ARKANSAS REPORTS

Vol. 66

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

FROM DECEMBER, 1898, TO OCTOBER, 1899.

T. D. CRAWFORD
REPORTER

LITTLE ROCK, ARKANSAS
PRESS OF
GAZETTE PUBLISHING COMPANY
1900

COPYRIGHT 1900 BY
ALEX. C. HULL,
SECRETARY OF THE STATE OF ARKANSAS
Rec. May 22, 1900.

JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME.

HENRY G. BUNN, - - -	CHIEF JUSTICE.
BURRILL B. BATTLE, - -	ASSISTANT JUSTICES.
SIMON P. HUGHES, - -	
CARROLL D. WOOD, - -	
JAMES E. RIDDICK, - -	
JEFFERSON DAVIS, - -	ATTORNEY GENERAL.
P. D. ENGLISH, - - -	CLERK.
J. H. CAMPBELL, - - -	DEPUTY CLERK.

Rule 25—Amendment of Transcript

Defects or omissions in the transcript may, with the court's permission, be cured by amendment when counsel on both sides consent thereto and file a written certificate that such amendment is in accordance with the record in the trial court.

Rule 26—Hours of Meeting.

Except during recesses, the hours of convenings of court shall be on Saturdays at 10 a. m., and on Mondays at 9 a. m.; and at the same hour (9 a. m.) on the first day of the term, instead of 10 a. m., as heretofore.

TABLE

OF CASES REPORTED.

A

Acruman *v.* Barnes . . 442
Adams (Martin *v.*) . . 10
Ætna Fire Ins. Co. (State *v.*) 480
Alkire Gro. Co. *v.* Jackson 455
Allen (Baker *v.*) . . . 271
Anderson (Slayden-Kirksel Woolen Mills *v.*) . 419
Archer *v.* Turrell . . . 171

B

Bagley (Rhea *v.*) . . . 93
Baker *v.* Allen 271
Bales (Richardson *v.*) . 452
Bank of Little Rock *v.* Collins 240
Bank of Paris *v.* Pearson 310
Banks *v.* Directors of St. Francis Levee Dist. . 490
Barnes (Acruman *v.*) . . 442
Baugh *v.* Prairie County . 360
Beaty *v.* Johnston . . . 529
Beck *v.* Biggers . . . 292
Biggers (Beck *v.*) . . . 292
Blaisdell *v.* Sumpter . . 7
Blass *v.* Brown 79
Blevins *v.* Case 416
Boarman *v.* State . . . 65
Boles *v.* McNeil 422
Boone County Bank *v.* Eoff 321
Bragg (St. Louis, I. M. & S. Ry. Co. *v.*) . . . 248
Brandon *v.* Yeakle . . . 377
Brannon *v.* Vaughan . . 87
Brown (Blass *v.*) . . . 79
——— *v.* Henderson . . . 302
Brown (Muskegon Lumber Co. *v.*) 539
——— *v.* Toler 361
Bunch *v.* Schaer . . . 98

C

Case (Blevins *v.*) . . . 416
Coleman *v.* Fisher . . . 43
Collins (Bank of Little Rock *v.*) 240
Crane *v.* Hibbard . . . 282
Creson *v.* Ward 209

D

Davis (Robinson *v.*) . . 429
——— *v.* Webber . . . 190
Day (Everton *v.*) . . 73
De Armond *v.* De Armond 601
Dedman (Parham *v.*) . . 26
DeGraffenried *v.* St. Louis S. W. Ry. Co. . . . 260
Dickson (McIlroy Banking Co. *v.*) 327
——— (Sawyer *v.*) . . 77
Directors of St. Francis Levee District (Banks *v.*) 490
Dooley (Porter *v.*) . . 1
Driver *v.* Lanier . . . 126
Dunlap *v.* State 105

E

Eoff (Boone County Bank *v.*) 321
Euclid Avenue Nat. Bank *v.* Judkins 486
Everton *v.* Day 73
Ewan (Perkins *v.*) . . . 175

F

Farnsworth *v.* Hoover . . 367
Farris *v.* Morrison . . . 318
Files *v.* Reynolds . . . 314
Fisher (Coleman *v.*) . . 43
Flowers *v.* Jackson . . 458
Folbre (St. Francis County *v.*) 91
Ford *v.* St. Louis, I. M. & S. Ry. Co. 363
Ft. Smith Ice & Cold Storage Co. (Miller-Jones Furniture Co. *v.*) . . 287

G

Gage *v.* Harvey 65
Garner (St. Joseph's Convent *v.*) 623
Goodbar (Moore *v.*) . . 161
Gray *v.* Matheny . . . 36
Griffith *v.* Maxfield . . . 513

H

Hall (Roulston *v.*) . . . 305
Hammett Gro. Co. (Scroggin *v.*) 183
Hardin *v.* State 53
Harris (Sidway *v.*) . . . 387
Harvey (Gage *v.*) . . . 65
Hays *v.* McLain 400
Heard (Summers *v.*) . . 550
Helm *v.* Leggett 23
Henderson (Brown *v.*) . . 302
Hooke *v.* Stamford . . 535
Henry Wrape Co. *v.* Huddleston 237
Hess (Warner *v.*) . . . 113
Hibbard (Crane *v.*) . . 282
Hiner *v.* Whitlow . . . 121
Hodges *v.* Nall 135
Holden (Kansas City, P. & G. Ry. Co. *v.*) . . . 602
Honnett *v.* Williams . . 148
Hoover (Farnsworth *v.*) . 367
Houston *v.* State . . . 120
——— *v.* State 607
Huddleston (Henry Wrape Co. *v.*) 237

I

Independence County *v.* Young 30

J

Jackson (Alkire Grocery Co. *v.*) 455
——— (Flowers *v.*) . . 458
Jefferson County *v.* Philpot 243
Johnson (Whipple *v.*) . . 204
Johnston (Beaty *v.*) . . 529
——— (Welch *v.*) . . . 251
Judkins (Euclid Ave. Nat. Bank *v.*) 486

K

Kansas City, Ft. S. & M. Ry. Co. *v.* King . . . 439
Kansas City, P. & G. Ry. Co. *v.* Holden 602
——— *v.* Moon 409
Kelley *v.* Telle 464
Kelsey (Webb *v.*) . . . 180
King (Kansas City, Ft. S. & M. R. Co. *v.*) . . . 439
——— *v.* Williams . . 333
Kinnemer *v.* State . . . 206
Kizer *v.* Texarkana & Ft. Smith R. Co. . . . 348
Kocourek (Tupy *v.*) . . 433

L

Lancashire Fire Ins. Co. (State *v.*) 466
Langley (St. Louis Refrigerator & Wooden Gutter Co. *v.*) 48
Lanier (Driver *v.*) . . . 126
Lazarus (Williamson *v.*) . 226
Leach (Texarkana *v.*) . . 40
Leatherman (Weaver *v.*) . 211
Lee County *v.* Robertson . 82
Lee *v.* State 286
Leggett (Helm *v.*) . . . 23
Little Rock & Ft. S. Ry. Co. *v.* Smith 278
Little Rock & Ft. S. Ry. Co. *v.* Wilson 414

Little Rock Traction & Electric Co. *v.* Nelson . 494
——— *v.* Wilson . . . 582

M

McCombs *v.* Wall . . . 336
McConnell *v.* Swepston . 141
McDonnell (Rutherford *v.*) 448
McFalls *v.* State . . . 16
McIlroy Banking Co. *v.* Dickson 327
McKenzie (Welch *v.*) . . 251
McLain (Hays *v.*) . . . 400
McNeil (Boles *v.*) . . . 422
Markham (St. Louis S. W. Ry. Co. *v.*) 297
Martin *v.* Adams. . . . 10
Massengill (Winkler *v.*) . 145
Matheny (Gray *v.*) . . . 36
Maxey *v.* State 523
Maxfield (Griffith *v.*) . . 513
Miller-Jones Furniture Co. *v.* Ft. Smith Ice & Cold Storage Co. 287
Moon (Kansas City, P. & G. R. Co. *v.*) 409
Moore *v.* Goodbar . . . 161
——— (Sparks *v.*) . . 437
——— *v.* Terry . . . 393
Morrison (Farris *v.*) . . 318
Muskegon Lumber Co. *v.* Brown 539
Mutual Life Ins. Co. *v.* Parrish 612

N

Nall (Hodges *v.*) . . . 135
Neal (St. Louis & S. F. R. Co. *v.*) 543
Nease (Webb *v.*) . . . 155
Nelson (Little Rock Traction & Electric Co. *v.*) . . 494

O

Ostrander (St. Louis & S. F. Ry. Co. *v.*) . . . 567

P

Page (Tharp *v.*) . . . 229
Parham *v.* Dedman . . . 26
Parrish (Mutual Life Ins. Co. *v.*) 612
Payne *v.* Rittman . . . 201
——— *v.* State 545
Pearson (Bank of Paris *v.*) 310
Perkins *v.* Ewan . . . 175
Philpot (Jefferson County *v.*) 240
Porter *v.* Dooley . . . 1
Prairie County (Baugh *v.*) 360
Pritchett (St. Louis, I. M. & S. Ry. Co. *v.*) . . 46

R

Reed *v.* State 110
Reigler *v.* Sherlock . . . 215
Reynolds (Files *v.*) . . 314
Rhea *v.* Bagley 93
Richardson *v.* Bales . . 452
Rittman (Payne *v.*) . . 201
Robertson (Lee County *v.*) 82
Robinson *v.* Davis . . . 429
——— (Sparks *v.*) . . 460
Roleson (St. Francis County *v.*) 139
Roulston *v.* Hall . . . 305
Rugby Distilling Co. (Triplett *v.*) 219
Russell *v.* State 185
Rutherford *v.* McDonnell . 448

S

St. Francis County *v.* Folbre 91
——— *v.* Roleson . . . 139
St. Joseph's Convent *v.* Garner 623
St. Louis & S. F. R. Co. *v.* Neal 543
——— *v.* Ostrander . . 567
St. Louis, I. M. & S. Ry. Co. *v.* Bragg 248
——— (Ford *v.*) . . . 363
——— *v.* Pritchett . . . 46

St. Louis Refri[illegible]tor & Wooden Gut[illegible] Co. *v.* Langley . . [illegible] 48
St. Louis S. W. Ry. Co. (DeGraffenried *v.*) . . 260
——— *v.* Markham . . 297
Sawyer *v.* Dickson . . . 77
Schaer (Bunch *v.*) . . . 98
Schmaltz (Standard Life & Accident Ins. Co. *v.*) 588
Scroggin *v.* Hammett Gro. Co. 183
Scull (Texarkana & Fort Smith Ry. Co. *v.*) . . 312
Sherlock (Reigler *v.*) . . 215
Sidway *v.* Harris 387
Slayden - Kirksey Woolen Mills *v.* Anderson . . 419
Sloan (State *v.*) . . . 575
Smith (Little Rock & Ft. S. Ry. Co. *v.*) 278
———(Wear-Boogher Dry Goods Co. *v.*). 611
——— (Williams *v.*) . . 299
Sparks *v.* Moore . . . 437
——— *v.* Robinson . . 460
Standard Life & Accident Ins. Co. *v.* Schmaltz . 588
Standiford (Hencke *v.*) . 535
State *v.* Ætna Fire Ins. Co 480
——— (Boarman *v.*) . . 65
——— (Dunlap *v.*) . . 105
——— (Hardin *v.*) . . 53
——— (Houston *v.*) . . 120
——— (Houston *v.*) . . 607
——— (Kinnemer *v.*) . . 206
——— *v.* Lancashire Fire Ins. [illegible] 466
——— [illegible]ee *v.*) . . . 286
——— [illegible]lls *v.*) . . 16
——— [illegible] *v.*) . . 523
——— [illegible] *v.*) . 545
——— [illegible] . 110
——— [illegible] *v.*) . 185
——— [illegible] . 57[illegible]
——— [illegible] . 5[illegible]
State *v.* Wellbon 510
——— (Williams *v.*) . . 264
Stephens *v.* Stephens . . 356
Strauss *v.* White . . . 167
Sullivan *v.* State . . . 506
Summers *v.* Heard . . . 550
Sumpter (Blaisdell *v.*) . . 7
Swepston (McConnell *v.*) 141

T

Telle (Kelley *v.*) . . 464
Terry (Moore *v.*) . . . 393
Texarkana *v.* Leach . . 40
Texarkana & Fort Smith Ry. Co. (Kizer *v.*) . . 348
——— *v.* Scull 312
Tharp *v.* Page 229
Thompson *v.* Willard . . 346
Toler (Brown *v.*) . . . 361
Triplett *v.* Rugby Distilling Co. 219
——— (W. W. Johnson Co. *v.*) 233
Tupy *v.* Kocourek . . . 433
Turrell (Archer *v.*) . . 171

V

Vaughan (Brannon *v.*) . 87
——— *v.* Walton . . . 572

W

Wall (McCombs *v.*) . . 336
Waller (West-Winfree Tobacco Co. *v.*) 445
Walton (Vaughan *v.*) . . 572
Ward (Creson *v.*) . . . 209
Warner *v.* Hess 113
Wear-Boogher Dry Goods Co. *v.* Smith 611
Weaver *v.* Leatherman . 211
Webb *v.* Kelsey 180
———*v.* Nease 155
Webber (Davis *v.*) . . . 190
Welch *v.* Johnston . . . 251
——— *v* McKenzie . . 251
Wellbon (State *v.*) . . 510
West-Winfree Tobacco Co. *v.* Waller 445

Whipple *v.* Johnson . . 204
White (Strauss *v.*) . . 167
White Sewing Mach. Co. *v.* Wooster 382
Whitlow (Hiner *v.*) . . 121
Willard (Thompson *v.*) . 346
Williams (Honnett *v.*) . . 148
——— (King *v.*) . . . 333
——— *v.* Smith . . . 299
——— *v.* State . . 264
Williamson *v.* Lazarus . 226
Wilson (Little Rock & Ft. S. Ry. Co. *v.*) . . . 414
Wilson (Little Rock Traction & Electric Co. *v.*) . 582
Winkler *v.* Massengill . . 145
Wooster (White Sewing Machine Co. *v.*) . . . 382
W. W. Johnson *v.* Triplett 233

Y

Yeakle (Brandon *v.*) . . 377
Young (Independence County *v.*) 30

TABLE OF CASES

CITED BY THE COURT.

A

Ackley School Dist. *v.* Hall, 113 U. S. 135 580
Adams *v.* Penzell, 40 Ark. 531 585
——— *v.* State, 64 Ark. 188 121
Adkins *v.* Edwards, 83 Va. 316 44
Alabama Great Southern Rd. Co. *v.* Hawk, 72 Ala. 112 501
Aldridge *v.* Williams, 3 How. 24 472
Alexander *v.* Hardin, 54 Ark. 489 418
——— *v.* Town of New Castle, 17 N. E. Rep. 200 71
Allen *v.* Hamby, 66 Ill. 164 444
——— *v.* Jackson, L. R. 1 Ch. Div. 403 24
Alter *v.* Kinsworthy, 30 Ark. 756 330
Am. Mort. Co. *v.* Milam, 64 Ark. 306 205
Ames Iron Works *v.* Kalamazoo Pulley Co., 63 Ark. 87 225
Ammon *v.* Martin, 59 Ark. 194 302
Anderson *v.* Sloan, 72 Wis. 566 562, 563
Apel *v.* Kelsey, 52 Ark. 341 418
Applegate *v.* Lexington & Carter County Mining Co., 117 U. S. 897 7
Atkins *v.* State, 16 Ark. 588 547, 548
Atkinson *v.* Ritchie, 10 East. 530 356

B

Badgett *v.* Jordan, 32 Ark. 154 182
Baird *v.* St. Louis, I. M. & S. Ry. Co., 41 Fed. 592 571
Baldwin *v.* Scoggin, 15 Ark. 427 539
Bank *v.* Beck, 123 Mo. 141 104
Bank of Harrison *v.* Gibson, 60 Ark. 269 79
Barnes *v.* Brown, 130 N. Y. 372 534
Beard *v.* Arbuckle, 19 W. Va. 145 44
Bearden *v.* State, 44 Ark. 331 208
Bell *v.* Radcliff, 32 Ark. 645 320
Bender *v.* Bean, 52 Ark. 145 145
Bennett *v.* Child, 19 Wis. 362 309
——— *v.* Dawson, 18 Ark. 334 330
——— *v.* Robinson, 10 Watts, 348 24
Benton *v.* Holliday, 44 Ark. 60 115
——— *v.* State, 30 Ark. 328 55, 59
Beirne *v.* Emboden, 14 Ark. 237 330
Blennerhassett *v.* Sherman, 105 U. S. 100 104
Bloom *v.* Lehman, 27 Ark. 490 407
Boehm *v.* Botsford, 52 Ark. 400 4
Bond *v.* Jay, 7 Cranch, 350 473, 476
Borden *v.* State, 11 Ark. 519 418
Bostick *v.* Blades, 59 Md. 231 24
Boyd *v.* Bryant, 35 Ark. 73 579
Branch *v.* Knapp, 61 Ga. 616 433
Brandon *v.* Robinson, 18 Ves. 429 153
Brennan *v.* Fair Haven & W. R. Co., 45 Conn. 284 505
Bridge *v.* Hubbard, 15 Mass. 103 124
Brinkman *v.* Ritzinger, 82 Ind. 358 44
Brodie *v.* Watkins, 33 Ark. 545 194
Brown *v.* State, 34 Ark. 232 270
——— *v.* Watson, 47 Me. 161 42
Bryant *v.* State, 62 Ark. 459 121
Buck *v.* People's St. Ry. etc. Co., 108 Mo. 179 505
——— *v.* Lee, 36 Ark. 525 385
Buckner *v.* Bank, 5 Ark. 536 312
Bugg *v.* Sebastian County, 64 Ark. 575 34
——— *v.* Wertheimer - Schwartz Shoe Co., 64 Ark. 12 225, 236
Bullard *v.* Northern Pac. R. Co., 45 Am. & Eng. R. Cas. 544 355, 356

C

Cairo & F. Rd. Co. *v.* Parks, 32 Ark. 131 542
Campbell *v.* City of Kalamazoo, 80 Mich. 655 20
Campion *v.* Cotton, 17 Ves. 264 422
Carr *v.* Caldwell, 10 Cal. 385 444
——— *v.* State, 43 Ark. 104 501
Carroll *v.* State, 45 Ark. 539 22
Carson *v.* Lovee Dist., 59 Ark. 513 579
Carter County *v.* Sinton, 120 U. S. 522 580
Cary *v.* Dixon, 51 Miss. 593 117
Casey *v.* Inloes, 1 Gill, 430 52
——— *v.* State, 37 Ark. 67 55, 59
——— *v.* State, 53 Ark. 336 472
Cato *v.* Stewart, 28 Ark. 136 399
Catlett *v.* Railway Co., 57 Ark. 461 505
Cayton *v.* Hardy, 27 Mo. 536 451
Charles *v.* State, 11 Ark. 408 509
Chester County *v.* Barber, 97 Pa. St. 455 195

Chicago & S. E. Ry. Co. *v.* St. Clair, 42 N. E. Rep. 225 44
Child *v.* Brace, 4 Paige, Ch. 309 489
Chisholm *v.* Andrews, 57 Miss. 636 170
Choate *v.* Kimball, 56 Ark. 55 90
Chollar *v.* Temple, 39 Ark. 238 116
Chrisman *v.* Partee, 38 Ark. 31 438
Church *v.* Holcomb, 45 Mich. 39 432
Cissel *v.* Pulaski County, 10 Fed. Rep. 891 5
Clark *v.* Anthony, 31 Ark. 548 488
——— *v.* Gilbert, 26 N. Y. 279 199
——— *v.* Hare, 39 Ark. 258 182
Clayton *v.* Johnson, 36 Ark. 406 166
Clinton *v.* Estes, 20 Ark. 225 501
Cockrill *v.* Armstrong, 31 Ark. 580 308
——— *v.* Sanders, 8 S. W. Rep. 831 194
Cole *v.* Cole, 41 Md. 301 335
——— *v.* White County, 32 Ark. 45 246
Coleman *v.* State, 63 Ala. 93 183
Commissioners of Edenton *v.* Capeheart, 71 N. S. 156 483
Commonwealth *v.* Hayden, 40 N.E. 846 188
——— *v.* Mash, 7 Met. 472 189
——— *v.* Sego, 125 Mass. 210 509
——— *v.* Sturtevant, 117 Mass. 122 498
Conner *v.* Abbott, 35 Ark. 365 116, 117
Consaul *v.* Sheldon, 52 N. W. 1104 291
Conway, *ex parte*, 4 Ark. 302 166
Cooper *v.* Freeman Lumber Co., 61 Ark. 36 542
——— *v.* Lee, 59 Ark. 450 144
——— *v.* Phibbs, 2 L. R. Eng. & Ir. App. Cas. 170 451
Coquillard *v.* Bearss, 21 Ind. 479 195
Corley *v.* State, 50 Ark. 305 61, 63, 509
Cornell *v.* Lovett's Executor, 35 Pa. St. 100 24
Corning *v.* Lowerre, 6 Johns. Ch. 439 42
Cottrell *v.* Watkins, 89 Va. 801 433
Cribbs *v.* Benedict, 64 Ark. 555 39
Cuff *v.* Newark & N. Y. Ry. Co., 35 N. J. L. 31 72, 73
Cupp *v.* Campbell, 103 Ind. 213 117

D

Dailey *v.* Preferred Masonic Mut. Acc. Ass'n, 57 N. W. 186 597
Danenhauer *v.* Dawson, 65 Ark. 129 573
Davis *v.* Fire Ins. Co., 63 Ark. 412 489
——— *v.* Gaines, 48 Ark. 370 579
——— *v.* Ladoga Creamery Co., 123 Ind. 222 135
——— *v.* Webber, 66 Ark. 190 264
Dawson *v.* Parham, 55 Ark. 286 343
Dean *v.* Anderson, 34 N. J. Eq. 496 336
Demartin *v.* Albert, 68 Cal. 277 484
Dias v. Glover, Hoff. Ch. 71 308
Diver *v.* Diver, 56 Pa. St. 106 309
Dobbin *v.* Hubbard, 17 Ark. 194 117
Doe *v.* Garrison, 1 Dana, 35 308
Dolan *v.* State, 40 Ark. 454 549
Doran *v.* Phillips, 47 Mich. 228 539
Dorsey *v.* McGee, 46 N. W. 1018 291
Drake *v.* Thyng, 37 Ark. 228 451
Draper *v.* Mackey, 35 Ark. 497 42
Drewry *v.* Montgomery, 28 Ark. 256 260
Dumas *v.* Smith, 17 Ala. 305 195
Durfee *v.* Dean, 52 Mich. 387 316
Dyer *v.* Clark, 5 Metc. (Mass.) 562 260

E

Ede *v.* Johnson, 15 Cal. 53 183
Edison *v.* Frazier, 5 Ark. 219 312
Ellenbogen *v.* Griffey, 55 Ark. 270 464
Elliott *v.* McClelland, 17 Ala. 209 199
Ellwood *v.* Wilson, 21 Ia. 523 197
Emmett *v.* Yandes, 60 Ind. 548 117
Erwin *v.* St. Louis, I. M. & S. Ry. Co., 35 Am. & Eng. R. Cas. 390 505
Evans *v.* Perciful, 5 Ark. 43 6
——— *v.* Speer Hardware Co., 65 Ark. 204 312
Ewing *v.* Walker, 60 Ark. 503 166
Eylar *v.* Eylar, 60 Tex. 315 445

F

Featherstone *v.* Wilson, 4 Ark. 154 399
Feder *v.* Iowa St. Traveling Men's Ass'n, 78 N. W. 252 595, 596
Filkner *v.* Tighe, 39 Ark. 357 438
Fenno *v.* Coulter, 14 Ark. 38 432
Ferguson *v.* Hanauer, 56 Ark. 179 260
Feucht *v.* Evans, 52 Ark. 556 320
Finley *v.* Hogan, 60 Ark. 499 144
Fletcher *v.* Daugherty, 13 Neb. 224 375
——— *v.* Oliver, 25 Ark. 299 580
Fort Smith Oil Co. *v.* Slover, 58 Ark. 168 502
Foster *v.* Jack, 4 Watts, 334 194
Francis *v.* Lawrence, 48 N. J. Eq. 508 104
——— *v.* Schoellkopf, 50 N. Y. 152 42
Frecking *v.* Rolland, 53 N. Y. 422 119
Freeman *v.* Auld, 44 N. Y. 50 124

G

Garner *v.* Jones, 52 Mo. 68 309
Gibney *v.* Crawford, 51 Ark. 42 5
Gibson *v.* Zimmerman, 12 Mo. 385 308
Gilman *v.* Jones, 87 Ala. 702 195
Goddard *v.* Ordway, 94 U. S. 672 45
Goodman *v.* Cody, 24 Am. Rep. 808 270
Goodrum *v.* Ayers, 56 Ark. 93 542
Graham *v.* Anderson, 92 Am. Dec. 89 183
Green *v.* Brooks, 25 Ark. 318 330
——— *v.* United States, 9 Wall. 665 247
Griffith *v.* Mayfield, 63 Ark. 548 436

H

Haizlip *v.* Rosenberg, 63 Ark. 430 277
Hamilton *v.* Whitridge, 11 Md. 128 42
Hamrick *v.* Peoples' Bk., 54 Ga. 502 444
Hardin *v.* Hyde, 40 Barb. 435 124
Hardy *v.* Heard, 15 Ark. 188 170
Harman *v.* May, 40 Ark. 149 170

Harris, Appeal of, 12 Atl. (Pa.) 743 534
——— v. King, 16 Ark. 126 170
——— v. State, 62 Ark. 500 109
Heath v. Bishop, 4 Rich. Eq. 46 153
Hecker v. Haak, 88 Pa. St. 238 117
Heilman v. Martin, 2 Ark. 158 205
Hempstead v. Auditor, 16 Ark. 57 183
Heuisler v. Nickum, 38 Md. 270 444
Hicks v. Turck, 72 Mich. 311 336
Higgins v. Beckwith, 102 Mo. 463 460
Hight v. Harris, 56 Ark. 98 139
Hildeburn v. Brown, 17 B. Mon. 779 104
Hill v. Butler, 6 Ohio St. 207 407
——— v. Fellows, 25 Ark. 11 139
Hilliard v. Cagle, 46 Miss. 309 104
Hinkson v. Williams, 12 Vroom, 35 119
Hoboken Land & Imp. Co. v. Hoboken, 36 N. J. L. 540 42
Hoffbauer v. D. & N. Ry. Co., 52 Ia. 342 605
Holman v. Patterson 29 Ark. 357 170
Holland v. Rogers, 33 Ark. 255 521
Holloway v. Lowe, 7 Port. 488 199
Holt v. Kirby, 57 Ark. 250 79
Horner v. Hanks, 22 Ark. 572 418
Hot Springs Rd. Co. v. Newman, 36 Ark. 607 249, 250
Houlehan v. Rassler, 73 Wis. 557 444
Howard v. Priest, 5 Metc. (Mass.) 585 260
——— v. Savings Bank, 40 Vt. 598 302
——— v. Sheldon, 11 Paige, Ch. 558 489
——— v. State, 47 Ark. 411 295
Hulett v. Inlow, 57 Ind. 412 309
Humphrey v. Spencer, 36 W. Va. 11 422
Hunt v. Rousmanier's Admrs., 8 Wheat. 174 522
——— v. Weiner, 39 Ark. 74 488

I

Independence County v. Young, 66 Ark. 30 39
Ingram v. Rankin, 47 Wis. 406 563
Ingwersen v. Rankin, 47 N. J. L. 18 277
Insurance Co. v. Brodie, 52 Ark. 11 597
Irvin v. Armstrong, 31 Minn. 216 336
Irving v. Campbell, 121 N. Y. 353 436

J

Jacks v. Thweatt, 39 Ark. 340 194, 195
Jackson v. Woodruff, 57 Ark. 597 185
Jamison v. May, 13 Ark. 600 185
Jenkins v. Shinn, 55 Ark. 347 399
Johnson v. Parker, 51 Ark. 419 228
Jones v. Chandler, 40 Ind. 588 309
——— v. Duffy, 119 Ind. 440 304
——— v. Horn, 51 Ark. 19 562, 563
——— v. Pearce, 25 Ark. 545 139
——— v. School Dist., 26 Kas. 490 453
——— v. Williams, 31 Ark. 175 626
Joyner v. Harrison, 56 Ark. 276 542

K

Kaufman v. State, 63 Ala. 93 183
Kelly v. McDonald, 39 Ark. 387 562, 563
Kennedy v. Brown, 7 L. T. Rep. (N. S.) 626 194, 195
Kerr v. White, 7 Baxter, 394 45
Keystone Bridge Co. v. Summers, 13 W. Va. 476 42
Kies v. Young, 64 Ark. 385 118
Kirstein v. Madden, 38 Cal. 158 432
Knapp's Case, 10 Pick. 489 509
Koechling v. Henkel, 144 Pa. St. 215 117

L

La Du King Mfg. Co. v. La Du, 36 Minn. 473 199
Lafargue v. Markley, 55 Ark. 423 15
Lane v. Lane, 87 Ga. 268 433
Lawson v. Bettison, 12 Ark. 401 184
Leather Mfg. Bank v. Merchants Bank, 128 U. S. 26 453
——— v. Stiger, 30 N. J. Eq. 610 124
Lee v. Onstott, 1 Ark. 206 451
Leep v. Railway Co., 58 Ark. 407 413
Leonard v. Commonwealth, 112 Pa. St. 620 474
Lewis v. Boskins, 27 Ark. 61 170
——— v. Lewis, 15 Ohio, 715 197
——— v. Smith, 5 Seld. 502 25
——— v. State, 62 Ark. 496 113
Little Rock & F. S. Ry. Co. v. Chapman, 39 Ark. 463 275, 276
Little Rock, etc., R. Co. v. Payne, 33 Ark. 816 250
Little Rock & F. S. Ry. Co. v. Trotter, 37 Ark. 593 250
——— v. Worthen, 46 Ark. 312 39
Little Rock, M. R. & T. Ry. Co. v. Leverett, 48 Ark. 333 503
——— v. Manees, 41 Ark. 100 347
Lindsay v. Harrison, 8 Ark. 302 153
Lippincott's Est., 173 Pa. St. 368 382
Livingston v. McDonald, 21 Ia. 160 275
Log Cabin Permanent Bldg. Ass. v. Gross, 71 Md. 456 124
Loring v. Proctor, 26 Me. 18 621
Lowenstein v. Finney, 54 Ark. 124 166
Ludlow v. Flournoy, 34 Ark. 460 630
Lund v. Tyngsborough, 9 Cush. 36 500
Lynde v. McGregor, 13 Allen, 182 422
Lytle v. State, 17 Ark. 608 194

M

McConnell v. Beattie, 34 Ark. 113 170
McCulloch v. Chatfield, 15 U. S. A. 48 521
McCullough v. Blackwell, 51 Ark. 159 87
——— v. Campbell, 49 Ark. 367 628
McCurdy v. Canning, 64 Pa. St. 39 309
McDonald v. Hooker, 57 Ark. 632 134
——— v. People, 126 Ill. 150 20
McDuff v. Beauchamp, 59 Miss. 531 309
Maclin v. State, 44 Ark. 115 22

McWilliams *v.* Phillips, 51 Miss. 196 539
Madden *v.* Mo. Pac. Ry. Co., 50 Mo. App. 666 498, 499
Manz *v.* St. L., I. M. & S. Ry. Co., 87 Mo. 278 433
Marbury *v.* Cole, 49 Md. 402 309
Marr, *ex parte*, 12 Ark. 84 418
Martin *v.* Foreman, 18 Ark. 249 585
——— *v.* Roesch, 57 Ark. 474 52
Matthews *v.* Paine, 47 Ark. 54 79
May *v.* State National Bank, 59 Ark. 614 422
Meadow *v.* Wise, 41 Ark. 285 170
Mebane *v.* Mebane, 4 Rich. Eq. 131 152
Melton *v.* State, 43 Ark. 367 22
Messenger *v.* Penn. Rd. Co. 36 N. J. L. 407 356
Metropolitan St. Rd. Co. *v.* Moore, 83 Ga. 453 505
Meux *v.* Anthony, 11 Ark. 418 488
Middlebrooks *v.* Warren, 59 Ga. 232 444
Miles *v.* Collins, 1 Metc. (Ky.) 308 195
Milhau *v.* Sharp, 27 N. Y. 611 42
Miller *v.* Barkeloo, 8 Ark. 318 630
Minor *v.* Rogers, 40 Conn. 518 302
Mitchell *v.* Darley Main Colliery Co., L. R. 14 Q. B. Div. 125 278
Montgomery *v.* Johnson, 31 Ark. 74 418
Moore *v.* Anders, 14 Ark. 633 170
Moran *v.* Johnston, 26 Gratt. 108 44
Morris *v.* Floyd, 5 Barb. 130 124
Morse *v.* Gilman, 16 Wis. 531 484
Muehlhausen *v.* Rd. Co., 91 Mo. 332 505
Murray *v.* Keyes, 35 Pa. St. 384 117
Myton *v.* Davenport, 51 Ia. 583 574

N

Neil *v.* Rozier, 49 Ark. 551 144
Neis *v.* Gillen, 27 Ark. 184 139
Nevada County *v.* Hicks, 50 Ark. 416 246, 247
Newman *v.* Washington, Mart. & Yerg. 79 194
Newsom *v.* Thighen, 30 Miss. 414 539
Nichols *v.* Eaton, 91 U. S. 716 153
——— *v.* Overacker, 16 Kas. 54 444
Nickens *v.* State, 55 Ark. 567 620
Nolen *v.* Harden, 43 Ark. 319 302
Norcross *v.* Thoms, 51 Me. 503 42
Norman *v.* Fife, 61 Ark. 33, 182
North Chicago St. Ry *v.* Ackley, 49 N. E. Rep. 222 197
Northampton, etc., Ins. Co. *v.* Tuttle, 40 N. J. L. 103 622

O

O'Neal *v.* Kelley, 65 Ark. 550 291
Orr *v.* Shraft, 22 Mich. 260 385
——— *v.* Turner, 12 R. I. 94 195
Overton *v.* State, 57 Ark. 60 620

P

Pacific Rd. Co. *v.* Ketchum, 95 U. S. 1 45
Parsons Oil Co. *v.* Boyett, 44 Ark. 230 79
Paul *v.* Virginia, 8 Wall. 168 470
Pease *v.* Morgan, 7 Johns. (N. Y.) 468 433
Penny *v.* Vancleef, 1 Hall (N. Y) 168 432
People *v.* Fowler, 62 N. W. 572 21
——— *v.* Mahaney, 13 Mich. 481 580
——— *v.* Montague, 71 Mich. 447 20
——— *v.* Weed, 29 Hun, 628 189
Pettibone *v.* Hamilton, 40 Wis. 402 42
——— *v.* Washington Co., 43 Ark. 33 141
Phelps *v.* Jackson, 27 Ark. 589 488
Phillips *v.* Grayson, 23 Ark. 769 153
——— *v.* Medburry, 7 Conn. 568 24
Phœnix Ins. Co. *v.* Flemming, 65 Ark. 54 48, 267, 597
Pickett *v.* Merch. Natl. Bank of Memphis, 32 Ark. 346 124
Picquet *v.* Augusta, 64 Ga. 516 433
Pinnell *v.* Boyd, 33 N. J. Eq. 190 124
Pleasant *v.* State, 13 Ark. 360 527
——— *v.* State, 15 Ark. 624 268
Plitt, *ex parte*, 3 Wall. Jr. 480 195
Polack *v.* S. F. Orphan Asylum, 48 Cal. 490 42
Polk *v.* State, 45 Ark. 165 55, 58
Porter *v.* Dooley, 66 Ark. 1 182
——— *v.* Throop, 11 N. W. 174 21
Powell *v.* Durden, 61 Ark. 21 34, 579
Prentis *v.* Bates, 93 Mich. 234 21
President, etc., Turnpike Road *v.* Leonhardt, 66 Md. 70 498, 499
Price *v.* Carney, 75 Ala. 552 195
Pringle *v.* Dunkley, 14 Sm. & M. 16 24
Probst *v.* Scott, 31 Ark. 652 585

Q

Queen *v.* Justices of Berkshire, 4 Q. B. Div. 469 363

R

Railway Co. *v.* Sageley, 56 Ark. 549 415
——— *v.* State, 58 Ark. 39 115
Rector *v.* Bernaschina, 64 Ark. 650 399
Regina *v.* Baldry, 16 Jur. 599 509
——— *v.* Moore, 16 Jur. 622 509
——— *v.* Thompson, 8 Eng. Rul. Cas. 90 61, 63
Reynolds *v.* United States, 98 U. S. 145 60
Rhea *v.* Bagley, 63 Ark. 374 95
Richie *v.* Frazier, 50 Ark. 393 399
Ridenhour *v.* Kansas City Cable Ry. Co., 102 Mo. 270 505
Riggin *v.* Hilliard, 56 Ark. 481 489
Robinson *v.* Eagle, 29 Ark. 202 308, 309
Robson *v.* Hough, 56 Ark. 621 385
Rockafellow *v.* Peay, 40 Ark. 69 385
Rosseter *v.* Cahlmann, 8 Exch. 361 474
Russell *v.* Place, 94 U. S. 608 344
Ryan *v.* Lemon, 7 Ark. 78 330

S

St. Louis, I. M. & S. Ry. Co. *v.* Barnett, 65 Ark. 255 48
——— *v.* Briggs, 47 Ark. 59 347

St. Louis, I. M. & S. Ry. Co. *v.* Heath, 41 Ark. 476 347
——— *v.* Hendricks, 53 Ark. 201 366, 367
——— *v.* Kelley, 61 Ark. 52 502
——— *v.* Pritchett, 66 Ark. 43 267
——— *v.* Richter, 48 Ark. 349 585
——— *v.* Waren, 65 Ark. 619 48
St. Louis S. W. Ry. Co. *v.* Russell, 62 Ark. 182 48
Sale *v.* McLean, 29 Ark. 621 488
Salinger *v.* Gunn, 61 Ark. 414 542
Sanders *v.* Rudd, 21 Ark. 519 330
Sandlin *v.* Anderson, 76 Ala. 405 183
Scoggins *v.* State, 32 Ark. 205 189
Scott *v.* Pleasants, 21 Ark. 364 5, 6
Scripps *v.* Reilly, 35 Mich. 371 20
Seasongood *v.* Ware, 104 Ala. 212 422
Sessions *v.* Peay, 23 Ark. 39 376
Shackelford *v.* State, 33 Ark. 539 547
Shaul *v.* Harrington, 54 Ark. 307 139
Shaver, *re*, 31 U. C. Q. B. 605 309
——— *v.* Sharp County, 62 Ark. 78 344
Shaw *v.* Hall, 46 Ark. 333 436
——— *v.* Hearsay, 5 Mass. 521 308
Sheehy *v.* Miles, 28 Pac. 1046 436
Shorman *v.* Eakin, 47 Ark. 351 539
Shropshire *v.* State, 12 Ark. 190 183
Shugart *v.* Egan, 83 Ill. 56 72
Shumate *v.* Farlow, 125 Ind. 359 199
Sidway *v.* Nichol, 62 Ark. 152 117
Smith *v.* Robinson, 13 Ark. 533 170
Sneed *v.* State, 47 Ark. 180, 55, 59
Spies, *ex parte*, 27 Am. Law Reg. (N. S.) 46 58, 59
Stafford *v.* State, 10 Tex. App. 46 109
Standard Paper Co. *v.* Guenther, 67 Wis. 101 104
Stanley *v.* Snyder, 43 Ark. 429 386
State *v.* Adams, 78 Ia. 292 548
——— *v.* Armington, 25 Minn. 29 189
——— *v.* Brown, 24 Ark. 620 208
——— *v.* Deschamp, 53 Ark. 490 39
——— *v.* Devers, 34 Ark. 188 205
——— *v.* Hall, 50 Ark. 28 511
——— *v.* Hayden, 45 Ia. 11 548
——— *v.* Hughes, 58 Iowa, 165 189
——— *v.* Lancashire Fire Ins. Co., 66 Ark. 466 485
——— *v.* Lawson, 6 Ark. 269 170
——— *v.* Marsh, 37 Ark. 357 39
——— *v.* Sherwood, 35 Atl. 352 183
State use Izard Co. *v.* Hinkle, 37 Ark. 532 141
State Savings Bank *v.* Buck, 123 Mo. 141 104
Steck *v.* Mahar, 26 Ark. 536 182
Stewart *v.* Houston, etc., R. Co., 62 Tex. 248 195
Stidham *v.* Matthews, 29 Ark. 650 438
Stiger *v.* Bent, 111 Ill. 328 124
Stillwell *v.* Adams, 29 Ark. 351 116, 117
Stinson *v.* Shafer, 58 Ark. 110 314
Stoddard *v.* Hart, 23 N. Y. 556 336
Stokes *v.* Pillow, 64 Ark. 1 24
Stone *v.* Ry Co., 29 Am. Rep. 458 606
Straus *v.* Glass, 108 Ala. 546 118
Street *v.* French, 35 N. E. 814 436
Stryker *v.* Hershy, 38 Ark. 264 463
Sturgis *v.* Preston, 134 Mass. 172 453

T

Taliaferro *v.* Gay, 78 Ky. 496 574
Tate *v.* Joy, 31 Ark. 577 258
Taylor *v.* Lowenstein, 50 Miss. 282 170
——— *v.* Mississippi Mills, 47 Ark. 247 222, 225, 236
Tenny *v.* Porter, 61 Ark. 329 79
Thatcher *v.* Candee, 42 N. Y. 157 433
——— *v.* Franklin, 37 Ark. 54 166
Thomas *v.* Hinkle, 35 Ark. 450 307
Thompson *v.* King, 54 Ark. 9 385
Tiffany *v.* Henderson, 57 Ia. 490 432
Tillar *v.* Cleveland, 47 Ark. 287 464
Tracy *v.* Keith, 11 Allen, 214 117
Trammell *v.* Russellville, 34 Ark. 105 347
Trapnall *v.* State Bank, 18 Ark. 61 170

U

Uline *v.* N. Y. C. & H. R. Rd. Co., 101 N. Y. 98 278
Union Co. *v.* Smith, 34 Ark. 684 182
United States *v.* Palmer, 3 Wheat. 610 473
——— *v.* Trans-Missouri Freight Ass'n, 166 U. S. 318 472

V

Vahlberg *v.* Keaton, 51 Ark. 545 15
Vallentine *v.* Holland, 40 Ark. 338 185
Vance *v.* State, 56 Ark. 402 55, 56
Vansyckel *v.* Woolverton, 56 N. J. L. 8 119
Vaughan *v.* State, 57 Ark. 1 22
Vogel *v.* Leichner, 102 Ind. 55 117

W

Wagar *v.* Stone, 36 Mich. 364 574
Wahrmund *v.* Merritt, 60 Tex. 24 445
Wallace *v.* Brown, 17 Ark. 449 139
Walker *v.* Byer, 14 Ark. 247 330
——— *v.* Jessup, 43 Ark. 166 117
——— *v.* State, 40 Ark. 532 608
Ward *v.* Carlton, 26 Ark. 662 182
——— *v.* Mayfield, 41 Ark. 94 385
Ware *v.* State, 74 Ind. 181 453
Warickshall's Case, 1 Leach, Cr. Cas. 299 509
Warren *v.* George, 58 Fed. 435 533
Wear *v.* Gleason, 52 Ark. 364 211
Welsh *v.* Continental Ins. Co., 47 Hun, 598 621
Wesson *v.* Washburn Iron Co., 13 Allen, 95 42
West *v.* Weaver, 3 Heisk. 589 45

White *v.* Griggs, 54 Iowa, 650 574
——— *v.* Wheelan, 71 Ga. 533 444
Whittington *v.* Flint, 43 Ark. 504 574
Wilkerson *v.* Gordon, 48 Ark. 360 330
Williams *v.* State, 47 Ark. 230 182
Wilson *v.* Fussell, 60 Ark. 194 247
——— *v.* Northwestern Mut. Acc. Ass'n, 53 Minn. 470 597
Wilton *v.* Middlesex Rd. Co., 107 Mass. 108 505
Winship *v.* Merchants Nat. Bank, 42 Ark. 22 312
Wood *v.* Terry, 30 Ark. 385 438
Woodward *v.* Campbell, 39 Ark. 580 52
Woolfork *v.* Buckner, 60 Ark. 163 144
Worthington *v.* DeBardlekin, 33 Ark. 651 206
Wright *v.* Campbell, 27 Ark. 637 488

Y

Young *v.* State, 50 Ark. 501 61

Z

Zielke *v.* State, 60 N. W. 1010 538

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

PORTER *v.* DOOLEY.

Opinion delivered October 29, 1898.

66 1
f66 182

66 1
68 213

66 1
72 108
72 111
72 116
72 304

66 1
77 383

66 1
89 69

1. TAX-TITLE—CONFIRMATION—CONCLUSIVENESS.—All inquiry as to the validity of a tax-title is cut off by a decree of confirmation of the tax sale under which the title was acquired. (Page 3.)

2. PROOF OF PUBLICATION—SUFFICIENCY.—The proof of publication of notice of a suit for confirmation of a tax-title was sufficient under Mansf. Dig., § 4359, but did not show compliance with the requirement of Mansf. Dig., § 579, in that the magistracy of the justice before whom the proof was sworn to was not certified to by the county court. Without deciding whether the latter act was repealed by the former or not, *held* that the decree of confirmation was not void on collateral attack under the latter section, which points out a mode of proof of publication that shall be "sufficient," but does not preclude the idea that such proof may be made in some other way. (Page 4.)

Appeal from Arkansas Chancery Court.

JAMES F. ROBINSON, Chancellor.

Rose, Hemingway & Rose, James H. Gibson and *John B. Jones*, for appellant.

This case should have been tried before a jury, and not in a court of equity, since it involves title and right of possession of real property. 56 Ark. 374; 32 Ark. 553; 105 U. S. 189. Defective proof of publication of notice of sale is a question which could be tried at law. 44 S. W. 1041; S. C. 65 Ark. A complaint which states only "information" or "belief" of fraud furnishes no grounds for chancery jurisdiction. Big. Fraud 450, 451. It is not fatal to the proof of notice that the county clerk did not certify to the official character of the justice of the peace before whom it was made. The court takes

notice of this. 1 Gilm. (Ill.) 116; 11 Ill. 119; 4 Scam. 477; 42 Ill. 516. The act of 1875 (p. 152) revised the whole law as to the requirements of proof of publication of legal notices. 41 Ark. 149; 47 Ark. 491; 43 Ark. 427; 10 Ark. 590; 31 Ark. 19; 46 Ark. 451. The confirmation decree cured any defects as to description, etc., in the notice of sale. 55 Ark. 470. This decree can not be questioned in a collateral proceeding. 21 Ark. 364; 5 Ark. 43; 42 Ark. 344; 52 Ark. 400; 47 Ark. 131, 144; 53 Ark. 30, 55. Possession by appellant for the statutory period (of two years) is sufficient, in this case, to give title, if it was hostile and exclusive as against appellee. Tied. Real Prop. § 698, 699; 50 Ark. 141; 29 Ga. 651; 17 S. W. 755, 757; 22 Fla. 442, 446; 18 S. W. (Tex.) 815. Appellee should have, at least, tendered such taxes paid by appellant. 56 Ark. 186.

P. C. Dooley, pro se.

The land was so defectively and indefinitely described in the notice and sale that no title passed. 56 Ark. 172; 1 Desty, Taxation, 565–6; 2 *ib.* 829, 921, 922.

The court had no jurisdiction to render the decree of confirmation, because the notice was not such as is required by the statute; and, therefore, the confirmation decree is a nullity. 55 Ark. 30; 49 Ark. 397; 97 U. S. 444; 18 Wall. 350; Van Vleet, Col. Attack, § 16, p. 14; 27 Cal. 300–317. The affidavit of the *editor, proprietor or principal accountant* of the newspaper is the *only* competent evidence of publication of the notice. Mansf. Dig., § 4356. This must appear of record. 32 Wis. 394. Its deficiency can not be supplied by parol. 4 Sawy. 638; 6 Barb. 617; 4 Vt. 506; 51 Ark. 34; 5 Ill. 69; 6 N. H. 196; 14 Mich. 528; 48 Me. 528; 13 Wis. 99; Blackw. Tax Titles, 239, 240; 3 McCrary, 446.

The affidavit of publication was made before a justice, to whose magistracy the county clerk did not certify as required by statute, and the land is incorrectly described. See Mansf. Dig., § 579, 578. Such non-compliance with the statute is fatal to the jurisdiction of the court. The statute must be strictly followed, and the record must so show. 37 Minn. 194; 38 Minn. 506; 19 Neb. 689; 67 Mich. 530; 29 Wis. 558; 28

N. Y. 365; 41 Ill. 45; 15 Wis. 188; 19 Wis. 397; 36 Kas. 543; 23 Wis. 367; 31 Cal. 342–352; 32 Barb. 604–608; 64 Wis. 330; 54 Tex. 193; 67 Miss. 543; 32 Ga. 653–655; 35 Ill. 315; 16 Barb. 319, 322; 74 Ill. 274; 27 Cal. 295–298; 37 Mich. 143; 28 Fed. 514; 60 Ill. 338; 55 Ill. 377; 8 Minn. 381; 44 S. W. (Ark.) 1041; 16 S. W. (Ark.) 197; 51 Ark. 34; 48 Ark. 238; 10 Fed. 891; 33 Ark. 450; 27 Ark. 110; 33 Ark. 740; 30 Ark. 723; Newman's Pl. & Pr. 56; 11 Ark. 120; 13 Ark. 491; 14 Ark. 408; 22 Ark. 286; Sand. & H. Dig., § 4685; Cooley, Tax. 487, 335, 337; 6 Yerg. 22; 3 Johns. Cas. 1, 7; 42 Ark. 77; Wade on Notice, § 1120; 8 Ohio, 114; 12 Ala. 617; 26 Md. 206; 16 S. & R. (Pa.) 251; Black, Tax. 86; Blackwell, Tax Tit. 239, 240; 54 Md. 454; 51 Wis. 62; 4 Sawy. 638; 37 Cal. 295; 3 Sawy. 93; 97 U. S. 444; 39 Ark. 63; 32 Wis. 394; Freeman, Judg. 137. The fraudulent concealment from the court of the defects in the notice vitiates it. 42 Ark. 330; 22 Ark. 118. No adverse possession is proved in favor of appellee; hence the two years statute of limitation must fail him. 57 Ark. 523; 60 Ark. 163; 57 Ark. 105; 49 Ark. 266; 56 Ark. 104. As to general requisites of adverse possession, see further: 150 U. S. 597; 9 B. Mon. 253; 101 N. Y. 669; 11 Gray, 33; 30 Ga. 619; 26 Ga. 701; 28 Ga. 130; 33 Ga. 539; 32 Ga. 239; 34 Pa. St. 74; 36 Pa. St. 513; 2 N. & McC. (S. C.) 534; 1 N. & McC. 354; Cheves (S. C.), 354; 3 Metc. 125; 10 N. H. 397; 5 Md. 256; 39 Cal. 24; 4 Mass. 416; 37 Tex. 437; 30 Cal. 408; 32 La. 572; 43 Ark. 486; 24 Am. Rep. 627; 3 Mass. 219; 9 Wend. 511; 83 N. C. 424; 4 S. & R. 465; 27 Ark. 93; 30 S. W. 186; 20 S. W. 43.

HUGHES, J. This is an appeal from a decree in chancery in favor of the appellee setting aside a decree of confirmation of a tax title in favor of the appellant. The decree confirming the tax title of appellant Porter was rendered on the 19th of March, 1887. The land, the title to which was confirmed, was sold for taxes on the 14th of April, 1884. The decree of the court setting aside the decree of confirmation holds the decree of confirmation void for the want of jurisdiction to render it, for the want of notice and the uncertainty as to the land sold.

The evidence in the case shows that there was no sufficient

description of the lands sold in the advertisement of the tax sale, and that the southwest quarter of section 22 was described in the advertisement as in 2 S., 4 W., and that in the deed by the officer it is described as in 3 S., 4 W., which was the proper description. The tax deed itself is regular and valid on its face. Had the tax sale been attacked before the decree of confirmation, it is conceded by the appellant that it would have been held void. But "all inquiry as to the validity of a tax title is cut off by a decree of confirmation of the tax sale under which title was acquired." *Boehm* v. *Botsford*, 52 Ark. 400. The tax deed is the muniment of title.

The only question then is, is the decree of confirmation valid? Did the court have jurisdiction? Is there error upon the face of the record that warrants the decree setting aside the said decree of confirmation? The only contention upon these questions is that the proof of the publication of the notice that the appellant would apply to the court for a decree of confirmation is not in accordance with the directions and requirements of the statute, and is insufficient.

After prescribing what the notice of confirmation of tax title shall contain, the statute (section 578, Mansfield's Digest) provides that "the affidavit of one or more of the publishers or proprietors of said newspaper (in which the notice is published) setting forth a copy of such notice, with the date of the first publication thereof and number of insertions, sworn to and subscribed before some justice of the peace of the county or city in which said newspaper is published, with a certificate of magistracy of the court of said county, under the seal of his office, on being produced to said court, shall be taken and considered as sufficient evidence of the fact of publication, the date and number of insertions and form of such notice." Section 579, Mansfield's Digest, reads: "On producing the proof of said notice, as required in the preceding section, the party publishing the same may apply to the judge of the court aforesaid to confirm the sale," etc.

The objection to this proof here is that the justice of the peace before whom it was sworn to is not shown by the certificate of the clerk to be a justice of the peace of that county,—that there is no certificate of magistracy. It is contended by

the appellant that the above-quoted provision of law was repealed by the subsequent act prescribing the manner of proof of publication of legal advertisements. Mansf. Dig., c. 94. In the view the court has taken of the question upon the sufficiency of the proof of publication of the notice to apply for confirmation, it is unnecessary to decide whether the latter repeals the former act or not, as we are of the opinion that the proof is good under either act.

It will be observed that section 578 of Mansfield's Digest does not preclude the idea that the mode of proof of publication of the notice is exclusive of other evidence of the fact of publication; but only says that, when made as therein required, it "shall be taken and considered as sufficient evidence of the fact of publication, the date and number of insertions and the form of such notice."

In *Gibney* v. *Crawford*, 51 Ark. 42, and in *Cissel* v. *Pulaski County*, 10 Fed. Rep. 891, it is said that, "the statute having prescribed the manner in which the notice should be given, it could not be given legally in any other manner, and. having prescribed what shall be the evidence of the publication, it can be proved in no other manner. Facts which should be of record cannot be proved by parol."

Cissel v. *Pulaski County* was decided in 1881, and *Gibney* v. *Crawford* in 1888, both under the latter act, which provides that 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." Mansf. Dig., § 4359.

It is to be observed that this act—not like the prior act—precludes the idea that proof may be made in any other way than as therein prescribed by stating that, when made as therein prescribed, it "*shall be the evidence* of the publication thereof as therein set forth."

In *Scott* v. *Pleasants*, 21 Ark. 364, an attack was made on

a decree of notice of confirmation of tax sale because the affidavit of publication of notice was made by the editor, instead of the publisher or proprietor, of the newspaper, as then required by the statute. The court said this was error, but held the decree was not void. The court said: "But it does not follow that the decree, though reversible upon appeal and for error on its face, must be held void, and consequently be disregarded when introduced collaterally. The decree of the court was made upon a matter over which it had jurisdiction, as held in *Evans* v. *Perciful*, 5 Ark. 43. * * * A decree *pro confesso* on constructive notice that is defective is as good as a like decree upon insufficient personal service, and such decree, when made final, cannot be collaterally questioned. * * * The court rendering the decree under consideration passed directly upon the evidence of publication of the notice; that was one of its clearest prerogatives, and, though it may be admitted that the court wrongfully decided, its decision was simply an interpretation of the law that could have been corrected if made the subject of direct review in this court; it could not be annulled by the circuit court of Pulaski county. * * * It is claimed that, in the confirmation of tax titles by our statutory decrees, a more stringent rule of construction must be applied to them than to other decrees; that, as being founded on a summary proceeding, everything both to show the jurisdiction, the manner of its exercise, and the evidence on which it was rendered, must be set forth in the decree. * * * It is not perceived why any [other] rule of construction or admissibility in evidence should be applied to a decree of confirmation than is applied to decrees rendered in our usual chancery practice upon constructive notice."

In *Scott* v. *Pleasants* the court said: "The statute does not say that it [the affidavit of the publisher or proprietor] shall be the only evidence of the publication; and if the decree did not exclude the conclusion, we might infer that other evidence than the affidavit attached to the notice read by the plaintiffs was before the court upon the rendition of the decree."

The decree of confirmation attacked in this case does not exclude the conclusion that other evidence of the publication than that of the affidavit said to be insufficient for the want of

a certificate of magistracy was before the court upon the rendition of the decree. There is no evidence that this affidavit was the only proof relied upon.

The judgment of the court is presumed to be right, unless the contrary is made to appear.

In case of *Applegate* v. *Lexington & Carter County Mining Co.*, 117 U. S. (Lawyers' Ed.) 897, Mr. Justice Woods, delivering the opinion of the court, said: "The result of the authorities, and what we declare, is that where a court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record; and the judgment of the court, so far as it affects such property, will be valid."

The decree is reversed, and remanded with directions that a decree be entered below in accordance with this opinion.

BLAISDELL v. SUMPTER.

Opinion delivered December 3, 1898.

UNNECESSARY ADMINISTRATION—COSTS—PRACTICE IN EQUITY.—Where it appears that there was no occasion for an administration, the debts of intestate having been paid, it is error to allow the administrator, in a suit in equity against the heirs for possession of intestate's property, to recover costs needlessly incurred by him in taking care of the property and in making appraisement thereof. (Page 9.)

Appeal from Garland Chancery Court.

LELAND LEATHERMAN, Chancellor.

G. W. Murphy, for appellants.

BUNN, C. J. The abstract of appellants (there being no

brief and abstract for appellee) states the facts of this case fairly from the record, as follows, to-wit: "In the year 1873, Ida Thompson and John M. Blake, a jeweler in Hot Springs, Garland county, Ark., were married. In 1874, they were divorced. They had no children. In 1875, at Memphis, Tenn., she intermarried with A. J. Ackerman, and was soon divorced from him. Afterwards, in 1878, at San Antonio, Tex., she was married to H. E. Tuttle, from whom she was also afterwards divorced. J. M. Blake continued his jewelery business in Hot Springs until 1878, when his establishment, with everything in it, was lost by fire. He soon resumed business in the same line, and continued it until his death, in July, 1887, notwithstanding he passed through another fire in 1880. He left no children. E. G. Blake, R. K. Blake, Lucinda Otis, A. C. Otis, C. N. Porter and Rufus Porter are his heirs at law, and the only persons having any interest in his estate as such. They, the appellants, were all over 21 years of age when he died. He died intestate. These facts appear from the stipulation of counsel, as well as from the evidence. Upon the death of John M. Blake, his heirs, who are the appellants, and the creditors of his estate placed the stock of jewelery left by him in the hands of Ed. Hogaboom to be sold from as formerly until all his debts were paid, after which the business and what remained of the stock were turned over to the appellants under that agreement. The debts so paid amounted to from $12,000 to $14,000. After the turning over of the stock to the heirs, they continued the business. On the 28th of July, 1891, Ida Tuttle, in the name of Ida Thompson Blake, * * * filed in the probate court of Garland county, in vacation, a petition for the appointment of John J. Sumpter, as administrator of the estate of said John M. Blake. The clerk issued the letters of administration to him on the same day." Thereupon the said Sumpter qualified as such administrator, and thereupon he, as such administrator, instituted this suit against the defendant, Blaisdell, in charge of said business and property, for the possession of all the said stock of jewelry, on the 28th day of July, 1891, and a writ of possession was issued, and appellee was put in possession of said goods, and the appellant's business was closed. The other appellants, having been made parties defendant, filed

a joint answer with Blaisdell, setting up substantially the facts as stated above, and the fact that all the debts of John M. Blake had been paid by them.

The appellants also filed a protest in the Garland probate court against the confirmation of the action of the clerk in granting letters of administration, but the probate court confirmed the appointment, and appellants appealed to the circuit court, where the judgment of the probate court was reversed, and the letters of administration were revoked. This proceeding was subsequently set forth by the appellants in a supplemental answer in this cause. Appellee filed an answer to the cross-complaint, admitting the payment of the debts by the appellants, as stated, but alleging that they were not all the debts of John M. Blake, his intestate; averring that the suit was instituted in good faith, and not fraudulently, as alleged in defendant's answer; and also insisting that if the said marriages and divorces of the said Ida are material, she ought to be made a party; and that he, said administrator, had expended the sum of $500 in taking care of the property and in having it appraised.

The said claimant, under the name of Ida Thompson Blake, then filed her petition for dower, in which she set up her marriage with Blake, and her divorce from him, his death and intestacy, and a claim to one-half of the property aforesaid.

The court below dismissed the petition of the said Ida Thompson Blake, and the complaint and cross-complaint, but decreed that appellants should pay all costs in the proceedings; and from this latter order appellants appealed, there being no appeal on the part of the appellee, nor of Ida Thompson Blake.

The costs is all that is involved in this case. The cause was transferred to the Garland chancery court, and there heard. In equity, the costs are not necessarily adjudged, as at law, against the losing party; but, on the contrary, the chancellor possesses a large discretion in the matter, and, when the facts warrant it, may distribute the costs upon equitable principles, without regard to the fact of the decree in the case being otherwise for the one party or the other. But this discretion should be exercised upon well known principles only, and in cases

where the successful defendant is not without fault himself. 2 Beach, Equity Practice, § 1011.

The case at bar does not present the appellants as blamable in any respect for the entailment of the costs; but, on the contrary, presents the petitioner and the appellee as prosecuting a groundless claim. As to money expended for taking care of the property and for making an appraisement of the same, the property belonged to the appellants, was used in their legitimate business, and the taking of it by the appellee under his writ of possession was at his instance, and he ran the risk of succeeding in his suit, and failed.

The decree for costs is reversed, and the same are adjudged against the appellee individually, and the decree is so rendered here.

MARTIN v. ADAMS.

Opinion delivered December 3, 1898.

USURY—RATIFICATION OF CONTRACT.—A borrower applied to a broker to secure for her a loan of $4,500. The broker applied to the agent of a foreign money lender who accepted the proposition for a loan, subject to his principal's approval. Under the broker's directions the borrower executed to the lender a mortgage with notes for a loan of $4,500 for five years, bearing 8 per cent. interest, and at the same time executed a separate mortgage with notes for $900 to the broker as a commission for procuring the loan. Thereupon the broker advanced the amount of the loan to the borrower on behalf of the lender, and transmitted to the latter the mortgage and notes for that amount. The lender ratified the act of the broker in making such advance and repaid same. *Held* that the borrower executed two separate contracts, viz., (1) to repay the loan, and (2) to pay her broker's commission; that the lender, in ratifying the act of the broker in advancing the amount of the loan, did not ratify the latter contract and make it a part of the former, so as to render the loan usurious. (Page 14.)

Appeal from Chicot Chancery Court.

JAMES F. ROBINSON, Chancellor.

Rose & Coleman, for appellants.

To charge a lender with usury on account of the act of his agent in demanding a compensation from the borrower, which, added to the interest paid the lender, made an amount in excess of the legal interest, the lender must have had knowledge of the transaction, or the circumstance must be such as to charge him therewith. 51 Ark. 545. The agency of the Corbin Banking Company could not be proved by the declarations of its officers. 33 Ark. 251; 37 Ark. 17; 46 Ark. 222. Its acts did not really bind the lender at all, because nothing shows the character of the services they were to render. 82 Ga. 299. Ratification must be made with full knowledge of all essential facts. Whart., Ag. §§ 65, 614. The fact that the banking company advanced the money on the approval of the loan did not constitute it the lender. 82 Ga. 299; 96 Ga. 227.

Robt. E. Craig and *Baldy Vinson*, for appellee.

If the Corbin Banking Company was the agent of the mortgage company, its exaction of usury binds the latter. 51 Ark. 544; 54 Ark. 50. Ratifying this act and accepting benefit of same would render it chargeable. Or if the banking company made the loan on its own responsibility, it was usurious, and the taint follows it into the hands of all transferees. 41 Ark. 331; 54 Ark. 572. The agreement for the interest and that for the bonus formed one entire contract. 13 S. W. 843. But the banking company was the real lender, in the first place. 11 S. W. 881.

BATTLE, J. In 1883, the Corbin Banking Company did a general banking business, and acted as loan brokers in the negotiation of loans. At the same time the American Mortgage Company was a corporation organized in Scotland to lend money on mortgages on farms in the United States, Canada, and other countries, having its principal office in Edinburgh, Scotland, and an agent (J. K. O. Sherwood) in New York City, whose duty it was to examine the titles to the farms offered as security, and accept applications for loans, subject to the approval or rejection of his principal. As early as 1877 the banking company commenced to negotiate with the mortgage company for loans, and in the course of many years succeeded

in securing a considerable number. They were secured in this manner: Applications for the loans, accompanied by statements showing an abstract of the applicant's title to the land which he offered to secure the loan and the value of the same, were first presented to the agent in New York City for acceptance or rejection. If he accepted, the applicant executed his notes for the amount desired to the mortgage company, and a mortgage to secure the same, and caused the mortgage to be recorded; and then the banking company sent the application and accompanying statements, and the notes and mortgage to the mortgage company in Edinburgh; and, if it approved the application, notes and mortgage, it paid the full amount of the notes to the banking company for the applicant.

In June, 1883, Mrs. Kate H. Adams applied to John C. Calhoun for a loan of $4,500 at 8 per cent. per annum interest, to be secured by a mortgage upon her lands. At the same time she entered into a written contract, by which she agreed to pay him $900 in the event he succeeded in securing the loan. Calhoun forwarded the application, and a statement showing an abstract of her title to the lands and their fertility and value to the banking company, which presented them to Sherwood, as agent, and he approved making the loan. The banking company thereupon prepared a note for $4,500, with five coupons for 8 per cent. interest attached, payable to the mortgage company, and a deed of trust in favor of Sherwood, as trustee, to secure the payment of the same. They also prepared five other notes aggregating $900, payable to Calhoun, and a deed of trust in favor of F. W. Dunton, cashier of the banking company, to secure them. The deeds of trust and the notes and coupons secured by them were then forwarded to Mrs. Adams, and she executed all of them. The deed in favor of Sherwood was filed for record on the 4th of July, 1883, and the other on the 26th of the same month. The former was recorded on the twentieth, the sixteenth day after it was filed. After this Calhoun returned the deeds, notes and coupons to the banking company, with information that he had drawn five drafts on them, aggregating $4,500, the amount of the loan, which drafts were duly paid by the drawees. The banking company then forwarded the note for $4,500 and the coupons for interest

thereon, which were payable at their office in the city of New York, and the deed of trust executed to secure them, which contained a stipulation that it and the note secured thereby, except as therein otherwise provided, "should be construed according to the laws of Arkansas, where the same was made," and the application for the loan and the accompanying statements, to the mortgage company in Edinburgh, Scotland, which approved the loan and delivered to the banking company the $4,500. Calhoun transferred the other five notes and mortgage to the banking company in full payment for their services, having first received from them $90 for his interest therein. The mortgage company had no interest in them (the five notes) nor notice of their existence until long after the loan was made. As the maturity of the coupons approached, the banking company urged Mrs. Adams to pay them promptly. They did this without the knowledge or consent of the mortgage company, for the purpose of establishing and maintaining a good reputation as loan brokers. In this way they collected the two coupons first falling due and a part of the third, when Mrs. Adams refused or neglected to make further payments; and the trustee appointed to foreclose the mortgage in favor of Sherwood proceeded to sell her lands, and she brought this action to restrain him from so doing and to cancel the note for $4,500 and the unpaid coupons, together with the mortgage securing them, alleging that the notes made payable to Calhoun were for interest on the $4,500, and that, adding the principal thereof and of the coupons, the interest she promised to pay on the loan amounted to 12 per cent. per annum; that the notes to Calhoun were executed and intended as a device to avoid the usury laws; and that all of the notes, coupons and mortgages were usurious, null and void. The mortgage company denied the usury and notice or knowledge of the existence of the notes payable to Calhoun, and asked that the mortgage executed to secure the note for $4,500 and coupons be foreclosed, and other proper relief. Upon evidence adduced at the hearing tending to prove the foregoing facts, the court below found that the loan was usurious and void, and cancelled the notes and mortgages.

To sustain the decree of the chancery court, it will be

necessary to find that the banking company made the loan, or that they were the agents of the mortgage company in making it, and that the mortgage company knew, or is presumed to have known, at the time it made it, that the banking company were to receive from Mrs. Adams, or her agent, compensation for procuring it greater than 2 per cent. on the amount lent, which, added to the 8 per cent., made the sum she paid and promised to pay for the loan exceed 10 per centum per annum.

But neither of these theories is correct. The banking company did not undertake to lend Mrs. Adams any money, but to procure a loan. To do so they presented her application to the agent of the mortgage company to get his approval, upon securing which they had reason, based upon past business transactions, to believe that they would be successful in their undertaking. Upon this belief they prepared and sent a note for $4,500, and coupons for 8 per cent. per annum interest thereon, payable to the mortgage company, and a mortgage, to Mrs. Adams; and she executed and returned them to the banking company. They advanced to her the amount of the note, and forwarded the note, coupons and mortgage to the mortgage company in Edinburgh, Scotland, and received in return from it the $4,500 for Mrs. Adams, which, having already advanced to her, they retained for their own use. They did not intend to lend to Mrs. Adams the money advanced to her, as evidenced by their conduct immediately afterwards, and did not, as the sequel proved. But they advanced it for the mortgage company, believing that it would ratify their acts in its behalf. They exacted no promise from her to return it at any future time. She did not become bound or undertake to pay them any interest for the use of money. If she became liable in any contingency to return the amount received from them, that liability was wiped out by the receipt of the money from the mortgage company.

The evidence clearly shows that the banking company was not the agent of the mortgage company. Two contracts were made by Mrs. Adams,—one with Calhoun, by which she agreed to pay him $900 to secure a loan of $4,500 to her, and the other with the mortgage company for the loan. The latter was not binding, and did not become operative until ratified. When

ratified by the mortgage company, it became a valid contract, and the parties to it were bound to perform it according to its terms. The mortgage company could not ratify the former contract, because it was not made in its name or for its benefit. *Lafargue* v. *Markley*, 55 Ark. 423. It was a separate and distinct contract, based upon a different consideration. Calhoun, or the banking company, in making it, did not assume to act for the mortgage company. Hence the mortgage company, in ratifying the latter, did not ratify the former, and make it a part of the latter.

The contract with the mortgage company is unlike those contracts which have been held usurious because the agent of the lender, either with the knowledge of his principal, or under circumstances from which the law presumed knowledge, received from the borrower a bonus in excess of the highest lawful rate of interest. Such contracts were held to be usurious because it was the duty of the lender to pay his agents for their services, and the borrower, in rewarding them, paid for services rendered the lender, paid the debt of the lender, and thereby paid him more than ten per cent per annum interest for the use of money. *Vahlberg* v. *Keaton*, 51 Ark. 545. That is not so in this case. The banking company and Calhoun were not in the employment of the mortgage company, and it was under no obligation to pay them for procuring the loan. It owed them no debt for their services, and Mrs. Adams, in compensating them, did not pay the mortgage company anything for the use of its money.

Our conclusion is that the note for $4,500 was not affected by usury, and that the mortgage to secure it should have been foreclosed.

The decree of the chancery court is, therefore, reversed, and the cause is remanded with directions to the court to render a judgment in favor of the mortgage company against Mrs. Adams and R. J. Adams for the amount due on the note for $4,500, and to foreclose the mortgage in favor of Sherwood, and for other proceedings not inconsistent with this opinion.

HUGHES and WOOD, JJ., dissent.

66 16
71 418
66 16
74 258

66 16
88 581

McFALLS v. STATE.

Opinion delivered December 3, 1898

1. CRIMINAL TRIAL—FALSITY OF OPENING STATEMENT.—The failure of the court to instruct the jury to disregard certain statements of the prosecuting attorney as to what the evidence would show, which statements were not sustained by evidence, is not prejudicial where the court was not requested so to instruct, and it was apparent to the jury that the evidence was not what the prosecuting attorney expected it to be. (Page 18.)

2. EVIDENCE—WHEN NOT PREJUDICIAL.—The admission of evidence tending to connect with the crime one indicted jointly with defendant is not prejudicial to the latter. (Page 21.)

3. ACCOMPLICE—CONCEALMENT OF CRIME.—One who conceals crime from anxiety for his own safety, and not to shield the criminal, is not an accomplice. (Page 22.)

4. TRIAL—JUROR—UNDUE INFLUENCE.—The proof was that the officer in charge of the jury, after the case had been submitted, asked one of the jurors, while separated from his fellow jurors, how the jury were running, and that the juror replied, "Pretty well; I think we will get through in two or three hours." The officer then said, "If you do, I will get the judge to come over, and then we may get some rest tonight." *Held* not to show that the juror was subjected to undue influence. (Page 22.)

