., (after stating the facts). This is an action upon a bond given by O'Neal to Kelley for the performance of a building contract. The contract, for the full performance of which the bond was executed, required that, for the sum of $2,000 to be paid by Kelley, O'Neal should furnish materials and erect a brick building, the lower story of which should be 96 feet long and 14 feet high, and the upper story 75 feet long and 12 feet high. During the progress of the work, O'Neal contracted with Kelly that, for the additional sum of $25 paid him by Kelley, he would build the upper story 96 feet long instead of 75 feet, as required by the original contract. The appellant sureties contend that this alteration of the contract discharged them from further liability on the bond, and we are of the opinion that this contention must be sustained.

"The contract by which a surety becomes bound," says the Supreme Court of Pennsylvania, "is voluntary on his part, without profit or advantage, and without having in view the prospect of gain. It is an act of benevolence to the obligor, and of convenience to the obligee; and of emphatic use to both. The obligations of social duty require, therefore, that he should be dealt with in fairness, and in a spirit of the utmost good faith. The obligor and the obligee are bound to know that if they find it convenient to change or vary the terms of the original contract, they must seek the assent of the surety, because it is his contract as well as theirs. And if they will not do so, they take upon themselves the hazard, and thus loosen the bonds of the surety." *Hibbs* v. *Rue*, 4 Pa. St. 348.

Any material alteration in the terms of such a contract discharges the surety if he has not consented to the change, and this is so even if the alteration be for the benefit of the surety; for, although the principals may change their contract to suit their pleasure or convenience, they cannot thus bind the surety; and as the new contract abrogates the old, the surety is discharged from all liability unless he has consented to the alteration. *Warden* v. *Ryan*, 37 Mo. App. 466; *Judah* v. *Zimmerman*, 22 Ind. 388; *Simonson* v. *Grant*, 36 Minn. 439; *Bethune* v. *Dozier*, 10 Ga. 235; 24 Am. & Eng. Enc. Law, 837; 2 Brandt, Suretyship, §§ 278, 288.

The alteration of the contract shown in this case was material, and there is nothing to show that the sureties consented thereto. It required that O'Neal should erect a building of dimensions different from that required by the original contract, and for which he was to receive a different consideration. It called for the erection of a more expensive building, but no extension was made in the time within which the building was to be completed. As the sureties had undertaken that O'Neal should complete the building within a limited time, an alteration of the contract, by which he was required to build a larger and more expensive building within the same time, was, in our opinion, not only material, but directly against the interest of the sureties; and, as the same was made without their consent, it clearly operated to discharge them.

The fact that Kelley refused to agree to the alteration until O'Neal the contractor had assured him that it would not affect the original contract is a matter of no moment, for O'Neal did not represent the sureties, and they are not bound by his opinion on a question of law. Nor does the fact that he afterwards failed to carry out the contract as altered affect the question. It is the execution of the new contract, and not the performance thereof that discharges the surety.

There is no dispute about the facts of this case, and, after considering the same, we are of the opinion that the judgment of the circuit court against the sureties of O'Neal is not supported by the evidence. The judgment as to them is reversed, and the case is dismissed; but as to O'Neal it is affirmed.

McCRACKEN v. PAUL.

Opinion delivered October 8, 1898.

EXECUTION SALE—REVERSAL OF JUDGMENT—RESTITUTION.—If a plaintiff purchased at his own execution sale, and the judgment under which the sale was made is subsequently reversed, he is entitled to restore the property *in specie*, if he can; but if he cannot, he is responsible for its loss. If the property was purchased by a third person, the measure of

damages is the price it brought at the sale with interest; and if defendant was the purchaser, there is no recovery against plaintiff, except for money paid, because the defendant has what he claims. (Page 556.)

Appeal from Greene Circuit Court.

W. S. LUNA, Special Judge.

J. S. Jordan and *Rose, Hemingway & Rose*, for appellant.

The pleading, so denominated by appellee, was no cross-complaint. Sand. & H. Dig., § 5712; 32 Ark. 281. Nor was it a valid counter-claim, because: (1) A counter-claim can only set up some breach of the contract sued upon. 27 Ark. 489; 17 *id.* 245; 26 *id.* 314; 22 *id.* 409; 32 *id.* 284. (2) A counter-claim based on tort is no defense in an action on contract. 57 Ark. 609; 1 *id.* 338; 4 *id.* 527. Even in actions of tort, the injury must grow directly out of the tort complained of. 48 Ark. 296: 55 *id.* 312; 40 *id.* 75. Nor was the defense interposed a valid set-off. 22 Ark. 230; 30 Ark. 50; 54 *id.* 190. The measure of damages, if any, was what the property sold for. 38 N. H. 171; Wright (Ohio), 520; 26 N. H. 117; 1 Murph. 272; 128 Ill. 510; 100 Mo. 207; 12 Barb. 83; 6 Pet. 8; 155 U. S. 310; 2 Freeman, Judg. § 482; 24 N. E. 223; 13 Ill. 486; 71 N. Y. 106; 1 Gray, 65, 67. The appellant did not waive his objection to the improper matter in the counter-claim by replying to it. 32 Ark. 281; 48 Ark. 396; 57 Ark. 606.

G. B. Oliver and *J. D. Block*, for appellee.

It was not error to overrule appellant's demurrer, for the cross-complaint did at least state a cause of action. 31 Ark. 305; 30 Ark. 327; 9 Neb. 513; 37 S. W. 868; 13 Ind. App. 196; 82 Cal. 209; 87 *id.* 245. Hence appellant, by traversing the counter-claim and proceeding to trial on the merits, waived any objections he might have raised by a sufficient demurrer. Sand. & H. Dig., § 5730. Objections to instructions and testimony do not save the point. 23 Ark. 532; 55 *id.* 109; 51 *id.* 260; 46 N. Y. Sup. 374; 61 N. W. 476; 9 N. W. 632; 10 Bosw. 143. The court rendering the vacated judgment is the proper one to restore property taken under such judgment. Tidd, Pract. 1033; Pomeroy's Code Rem. §§ 37,

68, 69; 9 Wall. 605; 6 Pet. 8. This can be done: (1) in an original action (10 Wend. 354; 6 Cow. 297; 1 Har. & J. 405), or (2) by bringing the facts to the attention of the trial court in some appropriate manner. 9 B. Mon. (Ky.) 79; 5 Gratt. 272; 14 Cal. 667; 3 Ky. Law Rep. 393; 18 C. C. A. 308. Upon the venue being changed, the new forum is the proper one. 35 Ark. 531; 4 Ark. 162; 9 Ark. 498; 60 Ark. 34. There was no prejudical error committed, by whatever name the action be called. 34 Ark. 598; 32 Ark. 495; 33 Ark. 811; 34 Ark. 93. The fact that the grounds for a counter-claim arose after the suit was commenced constitutes no objection to it (82 N. Y. 271; 97 *id.* 395; 27 Ark. 489; 64 Ark. 222; Pom. Code Rem. § 774) and the counter-claim was proper to consider. 93 N. Y. 556; 20 Nev. 168; 30 Barb. 225; 114 Mo. 651; 53 *id.* 199; 61 N. Y. 226; 31 S. W. 843; 23 *id.* 326. The value of the property is the correct measure of damages. 41 Mo. 416; 27 Ia. 239; 8 N. Y. 138; 15 Wis. 289; 128 Ill, 510; 1 Suth. Dam. § 469, p. 972; 83 Ind. 86; 45 Cal. 616; 1 N. Y. Law, 159; 7 Mon. (Ky.) 6; 25 S. W. 879; 16 Ky. Law Rep. 396; 2 Abb. (U. S.) 479; 34 Mo. 364; 55 Ark. 333; 61 *id.* 33.

BUNN, C. J. The appellant, McCracken, obtained judgment against the defendants, and caused their property, consisting mostly of timber, lumber, and saw mill machinery, to be levied on and sold to satisfy his judgment. An appeal was prayed from the judgment, but no supersedeas bond was given, and no supersedeas writ issued. At an adjourned day of the term of the court, the defendants having filed a second motion for a new trial, on the ground of newly discovered testimony, among others, and after the execution sale, the court sustained the second motion, and set aside the former judgment, under which the sale of the property was had. Defendants then filed their amended answer and cross-complaint, claiming damages growing out of the sale of their said property under the judgment aforesaid; and the plaintiff first demurred, which being overruled, he answered, and a new trial was had, resulting in a verdict and judgment against the plaintiff for the full value of all the property sold. Plaintiff filed his motion for new

trial, showing that he had newly discovered evidence as to the sale of the property, tending to show who were the real purchasers, but this was overruled, and this appeal was taken. The record is too complicated and confused to justify a more extended statement of the case.

The trial court should have treated the amended answer and cross-complaint of defendants, as we now treat it, as a motion or petition for an order of restitution and prayer for damages in the alternative. That motion should have stated clearly and pointedly who was the real purchaser of the property sold at the execution sale, and how much of it each purchaser, if more than one, purchased at the sale, so that the plaintiff might have been permitted to restore the property to the defendants, or to the court, as the case might be and, failing to do so, show cause why he did not or would not do so. The plaintiff, in pursuing his remedy to collect his debt, was neither a trespasser nor wrongdoer in the true sense, but had obtained a valid judgment fairly, and no supersedeas had been issued to stay his proceedings. He was therefore entitled to the protection of the rule, now of universal application in such cases, which is in substance thus laid down by Freeman in his work on Judgments, and which we give here for the future guidance of the court in the trial of this cause. Plaintiff purchasing at his execution sale, on reversal of the judgment under which the sale is made, is entitled to the benefits of the order of restitution, so that he may restore the property *in specie*, if he can. If he cannot, he is responsible to the defendant for its loss. If the property is purchased by a third person, the measure of damages is the price it brought at the sale and interest, and if the defendant is the purchaser, there is no recovery against plaintiff, except for money paid, because the defendant has what he claims. Freeman, Judgments, §§ 482, 483, 484.

Reversed and remanded.

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JEFFERSON COUNTY v. COOK.

Opinion delivered October 22, 1898.

CORONER—DUTY TO HOLD INQUEST.—Under Sand. & H. Dig., §§ 751-2, providing, in effect, that a coroner shall hold an inquest upon receipt of information that the circumstances of a person's "death indicate that he has been foully dealt with." *Held* that, upon receipt of information merely that a man has been slain, and that his slayer is definitely known, it is the duty of the coroner to hold an inquest to determine whether the slayer was criminally liable. (Page 558.)

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

N. L. Cook, coroner of Jefferson county, presented to the county court his claim for $10.50 for services performed by him in holding an inquest over the dead body of John Brown. The claim was disallowed by the county court. He appealed to the circuit court, where his claim was allowed. The county has appealed.

The coroner himself gave the following testimony, which is all the testimony taken in the hearing, and is relied on by both sides: "About the 26th day of January, 1896, I was notified that a man had been killed at the Atkins place, in this county. The information given to me that his name was John Brown, and that he had been killed by a pistol in the hands of William Barrett, the two being engaged in a quarrel. The information also was that it was definitely known who had killed deceased, and that there were several persons present at the time the shot was fired."

S. C. Martin, for appellant.

The coroner has no right to hold an inquest over the body of a slain man, when the circumstances of his death are not unknown, and there is nothing to indicate that secret or clandestine means were used. Sand. & H. Dig., § 751; 4 Am. & Eng. Enc. Law, 177—"Coroner;" 52 Ark. 364. The office of the coroner's inquest is to ascertain the *cause* of death. Cases *supra*.

W. P. & A. B. Grace, for appellee.

It is the duty of the coroner to hold an inquest "if any person die, and the circumstances of his death indicate that he has been foully (meaning *unlawfully*, or *criminally*) dealt with." Sand. & H. Dig., § 751; *ib.* §§ 752–767; 55 Ark. 528; 55 Ark. 419; 100 Pa. St. 264; 52 Ark. 361. In all such cases the county is bound to pay costs. Authorities *supra*.

BATTLE, J. Was the coroner of Jefferson county authorized or required by law to hold an inquest over the dead body of John Brown? If he was, the judgment of the circuit court should be affirmed; if not, it should be reversed.

The decision of this question depends upon the statute, which reads as follows: "If the dead body of any person be found, and the circumstances of the death be unknown, information shall immediately be given to the coroner of the county; and if any person die, and the circumstances of his death indicate that he has been foully dealt with, the information shall forthwith be furnished to the coroner." (Sand. & H. Dig., § 751). This statute provides that information shall be given to the coroner in only two classes of cases; and they are: (1) "If the dead body of any person be found, and the circumstances of the death be unknown;" and (2) "if any person die, and the circumstances of his death indicate that he has been foully dealt with."

The object of the statute, doubtless, was to prevent the accumulation of unnecessary costs, and at the same time prevent persons, criminally liable for the death of any one, escaping punishment. Hence it provides that where the circumstances of the death are unknown, or if a person die, and the circumstances of his death, being known, "indicate that he has been foully dealt with," information shall be given to the coroner. In both of these classes of cases, the statutes make it the duty of the coroner, upon the receipt of such information, to hold an inquest; and if it be found by the inquisition that the death of the deceased was caused by the act, abetment, procurement, or command, or counsel of any person, it is made the duty of the coroner to cause the arrest of every

such person, if not already under arrest, "unless it appears by the inquisition to be a case of excusable homicide." Sand. & H. Dig., §§ 752–764. The duties of the coroner, upon the receipt of the information that shall be given him, as defined by the statute, clearly indicate that the object in requiring the information to be given is to prevent the escape of the guilty. Consequently, it is the duty of the coroner to hold an inquest over the body of a deceased person, upon the receipt of information of the circumstances of his death, which indicate that some one might be criminally liable; for, the killing being known, the presumption is that the slayer is guilty of a crime, in the absence of circumstances that justify or excuse the homicide. Sand. & H. Dig., § 1643.

We therefore think the judgment in this case should be affirmed; and it is so ordered.

CONRAND v. STATE.

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Opinion delivered October 22, 1898.

1. INDICTMENT—ALLEGATION AS TO TIME.—An indictment as for slander is not insufficient because it charges that defendant on a future date "did use, utter and publish" the words complained of, the allegation of a future and therefore impossible date being a clerical error. (Page 561.)

2. SLANDER—ALLEGATION OF CONSENT TO PROSECUTION.—The allegation in an indictment for slander that the prosecution was with the consent of the person slandered is not part of the statement of the offense, nor was it necessary for the prosecution to prove it to convict the defendant. (Page 563.)

3. VERDICT—SUFFICIENCY.—A verdict in a prosecution for slander is sufficient which is to the effect merely that the jury find the defendant guilty and leave his punishment with the court. (Page 563.)

Appeal from Faulkner Circuit Court.

ELDON A. BOLTON, Special Judge.

John G. B. Simms, for appellant.

The indictment is fatally defective, because it charges the commission of the offense at a future date. 10 Am. & Eng

Enc. Law, 584, note 3; *ib.* 589, par. 2; Sand. & H. Dig., § 2075. The court erred in refusing the first, fourth and seventh instructions asked by appellant. The verdict of the jury violates the tenth instruction given by the court, on appellant's behalf, wherein the court told the jury that the state was required to allege and prove that the offense was committed within twelve months *before* the finding of the indictment.

E. B. Kinsworthy, for appellee.

The fact that the indictment states the charge as in the past tense shows that the offense is meant to be charged as already committed. The error is not prejudicial, hence not material. Sand. & H. Dig., § 2076. No date need be specified, where time is not an ingredient of the offense. Sand. & H Dig., § 2075; 79 Ky. 451; 89 Am. Dec. 605; 5 Baxter, 681; 25 Ga. 515.

BATTLE, J. On the 14th day of July, 1896, an indictment was filed in the Faulkner circuit court, in which Charles Conrand was accused of slander. The commission of the offense was charged, in part, as follows: "The grand jury of Faulkner county, in the name and by the authority of the State of Arkansas, accuse Charles Conrand of the crime of slander *committed* as follows, to-wit: The said Charles Conrand, in the county and State aforesaid, on the 15th day of May, A. D. 1899, then and there maliciously, wilfully, feloniously and falsely *did* use, utter and publish (in the presence of James Campbell, Rebecca Campbell, Elias Stone, Mary Ann Stone and others) of and concerning Barbara A. Rosamond," etc.; and it was alleged in the indictment as follows: "This prosecution is with knowledge and consent of the said Barbara A. Rosamond." The indictment was indorsed as follows: "This prosecution with consent of Barbara A. Rosamond. A true bill. [Signed] A. J. Witt, foreman."

The defendant moved to set aside the indictment because it was alleged therein that the offense charged was committed "upon a future and impossible date;" and the court overruled the motion. He thereupon pleaded not guilty, and was tried by a jury. He introduced witnesses and, testified, and thereby clearly indicated that he was not misled by any allegation in the

indictment as to the time when the offense of which he was accused was committed.

The court refused to instruct the jury, at the request of the defendant, as follows: "The state must prove every material allegation in the indictment; and if it has failed to prove that this indictment was found and prosecuted by the instance or consent of Mrs. Barbara A. Rosamond, they will acquit." Instructions were given, and others were asked and refused, but it is not necessary to notice any of them in this opinion except the one we have copied.

The defendant was convicted, the jury having returned a verdict in the following form: "We, the jury, find the defendant guilty, and leave punishment with court." (Signed) "T. L. Daniel, foreman." The court fixed his punishment at imprisonment and hard labor in the penitentiary for the period of three years, and rendered judgment against him accordingly.

The defendant insists that this judgment should be reversed for the following reasons: (1) Because the court erred in overruling his motion to set aside the indictment. (2) Because the court erred in refusing to give the instruction copied in this opinion. (3) Because the verdict was insufficient.

(1) The allegation as to the day on which the offense was committed is immaterial, and did not affect the sufficiency of the indictment. The statutes provide that the indictment must contain "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 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 rights of the case." And further provide 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., §§ 2090, 2075, 2076. According to these provisions of the statutes, an allegation in the indictment as to the day upon which the offense charged was committed cannot affect it, if it can be understood therefrom by a person of common understanding that the grand jury intended to charge that the offense was committed "at some time prior to the time of finding the indictment." The only necessity for such allegation is to show that the offense was committed before the indictment, unless time is a material ingredient of the offense. Except as stated, it is not necessary to a conviction that the state prove that the offense was committed on the day alleged; but it is sufficient, as to time, to show that it was committed on any day before the indictment was found, and within the time prescribed by the statutes of limitations. Hence section 2081 of the digest declares: "The statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of the finding of the indictment, except when the time is a material ingredient in the offense." This section does not mean to say that a statement as to the day on which the offense was committed shall be necessary to constitute a good and sufficient indictment, but, when made, what purpose it shall serve. An interpretation of it to the contrary effect would make it conflict with the section of the digest preceding it which declares that an indictment shall be sufficient in that respect, it it can be understood therefrom that the offense was committed before it was found.

Under a statute of which section 2081 is an exact copy, the court of appeals of Kentucky held that an indictment for breaking into a railroad depot and stealing therefrom, which was returned on the 28th of December, 1891, and fixed the date of the commission of the offense on the 29th of December, 1891, but alleged that the defendant "*did* break open and enter the depot building," and "*did* steal and carry away," etc., contained a sufficient allegation that the offense was committed before the indictment was found, and sustained the indictment. *Williams* v. *Com.*, 18 S. W. Rep. 1024; *Com.* v. *Miller*, 79 Ky. 451; *Vowells* v. *Com.*, 84 Ky. 52.

The question decided by the court of appeals of Kentucky is presented in this case. In the indictment before us the grand jury of Faulkner county accused the defendant of the crime of slander, "committed as follows," and alleged that the defendant, "on the 15th day of May, 1898, then and there maliciously, wilfully, feloniously and falsely *did* use, utter and publish," etc. They alleged that the offense was committed in the past, using the words "committed" and "did" for that purpose, on a day sometime in the future. No man of common understanding could infer from the indictment that the grand jury intended to accuse the defendant of having committed a crime before it was committed. To accuse one of a crime is to charge that it was committed prior to the accusation. The allegation as to the date of the commission of the offense was a clerical error, apparent on the face of the indictment, and was not calculated to, and did not, mislead the defendant; and did not affect the validity or sufficiency of the indictment or the judgment against him.