Appeal from Sevier circuit court.

WILL P. FEAZEL, Judge.

George Vaughan, for appellant.

Unless a conspiracy be proved by evidence *aliunde*, it is not competent to introduce evidence of an alleged co-conspirator's acts. 3 Greenl. Ev. § 94; Whart. Ev. § 1206; Gillett, Ind. and Col. Ev. § 28; 32 Ark. 220; 37 Ark. 67; 45 Ark. 132. The court should have excluded this evidence, on the state's failure to prove a *prima facie* conspiracy. Clark's Cr. Prac. 522; 2 McLain, Cr. Law, §§ 988–990. Nor could evidence of the acts and declarations of an alleged accomplice, after the commission of the crime, be received in evidence. 1 Greenl. Ev. § 111; 3 *ib.* § 94; Whart. Crim. Ev. § 699–700; Kerr, Homicide, 490; 20 Ark. 216; 45 Ark. 132; *ib.* 165; 21

So. 404; 40 S. W. 596; 2 Whart. Crim. Law, § 1406. Instruction No. 9, for the state, was erroneous, in that it was not based on any evidence. 15 Ark. 491; 14 Ark. 530; 16 Ark. 628; 42 Ark. 57; 49 Ark. 543; 12 Pac. 106. The court gave contradictory instructions, which was error. Wells, Questions of Law and Fact, 36, 37; 53 Ark. 117; 58 Ark. 473, 480; 41 Mich. 433. In capital cases,at least, it is error to allow the jury to separate after the cause is submitted. 12 Ark. 782; 34 Ark. 341; 44 Ark. 115; 57 Ark. 1; 12 Am. & Eng. Enc. Pl. & Pr. 566; Proffatt, Jury Tr. §§ 395, 396; 3 Minn. 444, 447; 5 Cal. 275; Sand. & H. Dig. § 2239; 56 Ga. 653; 12 La. Ann. 710; 10 Yerg. 241; Hayne, New Ter. & App. § 68, par. 2*a*. The communication between one of the jury and the officer in charge as to the probable length of their deliberations is a ground for new trial. 10 So. 579; Proff. Jur. Tr. § 391; 14 So. 181; 31 Ga. 639; 42 Mich. 267; 12 Am. & Eng. Enc. Pl. & Pr. 543. The presumption is that the misconduct of the jury was prejudicial. Thomp. & Merriam, Jur. § 438. It was error to allow the prosecuting attorney to make statements in his open argument which the evidence did not sustain. 78 Ga. 592; 68 Ala. 476; 48 Ark. 131; 30 N. W. 630; 4 N. E. 911; 33 N. E. 991; 41 N. E. 545; 75 Ind. 215, 221; 38 Kas. 53; 11 N. W. 174; 36 O. St. 201; 44 Wis. 282; 62 Ala. 155; 71 Mich. 452; 35 Mich. 371; 126 Ill. 150; 35 Mich. 371, 392; 62 N. W. 572; 11 Ga. 633, 634; 41 N. H. 317; 52 N. W. 873; 75 N. C. 306; 79 N. C. 589; 2 Enc. Pl. & Pr. 727; 1 Bish. Crim. Law, § 969; Ell. App. Prac. § 672; Kerr, Hom. § 305; 1 Thomp. Tr. §§ 263, 264; *ib.* pp. 754, 755; 68 Ala. 476; 18 Tex. App. 524, 564; 19 Tex. App. 227; Sand. & H. Dig. § 2220; 3 Rice, Ev. § 180. The evidence wholly fails to support the verdict, and same should be reversed. 34 Ark. 632; 49 Ark. 364; 59 Ark. 50; 27 S. W. 225; 63 Ark. 457; Hill, N. Tr. chap. 14.

E. B. Kinsworthy, attorney general, and *Chas. Jacobson*, for appellee.

Evidence of the acts and declarations of a co-conspirator is admissible if collusion is shown *prima facie* or in such a

measure as to properly present the question to the jury. 32 Ark. 331; 57 Ia. 427–8; 1 Greenl. Ev. § 111; 3 *ib.* § 94; 53 N. Y. 472; 6 Am. &Eng. Enc. Law (2 Ed.), 866b; 143 N. Y. 455. The least degree of consent or collusion makes the act of one the act of all. 92 N. C. 732, 737–747; 11 S. C. 197; Underh. Crim. Ev. § 491; 2 Starkie, Ev. 234; 12 Tex. App. 65. It is not material as to the order of introducing the proof. 122 Ill. 8; 1 Greenl. Ev. § 111; 18 Kas. 298; 6 Am. & Eng. Enc. Law (2 Ed). The conspiracy being shown, it is immaterial as to whether or not defendant was present at the making of the declarations of a co-conspirator. 45 Fed. 872; 32 Ark. 220; 2 McClain, Crim. Law, § 988. The ninth instruction was sustained by sufficient evidence. 22 Ark. 477; 50 Ark. 545. One who conceals a crime through fear of the criminal is not an accessory after the fact or an accomplice. 45 Ark. 539. The jury's finding that one is not an accomplice is conclusive. 43 Ark. 367; 51 Ark. 115; 51 Ark. 189. The only effect of the affidavit showing that a juror had spoken with an officer during their deliberations was to put on the state the burden to disprove prejudice to defendant. 12 Ark. 782; 13 Ark. 323; 20 Ark. 53; 26 Ark. 323. The arguments of the prosecuting attorney were not improper. 34 Ark. 658; 58 Ark. 353; 66 N. W. 41; 22 La. 497; 104 Ind. 467; 18 Tex. App. 564; 55 Mo. 520; 92 Ind. 477; 4 Am. & Eng. Enc. Law, 875.

BATTLE, J. Henry Williamson and Will McFalls were jointly indicted for murder in the first degree, committed by feloniously, wilfully, maliciously, deliberately, and premeditatedly killing one Joe Wright. Upon arraignment they pleaded not guilty, and severed in their trials. Will McFalls was tried, and convicted of murder in the first degree. He has appealed to this court, and assigns many reasons why his conviction should be set aside. He says, among other things, that he is entitled to a new trial, because the prosecuting attorney, in his opening statement to the jury of what he expected to prove, was permitted by the court to make the following remarks: "The evidence will show that Henry Williamson, jointly indicted with this defendant, had on divers occasions made threats against

the life of the deceased. These threats were occasioned by the following circumstances. Several months ago one of Henry Williamson's daughters had gone astray. Her father was so incensed that he was heard to say that if ever one of his daughters was misled again he would kill the perpetrator of the wrong, and let the law take its course. Just prior to the killing, one of his daughters was again found in a bad fix, and the deceased, Joe Wright, was the accused party. The evidence will further show that the defendant, Will McFalls, had married a niece of the said Henry Williamson, and it is the theory of the State that the two defendants met at the place of the killing on the fatal Sunday morning, knowing that the deceased would pass along the road, and there assaulted and murdered him. It will further appear from the testimony that, on the Thursday following the disappearance of the deceased, said Henry Williamson had exhibited to Dr. Graham a wound in his side, which had been made with a knife or razor; but that he explained to the doctor that the wound had been made by a plow handle in a runaway scrape, that his horse had run away and broken the plow lines. Gentlemen, we have got the plow lines, and they show, beyond question, to have been cut, instead of broken. The wound, when exhibited to the doctor, was partially healed, and we will show that it had been made some three or four days previously." No evidence was adduced tending to prove any of these statements, except the following testimony of Dr. Graham: "I saw Henry Williamson on Thursday morning following the disappearance of Joe Wright. I saw a cut place on his side about three inches long, and it looked to have been made by some sharp instrument, such as a knife or razor. The wound was beginning to heal, and appeared to have been made three or four days previous." The court did not instruct the jury to disregard any of the statements made by the prosecuting attorney, and the defendant did not ask it to do so. Did the court err in failing to do so?

Every man accused of a crime, before he can be legally convicted and punished, is entitled to a fair and impartial trial, according to law; and it is the duty of the courts and the prosecuting attorneys to see that this right is upheld and sustained in all prosecutions coming before them.

The statutes of this state provide that, after the jury in a criminal case has been duly impanelled and sworn, the prosecuting attorney may then read to it "the indictment, and state the defendant's plea thereto, and the punishment prescribed by law for the offense, and may make a brief statement of the evidence on which the state relies;" and "the defendant, or his counsel, may then make a brief statement of the defense, and the evidence upon which the defendant relies" (Sand. & H. Dig., §§ 2220, 2221). The object of these statements is to enable the court and jury to more readily understand the issues to be tried and the evidence subsequently adduced. The statutes, in effect, say that they must be brief. But this means that they must be a summary or outline of the evidence intended to be offered, and sufficiently clear and full to accomplish the purpose for which they were made. In making them parties should not be allowed to go beyond the limits of the object they are intended to subserve. Neither one should be permitted to pervert them from the office they are designed to fill into an argument to convince the jury, in advance of the evidence, that their verdict should be in his favor, or to use them, by making appeals, or irrelevant, false, exaggerated or improper statements, which he cannot or will not be permitted to prove, to prejudice their minds against his adversary. In all such cases it is the legal duty of the court to interfere in the interest of justice, and prevent such unfair and illegal advantages, with promptness and efficiency. *Scripps* v. *Reilly*, 35 Mich. 371, 388; *People* v. *Montague*, 71 Mich. 447, 452; *McDonald* v. *People*, 126 Ill. 150; *Campbell* v. *City of Kalamazoo*, 80 Mich. 655.

It is clear that some latitude must be allowed to a prosecuting attorney in making his opening statement to a jury. He may not always find that the evidence will "meet the case he expects to make." He may have been misinformed. Witnesses may not testify as they represented facts to be. It would be an unreasonable rule which would require him to state only such facts as the evidence will sustain. All that can be reasonably required of him, in this respect, is good faith. Hence it is not every statement that the evidence fails to sustain that will entitle a defendant, in case he is convicted, to a

new trial. Such statements, however, may be so unfair or prejudicial as to justify the setting aside a verdict against the defendant, and make it the duty of the trial court to do so; but they must result in bringing to the attention of the jury matters of a nature calculated to create such a prejudicial impression upon the minds of the jury that a charge of the court would or might not be sufficient to eliminate the prejudice produced thereby, in order to justify an appellate court in vacating a judgment on such grounds; and, it is said, "in determining whether such an error has been committed, it is believed to be safe to credit the jury with at least average intelligence." *Prentis* v. *Bates*, 93 Mich. 234, 238; *Porter* v. *Throop*, 11 N. W. Rep. 174; *People* v. *Fowler*, 62 N. W. Rep. 572, and cases above cited.

In this case the opening remarks of the prosecuting attorney, except as to the rope, were statements as to what the evidence would show. Except as to the rope, he made none as to what the facts actually were. In so far as his statements were not sustained by the testimony, the jury could see that the evidence was not what he expected it to be. To that extent, what he said was disproved; and his representations as to the rope could have no greater effect than those in connection with which they were made.

The appellant insists that the court erred in admitting, over his objection, the testimony of Dr. Graham, which we have stated, and the testimony of Abe Jeter, which was as follows: "I met Henry Williamson at the Jerry Gill place, about a mile north of defendant's house, at about half-past 7 o'clock on the morning of the fifth Sunday in May. He was going in the direction of defendant's house. Henry had three of his boys with him. They were on horseback, one of the boys riding behind Henry. He said he was going to Nev. Hopson's. He was also going in that direction." If the contention of the appellant be correct, there is nothing to indicate that the error of the court in admitting the testimony was prejudicial. It did not connect him with the commission of the offense. It only tended to show, if anything, Williamson's connection with it. The same is true of the opening remarks of the prosecuting attorney.

Appellant contends that the court erred in instructing the jury as follows: "9. You are instructed that if you believe from the evidence, that the witness John Gigger concealed the crime in this case from the magistrate from anxiety for his own safety, and not to shield the criminal, he would not be an accomplice, and his evidence would not have to be corroborated in order that you convict the defendant." But this instruction is upheld and sustained by the decisions of this court. *Melton* v. *State*, 43 Ark. 367; *Carroll* v. *State*, 45 Ark. 539.

After this cause had been submitted to the jury, about 11 o'clock in the night, one of the jurors, with the officer in charge of the jury, retired about ten steps from where the jury were locked up, "to attend to a call of nature," and remained away about five minutes, and during that time conversed with the officer, a deputy sheriff. The juror relates the conversation and what occurred as follows: "He asked me how we were running. I said, 'Pretty well. I think we will get through in two or three hours.' He said: 'If you do, I will get the judge to come over, and then we may get some rest to-night.' I then went near the court yard fence, but not outside. Was only there a few minutes, and came back as soon as I could. I had no other conversation with the deputy sheriff, except as related; did not discuss the case with him, except as stated, and was not with, and did not speak to, any other person than the deputy sheriff." The deputy sheriff, in a sworn statement, corroborates what he says. No one contradicts it. These statements are sufficient to show that the juror was not subjected to any undue influence while he was separated from his fellow jurors. *Maclin* v. *State*, 44 Ark. 115; *Vaughan* v. *State*, 57 Ark. 1.

The evidence is sufficient to sustain the verdict in this court. However unsatisfactory it might be to us, it does not come within our province to set it aside.

Judgment affirmed.

WOOD, J., dissents.

HELM v. LEGGETT.

Opinion delivered December 10, 1898.

1. DEVISE—CONDITION IN RESTRAINT OF MARRIAGE.—A devise of land by a testator to his wife for so much of her natural life as she shall remain unmarried, and, upon her death or subsequent marriage, to his child, is valid. (Page 24.)

2. SAME—ELECTION—HOMESTEAD.—Where a testator devised certain lands, including his homestead, together with the sole use and control thereof and all rents and issues arising therefrom, to his wife for and during her natural life or widowhood, provided that upon her subsequent death or marriage it should go to his child, the devise is repugnant to her right of homestead, and if she elects to take under the devise, she cannot, after marrying, hold the homestead or any of the other lands devised to her. (Page 24.)

Appeal from Independence circuit court in chancery.

RICHARD H. POWELL, Judge.

J. W. Butler and *Elisha Baxter*, for appellants.

The condition of the bequest was void because in restraint of marriage. 4 Kent, Com. side page 130; 1 Story, Eq. § 274. The widow can not be deprived of her homestead right by any act of the husband. Thomp. Hom. & Ex. §§ 690, 589, 590, 280; Sand. &. H. Dig. §§ 3713, 3714; Const. of Ark., art. 9, §§ 3, 6. She is entitled to it against heirs as well as creditiors. 31 Ark. 145; 33 Ark. 399.

Neill & Neill and *Yancey & Fulkerson*, for appellees.

A devise to a widow during widowhood is valid. L. R. 1 Ch. Div. 403; 2 Wh. & Tud. L. Cas. Eq. 105; 24 Ga. 139; 12 Ill. 424; 26 Md. 347; 59 Md. 231; 85 Va. 509; 114 Ind. 8; 24 Mo. 70; 7 Conn. 568; Story, Eq. 280; 20 Wend. 53; 38 Pa. St. 422; 21 Tex. 597; 2 Sneed, 512; 10 La. An. 466; 2 Jarman, Wills, 44; Tiedeman Real Prop. § 281. The widow's election to take under the will bars her right of homestead where such provision of the will is repugnant to the homestead right. 64 Ark. 1; 2 Johns. 348; 1 Pom. Eq. Jur. 541.

BATTLE, J. George L. Massey died at his residence in In-

dependence county, in this state, in the year 1891, leaving surviving him Sarah J. Massey, his widow, and Ida Leggett, Edwin L. Massey, Harry M. Massey, and Louis O'Neal Massey, his only children and heirs at law. He left a last will and testament, by which he made a devise as follows: "I give and devise unto my wife, Sarah J. Massey, for the period of her natural life, or so long as she shall remain my widow, the following described lands, to-wit: [Here he describes the land.] My said wife to have the sole use and control of said lands devised to her, and all rents and issues arising therefrom, for and during the period of her natural life, unless she should marry, in which event it is my will that her interest in said lands shall at once cease and determine. At the death of my said wife or upon her marrying, the lands herein above devised to her shall go to and become the property in fee simple of my son, Louis O'Neal Massey." The widow took possession of the lands devised to her, "and remained in possession of all the same until the time hereinafter mentioned, accepting the same under the will." Thereafter, on the 26th of September, 1894, she intermarried with P. B. Helm, and on the 15th of December, 1894, caused a part of the lands devised to her to be set apart to her as a homestead. The question is, can she hold the lands so set apart, after having elected to take under the will?

A devise of land by a testator to his wife for so much of her natural life as she shall remain his widow, and after her death or widowhood to a child, has, generally, if not universally, been upheld and sustained by the courts. In fact, it may now be considered a well-established rule of law. *Allen* v. *Jackson*, L. R. 1 Ch. Div. 403; *Snider* v. *Newsom*, 24 Ga. 139; *Bostick* v. *Blades*, 59 Md. 231; *Phillips* v. *Medburry*, 7 Conn. 568; *Cornell* v. *Lovett's Executor*, 35 Pa. St. 100; *Bennett* v. *Robinson*, 10 Watts, 348; *Pringle* v. *Dunkley*, 14 Sm. & M. 16; Schouler, Wills, (2 Ed.) §§ 22, 603.

To determine whether a widow must elect to take the homestead of her deceased husband in lieu of a devise to her, in order to hold the same, this court has adopted the rule which formerly prevailed as to dower. In *Stokes* v. *Pillow*, 64 Ark. 1, Mr. Justice Riddick said: "Although there may be no express declaration to that effect, yet if the devise to the widow

is clearly inconsistent with her right to claim a homestead, then it will be treated as made in lieu of her homestead estate, and she must make her election whether to claim her homestead estate or take the provision given by the will." According to this rule, the devise to the widow must be so repugnant to the claim of homestead that they cannot stand together, or she will not be compelled to elect. *Lewis* v. *Smith*, 5 Seld. 502.

Can the devise to the wife in this case and her homestead right stand together? The homestead interest, as frequently defined by this court, is a mere right to the occupancy and control of the land and improvements which constitute the homestead, and to the rents and issues thereof. The devise was of certain real estate, including the homestead and other lands, for and during her natural life or widowhood, together with the sole use and control thereof, and all rents and issues arising therefrom. The devise specifically embraces all those things which constitute the homestead interest. There is no room to say that it does not. It does so expressly by enumeration. In this way the will virtually provides that the devise shall be in lieu of the homestead, and then provides that, if the widow shall marry, it shall cease and determine, and the lands so devised to her shall go to and become the property in fee simple of his son Louis O'Neal Massey. She was, therefore, compelled to elect which of the two—the homestead interest or devise—she would take, and, having elected to take the former, and married, she cannot afterwards hold the homestead or any of the lands devised to her.

Decree affirmed.

RIDDICK, J., dissented.

PARHAM v. DEDMAN.

66 23
80 579

Opinion delivered December 10, 1898.

AGREEMENT TO DIVEST TITLE — CONSIDERATION — STATUTE OF FRAUDS.— Where one has acquired title to land by adverse possession, a parol agreement by him that if the holders of the record title will let his tenant continue to occupy the land for a certain time, he will thereafter surrender possession and pay rent, is without consideration and within the statute of frauds. (Page 30.)

Appeal from Dallas circuit court.

MARCUS L. HAWKINS, Judge.

STATEMENT BY THE COURT.

On June 7, 1893, appellees filed their complaint in ejectment in the Dallas circuit court against R. W. Parham and Sam Coleman, alleging that they were the owners in fee simple and entitled to the possession of "that part of the S. ½ of the N. W. ¼, sec. 27, t. 10 S., r. 14 W., lying east of the Little Bay road, except such part of one square acre on which Parham's mill stands as is north of said creek and east of said road, said mill house being in the center of said square acre." The complaint further alleges that "situate upon said lands belonging to plaintiffs is a two-roomed dwelling house inclosed with a fence, embracing about one-third of an acre, more or less. Said house is about 90 yards west or northwest of said mill house, and east of the Little Bay road." Plaintiffs deraign title to the house and land as follows: (1) On July 28, 1880, defendant R. W. Parham, and wife, by deed of that date, duly acknowledged and executed, conveyed to T. J Barner, amongst other lands, the S. ½ of the N. W. ¼, sec. 27, t. 10 S., r. 14 W., except that part being west of the Little Bay road (about 12 acres, more or less), also one acre on which our steam mill stands,"—which parts are reserved to the grantor. (2) On May 25, 1884, said T. J. Barner and wife, by their deed of that date, duly acknowledged and recorded, conveyed in fee to Wm. H. Marshall, Jr., amongst other lands, the follow-

ing: The S. ½ of the N. W. ¼, sec. 27, "except that part lying west of the Little Bay road (about 12 acres more or less), also one acre on which the steam mill stands." (3) On March 25, 1890, said Wm. H. Marshall, Jr., and his wife, by their deed of that date, duly acknowledged and recorded, conveyed in fee to M. M. Duffie and R. H. Dedman (the plaintiffs) one-half interest in these, among other, lands, to-wit: "All that portion north of Mill Creek and east of the Little Bay road, in the N. E. ¼ of the S. W. ¼, and the S. ½ of the N. W. ¼ of sec. 27, t. 10 S., r. 14 W., * * * except such part of one square acre as would lie north of Mill Creek, taking Parham's steam mill for the center of said acre, said mill being on the bank of said creek." (4) On December 16, 1890, said Wm. H. Marshall, Jr., and his wife, by their deed of that date, duly acknowledged and executed, conveyed to said M. M. Duffie and R. H. Dedman, one-half interest to the following lands (amongst others): "All that portion north of Mill Creek and east of the Little Bay road, in the N. E. ¼, S. W. ¼, and S. ½, N. W. ¼ sec. 27, t. 10 S., r. 14 W., * * * except such part of one square acre as will lie north of Mill Creek, taking Parham's steam mill as the center of said acre, said mill being on the bank of said creek." The complaint closes with the allegations that plaintiffs have title and right to immediate possession of the lands and tenements in suit; that defendant is and has been in unlawful possession thereof, to the damage of plaintiffs, etc. The four deeds referred to in the complaint were filed as Exhibits "A," "B," "C" and "D," and they appear in the transcript.

Defendant Coleman answered separately, disclaiming title to the land in suit, and alleging that he was the tenant of defendant Parham.

The appellant, R. W. Parham, answered in substance as follows: (1) He admits the facts of the execution of the deeds referred to and exhibited with complaint. (2) He denies that he is in unlawful possession of the premises, or that he owes plaintiff $100 or any other sum as rent for said premises. He alleges that he is "now and always has been" the owner of the premises in suit; that there was an understanding between himself (Parham) and Barner (his vendee), at the

time of his execution to him of the deed marked Exhibit "A" to complaint, that the acre reserved therein should be so laid off as to cover and embrace the house and grounds in controversy, as well as the steam mill of defendant. (3) He alleges that at the time of the reservation of the one acre in his deed to Barner, the house and land in controversy was and has ever since been in the actual, adverse and notorious possession of defendant; wherefore he pleads the seven years statute of limitation. (4) He alleges that during the past three years, while in possession of the land, he had made valuable improvements upon the land to the amount of $57.50. He concludes with a prayer for judgment for (a) possession of land or (b) the value of improvements by him placed upon the property and the declaration of a lien therefor, in the event the court should award the possession to plaintiffs.

On June 20, 1894, the cause was tried before the court sitting as a jury. The court found for the appellees, Dedman and Duffie, and rendered judgment in their favor for recovery of the property claimed, and for damages for the detention thereof.

Parham filed a motion for a new trial, which was overruled, to which he excepted, and appealed to this court. There were instructions below, but they were not excepted to. One of the grounds of the motion for a new trial is that the court erred in its finding of facts.

R. C. Fuller, for appellant.

The court erred in finding that the acre should be laid out in a square. This finding, not being supported by the evidence, was error. 33 Ark. 651; 2 Ark. 360; 5 Ark. 407; 6 Ark. 89; 20 Ark. 638; 34 Ark. 338. Appellant has title by virtue of his adverse possession. 33 Ark. 633; 30 Ark. 640; 38 Ark. 181. The court erred in making and refusing declarations of law.

E. B. Kinsworthy and *Jas. H. Stevenson*, for appellee.

The bill of exceptions is insufficient. The bill of exceptions, and not the judgment entry, should contain the record of the saving of exceptions to the overruling of the motion for

new trial. 44 Ark. 411; 28 Ark. 450; 30 Ark. 585; 43 Ark. 394; 31 Ark. 725. No exceptions being saved to the declarations of law or fact, all objections thereto are waived. 8 Enc. Pl. & Pr. 157, 166, 255 and 278; 60 Ark. 256–258; 38 Ark. 246; 41 Ark. 535; 36 Ark. 451. Nor can such objection be raised for the first time by motion for new trial. 8 Enc. Pl. & Pr. 279; 45 Ind. 400; 91 Ky. 406. The legal effect of the deed describing an acre as including an improvement is that the acre should be laid off in a square with the improvement in the center. Hughes (Ky.), 29; *ib.* 31; *ib.* 180; Sneed (Ky.), 102; 1 Bibb (Ky.), 11, 12; *ib.* 17; *ib.* 47, 49; *ib.* 94; *ib.* 95; *ib.* 107; *ib.* 101, 102; 17 Fed. 657; 74 Ala. 141; 19 S. W. 734; 53 Miss. 259; 66 Ill. 519; 1 Dembitz, Land Tit. 38, 67; 2 Ohio, 328; Wright (Ohio), 366; *ib.* 650. If the evidence be taken as showing adverse possession, all the evidence on this point being to the same effect, the existence of adverse possession became a question of law, and the finding thereon should have been excepted to. 30 Am. Dec. 218; 82 Ga. 675; 5 Peters, 401, 438.

HUGHES, J., (after stating the facts.) The evidence in the case shows that R. W. Parham held the open, continuous, adverse possession of the property in controversey in this suit for a period of more than seven years before the bringing of this action, and if this be the case he thereby obtained a title to the same, and all title and right of Dedman and Duffie were, by reason of such adverse possession, extinguished. This suit was commenced in June, 1893. According to the evidence, R. W. Parham had held open, continuous, adverse possession of the piece of land in controversy, and the house situated thereon, since 1880, a period of over twelve years.

It is contended by appellants that this house and the ground on which it is situated were in controversy in a suit between R. W. Parham and Marshall, the vendor of Dedman and Duffie, which was decided adversely to Parham by the supreme court in 1893, and that the statute of limitations could run only from the determination of said suit. But we find this suit between Parham and Marshall was about that part of the south half of the northwest quarter of sec. 27, t. 10 S., r. 14

W., lying south of Mill Creek, while this suit involved only that part of the S. ½, N. W. ¼, sec. 27, t. 10 S., r. 14 W., that lies east of the Little Bay road, and north of Mill Creek. So that suit did not affect the question involved in this.

It is also contended that in 1893 Parham said to one of the appellees that since he had lost the suit with Marshall, if the appellees would let his tenant occupy the house till the end of the year, he would surrender possession of the house to them, and pay them rent for it; that he thereby acknowledged their right, attorned to them and is estopped to dispute their title. But the title of Parham had then been completed by lapse of time, and adverse possession for several years more than seven, and his title was not divested by this agreement. There appears no consideration for it, and the title to land cannot be transferred in this way. There was no writing, and therefore the agreement, so far as the transfer of title is concerned, was within the statute of frauds.

Reversed and remanded.

---

66 30
66 39

INDEPENDENCE COUNTY *v.* YOUNG.

Opinion delivered December 10, 1898.

1. CONSTITUTIONAL LAW—ACT FIXING SALARY.—The act of 1895 fixing the salaries of the county officers of Independence county (Acts 1895, pp. 66-9, §§ 2-7) is not unconstitutional in fixing the salary of the county clerk at $1800 per annum, it not appearing that such salary was so low as to render impossible or impracticable the efficient exercise of the functions of the office. (Page 34.)

2. AMOUNT OF CLERK'S SALARY—CONSTRUCTION OF STATUTE.—The act of 1895, *supra*, provides that the emoluments of the county clerk shall not exceed $1800; that he shall charge and collect the same fees as are now allowed by law, and report to and make settlement with the county court quarterly by paying into the treasury all amounts in excess of the amount of salary due him to that date; and that "all moneys paid into the treasury arising from said fees and commissions shall be covered into the general revenue fund of the county." *Held*, that the main purpose of the act is to fix the salary of the clerk at a maximum limit of $1800 per annum, to be paid out of the fees collected or chargeable

against the clerk during the fiscal year, and that any sums paid in by him on making the first three quarterly settlements in each year should be held by the treasurer until the final annual settlement, at which time any excess over his salary for the year shall be covered into the general revenue fund. (Page 34.)

Appeal from Independence Circuit Court.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

Appellee filed in the county court the following petition, to-wit:

"To the Honorable W. G. Wilson, Judge of the County Court of Independence county:—George W. Young, clerk of the county court of Independence county, respectfully represents that the report hereto attached, marked 'Exhibit A,' shows the amount of fees collected by him, by virtue of his office aforesaid, for the year commencing November 1, 1895, and ending October 31, 1896. Your petitioner prays that, by an appropriate order of this court, his said report be approved and confirmed, and that he be allowed to retain as salary for said year all of the fees reported in 'Exhibit A,' instead of paying into the treasury of the county the amount in excess of his salary for any quarter, as contemplated by the act of the legislature of the state, entitled 'An Act to fix the fees and salaries of the county officers of Independence county, Arkansas, and for creating the office of tax collector,' as approved March 14, 1893, and amended March 26, 1895.

"J. W. BUTLER, Attorney for Geo. W. Young."

The exhibit referred to in the foregoing petition is as follows:

In the Independence County Court—January Term, 1897. To the Honorable W. G. Wilson, Judge of the County Court of Independence county: George W. Young, as clerk of the county court and ex-officio clerk of the probate court of Independence county, respectfully submits the following report of fees received by him as such clerk for the year commencing November 1, 1895, and ending October 31, 1896, to-wit:

Net amount of fees for quarter ending 31st day of December, 1895, as

per report filed at January term, 1896,	$ 169 85
Net amount of fees for quarter ending March 31, 1896, as per report filed at the July term, 1896	1,176 80
Net amount of fees for quarter ending June 30, 1896, as per report filed at the July term, 1896	377 91
Net amount of fees for quarter ending October 31, 1896, as per report filed at the October term, 1896	201 15
Net amount of fees for month of October, 1896	365 30
Amount of fees uncollected for said year, ending October 31, 1896	$ 64 94

"GEORGE W. YOUNG, Clerk."

"Sworn and subscribed to before me, this 2d day of January, 1898. T. H DEARING, Clerk."

The county court denied appellee's petition, and directed that all amounts collected by him as fees, or for which he is chargeable, whether collected or not, for any quarter, in excess of the salary due him at that date, be paid into the county treasury.

On appeal to the circuit court, the following judgment was rendered: "It is ordered and adjudged by the court that said report of George W. Young, clerk of the county court and ex-officio clerk of the probate court of Independence county, be and the same is hereby affirmed. It is further ordered that the amount of fees collected by said George W. Young, as shown in his report, be retained by him as salary, as such clerk, for the year ending October 31, 1896."

F. D. Fulkerson, for appellant.

J. W. Butler, for appellee.

WOOD, J., (after stating the facts.) So much of an act entitled "An act to fix the fees and salaries of the county officers of Independence county, Arkansas," as relates to the clerk, and necessary to be considered in the determination of this case, is as follows:

Sec. 2. The county clerk shall be ex-officio probate

clerk, and the fees and emoluments of the county court clerk shall not exceed the sum of eighteen hundred dollars per annum, and out of such sum they shall each pay their deputies and assistants, as may be required to discharge the duties of their respective offices, and in no case shall their salaries be more than the fees and emoluments arising from said offices, whether they reach the sum prescribed in this act or not; * * * *provided, further*, that nothing in this act shall be so construed as to give any officer more than the fees and emoluments of his respective office.

"Sec. 3. That it shall be the duty of the * * * clerk of the * * * county court, * * * of Independence county, Arkansas, to charge and collect the same fees as are now allowed by law, * * * and they shall each, on the first day of the regular term of the Independence county court of Arkansas, file a report in said court, showing the amount of all fees and commissions collected by them, respectively, and make settlement with said county court by paying in all amounts in excess of the amounts of salary due each one of them to that date into the county treasury of said county, and file the treasurer's receipt therefor as a voucher in said settlement, and in such settlement said officers, as aforesaid, shall be chargeable and liable for all fees and commissions that it was the duty of said officers to charge and collect, whether the same was collected or not.

"Sec. 4. That at each and every settlement made by an officer of Independence county, as aforesaid, he shall pay over to the treasurer of said county in kind the funds received by him in excess of his salary, and shall file his affidavit with the county court of said county that said settlement is true, just and correct, that he has faithfully performed his duty as prescribed in this act."

(Sec. 5 requires the keeping of a public record by each officer of the commissions and fees.)

"Sec. 6. That if any of said officers of Independence county, Arkansas, shall fail to make his settlement with the county court of said county, or to pay the excess into the county treasury of said county, at each term of the court as above required, unless for good cause such settlement be continued by order of

the court, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in the circuit court, shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars, and be removed from his office.

"Sec. 7. That all moneys paid into the treasury, arising from said fees and commissions in Independence county, Arkansas, shall be covered in the general revenue of the county. Acts 1895, pp. 66–69."

The court erred in declaring the act void. It does not contravene any provision of our constitution. Even if the clerk only received for his salary the sum of $1,402.91, we could not say, in the absence of other proof, that this amount showed that the purpose of the legislature was to abolish the office of county clerk by making the salary of its incumbent so low as to render impossible or impracticable the efficient exercise of its functions. *Powell* v. *Durden*, 61 Ark. 21; *Bugg* v. *Sebastian County*, 64 Ark. 575.

It might be a very unwise and unsafe legislative policy to fix the salary at such sum, but with that, it must be remembered, we have nothing to do. *Bugg* v. *Sebastian County*, *supra*.

But the design of the legislature, we think, was to fix the salary of the county clerk of Independence county at the sum of $1,800 per annum, provided the fees and emoluments of the office for the year amounted to that sum. If the fees and commissions collected by or chargeable against the clerk during the year do not equal the sum of $1,800, then the clerk gets as salary all he collects, but if the fees and commissions collected during the year, including the fees and commissions with which the clerk is chargeable, equal or exceed $1,800, then the clerk receives that sum, and if there be an excess of that sum collected during the entire year, such excess at the end of the year, when the last or final settlement is made with the county court, is covered into the general revenue fund of the treasury. The title of the act shows its purpose to be "to fix the fees and salaries of the county officers of Independence county." We are of the opinion, taking the act as a whole, that the purpose, as we have indicated, was to fix the salary of the county clerk at the maximum limit of $1,800 per annum, to be paid out of

the fees of the office collected and those not collected with which the clerk is chargeable during the year. Therefore the provisions in regard to the quarter-annual settlements with the county court should be so construed, if possible, as to effectuate this main purpose.

The provision of section 7, requiring that all moneys paid into the treasury arising from said fees and commissions in Independence county, Arkansas, "shall be covered in the general revenue fund of the county," should be construed. in connection with the other sections, to mean that only the moneys paid into the treasury arising from fees and commissions in excess of the clerk's salary for the year shall be covered in the general revenue fund. There is nothing in any section prescribing when the excess of fees over salary shall be covered into the revenue fund. The treasurer, therefore, when these quarter annual settlements are made, shall receive whatever excess may be paid in at that time, and hold the same in the treasury; but the act of setting it apart to the general revenue fund does not take place until after the last and final settlement with the county court shall have been made; because prior to that time it cannot be known whether the amount of fees collected and chargeable against the clerk for the entire year will exceed his salary for the year, and, unless they do, there would be nothing in the treasury to cover into the general revenue fund. If, at any quarter annual settlement, there shall have been paid into the treasury an excess over the salary due to that date, the treasurer simply holds the same in his official capacity until the final settlement of the officer is made. The treasurer holds such excess of any quarter annual settlement prior to the last for the party who shall be determined, in the final settlement of accounts between the county and officer, to be entitled thereto. This view of the law harmonizes all seemingly contradictory sections, and will carry out what we believe to be the obvious design of the legislature, and that, too, without doing violence to the very letter of the statute.

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

BATTLE, J., concurred in the result, but not in the reasoning of the court.

GRAY v. MATHENY.

Opinion delivered December 10, 1898.

CONSTITUTIONAL LAW—DIVERSION OF TAXES—PARTIAL INVALIDITY OF ACT. Although the act of 1895 fixing the salaries of officers of Independence county, in so far as it requires the amount of the county treasurer's commissions on the various funds in excess of his salary of $800 to be covered into the general revenue fund (Acts 1895, p. 69, § 7), is in conflict with art. 16, § 11 of the constitution which provides that "no moneys arising from a tax levied for one purpose shall be used for any other purpose," so much of the act as is invalid may be disregarded, and the act be left complete without it. (Page 39.)

Appeal from Independence Circuit Court.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

Appellee filed his report as follows:

October 1, 1896.

Report of E. F. Matheney, Treasurer of Independence County.

To the Honorable County Court of Independence County:

Amount of commissions received for quarter ending October 1, 1895:

Com. on poll tax	$ 2 00
Com. on B. & R.	01
Com. on individual	60
Com. on pauper	04
Com. on county general	25 00
	$28 47
For quarter ending Jan. 1, 1896	26 13
For quarter ending April 1, 1896	116 53
For quarter ending July 1, 1896	592 43
Com. received from other funds for month of October, 1896	144 14
Total	$906 70

This report is for the year ending October 31, 1896.

E. F. MATHENEY, Treasurer.

Subscribed and sworn to before me this 5th day of November, 1896. G. W. YOUNG, Clerk.

Appellant filed in the county court the following petition, to-wit: "In the matter of the report of E. F. Matheny, county treasurer, and of the commissions received. The undersigned, a citizen and taxpayer of Independence county, would respectfully state that said treasurer, in his report, filed for the year ending October 31, 1896, at the October adjourned term of said court, shows that he collected from the commissions of said office the sum of $906, and that he has retained the same, when by law he is entitled only to the sum of $800 of the same; that said treasurer has not paid any part of the sum that exceeds his salary, to-wit, $106, into the county treasury, as by law he is required to do, but has retained the same to himself. Wherefore your petitioner prays that the court make an order requiring him, the said treasurer, to pay over the said sum, and file the treasurer's receipt, as he is required and duty bound to do. Respectfully, A. G. Gray."

The decision of the county and of the circuit court was adverse to the appellant and he prosecutes this appeal.

J. W. Butler, for appellees.

The office of county treasurer being a constitutional one, the legislature has no power to pass a law which so far reduces the salary as to practically abolish the office. 61 Ark. 21; 64 Ark. 515. The act, so far relates to the treasurer, is in conflict with section 10 of the constitution.

F. D. Fulkerson, for appellants.

In construing the act under consideration [Act March 3, 1895], the meaning must be gathered from the whole act, and such a construction given as will render its several provisions consistent and effective. 31 Ark. 119; 40 Ark. 431; 3 Ark. 385; 28 Ark. 203. Laws are to be construed according to their spirit, and not their letter. 29 Ark. 356; 28 Ark. 203. All doubts as to the constitutionality of a statute are resolved in its favor. 39 Ark. 355; 32 Ark. 131; 11 Ark. 481; 56 Ark. 495; 59 Ark. 513; 58 Ark. 407; 36 Ark. 171. If necessary, the act being divisible, the provision as to the quarterly

payments can be stricken out, and still the act will stand. 37 Ark. 356; 46 Ark. 312; 53 Ark. 490. But the act is valid. 61 Ark. 21; 64 Ark. 515—construing Act of March 20, 1893.

WOOD, J., (after stating the facts.) The legislature of 1895 passed an act entitled "An act to fix the fees and salaries of the county officers of Independence county." So much of the act as is necessary to consider in the decision of the present suit is as follows:

"Sec. 2. * * * The fees and emoluments of the treasurer of Independence county, Arkansas, shall not exceed the sum of eight hundred dollars per annum, and out of such sum he shall pay such deputies and assistants as may be required to discharge the duties of said office; * * * *Provided, further*, that nothing in this act shall be so construed as to give any officer more than the fees and emoluments arising from his respective office.

"Sec. 3. That it shall be the duty of * * * the treasurer of Independence county, Arkansas, to charge and collect the same fees as are now allowed by law, * * * and they shall each, on the first day of the regular term of the Independence county court of Arkansas, file a report in said court showing the amount of all fees and commissions collected by them, respectively, and make settlement with said county court by paying in all amounts in excess of the amounts of salary due each one of them to that date into the county treasury of said county, and file the treasurer's receipt therefor, as a voucher in said settlement, and in such settlement said officers, as aforesaid shall be chargeable and liable for all fees and commissions that it was the duty of said officers to charge and collect, whether the same was collected or not.

"Sec. 4. That at each and every settlement made by an officer of Independence county, as aforesaid, he shall pay over to the treasurer of said county, in kind, the funds received by him in excess of his salary, and shall file his affidavit with the county court of said county that said settlement is true, just and correct, that he has faithfully performed his duty as prescribed in this act."

(Sec. 5 requires the keeping of a public record of fees and commissions by each officer.)

"Sec. 6. That if any of said officers of Independence county, Arkansas, shall fail to make his settlement with the county court of said county, or to pay the excess into the county treasury of said county, at each term of the court, as above required, unless for good cause such settlement be continued by order of the court, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in the circuit court, shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars, and be removed from his office.

"Sec. 7. That all moneys paid into the treasury arising from said fees and commissions in Independence county, Arkansas, shall be covered into the general revenue of the county."

What we have said in *Independence County* v. *Young*, *ante p.* 30, is decisive of this case. There is this difference, however, in the case of the treasurer. He receives fees or commissions on funds paid into the treasury derived from taxation. Section 11, art. 16, of the constitution of Arkansas provides: * * * "and no moneys arising from a tax levied for one purpose shall be used for any other purpose." Section 4 of the special act under consideration requires the officers to pay over in kind the funds received by them in excess of their salaries. We are of the opinion that section 7 of the act is obnoxious to the above provision of the constitution, in so far as it requires the excess over the treasurer's salary of eight hundred dollars, to be covered into the general revenue fund of the county. The excess of funds in the hands of the treasurer over his salary belongs to the county, and goes to the respective funds for which the tax was levied and collected. This provision, however, as it relates to the treasurer, may be stricken out, and the act be left complete without it. *State* v. *Marsh*, 37 Ark. 357; *Little Rock & F. S. Ry.* v. *Worthen*, 46 Ark. 312; *State* v. *Deschamp*, 53 Ark. 490; *Cribbs* v. *Benedict*, 64 Ark. 555.

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

66 40
e71 9
66 40
74 200
77 228
77 576

66 40
188 481

TEXARKANA v. LEACH.

Opinion delivered December 17, 1898.

1. MUNICIPAL CORPORATION—VACATION OF STREET.—Cities of the second class have no authority, express or implied, to vacate streets. (Page 42.)

2. VACATION OF STREET—INJUNCTION.—The vacation of a public street by a city of the second class may be enjoined by an adjacent land owner whose property would thereby be depreciated in value, notwithstanding it would affect many others in the same manner. (Page 42.)

Appeal from Miller Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

Dodge & Johnson, for appellants.

The city, and it alone, had the right to judge of the necessity for changing the street crossing. Sand. & H. Dig. §§ 5132, 5151; 114 Pa. St. 477; 7 Cush. 254; 24 Pa. St. 207; 55 N. Y. 486; Dill. Mun. Corp. § 666; 25 Vt. 49. Appellee is not entitled to any relief, because the injury of which she complains is one of the same kind as that borne by the general public, and it is not sufficient that the injury falls more heavily upon her. 102 Ill. 379; 106 Ill. 353; 7 Cush. 254; 157 Mass. 17; 11 Gray, 26; 153 Mass. 218; 154 Mass. 509; 43 N. Y. 399, 414; 55 N. Y. 486; 24 Pa. St. 207; 114 Pa. St. 470; 15 R. I. 334; 10 R. I. 437; 48 Cal. 490; 74 Mich. 699; 102 Ill. 379; 119 Ill. 200; 45 Ia. 275; Dill. Mun. Corp. § 666; 57 N. W. 832, 833; 107 Mo. 204; 55 N. Y. 490; 4 Kas. 630; Elliott on Streets, 663; 101 N. Y. 411; 50 Ark. 469; 40 Ark. 83, 88, 89. When a portion of a street is vacated, those whose property does not abut upon the vacated portion can not complain. 48 Cal. 490; 102 Ill. 379; 107 Ill. 600; 26 Ia. 387; 66 Ia. 687; 28 Kas. 622, 625; 11 Gray, 66; 20 Mich. 95; 50 N. H. 530; 10 Kas. 95; 12 Mo. App. 175; 40 Ia. 576; *ib.* 571; 45 Ia. 275. The fee of the roadway across the railway company's tracks was in the company, and, upon the vaca-

tion or discontinuance of the way, it reverted to each owner. 36 Barb. 162; 3 Bosw. 372; 60 N. Y. 242; 10 Peters, 26; 6 Peters, 513; 1 Sum. 21; 8 Watts, 172; 13 Mass. 256; 4 Miss. 427; 2 Sm. Lead. Cases. 180; 52 Conn. 248; 45 Ia. 275; 21 Fed. 233; 94 Ill. 265.

J. D. Cook, for appellee.

The right to vacate the street was not vested in the city of Texarkana, either by express delegation from the legislature or by necessary implication. Therefore it had no such power. 50 Ark. 466; 35 Ark. 497; 13 How. 518; 2 Black, 485; 15 Pick. 169; 50 Ga. 451; 40 Ark. 83; 40 N. J. Eq. 417; 42 N. J. Eq. 169; Elliott, Roads, 661. The ordinance being without authority, both the city and the railway company were subject to injunction to prevent its enforcement. 44 Ind. 418; 45 Ga. 152; Elliott, Roads, 605. Appellee's right in the highway was a special one, and she is protected therein. 42 N. W. 77; 7 Ind. 9–38; 50 Ind. 537; 50 N. H. 530; 67 Ill. 439; 16 Am. Rep. 624; 10 Bush, 382; 6 Peters, 431; 35 Ark. 429.

BATTLE, J. The city of Texarkana is divided by the St. Louis, Iron Mountain and Southern Railway into two parts. A part of the city lying south of the railway is known as "College Hill Addition." This addition and the business part of the city, which lies north of the railway, is connected by a street which is known as the College Hill street. It leads from Broad street on the north across many tracks of railroad in the St. Louis, Iron Mountain & Southern Railway yards to Dudley street on the south. South of the railway, and abutting on College Hill street, Mrs. Nancy Leach owns four town lots. These lots are improved, and one or more of them constitute her homestead. To obviate the necessity of crossing so many railway tracks, and to protect life and property, the city council of Texarkana, in consideration that the railway company would open a new street on a certain route, and across the railway at a designated point, where the tracks were less numerous than they are at the crossing of the College Hill street, passed an ordinance by which it declared vacated the said crossing of the College Hill street, and authorized the railway company to close

the same. In pursuance of this ordinance, the railway company was proceeding to open said new street and to close up said crossing, when Mrs. Leach, to prevent it, instituted an action in the Miller circuit court against the city and railway company, and sued out an order therein prohibiting and restraining them from so doing. At the hearing it clearly appeared that the effect of closing and vacating the same would depreciate the the value of said town lots of Mrs. Leach from twenty-five to fifty per cent., as well as the value of the town lots of many other persons in the same vicinity; and the court made the order perpetual, and the defendants appealed.

Texarkana being a city of the second class, the ordinance of its city council is void. The municipal authorities of a city or town cannot vacate a street or any part of it without the authority of the legislature. This power does not inhere in a municipality. *Hoboken Land & Imp. Co.* v. *Hoboken*,, 36 N. J. L. 540; *Polack* v. *S. F. Orphan Asylum*, 48 Cal. 490; 2 Dillon, Municipal Corporations, (4 Ed.) § 666, and notes. The statutes of this state authorize municipal corporations to lay off, open, widen, straighten, establish and improve streets, and keep them in repair, but they do not expressly, impliedly, or incidentally confer upon cities of the second class or incorporated towns authority to vacate streets. Sand. & H. Dig., §§5151, 5208

The vacating and closing of the College Hill street crossing of the railway would be a public nuisance, and an injury to Mrs. Leach specially, notwithstanding it would affect many others in the same manner; and her right to an injunction to prevent it is unquestionable. *Draper* v. *Mackey*, 35 Ark. 497; *Wesson* v. *Washburn Iron Co.*, 13 Allen, 95; S. C. 90 Am. Dec. 181; *Snell* v. *Buresh*, 123 Ill. 151; *Corning* v. *Lowerre*, 6 Johns. Ch. 439; *Keystone Bridge Co.* v. *Summers*, 13 W. Va. 476; *Pettibone* v. *Hamilton*, 40 Wis. 402; *Francis* v. *Schoellkopf*, 50 N. Y. 152; *Hamilton* v. *Whitridge*, 11 Md. 128; S. C. 69 Am. Dec. 184; *Norcross* v. *Thoms*, 51 Me. 503; S. C. 81 Am. Dec. 588; *Milhau* v. *Sharp*, 27 N. Y. 611; S. D. 84 Am. Dec. 314, 321; *Brown* v. *Watson*, 47 Me. 161; S. C. 74 Am. Dec. 482; 2 Wood, Nuisances (3 Ed.) §§ 663, 669, 670, 672, 674, 676–680.

Let the decree of the Miller circuit court be affirmed.

BUNN, C. J., concurs as to want of power in city to vacate street, but dissents as to special interest of appellee to bring this suit.

COLEMAN v. FISHER.

Opinion delivered December 17, 1898.

RECEIVER—APPOINTMENT PENDING APPEAL.—Where a complaint asking for foreclosure of a mortgage of land is dismissed by the chancery court, and an appeal taken, the proper practice, if appellant desires the appointment of a receiver to take possession of the property and rent same during the pendency of the appeal, is to make application therefor to the lower court. (Page 43.)

Appeal from Pulaski chancery court.

DAVID W. CARROLL, Chancellor.

BATTLE, J. This action was instituted in the Pulaski chancery court by Edward W. Coleman against J. W. Fisher and Dora P. Fisher to foreclose a mortgage upon real estate. At the final hearing the complaint was dismissed, and the mortgage was cancelled; and the plaintiff appealed. The appellant has filed in this court a petition by which he asks for the appointment of a receiver to take possession of the property mortgaged and rent the same during the pendency of this appeal, and to collect the rents and hold the same subject to the order of this court. Shall the petition be granted? This question involves another, and that is, has the chancery court power to appoint a receiver, after an appeal to this court has been taken, when the facts warrant it?

It is said in Elliott on Appellate Proceedings (§ 545): "Matters independent of, and distinct from, the questions involved in the appeal are not taken from the jurisdiction of the trial court. Such matters as the appeal does not cover are purely collateral and supplemental, lying outside of the issues framed in the case, or arising subsequent to the delivery of the judgment from which the appeal is prosecuted. The general

rule that a case leaves the jurisdiction of the trial court when an appeal is perfected is not infringed by holding that purely collateral or supplemental matters are left under the control of the trial court, notwithstanding the loss of jurisdiction over the case taken to the higher court."

In the text books on receivers it is said that the power to appoint receivers is generally confined to courts having original jurisdiction, and is rarely exercised by those having appellate jurisdiction only. Beach, Receivers, § 15; Smith, Receivers, p. 54, § 18; High, Receivers, § 41.

In *Moran* v. *Johnston*, 26 Gratt. 108, there was a decree for the sale of certain land, and an appeal was taken from it to the supreme court of appeals. During the pendency of the appeal the lower court, upon the petition of creditors who were parties to the suit, appointed a receiver to take possession of the real estate, rent it out, and collect the rents until the further order of the court. From this decree the defendants appealed, and the decree was affirmed on the ground that the appointment of a receiver was not repugnant to the first appeal, but was made necessary by that appeal, and could be made only by the court of original jurisdiction. *Adkins* v. *Edwards*, 83 Va. 316.

In *Beard* v. *Arbuckle*, 19 W. Va. 145, certain lands were ordered to be sold, and an appeal was granted, and the sale was superseded. The court held that the trial court, to preserve the rents and profits of the land, could, upon the petition of the creditors, appoint a receiver, notwithstanding the case was pending in the supreme court of appeals upon a supersedeas.

In *Brinkman* v. *Ritzinger*, 82 Ind. 358, a receiver was appointed after a final decree had been rendered, and after an appeal had been taken. The court said: "He may be appointed after the decree, while the decree remains in force, whether such relief was prayed for or not". And further said that "the suit, having been appealed to the supreme court, may be regarded as yet pending for the purpose of an application for a receiver of the rents and profits, and we think the court that rendered the decree appealed from was the proper court to hear and determine such application." *Chicago & S. E. Ry. Co.* v. *St. Clair*, 42 N. E. Rep. 225.

In *Goddard* v. *Ordway*, 94 U. S. 672, the court held that "where the subject-matter of litigation is the funds in the possession of a receiver, the court below may, notwithstanding the supersedeas, give him the requisite order for their preservation; but it cannot place them beyond the control of a decree that may be made" by the supreme court.

In *Pacific Railroad Company* v. *Ketchum*, 95 U. S. 1, the supreme court of the United States refused to appoint a receiver over the property of a railway, pending an appeal from a decree of foreclosure, but without undertaking to decide whether a case may not arise in which it would exercise the power during the pendency of an appeal.

In Tennessee, however, it has been held that the supreme court of that state has the power to appoint receivers, "when it becomes necessary and proper to exercise such powers, in the due administration of its appellate jurisdiction; but, to exercise this power, the property sought to be placed in the hands of the receiver must be first brought under the jurisdiction of that court by virtue of the appeal, or by virtue of some order or decree rendered in that court." *Kerr* v. *White*, 7 Baxter, 394; *West* v. *Weaver*, 3 Heisk. 589.

Under the statutes of this state, "whenever it shall not be forbidden by law, and shall be deemed fair and proper in any case in equity, the court, judge or chancellor may appoint some prudent and discreet person as receiver," and may do so "either before or after answer or after a decree." Sand. & H. Dig., §§ 5964, 5965. He may exercise this power in a proper case after an appeal to this court. Having the jurisdiction to hear and determine applications for receivers during the pendency of appeals, it seems to us that it would be less expensive and more convenient to litigants to make such applications to the courts in which the decree appealed from was rendered, or the judges of the same, than it would be to make them to this court. They have the authority to take such competent testimony as may be necessary to enable them to act advisedly, and to hear and determine questions pertaining to the relief sought. This power falls more appropriately within the original jurisdiction of the trial courts than it does in that of this court. We

therefore think it meet and proper, and that the better practice is, that such applications should be made to them.

"Without undertaking to decide whether a case may not arise in which we would excercise the power of appointing a receiver pending an appeal in this court," we deny the petition of appellant, without prejudice to a new application to the Pulaski chancery court.

---

66 46
66 267
66 46
70 563
66 46
71 317
66 46
73 596
74 437
74 609
66 46
78 76
80 227
82 391

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

Opinion delivered December 17, 1898.

RAILROADS—DUTY TO KEEP LOOKOUT—INSTRUCTION.—The court instructed the jury that "it is the duty of the employees of a railroad train to keep a constant lookout for persons and property upon its track." *Held*, that if this instruction is ambiguous and misleading, the defect is one of form, which can be reached only by a specific objection. (Page 47.)

Appeal from Jackson Circuit Court.

RICHARD H. POWELL, Judge.

Dodge & Johnson, for appellant.

The engineer had a right to presume that the child, not seeing the danger of attempting to cross in front of the engine, would abandon the attempt. 63 Ark. 177; 36 Ark. 41; 47 Ark. 497; 46 Ark. 513; 37 Ark. 393. The fact that deceased was too young to be guilty of contributory negligence does not render appellant liable unless it is guilty of negligence. 19 L. R. A. 167; 88 Pa. St. 520; S. C. 32 Am. Rep. 473; 74 Fed. 313; 126 Mass. 397; 97 Ill. 66–71; 70 N. Y. 126; 60 Mo. 413; 14 R. T. 314; 11 Wright, 304; 12 *ib.* 218. The first instruction given for plaintiff is erroneous, because it placed the duty of keeping the lookout upon each and every one on the train. 62 Ark. 185. The instruction is also abstract. 53 Ark. 96. The verdict is excessive.

J. A. Watkins, for appellee.

This court will not reverse for want of evidence, where there is *any* evidence to sustain the verdict. 21 Ark. 306; 51 Ark. 467; 57 Ark. 577. The engineer had no right to presume that the child would exercise the prudence of an adult, and he should have used proper care to prevent injuring it. 46 Ark. 523. Special care to prevent accidents is required of a railway company where it is backing a train at a public crossing. 8 Am. & Eng. Enc. Law, 420. Ringing the bell does not discharge this duty. 104 N. Y. 362; 92 N. Y. 289. The verdict is not excessive. Compensation for pain and suffering can not be measured, but must be left to the jury. 48 Ark. 396; 57 Ark. 377.

RIDDICK, J. This was an action by the administrator of the estate of M. E. Pritchett against the appellant company for injuries causing him pain, suffering and death. The deceased was a boy only seven years of age, and in attempting to cross the railway track of appellant at a public crossing in the town of Newport he was struck by the tender of a backing engine and killed. The evidence, we think, makes out a case of negligence against the employees in charge of the engine sufficient to support the verdict of the jury. The only error complained of is that the court gave the following instruction: "It is the duty of the employees of a railroad train to keep a constant lookout for persons and property upon its track; and if any person or property shall be killed or injured by the neglect of such employees to keep such lookout, the company owning and operating 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, unless the deceased was guilty of contributory negligence."

Counsel for appellant contend that this instruction, in effect, declared it to be the duty of each and every member of the train crew to keep a lookout. We do not believe that the language used necessarily conveys such meaning. It can just as well be construed to mean that the members of the crew should see that a lookout was kept, and this, doubtless, is the

meaning which the presiding judge intended to convey. If there was ambiguity calculated to mislead the jury, counsel for appellant should have made a specific objection to the instruction on that account, or should have asked an instruction stating that it was not required that every employee upon the train should be constantly on the look. This would have brought the matter squarely to the attention of the presiding judge; but counsel did not do so, but adopted almost the same language in instructions asked by them, and which were given. The defect was one of form only, and a general objection is not sufficient to raise a question of that kind. *Phœnix Ins. Co.* v. *Fleming*, 65 Ark. 54; *St. L., I. M. & So. Ry. Co.* v. *Barnett*, 65 Ark. 255; S. C., 45 S. W. 550.

In the case of *St. Louis, S. W. Ry. Co.* v. *Russell*, 62 Ark. 182, cited by counsel, the judgment was reversed for a refusal to instruct the jury that the law did not require the engineer and fireman both at the same time to keep a constant lookout. In the recent case of *St. Louis, I. M. & S. Ry. Co.* v. *Waren*, 65 Ark. 619, the instruction criticised declared it to be the duty "of *all* persons running trains to keep a constant lookout," and made the company liable for injuries caused by the failure "of *any* employees to keep such lookout." It can be seen that this was materially different from the instruction given in this case.

Finding no error, the judgment is affirmed.

ST. LOUIS REFRIGERATOR & WOODEN GUTTER COMPANY *v.* LANGLEY.

Opinion delivered July 9, 1898.

1. FORFEITED LAND—DONATION—OVERDUE TAX SUIT.—During the pendency of an overdue tax suit to set aside a forfeiture of certain land for taxes, the commissioner of state lands had no authority to issue a donation certificate and deed based upon such forfeiture. (Page 51.)

2. OVERDUE TAX SALE—TITLE.—Until the period of redemption from overdue tax sales expired, the state, by purchase thereat, acquired no

title which the state land commissioner had power to convey. (Page 52.)

3. AFTER-ACQUIRED TITLES—STATE AS GRANTOR.—The statute which provides that titles afterward acquired by the grantor in a deed shall pass to his grantee (Sand. & Dig., § 699) has no application to conveyances made by the state. (Page 52.)

4. DONATION DEED—EFFECT.—A donation deed issued by the state land commissioner is a quit-claim deed, and conveys only such title as the state had at the time it was executed. (Page 52.)

Appeal from Clark Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

This suit was begun in ejectment for eighty acres of land. Afterwards an amendment to the complaint was filed, and the case, on motion of the plaintiff, was transferred to chancery, where the defendant filed an answer, and the cause was heard, and decree rendered, and this appeal prosecuted.

The special findings of fact by the court are full enough to outline the contention of both parties. Substantially, they are as follows: That the eighty acres of land in controversy were forfeited, sold, and duly certified to the state for taxes of 1873–1875. That on May 23, 1882, the commissioner of state lands granted to appellee a homestead donation certificate, and on proper proof, on October 4, 1883, executed to him a donation deed for said land, which deed was recorded January 30, 1893. That immediately after May 23, 1882, appellee entered upon said lands and remained, by himself and his tenants, in the actual and visible possession of same until December 1, 1892, assessing and paying all taxes thereon, when appellant took possession thereof, claiming title by the following chain, viz: That on April 19, 1892, "an overdue tax" suit was instituted in Clark county, in which said land was included. That same was, according to law, by the chancery court, condemned to be sold for the taxes of 1873–1875, costs, etc., and under said decree a sale was had October 2, 1882, and said land was then sold to the state for the said taxes, costs, etc., due thereon, which sale was duly confirmed by said court, and afterwards duly certified to the state land office. That on June 5, 1886,

the state, by its said commissioner, conveyed by "overdue tax deed" said lands to J. A. Smith, which deed was recorded September 3, 1887. That on September 9, 1887, said Smith, by his warranty deed, conveyed same to appellant, which deed was recorded September 10, 1887. That neither said Smith nor appellant had any actual notice of the claim of appellee, and both were purchasers in good faith for a valuable consideration.

The court found, as matter of law, that appellee's title was prior and superior to that of appellant. That appellee's damages, by reason of the cutting of timber from the land, was $188.15, and for all other damages, $150.00; which amounts were decreed to him, less $8.64 for taxes paid by appellant. Appellant excepted, and appealed to this court.

J. H. Crawford, for appellant.

He who purchases land bid in by the state at an overdue tax sale has a better title than one who claims under a donation certificate issued pending said overdue tax litigation. Act March 12, 1881, §§ 2, 3, 6, 7, 15; 13 S. W. 597. It is the general policy to uphold overdue tax titles, when the sale is regular. 49 Ark. 336; 53 Ark. 430, *ib.* 445: *ib.* 449; 57 Ark. 423; 63 Ark. 1. A purchaser *pendente lite* take subject to the decree. 11 Ark. 411; 12 *ib.* 564; 29 *ib.* 358; 36 Ark. 217; 57 Ark. 97; *ib.* 229; *ib.* 573; 45 Ark. 420; 21 Ark. 131, 136. The state and its grantees will not be estopped by the unauthorized acts of its public officers. 39 Ark. 580, 583; 40 Ark. 251, 256; 42 Ark. 118, 121; 1 Gill (Md.), 430; S. C. 39 Am. Dec. 658; 34 Ark. 590, 596. The state is not included in the act of the legislature making an after-acquired title inure to the benefit of one to whom a conveyance had been made of property not the grantor's at the time of so conveying. Sand. & H. Dig. § 699; 32 Ark. 43, 511; 61 Ark. 407, 409; 36 Ark. 158, 159.

T. J. Langley, pro se.

The after-acquired title inured to the benefit of appellee. Mansf. Dig., § 642; 33 Ark. 251; 15 Ark. 73. The titles being derived from the same source, the elder must prevail.

41 Ark. 17; 44 Ark. 5, 17. Appellant should have commenced proceedings to set aside appellee's deed within two years. Mansf. Dig. §§ 4475, 5791; 32 Ark. 131.

WOOD, J., (after stating the facts.) Both parties to this litigation deraign title from the state—the appellant through an overdue tax deed dated June 5, 1886, and the appellee through a donation deed dated October 4, 1883. The question is, who has the fee simple title?

Section 2, act March 12, 1881, provides for the filing of the complaint in an overdue tax suit, and that the clerk should enter on the record of the court an order to the effect that "all persons having any interest in said lands, or any of them, are required to appear in said court within forty days from that date, then and there to show cause, if any they can, why a lien shall not be declared on said lands for unpaid taxes, and why said lands should not be sold for non-payment thereof." Section 3 provides for the publication of said order, and that "such publication shall be taken to be notice to all the world," etc. Section 6 provides for special notice to the state by service of summons on its auditor. Section 7 provides that "in all cases where it shall be made to appear that the lands described in the complaint have been sold or forfeited to the state, the court shall inquire whether such sale or forfeiture was sufficient in law to vest a title in the state; and if the court finds that no title passed to the state by virtue thereof, the court shall proceed in the same manner as if no such forfeiture had taken place," etc. Section 15 provides that "whenever a report of such commissioner (the commissioner to sell) shall be confirmed, all objections to the sale and the proceedings thereunder shall be adjudged in favor of the validity thereof, and * * * * the court shall order the commissioner making such sale * * * * to execute a deed to the purchaser, conveying to him the land bought by him in fee simple, and such deed shall be conclusive against the world."

The state had no title to the land in controversy at the time the commissioner issued his certificate of donation. Under section 7, *supra*, the decree necessarily determines that,

at the time of its donation, the state had no title in the land, but only the right to enforce its lien for taxes. The state had instituted an action to foreclose this lien prior to the issue of the certificate of donation to appellee. It follows that the commissioner of state lands had no authority, prior to the sale of the land under the overdue tax decree, to issue a certificate of donation, and same conferred upon the donee no rights whatever. Nor did the state, at the time the donation deed was executed, have any title which the land commissioner had power to convey. Her title at that time was inchoate and incomplete, being subject to right of redemption for two years, as provided in section 11 of the overdue tax act.

But it is contended that, as there was no redemption, and the title became perfect in the state before she sold to appellant's grantor, such title should inure to the benefit of appellee under his donation deed. Undoubtedly, in the deeds of individuals, that is the law. Section 699 of Sand. & H. Dig. is as follows. "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired shall immediately pass to the grantee," etc. This statute is declaratory of the doctrine of estoppel which would prevail in the case of deeds executed by individuals, were there no such statute. But it does not apply to conveyances made by the state. The state is not expressly named, nor is it included by necessary implication. *Martin* v. *Roesch*, 57 Ark. 474–76.

In *Casey* v. *Inloes*, 1 Gill, 430, it is said: "The doctrine of estoppel does not apply to a grant from the state, so as to pass an after-acquired title, and such grant passed only the title the state then had."

The donation deed by the state land commissioner was a quit-claim, and carried only such title as the state had at the time it was executed. At this time the state had no perfect title, and the commissioner could not convey any.

This court held in *Woodward* v. *Campbell*, 39 Ark. 580, "that the state will not be estopped by the unauthorized acts

of its officers; that all who deal with a public agent must, at their peril, inquire into his real power to bind his principal.

As to the statute of limitations, it does not appear that the court reached any conclusion of law based upon any findings of fact as to the statute of limitations. The court simply found, as matter of law, "that appellee's title was prior and superior to that of appellant," showing that the court only passed upon the donation deed, and upon the overdue tax deed, and pronounced the former "prior and superior" to the latter. There is nothing in the record, either in the pleadings or proof, that would justify us in passing upon the question of limitations, either of two or seven years.

The court erred in decreeing the donation deed of appellee prior and superior to the overdue tax deed of appellant, and for this error the decree of the Clark chancery court is reversed, and remanded with directions to enter a decree for appellant according to this opinion.

RIDDICK, J., dissents.

HARDIN v. STATE.

Opinion delivered December 17, 1898.

66 53
f69 325
66 53
672 152
672 161
f72 618
66 53
f79 132
79 133
f80 15
66 53
f85 68
f85 69
85 539

1. JUROR—COMPETENCY.—A juror in a criminal case who states that, from rumor and from reading the newspapers, he has formed an opinion as to defendant's guilt which it will require evidence to remove, but that, for the purpose of the trial, he can disregard such opinion, and give defendant a fair and impartial trial, is not incompetent, if it does not appear that he entertained any prejudice against defendant. (Page 55.)

2. EVIDENCE—WHEN CONFESSION NOT VOLUNTARY.—A confession made by a prisoner to the officer having him in custody, upon the latter's assuring him that they had evidence to convict him and exhorting him to tell the truth, with other remarks intended to convey the idea that if he confessed it would save him from the death penalty, is involuntary and inadmissible. (Page 60.)

3. SAME—DEFENDANTS' TESTIMONY ON TRIAL OF CO-DEFENDANT.—Defendant's testimony, on the trial of one jointly concerned with him in commission of the crime charged against him, to the effect that he had been offered no inducement to make a confession is not admissible on his own trial to prove that such confession was voluntary; Sand. & H.

Dig. § 2909, providing that the testimony of one of two or more persons jointly concerned in the commission of crime "shall in no instance be used against him in any criminal prosecution for the same offense." (Page 63.)

Appeal from Van Buren Circuit Court.

E. G. MITCHELL, Judge.

J. H. Harrod, for appellant.

It was error to admit a juror who had formed an opinion as to the guilt or innocence of the accused, such that it would "take evidence to remove." 45 Ark. 165; 56 Ark. 402. A confession, to be admissible, must be given freely, without either "the flattery of hope or the torture of fear" or any circumstance of official indictment. 50 Ark. 305.

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

A juror who has formed an opinion merely from rumor and newspaper reading is competent. 13 Ark. 720; 19 Ark. 156; 30 Ark. 328; 47 Ark. 180; 84 Mo. 278. Whether or not confessions are voluntary is a question for the court, and its ruling will not be disturbed on appeal, unless it arbitrarily abuses its discretion. 84 Mo. 278; 28 Ark. 121; 28 Ark. 531; 50 Ark. 305. The court's finding that the confession was voluntary is supported by the law. 108 Mass. 464; 108 Mass. 285. The evidence shows it to have been so. 19 Ark. 156; 50 Ark. 501; 35 Ark. 47. Mere artifice in obtaining it does not render a confession inadmissible. 74 Mo. 128; 84 Mo. 278; 3 Brews. (Pa.) 461.

RIDDICK, J. The appellant, W. H. Hardin, was indicted by the grand jury of Van Buren county for the murder of Hugh Patterson. Patterson and his family were at supper on the 13th of December, 1897, when two masked men entered his house, and made an assault upon him, for the purpose of robbing him of his money. Patterson and his son resisted, and in the struggle which followed he was killed, and the robbers fled. Afterwards the appellant, Hardin, and one Lee Mills were suspected of the crime and arrested. Hardin made a confession, and also testified against Mills. Mills was indicted, convicted of murder, and executed. Hardin was then placed on trial, and

he also was found guilty of murder in the first degree, and sentenced to be hung.

This appeal of Hardin brings two questions before us for consideration. The first relates to the ruling of the circuit court upon the challenge of defendant to certain jurors. These jurors had formed opinions from rumor and from reading newspapers, and also one or two of them had heard statements of persons who had attended the investigation before the coroner's jury. In the course of their examinations, each of them stated that it would take evidence to remove his opinion, but that, for the purpose of the trial, he could disregard such opinion, and give the defendant a fair and impartial trial upon the law and evidence, uninfluenced by the opinion he then entertained. It did not appear that either of them entertained any prejudice against the defendant. Upon further examination it seems that each of them also retracted or modified the statement that it would require evidence to remove the opinion held by him.

But, if we concede the contention of counsel for appellant to be true, that the jurors did entertain opinions of the merits of the case which it would require evidence to remove, does it follow that the circuit court erred in holding them to be competent? An examination of the decisions of this court rendered since the adoption of the code, which now regulates the method of selecting jurors and the grounds of challenge in criminal cases, will disclose some conflict in the decisions on this point. Three of such decisions seem to hold that an opinion by a juror concerning the merits of a criminal case, requiring evidence to remove it, does not necessarily disqualify him from sitting in such case. *Benton* v. *State*, 30 Ark. 328; *Casey* v. *State*, 37 Ark. 67; *Sneed* v. *State*, 47 Ark. 180, 1 S. W. 68. Opposed to these decisions, there are two cases which adopt the rule contended for by counsel for appellant,—that an opinion requiring evidence to remove it renders the juror incompetent. *Polk* v. *State*, 45 Ark. 165; *Vance* v. *State*, 56 Ark. 402, 19 S. W. 1066. A consideration of the facts upon which these two last-named cases were based will show that, although it was said in each of them that an opinion requiring evidence to remove it disqualifies a juror, yet it was unnecessary to have gone to that extent in order to support the conclusion

of the court in those cases. The judgment of reversal rendered in each of those cases was right, without regard to such rule.

In *Vance* v. *State*, *supra*, the defendant was convicted of an assault with intent to kill. One of the jurors held to be competent by the circuit court stated on his examination in said court "that he was in an adjoining room to that where the defendant did the shooting, eating dinner, and he heard shots, jumped up, ran out, and saw the defendant running up the street with a smoking pistol in his hand." It can hardly be doubted that this juror (being at the place where the shooting occurred, hearing the shots, and seeing the fleeing defendant and the smoking pistol) acted as men usually do in such cases,—made inquiry as to the cause and origin of the difficulty, discussed the question with those present, and formed his opinion from the facts known by him and learned from others at that time. He stated that he could give the defendant a fair and impartial trial, notwithstanding the opinion he entertained; but when it is apparent that the juror has formed an opinion from his own knowledge of the facts of the case, or that, from his connection with the prosecution or defense, he is not an impartial juror, his statement that he can give the defendant a fair and impartial trial will not remove the objection to his competency, for it is possible that the most prejudiced man might be willing to say, and even believe, that he would be an impartial juror. Had this juror answered that it would take no evidence to remove his opinion, he would have still been incompetent; and, even had he disclaimed any opinion, it is doubtful if he would have been a competent juror. The judgment in the Vance case, therefore, is clearly right, irrespective of the question now under consideration.

The same thing may be said of the decision in *Polk* v. *State*. Several jurors stated on their examination in that case that they had formed opinions as to the guilt or innocence of the defendant. One had an impression on his mind from having heard a witness for the state testify in a case against another person jointly indicted with defendant for the crime of murder for which defendant was being tried. Another had formed an opinion from the statement of a person "who pur-

ported to state the facts." Yet the circuit judge refused to allow the defendant to ask one of these jurors, on his examination, whether it would take evidence to remove the impression he had on his mind. He refused to allow him to ask another whether he could go into the jury box prepared to give the defendant the presumption of innocence, or to ask another whether, from his knowledge of his own mind, he believed himself to be an unbiased juror. The object of the examination of jurors touching their qualifications, said Judge Smith in that case, is to ascertain whether they are impartial. "The court," he said, "is the trier, and should permit any question to be answered which seems to be propounded in good faith for the purpose of sifting the truth, and searching the consciences of the jurors." The jurors having stated in that case that they had opinions concerning the guilt or innocence of the defendant, it was incumbent on the state to show that such opinions were not of a nature to influence their judgment in the trial of the case. This was not shown, for the circuit court, upon the jurors stating that they could give the defendant a fair and impartial trial, cut off further examination, and refused to permit a full and fair examination of such jurors; and it could not be said whether they were qualified to sit in the case or not, and a reversal was necessary. But the learned judge who delivered the opinion in that case undertook to lay down the rule broadly that persons offered as jurors who state upon their examinations that they have formed opinions of the guilt or innocence of the defendant which would require evidence to remove are incompetent, and should be rejected. The objection to his reasoning on this point is that he seems to assume that an opinion requiring evidence to remove it is necessarily a settled or fixed opinion, and such as to prevent the juror from impartially trying the case. Now, it is a matter of common knowledge that we all form opinions from rumor, and from reading newspapers, which we retain until we hear another version of the matter, or until time, or forgetfulness, or something, has removed them from our minds. If one called for examination as a juror should have an opinion of that kind concerning the case, however slight the importance he attached to it, he might yet truthfully say that, if put on the

jury, it would remain on his mind until he heard something to the contrary,—in other words, that it would take evidence to remove it. It does not by any means follow that he would, if placed on the jury, be influenced by such opinion, or allow it to take the place of evidence. If he possessed ordinary intelligence, he would know, before being admonished to that effect by the presiding judge, that the rumor he had heard or the statement he had read in the newspapers was not evidence upon which he could act as a juror. He would know also that such rumors and statements are often misleading, and if he was fair-minded, and had no direct interest in the prosecution or defense, he would neither be governed nor influenced by such opinions in the trial of the case. It might, indeed, be desirable to have jurors without opinions of any kind; but that is impracticable in this age, when newspapers go into every corner of the land. To seek an impossible jury consisting of perfect men without bias of any kind would be, to use the language of Mr. Bishop, simply to forbid the wheels of justice to move. Bish. Cr. Prac. § 910. Our statute, therefore, wisely provides that it shall not be a ground of challenge that a juror has formed or expressed an opinion from rumor merely. Sand. & H. Dig. § 2212. But the rule, as broadly stated in *Polk* v. *State*, operates to exclude nearly every juror challenged who has an opinion of any kind, and, in effect, almost annuls the statute. A writer in the American Law Register, speaking of this question, says: "It is quite a common thing for counsel to propound to a juror the question whether he has such an opinion as will require evidence to change it. But, while some courts seem to recognize this as a test, the overwhelming weight of authority does not regard it as a proper test, as no rational person ever has an opinion on any subject which is changed or removed except by evidence of some kind. Note to *Ex parte Spies*, 27 Am. Law Reg. (N.S.) 46.

But our objection to such a test is not that it is unsupported by authority, for we believe that it is adopted by a number of learned courts, but our objection is that in the actual administration of justice it is impracticable. It is well known that the most intelligent and better class of citizens frequently object to serving on juries, especially in trials

for capital offenses, where they are likely to be closely confined and deprived of their liberty for several days. If they can disqualify themselves without stating a falsehood, they are almost certain to do so. This class of men read newspapers and keep informed on current events, and usually have opinions of some sort in reference to cases for murder on trial in their county. But, if they have an opinion of any kind, they can, under the rule contended for, easily render themselves subject to challenge for cause by stating that it will take evidence to remove the opinion. And no one can charge the juror with having answered untruthfully in saying that, although he will not be governed or influenced by such opinion on the trial, yet he will retain it, however slight it may be, until he hears something to the contrary. A rule that rejects a juror on a challenge for such a cause is very close to one that rejects him if he has an opinion of any kind in reference to the case, and seems both unreasonable and impracticable. A sounder rule, we think, was afterwards laid down by Judge Smith himself in *Sneed* v. *State*, 47 Ark. 180, 1 S. W. 68, when, in speaking of a juror who had answered that he had an impression with regard to the case which it would take evidence to remove, he said: "The entertainment of preconceived notions about the merits of a criminal case renders a juror *prima facie* incompetent. But when it is shown that the impression is founded on rumor, and not of a nature to influence his conduct, the disqualification is removed." *Sneed* v. *State*, 47 Ark. 180, 1 S. W. 68; *Casey* v. *State*, 37 Ark. 67; *Benton* v. *State*, 38 Ark. 328; *Ex parte Spies*, 27 Am. Law Reg. (N. S.) 23, and cases collated in note (S. C. 8 Sup. Ct. 22); 1 Thomp. Trials, §§ 79, 80, and cases cited.

It is the duty of the circuit judge, under our statute, to determine whether the opinion entertained by the juror is such "that he cannot try the case impartially and without prejudice to the substantial rights of the party challenging." Sand. & H. Dig. § 2208. Before deciding that question, he should permit a full and fair examination of the juror touching the nature and source of the opinion held by him, and his connection with the case, if any, in order to determine whether the opinion is such as to influence his judgment on the trial If it appears

that the opinion is such as to influence or affect his action or finding in the case, the juror should be rejected. But when a question of that kind comes for review before the appellate court, it should be remembered that the circuit judge, in his efforts to secure competent and impartial jurors for the trial of a criminal case, has often to encounter a strong disinclination to such service on the part of those summoned. At times, too, improper persons, unsuited for jurors, endeavor to worm themselves upon the jury. As the trial judge has the juror before him, he can observe his manner and bearing, can note the amount of intelligence he displays, and judge his capacity for jury service, and whether he will be influenced by the opinion he has formed, or be able to disregard it. "In such cases," says Chief Justice Waite, "the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case." "The finding of the trial court upon that issue," he says, "ought not to be set aside by a reviewing court, unless the error is manifest." *Reynolds* v. *United States*, 98 U. S. 145. This seems to be a correct statement of the rule that should govern appellate courts in such cases. We will only add that in our opinion no such error is shown in the findings of the court as to the competency of the jurors challenged in this case. It might have been safer to have sustained the challenge to those jurors who heard statements from parties that had attended the sittings of the coroner's jury, but it appears that these were afterwards peremptorily challenged, and none of them sat on the jury.

The next question relates to the ruling of the court in admitting the confession made by Hardin, as evidence against him, to the admission of which he objected and duly excepted. The confession of a prisoner, in order to be admissible, must be free and voluntary. It must not be extracted by any fear of violence, nor obtained by any direct or implied promises of the officer having him in custody, or of any other person in authority. This rule in regard to confessions has not alto-

gether escaped criticism, and it is said that Bentham, the law reformer, advocated a rule admitting all confessions, in connection with the circumstances under which they were made, to be given such weight as the jury deemed proper. But the law both in England and the United States is settled to the contrary. By that law, if the confession "proceeds from remorse, and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear excited by a person in authority, it is inadmissible." *Reg.* v. *Thompson*, 8 Eng. Ruling Cas. 90, and note; *Corley* v. *State*, 50 Ark. 305; 7 S. W. 255; *Young* v. *State*, 50 Ark. 501; 8 S. W. 828.

When a prisoner is merely exhorted to tell the truth, or when he is only admonished that he had better tell the truth, and no hope is held out that the punishment will in consequence be mitigated, any confession thereupon made will be admissible. But if the officer having the prisoner in custody assumes that he is guilty, and lets him know that, by his exhortion to tell the truth, he means for him to confess his guilt of the crime charged, it is the same as asking him to confess, and will be so considered. 1 Bish. Crim. Proc. § 1227. The facts in this case are, in substance, as follows: After Hardin and Mills had been arrested, the attorney employed to prosecute Mills told the sheriff that, in order to assure the conviction of one of the defendants, it would be necessary to get a confession from the other. The sheriff and certain citizens of the town also had an understanding that, if Hardin would confess, they would do what they could to save him from the death penalty. The attorney employed to prosecute Mills, knowing that the sheriff was endeavoring to secure a confession from Hardin, told him to tell Hardin that, if he would tell the whole truth, they would recommend to the prosecuting attorney that he permit Hardin to plead guilty to murder in the second degree, and thus save him from the death penalty. The sheriff did not communicate these statements to Hardin, nor did he make him any promise to use his influence with the prosecuting attorney to allow him to escape the death penalty by pleading guilty to murder in the second degree, until after the confession was made, nor did he know of any one else doing so. But the sheriff and certain citizens had frequent conversations with Hardin. The sheriff

let him know that they believed he was guilty, recited to him certain portions of the evidence, and told him that they had a strong case against him, and in that connection exhorted him to tell the truth, saying that by so doing he might escape the death penalty. One citizen, a short time before the confession, said to Hardin, in the presence of the sheriff: "If you are guilty, the best thing you can do is to tell it. It might help you. You know how such things are worked in the courts." Hardin, who had been deputy sheriff and constable, and was a man of ordinary intelligence and some firmness, did not yield readily to these exhortations. For several days he withstood them, while, with a view of securing a confession from him, he was kept closely guarded and separate from Mills. Meantime there was also considerable talk of a mob, of which talk Hardin was informed. After repeated conversations with him on the part of the sheriff, such as stated above, he at last gave in, and made the confession offered in evidence. He was then told that, to get the benefit of the promises made to him, he would have to go on the stand and testify against Mills. The prosecuting attorney was informed of the agreement made with Hardin, and approved it, but said that it would be better for him to make no direct promises. When the circuit judge was told of the matter, he refused to allow Hardin to plead guilty of murder in the second degree. Thereupon the prosecuting attorney and the attorney assisting in the prosecution of Mills had a consultation with the attorney for Hardin. "The prosecuting attorney," so the witness states, "told over what the judge said, but implied, for his own part, he would find a way to let Hardin off with second degree punishment, if Hardin would testify against Mills." Hardin thereupon testified against Mills, and no complaint is made that he held back the truth in any respect; but afterwards he was himself put on trial, and his confession and a portion of his testimony against Mills were used to convict him.

We have not set out all the testimony tending to show that the confession of Hardin was made under the influence of a hope of leniency held out to him by the sheriff and others; for this fact is established beyond controversy by the testimony of the sheriff himself, who seems to have made a candid state-

ment. "I asked him," he said, "if he ever heard of a man being hung who came out and told the truth, and I may have said that I never did. I told him it was best to tell the truth, and I intended for him to get the impression that, if he would tell the truth, it would save him from the death penalty, and my judgment is that I made that impression to him." When we remember, in this connection, that the sheriff had told Hardin that he believed he was guilty, and that they had a strong case against him,—endeavored, as he said, to impress that on his mind, —it is plain that his exhortation to tell the truth meant only that he should make a confession, and that Hardin so understood it. It was, in effect, just the same as if he had said: "You are guilty, and we have the evidence to prove it. But men who tell the truth are seldom hung, and you had better make a full confession of your crime, and in this way you may be saved from the death penalty." By the whole current of authority, both in this country and in England, a confession of a prisoner, following soon after such a statement made to him by the sheriff having him in custody, is inadmissible. *Corley* v. *State*, 50 Ark. 310, 7 S. W. 255; *Reg.* v. *Thompson*, 8 Eng. Ruling Cas. 90.

The evidence that this confession was involuntary is not contradicted in the slightest degree, except by a statement of the prisoner himself, made while on the stand as a witness against Mills. In response to a question asked him on that occasion, he said that he had been offered no inducements to confess or testify. This statement was probably made under the same influence which procured the confession, but, even if voluntary, the statute forbids it to be used against the defendant. "In all cases," says the statute, "when two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense." Sand. & H. Dig. § 2909. The testimony of Hardin while a witness against Mills was not shown, further than the statement above mentioned. No objection was made to the admission of this statement, and no error can be based

upon its introduction; but, while this is so, we cannot give any weight to it, for the reason, as before stated, that the statute positively forbids it to be used against defendant. The evidence showing that the confession was made under the influence of hope excited by those in authority is, therefore, uncontradicted by any legal evidence. The evidence goes further, and raises a slight suspicion that the element of fear, as well of hope, had its effect, also. There was much talk of a mob taking Hardin and Mills out and hanging them. Hardin, while closely guarded, was kept informed of this talk by the sheriff. The sheriff did not remember having said to Hardin that the talk was that the mob would hang him, unless he confessed, but he significantly adds, "The guards talked to him more than I did." No one told what they said. This evidence as to the talk of a mob might amount to nothing, standing alone; but, when taken in connection with the other facts, it strengthens the conclusion that the confession afterwards made was inadmissible. We can appreciate the motives which led the circuit judge to refuse to permit Hardin to plead guilty to murder in the second degree. He doubtless believed that he was as guilty as Mills, and should suffer the same penalty. But in admitting the confession of Hardin as evidence against him, procured as it was in the manner above stated, we are of the opinion that he committed an error for which the judgment must be reversed, and the cause remanded for a new trial, and it is so ordered.

BUNN, C. J., does not concur as to the inadmissibility of the confession, but concurs otherwise.

66 65
671 350
66 65
84 99

BOARMAN v. STATE.

Opinion delivered December 24, 1898.

1. INDICTMENT FOR TRESPASS—ALLEGATION OF OWNERSHIP.—Under Sand. & H. Dig. § 2080, providing that an erroneous allegation as to the person injured shall not be material, an indictment for cutting down trees, and destroying and carrying away the timber thereof, is not defective in alleging the property as belonging to the estate of a deceased person. (Page 66.)

2. SAME.—An allegation that defendant cut down timber sufficiently alleges that the timber was standing or growing. (Page 66.)

3. SAME—VALUE OF TREES.—In an indictment for cutting down trees and destroying and carrying away the timber thereof it is unnecessary to allege or prove the value of such trees. (Page 67.)

Appealed from Little River Circuit Court.

WILL P. FEAZEL, Judge.

A. R. Boarman, pro se.

The indictment is defective because it does not use all the words of the statute descriptive of the offense, nor words equivalent thereto. 47 Ark. 492; 62 Ark. 514. The indictment should have stated that the timber was "standing or growing" upon the lands of another. Sand. & H. Dig. § 1773. The indictment should also have stated the value of the timber. The indictment is defective further in that it does not describe the land sufficiently. The evidence does not sustain the verdict. To sustain a conviction of this kind, the accused must have actually procured or participated in the commission of the offense.

E. B. Kinsworthy and *Jas. H. Stevenson*, for appellee.

The indictment follows the language of the statute, and is sufficient. The description of the land was sufficient. 31 Ark. 676. The allegation that defendant "cut down" the trees is sufficient, because it conveys the same meaning as to allege that the trees were "standing or growing." Sand. & H. Dig.

§ 2088. There are no accessories after the fact in misdemeanors. 45 Ark. 361. His assenting to the crime by accepting its benefits makes him guilty as a principal. 18 Ark. 179; 10 Ark. 378.

BUNN, C. J. This is an indictment for cutting down trees on the land in charge of A. J. Hemphill, an agent of the estate of J. J. Hemphill, and destroying and carrying the timber thereof, which, omitting merely the formal parts, is in these words: "The said A. R. Boarman, in the county and state aforesaid, on the 1st day of May, A. D. 1897, did unlawfully and wilfully enter upon lands belonging to the J. J. Hemphill estate, and cut down, destroy and carry away timber," etc. Trial and verdict against the defendant, and judgment accordingly.

The defendant filed his motion in arrest of judgment, alleging four several causes, to-wit: (1) "That the indictment does not sufficiently describe the land intended." (2) "That the indictment does not allege that the timber cut and carried away was standing or growing upon the said land." (3) "That the indictment does not allege the value of the timber." (4) "Because the indictment alleges that the defendant entered and cut and carried away timber, and the proof shows that one Wade cut said timber, without the consent or knowledge of the defendant."

Under the first head it is contended by the defendant that the expression "land belonging to the J. J. Hemphill estate" does not describe the land sufficiently. The land is alleged to be situate in the county and state wherein the indictment was found, and the only controversy under this heading seems to be as to whether or not describing lands as the property of an estate is sufficiently definite,—that is, the indefiniteness is as to the ownership, and not as to the identity and locality of the land otherwise. Section 2080, of Sandels & Hills Digest, reads: "Where an offense involves the commission, or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, is not material." In construing a statute of California identically the same

as the one quoted, the supreme court of that state, in *People* v. *Smith*, 112 Cal. 333, held (quoting from the syllabus) that "there is no substantial variance between a complaint for larceny, describing the property stolen as belonging to and being owned by the estate of a deceased person named, and an information describing it as belonging to and being owned by persons named as executor and executrix of the estate of such deceased person; and the description in the complaint cannot be held insufficient under the provisions of section 956 of the code [the section like ours], the offense being described with sufficient certainty to identify the act, and the alleged ownership being in effect in the estate of the deceased person."

In the case at bar there is no contention that the act is not sufficiently described otherwise in order to be identified. This objection is therefore not sound.

As to the second ground of motion, we think the allegation that the defendant cut down the timber sufficiently indicates that the timber was standing or growing, within the meaning of the statute, and the defendant must necessarily have known what was meant by that language.

As to the third ground, the statute seems to assume that "standing or growing timber" is of some value; at all events, the act of cutting down, destroying and carrying away such timber is made the offense *per se;* and therefore there is no real necessity of alleging value or of proving the same.

But the proof shows that one Wade had contracted with defendant to cut timber on the lands of another, and by mistake had gone over the line and cut some ties on the Hemphill estate lands; and that he also was an independent contractor; and that he had cut said trees, if cut at all, without the knowledge or consent, and of course without the direction, of the defendant. The evidence is also to the effect that defendant, on hearing that the timber had been cut, offered to pay for the same; but this, we think, does not amount to an admission of responsibility on his part for the act of cutting the timber.

Judgment reversed, and cause remanded.

GAGE v. HARVEY.

Opinion delivered December 24, 1898.

SALOON-KEEPER—CIVIL LIABILITY.—One who becomes intoxicated upon liquor sold to him in a saloon, and thereby incapacitated to take care of his money, and who, while in that condition, loses it by having it forcibly and without his consent taken from his pockets by another, cannot maintain an action against the saloon-keeper and the sureties on his bond to recover the money so taken. (Page 69.)

Appeal from the Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

A. Harvey filed his suit in the Garland circuit court against Vincent Gage, George Sargianovich, J. Kempner and David Beffa to recover $470, alleged to have been lost in a saloon or dram-shop managed by Gage for Sargianovich. The complaint alleges that in November, 1895, Sargianovich was the owner of a certain saloon in the city of Hot Springs; that on January 1, 1895, he procured a dram-shop license for the same from the county court of Garland county and executed a bond to the state, with J. Kempner and D. Beffa as his sureties; that on the 23d of November, 1895, Sargianovich had Gage in charge of said saloon as manager; that on said date Harvey became and was intoxicated in said saloon; that said intoxication was caused in whole or in part by liquor sold or given away at the bar by Gage; that Harvey, while in said saloon on that day, had on his person a large sum of money, which fact Gage well knew; that Gage took from Harvey's person, without his knowledge or consent, the sum of $470 in currency, and refused to return the same.

There was evidence tending to sustain the allegations of the complaint, and a verdict for the amount sued for was returned against all of the defendants, who have appealed.

Graves & Martin and *Morris M. Cohn*, for appellants.

This is a statutory action, based upon sections 4870 and 4873, Sand. & H. Dig. Such statutes are strictly construed.

70 Ill. 496; 71 Ill. 241; *ib.* 632; 72 *id.* 540; 4 Hun, 773. The evidence must be confined to the pleadings. 77 Ill. 109. No such action existed at common law. 44 Ia. 19; 55 Ark. 52; 30 Wis. 344; 11 Ind. 64. The section providing for the bond and that giving the general cause of action are to be construed together. 33 Wis. 107. The statute does not protect the one whose intoxication is the alleged basis of recovery. 44 Mich. 617; 8 Hun, 112; 14 Bush, 538; 7 Tex. Civ. App. 158. The loss, to sustain an action in any event, must have been proximately caused by intoxication from liquor sold by defendant. 53 Ind. 517; 54 *id.* 559; 84 Ill. 195; 83 *id.* 56; 37 Minn. 345; 3 Ill. App. 375; 80 Ala. 505; 86 Ga. 177; Cooley, Torts, 68, 69. The court's instructions assume the truth of facts which legitimately belong to the jury; hence they are erroneous. 14 Ark. 295; *id.* 537; 18 *id.* 525; 20 *id.* 188; 23 *id.* 411; 24 *id.* 543; 34 *id.* 702; 36 *id.* 125; 45 *id.* 263.

Wood & Henderson, for appellees.

The question, what was the proximate cause of the appellee's loss, was for the jury. 62 N. W. 891. The fact that appellee drank at other places is not material. 77 Ill. 126; 42 N. W. 751; 27 O. St. 259; 25 Am. Rep. 362. Appellee is a person "aggrieved," within the meaning of the law. Sand. & H. Dig. § 4873; 62 Ark. 374. The legislature has a right to provide a remedy for damages occasioned by liquor sales. 43 Ark. 364; 45 Ark. 356.

BATTLE, J. The question in this case is, can one who becomes intoxicated upon liquor sold to him in a saloon or dramshop by the keeper thereof or his agents, and thereby incapacitated to hold and take care of his money, and who, while in that condition, loses it by having it forcibly or without his knowledge or consent taken from his pockets by some person, maintain an action against the keeper and the sureties on his bond to recover the money so taken?

This question arises under section 4870 of Sandels & Hill's Digest, which provides: "Each applicant for a dramshop or drinking saloon license * * * shall enter into bond to the state of Arkansas, in the penal sum of two thousand dollars, conditioned that such applicant will pay all dama-

ges that may be occasioned by reason of liquor sold at his house of business, * * * which bond shall have two good securities thereto, to be approved of by the court;" and under section 4873 which reads as follows: "Any person aggrieved by the keeping of said dram-shop or drinking saloon * * * may have an action on said bond against the principal and securities for the recovery thereof."

The answer to the question obviously depends upon the meaning of the words, "conditioned that such applicant will pay all damages that may be occasioned by reason of liquor sold at his house of business," which are used in section 4870. They should be construed according to the general rule fixing the limit of the liability of parties for the consequences of their acts in other cases, as they in no way indicate an intent to make the liability of the saloon keeper an exception to such rule. According to their legal effect, they bind him to pay all damages that may be the natural and proximate result of the use or consumption of liquor sold by him or his agents at his place of business. Further than this the law does not extend the liability on his bond on account of the sale of liquor. As said by Lord Bacon: "It were infinite for the law to consider the cause of causes, and their impulsion one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Bacon's Maxims, Reg. 1; Broom's Legal Maxims, 165.

The material inquiry in this case is, therefore, whether the use or consumption of the liquor sold by the keeper or his agents at his place of business was the proximate cause of the loss of the money mentioned in the question propounded.

In determining whether an act of a defendant is the proximate cause of an injury, the rule is that the injury must be the natural and probable consequence of the act—such a consequence, under the surrounding circumstances of the case, as might and ought to have been foreseen by the defendant as likely to flow from his act; the act must, in a natural and continuous sequence, unbroken by any new cause, operate as an efficient cause of the injury. If a third person intervenes between the act of the defendant and the injury, and does a culpable act, for which he is legally responsible, which pro-

duces the injury, and without it the injury would not have occurred, and the act of the defendant furnished merely an occasion for the injury, but not an efficient cause, the defendant would not be liable. For no one is responsible for the independent wrong of a responsible person to whom he sustains no relation which makes him liable for his wrong independent of an actual participation therein or connection therewith, as, for instance, the master for the acts of the servant in the scope, course or range of his employment.

Mr. Wharton states the doctrine in question and answer as follows: "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative; for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is liable to the person injured." Wharton, Negligence, § 134 *et seq.*

We will give a few illustrations of the rule stated, beginning with *Alexander* v. *Town of New Castle*, 17 N. E. Rep. 200, in which a town was sued for injuries alleged to have been caused by a pit or excavation in a street, which the town wrongfully and negligently suffered and permitted to remain open and uninclosed. The plaintiff was a special constable, and was thrown into the pit by a prisoner he had under arrest, as they were passing and opposite the pit, and was injured; the prisoner escaping. It was insisted that, as the pit or excavation, so wrongfully and negligently permitted to remain open and uninclosed, afforded the prisoner the opportunity of throwing the plaintiff into it, as a means of escape, it was, in legal contemplation, the proximate cause of the injuries which the plaintiff received. But the court held that the prisoner was

clearly an intervening as well as an independent human agency in the infliction of the injuries of which the plaintiff complained, and that the town was not liable. In that case the pit afforded the opportunity to inflict the injury, but was not an efficient cause of it.

In *Vicars* v. *Wilcocks*, 8 East, 1, the plaintiff sued the defendant for slander, which was uttered in a conversation with persons who were not his employers, but was communicated to his master, and attempted to hold him liable for the damage he suffered by reason of his master discharging him, in consequence of the slander, before the expiration of his term of service. And Lord Ellenborough said that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration; and here it was an illegal consequence, a mere wrongful act of the master for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horse pond by way of punishment for his supposed transgression. And his lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. *Cuff* v. *Newark & N. Y. R. Co.*, 35 N. J. L. 31.

In *Shugart* v. *Egan*, 83 Ill. 56, the plaintiff's husband, while in a state of intoxication caused by liquors obtained by him from the defendant, insulted or menaced one McGraw, who thereupon stabbed him, inflicting a wound whereof he died shortly afterwards. The court held that the plaintiff was not entitled to recover under a statute which gave a wife "who shall be injured in person, property or means of support" in consequence of the intoxication of any person "a right of action against the person who caused the intoxication, and made such person liable for all damages sustained and for exemplary damages." Mr. Justice Scholfield, for the court, said: "It has also been held that the intervention of the independent act of a third person between the wrong complained of and the injury sustained, which was the direct or immediate cause of the injury, breaks the causal connection; and, consequently, there can, in such case, be no recovery except as against the person

whose immediate agency produced the injury. * * * Here, the death not resulting from intoxication or from any disease induced or aggravated by the use of liquor, but solely from the direct and wilful act of McGraw, we have a case clearly within this principle."

In the case before us the intervening act produced the injury complained of, and was the wrongful act of a third person for which he was legally responsible. The sale and consumption of the liquor may have furnished the opportunity or occasion for the wrongful act of the third person, but was not the proximate cause of the injury. Hence the saloon keeper, who sold the liquor which produced the intoxication, and the sureties on his bond, are not liable for damages. *Cuff* v. *Newark & N. Y. R. Co.*, 35 N. J. L. 17.

The judgment of the circuit court is reversed as to George Sargianovich, the keeper of the saloon, and J. Kempner and D. Beffa, the sureties on his bond, and is affirmed as to Vincent Gage.

EVERTON v. DAY.

Opinion delivered December 24, 1898.

1. PAYMENTS—APPROPRIATION.—Under an agreement between a debtor and creditor that the creditor might appropriate all payments made by the debtor to any indebtedness due at the time of payment, the creditor was authorized to appropriate all such payments to the satisfaction of an account already due, before crediting any of them on a matured note. (Page 75.)

2. LIMITATIONS—PART PAYMENT.—Where plaintiff settled part of his indebtedness on account to defendant by a note secured by a deed of trust, and thereafter made payments in excess of so much of the account as was not settled by note, all of which payments were by the creditor appropriated to the account, so much of the payments as was in excess of the unsecured account became a payment on the note, so that an action to foreclose the deed of trust, brought within five years thereafter, is not barred. (Page 76.)

3. FOREIGN CONTRACT—PRESUMPTION.—The presumption is that a verbal contract, entered into in another state, to pay 8 per cent. interest on an account, is valid. (Page 76.)

Appeal from Lonoke Chancery Court.

THOMAS B. MARTIN, Chancellor.

George Sibly, for appellants.

The debt being barred, the deed of trust is also barred. Act March 25, 1898; 61 Ark. 115. The injunction prohibiting the sale did not prevent the commencement of an action for the debt, and hence did not stop the statute. 14 Ark. 496; 2 Am. & Eng. Ch. Cas. 587. To toll the statute, the exception must come strictly within those enumerated in the statute. 13 Am. & Eng. Enc. Law, 731, § 5, note; Angell, Lim. 196, note 3. Bringing the suit for injunction against appellees did not interrupt the statute. 42 S. W. 534; S. C. 64 Ark. 345; 42 S. W. 1068; S. C. 64 Ark. 412. The court erred in not directing a statement of account. The wife could not be a partner or joint maker with her husband. 43 Ark. 212; 56 Ark. 294. Her position was that of surety, and she was, therefore, entitled to all credits. 1 Jones, Mort. §§ 114 *et seq.*, 949 *et seq.* In the absence of pleading and proof, the court will presume the the Tennessee statute of usury to be like ours.

Dodge & Johnson and *Carroll & Pemberton*, for appellees.

The evidence shows that a note was executed for the amount secured in the deed of trust, and that a payment was made in January, 1891. The deed is not barred. The injunction was sufficient to interrupt the statute. Sand. & H. Dig. § 4844. The accounts were simple, and no reference was required. The deed of trust is sufficient to convey Mrs. Everton's interest. There is no presumption that the rate of interest in a sister state is the same as in ours. 46 Ark. 66; 50 Ark. 241.

BATTLE, J. On the 28th of February, 1888, B. F. Everton was indebted to Day, Horton & Bailey, on account, in a large sum of money; how much, they did not know, but estimated it at the sum of $1,000. Everton and his wife executed a note for this amount, due and payable on the 1st of October, 1888, in settlement of so much of such indebtedness; and Day, Horton & Bailey agreed to advance to him until the first day of April, 1889, goods, wares and merchandise not exceeding, at prices sold, the aggregate sum of $20,000; and, to secure the

payment of the promissory note and the amount that would be due for the goods, wares and merchandise to be advanced, Everton and his wife executed a deed of trust, and thereby mortgaged certain lands. It was stipulated in the deed of trust that Day, Horton & Bailey might appropriate all future credits in favor of Everton to the payment of any part of his indebtedness to them that may be due, and that the trustee shall have the power to sell the lands mortgaged in the event Everton failed to pay the indebtedness secured thereby in a stipulated time, upon giving a specified notice. All these contracts were entered into, and the note and deed of trust were executed, at Memphis, in the state of Tennessee, where Day, Horton & Bailey resided and did a mercantile business.

After the execution of the note, it was ascertained that Everton was indebted to Day, Horton & Bailey, on the 28th of February, 1888, in a sum much larger than one thousand dollars, which still remained in the form of a bank account, except as stated.

In pursuance of their agreement, Day, Horton & Bailey sold and delivered to Everton, at their place of business in Memphis, between the 28th of February, 1888, and the first of April, 1889, a large quantity of goods, wares and merchandise, and Everton made many payments, making the last payment on the 28th of January, 1891, all of which were credited on the account, notwithstanding the payments exceeded the amount of the account, exclusive of so much as was settled by the note. In the meantime, Horton withdrew from the partnership, and Day and Bailey succeeded to all his rights and interests in the firm, and continued the business under the style of Day & Bailey. Everton failing to pay them the balance due, the trustee advertised the lands for sale pursuant to the terms of the deed of trust, when Everton and his wife, on the 27th of June, 1891, instituted an action in equity against Day & Bailey and the trustee, and secured an order temporarily restraining the sale. Day & Bailey on the 20th of July, 1891, filed an answer and cross-complaint, and asked that the deed of trust be foreclosed; and Everton and his wife answered the cross-complaint, setting up, among other defenses, the five-years statute of limitations in bar of the action to foreclose; and the court, upon the final

hearing, dissolved the injunction, and rendered a decree in favor of Day & Bailey against Everton for the balance due them.

Was the action to foreclose the deed of trust barred? The note for $1,000 was obviously executed for the purpose of settling the account of Everton with Day, Horton & Bailey, and of changing the form of the indebtedness. Its effect was to segregate, merge and change as many of the first items of the account as amounted to $1,000 from an account into a note. When payments were thereafter made by Everton to Day & Bailey, and were credited by them on the account, the note was not affected thereby until the account was in that manner fully paid, when all moneys afterwards paid by Everton partly in discharge of his indebtedness to Day & Bailey, in excess of the account, became *ipso facto* a part payment of the note as of the date of its receipt by the creditors. In this way the account was first fully paid, and payments were afterwards made on the note, the last one being made on the 28th of January, 1891. Hence the balance which remained unpaid, an amount less than $1,000, was due upon the note; and the action to foreclose the deed of trust, having been brought within five years after the last payment, was not barred by the statute of limitations.

In pursuance of a verbal agreement, Day & Bailey charged Everton with interest on many of the items of his account, if not all, at the rate of 8 per cent. per annum, and credited him with interest at the same rate and in the same manner. He undertook to show, in his answer to the cross-complaint, that he was not bound to pay this interest, and, without denying the agreement, or that it was based upon a sufficient consideration, insisted that the charge was illegal, because the contract was made in Tennessee, and was governed by the laws of that state, which, as he alleges, require contracts for such a rate of interest to be in writing, and make them void, if they are not. But no evidence to prove the laws of Tennessee was adduced. In the absence of a statute requiring it, such contracts need not be in writing; and, inasmuch as the contract in this case is a Tennessee contract, the presumption, until the contrary is shown, is that it is valid.

Decree affirmed.

RIDDICK, J., absent.

SAWYER v. DICKSON.

66 77
69 355
66 77
73 520

Opinion delivered December 24, 1898.

1. CONTRACT—PLACE OF PERFORMANCE.—Where the notes secured by a mortgage were dated and made payable in Missouri, though the mortgage was upon land in this state, and was acknowledged here, the contract is governed by the laws of Missouri. (Page 79.)

2. USURY—FOREIGN CONTRACT—PRESUMPTION.—There is no presumption that a loan contract entered into in another state is void for usury. (Page 79.)

Appeal from Pike Circuit Court in Chancery.

WILL P. FEAZEL, Judge.

W. C. Rodgers, for appellant.

It was error to cancel the deed and notes as to all the defendants, because two of them, though properly summoned, have made default. The taking of interest in advance is not usury. 2 Wm. Be. 791, 792; 2 Cow. 664, 675; 15 Johns. 162, 168; 4 Wend. 652, 653; 30 Hun, 201, 203, 204; 4 Scam. (Ill.) 21; 7 Rob. (La.) 539, 541; 110 Ill. 390, 394; 30 Ill. 490, 498; 110 Ill. 235; 132 Ill. 550; 34 Ill. 110; 7 Kas. 405; 12 Pick. 586; 60 Ark. 288. The presumption is against usury. 8 N. Y. 276; 46 Ia. 46; 7 Wall. 499. When an agent or broker makes a charge, which, added to the interest, makes an amount in excess of the legal rate, to charge the lender with usury, it must be shown that he was in some way privy to the transaction. 9 Ark. 22; 51 Ark. 534; 110 Ill. 235; 54 Ark. 566; 110 Ill. 390; 92 Ala. 135; 29 N. Y. Eq. 454; 16 N. Y. Eq. 537; 54 Ark. 573; 32 N. Y. 165; 57 Ark. 251; 51 Ia. 397; 46 Ia. 46; Tyler, Usury, 165; 21 N. Y. 219; 33 Conn. 81; 33 Barb. 350; 121 U. S. 105; 109 N. Y. 473, 477, 478; 132 Ill. 550; 79 Ga. 213. The notes, on their face, bear only legal interest; hence it lies on the attaching party to prove some corrupt device and knowledge thereof by the parties. 9 Pet. 397; 116 U. S. 98; 9 Ark. 22; 38 S. W. 1113; 97 U. S. 13; 33 Atl. 248; 57 Ark. 250, 256; 7 Pe-

ters, 103, 111; 7 Wallace, 499; 22 N. J. Eq. 612; 12 Or. 349; 8 N. J. Eq. 789; 14 *ib.* 326; 36 C. E. Greene, 481; 5 Leigh, 65, 68. Forfeitures for usury find no favor in courts of equity. 97 U. S. 13; 144 U. S. 384. Agency can not be proved by drclarations of the agent. 44 Ark. 213; 36 Alt. 797. The notes are payable in Missouri, and its laws as to interest will govern. 44 Ark. 230; 47 Ark. 54; 60 Ark. 269; 33 Ark. 645; 40 S. W. 466; 69 Miss. 779; 14 Ark. 603; 35 Ark. 52; 36 Ark. 569; 10 So. 754; 61 Ark. 329, 338. No proof of the law of Missouri was offered, and the court could not take judicial notice of it. 14 Ark. 603; 10 Ark. 109; 30 Ark. 124; 50 Ark. 237. There is no presumption that the laws of a sister state are like our own in cases of usury. 46 Ark. 50, 66. It is not usury to reserve a sufficient amount to pay necessary expenses of the transaction. 2 T. R. 53; 57 Ark. 347; 145 Ill. 421. Every material fact necessary to constitute usury must be pleaded and proven. 40 N. E. 273; 33 Atl. 248; 70 N. W. 399; 33 Neb. 409; 5 Leigh, 69; 8 *id.* 330; 8 Paige, Ch. 452; 4 *id.* 458. The proof must conform to the plea. 11 Ark. 120, 134, 135; 24 Ark. 371; 29 Ark. 500; 10 Pet. 177; 13 Pet. 378; 41 Ark. 393, 400.

J. H. Harrod, for appellee.

Objections to the proceedings should be urged below. The law of this state governs. 54 Ark. 40. The proof shows that the lender had knowledge of the usurious transactions of its agent.

HUGHES, J. This is an appeal from a decree in chancery, in which the appellees, the plaintiffs below, sought foreclosure of a deed of trust given to secure notes therein described, and to have the land conveyed by the deed sold for payment of the notes. The defense was usury. The answer prayed for cancellation of the notes and deed of trust. The court found for appellees, and decreed cancellation of the notes and deed of trust, from which the case comes here upon appeal.

The evidence discloses that the notes secured by the trust deed were dated and made payable at Kansas City, Missouri. The trust deed was given upon lands in Arkansas, and was acknowledged in the state of Arkansas. There was no proof of

the statutes of the state of Missouri upon usury. If the contract was good in Missouri, it is good here. We do not take judicial notice of the statutes of another state.

The court will not presume a contract to be usurious. To maintain a plea of usury, it must be sustained by clear proof. *Holt* v. *Kirby*, 57 Ark. 250. The rights of parties to contracts made and to be performed in another state will be adjudicated by the courts of this state precisely as they would be adjudicated in the courts of the state where the contracts were made and to be performed. *Parsons Oil Co.* v. *Boyett*, 44 Ark. 230; *Matthews* v. *Paine*, 47 Ark. 54; *Bank of Harrison* v. *Gibson*, 60 Ark. 269; *Tenny* v. *Porter*, 61 Ark. 329.

Outside of the fatal objection above stated, we think the proof does not show that the notes were usurious.

Reversed and remanded, with directions to the court below to render a decree for the amount due upon the notes, including interest, and for foreclosure of the trust deed.

BLASS *v.* BROWN.

Opinion delivered December 24, 1898.

JUSTICE OF THE PEACE—EXECUTION.—A justice of the peace has no power to issue execution on a forfeited forthcoming bond taken upon the levy of an execution issued by him, no such power being conferred on him by statute. (Page 82.)

Appeal from Yell Circuit Court, Dardanelle District.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

The appellants, having a judgment against C. W. Brown & Co., for $227, procured the issuance of an execution thereon from the justice of the peace before whom the judgment was obtained, which was levied upon a stock of goods in possession of C. W. Brown & Co. by a constable, who took the forthcoming bond of J. B. Crownover as principal and William Camp-

bell as surety, in the following form, to-wit: "We, John B. Crownover, as principal, and W. A. Campbell, surety, do bind ourselves that the property mentioned in the following schedule and valuation, to-wit, one lot of merchandise now in the storehouse formerly run by C. W. Brown & Co., in Dardanelle, Arkansas, of the value of seven hundred dollars, shall be forthcoming on the 9th day of January, 1897, next, at the hour of 12 o'clock in the day. Witness our hands on this 29th day of December, 1896. [Signed] John B. Crownover. W. A. Campbell." The return of the execution and bond were promptly noted on the docket of the justice.

On motion of appellants, the justice issued execution on the forfeited forthcoming bond in these words: "The State of Arkansas to any constable of Yell county, Greeting: You are hereby commanded that of the goods and chattels of J. B. Crownover you cause to be made the sum of two hundred and twenty-seven dollars and five cents, which Gus Blass & Co., late before me, a justice of the peace for said county, recovered against J. B. Crownover, on his forthcoming bond, for two hundred and twenty-seven dollars and five cents, with interest thereon from the 9th day of January, 1897, until paid. Also the sum of twelve dollars and thirty-four cents, which was adjudged to said Gus Blass & Co. in that suit expended, and that you have said sum of money within thirty days to render to the said Gus Blass & Co. for his debt, interest and costs aforesaid. Given under my hand this 21st day of January, 1897.

[Signed] "S. L. STRAYHORN, J. P."

Thereupon the defendants and the sureties on the forthcoming bond filed before the justice a motion to recall and quash the execution which had been issued on the forthcoming bond. The grounds of this motion to quash were several, but they may all be condensed into the objection that the constable was not authorized to take this bond, and that it did not authorize the justice to issue execution upon it. The justice overruled the motion to quash, and the appellees appealed to the circuit court.

The circuit court, on appeal, rendered the following judgment: "Now, on this day, this cause comes comes on to be heard by consent of all the parties thereto. The plaintiffs,

Gus Blass & Co., offered to introduce the constable to prove that he called on John B. Crownover at 12 o'clock on the day of the sale to produce the goods, or pay the amount of the execution and costs held against C. W. Brown & Co., which was refused by the said Crownover, and that he then returned the execution and the bond as forfeited, in accordance with the statutes. The court refused to hear this evidence, and the plaintiffs in the execution, Gus Blass & Co., at the time, excepted to the ruling of the court. The motion to quash the execution issued by S. L. Strayhorn, a justice of the peace of Dardanelle township, on a forthcoming bond returned into his office by T. J. Tucker, a constable of said township, comes on to be heard, and the court, after hearing the arguments of counsel and being sufficiently advised in the premises, doth sustain the said motion. And it is by the court here ordered, considered and adjudged that said execution issued by said justice of the peace upon the forthcoming bond be, and the same is hereby, quashed and held for naught, and that no further proceedings be had by said constable and said justice of the peace thereon And that said J. B. Crownover have and recover of the said Gus Blass & Co. his costs had in about said execution, and that execution issue therefor,"—to which Gus Blass & Co. excepted, and appealed to this court.

Robert Toomer and *W. S. & Farrar L. McCain*, for appellants.

Section 3075, Sand. & H. Dig. (§ 680, Civil Code), is not repealed by Sand. & H. Dig. § 4329. Hence a forthcoming bond is as proper in justice's court as in the circuit court. Sand. & H. Dig. § 5600. The rendition of judgment on a forthcoming bond is not a judicial but a ministerial act. 11 Ark. 584; 9 Ark. 451; 14 Ark. 595; *ib.* 597.

Jacoway & Jacoway, for appellee.

The provisions of the statute as to forthcoming bonds are not applicable to proceedings in justice's court. Sand. & H. Dig. p. 779, note m; *ib.* §§ 7223, 3088, 4329; 44 Ark. 380; 48 Ark. 476. The justice had no power to render the judgment on the bond, because it is a lien on real estate (28 Ark.

500), and is also for an amount beyond his jurisdiction. The bond itself is void, because the constable had no power to take it. 21 Am. Dec. 33; 35 Ark. 327. Also because there is no schedule of valuation of the property attached to it. Sand. & H. Dig. § 3075. Also because it is uncertain in its terms as to the place of performance, the obligee and the description of the goods. Litt. Sel. Cas. (Ky.) 12; 4 Ark. 141; 8 Am. & Eng. Enc. Law, 565, 566, 568; 27 Ark. 20; Freeman, Executions, § 42.

HUGHES, J., (after stating the facts). There does not appear to be any authority for a justice of the peace to issue an execution upon a forthcoming bond taken upon the levy of an execution issued by him. He has such powers only as are conferred upon him by law. In ch. 94, § 4329, Sandels & Hill's Digest, it is provided that "parties to the action [before justice of the peace] may be the same as in the circuit court, and all the proceedings prescribed for that court, as far as the same are applicable and not herein changed, shall be pursued in justices' courts. But the powers of justices' court shall be and are only such as are in this chapter enumerated." The enumeration of the powers in the chapter referred to does not include, expressly or by implication, the power to issue execution upon a forfeited delivery bond.

Other reasons might be given why the judgment should be affirmed, but the above is sufficient.

Affirmed.

'66 82
'87 433
66 82
'90 222

LEE COUNTY v. ROBERTSON.

Opinion delivered December 24, 1898.

1. LEVYING COURT—DIVERSION OF TAX.—Under Const. 1874, art. 16, § 11, providing that "no moneys arising from a tax for one purpose shall be used for any other purpose," the levying court has no power to appropriate for county general purposes an unexpended balance of a fund in the county treasury which has been levied and collected for the purpose of paying indebtedness incurred prior to adoption of the constitution, so long as such indebtedness remains unpaid. (Page 84.)

2. COUNTY BONDED DEBT—DIVERSION OF TAX.—Diversion of money raised for the purpose of paying the bonded debts of a county into the general revenue fund is forbidden by Acts 1895, p. 170, § 8. (Page 86.)

3. ILLEGAL APPROPRIATION—EFFECT.—An order of the levying court appropriating funds to another purpose than that for which they were raised is tantamount to an allowance and enforcement of an illegal exaction against every tax payer in the county. (Page 86.)

4. SAME—RIGHT OF TAXPAYER TO APPEAL.—Where a citizen and taxpayer of a county appeared in the levying court, and asked to be made party to an order misappropriating county funds, and made objections thereto, and was treated as an adversary party in that court, though not formally made a party, he will be entitled to appeal to the circuit court from the order making such appropriation. (Page 87.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

In October, 1895, the quorum court of Lee county levied a tax of three mills for "old indebtedness." The old indebtedness had been bonded; the principal of the bonds being due in twenty years, with interest payable semi-annually. Under the levy of 1895 for old indebtedness, there was raised a sum sufficient to pay the interest on said indebtedness which had accrued, and leave a balance in the hands of the county treasurer of $2,722.43, to the credit of old indebtedness. In October, 1896, the quorum court, on motion of one of its members, ordered that $2,500 unexpended balance in the hands of the county treasurer to the credit of old indebtedness "be reappropriated for the use of the county general purposes in the payment of outstanding warrants of Lee county," and the treasurer was ordered to transfer the same accordingly, etc. Before this order was made, however, J. T. Robertson, a citizen and taxpayer of Lee county, appeared and asked to be made a party to the proceedings, and to be allowed to file his objections to same, which he did through his counsel, and was heard in opposition to the motion, after which the order was entered as indicated *supra*, whereupon said Robertson filed his affidavit and prayer for appeal to the circuit court, which was granted. The case was tried in the circuit court upon the transcript and certain other records of the county court and quorum court and

oral testimony of the county clerk, which showed that the bonds issued to cover the old indebtedness of the county—*i. e.* indebtedness prior to the constitution of 1874—were still outstanding and unpaid; that all of the accrued interest on said indebtedness had been paid out of the fund produced from the three mills levy of October, 1895, and that there was a balance after such payment, in the hands of the treasurer, of $2,722.43. The circuit court reversed the order of the county court, and the county appeals.

McCulloch & McCulloch, for appellant.

A private citizen has no appeal from the decisions of the county or quorum court, except when it acts judicially and in adversary proceedings. 40 Ind. 217; 5 Sneed, 515; 8 Humph. 634. Cf. 51 Ark. 159; 52 Ark. 99; 53 Ark. 287. The acts of the quorum court in levying taxes and appropriating the revenue of the county are entirely administrative, and not judicial. Cooley, Tax. 244; 110 U. S. 321. A taxpayer can object to a levy only in so far as it effects him. Sand. & H. Dig. § 6423. The clause of the constitution placing limitations upon the management of public funds should be construed liberally to conform with the general spirit of the constitution. 59 Ark. 513;. 60 Id. 343; 51 Ark. 534. Sec. 11, art. 17, Const. of 1874, applies to only those tax levies made by the legislature for state purposes. 40 Pac. 130; 109 N. Y. 100.

Jas. P. Brown, for appellee.

As to right of appeal from judgments of the county court, see 34 Ark. 240; 36 Ark. 378. Appellee was made a party below without objection, and it is now too late to interpose same. The constitution declares that money raised by taxation for a specific purpose shall not be diverted to any other. Const. art. 6, § 11; 46 Ark. 156.

WOOD, J., (after stating the facts.): Two questions are presented:

1. Did the quorum court have the power to appropriate for "county general purposes" an unexpended balance of a fund in the county treasury which had been levied and collected for the purpose of paying the "old indebtedness" of the county (*i. e.*

indebtedness which was incurred prior to the adoption of the constitution of 1874)? The order of the quorum court was in plain violation of art. 16, § 11, of the constitution, which declares that "no moneys arising from a tax for one purpose shall be used for any other purpose." Here the court was proposing to use a fund for "county general purposes" which had been levied and collected for the specific and entirely different purpose of paying "old indebtedness." It is true that the quorum court in its order of reappropriation (1896) found and recited that the tax had been levied "to pay interest on the old indebtedness," and the circuit court also found that the levy was "to pay interest on the bonds." The order of the court in 1895 making the appropriation is as follows: "It was moved and seconded that a tax of three mills be levied for old indebtedness on each dollar valuation under assessment of 1895, which motion was put by the presiding judge, and there was a tax of three mills duly levied for old indebtedness." No order or finding of any subsequent court that the appropriation was to pay the interest on the "old indebtedness" could change or affect the order made by the court making the levy. But even if the court making the levy had ordered same to pay "the interest on old indebtedness," instead of to pay "the old indebtedness," still the result would have been the same, and the order of the quorum court under consideration would still have been in direct conflict with the provision of the constitution *supra.* For the balance of the fund in the hands of the treasurer was sought to be used, by the order reappropriating same, not to pay interest on "old indebtedness," but for "county general purposes." The argument of learned counsel for appellant that when the accrued interest on the bonded indebtedness had been paid, the purposes for which the levy had been made were subserved, is unsound. Interest was going on all the while, and would be still accruing so long as the principal remained unpaid. So, if the fund was to pay interest on the old indebtedness specifically, and not the principal, to use it for any other purpose than the payment of that interest would be a palpable diversion of it from the purpose for which it was levied. The purpose for which such fund was levied will not have been accomplished until the principal shall have been

paid; for, until that shall be done, interest will continue to accrue.

Not only was the order of the quorum court reappropriating the fund in conflict with the constitution, but it was also in obvious contravention of the act itself authorizing the refunding of the old indebtedness of counties by calling in the bonds already issued, and issuing new bonds to cover same. Acts 1895, p. 167. The act provides that "any county issuing its bonds for the purpose aforesaid shall, at the time of issuing the same, provide for the levy and collection of an annual tax sufficient to pay the annual interest on such funding bonds as it falls due and a sufficient sinking fund for the payment of the principal of such bonds when they become due" (section 4); and that "whenever there shall be in the hands of the treasurer of the county a sum arising out of the proceeds of the tax aforesaid sufficient money to purchase one or more of the said funding bonds hereinbefore mentioned, the county court may order the treasurer to purchase such bond or bonds as they may designate," (sec. 6); and that "no money collected nor bonds purchased under the provisions of this act shall be subject to execution nor liable to be levied upon, taken, sequestered or applied toward paying the debts of such county, nor for any other purpose than as is provided in this act, and the same shall be held and deemed an inviolable sinking fund for the purpose of extinguishing such county indebtedness and for no other purpose" (sec. 8). There can be no misapprehension of the legislative purpose, as reflected in both the constitution and statute, which the order under consideration plainly ignores.

2. Did appellee have the right to appeal from such order? The proceedings in both the quorum and circuit courts were treated as adversary without objection from appellant. Still, if appellee could not have been legally a party to the proceeding, the question becomes one of jurisdiction, and can be raised at any time.

Section 13 of article 16 of the constitution provides that "any citizen of any county may * * * institute suit in behalf of himself and all others interested to protect the inhab-

tants thereof against the enforcement of any illegal exactions whatever."

The order of reappropriation was tantamount to an allowance and enforcement of an illegal exaction against every taxpayer of the county. Each taxpayer was therefore individually interested in such order. The diversion of the balance in the hands of the treasurer from the purpose for which it was raised was equivalent to making a levy by indirection of the amount diverted for "county general purposes," in addition to the regular levy for such purpose. Such diversion would also necessitate the levy of the same amount to meet the deficit thus made in the funds which had been levied for the old indebtedness. As was said by this court in the case of *McCullough* v. *Blackwell*, 51 Ark. 159, the motion by appellee to be made a party for the purpose of protesting against this illegal proceeding "does not manifest the impertinent interference of a stranger without interest, and, when made a party by order of the court, he many prosecute an appeal from the judgment thereafter rendered." Here the appellee, if not formally, was in legal effect made a party to the proceedings, as the record shows his protest was presented, and that the cause was heard "pro and con." The appellee was directly interested, and the proceeding thus became adversary in its nature. We are therefore of the opinion that appellee could appeal from the order of the court making the reappropriation.

The judgment of the Lee circuit court is affirmed.

BRANNON *v.* VAUGHAN.

Opinion delivered December 24, 1898.

1. FIXTURE—WHAT IS NOT.—Proof that a box-house was placed on land under agreement with the conditional purchaser thereof that it should be subject to removal by the party erecting it will support a finding against the vendor that the building was not a fixture, where the latter was informed of such agreement while the building was being erected, and made no objection, especially when it does not appear that the house was attached to the land in any way except by its own weight,

nor that any injury would result to the land from its removal. (Page 89.)

2. SAME—WHAT IS.—A room built as an addition to a building situated on land conditionally sold, under agreement with the vendee that the person erecting it should have the right to remove it, of which agreement the vendor had no notice until after the room was built, will be held, on a forfeiture of the conditional sale, to be a fixture if it was so firmly attached to the building that it could not be removed without great injury thereto. (Page 90.)

Appeal from White Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

The appellant, Thomas Brannon, sold to B. W. Vaughan a tract of land; the price to be paid in installments. Vaughan executed his notes for the payment of the purchase price, and received from Brannon a bond for title to the land. In this bond it was stipulated that if Vaughan failed to make either of the payments mentioned therein, the contract to convey should "be forfeited and determined at the election of the said Thomas Brannon." Vaughan took possession of the land under his contract to purchase, and while thus in possession he permitted his son, A. P. Vaughan, to erect a box-house on the land, under an agreement that his son should have the right afterwards to remove said house. He also permitted his son-in-law, Allison, to erect an addition of one room to the original dwelling which was on the land at the time of the purchase from Brannon. The addition by Allison was also erected under an agreement with Vaughan that Allison should be allowed to remove same. Vaughan failed to pay for the land, and Brannon elected to declare the contract forfeited, and served a written notice on Vaughan, demanding the possession. He afterwards brought an action to recover possession of the land. After the notice demanding possession was served, the Vaughans and Allison tore down and removed the box-house and the one-room addition to the main building above mentioned. Brannon brought his action of replevin to recover the lumber in said buildings. The circuit judge held that the defendants, under the contract made with B. W. Vaughan, had the right to re-

cover said buildings, and that the lumber of which same were built did not belong to Brannon. He therefore gave judgment for defendants.

D. McRae, for appellant.

The relation between a vendor who has given his bond for title and his vendor is the same as that of mortgagor and mortgagee. 33 Ark. 345; 31 Ark. 247. The more strict rule as to removal of fixtures applies it such a case. Ewell, Fixt. 271, 273. The building was a fixture, and could not be moved without consent of the owner of the freehold. 53 Ark. 526; Ew. Fixt. 271. The burden was upon appellee to show an understanding or intention to remove the building. Ew. Fixt. 66, 39–43. A stranger can not remove fixtures so as to divest the title of the owner without his consent. Ew. Fixt. 47; Jones, Mortg. §§ 428, 433, 436a, 439. Permanent additions to a house can not be removed as personalty. Ew. Fixt. 128, 129. After default in payment of purchase money, appellant was the legal owner of the land and fixtures. 32 Ark. 478; 18 Ark. 579.

S. Brundidge, Jr., for appellee.

Conceding the relation existing to be that of mortgagor and mortgagee, appellant's right is only a lien, and the other secured creditors have a right to insist on a marshaling of assets. Ewell, Fixt. 49. The presumption arising from annexation is rebuttable. Ewell, Fixt. 62. The intention of the parties in making the annexation governs. 53 Ark. 530; 56 Ark. 55; 63 Ark. 528.

RIDDICK, J., (after stating the facts). So far as the house erected by A. P. Vaughan is concerned, we think the judgment of the circuit court can be sustained. If this house had been built by the grantee, B. W. Vaughan, the presumption would be that he intended it as a permanent improvement of the land, and he would not be permitted to remove it. But the house was not erected by the grantee, but by a third party under an express agreement with the grantee that it should not become a part of the real estate, and should be subject to be removed by the party erecting it. The intention is thus shown that it

should not become a portion of the real estate. It does not appear that the house was attached to the land in any way except by its own weight, nor that any injury resulted to the land from its erection and removal. In addition to this A. P. Vaughan, the party who erected it, testified that Brannon, the grantor, was present while he was building the house, and was informed of the agreement under which it was being erected, and it does not appear that he made objection. This proof tended to show that Brannon assented to the agreement as to the removal of the house. The evidence, taken as a whole, therefore, is sufficient to support the finding of the circuit court "that the building was not a fixture, and not part of the freehold, and that the defendant had the right to remove."

As to the room which was built by Allison as an addition to the original dwelling house situated on the premises, the case is different. There is no evidence in regard to this room, as there was in regard to the one erected by A. P. Vaughan, that while the building was being erected, Brannon, the grantor, was informed of the agreement giving right to remove. The evidence shows that he was informed of the agreement after the room was built, and it does not show that he made any response to the information. The uncontradicted evidence shows that this room was firmly attached to the main dwelling in such a manner that it could not be taken away without great injury to the main building. By being thus attached it became a part of the main building,—an addition to it, as the witnesses say,—and a part of the real estate to which the main building was attached. The fact that the grantor, Vaughan, had agreed that Allison should have the right to remove such addition cannot control the decision of the case; for the title to the land was not in him, and he had no authority to bind the owner thereof to an agreement that would result in injury to his land. The fact that this room was built as an addition to the main building, and so firmly attached to it that it could not be detached without greatly damaging such building, conclusively establishes the fact that, in the absence of any agreement with the owner of the land sold, it was real, and not personal, property, and belongs to such owner. *Choate* v. *Kimball*, 56 Ark. 55; Ewell on Fixtures, chapters 2, 3.

Had Vaughan paid for and become the owner of the land, then, in a contest between him and Allison as to whether this house was a fixture, a different question would have been presented, for he agreed, before its erection, that it might be removed, but Brannon, the appellant, made no such agreement.

Judgment reversed, and new trial granted as to the lumber in addition erected by Allison. In other respects the judgment is affirmed.

ST. FRANCIS COUNTY *v.* FOLBRE.

Opinion delivered January 7, 1899.

1. FEES OF COUNTY CLERK—MAKING SETTLEMENT.—The mere taking of proof of the attendance of a witness by the county clerk, for which he is otherwise paid, is not making a "settlement," within Sand. & H. Dig. § 3309, allowing him a fee for making settlements of accounts with the county. (Page 92.)

2. SAME—ALLOWANCES.—Under the statute allowing the county clerk a fee "for each allowance against the county" (Sand. & H. Dig. § 3309), the clerk is entitled to the fee for entering each order of allowance. (Page 92.)

3. SAME—FOR WARRANTS ISSUED.—The county clerk is not entitled to a fee for warrants made out by him pursuant to orders of the court, but not signed by him nor delivered. (Page 93.)

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

E. B. Kinsworthy, Attorney General, and *Chas. Jacobson*, for appellant.

It was error to allow the clerk fees for the warrants which he never signed nor delivered. It was also error to allow a separate fee for each item in the accounts presented for allowance and settlement. Sand. & H. Dig. § 3309; 56 Ark. 251; 57 Ark. 491. Any doubt as to the meaning of the statutes must be construed against the officer. 47 Ark. 443.

Norton & Prewitt, for appellee.

The clerk is required to keep a record of the amount due each person, and this amounts to an allowance and settlement. There was no error in allowing appellee fees for 454 allowances and settlements. 57 Ark. 487. It was the duty of the clerk to draw the warrants, under the order of the court, and their non-delivery is immaterial.

BUNN, C. J. This is a suit for fees alleged to be due the appellee, as county clerk, from St. Francis county, the appellant, under section 3309, Sand. & H. Dig. The appellee, while county clerk of said county, took the proof of 454 witnesses' attendance and similar claims in criminal cases, entered the order of allowance by the county court in each instance, and issued the warrants thereon, as hereinafter set forth, amounting in the aggregate to the sum of $137.90, which, together with fees for entering twenty-one orders and making as many indexes ($6.30) and 454 other indexes ($45.00), and $1.50 postage, made the sum total of the account $189.40, which was presented to the county court in due form, and disallowed as to 397 settlements of the 454, and as many of the entries of the orders of allowance of the 454 items.

It appears also that, as to the 140 of the 454 items, the warrants on the treasurer had been made out by the appellee, but neither signed by him nor delivered, but laid away for future disposal. Under this state of facts, the county court allowed, not the 454 items, but for 57 papers, in which these items were included and presented by him, and refused to allow for the 140 warrants drawn up, but not signed nor issued. So that appellee's whole claim was cut down to the sum of $96; and he appealed to the circuit court, where the whole claim was allowed as claimed by him in the first instance. Thereupon the county appealed to this court.

The mere taking of proof of the attendance of a witness by the clerk, for which he is otherwise paid, is not making a "settlement" in the meaning of the word. The witness, for instance, makes an affidavit as to the number of days he has attended. The law fixes the rest; and the clerk exercises no discretion as an accountant in the matter. Jurors' attendance is determined on certificate of the court wherein the services

were rendered. Hence the 10-cent charge for each settlement was erroneous.

The clerk, however, is entitled to 10 cents for entering each order of allowance, which in this case amounts to $45.40, and 10 cents for each warrant issued on said allowance, which in this case is 10 cents for each of the 314 items upon which warrants were actually issued and delivered, amounting to the sum of $31.40, but not anything for the 140 neither signed nor delivered, for they were not in fact issued in the meaning of the statute.

Therefore the lawful claim of the appellee is $130. The judgment of the circuit court is reversed, and the cause remanded, with direction to the circuit court to enter judgment for the said sum of $130, and to direct the county court to make the allowance for that amount. The appellee will pay the costs of this appeal.

The items allowed as lawful are.

21 orders	$ 4 20
21 indexes	2 10
454 allowances	45 40
454 indexes	45 40
314 warrants	31 40
Postage	1 50
Total	$130 00

RHEA v. BAGLEY.

Opinion delivered January 7, 1899.

1. NATURAL GUARDIAN—LIABILITY—DEFENSE.—In a suit to hold the estate of a father liable for rents collected by him as natural guardian from land belonging to his infant sons, his administrator may make defense that the rents so collected were expended by him, wholly or in part, in making improvements on such property, and need not set up such matter by way of counter-claim or set-off. (Page 97.)

2. ADVANCEMENT—WHAT IS NOT.—The fact that the land from which the rents were collected was itself an advancement, the purchase money being supplied by the father and title taken in name of his sons, will

not make the expenditure of the rents in improving the property likewise an advancement. (Page 97.)

3. STATUTE OF LIMITATIONS — WHEN DEFENSE NOT BARRED. — In a suit against the administrator of a natural guardian to hold the latter's estate liable for rents collected by him from land belonging to his infant sons, the defense that such rents were employed, wholly or in part, in improving the land will not be barred by lapse of time, but may be made whenever suit is brought. (Page 98.)

Appeal from Lawrence Circuit Court, Eastern District.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

The facts which gave rise to this litigation are concisely stated in the opinion rendered in this case January 23, 1897, and are as follows:

"Moses B. Rhea purchased of Mrs. A. Mary Boas two lots, and paid for the same. She conveyed them, at the request of the purchaser, to his two minor sons, James M. and W. P. Rhea, by deed bearing date the first day of March, 1887; the father 'remarking at the time that he gave the property to the boys.' The sons having no curator or guardian, the deed was delivered to the father, and he took 'charge' of the lots, 'and collected all the rents arising from the same up to the date of his death,' which occurred in March, 1893. After his death, James M. Rhea and G. A. Henry, as guardian of W. P. Rhea, presented an account against his estate for the rents collected by him, amounting to $2,511, properly sworn to, which was disallowed by the probate court. On appeal to the circuit court, it was admitted by all parties as evident that the amount of rents collected by the deceased in his lifetime was substantially the amount claimed in the account presented. The claim was disallowed by the circuit court, and the plaintiffs appealed."

The court held that the conveyance of the lots to the two minor sons, at the request of the father, was an advancement; the conveyance vested the title in them, and they became entitled to the possession of the property from the time of the delivery of the deed to their father; and, no interest in the lots being conveyed to or retained by the father, they were entitled to recover of his estate all rents collected by him. The judg-

ment was therefore reversed, and the cause remanded for a new trial. *Rhea* v. *Bagley*, 63 Ark. 374.

The mandate was filed in the circuit court on the 24th of February, 1897, and the defendant, on the 20th of March, 1897 (four years after the account was first presented to the administrator and after it had been disallowed by the administrator, the probate court and the circuit court on appeal), filed the following counter-claim:

"The defendant, for counter-claim to plaintiff's cause of action, says that his intestate, M. B. Rhea, is entitled to be credited as follows:

"1882. To extending barber shop on lot No. 3	$ 200 00
"1889. To building restaurant on lot No. 2	300 00
"1892. To cost of building brick house on lot No. 2	1,357 00
'1889 to 1891. To taxes paid five years $20.10 per year	100 50
"1892. To taxes paid by administrator	20 10
Total	$1,977 60

On the same day the plaintiffs filed a motion to strike said counter-claim from the files of the court, assigning the following reasons: (1) Because defendant's claim was not set up and pleaded while the case was pending in the probate court when plaintiff's suit was originally brought and first adjudicated; (2) Because the improvements made by defendant's intestate were an advancement to plaintiffs; (3) Because defendant's claim is barred by the statute of limitations,—which motion to strike was overruled by the court, and to which ruling of the court the plaintiffs at the time excepted.

Thereupon plaintiffs replied to the counter-claim of defendant, interposing as a defense the statute of limitation of three years, and alleging that whatever improvements plaintiffs' ancestor put upon the lots of plaintiffs were put there as an advancement, and are not properly chargeable against plaintiffs.

The cause was submitted to the court sitting as a jury, upon the agreed statement of facts that the plaintiffs' ancestor made the improvements of the value and paid taxes to the amount claimed by defendant in his counter-claim, and that the claim of plaintiffs for rents amounts to $2,511. The court offset the claims of plaintiffs with the counter-claim of defendant, and rendered judgment in favor of plaintiffs for the balance of $513.50.

On the same day plaintiffs filed a motion for a new trial, alleging that the court erred: (1) In holding that defendants' counter-claim could be filed and considered in the circuit court, when the same had not been pleaded or set up in the probate court below; (2) in not holding defendants' counter-claim to be barred by the statute of limitation; (3) in not holding that the improvements made by plaintiffs' ancestor were an advancement and could not be set-off against their claim for rents; and (4) in setting off the counter-claim against plaintiffs' claim for rents, which motion was by the court overruled. To which ruling of the court plaintiffs excepted, had their exceptions noted of record, and prayed an appeal to the supreme court, which was granted.

Jas. K. Gibson, *Jas. M. Moore* and *W. B. Smith*, for appellants.

A counter-claim or set-off, not pleaded in justices' or probate court, cannot be pleaded in circuit court, on appeal. 25 Ark. 15; 44 Ark. 376; 48 Ark. 353; Sand. & H. Dig. § 4447. Nor can it be pleaded after the case is remanded for a new trial in circuit court. 62 Ark. 78. The claim which appellee attempts to set-off is barred by limitations. If the statute commences to run during the lifetime of the creditor, it is not suspended until a personal representative is appointed after his death. 16 Ark. 612; Angell, Lim. (5 Ed.) 47; 31 Ark. 377; 17 Ark. 539. The conveyance of lands by the father was an advancement. 63 Ark. 376. The improvements subsequently made thereon by him, in the absence of proof of a contrary intention, must be considered a part of the advancement. 43 Ark. 484; 48 Ark. 20; 47 Ark. 65; 52 Ark. 180.

Chas. Coffin, for appellee.

HUGHES, J., (after stating the facts). It is contended by the appellant that the appellee, the defendant below, in his defense in the circuit court set up a counter-claim, which he had not relied upon in the probate court, and that it was a new cause of action, which could not be set up in defense upon appeal to the circuit court, as it was not relied upon in the probate court. Causes upon appeal to the circuit court are tried *de novo*, and a defendant may make his defense to the action in that court as he could have done in the court below. While, on appeal to the circuit court, no new cause of action, or cause of action not tried below, can be heard, yet a defendant may say, as in this case, that he does not owe the plaintiff, or that he has paid or satisfied the plaintiff's demand in whole or in part, and the defense would be proper, and would not be a new cause of action, but merely a defense to the action. We are of the opinion that the defense in this case was not a counter-claim or set-off, and that it was legitimate.

The father was the natural guardian of his sons in this case. Acting in the exercise of a sound discretion for their interest, he doubtless invested the rents received from their property by him in making the improvements upon it that it might be productive, and has thus wisely expended the rents received for their benefit. To allow the appellants to recover the rents in this case, without accounting for the amounts expended for improvements upon the property which produced the rents, would be to give them their rents twice.

It is true that the lots themselves were an advancement, as held by this court in this case when first here, but the lots were paid for with the father's own money. There was no pretence or contention that the rents received by the father were not expended in making improvements upon the property of his minor sons. In fact, that is conceded by the pleadings and issues made in the case. The only contention of the appellees is that the value or cost of these improvements, (1) could not be considered in the circuit court, the same not having been claimed below; (2) that defendant's claim was barred by the statute of limitations; (3) that the improvements were an advancement; (4) that

the court erred in allowing the claim for expenditures for improvements. It makes a different case from that where the father bought the lots with his own money in the name of his sons, and there was nothing to show that he did not intend the purchase as an advancement. We are of the opinion that the expenditure of the rents in making the improvements was not an advancement.

The defense of the defendant was not barred by the statute of limitations, as he had a right to make it when the suit was brought.

There was no error in the judgment of the court save in this, that the court failed to deduct from the defendant's claim for expenditures for improvements the first item in the account for improvements of two hundred dollars, which the account itself shows was made in extending a restaurant before the lots were conveyed to the minor sons of the father. This extension was made in 1882. The conveyance in 1887.

Wherefore the judgment is modified by adding two hundred dollars to the recovery of the plaintiff, which will make their recovery $713.50, instead of $513.50 in the court below. With this modification the judgment is affirmed.

BUNCH v. SCHAER.

66 98
69 234

Opinion delivered January 7, 1899.

66 98
186 230

FRAUDULENT AGREEMENT—CONCEALMENT OF DEEDS.—A vendee who, by agreement or understanding with his vendor, withholds from record and keeps secret his deed of conveyance to valuable property, and allows the vendor to hold himself out as the owner of such property, cannot, if the vendor becomes insolvent, set up his title to such property as against one who has in good faith parted with his goods and credited such vendor in the belief that he still owns the property. (Page 104.)

Appeal from Pulaski Chancery Court.

THOMAS B. MARTIN, Chancellor.

Morris M. Cohn and *Jos. Loeb*, for appellant.