(2) The statutes provide that no indictment for slander shall be found, "except at the instance or by consent of the person slandered or his legal representative" (Sand. & H. Dig., § 1730). The grand jury alleged in the indictment in this case that it was found with the consent of the person slandered. But this allegation was no part of the statements which were made to show the commission of the offense, and it was not necessary to prove it to convict the defendant. In pleading not guilty the defendant did not put it in issue. If it was untrue, the defendant could have taken advantage of it by a motion to set aside the indictment, as it affected the authority of the grand jury to find the indictment, and nothing more. Having failed to do so, he waived any advantage he could have taken of it, and it was not necessary for the state to prove that it was true; and the court properly refused to instruct the jury that it was their duty to acquit in the event they found that it was not proved. Sand. & H. Dig., § 2126; *Wright* v. *State*, 42 Ark. 94; *Miller* v. *State*, 40 Ark. 488.

(3) The verdict, although not as full as it might have been, was sufficient. The offense charged did not consist of different degrees, and it was therefore, not necessary for them

to say more than they found the defendant guilty, and assess the punishment. As the statute authorized the court to assess the punishment, when they failed to do so, this defect was not fatal, and did not affect the judgment of the court.

Judgment affirmed.

RIDDICK, J. (dissenting). I regret that I am not able to agree with so much of the opinion of the court as holds that it is not necessary under our statute for the indictment to allege that the offense charged was committed at a time prior to the finding of the indictment. Before the adoption of the criminal code, it was necessary not only to allege that the offense was committed at a time prior to the finding of the indictment, but also that it was committed at a time within the period of the statute of limitations. *Scoggins* v. *State*, 32 Ark. 215. The code changed this rule by providing that the indictment was sufficient, so far as the allegation of time was concerned, if it could be understood therefrom that the offense was committed "prior to the finding of the indictment." Sand. & H. Dig., § 2075.

The rule is that the charge in the indictment cannot be helped out by argument or inference (Clark, Crim. Pro. 162); and I understand, from the provisions of the code above referred to, that it must appear from the allegation as to time in the indictment that the offense was committed before the finding of the indictment. If the indictment allege the offense to have been committed on a future day, it is, I think, still bad under our statute. *State* v. *Smith* (Iowa), 55 N. W. 198; Clark, Crim. Pro. 242. This is made plain by a subsequent section of the statute which provides that "the statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of finding the indictment, except when the time is a material ingredient in the offense." Sand. & H. Dig., § 2081.

It seems to me that this section expressly makes it material to allege that the offense was committed at a time prior to the finding of the indictment. Had the legislature intended that a mere inference, drawn from the use of the word "*did*"

or from other language of the indictment, should be allowed to overcome the direct allegation as to time, it seems reasonable to believe that it would have expressed its intention by simply saying that such allegation as to the time the offense was committed was immaterial, as the court in effect held in this case.

As grand juries do not indict for crimes to be committed in the future, it can be inferred from any indictment that it refers to a past offense, and the effect of the decision of the court in this case is that it is not necessary to allege time in an indictment, except when it is a material part of the offense. "To accuse one of a crime," says the court, "is to charge that it was committed prior to the accusation." But the legislature did not so declare the law, nor did it intend that an inference of that kind should take the place of a direct allegation as to time, much less did it intend that an inference should be allowed to overturn such allegation when made. After enacting that the statement in the indictment as to the time the offense was committed is not material, it does not stop, as the court seems to have done in its construction of the law, but it goes further and makes an exception. Such statement says the statute is not material, "*further than as a statement that it was committed before the time of finding the indictment.*" The decision of the court in this case has stricken this exception from the statute.

I may admit that there seems to be little reason why an allegation of time should be required in an indictment, except in cases where time is a material ingredient in the offense. I may admit that the construction given by the court improves the statute, but I can not concur in it, for it seems to do violence to the language of the act. As stated by a learned author, "it is not the province of the courts to supervise legislation, and keep it within the bounds of propriety and common sense." Sutherland, Stat. Const. § 238.

The indictment here alleged that the offense was committed on the 15th day of May, 1899, and I hold that it was insufficient, and therefore dissent from the opinion and judgment of the court.

HARRIS v. STEWART.

Opinion delivered October 22, 1898.

1. ATTACHMENT—SUCCESSIVE LEVIES.—The fact that a third person has intervened in an attachment suit and executed a forthcoming bond for the attached property is no reason why such property should not be subsequently levied upon in another suit and sold as the property of the attachment debtor. (Page 571.)

2. FRAUD—COLLUSIVE JUDGMENT.—A judgment collusively entered into between an attaching creditor and an intervener, who executed a forthcoming bond for the attached property, with intent to defraud a junior attacher, is voidable at the latter's instance in a collateral proceeding. (Page 573.)

Appeal from Lafayette Circuit Court.

CHAS. W. SMITH, Judge.

W. W. Stewart brought suit against S. L. Harris, sheriff of Lafayette county, and alleged that on the first day of July, 1893, a suit was brought against Alex Stewart by S. G. Dreyfus & Co., and a writ of attachment was issued, and a large lot of personal property was taken into the possession of the sheriff under said writ, among said property there being four log wagons of the value of $250. That on the 28th day of July, 1893, W. W. Stewart interpleaded, alleging that said attached property was his property, and not that of A. Stewart, and on the same day entered into a bond, with surety, conditioned that if the property, on the trial of such interplea, be found to be the property of A. Stewart, and judgment was recovered against said A. Stewart, said W. W. Stewart would deliver said property to the sheriff, whenever demanded by him after execution upon such judgment came to his hands to be levied thereon; that, on the trial of said interplea, judgment was rendered against said W. W. Stewart, this interpleader. That afterwards on the —— day of November, 1894, S. L. Harris, as sheriff, under an execution issued upon a judgment in favor of one J. F. Looney against A. Stewart,

levied upon, advertised for sale, and did sell four log wagons for the sum of $250, the identical wagons seized under said attachment suit, and for which the said W. W. Stewart interpleaded and gave bond. That on the 4th day of December, 1894, the said S. L. Harris, as sheriff, under an execution issued upon the judgment of S. G. Dreyfus & Co. against A. Stewart, demanded of W. W. Stewart the return of the property included in said interplea, of which the four wagons levied upon and sold by said Harris, as sheriff, under said execution in favor of J. F. Looney against A. Stewart, was a part. That, in consequence of said seizure and sale by said sheriff under said Looney execution of the four wagons, the said W. W. Stewart could not deliver said property in accordance with his bond, and was compelled to pay to S. G. Dreyfus & Co. the sum of $250, the value of the said four wagons. That said four log wagons seized and sold by said Harris, as sheriff, as the property of A. Stewart, was the plaintiff's property, and not subject to said sale and seizure. That said four wagons were worth $250, and that, by virtue of said seizure and sale of said wagons, the said W. W. Stewart has been damaged in the sum of $250; and prays for judgment for said sum with interest, costs and other relief.

On the 28th day of January, 1895, J. F. Looney was made a party defendant, and his appearance entered.

On the 31st day of January, 1895, S. L. Harris, as sheriff, and J. F. Looney filed their answer to the complaint. In the first paragraph they deny that, in consequence of the seizure and sale of four log wagons by the defendant, Harris, as sheriff, under an execution in favor of J. F. Looney against A. Stewart, the said W. W. Stewart, plaintiff, was compelled to pay to S. G. Dreyfus & Co. the sum of $250, the value of said wagons, or any other sum whatever. They deny that said four log wagons seized and sold by defendant, Harris, as sheriff, as the property of A. Stewart, was the property of the plaintiff, W. W. Stewart, and not subject to said seizure and sale under said execution; they deny that, by virtue of said seizure and sale of said wagons, the plaintiff, W. W. Stewart, has been damaged in the sum of $250, or any other sum whatever.

In the second paragraph of their said answer, as a further

defense, the defendants allege that on the 3d day of July, 1893, defendant, Looney, commenced an action in the Lafayette circuit court against one A. Stewart for the recovery of $190 due upon contract, and made and filed in said court his affidavit and bond for a general order of attachment against the property of said A. Stewart; that said order was, on said 3d day of July, 1893, by the clerk of said court, duly issued, directed and delivered to the then sheriff of the county, commanding him therein to attach and safely keep the property of A. Stewart in his county not exempt from execution, or so much thereof as will satisfy the claim of said Looney for $190 and $30 for the costs thereof. That, under and by virtue of said writ of attachment, said sheriff forthwith levied upon and attached in his county a stock of merchandise, five log wagons, a two-horse wagon and thirteen stock horses, being the same property then in his possession and custody, under a levy and attachment previously made on said day, under an order of attachment issued out of the Lafayette circuit court in a suit then therein pending, wherein S. G. Dreyfus & Co. were plaintiffs and the aforesaid A. Stewart was defendant. That, on the 28th day of July, 1893, W. W. Stewart made and delivered to the sheriff his affidavit that he was the owner of the property attached as aforesaid, and that the same was not liable to seizure on the order of attachment issued in said suit of S. G. Dreyfus & Co. against A. Stewart. That thereupon the sheriff chose two citizens of Lafayette county, where the writ was levied, who, on their oath, ascertained the value of said property so attached and claimed by the said W. W. Stewart to be $3,288. That thereupon said W. W. Stewart gave bond with security, in favor of S. G. Dreyfus & Co. in the sum of $6,660, conditioned that he would interplead at the July, 1893, term of the court, and prosecute such interplea to judgment without delay, and if, on the trial of such interplea, the said property shall be found to be the property of the defendant, A. Stewart, the property shall be delivered to said sheriff or his successor in office, whenever demanded, which said bond was approved by the sheriff, and, together with the affidavit, was by him returned with the writ issued in said suit of S. G. Dreyfus & Co. against said A. Stewart. That no affidavit of ownership of said

property or any part thereof, nor claim that the same was not liable to seizure on the order of attachment issued in the suit of J. F. Looney against A. Stewart as aforesaid was ever made and filed in said suit by the said W. W. Stewart, the plaintiff herein. That on the 27th day of July, 1893, judgments were duly rendered in this court against A. Stewart in favor of S. G. Dreyfus & Co. for $1,438.05 and J. F. Looney for $190 and costs and interest, and the attachments in said suits were sustained, subject to the rights of the said W. W. Stewart, as same might be hereafter determined; that one year after the rendition of said judgment, to-wit, on the 26th day of July, 1894, the interplea of W. W. Stewart, the plaintiff herein, in the suit of S. G. Dreyfus & Co. against A. Stewart, came on to be heard in this court, and, by consent of the parties, the court found "in favor of the plaintiffs, S. G. Dreyfus & Co., and against the interpleader, W. W. Stewart; that the property described in the return to the order of attachment in said suit, to-wit, the stock of merchandise, the five log wagons, the two-horse wagon and the thirteen head of stock horses, is and was subject to the attachment; that all of said property is and was of the value of $1,000; that, at the time of filing the interplea in said suit, said interpleader executed an interpleader's bond in said suit in the sum of $6,660, conditioned as provided by law, and retained possession of said attached property, and the court adjudged that said property be delivered to the sheriff, and if not delivered then, the clerk to issue execution in favor of the plaintiff against the obligors on the bond in the sum of $1,000," and half the costs expended. That on the —— day of November, 1894, an execution against the property of A. Stewart, based upon the judgment of J. F. Looney, was issued in due form of law by the clerk of this court, directed and delivered to the defendant, S. L. Harris, as sheriff of Lafayette county, for service, whereby he was commanded to satisfy the same out of the property of said judgment debtor subject to execution; that on the —— day of November, 1894, the said S. L. Harris, as sheriff, under and by virtue of said execution, levied upon the identical four log wagons previously levied upon and attached under the writ of attachment issued in the suit of Looney against A. Stewart, as

hereinbefore set forth, and which said attachment was by this court sustained, and all which said property was adjudged subject and liable to seizure and sale under said attachment levy on the trial of the interplea of the plaintiff herein; and after due advertisement, the said sheriff sold the said four log wagons to satisfy said execution in favor of J. F. Looney; and which said levy and sale constitute the levy and sale alleged, but which four log wagons so levied upon and sold, these defendants aver, were at the time subject to said levy and sale under the said execution.

And for a further defense, the defendants aver that the finding and judgment by consent, on the trial of the interplea set up in the complaint, as the ground upon which the plaintiff relies to recover in this action, was fraudulently intended, by the parties to said consent finding and judgment, to prevent and defeat the defendant, Looney, from subjecting any of said property in question in said action, to the payment of the judgment debt aforesaid, and thereby cheat and defraud him out of the same; that said finding and judgment was erroneous and void as to defendants, in this, that the court was without jurisdiction—first, to find the value of all the property claimed by the interpleader in said action to be $1,000, or any other and different sum than $3,288, the value of the same as ascertained and determined by appraisers duly appointed by the sheriff for that purpose, as provided by law; and, second, to adjudge the entire property to be subject exclusively to the lien of Dreyfus & Co., the first attaching creditor, for said sum of $1,000; that said property was of the value as appraised, and, if surrendered to the sheriff for sale, would have realized a sufficient sum to have paid the judgments of S. G. Dreyfus & Co. and the defendant Looney aforesaid; that if the defendants had not realized and sold the property in the manner and at the time they did, defendant Looney would have wholly lost his judgment, as said property was about to be fraudulently removed from this state, and the judgment debtor had no other property in this state out of which said debt could have been made.

The court sustained a demurrer to the second paragraph

of the answer upon the ground that it failed to state facts sufficient to constitute a good cause of action.

A witness testified that the four log wagons levied upon and sold by the sheriff under execution in favor of Looney *v.* A. Stewart are the identical wagons levied upon under the writ of attachment in the suit of S. G. Dreyfus & Co. *v.* A. Stewart. They were worth $250. The plaintiff paid to Dreyfus & Co. $250, the value of said wagons, on account of execution of his interpleader's bond and by reason of the sale of said wagons under execution on judgment in favor of Looney v. A. Stewart. This was all the evidence given in the case.

The court found that the four log wagons, at the time of the seizure and sale, were the property of the plaintiff, W. W. Stewart; that he was in possession under and by virtue of his interplea and bond in the suit of S. G. Dreyfus & Co. *v.* A. Stewart; that he was damaged, by their seizure and sale, in the sum of $258.75, and gave judgment accordingly. Defendants have appealed.

A. H. Sevier, for appellants.

The demurrer to the second paragraph of the answer should have been overruled. Fraudulent and collusive judgments are void, and are open to collateral attack. Black, Judg. §§ 291–293; 68 N. Y. 58. As long as an attachment continues in force, its lien is good against the property levied upon. Drake, Attach. 350; 33 Ark. 70. The sheriff's right to take the property under the second attachment was not affected by the dissolution of the first. Drake, Attach. 355.

Scott & Jones, for appellees.

The court properly sustained the demurrer. A levy upon an equity in personal property can not be sustained. 42 Ark. 236; 58 Ark. 289. This was the character of whatever claim Stewart can be said to have had to the property.

WOOD, J. The court erred in sustaining the demurrer to the second paragraph of the answer. Assuming, for the purpose of argument, that the allegations of said paragraph are true, it follows that the sheriff acquired control of the property as much by reason of the levy of the attachment in favor of

Looney as of that in favor of Dreyfus & Co., and it was his duty to retain control over it under said writ, as much so as under the attachment in favor of Dreyfus & Co., until he was legally deprived of such control. No bond was given in favor of Looney for the forthcoming of the property, in case his attachment was sustained. Consequently, in contemplation of law, the sheriff still had control of the property under the Looney attachment, when judgment was rendered sustaining same, and when execution was issued. The sheriff had the right to take the property by virtue of the lien of the Looney attachment, and to hold same under that attachment, and, if the appellee desired to retain possession of same against said attachment, he should also have given a forthcoming bond in favor of Looney. Moreover, there was nothing to prevent the sheriff from levying upon the property of A. Stewart, although in the possession of a third party, to satisfy an execution creditor of said Stewart. Because W. W. Stewart had given bond for the forthcoming of said property in an attachment proceeding was no reason why it should not be levied upon and sold under execution as the property of A. Stewart, if it really was his property, as it seems to have been. And, if it was not his property, and W. W. Stewart wished to test that matter, as against the execution creditor, there was nothing to prevent him from giving the bond required by Sand. & H. Dig., § 3088, which is as follows: "The sale of personal property upon which an execution is levied shall be suspended at the instance of any person, other than the defendant in the execution, claiming the property, who shall execute a bond to the plaintiff," etc.

It would not be the province of W. W. Stewart to say "This property is not subject to execution as the property of A. Stewart now, because it has already been attached in my possession as his property, and I have given bond to retain possession of same, and for its forthcoming in that case." That would furnish only the greater reason why he should not suffer the property taken out of his possession under the execution. He could not raise the issue for the prior attaching creditor, or for the debtor, that the property was not subject to execution. That would be a matter for the creditors and the

debtor to settle between themselves. If he claims the property, and wants to retain possession of same until the rights of property are are settled, the law points out the way, whether the property be taken under attachment or execution. Sand. & H. Dig., §§ 406, 3088. When he has pursued neither course, as against the process which is sought to be enforced in favor of Looney, he can not claim that the sheriff and the execution or attachment creditor are trespassers for taking the property of A. Stewart under such process.

Again, that part of the second paragraph of the answer which undertakes to set up that the judgment obtained by Dreyfus & Co. against W. W. Stewart was a fraud as to Looney, although not aptly and clearly stated, was sufficient on demurrer, and constituted a good defense to this action. Looney was not a party to that judgment. If, as can be seen from the statements in this part of the answer, the judgment fixing the value of the property attached and claimed by W. W. Stewart at $1,000 was obtained by the collusion of said Dreyfus & Co. and the said Stewart, for the purpose of enabling the said Stewart to pay off the Dreyfus judgment and retain property of the real value of over $3,000, according to the appraisers, and to remove the same beyond the reach of the sheriff, so that it could not be subjected to the Looney judgment, said proceedings would constitute a fraud against Looney, which he had the right to plead and to establish as a defense to this action. "Judgments," says Mr. Black, "entered into by the collusion or fraud of both parties to the action are void as to creditors, and may be attacked in any collateral proceeding by them." 1 Black, Judg. §§ 291–93.

Whatever this part of the answer lacked in the manner of statement to make it conform to the requirements of good pleading could have been corrected on motion. It showed a good defense. For the errors indicated, the judgment is reversed, and cause remanded with directions to overrule the demurrer, and for further proceedings.

KELLY v. PEOPLES' BUILDING & LOAN ASSOCIATION.

Opinion delivered October 29, 1898.

1. BUILDING ASSOCIATION—AMENDMENT OF ARTICLES.—Although the articles of association of a building and loan association require that a notice of a proposed amendment of such articles shall be given to each shareholder, a failure to give notice of such an amendment to a member will not invalidate the amendment if it was for the member's benefit, and he acquiesced in it. (Page 575).

2. SAME.—Where the articles of association of a building and loan association provided that members should have notice of all proposed amendments to such articles, an amendment which has the effect to take away the right of members to withdraw from the association at will is inoperative as to a member who had no notice of such amendment. (Page 577).

Appeal from Monroe Circuit Court.

JAMES S. THOMAS, Judge.

C. F. Greenlee, for appellant.

Appellant was in good standing, and was entitled to withdraw and be paid the value of his stock. 42 N. E. 1008; 48 N. E. 1016. An action at law is the proper one in such a case. 47 N. E. 739; 27 N. E. 543.

Chester M. Elliott and *W. T. Tucker*, for appellee.

The articles of association in force at the time of appellant's contract form part thereof. 148 N. Y. 281; 52 N. Y. 131; 39 N. Y. Sup. Ct. 73; 66 N. Y. 533; 94 N. Y. 104; 92 Hun, 572; 1 Mor. Corp. 96; 1 Beach. Corp. 521; 1 Thomp. Corp. § 1136. This being true, he has no contract right of withdrawal. The repealing amendment is binding upon appellant. 148 N. V. 281; [1893] 2 Ch. 311; 15 Misc. (N. Y.) 427; 31 Hun, 49; 1 Beach, Corp. § 323; 15 Misc. (N. Y.) 427.