A voluntary conveyance, made in contemplation of insolvency, is void as against subsequent creditors, if the debtor may be reasonably supposed to have had in contemplation, at the time of the conveyance, the contracting of debts. 56 Ark. 73; 50 Ark. 46; 38 Ark. 427; Bump. Fr. Con., chap. 13; Wait, Fr. Con. §§ 96, 98, 100, 101; 59 Ark. 614; 8 Wheat. 229. A conveyance for the use and benefit of the grantor is not good against creditors. 52 Ark. 458; 59 Ark. 614. Even if the deed had been valid in the first place, the collusive concealment of its existence renders it of no force as against those who contracted with the grantor under the mistake thus induced as to the ownership of the land. 43 N. W. 411; 105 U. S. 100, 117; 2 Vern. 261; 44 Pa. St. 43; 46 Miss. 309; 2 Md. Ch. 270; 1 Ired. (N. C. Law) 490; 17 B. Mon. 779; 104 U. S. 428; 2 Vern. 510; 7 B. Mon. 374; 6 Paige, Ch. 526; 109 Mo. 40; 123 Mo. 141; 7 S. E. 743; 52 Ark. 458; 41 N. W. 514; 58 Ark. 297; 62 Ark. 22.

G. W. Murphy and *John Barrow*, for appellees.

The evidence does not show any intent to defraud. The question here is one of intent. 59 Ark. 614; 76 N. W. 151; 72 N. W. 648.

RIDDICK, J. This action was brought by appellant, T. H. Bunch, to set aside a conveyance of certain land made by Clem Schaer and wife to Jos. F. Schaer, and to declare the same fraudulent and void as to the creditors of said Clem Schaer. The conveyance in question was made on the 15th day of June, 1895. At that time Clem Schaer was engaged in the grain and feed business in Little Rock.

He or his wife was the owner of a homestead in Little Rock of the value of $4,500, the size of which was 75 feet by 150 feet. He owned 40 acres of land adjoining Argenta or North Little Rock, which was divided into lots, and known as "Schaer's Addition." The value of this "Addition," as stated by different witnesses, varied from about $4,000 to over $15,000, though it is probable that its actual cash value was much nearer the first than the last named sum. Besides the above mentioned land, he owned also 47 acres of land in Pulaski county, worth $2.50 per acre, and 292 acres in Ouachita

county, worth from two to four dollars per acre. Besides this real estate he owned no other property except his stock in trade, a few cattle, a wagon, buggy and team. Though not insolvent, Schaer at the time he executed this conveyance was financially embarrassed. His homestead had been mortgaged. He was so unfortunate as to become liable as a surety upon the bond of a defaulting officer. A judgment for the sum of $1,800 had been recovered against him as such surety. To obtain money to satisfy this judgment, and to pay claims of other parties that were pressing, he was compelled to give to Jacob Niemeyer a second mortgage upon his homestead and upon "Schaer's Addition" in the sum of forty-three hundred dollars. Schaer and his wife became apprehensive that they might not be able to pay these mortgages and might lose their homestead. With a view of relieving the homestead of these liens, they executed to Jos. Schaer, a cousin and intimate friend of Clem Schaer, the deed in question here. By this deed they conveyed to him "Schaer's Addition," and also the other land owned by Schaer in Pulaski county besides his homestead. The consideration recited by the deed is that Jos. Schaer paid five dollars, and assumed the payment of the Niemeyer mortgage debt of $4,300. The appellant contends that this conveyance was colorable only, gotten up for the purpose of defrauding the creditors of Clem Schaer, and that Jos. Schaer neither paid nor intended to pay anything for such conveyance. But we find it unnecessary to discuss that question.

The deed was delivered to Jos. Schaer at the home of Clem Schaer. Joseph did not keep the deed nor have it recorded until months afterwards, but, so soon as he received it, he at once handed it to the wife of Clem Schaer, and told her to keep it for him. He also, so he states, appointed Clem his agent, and authorized him to sell lots and pay proceeds on the Niemeyer mortgage. It seems from the evidence that Joseph left the price and terms of such sales altogether in the discretion of Clem, and Clem continued afterwards to exercise dominion and control over the property in every respect as if he was the actual owner thereof, and as if the deed to Joseph Schaer was not in existence. Meantime, Clem was still carrying on his mercantile business, but, soon after the execution of the deed to Joseph

Schaer, he says, it commenced to decline. Competition became greater, and sales decreased. His debts increased, while his ability to pay was less. Finally, on the 18th of April, 1896, his creditors continuing to press him, he made an assignment of his stock in trade and other personal property for the benefit of his creditors.

During the course of his business after the execution of the deed to Jos. Schaer, and before said deed was recorded, Clem Schaer contracted the indebtedness to appellant Bunch upon which this action is based. Bunch lived in Little Rock, was a wholesale dealer in grain, and had for several years been selling to Schaer. He knew that Schaer had been the owner of Schaer's Addition, and, in his deposition, states that he had never heard of the conveyance to Joseph until after the assignment; that Clem Schaer always spoke of it as his own property, and that, at the time he sold the goods for which Clem now owes him, he supposed that Clem was still the owner of such property, and gave him credit upon such belief. He also stated that Clem, even after the assignment, promised to have Joseph convey the property to him, saying that he only conveyed it to Joseph "to keep other people from hopping on it."

Clem Schaer denied that he offered to convey this "Addition" to Bunch after the assignment, or that he told him he owned it after the conveyance to Joseph Schaer. But he does not and cannot deny that, after the conveyance to Jos. Schaer, he continued to treat said property as his own. He assessed it as his own, paid taxes on it, rented it and collected rents, and tried to borrow money on it. He advertised it for sale as his own, sold ten of the lots, and he and his wife executed in their own names warranty deeds to the purchasers. He had conversations with a number of different real estate agents and other parties in reference to selling this property, and to none of them did he say anything inconsistent with his ownership thereof or connecting the name of Joseph Schaer with the ownership of such property. None of them knew that the land had been conveyed to Joseph Schaer. Even Niemeyer, whose mortgage Joseph Schaer had agreed to assume as a consideration for the conveyance to him, was not told of such conveyance or agree-

ment. After such deed was executed, Clem Schaer paid to Niemeyer several hundred dollars upon his mortgage, proceeds of the lots sold, but never intimated to him that the mortgage had been assumed by Jos. Schaer, and that he was making the payments as his agent.

So far as the evidence discloses, the fact that such property had been conveyed to Jos. Schaer was not known outside of the families of the two Schaers until ten months after its execution, when, on the very day that Clem Schaer executed his assignment, it was filed for record. Under such circumstances no one can dispute the statement of Bunch that when he sold his goods to Clem Schaer on credit he believed that Clem owned the property now claimed by Jos. Schaer, for this was the general understanding in the community. Bunch's statement that he was influenced by this belief to extend credit to Clem Schaer is not contradicted. It is in accordance with the usual custom of merchants and other business men that in selling on credit they should be influenced to a considerable extent by the amount of property the purchaser owns or appears to own. Clem Schaer was supposed to be the owner of this property, which was worth, so the evidence shows, from four to ten thousand, and it is reasonable to believe that it helped to sustain his credit. We must therefore take it as established that Bunch, without fault on his part, believed from the conduct of Clem Schaer in reference to this addition, that he was still the owner of it, and was thus influenced to sell him the goods, to recover the price of which this action is brought.

The evidence shows also that Joseph Schaer consented to and approved of these acts of Clem Schaer. The facts and circumstances in proof show that there was an agreement or understanding between Clem and Joseph Schaer to withhold the deed to Joseph from record, and to keep the fact of its execution a secret. Joseph Schaer, when asked why he did not record the deed at an earlier date, said that it was not his custom to record deeds, that he was feeling bad at the time he received the deed, and so he just handed it to the wife of Clem Schaer and asked her to keep it for him. He also stated in his answer that one reason why he did not record the deed was that he desired to sell the lots and have the proceeds applied on

the Niemeyer mortgage, and that "it was more convenient and less expensive to leave C. R. Schaer in a position to make such deed and papers directly." The statement last mentioned seems more reasonable than the first. It is not customary for a vendee, who intends to retain the title of lands purchased, to hand back to the wife the deed he has received from her husband, and to retain himself no evidence of the title. Nor is it apparent why even a man who "was feeling bad" could not put the deed in his pocket and take it home with him. A deed is not so heavy as to inconvenience even a sick man, and Joseph Schaer does not say he was sick. We think, from these statements in the answer of Joseph Schaer alone, that we would be safe in concluding that he let Mrs. Schaer keep the deed because he had an arrangement to that effect with her husband. A similar admission is found in the answer and testimony of Clem Schaer. But, outside of these admissions, the facts and circumstances in proof make it, as before stated, clear beyond a doubt that there was an understanding between the two Schaers that the deed should not be recorded. The acts and conduct of these two parties in reference thereto cannot be reasonably explained upon any other theory. Though vendor and vendee lived in the same town, the vendee did not take the deed home with him, but at once handed it back to the wife of the vendor, and told her to keep it. The vendor continued, with the knowledge and consent of the vendee, openly and notoriously to exercise acts of ownership and control over the property, and no one outside of their own families was told of the sale until the vendor was about to make an assignment.

These facts and circumstances cannot be disposed of by saying that Clem was only acting as the agent of Joseph. This may be true, but the public was not informed of such agency. Bunch did not know it, and, as Clem had owned this property, and as he continued to control it just as if he were still the owner, it was natural that Bunch should believe him to be the owner. As the conduct of the parties to this deed was directly calculated to impress the public or those having an interest therein with the belief that Clem Schaer was still the owner of such land, we must conclude that they intended such result. It is not necessary to attribute any dishonest motives to them in

reference to this matter. From the time this deed was executed until he assigned, Clem Schaer was struggling to overcome the misfortune which had befallen him in the matter of the official default for which he became liable as a surety. Though his business was falling off, and his debts increasing, he doubtless had hopes that the tide would turn, and he would be able to pull through the period of depression. But both Clem and Joseph knew that, if that conveyance was made public, it would injure the credit of Clem, and at once precipitate the threatened catastrophe. They therefore withheld it from record.

But it is a rule of law, based on the soundest of reasons, that a vendee who, by an agreement or understanding with his vendor, withholds from record and keeps secret his deed of conveyance to valuable property, and allows the vendor to hold himself out as the owner of such property, cannot, if the vendor becomes insolvent, set up his title to such property as against one who has in good faith parted with his goods and credited such vendor in the belief that he still owns such property. As between the vendee and creditor, in such a case, the vendor will still be considered the owner of the property; for to allow the vendee to hold the property under such circumstances would be to permit him and the vendor to perpetrate a gross fraud upon the creditor. Under such circumstances the deed will be treated as fraudulent and void as to the creditor, without regard to whether the parties to the deed intended any fraud or not. *Standard Paper Co.* v. *Guenther*, 67 Wis. 101; *State Savings Bank* v. *Buck*, 123 Mo. 141; *Blennerhassett* v. *Sherman*, 105 U. S. 100; *Hildeburn* v. *Brown*, 17 B. Mon. 779; *Hilliard* v. *Cagle*, 46 Miss. 309; *Francis* v. *Lawrence*, 48 N. J. Eq. 508.

In this case, the conduct of Jos. Schaer in reference to the deed from Clem brings him squarely within the rule of law above stated. He may have intended no wrong; but, by keeping the deed from record and permitting Clem to control the land as his own, he thereby misled Bunch into making a sale to Clem on credit which otherwise he would not have done. We may attribute to the parties to this deed only honest intentions, but still it is, as a matter of law, fraudulent and void as to Bunch.

The chancellor found that Clem Schaer was insolvent, and

the evidence shows that such is the fact, and that, unless Bunch can subject this land to the payment of his judgment, the same will remain unsatisfied. We are therefore of the opinion that the chancellor erred in dismissing the complaint as to Joseph Schaer.

Judgment reversed, and cause remanded with an order that a decree be rendered against Joseph Schaer in accordance with this opinion.

DUNLAP v. STATE.

Opinion delivered January 14, 1899.

1. BAIL—AUTHORITY TO TAKE.—A recital in a bail bond that the prisoner was admitted to bail in a designated sum, not being disproved, shows authority in the sheriff to take it and discharge the prisoner from custody, without any special authorization by the court. (Page 109.)
2. SAME—LIABILITY OF BAIL.—The fact that the prisoner for whose appearance a bail bond was given was in custody under other warrants at the time the bail bond was executed and afterwards until he effected his escape from the officers does not discharge his bail from liability, if he was not in custody at the time when his bail was bound for his appearance. (Page 109.)
3. SAME—CONSIDERATION.—A bail bond given to effect a prisoner's discharge from custody for a specified offense is not without consideration by reason of the fact that the prisoner, at the time it was executed, was under arrest for another offense for which he was held until he made his escape. (Page 109.)

This is a suit brought on a forfeited bail bond. Defendant, Dunlap, in his answer sets up two defenses. In the first paragraph he states that C. F. Aycock, who was treasurer of Boone county, was indicted five times during the January term, 1895, of the Boone circuit court; that during the term a warrant was issued for his arrest in one case; that he was brought into court on said warrant during said term, and the court ordered him to enter into recognizance in open court; that he failed to do so, but during said term, without an order of the court, the sheriff of said county took the bond in issue

with appellant herein as security. In the second paragraph, he admits the execution of the bond in question, but claims that the said C. F. Aycock never did receive his liberty under the same, but that, being in the custody of the officer, charged with other offenses, he made his escape before he was released on the bond in issue, and claims that there was no consideration for the execution of said bond.

The case was tried before the court upon the bond and the agreed statement of facts, which agreed statement of facts, so far as is material, is as follows:

"It is agreed that at the January term, 1895, of the Boone circuit court, C. F. Aycock was indicted in five cases, numbered 79, 80, 81, 82 and 83; that on the 2d day of February, 1895, the court made an order to take bail in No. 79, then pending, it being one of the five mentioned; that on the first day of said month and year, bench warrants were issued in all five of said cases; that on the 11th day of February, 1895, the sheriff of said Boone county, Arkansas, took bond in three cases, to-wit: The said Nos. 79, 80 and 81, then pending against the said C. F. Aycock—the defendant, David Dunlap, executing said bonds; that on the 6th day of February, 1895, the Boone circuit court made orders requiring the said C. F. Aycock to enter into recognizance in open court, fixing the amount of bail in cases Nos. 80 and 81; that on the 12th day of February, 1895, the court made orders authorizing the sheriff to take bail in 80 and 81 mentioned; that the bond in issue in Nos. 9 and 10 on law docket of this court were executed by the defendant, David Dunlap, before the sheriff was authorized by the court to take them, and that at the time they were taken the circuit court of Boone county, Arkansas, was in session; that at the time of executing the three bonds in question the said C. F. Aycock was in the custody of the deputy sheriff; that they were executed about 20 miles from the town of Harrison, in Boone county, Arkansas, and he was thereupon brought back to Harrison by the deputy sheriff; that Aycock was under arrest in two more cases at the time of the execution of the three bonds, and had been for some time; that, after the execution of said three bonds, C. F. Aycock

was granted more liberty than he otherwise would have been if he had not given bail in the said three cases, but was at all times after the execution of said bonds considered by the sheriff and his deputies as being in their custody and subject to their control, for the reason that he had not given bail in the other two cases against him; * * * that * * * C. F. Aycock made his escape, and has not been re-arrested. That the bonds executed in cases 79, 80 and 81, aforesaid, are the bonds in issue in the three cases on the law docket of this court, numbered 8, 9 and 10 as aforesaid." The bail bond in suit was conditioned as follows:

"C. F. Aycock, being in custody and charged with the offense of embezzlement, and being admitted to bail in the sum of one thousand dollars, now we, David Dunlap, of Boone county, Arkansas, undertake that the said C. F. Aycock will appear in the Boone circuit court on the first day of its next July term, which will be on the 15th day of July, 1895, to answer said charge, and will at all times render himself amenable to the order and process of said court in the prosecution of said charge, and, if convicted, will render himself in execution thereof; and if he fail to perform either of these conditions, we will pay the state of Arkansas the sum of one thousand dollars.

"This 11th day of February, 1885.

[Signed] "C. F. AYCOCK,
"DAVID DUNLAP.

"Approved:
"D. A. EOFF, Sheriff,
"J. M. WAITS, Witness."

The court made its finding of facts as follows:

"The court finds the facts to be that the defendant, C. F. Aycock, had been indicted and arrested on the charge of embezzlement, and that the court had fixed his bail at one thousand dollars, [that] the defendant, Aycock, executed a bond in said sum with David Dunlap as his security, which bond was duly delivered to said sheriff, and was fully satisfactory to said sheriff, and that the defendant, Aycock, was no longer held in custody under said charge, but was given his liberty, so far as said charge was concerned, but that the said sheriff had the de-

fendant, Aycock, in custody under other charges, and that he, the said sheriff, never at any time discharged the said Aycock in these other two cases in which he had not given bond, that said Aycock escaped custody in the cases in which he failed to give bond, and never appeared in court in the case in which he had given bond according to the tenor and terms thereof, and that a forfeiture was duly taken on said bond after it was given and at the time by the terms of which defendant, Aycock, was to make good his appearance in the Boone circuit court, and that said David Dunlap, surety on said bond, had been duly summoned to show why final judgment should not be rendered against him on said bond as required by law, and that the defendant, David Dunlap, is justly indebted to the plaintiff, the State of Arkansas, in the sum of one thousand dollars."

The court rendered judgment against defendant, from which he has appealed.

Appeal from Boone Circuit Court.

BRICE B. HUDGINS, Judge.

DeRoos Bailey, for appellant.

The sheriff had no authority to take the bond. The order of the court was that the defendant "enter into recognizance in open court," and this did not authorize the sheriff to take the bond. 28 Ark. 397; *ib.* 682; 31 Ark. 53; 5 Tex. 270; 17 Ill. 563; 34 Kas. 151; 37 Kas. 437; 6 Tex. App. 316. The fact that the prisoner was in custody at the time of his escape releases his sureties. Since the prisoner was never released at all, there was no consideration for the bond. 10 Wend. 435; 51 Ga. 158; 11 Bush, (Ky.) 38; 48 Ia. 343; 58 Ga. 314; 4 Blackst. Comm. 296; 2 Bish. Cr. Proc. § 248.

E. B. Kinsworthy, Attorney General, and *Jas. H. Stevenson*, for appellee.

The bond recites the admission to bail of Aycock, and the surety can not deny it. 45 Ark. 59; 60 Ark. 212–13. The statute, and not the court, *authorizes* the sheriff to accept bail. Sand. & H. Dig. § 2015. Bail bonds are liberally construed. *Ib.* § 2017; 28 Ark. 397. The fact that Aycock was in the

custody of the law at the time of his escape does not discharge his sureties. The consideration of the bond was complete if Aycock was no longer held by virtue of the charges to answer which he had given bond; and the state had a right to re-arrest him on any other charge or to detain him (without even actually re-accusing him) on any other charge. 71 Ga. 559; 62 Ark. 501, 505–6; 38 Tex. 173; 10 Tex. App. 46, 59.

BATTLE, J. Appellant contends that the judgment rendered against him should be reversed for the following reasons:

First. Because the bail bond upon which this action is based was executed before the sheriff had authority to accept it.

Second. Because Aycock, the person for whom he became bail by the execution of said bond, was in custody at the time of his escape.

Third. Because there was no consideration for the bond, Aycock never having been discharged from the custody of the sheriff.

We will consider these contentions in the order named.

First. The recitals in the bond show that C. F. Aycock, the person for whom appellant became bail, was "admitted to bail in the sum of one thousand dollars," which the appellant in his answer admitted, and the court so found, in this action. The agreed statement of facts does not show anything to the contrary. When the amount of the bail was fixed, it was lawful for the sheriff to take it and discharge the prisoner from custody for the charge mentioned or referred to in the bond of the bail, without any authorization for that purpose by the court. The statute authorized him to do so. Sand. & H. Dig. §§ 2014, 2015.

Second. The fact that Aycock was in custody at the time of his escape did not discharge his bail from his liability on the bond sued on. He was not in custody at the time his bail was bound for his appearance. The fact that he had been was no obstacle in the way of his appearance at a time subsequent thereto in the discharge of the obligation of his bail. *Havis* v. *State*, 62 Ark. 500; *Stafford* v. *State*, 10 Tex. App. 46.

Third. The consideration of the bond of the bail was the discharge of Aycock from custody for the offense for which he

had given bail to answer. It does not appear that he was ever held in custody for the same offense after the bond of his bail had been accepted and approved by the sheriff. He stood discharged from custody for said offense at the time of his escape, but he was under arrest for another and distinct offense. His bail executed the bond for his appearance with the understanding implied by law that he could be arrested for any other offense. There was no failure of the consideration of the bond, or the condition upon which the bail executed it. If he was at any time unwilling for it to remain in force, he had the right to surrender Aycock, his principal, though in custody, and discharge himself from his obligation as bail. See cases cited above.

Let the judgment be affirmed.

REED v. STATE.

66 110
90 386

Opinion delivered January 14, 1899.

1. INDICTMENT FOR BURGLARY—DESCRIPTION OF HOUSE.—In an indictment for burglary it is sufficient to describe the house alleged to have been entered as situated in the county and state of the venue and being used and possessed by one H. (Page 112.)

2. SAME—ALLEGATION OF INTENT.—An indictment for burglary which alleges an entry "with the felonious and burglarious intent," the personal property of the said H., being in said house, "feloniously and burglariously to steal, take and carry away," is defective in failing to allege an intent to commit a felony. (Page 112.)

3. HEARSAY EVIDENCE—WHEN PREJUDICIAL.—Where the proof of defendant's guilt in a burglary case is otherwise doubtful, it is prejudicial error to permit a witness, who has seen the property alleged to have been burglariously stolen, to state that, from a description given him by another, he recognized such property as belonging to the injured party. (Page 113.)

Appeal from Independence Circuit Court.

RICHARD H. POWELL, Judge.

W. S. Wright and *S. D. Campbell*, for appellant.

An indictment must be direct and certain as to the facts

and material circumstances of the offense. Sand. & H. Dig. §§ 2074, 2090; 29 Ark. 68; *ib.* 168; 26 Ark. 323. The description of a house as "being used and possessed by one John Head" is not sufficient in an indictment for burglary. 2 Enc. Pl. & Pr. 747; 4 Enc. Forms, 139; 1 Whart. Cr. Law, § 816; Clark, Cr. Proc. 214; 56 Ark. 365; 33 Ark. 518; 32 Ark. 704. In an indictment for burglary, when larceny is the felony intended, it is necessary to allege that defendant intended to commit *grand* larceny. 49 Ark. 514; 61 Ark. 241; 1 Whart. Cr. Law, § 818; 2 Am. & Eng. Enc. Law, 689, *note*. The value of the property should have been alleged. Clark, Cr. Proc. 216; Clark. Cr. Law, 244; Whart. Cr. Pl. & Pr. § 213; 33 Ark. 567. The words "felonious and burglarious," preceding the word "intent," do not supply the defect. Clark, Cr. Proc. 156; 38 Ark. 519; Clark, Cr. Proc. 161; 2 Enc. Pl. & Pr. 772, 773, 777; 32 Ark. 712; 33 Ark. 518; 43 Ark. 348; 61 Ark. 244; 62 Ark. 539; 53 Ark. 566. There was no breaking and entry of the house. Clark, Cr. Law, 232; Whart. Cr. Law, § 759. The evidence as to the time of the breaking does not show it was at night. 46 Pac. 801. The court erred, also, in giving and refusing instructions.

E. B. Kinsworthy, Attorney General, and *Chas. Jacobson*, for appellee.

The indictment sufficiently describes the house. 13 Tex. App. 464; 112 Mass. 458; 87 Ky. 189; 2 Bish. Cr. Proc. § 137; Wh. Cr. Law, § 804; 63 Ark. 618; Sand. & H. Dig. §§ 2076, 2074, 2090. The charge that defendant broke into the house with "a felonious and burglarious intent * * * to steal, etc," is sufficient. 94 Cal. 595. The breaking was sufficient. 68 Ala. 96; Sand. & H. Dig. § 1493. The indictment and proof are sufficiently clear that the crime was committed at night. 63 Ga. 141; 9 Tex. App. 396; 43 Fitch, 417.

BATTLE, J. Lawrence Reed was indicted for, and convicted of, burglary. He asks that this conviction be set aside, and that a new trial be granted to him. We will consider only two grounds upon which he asks this relief, the sufficiency of the indictment and admissibility of evidence.

The indictment, without the caption, is as follows: "The

said Lawrence Reed, on the 27th day of August, 1898, in the county and state aforesaid, and during the night time of said day, a certain house there situated, and being used and possessed by one John Head, feloniously and burglariously did break and enter, with the felonious and burglarious intent, the personal property of the said John Head, being in said house, feloniously and burglariously to steal, take and carry away, against," etc.

Appellant, Reed, insists that this indictment is defective because the house broken and entered into is not sufficiently described, and the felony which he intended to commit is not properly charged.

We think that the house is sufficiently described. Was the intent with which it was entered as charged sufficient to make the breaking and entering a burglary? Burglary, as defined by the statutes, "is the unlawful entering a house, tenement, railway car, or other building, boat, vessel, or water craft, in the night time, *with the intent to commit a felony.*" The intent, as stated in the indictment, is as follows: "With the felonious and burglarious intent, the property of the said John Head, being in said house, feloniously and burglariously to steal, take and carry away." The offense intended to be committed, as charged, was larceny, but it is not shown that it was a felony; there being two grades of larceny, one a misdemeanor, and the other a felony. But it is contended that the larceny which the appellent intended to commit is shown to be a felony by the use of the words, "feloniously * * * to steal, take and carry away." That is not true. All larceny, as defined by the statute, "is the felonious stealing, taking and carrying, riding or driving away the personal property of another." The grade is fixed by the punishment, all offenses punishable by imprisonment in the penitentiary being made felonies by the statutes of this state; and the punishment is regulated by the value of the property stolen, the statutes providing that a person convicted of larceny, when the value of the property stolen exceeds ten dollars, shall be punished by imprisonment in the penitentiary, and when the value of the property stolen does not exceed ten dollars, he shall be punished by imprisonment in the county prison and fine. Consequently,

the grade of larceny, of which any one may be accused, can be shown in an indictment only by a statement of the value of the property stolen. Except as to the value of the property stolen, the elements of both grades are the same. The words, "feloniously steal, take and carry away," when used in an indictment for larceny, can describe no element which is not necessary to constitute either grade. It follows, then, that the indictment fails to show that appellant broke and entered the certain house used and occupied by John Head with the intent to commit a felony, and in this respect is fatally defective.

A part of the property stolen was meat and a bucket. Before they were found, Head described them to C. B. Burchfield, in the absence of appellant. In the trial Burchfield was allowed to testify, over the objections of the appellant, as follows: "Rutledge found a bucket of meat under the house, and from the description that Head had given me previously I recognized it as Head's bucket, and also recognized the meat as being similar to the meat which Head stated to me he had lost." This testimony was incompetent, and should have been excluded. Before its admission, Head had testified that the meat and bucket were his property, and the statement of Burchfield added strength to his testimony. On account of the doubt in which the evidence adduced at the trial left the guilt of appellant, the incompetent testimony of Burchfield was prejudicial. *Lewis* v. *State*, 62 Ark. 496.

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

WARNER v. HESS.

Opinion delivered January 14, 1899.

66 113
89 118

1. APPEAL—DEFAULT JUDGMENT.—Rendition of judgment by default on a complaint which fails to state a cause of action is a reversible error. (Page 115.)

2. COMPLAINT AGAINST MARRIED WOMAN—SUFFICIENCY.—A complaint seeking to hold a woman liable on a note and mortgage signed by her,

which shows that she is married, but fails to show that the note and mortgage are the evidence of such a contract as she is competent to make, is insufficient to support a judgment against her. (Page 115.)

Appeal from Independence Circuit Court in Chancery.

RICHARD H. POWELL, Judge.

J. C. Yancey and *F. D. Fulkerson*, for appellees.

A *femme covert* can bind herself by such contracts only as relate to her separate estate. 17 Ark. 194; 30 Ark. 729; *ib.* 17; *ib.* 385; 32 Ark. 776; 35 Ark. 372; 36 Ark. 476; 39 Ark. 242; *ib.* 360; 43 Ark. 166; 53 Ark. 511. A complaint, founded upon a married woman's contract, must show that the contract was such a one as the woman could make. 29 Ark. 351; 35 Ark. 270; 39 Ark. 242; 36 Ark. 479. Failure of complaint to state a cause of action can be raised at any time. 44 Ark. 60; *ib.* 205; 49 Ark. 278; 62 Ark. 138; 18 Wall. 99. It was error to render a personal judgment against appellant. 29 Ark. 353; 99 U. S. 325; Reeves, Dom. Rel. 171; 64 Ark. 381; 56 Ark. 294.

Neill & Neill, for appellee.

The court had jurisdiction of the persons and subject-matter, and the judgment is not void. 55 Ark. 373; 39 Ark. 243; 48 Ark. 223. Coverture is a defense which, unless pleaded at the trial, will be considered as waived. 10 Enc. Pl. & Pr. 270; 62 N. Y. 505; 53 Ark. 180; 36 Ark. 479; 22 Ark. 526–7. The debt was the *femme covert's* own debt, and a personal judgment was proper. 62 Ark. 146.

BATTLE, J. On the sixth day of August, 1894, W. T. Warner and his wife, Addie L. Warner, executed to T. M. Hess their joint and several promissory note, for the sum of $1,564.20 and ten per centum per annum interest thereon from date until paid. At the same time they executed a deed of trust conveying to Simon Adler certain lands in trust to secure the payment of the note. Hess brought this action against Warner and his wife upon the note and deed of trust, and asked for a judgment against them for the amount due on the note, and for a decree foreclosing the deed of trust. He alleged in his complaint that "defendants, W. T. Warner and Addie L.

Warner, his wife, by their joint and several note of date August 6, 1894, agreed to pay plaintiff three years thereafter the sum of $1,564.20 with interest thereon at the rate of ten per cent. per annum from date until paid, but totally failed to state any fact or facts to show that the contract evidenced by the note was such as a married woman had the power to make. He filed the note and deed of trust as exhibits to his complaint. In the deed, after W. T. Warner and Addie Warner were denominated parties of the first part, the following language was used: "Whereas, the said party of the first part are justly indebted unto the party of the third part in the full sum of $1,564.20, which is evideneed by their joint and several promissory note of even date herewith for said sum, due and payable three years after date, with interest at the rate of 10 per cent. per annum from date until paid," etc. Mrs. Warner was duly summoned, but did not appear in court nor make any defense. The cause was submitted to the trial court upon "the complaint, original note and deed of trust, * * * * the summons and return thereon;" and plaintiff recovered a judgment by default against both defendants for the sum of $1,739.91, the amount due upon the note, and a decree foreclosing the deed of trust. The lands described in the deed were sold, under the decree of foreclosure, for the sum of $1,500, which was appropriated to the part payment of the judgment. A balance having been left unpaid, Mrs. Warner appealed from the judgment against her to this court.

The record showing that she was a married woman at the time the note sued on was executed by her, and failing to show that the note was the evidence of such a contract as she was competent to enter into, appellant insists that the court erred in rendering the judgment by default against her, and that it should be reversed. Is her contention correct?

The rendition of a judgment by default upon a complaint which fails to state facts sufficient to constitute a cause of action is an error for which the judgment should be reversed on appeal. *Benton* v. *Holliday*, 44 Ark. 60; *Railway Co.* v. *State*, 58 Ark. 39; Elliott, Appellate Procedure, §§ 471, 475.

In this case it does not appear that Mrs. Warner had the power to bind herself by the promissory note upon which this

action was based. Was the appellee bound to show, in his complaint, that it was such a contract as she, as a married woman, could make, in order to state a cause of action against her? In *Stillwell* v. *Adams*, 29 Ark. 351, it is said: "As a general rule, the wife has no power to contract and bind herself; and if the pleader wishes to charge her, and fix a liability upon her to account out of her separate estate, he must state such facts as take his case out of the general rule, and fix upon her such liability; and, as these facts do not appear in the pleadings, no cause of action is made against the wife."

In *Conner* v. *Abbott*, 35 Ark. 365, the appellee, Abbott, filed a bill against James T. Martin and his wife, Kate A. Martin, and others, to foreclose a mortgage made to secure a note executed by Kate A. Martin and others to complainant on the 4th of February, 1873. Mrs. Martin answered, but did not set up her coverture at the time of the execution of the note as a defense. It appeared, however, from the evidence that she was a *femme covert* at the time plaintiff recovered a judgment against her for the amount due on the note. On appeal, this court reversed the judgment against her, saying: "As to Kate A. Martin, it is apparent that both the note and mortgage were absolutely void. She executed both, and acknowledged the latter as a *femme sole*. This she was incompetent to do. The note does not purport, nor does any proof show it, to have been executed for the benefit of herself, personally, or her seperate property."

Chollar v. *Temple*, 39 Ark. 238, was an action instituted by Mrs. Chollar to enjoin the sale of her property under an execution issued upon a judgment by default obtained against her upon a note executed by her and her husband while she was a married woman. In the action in which the judgment was rendered, she did not appear or defend, and her coverture did not appear from the complaint, nor in any other manner. Her complaint in the action to enjoin was dismissed, and this court affirmed the decree. In speaking of the note, the court said: "It is plain, then, that, the contract being, as to Mrs. Chollar, absolutely void, no judgment could have been rendered against her, if she had appeared and set up her coverture; and, of course, no execution. But it does not follow, as counsel seem

to urge, that the judgment itself is therefore void, if rendered by default, and remaining undisturbed by any appellate proceedings." The intimation is clear that the judgment would have been reversed upon appeal if the coverture had appeared from the record in the case in which it was rendered.

But it is said that *Stillwell* v. *Adams*, 29 Ark. 351, and *Conner* v. *Abbott*, 35 Ark. 372, "arose under contracts antedating the married woman's act of April 28, 1873." How does this act affect the rule? It does not give the wife power to contract generally, but authorizes her to contract in reference to her services, her separate estate, and in respect to a separate business carried on by her. *Walker* v. *Jessup*, 43 Ark. 166, 167; *Sidway* v. *Nichol*, 62 Ark. 152. The fact that the statute increases her power to contract does not raise a presumption, in the absence of evidence to the contrary, that a contract made by her comes within the exceptions. *Vogel* v. *Leichner*, 102 Ind. 55; *Cupp* v. *Campbell*, 103 Ind. 213; *Murray* v. *Keyes*, 35 Pa. St. 384; *Tracy* v. *Keith*, 11 Allen, 214. As a general rule, contracts made by a wife were void at common law, and could not be enforced against her in a court of law, but there were special exceptions to this rule. *Dobbin* v. *Hubbard*, 17 Ark. 194. Yet the presumption prevailed that a contract was void, in the absence of evidence showing it came within the exceptions. Hence the rule based upon this presumption has not been changed, and it is still necessary for a plaintiff, suing upon a contract of the wife, to state facts sufficient to show that she had the power to make it, in order to show a cause of action against her; and that a judgment by default againse her, in such an action, upon a complaint that shows she was a *femme covert* at the time the contract was entered into, and fails to show that she had the power to make it, is reversible on appeal. *Emmett* v. *Yandes*, 60 Ind. 548; *Hecker* v. *Haak*, 88 Pa. St. 238; *Koechling* v. *Henkel*, 144 Pa. St. 215; *Cary* v. *Dixon*, 51 Miss. 593.

The rule we have stated does not prevail in Alabama and New Jersey. In Alabama the statutes have abrogated the principle of the common law that the legal existence of the wife becomes merged by marriage, and established her personality separate from her husband. In *Straus* v. *Glass*, 108

Ala. 546, the court said: "Such being her legal status, under the statute, the law will not conclude, from the fact of coverture, that she was incapable of making the contract, unless such affirmatively appears from the complaint itself. * * * * If the complaint presents, *prima facie*, a cause of action against the defendant,—and we hold since the adoption of the statute, *prima facie*, a married woman is bound by her contracts,—a plea of coverture, without additional averments, does not answer the complaint. We see no good reason for holding that the plea of coverture should imply all that such a plea implied at common law, since the reason why it was given such effect cannot arise under our statute."

The statutes of this state do not authorize the wife to contract generally, nor entirely establish her personality, separate from her husband. In *Kies* v. *Young*, 64 Ark. 385, Mr. Justice Riddick, speaking for the court, said: "Notwithstanding the important changes wrought by our statute concerning the powers and rights of married women, many of the rules of law resting upon this unity of the husband and wife are still enforced by the courts of this state. This court, since the passage of the statute above referred to, has held that, by reason of such unity, the husband and wife cannot contract with each other, * * * nor become partners in business, * * * nor sue each other in a court of law. * * * By reason of this legal unity, land in this state conveyed to the husband and wife jointly vests in them an estate by entirety, so that the survivor takes the whole, whereas, but for this theory of legal unity, they would take as tenants in common. * * * It will be seen, by reference to these and other decisions of this court, that the common-law unity of the husband and wife still exists in this state, except so far as the legislative purpose to modify it and change it has been expressed by the statute."

Assuming the theory upon which the Alabama rule is based to be correct, it does not follow that it should be enforced under the statutes of this state. A rule similar to that in Alabama is or was in force in New Jersey, but it was based upon a statute essentially different from ours; and we find in the cases in which it was enforced no reason why it should be

adopted in this state. *Hinkson* v. *Williams*, 12 Vroom, 35; *Vansyckel* v. *Woolverton*, 56 N. J. L. 8.

Our attention has been directed to *Frecking* v. *Rolland*, 53 N. Y. 422. In that case the coverture of the defendant and her competency to make the contract sued on was shown by the evidence adduced at the trial, and the question in this case was not decided. The language of the court should be understood by applying it to the facts in that case.

Appellee relies on the language used in the deed of trust as sufficient to show that appellant was bound to pay the note. But that does not show that she was competent to bind herself. She virtually made the same declaration in the note, and the deed adds no force to it.

The judgment against the appellant is reversed, and the cause is remanded.

WOOD, J., dissents.

RIDDICK, J., (dissenting.) At common law the legal existence of a woman was suspended by marriage. She could not, when married, make contracts binding upon herself. "There is indeed one case," says Blackstone, "when the wife shall sue and be sued as a *femme sole*, viz., where the husband has abjured the realm or is banished, for then he is dead in law." 1 Blackstone, Com. 443.

But in this state the law has been changed by statute. She may buy, own and sell property, borrow money, carry on business, perform labor or services for her sole or separate account, and may sue and be sued on account of her property, business or services. Sand. & H. Dig. § 4946. I think, under this statute, her contract, such as a note or mortgage, should be taken as *prima facie* valid unless there be something on its face to show to the contrary. In an action upon such contract she should be sued just as if she were single, and if she has a defense not apparent upon the face of the complaint, she should be required to set it up by answer, as other defendants are required to do. I think that the complaint in this case was sufficient, and, as Mrs. Warner was duly summoned, and failed to put in any defense, the judgment against her was proper, and should in my opinion be affirmed.

HOUSTON v. STATE.

Opinion delivered January 14, 1899.

INDICTMENT—VARIANCE.—An allegation in an indictment that defendant sold 4,000 pounds of seed cotton on which there existed a landlord's lien will not be supported by proof that he sold three bales of ginned cotton which was subject to such lien. (Page 121.)

Appeal from Craighead Circuit Court, Jonesboro District.

FELIX G. TAYLOR, Judge.

Eugene Parrish, for appellant.

The indictment alleges that the cotton was "seed cotton." It was then incumbent upon the state to show this, as the averment was materially descriptive. 3 S. W. 716; 2 S. W. 859; 34 Ark. 160; 62 Ark. 538; 58 Ark. 642; 60 Ark. 141; 62 Ark. 516; Wh. Cr. Ev. § 146. It is no crime to remove property on which a lien exists from the *premises*. The removal must be from the county or state. The indictment avers a lien for *rent*, and evidence of one for supplies was inadmissible. Gr. Ev. § 50; 41 Ark. 397.

E. B. Kinsworthy, Attorney General, and *Chas. Jacobson*, for appellee.

The proof shows that the cotton removed was "seed cotton." The offense may be committed by barter, sale, exchange or other disposition of the property, as well as by removal from the county or state. Sand. & H. Dig. § 1868. The instructions were correct.

RIDDICK, J. The appellant, Lee Houston, was tried and convicted of the crime of selling cotton upon which there existed a landlord's lien for rent.

It is first said that the circuit judge erred in admitting evidence to show that the landlord, in addition to a lien for rent, also held a lien on the cotton for supplies furnished the tenant. But no question in reference to the admission of this evidence

is presented here, for no objection was made to the evidence introduced at the trial or to the instructions of the court, and no exceptions of any kind was saved during the trial.

The only question raised by the appeal is, whether the evidence supports the verdict. The cotton which it is alleged that the defendant sold is described in the indictment as "four thousand pounds of seed cotton, the value of forty dollars." Now, it is evident this description of the cotton is material. It points out and identifies the cotton which the defendant is charged with having unlawfully sold, and such allegation must be proved as made, for the defendant cannot, under this indictment, be convicted by showing that he sold some other kind of cotton. *Adams* v. *State*, 64 Ark. 188; *Bryant* v. *State*, 62 *ib.* 459. But there was no evidence that defendant sold seed cotton. The undisputed fact is that he did not sell seed cotton, but sold three bales of ginned cotton, and the evidence therefore fails on a material point. We conclude that the motion for new trial should have been granted, on the ground that the evidence does not support the verdict.

Judgment reversed, and cause remanded for a new trial.

HINER *v.* WHITLOW.

Opinion delivered January 21, 1899.

1. USURY—RIGHT OF ASSIGNEE TO PLEAD.—One who buys land on which there is an existing mortgage and in part consideration thereof undertakes to pay the debt secured by such mortgage, as well as one who buys land expressly subject to an existing mortgage thereon, will not be allowed to defeat the enforcement of such mortgage by a plea of usury, unless so authorized by statute. (Page 123.)

2. SAME—CONSTRUCTION OF STATUTE.—One who buys land and in part payment undertakes to pay an existing mortgage thereon cannot defeat such mortgage on the ground of usury under act of March 3, 1887, § 1, providing that any person who may have acquired the title to, or any interest in, or lien upon, any property by purchase or assignment, may bring suit to have any usurious mortgage thereon "cancelled and annulled, in so far as the same is in conflict with the rights of the plaintiff in the action." (Page 124.)

3. COSTS—JUDGMENT AGAINST HUSBAND.—In a suit against a married woman to foreclose a mortgage assumed by her, it is error to render judgment for costs against her husband. (Page 126.)

Appeal from Sebastian Circuit Court in Chancery.

EDGAR E. BRYANT, Judge.

Chas. E. Warner, for appellants.

The court erred in finding that the note and contract were not usurious. This court has the same means of reaching a correct conclusion as the chancellor, and will reverse his decree if against the decided preponderance of evidence. 41 Ark. 292; 13 Ark. 350; 15 Ark. 209; 23 Ark. 341; 55 Ark. 112.

Thomas E. Ward, for appellee.

Appellants are not in a position to plead usury. 32 Ark. 346; 61 Ark. 329.

BATTLE, J. "On July 31, 1896, appellee filed his complaint in this action against appellants, alleging that on February 20, 1891, one Watts and wife made a mortgage to Bleecker Luce to secure the loan of $1,600, made by H. L. Monroe, conveying certain described real estate in the city of Fort Smith, and that said Luce and Monroe in 1891 assigned said debt and mortgage to appellee; that on April 5, 1893, said Watts and wife sold their equity in such property to said H. L. Monroe, who, on January 12, 1894, sold and conveyed said property to one Vance, who assumed the mortgage;" that afterwards, on the 12th of June, 1894, Vance sold the real estate to Edwin Hiner, who, in part consideration thereof, undertook and agreed to pay the debt secured by the mortgage made by Watts and wife, and did at the time pay all the overdue interest, and $250 of the principal of the debt, and at his request the property was conveyed to his wife, appellant, Martha Hiner; and alleged that the principal of the debt and two years' interest thereon were due and unpaid, and that Hiner and wife refused to pay the same; and asked for a foreclosure of the mortgage.

Hiner failed to answer, but his wife did, alleging as her only defense that the debt and mortgage were void for usury,

and that, if valid at any time, they had been satisfied and discharged.

The facts, as shown by the evidence, were as follows: On the 20th day of February, 1891, M. C. Watts and his wife conveyed certain real estate to Bleecker Luce in trust to secure a loan of $1,600 made to him by Harry L. Monroe, which was evidenced by a bond therefor, with ten coupons for interest attached. In February, 1891, Luce and Monroe, for a valuable consideration, transferred the bond and coupons and the deed of trust or mortgage to appellee, R. W. Whitlow. On the 12th day of January, 1894, Monroe sold and conveyed the real estate to one M. D. Vance, who, as part consideration therefor, agreed and undertook to pay off and discharge the deed of trust or mortgage executed by Watts and wife. Afterwards, on the 12th of June, 1894, Vance sold the property to Edwin Hiner, who caused the same to be conveyed to his wife, Martha L. Hiner, subject to the mortgage thereon, which was executed by Watts and wife. The property sold was worth about $2,000, and the consideration received by Vance was property worth about $160, the difference between the value of that received and conveyed being about the sum due on the mortgage debt. Evidence was adduced at the hearing tending to prove that Hiner, in part consideration for the property conveyed to his wife, agreed with Vance to pay off and discharge the mortgage; and evidence was also adduced tending to prove that he did not enter into such agreement, but purchased subject to the mortgage. The amount due and unpaid on the debt at the time of the hearing was $1,642.95.

The court rendered a decree in favor of Whitlow, foreclosing the mortgage, and a judgment against Hiner and his wife for costs, and they appealed.

According to any view that can be taken of the terms of the contract between M. D. Vance and Edwin Hiner or Mrs. Hiner, the last two persons named will not be allowed to set up usury to defeat the foreclosure of the mortgage sued on, or the collection of the debt secured thereby, unless authorized to do so by a statute. If they purchased the land expressly subject to the mortgage, the land was as effectually charged with the incumbrance of the mortgage debt as it would have been had they expressly assumed the payment of the debt, or had executed

a mortgage to secure it. The land became, by the terms of the contract, the primary fund for the discharge of the debt. The theory is that the amount of the mortgage was deducted from the purchase money, and it would be inequitable to allow them to take advantage of the invalidity of the mortgage, when the vendor had virtually furnished them with the means of discharging it. Their position, in principle, is in no respect different from what it would have been had their vendor counted out in cash the sum specified in the mortgage, and placed it in their hands as his messengers, with directions to pay it to the mortgagee in discharge of the mortgage. They cannot any more defeat the appropriation intended to be made by the plea of usury in one case than they can in the other, and they cannot in either. *Morris* v. *Floyd*, 5 Barb. 130, 134, 135; *Freeman* v. *Auld*, 44 N. Y. 50; *Lee* v. *Stiger*, 30 N. J. Eq. 610; *Pinnell* v. *Boyd*, 33 N. J. Eq. 190; *Hardin* v. *Hyde*, 40 Barb. 435; 1 Jones, Mortgages (5 Ed.), §§ 735, 736.

If Hiner and wife undertook, as a part of their contract with Vance, to pay off the indebtedness secured by the mortgage, they will not be allowed to defeat the enforcement of the mortgage by a plea of usury, unless allowed to do so by a statute. Their contract was not usurious. A part of the purchase money to be paid for the land was the amount due on the mortgage debt. As in the former case, they purchased only the equity of redemption, and to allow them to defeat the mortgage would enable them to acquire the land for a sum considerably less than they agreed to pay. They stand in no better position than they would had they purchased subject to the mortgage. *Stiger* v. *Bent*, 111 Ill. 328; *Log Cabin Permanent Building Association* v. *Gross*, 71 Md. 456; *Bridge* v. *Hubbard*, 15 Mass. 103; *Pickett* v. *Merch. Nat. Bank of Memphis*, 32 Ark. 346, and cases cited above.

Can they, Hiner and wife, defeat the mortgage by setting up and maintaining a plea of usury, under the act entitled "An act to give effect to the constitutional provisions against usury," approved March 3, 1887? That act provides as follows:

"Section 1. That every lien created or arising by mortgage, deed of trust or otherwise, on real or personal property, to secure the payment of a contract for a greater rate of inter-

est than ten per centum per annum, either directly or indirectly, and every conveyance made in furtherance of any such lien, is void; and every such lien or conveyance may be cancelled and annulled at the suit of the maker of such usurious contract, or his vendees, assigns or creditors. The maker of a usurious contract may, by suit in equity against all parties asserting rights under the same, have such contract, and any mortgage, pledge or other lien, or conveyance executed to secure the performance of the same, annulled and cancelled, and any property, real or personal, embraced within the terms of said lien or conveyance, delivered up if in possession of any of the defendants in the action, and if the same be in the possession of the plaintiff, provision shall be made in the decree in the case, removing the cloud of such usurious lien, and conveyance made in furtherance thereof, from the title to such property. And any person who may have acquired the title to, or any interest in, or lien upon, such property by purchase from the makers of such usurious contract, or by assignment or by sale under judicial process, mortgage or otherwise, either before or after the making of the usurious contract, may bring his suit in equity against the parties to such usurious contract and any one claiming title to such property by virtue of such usurious contract, or may intervene in any suit brought to enforce such lien, or to obtain possession of such property under any title growing out of such usurious contract, and shall by proper decree have such mortgage, pledge or other lien, or conveyance made in furtherance thereof, cancelled and annulled *in so far as the same is in conflict with the rights of the plaintiff in the action.*

"Sec. 2. That any creditor whose debtor has given a lien by mortgage, pledge or otherwise, on real or personal property, subject to execution to secure the payment of a usurious contract, may bring his suit in equity against the parties to such usurious contract, and recover judgment for his debt against the debtor, and a decree cancelling and annulling such usurious lien, and directing the sale of the property to satisfy the plaintiff's judgment and costs, and any surplus that may remain after satisfying the plaintiff's judgment shall be paid to the debtor."

Only four classes of persons are allowed by this act to in-

stitute an action to set aside a mortgage or deed of trust on account of usury, and they are the maker, his vendees, assigns or creditors. The vendees and assigns can do so only in so far as it may be necessary to protect their rights in the property incumbered. The language of the act is: "And any person who may have acquired the title, or an interest in, or lien upon such property by purchase from the makers of such usurious contract, or by assignment or by sale under judicial process, mortgage or otherwise, may institute suit in equity * * * * and shall by proper decree have such mortgage, pledge, or other lien, or conveyance made in furtherance thereof, cancelled and annulled *in so far as the same is in conflict with the rights of the plaintiff in the action.*" The creditor can do so only when he recovers a judgment against the maker. So Hiner and wife cannot defeat the mortgage in this case on account of usury, because they acquired only the right to redeem the property mortgaged,—that is, that part of the estate or interest in the property not covered by the mortgage; and for the further reason that the mortgage is in no wise in conflict with their rights.

The decree of the circuit court is, therefore, affirmed, except so much thereof as is a judgment against Edwin Hiner for costs; to that extent it is reversed.

BUNN, C. J., absent.

DRIVER v. LANIER.

Opinion delivered January 21, 1899.

1. APPEAL—MOTION TO DISMISS.—Where a receiver brought a suit under order of the court which appointed him, and appealed from an order dismissing such suit, the supreme court will not entertain a motion to dismiss such appeal upon the ground that, before such appeal was prayed or granted, he had been discharged as receiver in the suit in which he was appointed if no proof of such discharge was made in the trial court in the suit appealed from, nor any attempt made to take advantage thereof. (Page 133.)

2. IDENTITY OF NAME—PRESUMPTION.—Where one of the defendants in a suit brought by a receiver has the same name as one of the defendants in the suit in which the receiver was appointed, it will be presumed, in the absence of any contrary showing, that the same person is defendant in the two suits. (Page 133.)

3. RECEIVER—POWERS.—Where a receiver is appointed by the court to collect certain notes, he alone, until he is discharged, is qualified to bring suit to enforce their collection. (Page 134.)

Appeal from Mississippi Circuit Court in Chancery.

FELIX G. TAYLOR, Judge.

Watson & Fitzhugh, for appellant.

It was error to make Lanier a party defendant, upon his own motion, over the objection of the complainant. 17 How. 15; 6 Blatchf. 118; *ib.* 151; 4 Hen. & M. 483; 71 Miss. 1017; 1 Dan. Ch. Pl. & Pr. 287, note 2; 2 Tenn. Chy. 140; 49 Ark. 103; 6 Am. & Eng. Enc. Law, 744, note 7. There was no necessity of making him a party, since the receiver was a trustee for the parties really entitled to the fund. 20 Am. & Eng. Enc. Law, 11–14, 110, 126, 137, 158–9. Lanier was neither a necessary nor a proper party in the suit by the receiver, and it was error to allow him to file his cross-bill. 28 Ark. 152. The receiver had the right to appeal. 80 Fed. 972–3.

Chas. T. Coleman, for appellee.

A court can not take judicial notice of its own records in a different case from that on trial. 44 S. W. 1034; 31 Cal. 215; 14 Ia. 131; 13 Bush, 419; 61 Mo. 76; 91 U. S. 521; 24 Cal. 73; 67 Wis. 648; 26 Mo. App. 226; 54 Ia. 557; 91 N. C. 78; 19 Mo. 674; 78 Ia. 482. Nor of the pendency of another action before it, involving the same matter. It must be pleaded. 31 Cal. 215; 24 Cal. 73; 14 Ia. 131; 19 Mo. 674; 26 Mo. App. 226; 67 Wis. 648; 91 N. C. 78. Nor will a court take notice, without evidence, of any correction between a former case and one on trial. 61 Mo. 76. There was no error in making Lanier a party. He had an interest in the note, and was entitled to be made a party. It does not matter that he filed a "cross-bill." Its effect was that of an interplea. 45 S. W. 137. The answer being withdrawn, no plea of estoppel is before the court. It could not be raised

on motion to strike. The receiver, having been discharged by the court before the appeal was taken, had no right to appeal. His discharge is admitted, and no proof is necessary.

BATTLE, J. On the 22d day of January, 1894, John B. Driver, as receiver, commenced this action against J. R. Riggans; and, on the 14th of September, 1894, by amendment to his complaint, made F. R. Lanier, Jr., W. H. Grider and Roger Sherman, parties defendant to the same. He commenced his complaint as follows: "The plaintiff, John B. Driver, as receiver herein, appointed by the Honorable J. E. Riddick, judge of this court, in chambers, and directed to collect and hold, subject to the orders of the court, the notes hereinafter described, states;" and then alleged as follows: That on the 25th day of January, 1888, Felix R. Lanier sold and conveyed to the defendant, Riggans, the following tract of land, situate in the county of Mississippi, and state of Arkansas, to-wit, the southwest quarter of thirty-five, in township twelve north, and in range ten west, at and for the sum and price of $640, in consideration of which Riggans executed to Lanier, the vendor, his five promissory notes for the purchase money and interest; and Lanier conveyed the land to Riggans; and Riggans conveyed it to F. R. Lanier, Jr., W. H. Grider, and Roger Sherman, in trust, to secure the payment of his notes, which were given for the purchase money. He then states, obviously in part to explain the reason and object of the appointment of him receiver, as follows: "Plaintiff further states that, owing to the title to the said land becoming involved and in dispute in the litigation now pending in this court in the cause of M. E. Graham, executor, et al., against Felix R. Lanier, The American Freehold Land Mortgage Company, of London, Limited, The Corbin Banking Company, The Union Mortgage, Banking & Trust Company, Limited, of London, England, et al., the defendant herein failed, neglected and refused to pay off any of said purchase notes and interest, and this in the face of the fact that all of the parties above named recognize and treat as absolutely valid and binding the sale made to defendant by Lanier. So that in no event nor contingency can the defendant fail to secure a good title (in fact there is no contest,

except as to the proceeds of the said sale), and the court, by proper orders and decrees, has taken upon itself to protect, not only the defendant, but all of the adverse claimants of the purchase money, by ordering it paid into court until all of the respective claims to the same can be settled and finally adjusted, a matter which does not affect nor prejudice the rights of the defendant herein, because the court will decree to him a perfect title to the land, when the purchase money is paid into court, as the court has ordered that it shall be done." He then asked the court to order the land to be sold to pay the notes, and for general relief.

On the 9th day of May, 1894, Riggans filed his answer, which he commenced as follows: "The answer of J. R. Riggans to the bill of complaint exhibited against him in this honorable court by John B. Driver, as receiver, appointed herein by this honorable court in the case of M. E. Graham, executor, et al., against Felix R. Lanier, et al., now pending and undetermined, and the cross-bill of J. R. Riggans against John B. Driver, as receiver, The American Freehold Land & Mortgage Company of London, Limited, The Union Mortgage Banking & Trust Company of London, Limited, both of the last-named defendants being corporations created under the laws of Great Britain, having their principal place of business in the city of London, in the Kingdom of Great Britain, James H. Watson, as trustee, a citizen of the state of Tennessee, The Corbin Banking Company, domiciled in the city and state of New York, Austin Corbin, W. G. Wheeler and F. W. Dunton, the last-named three being non-residents and citizens of the state of New York, and Joseph C. Clarkson, trustee, a citizen of the state of Tennessee,"—and then admits as follows: "It is true that this honorable court did appoint the complainant as such receiver herein, as alleged, and it is also true that this respondent executed the deed of trust and the notes set out in the complaint; * * * * that it is true, as alleged, that respondent did fail and refuse to pay to the Corbin Banking Company, The Union Mortgage Banking & Trust Company, James H. Watson, as trustee, and to all of the defendants herein and above named, any part of

the purchase money for the said lands;" and for a defense alleged: "And he says that none of the defendants ever had any right, title, or interest in and to the said notes, because respondent says that he is advised, informed, believes, and so charges the fact to be, that the assignment of the purchase notes was made in furtherance of an usurious and void contract for the forbearance of money in contravention of the constitution and laws of Arkansas, and is void, and conferred no right whatever on any of the said defendants to implead this defendant, and no right whatever to subject the interest of this respondent in the lands in question to the payment and satisfaction of any claim or amount set up by any one and all of the said defendants to the purchace notes or to the lands in question as an asset to satisfy the same. * * * Respondent further states that the notes in question are indorsed by F. R. Lanier, as collateral security for a usurious debt, and that plaintiff cannot have and maintain his action in any event without suing in Lanier's name for the use and benefit of the assigns; that the legal title is in Felix R. Lanier, Jr., as trustee, who is an indispensable party, and is not made a party."

On a subsequent day Felix R. Lanier, on his motion, was made a party defendant in this action; and on the 11th day of March, 1895, filed an answer, which he made a cross-bill, and admitted therein that he sold the land to Riggans, for the consideration, and received from him his notes for the purchase money and a deed of trust to secure the same, as alleged in the complaint of Driver. He does not deny the appointment of Driver as receiver and his authority to bring this action under the appointment. But he says he contracted for and secured many loans for large sums of money from The Corbin Banking Company; that these contracts and loans were usurious and void; that the notes and deed of trust sued on in this action were pledged by him with The Corbin Banking Company as a security for payment of the loans; that The Corbin Banking Company transferred the contracts for loans and the notes and deed of trust to the Real Estate Mortgage Company of the county of Cumberland, Maine, which transferred them to The Union Mortgage, Banking & Trust Company of London, England, which is now the holder thereof; and that he had fully

paid his indebtedness to The Corbin Banking Company at the time of the transfer to the Real Estate Mortgage Company.

On the 5th day of December, 1895, the receiver filed a motion to strike the answer and cross-bill of Lanier from the files of this action, upon the ground that Lanier is a defendant in the suit in which he was appointed receiver. This motion was afterwards denied by the court, to which Driver excepted.

On the 7th day of December, 1895, Lanier filed an amendment to his cross-bill, by which he made The Corbin Banking Company, The Real Estate Mortgage Company of the county of Cumberland, Maine, E. B. Hinsdale, and The Union Mortgage, Banking & Trust Company of London, Limited, defendants to the same; and asked that the deed of trust executed by Riggans be foreclosed under a decree in his favor, and for a judgment against Riggans for any part of his notes remaining unpaid after the proceeds of the sale of the land under the decree of foreclosure have been appropriated to the payment thereof.

On the 6th day of May, 1896, the Union Mortgage, Banking & Trust Company demurred to the cross-bill of Lanier, which was by the court overruled; and the demurrant refused to plead further.

An order was made by the court in this action, which bears no date, but appears in the transcript after the order overruling the demurrer to Lanier's cross-bill. By it the court ordered "that the cases of John B. Driver, receiver, against Martha Ferguson, et al., James Keyler, et al., George Joiner, Dilcey Pierce, et al., Morris & Jackson, Eli Jones, Alex Gable, Joshua B. Dillingham, Addison Tole, J. H. Myers, et al., George Thomas, et al., E. M. Geter, et al., T. A. Barton, et al., and William Williams," thirteen cases in all, which were pending in the Mississippi circuit court on the equity docket, the same court in which this action was at the time pending, be tried with and abide the determination of the issues in this action, and the final decree rendered herein shall be entered in the same.

On a day not shown in the record in this court, a final decree was rendered, in which it is stated that this cause was heard "on the bill of the receiver herein and the answer and

cross-bill of F. R. Lanier;" and that the court found that the notes of the defendant, Riggans, sued on herein, were payable to F. R. Lanier; that Lanier pledged them to the Corbin Banking Company, as collateral security for certain loans from the Banking Company to Lanier; that the notes were pledged "by a special and restrictive indorsement on each, which destroyed their negotiability;" that the Banking Company wrongfully attempted to transfer the notes to the Real Estate Mortgage Company of Maine, which likewise attempted to transfer them to the Union Mortgage, Banking & Trust Company, one of the parties to this action; that the attempted transfers did not pass the title; that the indebtedness of Lanier to the Banking Company was fully paid by Lanier before the attempted transfers; that the notes are the property of Lanier; that there is now due from Riggans to Lanier, on the notes, $1,012.37; and that the notes are secured by a deed of trust, as stated in the receiver's complaint. Upon these findings, the court ordered "that the bill of the receiver be dismissed, and said receiver be discharged from this suit," and that Lanier recover from Riggans the $1,012.37, and that the land described in the deed of trust be sold; to all of which findings and decree John B. Driver, receiver, and the Union Mortgage, Banking & Trust Company excepted at the time, and prayed an appeal to this court, which was granted.

On the second day of March, 1897, the appeal was completed by the filing of an authenticated copy of the record in the action in this court. On the 13th of December, 1897, Felix R. Lanier, appellee, moved to dismiss the appeal of Driver, because he was discharged as receiver by the court in the suit in which he was appointed before his appeal was prayed or granted. To prove the truth of his motion, he filed a certified copy of what purported to be an order made by the Mississippi circuit court, in equity, on the 10th of December, 1896, in the action of M. E. Graham et al., against Felix R. Lanier et al. and F. R. Lanier, cross-complainant, against Union Mortgage, Banking & Trust Company, discharging John B. Driver, who had been appointed receiver therein, because he had fully discharged the duties of such receiver, and there was no further need of his services in that capacity.

We have found it necessary, on account of defective pleadings and an imperfect record, to state the facts in the manner we have. This was necessary to show the undisputed facts in the case, and the manner in which they appear, and the reasons upon which we have based our conclusions as to the facts in the case.

From this statement we find the complaint of John B. Driver, as receiver, substantially alleges that he was appointed such receiver in M. E. Graham, Executor, against Felix R. Lanier, The American Freehold Land Mortgage Company, of London, Limited, the Corbin Banking Company, The Union Mortgage, Banking & Trust Company, Limited, of London, England, et al., and was ordered to collect the notes sued on in this action, and hold the proceeds of his collection, subject to the orders of the court, for the purpose of protecting, among others, the adverse claimants of said notes. These facts were expressly or impliedly admitted by Riggans and Lanier in their respective answers. They are not denied by any party to the action, and are undisputed facts. Lanier admits that the notes were executed to him, and alleges that he transferred them to The Corbin Banking Company, as collateral security, and that they transferred them to the Real Estate Mortgage Company, of the county of Cumberland, Maine, and they transferred them to The Union Mortgage, Banking & Trust Company of London, England, which is now the holder thereof, but that they lawfully belonged to him, thereby showing, in connection with the undisputed facts above stated, that he and the last-mentioned company are the adverse claimants of the notes in the suit in which Driver was appointed receiver. The allegations of his answer and cross-complaint preclude the idea that there were any other claimants.

The cause was heard upon the complaint of Driver, as receiver, and the answer and cross-complaint of Lanier, and the complaint of the receiver was dismissed, and he was discharged from this action; to which Driver, as receiver, at the time excepted and prayed an appeal. The discharge of the receiver was not pleaded or set up as a matter of abatement or defense in this action, as shown by the record.

If the receiver was discharged before the appeal of Driver was prayed for or granted. the presumption is that he was dis-

charged before the final decree was rendered, and while this action was pending in the circuit court, because he (Driver) excepted and prayed an appeal at the time the decree was rendered, and no time intervened between the decree and the prayer for the appeal in which an order could have been made. In that case appellee could have taken advantage of the discharge while the action was pending in the circuit court. But he failed to do so. The cause was heard and finally disposed of by the circuit court upon the theory that Driver was receiver. He (Lanier) cannot avail himself of it in this court, and it would be manifest injustice to the parties in this and thirteen other cases, for whose protection he was appointed, to allow him to do so. *McDonald* v. *Hooker*, 57 Ark. 632; Elliott, Appellate Procedure, § 489, *et seq.*

The appointment of John B. Driver, receiver, in an action in which M. E. Graham, executor, et al., were plaintiffs and Felix R. Lanier, The Corbin Banking Company, The Union Mortgage, Banking & Trust Company, Limited, of London, England, and others were defendants, is unquestioned. The presumption is that it was a valid appointment, and that the notes sued on were involved in litigation in the action in which the appointment was made. The notes being in the hands of the receiver, the presumption is that he was lawfully in possession. Lanier, in his answer and cross-complaint, does not undertake to show that this possession is unlawful, but admits that the notes were executed to him, and for the consideration as stated in the complaint of the receiver, and alleges that they were transferred to The Corbin Banking Company, and the Union Mortgage, Banking & Trust Company, Limited, of London, England. Felix R. Lanier and companies bearing the same names as the two last-mentioned companies were defendants to the action in which the receiver was appointed. The presumption, under the circumstances, is that Felix R. Lanier, who was a party defendant in this and that action, was the same person. This presumption is not rebutted, so far as we have discovered, by a single allegation in any of the pleadings in this action. We therefore conclude that he is the same person.

Driver, by virtue of his appointment, succeeded, for the purposes of litigation, to all the rights which Lanier had to the

notes in controversy, as well as to all rights thereto of all the other parties to the action in which he was made receiver, and he, under the orders of the court, and no other person, until he was discharged, could maintain an action to enforce such rights. High, Receivers (3 Ed.), §§ 201, 205; *Davis* v. *Ladoga Creamery Co.*, 123 Ind. 222, and cases cited. And, under the statutes of this state, he can sue in his own name. Sand. & H. Dig. § 5968.

The order making Lanier defendant in this action, and the final decree of the circuit court, are therefore reversed, and the cause is remanded, with directions to the court to dismiss the cross-complaint of Lanier and strike his answer from the files in this action, and for other proceedings consistent with this opinion.

BUNN, C. J., absent; RIDDICK, J., disqualified.

HODGES v. NALL.

Opinion delivered January 21, 1899.

1. REPLEVIN—WHEN DOES NOT LIE.—Where, in replevin for some cows which defendant agreed to sell plaintiff, it appeared either that defendant delivered them to plaintiff at the time the agreement was made, and was not afterwards in possession of them, or that he failed to complete the sale by making delivery, replevin will not lie in either case, though in the latter case defendant might be liable on his contract for failure to deliver. (Page 138.)

2. SAME—DAMAGES.—If a defendant in replevin has sustained damages by being wrongfully arrested, under Sand. & H. Dig. § 6388, for having concealed the property in suit, he cannot recover damages therefor in the action of replevin. (Page 140.)

Appeal from Hot Springs Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

The appellee recovered a judgment in replevin against the appellant for two cows.

It appears, from the evidence of the appellee in this case, that (to use his own language): "I sold unconditionally to the defendant, B. F. Hodges, the right to sell a certain trap, patented May 7, 1889, No. 402,589, in Grant county, Arkansas, for the consideration, two cows, one running in the range west of the Saline river, near Horton Webb's, known as the Dock Sandford cow, which was white and red pied, and the other roved about the defendant Hodges, at Prattsville, on the east side of the river,—a black muley bell cow,—which he pointed to me as one of the cows traded me. This cow was pointed out to me at the time we traded. The one near Mr. Webb's he would not be responsible for, as she might be drowned; but the other one he wanted me to leave with him for a while, as she was the leader. Defendant also agreed to assist in getting up the cows when I should send for them." He further also testified: "It was distinctly understood that they were sold and delivered at the time in the range, where they were running." He also testified: "I don't know that defendant ever exercised any ownership over the cows after he traded them. I know he refused to give them up." It was shown by the testimony of the constable that the cows were on the range when he went to serve the writ,—that they were not found in the possession of the defendant.

The court refused to give the following instructions asked by appellant as the law in the case to-wit:

"No. 1. The jury are instructed by the court that the plaintiff claims the title to the property in question by purchase of defendant; and unless the jury believes from the evidence that defendant sold plaintiff the cattle in controversy, and delivered them to him at the time of the purchase, or subsequent thereto, and before the institution of this suit, your verdict should be for the defendant.

"No. 2. The jury are further instructed that if they believe from the evidence that the cattle in controversy were sold by defendant to plaintiff, and that they were constructively delivered in the range as they then ran, and at the time of the institution of this suit, the defendant did not have possession of the cattle, or either of them, then your verdict should be for the defendant.

"No. 3. The jury are instructed that, before the plaintiff can recover in this action, he must prove by a preponderance of the evidence that, at the time of the commencement of this suit, he was the owner of the property in question, or of some one of them, and that he was entitled to the immediate possession thereof, and that he must also further prove by a preponderance of the evidence that defendant had possession of the property at the commencement of this action, and that he wrongfully detained them from the plaintiff after a demand was made upon him for the property by said plaintiff; and, unless you so find from the evidence, your verdict should be for the defendant.

"No. 4. The jury are further instructed that if they believe from the evidence that there was a conditional sale by defendant to plaintiff of the property in question, and that the cattle were to be thereafter delivered, and were not delivered, then the court tells you there was no sale of the cattle by defendant to plaintiff; and your verdict should be for the defendant, and for the cattle or their value.

"No. 5. The jury are further instructed that if they believe from the evidence that the cattle in controversy were delivered in the range at the time of the purchase, and believe at the time of the institution of this suit that said cattle were running in said range, and that plaintiff instituted this suit, and had defendant arrested, for the purpose of coercing him to deliver said cattle, then, in such event, you will assess the damages of defendant at such a sum as you think the evidence in this case will warrant you in finding for him, by reason of the allegations of plaintiff charging defendant with having secreted the cattle, having him arrested and depriving him of his liberty.

"No. 6. The jury are further instructed that if they believe from the evidence that at the time this suit was instituted that the cattle, nor either of them, were in the possession of defendant, but were running at large in their range, and where the constable afterwards found them, then, notwithstanding you may believe from the evidence that plaintiff purchased the cattle in question, and at the time of such purchase the cattle

were constructively delivered in the range as they ran, your verdict should be for defendant.

"No. 7. If the jury believe from the evidence that defendant conditionally sold the cattle in controversy to plaintiff for a certain patent rat trap, and the right to sell the same in Grant county, and was to get the cattle up and deliver them within two or three weeks, provided the rat trap proved to be as good as recommended by plaintiff, and afterwards refused to get up and deliver said cattle, then your verdict should be for the defendant."

At the court refusing to give the foregoing instructions, the appellant at the time properly saved his several, separate exceptions.

E. H. Vance, Jr., for appellant.

A sale is not complete, so as to vest in the vendee the immediate right of property, so long as anything remains to be done between the buyer and seller in relation to the property sold. Story, Sales, § 269; p. 239; 25 Ark. 545; 54 Ark. 307; 56 Ark. 98; 59 Ark. 641; 27 S. W. 31. In tendering back the property, appellant did all his contract called for. Story, Sales, § 313, p. 252; 1 Beach, Cont. §§ 792–3. The court erred in refusing and giving instructions. It was also error to permit appellee's attorney, in his argument to the jury, to refer to matters not in the evidence. 63 Ark. 174; 65 Ark. 619. If the cows were constructively delivered to appellee, they were not *detained* by appellant. 17 Ark. 449; 25 Ark. 11; 27 Ark. 184.

HUGHES, J., (after stating the facts.) The evidence in the case tended to show either that the cows were delivered to the appellee at the time of the trade, and were never afterwards in the possession of the appellant, or that the appellant had only agreed to deliver them, but did not. It follows that if the cows were delivered to the appellee, and were not afterwards in the possession of the appellant, replevin would not lie against the appellant. If appellant agreed to deliver the cows, but never did so, the sale was not complete for want of delivery of the property sold; and in this event replevin would

not lie against the appellant, though he might be liable on his contract for failure to deliver the property.