BUNN, C. J. This is a suit for amount due on the withdrawal of plaintiff as a member of the defendant association, less certain credits allowed. Judgment for defendant company, and the plaintiff appeals to this court. The main question involved is, whether or not, under the articles of association and

by-laws of the company, the appellant had a right to withdraw when he attempted to do so, following the same up by the institution of this suit.

When the appellant became a member of the association in May or June, 1893, the articles and by-laws did not permit withdrawals of members of the class to which appellant belonged until the maturity of the stock, or until it had reached par value. In December following, an amendment to the articles was adopted by the association, in this language: "Members having certificates in class 'A' shall be entitled to withdraw the amount paid into the loan fund on the same, provided such certificates have been in force for three years or more, and that they are in good standing on the books of the association at the time the application for withdrawal is made." Then follows another section as to the allowance of interest. The appellant does not appear to have had any notice of the intention to present, or of the adoption of, the amendment quoted, until long after it was adopted, to which notice he was entitled under one of the articles of association which reads as follows, to-wit: "These articles of association may be altered or amended at the annual meeting, or any special meeting called for that purpose; provided, that a notice in writing stating the proposed alteration or amendment be mailed to each shareholder ten days before the day on which such meeting shall be held." A majority of us construe this language to mean that the notice required should be given in case of a regular annual meeting, as well as in the case of a special called meeting. There was no such notice given to appellant, as required, of the proposed amendment afterwards adopted in December, 1893, as stated; but since it was apparently for the benefit of appellant and all included in his class, his assent to it will be presumed; besides, he actually acquiesced in it, and in fact claims the benefit of it in this suit. It is therefore good as to him, and confers an additional vested right. *Kent* v. *Quicksilver Mining Co.*, 78 N. Y. 159. Under this amendment, the appellant, having been a member more than three years, and being clear on the books of the company, was entitled to a withdrawal, and thereon to receive such sums as the regulations allowed him,—in this instance $390, as he shows.

On the 10th of January, 1896, another amendment was adopted, which in effect repealed the one of December, 1893, last above referred to, and prohibited withdrawals by the appellant and members of his class, until the maturity of their stock. Of the pendency of this last amendment appellant had no notice whatever, neither did he know anything of it until the controversy arose as to his right to withdraw some months after its adoption. The repealing amendment manifestly took away from appellant such vested right as had been conferred upon him by the first named amendment of December, 1893.

After the appellant had been a member the required length of time, and when he stood fair on the books of the company, to-wit, on the 2d of May, 1896, he wrote to O. N. Whiting, secretary of the company, at Syracuse, N. Y., indicating to him his desire and intention to withdraw, and received an answer of which the following is a copy: "Syracuse, N. Y., May 6, 1896. W. E. Kelly, Brinkley, Ark. Dear Sir: We have yours of the second, and beg to say in reply that we have, so far as we are concerned, found no fault with you as collector at Brinkley. We have requested you once or twice to be more prompt with your remittances. Of course, if you wish to withdraw your stock, that is another matter. You are entitled to file your application for withdrawal at any time, and, upon receipt of notice of your intention to do so, we will send you the necessary blanks. No reason is necessary further than your wish."

Appellant testified further: "I at once notified defendant to send necessary blanks, and I would comply with all conditions to withdraw, but it (the defendant) refused to do so, but on the contrary denied my right to withdraw. After I had received their letter of May 6th, I thought there was no question about my right to withdraw, and that I would at once receive the amount I had paid in, with interest and dividends, according to (the) terms of articles of association and by-laws, and therefore retained $207.07, which I had collected for defendant, from M. Kelly, and applied the same on amount due me, and wrote to defendant, notifying it of this, and asked for balance due of $182.93 with interest, but it then refused to permit my withdrawal. After allowing credits for amount I received from

M. Kelly, the defendant is now due me $182.93, with interest, which is unpaid."

The amendment of 10th January, 1896, having the effect to take away a vested right conferred upon appellant by the amendment of December, 1893, and furthermore having been proposed and adopted without the required notice to appellant, the same is void as to him; and he had a right to withdraw at the time he endeavored to do so, notwithstanding the existence of the amendment, and was entitled, on such withdrawal, to the amount claimed by him, so far as the evidence shows; and the judgment against him was therefore erroneous.

The cases, to which our attention has been called, to-wit, *Englehardt* v. *Fifth Ward Loan Association*, 148 N. Y. 281; *Pepe* v. *City & Suburban Permanent Building Society*, [1893] 2 Ch. 311, are not strictly applicable to the case at bar. They are not apparently based on the same character of articles of association and by-laws,—that is, rules requiring notice, for instance—but all of them seem to contain a discussion of the question whether or not amendments passed according to the constitution and by-laws are binding upon the members, and this too when the subject of the amendments is merely the routine management of the business of the concern. Without stopping to discuss such a question, we simply hold that the notice required by the articles of association involved in this case falls within the category of the manner of proposing and adopting amendments, and must be complied with in order to bind the members. *Holyoke B. & L. Association* v. *Lewis*, 27 Pac. Rep. 872.

Reversed and remanded.

KELLER v. LEWIS.

Opinion delivered November 5, 1898.

PHYSICIAN AND SURGEON—NEGLIGENCE.—A surgeon who, on being called upon to treat a patient, informed him that he would be absent for two weeks, and that another surgeon named would attend to his cases in his absence, will not be responsible for the latter's negligence or want of skill in treating the patient during such absence, if there was no business relation between the two surgeons. (Page 580).

Appeal from Hot Spring circuit court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

The appellee sued the appellant for damages in negligently treating a broken arm of his son, for whom he sued.

The son, Lawrence B. Lewis, a boy 13 years old, fell and dislocated and otherwise injured an arm, and on the next day was carried from their home in the country, seven or eight miles, to Hot Springs to procure the services of a surgeon. He first sought Dr. Thompson, and, failing to find him, reached Dr. Keller's office, and Dr. Keller, informing him that he would leave that day, and be gone two or three weeks, and that in his absence Dr. Minor would attend his cases, proceeded to dress the wounded arm and shoulder, the same being so much swollen as to prevent an examination at the time. It was not shown that Dr. Keller and Dr. Minor sustained any business relations toward each other. There is a conflict of the testimony as to what directions Dr. Keller gave the parents of the boy at the time Dr. Minor was present, but the suit was against Dr. Keller alone. The case was such that, if there was negligence at all, it may have consisted either in misdirections of Dr. Keller, or in a failure to carry them out by the parents, or in the refusal of Dr. Minor to examine the wound when the boy was brought to him as directed by Dr. Keller, preferring to await the return of the latter.

Under this state of things, it became necessary for the defendant to ask an instruction defining his responsibility for

anything Dr. Minor may have done in the matter. This much of the facts will explain the opinion which follows.

The jury returned a verdict for the plaintiff in the sum of $2,000.

Cockrill & Cockrill, for appellant.

The testimony did not warrant the verdict. If a physician's unskilful treatment results in no injury, no recovery can be had against him. Whart. Neg. § 736. Experts testifying as to matters not known to laymen are to be taken as correct. 78 Fed. 442, 444. There is no evidence that pain, suffering or injury resulted from defendant's treatment or advice. 78 Fed. 442, 444; 176 Pa. St. 181, 206. The plaintiff, having failed to comply with appellant's instructions, can not recover. Deering, Neg. § 235. Recommending a physician does not make one liable for his negligence. 38 Mich. 501. The statement of plaintiff that appellant told him not to return under eight days is disproved, and is too improbable for belief. 84 Fed. 935, 938. A new trial should be granted because the verdict is so clearly against the weight of the evidence as to shock the sense of justice. 34 Ark. 632; 2 Ark. 360; 5 Ark. 407; 6 Ark. 428; 10 Ark. 138; *ib.* 638; *ib.* 491; 26 *id.* 369; 39 Ark. 491. The court erred in refusing to allow the expert, Dr. Steele, to express his opinion as to cause of the then condition of the plaintiff's arm. 1 Suth. Dam. § 441. The third instruction given for appellee was erroneous (45 Ark. 256, 263); as were, also, the fourth and fifth. The standard of reasonable care and skill is that ordinarily exercised by others in the same profession or calling. 48 Am. Dec. 482, note; 66 N. W. 894; S. C. 70 N. W. 750; 40 S. W. 261. A physician or surgeon attending gratuitously is liable for gross negligence only. 2 Sh. & Red. Neg. § 604. The tenth instruction for appellee is erroneous, in that it tells the jury that if they find for the plaintiff at all, they "will" take mental pain and suffering into consideration in estimating the damages. This instruction is not hypothetical. 14 Ark. 530; 31 Ark. 684, 689; 52 Ark. 45; 33 Ark. 350; 24 Ark. 540; 61 Ark. 155, 156. The verdict is excessive.

Wood & Henderson, for appellees.

The evidence clearly supports the verdict. The instructions of the court were correct. It was correct to tell the jury that reasonable care was to be measured according to the surroundings and facilities of the physician. 18 L. R. A. 627; 14 Am. & Eng. Enc. Law, 76–78 and cases. The seventh instruction is law. 14 Am. & Eng. Enc. Law, 81.

Cockrill & Cockrill, for appellant, in reply.

The plaintiff's failure to follow the surgeon's instructions bars his recovery. Deering, Neg. § 235; 35 N.E. 521; 95 Ind. 376. The appellant did not undertake to give appellee all the treatment required, and hence he is not liable for any neglect of the physician subsequently called in. 33 Atl. 389; 53 Ark. 503; 13 So. 638; 9 C. C. A. 14; S. C. 60 Fed. 365; 28 N. E. 266; 120 Mass. 432; 38 Mich. 501. The plaintiff's complaint is in tort, and can not be sustained by proof of the violation of a contract. 84 Md. 363, 381; 5 Watts, 355.

BUNN, C. J., (after stating the facts). The defendant asked the following instruction, which was refused by the court: "9. A physician is responsible for want of ordinary care and skill and this too, whether his services are given gratuitously or not. *But in this case, if plaintiff knew defendant was going away, and the services of the defendant were given gratuitously, he could only be held responsible for such treatment as he administered personally, and cannot be held for any negligence or want of skill in Dr. Minor.*" The sentence we have italicised is the only one demanding our consideration. The employment of Dr. Minor constituted an independent contract, and Dr. Keller is not responsible for his negligence or want of skill. *Myers* v. *Holborn*, 33 Atl. Rep. 389; *Hitchcock* v. *Burgett*, 38 Mich. 501. The error is a material one, for we cannot say how far it may have influenced the jury in arriving at the verdict on the whole case. There are other minor errors in instructions, but they are not prejudicial.

Furthermore, without intending to express any opinion as to whether there is evidence to justify a verdict for some amount or not, the verdict is manifestly excessive in amount,

evincing passion or prejudice in the jury, or else that they did not understand the court's instructions as to the damages they were to inquire into.

For the errors named, the judgment is reversed, and the cause remanded.

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MUTUAL RESERVE FUND LIFE ASSOCIATION *v.* FARMER.

Opinion delivered November 5, 1898.

1. LIFE INSURANCE—PAYMENT—PRESUMPTION.—In a suit upon a policy of life insurance which provided that the policy should not be in force until the first payment of the premium was made, where it was conceded by the insurance company that the fact of delivery of the policy raised a presumption of payment, proof that the general officers of the insurance company never received such payment is insufficient to rebut such presumption if it appeared that the local soliciting agent of the company had authority to receive such payment, and that he might have done so. (Page 586.)

2. SAME—APPLICATION—WARRANTY.—Where, in an application for life insurance, the examining physician made certain interpolations in the applicant's answers without the latter's knowledge, but with the consent of the insurance company's agent, the insurance company is estopped from relying upon the falsity of such interpolations as a breach of the warranty in the application. (Page 588.)

3. SAME.—Leaving unanswered a question in the blank application for insurance will not constitute a breach of warranty, especially where other answers indicate a want of knowledge on the subject. (Page 589.)

4. SAME.—Where an applicant for life insurance, warranting his answers to be true, was asked whether he had ever had any illness, and answered "No," and thereupon was asked for what disease he had been treated by a physician, and answered that he had not been sick in ten years, his answer to the second question will be held to qualify his answer to the first, and proof that he had been ill ten years before will not establish a breach of warranty. (Page 590.)

5. SAME.—Where an applicant for insurance was asked whether he had "had any illness, local disease, injury, mental or nervous disease or infirmity, or ever had any disease, weakness of the head, throat, heart, lungs, stomach, kidneys, bladder, or any disease or infirmity whatever," and answered that he had not had any of the diseases mentioned for ten years past, proof that he had taken chloroform with suicidal intent a year or two previously will not establish a breach of his warranty of the truth of his answers. (Page 591.)

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Jas. A. Gray and *Rose, Hemingway & Rose*, for appellants.

There was no evidence to support the verdict. The evidence shows that the insured knew of, and made no objection to, the answers written by Ellsworth. If this were not true, the insured *ought* to have read over the application, and he can not urge that reason to avoid the agreements therein. 58 Ark. 281; 117 U. S. 519; 62 Ark. 47. By making Ellsworth his agent in answering these questions, insured bound himself by his answers. 53 Ark. 222; May, Ins. § 122; 70 N. W. 86. These answers and statements in the application are binding on the applicant, and their falsity avoids the policy. 91 U. S. 50; 90 Va. 290; 18 S. E. 191; 58 Ark. 528; 18 Sup. Ct. Rep. 300; 120 U. S. 183; 60 Fed. 727; 58 Fed. 940; 132 N. Y. 331; 74 Hun, 385. The effect of failure to disclose required facts is the same as misstating them. May, Ins. § 201–4; Bliss, Life Ins. § 52. The first premium was not paid in cash, and hence the policy never attached. 102 U. S. 211. The insured never accepted the policy, and hence the contract is not binding on either party. 23 Wall. 85; 92 U. S. 377; 32 N. Y. 619; 71 Hun, 104; 51 Fed. 689; 28 *id.* 705; 30 *id.* 545; 53 *id.* 208; 26 Atl. 78; 30 Nev. App. 589; 6 Bush, 450; 18 W. Va. 782; 18 Minn. 448; 17 *id.* 153; 98 Mass. 539; S. C. 103 Mass. 78; 13 B. Mon. 400; 27 Pa. St. 268; 40 Mo. 42; 32 Md. 108; 4 Allen, 116; 15 So. 639; 4 Ark. 251; 11 *id.* 689; 17 *id.* 78; May, Ins. § 53; 1 Biddle, Ins. § 140; 35 Pac. 736; 32 Ark. 399; 1 McCrary, 578. It was error to give the fourth instruction asked by appellee. 6 C. B. (N. S.) 437; 2 Kent, 557; 2 Whart. Cont. § 657. The contract was wholly in writing, and hence its construction was for the court. 20 Ark. 583.

Wood & Henderson, for appellee.

The policy was delivered to the assured in his lifetime, and while he was in good health. The contract was complete when the acceptance was mailed. 57 N. W. 184; 40 N. J. L. 476; 43 N. J. L. 300; 9 How. 390; 28 N. Y. Sup. 794; 122 N. Y. 244; 5 Fed. 229; 30 Fed. 902; 47 Fed. 869; 29 N. J. L.

486; 6 Wend. 103; Bacon, Ben. & Life Ins. § 266, *et seq.* The evidence is sufficient to support the finding that the first payment was made as required. Appellee made out a *prima facie* case of payment by showing the unconditional delivery of the policy. 31 Fed. 322; 12 Wall. 285; 24 Am. Rep. 344; May, Ins. §§ 56–60, 359–360–360 a, 360 b, 360 d; 17 Minn. 153; 35 N. E. 193; Bacon, Ben. Soc. & Life Ins. § 276, 277; 40 Ill. App. 266; 36 Pac. 113; 23 Pac. 869; 22 Fed. 586; 20 Fed. 232; 42 N. E. 137; 20 Wall. 560. The failure of appellant to prove the non-existence of this fact, by the only witness who really knew the truth of the matter, must be construed as indicating the existence of the fact. 4 How. 242; 32 Mich. 394; 8 Porter (Ala.), 529; 27 W. Va. 16; 48 Mich. 465; 64 Pa. St. 120; 19 Am. & Eng. Enc. Law, 70, *et seq.*; Whart. Ev. § 1267; 7 Wend. 31, 33, 36; 10 Pick. 329; 8 Wheat. 407; 1 Greenl. Ev. § 51 and note. Appellant's actions after notice of death were such as to estop it to allege the non-payment, if such were the fact. 22 Atl. 665; 80 N. Y. 108; 15 N. W. 453; 1 Atl. 2; 53 Ark. 494; 96 U. S. 577; 41 Fed. 512; 95 U. S. 326. The evidence shows that there was no breach of warranty by failure of assured to fully and truly answer questions in application. There is nothing in the answers of the assured, taken as they were when he signed the application, which was untrue, or constituted a breach of warranty. 1 Bac. Ben. Soc. & Life Ins. §§ 204, 205, 205a; 6 Gray, 185; 24 Ohio, 345; 14 N. Y. 9; 59 N. Y. 557; 17 Am. St. Rep. 372; 120 U. S. 183; 43 N. J. L. 300; 21 Ohio, 176; 106 Pa. St. 28; 40 N. W. 386; 69 N. Y. 256; 25 Am. St. Rep. 182; 14 Otto, 199; 60 Fed. 236; 80 N. Y. 281; 36 Am. Rep. 617. Since the appellant placed it in the power of the agent to do a wrong, it must bear the consequences. 42 Fed. 30; 26 N. E. 1082; 35 N. W. 430; 28 N. W. 47; 43 N. W. 373; 40 N. W. 386; 22 N. E. 954; 14 N. E. 271; 12 N. E. 609; 25 Atl. 227; 64 Ark. 257. The solicitor and examining physician were the agents of the company, and not of the insured, in the preparation and forwarding of the application. 18 Pac. 291; 8 Pac. 112; 53 Ark. 222; 53 Ark. 497; 52 Ark. 11; 11 L. R. A. 341, and cases in note; 5 Cent. Rep. 211; 7 Western Rep. 90; 17 Hun, 95; 55 Miss. 479: 2 Hughes (U. S.), 531; 18 Blatchf. 386; 56

Ill. 402; 90 *ib.* 445; 93 *ib.* 96; 110 *ib.* 166; 109 Pa. St. 157; *ib.* 507; 69 Tex. 353; 43 N. J. L. 300; 39 Am. Rep. 584; 25 W. Va. 622; 8 S. E. 616; 13 Wall. 222; 21 Wall. 152; Bacon, Ben. Soc. & Life Ins. § 221, and cases in note 3; 21 Pac. 233; 28 N. W. 607; 12 Fed. 465; 14 Fed. 272; 58 Fed. 723. The fact that appellant had taken an overdose of chloroform, and had been treated and attended by a physician for same, does not constitute a breach of the warranties. 14 Otto, 197; 58 Fed. 945; 7 C. C. A. 581; 45 Fed. 455; 1 Central Rep. 134; S. C. 1 Atl. 340; 17 Wall. 672; 32 N. W. 610; 41 Fed. 506; 112 U. S. 250; 33 N. E. 107; 92 N. Y. 274; 44 Am. Rep. 372; 53 Ga. 535; 12 Western Rep. 715; 3 Cent. L. J. 302; 58 Hun, 366; Bacon, Ben. Soc. & Life Ins. §§ 234, 235, 199. The company is estopped to set up a defense based on the wrongful act of its own agent. 16 N. W. 430; 59 N. W. 247; 59 N. W. 943; 43 N. W. 373; 50 Pa. St. 331; 89 Pa. St. 464; 76 N. Y. 415; 62 Md. 196; 1 Comst. 290; 12 Fed. 465. See further as to estoppel and waiver:—41 N. W. 601; 16 Atl. 263; 51 Md. 512; 31 Am. 323; 41 Am. Rep. 647; 9 S. W. 720; 69 Fed. 71.

Jas. A. Gray and *Rose, Hemingway & Rose*, for appellant, in reply.

Mailing of the policy did not make it operative, because payment of the first premium was a condition precedent to the binding effect of the contract. Benj. Sales, § 320; 1 Biddle, Ins. § 151; 28 Fed. 705; 30 *id.* 545.