It follows that the circuit court erred in refusing to give instructions asked by defendant and numbered 1, 2, 4, 6 and 7, and in modifying instructions No. 3 and giving it as modified, and in not giving it as asked. See *Jones* v. *Pearce*, 25 Ark. 545; *Shaul* v. *Harrington*, 54 Ark. 307; *Hight* v. *Harris*, 56 Ark. 98; *Wallace* v. *Brown*, 17 Ark. 449; *Hill* v. *Fellows*, 25 Ark. 11; *Neis* v. *Gillen*, 27 Ark. 184. There were no instructions curing the failure to give these.

There was no error in refusing to give the 5th, as, if the appellee is entitled to damages for wrongful arrest, they are not recoverable in this action.

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

RIDDICK, J., and BUNN, C. J., absent and not participating.

ST. FRANCIS COUNTY *v.* ROLESON.

Opinion delivered January 21, 1899.

JUDGMENT OF COUNTY COURT—CONCLUSIVENESS.—An action will not lie before a justice of the peace to recover the amount of a claim against a county which had been allowed by the county court and paid by the county. (Page 140.)

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

This case was appealed to this court from St. Francis circuit court under an agreed statement of facts, which was made part of the record, and which we copy verbatim from the record, as follows:

"In the St. Francis circuit court, St. Francis County v. R. F. Roleson. It is agreed that the defendant was the regular

prosecuting attorney of this court, and represented the State of Arkansas in the prosecution of the case of the State of Arkansas against James Cannon, in St. Francis circuit court; that said Cannon was convicted of murder in the first degree, and sentenced to be hanged; that afterwards, on appeal to the supreme court, the judgment of the circuit court was reversed, and the cause remanded; that, before the reversal of said cause in the supreme court, the defendant, H. F. Roleson, presented to the county court of St. Francis county his account for the fee, which had been certified as correct by the circuit court, and, after having been considered and examined by the county court in the term time, was allowed and ordered paid in the sum of $75 for the same; that demand has been made on him for a return of the amount, and he has refused to return it. [Signed] St. Francis County, by John T. Hicks, prosecuting attorney; H. F. Roleson."

The county brought suit against a justice of the peace for the said $75, and judgment was awarded the defendant Roleson, whereupon the county appealed to the circuit court, where, after trial, judgment was again given for the defendant, whereupon the plaintiff appealed to this court.

E. B. Kinsworthy, Attorney General, and *Chas. Jacobson* for appellant.

A *verdict of guilty*, without a final and valid judgment thereon, is not a *conviction*, within the meaning of the statutes (Sand. & H. Dig. 3304) giving a prosecuting attorney a stated fee for each *conviction, etc.* 47. Ark. 443; Rap. & Law. Law Dict.—"*Conviction;*" Black's Law Dict.; 58 Ark. 161; 48 Me. 123; 14 S. & R. (Pa.) 69; 6 Lea, 637; 52 N. Y. 593; 64 N. Y. 47; 69 N. Y. 107; 10 S. & M. (Miss.) 192, 236; 1 N. Y. Civ. Pro. 47; 99 Mass. 420; Cowp. 1, 3; 2 Mass. 106; 1 Ill. 311; 10 Tex. Cr. App. 469; 24 Fla. 153; 15 East, 570; 79 Va. 616.

H. F. Roleson, pro se.

A judgment of the county court cannot be reviewed in a justice of the peace court.

HUGHES, J., (after stating the facts.) Certainly the judgment of the county court allowing this claim could not be

disregarded or held for naught, in an action brought before a justice of the peace to recover the amount of a claim which had been allowed by the county court, and paid by the county. A judgment of the county court cannot be reviewed by a justice of the peace. If the judgment was erroneous, it might have been reviewed on appeal. If fraudulently obtained, it might have been set aside for fraud by bill in chancery. Constitution of 1874, art. 7, § 51; Sand. & H. Dig. §§ 1264, 1265, 1266; *Pettigrew* v. *Washington Co.*, 43 Ark. 33. In a case where it appears the county had no authority or discretion to allow a claim against the county, the order of allowance may be quashed on certiorari. See *State, use of Izard County* v. *Hinkle*, 37 Ark. 532.

Judgment affirmed.

McCONNELL v. SWEPSTON.

66 141
71 393

Opinion delivered January 21, 1899.

1. ADVERSE POSSESSION—TAX-TITLE.—Two years' continuous adverse possession of land under a tax deed is sufficient, under Sand. & H. Dig. § 4819, to confer an indefeasible title, unless there is a right to redeem, under Sand. & H. Dig. § 6615. (Page 144.)

2. TAX-SALE—RIGHT TO REDEEM—ASSIGNMENT.—While the right given to a minor by Sand. & H. Dig., § 6615, to redeem his land from a tax-sale passes to his vendee, it will not pass to one who has purchased a minor's equity of redemption in his ancestor's land at a foreclosure sale of a mortgage given by such ancestor. (Page 144.)

Appeal from Mississippi Circuit Court in Chancery.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

On the 16th of March, 1886, one B. F. McConnell and his wife executed a mortgage on certain lands to Hill, Fontaine & Co. The mortgagor, McConnell, died in December, 1887, leaving a widow and minor heirs. Suit was begun in 1891 to foreclose the mortgage. The widow and minor heirs of McConnell

were made parties, and were properly before the court. Decree of foreclosure was properly rendered in 1894, and the lands in controversy ordered sold. Accordingly, the lands were duly sold in 1894, and Hill, Fontaine & Co. were the purchasers. Afterwards Jerome Hill and J. H. Martin, then members of the firm of Hill, Fontaine & Co., conveyed their interest in said lands to N. Fontaine and N. Hill, defendants and cross-complainants in this suit. In December, 1895, a writ of possession issued from the circuit court requiring the sheriff to dispossess Mrs. E. G. McConnell, the mortgagor aforesaid, of the lands mentioned, and to deliver possession of same to N. Fontaine and N. Hill in pursuance of the decree of foreclosure above mentioned in case of Hill, Fontaine & Co. v. Mrs. E. G. McConnell et al.

This suit was instituted by the appellant, W. H. McConnell, to enjoin the enforcement of said writ. The plaintiff set up that he was the owner of the lands of which possession was thus sought by virtue of tax deeds executed in 1891. He claimed that the lands were sold in 1889 for the taxes of 1888, and that one Smith became the purchaser, who transferred his certificate of purchase to the plaintiff, and that plaintiff obtained from the clerk the tax deeds. He further claimed that said lands had been, ever since the obtaining of said deeds, held by him as the owner for more than two years.

The defendants, Hill and Fontaine, in their answer admit that the lands were sold for the non-payment of the taxes of 1888, but allege that the sale was void for various reasons (unnecessary to set out), and deny that plaintiff had been in the possession of said land as claimed, and deny that he was the owner thereof; allege that plaintiff did not buy the lands in good faith, but that said lands were bought for the widow and minor heirs, etc. The answer further set up the payment of taxes by defendants (appellees) from 1890 to 1895 inclusive. And by way of cross-complaint the defendants set up their title as derived through the foreclosure proceedings above mentioned. And they alleged that they had offered to redeem said lands from plaintiff, and that he had refused to allow them to redeem. They set up that the heirs were all still minors except one, and that two years had not expired since he attained his

majority, and they claimed the right to redeem, and prayed to be allowed to do so.

Plaintiff, in answer to cross-complaint of defendants, denied all the material allegations thereof.

The trial court adjudged that said tax sale, and deeds in pursuance thereof, were void, but that plaintiff had been in possession for more than two years under said tax deeds; further, that the defendants should be allowed to redeem said lands; and accordingly granted the prayer of their cross-complaint in that particular.

Both sides appealed, the plaintiff below from the decree allowing the defendants and cross-complainants the right to redeem, and the defendants below appealed from so much of the decree as held that the void tax deeds were not a meritorious defense to plaintiff's complaint.

W. G. Weatherford, for appellant.

Adverse possession for two years, under tax deeds proper in form, bars recovery. 59 Ark. 450; 60 Ark. 163; *id.* 499. The mortgagees had the right to redeem within two years. 39 Ark. 584; 42 Ark. 221. The purchaser at foreclosure sale gets only such title as the mortgagor had. 8 Am. & Eng. Enc. Law, 273; Jones, Mortg. § 1654. The privilege of a minor to redeem within a certain period after becoming of age does not pass to any except the minor's own vendees. 49 Ark. 553; 52 Ark. 145; 21 Ark. 319.

W. D. Wilkerson, for appellees.

The tax sale and deed were void because the tax was in excess of the legal amount. 32 Ark. 416; 42 Ark. 100; 56 Ark. 93; Sand. & H. Dig. § 6416. The minor's right of redemption within two years after majority is not a personal one, but extends to the vendee of the minor. 49 Ark. 551; 35 Ia. 47; 39 Ark. 584; Cooley, Tax Tit. 366; Blackwell, Tax Tit. 420; 25 Am. & Eng. Enc. Law, 411.

WOOD, J., (after stating the facts.) The allegation of the answer that plaintiff did not buy said lands in good faith was not sustained by the proof. The proof tended to show that plaintiff had been in possession of the lands under his tax

deeds continuously and adversely for more than two years before the filing of the answer and cross-complaint of the defendants. The allegations of the cross-complaint and the answer thereto show clearly that, considering defendants in the light of cross-complainants, this was a suit by them for the possession or recovery of the lands in controversy. The court therefore did not err in holding that cross-complainants were not entitled to recover, notwithstanding the invalidity of the tax deeds under which the plaintiff claimed. The two years' possession under said deeds gave plaintiff the title, unless the defendants had the right to redeem. *Cooper* v. *Lee*, 59 Ark. 450; *Woolfork* v. *Buckner*, 60 Ark. 163; *Finley* v. *Hogan*, 60 Ark. 499.

Did defendants below have the right to redeem? They assert such right as purchasers under the mortgage foreclosure, by which they claim to have succeeded to the rights of the minor heirs to redeem from the tax sale.

The title which the purchasers acquired at the sale under the mortgage foreclosure was in exclusion of the minors, and in spite of them. The title thus acquired was not from nor under the minors at all. The foreclosure proceedings as to the minors was *in invitum*. They did not voluntarily part with any interest that they might have had in the land. They had no interest in fact, except an equity of redemption, for their father had conveyed same by mortgage. The purchasers at the mortgage sale succeeded to all the rights of the mortgagor. The title they acquired was only such title as the mortgagor had at the time of the execution of the mortgage. The mortgagor himself, had he been living, could not have redeemed from the tax sale after two years. Neither could the defendants, who succeeded to the rights and title he had at the time the mortgage was executed.

This court in *Neil* v. *Rozier*, 49 Ark. 551, held that the right of redemption, under § 5772, Mansf. Dig. (§ 6615, Sand. & H. Dig.), is not personal to the minor, but may be enforced by his vendee. But, as explained by this court in *Bender* v. *Bean*, such conclusion was reached only by virtue of the statutory recognition of the minor's vendee; otherwise, it would have been held that the privilege was strictly personal.

Bender v. *Bean*, 52 Ark. 145. The right to redeem is not an estate in the lands, but only a statutory privilege to defeat the tax purchaser's title within a limited time. It passes to the vendee of the minor, but it can be exercised only by one to whom the minor has voluntarily transferred his interest, and not by one who has acquired the estate in opposition to the minor. Only the benefit to accrue to the minor was in the mind of the legislature when it passed the act.

The court finds, and the evidence shows, that the defendants, cross-complainants below, paid the taxes on the lands in controversy for the years 1890 to 1895, inclusive. Cross-complainants are therefore entitled to a judgment for these taxes, and to have same declared a lien upon the land.

Reversed and remanded, with directions to proceed in accord with this opinion.

WINKLER v. MASSENGILL.

Opinion delivered January 28, 1899.

UNLAWFUL DETAINER—PLEADING.—A complaint which alleges that defendant surreptitiously, and by collusion with plaintiffs' tenant, entered upon and took possession of plaintiffs' land, and forcibly holds same, although plaintiffs have made demand in writing for possession, states a good cause of action in unlawful detainer, under Sand. & H. Dig. § 3444, providing that every person who shall peaceably and unlawfully obtain possession of any lands, "and shall hold the same wilfully and unlawfully after demand made in writing for the delivery or surrender thereof, * * * shall be deemed guilty of an unlawful detainer." (Page 147.)

Appeal from Arkansas Circuit Court.

JAMES S. THOMAS, Judge.

STATEMENT BY THE COURT.

This is a suit for the immediate possession of an 80-acre tract of land in Arkansas county, by the appellants against the appellee. Demurrer to the complaint sustained, and, plaintiffs

declining to plead over, judgment for defendant, and plaintiff appealed.

Omitting the merely formal parts, the complaint is as folfows, to-wit:

"That, [at] the time hereinafter mentioned, the plaintiffs were in the peaceable and actual possession of the north half of the northwest quarter of section five, township four south, range six west, and the dwelling house and buildings thereon situate. Said premises are in Arkansas county, state of Arkansas. Said plaintiffs have been in possession of the premises above described from 1893 to 1896 inclusive; have maintained a substantial fence around same, and kept the buildings in good repair, and kept a tenant thereon, during all the time above mentioned. Said plaintiffs' grantees have been in possession of said land since 1889. On January 1, 1896, plaintiffs leased said premises to one Louis Boggy for the term of one year, or to January 1, 1897, and said Boggy entered thereon. Said lease is in the form of a rent note, and, when said note was paid, it was turned over to said Boggy. So said note, or a copy thereof, cannot be exhibited with this complaint. That on the 28th day of December, 1898, and before said Boggy's lease had expired, the defendant surreptitiously and by collusion with Boggy, the said tenant, entered on the premises, and took possession thereof, contrary to the form of the statute. Said defendant says that he holds under lease from F. M. Quertemous, who purports to be the agent of Mary Boggy, a minor sister of Louis Boggy, the tenant above mentioned, and who lived with Louis Boggy upon said premises, and as one of his family. Said defendant forcibly and unlawfully holds and keeps possession of said land and tenements, and has so held and kept possession of the same at all times since the 28th day of December, 1896, although possession has been demanded and the same has been refused. Notice to quit was also served on defendant. A copy of said notice is herewith filed, marked 'Exhibit B,' and made part hereof. Plaintiffs state that they are lawfully entitled to the possession of said land above described; that, in consequence of said acts, the plaintiffs have been deprived of the rents and profits of said lands, to their damage in the sum of $50, having leased said premises to

Henry Dunlop, for the year 1897, for said sum. Therefore plaintiffs pray judgment for the possession of said premises, for $50 damages, and for all their costs in this action expended."

Upon the filing of the complaint and the proper bond, the writ of possession was issued, and in due time the defendant filed his bond to retain possession. To the complaint the defendant interposed a general demurrer at first, but then withdrew the same to file certain preliminary motions, which having been disposed of, his demurrer was renewed, and on argument and consideration it was sustained, and plaintiffs rested, and judgment was rendered for defendant, and plaintiffs appealed.

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

The complaint was sufficient if it stated that either the entry or detainer was forcible. 27 Cal. 375; *ib.* 502; 2 N. H. 550; 4 Bibb, 501; 6 J. J. Marsh, 464; 40 Ark. 192; 41 Ark. 535; 8 Am. & Eng. Enc. Law, 109, 110; 2 Treadw. (S. C.) 489; 45 Cal. 597.

BUNN, C. J., (after stating the facts.) The question in this case is whether or not the complaint makes out a case of forcible entry and detainer, or of unlawful detainer, under the statute; and if either, which one, since, for the purposes of the demurrer, the statements of the complaint are to be taken as admittedly true.

Without stopping to consider whether or not the case presented would be one of forcible entry and detainer were it made to appear that the entry of the defendant was entirely disconnected from any act of Louis Boggy, the tenant of the plaintiff, and rested solely on his contract with Mary Boggy, a third party, we will consider the holding of the defendant to be under Louis Boggy, plaintiffs' tenant, since it is alleged that, by collusion with said tenant, he entered into and holds, etc. Viewing it in this light, the complaint makes out a clear case of unlawful detainer, since it must be admitted that the tenant, Boggy, had lawful right to admit the defendant in as his sub-tenant, to hold until his lease should expire; and for that reason the entry of the defendant was lawful and peaceable.

The third section of the 70th chapter of Sand. & H. Dig.,

styled "Forcible Entry and Detainer," reads as follows, to-wit: "Sec. 3444. Every person who shall willfully and without right hold over any lands, tenements or possession after the determination of the time for which they were demised, or let to him or the person under whom he claims, or who shall peaceably and lawfully obtain possession of any such and shall hold the same willfully and unlawfully after demand made in writing for the delivery or surrender thereof by the person having the right to such possessions," etc.

The demand was properly made, according to the statement of the complaint; and while it may be technically said that the defendant did not claim under the tenant, Boggy, yet he entered by his permission, and his obtaining of possession was peaceable and lawful, and his refusal to surrender after proper demand made brings the case squarely within the conditions of unlawful detainer, as defined in the section quoted. The complaint therefore stated a good cause of action, and the demurrer should have been overruled.

For the error in sustaining the demurrer to the complaint, the judgment is reversed, and cause remanded, with directions to overrule the demurrer, and proceed.

HONNETT v. WILLIAMS.

Opinion delivered January 28, 1899.

1. TRUST—RIGHT OF BENEFICIARY TO CONVEY INTEREST.—Where a grandfather conveyed certain land to his son and his wife as trustees for the sole separate use and benefit of their children then living, and of any issue they might thereafter have, free from the debts of such trustees, except that they might appropriate the rents and profits of the land for the support of themselves and their children, a mortgage executed by the surviving trustee and by such of the children as were of age will convey the shares of such adult children freed from any charge for such trustee's sustenance. (Page 152.)

2. RATE OF INTEREST—ACCOUNT.—When a mortgage given to secure an account provided that the items of the account which were for money advanced should bear interest at the rate of 10 per cent., while other items should bear only 6, interest will be allowed at the latter rate only

in a suit to foreclose the mortgage if the plaintiff fails to separate the items of money advanced from the other items of the account. (Page 155.)

Appeal from Jefferson Chancery Court.

JAMES F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

The facts in this case are as follows: One Willoughby Williams, Sr., being the owner of land in Jefferson county of this state, conveyed the same to his son, Willoughby Williams, Jr., and the wife of his son, Anna H. Williams, by the following deed:

"This deed, made and entered into this, 29th day of May, A. D. 1877, by and between Willoughby Williams, Sr., of the county of Davidson, in the state of Tennessee, as party of the first part, and Willoughby Williams, Jr., Anna H. Williams, his wife, of the second part, and Andrew F. Williams, Nannie W. Williams, Harry McLemore Williams, and Alex N. Williams, children of the parties of the second part, and any issue from them (the said parties of the second part) they may hereafter have, parties of the third part, witnesseth, that the said party of the first part, for and in consideration of love and affection to the parties of the third part, and the sum of five dollars to him in hand paid by the said parties of the second part, the receipt of which is hereby acknowledged, does by these presents give, grant, bargain, sell and convey and assign to and with the said parties of the second part the following described real estate lying and being situated in Jefferson county in the state of Arkansas, and known as the southwest quarter of section 3, the northwest quarter of section 10, and that part of the southwest quarter of section 10 north of King's bayou, in township 6 south, of range 7 west, containing four hundred acres, more or less. To have and to hold the same, with all and singular the rights, privileges and appurtenances thereunto belonging or in any wise appertaining, unto the said parties of the second part, their heirs and assigns forever, in trust to and for the sole and separate use, benefit and behoof of Anne F., Nannie W., Harry McLemore, and Alex N.

Williams (and any issue they, the parties of the second part, may hereafter have), children of the said parties of the second part, free from debts, demands or liabilities of the said parties of the second part, or their control, further than the use and appropriation of the rents and profits of the said land for the sustenance of themselves and the support, education and maintenance of the children aforesaid, and of any issue they may hereafter have. They, the said parties of the second part, may, however, whenever they may deem it wise to do so, without the intervention of any court, sell and convey in fee simple said real estate, and reinvest the proceeds of said sale for the sole separate use and benefit of said children of the said parties of the second part, and any issue they may hereafter have, free from the debts and liabilities of the said parties of the second part. The said party of the first part hereby warrants and defends the title to said lands to the said parties of the second and of the third part against the lawful claims of all parties whomsoever. In testimony whereof the said party of the first part hereunto affixes his hand and seal this day and year above written. WILLOUGHBY WILLIAMS."

After the execution of this deed another child, John N. Williams, was born to Willoughby Williams, Jr., and Anna H. Williams, and is a beneficiary under the terms of the trust deed. Willoughby Williams, Jr., the husband of Anna H. Williams, died in 1892. At the time of his death, he and his wife were indebted to appellants, Honnett & Weil, in the sum of about $500 for supplies and money furnished them for the use of themselves and family, and for the cultivation of the lands held in trust by them. To secure the payment of this debt, and also to secure means to cultivate said land in 1893, and for their support and maintenance, the appellees, Anna H. Williams, Andrew F. Williams, Henry McLemore Williams, Alexander N. Williams and Nannie W. Williams, on March 24, 1893, executed a promissory note to Honnett & Weil for the sum of $500 due November 15, 1894, and also executed a mortgage on the lands mentioned to secure said note and supplies to be advanced. Honnett & Weil made advances of supplies and money during 1893, and afterwards, on 2d of Janu-

ary, 1895, brought this action to foreclose the mortgage, and to recover the sums on the note and account.

The chancery court gave judgment against the appellees for the sum of $1,385, the amount due on note and account, but adjudged that the mortgage was void by reason that appellees had no power to charge said land with the debts sued on.

I. Reinberger and *Crawford & Hudson*, for appellants:

Restraints upon alienation are not countenanced now, and can not avail to give a man an estate free from claims of his creditors. Gray, Restraints on Alienation (2 Ed.), § 4; *ib.* pp. 105, 119; Const. Ark. (1874), art. 2, § 19; 4 Kent's Comm. 266; 8 Ark. 302; 6 Ark. 109; 125 Mass. 263; Lewin, Trusts, 97, 98; Perry, Trusts, §§ 386, 386*a*; 2 Story, Eq. § 974, 974*a*; Underhill, Trusts, 67–73; 1 Dembitz, Land Tit. 103, 165; 57 Pa. 236; 26 S. W. 813; 12 *ib.* 1035; 24 S. W. 343; Sand. & H. Dig. §§ 696, 3049. There being no express restraint on alienation in the deed, none can be implied. 125 Mass. 356; 71 Mass. 336. The right of the heirs was a vested one. Bouvier's Dict. title "To vest"; Fearne, Rem. 2. There can be no inalienable equitable fee. 57 Pa. 236; 2 Am. & Eng. Dec. Eq. 634. The trustee had power to mortgage the trust estate. 27 Am. & Eng. Enc. Law, 138, note 2; *ib.* 136; 75 Ga. 130; 68 Ia. 255; 36 N. J. Eq. 169; 52 L. T. N. S. 494; 1 Rawle, 231; 151 Pa. St. 323; 14 W. N. C. (Pa.) 76; 22 Ont. Rep. 560; 160 Pa. St. 95. A future interest in lands can be conveyed, and is subject to the payment of debts. Sand. & H. Dig. § 701–2; 14 Ark. 489; 17 Ark. 674; 125 Mass. 263.

D. H. Rousseau and *Austin & Taylor*, for appellees.

The owner of property has a right to provide that the rents and profits of his estate shall go to his children, and that the estate shall be not subject to the payment of their debts, if they should be improvident or unfortunate; and, in such a case, it is not necessary that the instrument declare in terms that the property is to be held free from creditors, if such intent is sufficiently manifest. 4 Fed. 136; 59 Fed. 923; 135 Pa. St. 585; 8 Bush, 661; 79 Ky. 5. The trustee and the adult beneficiaries had no power to, sell as long as there was a minor with an indefinite interest. Gray, Restraints or Aliena-

tion, § 116; 5 W. & S. 323; 36 Pa. St. 338; 2 W. N. C. 533; 133 Pa. St. 342; 46 Pa. St. 392; 59 Pa. St. 393; 67 Pa. St. 473; 49 Pa. St. 213; 80 Pa. St. 348; 2 Rawle, 33; 7 Watts, 547; 4 Allen, 566; 111 Ill. 247; 143 Ill. 301; 66 Md. 436; 30 Vt. 338; 45 Vt. 24; 59 Vt. 530; 20 Mo. App. 616; 96 Mo. 439; 10 Gratt. 336; 11 Gratt. 552; 28 Gratt. 192; 87 Va. 758; 2 Lowell, 575; 91 U. S. 716. The note was given for a past consideration, and is unenforceable. Beach, Mod. Law, Cont. §160; 21 Ark. 18.

RIDDICK, J., (after stating the facts.) This is an action to foreclose a mortgage. The main question presented for our consideration is whether the mortgagors had power to execute a valid mortgage upon the lands mortgaged. The land in question was owned by Willoughby Williams, Sr., who conveyed it to his son, Willoughby Williams, Jr., and Anna H. Williams, the wife of his son, in trust for their children, "free from the debts or liabilities" of the said Willoughby Williams, Jr., and Anna H. Williams, "or their control, farther than the use and appropriation of the rents and profits of said lands for the sustenance of themselves and the support, education and maintenance of the children aforesaid." Four of the children and their mother, Anna Williams, joined in the execution of the mortgage to appellants. If they owned a vested interest in the land, they could mortgage it; for the general rule is that the beneficial interest of the *cestui que trust* in land may be sold and conveyed as other interests in property, legal or equitable. Speaking of this question, Mr. Pomeroy says that, "with the exception in reference to married women, the estate of the *cestui que trust* cannot, by any restrictions annexed to the trust, be rendered inalienable, nor can it be stripped of the other incidental rights of ownership. It is also liable for the debts of the beneficiary. It cannot be so created that, while it is subsisting, and enjoyed by the beneficiary, it shall be absolutely free from such liability. The trust may be so limited that it shall not take effect unless the beneficiary is free from debt, or that his estate shall cease upon his becoming insolvent, or upon a judgment being recovered against him, and shall thereupon vest in another person; but the *cestui que trust* cannot hold and enjoy his interest en-

tirely free from the claims of creditors." 2 Pomeroy's Equity, § 989; *Mebane* v. *Mebane*, 4 Rich. Eq. 131; S. C. 44 Am. Dec. 102; *Heath* v. *Bishop*, 4 Rich. Eq. 46; S. C. 55 Am. Dec. 654; *Brandon* v. *Robinson*, 18 Vesey (Eng.), 429.

While the rule, as thus announced by the learned author, is the settled law of England, and is followed in some of our states, it has been repudiated by the courts of other states, and also, it seems, by the supreme court of the United States.* These latter courts uphold what are sometimes called spendthrift trusts, which restrain the power of the *cestui que trust* to alien or incumber the trust property. But, while the rule in favor of spendthrift trusts has now the sanction of many learned courts, it has been condemned by certain text-writers as an innovation that has added nothing of value to the jurisprudence of those states that have adopted it. Gray, Restraints on Alienation; Wait, Fraud. Conv. §§ 364–5. The question as to the validity of such trusts has never been decided by this court, but, so far as it has been alluded to, the intimations seem to favor the old rule that, if property, either legal or equitable, be vested in one, it becomes liable to the incidents of property, and capable of being sold or conveyed by the owner, or seized for his debts, —subject, of course, to such protection as may be granted by homestead and exemption laws. *Lindsay* v. *Harrison*, 8 Ark. 302; *Phillips* v. *Grayson*, 23 *ib.* 769.

We are not required to decide the question in this case, for no restraints appear to have been placed by the deed under consideration upon the *cestuis que trust* in the matter of alienating the trust property. If, therefore, they had at the time of the mortgage any vested interests in this property under the trust deed of Willoughby Williams, Sr., there is nothing that restrains them from mortgaging the same.

At the time the mortgage which appellants ask to foreclose was executed, Willoughby Williams, Jr., was dead, and there was no possibility of further issue to the marriage of himself and Anna Williams. The beneficiaries under the deed of trust of Willoughby Williams, Sr., were determined, and each of the children of said Willoughby and Anna Williams had in equity

**Nichols* v. *Eaton*, 91 U. S. 716, and Gray, Restraints on Alienation, where the English and American cases are collected and ably discussed.

a vested estate in fee simple in said lands, subject to the right of their mother, Mrs. Anna Williams, to a support out of the rents and profits of the same during her life. After they all become of age, the five children will, under the terms of the trust deed, be each entitled to a fifth share of the rents and profits of the estate conveyed by such deed, subject to the right of their mother to a sustenance out of same. The children are now all of age, except John N. Williams. He did not join in the mortgage, and we are of the opinion that the trustee had no power to mortgage his interests, and that he is not affected by such mortgage. He is entitled, not only to a support and maintenance, but also to be educated out of the income from the trust estate. Until he arrives of age, he should have set apart for him, out of the rents and profits of the estate, an amount equal to that of the adult beneficiaries, and even greater if necessary to maintain and educate him. As to Mrs. Anna Williams, the land was conveyed to her and her husband for "the sole and separate use, benefit and behoof" of the children. If she had a beneficial interest in the land under this deed, it was a legal, and not an equitable, interest, and could be conveyed; but we are not certain that she had any interest that could have been mortgaged, had the children not joined in the deed; for her right to a sustenance out of the income seems to have been intended, not as an interest in the land, but as an emolument connected with her office of trustee. But she could join with any child in a conveyance, and thus release the share of such child from any charge for her support. Four of the five children joined with her in the execution of the mortgage under consideration, and we are of the opinion that the mortgagees have the right to foreclose such mortgage, and that the purchasers at such foreclosure sale will take the shares of such children freed from any charge for her sustenance; and this interest in the land, according to admissions of counsel for appellant, is more than sufficient to satisfy the mortgage debt.

We are also of the opinion that the personal judgment rendered against appellees is sustained by the evidence, though, in view of our conclusion that the mortgage is valid, we suppose that this is now a matter of small importance, as the mortgaged property is worth more than the debt.

We concur in the ruling of the chancery court on the question of interest. The mortgage does not, as counsel for appellant contend, provide that the account shall bear interest at the rate of ten per cent., but only that the items of money advanced shall bear such interest. Now these items of money constitute only a small portion of the account, and the amount of the money advanced is not set out in the complaint, nor separated in any way from the other items of the account. The fact that small sums of money were advanced furnished no reason why the whole account should bear interest at the rate of ten per cent. after maturity; and, as the amount of such items of money was not set out in the complaint, the court was not called on to distinguish these money items from other items in the account. The judgment as to the debt and interest is affirmed, but the judgment that the mortgage was invalid is reversed, with an order that a decree foreclosing said mortgage be entered in accordance with this opinion.

WEBB v. NEASE.

Opinion delivered January 28, 1899.

66 155
85 64

66 155
89 313

1. REFORMATION—PROOF OF MISTAKE.—Reformation of a deed of land on account of a mistake of the parties as to the extent of interest conveyed will not be decreed unless the proof of such mistake be clear and convincing. (Page 160.)

2. PARTITION AGREEMENT—CONSTRUCTION.—A widow joined with T., one of her two sons by her last marriage, in relinquishing all claim to part of her late husband's land to W., the other son, who, in consideration thereof, conveyed to her and to T., and their heirs and assigns, all his interest in the remainder of his father's land. She then made an oral agreement with T. for partition of such remainder, which was executed by delivery of possession, and afterwards died, leaving her property by will to a son by a former marriage. *Held* (1) that by his deed W. conveyed to the widow and T. each an undivided one-fourth interest in the land released by him, the title to the other half being already vested in T. subject to the widow's rights of dower and homestead therein; (2) that the oral agreement between the widow and T. should, in the absence of evidence to the contrary, be considered a recognition of the estate she already owned, and not to create a new estate in her; (3) that the

dower and homestead interests of the widow passed out at her death, leaving to be disposed of by will only the undivided fourth interest which she purchased from W. (Page 160.)

Appeal from Pope Circuit Court in Chancery.

DAN. B. GRANGER, Special Judge.

STATEMENT BY THE COURT.

Woodford C. Webb died in 1882, leaving surviving him his wife, M. P. Webb, and two sons, Woodford C. Webb, Jr., and T. J. Webb. He owned at time of his death 360 acres of land, a part of which was his homestead. The two sons coming of age, they and their mother, M. P. Webb, entered into the following agreement for a division of the land:

"Whereas, Woodford C. Webb having died on or about the —— day of ———, 1882, leaving no will or other disposition of his lands, to-wit: The southeast ¼ of section 2, township 6 north, range 18 west, and the south ½ of the east ½ of the northwest ¼, section 11, township 6 north, range 18 west, containing in all 360 acres, more or less, situated in Pope county, Arkansas. Therefore, between us, the undersigned lawful heirs of the said Woodford C. Webb, this agreement is mutually made and entered into, to-wit: By and between Mrs. M. P. Webb, widow of the said Woodford C. Webb, deceased, and T. J. Webb and W. C. Webb, Jr., sons of the said Woodford C. Webb, deceased, for and in consideration of mutual friendship and affection, as widow and sons of said deceased, for the fair, just and equitable division of the lands aforesaid; that is to say, it is hereby agreed and stipulated that the said W. C. Webb, Jr., shall take, as his part or share of the said lands, the southeast ¼ of section 2, township 6 north, range 18 west, being 160 acres, more or less. And that the said M. P. Webb and T. J. Webb shall release, relinquish, and quitclaim all their right, title and interest in and to the said lands to the said W. C. Webb, Jr. And that the said W. C. Webb, Jr., in consideration aforesaid, and also of the relinquishment of interest as aforesaid in the last described tract of land, hereby agrees to relinquish and quitclaim to the said M. P. Webb and T. J.

Webb all of his interest in and to the northeast $\frac{1}{4}$ and the south $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of section 11, township 6 north, range 18 west, being 200 acres, more or less. It is further agreed and hereby ratified that the said parties hereto shall each receive, have and enjoy the quiet and peaceable possession of their separate and respective lands, as herein agreed to be divided, free and relieved from the claims of the other party or parties, and that the one shall in no manner enter upon, use, cultivate or otherwise molest the other in such possession. In witness whereof we hereunto set our signatures this 9th day of January, 1883. Mrs. M. P. (her mark) Webb, T. J. Webb, W. C. Webb."

In pursuance of this agreement, Mrs. Webb and T. J. Webb executed a deed conveying to W. C. Webb all their right, title and interest in the 160 acres mentioned, and he, on his part, executed and delivered to them the following deed: "Know all men by these presents, that I, Woodford C. Webb, of the county of Pope and state of Arkansas, for and in consideration of the sum of one dollar to me in hand paid by Mrs. M. P. Webb and Thomas J. Webb, the receipt of which is hereby acknowledged, and for the further consideration of the release to me by quitclaim deed, by said Mrs. M. P. Webb and T. J. Webb, of their entire right, title, and interest and claim in and to a certain tract or parcel of land described as follows: The northeast $\frac{1}{4}$ of section 2, township 6 north, range 18 west, containing one hundred and sixty acres, more or less, in Pope county, Arkansas, as will more specifically appear from articles of agreement for partition of certain lands therein described, entered into the 9th day of January, 1883, by, and between Mrs. M. P. Webb, Thomas J. Webb and Woodford C. Webb, I do hereby grant, sell, convey and quitclaim unto the said Mrs. M. P. Webb and Thomas J. Webb, and unto their heirs and assigns forever, the following lands lying in the county of Pope and state of Arkansas, to-wit: The southeast $\frac{1}{4}$ and the south $\frac{1}{2}$ of the east $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of section 11, township 6 north, range 18 west, containing 200 acres, more or less. To have and to hold the same unto the said Mrs. M. P. Webb and Thomas J. Webb, and unto their heirs and assigns, forever, with

all appurtenances thereunto belonging. Witness my hand and seal this 9th day of January, 1883. W. C. WEBB."

Soon after the execution of this deed, Mrs. Webb and T. J. Webb, by an oral agreement, divided their portion of the land, each of them taking about one hundred acres, and they each continued to hold and occupy the portion thus allotted until the death of Mrs. Webb, which occurred in 1896. Mrs. Webb, at the time she married Woodford C. Webb, was a widow, and had three children by her former marriage. One of them, W. S. Nease, she, by a will duly executed, made the residuary devisee of her estate; and under that will he, after her death, claimed the portion of the land above mentioned that had been allotted to her. The appellant, T. J. Webb, brought this action to correct the deed of W. C. Webb to himself and mother, so as to show that the words of inheritance used in said deed did not apply to her portion of the land. The appellee, W. S. Nease, denied his right to any relief, claimed the land under the will of his mother, and asked that his title be quieted. The chancellor found in favor of Nease, and rendered a decree quieting his title to the land, from which decree an appeal was taken.

Jeff. Davis and *J. G. Wallace*, for appellant.

The declarations of the parties at or about the time of partition were admissible to show their intentions and their understanding of the contract. 1 Gr. Ev. § 109; 55 Ark. 75; 20 Ark. 597. Mistakes of law are sometimes relieved against in equity. Story, Eq. Jur. 137, 138. Unintentional omissions or insertions are mistakes of fact. 11 L. R. A. 670. The mistake in this case was one of fact, and parol evidence was admissible to show it. 1 Am. Dec. 58; *ib.* 24; 26 Am. Dec. 390; 60 Ark. 304; 50 Ark. 179; 28 Ark. 372; 31 Ark. 252; 33 Ark. 119; 5 Am. Dec. 701; 13 Ark. 593; 5 Am. Dec. 610. The nature of the subject-matter must be considered in construing the contract. 15 Ark. 549. The court erred in applying to this transaction the rules for construing a deed of bargain and sale. Deeds of partition do not fix title. 42 Am. Dec. 210; Lawson, Rights, etc., § 2739; 49 Ark. 104; 47 Ark. 235; 40 *id.* 155; 44 *id.* 334. The intention of the parties is shown by

what they have done under the deed. 46 Ark. 130; 52 Ark. 75; 55 Ark. 417. Wherever a confidential relation exists in any transaction between the parties whereby the superior obtains any benefit, the presumption of undue influence arises, and must be rebutted. 21 Am. St. Rep. 101. The rule applies, also, to transactions occurring shortly after the termination of the relation. 25 Am. Rep. 718; 30 *ib.* 577; 1 Am. St. Rep. 84. The widow having a homestead of her own, she was not entitled to any in her husband's lands. 51 Ark. 432; 45 Ark. 343.

J. F. Sellers and *J. T. Bullock*, for appellee.

The statements of the parties, made either before, at the time, or afterwards, cannot be heard to alter or vary the contract. 13 Ark. 125; 15 Ark. 453; 16 Ark. 519; 21 Ark. 69. The agreement and deeds must be construed together. 18 Ark. 65. The acts of the parties under the instrument show its true intention. 5 Laws. Rights, etc. § 2229; Devlin, Deeds, §§ 836–840. To justify a reformation on the ground of mistake, the mistake must be one of fact (and not of law), and mutual. 1 Am. & Eng. Dec. Eq. 232. A mistake as to the legal effect of the word "heirs" is a mistake of law, and is not a ground for reformation . 11 L. R. A. 674; 1 Am. & Eng. Dec. Eq. 232. Family arrangements as to property are to be upheld by the courts. 1 Ch. Gen. Pr. 67; 7 Am. & Eng. Enc. Law, 808; 1 Story, Eq. 132; 23 S. W. 78; 15 Ark. 276. No exceptions were saved to any ruling of the court, and this appeal should be dismissed. Sand. & H. Dig. § 5844 *et seq.* The order overruling the motion for new trial must be excepted to. 11 Ark. 625; 18 *ib.* 355; 19 *ib.* 683; 24 *ib.* 628; 40 *ib.* 251; 44 *ib.* 411. The appeal without this is not sufficient. 34 Pac. 34; 40 Pac. 570; 43 Pac. 1024; 46 Pac. 879; 36 N. E. 896; 29 N. E, 775.

RIDDICK, J., (after stating the facts.) This is an action by T. J. Webb to correct an alleged mistake in a deed from W. C. Webb to M. P. and T. J. Webb. The defendant, W. S. Nease, who claims the land as residuary devisee of Mrs. M. P. Webb, denies that there was any mistake, and asks that his title to the land be quieted. We concur in the ruling of the chancellor refusing to correct and reform the deed. While the

facts and circumstances in proof may be sufficient to arouse a suspicion that this deed, as drawn, did not reflect the intention of the parties, still the evidence bearing on that point is in our opinion not sufficiently clear to justify a reformation of such deed. As stated by the chancellor, when it is clear that a deed or other instrument does not express the intention of the parties, owing to the accidental omission or insertion of a material stipulation, equity can reform the instrument, and correct the mistake; but, to justify such a decree of reformation, the evidence must be clear and convincing. The other two parties to the deed in this case are dead, the evidence bearing on the question of a mistake in the deed is contradictory, and such mistake, if any existed, not clearly established. The prayer of the complaint to that extent was properly refused.

But we are not able to agree with the learned special chancellor in his holding that the effect of the written agreement between W. C. Webb and M. P. and T. J. Webb, and the deed of W. C. Webb to M. P. and T. J. Webb, was to vest an estate in fee to Mrs. Webb to an undivided one half of the land described in the deed from W. C. Webb, and that after the oral agreement of partition, followed by possession, she was entitled to a conveyance of the legal title to the portion allotted. The grantor, W. C. Webb, owned only an undivided half interest in such land. He conveyed this interest to M. P. and T. J. Webb jointly. They each took by this deed from W. C. Webb a half of the interest in such land owned by him. That is, each of them took by this deed a one-fourth interest in the 200 acres of land described in such deed. The fact that they subsequently, by oral agreement, partitioned this 200 acres between them, each of them taking about one hundred acres, does not, in our opinion, show an intention to vest in Mrs. Webb the title to all that portion of the tract allotted to her. If the deed of W. C. Webb only conveyed her an undivided $\frac{1}{4}$ of the 200 acres, and it could not have conveyed more, then the other $\frac{3}{4}$ of the 200 acres was owned by T. J. Webb. But this was subject to a right of Mrs. Webb to homestead and dower. She had relinquished such interest in 150 acres to W. C. Webb in consideration of his conveyance to her, but she had not relinquished the same in the 200 acres. When it is ascertained that she had certain

interests in this land, then the oral agreement of partition made with the other party interested in the land should, in the absence of evidence to the contrary, be attributed to a recognition and allotment of the interests that she actually owned, and not be allowed to create a new estate in her. The plaintiff testified that, in making the partition, it was expressly understood between him and his mother that she took only a life estate in the land. No deeds were passed between him and his mother, and his land was separated from hers only by a "turning row," as he calls it. We see in this partition of land between him and his mother nothing inconsistent with his claim of a fee in said land, and the case must be determined by the actual rights of the parties in this land at the time of the partition, as we think they were unaffected by such partition and subsequent possession. The dower and homestead rights of Mrs. Webb in this land passed out upon her death, leaving to be disposed of by her will the undivided ¼ interest which she purchased from her son W. C. Webb. The appellee, W. S. Nease, is entitled to this interest as the residuary legatee of his mother, and his title to the same should be quieted. The decree to that extent is right, but for the error in declaring said W. S. Nease to be the owner of the whole tract of land allotted to his mother the decree is reversed and remanded, with an order that a decree be entered settling the rights of the parties, as set out in this opinion.

---

66 161
j 83 186

MOORE v. GOODBAR.

Opinion delivered February 4, 1899.

1. DEED OF ASSIGNMENT—FILING.—Under the act of 1895 regulating assignments for the benefit of creditors (Acts 1895, p. 162), a deed of assignment is not void because it was not filed. (Page 165.)

2. PROPERTY ASSIGNED—POSSESSION BY ASSIGNEE.—Where, at the time a deed of assignment was executed, the property assigned was in possession of the sheriff under execution, and the sheriff, by consent of the execution plaintiff, put the assignee in possession as the sheriff's agent,

under agreement that the sheriff should not be responsible for any loss, and the assignee thereupon took an inventory, and preserved the property until disposed of under the court's direction, the assignee should be considered as holding under the deed of assignment. (Page 165.)

3. FAILURE TO FILE BOND—EFFECT.—The failure of an assignee to file his bond within ten days after the deed of assignment was executed, as required by Acts 1895, p. 163, does not invalidate the assignment. (Page 166.)

4. ASSIGNMENT—RESERVATION OF SURPLUS.—An assignment which directs payment to creditors named, without expressly providing what shall be done with the residue, is not void as impliedly containing a reservation in favor of the assignor to the exclusion of creditors not named, especially if it does not appear that there are creditors not named in the assignment. (Page 166.)

Appeal from Crittenden Circuit Court in Chancery.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

This is a bill to set aside and annul an assignment made by G. W. Cartwright, a merchant doing business at the town of Earle in Crittenden county, to P. H. Thompson, as assignee, for the benefit of his creditors, preferring certain of them, and conveying to said assignee, for that purpose, all his mercantile goods at said place, with directions as to their disposal and the appropriation of the proceeds. Decree for the plaintiffs, and the defendants appealed.

The agreed statement of facts is as follows, to-wit: "(1) That on November 30, 1895, G. W. Cartwright made, signed and delivered to P. H. Thompson, as assignee, an instrument of writing, purporting to be an assignment of all his stock of goods at Earle, Arkansas, which instrument is of record in this case. (2) That, at the time said goods were assigned, the sheriff of Crittenden county had levied an execution upon the whole of said stock in favor of W. N. Brown, Jr., for a debt amounting to about $225. (3) That, after the said instrument was signed and delivered to Thompson by Cartwright, the sheriff turned over the stock of goods to the said Thompson as his care-taker; W. N. Brown, Jr., agreeing to this by his counsel, and releasing the sheriff from any liability for loss of goods occasioned while same were in possession of said Thompson.

(4) That said Thompson at once took an inventory of said goods, and that said inventory correctly represents the goods received by said Thompsom from G. W. Cartwright. (5) That on December 9, 1895, the said Thompson, in the office of the clerk of this court, at Marion, Ark., presented his bond as assignee, signed by W. N. Brown, Jr., as surety, and that at the time J. L. Holloway, the then clerk, objected to the bond on the ground that, in his opinion, W. N. Brown, Jr., was not good for the penalty thereon; that said J. L. Holloway, clerk, at the time stated to the attorney for P. H. Thompson, assignee, that if he procured one Sam Davis, of Vincent, Arkansas, to become surety upon said bond, he (the clerk) would then accept the same. (6) That thereupon the counsel for said P. H. Thompson stated to J. L. Holloway that he would at once go to Vincent, and procure the signature of said Davis to said bond, and would return the same to him by mail, which was agreed upon by said Holloway. (7) That R. G. Brown, attorney for P. H. Thompson, did, upon the 9th day of December, 1895, procure the said Davis' signature to said bond as security, and that he mailed the same to said J. L. Holloway from Memphis, Tenn., upon the afternoon of December 9, 1895. (8) That said bond was not received by the clerk of this court until December 12, 1895. (9) That, at the time the bond was tendered to the clerk, the inventory prepared by P. H. Thompson was left with the clerk of this court, bearing the indorsement, "To be filed, but not to be recorded," and the said note [indorsement] upon said inventory was not signed by either the said Thompson or any one for him. (10) That all the debts set out in the assignment executed by G. W. Cartwright were valid debts, and were due and payable at the time said assignment was executed. (11) That all of the debts claimed by plaintiffs in this action are valid debts, and were due and payable at the time the complaint in this cause was filed. It is agreed that the court may take these facts as though they were fully set up by formal proof and evidence."

The plaintiffs charged in their bill that the assignment was fraudulent and void on the following grounds, to-wit: "(1) The deed of assignment was not filed at any time. (2) The defendant, P. H. Thompson, purporting to be the assignee, never did and could not take possession of the property pretended to

be conveyed, the same having been levied on by the sheriff, and being, at the time of the assignment was executed, in the possession of the sheriff. (3) That the assignee failed to file the bond required by law in the time prescribed by the statute. (4) That no bond was filed or approved by the clerk of the circuit court, and the pretended bond is not *scheduled* [?] as the law directs, and is insufficient security for the amount of its penalty. (5) That the assignment is not for the benefit of all his creditors, and reserves to the assignor the residue or remainder after payment of debts named in the deed."

By consent the following order was entered by the chancellor in vacation: "In this cause, for reasons appearing satisfactory to the judge upon the affidavit of P. H. Thompson, assignee, and R. G. Brown and O. C. Armstrong, a member of the firm of W. R. Moore & Co., and by the consent of all the parties plaintiff herein, it is ordered by the judge in vacation: (1) That P. H. Thompson, as assignee, do make advertisement of sale in the "Marion Reform" for two weeks, of the goods assigned to him by G. W. Cartwright on the 30th day of November, 1895, and that he (the said Thompson) do make sale of said goods in bulk, for cash or otherwise, as may seem to the best interest of all parties, to the highest bidder on the day set out in the advertisement or notice of sale. (2) That out of the proceeds of such sale the said Thompson shall pay the costs of said advertisement and sale, and the judgment in favor of Brown, Smith & Co. (represented by W. N. Brown, Jr., one of that firm) v. G. N. Cartwright, with all costs that have accrued thereon. (3) The balance of the fund the said Thompson will retain in his hands subject to the further orders of this court. (4) The injunction granted him upon the 16th day of December, 1895, is held by the court to have been imprudently granted, and the same is hereby dissolved at the cost of the plaintiffs. All of which is ordered, adjudged and decreed at chambers, in vacation."

The injunction referred to seems to have been an order, made at the instance of the plaintiffs, restraining the sheriff from selling the goods under the Brown execution, and also re-

quiring Thompson to make a good and sufficient bond as assignee in the penal sum of $5,000, and to hold himself, as receiver, subject to the orders of the court.

The following is the decree of the court at the final hearing, viz: "And thereupon the court, having fully considered all matters, is of opinion that the failure of P. H. Thompson, assignee, to file his bond as assignee within ten days after the execution of the assignment vitiated said assignment, and rendered the same void. It is therefore ordered and adjudged by the court that the said assignment be taken and held to be a general assignment for the benefit of all of the creditors of said G. W. Cartwright, and the assignee will distribute the amount remaining in his hands *pro rata* among all of the creditors of G. W. Cartwright."

The report of the assignee, except as to certain expenditures made by him, was approved and confirmed, and he appealed specially from the disallowance.

R. G. Brown, for appellants.

In an assignment the taking possession by the assignee, filing inventory and giving bond are all conditions subsequent, and cannot affect the vesting of the title under the deed, or the rights of creditors secured thereby. 54 Ark. 124; 4 Ark. 302; 36 Ark. 406; 37 Ark. 54; 71 N. Y. 506; 88 Pa. St. 167; Burrill, Assignments, § 351 *et seq.;* 68 Wis. 442. The assignment should have been held good. 54 Ark. 124; 58 Ark. 573; 47 Ark. 347; 52 Ark. 30.

BUNN, C. J., (after stating the facts.) The first objection made to the deed of assignment, to the effect that it was never filed, may be answered by reference to the statute (Acts of 1895, page 162), which does not require the deed to be filed.

The second, to the effect that the assignee did not take, and could not have taken, possession of the property upon the execution and delivery of the deed of assignment, is answered by the real facts in the case. At the time of the execution of the assignment the property was in possession of the sheriff by virture of the levy of an execution in his hands, in favor of W. N. Brown, Jr. for Brown, Smith & Co.; but the sheriff, by consent of the plaintiff in execution, put the assignee in

possession as his (the sheriff's) agent, Brown agreeing not to hold the sheriff responsible for any loss occasioned thereby, and, being in possession in this way, the assignee took the inventory required by statue, and cared for and preserved the property until the same was disposed of by him under directions of the chancellor, as recited in the statement of facts.

The third ground, to the effect that the assignee failed to file his bond, as required by statute, within ten days from the execution of the assignment, if true as a matter of fact (which fact we need not here discuss), did not invalidate the assignment. In *Lowenstein* v. *Finney*, 54 Ark. 124, this court said: "When the deed of assignment was signed, acknowledged and delivered by Finney to Little, the title vested in Little, and the statutory requirement that Little should file a bond and inventory before he could control the property was a condition subsequent, which could have nothing to do with the vesting of the title under the deed. They were requirements with which Finney had nothing to do. The consent or objection of Finney could in no wise affect the title thus vested." To the same effect are *Ex parte Conway*, 4 Ark. 302; *Clayton* v. *Johnson*, 36 Ark. 406; *Thatcher* v. *Franklin*, 37 Ark. 54.

It is, indeed, well settled that nothing that either the assignor or the assignee could do or fail to do, after the execution of the assignment and the delivery thereof, can effect the validity of the assignment, for rights of others have then become vested. Besides, should an assignee in any case fail to qualify or neglect or refuse to perform his duty under the assignment, the court, under the familiar rule, would appoint another to act in his place, and administer under the assignment. *Ewing* v. *Walker*, 60 Ark. 503; *Ex parte Conway*, 4 Ark. 302.

Nothing need be said as to the fourth objection to the deed of assignment, more than has been said as to the third objection, if, indeed, it is not untenable for other reasons.

The fifth objection is to the effect that the assignment is not for the benefit of all the assignor's creditors, and that it reserves to the grantor the residue of the property, or its proceeds, after payment of creditors mentioned therein. There is no reservation of the residue to the grantor to be found in the language of the deed before us. The deed directs

that the judgment and execution of Brown, Smith & Co. be first satisfied; then payment be made to the defendants herein by name, and then to plaintiffs and others named in the deed; and, inferentially, any surplus remaining would go to any other creditors not named, by omission or otherwise, or as the law directs. The facts in this case show that there were no other creditors than those named in the deed, and one of the strongest evidences of this fact is that the plaintiffs herein, who are among the creditors named, are suing because the proceeds of the property was not sufficient to satisfy these claims, if appropriated under the assignment.

We do not see that any of the objections to the assignment are valid, and the decree declaring the same fraudulent and void is reversed, and the cause is remanded, with directions to execute the assignment by a proper distribution of the fund thereunder, and further to make the allowance to the assignee of the amount of expenditure claimed by him and disallowed as if the same had been expended under a valid assignment, the court here assuming that the disallowance followed the decree annulling the assignment, and for that reason only.

STRAUSS v. WHITE.

66 167
76 27

66 167
84 41

66 167
85 211

66 167
90 152

Opinion Delivered February 4, 1899.

1. POSSESSION—WHEN NOTICE OF TITLE.—Actual possession of land by a vendee under bond for title is sufficient notice of his title, relieving him of the necessity of filing his bond for record as protection against subsequent purchasers. (Page 169.)

2. BOND FOR TITLE—EFFECT.—When the owner of land sells it, takes the vendee's notes for the purchase money, and executes to him a bond for title, the effect of the contract is to create a mortgage upon the land in favor of the vendor to secure the purchase money. (Page 170.)

3. SAME—VENDOR'S INTEREST—SALE UNDER EXECUTION.—The interest of a vendor of land who has given a bond for title is not subject to sale under execution issued against him. (Page 170.)

Appeal from Jefferson Chancery Court.

JAMES F. ROBINSON, Judge.

N. T. White, for appellants.

Possession under bond for title is notice of the claim and rights of the possessor. 27 Ark. 63; 29 Ark. 352; 60 Ark. 90. The legal effect of such a transfer is to vest title in the purchaser, subject to the equitable mortgage right of the vendor. A mortgagee's interest in mortgaged property is not subject to attachment or execution. 13 Ark. 534; 18 Ark. 61; 41 Ark. 285; 40 Ark. 149. But the mortgagee's interest is. 15 Ark. 187, 188; 25 Ark. 277; 33 Ark. 230; 13 Ark. 534. Whether or not the appellee had notice, he purchased subject to the rule of *caveat emptor*. 31 Ark. 252; 32 Ark. 396; 34 Ark. 85; 42 Ark. 422; 53 Ark. 137. The actual possession of appellant was notice. 34 Ark. 391; 33 Ark. 465; 41 Ark. 169; 54 Ark. 273; 58 Ark. 258. The burden is on the plaintiff, and he must succeed on the strength of his own title. 62 Ark. 57; 47 Ark. 215; *id.* 413; 40 S. W. 703. Before estoppel can be relied upon, it must be shown that the party invoking the defense relied upon the conduct of the other, and was misled and damaged thereby. 24 Ala. 446; 49 N. Y. 111; 126 Ill. 310.

J. M. & J. G. Taylor, for appellee.

Appellant's acquiescence in the sale estops him now to attack it. 39 Ark. 131. Pleadings in one suit may be read in evidence against the one making them in another suit. 2 Whart. Ev. § 838; 53 Fed. 438; 1 Greenl Ev. § 174. An occupant having notice of an adverse claim is no longer a *bona fide* possessor. 45 Ark. 413; 8 Wheat. 79; Sedgw. & Wait, Trial of Title to Land, § 705.

BATTLE, J. Robert L. White instituted an action of ejectment against Abraham Strauss and Henry Charles, to recover the possession of a certain tract of land, which is described in his complaint. All parties claim to have acquired title to the land through Isom Jones. Plaintiff alleges that Frank Tomlinson recovered judgment against him; that an execution was issued on the same; that the land in controversy was levied upon and sold, as his property, under the execution, on the first day of November, 1881, to Frank Tomlinson, and was conveyed to him by the sheriff, who made the sale, on the sixth day of

November, 1882; that he (plaintiff) recovered a judgment against Frank Tomlinson in the circuit court of the United States for the eastern district of Arkansas, on the 24th of October, 1883; that he caused an execution to be issued upon this judgment; that the marshal, to whom it was directed, levied upon the land in controversy, as the property of Tomlinson, to satisfy it, on the 24th of August, 1886, and sold the same to the plaintiff on the 23d of September, 1886, and, on the 19th of October, 1887, conveyed the land to the purchaser.

The defendants claim title and hold possession under a sale of the land under an execution issued upon a judgment recovered by James Hancock & Co. against Frank Tomlinson, a mortgage executed by Isom Jones to Sam Berlin, on the 7th of February, 1880, a deed of mortgage executed by Isom Jones to H. Strauss on the 31st of March, 1881, a deed executed by Isom Jones to Abraham Strauss on the 26th of October, 1882, a deed executed by M. L. Bell to Abraham Strauss on the 23d of June, 1886, and a bond for title executed by Frank Tomlinson to Henry Charles on the 14th of April, 1883.

It will be unnecessary to relate or consider the evidence as to the muniments of title under which the defendants claim, except the bond for title. The fact that they claim under many deeds does not make it necessary for them to sustain their claim under each and all of them. They had the right to strengthen their title by the purchase of conflicting claims, and can defeat the recovery of the land by the plaintiff, if any of them shows that he is not entitled to the possession.

The plaintiff recovered judgment against Frank Tomlinson on the 24th of October, 1883. Prior to that day, on the 14th of April, 1883, Frank Tomlinson, by his bond for title, sold the land to Henry Charles for the sum of $200, received $30 of this amount, and agreed to convey the land to him when the remainder of the $200 was paid. Charles took possession and was in possession, cultivating the land, at the time and before plaintiff recovered a judgment against Tomlinson. This possession was notice to plaintiff of the title or claim under which Charles held, and relieved him of the necessity of filing his bond for record, in order to protect himself against plaintiff's claim.

Abraham Strauss purchased Charles' interest in the land, and received from him the bond executed by Tomlinson and no other evidence of title, and took possession of the land. He has since died, and his heirs, who have been made defendants, claim the land in his right. Can they hold it?

It has been uniformly held by this court that when the owner sells land, "takes the notes of the vendee for the purchase money, and executes to him a bond for title, the effect of the contract is to create a mortgage in favor of the vendor upon the land to secure the purchase money, subject to all the essential incidents of a mortgage, as effectually as if the vendor had conveyed the land by an absolute deed to the vendee, and taken a mortgage back to secure the purchase money." *Smith* v. *Robinson*, 13 Ark. 533; *Lewis* v. *Boskins*, 27 Ark. 61; *Holman* v. *Patterson*, 29 Ark. 357; *McConnell* v. *Beattie*, 34 Ark. 113; *Harris* v. *King*, 16 Ark. 126; *Moore* v. *Anders*, 14 Ark. 633. "It follows, then," says the court in *Hardy* v. *Heard*, 15 Ark. 188, "that the vendee, in analogy to the mortgagor, is the owner of an equity of redemption, and that this is the real and beneficial estate, which is descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law (4 Kent, 59, 160), subject, of course, to the rights of the vendor." This court has also declared that, a mortgage being a mere security for a debt, the interest of the mortgagee is not vendible under execution. *State* v. *Lawson*, 6 Ark. 269; *Trapnall* v. *State Bank*, 18 Ark. 61; *Meadow* v. *Wise*, 41 Ark. 285; *Harman* v. *May*, 40 Ark. 149. It is, therefore, plain that plaintiff, White, acquired no right or title to the land in controversy by his purchase, and, consequently, no right to the possession thereof. *Chisholm* v. *Andrews*, 57 Miss. 636; *Taylor* v. *Lowenstein*, 50 Miss. 282. As he can recover only upon the strength of his own title, and not upon the weakness of his adversary's, the defendants are entitled to hold the land, they being in possession.

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

ARCHER v. TURRELL.

Opinion delivered February 4, 1899.

SPECIFIC PERFORMANCE—WHEN ENFORCED PRO TANTO.—Where several tracts of land were sold for a lump sum, and a note was given for the purchase money, conditioned that it should not be paid until the vendee's title to all of the land had been perfected, upon failure of the vendors to make title to any part of the land the vendee may elect to rescind the sale, restoring what he has received; but if he do not so elect, and the vendors have endeavored in every way possible to perform their part of the agreement, and failed as to part, the proper course is to deduct enough from the principal of the note to compensate for such failure. (Page 174.)

Appeal from Pulaski Chancery Court.

THOMAS B. MARTIN, Chancellor.

Carmichael & Seawel, for appellants.

The stipulation that the note should be null and void in case of failure to procure the deeds was a liquidation of damage in case of breach of the contract. 54 Ark. 340; 56 Ark. 405. The fact that the actual damage could be subsequently ascertained would not alter the effect of the stipulation. 57 Ark. 168; 42 Mo. 606. Even if the stipulation is held void, as being a penalty, the delivery of the deed from Smith is a condition precedent to appellee's right to sue on the note. 22 N. H. 109; Anson, Cont. 399–400–402; 7 Am. & Eng. Enc. Law (2d Ed.), 118; 34 S. W. 443; 62 Ark. 43; 27 Tex. 145. Equity will relieve from a penalty, but not from a condition precedent. 2 Edw. Ch. 78; 53 Me. 499; 61 Ark. 512; 11 N. Y. 25; 10 Am. & Eng. Enc. Law, 178; 19 Johns. 69. Appellant's agreement was to buy all of the land, and he had the right to refuse less, and rescind the contract. 18 S. E. 917; 47 Pac. 215; 24 L. R. A. 763–8; 25 S. W. 276; 36 S. W. 1080; 63 Ark. 548; 4 Madd. Ch. 122; 60 Ark. 39–45; 1 Madd. Ch. 326.

Marshall & Coffman, for appellees.

A stipulated sum, to be paid in case of breach of contract, will be taken as the innocent party's measure of damages only when it will no more than compensate his loss; but if it will more than do this, it is a penalty. 59 N. W. 893; 57 Ark. 168; 68 Am. Dec. 85, note; 4 Am. Dec. 323; 9 Am. Dec. 46; Rawle, Cov. §§ 186–7; 99 Am. Dec. 78–9; 2 Suth. Dam. 289; 30 Atl. 265; 18 S. W. 425; 66 N. W. 253; 27 S. W. 914. The warranty of each of the grantors only extended to his share, and the making of a deed to the whole was not a condition precedent. Rawle, Cov. §§ 250, 298; 59 Ark. 299. Appellant knew what he was buying; and this knowledge would debar his attempted rescission, even if the contract was executory. 28 Am. & Eng. Enc. Law, 151; 70 Am. Dec. 333; 25 Ark. 196. Inevitable accident, preventing performance, is a defense in such a case as this. 61 Am. Dec. 85. As to measure of damages, see Rawle on Covenants, § 340.

BATTLE, J. On the 15th day of October, 1894, Josephine Turrell owned the southeast quarter of the northwest quarter and the northwest quarter of the southwest quarter of section thirty-one, in township three north and in range twelve west; and Josephine Turrell, Augusta D. Kirkman, Josie Stevenson, Jessie Turrell, Edwin Smith and Norma Smith owned the east half of the southwest quarter of the same section, Edwin and Norma Smith owning one undivided fourth. Josephine Turrell, Augusta D. Kirkman, Josie Stevenson, and Jessie Turrell, for themselves and Edwin and Norma Smith (the last two being minors), sold all of this land to William F. Archer at and for the price and sum of one thousand dollars, and conveyed the same, except one fourth of the last mentioned tract, to Archer, promising that Edwin and Norma Smith would each convey to him their respective one-eighth thereof when they became of age. Archer paid of the purchase money five hundred dollars, and for the residue executed his note as follows:

"$500.00. Little Rock, Ark., Oct. 15, 1894. On or before two years after date, I promise to pay to the order of Josephine Turrell, Augusta D. Kirkman, Josie Stevenson, Jessie Turrell, Edwin Smith and Norma Smith the sum of five

hundred dollars, with interest at the rate of 6 per cent. per annum from date until paid, all of said interest payable being the three deferred payments for the following described property, to-wit: S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, and E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ 31, 3 N., 12 W., as per deed of even date herewith, executed to maker hereof by said payees (for said land), except said Edwin Smith and Norma Smith, who are minors, and who will attain their majority before maturity of this note, when they are to execute deed to maker hereof for their interest in said E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ 31, and this note not to be paid until they do execute said deed, and, should they refuse to do so, then this note to be null and void. This note is a lien on the property above mentioned. [Signed] W. F. ARCHER."

Norma Smith has since arrived of age, and executed a deed conveying her one-eighth of the last mentioned tract to Archer, and tendered the deed to him, and he refused to accept it. But Edwin Smith left this state, before becoming of age, and, although he reached the age of twenty-one before the maturity of the note, has not conveyed his interest. On account of this failure, Archer refused to pay the note for $500, and Josephine Turrell, Augusta D. Kirkman, Josie Stevenson, Jessie Turrell and Norma Smith brought this action to compel him to do so, less an amount equal to the value of Edwin's one-eighth, and to enforce a lien upon the land for the payment of the purchase money. They alleged that Edwin, without fault on their part, left this state before he was twenty-one years old, and has been absent one year or more, and, although they have endeavored in every way possible, they have been unable to find him, and that it is impossible to obtain his deed. Archer answered, but did not deny this allegation. His defense was, the note is not due and payable according to its terms, because Edwin Smith failed to convey his part of the property sold, and that he has been damaged in an amount greater than the sum due on the note by reason of such failure. He alleged that he had made improvements, of the value of $600, upon the land, and for that reason asked that the court declare the lien for the purchase money fully satisfied.

Upon the final hearing of the cause all the foregoing facts were shown, and evidence was adduced tending to prove that

there was a residence on the land at the time Archer purchased; that it was fully worth the sum of $200, if not more; that it had been destroyed by fire since the purchase; that Archer had made many valuable improvements on the land while he occupied it; and that the tract of land, of which Edwin Smith owns one eighth, is of the value of $240.

The court below rendered a judgment in favor of the plaintiffs against Archer for the sum of $449, the amount due on the note less $40, deducted on account of the failure of Edwin Smith to convey as before stated, and $30 paid on the first of November, 1895, and ordered that the land be sold to pay the judgment.

The conveyance by Edwin and Norma Smith of their interest in the east half of the southwest quarter of section thirty-one was made a condition precedent to the payment of the note sued on. It is said in the note: "And this note not to be paid until they do execute said deed." A part of this condition has not been performed,—Edwin Smith has not executed a deed according to agreement. Plaintiffs alleged in their complaint, and defendants did not deny, that they have endeavored in every way possible to perform this part of their agreement, and have been unable to do so, and that it is impossible to obtain Edwin's deed. Are they remediless?

The effect of the failure of plaintiffs to perform their agreement authorized Archer to rescind his contract of purchase by placing the vendors (plaintiffs) *in statu quo.* He could not hold the property, on account of this failure, without any obligation to pay for it resting upon him. The failure to perform the condition precedent did not work a forfeiture to him of the property or compensation for it. He was under obligations to pay for it or rescind the contract by which he held it. But he did not elect to rescind by restoring what he had received and receiving in return what he had paid. In fact, he could not have done so, the residence upon the land, a valuable part of the property purchased, having been destroyed. On the other hand, he placed valuable improvements upon the land, and was unwilling to surrender them without compensation. In view of all these facts, the equitable course to pursue was to deduct enough from the principal of the note for the

purchase money to fully compensate for the loss of Edwin Smith's interest, and render judgment for the remainder and interest, less the $30 which have been paid. Pomeroy, Contracts (2d Ed.), § 327, and cases cited; 2 Story, Eq. Jur. §§ 772, 775. The chancery court endeavored to do this, but probably deducted too much on account of Edwin Smith's portion. But, as no one complains of this, the decree will be affirmed.

PERKINS v. EWAN.

Opinion delivered February 4, 1899.

1. TRESPASS—DAMAGES.—The measure of damages for the seizure and sale under process of a stock of goods of a stranger is the sum for which the goods could be sold in bulk at the time of the seizure, with 6 per cent. interest, and such damages cannot be diminished by an allowance for the costs of such sale. (Page 177.)
2. SAME—SALE BY RECEIVER.—The fact that a receiver was appointed in an attachment suit, in which the goods of a stranger were seized and sold as belonging to the defendant therein, will not affect their owner's right to recover their value. (Page 178.)
3. EVIDENCE—VALUE.—In order to show the market value of goods illegally seized under process and sold, it is competent to prove what the goods sold for under such process. (Page 179.)

Appeal from Monroe Circuit Court.

JAMES S. THOMAS, Judge.

STATEMENT BY THE COURT.

This is an action upon an indemnifying bond. One Henry Goldman was the owner of a stock of goods worth from three to five thousand dollars. Goldman was indebted to the plaintiffs, J. R. Perkins et al., in sums aggregating over seven thousand dollars. To secure this indebtedness, he gave them a mortgage upon his stock of goods, and put them in possession of the same. Goldman was also indebted to other parties in large amounts, and certain of these parties brought suits against him in the Monroe circuit court, and had attachments issued against his property, and directed the sheriff to levy the attachments upon the stock of goods above mentioned. The sheriff

demanded an indemnifying bond, and thereupon defendants, P. C. Ewan et al., executed the bond upon which this action is brought.

The sheriff levied upon the goods, and took them from the possession of the plaintiffs. Afterwards the judge of the Monroe circuit court, on motion of defendants, appointed a receiver to take charge of and sell the attached goods. The plaintiffs had notice of this application for a receiver, but did not appear. The receiver sold the attached property as ordered, and afterwards turned over the proceeds to the plaintiffs, less $342.90, costs of selling the goods, including clerk's hire, etc. Plaintiffs brought this action upon the indemnifying bond to recover damages for the unlawful seizure and conversion of their goods.

Upon the trial the circuit judge gave the following instructions to the jury: "(1) It is admitted in this case that the levy upon the goods of plaintiff was wrongful, and this entitled the plaintiff to recover in some amount, unless you find that the plaintiffs have already received of the defendants, on account of the unlawful levy and conversion, an amount equal to the value of the goods at the time of the levy, and six per cent. interest to the time of payment. The burden is upon the plaintiff to show the value of the goods taken and converted, and the burden is upon the defendants to show the amount paid by them on account of said unlawful levy. (2) If you find the plaintiff is entitled to recover, you will assess the damage at the value of the goods at the time of the levy, with six per cent. interest to this date, less such sums as have been paid, and six per cent. interest thereon to this date from the date of payment, after deducting the necessary expenses of the sale. (3) In fixing the value of the goods, you are instructed that what this stock may have sold for at forced sale, or similar stocks, is not the criterion of value. (4) The jury are instructed that if they find from the evidence that the goods were sold by T. H. Jackson, as receiver, upon the terms and in the manner designated by the mortgage given by Henry Goldman to the plaintiffs in this action, then the necessary expenses incurred in such sale, and the taxes thereon, should be deducted from the sum which the plaintiff should recover; and if you find from

the evidence that said goods were sold at their value in bulk, in the town of Brinkley, and that the plaintiffs or their attorneys have received the money, less the expenses of the sale, taxes, etc., they will find for the defendant."

The plaintiffs objected, and saved exceptions to instruction No. 4, and to so much of No. 2 as authorized the jury to deduct expenses of the sale from the value of the goods.

There was a verdict and judgment for defendants. Plaintiffs moved for a new trial, and, the same being overruled, appealed.

N. W. Norton, *C. F. Greenlee*, *J. N. Cypert* and *J. W. Phillips*, for appellants.

The goods of plaintiffs were turned into cash against their consent, and they can not be held liable for the cost of so doing. 45 Ark. 112; 39 Ark. 70. No process was ever issued upon the bill for a receiver, and hence no such cause was before the court. 62 Ark. 401. An action pending in equity involving the title to the property was no bar to a recovery in conversion. 52 Ark. 416. Plaintiffs were not required to be satisfied with the amount for which the goods were sold. 45 Ark. 112; 62 Ark. 135; 39 Am. Dec. 509.