BUNN, C. J. This is a suit to recover on a policy of life insurance, and the defenses are several, and the first in order is that the policy, notwithstanding its delivery, under an expressed stipulation contained in the application for it, never in fact became operative. The stipulation referred to is in these words: "*That under no circumstances shall the insurance hereby applied for be in force until payment in cash of the first payment, and delivery of the policy to the applicant during his life and in good health.*"

The evidence in the case tended to show that the policy was placed in the mail at Hope, properly addressed to the insured at Hot Springs, early in the morning of the day in the afternoon of which the insured was taken with his last illness,

and that in due course it should have reached him before he was taken sick; and the court appears to have so found, and to have determined accordingly. This, of course, involves also the question whether or not the placing of a writing in the mail, properly addressed, with postage prepaid, as in this instance, is a delivery as a general rule, as the trial court held. As to this, we see no error, and the question is at last, does this case come under the general rule as to that particular? Or, in other words, was the first payment made before delivery, under special stipulations referred to above, so as to make the policy operative before the last sickness and death of the insured? All the other material issues in this case involve the breaches of special warranties. This one does not, but is a mere stipulation as to what shall not be a delivery so as to make the contract of insurance complete and effective.

The policy itself contains this recital: "*In consideration of the answers, statements and agreements contained in the application for the policy of insurance, which are hereby made a part of this contract, and of the payment of eighty dollars, as a first payment to be paid on or before the delivery of this policy, and the further payment of thirty dollars payable to the association within sixty (60) days from the date of this policy, for the general expense fund of the association, the Mutual Relief Fund Life Association does hereby receive Lucien Farmer, of Hot Springs, County of Garland, State of Arkansas, as a member of said association,*" etc.

Other than the presumption that may arise from this recital, taken in connection with the mailing of the policy and the receipt of the same by the family of the insured, if not by himself, there was absolutely no evidence of this first payment having been made at all, adduced on the trial. There is this to be said also that, besides Hartin, the agent who solicited for the insurance, and mailed the policy to the insured, and did all necessary things connected with the insurance, there was no one living who could testify as to this payment, since the officials of the company did not necessarily know whether or not it had been made; nor could the beneficiary, Mrs. Farmer. When Hartin was on the stand testifying, neither party asked him as to this payment, and he said nothing in reference

thereto. Each party seems to have been afraid of any answer on the subject he might make, and so the matter was left, each one claiming the benefit of the presumption that arises under such a state of things.

To guide the jury in concluding upon the evidence on this point, at the instance of the defendant company, the court gave the following instruction, which was in no way modified or affected by any other, to-wit:

"14. The possession of the policy by Farmer before his death is *prima facie* evidence that the first premium was paid, but it may still be shown that in point of fact it was not paid. The question for you to decide is whether the first premium was paid by Farmer while in good health; and in passing on this point you will fairly and impartially consider all the testimony in the case; and if you find from the preponderance of the evidence that the premium was not paid by Farmer while he was in good health, you will find for the defendant."

This certainly made a delivery of the policy a presumption that the first payment had been made, and cast upon the defendant company the burden of showing that in fact it had not been made. It showed by its officers, whose duty it was to have received the money had the same been paid to it, that they had never received it, and then the defendant, by a sort of counter presumption to rebut the presumption in favor of the plaintiff, referred to one of its by-laws, which made its agent and solicitor and the examining physician, in the collection of money, a representative and agent of the applicant for insurance, thus making the applicant responsible for money so paid, until it was actually paid into the treasury of the company. If this were all of it, it would seem that the former presumption would, in a way, be rebutted; but this not all of it, for, whatever may be the case in respect to other payments and collections of money, as regards the first payment the following clause in the contract between Hartin and the company, made subsequent to and in view of the by-law mentioned, makes Hartin the agent of the company, and not only so, but gives him authority, after paying the examining physician's fee out of it, to appropriate this first payment—in this case eighty dollars—to the payment of his own fee, thus:

"The compensation to be allowed said J. F. Hartin for securing said business on the year distribution deposit plan (presumably the kind of policy involved herein) shall be $8 for each $1,000 of insurance, payable out of the first payment thereunder, less the medical examination fee, which is to be remitted to the association with the application; or a receipt therefor from the physician must accompany the same."

The expression, "payable out of the first payment thereunder," especially when taken in connection with the manner of payment to the examining physician, makes it manifest that the agent had the right to retain as much of the payment as would pay his fee, which in this case is substantially the exact amount. Nor is this clause, so far as third parties are concerned, changed by the subsequent provision in the contract to the effect that the company might set-off against the agent's commission any debt it might have against him; but what follows indicates that subsequent commissions are mainly, if not exclusively, referred to in the provision. At all events, this part of the contract plainly makes Hartin the agent of the company in making the first collection, or rather authorizes him to act for himself, and in this he is not representing the applicant. The proof, therefore, that the payment was not in fact made to Hartin, we think, was insufficient to rebut the presumption of payment arising from the recital of the policy, and the jury's finding cannot be disturbed as to that.

The other issues raised spring out of the alleged breaches of the warranties in answers to questions propounded in the application to the applicant and answered by him through the agent, Hartin; he being, by a stipulation in the application, made the agent of the applicant, as is also the examining physician, as to all statements and answers in the application.

The following occurs in relation to the questions and answers of No. 15: "Q. How long since you consulted or were attended by a physician?" (This of course means how long since applicant consulted a physician concerning some disease or ailment of his own; probably such as are named in another question, preceding this, to-wit: No. 14, "Any illness, local disease, injury, mental or nervous disease or infirmity," and also

how long since he had been attended by a physician for such purpose.)

"A. Don't know (about ten years.)"

"B. State name and address of such physician?

"B. Name (P. H. Ellsworth.) Address (Hot Springs, Ark.)"

"C. For what disease or ailment?

"C. Have not been sick in ten years."

(This answer substantially conforms to the statement made in the first answer, "about ten years," included in parenthesis marks.)

"D. Give name and address of each physician who has prescribed for or attended you within the past five years, and for what diseases or ailments?

"D. Name————————, Address————————."

(This last question was not answered at all).

If the part of the answer to the first of this question we have quoted—"about ten years"—was made by the applicant, or by his authority, or his acquiescence in, or adoption of it, then it becomes one of his statements, which he warranted to be true. But it is undisputed that these words were inserted by Dr. Ellsworth, and, it appears, in the presence and with the knowledge of Hartin, after the application had been signed by the applicant, and the real controversy is, whether or not the applicant authorized or adopted them, and of this, whether or not he was so situated at the time as to have seen what was written by Ellsworth, or to have heard what was said in relation thereto between the doctor and Hartin, the agent, and understood it, and by his conduct adopted it as his statement. This may be said in a general way also as to insertion of his name and address by Dr. Ellsworth in the answer to the next question.

It is not within our province to consider whether or not these questions and answers were or are material. By contract and stipulation of the parties to the contract, each and every one of them is made material, and every answer is by agreement warranted to be true. So, then, the trial court had only to consider, under this head, whether or not any one of these answers was made, as it appears, by the applicant, and, if so,

whether any one of them was false. The applicant being dead, and he and Ellsworth and Hartin being the only persons present, or who may be shown to be present at the time, the only witnesses available to settle this fact were Ellsworth and Hartin. Their testimony is, apparently, somewhat conflicting; but we think it is more indefinite and uncertain than conflicting, for the difficulty at last is to say positively from their testimony, taken together, what really was the situation, and to say as much from the testimony of either one. We express no opinion as to what weight should have been given to this testimony by the jury and the trial court; only we cannot say that, as we view it, it was so much in favor of the defendant as to persuade us that the finding for the plaintiff by the jury on the point was the result of prejudice or passion.

The instruction on this point, given to the jury by the trial court, we think, fairly submitted to them the question whether or not the applicant consented to the insertion of the words by Dr. Ellsworth. On behalf of the plaintiff, the court instructed the jury as follows: "2. * * * and if said Ellsworth so wrote the said words after said application had been signed by the applicant, the said Lucien Farmer, and without the knowledge or consent of said Farmer, and if, after the said application had been so changed, the said Hartin, as such agent, forwarded it to the defendant at its home office for approval, and the said Farmer, at the time said application was so forwarded, did not know of such change, nor consent to the same, then the defendant is estopped from relying on the words so written by Ellsworth as a defense to this action." The defendant asked no instruction on this point, except one to the effect that the fact whether the applicant consented to the insertion by Ellsworth or not was not material, and this was refused, and we think properly so.

The applicant made no answer to question marked "D," but left the spaces for answers as to the name and address of the physician referred to blank. If that was thought to be important, the application for the policy should not have been accepted until the answers were made by the applicant Certainly, we could not say, under the circumstances, by this failure to fill out the blank for the answer, the applicant was suppressing

the truth, especially in view of his previous answers indicating a want of knowledge on the subject.

Were any of these answers of the applicant to the questions propounded to him in the application in fact false? And this question is narrowed down to this: Had the applicant ever had any illness, local disease, injury, mental or nervous disease or infirmity? And how long had it been since he had consulted or been attended by a physician? He answered that he had not been sick in ten years. The other question as to physician was answered by Ellsworth, applicant failing to answer the same. These answers were to questions numbered fourteen and fifteen, and on the evidence relating thereto the court, over the objection of defendant, gave the following instruction asked by plaintiff: "4. In determining whether the answer of Lucien Farmer to question fourteen of the application is untrue, you will consider the same in connection with answers to question fifteen; and if you find from the evidence that said Farmer, in his answer to question fifteen, intended to qualify his answer to question fourteen by saying that he had been ill, or had a disease or infirmity at some time more than ten years prior to that date, then, if it should be a fact that he had had a spell of bilious fever at some time more than ten years prior to the date of said application, that would not render the answer to question fourteen false or untrue."

The conflict between the statements of the applicant in answer to question fourteen, and his answer to question fifteen, if conflict at all, consisted in this: In answer to fourteen (whether or not he had ever had any of the ailments named) he said "No;" and in answer to the corresponding question in fifteen he said he had not been sick in ten years. We think it but fair to say that he meant that he had not been sick in ten years, and, in saying so in answer to fifteen, he intended to qualify his answer to fourteen that far, and as this apparent conflict appeared on the face of the application, the defendant should have refused to approve the application, if it was deemed important, and, in failing to do so, the point was waived, especially as the examining physician explained the nature of the ailment about ten years previously.

The last question, No. 12, was, "has the applicant ever

had any illness, local disease, injury, mental or nervous disease or infirmity, or ever had any disease, weakness of the head, throat, heart, lungs, stomach, kidneys, bladder or any disease or infirmity whatever?" This question was answered by the examining physician (whose answers the applicant made his own) by stating, in effect, that applicant had had none of the diseases mentioned within ten years.

On this particular point, Dr. John H. Gaines, a practicing physician of Hot Springs, was the only, or at least the principal, witness, and he states in substance that, about one year or more before the death of the insured, "I saw him (Farmer) in an insensible condition. The room [in which he was at the time] was full of the fumes of chloroform, and he was under its influence, from which he soon recovered. I laid him on the floor, but, before anything was done, I saw that consciousness was returning. He had not taken enough chloroform to be in a really dangerous condition. I think I gave him a hypodermic injection. There was a vial there with a chloroform label on it, which contained a small quantity of that drug. Before I went away he recovered consciousness, and had spoken rationally. I think I stayed there not more than fifteen minutes. This was a year or more before Farmer died. After he took chloroform he spoke to me once about it. Mentioned my services and his intention to pay for them. Said he regretted the act very much; that he was going to live a changed life, and be a different man. He never paid me anything. He was engaged in the fire insurance and real estate business. The chloroform he took would not permanently affect his health. I do not know whether he was sufficiently conscious to know that I was there. When called to go to see him, I was at my office nearly on the opposite side of the street. I think he would have recovered if I had not done anything for him."

This presents a question rather difficult, if not impossible, of solution. It is contended that the attempt to commit suicide (assuming that such was shown) was an exhibition on the part of the applicant which, had it been known to the company, would have certainly deterred it from accepting the risk. We are inclined to think that may be a sound conclusion. But that is not exactly the question. The question is, first, was

such *attempt*, or the *condition of mind* at the time which conduced to it, a nervous or mental disease, or any other disease named or contemplated in the question? The suicidal mania is held by many, and perhaps most, of the authorities on the subject to be a mental or nervous disease, and if the stage of mania has been reached, it would seem that that view of it is correct; but the proof of the isolated attempt in this case is meagre, while there is none as to a mania in the sense of disease. We know nothing of the circumstances which superinduced such an attempt, if such indeed was ever made, and therefore are not willing to say that applicant answered falsely the question propounded, in this view of it. If the *effect* of taking the chloroform is the real subject of this inquiry, we are not sure that such is an ailment in the meaning of the question. Nor are we sure, from Dr. Gaines' testimony, that the effect of the taking of the chloroform was so material as to become a subject of question and answer at all in the application.

In *Cushman* v. *U. S. Life Ins. Co.*, 70 N. Y. 72, quoted with approval by this court in *Reutlinger* v. *Providence L. Ass. Co.*, 58 Ark. 535, it was said: "In construing contracts, words must have the sense in which the parties used them, and, to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. By the questions inserted in the application, the defendant was seeking for information bearing upon the risk which it was to take, the probable duration of life to be insured. It was not seeking for information as to merely temporary disorders or functional disturbances, having no bearing upon general health or continuance of life." This disposes of the question also of Dr. Gaines' attendance.

The instructions, taken together, seems to have presented the case fairly well—at least we see no reversible error in the judgment, and the same is affirmed.

BATTLE, J., (dissenting). The contract of insurance sued upon provides that it shall not go into effect or become operative until the first payments due thereon should be made. I think the evidence fails to show that these payments were

made, and, consequently, the policy or contract never was binding, and was of no effect.

In the contract of insurance—calling and referring to it as such in this opinion for the sake of convenience—Lucien Farmer, the insured, warranted the statements and answers to questions contained in his application for a policy of insurance "to be full, complete and true," and agreed with the Mutual Reserve Fund Life Association, the insurer, that, if they were not full, complete and true, the policy or contract of insurance executed to him should be null and void. Were they full, true and complete? To the following four questions: "how long since you were attended by a physician," "state name and address of such physician," "for what disease or ailment," and "give name and address of each physician who has prescribed for or attended you within past five years, and for what disease or ailments, and date,"—he answered in his application as follows: to the first, "don't know;" the second he did not answer; to the third, "have not been sick in ten years;" and to the fourth he made no response. These questions and answers are contained in the application, which is dated "June 19, 1893." Sometime in 1892 Dr. Gaines, a physician, was called to see him, when he was under the influence of chloroform, and in an insensible condition. After this he spoke to the doctor about it; mentioned his services and his intention to pay for them; and "said he regretted the act very much; that he was going to live a changed life, and be a different man." If my memory be correct, this evidence is uncontradicted and unimpeached. If it be true, which I do not doubt, the answers to the questions are not full, complete and true; and the contract sued on is void.

In *Providence Life Assurance Society* v. *Reutlinger*, 58 Ark. 528, a covenant was contained in the policy similar to that contained in the contract sued on in this case. Among the questions propounded to the insured was the following: "When and by what physician were you last attended, and for what complaint?" To which he replied: "Never called a doctor in his life." In speaking of this question the court said: "In the last-mentioned interrogatory two questions were combined in one. (1) He was asked, 'when and by what physician were

you last attended?' (2) If so, 'for what complaint?' The object of asking 'for what complaint' was not to ascertain if he ever had any serious illness or personal injury. He had already answered a question propounded for that purpose in the negative. If such had been the object, it was wholly unnecessary to ask in connection with it, 'when and by what physician were you last attended?' The question takes for granted that if he had been attended by a physician, it was in a case of sickness;' and the words, 'for what complaint,' were added to ascertain what the sickness was, without regard to its being serious or trivial, and to show what kind of attendance of a physician was referred to. The obvious purpose of it was to ascertain the name of a person from whom information affecting the risk of insuring the life of Reutlinger could be derived."

The first three questions in this case which I have set out in this opinion are about the same as the one in the Reutlinger case. In this case the question was, "how long since you were attended by a physician?" In the Reutlinger case it was, when were you last attended by a physician? The difference in these parts of the questions is: in the former the words, "how long since," and in the latter, "when," are used. The information sought by each is the same. By the remainder of the questions in the two cases the insurer seeks to find out the name of the physician, and the complaint or ailment for which he attended. In this case, as in the Reutlinger case, the object of asking the question "for what disease or ailment" was not to ascertain if he ever had any serious illness or personal injury. He had already answered a question propounded for that purpose in the negative. If such had been the object, it was wholly unnecessary to ask in connection with it, "how long since you were attended by a physician," and "state name and address of such physician." The question takes for granted that if he had been attended by a physician, it was in a case of sickness; and the words "for what disease or ailment" were added to ascertain what the sickness was, without regard to its being serious or trivial, and to show what kind of attendance of a physician was referred to. Why ask the insured to "state name and address of such physician?" Why was the address of the physician demanded? The obvious pur-

pose of the three questions, as of the one in the Reutlinger case, was to ascertain the name of a person from whom information affecting the risk of insuring the life of Farmer could be obtained. The answers of the insured do not give the information which the first and third questions were obviously intended to elicit, and are not "full, complete and true" as the assured warranted them to be; and the contract sued on, according to its own terms, is null and void.

I think that the judgment of the circuit court should be reversed.

TAYLOR v. STATE.

Opinion delivered November 5, 1898.

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1. TAX SALE—AMENDMENT OF RECORD.—A county clerk, who was deputy of his predecessor, has no authority, after expiration of the latter's term of office, to amend the record of the list and notice of lands sold for taxes during said term by attaching thereto a certificate showing that such list and notice were duly published. (Page 599.)

2. SAME—CONCLUSIVENESS OF RECORD.—While the record of publication of a notice of tax sale and of the certificate thereof is made evidence of the facts therein contained (Sand. & H. Dig., § 6606), it is admissible to show that what purports to be such a record is a supposititious one, and that no such record is in existence. (Page 599.)

3. SAME—VALIDITY.—A tax sale is void where the county clerk failed to certify to the publication of the list of lands and the notice of sale, as required by Sand. & H. Dig., § 6606. (Page 600.)

4. SAME—POSSESSION.—The state has no constructive possession of unoccupied land under a void tax title. (Page 600.)

5. TRESPASS—POSSESSION.—In order to recover in an action of trespass, plaintiff must have either actual or constructive possession. (Page 600.)

Appeal from Greene Circuit Court.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

This action was brought, under the provisions of Sand. & H. Dig., ch. 85, p. 928, to recover damages for trespass upon

certain lands, which it was alleged the state owned, by cutting and removing therefrom certain timber and ties. The answer denied the taking of the timber and ties, as alleged in the complaint, and denied that the state was the owner of the land, timber and ties.

On the trial, over the objections of appellants, and to which they at the time excepted, the court permitted the appellee to introduce in evidence what purported to be a copy of the records of the state land office of "Forfeited Lands in Greene County," certified to be a true copy of such record under the hand and seal of the commissioner of state lands, and showing the forfeiture to the state, in three separate tracts, of the lands described in appellee's complaint, in the year 1892, for the taxes of 1891. Following such certificate was what purported to be a copy of a certificate from the clerk of Greene county that it was a true and correct list, and a copy of a second certificate from the same source that the same had been recorded. The appellee also introduced a certified copy of the records of the state land office, showing the donation of the lands by certain persons and the subsequent relinquishment thereof by them. Also a similarly authenticated copy of the records of the same office, showing a sale and conveyance of the lands mentioned in section 34 to J. L. Carroll by the commissioner, June 11, 1895, for $200, and of the south half of the land described in section 33 to W. J. Wood, March 25, 1895, for $100.

The appellee read in evidence the deposition of J. F. Ritchie and C. B. Myers, commissioner and deputy commissioner of state lands, who stated that, in making these two sales, all timber previously cut from the land was reserved.

A. C. Johnson, for appellee, testified that between January, 1895, and June 11, 1895, the appellants had cut from the lands described in appellee's complaint in section 34, 118,518 feet of timber, worth $1 per thousand, and 2,800 ties, worth 10 cents each; and between January 1, 1895, and March 25, 1895, they had cut from the lands described in appellee's complaint in section 33, 546 ties, worth 10 cents each. He had notified appellants that land and timber belonged to the state,

and in his capacity as deputy timber inspector had forbidden them cutting the timber.

The appellants then introduced the record of the list and notice of the sale of lands in Greene county in 1892 for the taxes of 1891, showing the lands described in appellee's complaint advertised for sale as delinquent for the taxes of 1891, in three separate tracts, to which record was attached a certificate showing the publication of said notice and list on "May 12, 1892, and May 19, 1892, the first insertion being 30 days before June 8, 1891, which was the date of sale." This certificate was dated May 12, 1892, and signed "T. B. Kitchens, Clerk, by J. R. Miller, D. C."

Appellants read in evidence the deposition of C. W. Stedman, who stated that J. R. Miller succeeded T. B. Kitchens as clerk of Greene county, and witness was deputy under Miller, having had no connection with the office and having done no work whatever therein during Kitchens' incumbency. He began working in the office in December, 1892, and continued until November, 1894. Witness here examined the record of the list and notice of the sale of lands in Greene county in 1892 for the taxes of 1891, and stated that he prepared the certificate of publication thereto attached, and Miller signed it after Kitchens was no longer clerk, after Miller was clerk and after witness began work for Miller as his deputy. Miller instructed him to prepare the certificate, saying that it had been overlooked.

A further statement of facts is unnecessary. The judgment was for appellee, and this appeal taken.

Block & Sullivan, for appellants.

The judgment against the bond was erroneous. Sand. & H. Dig., § 343; 37 Ark. 528; 54 Ark. 13. It was also error to give judgment against the sureties for an amount in excess of the amount secured. 9 Wheat. 702; 81 N. Y. 406; 18 Pac. 228; 70 Mo. 524; 10 *id.* 560; 22 N. W. 730; 6 How. 298; 61 N. Y. 39; 16 N. E. 254; 28 N. W. 157; 47 Am. Rep. 140. The clerk's certificate of forfeiture is the best evidence to show its contents, and the certified record from the land office was inadmissible for such purpose. Sand. & H. Dig., § 6627; 55 Ark. 196; 47 Ark. 298; 33 *id.* 833; 33 S. W.

879. If it had been admissible, it was not sufficient proof. No officer's certificate is evidence, unless made so by law. 61 N. W. 687; 28 S. W. 1056; 47 Ark. 298; 33 *id.* 833. The forfeiture was void because of illegal fees charged. 56 Ark. 93; 61 Ark. 36; Sand. & H. Dig., § 6614. Also it was inadmissible because the certificate of publication was not attached to the record at the time of sale. 34 Fed. 701; S. C. 140 U. S. 634; 55 Ark. 218. This omission of the clerk could not be supplied by him after his term expired. Mech. Pub. Off. §§ 396, 509; 10 Martin (La.), 479; S. C. 13 Am. Dec. 338; 76 N. Y. 316. Actual possession, or title sufficient to show a right of possession, in plaintiff was essential; and since the tax title is void, appellee must fail on this ground. 1 Ark. 448; *id.* 470; 8 *id.* 472; 10 *id.* 16; 14 *id.* 483; 26 Ark. 505; 44 Ark. 77; 1 N. Y. 528; 65 N. Y. 125; 71 *id.* 380; 12 N. W. 62; 17 N. W. 314; 38 N. W. 458; 21 Wall. 58; 20 Pac. 780; 58 N. W. 288; 8 Ark. 406–414; 11 Pac. 281; 13 N. W. 426; 35 N. W. 62. A constructive possession of premises cannot arise from a void conveyance. 53 N. Y. 432; 61 N. Y. 67; 57 Ark. 523; 60 *id.* 163.

E. B. Kinsworthy, Attorney General, and *Luna & Johnson*, for appellee.

The court found that appellants were trespassers, and the evidence introduced by appellants shows that the lands were forfeited to the state. Hence appellant has no standing in court (59 Ark. 370), and the state has proved *prima facie* title. The duly certified transcript of the records of the state land commissioner was admissible and sufficient evidence. Sand. & H. Dig., § 2886; 47 Ark. 298; 55 *id.* 286. No one except the original owner or some one claiming under him could be permitted to assail the tax title. Sand. & H. Dig., § 6627; 55 Ark. 196. A trespasser will not be permitted to show an outstanding title in a stranger. Sedg. & W. Tr. Tit. §§ 58, 477, 718; 2 Waterman, Tres. § 1066; 17 Pick. 388; 6 Pa. St. 210; 47 Am. Dec. 455; 43 *id.* 556, *et seq.*; 22 Ark. 82–87; 41 Ark. 17–21; 59 Ark. 370; Black, Tax Tit. § 248; 2 Greenl. Ev. § 618; 1 Ark. 472; 55 *id.* 217; 10 Ia. 587; 52 Conn. 50. The tax sale record can not be contradicted or impeached by parol. 61 Ark. 36; 33 S. W. 959; 55 Ark. 218.

Block & Sullivan, for appellants, in reply.

Trees cut without the landowner's consent belong to him, and the legislature has no power to take them from him and give them to one claiming under a merely colorable title. 21 Wall. 196; 12 N. Y. 209; 68 N. W. 173; 67 N. W. 918. None of the fees of the clerk for services under the revenue laws are to be paid by the landowner or charged to the delinquent tract. Sand. &. H. Dig., § 3310; 12 Ark. 60; 11 Nev. 382; 129 Mass. 135; 79 Wis. 89; 3 Edw. Ch. 56; 10 Minn. 296. The fee of the clerk for transferring the land on the tax books must be paid by the purchaser. 127 Ill. 431; 138 *id.* 590; 141 *id.* 215. The record, showing the lands to be forfeited, since it does not show that the prior essential requirements have been complied with, is not alone proof of the forfeiture. Black, Tax Tit. § 443; 55 Ark. 218; 18 So. Car. 538; 14 Minn. 355; 131 Ill. 537.

WOOD, J., (after stating the facts). It may be conceded that the certified copy of the original clerk's certificate of lands forfeited to the state for the non-payment of taxes made by the state land commissioner, which he states was made from the original on file in his office, was properly admitted in evidence, and that it was sufficient to show *prima facie* title in the state to the lands in controversy. Still, under the facts of this case, that would not enable the state to maintain this action. For it is shown by the uncontradicted proof that there was no certificate attached to the record of advertisement for the sale of the lands showing its publication, as required by Sand. & H. Dig., § 6606. Such a certificate was attached, but it appears that it was done long after the sale occurred, and long after the one who was clerk before and at the time of the sale had gone out of office, and the certificate that appears of record was made in his name and signed by his deputy, Miller, who was clerk at the time the certificate was attached. While the record of publication and the certificate thereof is made evidence of the facts in said list and certificate contained, and while said facts can not be controverted or supplemented by evidence *aliunde*, it is perfectly legitimate to show that what purports to be the record is supposititious, and that there was in fact none in existence.

As there was no record of the publication of these lands for sale, and no certificate thereof, according to the requirements of Sand. & H. Dig., § 6606, said sale was absolutely void, and the state acquired no title thereunder. *Martin* v. *Allard*, 55 Ark. 218.

Now, the statute under consideration only gives the right of action to the owner. Sand. & H. Dig., § 3895. The state in this case, it appears, was not only not the owner, but did not have either the actual or constructive possession of the land. Under the statute of some states, even a void tax title draws after it constructive possession of unoccupied land. But such is not our law. *Gates* v. *Kelsey*, 57 Ark. 523; *Woolfork* v. *Buckner*, 60 *id.* 163.

When the sovereign assumes the attitude of a litigant, in the absence of some statutory provisions to the contrary, she is subject to the same rules and principles as apply to other litigants who invoke the aid of the courts and the processes of the law to enforce their rights or redress their wrongs.

This court has repeatedly held that, in order to entitle one to maintain an action of trespass to realty, he must have either the actual or constructive possession thereof. He must have the legal title to, or be in the actual possession of, the land. *Ledbetter* v. *Fitzgerald*, 1 Ark. 448; *Wilson* v. *Bushnell*, 1 *id.* 470; *Smith* v. *Yell*, 8 Ark. 470; *Brock* v. *Smith*, 14 *id.* 433; *McKinney* v. *Demby*, 44 *id.* 74. See also *Merrick* v. *Britton*, 26 *id.* 505; *Gunsolus* v. *Lormer*, 12 N. W. (Wis.) 62; *Johnson* v. *Elwood*, 53 N. Y. 432; *Thompson* v. *Burhans*, 61 N. Y. 67; and other cases cited in appellant's brief from other states are instructive.

This statute does not broaden that doctrine. On the contrary, if anything, it narrows and restricts it by giving the relief provided to the owner. It requires, according to our decisions, the legal title to put one in the constructive possession of land. See Arkansas cases cited *supra*. We are of the opinion therefore that, in order to maintain the present action, the state should be required to show that she is the owner of the land upon which the alleged trespass occurred. If she were permitted to maintain the action upon a mere *prima facie* title, what would hinder the true owner from also maintaining the

action, and thus subjecting the trespasser to two actions and a double recovery for the one wrong?

The state having failed to show that she is the owner of the land, it follows that the court erred in its declarations of law. The judgment is therefore reversed, and the cause is remanded for new trial.

BATTLE, J., absent.

BUNN, C. J., (dissenting.) This is an action by the state against the defendants, Taylor and Routh, in the Greene circuit court, for cutting and removing timber from the lands in the complaint mentioned as the lands of the state, under the provisions of chapter 85 of Sand. & H. Dig.; the damages being laid at double the value of the timber alleged therein to have been cut and removed as aforesaid.

The state claims title by a tax forfeiture and sale for the taxes of 1891, made in the year 1892. The plaintiff exhibited with her complaint a certificate of the clerk of Greene county showing the said lands to have been struck off to the state at said tax sale, and also the certificate of the commissioner of state lands, showing the lands in controversy to be the lands so certified to the state, and also, in both instances that the certificates were of record.

The defendants answered, merely denying taking the timber and ties as alleged, and also denying title in the plaintiff. Evidence, in addition to the copies of the records, was introduced by the state as to the cutting and removal of the timber and ties by the defendants and the value thereof.

The defendants saved exceptions to the introduction in evidence of the copy of the records in the office of the commissioner of state lands, and then introduced in evidence the record of the list and notice of the sale of lands in Greene county, in 1892, for the taxes of 1891, showing the lands described in plaintiff's complaint advertised for sale as delinquent for the taxes of 1891 in three separate tracts, to which record was attached a certificate showing the publication of said notice and list on May 12, 1892, and May 19, 1892, the first insertion being 30 days before June 8, 1892, which was the date of sale. This certificate was dated May 12, 1892, and signed T. B.

Kitchens, clerk, by J. R. Miller, D. C. Defendants also introduced the record of lands of Greene county sold to the state in 1892 for the taxes of 1891, showing a sale of the lands mentioned in plaintiff's complaint in three tracts for the taxes of 1891 and penalty, together with the following charged against each tract as costs of sale, to-wit: Clerk's fees, 25 cents; advertising, 25 cents; and sheriff's fees, 10 cents,—aggregating 60 cents, some or all of which they claim to be overcharges. They also read in evidence the deposition of C. W. Stedman (deputy of Miller who succeeded Kitchens as clerk of said county) who had not served at all under Kitchens, showing that, at the instance of Miller, he himself made out or signed the certificate of the notice of sale, Miller saying at the time that it had been overlooked.

Without going into an inquiry as to whether or not any of these defects, or all of them, had the effect of invalidating the tax sale and forfeiture to the state, we address ourselves to the task of ascertaining whether or not a wilful trespasser, claiming neither title nor right of possession, is permitted to allege and show defects in a plaintiff's title which is good on its face, and therefore makes a *prima facie* case for him; and, secondly, whether such a trespasser is permitted to show a defect in the state's tax title, good on its face, by testimony showing the omission or neglect of officers in the proceedings anterior to the sale.

The court decided in *Cairo & F. R. Co.* v. *Parks*, 32 Ark. 131, that section 5206, Gantt's Digest, cut off all defenses against a tax deed except the few therein named; and that, in so far, the section was unconstitutional, upon the ground that the deed, except in the respects named, was made conclusive evidence. Subsequently the legislature made changes in corresponding sections of our revenue laws, by making the recitals in deeds *prima facie* evidence only; and also in giving the right and privilege to him who was the owner at the time of the sale, or who had become the owner by purchase or otherwise from the state or federal government, or one holding under the owner (but to no others), to contest the tax title by showing that he had in fact paid the taxes, and through mistake of the officers the same were sold notwithstanding such payments; or that the

officers selling the same had been guilty of fraud, or fraud in the purchaser. Being already privileged to show that his land was not subject to the tax, these provisions were supposed to cover any meritorious defense which an owner might have against the forfeiture and sale of his lands, and hence, while all decisions subsequent to the one cited refer to it, yet they all hold the amended statute (see sections 6623, 6624 and 6625, Sand. & H. Dig.), as cutting off only defenses on the ground of mere irregularities not mentioned in their notices, and hence, with that construction upon them, the present sections are not unconstitutional in any respect. *Radcliffe* v. *Scruggs*, 46 Ark. 96; *Townsend* v. *Martin*, 55 Ark. 192.

While this court has gone to the full extent of permitting attacks to be made on tax deeds, yet no case is found where this right is given at all to any one except the owner or one holding and claiming under him, for he is the person named in the acts as the person who will be permitted to make these attacks. This being the state of the law, can it be said that a wilful trespasser can defend at all? He surely has no merit in any defenses he may make, and it is only because of the meritoriousness of any defense that the strict rule of the statute has been modified by the courts.

In ordinary suits in ejectment, notwithstanding the old rule that a plaintiff must rely upon the strength of his own title, and not upon the weakness of that of his adversary, yet the rule has been growing more and more relaxed, so that, in the modern state of the law, it is a mooted question whether a wilful trespasser will be allowed to contradict a *prima facie* title, because of the fact that, however successful he may be in showing the plaintiff's title is not the better, he can never show that he has any. But it is unnecessary to discuss this phase of the question.

If the defendant trespasser desires to protect himself from claims for damages from two claimants, it is quite easy for him to have the owner made a party to the suit, and indeed the trial court should have done this, even without his motion.

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HIGGINS v. GAGER.

Opinion delivered November 5, 1898.

1. STATUTE OF FRAUDS—PAROL LEASE of land for the term of one year, to commence at a date subsequent to the making of the contract, is valid under the statute of frauds (Sand. & H. Dig., § 3469, sub-div. 5). (Page 605.)

2. SAME—CONTRACT NOT TO BE PERFORMED WITHIN YEAR.—Where a parol lease of a saloon adjoining the lessor's hotel, to commence in the future and to continue for one year, stipulated that the lessor should not sell cigars during the lease, such stipulation is within the provision of the statute of frauds relating to contracts not to be performed within one year (Sand. & H. Dig., § 3469, sub-div. 6); and, the consideration being entire, the contract is not enforcible. (Page 607.)

Appeal from Craighead circuit court, Jonesboro district.

FELIX G. TAYLOR, Judge.

E. F. Brown and *N. F. Lamb*, for appellants.

An oral agreement for the lease of real estate for a year, to commence in the future, is invalid under the statute of frauds. Sand. & H. Dig., § 3469, sub-div. 5 and 6; 1 Ld. Raym. 736; Browne, Stat. Fr. § 33; 20 So. 77; 43 Minn. 166; 9 So. 164; 19 Mo. App. 66; 40 *ib.* 251; 45 *ib.* 401; 3 Pac. 573; 4 Cush. 42; 3 Atl. 800; 22 Ill. 248; 3 Mon. 247; 22 Kas. 436; 31 Ga. 507; 19 Ill. 576; 78 Ill. 125; 50 Ala. 411; Wood, Stat. of Fr. 45; Tayl. Landl. & Ten. § 30 and note. The agreement, so far as it relates to personal property, is not binding. Sand. & H. Dig., § 3469, sub-div. 6; Wood, Stat. Fr. § 269; Browne, Stat. Fr. § 282. The agreement in respect to keeping the door open is a contract for an easement, and is within the fourth section of the statute of frauds. Sand. & H. Dig., § 3469; 110 Ind. 117; 2 Met. 98; Wood, Stat. Fr. § 3, p. 5; Browne, Stat. Fr. 232; 54 Ark. 519. The consideration being entire, the contract must fail *in toto*. 22 Ark. 158; 30 Ark. 186; 52 Ark. 275; 63 Ark. 187; Browne, Stat. Fr. §§ 140–147 and cases; 2 Pars. Cont. 517–521; 6 Gray, 500; 6 Cush. 508; 37 Vt. 361; 13 Wend. 53; 23 N. E. 1018; 67 Ill. 469; 18 Ill. App. 62; 45

Pac. 102; 30 Pac. 1022; 59 Pa. St. 420; 56 Fed. 61; 35 S. W. 1053; 5 Metc. 452; 66 Pa. St. 351.

S. R. Simpson and *J. C. Hawthorne*, for appellee.

A parol lease for a year can be made to commence in the future. 5 N. Y. 465. In such a case the year begins with the lease, and not at the time of the contract. 8 N. Y. 115; 10 N. Y. 479; 64 N. Y. 518; 5 Lawson, Rights, Rem. & Pract. § 2325; 2 L. R. A. 847; 63 Ga. 475. The agreements as to selling cigars, etc., were only bargains made in connection with the occupancy of the rooms, and the sixth section of the statute of frauds does not apply. Wood, Stat. Fr. § 192–3, 215–16; 6 Gray, 500; 6 Cush. 508; 11 Metc. 411; 97 Mass. 208; 9 Gray, 168. The verdict of the jury is conclusive of this contion of appellant. The agreement to keep the door open was a license, and not an easement.

WOOD, J. Appellants, on the 15th day of December, 1893, entered into a contract with appellee, which is stated by appellee as follows: "We made a contract whereby defendants [appellants] were to pay me $55 per month, cash in advance, from January 1, 1894, during the entire year, for the use of the saloon room adjoining the hotel office of the Gager House, the small room back of the saloon room, one billiard table, one pool table, cues, racks, balls, wires for each, and other fixtures accompanying the same, and I was not to sell cigars in the hotel office, and was to leave the door between the hotel office and the saloon room open. The consideration was entire for all the property, and was not in any manner apportioned to the different items." Appellants failed to take the property. Appellees sued them, and they set up in defense the statute of frauds. Can appellee recover?

First. The provisions of the statute of frauds bearing upon the question are as follows: "No action shall be brought: * * * * *Fifth*. To charge any person upon any lease of lands, tenements or hereditaments for a longer term than one year. *Sixth*. To charge any person upon any contract, promise or agreement that is not to be performed within one year from the making thereof, unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and

signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized." Sand. & H. Dig., § 3469.

The fifth sub-division applies to the lease of lands only, while the sixth applies to all other contracts, promises, agreements, etc., than those appertaining to lands.

The sixth sub-division was not intended to apply to contracts concerning the lease of lands at all; for, if it applies to contracts concerning the lease of lands, as well as to all other contracts, then it is obvious that the fifth sub-division was wholly unnecessary. According to familiar canons of construction, we are not to conclude that different parts of a statute mean and include the same thing, when they are susceptible of different and independent meanings, and may embrace different subjects.

The fifth sub-division, read independently and consecutively with the qualification which properly concludes each of the sections, is as follows: "No action shall be brought to charge any person upon any lease of lands, tenements or hereditaments, for a longer term than one year, unless the contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized." When the section is thus read, as it should be, it is clear that leases for a shorter term than one year are not within the terms of the statute, and hence need not be in writing. It will be observed that the words "from the making thereof" are not used in the fifth sub-division. They were doubtless omitted for the very purpose of excepting from the purview of the statute verbal contracts to lease lands for one year or less, thus leaving such contracts valid, as they were at the common law, and thereby having the law to conform to what was the custom of the people of this state as to such contracts. At any rate, *ita lex scripta est.* The language of this (fifth) sub-division clearly has reference to the duration of the term from the time the tenant is to commence to occupy the premises, and not from the time the contract is made. There is not a word in the statute

to warrant the conclusion that "the time between the making of the lease and its commencement in possession" is to be taken as a part of the term granted by the lease.