J. C. Hawthorne and *Grant Greene, Jr.*, for appellees.

The expense of the sale was a necessary one, and appellants should bear it. 91 Mass. 62; 4 Paige, 24; 2 Johns. Ch. 582; 24 N. Y. 505; 1 Suth. Dam. 239; 3 *id.* 527, 536; 106 Mass. 331; 35 Mass. 278; 31 Mass. 356. Appellant's attorney waived service of notice of application for receiver, and hence there was no occassion for summons. 18 S. E. 268; 37 Pac. 1052; 9 L. R. A. 845 and note. The judgment appointing the the receiver can not be collaterally attacked. 62 N. W. 1050; 38 Pac. 854. Appellants were not prejudiced by evidence tending to show that goods were worth less than the invoice price. 44 N. W. 327; 91 Mass. 62.

RIDDICK, J., (after stating the facts.) This was an action upon an indemnifying bond to recover damages for the unlawful seizure and conversion of goods. It is admitted that the

defendants, in an action against one Goldman, caused the goods of plaintiffs to be seized and sold, but the defense is that plaintiffs have received the full value of such goods, less the costs of selling the same, and that this is all to which they are entitled. But we feel very confident that this contention can not be sustained. The goods of plaintiffs were wrongfully seized and sold, and they are entitled to recover their value at the time of the seizure, with 6 per cent. interest from that date, and defendants cannot diminish this sum by an allowance for costs of such unlawful sale.

The fact that the goods were sold by a receiver does not affect the question, for this receiver was not appointed in any action against plaintiffs. There is nothing in the record to show that plaintiffs assented to the appointment of such receiver, and we think that their rights are in no respect affected by such receivership. At the time this receiver was appointed, there was no action pending, except the action of attachment against Goldman, and the sale of the receiver was in effect only a sale of attached property under the order of the court where the attachment was pending. So far as Goldman was concerned, such sale operated to pass the title, but it in no way affected the rights of plaintiffs to recover the full value of their property thus sold. Plaintiffs had an interest in the goods attached, to the extent of the mortgage debt, for which they held the same, and it is admitted that this debt was for an amount greater than the value of the goods. They were practically owners of the goods, and in the case of an unlawful conversion they can recover the value of the goods converted. Although the mortgage provides for a sale of the goods, still one who unlawfully seizes and sells such goods will not be allowed to deduct from the value of the goods his expenses in selling them. The value of the goods was that sum of money for which they could be exchanged or sold in bulk; in other words, the net sum that could be realized by a sale. It represents the measure of the owner's injury occasioned by an unlawfully conversion of the same, and he is not fully compensated for such an injury if the wrongdoer is allowed to deduct from this sum his clerk hire and other costs of converting the goods into money.

We do not mean to say that plaintiffs can recover the re-

tail value of these goods, or the price for which they were sold at retail. If they were seeking to recover that value, there would be more force in the contention that defendants, when acting in good faith, should be allowed necessary expenses of making the sale. But plaintiffs are only asking the actual value of their goods in the condition and at the time they were seized.

It is conceded that defendants were acting in good faith, and it may be that the gross sums they realized for these goods by selling at retail were greater in amount than the value of such goods at the time they were seized under the attachments. If the sums thus realized exceeded the value of the goods in bulk to an extent sufficient to cover the costs of selling at retail, it necessarily follows, under the rule of damages contended for by plaintiffs, that defendants will retain such costs; for plaintiffs are only seeking to recover the value of the goods in bulk at the time of the unlawful seizure. On the other hand, if the price for which the goods were sold at retail is not more than their actual value in bulk at the time they were seized, the costs of this retail experiment should fall on defendants, who instituted it, and not on the innocent owners of the property. It would certainly be a strange rule to allow one to unlawfully seize a stock of goods owned by another, hire clerks, and incur costs to dispose of the same at retail, and then, when he is sued, to answer, "I have paid you the value of your goods in bulk, less expenses incurred in retailing them, and this is all you can recover." Such a rule, by enabling the wrong-doer to make a profit, would encourage violations of the rights of property, and requires only to be stated to show its unsoundness. We therefore conclude that the circuit judge erred in instructing the jury to find for defendant, if plaintiff had already been paid the value of the goods in bulk, less the necessary expenses for selling the same.

In addition to the error noticed above, plaintiffs contend that the court erred in admitting improper evidence, but, if this be true, such error was cured by instruction No. 3 given at the request of plaintiffs.

It was competent to show the price that the goods in ques-

tion brought at the sale by the receiver, or what similar goods were sold at auction, as evidence bearing on the question of the actual or market value of the goods at the time and place of conversion. The plaintiffs were not bound by the price at which receiver sold the goods, but, as the price obtained at such sales tends to show the value of the goods, it was proper to allow the jury to consider it in connection with other evidence bearing on the value. 26 Am. & Eng. Enc. Law, 826.

The only prejudicial error that we find has been noticed above, and extends only to the cost incurred by receiver in selling goods, which the evidence shows amounts to $342.90. Appellees may, if they wish, consent that a judgment be entered against them here for said sum and the costs of the action; otherwise the judgment will be reversed, and a new trial granted.

WEBB v. KELSEY.

66	180
68	566

Opinion delivered February 11, 1899.

66	180
86	73
87	409

1. APPEAL—WHEN BILL OF EXCEPTIONS UNNECESSARY.—Where the court's finding of facts and judgment contains a certain and definite statement of the point raised by an exception, and of the grounds upon which the court sustained the same, a bill of exceptions is unnecessary. (Page 181.)

2. JUDICIAL NOTICE—OFFICERS.—A decree of confirmation of a tax title, under Mansf. Dig. § 578, is not defective for failure of the county clerk to certify that the justice of the peace before whom proof of publication of the notice of confirmation was made was a justice of the peace in the county in which the newspaper was published, if that fact was known to the trial court by virtue of its judicial knowledge of the official character of the officers within its territorial jurisdiction. (Page 182.)

Appeal from Miller Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

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

Confirmation cures all errors in the original tax deed. 55 Ark. 470; 62 Ark. 421. A defective affidavit is good on collateral attack. 21 Ark. 364.

Geo. C. Lewis, *W. H. Halliburton* and *P. C. Dooley*, for appellees.

The notice of the pendency of confirmation proceedings was jurisdictional, and the statute must be strictly followed. 55 Ark. 33; 34 Ark. 399; *ib.* 221; 51 Ark. 39; 18 Wall. 350. Section 528, Mansf. Dig. governs this case. 25 Ark. 265; 66 Am. Dec. 209; 61 *ib.* 171, 172 and notes. The transcript should show that the record contains *all* the evidence. 42 Ark. 30; 44 *id.* 74; 54 *id.* 159; 38 Ark. 102; 42 *id.* 30. Motion for new trial and overruling of same are essential. 27 Ark. 37, 506, 549; 37 Ark. 544; 43 *id.* 391; 44 *id.* 411; 55 *id.* 376; Sand. & H. Dig. § 1061. No appeal lies from an order sustaining an exception to a document. 36 Ark. 200; 26 *id.* 51, 468; 30 *id.* 665.

BUNN, C. J. This is a suit by appellant, Webb, against appellees, in ejectment for land situated in Arkansas county. The complaint shows plaintiff acquired title originally by purchase at tax sale and deed, in 1861, and confirmation of said sale by the chancery court of said county at its March term, 1889; and the defendants answered, claiming title under David Shall and E. Cummins, purchasers from the state, and through mesne conveyances from them. On motion of defendants, plaintiff filed his muniments of title, to-wit, his said tax deed, and the proceedings and decree confirming the sale under which it was made; and they then filed sundry exceptions to the same, all of which were overruled by the court, except their third exception to the said decree of confirmation, which was sustained; and, on plaintiff's failure and refusal to amend or supply defects suggested in said exception, the complaint was dismissed, and plaintiff appealed; and, the other exceptions of defendants being overruled, they noted exceptions, and appealed.

The first contention of appellees before us is that there is no bill of exceptions in the record bringing up the evidence, and thereby showing the grounds upon which the court held that the said third exception was well taken. On the other hand, the appellant contends that there is no necessity for a bill of exceptions in this case, because, he says, the point raised by the

said exhibit to his complaint and the said exception thereto is fully and definitely set out in the findings and judgment of the court, and also in said exhibit and the exception thereto; and this contention is sustained by the record, the following being the finding of facts and judgment in relation thereto: "And the defendants, to sustain his (their) exceptions, introduce the complaint and notice, and proof of publication of the notice, filed in the chancery court of Arkansas county, Ark., on the 14th of March, 1899, styled 'J. P. Webb, *Ex parte*, confirmation of tax title and * * * argument of counsel. It is ordered, considered and adjudged that exception No. 3 to the decree of confirmation is sustained, because there is no certificate of magistracy by the county clerk under his seal, as required by the statute (section 578, Mansfield's Digest), to the official character of F. M. Quertermous, the person who administered the oath to J. P. Poynter, the publisher." This certainly is a certain and definite statement of the point raised by the exception, and of the grounds upon which the court sustained the same, and also that the absence of the certificate of official character furnished this ground. A bill of exceptions could serve no other purpose or end than the record of the findings and judgment of the court, and was therefore unnecessary, and a motion for a new trial was also unnecessary. *Ward* v. *Carlton*, 26 Ark. 662; *Steck* v. *Mahar*, 26 Ark. 536; *Badgett* v. *Jordan*, 32 Ark. 154; *Union Co.* v. *Smith*, 34 Ark. 684; *Clark* v. *Hare*, 39 Ark. 258; *Williams* v. *State*, 47 Ark. 230; *Norman* v. *Fife*, 61 Ark. 33.

The issues made by the various other exceptions of the defendants to the muniments of title of the plaintiff, and upon which defendants appealed, have been abandoned by them, except the issue raised by the said third exception to the confirmation decree, and more particularly as to the proof of publication of the notice of the pendency of the proceedings therein, and this presents the only other question for our consideration.

We held in *Porter* v. *Dooley*, *ante*, p. 1, that the requirements of section 578, Mansfield's Digest, as to the proof of publication therein referred to does not exclude any other evidence or proof of the facts therein required to be established. When the proof of publication in the confirmation proceedings involved in

this case was under consideration by the chancellor, he could have taken any other proof of the official character of the justice of the peace than the county clerk's certificate, or satisfied himself in any legitimate way that Quertermous was in fact a justice of the peace. Nothing of this kind was really necessary, for courts must take judicial notice of who are justices of the peace within their territorial jurisdiction, and also of their official character; and this rule, it seems, applies to every public commissioned officer of the state, and seems to be a very general rule in the other states. *Shrophire* v. *State*, 12 Ark. 190; *Hempstead* v. *Auditor*, 16 Ark. 57, 62; *Kaufman* v. *Stone*, 25 Ark. 336; *Ede* v. *Johnson*, 15 Cal. 53; *Coleman* v. *State*, 63 Ala. 93; *Sandlin* v. *Anderson*, 76 Ala. 405; *Graham* v. *Anderson*, 92 Am. Dec. 89. The exception should not have been sustained.

This court does not deem it necessary to rule upon the question whether or not the "legal notice" act of 1875, and acts amendatory thereof, repealed and took the place of the act we have been considering, digested as section 578, Mansfield's Digest; but, were that the fact, the publication and the proof of publication called in question in this action was in exact conformity with the general act of 1875, as it stood in 1889, when the publication was made; and so it would not be assailable under that act, and is in substantial conformity with both, for the "publisher" then was one who could make the proof, although it is not so now. Mansfield's Digest, § 4359.

Reversed, and remanded for a new trial and proceedings in accordance with this opinion.

SCROGGIN *v.* HAMMETT GROCER COMPANY.

Opinion delivered February 11, 1899.

EQUITY—RELIEF AGAINST JUDGMENT AT LAW will not be given in equity upon the ground that counsel of the defeated party negligently omitted to call up a motion for a new trial, in order to have it passed on, under the mistaken impression that such motion had been overruled. (Page 184.)

Appeal from Ouachita Circuit Court in Chancery.

CHARLES W. SMITH, Judge.

Geo. H. Sanders, for appellants.

It was error for the chancellor to refuse to pass upon appellants' motion for new trial. 40 Ark. 338; *ib.* 551; 48 Ark. 535; 50 Ark. 458; 51 Ark. 341; 57 Ark. 597; 61 Ark. 346. The tax-assessment list of appellees was not competent evidence. 42 Ark. 527; 44 Ark. 263. The shipment of goods out of the state, in the regular course of business, about six months before the attachment, was not such a removal as authorized the attachment. 4 Fed. 298; 44 Ark. 304; Drake, Attach. § 71.

Smead & Powell, for appellee.

BATTLE, J. Appellants lost the benefit of their motion for a new trial by their own negligence. They alleged that the motion, which was set out in their complaint, was filed in due time, but that the court failed to act upon it. The only reason given for this failure was "that defendant's counsel were of the impression that said motion had been overruled, and that plaintiffs thereby lost their right of appeal without any fault or negligence on their part, but solely on account of the failure to call up and act upon said motion as above set out." This reason is insufficient. It was their duty to call up the motion for the court to act upon it, in order to prevent it being passed unnoticed. They did not do so. The bill of exceptions in the case, which was filed and made an exhibit to their complaint in equity, shows that two of their counsel "were continuously present from day to day during the term at which said motion for a new trial was filed, and, from the time it was filed until the adjournment of the term, were often and daily asked by the court if they had any motion to make, and no mention of said motion for a new trial was made by either of them to the court, either in response to the court's inquiry for motions or at any other time." In the absence of fraud or unfairness, they are concluded by the acts or omissions of their attorneys. They are entitled to no equitable relief. *Lawson* v. *Bettison*, 12 Ark.

401; *Jamison* v. *May*, 13 Ark. 600; *Vallentine* v. *Holland*, 40 Ark. 338; *Jackson* v. *Woodruff*, 57 Ark. 597.

Decree affirmed.

BUNN, C. J. I concur in the judgment of dismissal for want of equity, but on a different ground from that assigned by the majority of the court. I think there was no error in the circuit court in sustaining the attachment, as appears from the bill in this case, and that therefore there was no good ground upon which the motion for a rehearing could have been sustained. It makes no difference, then, what were the motives of the local attorneys in respect to the motion for a new trial.

RUSSELL *v.* STATE.

Opinion delivered February 11, 1899.

1. BIGAMY—DEFENSE.—It is no defense to a prosecution for bigamy that defendant honestly and reasonably believed that he had been granted a divorce from his first wife, but such evidence is admissible in mitigation of his punishment. (Page 188.)

2. APPEAL—WHEN ERROR NOT PREJUDICIAL.—The error of refusing to admit competent evidence in mitigation of punishment is not prejudicial if the jury assessed the lightest punishment fixed by the statute. (Page 189.)

Appeal from Hempstead Circuit Court.

JOEL D. CONWAY, Judge.

STATEMENT BY THE COURT.

Appellant was indicted for bigamy. He demurred to the indictment, but in his argument does not insist upon the demurrer, which we do not discuss here. We think the indictment sufficient. He was tried, convicted and sentenced for three years in the penitentiary. He appealed to this court.

The evidence showed that when appellant married a second time his first wife was living, from whom he had not been divorced. The appellant sought to show in defense that at the time of his second marriage he believed in good faith that a

divorce had been granted him from his first wife, and that he did not intend to violate the law; but the court refused to allow such proof.

The defendant offered in evidence the following certificate: "State of Arkansas, County of Nevada. November 22, 1898. This is to certify that the circuit court of the aforesaid county granted the said Manney Russell a divorce from his wife, Ida Russell, and she has no interest in his property. Witness my hand. W. J. Munn, Circuit Clerk, per A. J. Fulton, Deputy." The court refused to allow this to be read to the jury, to which defendant excepted.

The defendant offered to prove that he had paid one W. H. Booth to procure him a divorce from his first wife, Ida Russell, and that a fraud had been practiced upon him, by which he was induced to believe, and did believe, at the time of his second marriage, that he had been divorced from his first wife; all which the court refused to allow. It also refused to allow proof of defendant's good character, to all which he excepted.

The court refused instructions in keeping with and based upon the theory in his (defendant's) offer of evidence to show that he believed, when he was married the second time, he had been divorced from his first wife; to which the defendant excepted.

The court then read to the jury the statute on bigamy, and gave the following instructions: "All law, independent of evidence, is in favor of innocence, and the guilt of the accused must be fully proved, and in so doing the jury will take into consideration all of the facts in the case; and, arriving at your verdict, you must take into consideration the manner and demeanor of the witness on the stand, as to the willingness or unwillingness in testifying one way or the other; and, after weighing his testimony, you may believe it in whole or in part, or you may disbelieve it in whole or in part, or you may give it just such weight as you think it entitled to. Upon the whole case, if you entertain a reasonable doubt as to the defendant's guilt, you should give him the benefit of the doubt, and acquit him; it being the burden of the state to prove beyond a reasonable doubt the guilt of the prisoner. If you believe that the defendant is guilty of bigamy, it will be your duty to say so:

'We, the jury, find the defendant guilty, and assess his punishment in the state penitentiary for a period of' not less than three years or more than seven. If you have a reasonable doubt as to his guilt, you will find him not guilty. The burden is on the state to prove beyond a reasonable doubt all the material allegations in the indictment." To the ruling and judgment of the court in giving these instructions, the defendant excepted.

J. E. Cook and *L. A. Byrne*, for appellant.

Criminal intent is a necessary ingredient of bigamy, and an honest mistake as to the fact of the death of a former wife is a good defense. Bish. Stat. Cr. §§ 596, 596*b*, 596*a*, note 5. The decree of care required of the defendant and his motives are questions for the jury. Bish. Stat. Cr. § 132; 46 Ind. 459; 13 Tex. App. 76. The evidence as to defendant's good character was improperly excluded. 28 Ark. 155.

Jeff Davis, Attorney General, and *Chas. Jacobson*, for appellee.

Bigamy is a purely statutory crime in this state, and is committed whenever a person marries a second time, having a living and undivorced spouse. The intent is then presumed, and mistake is no defense. Sand. & H. Dig. §§ 1480, 1482; Undh. Cr. Ev. § 398; 32 Ark. 205; 7 Met. 472; 98 U. S. 145, 167; 25 Minn. 29; 57 Barb. 625; 35 Atl. 352; 68 Vt. 414; 40 N. E. 846; 29 Hun, 628; 58 Ia. 165; 1 McClain, Cr. Law, § 128; 6 Cow. 512; 7 Blackf. 572; 63 Mo. 570; 5 McLean, 242; 34 W. Va. 88; 16 R. I. 403; 68 Miss. 347; 163 Mass. 103; 36 Ark. 38; 70 Mo. 635; 40 Ark. 480; 13 Bush (Ky.), 318; 11 L. R. A. 530; 139 Pa. 247; L. R. 2 C. C. 154; 44 Ia. 45; 2 Met. 190.

HUGHES, J., (after stating the facts.) Section 1480, Sandels & Hill's Digest, provides: "Every person having a wife or husband, living who shall marry any other person, whether married or single, except in the cases specified in the next section, shall be adjudged guilty of bigamy."

"Sec. 1481. The last preceding section shall not extend to the following persons or cases:

"*First.* To any person, by reason of any former marriage, whose wife or husband by such marriage shall have been absent for five successive years, without being known to such person within that time to be living.

"*Second.* To any person whose wife or husband has been absent from the United States for the space of five years.

"*Third.* To any person whose former marriage has been dissolved by a court of competent authority.

"*Fourth.* To any person whose former marriage has been pronounced void by the decree or sentence of a court of competent authority, on the ground of the nullity of the marriage contract.

"*Fifth.* To any person by reason of any former marriage contract by such person, within the age of legal consent, and which has been annulled by a decree of a court of competent authority."

Section 1482 provides: "If any unmarried person shall knowingly marry the husband or wife of another, in any case in which said husband or wife would be punished according to the foregoing provisions, such person, on conviction, shall be subject to the same punishment as is prescribed in cases of bigamy."

We find that the rulings of the court were correct in refusing to allow proof that the defendant believed he had been divorced from his first wife at the time of his second marriage, as this was no defense. The cases cited by the attorney general in his brief sustain the ruling of the court upon this question. These cases are to the effect that "the material facts of the crime of bigamy are the first and second marriages, and the fact that the first consort was alive and undivorced at the date of the void marriage. From such facts a bigamous intent may be inferred." Underhill, Evidence, § 398. That defendant had been told and believed that his first marriage was void, and acted on such belief, is no defense to a prosecution for bigamy. *State* v. *Sherwood*, 35 Atl. 352, 68 Vt. 414. An honest and reasonable belief in the death of a former wife is no defense to a prosecution for bigamy. *Com.* v. *Hayden* (Mass.), 40 N. E. 846. It is the marrying by a person who has a husband or wife living that constitutes the offense under our

statute, and the offense is complete under the second marriage. *Scoggins* v. *State*, 32 Ark. 205. Advice of counsel that there is no impediment to the second marriage is no defense to a prosecution for bigamy. *People* v. *Weed*, 29 Hun, 628; *State* v. *Hughes*, 58 Iowa, 165. To support an indictment for bigamy, it is sufficient to prove that defendant, being at the time lawfully married to one person, has married another. *Com.* v. *Mash*, 7 Met. (Mass.) 472.

In *State* v. *Armington*, 25 Minn. 29, the facts, briefly stated, were as follows: Armington was indicted in Minnesota for bigamy. He offered in evidence a certified copy of a decree of divorce between him and his first wife. This divorce was obtained in Utah. Counsel for the state objected to its admission, on the ground that at the time both parties were residents of Minnesota. The objection was sustained. Counsel for the defendant then offered to show by the paper and parol testimony of defendant that, at the time of the second marriage, he had this paper in his possession, and believed the decree to be effectual to make him a single man, and believed himself to be such, and that he would not have married again had he not believed such; and he had submitted the paper to a good attorney in this state, and had been advised that the paper was sufficient; and had married, relying on such advice and a copy of the decree, believing that he had a right to. All of this evidence was excluded, and on appeal to the supreme court that tribunal said: "To disprove any criminal intent, the record was also offered in evidence, coupled with an offer to show that the defendant, acting under the advice of counsel, believed in the validity of such alleged divorce, and that he contracted his second marriage in this belief. * * * If the pretended decree upon which he relied was in fact illegal and void, because made by a court having no jurisdiction, it afforded him no protection against the consequences of a second marriage, whatever may have been his motives or his belief in respect to the validity of the decree."

We think the evidence offered by the defendant affecting his intention and good faith in his second marriage was competent, not to show that he was not guilty, but because it might have affected the term of his imprisonment. But as defendant

was given the lightest punishment fixed by the statute, its refusal is not reversible error.

Affirmed.

---

66 190
166 264

66 190
78 92

DAVIS v. WEBBER.

Opinion delivered February 11, 1899.

1. ATTORNEY AND CLIENT—CHAMPERTY.—A contract between an attorney and client, allowing the former a contingent interest in the subject-matter of litigation as compensation for his professional services, is not void for champerty, though the courts will scrutinize such a contract closely to see that the attorney has taken no unjust or unfair advantage of his client. (Page 193.)

2. SAME—AGREEMENT OF CLIENT NOT TO SETTLE.—A stipulation in a contract for an attorney's fee for prosecuting a suit that the client shall not settle the suit without the attorney's consent is void as against public policy; and if such stipulation is not severable from the rest of the contract, but is an inducement for entering on it, the entire contract is void. (Page 197.)

3. SAME—FEE FOR PROFESSIONAL SERVICES.—Where a contract fixing the amount of an attorney's fee for professional services is void as against public policy by reason of a stipulation that the client shall not compromise without the attorney's consent, the court will grant compensation for the attorney's services, under the rule of *quantum meruit*. (Page 198.)

4. EVIDENCE—REASONABLENESS OF ATTORNEY'S FEE.—Notwithstanding a contract fixing the amount of an attorney's fee is void on account of a stipulation that the client shall not settle without the attorney's consent, the court may look to such contract to ascertain what the parties themselves thought such services were reasonably worth. (Page 199.)

5. SAME.—In determining what an attorney's services were worth in a particular case, the professional standing of the attorney, the amount of his professional business, and the nature and importance of the controversy in which the services were rendered, are all to be considered. (Page 199.)

6. ATTORNEY'S LIEN—PRACTICE.—In a suit to enforce an attorney's lien for services rendered in a certain suit on property received as a result of that suit, it is error to include in the judgment a fee for services rendered in a different suit. (Page 201.)

Appeal from Miller Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

Williams & Arnold, for appellant.

The rights of an attorney must not conflict with the interests of his client. Weeks, Attys. §§ 258, 271; 57 Ark. 93; 9 Fed. 721. Dealings between attorney and client are scrutinized closely, and the *onus* is upon the attorney to show fairness. Weeks, Attys. §§ 268, 273, 276, 277; 1 Am. & Eng. Enc. Law (2 Ed.), 333; Story, Eq. §§ 310, 311; 5 Johns. Ch. 48; 7 Atl. 842. The contract that appellee should have the penalty as his fee is void. Weeks, Attys. 724, 725; 49 N. E. 222. The agreement that the client would not compromise without the consent of the attorney was void, as against public policy. Greenhood, Pub. Pol. 774; 25 Ia. 487; 21 Ia. 523; 15 Ohio, 715. The opinions of witnesses as to reasonableness of fees, while merely advisory, should be considered in connection with the other facts in the case. 33 S. W. 777; Weeks, Attys. 697. Even if the contract was valid, the purpose having failed, recovery could not be had on its terms, but only on a *quantum meruit*. 23 S. W. 790; 22 S. W. 85; 92 Ill. 491; Weeks, Attys. 699; 1 Am. & Eng. Enc. Law (2 Ed.), 427; 8 Misc. Rep. (N. Y.) 533; 73 Md. 9; 7 W. Va. 202; 59 Barb. 574; 41 N. Y. Sup. Ct. 452; 28 S. W. 227; 20 Atl. 127; 33 Ark. 545. Contract is to be construed in the light of surrounding circumstances. 22 S. W. 85; 29 N. W. 838; 107 U. S. 442; 95 U. S. 23; 22 Wall. 111. A set-off can not be pleaded against a set-off. 22 Am. & Eng. Enc. Law, 236.

S. R. & Ashley Cockrill, for appellee.

The contingent character of the fee did not make the contract void for champerty. 17 Ark. 609, 663, *et seq.*; 33 Ark. 545. Appellant has an interest in the judgment, to the extent of the fee contracted for. Sand. & H. Dig. § 4223; 38 Ark. 385; 49 Ark. 86, 95; 36 Ark. 591. Even it the contract were void, the court could look to it for the purpose of ascertaining what the parties deemed a reasonable fee. 125 Ind. 359, 361; 36 Minn. 473; 26 N. Y. 279. The amount awarded should be allowed to stand, even on the basis of *quantum meruit*, all the

facts being considered. 1 Laws. R. & Rem. § 198; 44 Ark. 279; 33 Ark. 548. The contract was valid. 33 Ark. 545; 39 Ark. 340. Appellant's acquiescence estops him to deny his liability. 21 Ark. 420. A defective complaint will be treated as amended to conform to evidence introduced without objection. 54 Ark. 289; 59 Ark. 215; 53 Ark. 263; 24 Ark. 326; 57 Fed. 693. On appeal the presumption is that the irregularity of the pleading was waived. 39 Minn. 365; 51 Minn. 162.

WOOD, J. This is a suit by Webber against Davis to recover the sum of $2,885.50 for services, as an attorney at law, under a certain contract, and to declare and enforce a lien for such sums upon certain property. The contract is as follows: "Whereas, by the judgment of the Miller county circuit court in the case of Mansur v. Tebbetts Implement Co., and Hargadine-McKittrick Dry Goods Co. v. Robt. Ellis, in which N. L. Davis was interpleader, the proceeds of the sale of the stock of goods bought from said Ellis by said Davis was adjudged to be the property of N. L. Davis, and ordered to be immediately turned over to him by A. S. Blythe, sheriff, and a similar order was issued by the Hempstead circuit court on the other attachments against Ellis, taken to that county on a change of venue; and demand having been made on said sheriff, and he failing to pay the same, it becomes necessary to proceed against him on his official bond, and the said Davis having employed the said T. E. Webber for that purpose: Now, therefore, it is agreed and understood, by and between the said T. E. Webber and the said N. L. Davis, that T. E. Webber is to have, as fees for his services as attorney therein, the 10 per cent. per month affixed by the statute as penalty in such default, and that N. L. Davis is to make no settlement with said sheriff, or said bondsmen, or either of them, without the assent of the said T. E. Webber. In the event a proposition of settlement or compromise is submitted, either by the said sheriff and his bondsmen, or by the said T. E. Webber and N. L. Davis, or either of them, the same is not to be accepted unless agreed to by both T. E. Webber and N. L. Davis, and in such proposition, so mutually agreed to, such allowance shall be made for T. E. Webber's attorney's fees as may be agreed

upon by said Webber and said N. L. Davis, or else said proposition shall be rejected. Witness our hands this 30th day of April, 1894, to this agreement, which is separate and distinct from and in no wise affects or impairs any agreement heretofore entered into as to attorney's fees on the interpleas filed for N. L. Davis in said cause.

[Signed] "N. L. DAVIS.
"T. E. WEBBER."

The amount which the sheriff was ordered to pay Davis was $7,114.50. The sheriff failing to pay said amount upon the demand of Davis, Webber was employed, as indicated *supra*, to proceed against the sheriff and his bondsmen to collect the money. Accordingly, Webber, as attorney for Davis, instituted proceedings against the sheriff and his sureties by motion for summary judgment, and on September 14, 1894, obtained judgment against them for $7,034.50, the amount sued for, less the taxes which the sheriff had paid. The judgment was also for interest at the rate of 6 per cent. per annum, and 10 per cent. per month penalty, on the above amount from April 23, 1894, until paid. It was provided in the judgment that the amount of principal, interest and penalty should not exceed $10,000, the amount of the sheriff's bond. The principal, interest and penalty would have exceeded $10,000 at the time the judgment was rendered. So the judgment obtained by Davis against the sheriff and his bondsmen was for $10,000, and the amount due Webber of said judgment under the contract with Davis was something over $2,800. Webber filed his lien upon said judgment March 21, 1895. In April thereafter Davis accepted of the sheriff and his sureties certain notes and real estate in satisfaction of the judgment against them. This was done without the payment of Webber's fee, and, as he claims, without his consent; hence this suit.

Several defenses were presented. The only ones we need consider are: First, that the contract was void; second, that there can be no recovery except upon a *quantum meruit*, and, in that case, Davis contends, the decree for $1,997.05, was excessive.

1. *Was the contract void?* Long ago (1857) this court, in

an elaborate and learned opinion by Mr. Justice Scott, traced the origin, and reviewed the history, of the law of maintenance and champerty, as enacted into statutes and declared by the courts of England. *Lytle* v. *State*, 17 Ark. 608, 663, *et seq.* The conclusion reached was that such laws were not applicable to contracts between attorney and client providing remuneration to the attorney for services rendered his client in conducting litigation. The English rule avoiding such contracts upon the ground of maintenance and champerty was repudiated, as repugnant to our constitution and statutes, and the court showed, and might have added, that such a rule was contrary to the genius of our institutions. As was said by Mr. Justice Cobb in *Newman* v. *Washington, Mart. & Yerg.* (Tenn.) 79: "It is consonant with the nature of our institutions that faithful labors should be rewarded by reasonable remuneration, and he who works at the bar, and he who works at the plane, the physician, the farrier, the carpenter, and the smith, should all possess an equality of rights, and be paid what they reasonably deserve to have, according to the nature and value of their respective services." And he continues: "Here we have no separate orders in society, none of those exclusive privileges which distinguish the lawyer in England, in order to attach him to the existing government, and which constitutes him a sort of noble in the land. * * * But, upon the whole, a lawyer in England is as different from a lawyer here as a man clad in a plain suit of black or blue—his head such as nature made it—is unlike him in appearance who has his body surrounded with a long robe and his head covered with a large wig." As was said by Chief Justice Gibson in *Foster* v. *Jack*, 4 Watts, 334 "The dignity of the robe, instead of any principle of policy furnishes all the arguments that can be brought to support' the English rule. *Kennedy* v. *Broun*, 7 L. T. Rep. (N. S.) 626, 9 Jur. (N. S.) 119.

More than once since the decision in *Lytle* v. *State, supra*, this court has recognized the validity of contracts between attorney and client, allowing the former a contingent interest in the subject-matter of litigation as compensation for his professional services. *Brodie* v. *Watkins*, 33 Ark. 545; *Jacks* v. *Wheat*, 39 Ark. 340; *Cockrill* v. *Sanders*, 8 S. W. Rep. 831.

We are aware that some American courts of eminent respectability have approved the English rule concerning such contracts. *Miles* v. *Collins*, 1 Metc. (Ky.) 308; *Dumas* v. *Smith*, 17 Ala. 305; *Price* v. *Carney*, 75 Ala. 552. But see *Coquillard* v. *Bearss*, 21 Ind. 479; *Orr* v. *Tanner*, 12 R. I. 94. See *Gilman* v. *Jones*, 87 Ala. 702, for the doctrine now in Alabama.

But the modern, and decidedly prevailing, view in this country is in accord with the rule adopted by this court, to uphold such contracts. See cases collected in 5 Am. & Eng. Enc. Law (2 Ed.), 826, and in note to *Kennedy* v. *Broun*, 2 Am. Law. Reg. (1862–3) p. 372.

Such contracts, however, should be characterized by the utmost good faith on the part of an attorney towards his client, because of the confidence reposed in him. The courts will scrutinize such contracts closely, to see that *uberrima fides* has been preserved. If there has been "suppression or reserve of fact or exaggeration of apprehended difficulties," or any circumstances of the confidential relationship have been seized upon by the attorney to consummate an oppressive contract with the client, the courts will not hesitate to express their disapprobation of such contracts, and, when called upon, will set them aside or refuse their enforcement. *Ex parte Plitt*, 3 Wall. Jr. (C. C.) 480; *Chester County* v. *Barber*, 97 Pa. St. 455; *Stewart* v. *Houston, etc. R. Co.*, 62 Tex. 248; 5 Am. & Eng. Enc. Law, (2 Ed.) 827. This court, in *Jacks* v. *Thweatt*, 39 Ark. 340, passed upon a contract containing a stipulation whereby the clients agreed "to make no settlement without consulting their attorneys." But the question as to whether that clause rendered the contract void was not raised or decided in that case.

So far as the amount of the fee as fixed by the contract is concerned, there is nothing in the record to show any unjust or unfair advantage taken by Webber of his client, Davis, in determining the amount. At the time the contract was executed (30th of April, 1894), only seven days had expired from the time (23d of April, 1894) demand was made upon the sheriff for the money which he had been ordered to pay over to Davis. Under the contract Webber was to get no fee unless there was a recovery. While the amount Davis was to receive upon recovery was fixed and certain, the amount Webber was to receive

was contingent, depending entirely upon the time that elapsed from the demand until the amount sued for was collected. At the time Webber entered into the contract, neither he nor Davis could know what time would intervene before a settlement might be reached. If the sheriff and his bondsmen had settled the amount, with Webber's consent, in a few days after the contract between Davis and Webber was executed, the amount of Webber's fee would have been very small as compared with the amount of same at the time of the judgment. Davis appears to have been well pleased with the agreement. He says: "I told him (Webber) that if he would agree to collect the $7,114.50 for me, he could have any penalty that might be allowed; and if he would agree to that, and agree to set aside all the money that was collected until the whole amount of the principal was collected for me, that he could have the amount that would be allowed as a penalty." Witness Smith, one of the sheriff's sureties, and who was acting as an intermediary between the sheriff and his other bondsmen and Davis, to bring about a settlement before suit was instituted, and who had made a proposition of settlement to Davis, which Davis had declined, said concerning this: "I told him I was sorry, and that he would regret it more than I ever would; that in twenty-two or twenty-five years from now, when he hadn't got a nickle out of it, and a big lawyer's fee on his shoulders, he would think that Smith was right once." He [Davis] said: 'As to my lawyer's fee, Mr. Smith, I have a contract right here in my safe with a good attorney that I am never out a cent attorney's fee, but I must have all of my money, before there is any liability for attorney's fee.' I said to him, 'Mr. Davis, you certainly have an elegant contract.' He says, 'I think I have.' " Davis was a merchant, a man of intelligence, and, as the record shows, of considerable experience in litigation, and in the matter of contracts for lawyers' fees.

A contract with his attorney for fees, which, as the witness reports him, Davis regarded as "elegant" in the beginning of his important litigation, can not be avoided for the reason simply that, in the end, it did not bring to him the results which he had anticipated under it. Yet this is about the sum total of his grievance, so far as we can see. Therefore we do not consider

what is said by the learned counsel for Davis, in their excellent brief, as to good faith, fraud, oppression, extortion, the "severe relationship of trustee and *cestui que trust*," etc., and the authorities cited on these subjects, as applicable under the facts of this case. The facts, as we view them, fail to show any abuse whatever of the confidential relation of attorney and client, and, were this all, we would uphold the contract.

But it is contended that the provision in the contract preventing Davis from settling the controversy without the consent of Webber is void. This contention is well taken. Such a stipulation is against public policy. "The law," says Judge Dillon in *Ellwood* v. *Wilson*, 21 Ia. 523, "encourages the amicable adjustment of disputes, and a construction of a contract which would operate to prevent the client from settling will not be favored." It is said in *Lewis* v. *Lewis*, 15 Ohio, 715, that "a contract with an attorney to prosecute a suit containing a stipulation that the party should not have the privilege to settle or discontinue it without the assent of the attorney would be so much against good policy that the court would not enforce it." In *North Chicago St. Ry.* v. *Ackley*, 49 N. E. Rep. 222, it is held "that any contract whereby a client is prevented from settling or discontinuing his suit is void, as such agreement would foster and encourage litigation."

The impeachment of the contract under consideration is peculiarly proper upon the ground of public policy, regardless of the fairness and good faith of the parties in executing it. We would not call in question the good faith of the parties to the contract. The record would not justify our doing so. Davis was anxious to procure the services of an attorney to collect the money coming to him without paying out any "ready cash," and, as he says, he did not know whether any penalty would be allowed. Webber was perfectly willing to take the penalty for his fee, and risk the chance of recovering it. This, at the time, was doubtless considered an admirable arrangement by both, and, but for the clause prohibiting Davis making a settlement without the assent of Webber, we can see no objection to it. This clause was fatal to the entire contract. It is not severable from it. It seems to have been an inducement for entering upon the contract. It is impossible for us to say that

the parties would have entered upon the contract at all without this clause. To approve such a contract as a precedent would be unprecedented. It is a wise public policy to allow the parties to a law suit, or to disputes that have not even progressed to the proportion and dignity of a law suit, to settle their differences without hindrance from disinterested parties. Parties should be permitted to beg or buy their peace at any time. It would be difficult to estimate the monstrously unjust consequences that might result to parties willing and ready to settle a demand of this kind, if it lay in the power of an attorney to impede or control such settlement, especially when his interest in doing so was quickened by the stimulating influence of a fee which was accumulating at the appalling rate of $700 per month. It could hardly be expected that such a condition would expedite the litigation or the settlement.

When a law suit has progressed to judgment, then, of course, the attorney, under the statute (Sand. & H. Dig. § 4223) may establish his interest in the judgment which has resulted from his services, and this neither party to the litigation can ignore. Then the parties may settle if they wish, but before there can be any satisfaction of the judgment the attorney's fee must be paid. Before judgment the attorney can only trust to the integrity and good sense of his client not to compromise without advising with him and making satisfactory arrangements as to the fee. If the attorney should have for his client one who has neither the good sense to consult him nor the integrity to pay him, then, indeed, would he be unfortunate. But where this is the case, generally the attorney, unless he expects to give his services as *quiddam honorarium*, well deserves censure rather than sympathy for having such a client, and will have to suffer the consequences.

2. While the contract sued on is against public policy, and therefore void, yet the making of such a contract is neither *malum prohibitum* nor *malum in se*. It is not even of questionable propriety. Therefore the courts, although refusing to enforce such a contract, will nevertheless grant compensation for valuable services rendered under it, upon the rule of *quantum meruit*. 5 Am. & Eng. Enc. Law (2 Ed.) 828, and authorities cited.

The question as to the amount of recovery is one of fact, and one most difficult to decide, in view of the varying opinions of gentlemen distinguished in the profession as to the value of such services, and also the conflicting opinions of witnesses as to the value of the property accepted by Davis in satisfaction of the judgment, all of which it is proper to consider in fixing the value of the service under a *quantum meruit.*

The court may look to the contract for the purpose of ascertaining what the parties themselves thought the services were reasonably worth, and, in connection with the other evidence, to determine what was the reasonable value of the service actually rendered. *Shumate* v. *Furlow*, 125 Ind. 359, 361; *La Du King Mfg. Co.* v. *La Du*, 36 Minn. 473; *Clark* v. *Gilbert*, 26 N. Y. 279. But it can not be taken as the criterion of value for such services. *Holloway* v. *Lowe*, 7 Port. (Ala.) 488; *Elliott* v. *McClelland*, 17 Ala. 209.

The professional standing of the attorney, the amount of his professional business, and the nature and importance of the controversy in which the services were rendered, are all to be considered. 1 Lawson, Rights, Rem. & Prac. § 198.

Webber was "no cheap man" and "no mean lawyer." On the contrary, the character of the litigation, which the record discloses he conducted to a successful termination, and the fees he demanded and received, show him to have been a lawyer of good ability, who doubtless deserved, demanded and received pay commensurate with his labors and his talents. Now, this being true, what was the reasonable value of the services he rendered Davis in his controversy with the sheriff and his bondsmen? It would serve no useful purpose to set out in detail, and to discuss at length, the evidence (which is voluminous) upon which we base our conclusion. A less intelligent lawyer than Webber must have known, when he entered upon the contract, that there would be but little work and no difficulty in reducing the demand of Davis to judgment. All but a trifle of the amount had been judicially ascertained, and, from the lawyer's standpoint, it could have been but a simple and easy matter to file the motion and have summary judgment entered; for, in the state of Davis' claim, however hotly contested, there could be absolutely no defense

to it. There could be no uncertainty as to the amount, nor as to the result of the judgment, as far as the principal of the claim was concerned. The only uncertainty and contingency whatever related to the penalty, and there was no contingency about obtaining judgment for this, but only uncertainty as to the amount that would be allowed, depending upon the time that would intervene between the demand and the judgment. It will not do to liken a case of this kind to a suit for damages for personal injury, or any other kind of a suit, where both the question of obtaining judgment and the amount thereof, if obtained, are trembling in the balance. This, in fact, is a suit upon a liquidated demand, where there was no issue as to the amount of the judgment, and no doubt about obtaining it. The proof shows that the lawyer's fee, based upon the contingency of final recovery, would be much less in the latter case than in the former. Necessarily so, because of the diminished labor in its prosecution, and the anxiety as to the result.

The paramount obstacle that lay in Webber's path was not the difficulty and labor of obtaining judgment, but in collecting it. But even this, in view of actual results, was reduced to the minimum; for while suits to recover at one time were thought to be necessary, and investigations made and memoranda taken for the preparation of bills to that end, as a matter of fact, such bills were never filed, and there was no long and complicated litigation to collect what was finally received. Now, Webber, under the *quantum meruit*, should receive pay only for the services actually rendered. Suits that were never prosecuted should not be considered. We would not minimize the value of his excellent labors. His known ability, persistence and vigilance doubtless moved the sureties of the sheriff to make the offer of compromise, both before and after the suit was instituted. We are willing to concede this. Then how does the case stand? Webber instituted a suit against the sheriff and his bondsmen for the sum of $7,114.50, and which he must have known at the time, unless settled by them before, would amount to ten thousand dollars, including interest and penalty, by the time judgment would be obtained. To this claim, which had been ascertained by the court, and the amount of penalty fixed by the statute, even though

vigorously contested, there could be no defense. He succeeded in obtaining judgment for ten thousand dollars, and recovered of the amount, according to the estimate of the property by the court below, the sum of $8,850. A majority of the judges are of the opinion that this is the most favorable view of the case that can be taken for Webber; and it is, in our opinion, the correct view. When so considered, under all the proof, the sum of $1,000 would be a reasonable and fair compensation for all his services. This would give him ten per cent. of the amount of the judgment, or ten per cent. of the amount collected, and one hundred and fifteen dollars for the work done in preparing for suits to uncover, which would be ample to pay for that.

3. The court rendered judgment for $152 for services in a different suit. This is a suit to declare and enforce a lien for a fee for services rendered in a certain suit, on property which was received as a result of that suit. The controversy over the $152, being about an entirely different matter, is in no way germane to this issue, and should not have been considered, and judgment for said sum was improper in this proceeding.

The decree is therefore reversed, and the cause remanded, with instructions to enter a decree for Webber in the sum of $1,000, with interest at six per cent. per annum from the date of the acquisition of the property by Davis, and to proceed to enforce the lien on the property mentioned in the complaint, and for such other proceedings as may be necessary, not inconsistent with this opinion. The costs of this court will be paid by appellee; the cost below will stand as adjudged by the chancellor.

BUNN, C. J., dissenting.

PAYNE v. RITTMAN.

Opinion delivered February 18, 1899.

66 201
s68 339
68 558

66 201
72 184
72 234

66 201
74 425

66 201
f 84 551

66 201
f80 375
81 41
82 530
e82 531

1. CITY MARSHAL—VACANCY—APPOINTMENT.—A vacancy in the office of city marshal of a city of the second class cannot be filled by the appointment of the governor, but should be filled by the city council, under the general power of municipalities to fill vacancies. (Page 203.)

2. CIRCUIT COURT—JURISDICTION —Under Constitution 1874, art. 7, § 11, providing that "the circuit courts shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which may not be vested in other courts provided for by this constitutution," a demurrer to the jurisdiction of a circuit court to try a contested election case is properly overruled where exclusive jurisdiction has not been conferred on some other court. (Page 204.)

Appeal from Arkansas Circuit Court.

GEORGE M. CHAPLINE, Judge.

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

The governor has the power to fill a vacancy in the office of town marshal. When any office becomes vacant, and there is no means provided for filling it, the governor has the power to appoint. Sand. & H. Dig. § 3156; art. 6, § 23, Const. Members of the council, only, can be elected at special elections. Sand. & H. Dig. § 5127. A town marshal is not a member of the council. Sand. & H. Dig. § 5259. Appellant had the right to go into circuit court to recover both fees and office. 50 Ark. 266; 42 Ark. 117; 28 Ark. 451; 32 Ark. 315; 48 Ark. 301; 49 Ark. 361.

Geo. C. Lewis, for appelles.

Section 23, art. 6, of the constitution, confers power upon the governor to appoint only executive officers of *the state*, and refers only to commissioned officers. Nor does the amendment of 1893 [Acts 1893, p. 360) cover this case. The amended provision supersedes the old one. 53 Ark. 339. All governmental power, not delegated by the constitution, is lodged in the people. Const. Ark., art. 2, § 1729; Pom. Const. Law, § 151; Dill. Mun. Corp. § 9; Cooley, Const. Lim. 225. The right of local self government belongs to the people. 4 L. R. A. 71; Dill. Mun. Corp. §§ 11, 206; 15 N. Y. 561; 55 N. Y. 50; 13 Am. St. Rep. 123; 31 L. R. A. 529; 24 Mich. 44; 32 N. Y. 364. The power to elect impliedly includes the power to fill any vacancy in the office. 19 Am. & Eng. Enc. Law, 430, 548, 550; 1 Cal. 519; 2 Cal. 135; 55 N. Y. 50. The county court has exclusive original jurisdiction of contests in municipal elections. 33 Ark. 191; 43 Ark. 62; 51 Ark. 559; 61 Ark. 247.

BUNN, C. J. The city marshal of Stuttgart, Arkansas county, died, and on the 26th of September, 1898, the council of said Stuttgart, which was a city of the second-class, held a special election to fill the vacancy, and the election officers certified that the appellee was elected, and he took possession of said office, under the sanction of said council, and has held the same since that time. On the 8th of October, 1898, appellant was appointed and commissioned by the governor of the state as city marshal of said city.

This proceeding was instituted by appellant, seeking, in effect, two remedies by which to oust the appellee, the incumbent aforesaid: First. A suit in the nature of a proceeding by *quo warranto* to try title to office, the plaintiff claiming title under and by virtue of the appointment and commission of the governor, and calling in question the defendant's title under and by virtue of the special election, contending, in effect, that if the governor could lawfully fill the vacancy, the same could not be filled by the city by and through a special election. Second. A proceeding to contest the election of the defendant at said special election, conforming his pleadings to the statutory requirements in cases of election contests, and pointing out in his declaration the grounds of his contest. The two proceedings were instituted by the same complaint, but the same was divided into two paragraphs, the latter being in the nature of an alternative action, to be relied upon if the other was not available.

To the first cause of action the defendant interposed a general demurrer to the effect that said first paragraph of the complaint does not state facts sufficient to constitute a cause of action against this defendant. This demurrer raises the question as to which of the two methods—by the appointment of the governor or by special election by the city council—is the lawful method to fill a vacancy in the office of city marshal of a city of the second-class. It will be observed that, while authority is conferred by statute upon a city of the second class to order special elections to fill vacancies in the office of city aldermen, nothing is said in that connection as to the office of city marshal. But a majority of this court holds that the authority to fill vacancies belongs to municipalities generally,

and that these general powers are expressly conferred by statute in this state upon all its municipal corporations. This holding is to the effect, therefore, that the appointment in this instance by the governor is invalid. This demurrer was sustained by the circuit court, and the judgment to that extent is affirmed.

The defendant interposed his demurrer also to the second paragraph of the complaint, which calls in question the jurisdiction of the circuit court to try a contested election. The plaintiff, on the other hand, contends that, no other tribunal having been named by law as having jurisdiction in contests for the office, it follows that the circuit court has such jurisdiction inherently, under the 11th section of article 7 of the constitution, which reads as follows: "The circuit courts shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which may not be vested in some other court provided for by this constitution." It is said by this court in *Heilman* v. *Martin*, 2 Ark. 158, that "a plea to the jurisdiction of the circuit court must show that there is some other court having jurisdiction." And now it should appear, not only that there is some other court having jurisdiction, but exclusive jurisdiction. *State* v. *Devers*, 34 Ark. 188.

The court below sustained the demurrer to its jurisdiction also, and in this it was in error, and the judgment is therefore reversed, and remanded with directions to overrule the demurrer to the jurisdiction, and to proceed to try the cause on the second paragraph.

WHIPPLE v. JOHNSON.

66 204
c73 48

Opinion delivered February 18, 1899.

1. LIMITATION—MORTGAGE FORECLOSURE.—A suit to foreclose a mortgage is barred where the debt which it is given to secure is barred. (Page 205.)

2. SAME—DEATH OF MAKER OF NOTE.—The running of the general statute of limitations of five years as to a note will not, upon the death of the maker, be suspended by the statute of non-claim until letters of administration are granted upon deceased's estate. (Page 205.)

Appeal from Pulaski Chancery Court.

THOMAS B. MARTIN, Chancellor.

Hill & Auten, for appellant.

The first note being barred, no foreclosure could be had on it. Sand. & H. Dig. § 5094; 64 Ark. 306.

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

Since the right to foreclose was not barred, a decree as to both notes was proper. 29 Ark. 591; 34 Ark. 318. This rule is not effected by Sand. & H. Dig. § 5094; 43 Ark. 469. The mortgagor cannot redeem part and not all of the debt. 13 Am. & Eng. Enc. Law, 704; 2 Jones, Mort. 1204; 79 N. C. 480. The note would not be barred until two years after death of maker, since he died before it was barred. 33 Ark. 651.

WOOD, J. On the 21st of July, 1891, appellant executed a mortgage upon her individual property to secure two notes of her husband to John Lafferty, administrator of the estate of Mary Martin, deceased. The first note was for $62.50, due three months after date; the second note was for $62.50, due six months after date. The notes were of even date with mortgage. The notes were also signed by Mrs. Whipple with her husband, but it is conceded that the debts were the husband's. The notes and mortgage were given for the purchase money of the land mortgaged. Spencer Whipple, the husband, died in 1895, within four years from the date of the notes. John Lafferty having died, this suit is by appellee, his successor, to foreclose the mortgage. The appellant pleads the statute of limitations as to the first note, and this presents the only question.

More than five years had elapsed from the maturity of the first note (Oct. 21, 1891), to the bringing of this suit, Nov. 21, 1896. Under the decision of this court in *American Mortgage Co.* v. *Milam*, 64 Ark. 306, no suit to foreclose or enforce the mortgage as to the debt evidenced by this note can be maintained.

But it is claimed that the death of Spencer Whipple, which occurred in 1895, stopped the five years' statute of limitation on the first note, and that appellee should have the benefit of

the statute of non-claim. This contention cannot avail, for the reason that appellee fails to show that the statute of non-claim was ever started as to the debt for which the mortgage is sought to be foreclosed. The complaint alleges that there was no administration upon the estate of Spencer Whipple. There is nothing, in other words, to show that appellee has brought this case within the statute of non-claim. The general statute of limitation of five years as to notes would not cease to run until letters of administration were granted upon the estate of Spencer Whipple. Sand. & H. Dig. § 110; *Worthington* v. *De Bardleken*, 33 Ark. 651.

It appears from this record that the first note of $62.50 was barred by the five years' statute of limitation at the time this suit was instituted. The decree of the chancellor foreclosing the mortgage for that amount is therefore reversed; otherwise it is affirmed.

Reversed and remanded, with directions to dismiss the complaint as to the first note, and for further proceedings not inconsistent with this opinion.

KINNEMER *v.* STATE.

Opinion delivered February 18, 1899.

1. EVIDENCE—STATEMENT OF DEFENDANT'S WIFE.—It is not admissible to rebut the testimony of an accused person by proof of contradictory statements made by his wife. (Page 207.)

2. TRIAL—RE-READING INSTRUCTIONS IN ACCUSED'S ABSENCE.—It is error in a felony case for the court, in defendant's absence, to re-read the instructions to the jury, at their request, though they are read exactly as at first given, since defendant had a right to know that such was the case, and to be present for that purpose. (Page 208.)

Appeal from Pope Circuit Court.

WILLIAM L. MOOSE, Judge.

J. F. Sellers, for appellant.

It was error to require defendant to go to trial before a

copy of indictment was served on him. 24 Ark. 631. It was error to allow the state to prove the statements made by defendant's wife. 64 Ark. 121. It was error to allow the state to ask defendant whether he had not been convicted of petit larceny. 58 Ark. 476; 60 Ark. 450; 34 Pac. 1078. The prosecuting attorney made use of improper arguments. 61 Ark. 130; 58 Ark. 480; 168 U. S. 382; 8 S. W. 762; 32 S. W. 1149; 17 S. W. 1108; 14 S. W. 117; 12 S. W. 619; 5 S. W. 115; 43 Pac. 124; 11 S. W. 185; 30 Atl. 419. It was error to reinstruct the jury in the absence of defendant. 24 Ark. 624; 19 Ark. 209; 5 Ark. 431; 10 Ark. 325; 44 Ark. 332; 30 Ark. 328; 39 Ark. 180; 54 Ark. 489; Bish. Cr. Proc. § 688; 43 N. Y. 3; 146 U. S. 370, s. c. 36 Law, Ed., 1011, and note; 26 O. St. 208; 25 Alb. L. J. 59; 6 L. R. A. 832 and note; 16 Pac. 330; 6 S. W. 646; 4 Humph. 254; 2 Sneed (Tenn.) 550; 1 Wend. 91. The evidence was insufficient to sustain a conviction.

WOOD, J. On the night of June 16, 1897, Dr. Chamness was assassinated. He was sleeping, as was his custom, upon a cot on his gallery. While thus sleeping, some one shot him through the head with buckshot, killing him instantly. The defendant was indicted for the murder, the indictment charging him with murder in the first degree. He was convicted of murder in the second degree.

At the trial defendant and one Shipp testified that on the night of the killing (Wednesday night) Shipp stopped at defendant's house, which was about seven miles from the scene of the killing; that Shipp stayed till late in the night, and while at defendant's fixed his clock, the defendant being at home at the time; that defendant was at his home when Shipp left. It had been shown that Doctor Chamness was killed about the hour of 11 o'clock Wednesday night. The above testimony therefore was pertinent and material concerning the question of alibi. In rebuttal, a witness was permitted, over defendant's objection, to state that on Sunday, after the killing on Wednesday night, she saw defendant's wife, who told the witness that Joe Shipp had fixed their clock the day before. This testimony tended to contradict both the defendant and Shipp on a ma-

terial question in the case. It was pure hearsay. The wife of the defendant could not be a witness, and nothing that she said was proper. She could not be called to contradict or confirm the statements ascribed to her.

The record shows that, after the case had been submitted to the jury and after being out several hours, the jury came into the court room, and asked to be re-instructed, whereupon the court, the defendant being in jail, and not voluntarily absent, re-read the entire instructions exactly as first given to them. The record does not show that even defendant's counsel were present when this was done. The fact that the jury asked "to be reinstructed" shows that they did not comprehend the charge of the court when first delivered. The re-reading of the instructions was tantamount to instructing them originally, or for the first time, because the first time the instructions were read they were not understood. There is no more important or material step in the progress of a trial than instructing the jury. Even had the record showed affirmatively the presence of defendant's counsel, still they could not waive his presence while the jury was being instructed. The instructions could not be re-read in his enforced absence, for, although they were read "exactly as at first given," the defendant had the right to know and see that such was the case, and to be present for that purpose. *State* v. *Brown*, 24 Ark. 620; *Bearden* v. *State*, 44 *ib.* 331.

Various other grounds are set up in the motion for new trial which we deem it unnecessary to discuss. Most of them would not likely be raised on another trial. Inasmuch as the judgment must be reversed, and the cause remanded for new trial for the errors indicated, a majority of the judges deem it proper not to discuss the sufficiency of the evidence to sustain the verdict. For my part, I do not consider the evidence sufficient.

Reversed and remanded.

CRESON v. WARD.

Opinion delivered February 18, 1899.

1. CONVERSION—WAREHOUSEMAN.—One who sells the goods of another stored in his warehouse for safe-keeping is liable for their conversion. (Page 210.)

2. PRINCIPAL AND AGENT—RATIFICATION.—The son of a warehouseman, assuming to act as his father's agent, but without his knowledge, sold goods of another stored for safe-keeping, and directed the purchaser to pay the purchase price to his father. The latter, when informed, made no objections to the sale, and accepted part of the price from the purchaser. *Held* that the son's unauthorized acts were ratified. (Page 211.)

Appeal from White Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

W. L. Creson was the owner of a lot of second-hand clothing, consisting of overcoats, coats and vests. With the consent of R. A. Ward, Creson placed this clothing in the warehouse of Ward for safe-keeping. Nothing was said as to whether Creson was to pay Ward for the storage of the goods or not, but Ward told Creson that the warehouse leaked, and that if the goods were put in the house they would have to be put there at his risk.

Afterwards Oran Ward, a son of appellee, during his father's absence, sold the goods of Creson to one Sam Vaughan for thirty dollars and fifty cents. Creson afterwards demanded possession of his goods from Ward, and, Ward refusing to return the goods, Creson brought this action to recover their value. On the trial he testified that when he demanded the goods of defendant he replied that he had forgotten who the owner was, and had sold them, and offered him the price for which they sold,—five dollars in cash and balance when collected. Oran Ward testified that during the absence of his father he was having the warehouse cleaned up, and discovered these

goods. They were, he said, of little value, and, supposing that the owner had abandoned the same, he sold them. He told Vaughan, the purchaser, to pay his father, R. A. Ward, for the goods. His father did not know he was going to sell the goods, and he was not, he says, in the employ of his father; but he says: "I sold the goods on Friday or Saturday, and informed my father on Monday afterwards that I had sold them. He did not say anything when I told him I had sold the goods."

The appellee, R. A. Ward, testified in part as follows: "I never did make any effort to have the goods returned when Oran told me he had sold them. I did not think I had anything to do with the goods then, as they had been sold. These goods I tender here are part of the same goods. I don't know whether I could have had all the goods returned or not at the time Oran told me he had sold them. * * * I did not tell Creson that I sold the goods. I did tell him that I would pay him for them; that I would pay five dollars then, and the balance when I collected it." Vaughan, the purchaser of the goods, paid five dollars of the purchase price to R. A. Ward, and agreed to pay balance. The testimony as to the value of the goods was conflicting; some of the witnesses estimating their value at several hundred dollars, while others said they were of little or no value. There was a verdict and judgment for defendant.

J. P. Roberts, for appellant.

Appellee was guilty of gross negligence in making no effort to have the goods returned. Cooley, Torts, 630; 95 U. S. 441; 36 Ark. 607. The court's instructions were erroneous, and the cause should be remanded. 16 Ark. 308; 25 Ark. 487.

S. Brundidge, for appellee.

No gross negligence is shown, and appellee, being a gratuitous bailee, was liable only for gross negligence. 23 Ark. 61; Hale, Bailments, 61; Pars. Cont. 89.

RIDDICK, J., (after stating the facts.) This is an action for conversion of goods. It is admitted that plaintiff, Creson, left his goods for safe-keeping in the warehouse of defendant, R. A. Ward, by permission of Ward. Afterwards Oran Ward,

a son of defendant, not knowing to whom the goods belonged, and supposing that they had been abandoned, sold them. Whether the son was the agent of his father or not, the evidence clearly shows that he was assuming to act for his father. The goods were in his father's warehouse, and he directed the purchaser to pay the purchase price to his father. The goods were sold to a brother of Ward's clerk, and Ward was informed of the sale in a few days after it was made. He made no objection, accepted a part of the proceeds, and intended to collect the balance. He thus ratified the sale by his son. The act of the son amounted to a conversion, and this, by ratification, became the act of the father. 1 Am. & Eng. Enc. Law (2d Ed.), 1185; *Wear* v. *Gleason*, 52 Ark. 364.

Although the goods may have been of little value, they were certainly worth the price which defendant received for them, and plaintiff is entitled to recover that sum, if no more.

For want of evidence to support the verdict, the judgment is reversed, and a new trial ordered.

BUNN, C. J., and WOOD, J., dissent on ground that evidence was sufficient to support the verdict.

WEAVER v. LEATHERMAN.

66 211
74 220

Opinion delivered February 25, 1899.

PROHIBITION—PRACTICE.—Prohibition will not lie to prevent the chancery court from proceeding in a cause improperly transferred from the circuit court if an appeal would lie, and no irreparable loss to petitioner by its refusal is threatened. (Page 214.)

Petition for Prohibition to Garland Chancery Court.

LELAND LEATHERMAN, Chancellor.

Greaves & Martin, for petitioner.

As to when chancery and circuit courts had concurrent jurisdiction before the adoption of the code, see: 6 Ark. 317; *ib.* 79. Where the common-law jurisdiction of chancery was not exclusive, the code does not authorize a suitor to shift his ac-

tion from a court of law to one of equity. Sand. & H. Dig. §§ 5608–9, 5615. Nor will a transfer be allowed as to issues not cognizable in chancery, merely because the answer sets up equitable defenses. Sand. & H. Dig. §§ 5619–20; 44 Ark. 478; 59 Ark. 409; 46 Ark. 273; 49 Ark. 80; 54 Ark. 32; 26 Ark. 59; 47 Ark. 209; 31 Ark. 605. The right of trial by jury extends to all cases where legal, as distinguished from equitable, rights are to be determined. 56 Ark. 391; 48 Ark. 26; 40 Ark. 290; 57 Ark. 589; 32 Ark. 553; 11 N. H. 9; 15 Mich. 322; Sand. & H. Dig. § 5794; 52 Ark. 415; 47 Ark. 209; 48 Ark. 436. The chancellor is without jurisdiction to try this cause, and prohibition is the proper remedy to restrain him. 26 Ark. 51; 56 Ark. 539.

G. G. Latta, for respondent and intervenors.

When an equitable defense is filed, the court may, upon motion of the plaintiff, transfer the cause to chancery. 28 Ark. 458; 36 Ark. 238; 26 Ark. 59. Such transfer may be made, though all the defenses are not of exclusively equitable cognizance. 44 Ark. 458. Prohibition is not the proper remedy. The decision of the circuit court should have been reviewed by appeal. 31 Ark. 598; 47 Ark. 205; Leath. Notes, Ark. Stat. 1042–3–4. When an equitable defense is set up, the cause should be transferred. 51 Ark. 198; 13 B. Mon. 365; 14 B. Mon. 91; 15 B. Mon. 172; Sand. & H. Dig. §§ 5615–16; 37 Ark. 185; 35 Ark. 583; 46 Ark. 273; Leath. Notes, 277. The circuit court could have made the transfer *suo moto*. 39 Ark. 251; 49 Ark. 20; Leath. Notes, 1045.

BUNN, C. J. This is a petition for a writ of prohibition against the respondent, Leland Leatherman, as chancellor of the third chancery district, to restrain and prohibit him, as such chancellor, from proceeding further to hear and determine the cause of the First National Bank of Hot Springs, in said district, against the petitioner, Charles H. Weaver.

Said suit of the First National Bank against Charles H. Weaver was on a promissory note for $4,000, signed by Weaver and one Klein, and delivered to the bank, instituted 15th of September, 1896, in the Garland circuit court. On the 30th of September, 1896, Weaver filed his answer to the complaint in

said circuit court, alleging, by way of defense therein, that said note was executed by petitioner, but without consideration, and for the accommodation of said bank; and on the 20th of November, 1896, said Weaver filed his amendment to his said answer, in which he averred, by way of defense to said action, that the note sued on was the final note of a series of notes given seriatim in renewal of an original note executed on the 5th day of December, 1894, and that said (original) note was accepted by the plaintiff bank for the fraudulent purpose of covering an indebtedness of one Ed. Hogaboom, the president and a stockholder and director of plaintiff, which indebtedness was in excess of the amount lawful to be loaned by plaintiff, under the laws of the United States (it being a national bank) to any stockholder of plaintiff; alleging also that said bank, well knowing the indebtedness to it to be that of Hogaboom, and that he was insolvent, had negligently failed to collect or receive the money due it thereon, when it had an opportunity so to do, and in this way had released petitioner from all liability on said note, reference being made to the amended answer in said suit for a fuller statement of Weaver's defense therein.

To the answer and amended answer in said suit the plaintiff demurred, and also moved to strike out; and, both being overruled on November 13, 1897, thereupon the plaintiff bank, on said 13th of November, 1897, filed its motion to transfer the cause to the chancery court of Garland county, assigning as grounds therefor "that it would be necessary in the trial of the cause to examine the accounts of said bank with Hogaboom, covering a period of two years, which examination would necessarily be tedious, voluminous and intricate; that the circuit court had no authority to refer the accounts to a master; and that, under the pleadings, the cause should be transferred to equity, and an examination be had by a master,"—referring to the motion to transfer for a fuller statement of the grounds thereof. Therefore the transfer was ordered by the circuit court, over the objections and exceptions saved by the defendant.

Subsequently the defendant appeared in said chancery court, to which the cause had been transferred as aforesaid, and renewed his objections, by way of objection to the juris-

diction of said court to hear and determine the same, and asked that the same be remanded back to the circuit court, which, he contended, alone had jurisdiction, and in which alone he could properly and effectually assert all his legal rights as a defendant. The chancellor refused to remand the cause, and thereupon, after making and having noted his exceptions, Weaver, having given due notice, filed this petition before us for writ of prohibition as aforesaid, and the said chancellor duly responded thereto, and the matter was submitted to us.

The writ of prohibition is not a writ of right, but of discretion in the supervisory court, and, "like all other extraordinary remedies, prohibition is granted only in cases where the usual and ordinary forms of remedy are insufficient to afford redress. And it is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law. The doctrine holds good, even though the order of the court which is sought to be stayed or prevented is erroneous. * * * It follows necessarily from the doctrine laid down in the preceding section that the writ will not be allowed to take the place of an appeal, nor will it be granted as an exercise of purely appellate jurisdiction. In all cases, therefore, where the party aggrieved may have ample remedy by appeal from the order or judgment of the inferior court, prohibition will not lie, no such pressing necessity appearing in such cases as to warrant the interposition of this extraordinary remedy, and the writ not being one of absolute right, but resting largely in the sound discretion of the court. Thus, when the defendant in an action instituted in an inferior court pleads to the jurisdiction of such court, and his plea is overruled, no sufficient cause is presented for granting a prohibition, since ample remedy may be had by an appeal from the final judgment in the cause." High, Extraordinary Leg. Rem. §§ 770, 771.

No pressing necessity for the extraordinary relief prayed for appearing, and no irreparable loss threatening the petitioner, this case falls under the general rule laid down in the above

quotations; and therefore, without going into a discussion of the question of when a case should be heard at law, or when it should be heard in equity, when the one court has jurisdiction of a particular matter, and another court has not jurisdiction, the writ is denied in this case, because there is a complete and adequate remedy by appeal, and that remedy the petitioner is privileged to pursue, from all that appears to the contrary.

Prayer of petition denied.

REIGLER v. SHERLOCK.

Opinion delivered February 25, 1899.

EMPLOYER'S LIABILITY INSURANCE—EVIDENCE.—In an action on a policy indemnifying an employer against liability for injuries to his employees, it was proved that an employee sued for two injuries received at different times, asking for $5,000 damages in each of two paragraphs of the complaint, and recovered a judgment for $5,000 on a verdict in his favor not specifying for which injury the damages were awarded. The policy of indemnity covered the second injury, but not the first. *Held*, that the judgment was insufficient to show that it was rendered on the injury covered by the policy of indemnity. (Page 218.)

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

EDGAR E. BRYANT, Judge.

Whipple & Whipple, *Chas. E. Warner*, *F. T. Vaughan* and *T. J. Oliphint*, for appellants.

Appellees had ample notice of the original suit, if they were entitled to it. 4 Wall. 657; 7 Cranch, 322; 6 Johns, 159; 1 Sm. Lead. Cas. 139; 2 Gr. Ev. 116; 1 Johns. 317; Black. Judg. § 657; Wells, Res. Adj. etc. §§ 183, 184, 185; 4 Hill, 119; 34 N. Y. 280. The verdict was a general one, for the identical amount asked in each of the two counts of the complaint and appellant can use it upon either of the counts. 118 Ind. 5; 36 Ill. App. 123; Hempstead (Cir. Ct. Rep.), 104; 6 Ark. 178; 89 Pa. St. 363; 57 Ia. 672. The presumption is

that both counts were passed upon. 17 Ore. 381; 102 Ill. 596; 105 Ill. 336; 3 Fed. 199; 60 Ia. 289; 34 La. Ann. 805; 81 Me. 197; 89 Pa. St. 363; 1 Black, Judg. § 101; 23 Conn. 585; 113 Ind. 127; 2 Black, Judg. § 611; 32 S. W. 353; 53 Ark. 414; 51 Ark. 126; 51 Ark. 130; 1 Thomps. Tr. § 113; 26 Kas. 320; 49 Ala. 134. He who would avoid the effect of a general verdict must see to it that the jury specify upon which issue it is returned. 33 Vt. 180; 25 Ind. 43; 5 Bosw. 456; Wells, Res. Adj. 191; 2 Allen, 234; 1 Ch. Pl. (6 Am. Ed.) 445. A party for whose benefit a promise is made to another may maintain an action on it. 31 Ark. 155; *ib.* 411.

Read & McDonough and *Thos. E. Ward*, for appellee.

Failing to sue within the time limited by the contract, appellant is barred. Having once instituted and dismissed suit does not affect the running of the period. 7 R. I. 301; 78 N. Y. 462; 7 Wall. 386; 3 McCrary, 543; 27 Vt. 99. The judgment against the lumber company, in the absence of anything to show upon which count of the complaint it was based, does not estop appellees. Herman, Estop. §§ 252, 258; 94 U. S. 606; 24 How. 333; 43 N. E. 728; 23 N. E. 1024; 72 N. W. 1055; 16 N. E. 55; 20 N. W. 840; 102 Mass. 239, 245; 88 Ind. 149; 45 Am. Rep. 454, 460, 461; 46 N. E. 431. The burden of establishing an estoppel is upon him who invokes it. Freeman, Judg. § 176; 29 Atl. 970. As to what amount of participation in the suit is required to make a judgment binding as an estoppel on one not a party, see, 2 Bl. Judg. § 546; 23 Atl. 30; 33 Am. St. Rep. 893; 33 Fed. 437; 26 Minn. 87; 76 Fed. 166.

BATTLE, J. An action was regularly instituted by W. D. Adams and others in the circuit court for the Fort Smith district of Sebastian county, against The Luce Monroe Savings & Investment Company (hereinafter designated as the "Luce-Monroe Company"). S. H. Sherlock was appointed receiver in that action to take charge of the assets of the defendant, and all persons having claims against it were required to present them to the court. Andrew Reigler, as administrator of the estate of W. A. Powell, deceased, presented a claim by complaint in which he alleged, substantially, as follows: On the 27th of May, 1892,

the Luce-Monroe Company, at the instance of the American Casualty Insurance & Security Company, of Baltimore City, a corporation duly organized under the laws of the State of Maryland, executed a bond in the sum of $20,000 to the State of Arkansas, conditioned that the said insurance and security company would promptly pay all claims arising and accruing to any person or persons during the year immediately following after the date of the bond by virtue of any policy issued by it "upon the life or person of any citizen of this state." On the 22d of November, 1892, the American Casualty Insurance & Security Company of Baltimore City (hereafter designated as the "Insurance & Security Company") executed and delivered to the Southern Stave & Lumber Company (hereinafter designated as the "Lumber Company") its policy of insurance in the sum of $40,000, whereby it insured and indemnified the Lumber Company "against all liability for damages on account of the personal injury or death of the employees of the assured resulting from any and every accident" happening to them while in the employment of the assured. W. A. Powell and others, for whose benefit the policy was executed, paid the premiums which were the consideration of the insurance. In the month of January, 1893, Powell was injured through the negligence of the Lumber Company, while he was in its employment, and a citizen of this state. On the 27th of March, 1895, he commenced an action against the Lumber Company, in the Pulaski circuit court, to recover the damages arising from the injury, and, on the 18th of June, 1895, recovered a judgment against it for the sum of $5,000 for such damages. On the 10th day of September, 1896, Powell departed this life, intestate, and Andrew Reigler was duly appointed his administrator. He asked that the judgment so recovered against the Lumber Company be allowed as a claim against Sherlock, as receiver in the action instituted by W. D. Adams and others.