Life is too short and time is too precious to review the many conflicting authorities, and to expatiate upon the vast and varied learning in the books upon this subject. The view we have expressed is supported by the better reason and the highest courts of several states. *McCroy* v. *Toney* (Miss.), 2 L. R. A. 847; *Steininger* v. *Williams*, 63 Ga. 475; *Young* v. *Dake*, 5 N. Y. 463; *Becar* v. *Flues*, 64 N. Y. 518; *Sobey* v. *Brisbee*, 20 Ia. 105; *Jones* v. *Marcy*, 49 *id.* 188; 2 Reed, Stat. Fr. § 813, *et seq.*, where the question is discussed, and authorities pro and con cited. The contract as to the lease of the rooms, had it stood alone, was good.

Second. What was the effect of the stipulation of the lessor not to sell cigars in the hotel office? This clearly came within the provisions of sub-division six, *supra*, prohibiting suit upon any contract, promise or agreement that is not to be performed within one year from the making thereof, unless in writing. The contract was made December 15, 1893. It was to commence the 1st of January, 1894, and to continue one year; so that the agreement to refrain from selling cigars was not to be performed within one year from the making thereof. In *Myer* v. *Roberts*, 46 Ark. 85, this court said: "But a contract for personal services to continue and hold the parties together for a longer period than one year is plainly within the statute. Thus, if at Christmas I orally hire a servant for a year, to begin from New Year's day, when he presents himself at the time appointed in fulfillment of that contract, I am not legally bound to receive him into my service. * * * Nor does it make any difference that the contract, if for more than a year, is subject to determination sooner on a given event." The object of the statute, says Pollock, C. B., in *Dobson* v. *Collis*, 1 Hurl. & Nor. 81, "was to prevent contracts not to be performed within the year from being vouched by parol evidence, when, at a future period, any question might arise as to their terms," and that a contract was not the less a contract not to be performed within a year because it might be put to an end within that period. The contract in *Myer* v. *Roberts*,

was for personal services, to do certain work, for a period longer than one year. The contract here was to refrain from doing a certain thing. Some of the courts have distinguished between an agreement to do a thing and an agreement not to do a thing, for a certain definite time, more than a year. Thus in *Doyle* v. *Dixon*, 97 Mass. 208, where the action was upon an oral agreement that defendant would not engage in a certain trade, at a certain place, for the term of five years, the court held that the agreement was not within the statute, because it was fully performed if the promisor performed it as long as he lived, and that the death of the promisor completed the agreement. We are unable to concur in that view. It is not proper to speak of a contract not to do a thing for a certain period, which is not to be performed within one year from the making of the contract, as fully performed if the promisor dies, after entering upon the performance of his contract, within the year from the time the contract was made. The contract in such event has been certainly terminated, but not performed or completed, within the contemplation of the parties at the time of making the contract. "Where the manifest intent and understanding of the parties, as gathered from the words used and the circumstances existing at the time, are that the contract shall not be executed within the year, the mere fact that it is possible that the thing to be done may be done within the year will not prevent the statute from applying. * * * It is not enough that the thing stipulated may be accomplished in a less time" by reason of the death of the promisor. The accomplishment of the thing agreed upon must be a performance of the contract according to the understanding of the parties. Browne, Stat. Fr. § 281; *Farwell* v. *Tillson*, 76 Me. 227; Wood, Stat. Fr. § 272.

We agree with the author (Mr. Browne) that the distinction between an agreement to do a thing and an agreement not to do a thing for a definite term of years is quite unsubstantial; for, as he says, "in each case the promisor undertakes that, during the stipulated term of years, he will submit to and observe a certain obligation, which the agreement imposes upon him; and in each case, and in the same way in each case,

his death only makes the performance of that obligation for the residue of the stipulated time impossible." Browne, Stat. Frauds, § 282 b.

The stipulation of Gager to refrain from selling cigars being within the statute of frauds, how does it affect the contract as a whole? The proof is uncontroverted that the agreement not to sell cigars was an item of the contract, and, in the language of some of the witnesses, a "valuable and substantial feature." Gager himself testified that the consideration was not in any manner apportioned to the different items. In other words, the contract was entire and indivisible. In view of this evidence, there would be nothing to justify a finding that the agreement to sell cigars was not a substantial part of the contract. The law is well settled that where the several stipulations are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the whole, or that where a distinct engagement as to any one stipulation cannot be fairly and reasonably extracted from the transaction, no recovery can be had upon such stipulation, however free from the statute of frauds it may be. Browne, Stat. Frauds, § 140.

The suit was upon the contract as a whole. Where the consideration is single and entire, the contract is entire (*McQueeny* v. *Phœnix Ins. Co.*, 52 Ark. 275); and, of course, if one of the substantive stipulations is within the statute of frauds, the whole contract must fail. *Phœnix Ins. Co.* v. *Public Parks Amusement Co.*, 63 Ark. 187, and authorities cited in appellant's brief.

Inasmuch as this settles the controversy presented by this record, we deem it unnecessary to discuss the question raised as to the other items of the contract. The court erred in refusing requests for instructions which presented the view we have expressed.

Reversed and remanded.

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DICKINSON v. THORNTON.

Opinion delivered November 12, 1898.

1. EJECTMENT—AFTER ACQUIRED TITLE.—A title acquired after the commencement of an action of ejectment will not support the action. (Following *Percifull* v. *Platt*, 36 Ark. 456. (Page 612.)

2. SAME—TITLE.—A plaintiff in ejectment is not entitled to recover where she introduces in evidence a tax deed showing *prima facie* title in a stranger, without showing its invalidity, or tracing title to herself therefrom. (Page 612.)

Appeal from Chicot Circuit Court.

MARCUS L. HAWKINS, Judge.

Rose, Hemingway & Rose, for appellant.

The court erred in allowing appellee to introduce in evidence the complaint in another action to which appellant was not a party. 21 Ark. 329. Where one is led into a contract by fraud, he must repudiate it as soon as it is discovered. 26 Ark. 28; 17 Ark. 228; 91 U. S. 592; Bigelow, Fraud. 434. In order to invoke the statute of limitations, a party's holding must have been adverse. 48 Ark. 312; 38 *id.* 181; 13 Ark. 143; 16 *id.* 628; *id.* 671; 27 *id.* 222; 44 *id.* 452; 17 *id.* 77; 30 *id.* 640; 47 *id.* 66. A tenant's holding is not adverse to his landlord's title. 33 Ark. 633; 42 *id.* 118. An entry upon land and cutting wood and timber therefrom by one claiming to do so as owner is sufficient to break the continuity of possession. Wood, Lim. § 270. The fourth instruction given for defendant is erroneous. 44 S. W. 715. A tenant will not be allowed to set up against his landlord's claim an outstanding title which existed before the relation began. 31 Ark. 470. The settlement was a valid one. 62 Ark. 342; *id.* 621.

Jno. C. Connerly, for appellees:

The bill of exceptions was not signed within the time limited therefor. 38 Ark. 28; *ib.* 216; 33 Ark. 568; 42 Ark. 288; 39 Ark. 580; 48 Ark. 110.

Rose, Hemingway & Rose, for appellant, in reply.

The record shows that the bill of exceptions was signed in time. The motion of defendant asking the court not to sign the bill does not appear in the bill of exceptions, and is not before this court. 34 Ark. 384; 33 Ark. 305; 40 Ark. 114; 33 Ark. 830. Since the signing of the bill of exceptions is not an act properly of record, the statement of the bill of exceptions must control that of the record in this matter. 22 Ark. 365; 37 Ark. 370; 40 *id.* 172; 42 *id.* 278. The failure to sign was capable of amendment. Sand. & H. Dig., § 5769; 53 Ark. 250; 59 Ark. 54.

BATTLE, J. On the 30th of June, 1891, this action was instituted by Mrs. M. L. Dickinson against Joseph Thornton, to recover possession of a certain tract of land described in her complaint. The defendant denied her title and right to the possession thereof, and alleged that the land was forfeited to the state of Arkansas on account of the non-payment of the taxes assessed against it for the year 1871; that it was donated by the state to one Peter Jones; and that he purchased it from Jones.

In March, 1895, the issues in the action were tried by a jury, and a verdict was returned, and judgment was rendered, in favor of the defendant for the land.

In the trial before the jury evidence was adduced tending to prove that the defendant, in January, 1894, signed and delivered to the plaintiff an instrument of writing whereby he admitted that the land was the property of the plaintiff, and that she was in possession; and thereby undertook to authorize the circuit court, in which the action was pending, to enter a judgment, at any subsequent term, in favor of the plaintiff for the same. It is stated in the writing that the plaintiff, in consideration of the age and infirmity of the defendant and his wife, agreed to grant to them the right to use and occupy certain two acres of the land for and during their natural lives. But the instrument of writing was not signed by her. It appears that the defendant afterwards repudiated the writing, and refused to comply with its terms, and continued to claim and hold the land as his own; and that the plaintiff never demanded

that judgment be entered according to the terms, but used it only by reading it as evidence in the trial to prove what is admitted therein. Consequently, we cannot consider it, except to determine how far it serves the purpose for which it was read.

Plaintiff offered to read as evidence a deed executed to her by the clerk of the county court of Chicot county, in which it appears that the land in controversy was sold for the taxes of 1890, on the second Monday in June, 1891; but the court would not permit it to be read. In this the court did not err. The sale having been made and the deed executed after the commencement of the action, it was inadmissible. *Percifull* v. *Platt*, 36 Ark. 456.

The undisputed evidence in the case proves that the defendant and his wife occupied the land as a homestead at the commencement of this action, and thereafter continued to occupy it as such until they were dispossessed by a receiver appointed to take possession of it by the circuit court. In the progress of the trial plaintiff read as evidence a deed executed by the commissioner of state lands to one George E. W. Smith on the second day of February, 1887, whereby it appears that the land in controversy was forfeited to the state of Arkansas on account of the non-payment of the taxes assessed against it for the year 1881, and that it was donated to Smith. No evidence was adduced to prove that the forfeiture was in any way illegal or void. It is true that the record shows that the plaintiff read as evidence receipts of the collector of revenue for taxes paid by her, but they do not appear in the records, and it is not shown for what years the taxes were paid. The evidence having failed to show that the forfeiture to the state was invalid, or that the lands had been redeemed, or that the plaintiff had, since the forfeiture, acquired title, the deed from the state to Smith was conclusive evidence in the trial that the plaintiff was not entitled to recover the land. For she must recover on the strength of her own title, and not upon the failure of the defendant to prove that he is entitled to possession.

Plaintiff assigns many errors and insists that the judgment in this action should be reversed, but, as it is right upon the whole record, and no verdict could have been properly return-

ed, except that upon which it is based, it is not necessary for us to consider them.

Let the judgment be affirmed.

WOOD, J., being disqualified, did not participate in the decision of the questions in the case.

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WATERS v. TOWNSEND.

Opinion delivered November 12, 1898.

1. BOARD OF HEALTH—POWER.—A board of health, in abating a nuisance, is not exercising either judicial or legislative power. Page 615.)
2. SAME.—A city council may confer upon its board of health power to abate nuisances dangerous to the public health. (Gaines v. Waters, 64 Ark. 609, followed). (Page 615.)

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

Appellee, J. A. Townsend, was the owner of a house and lot in the city of Hot Springs. The board of health of said city, composed of W. W. Waters and other appellants, caused this house to be torn down and removed. Townsend thereupon brought this action against them to recover damages occasioned to him by the removal of such house. The defendants for answer alleged that, by the laws and ordinances of the city of Hot Springs, they constituted the board of health of said city, charged with the duty of preserving the sanitary condition thereof, and with the removal of nuisances dangerous to the health of the inhabitants. It was also alleged in substance that the house in question was a nuisance; that it was in a dilapidated, decayed and filthy condition; that it was used in part as a cheap boarding house; that during a recent epidemic of small-pox many cases of such disease had existed among the inmates of such house, and that, by reason of the condition of said house, it was impossible to disinfect the same and render it safe for human occupancy; and that said house was a constant

source of danger to the inhabitants of said city, and that its removal was necessary. There was evidence at the trial tending to support the allegations of the answer.

The circuit judge, among other instructions, gave at request of plaintiff the following instruction, to which defendants objected and afterwards duly excepted: "4. The law provides that the city council, by proper proceedings, may abate a nuisance, but the city council had no authority to delegate to the board of health the power to say that the plaintiff's house was a nuisance, and then to tear it down as such, without some ordinance or resolution of the city council declaring it to be a nuisance and directing its abatement as such. And if you find that the defendants, acting in their official capacity as the board of health, passed a resolution declaring said house a nuisance, and, without further authority from the city council, had the same destroyed, their acts in so destroying said house were unauthorized, and they are liable therefor as individuals." The same view of the law was conveyed in other instructions given by the presiding judge, but it is unnecessary to set them out. There was a judgment in favor of plaintiffs, from which defendants appealed.

Greaves & Martin, for appellants.

The city council has power to authorize the board of health to abate nuisances. 44 S. W. 353. As to extent of authority of private persons to abate nuisances, see Bish. Non-Cont. Law, §§ 430, 754, 755, 756, 1322, 1323; 1 Am. & Eng. Enc. Law (2 Ed.), 81.

Wood & Henderson, for appellee.

Municipal corporations have only the powers delegated to them by the government. 108 U. S. 110; 145 U. S. 135; 27 Ark. 467; 45 Ark. 454; Wood, Nuis. 820; 13 Am. Dec. 100. The authority to abate nuisances, being of a legislative character, can not be delegated. 15 Am. & Eng. Enc. Law, 1043, and note; 29 Am. Rep. 105; 30 Am. Rep. 776; 37 Am. Dec. 271, and note; 96 Am. Dec. 311, and note; 84 *id.* 314; 79 *id.* 686; 37 *id.* 627, 628, 629; 37 Am. St. Rep. 522; 16 Am. St. Rep. 813; 19 *id.* 658. The court's instructions were correct. Wood, Nuis. 794, 795, 816; Cooley, Torts. 46; 1 Am. & Eng.

Enc. Law, 80. The abatement was excessive, even if it had been at all justified. 1 Am. & Eng. Enc. Law, 84, 85, and notes; 16 Am. St. Rep. 13; 1 Greene (Ia.), 247; 50 Wis. 681; 26 Am. Dec. 444; 14 Pa. St. 306; 25 Pa. St. 503; 24 Ia. 35; 92 Am. Dec. 458; Wood, Nuis. 819.

RIDDICK, J., (after stating the facts). The question presented by this appeal is, whether a city council can confer upon the board of health power to abate nuisances dangerous to the public health. The circuit judge charged the jury at the trial that the city council had no such power, but that was before the case of *Gaines* v. *Waters* was determined by this court. We said there that the "contention that the city council could not delegate to the board of health the power to determine judicially that a certain structure is or is not a nuisance has no bearing on the case, for the reason that the council itself had no such power, nor does the board of health, in abating nuisances, exercise judicial powers, within the usual meaning of such term." *Gaines* v. *Waters*, 64 Ark. 609; *Cole* v. *Kegler*, 5 Am. & Eng. Corp. Cases, 361, and note.

We think it equally clear that counsel for appellee are mistaken in their contention that the power to abate a nuisance is a legislative power. "Legislative power is the power to enact laws, or to declare what the law shall be," (Anderson's Law Dictionary.) It is the power to enact new rules for the regulation of future conduct, rights and controversies. Cooley on Const. Lim. 110–112. It is very plain that the board of health does not, in abating a nuisance, exercise any such power.

The legislature has expressly conferred upon the city council legislative power in the matter of creating a board of health, and has authorized the council to invest the board "with such powers, and impose upon it such duties, as shall be necessary to secure the city and the inhabitants thereof from the evils of contagious, malignant and infectious diseases." The powers which the council is thus authorized to confer upon the board are not specifically enumerated, further than they must be such only as "shall be necessary to secure the city and the inhabitants thereof from the evils of contagious, malignant and infectious diseases." From the language used we do not think that the legislature intended that the functions of the board should be advisory only, but

that it intended to authorize the council to confer upon the board such limited discretionary and executive powers as might be necessary to effect the purpose for which the board was created. *Aull* v. *City of Lexington*, 18 Mo. 401. Within the limitations named, a discretion is given the city council. The power to abate nuisances dangerous to the public health comes, as we think, fairly within the limitations imposed by the statute. We therefore adhere to our former ruling that the city council may confer upon the board of health power to abate such nuisances. *Gaines* v. *Waters*, 64 Ark. 609; *Cole* v. *Kegler*, 5 Am. & Eng. Corp. Cases, 361, and note.

The nuisance must be one the abatement of which tends to protect the city and the inhabitants thereof from the evils of contagious, malignant and infectious diseases. The council could not confer upon the board power to abate a nuisance which tended only to injure property rights or the morals of the inhabitants of the city; it must be one affecting the public health.

It follows, from what we have said, that, in our opinion, the circuit judge erred in instructing the jury. The judgment is therefore reversed, and a new trial is ordered.

KINCAID *v.* HALPERN.

Opinion delivered July 9, 1898.

APPEAL BOND—LIABILITY.—Where an appeal to the circuit court is taken by two defendants against whom judgment has been recovered in a justice's court, and they jointly execute an appeal bond, each will be liable thereon for whatever amount may be adjudged on the appeal against either of them. (Page 616.)

Appeal from Monroe Circuit Court.

JAMES S. THOMAS, Judge.

STATEMENT BY THE COURT.

The appellant, Kincaid, brought suit before a justice of the peace against Jos. Hicks and Isaac Halpern for the sum of

of seventy dollars. He claimed that they owed him that amount for labor performed in "getting out" certain logs, and he claimed a lien upon the logs. The justice of the peace gave judgment in favor of Kincaid. The defendants appealed, and gave an appeal bond worded as follows:

"APPEAL BOND. In Justice of the Peace court, Cache Township. William Kincaid vs. Isaac Halpern & Jos. Hicks. We, the undersigned Joe Hicks and Isaac Halpern, acknowledge ourselves indebted to William Kincaid in the sum of $100, to be void upon this condition: whereas, Joe Hicks and Isaac Halpern have appealed from the judgment of John W. Hooper, a justice of the peace in and for Cache township in the county of Monroe and state of Arkansas, in an action between William Kincaid, plaintiff, and Joe Hicks and Isaac Halpern, defendants. Now, if the said Hicks and Halpern will prosecute their appeal with due diligence to a decision, and if on such appeal the judgment of the justice be affirmed, or if on the trial anew in the circuit court judgment be given against the appellants, they shall satisfy the judgment, or if their appeal be dismissed they shall pay the judgment of the justice, together with the costs of the appeal, this bond shall be void." This bond was signed by both Joseph Hicks and Isaac Halpern and by certain other parties.

On the trial in the circuit court the jury returned the following verdict: "We the jury find for the plaintiff against Hicks in the sum of seventy dollars, and lien not sustained. J. H. Plumber, Foreman." On this verdict a judgment was rendered against Hicks, but the circuit court refused to give judgment against Halpern and other signers of the appeal bond.

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

The appeal bond was in due form, and judgment should have been rendered thereon. Sand. & H. Dig., § 4431, 4449. The bondsmen were jointly and severally liable. Sand. & H. Dig., § 4186; *ib.* ch. 90. No bill of exceptions was required in this case. 26 Ark. 662; *ib.* 653.

M. J. Manning & J. P. Lee, for appellees.

The same cause of action must be tried in circuit court on appeal as was tried in the justice's court. Sand. & H. Dig., §

4447; 44 Ark. 375. The trial of a different cause on appeal exonerates the sureties on the appeal bond.

RIDDICK, J., (after stating the facts). This case was commenced before a justice of the peace, who gave judgment in favor of appellant, Kincaid, against appellees, Joseph Hicks and Isaac Halpern. An appeal to the circuit court was taken, and the question here is whether Halpern is liable upon the appeal bond for a judgment rendered in the circuit court against Hicks.

Counsel for Halpern say that appellant Kincaid sued Hicks and Halpern before the justice to recover for work and labor which he claimed to have performed for them by getting out logs, and that, in the circuit court on appeal, he was allowed to change his cause of action, and recover judgment against Hicks for the price of a boat, and they contend that this change operated to discharge the sureties. If this contention was sustained by the record, it would not only justify the circuit court in discharging the sureties of Hicks, but would also show that the judgment against Hicks himself was improper, for our statute provides that the "same cause of action, and no other, that was tried before the justice shall be tried in the circuit court upon the appeal." Sand. & H. Dig., § 4447. But if any change was made in the cause of action, it was not, so far as the record here shows, made in writing. There was no bill of exceptions. The evidence adduced at the trial is not before us, and there is nothing to show that any change was made in the cause of action. In the absence of any showing to the contrary, we must presume that the cause of action tried before the circuit court on appeal was the same as that tried before the justice of the peace.

Now, assuming, as we must do, that there was no change in the cause of action, was Halpern liable on the appeal bond? He need not have signed the bond of Hicks in order to appeal. He could have executed a separate bond binding himself and sureties to satisfy any judgment rendered by the circuit court against himself only. Had he done this, neither he nor his bondsmen would have been responsible for the judgment against Hicks. But this bond is not the separate bond of Halpern. It is the bond of both Hicks and Halpern, and it operated to suspend for them proceedings upon the judgment of

the justice not only as to Halpern but also as to Hicks. Our statute provides that "in all cases of appeal from a justice of the peace if the judgment of the justice be affirmed, or if, on trial anew in the circuit court, the judgment be against the appellant, such judgment shall be rendered against him and his sureties on the appeal bond." Sand. & H. Dig., § 4449. As the bond here is in the form provided by statute, and as the signers thereof are sureties for Hicks as well as Halpern, we are of the opinion that the plaintiff is entitled to judgment against them.

The judgment of the circuit court, so far as it discharges Halpern and other sureties on the bond, is reversed, and the cause is remanded with an order to render judgment against them.

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

Opinion delivered November 5, 1898.

1. WITNESS—COMPETENCY—AGE.—An infant under the age of 10 years is incompetent to testify in a civil case, under Sand. & H. Dig., § 2916. (Page 624.)

2. RAILROADS—DUTY TO KEEP LOOKOUT.—An instruction that it is "the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track" is erroneous and prejudicial. (Page 624.)

3. SAME—INSTRUCTION.—In instructions as to negligence, it was not error for the court to substitute the phrase "due care" for "ordinary care;" if the former phrase needed explanation, the court should have been asked to define it. (Page 624.)

4. SAME—DUTY TO KEEP LOOKOUT—INSTRUCTION.—Where it appeared that outsiders called the attention of defendant's trainmen to the dangerous position of plaintiff in front of an approaching engine, it was not error to refuse an instruction asked by defendant that "in the due and proper management of its trains, and in the movement thereof, the defendant's employees were not required, as a matter of law, to notice and obey signals given by persons not in the employ of the defendant company." (Page 625.)

5. TRIAL—IMPROPER ARGUMENT.—In a personal damage suit against a railroad company, one of plaintiff's counsel in argument referred to

the length of time the defendant had kept plaintiff in abeyance by changes of venue and by motions for continuance. The court admonished counsel, and instructed the jury to disregard such remarks. The same counsel was further permitted to say, in effect, that certain of defendant's witnesses, who were employed by it, would have been discharged if they had not testified as they did, but there was no proof that this statement was true. The jury returned a verdict for a sum held to be excessive under the circumstances in proof. *Held* that the improper remarks of counsel were prejudicial, notwithstanding the court's admonition. (Page 625.)

6. PERSONAL INJURY TO MINOR—DAMAGES.—In an action by a minor to recover damages for a personal injury caused by defendant's negligence, the measure of plaintiff's damages is his probable loss of earnings after he reaches majority, occasioned by the injury, and the increased expenses he will probably incur on account of the injury after that time, taking into consideration the value of the use during his minority of the money allowed for such loss and expense; to this should be added damages for his past, present and future pain from the injury and for personal disfigurement. (Page 627.)

7. REMITTITUR—ALLOWANCE.—A remittitur of excessive damages will be allowed only where excessiveness of damages is the only error found in the record, and the supreme court is able to designate an amount that will not be excessive. Under this rule a remittitur of excessive damages was refused where the evidence was conflicting, and there were errors at the trial which might have influenced the jury, so that it could not be determined from the record whether plaintiff would have recovered at all if such errors had not been committed. (Page 628.)

Appeal from Bradley Circuit Court.

MARCUS L. HAWKINS, Judge.

Dodge & Johnson, for appellant.

The evidence does not show negligence on the part of the company. Cooley, Torts, 630; 21 L. R. A. 820, note; 12 Am. & Eng. Ry. Cas. 163; 76 Mich. 591; 113 Mo. 670; 53 N. J. L. 233; 112 Ind. 404; 40 S. W. 863; 100 Pa. St. 144; 34 L. R. A. 459. If a child under 10 years of age is capable of understanding the obligation of an oath, he is a competent witness. 25 Ark. 96; 1 Greenl. Ev. § 367; 25 Ark. 448; 1 East, Pl. Cr. 442; McNally, Ev. 154; 10 Mass. 225; 1 Leach, Cr. Cas. 237; 19 So. Rep. (Ala.) 530; 159 U. S. 524; 1 Whart. Ev. §§ 398, 399, 400; 1 Best, Ev. §§ 155, 156; 88 Wis. 180; 102 Mo. 270; 88 Ala. 147; 23 Minn. 104; 39 Tex. 129; 2 Allen, 295; 47 Ga. 524; 79 N. C. 648; 9 Ore. 457; 11 Ind. 196; 3 App. D. C. 335; 165 Mass. 427; 35 S. W. 174; 25

S. E. 626; 37 S. W. 771; 79 Hun, 23; 4 Burrow, 25, 29; 21 Ark. 329. No proper foundation was laid for the impeachment of witness Biggers. 27 S. W. 432; Sand. & H. Dig., § 2960; 37 Ark. 328; 16 How. 46; 20 Md. 269; 36 Mo. 161; 8 Humph. 663; 10 Yerg. 347; 12 Ala. 129; 8 Ark. 572; 15 *ib.* 359; 16 *ib.* 569; 52 Ark. 308; 73 Fed. 777. It was error to instruct the jury that it was the duty of *all* those running the train to keep a lookout. 62 Ark. 185. The second instruction given for plaintiff was erroneous, in that it is based on assumptions of facts which should be left to the jury. 14 Ark. 530; 16 Ark. 569; 31 Ark. 699; 14 Ark. 295. It was error for the court to substitute the words "*due care*" for "*ordinary care*" throughout appellant's instructions. See Webst. and Stand. Dictionaries, word "*due;*" 44 S. W. 1067, 1068; 76 Mich. 591; 113 Mo. 570; 53 N. J. L. 233. It was error to allow plaintiff's counsel to argue facts not in the record. Also, the applause of the bystanders at the close of the argument of plaintiff's counsel was prejudicial to appellant. 61 Ark. 137; 48 Ark. 131, 132; 44 Wis. 282; 58 Ark. 473; 49 Ark. 34; 105 Ind. 304; 156 U. S. 361; 37 S. W. 432; 75 Ind. 220; 59 Ark. 368. The verdict is excessive. 33 Ark. 365; 57 Ark. 377; 42 Ark. 527; Wood's Mayne, Dam. 746, and cases; 3 Suth. Dam. 259; 3 Sedg. Dam. § 1319; Lofft. (Eng. K. B.) 771; 36 Fed. 252; 9 R. I. 139; Style (Eng.), 466; 16 Pick. 547; 36 Kas. 58; 22 Mo. 170; 3 Kas. 244; 19 Barb. 461; 53 Ill. 407; 69 Ill. 475; 3 C. C. A. 147; 53 Ark. 10; 58 Ark. 472, 473.

George W. Murphy, for appellee.

The lookout should be such as is calculated to avoid accident. 63 Ark. 177; 64 Ark. 236. As to the competency of the child. Sand. &. H. Dig., §§ 2915, 2916; 25 Ark. 448. The foundation for impeachment of appellant's witness was properly laid. 1 Greenl. Ev. § 462*a*; 52 Ark. 306; 37 Ark. 324; 86 Ind. 387; 56 Ind. 343–348; 2 Thomp. Tr. § 2756. The second instruction of plaintiff was proper. 91 Ill. 406. "Due care" means "reasonable care, adapted to the circumstances." 26 Am. Rep. 645; 10 Allen, 532; 54 Md. 656; 46 Ark. 513; 36 Ark. 41. Appellant, by not pressing the objection to the argument of appellee's counsel, waived it. 1 Thomp.

Tr. § 957, 967. The verdict is not excessive. 31 L. R. A. 855; 75 Fed. 102; 33 Ill. App. 450; 32 N. Y. Sup. 915; 14 N. Y. Sup. 336; 24 Hun, 184; 39 Hun, 5.

BATTLE, J. Ester Waren, a child about two and a half years old, was knocked down and seriously injured by one of the trains of the St. Louis, Iron Mountain & Southern Railway Company. He instituted this action against the railway company to recover the damages he suffered by reason of his injury. The main facts in the case are as follows: On the 24th of December, 1894, one of the defendant's trains, composed of seven cars, a caboose, and an engine, going north, arrived at Portland, a town in Ashley county, in this state. It arrived about 3:15 in the afternoon, and, after stopping at the depot for a short time, received orders to move on the side track, and await the arrival and passing of a south bound train due at 3:12 p. m. In obedience to these orders, it backed down the main track, according to the testimony of some witnesses, at the rate of six to eight miles, and of others at the rate of ten to twelve miles an hour. While the train was backing, some witnesses say that the bell upon the locomotive or engine was ringing, and others that they did not hear it; some say that there were two brakemen upon the cars keeping a lookout, and others that they saw no one, although they looked to see if any one was upon the train for that purpose. About or during this time Ester Waren was pursuing a flock of domestic geese in the street not far from the train. His aunt was sent to take him back to the house, where his mother was, which was about sixty yards from the railroad track, and near to where the boy was playing. As the aunt approached, the boy fled, and she pursued. In his effort to escape he ran upon the railroad track in front of the backing train, at a distance therefrom which was variously estimated by witnesses to be from twelve feet to sixty yards. His mother, seeing his danger, screamed aloud, and thereby gave a signal of great distress. Others hollowed, and waived their hands in an earnest effort to attract the attention of the trainmen to the boy's situation. But these signals of danger and distress were not seen or heard. The train, unchecked in its speed, struck the boy, ran over him, cut off both of his hands, and lacerated and seriously injured one

leg and foot. From these injuries he suffered excruciating pain. Opiates were necessarily administered to enable him to endure it. When not asleep, he cried for his hands. He continued in that condition from four to six weeks. He has never been able to walk. He moves about with great difficulty by hopping; and in that way can travel only a short distance without resting.

Upon evidence tending to prove the foregoing facts, which was adduced in a trial before a jury, a verdict was returned in favor of the plaintiff against the defendant for the sum of $40,000; and a judgment was rendered accordingly. The defendant insists that this judgment should be reversed for the following reasons: (1) Because the court erred in refusing to allow Earle Newton, a lad of the age of 8 years, to testify in behalf of the defendant. (2) Because the court erred in instructing the jury, at the instance of the plaintiff, and over the objections of the defendant, as follows: "1. It is the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads, and if any person or property shall be killed or injured by the neglect of any employees of any railroad to keep such lookout, the company owning and operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout, and the burden of proof shall devolve upon such railroad to establish the fact that this duty has been performed." (3) Because the court erred in refusing to instruct the jury at the instance of the defendant as follows: "The court instructs the jury that no railway company can be held liable for neglect where plaintiff by his own negligence has contributed to the injury, unless it was a wilful injury, or one resulting from want of ordinary care on the part of the company to avert it after plaintiff's negligence has been discovered. And you must consider this without regard to the amount of negligence on each side. In other words, although you should believe that defendant company was in this case guilty of some negligence, and at first this negligence was the greater, still you must find for defendant, if you further believe that the injury was caused by Ester Warren appearing suddenly and without

warning upon defendant's track so near a backing train that his dangerous position by the exercise of ordinary care was not discovered in time to avoid the injury." And, in striking out the words "ordinary care," wherever they appear in the instruction, and substituting therefor the words "due care," and giving it as modified. (4) Because the court erred in refusing to give other instructions at the request of the defendant, and striking out the word "ordinary care," wheresoever they appear therein, and substituting therefor the words "due care," and giving themas modified. (5) Because the court erred in refusing to instruct the jury at the request of the defendant as follows: "31. The court instructs the jury that in the due and proper management of its trains, and in the movement thereof, the defendant's employees were not required, as a matter of law, to notice and obey signals given by persons not in the employ of the defendant company." (6) Because one of plaintiff's attorneys made improper statements while addressing the jury. (7) Because the damages rendered are excessive, and appear to have been assessed by the jury under the influence of passion or prejudice.

We will consider the alleged errors in the order stated.

First. The court properly refused to allow Earle Newton to testify. He, being under the age of ten years, was incompetent to testify, under the statutes of this state. Sand. & H. Dig., § 2916, sub-division 2.

Second. The instruction as to "the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track" should not have been given. An instruction to the reverse was held to be correct in *St. Louis S. W. Ry. Co.* v. *Russell*, 62 Ark. 185. Unexplained by other instructions, it would have been prejudicial to the defendant.

Third and Fourth. In striking out the words "ordinary care" in the instructions asked for by the defendant, and substituting therefor the words "due care," the court did not alter the legal meaning of the instructions. The modification was unnecessary. The defendant should have asked for an instruction explaining to the jury what was meant by the words "due

care." Failing to do so, it has no right to complain of the substitution. *Fordyce* v. *Jackson*, 56 Ark. 594, 602.

Fifth. The instruction as to the duty of the defendant's employees to notice and obey signals given by persons who were not employed by it was properly refused.

Sixth. In his speech before the jury, after the close of the evidence, R. E. Craig, one of the plaintiff's attorneys, said: "Mr. Taylor, in examining the witnesses, asked the question if their recollection was quite clear about things that happened two years ago, and if that was not a long time to remember the words of a man. For almost that length of time the plaintiff in this case, poor and poverty stricken, by changes of venue, by motions for continuances, and by those means known to those lawyers who undertake to conduct the railroad cases in this country—." The defendant here objected to the remarks, and the court interrupted the speaker, saying: "Brother Craig, there is an exception to your remarks." The speaker then continued: "I stand on the remarks. The record shows everything I have said. By those means, I say, and for that length of time they have succeeded in holding the plaintiff in this case in abeyance, but I am proud to say to you, gentlemen of the jury, today, that we have them at last where they can shirk no longer by any means known to the law, and that we now have the privilege of presenting to a jury of twelve honorable and honest and impartial jurors, this case, and the injuries to Ester Waren." Defendant at the time objected to the above remarks by plaintiff's counsel, but the court permitted him to proceed and make said remarks to the jury, over the said objections of the defendant, to which action of the court and counsel, the defendant at the time saved exceptions. At the close of said attorney's argument, the court instructed the jury that the above remarks were improper, and they should pay no attention thereto, specifically calling their attention to what was said of changes of venue and motions for continuances.

In another portion of his argument to the jury, said attorney, R. E. Craig, was further permitted by the court to make use of the following language: "If Hall and Meadows had not come before this jury, and testified exactly what the railroad wanted them to testify to, that is, that the bell was ringing, and

that Hall and Meadows were in their places, what would have been the consequences? They would have received their walking papers. There has never been a case before a jury where the railroad employees did not come before the jury and testify everything that was necessary for them to testify in order to maintain their places."

The language used by counsel was highly improper, and for the use of it the speaker deserved the rebuke of the court. The rebuke given, if it may be called such, was too mild to impress the jury with a proper conception of the wrong done.

We have repeatedly condemned statements before juries without evidence to support them, and called attention to the duties of courts in such cases. In *Kansas City, etc., R. Co.* v. *Sokal*, 61 Ark. 137, we said: "Arguments by counsel of the evidence adduced and the law as given by the court are allowed only to aid them (the jury) in the discharge of their duty. Within these limits counsel may present their client's case in the most favorable light they can. When they go beyond them, and undertake to supply the deficiences of their client's case by assertions as to facts which are unsupported by the evidence, or by appeals to prejudices foreign to the case, they travel outside of their duty and right, and abuse the privilege of addressing the jury by using it for a purpose it was never intended to accomplish; for such assertions or appeals can serve no purpose except to mislead the jury and defeat the ends of the law in requiring them to confine their consideration to the evidence adduced and the law embodied in the instructions of the court. Hence it is the obvious duty of courts, in furtherance of the object of their creation, to prevent such assertions or appeals, or, when made, to remove their evil effects, so far as they can; and attorneys, in the making of them, if they are calculated to prejudice the rights of parties, are guilty of a violation of the law, of an abuse of their privileges, of conduct unfair and unbecoming to their profession, and should be promptly and sternly rebuked by the courts, and, if need be, punished."

"Ordinarily," it is said, "an objection by the opposing counsel, promptly interposed, followed by a rebuke from the bench, and an admonition from the presiding judge to the jury

to disregard prejudicial statements, is sufficient to cure the prejudice; but instances sometime occur in which it is not sufficient." As to whether it was sufficient in this case remains for us to determine.

The argument in the case before the jury was concluded by G. W. Murphy, one of plaintiff's counsel. At the conclusion of his speech a large crowd of citizens were collected in the court room, and some of them began to applaud his closing remarks in the presence of the jury. "Thereupon, immediately, and while the audience were applauding, the court reprimanded the audience for the same, and instructed the sheriff to ascertain, if possible, who the parties were, and directed the jury not to allow such applause to influence them in rendering their verdict." But no improper remarks or conduct are imputed to the eloquent counsel who elicited the applause.

Seventh. Are the damages recovered excessive? The plaintiff was two and a half years old at the time of the accident. His expectancy in life at that time could not have reasonably exceeded forty-eight years. For eighteen and a half years of this time he was and will be a minor. His earnings during this time of his minority belong to his parents. In return they are bound to care for, feed, clothe, and defray his expenses during his infancy. Consequently, he was not entitled to recover anything on account of such earnings and expenses. All that he was entitled to recover was his probable loss of earnings after he reached the age of twenty-one years, which he would have acquired had he not been injured, and the increased expenses he will probably incur on account of his injury after that time, and damages for past, present, and future pain from his injury, and for personal disfigurement; no exemplary damages being sued for, or asked for or allowed in the instructions to the jury. His right to recover for probable loss of earnings and increased expenses is limited to twenty-nine and a half years, the probable remainder of his life after the twenty-first year of his age. For this probable loss of earnings, and increased expenses, and for pain and disfigurement, he recovered $40,000. A part of this, the amount allowed for probable loss of earnings and increased expenses, should have been estimated as commencing to accrue eighteen and a half years after the accident—the

twenty-first year of his age—and the value of the use of the money allowed for such loss and expenses during his minority should also have been taken into consideration. The presumption is, had he not been injured, his capacity to earn after his twenty-first year would not exceed that of ordinary men. Taking into consideration all these facts and the uncertainties of life, we think that the damages recovered are excessive. In arriving at this conclusion we have not left out of consideration the pain and disfigurement of the boy, both of which are elements of compensatory damages. For them money is no adequate recompense; but, as the law can afford no other redress, it allows the sufferer to recover such an amount therefor as a jury, dispassionately considering all the circumstances, may reasonably deem sufficient. Measuring plaintiff's right to damages for pain and disfigurement by this standard, we still think the damages recovered are excessive, and appear "to have been given under the influence of passion or prejudice." In view of this fact, we think the improper remarks of counsel were prejudicial, notwithstanding the admonition of the court to the jury. If they did not excite the prejudice, they were calculated to increase it.

For the improper remarks of counsel and the excessive damages, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

Opinion on Rehearing.

Delivered December 10, 1898.

Battle, J. Appellee asks the court to allow him the privilege of remitting so much of the damages recovered in this action as renders them excessive, and that the judgment as to the residue be affirmed.

The theory upon which a remittitur is allowed is that the appellant has no just complaint save that the damages are excessive, and that, inasmuch as the appellate court can say that the given verdict is excessive, it can designate an amount that will not be, and give the successful party the option to remit the excess or submit to a new trial.

The judgment in this case was reversed on account of the

improper remarks of appellee's counsel, and because the damages recovered were excessive. We cannot say that the appellee's right to recover is free from doubt. The testimony is conflicting, and to assume that appellee had the unquestionable right to a verdict for some amount we would be compelled to hold that much of the evidence was entitled to no credence. The strongest contention of appellee's counsel is that he was injured by the engine, and that the train could have been stopped after he was knocked down and before the engine reached him. But this contention is principally founded upon the opinions of witnesses, which were based upon what they saw of the child under the cars, when they were from thirty-five to fifty yards distant, and while the train was moving from six to twelve miles an hour, and much excitement prevailed, and many were passing before or near them, and much existed to prevent the accuracy of their observation. As for ourselves, we are not assured as to what part of the train caused the injury, and that appellee's contention is correct. But it can serve no useful purpose to review the evidence at length. As the cause will be remanded, it may not be proper to do so. It is sufficient to say that we do not think that this case comes within the rule which allows a remittitur to be entered.