Sherlock, as receiver, answered, and set up many defenses, in bar of the claim presented by Reigler, as administrator, unnecessary to consider, and denied that Powell ever recovered a judgment against the Lumber Company on account of any injury received by him while the policy of insurance issued by the Insurance & Security Company was in force and effect.

At the hearing of this cause the following facts, among

others, were proved: On the 27th of May, 1892, the Luce-Monroe Company and others executed a bond to the State of Arkansas in the sum of $20,000, conditioned as before stated, and on the 22d of November, 1892, the Insurance & Security Company issued the policy as alleged. W. A. Powell, while in the service of the Lumber Company, and a citizen of this state, received two personal injuries. He brought an action against the Lumber Company, in the Pulaski circuit court, to recover damages. His complaint contained two paragraphs. In the first paragraph he asks for a judgment for $5,000 for damages suffered from the first of these injuries, which was caused by an accident which occurred prior to the 22d day of November, 1892, and before the policy executed by the Insurance & Security Company was issued. In the second paragraph of his complaint he asked for an additional $5,000 for the second injury, which he received from an accident which occurred on the 20th day of January, 1893. In the trial of that action the jury returned a verdict in his favor for $5,000, but did not designate the injury for which the damages, or any part thereof, were awarded; and the court rendered judgment in his favor against the Lumber Company accordingly. Since then Powell died, and Riegler was appointed his administrator; and he presented the judgment as a claim against the assets of the Luce-Monroe Company in the hands of Sherlock as receiver, and the court refused to allow it.

Reigler, as administrator, seeks to hold the Luce-Munroe Company liable by virtue of the bond executed to the State of Arkansas, and conditioned that the Insurance & Security Company would promptly pay all claims arising and accruing to any person or persons during the life of the bond by virtue of any policy issued by the last mentioned company upon the life or person of any citizen of the State of Arkansas. He produced no other evidence of its liability to him. It is therefore manifest that the Luce-Munroe Company is not liable on the bond on account of any injury received by Powell before the execution of the policy by the Insurance & Security Company to the Lumber Company, or at any time after its expiration. In order for Reigler, as administrator, to prove that the judgment recovered by his intestate was entitled to be allowed as a

claim against the assets of the Luce-Munroe Company, he must show that it was rendered for damages suffered by reason of an injury or injuries received from accidents which occurred during the life of the policy. The only evidence adduced to show this fact was the judgment and the complaint in the action in which it was rendered; and the complaint shows that Powell sued for damages occasioned by two injuries received, respectively, prior to the 22d day of November, 1892, and on the 20th of January, 1893. He asked for judgment for $5,000 for each injury. The latter only was covered by the policy. There is no evidence that the judgment was rendered for damages suffered from it. Hence the claim of Reigler, as administrator, against the Luce-Munroe Company is not sustained.

Decree affirmed.

TRIPLETT v. RUGBY DISTILLING COMPANY.

66 219
67 58
66 219
74 92

Opinion delivered February 25, 1899.

1. FRAUD—EVIDENCE—STATEMENT TO COMMERCIAL AGENCY.—In an action by a seller to rescind a sale of goods for fraud, a statement by the agent of the buyer who had control of the buyer's business, made in the line of his authority for the purpose of securing a commercial rating as the basis of credit, and tending to throw light upon the intent with which the purchase was made, is admissible against the buyer. (Page 222.)

2. PRIMARY EVIDENCE—PAROL PROOF OF STATEMENT.—In an action to rescind a sale for fraud, the contents of a written statement to a commercial agency, made by the agent of the buyer, may be proved by the verbal admission of such agent, such proof not contravening the general rule which excludes oral evidence where there is a writing in existence evidencing the same facts. (Page 222.)

3. SECONDARY EVIDENCE—WHEN NOT PREJUDICIAL.—While it was error to allow a writing which purported to state the contents of a certain written statement to be read to the jury, where the original statement would be admissible, such error is not prejudicial if it is conceded that the original statement was made, and that the statement made to the jury correctly expressed its contents. (Page 223.)

4. ERROR—WHEN NOT PREJUDICIAL.—In an action by a seller to rescind on the ground that the sale was induced by false representations of the

buyer as to his solvency, the seller's testimony that if he had known the buyer's insolvency at the time of the sale he would not have sold the goods, if erroneous, is not prejudicial. (223.)

5. REPLEVIN—WHEN DEMAND UNNECESSARY.—It is unnecessary in replevin to prove a demand for the property before suit if defendant's answer has set up title in himself, showing that a demand would have been futile to induce a surrender of the property. (Page 225.)

6. APPEAL—QUESTION NOT RAISED BELOW.—The question whether a seller can rescind the sale for fraud, without offering to return a note of the buyer given for the purchase money, cannot be first raised on appeal. (Page 225.)

7. RESCISSION—RETURN OF ACCEPTANCE.—In a suit by a seller to rescind the sale and recover the goods sold by him, brought against an officer who has attached the goods at the instance of creditors of the buyer, the officer cannot resist the rescission on the ground that a note by the buyer for the purchase money has not been tendered. (Page 225.)

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

Austin & Taylor, for appellant.

The statement of Wertheimer's business rating as shown by the commercial agencies was not competent for the purpose of showing fraudulent intent in the purchase of the goods. 47 Ark. 253; 64 Ark. 16. The instructions were abstract and misleading. 53 Ark. 38; 9 Ark. 212; 13 Ark. 317; 57 Ark. 627; 37 Ark. 580; 18 Ark. 521. They were erroneous also because they assumed facts which should have been left to the jury. 51 Ark. 88; 24 Ark. 544; 94 U. S. 610. The taking of the property by the sheriff was not tortious. 23 Ark. 417; 24 Ark. 264. Since he was not claiming it or exercising acts of ownership over it, a demand was necessary before this suit. 35 Ark. 169.

N. T. White, for appellee.

The fraudulent intent of Wertheimer, at the time of the purchase of the goods, authorized a rescission of the sale. 47 Ark. 247; 63 Ark. 87; 64 Ark. 12. It was not error to instruct the jury that fraudulent intent is usually provable only by circumstances. 47 Ark. 247; 63 Ark. 22. Demand was not necessary. Cases *ante*.

WOOD, J. This is a suit to replevy ten barrels of whisky of the aggregate value of $629.75, and warehouse receipts for fifteen barrels of whisky in bond, of the value of $158.71, the whole, free and in bond, being of the value of $788.46. The defendant denied all the material allegations of the complaint.

It appears that Mrs. E. Wertheimer had been engaged in the wholesale liquor business in Pine Bluff. On the 4th of April, 1896, various creditors had writs of attachment levied by the sheriff upon the property in controversy. The whisky in suit was sold by the plaintiff to Mrs. Wertheimer on March 14, 1896. It is contended by the plaintiff that Mrs. E. Wertheimer obtained the whisky through fraud, which entitled it to rescind the sale, and to recover the possession of the whisky from the sheriff. The defendant contends that there was no fraud in the purchase. This is purely a question of fact. The verdict of the jury has evidence to support it. It would serve no useful purpose to set out the evidence and to discuss the questions of fact.

The propositions of law presented in appellant's brief are: First, the court permitted incompetent evidence; second, the court erred in its declarations of law.

1. Ed. Wertheimer was introduced by the plaintiff. He testified that on November 12, 1895, he furnished a statement of assets and liabilities of the business of Mrs. E. Wertheimer, and also a supplemental statement on December 11, 1895. At that time he and his brother had control of the business of their mother, Mrs. E. Wertheimer, and had authority to make purchases and sales. The witness was asked to look at a paper, and to see if it was in substance the report. He was then asked if he furnished a statement of the liabilities as stated in that report, and answered that he could not say exactly, because he did not remember whether those are the exact figures or not. He further stated: "If I know, this entire thing is correct. I was there when it was furnished." He was then asked: "Does that correctly state it?" and answered: "I can not say what the whole is; I can't remember." He was asked if the paper contained a statement of the reports that he made of the condition of the business at the time, and answered as follows: "I remember some of the figures, but not all." He was then interrogated

upon the items appearing in the purported statement, and was asked by the attorney for the plaintiff as follows: "I just want to know whether this is the report you gave to the commercial agency?" His answer was "Yes; the amounts are correct, as near as I know." The witness was then asked to mention some items in the purported statement that he did not recall as being correct. He answered: "Open accounts, $584. I do not know whether that is the exact amount or not." He was then asked: "What else now on there that you don't remember exactly whether or not it is correct?" His answer was: "The open accounts; I think that is about right, but I don't know. We owed about eleven thousand dollars." He was further asked: "Is there any item that you say is not correct that you remember?" His reply was: "No, sir; I cannot say that, because I don't remember whether it is correct or not. I only say those are correct which I know to be about correct." Witness was then asked to read the paper purporting to be the additional statement of December 11th, which he did. He was then asked: "Do you remember that report?" His answer was: "I remember something of it; that the question was asked, and I answered 'Yes.'" He was then asked, "Did you make that paper,—that identical paper?" and replied, "No, sir." The witness stated that the report he made was at the request of Dun. He did not remember whether the report was made verbally or in writing. The correspondent of Dun came, and took the report. As to whether the witness wrote it, or the agent took it down, the witness did not remember. Proper exceptions were saved to the testimony.

The statement itself, although not made by E. Wertheimer herself, was pertinent in determining the question of fraud. It was made by one who had the control and management of her business, and for the purpose of securing a commercial rating, as the basis of credit. It was strictly in the line of her agent's authority, and tended to throw light upon the intent with which the purchases were made. *Taylor* v. *Mississippi Mills*, 47 Ark. 247.

The statement made to Dun's Agency does not come within any of the classes mentioned by Prof. Greenleaf as excluding oral evidence where there is a writing in existence evidencing

the same facts. 1 Gr. Ev. § 85, *et seq.; id.* § 97. "Where the writing is collateral to the principal facts, and it is on these facts that the claim is founded, the better opinion seems to be that the confession of the party, precisely identified, is admissible as primary evidence of the facts recited in the writing, though it is less satisfactory than the writing itself." 1 Gr. Ev. secs. 96, and authorities cited.

The court should not have allowed a paper purporting to show the contents of the statement made to the agency to be read to the jury. The witness might have used such a paper to refresh his memory, and then have testified as to the facts, independent of the paper. But the point of inquiry, so far as the statement was concerned, was as to whether it was made, and the facts concerning it, which the witness who made it could testify to, and his testimony would be primary evidence. 1 Gr. Ev. § 90.

However, the error of the court in allowing the statement to be proved in the manner indicated by reading the paper to the jury could not be prejudicial; for we do not understand appellant as contending that the paper introduced in evidence is in any manner different from the statement as originally made as to the assets and liabilities of E. Wertheimer. It must be conceded that the testimony of Ed. Wertheimer, supra, shows that the original statement to Dun's Agency was made, and that its contents were correctly reflected in the statement read in evidence. The court below was justified in coming to this conclusion, however conflicting and uncertain in itself the testimony of Wertheimer may have been. This counsel does not controvert. Then how could the error in the mere manner of proving the fact be prejudicial? If it could be insisted that no such statement was made, or that, if made, it was different from that shown by the paper read in evidence, or that the original statement and that read in evidence might have been different, then the error would be prejudicial.

Appellants insist that interrogations five and six and answers thereto by Edward M. Babbitt, secretary of appellee, should not have been admitted in evidence. These questions and answers are as follows: "Q. What information did the Rugby Distillery Company have of the financial condition of

E. Wertheimer at the time the property described in interrogatory second was ordered or shipped to him? A. Our agent, Mr. Kahnweiler, reported Wertheimer as being all O. K.; also gave reference to one Louisville house with whom Wertheimer had done business. We telephoned to Hetterman Bros., the party referred to, for reference, and they reported their accounts with Wertheimer as satisfactory. Both Dun and Bradstreet reported the firm in good standing. Q. Do you know, or have you any means of knowing, that E. Wertheimer was insolvent at the time the whisky and warehouse receipts were sent, and if you had known the true financial condition of E. Wertheimer at that time, would you have sent the goods and warehouse receipts? A. We did not know that E. Wertheimer was insolvent. On the contrary, all information we could secure in reference to her credit was that she was in good standing. Had we known she was insolvent, we would not have filled the order."

If it was error to permit the questions and answers, it was harmless error, and a matter about which appellant could not complain. The knowledge, or lack of knowledge, on the part of appellee and its agents of the insolvency of E. Wertheimer, if she were insolvent, at the time the whisky was purchased or shipped to her, could not affect the issue as to whether appellee had the right to rescind the sale and recover the property sold. That issue depended wholly upon whether or not Mrs. E. Wertheimer had made false representations to induce, and which did induce, the sale, and whether, at the time the sale was made to her, she intended not to pay for the goods purchased. Had the Rugby Distilling Company known of the insolvency of E. Wertheimer at the time the sale was made, that fact might tend to show that the sale was not superinduced by any fraudulent representation of Mrs. E. Wertheimer as to her solvency, but appellant could not be prejudiced by such testimony.

2. We find no reversible error in any of the instructions. While we would not approve of the instructions of which appellant complains as in good form, on account of the peculiar phraseology employed, still we do not consider that they are justly open to the criticism appellant makes of them as being misleading. We think the instructions complained of are in

harmony with the rules governing such cases as declared by this court in *Taylor* v. *Mississippi Mills*, 47 Ark. 283; *Bugg* v. *Wertheimer-Schwartz Shoe Co.*, 64 Ark. 12.

3. No demand was necessary before the institution of this suit. That is essential only where the defendant would not deny or contest the plaintiff's right to recover. The defendant in such a case should have the opportunity of surrendering that which the plaintiff claims, without being subject to the annoyance and expense of a law suit. But here it is obvious that a demand would have been of no avail. The sheriff had seized the property under writs of attachment, and the contest he has made, denying the right of plaintiff to repudiate the sale to Mrs. E. Wertheimer, and setting up her title to the property in controversy, shows clearly that a demand before suit would have been futile to induce a surrender of the property. Cobbey, Replevin, § 448.

4. The question as to the return, or offer to return, the acceptance of Mrs. E. Wertheimer was not specifically raised in the court below, and therefore cannot avail here. But the appellant could not raise the question any way. As was said by this court in *Ames Iron Works* v. *Kalamazoo Pulley Co.*, 63 Ark. 87, appellant owed appellee nothing, he was in no way responsible on the note, and could not be injured by the failure to return same. He is not in a position to resist the rescission of the alleged fraudulent sale to Mrs. E. Wertheimer on account of a failure to return, or offer to return, the note. Mrs. Wertheimer alone, or some one responsible on the note, might raise that issue.

The judgment is affirmed.

WILLIAMSON v. LAZARUS.

Opinion delivered February 25, 1899.

66 226
e70 169
66 226
77 59

HOMESTEAD—CURATIVE ACT—ACKNOWLEDGMENT.—Where, in a conveyance of a husband's homestead, the officer's certificate of acknowledgment stated that the wife acknowledged that she signed and sealed the relinquishment of dower, but omitted to state that she acknowledged the execution of the deed, the omission was subsequently cured by the curative act of March 11, 1891, which provided that conveyances whose proof of execution was insufficient "because the officer certifying such execution omitted any words in his certificate" shall be valid as though the certificate of acknowledgment was in due form. (Page 228.)

Appeal from Sevier Circuit Court

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

Henry Lazarus brought this action of ejectment against H. C. Williamson and others to recover 160 acres of land. The land was at one time owned by R. H. Flanagin. Flanagin sold it to I. Cohen, and executed and delivered to him the following deed:

"Know all men by these presents, That we, R. H. Flanagin, of Sevier county, State of Arkansas, and Margaret A. Flanagin, his wife, for and in consideration of the sum of three hundred and thirteen 19–100 dollars, to us paid by I. Cohen, of Nashville, Arkansas, do hereby grant, bargain, sell and convey to the said I. Cohen, and unto his heirs and assigns, forever, the following lands lying in the county of Sevier and State of Arkansas, to-wit: The southeast quarter of section eighteen (18) in township seven (7) south, in range thirty (30) west, containing one hundred and sixty (160) acres, more or less. To have and to hold the same unto the said I. Cohen, and unto his heirs and assigns, forever, with all appurtenances thereunto belonging. And I hereby covenant with the said I. Cohen that I will forever warrant and defend the title to said land against all lawful claims whatever. And I, Margaret A. Flanagin, wife of

the said R. H. Flanagin, for and in consideration of the said sum of money, do hereby release and relinquish unto the said I. Cohen all my right of dower in and to the said land.

"Witness our hands and seals this 18th day of January, 1889. R. H. Flanagin. [Seal.] M. A. Flanagin. [Seal.]"

"Acknowledgment. State of Arkansas, county of Sevier. Be it remembered, that on this day came before me, the undersigned, a justice of the peace within and for the county aforesaid, duly commissioned and acting, R. H. Flanagin, to me well known as the grantor in the foregoing deed, and acknowledged that he had executed the same for the consideration and purposes therein mentioned and set forth. And on the same day also voluntarily appeared before me the said Margaret Flanagin, wife of the said R. H. Flanagin, to me well known, and, in the absence of her said husband, declared that she had of own free will signed and sealed the relinquishment of dower in the foregoing deed for the consideration and purposes therein mentioned and set forth, without compulsion or undue influence of her said husband. Witness my hand and seal as such justice of the peace this 18th day of January, 1889. Joe M. Bell, J. P.

"Filed for record this 9th day of February, 1889, at 7 o'clock p. m. Alex Luther, circuit clerk and ex-officio recorder, by T. B. Hutcheson, D. C."

The plaintiff, Lazarus, holds under mesne conveyances from Cohen. The circuit judge found in favor of plaintiff, and gave judgment accordingly.

Collins & Lake and *Steel & Steel*, for appellants.

The deed to Cohen, being an attempted conveyance of a homestead, is void for non-conformity to the statute. Sand. & H. Dig. § 3713. The curative act of 1893 did not affect vested rights. 53 Ark. 53; 58 Ark. 117; 60 Ark. 269. Nor was the defect in this deed one included in said curative act.

Jas. D. Shaver, for appellee.

The relinquishment of dower and homestead appearing in the acknowledgement, it need not appear in the body of the deed. 44 Ark. 365; 50 Ark. 294; 51 Ark. 414; 53 Ark. 56;

58 Ark. 117; 57 Ark. 242; 62 Ark. 160; 64 Ark. 492. The deed was sufficient to convey all of grantor's interest. 53 Ark. 56. There can be no vested right based upon an informality which does not affect substantial equities. 43 Ark. 420; 44 Ark. 365; Cooley, Const. Lim. 359, 471; 25 N. Y. 197.

RIDDICK, J., (after stating the facts.) The land in controversy here was at one time the homestead of R. H. Flanagin. Flanagin sold it to Cohen, and his wife joined in the execution of the deed. The deed purports to convey an estate in fee simple to Cohen, but was invalid by reason of a defect in the acknowledgment. It does not show that the wife acknowledged the execution of the deed, but only that she had signed and sealed the relinquishment of dower. This deed was recorded before the passage of the curative act of March 11, 1891, and the only question here is whether it was affected by such act. The act provides that "all conveyances and other instruments of writing which have heretofore been recorded in any county in this state the proof of execution whereof is insufficient because the officer certifying such execution omitted any words in his certificate, * * * or is otherwise informal, shall be as valid and binding as though the certificate of acknowledgment or proof of execution was in due form." Appellants contend that this deed is void for failure to comply with the law in reference to conveyances of homesteads. They say that it is regular on its face; that there is no defect or informality apparent; and that the curative act above quoted does not apply. But this argument is in conflict with the decision of this court in *Johnson* v. *Parker*, 51 Ark. 419. That case was decided by a divided court, but after full discussion. It construed a statute from which the act in question here was afterwards copied, and is, we think, decisive of this case. "The application of the statute," said Chief Justice Cockrill in that case, "has heretofore been made only to obvious omissions of words from the certificate of acknowledgement, and particular instances of this nature may have given rise to the legislation in question; but the terms employed are comprehensive, and enunciate a general rule applicable to all cases in which the acknowledgment is insufficient to give full legal effect to the

terms of the conveyance." The terms of the deed from Flanagin and wife to Cohen, if given full legal effect, would vest in Cohen an estate in fee to the lands in question. The obvious intent of the parties, as shown by the deed, in the granting clause of which the wife joined, was to convey such an estate. The only reason why it failed to invest in Cohen all and every interest in the land held either by Flanagin or his wife was an insufficiency in the proof of execution through the omission of certain words from the acknowledgment. But this defect was cured by the statute, and the conveyance was thus made effectual. The circuit court was right in holding the deed to be valid, and, this being the only error complained of, the judgment is affirmed.

THARP v. PAGE.

66 Ark. 229 / 343

Opinion delivered March 4, 1899.

1. EVIDENCE—HEARSAY.—It is error, in a suit by a wife to recover damages for the seizure and sale under execution of her property to pay her husband's debts, to admit proof of a statement of the husband, made before the litigation arose, to the effect that the property belonged to the wife. (Page 232.)

2. SUBPŒNA DUCES TECUM—PRACTICE.—The denial of a motion for a subpœna duces tecum to bring up certain account books will not constitute error if the record fails to show the purpose for which it was desired to use the books as evidence. (Page 232.)

Appeal from Hempstead Circuit Court.

RUFUS D. HEARN, Judge.

J. H. McCollum and *C. V. Murry*, for appellants.

The statement that the firm owed Mrs. Page $500 for services as bookkeeper was open to suspicion (64 Ark. 377), and the subpoena duces tecum should have been granted to bring the books into court. Oglesby's testimony was incompetent as hearsay. The first instruction given for appellee was erroneous in that it withdrew from the jury the question of the ownership

of the property. 14 Ark. 530; 16 Ark. 569; 31 Ark. 699; 37 Ark. 580; 59 Ark. 417; 24 Ark. 540; 33 Ark. 350; 36 Ark. 117; 45 Ark. 256. The burden was on the wife to show *bona fides* of the transaction with her hnsband. 46 Ark. 550; Bump, Fr. Conv. § 288; Wait, Fr. Conv. §§ 300–1; 94 U. S. 580; 6 Am. St. Rep. 668; 19 *id.* 322; 42 *id.* 661.

Greene & McRae, for appellee.

The evidence is sufficient to uphold the findings of the jury, both as to ownership and value of goods. 51 Ark. 457; 46 Ark. 141; 57 Ark. 577; 49 Ark. 381; 62 Ark. 326. Simple demand for production of books is not equivalent to a motion for subpoena duces tecum. L. R. 2 Eq. 59; 15 Fed. 712; 3 Dill. 566; 70 Cal. 638; 72 Mo. 83; 1 Tuck (N. Y. Surrogate) 39. Granting of subpoena duces tecum is discretionary, and the action of the trial court will not be reviewed unless this discretion is abused. 10 Ark. 418; Sand. & H. Dig.; 2932. The testimony of Oglesby was competent, since the declaration of Page was part of *res gestae*. 20 Ark. 592; 1 Gr. Ev. § 113. No specific objection was pointed out to this evidence below, and hence the ruling will not be reviewed. 25 Ark. 434; 28 Ark. 8. Even if this evidence was not competent, it was merely cumulative, and its admission was not prejudicial or reversible error. 58 Ark. 125; 56 Ark. 37; 58 Ark. 446.

BATTLE, J. Certain creditors of W. L. Page & Co. recovered judgments against them, and sued out executions, to satisfy which the sheriff, to whom they were directed, levied upon a stock of groceries in Hope, in this state, as the property of W. L. Page. His wife, Emma R. Page, claimed the goods; and P. A. Tharp, W. A. Rhodes and Carl & Tobey Company executed five several bonds to the sheriff, by which they undertook to indemnify him "against all damages which he may sustain in consequence of the seizure or sale of said stock of groceries under execution; also to pay any claimant of the said goods the damages he may sustain in consequence of such seizure or sale." After this he sold the property under the executions, and Mrs. Page then brought this suit on the bonds

to recover its value, which she alleged to be $863.29, and the defendants denied her ownership.

The issues in the action were tried by a jury. In the trial evidence was adduced tending to prove, substantially, the following facts: W. L. Page & Co., a firm composed of W. L. Page and Mrs. M. P. Baldwin, his sister-in-law, conducted a prosperous business in Hope for about five years. Page was the sole manager. David Baldwin, Mrs. Baldwin's husband, worked for the firm, while they were in business, and represented his wife. In November, 1894, when the firm was much in debt, Page sold all their property to Carl & Tobey Company for $1,645, and out of this paid to the purchaser $545 in satisfaction of a debt which his firm owed it, $400 or $500 to Mrs. Chapman, his wife's sister, in return for money borrowed of her, $150 to Mrs. Baldwin, and $500 to his wife for keeping books for his firm. Page and his wife testified that he employed her to keep books for his firm, and agreed to pay her for such services at the rate of $10 a month, and that she kept the books for about fifty months, and that $500 were paid for such services. He testified that she received nothing for the labor until the payment of the $500, and no credit on the books of his firm for any amount. Baldwin testified that the books of the firm were kept at its store, except for two or three days at the end of the month, when Page would take the books to his house, and his wife would make out monthly bills; that she never worked on the books at the store; that he never knew of a contract to pay her anything, and never heard of it, until, sometime after the dissolution of the firm, in an action of Beal & Fletcher Grocery Company against W. L. Page & Co., he heard Page testify that he paid his wife $500 for keeping books.

In March, April, or May, 1895, Page purchased for his wife, with the $500 paid to her and $600 which she borrowed from her sister, Mrs. Chapman, a stock of goods, and she commenced business with the same as her stock in trade, and continued until June, 1895, when the goods were seized under executions against W. L. Page & Co., and sold as before stated. She commenced and did business as Page & Co.; and W. L. Page managed the business for her.

S. R. Oglesby, during the trial, was allowed to testify, over the objections of the defendants, that he knew about the time the firm of Page & Co. began business; and that W. L. Page told him that his wife, Emma R. Page, composed the firm of Page & Co.

The jury returned a verdict in favor of the plaintiff for $956.66; and the court rendered judgment in her favor against the defendants for that amount.

The testimony of Oglesby, as adduced, was incompetent. As the statement of Page, to which he testified, was made at a time when Mrs. Page's title to the goods purchased for her was unquestioned, and at a time when there was apparently no occasion for Page to make a false statement, it tended to strengthen the evidence adduced to sustain her claim; and as the good faith in which the property was purchased for and held by her is doubtful, it was prejudicial to the defendants.

During the pendency of this action, and before the trial, the defendants asked the court for a subpœna duces tecum, requiring W. L. Page to produce at the trial all the books of W. L. Page & Co. to be used as evidence, and the court denied it. As the record fails to show in what way they wished to use the books as evidence, it does not appear that the court committed any error in denying the motion. It was not the duty of the court to grant the request of the defendants merely because they made it. Had they asked for the subpœna for the purpose of showing that the books were not in the handwriting of Mrs. Page, but in that of other persons, and in that way that she was at no time the bookkeeper of W. L. Page & Co., the subpœna should have been granted.

For admitting the testimony of Oglesby, the judgment of the trial court is reversed, and the cause is remanded for a new trial.

W. W. JOHNSON COMPANY v. TRIPLETT.

Opinion delivered March 4, 1899.

SALE—RESCISSION FOR FRAUD.—In a suit by a vendor of personal property to rescind the sale for fraud, and to replevy such property, where plaintiff's contention was based on two grounds, viz., (1) that the vendee did not, at the time of its purchase, intend to pay for the property, (2) that the sale was induced by false representations of the vendee as to her financial condition, it was error for the trial court by its instructions to confine the jury's attention solely to the question whether or not the vendee at the time of the purchase intended to pay for the property. (Page 236.)

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

Bridges & Wooldridge, for appellant.

It was error for the court to instruct the jury that it should not take into consideration the false representations made by Wertheimer as to her solvency, unless they should find that she purchased the goods with the preconceived intention of not paying for them. 64 Ark. 12. This vice in the first, second, third, sixth, seventh and eighth instructions is not cured by giving other and correct instructions on the point. 44 S. W. 715.

Austin & Taylor, for appellee.

Before plaintiff could maintain any suit it was necessary to place Wertheimer in *statu quo* by returning the acceptance given for goods. 59 Ark. 259; 35 Ark. 483. Since the sheriff did not claim title, demand was necessary before suit. 23 Ark. 417; 24 Ark. 264; 35 Ark. 169. A judgment which is right upon the whole record will not be reversed, though incompetent evidence was admitted or improper instructions given. 10 Ark. 9; 44 Ark. 556; 46 Ark. 542; 43 Ark. 296; 24 Ark. 587.

WOOD, J. This suit was brought on the 14th day of April, 1896, by appellant, W. W. Johnson Company, to replevy ten barrels of liquor from appellee, C. H. Triplett, sheriff of

Jefferson county. The liquor was sold for $580.63 on a credit of two and four months by appellant on February 29, 1896, to E. Wertheimer, who was at that time engaged in the wholesale liquor business at Pine Bluff, Arkansas. On December 4, 1895, Ed. Wertheimer, son of and representing E. Wertheimer in her business, made a commercial statement of the financial condition of her business, as it existed November 1, 1895, unto Damon Clarke as a representative of the commercial agency of R. G. Dun & Co., a copy of which statement was forwarded by the Little Rock office of the agency to its office in Cincinnati, Ohio. The appellant obtained a copy of this statement from the Cincinnati office of this commercial agency, and, relying upon the truthfulness of the statement, sold the liquors in question, and other goods, to E. Wertheimer. The business of E. Wertheimer was conducted and managed by her sons, Ed. Wertheimer and Lee Wertheimer, and her husband, Jacob Wertheimer. Ed. Wertheimer did most of the buying and ordering of the goods.

On the 4th day of April, 1895, attachment suits were filed in the Jefferson circuit court against E. Wertheimer by various creditors for amounts aggregating about $19,000. Her sons, Ed. and Lee Wertheimer, were among the attaching creditors for the sums of $3,306.05 and $4,709.27 respectively. The writs of attachment were delivered to the sheriff of Jefferson county on the same day, and levied upon the property of E. Wertheimer, including the mercantile stock. The liquor in question was attached as the property of E. Wertheimer, and, while the sheriff was holding it under these attachments, appellant replevied it from him, and thereby obtained possession of the liquor. Evidence was adduced tending to show that the statement made to the commercial agency was false. The verdict was for the appellee. The facts were controverted, and there was evidence to support the verdict on the questions of fact arising in the case. Was the jury properly instructed?

At the request of plaintiff the court gave the following: "3. If the jury find from the evidence that E. Wertheimer, during the month of November, 1895, while knowing herself to be insolvent, made a false statement to the commercial agency, showing herself to be solvent, for the purpose of obtaining

goods on a credit, and that the plaintiff, relying upon the truthfulness of said statement, contracted to sell her the liquor in controversy, the jury will find for the plaintiff."

And at the request of the defendant the court instructed the jury as follows: "1. The court instructs the jury that although they believe that there may be some evidence in this case tending to show that the said E. Wertheimer was insolvent at the time of the purchase of the goods in controversy, this is not sufficient to show fraud in the sale of said goods; but before plaintiffs can recover they must show, by a preponderance of the testimony, that the said E. Wertheimer, at the time of the purchase of the goods, did not intend to pay for them."

"2. The court instructs the jury that no mere legal or constructive fraud shown from the evidence in this case will entitle the plaintiff to recover; but, before they can recover as against defendants, plaintiffs must show, by a preponderance of the evidence, a preconceived intention on the part of the vendee, E. Wertheimer, to get the goods for which the suit is brought without paying for them.

"6. The jury are instructed that, although they may believe from the evidence that E. Wertheimer, at the time of the purchase of the goods in controversy in this suit, was insolvent, and knew herself to be so, and did not disclose this fact to the plaintiffs, still the said Wertheimer would not be guilty of fraud, so as to vitiate the contract for the sale of the said goods, provided the jury further believed from the evidence that she then intended to pay for the said goods."

"7. The court instructs the jury that E. Wertheimer had a lawful right to make contracts for the purchase of goods at any and all times, whether she was insolvent or not, and the question of her insolvency at the time the goods in controversy were ordered, or at any other time, will not be considered by the jury, except as it may throw light on the question as to whether or not she intended to pay for the said goods at the time they were ordered.

"8. The court further instructs you that, before the plaintiffs can recover in this action, they must show by a preponderance of the evidence that the property in controversy, at the time of the institution of this suit, was wrongfully detained by

the defendant, C. H. Triplett, as sheriff; and if the plaintiff had failed in this, they will find for the defendant, and assess the value of the property at $630.63, with six per cent. interest thereon per annum from the 14th day of April, 1896, to the present time, unless the plaintiff has shown that E. Wertheimer, at the time she purchased the goods from the plaintiff, did so with the preconceived intention of getting the goods without paying for them, and this must be proved by the plaintiffs by a preponderance of the evidence."

The appellant saved proper exceptions. In the court below it was contended that plaintiff should recover for two reasons: First, because E. Wertheimer did not intend to pay for the liquor in controversy at the time she purchased same; second, because E. Wertheimer obtained the liquor on a credit by making false representations as to her financial condition.

The court's instructions upon these two propositions, taken as a whole, are irreconcilable, confusing, and well calculated to mislead the jury. The court properly tells the jury, in the instruction given at the request of plaintiff, that if E. Wertheimer, knowing herself to be insolvent, made a false statement to the commercial agency showing herself to be solvent, for the purpose of obtaining goods on a credit, such false representations would entitle the seller to rescind the sale, and to recover the property obtained by reason of such representation. This would be a fraud on the seller, and sufficient of itself to avoid the sale and give the seller the right to recover the property sold upon the faith of such representation, as we held in *Taylor* v. *Mississippi Mills*, 47 Ark. 247, and *Bugg* v. *Wertheimer-Schwartz Shoe Co.*, 64 *id.* 12. But in the eighth instruction, given at the request of defendant, the court tells the jury that "unless the plaintiff has shown," by a preponderance of the evidence, "that E. Wertheimer, at the time she purchased the goods from the plaintiff, did so with the preconceived intention of getting the goods without paying for them, they should find for the defendant." And in the seventh the court tells the jury that "the question of her [E. Wertheimer's] insolvency at the time the goods in controversy were ordered, or at any other time, will not be considered by the jury, except as it may throw light on the question as to whether or not she intended to pay for the

said goods at the time they were ordered." It is not pretended that there were any fraudulent representations to induce the sale, except as to the solvency of E. Wertheimer, and yet the court tells the jury that the question of her insolvency will not be considered "except as it may throw light on the question as to whether or not she intended to pay for the said goods." These and other instructions given at the request of the defendant seem to hinge the plaintiff's right to recover solely upon the question as to whether or not E. Wertheimer at the time of her purchase intended to pay for the liquor sold her. The instructions should be drawn in harmony with the doctrine announced by this court in the cases cited above, and tell the jury that plaintiff would have the right to recover the liquor sold if the sale was superinduced by false representations of E. Wertheimer, or if she intended, at the time of the purchase, not to pay for the liquor bought. Either or both of these facts, if established, would avoid the sale, and give plaintiff the right to recover.

For the errors indicated, reverse the judgment, and remand the cause for a new trial.

HENRY WRAPE COMPANY *v.* HUDDLESTON.

Opinion delivered March 11, 1899.

NEGLIGENCE—STRUCTURAL DEFECT IN MACHINERY—CONTRIBUTORY NEGLIGENCE.—Where an employee, engaged in operating a barrel saw in a stave factory, was injured while attempting to unchoke the hopper which received the sawdust and splinters, he cannot recover on account of any defect in such hopper if his injury was due to his using a short and weak stick, so that when it broke his hand suddenly came in contact with the revolving saw and was injured. (Page 239.)

Appeal from Green Circuit Court.

FELIX G. TAYLOR, Judge.

Dodge & Johnson, *Carroll & Pemberton*, for appellant.

The plaintiff cannot recover, because he was guilty of contributory negligence, in that he used too short a stick in un-

clogging the saw. 70 N. W. 176; 163 Mass. 515; 23 Pa. St. 147; 36 Ark. 46; *ib.* 377; 51 Ark. 467; 47 Ark. 504; 41 Ark. 542; 95 U. S. 439; 71 Fed. 270; 8 Pac. 888; 67 N. W. 633; 40 N. E. 430; 37 N. E. 1065; 148 Mass. 533. The evidence does not support the verdict. The court erred in the admission of evidence and in giving and refusing instructions. It was error to allow counsel for plaintiff to say, in the presence and hearing of the jury, "that he did not propose to use any other witnesses who were employed by defendant." 65 Ark. 619; 48 Ark. 141; 48 *ib.* 173; 61 *id.* 137; 75 Ind. 220; 156 U.S. 361. Appellee knew of the defect, and assumed the risk.

John Huddleston, pro se.

Defendant is liable because, by its promise to repair the machinery, it induced plaintiff to continue to operate same. 35 Ark. 602; 38 N. W. 632; 16 Pac. 46; 8 S. W. 871; 15 S. W. 831; 67 N. W. 358; 40 Pac. 995; 38 N. E. 842; 59 N. W. 531; 54 Ark. 289. Contributory negligence is a question for the jury, and their verdict concludes the matter, if supported by any evidence. 34 S. W. 889.

BUNN, C. J. This is a suit for personal damages by the appellee as an employee of appellant, a corporation operating a stave factory. The damages claimed were $5,000, and the jury returned a verdict for $1,000, and judgment was rendered accordingly, and from this judgment this appeal was taken.

The charge of negligence against the company is, in effect, that it failed and neglected to maintain a reasonably safe place in which the plaintiff was required to work, and to keep reasonably safe implements with which he was required to work, and specifically that, while plaintiff was required to manage a barrel saw and the machinery immediately connected therewith, the defendant negligently continued to use a hopper after a hole had worn in one side of it, by which the sawdust and splinters falling from the barrel saw therein would clog up the passage-way for the same to pass off, necessitating frequent unchoking, and thus subjecting the plaintiff to increased and more frequent risks; and that, while attempting to

remove the obstruction on one occasion, he received a severe wound by his hand coming in contact with said barrel saw.

The only complaint of negligence on the part of the defendant is in operating the machine after the hole had worn in the hopper, which, from the statement of the complaint, seems to have been around the barrel saw for the purpose of catching the saw dust and splinters made by the operation of the saw. There is just the smallest amount of proof of negligence, if any, on the part of defendant, or that the alleged negligence really increased the risk.

The uncontradicted evidence shows that the operation of the saw and connecting machinery, even with the defect in the hopper, was attended with no risk, and involved no real danger to the operator who should exercise ordinary care. The hurt was occasioned by an effort of plaintiff to unchoke the hopper, in which he made use of a short stick thirteen or fourteen inches strong, and too weak for the purpose, instead of a sufficiently long stick thirty-one or thirty-two inches long, near at hand, and kept and used for that purpose. The shortness of the stick used by the plaintiff brought his hand nearer to the saw, and when it broke the hand suddenly came in contact with the rapidly revolving saw, and produced the injury complained of. The manner of the attempt to remove the dust and splinters was also careless, the movement of the hand in the operation being in the direction of the saw. There does not appear to have been any reasonable excuse for the use of the shorter and weaker stick, nor for the careless manner in which plaintiff sought to perform this particular duty. Under the circumstances, the verdict of the jury was without evidence to support it, in this, that the uncontradicted evidence shows that the plaintiff carelessly and negligently contributed to his own injury. The judgment is therefore reversed, and the cause remanded for a new trial.

BANK OF LITTLE ROCK *v.* COLLINS.

Opinion delivered March 11, 1899.

1. CONDITIONAL SALE—EFFECT.—Where a note given for the purchase money of personal property provides that such property shall remain the property of the vendor and its assigns, and for default of payment shall be returned to the vendor or assigns, the effect is a reservation of title in the vendor or assigns until the property is paid for, and the vendee, and those claiming under him, cannot acquire title without having paid the purchase money. (Page 242.)
2. SAME—ASSIGNMENT OF VENDOR'S RIGHTS.—Under Sand. & H. Dig. § 489, providing that "all bonds, bills, notes, agreements and contracts in writing for the payment of money or property, or for both money and property, shall be assignable," where a sale of personal property is made upon condition that title shall be reserved in the vendor until the purchase money is paid, the reservation is part of the contract, and passes to the vendor's assignee the right to sue for and recover the property in his own name, upon default in payment of the purchase money at maturity. (Page 242.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

J. A. Watkins, for appellant.

Where a chattel is sold with a reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and the vendee can convey no title. 47 Ark. 363; 49 Ark. 63; 48 Ark. 160; 48 Ark. 273. The recital in the note of reservation of title did not inpair its negotiability; and the assignment of the note carries with it the security reserved. 48 N. W. 1100, 1103; 4 Chand. (Wis.) 153; 3 *id.* 83; 9 Wis. 503; 11 Wis. 353; 39 Wis. 146; 16 Wis. 645; 45 Wis. 110; 17 Wis. 303; 36 N. H. 40; 10 Vt. 294; 6 Allen, 86; 29 Conn. 29; 7 Blackf. 297; 51 Pac. 649; 18 So. 365; 47 Miss. 289; 54 Miss. 286; *ib.* 524; 36 Minn. 198; 35 Minn. 434; 44 Vt. 277; 59 Ark. 225, 232.

T. J. Oliphint, for appellee.

The assignment of a note given on a conditional sale does not carry with it the property as an incident, because the prop-

erty is not a *security*. 48 Ark. 160; 38 Ark. 264; 95 N. Car. 117. Assignment of the note in suit waived reservation of title until payment, and was an election to enforce payment. 69 Tex. 237; 48 Ark. 160; 109 Cal. 353; 18 S. W. 136. Assignment of note in blank is insufficient to enable indorsee to replevy the property. 63 Ind. 322.

BATTLE, J. On the 16th day of April, 1896, the Bank of Little Rock instituted an action of replevin in the Pulaski circuit court against W. D. Collins to recover the possession of certain personal property described in its complaint, and averred that it was the owner thereof, and entitled to the possession of the same, and that Collins unlawfully detained the property after a demand made by it for the possession. It based its right to recover upon a contract, which is set out in its complaint, and is as follows:

"$650. Little Rock, Ark., Sept. 1, 1894.

"On or before the 15th day of November, 1895, we promise to pay to Thomas Manufacturing Company, or order, six hundred and fifty dollars, at their office in Little Rock, for value received in one Thomas Standard Press No. 1482, two Gwathney Huller Gins with feeders and condensers, gins numbered 109 and 110, also elevator system complete, Atlas Center Crank Engine and Boiler furnished by said Thomas Manufacturing Company, with interest from date at the rate of eight per cent. per annum until paid. The goods described, for the use of which to the maturity hereof this note is given, is and shall remain the property and under the control of Thomas Manufucturing Company or assigns; and for default of payment, or if the said Thomas Manufacturing company deem the goods described in unsafety by removal or any other cause, they shall, on demand and without legal process, be returned to Thomas Manufacturing Company, or assigns, in good order, in which event we will pay fifty dollars per month for the use thereof from this date and for any damage done to the same. This is first note of series of two.

[Signed] "LON A. DUNKELBERG.
"JULIA (her X mark) PARSONS.
Witness: "GEO. G. LOW."

It alleged that this contract was transferred and assigned to it by the Thomas Manufacturing Company. The defendant demurred to the complaint because the facts stated therein were not sufficient to constitute a cause of action, and the court sustained the demurrer. Did it err in so doing?

The defendant contends that it did not, because the transfer of the contract upon which the plaintiff in its complaint based its right to recover did not convey the property in controversy, and because the title to the same thereafter remained as it was before the assignment was made. The sufficiency of the complaint in every other respect seems to be conceded. The defendant's contention presents the only question which the parties ask us to consider, and for that reason we shall decide no other.

The contract in question contains a promise of the makers to pay to Thomas Manufacturing Company, or order, $650 for the goods in controversy, and provides that they "shall remain the property and under the control of Thomas Manufacturing Company or assigns." The time when, or the condition upon the performance of which, they shall cease to be the property of the Manufacturing Company, or its assigns, is not specified, but it does provide in what event they shall be returned to the Manufacturing Company, or assigns, and that is upon default of payment, or when the Manufacturing Company shall deem them unsafe by removal or any other cause; in either of which events the property was to be delivered on demand to the Manufacturing Company or assigns. According to these stipulations, the goods would be no longer returnable after the payment of the $650 and interest, but would become the property of the makers of the contract. The result is, the contract between the Manufacturing Company and the other parties was a conditional sale.

The purchasers assumed a twofold obligation: Until the maturity of the contract they were bound to pay the purchase money to the Manufacturing Company, or order, and, upon default of payment at maturity and demand for the return of the goods, they agreed to deliver them to the Manufacturing Company or assigns, and pay fifty dollars a month for the use of them, and for any damage to the same. As each obligation

rested upon the parties, the contract was assignable under the statutes of this state, which provide: "All bonds, bills, notes, agreements and contracts, in writing, for the payment of money or property, or for both money and property, shall be assignable." Upon the assignment the right to sue for and recover the property or money, as the case may be, in its own name, passed to the assignee. Sand. & H. Dig. § 489.

The vendor evidently retained the title to the property to induce the purchasers to pay promptly, and to indemnify it against loss in the event they failed to do so. They and those claiming under them could not acquire any title without the payment of the purchase money, unless it (the vendor) waived the right to the property. The reservation was a part of the contract, and added to its value, and passed, under our statutes, to the assignee as a necessary part of the same; and this carried with it to the assignee the right to sue for and recover the property, in its own name, upon default in the payment of the purchase money at maturity.

The judgment of the circuit court is reversed, and the cause is remanded, with directions to the court to overrule the demurrer, and for other proceedings.

JEFFERSON COUNTY *v.* PHILPOT.

Opinion delivered March 11, 1899.

COUNTY—LIABILITY FOR COSTS.—When a creditor of a county presents his claim to the county court for allowance against the county, in accordance with the statute, and judgment thereon is rendered in his favor, the creditor is entitled to recover of the county the costs expended by him in the proceeding, including the fee of ten cents paid to the county clerk for filing his claim. (Page 245.)

Appeal from Jefferson Circuit Court.

JOHN M. ELLIOTT, Judge.

Smith C. Martin, for appellant.

No fee is payable to officers unless specifically provided by legislative enactment. Mansf. Dig. § 1237; 56 Ark. 581; 57

Ark. 487. The state and county are not affected by the general provisions of Mansf. Dig. § 3307; 32 Ark. 45. A county is not liable for services rendered by the clerk in filing accounts of individuals against the county. 41 S. W. 220.

Cockrill & Cockrill, for appellee:

Appellee was legally bound to pay for the filing of the claims. Sand. & H. Dig. § 3309; 41 S. W. 420; 32 Ark. 45, 52. The county court has exclusive original jurisdiction of all suits in state courts against the county. 44 Ark. 225. Sand. & H. Dig. § 810, 811. The proceeding is a "civil action," within the meaning of the code (Sand. & H. Dig. § 5602), and results in a final judgment. Sand. & H. Dig. § 5851; 22 Ark. 595; 33 Ark. 788; 39 Ark. 485 and cases; 37 Ark. 532, 540; 148 U. S. 529, 532. Costs should be adjudged for the prevailing party. 50 Ark. 416; Sand. & H. Dig. § 787; 2 Bac. Abr. 484, 485. The county, being authorized to contract, is liable to suit. 39 Fed. 7; 6 C. C. A. 674, 680; 148 U. S. 529. Counties are liable for costs. 132 U. S. 1; 133 U. S. 529. And this is true, though no mention is made of them in the statute regulating costs. The mere fact that it is a state agency does not exempt it. 41 Ark. 45; 49 Ark 139, 142; 45 Ark. 123; 56 Ark. 68, 71; 10 Ark. 588. Statutes are to be construed in the light of their intention. 1 Black, 54; 61 Ark. 226, 241.

Williams & Bradshaw, amici curiæ, in reply to appellee.

Cases are regulated by statute, and the general statute does not apply to special proceedings. 60 Ark. 194. The liability of a county for costs is regulated by and dependent upon statute. 10 Ark. 167; 32 Ark. 45; 60 Ark. 194; 62 Ark. 272. General provisions do not apply to the county, unless expressly named. 57 Ark. 487. In the absence of a statute providing for the payment of a claim out of the county treasury, the county court should not allow it. 22 Ark. 595. In respect to such claims as this, the county court is a mere auditing board. 22 Ark. 595. The right to appeal [given by Sand. & H. Dig. § 810] does not make it a suit. This is a special proceeding, and costs are not allowable. *Ibid.* Cost statutes are strictly construed, and most strongly against the claimant officer. 47

Ark. 442; 61 Ark. 407; 25 Ark. 235; 58 Ark. 487; 32 Ark. 45; 56 Ark. 581. In equity costs do not always follow the judgment. 36 Ark. 383.

BATTLE, J. Philpot had several claims against Jefferson county. He presented them to the county court for allowance. When presented, they were filed by the clerk of the court, and he charged the claimant ten cents for filing each claim. The county court entered judgment against the county for the amount of the claims, but refused to allow the ten cents paid to the clerk for filing each of them. Philpot appealed to the circuit court, which found that Philpot was entitled to recover the amount of the claims presented, and that he had paid ten cents to the clerk of the county court for filing each of them; and thereupon declared the law to be that the amount paid to the county clerk was a part of the costs of the allowance of his claims, and that he should recover it from the county. The county has appealed. It concedes that the allowance of the original claims is correct, but contends that the circuit court erred in permitting the plaintiff to recover the amounts paid by him to the clerk of the county court for filing his claims for allowance.

The only question, therefore, presented by the record is this: "When a creditor of a county presents his claim to the county court for allowance in accordance with the statute, and judgment thereon is rendered in his favor, is the creditor entitled to recover of the county the costs expended by him in the proceeding?"

Our statutes provide that when a plaintiff in an action shall recover "judgment, he shall have judgment for costs against the defendant." Sand. & H. Dig. § 787.

"A civil action," as defined by the code, "is an ordinary proceeding in a court of justice by one party against another for the enforcement or protection of a private right, or the redress or prevention of a private wrong." Sand. & H. Dig. § 5602. It is variously defined to be: "The rightful method of obtaining in court what is due to any one; the lawful demand of one's right in a court of justice; the lawful demand of one's rights in the form given by law; the form of a suit given by

law for the recovery of that which is one's due; the lawful demand of one's rights; a remedial instrument of justice, whereby redress is obtained for any wrong committed or right withheld; any judicial proceeding which, conducted to a termination, will result in a judgment." Winfield's Adjudged Words and Phrases, p. 16.

The county court has exclusive jurisdiction, as against the state courts, of all claims and demands against the county. The statutes provide: "All persons having demands against any county shall present the same, duly verified according to law, to the county court of such county for allowance or rejection. From the order of the county court thereon appeals may be prosecuted as now provided by law. If on any such appeal the judgment of the county court is reversed, the judgment of reversal shall be certified to the county court, and the county court shall thereupon enter the judgment of the superior court as its own." Sand. & H. Dig. §§ 810, 811.

In *Nevada County* v. *Hicks*, 50 Ark. 416, it is said. "Whilst it is true that, by the act of February 27, 1879, counties cannot be sued in the ordinary way of bringing suits, still judgments may be and are rendered against them. Every allowance of a claim by the county court is a judgment." And a judgment "is the final determination of the rights of the parties to an action." Sand. & H. Dig. § 5851.

The filing of a demand against a county and presenting it to the county court for allowance is, therefore, according to the various definitions given, the institution of a suit or action, no other pleading or proceeding for that purpose being required; and under the statutes the plaintiff, or person presenting the same, if allowed, is entitled to judgment for costs; and the fee allowed and paid for the filing of each claim is cost of the action.

Appellant contends that a county is not liable for the fees paid for the filing of claims allowed against a county, and cites *Cole* v. *White County*, 32 Ark. 45, to sustain its contention. In that case the demand for such fees was made by a clerk for *ex parte* services rendered by him, and was not a claim for the costs of a successful suit against the county. A careful read-

ing of the opinion in that case will show that the question presented in this was not considered in that case.

Appellant relies upon the rule to the effect that, in the construction of statutes, general words do not include the state or county, nor affect its rights, unless the state or county is named or clearly included. That is true. But there are exceptions to the rule. Where a state or county becomes a party to an action in a court, it becomes subject and liable to all the statutes and rules which regulate the pleadings and proceedings, and determine the rights and liabilities of the parties, in such actions, unless expressly or impliedly excepted. *Green* v. *United States*, 9 Wall. 655. This necessarily follows, otherwise the courts would sometimes be left without any law to control or guide them in such cases. Ordinarily, there can be no reason or necessity for a different rule in actions to which a state or county is a party, and, generally, none is enacted.

In *Nevada County* v. *Hicks*, *supra*, the question was whether a statute declaring that judgments should bear interest applied to a judgment against a county. Counties were not mentioned in the act, and the question was whether they stood upon a different footing from other litigants against whom judgments were rendered. The court held that they did not, that interest was an incident under the statute to all judgments, and that counties were bound by its terms unless specially excepted.

Costs are incidents to all actions. One cannot be prosecuted without it. For the same reason that a county is liable under the statute to pay interest on judgments against it, it should be liable for costs when a judgment is rendered against it. The statute regulating the adjudication of costs governs, in part, the procedure in actions in all courts, unless otherwise provided by statute; and the state or county becoming a party to them is subject to it, unless excepted.

In *Wilson* v. *Fussell*, 60 Ark. 194, cited by appellant, D. M. Wilson, the sheriff of St. Francis county, gave bond as collector of taxes, which was approved by the county court. The appellees, James Fussell and others, citizens and taxpayers of the county, deeming the sureties on said bond insufficient, appealed to the circuit judge in vacation from the order of the county court approving the bond, and the circuit judge, after

hearing the evidence, likewise approved the bond. The court held that the proceedings before the judge was not an action at law or in equity, and that costs could not be adjudged to the successful party. So it does not support appellant's contention.

Judgment affirmed.

---

66 248
67 516
66 248
77 601
66 248
84 373
66 248
f80 383

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

Opinion delivered March 11, 1899.

1. RAILROADS—INJURY TO ANIMAL AT CULVERT—NEGLIGENCE.—Where a mule, frightened by the approach of a train, ran into a culvert and was injured by a fall, the trainmen were not negligent in failing to stop the train before the injury occurred, if they could not have foreseen, as a natural or probable consequence of not stopping, that the mule would attempt to go on the trestle, and be injured. *Hot Springs Rd. Co.* v. *Newman*, 36 Ark. 607, followed. (Page 249.)

2. SAME—PRESUMPTION OF NEGLIGENCE.—The trial court properly instructed the jury that if plaintiff's mule was run into a trestle by a train on defendant's road, and injured, and died from injuries so received, the law presumes negligence on the part of defendant, and the burden of proving proper care devolved on it. (Page 250.)

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

Dodge & Johnson, for appellant.

The evidence shows that appellant did all that the law requires of it, and hence was guilty of no negligence. 36 Ark. 607; 57 Ark. 16; 37 Ark. 693.

Smead & Powell, for appellee.

The verdict, being supported by evidence, will not be disturbed on appeal. 23 Ark. 208; 47 Ark. 196; 46 Ark. 524; 51 Ark. 324. The jury had a right to disregard the testimony of the train crew. 57 Ark. 214.

HUGHES, J. This is an appeal from a judgment for damages for the value of a mule, alleged to have been killed through the negligent operation of appellant's train.

The facts, briefly stated, are about as follows: "Plaintiff's mule and another animal were grazing, one on the side of defendant's track and one on the track, when a train was approaching; when within from 200 to 400 yards of the animals, the whistle was sounded, and the engineer immediately commenced to reduce the speed of his train. Plaintiff's mule started down the track, and ran into a culvert or trestle. The other left the track, and the train came to a full stop about the time the animal jumped into the culvert. Seeing that the animal was fastened in the trestle, the engineer pulled up his train until within from ten to fifty steps of the trestle, and stopped. He and the crew alighted from the train, went to where the animal was, and pulled her out of the trestle. They found that the mule had broken one hind leg and one fore leg when she jumped into the trestle. In lifting her out of the trestle they did not injure her, but did it as best they could. The engine did not strike the animal, and was never nearer to it than two telegraph poles—some 200 yards—until after it pulled up and stopped a short distance from the trestle."

This case is ruled by the case of *Hot Springs Rd. Co.* v. *Newman*, 36 Ark. 607. In that case the court said: "There was no proof of any hindrance or impediment in the way of the cow's getting off the track, or of any facts or circumstances from which the persons in charge of the train might have foreseen, as a probable consequence of not sooner stopping the train, an injury to her, or that she would, in her freight, attempt to pass over the culvert, and not go off the track as the other cattle had done. For anything appearing to the contrary, egress from the track at the culvert was as possible and safe as where the others left it. * * * Though the injury might not have happened if the train had been sooner stopped, yet, if it was not to have been foreseen or anticipated by the person in charge of it, as a natural or probable consequence of not stopping sooner, that the cows would attempt to pass over the culvert, or be injured, and which they, as persons of ordinary care and prudence, should have guarded against, negligence cannot be

imputed to them, or the defendant. 'Culpable negligence is the omission of something which a reasonable, prudent and honest man would do, or the doing something which such a man would not do, under all the circumstances surrounding each particular case.' He who seeks a recovery for an injury caused by the alleged negligence of the defendant must not only prove that he has suffered loss by the defendant's act or omission, but also that the act or omission was a violation of a duty required of him. We do not think the evidence sustained the finding of negligence."

We are of the opinion that there was no error in instructing the jury that if the plaintiff's mule was run into a trestle by a train on defendant's road, and injured, and died from having been so injured, the law presumed negligence on the part of the defendant, and the burden of proving proper care devolved on it; and that if defendant failed to show, by a preponderance of the evidence, that it used ordinary prudence to prevent the injury, they should find for the plaintiff. *Little Rock & C. R. Co.* v. *Payne*, 33 Ark. 816, construing first and and eighth sections of act of Feb. 3, 1895, for recovery of damages for injury by railroads.

The engineer was not guilty of negligence in not stopping or slackening the speed of his train, when he had reason to believe that the mule would leave the track before reaching the culvert, and when it was not to be foreseen or anticipated by him, as a natural and probable consequence of not stopping, that the mule would attempt to pass over the culvert or be injured. *Hot Springs Rd. Co.* v. *Newman*, 36 Ark. 607; *Little Rock & F. S. Ry. Co.* v. *Trotter*, 37 Ark. 593.

We think there is no evidence of negligence on the part of the appellant, and that the presumption of negligence arising from the injury has been overcome.

Reversed, and remanded for a new trial.

WELCH v. MCKENZIE.

WELCH v. JOHNSTON.

Opinion delivered March 11, 1899.

1. POWER OF ATTORNEY—CONSTRUCTION.—A power of attorney executed by a widow, authorizing the attorney to represent her and her interest in the estate of her late husband, with full power to do and perform all acts necessary to promote and protect her interest therein, does not authorize the attorney to bind her by a contract, without consideration, to release her dower in lands of which her husband was seized of an estate of inheritance during his lifetime. Nor does such power of attorney convey authority to represent her in regard to lands which had belonged to her husband, but which he had conveyed away during his lifetime; such lands being no longer a part of his estate. (Page 258.)

2. DOWER—IMPROVEMENTS.—In awarding to a widow dower in lands which had been sold by her husband in his lifetime, she is entitled to recover one-third of the rents of said lands since the death of her husband; but the value of improvements thereon made by the purchasers from her husband should be excluded in estimating her dower and the rents to which she is entitled. (Page 259.)

3. SAME—PARTNERSHIP LANDS.—A widow of a partner is not entitled to dower in lands which were bought with partnership funds for partnership purposes, which were sold as partnership property, and the proceeds of which were paid to the partnership. (Page 259.)

Appeals from Yell Circuit Court in Chancery, Dardanelle District.

JEREMIAH G. WALLACE, Judge.

W. D. Jacoway, for appellant.

The widow is entitled to dower in all lands whereof her husband was seized as an estate of inheritance during marriage unless released by her in legal form. Sand. & H. Dig. §§ 2520, 2552; 31 Ark. 557; 2 Woerner, Adm. 1074 and note; 5 Am. & Eng. Enc. Law, 912, notes 14 and 15; 21 Ark. 347. Dower can not be released by parol. 21 Ark. 62; 4 Lead. Cases, Am. Law Real Prop. 521. Never having been evicted, appellees could not have sued on the warranty. 3 Washb. Real Prop. 478; 90 N. J. 298; 112 Mass. 8; 4 Am. & Eng. Enc.

Law, 521–533; 33 Ark. 593. The power of attorney extended only to the appellant's interest "in the estate" of her husband. Hence the act of the attorney in fact in releasing dower was not binding on appellant. 3 Wash. Real Prop. 77–79; 5 Pet. 319. For a misrepresentation to work an estoppel, five elements must concur. There must have been a misrepresentation; knowingly made; made to one who neither knew nor was required to know the facts; made with the intention of inducing action; and having that result. 3 Washb. Real Prop. 79, note 1; Big. Est. 57, 569; 10 Allen, 433; 49 N. Y. 11; 40 Ark. 283; 54 Ark. 465; *id.* 499; 33 Ark. 465; 49 Ark. 218; 63 Ark. 212; 37 Ark. 551; 106 U. S. 447; 93 U. S. 326; Bisp. Eq. 355, note 2; Big. Est. 626; 4 Lead. Cas. Am. Law Real Prop. 421; Tied. Real Prop. 725. The widow can recover her portion of rents up to apportionment of dower. Sand. & H. Dig. §§ 78, 2552; 34 Ark. 63; 8 Ark. 41, 42; 5 Ark. 608; 60 Ark. 475; 2 Scrib. Dow. 700–4; 40 Ark. 393; 2 Woerner, Adm. 1152. Realty bought with partnership funds, or for partnership purposes, is realty at law, subject to dower, just as if the partners were tenants in common. Bisp. Eq. § 408, note 314; 2 Scrib. Dow. 685; 5 Am. & Eng. Enc. Law, 897–898; 48 Ark. 557. Subject to creditors' claims, the widow was dowable out of such property. 48 Ark. 256; 24 Ark. 19; 1 Washb. Real Prop. 200; Tied. Real Prop. §§ 116, 245, 246.

J. C. Hart and *R. C. Bullock*, for appellees.

A widow may, by her declarations and acts, estop herself to claim dower in certain property. Herm. Estop. 1244; 1 Washb. Real Prop. 235, 264; 4 Paige, Ch. 92; 67 Mo. 175. Where the whole value of a widow's dower is set apart in part of her husband's lands, she has no claim to the remainder. 40 Ark. 70; 6 Paige, Ch. 478. The making of the release was within both the real and apparent scope of the authority of the attorney in fact. 1 Dev. Deeds, 360, 362; 58 Fed. 712; 48 Fed. 431; Big. Estop. 442. The widow was not entitled to dower out of the partnership lands. 28 Ark. 256; 48 Ark. 557; 4 Met. 527; 5 *ib.* 585; *ib.* 562; Collyer, Part. 135; 1 Dev. Deeds, 208; 56 Ark. 179; 21 S. W. 1, 105; 6 S. E. 630. In suits by widow against alienees of husband's lands, rents are recov-

erable only from demand or suit. 29 Ark. 650; Boone, Real Prop. § 71; 1 Washb. Real Prop. 292–293; 9 S. W. 569; 11 N. E. 912; 1 S. W. 873. Improvements made since sale should not be considered in assessing dower. 1 Washb. Real Prop. 300; 29 Fed. 402; 1 Am. Lead. Cas. 399, 400.

HUGHES, J. These suits were brought by appellant, on the chancery side of the Yell circuit court for the Dardanelle district, to the February term, 1896, for dower in certain lands and town lots owned by her deceased husband, C. W. Welch, and by him sold and conveyed during coverture without procuring her relinquishment of dower therein.

On the hearing in the court below, the two cases mentioned in No. 3671 were consolidated. To the same term six other suits were brought by appellant for dower, which were consolidated by agreement, all of which eight cases were submitted and argued together in the court below as No. 3672. The proof was taken in but one case, that is, the case of *Harriet P. Welch* v. *J. G. McKenzie*, and it was agreed that the depositions, exhibits, and proof in that case should be read, considered and treated as evidence in each of the eight cases for dower, as far as applicable.

The six cases mentioned in No. 3672 involve the same questions as in the two cases consolidated in No. 3671, except it is contended that the lands and town lots described in the six cases mentioned in No. 3672 were partnership property, and, therefore, not subject to dower. It was also agreed that the six cases mentioned in No. 3672 should all abide the decision of the supreme court in the case of Harriet P. Welch *v.* T. A. Johnston.

The complaints allege that appellant is the widow of C. W. Welch, late a citizen of Dardanelle, Arkansas; that she intermarried with C. W. Welch on the 30th day of April, 1867; that C. W. Welch died intestate on the 23d day of October, 1890; that, during their coverture C. W. Welch was seized of an estate of inheritance in the S. ½ of the S. W. ¼ of sec. 25 in T. 7 N., R. 21 west, situated in said district, county and state, which is now claimed by appellee, J. G. McKenzie, and the N. ½ of S. W. ¼ of sec. 25 in T. 7 N., R. 21 west,

which is now claimed by appellee, T. H. Marr; that dower in said land has never been allotted to her; that said C. W. Welch sold and conveyed said lands to appellees during their coverture; that she never joined her said husband in said deeds, nor relinquished her dower in and to said lands; that said appellees have been in possession of said lands respectively claimed by them, and have enjoyed the rents and profits thereof, continuously since the death of her said husband,—and pray that an account be taken of the annual rental value of said lands since the death of her said husband, and that she be decreed one-third thereof, with six per cent. interest since the accrual of said rents, and that dower be decreed to her in said lands, and that an assignment thereof be made according to the statute.

Appellees, J. G. McKenzie and T. H. Marr, by their respective answers, state that they purchased said lands from C. W. Welch long prior to his death, and that he conveyed said lands to them with proper covenants of warranty and relinquishment of dower by Rosana Welch; that they paid full value for said lands; that C. W. Welch lived with said Rosana, and represented that she was his lawful wife; that, after the death of C. W. Welch, E. P. Welch, the son and sole heir of C. W. Welch, came to Dardanelle with power of attorney from his mother (the appellant herein), and that all of the estate of the said C. W. Welch, deceased, undisposed of at his death, was turned over to E. P. Welch and appellant; that appellees learned that appellant was about to begin proceedings to recover dower in the lands mentioned in these suits, and they were about to proceed against the estate of C. W. Welch to recover on the breach of warranty embraced in said deeds made to them for said lands; that appellant agreed with appellees that she would not claim dower in said lands if appellees would not bring their suit; that, since that time, E. P. Welch and appellant have sold and disposed of the entire estate, or removed it from the state; that, on account of the false and fraudulent representations "made as aforesaid," appellees were induced to abandon their claims against said estate for breach of warranty; that appellant is estopped by her fraudulent conduct, as aforesaid, from claiming dower in said lands. Appellee Marr avers that the northeast $\frac{1}{4}$ of southwest $\frac{1}{4}$, aforesaid, claimed by him,

was exchanged by C. W. Welch with J. H. Dacus for Dardanelle property, and that appellant is barred from recovering dower in that forty acres because she did not begin suit within one year after the death of C. W. Welch.

In the case of Harriet P. Welch v. T. A. Johnson the complaint is substantially the same as the complaints of J. G. McKenzie and T. H. Marr. And the answer of T. A. Johnston is substantially the same as the answers of J. G. McKenzie and T. H. Marr, except that T. A. Johnston contends that lots 9, 10, 11 and 12 in block 56 in Dardanelle, and described in the complaint against him, were purchased by W. E. Cotton and C. W. Welch "out of partnership funds for speculative purposes, and were sold, and the proceeds of sale were put into the partnership."

There is evidence tending to show that E. P. Welch, the son and heir of E. W. Welch, by his words and conduct led the appellees to believe that his mother, Harriet P. Welch, the widow of C. W. Welch, would not claim dower in the lands which her husband had owned and sold in his lifetime, in which she had not relinquished dower, and that, relying thereon, the appellees, who had bought said lands of said Welch in his lifetime, refrained from suing the estate of C. W. Welch for breach of warranty contained in the deeds by him conveying said lands. It is not disputed that Harriet P. Welch is entitled to dower in the lands involved in No. 3676, if she is not estopped to claim the same.

After the death of C. W. Welch, his son, the said E. P. Welch, went to Dardanelle with a power of attorney from his mother, to look after and represent her interest in the estate of her deceased husband, the said C. W. Welch, who it seems had for some years been living with a Mrs Rosana Burton, as his wife, and who as such had signed the relinquishments of dower in the deeds conveying the lands in controversy in these cases, and who was generally supposed to be his lawful wife. Following are copies of said power of attorney, and of a letter written by R. C. Bullock to Edwin P. Welch and the reply of Edwin P. Welch to the same, relied upon as evidence to show that Harriet P. Welch is estopped to claim dower in said

lands, together with some other evidence contained in the testimony of witnesses.

"Power of Attorney. The State of South Carolina; County of Anderson. Know all men by these presents: That I, Harriet P. Welch, widow of Clark W. Welch, deceased, and before my marriage named and known as P. A. Harriet Hall, do make, constitute and appoint my son, Edwin P. Welch, my true and lawful attorney for me and in my name to represent me and my interest in the estate of my late husband, the said Clark W. Welch, who recently died in the State of Arkansas, with full power to do and perform all acts necessary to promote and protect my interest therein, to sign all papers, either under seal or not under seal, be it bond for administration, for property or other contracts generally touching the same, to bring suit when deemed advisable, to give all proper receipts and acquittances, releases and the like, and in fact to do all and singular every act relating to said estate affecting mine and his interest, as he may deem best, even to the extent of selling or disposing of our interest and shares in said estate; with power also to appoint attorney or attorneys under him for that purpose, to make and substitute, and to do all lawful acts for effecting the premises; hereby ratifying and confirming all that my said attorney or substitute or substitutes shall do by virtue thereof. [Signed] Harriet P. Welch."

"DARDANELLE, ARK., Feb. 12, 1891.

"Edwin P. Welch:

"DEAR SIR—Am importuned by Mr. J. W. Blevins, McKenzie *et al.*, in regard to the lands sold by your father in his lifetime without relinquishment of dower on the part of your mother, in which Mrs. Burton joined as his wife. They demand a definite answer, and talk of bringing suit unless they get some kind of quitclaim to the lands from your mother. I have not looked the matter up from a legal standpoint, but it would seem at first blush that they are innocent purchasers, and whether or not your estate from your father would be liable on account of his covenants in the deeds is a question I can't answer just now, not having time to look it up; but if your mother does not desire to contest her rights of dower in these lands,

that would settle it. You can answer me early. Am very busy with circuit court, and will write again. Yours, etc.,

[Signed] "R. C. BULLOCK."

"February 16, 1891.

"Mr. R. C. Bullock, Dardanelle, Ark.:

"DEAR SIR—Your favor of the 12th inst. to hand. In regard to dower would say that neither my mother nor myself have any desire to claim anything whatever from those gentlemen. I suppose that they gave full value for the title which they now hold, and I think that it would be out of the question of justice and right to force them to pay the dower. I don't think they are acting altogether right in the matter, however, as they seem to anticipate forcing matters, which I am confident would prove a failure. It appears to me that it would have been much more businesslike in these gentlemen to have seen me and asked me to have given them the relinquishment necessary, without making any unusual amount of threats. You can say to them that they need have no fears from this section. Very truly, [Signed] EDWIN WELCH."