The petition of appellee is denied

APPENDIX.

I

OPINIONS NOT REPORTED.

Hot Springs Street Railway Co. *v.* Hill; appeal from Garland circuit court; Alexander M. Duffie, judge; reversed and remanded November 12, 1898; per Wood, J.

Memphis & L. R. R. Co. as Reorganized *v.* Humphreys; appeal from Crittenden circuit court in chancery; Felix G. Taylor, judge; reversed and complaint dismissed November 19, 1898; per Bunn, C. J.

Sherwood *v.* Graham; appeal from Monroe circuit court in chancery; James S. Thomas, judge; reversed and remanded October 22, 1898; per Wood, J.

Richmond City Mill Works *v.* Harris; appeal from Marion circuit court; B. F. Fee, judge; reversed and remanded October 22, 1898; per Riddick, J.

Halpern *v.* Spencer; appeal from Monroe circuit; James S. Thomas, judge; affirmed October 22, 1898; per Wood, J.

Missouri Pacific Ry. Co. *v.* Wright, and Same *v.* Spelce; appeals from Franklin circuit court, Ozark district; Jephtha H. Evans, judge; reversed and dismissed October 15, 1898; per Battle, J.

Newton *v.* Bateman; appeal from Jackson circuit in chancery; Richard H. Powell, judge; reversed and remanded July 9, 1898; per Wood, J.

Gibson *v.* Gossom; appeal from Arkansas chancery court; James F. Robinson, chancellor; reversed and remanded June 25, 1898; per Bunn, C. J.

Little Rock & F. S. Ry. Co. *v.* Spencer; appeal from Crawford circuit court in chancery; Jephtha H. Evans, judge; reversed in part and affirmed as to residue July 9, 1898; per Battle, J.

Germania Ins. Co. *v.* Briant Bros.; appeal from Hempstead circuit court; Rufus D. Hearn, judge; reversed and remanded July 9, 1898; per Battle, J.

Caledonia Ins. Co. *v.* Public Parks Amusement Co.; appeal from Garland circuit court; Alexander M. Duffie, judge; reversed March 26, 1898; per Riddick, J.

Little Rock & F. S. Ry. Co. *v.* Locke; appeal from Crawford circuit court; Jephtha H. Evans, judge; reversed and remanded May 14, 1898; per Battle, J.

Stephenson *v.* Weathersby; appeal from Lafayette circuit court; Charles W. Smith, judge; reversed and remanded June 4, 1898; per Riddick, J.

Ferguson *v.* Williams; appeal from Washington circuit court; Edward S. McDaniel, judge; reversed and remanded March 12, 1898; per Riddick, J.

Helt *v.* Robinson; appeal from Lincoln chancery court, Star City dis-

trict; James F. Robinson, chancellor; reversed and remanded February 26, 1898; per Wood, J.

Texarkana & Ft. Smith Ry. Co. *v.* Bullington; appeal from Howard circuit court; Will P. Feazel, judge; reversed and remanded October 15, 1898; pur Wood, J.

II

CASES DISPOSED OF ORALLY.

Kellar & Tam Mfg. Co. *v.* Ward; appeal from Clay circuit court; Felix G. Taylor, judge; dismissed on motion of appellant, January 31, 1898; *per curiam.*

Evans *v.* Jacobson; appeal from Conway circuit court; Jeremiah G. Wallace, judge; affirmed under rule seven, January 31, 1898; *per curiam.*

Byrne *v.* Am. Savings & Loan Association; appeal from Miller circuit in chancery; Rufus D. Hearn, judge; dismissed on motion of appellant, January 31, 1898; *per curiam.*

Phillips *v.* Dailey; appeal from Carroll circuit court; Edward S. McDaniel, judge; dismissed for non-compliance with rule nine, February 7, 1898; *per curiam.*

N. E. Mortgage Co. *v.* Crippen; appeal from St. Francis circuit court in chancery; Grant Green, Jr., judge; reversed February 12, 1898; per Bunn, C. J.

Hynes *v.* Merrill, adm'r; appeal from Franklin circuit court; Jephtha H. Evans, judge; affirmed February 12, 1898; per Hughes, J.

Luce-Monroe Savings, etc., Co. *v.* Southern Stave & Lumber Co.; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed February 12, 1898; per Hughes, J.

Gates *v.* Elcan; appeal from Lonoke circuit court; James S. Thomas, judge; affirmed February 12, 1898; per Hughes, J.

St. L., I. M. & S. Ry. Co. *v.* Southern Grocery Co.; appeal from Jefferson circuit court; John M. Elliott, judge; affirmed February 12, 1898; per Riddick, J.

Darr & Reynolds, *ex parte*; *certiorari* to Franklin circuit court; Jephtha H. Evans, judge; bail granted February 12, 1898; *per curiam.*

Patrick *v.* Paden; appeal from Sebastian circuit court; Edgar E. Bryant, judge; dismissed for non-compliance with rule nine, February 14, 1898; *per curiam.*

Newton *v.* Cortner; appeal from Benton circuit court; Edward S. McDaniel, judge; dismissed for non-compliance with rule nine, February 14, 1898; *per curiam.*

Kiger *v.* Thompson; appeal from Chicot chancery court; J. G. Williamson, special chancellor; affirmed February 26, 1898; per Hughes, J.

Underwood, Fagan & Co. *v.* Price; appeal from Arkansas circuit court; James S. Thomas, judge; compromised and dismissed February 26, 1898; *per curiam.*

St. L., I. M. & S. Ry. Co. *v.* Shaw; appeal from Saline circuit court; Alexander M. Duffie, judge; remittitur entered and affirmed February 26, 1898; per Riddick, J.

Kelley *v.* State; appeal from Ashley circuit court; Marcus L. Hawkins, judge; affirmed March 5, 1898; per Battle, J.

Oxley Stave Co. *v.* Goodnight; appeal from Greene circuit court; Felix G. Taylor, judge; affirmed March 5, 1898; per Battle, J.

Halford *v.* Gardner; appeal from Jackson circuit court in chancery; John B. McCaleb, judge; affirmed March 5, 1898; per Battle, J.

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St. L., Ark. & Tex. Ry. Co. *v.* Beard; appeal from Miller circuit court; Rufus D. Hearn, judge; remittitur entered and affirmed April 2, 1898; per Battle, J.

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Stroup *v.* O'Daniel; appeal from Sebastian circuit court; Stylus T. Rowe, special judge; affirmed April 9, 1898; per Bunn, C. J.

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Irwin *v.* Andrews; appeal from Cleburne circuit court; J. H. Frazier, special judge; dismissed for non-compliance with rule nine, April 9, 1898; *per curiam.*

Plunkett *v.* Hemingway; appeal from Prairie circuit court; James S. Thomas, judge; dismissed for non-compliance with rule nine, April 11, 1898; *per curiam.*

Gaines *v.* Meade; appeal from Chicot circuit court; Marcus L. Hawkins, judge; affirmed as a delay case, April 16, 1898; per Bunn, C. J.

Johnson *v.* Booker; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed April 16, 1898; per Bunn, C. J.

Hulsey *v.* Murphy; appeal from Union circuit court in chancery; Charles W. Smith, judge; affirmed April 16, 1898; per Hughes, J.

Ames Iron Works *v.* Rea; appeal from Marion circuit court in chancery; B. F. Fee, special judge; affirmed April 16, 1898; per Hughes, J.

St. Louis Refrigerator, etc., Co. *v.* Dilley Foundry Co.; appeal from Ouachita circuit court; Charles W. Smith, judge; compromised and dismissed by consent, April 16, 1898; *per curiam.*

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Triplett *v.* Union Mfg. Co.; *certiorari* to Jefferson chancery court; James F. Robinson, chancellor; dismissed for non-compliance with rule nine, April 25, 1898; *per curiam.*

Smith *v.* Southerland; appeal from Madison circuit court in chancery; Edward S. McDaniel, judge; affirmed April 30, 1898; per Bunn, C. J.

Nofziger *v.* Shreve; appeal from Arkansas chancery court; James F. Robinson, chancellor; affirmed April 30, 1898; *per curiam.*

Thompson *v.* Brown; appeal from Craighead circuit court in chancery; Felix G. Taylor, judge; dismissed for non-compliance with rule nine, May 2, 1898; *per curiam.*

Union Central Life Ins. Co. *v.* Sharp; appeal from Crawford circuit court; Jephtha H. Evans, judge; compromised and appeal dismissed, May 2, 1898; *per curiam.*

Markle *v.* Townsend; appeal from Woodruff circuit court in chancery; Hance N. Hutton, judge; modified May 7, 1898; per Wood, J.

Shea & Co. *v.* Meyers; appeal from Clay circuit court; James E. Riddick, judge; affirmed May 14, 1898; per Bunn, C. J.

May *v.* Yarbrough; appeal from Yell circuit court; Jeremiah G. Wallace, judge; affirmed May 14, 1898; per Bunn, C. J.

Biscoe, Block & Co. *v.* Courtney & Ogburn; appeal from Desha chancery court; James F. Robinson, chancellor; affirmed May 14, 1898; per Hughes, J.

St. L. S. W. Ry. Co. *v.* Chandler; appeal from Calhoun circuit court; Charles W. Smith, judge; affirmed May 14, 1898; per Hughes, J.

Norton *v.* McCracken (two cases); appeals from Clay circuit court in chancery; Felix G. Taylor, judge; dismissed by consent, May 14, 1898; *per curiam.*

Merchants' & Planters' Bank *v.* Cheever; appeal from Little River circuit court in chancery; Will P. Feazel, judge; dismissed on motion of appellant May 23, 1898; *per curiam.*

Beebe School District *v.* Simmons; appeal from White circuit court; Hance N. Hutton, judge; affirmed May 28, 1898; per Bunn, C. J.

Keener *v.* State; appeal from Miller circuit court; Alexander M. Duffie, judge, on exchange of circuits; reversed May 28, 1898; per Bunn, C. J.

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Meyers *v.* Lawhorn; appeal from Fulton circuit court in chancery; John B. McCaleb, judge; affirmed May 28, 1898; per Hughes, J.

Hill *v.* McKee; appeal from Sebastian circuit court in chancery; Stylus T. Rowe, special judge; affirmed May 28, 1898; per Hughes, J.

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Smith *v.* Walker; appeal from Benton circuit court; Edward S. McDaniel, judge; affirmed May 28, 1898; per Wood, J.

Deakins *v.* State; appeal from Washington circuit court; Edward S. McDaniel, judge; affirmed May 28, 1898; per Riddick, J.

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McBreed *v.* State; appeal from Craighead circuit court; William H. Cate, special judge; dismissed for non-compliance with rule nine, May 30, 1898; *per curiam.*

St. L., I. M. & S. Ry. Co. *v.* Moseley; appeal from Miller circuit court; Rufus D. Hearn, judge; settled and appeal dismissed, May 30, 1898; *per curiam.*

St. L. S. W. Ry. Co. *v.* Pyles; appeal from Craighead circuit court; Felix G. Taylor, judge; affirmed June 4, 1898; per Bunn, C. J.

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St. L., I. M. & S. Ry. Co. *v.* Duke; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed June 4, 1898; per Wood, J.

Leigh *v.* Parks; appeal from Lafayette circuit court; Charles W. Smith, judge; compromised and appeal dismissed June 4, 1898; *per curiam.*

Brewer *v.* Mack; appeal from Greene circuit court in chancery; Felix G. Taylor, judge; affirmed June 11, 1898; per Bunn, C. J.

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Walker *v.* State; appeal from Drew circuit court; Marcus L. Hawkins, judge; affirmed June 11, 1898; per Battle, J.

Clyburn *v.* State; appeal from Nevada circuit court; Joel D. Conway, judge; affirmed June 11, 1898; per Hughes, J.

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McDonald *v.* Bank of Newport; appeal from Jackson circuit court; Richard H. Powell, judge; compromised and dismissed June 11, 1898; *per curiam.*

Hanger *v.* Shepperd; appeal from Pulaski chancery court; Thomas B. Martin, chancellor; affirmed as a delay case June 13, 1898; *per curiam.*

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St. L., I. M. & S. Ry. Co. *v.* Aven; appeal from Lee circuit court; Hance N. Hutton, judge; affirmed June 18, 1898; per Battle, J.

Baker *v.* Hunt; appeal from Crawford circuit court in chancery; Jephtha H. Evans, judge; affirmed June 18, 1898; per Battle, J.

Heisman *v.* Co-Operative Real Estate Co.; appeal from Pulaski chancery court; Thomas B. Martin, chancellor; affirmed June 18, 1898; per Hughes, J.

Paragould, City of, *v.* Ward; appeal from Greene circuit court; Felix G. Taylor, judge; affirmed June 18, 1898; per Wood, J.

Cathey *v.* St. L., I. M. & S. Ry. Co.; appeal from Clay circuit court; Felix G. Taylor, judge; dismissed for non-compliance with rule nine, June 20, 1898; *per curiam.*

Cole *v.* Anderson; appeal from Craighead circuit court; Felix G. Taylor, judge; appeal dismissed on motion, June 25, 1898; *per curiam.*

Ward *v.* State; *certiorari* to Ashley circuit court; Marcus L. Hawkins, judge; petition denied June 25, 1898; *per curiam.*

Little Rock Traction & Electric Co. *v.* Jones; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed June 25, 1898; per Hughes, J.

St. L. S. W. Ry. Co. *v* Roberts; appeal from Hempstead circuit court; Rufus D. Hearn, judge; compromised and dismissed June 25, 1898; *per curiam.*

Foster *v.* Ellis; appeal from Jackson circuit court; Richard H. Powell, judge; dismissed for non-compliance with rule nine, June 27, 1898; *per curiam.*

McKee *v.* L. R. & F. S. Ry. Co.; appeal from Crawford circuit court; Jephtha H. Evans, judge; affirmed July 9, 1898; *per curiam.*

Mills *v.* State; appeal from Cleburne circuit court; Brice B. Hudgins, judge; affirmed July 9, 1898; per Bunn, C. J.

Brinkley *v.* State; appeal from Conway circuit court; Jeremiah G. Wallace, judge; affirmed July 9, 1898; per Battle, J.

Pickard *v.* Freeman; appeal from Carroll circuit court; Edward S. McDaniel, judge; affirmed July 9, 1898; per Battle, J.

Stitt *v.* State; appeal from Clark circuit court; Joel D. Conway, judge; affirmed July 9, 1898; per Wood, J.

Patrick *v.* State; appeal from Franklin circuit court; Jephtha H. Evans, judge; affirmed July 9, 1898; per Wood, J.

St. L., I. M. & S. Ry. Co. *v.* Coppege; appeal from Hot Springs circuit court; Alexander M. Duffie, judge; affirmed July 9, 1898; per Wood, J.

Smith *v.* State; appeal from Hot Springs circuit court; Alexander M. Duffie, judge; affirmed July 9, 1898; per Riddick, J.

Cayce *v.* St. L., I. M. & S. Ry. Co.; appeal from Hempstead circuit court; Rufus D. Hearn, judge; affirmed July 9, 1898; per Riddick, J.

St. L., I. M. & S. Ry. Co. *v.* Culver; appeal from Clay circuit court; Felix G. Taylor, judge; affirmed on motion as a delay case, October 1, 1898; per Bunn, C. J.

Noblin *v.* State; appeal from Boone circuit court; Brice B. Hudgins, judge; appeal dismissed October 1, 1898; *per curiam.*

Hawkins *v.* Simpson; appeal from Little River circuit court; Will P. Feazel, judge; affirmed October 1, 1898; per Bunn, C. J.

Miller *v.* Brammer; appeal from Carroll circuit court; Edward S. McDaniel, judge; affirmed October 8, 1898; *per curiam.*

White *v.* Friedman, Kieler & Co.; appeal from Jefferson circuit court; John M. Elliott, judge; affirmed October 8, 1898; per Hughes, J.

Ultima Thule, Ark. & Miss. Ry. Co. *v.* Strong; appeal from Dallas circuit court; Marcus L. Hawkins, judge; affirmed October 8, 1898; per Hughes, J.

Radcliffe *v.* Clark; appeal from Marion circuit court in chancery; M. N. Dyer, special judge; affirmed October 8, 1898; per Hughes, J.

Jones *v.* Light; appeal from Yell circuit court in chancery; Jeremiah G. Wallace, judge; affirmed October 8, 1898; per Wood, J.

St. L. S. W. Ry. Co. *v.* Beathard; appeal from Lafayette circuit court; Charles W. Smith, judge; affirmed on remittitur of $2,000 being entered October 8, 1898; per Riddick, J.

McBain *v.* Goodwin; appeal from Drew circuit court; Marcus L. Hawkins, judge; dismissed for non-compliance with rule nine October 10, 1898; *per curiam.*

Alexander *v.* Curtis Manufacturing Co.; appeal from Clay circuit court; Felix G. Taylor, judge; affirmed October 15, 1898; *per curiam.*

Hodges *v.* Reagan; error to Washington circuit court in chancery; Edward S. McDaniel, judge; affirmed October 15, 1898; per Bunn, C. J.

Hodges *v.* Reagan; appeal from Washington circuit court in chancery; Edward S. McDaniel, judge; affirmed October 15, 1898; per Bunn, C. J.

Hamberg *v.* Hamberg; appeal from Pulaski chancery court; Thomas B. Martin, chancellor; affirmed October 15, 1898; per Bunn, C. J.

Storthz *v.* King; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed October 15, 1898; *per curiam.*

Alford *v.* Martin; appeal from Garland circuit court; Alexander M. Duffie, judge; appeal dismissed, October 15, 1898, on motion of appellant; *per curiam.*

Wood *v.* Wood; appeal from Marion circuit court in chancery; B. F. Fee, special judge; affirmed October 22; 1898; per Wood, J.

Robins *v.* Cockrill; appeal from Ashley circuit court; A. C. Jones, special judge; affirmed October 22, 1898; per Riddick, J.

Tong *v.* State; appeal from Howard circuit court; Will P. Feazel, judge; affirmed October 29, 1898; per Hughes, J.

Vagen *v.* Dufo; appeal from Garland circuit court; Alexander M. Duffie, judge; affirmed November 5, 1898; per Battle, J.

Little Rock, Hot Springs & Texas Railroad Co. *v.* Hart, *v.* Kennedy, and *v.* Corder; appeals from Garland chancery court; Leland Leatherman, chancellor; reversed as to lien, affirmed as to personal decree, November 5, 1898; per Hughes, J.

Little Rock, Hot Springs & Texas Railroad Co. *v.* Maloney & Boles; appeal from Garland chancery court; Leland Leatherman, chancellor; reversed and dismissed November 5, 1898; per Hughes, J.

Jackson *v.* Cook; appeal from Ashley chancery court; James F. Robinson, chancellor; affirmed November 5, 1898; per Riddick, J.

Hely *v.* Willeford; appeal from Sharp circuit court; John B. McCaleb, judge; dismissed for non-compliance with rule nine November 7, 1898; *per curiam.*

Bullock *v.* People's Exchange Bank; appeal from Pope circuit court; John Fletcher, special judge; affirmed November 12, 1898; per Bunn, C. J.

D. E. Jones Co. *v.* Shearer; appeal from Grant circuit court in chancery; Alexander M. Duffie, judge; affirmed November 12, 1898; per Hughes, J.

Wear-Boogher Dry Goods Co. *v.* Smith; appeal from Howard circuit court in chancery; Will P. Feazel, judge; affirmed November 12, 1898; per Wood, J.

Wood & Henderson *v.* Rice, Stix & Co.; appeal from Garland circuit court; Alexander M. Duffie, judge; affirmed November 19, 1898; per Bunn, C. J.

Freeman *v.* Hall; appeal from Logan circuit court in chancery; Jephtha H. Evans, judge; affirmed November 19, 1898; per Wood, J.

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