Mrs. Harriet P. Welch testified: "I do not know any of the defendants to the several suits instituted by me for dower in Yell county, Ark. I never did at any time, in any way or manner, agree with the defendants, or any one else, not to sue for dower in any lands or town lots involved in any of suits now pending in the Yell circuit court, for the Dardanelle district. Nor did I ever authorize my son, E. P. Welch, as my agent and attorney in fact, to make any agreement to surrender, abandon or release my dower rights to any of the lands or town lots involved in said suits. I did not know, prior to the institution of these suits, what lands and town lots in Yell county, Ark., my husband, C. W. Welch, had owned and sold before his death." Unless the said power of attorney conferred upon the said Edwin P. Welch the power to make the agreements which it is contended was made by Edwin P. Welch, and which it is said estops Mrs. Harriet P. Welch from claiming dower in the said lands, there does not appear to be any evidence of estoppel in the case. In adddition to the testimony of Mrs. Welch above quoted, she said on cross-examination:

"E. P. Welch did not, with my knowledge or consent, write to R. C. Bullock to tell said parties that I would make no claim for dower in the lands conveyed to them, nor any words to that effect." Edwin P. Welch testified: "Nor did I ever at any time, in any way, manner or form, agree with the defendant, J. G. McKenzie, or any one else, to abandon or release my mother's dower interest in any of said lands or town lots, nor did my mother, Harriet P. Welch, ever give me any authority to do so, and I never exercised or attempted to exercise such authority." It seems, however, that there is some testimony tending to show that he induced the purchasers of these lands to believe that if they would not sue for breach of covenants in his father's deed to the same, his mother would not claim dower in these lands, which had been conveyed by C. W. Welch in his lifetime, in which Mrs. Harriet Welch had not relinquished her dower.

Did the power of attorney authorize Edwin P. Welch to make the agreement contended for? The expressed purpose of the power of attorney was to empower and authorize Edwin P. Welch to represent Mrs. Harriet P. Welch and her interest in the estate of her late husband, the said Clark W. Welch, "with full power to do and perform all acts necessary to promote and protect my interest therein." Certainly, this did not authorize Edwin P. Welch to relinquish her dower in the lands in controversy, or to bind her not to claim her dower. By the laws of this state, the widow is entitled to her dower in the lands of her deceased husband, whereof he was seized of an estate of inheritance at any time during marriage, unless the same shall have been relinquished in legal form. Sand. & H. Dig. § 2520. She takes this dower by way of lien created by, and at the time of, marriage, and independent of debts, and paramount to the claims of creditors. *Tate* v. *Jay*, 31 Ark. 577, and cases cited. In the event the parties to whom the land had been conveyed by Clark W. Welch with warranty of title had sued for breach of warranty, and had recovered judgment against the estate of C. W. Welch, it would not have diminished or affected, in the least, the widow's dower in the lands, but would have diminished the estate of the heir, Edwin P. Welch, or the estate in the hands of an admin-

istrator. It is not supposed that Harriet P. Welch, the widow, consented to part with her dower without consideration.

Again, this power of attorney authorized E. P. Welch to represent and protect the interest of Mrs. Harriet P. Welch in the estate of her said husband, Clark W. Welch. These lands in controversy had been conveyed by Clark W. Welch in his lifetime, and, after his conveyance of them, were no longer any part of his estate, and were not such at the time the power of attorney was executed. The evidence tends to show that, at the time she made the power of attorney, she did not know what lands, if any, her husband owned in his lifetime. This, it would seem, negatives the idea that, when she used the expression, "estate of her deceased husband," she referred to these lands as a part of the same.

We think that if E. P. Welch undertook to bind his mother, Harriet P. Welch, not to claim dower in the lands in controversy, he had no authority or power to bind her; that his acts, if they were intended to bind her, were unauthorized, and she is not estopped, according to the evidence in this case, from claiming dower in said lands in case No. 3671. The decree of the court holding that she was estopped is reversed, and as to this the cause is remanded, with directions to enter a decree for Harriet P. Welch for dower in said lands involved in case 3671 of Harriet P. Welch *v.* J. G. McKenzie, and Harriet P. Welch *v.* T. H. Marr, and for one-third of the rents of said lands since the death of the said Clark W. Welch, her deceased husband; but the value of improvements made by the purchasers from her husband must be excluded in estimating her dower (1 Washburn, Real Property, 300, and cases cited) and the rents to which she is entitled.

In case No. 3672, *Harriet P. Welch* v. *T. A. Johnson*, it appears that the lands involved were partnership lands, bought with partnership funds and for partnership purposes, by Cotton and C. W. Welch, while partners in business, and were sold by the firm as partnership property, and that the proceeds of the sale were paid into the partnership. "In equity real estate purchased with partnership funds, or for the use of the partnership, are chargeable, upon settlement of the

affairs of the firm, with the debts of the co-partnership, and any balance that may be due from one partner to the other. If the realty be acquired in such manner as to make its owners tenants in common, other than that arising from or growing out of the partnership, in such cases the widow is entitled to dower; otherwise, if acquired with partnership funds. *Drewry* v. *Montgomery*, 28 Ark. 256. This land was purchased, as appears from the evidence, during the partnership, with partnership funds, for the use of the partnership, and the deed was taken to Cotton Bros. & Co., and it does not appear that there was any agreement that it should be held for the separate use of the partners. It was sold as partnership property while the partnership existed, and the proceeds of the sale were turned into the firm. The widow was therefore not entitled to dower in the lands involved in consolidated case No. 3672, and the decree in that case is affirmed. *Ferguson* v. *Hanauer*, 56 Ark. 179; *Howard* v. *Priest*, 5 Metc. (Mass.) 585; *Dyer* v. *Clark*, 5 *id.* 562.

BUNN, C. J., and WOOD, J., dissenting.

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

Opinion delivered March 11, 1899.

CONTRACT—CONSTRUCTION.—A contract whereby a plaintiff in a suit conveyed to his attorneys a half interest in any judgment he might recover therein does not convey any interest in plaintiff's cause of action, nor confer upon such attorneys any right to question the good faith of any settlement which plaintiff may make with defendant before a judgment is recovered. (Page 263.)

Appeal from Nevada Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

Nettie Brownlow sued the railway company for personal injuries. The issues were made up, and the cause was trans-

ferred to the equity docket, where it had progressed to submission, but, before a decree was rendered, the railway company settled with the plaintiff, and secured her written authority to dismiss her suit. Thereupon, the railway company filed its motion to dismiss, and the appellants, who were plaintiff's attorneys, filed their intervention, and resisted appellee's motion to dismiss. The intervention set up, *inter alia*, that interveners were employed by the plaintiff to take charge of her claim against the railway company for personal injuries, and that they were to have full power to enter suit or compromise the same as they might deem best, and as compensation therefor were to receive a one-half interest in said claim. This was the verbal agreement of interveners with plaintiff, and in addition to this they allege that plaintiff executed to interveners a written transfer of a one-half interest in her suit and any judgment she might recover therein. They show that, in pursuance of the agreement with plaintiff, they instituted suit against the railway company, and conducted same, doing all the labor incident thereto, down to the time the cause was submitted to the chancellor for decision, and to the filing of the motion to dismiss. They set up the insolvency of the plaintiff, show the unpaid costs in the case to be $28.75, for which they allege interveners were liable; also allege that there were additional costs and expenses amounting to $139.55, which plaintiff had promised to pay. They set up that the releases obtained by the railway in settlement of plaintiff's demand were without the knowledge and consent of the interveners, and that the railway well knew at the time that interveners owned a one-half interest in the suit, and were working for a contingent fee of one-half the amount that might be recovered; also knew that interveners had advanced large sums of money to plaintiff as aforesaid in procuring evidence, etc. They charge that the settlement was collusive, and made with the intent to cheat and defraud interveners. They allege the justness of plaintiff's claim, saying she was entitled to receive $25,000, whereas she in fact only received $150. Their prayer was that the suit be not dismissed, and that the court should render a decree upon the merits, and that interveners recover against the defendant the sum of $12,500, and all costs, and for general and special relief, such as the equities require. A demurrer and answer

were interposed by the railway company. The answer denied all material allegations. The cause was heard upon all the pleadings and depositions, and the court rendered the following decree: "The court is of opinion that said interveners are not entitled to prosecute this cause upon their intervention, except for the purpose of collecting the taxable costs in this case, amounting to the sum of $50.55, which amount the St. Louis Southwestern Railway Company now pays into court, but the interveners refuse to accept the same or any part thereof. And it is considered, ordered and adjudged by the court that said intervention be dismissed for want of equity, and that the whole case be dismissed." The interveners only appealed. Such facts as may be necessary will be stated in the opinion.

Tompkins & Greeson and *Scott & Jones*, for appellants.

Where parties collusively compromise a cause out of court, for the purpose of defrauding the attorney, he is entitled to prosecute the suit, and if he establishes a cause of action on the suit as it originally stood, he is entitled to recover his costs. 22 N. E. 361; 12 Ark. 144; 1 Am. & Eng. Enc. Law, 972; Jones, Liens, § 204; 17 N. Y. L. 438; 22 Wis. 453; 27 N. H. 324; 40 S. W. 1065. Notice of the contract of appellants, given to attorneys of the defendant corporation, put it on notice. 25 Ia. 464; 45 N. W. 744; Whart. Ag. 584. Where defendant colludes with plaintiff to cheat the latter's attorney out of his fee, the defendant is not protected in making the payment by want of notice of the attorney's lien. 2 Ark. (Vt.) 162; 17 N. Y. 438; 22 Wis. 433; 32 Abb. Pr. 323; 1 Jones, Liens, § 203; Weeks, Attorneys, 377, 379.

Sam H. West and *John T. Sifford*, for appellee.

Fraud is never presumed. 11 Ark. 378; 38 Ark. 419; 17 Ark. 151; 22 Ark. 184; 20 Ark. 216. The attorney's contract to sue for personal injuries and pay costs for a contingent fee was void. 41 L. R. A. 520; 49 N. E. 22. It was void as to the agreement not to compromise. Greenhood, Pub. Pol. 774; 25 Ia. 487; 21 Ia. 523; 15 Ohio, 715. The attorney had no lien before judgment. Jones, Liens, § 193; 1 Pars. Cont. 116; 3 *id.* 629; 13 Fed. 215. As to general right of litigants to settle without consent of attorneys, see 14 N. W. 617; 71 N

Y. 443; 62 Barb. 500. In the absence of proof, the laws of Texas are presumed to be the same as in our state. 58 Ark. 26; 50 Ark. 237. Independent of statute, the cause was not assignable in Texas. 62 Tex. 247; 30 S. W. 684; 25 S. W. 1024. Since attorney's fees are not taxable as costs, appellant has no claim in this case. 71 N. Y. 443; 15 Am. & Eng. R. Cas. 383.

WOOD, J., (after stating the facts.) The decree that interveners were not entitled to prosecute this suit upon their intervention was correct. Appellants do not show that they have any interest, legal or equitable, in plaintiff's claim for damages. The instruments under which appellants claim a half interest in the suit and in any judgment she might recover therein is as follows:

"State of Texas, County of Gregg: Know all men by these presents that I, Nettie King, of Henderson county, Texas, for and in consideration of the services rendered and to be rendered by DeGraffenreid & Young, a firm composed of R. C. DeGraffenreid and Ras Young, of Longview, Texas, have granted, sold and conveyed, and do by these presents grant, sell and convey, unto said DeGraffenreid & Young, a one-half interest in any judgment I may recover in my suit against the St. Louis Southwestern Ry. Co., said suit being in the circuit court of Nevada county, Arkansas, at Prescott, Arkansas, and they, the said DeGraffenreid & Young, are hereby authorized and empowered to collect all of any judgment that I might recover of and from said railway company, and they are hereby authorized and empowered to collect all of my interest in any judgment that might be rendered in my behalf against said St. Louis Southwestern Railway Company as my attorneys. Witness my hand this 10th day of October, 1895.

"NETTIE KING.

Witnesses: "L. R. COLEMAN,

"W. E. BEALL."

This instrument does not purport to convey anything but a half interest in "any judgment" that might be recovered. No judgment was ever recovered, and appellants acquired nothing under the assignment, even if it had been executed and ac-

knowledged as the Texas statute requires. As appellants had no interest in the plaintiff's cause of action, they cannot complain of any settlement she might choose to make before the suit had progressed to judgment. Appellants had no lien. Appellants' counsel concede that, prior to judgment, an attorney has no interest in the cause of action that would enable him to prevent any *bona fide* settlement by the client. Having no interest in the cause of action, it follows, from what we said in *Davis* v. *Webber*, *ante*, p. 190, that the attorney has no right to question the *bona fides* of any settlement made between the plaintiff and the defendant. This much as to the question of collusion and fraud, as it affects the claim for fees. So far as the question of costs is concerned, the court rendered judgment for the interveners for the taxable costs in the case. This they refused to accept. The railroad has not appealed, and therefore the correctness of the court's judgment in this respect is not questioned. The appellants cannot complain of a judgment for this amount in their favor. Even if they could, under certain circumstances, ask for this much, which we do not determine, they certainly could not ask for anything more.

Finding no error in the decree of the court, it is in all things affirmed.

BUNN, C. J., disqualified.

---

66 264
70 563
66 264
73 596
66 264
78 76
264
66 137
88 454
88

WILLIAMS v. STATE.

Opinion delivered March 11, 1899.

1. INSTRUCTIONS—GENERAL EXCEPTION.—A general exception to an instruction is not sufficient to raise the objection that it is defective in form. (Page 267.)

2. EVIDENCE—GENERAL EXCEPTION.—Where a witness, called to impeach the general reputation of defendant, who had testified for himself, was asked, "Do you know his reputation in the neighborhood?" and replied that he did, and that such reputation was bad, and it was apparent from the cross-examination that the witness meant that defendant's general reputation for truth and immorality in the neighborhood in which he lived was bad, a general exception to the question will not be sufficient

on appeal to raise the objection that such question was not in the form required by the statute. (Page 267.)

3. WHEN ERROR CURED BY INSTRUCTION.—If such question and answer might otherwise have been misleading, the error was cured by an instruction that to impeach a witness in that way it must be shown that his general reputation for truth and immorality in the neighborhood in which he lived is bad. (Page 268.)

4. EVIDENCE—RAPE—COMPLAINT BY PROSECUTRIX.—Though it is competent for the state in a rape case to show that the prosecutrix made complaint of the injury, yet the particular facts which she stated are not admissible in evidence except where elicited on cross-examination or by way of confirming her testimony after it has been impeached. (Page 268.)

5. SAME—RES GESTÆ.—The particulars of a statement by the prosecutrix in a rape case, made fifteen minutes after the crime was said to have been committed, are not admissible as part of the *res gestæ*, being only a narration of a past transaction. (Page 268.)

6. SAME—WHEN ERROR NOT PREJUDICIAL.—The improper admission of the particulars of a statement made by a prosecutrix in a rape case is not prejudicial if such statement contained nothing that was not admitted to be true. (Page 269.)

7. WHEN ERROR CURED BY REMITTING EXCESSIVE PUNISHMENT.—While it is error for the jury to determine the number of years of punishment by a "quotient verdict," under a precedent agreement to be bound thereby, such error will be cured by remitting so much of the punishment as exceeds the minimum punishment fixed by law. (Page 270.)

Appeal from Columbia Circuit Court.

CHARLES W. SMITH, Judge.

STATEMENT BY THE COURT.

The appellant, Fern Williams, a negro boy eighteen years of age, was indicted for the crime of rape alleged to have been committed upon Julia Lagrone, a negro woman a year or two older than defendant. She testified on the trial in substance as follows: She was returning from church alone and on foot on a Sunday afternoon when she was overtaken by the defendant, who had attended the same church. After some remarks about the services at church, he made an indecent proposal, which she declined. He thereupon caught hold of her, and threw her down, and ravished her. She testified that she called for assistance, and fought him with all her strength, and complained of the crime to Reuben Warren, the first person whom she afterwards met.

The defendant, who took the stand in his own behalf, admitted that he had sexual intercourse with the prosecuting witness at the time and place named by her, but stated that it was with her consent. "The reason why she got mad," he said, "she asked me for a dollar after I got through, and I did not have a dollar, and told her I would not pay it; and she says, 'you son of a bitch, you have to pay me,' and tried to fight me, and that is how the row came up, and I flung her down."

The jury returned a verdict finding defendant guilty of an assault with intent to rape, and assessed his punishment at five years in the state penitentiary. The evidence, though contradictory, was sufficient to support the verdict.

Smeade & Powell, for appellant.

Every indictable offense must be committed with a felonious intent. Bish. Cr. Law, §§ 242–7, 427. The second indictment is based on an isolated fact, and hence erroneous. 45 Ark. 165; 57 *ib.* 520. As to what constitutes a "reasonable doubt," see 62 Ark. 298; 5 Cush. 320; 1 Gray, 534; Bouv. Dict. 563, "Doubt." It was error to admit the testimony of witness Warren on the theory that the matters referred to therein were part of the *res gestæ*. 58 Ark. 47; 19 *id.* 490; 46 *id.* 141; 43 *id.* 289; *ib.* 102. Nor was it evidence of the commission of the offense. 38 Ind. 39; 17 Ohio, 593; 18 *ib.* 99; 8 Oh. St. 643; 1 Denio, 19. A quotient verdict is illegal, and can be impeached in a criminal case. Sand. & H. Dig. § 2268; 28 Ark. 155; 29 Ark. 248; 49 Ark. 454; 44 Ark. 115; 57 Ark. 1; Thomp. & Merr. Juries, 409–411.

Jeff Davis, Attorney General, and *Chas. Jacobson*, for appellee.

When a defendant elects to take the stand, he may be impeached as any other witness may. 46 Ark. 141; 56 Ark. 4; 25 S. W. 603; *ib.* 279; Und. Cr. Evid. § 78; 1 Bish. Cr. Proc. 1185; 76 Mo. 328; 76 Mo. 35. And this is true, even though his good character may not have been previously put in issue. 46 Ark. 141. Declarations, spontaneous and unpremeditated in character, made so closely in connection with the principal act as to form a part thereof, are admissible as *res gestæ*. Und. Cr. Ev. § 97; 43 Ark. 103.

RIDDICK, J., (after stating the facts.) Several objections have been presented to the instructions given by the presiding judge to the jury, but we are of the opinion that they fairly stated the law of the case. Some of the instructions may be slightly defective in form, but we have several times held that a general objection is not sufficient to raise a question of that kind. *St. L., I. M. & So. Ry. Co.* v. *Pritchett*, *ante*, p. 43, 48 S. W. 809; *Phœnix Insurance Co.* v. *Flemming*, 65 *ib.* 54, 44 S. W. 464.

The defendant testified in his own behalf, and afterwards the state introduced several witnesses to impeach his character for veracity. To one of these witnesses, who had stated that he had known the defendant for three or four years—"ever since he has been in that neighborhood"—the prosecuting attorney propounded the question: "Do you know his reputation in the neighborhood?" (Question objected to by defendant, objections overruled, and exceptions saved.) Witness answered that he did, and stated that defendant's reputation was bad. On cross-examination, witness stated that he had heard talk about defendant "raising rackets, drawing his pistol at church, and being in people's watermelon patches." Had never heard any one say he would tell a lie, but judged him from his character in the neighborhood in which he lived. It is evident that the only tenable objection to the question propounded to this witness, and to which the defendant objected, is that it was not sufficiently full and explicit. No one can doubt that the intention was to ascertain whether the witness knew the general reputation of defendant for truth and immorality in the neighborhood where he lived. This is apparent from the cross-examination which followed, and from the fact that the question was correctly put to other witnesses called by the state for the same purpose, while the defendant in the examination of Church Williams, one of his rebutting witnesses on this question of reputation, made a lapse very similar to that complained of by him against the prosecuting attorney. The prosecuting attorney was guilty of some carelessness in putting the question in that form; but if the attention of the presiding judge had been called to the defect, he doubtless would have compelled him to put the question in the form required by the statute.

The bill of exceptions shows that the defendant made a general objection to this question, which was overruled, and exceptions saved. The stenographer and circuit judge have since certified that he, in fact, made no objection, but the judge states that he allowed the bill of exceptions to show that objections were made and exceptions saved in order that defendant might raise the question as to whether it was competent to impeach the character of a defendant who testified in his own behalf. As the bill of exceptions has not been amended, we must treat it as correct; but we regard the controversy as immaterial, for the objection, being general, was not sufficient to raise the question concerning the form of the interrogatory propounded to the witness. We must treat it as an objection, not to the form of the question, but to the question itself in any form; and, as the state had the same right to impeach the testimony of the defendant as that of any other witness, the objection cannot be sustained.

Again, even if there had been proper objection, the error was cured by the charge of the judge, who, at the request of the defendant, stated to the jury that to impeach a witness in that way it must be shown that his general reputation for truth and immorality in the neighborhood in which he lived is bad.

The next exception relates to the testimony of Reuben Warren. He was permitted, over the objection of the defendant, to give the particular facts which Julia Lagrone, the prosecuting witness, related to him when making complaint of the assault. It is competent, on a charge of rape, for the state to show that the prosecuting witness made complaint of the injury, but the particular facts stated by her are not admissible on direct examination. They may be brought out by defendant on cross-examination; and if the defendant denies that the prosecuting witness made complaint, and undertakes to impeach the testimony on that point, then the particular facts stated by her may be proved by the prosecution, in order to confirm her testimony that she made complaint. *Pleasant* v. *State*, 15 Ark. 624; 3 Greenleaf, Ev. § 213. We are of the opinion that the statement of Julia Lagrone was improperly admitted in this case.

The circuit judge no doubt understood the law as we have

stated it, but admitted such statement on the ground that they were part of the *res gestæ*. We do not concur in this view of the matter. The statement was made fifteen minutes after the crime was said to have been committed. The prosecuting witness, Julia Lagrone, had left the place of the assault. The statement to Warren was not made by her spontaneously under the excitement caused by the assault, but was made in response to an inquiry of Warren. "As I passed her," he said, "I noticed she was crying, and had dirt on her, and I asked her what was the matter, and she said Fern had been down there trying to make her do what she did not want to do." This was only the narration of a past transaction, and not a part of the *res gestæ*.

But, while we think the statement was improperly admitted, we do not see how it could have prejudiced the defendant. This is not a case where there is a question concerning the identity of the defendant with the party committing the crime. If there was any doubt on that point, the statement of Julia Lagrone to Reuben Warren, admitted in proof, that Fern committed the assault would have been prejudicial. But the defendant admits that he had sexual intercourse with Julia Lagrone at the time and place named by her. He admits that they had a quarrel, and that he threw her down, but states that the assault was after the sexual act had taken place, and was brought about by his refusal to pay the price which she demanded. Now the only part of the statement of Julia Lagrone proved by Reuben Warren not properly admitted was that giving the name of the party who had assaulted her. The other portion of the statement is nothing more than a complaint that an assault had been made. But giving the name of the defendant did not prejudice him, for, from his own admissions on the stand, there is no question, if a rape was committed, that he is the guilty party. The only question is whether the sexual connection, which he admits that he had with Julia Lagrone, was with her consent, or by force and against her will. We are therefore of the opinion that defendant was not prejudiced by the evidence on this point.

The last contention is that the verdict was arrived at by lot. Evidence bearing on this point was introduced both by

the state and defendant at the hearing of the motion for new trial. No objection was made in the circuit court, and no question is raised as to the admissibility of such evidence. The facts are admitted, and we need not therefore discuss the method by which they were established. They amount to this, that the jury, after finding that defendant was guilty, arrived at the punishment to be assessed against him by adding the number of years that each juror was in favor of assessing, and dividing the aggregate by twelve; it having been previously agreed that the quotient thus obtained should be the number of years of imprisonment assessed against defendant. This method of arriving at a verdict has been frequently condemned, and was plainly wrong.* *Goodman* v. *Cody*, 24 Am. Rep. 808, and note; Thompson, Trials, § 2602; Thompson & Merr. Juries, § 409.

It did not, however, affect the finding that the defendant was guilty, and furnishes no reason why the verdict in that respect should be set aside. The punishment assessed was five years in the penitentiary. The lowest punishment allowed for an assault with intent to commit rape, of which crime defendant was convicted, is three years' imprisonment in the penitentiary. As the defendant may have been prejudiced by the improper method of arriving at that portion of the verdict, we will modify the judgment, so as to allow the sentence to stand for three years' imprisonment only. *Brown* v. *State*, 34 Ark. 232. With this modification, the judgment will be affirmed.

Mr. Justice Battle does not concur in the view that this court can modify the judgment of the circuit court, but favors a reversal.

---

*That a "verdict has been decided by lot" is one of the statutory grounds for new trial in criminal cases. Sand. & H. Dig. § 2268. (Reporter.)

66 271
e80 238
f82 453
66 271
87 480
66 271
f90 235

BAKER v. ALLEN.

Opinion delivered March 11, 1899.

1. DAMAGES—OBSTRUCTING FLOW OF SURFACE WATER.—It is only where a landowner obstructs the natural flow of surface water unnecessarily, when by reasonable care and expense he might have avoided such injury, that he becomes liable to an upper proprietor for the damages thus occasioned. (Page 275.)

2. NUISANCE—LIABILITY OF LANDLORD.—A landlord, having no possession or control of the demised premises, will not be liable for the act of his tenant in so obstructing the natural flow of surface water that the land of an upper proprietor is flooded, if he neither licensed nor consented to such obstruction. (Page 276.)

3. OBSTRUCTION TO SURFACE WATER—WHEN NOT PERMANENT.—A levee composed of dirt, less than two feet high, and only a few feet thick, is not such a permanent obstruction to the flow of surface water as will justify the award of prospective damages. (Page 277.)

4. PRACTICE IN SUPREME COURT—FAILURE TO SET OUT INSTRUCTIONS IN ABSTRACT.—Where appellant failed to set out the instructions of the circuit court in his abstract and brief, as required by rule 9 of this court, no costs for such abstract and brief will be taxed in case of a reversal. (Page 278.)

Appeal from Lawrence Circuit Court, Eastern District.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

J. F. Allen owned a tract of land in Independence county adjoining a tract owned by R. L. Baker. Baker's tract lay south of Allen's land. Both tracts were nearly level bottom lands, subject at times to overflow from White river. A swale or slight depression extended across a portion of Allen's land, and also across Baker's land. There was no creek or stream, but the surface water from a portion of Allen's land, and also from other lands lying above Allen's lands, drained off along this swale over Baker's land. To protect his land from this surface water flowing from Allen's and adjacent lands, a previous owner of the Baker tract had constructed a small levee, about eighteen inches high and two or three hun-

dred feet long, across this swale near the upper portion of the Baker tract, and only a short distance from the south side of the Allen tract. The effect of this levee was, in wet seasons, to hold back the surface water upon a portion of Allen's land, and render it wet and unfit for cultivation. This levee was afterwards cut, and an opening made sufficient to allow the water to pass off from Allen's land. It was in this condition in 1890 when Baker became the owner of the land, and remained cut until 1894. Baker rented his land to one Busby for that year, and in February, 1894, Busby closed up the opening in the levee, and some of the witnesses say that he also made the levee longer and higher. Shortly afterwards, Hart, a tenant of Allen, complained to Baker that the levee had been closed, and asked permission to cut it. Baker told Hart he could do so, but Busby, to whom the land was rented, refused to have the levee cut, and it remained closed during the year 1894. In August of that year Allen brought this action against Baker, alleging that on the 1st day of February, 1894, he wrongfully and negligently caused to be constructed a levee across the swale or depression running through the land of plaintiff and defendant, and thereby caused the water to back upon and overflow a large quantity of plaintiff's land, to-wit, thirty or forty acres, more or less, causing said land to become wet and unfit for cultivation, to plaintiff's damage in the sum of one thousand dollars, for which he asked judgment. Baker filed an answer, denying the material allegations of the complaint.

On the trial the circuit judge gave the following instructions to the jury (the first six of which were objected to by defendant, and the two last were given at request of defendant):

"1. The issue to be settled in this case is, was the obstruction of the embankment or levee complained of, any injury to the plaintiff's property for which he had a right to hold the defendant responsible? And, if so, how much has been the damage?

"2. To entitle the plaintiff to recover, it must be proved, to the satisfaction of the jury, that the defendant, in building or causing said embankment or levee to be constructed, or some part of the works in connection therewith, so obstructed or im-

peded some natural flow of water by erecting an embankment across said stream or natural flow in such manner as to cause the same to overflow the premises of the plaintiff.

"3. If the evidence in the case shows, to the satisfaction of the jury, that there was a natural flow and drainage of the water, accumulating by rainfall or otherwise from the surrounding country, by which the water in its natural flow was carried off from the lands of the plaintiff across the lands of the defendant, and that, by the erection of the embankment complained of, the flow was prevented, and land of the plaintiff caused to be overflowed, then the defendant would be responsible in damages to plaintiff, to the extent of the injury caused thereby to his property.

"4. Although the levee or embankment complained of had been built more than three years before the commencement of this action, if, after it was so built or constructed, the same had been cut, so as to avoid any obstruction by said embankment, and afterwards the defendant filled up said cut, or caused the same to be filled, so as to overflow the plaintiff's land, the statute of limitation would begin to run, for the purpose of this suit, only from the time of filling said cut.

"5. In estimating the damage, the jury can only consider the value of the lands and premises injured at the time the injury complained of was done, and compare it with what the value would have been if the overflow had not been caused, and fix the damages at the difference between the two values.

"6. The jury are instructed that, if they find from the evidence that complaint was made to the defendant by the plaintiff or his tenant of the damages caused by the levee on his place, it was his duty to have it abated or removed, and, if he failed so to do, he would be as responsible as if he had ordered it originally, for all damages that resulted therefrom after he was so notified.

"7. The jury are instructed that a landowner has a right to erect a levee or embankment on his lands to improve them for the purposes for which the lands are naturally suited, and prevent surface water, such as rainfalls, melting snows, ice and such waters, flowing on to his lands. And if you find from

the evidence that the defendant's lands are adjacent to plaintiff's lands, and are suited for agricultural purposes, and that the defendant maintained the levee complained of wholly on his own lands to protect his lands from surface waters, such as rainfalls, melting snows, ice, etc., flowing on to them, to improve them for agricultural purposes, with no malicious design or evil intent to damage the plaintiff, you will be authorized to find for the defendant.

"8. The jury are instructed that a landowner, in the use and improvement, and for the enjoyment, of his own lands, has a right at pleasure to obstruct or hinder by embankment, levee or other means the natural flow of mere surface waters onto his lands, and turn the surface water back onto the lands from which they came, without liability for any injury arising from such obstruction, provided the levee or obstruction be made in good faith, and in the enjoyment and for the greater usefulness of his own lands."

There was a verdict and judgment in favor of plaintiff for the sum of two hundred dollars.

Otis W. Scarborough and *Phillips & Campbell*, for appellant.

As the cause of the damage is not in its nature permanent, a recovery can be had only to date of suit. 5 Am. & Eng. Enc. Law, 16; 57 Ark. 387; 65 Mo. 359; 52 Ark. 240. The sixth instruction given for plaintiffs was unsupported by evidence. 57 Ark. 513; 49 Ark. 60; 56 Ark. 380. The landlord was under no obligation to abate the nuisance placed on the land, without his authority, by the tenant. L. R. 4 C. P. 198; Taylor, L. & Ten. § 175; 12 Am. & Eng. Enc. Law, 690; 32 O. St. 264; 63 Ark. 593; 56 Ark. 380. The tenant, if any one, was responsible. 40 Mich. 164. Only a tenant in possession can sue for temporary damage to his possession and enjoyment of the premises. 63 Ark. 251; 63 Ark. 536.

Elisha Baxter and *Chas. Coffin*, for appellee.

The erection of the dam was in the nature of a permanent injury to the land. As the dam was on appellant's land, appellee could not enter to remove it, and this suit was proper. 5 Am. & Eng. Enc. Law, 20.

RIDDICK, J., (after stating the facts.) This is an action to recover damages for the obstruction of the natural flow of surface water, caused by the construction of a levee across a swale or depression which extended across the lands of both plaintiff and defendant, and along which the surface water passed in times of rain and melting snow. These lands, at rare intervals, were subject to overflow from White river, but it was not shown that the levee caused injury by holding back the flood waters which came from the river. The injury, if any, arose from the obstruction of ordinary surface water only.

At the common law, each proprietor had the right to protect his land against surface water flowing upon his soil, and, under the strict rules of that law, plaintiff would have no right of action. But this court, after what seems to have been a full consideration of the question, adopted a rule materially different from that of the common law. In the case of *Little Rock & Ft. S. Ry. Co.* v. *Chapman*, 39 Ark. 463, it held that the right of a landowner to obstruct the natural drainage or flow of surface waters was not absolute, and that if such proprietor unnecessarily injure the land of upper proprietors by the erection of an embankment or levee, when by reasonable care and expense he might have avoided the injury, he becomes liable for damages thus occasioned. The rule, as declared by this court, is similar to that followed by the courts of several of the states. Speaking of this question, Judge Dillon, of the supreme court of Iowa, said: "We recognize the fact, to use Lord Tenderden's expression, that surface water or slough water is a common enemy which each landowner may reasonably get rid of in the the best manner possible; but, in relieving himself, he must respect the rights of his neighbor, and cannot be justified by an act having the direct tendency and effect to make that enemy less dangerous to himself and more dangerous to his neighbor. He cannot make his estate more valuable by an act which unnecessarily renders his neighbor's less valuable." *Livingston* v. *McDonald*, 21 Iowa, 160.

The instructions given by the circuit judge in this case do not state the law correctly, for they are to the effect that the defendant had no right under any circumstances to obstruct "a natural flow or drainage of water." There is no pretense or

claim here that the defendant obstructed a stream or water-course. The levee was constructed across a slight but broad depression, along which the surface water was drained from lands of upper proprietors. But the court, in the third instruction, told the jury that "if the evidence in the case shows to the satisfaction of the jury that there was a natural flow and drainage of water accummulating by rainfall or otherwise from the surrounding country, by which the water in its natural flow was carried off from the lands of the plaintiff across the lands of the defendant, and that, by the erection of the embankment complained of, the flow was prevented, and land of the plaintiff caused to be overflowed, then the defendant would be responsible in damages to the plaintiff, to the extent of the injury caused thereby to his property." This instruction seems to have been copied from one given by the circuit judge in case of *L. R. & Ft. S. Ry. Co.* v. *Chapman*, *supra*. But this court said in that case that, in order to recover, the obstruction must be shown to have been unnecessary, and called attention to the defect in the instruction. It, however, affirmed the judgment, for the reason that there was in that case a special finding that the obstruction was unnecessary. Now, under the rule established in that case, if the landowner, by the use of a ditch or drain, instead of a levee, could protect his own land from water, and avoid injury to the adjoining proprietor, he should do so. But he would not be required to go to an unreasonable expense to protect the lands of the adjoining proprietor, and would not be liable for damages occasioned by holding back surface water if such levee was the only practical method of protecting his lands from such surface water. *L. R. & Ft. S. Ry. Co.* v. *Chapman*, 39 Ark. 463. This third instruction seems also in conflict with the seventh and eighth instructions, which were too favorable to defendant. Neither of these instructions stated the law correctly, and, taken together, tended to confuse and mislead the jury.

The landlord's right to possession being usually suspended during the term of the lease, his liabilities in respect to the possession are, as a general rule, suspended as soon as the tenant takes possession. It follows that, for a nuisance committed by the tenant during his term, the landlord, as a general

rule, is not liable; for he has no legal means of abating the nuisance. He cannot interfere with the possession of the tenant for that purpose, but, when the term expires, he has then the right of entry and power to abate the nuisance, and if he fails to do so his liability commences. *Ingwersen* v. *Rankin*, 47 N. J. Law, 18, 54 Am. Rep. 109.

We are therefore of the opinion that the judge should, as requested by defendant, have told the jury that if the defendant had rented his land to Busby during the year 1894, and had neither possession or control over the same, he would not be responsible for the act of his tenant in closing the cut in the levee, if he neither licensed or consented to said act. If Busby was the agent or manager of defendant, and acting for him, the defendant would, of course, be responsible for his acts done within the scope of his agency. But if Busby had rented the land during 1894, and had exclusive possession and control over same, defendant would not be liable for his act in closing the levee, unless he advised or licensed the same, or unless he afterwards renewed the lease or granted another lease with the levee in such condition. 2 Wood's Landlord & Tenant, (2 Ed.) § 526; 1 Taylor's Landlord & Tenant, (8 Ed.) § 175; *Haizlip* v. *Rosenberg*, 63 Ark. 430.

The levee complained of in this case was composed of dirt, and less than two feet high, and only a few feet thick. It could easily be cut and opened so as to allow the passage of water. It was not a part of a railroad bed or other permanent structure. It had been cut and opened for the passage of water, and so remained for several years until 1894. It was closed by the tenant who occupied the place for that year, to protect the land from surface water during that year. When we consider the ease with which this small embankment could be opened or closed, and also the purpose of the tenant in closing the same, it seems clear that the act of such tenant did not constitute a permanent injury to plaintiff's land. The opposite view might make the defendant liable for large sums in the way of prospective damages, even though there was no intention to permanently close the levee, and though he should wish to remove the obstruction and obviate the injury. As the levee could easily be opened, and such prospective injury avoided, it would

be unjust, as well as unreasonable, under such circumstances, to presume conclusively that the nuisance would be continued, and the injury made permanent. *Mitchell* v. *Darley Main Colliery Co.*, L. R. 14 Q. B. Div. 125; *Uline* v. *N. Y. C. & H. R. R. Co.*, 101 N. Y. 98.

We think, therefore, as the complaint alleges the levee to have been erected in 1894, and as this action was commenced in that year, the recovery must be limited to such damages as accrued up to the bringing of the action. We are therefore of the opinion that the court erred in his instruction defining the measure of damages. For the errors indicated, the judgment is reversed, and a new trial granted.

As the appellant did not set out the instructions of the court in his abstract, as required by the rule of this court, no costs will be taxed for such briefs.

CHIEF JUSTICE BUNN and MR. JUSTICE BATTLE concur in the judgment of reversal.

---

66 278
74 161
75 372

66 278
89 138

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

Opinion delivered March 18, 1899.

1. RAILWAY—STOCK KILLING—COMPLAINT.—In an action against a railway company for killing stock, plaintiff should be required to state, with as much definiteness and certainty as possible, the time and direction and kind of train, and the particular point where the injuries occurred, in order that defendant may be enabled to make defense and avoid the necessity of subpœnaing an unnecessary number of witnesses. (Page 281.)

2. JUSTICE OF THE PEACE—JURISDICTION—SEVERAL TORTS.—In an action before a justice of the peace plaintiff may combine several causes of action for killing stock where the damage claimed in each of the several causes of action does not exceed one hundred dollars, though their aggregate amount exceeds that sum. (Page 281.)

Appeal from Franklin Circuit Court, Ozark District.

JEPHTHA H. EVANS, Judge.

Dodge & Johnson, for appellant.

A justice of the peace has no jurisdiction in matters of damage to personal property where the amount sued for exceeds $100; hence on appeal the circuit court acquired no jurisdiction. 44 Ark. 100; 45 Ark. 346; Const. 1874, art. 7, § 40; 47 Ark. 59; 48 Ark. 295. The complaint should have been made more specific, so as to state the locality and dates of the alleged torts. 59 Ark. 165; Pom. Rem. & Rem. Rights, § 554; Newm. Pl. & Pr. 246; 8 Oh. St. 293; 2 Comst. 506; 1 Russ. & Myl. 527; 2 Dan. Ch. Pr. 240; 2 N. Y. 507.

BUNN, C. J. This is an action for the killing of a cow, a horse and two hogs by the negligent running of defendant's trains. The complaint was as follows:

"The plaintiff states that the defendant is a corporation owning and operating a line of railway through Franklin county, Arkansas, from Little Rock to Fort Smith. The said defendant, in said county, on the second day of November, 1896, through the negligence of its employees in the operation of its trains, killed a horse owned by the plaintiff of the value of $85, for which he prays judgment.

"For further cause of action the plaintiff states that on the — day of October, 1896, the employees of defendant negligently killed a cow belonging to the plaintiff, of the value of $25, for which he prays judgment.

"And for a further cause of action the plaintiff states that the employees of defendant negligently killed two hogs belonging to plaintiff, on the — day of November, 1896, of the value of three dollars.

"The plaintiff states that in the killing of said horse he was deprived of his use and in the manner further damaged in the sum of forty dollars; and in killing of said cow he was deprived of her use, to his further damage fifteen dollars.

"Wherefore plaintiff prays judgment for the full sum of one hundred and sixty-eight dollars, and for other relief.

(Sworn to and signed) "JACOB SMITH."

On this complaint judgment was rendered in the justice court, by default, for the sum of $168, and in due time the defendant took its appeal to the circuit court.

In the circuit court the defendant demurred to the com-

plaint on two several grounds: First, because the justice court had no jurisdiction of the subject-matter of the action; second, because the complaint failed to set facts sufficient to constitute a cause of action. Before this demurrer was disposed of, the plaintiff filed an amended complaint. The demurrer was then overruled, and defendant saved exceptions, and filed its motion to compel plaintiff to make his complaint more specific and certain.

The amended complaint read as follows (omitting formal parts): 1st Paragraph. "That the said defendant on the —— day of September, 1896, by and through the negligence of its trainmen and employees in the operation of its trains, carelessly and negligently killed a cow, the property of plaintiff, by striking said cow with the engine of defendant, operated upon said railroad, to the damage of plaintiff $30." 2d Paragraph. "The plaintiff further states that said defendant, in said county (Franklin), on or about the 4th day of November, 1896, by and through the carelessness of its employees in the operation of its engine and cars on said road, negligently killed a horse the property of the plaintiff, by striking said horse with the engine and cars of defendant, to the damage of plaintiff, $95." 3d Paragraph. "The plaintiff further states that the said defendant, on the —— day of November, 1896, and on the —— day of ———, 1896, by and through the carelessness of its employees in the operation of the trains on said railway, negligently killed two hogs, the property of said plaintiff, to his damage $7, by striking said hogs with the engine of said defendant, and running upon them with said cars." Prayer for judgment for each item, and also for the aggregate, $187, which seems to be more than the claim.

It will be observed that the date of the killing of the cow is not alleged, nor is the county stated, except inferentially. The county and date of the killing of the horse is stated. The month, but not the day, of the killing of one of the hogs is stated, and the year of the killing of the other is stated, but neither day, nor month, nor county. The court overruled the motion to make plaintiff's complaint more specific, and defendant excepted.

The motion of defendant sets the several grounds thereof

at length, in various paragraphs, and concludes with the following: "Therefore, the premises considered, defendant prays the court to require the plaintiff to make his complaint more definite and certain, in this: That said plaintiff shall allege the specific day on which the injury is claimed to have occurred, and the course and character of the train, the hour of the day, and the particular point on the track, or else that plaintiff be required to give the number of the train by which defendant effects its operation; and if the plaintiff fails to make his complaint more specific in this relation, defendant moves the court to dismiss the same."

That the plaintiff should state, with as much definiteness and certainty as possible, the time and direction and kind of train, and the particular point where the injuries occurred, was altogether reasonable. So in respect to other particulars within his knowledge and belief, so as to identify the time and place, and the train which did the damage, in each case, as nearly as possible under the circumstances, to the end that the defendant might be enabled to prepare for their defense, and avoid the necessity of subpœnaing an unnecessary number of witnesses, and thus possibly decrease the efficiency of the service on their trains, and be put to unnecessary expense.

The motion should have been sustained, and plaintiff required to make his complaint definite and certain, or as much so as he could under the circumstances. For this error in overruling the motion, the judgment is reversed, and the case remanded, with instructions to sustain the motion, and require the plaintiff to make his complaint more definite and certain.

The question as to the jurisdiction of the justice of the peace to hear and determine the cause where the three separate damages for the several torts are each less than $100, but aggregate more than $100, is determined by a majority of the court in favor of the ruling of the court below on the demurrer to the jurisdiction, and in that respect its judgment is affirmed.

CRANE v. HIBBARD.

Opinion delivered March 18, 1899.

CONSTRUCTIVE SERVICE—FOREIGN CORPORATION—AFFIDAVIT.—To justify the issuance of a warning order against a foreign corporation, an affidavit is not sufficient which alleges merely that defendant is a foreign corporation, without stating that defendant has no agent in the state upon whom service of summons can be had. (Page 285.)

Appeal from Benton Circuit Court.

E. S. MCDANIEL, Judge.

E. P. Watson, for appellant.

Admissions of the owner or his agent, as to character of title, etc., made during possession, are admissible in evidence. 1 Ph. Ev. 396, 390–1, 301; 1 Greenl. Ev. §§ 108–9, 189–191; 20 Ark. 597; Abb. Tr. Ev. 11, 12, 14, 286–7, 710–11, 158, note 5, 236, § 7; 49 Ark. 207; 5 Am. & Eng. Enc. Law, 367. The possession of appellant gave him a better right than appellee or any one not the true owner. Wells, Replevin, §§ 109–110, 113–15, 300; 47 Ark. 379; Freeman, Ex. § 175; Shinn, Attachment, § 452. Whether or not the justice's docket shows the appointment of the attorney *ad litem* and making of warning order, the papers in the case show it, and for that purpose they are both competent and sufficient. Black, Judg. §§ 124, 282; 94 Am. Dec. 742; 20 Am. & Eng Enc. Law, 476; 55 Ark. 281; 52 Ark. 281; 2 Allen, 443; S. C. 79 Am. Dec. 797; 47 Ark. 281; 52 Ark. 373; 51 N. Y. 381; Freeman, Judg. § 517. These facts may be shown when the docket is silent, if the judgment is collaterally attacked. 43 Ark. 230; 46 Ark. 153; 55 Ark. 284; 47 Ark. 131; 51 N. Y. 381. The jurisdiction appearing, the presumption is that it was rightfully waived. 47 Ark. 131; Black, Judg. §§ 267, 260; Wells, Jurisdiction, § 46.

J. A. Rice, for appellee.

It is sufficient if a defendant in replevin show title in a third person. Wells, Replevin, §§ 111, 112, 690–2–3; 20 Am.

& Eng. Enc. Law, 1054–6; 38 Mo. 160; 46 Mo. 65; 38 Ark. 413; 43 Ind. 432; 60 Ind. 214; 63 Cal. 163; 3 Am. & Eng. Enc. Law, 163.

BUNN, C. J. To state this case as briefly as possible, one Dr. Hiram Faucette was the owner and in possession of the mill machinery which is involved, and this property was in the Indian Territory when he died. After his death, his widow, Mrs. Phoebe Faucette, took possession for herself and the only child and heir at law of herself and deceased husband, Lydia Faucette, at the time a minor. At this juncture, one Broadus (sometimes called Berdeau), president of the Interstate Oil & Development Company (a corporation organized and doing business under the laws of the state of Kansas, having for its objects the prospecting for oil, gas and minerals and the development of the same when discovered), appeared on the scene. This machinery was of the kind suitable to his work, and he bargained for the same from Mrs. Faucette for the price of $350, for which he gave her his individual note, payable at a time therein named. This sale was a conditional sale, in which Mrs. Faucette reserved title in herself until the machinery should be paid for, and it was arranged at the time that Broadus should remove the same from the Indian Territory to the farm of the appellee, Hibbard, located in Hico township, Benton county, Arkansas, just north of Siloam Springs, and he collected up a portion of the machinery, and removed it to said farm, and placed it in some temporary buildings there erected, adding some other articles of machinery thereto. Some time afterwards the company became insolvent, and unable to operate its business, and abandoned said machinery, and the appellee claims to have taken possession and cared for it as the property of Mrs. Faucette and her child, it being situated on his farm.

It was then that the plaintiff, J. E. Crane, and A. F. Crane, who had been the assistant superintendant of the company, and Beck & Son, each having a claim against the company, brought their several suits against it for their several debts, and at the same time each sued out his writ of attachment, and caused the same to be levied on the property in question, alleging in their attachment affidavits that the defendant

"company was a foreign corporation and a non-resident of the State of Arkansas." The affidavit contained no prayer for, nor allusion to, a warning order. The writ was placed in the hands of the constable of the township, and the same was executed by him, and duly returned with the indorsement that he "had levied on the property mentioned in the writ as the property of the said Oil Company," by taking said property into his possession, and tacking a copy of the writ on the building inclosing said property, and that he (the constable) "further served this writ by having a warning order for thirty days, etc.—all done on the farm of Mart Hibbard," the appellee.

The warning order referred to appears to have been issued in the usual form by J. A. Petty, the justice of the peace of said township before whom said proceedings were had, on the 25th day of January, 1897, and on the back of the same was the affidavit as proof of publication, filed February 24, 1897; and the warning order appears to have been issued on the affidavit for the writ of attachment, which showed the corporate character and non-residence of the defendant as stated, and not otherwise; and it nowhere appears that said non-resident or foreign corporation was without an agent in this state upon whom service of writ of summons might have been had under the statute in such cases.

This is a suit in replevin, in which the plaintiff, J. E. Crane, claims title by purchase from one C. W. Dunlop, who was the purchaser at the sale ordered by the court in said attachment suits. The following appears from the minutes of the proceedings before the justice of the peace trying the attachments suits: "Now, at 1 o'clock (26th March, 1897), comes the plaintiff (J. E. Crane) in person, as well as by attorney, and answered 'Ready for trial.' G. W. McClelland appears to represent defendant, but, on motion and showing made by plaintiff, I found that he had no authority to represent the defendant, and made an order forbidding him from doing so. The defendant failing to appear, after hearing the evidence adduced by the plaintiff upon the merits, and affidavit for attachment, it is ordered and adjudged by the court that plaintiff recover of the defendant $300 and costs of this action, and that the attachment issued herein be sustained. And it is therefore or-

dered that the constable sell said property described in this judgment as attached in this case by him, and now in his hands, at the oil well and derrick on W. H. Hibbard's farm north of Siloam Springs, for cash in hand, first giving ten notices by advertisement of time, place and manner of said sale. When the sale shall have been made, he will pay over the proceeds thereof in satisfaction of the foregoing judgment and cost, and, if any excess remains, he will pay the same over to the defendants. T. G. Williams, attorney appointed by the court on behalf of defendants, filed his report on the 20th day of March, 1897, stating he had notified defendants at Topeka, Kas., of the pendency of this suit. By agreement of the parties (who these were does not appear, only the plaintiff being present) the same proceedings were had and some minutes made in the cases of A. F. Crane and of Beck & Son against the Oil Company, as in the above case of J. E. Crane. The constable sold the property, it appears, as directed, and C. W. Dunlop became the purchaser, and then assigned his certificate of purchase to J. E. Crane, the plaintiff here, and who was also plaintiff in one of the attachment suits.

It is unnecessary to follow the proceedings further, for this case goes off on a want of proper service upon the Oil Company, a foreign corporation. There is no specific affidavit for the warning order, but the same was issued on the statement of facts in the affidavit for attachment, to-wit: That "the defendant is a foreign corporation, and a non-resident of the state." This is not sufficient to justify the issuance of a warning order against a foreign corporation, for it should state in addition that defendant has no agent in this state upon whom service of summons can be had. See Sand. & H. Dig. § 5679. The judgments in the attachment suits were therefore nullities, being without notice to the defendant, and, of course, the sale was invalid. The plaintiff obtained no title thereby, and could not maintain this suit. The judgment of the circuit court was for the defendant, and the same is affirmed.

LEE v. STATE.

Opinion delivered March 18, 1899.

WITNESS—IMPEACHMENT.—It is not admissible to impeach a witness by proving on cross-examination that three of her sons have served terms in the penitentiary for infamous crimes.

Appeal from Pulaski Circuit Court, First Division.

ROBERT J. LEA, Judge.

T. J. Oliphint, for appellant.

It was error to allow the state to impeach defendant's witnesses by showing that certain ones of their families and kinsmen were felons. It was error to allow the prosecuting attorney to comment on this in argument. 58 Ark. 368.

Jeff Davis, Attorney General, and *Chas. Jacobson*, for appellant.

The question as to argument of prosecuting attorney, being raised here for the first time, will not be considered. The limits within which either party may cross-examine on matters not strictly relevant, but which affect the credibility of a witness, is largely discretionary with the court; and, to warrant a reversal, this discretion must be abused. Undh. Cr. Ev. § 221 and cases on p. 272; 1 N. Y. 379; 5 Gratt. 664; 16 Mich. 43; 58 Ark. 478; 45 Ark. 309.

BATTLE, J. William Lee was indicted by a grand jury of the Pulaski circuit court for grand larceny, alleged to have been committed by feloniously stealing, taking and carrying away one cow the property of John Saul, was convicted, and his punishment was assessed at one year's imprisonment in the penitentiary. In his trial evidence was adduced by the state tending to prove his guilt, and by him witnesses were introduced whose testimony tended to prove the falsity of the state's evidence, and to show that the principal witness who testified against him was unworthy of belief. Among these witnesses were Jemina Forbus, Jane Lee and John Lee. The state impeached their credibility. The prosecuting

attorney was allowed, over the objections of the defendant, to ask Jemina Forbus the following questions: "Are you the mother of Rufe Lee, and was he not in the penitentiary for perjury, committed while testifying in a case against him for burning Wash Robinson's barn?" "Were you the mother of John Lee, and had he not served a term in the penitentiary for killing a man?" "Were you the mother of Dick Forbus, and was he serving in the penitentiary for stealing a cow?" All of which she answered in the affirmative. Similar questions were asked Jane and John Lee, over the objections of the defendant, and were answered in the affirmative.

This mode of impeachment was improper, and the testimony elicited was inadmissible. Witnesses may be impeached by cross-examination as to their associations which affect their credibility, but such associations must be voluntary. They are not responsible, legally or morally, for the acts of their kin, with which acts they are in no wise connected. It does not follow that a witness is unworthy of belief because a relative has committed a felony. Worthy credible witnesses may have felons for kindred.

Reversed and remanded for a new trial.

---

66 287
e71 202
71 203
e71 204
71 206

MILLER-JONES FURNITURE COMPANY v. FORT SMITH ICE & COLD STORAGE COMPANY.

Opinion delivered March 18, 1899.

1. BUILDING CONTRACT—ALTERATION OF PLANS—LIABILITY OF SURETY.—A contract for a one-story building provided that, unless the work was completed within a period designated, the contractor should incur a penalty, and that the owner might make alterations in the plans without affecting the contract, in which case the architect should determine the amount to be paid or deducted therefor. Without consent of the contractor's surety, the owner changed the plans so as to make the building two stories high, thereby greatly increasing the cost and labor. *Held* that the alterations which the original contract authorized were such minor changes as would not greatly effect the contractor's undertaking, and that the surety was discharged by the alterations made. (Page 290.)

2. SURETY—DISCHARGE—ESTOPPEL.—Where the surety of a building contractor sued the owner of the building for materials furnished in its erection, and the owner filed a counterclaim, asking for judgment against the contractor and surety for the penalty named in the contract for delay in completing the building, the surety was not estopped from setting up that he had been discharged by a material and unauthorized alteration in the contract by the fact that the materials were furnished by the surety after knowledge of such alteration. (Page 291.)

Appeal from Sebastian County, Ft. Smith District.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

The Fort Smith Ice & Cold Storage Company, desiring to have a building erected for cold storage and other purposes, contracted with one Wickshire for the erection of the same. The building was to be one story high, and constructed of brick. Wickshire was to furnish all material except the brick, and was to receive the sum of $7,875 for constructing same. He agreed to finish the building on or before the 14th day of October, 1895, and that, if he failed to complete the building at that time, he would pay the owner, by way of liquidated damages, the sum of $25 for each day thereafter the building remained incomplete. The contract also contained the following provisions: "It is further agreed that the said party of the second part may make any alterations, deviations, additions or omissions from the aforesaid plans, specifications and drawings, or either of them, which they shall deem proper, and the said architect shall advise, without affecting or making void this contract; and in all such cases the architect shall value or appraise such alterations and add to or deduct from the amount heretofore agreed to be paid to the said party of the first part the excess or deficiency occasioned by such alterations." Wickshire gave bond for the performance of his contract, with the Miller-Jones Furniture Company as surety. He afterwards, about the 1st of October, 1895, made a supplemental contract with the Cold Storage Company, by which he agreed to make the building two stories high instead of one, and was to receive an additional consideration of $1,175. The Furniture Company, surety on the bond for first contract, was told by Wickshire on the 1st of October, 1895, that he and the Cold Storage

Company had agreed to make the building one story higher, and on that day the Furniture Company, at request of Wickshire, ordered material to be used in the construction of said second story. The price of material furnished Wickshire by the Furniture Company, and used in the construction of said building, amounted in all to $3,260.86, of which Wickshire paid $2,000, leaving a balance of $1,260.86 due the Furniture Company. The Furniture Company filed its lien for said sum against the building of the Cold Storage Company, and afterwards brought this action against Wickshire and said Cold Storage Company to enforce said lien and recover said debt. The Cold Storage Company filed an answer and counter-claim, asking judgment against Wickshire and the plaintiff as surety for delay in completing the building.

The circuit judge, sitting as a jury, found that Wickshire was indebted to the plaintiff Furniture Company in the sum of $1,260.86 for materials furnished; that the defendant Cold Storage Company was entitled to $600 damages against Wickshire and plaintiff as surety on his bond for delay in completing the cold storage rooms, and further that plaintiff was entitled to a judgment against Wickshire for $1,260.86, and to a lien on building for $660.86, balance of debt after deducting damages allowed on counterclaim,—and gave judgment accordingly.

H. C. Mechem and *F. A. Youmans*, for appellant.

Any change in the contract releases the surety. 9 Wheat. 702; 23 Mo. 244; 11 N. E. 232; 137 N. Y. 307; 31 N. W. 862; 36 Atl. 400. The burden was on appellee to show, not mere knowledge, but actual consent of the surety to the change. 27 N. Y. S. 1097; 55 Ga. 656; 4 Pa. St. 348; 19 Pa. St. 119; 6 Mon. (Ky.) 567; 12 Ga. 271. The act of the surety in subsequently furnishing material for the addition called for in the altered contract was not a waiver of its discharge. The changes provided for in the substituted contract were not such as the owner was authorized to make under the stipulation for changes in the old contract. 46 N. W. 1020; 52 N. W. 1106; 63 N. W. 17; 7 Mo. App. 283. Appellant is entitled to a lien for materials under the second contract. 49 Cal. 131.

Hill & Brizzolara, for appellee.

When a contract provides in advance for changes, the surety is not released by the making of such changes. 42 N. E. 669; 52 N. W. 165; 7 Mo. App. 283; 48 Kas. 756; 46 N. W. 1018; 8 So. 509. Since the surety is not placed in any different position, he is not discharged. 20 Wall. 165. The appellant is not estopped to plead its discharge, because of its subsequent acts and silence. 50 Ark. 458; 11 Ark. 249; 33 Ark. 465.

RIDDICK, J., (after stating the facts.) The only question presented by this appeal is whether the Miller-Jones Furniture Company, surety on the bond of Wickshire for the performance of his contract to erect a building for the Fort Smith Ice & Cold Storage Company, was discharged by the subsequent alteration of the contract. The Cold Storage Company contends that the supplemental contract did not discharge the surety, for the reason that such supplemental contract was within the scope of the first contract, and was therefore assented to by the Furniture Company at the time it signed the bond. This contention of the Cold Storage Company is based on a provision in the original contract permitting the owner to make alterations in the plans and specifications of the building. But we are of the opinion that the parties did not intend by this provision to authorize changes so extensive as the one complained of here. The provision referred to, which is set out in the statement of facts, permits such alterations to be made, even without the consent of the contractor, and provides that the architect shall determine the amount to be paid or deducted therefor. We cannot suppose that the parties intended by this provision to permit the owner to make great and extensive changes in the plan of the building, and to force the contractor to complete it in conformity therewith, at such compensation as might be allowed by the architect. The fact that these alterations in the plan could be made without the consent of the contractor forces us to the conclusion that the alterations referred to were such minor changes as owners often wish to make in the plan of buildings while they are under construction, and which do not greatly affect the undertakings of the contractor. *Dorsey* v.

McGee, (Neb.) 46 N. W. 1018; *Consaul* v. *Sheldon*, (Neb.) 52 N. W. 1104.

But the supplemental contract in this case called for very extensive changes. It called for a larger building at an increased price. The surety undertook that the contractor should, on or before the 14th day of October, 1895, construct and finish a one-story building in which there were to be cold storage rooms. The owner afterwards, without the consent of the surety, released the contractor from his obligation to complete the building within the time required, and agreed with him that, instead of the one-story building for the completion of which the surety was bound, he should, for an additional consideration of $1,175, erect a two-story building, in the first story of which cold storage rooms were to be constructed and finished on the 14th day of October, 1895. It was specially agreed that the change in the contract by adding another story to the building should not affect the completion of the cold storage rooms, and the Cold Storage Company now asks damages because these cold storage rooms were not completed within the time named. But, after the contract was changed so as to call for a two-story building, the obligation to complete the storage rooms within the time named rested on the second contract, to which the surety was not a party. The first contract being abrogated by the second, the surety could not be held liable for the performance or non-performance of any part of the second contract. *O'Neal* v. *Kelley*, 65 Ark. 550.

We are also of the opinion that the fact that the Furniture Company knew of the alterations in the contract, that it subsequently furnished material to Wickshire to complete the building as altered, and that the largest portion of its account against Wickshire is for material furnished after such alteration, does not estop it from setting up such alteration as a defense againts the counterlaim of the Cold Storage Company.

"Equitable estoppel," says Prof. Pomeroy, "is the effect of the voluntary conduct of a party, whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby

to change his position for the worse, and who on his part acquired some corresponding right, either of property, of contract, or of remedy." 2 Pom. Equity Jur. (2 Ed.) § 804. Now, in this case, the Furniture Company did nothing that in any way misled the Cold Storage Company, or that caused it to change its position in any respect, and the doctrine of estoppel does not apply. As the Furniture Company did not consent to such alteration of the contract, nor do anything to estop it from setting up the same as a defense, we are of the opinion that its contention on that point must be sustained, and we must hold that it was thereby discharged from liability as surety on the bond of Wickshire. We are therefore of opinion that the judgment of the court as to damages on the counterclaim was erroneous. In other respects it was right; but for the error mentioned the judgment is reversed, and the cause remanded, with an order to enter judgment in accordance with this opinion.

BECK v. BIGGERS.

Opinion delivered March 25, 1899.

1. PUBLIC ROAD—NOTICE OF VIEWERS' MEETING—WAIVER.—A landowner, appearing at a meeting of the viewers appointed to view and locate a public road and assess damages, and filing exceptions thereto, does not thereby waive his right to five days' notice of such meeting, given by Sand & H. Dig. § 2823. (Page 295.)

2. SAME—DESCRIPTION—SUFFICIENCY.—An order establishing a public road will be set aside on appeal if the terminal and intermediate points of the route are described in such order, and in the report of the viewers on which it is based, with such indefiniteness that it would be difficult, if not impossible, to determine therefrom the true location of the road. (Page 295.)

3. SAME—DISQUALIFICATION OF VIEWERS.—The statute which requires the county court to appoint "three disinterested citizens of the county as viewers" to lay out a proposed public road, and to determine whether the public convenience requires that such road be established, and also to determine what damages will be suffered by the landowners affected (Sand. & H. Dig. §§ 2820, 2822), is violated by the appointment as viewers of the father-in-law and brother of the principal petitioner for the road, who had entered into a bond to the county to pay all costs and expenses of the application if the petition was denied. (Page 296.)

4. APPEAL—WHEN APPELLANT CAN NOT COMPLAIN.—Appellant can not complain of the introduction of incompetent testimony by his adversary if he first introduced evidence of the same kind. (Page 296.)

Appeal from Sharp Circuit Court.

JOHN B. MCCALEB, Judge.

Carmichael & Seawel, for appellant.

In condemnation proceedings the statute must be closely followed. 1 S. W. 216; 96 Mo. 39; 14 Pac. 140; 13 S. W. 1027. The petition should have specified the place of beginning, the intermediate points and place of termination of the road; and none of these places are adequately described by saying they are "near" to a certain place or thing. Sand. & H. Dig. § 2818; 34 Ark. 224; 4 Ore. 47; 47 N. W. 633; 50 Ind. 583; 47 Mich. 460; 58 Ind. 64; 19 Hun, 263; 73 Ind. 455; 59 Ark. 344; End. Int. Stat., § 435; 9 Am. & Eng. Enc. Law, 370. The giving of the required notice to landowners must appear from the report of the viewers. Sand. & H. Dig. § 2823; 44 N. W. 677; 42 N. W. 814; 10 R. I. 461. The description in the report should conform to that in the petition. 49 Cal. 672; 37 Atl. 1111; Sand. & H. Dig. § 2824; 50 N. E. 118; 58 Ill. 422; 109 Ill. 379. The viewers should have taken with them chain-carriers, and markers are required by statute. 43 N. W. 648; 41 N. W. 885; 7 Atl. 772. All the landowners concerned must be legally notified before a valid establishment of a road can be made. 32 Mich. 43; 7 Hun, 17; 18 Kas. 129; 96 Mo. 39; 14 Pac. 140. The mere presence of appellant, without any legal notice, was no waiver of same. 13 S. W. 1027; 42 S. W. 814; 16 Wis. 519, 522; 9 Am. & Eng. Enc. Law, 372; 43 S. W. 35. Relatives of the principal petitioner are not "disinterested" viewers. Sand. & H. Dig. § 2827; 23 Ill. 645; 44 Ind. 356; 11 Me. 473; 59 Me. 262; 53 Me. 387; 105 *id.* 225; 6 Am. & Eng. Enc. Law, 617; 36 Atl. 554; 19 Atl. 855; 50 Ind. 537; 31 Atl. 74.

Sam H. Davidson, for appellees.

If appellant wished to attack the proceedings, he should have remained away and quashed them by certiorari. 12 S. W. 570; 42 S. W. 127. His appearance before the viewers waived

notice. 30 Kas. 581; 35 Ark. 276. Their relationship to one of the parties did not disqualify the viewers. 47 Ark. 441. It is sufficient if the order describes the road with sufficient certainty to locate it. 3 Ark. 18; 30 Ark. 640; 30 Ark. 657; 58 Ark. 172. The description was sufficient in this case. 22 S. W. 82; 37 S. W. 872; 30 S. W. 518; 67 Wis. 285; 73 Ind. 454; 114 Pa. St. 627; 78 Me. 153; 45 N. Y. 332; 78 Mo. 399; 94 Ind. 187; 95 Ind. 53; 9 Am. & Eng. Enc. Law, 370, 371.

BUNN, C. J. This is an appeal from the Sharp county circuit court, upon a judgment therein rendered affirming an order of the county court establishing a public road, and assessing damages to real estate belonging to appellant occasioned by the location over the same of said road.

When the viewers appointed by the county court filed their report therein, J. E. Beck, one of the landowners whose lands were affected by the location of the road, filed his exceptions to the report, stating that he was owner of a portion of the land over which the road was located by the viewers, and that none of the petitioners gave him the notice required by law of the time and place of meeting of the viewers, and of the substance of the petition upon which the proceedings were had, and that no lawful notice was given to the non-resident owners of lands affected; that the viewers did not assess to him adequate and sufficient damages for the taking of his land; that two of the viewers were near of kin to R. S. Biggers, the principal petitioner; and that the viewers in their said report did not describe the route of the road as the same was actually viewed and laid out.

The court held that the report was defective, because the viewers had not viewed the road with reference to the land of W. H. Wallace, and other non-residents affected thereby, and, without acting on the exceptions of Beck, otherwise re-committed the matter to the viewers, to perfect their view and make report at a subsequent time. Two of the viewers, Dougherty and McCobb (the other being sick and unable to attend their meetings), viewed and made a supplemental report, exhibiting therewith the proof of publication of the notice to

Wallace and other non-residents, which appears to have been made in substantial compliance to the statute.

Beck then renewed his exceptions to the whole report, and on the 26th of January, 1897, the court heard the whole matter, and made an order establishing said road substantially as recommended by the viewers, making the same sixteen feet wide, and assessing damages to Beck in the sum of ten dollars, and to others as the viewers had recommended; and Beck and Wallace appealed, but Beck alone followed up his appeal to the circuit court, where the proceedings in the county court were affirmed, substantially. Beck filed his motion for new trial, reiterating therein his exceptions aforesaid, and setting up the formal grounds, and also that the court erred in admitting the testimony of certain witnesses, because they gave their conclusions as to the amount of damages, and not the facts upon which the same were based, and because the court erred in refusing to give instruction No. 1 asked by him.

There does not appear to have been any notice, as required by statute, of the intended presentation of the petition, but this does not appear to have been excepted to, except inferentially.

The appellant Beck, as a landowner, was not notified in writing by the principal petitioner five days previous to the meeting of the viewers for the purpose of viewing and locating the road; but it is contended that, having been notified on the day of the meeting, and having responded thereto by being present and taking part in said location, this defect was immaterial and without prejudice to his rights. Whether taking part as he did was a waiver of the statutory notice presents a question of some little doubt, but we are inclined to think that the particular part he took in the matter could not be regarded as a waiver of his right to lawful notice. The case of *Howard* v. *State*, 47 Ark. 441, cited by counsel, was a case of mere collateral attack upon the order of the county court establishing the road, and for that reason is not applicable to a case like this of direct attack on appeal.

Again, whether the route of the road was set forth in the report of the viewers, as really fixed by them, it is impossible for us to determine from this record; but the description of the

terminal and intermediate points of the route contained in said reports, and in the order of the court based thereon, is certainly indefinite enough, and a stranger, even with the aid of compass and chain, could with difficulty, if at all, certainly determine what was the true location of the road. This being true, the description is too indefinite to meet the requirements of the law.

Again, the appointment of viewers nearly related by affinity and consanguinity to the active promoters of the road, such as were M. C. Dougherty, the father-in-law, and M. L. Biggers, the brother of R. L. Biggers, the principal petitioner, was certainly not within the meaning and spirit of the statute, which requires the viewers to be disinterested persons. These viewers are clothed with the power and duty of not only locating the road, but also of assessing damages to landowners affected. R. L. Biggers was liable to pay the costs and expenses if the petition was not granted, having given a bond to that effect, as required by the statute. His father-in-law and brother could hardly be said to constitute an impartial jury in such a case.

The admission of the testimony of certain witnesses, made a matter of objection in the sixth ground of the motion for new trial, was improper; but, as the appellant had been guilty of the first error in this direction, he cannot be heard to complain of what followed upon his own act.

The eighth ground of the motion for new trial is the refusal of the court to give instruction No. 1 asked by respondent Beck, which reads as follows, to-wit: "The jury are further instructed that if you find, from a preponderance of the evidence in this case, that the route viewed and laid out by the viewers is an impracticable route, you are authorized to find for the defendant." There was no sufficient evidence upon which to base this instruction. In fact, the refusal to give it is not insisted on in the argument.

The first, second and third grounds of motion for new trial are merely the formal grounds. The fourth ground is an objection to the finding of the jury as to the amount of damages, which we could not control when the proceedings were otherwise regular and valid, and when the cause was properly submitted to them.

The fifth, seventh, eighth and ninth grounds are mere reiterations of the exceptions to the reports of the viewers and proceedings in the county court, which we have disposed of already.

For the errors named, the judgment of the circuit court is reversed, and cause remanded, with instructions to proceed to rehear the cause, not inconsistently herewith, and in accordance with section 2830 of Sandels & Hill's Digest.

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

Opinion delivered March 25, 1899.

RAILROADS—FAILURE TO POST STOCK—PENALTY.—Under Sand. & H. Dig. § 6350, providing that railroads shall incur a penalty for failure to post a notice of the killing or wounding of stock by trains within one week after the killing or wounding, proof that no notice was posted at 6:30 p. m. of the seventh day after the killing of a mule is not sufficient to establish the railroad's liability for the penalty, as the time for posting the notice did not expire until midnight of the seventh day. (Page 298.)

Appeal from Clay Circuit Court, Eastern District.

FELIX G. TAYLOR, Judge.

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

The evidence does not show that the required notice was not posted within the time allowed by statute, and hence the verdict for double damages was unwarranted.

W. E. Atkinson, for appellee.

If appellant did post the notice in time, he could easily have so proved, and his failure to do so is evidence that he did not do it.

BATTLE, J. I. S. Markham owned a mule, which was killed on the 19th of July, 1897, by a train of the St. Louis Southwestern Railway Campany. He sued the railway company, and stated in his complaint that the agents, servants and employees of the defendant had failed to post a notice of the kill-

ing within one week thereafter, and to keep the same posted for twenty days, and asked for double damages. The defendant denied these allegations. The plaintiff recovered a judgment for double damages.

The only question in the case is, was he entitled to such damages? The statute provides: "Whenever any stock, such as horses, cows, hogs, sheep, etc., are killed, wounded or injured by railroad trains running in this state, the conductor or engineer on the train doing the damage shall cause the station master or overseer at the nearest station house to the killing or wounding to post, within one week thereafter, and to so keep posted for twenty days thereafter, a true and correct description of such stock as may have been so killed or wounded, at the nearest station house and the nearest depot house, giving a true and correct description of the color, marks, brands and other natural description that may assist in identifying such stock, and the time when, and place where, killed or wounded, and, on failure to so advertise any stock so killed or wounded, the owner shall recover double damages for all stock so killed and not advertised." Sand. & H. Dig. § 6350.

In order for plaintiff to show that he is entitled to the penalty allowed by this statute, he should have proved that the railway company failed to give notice in the manner prescribed. According to the evidence, the last time within the week after the killing of the mule any one made an examination to ascertain whether notice of the killing had been posted was half past six o'clock in the afternoon of the 26th of July, 1897. No notice was found at that time. The time for posting did not expire until the midnight of that day. Five hours and a half after this examination, in which the notice could have been lawfully given, still remained. The burden was upon the plaintiff to prove that it was not given. No one testified that it was not posted within the five hours and a half which still remained. Three or four days after the expiration of the time allowed for that purpose a notice of the killing, posted in the place required by law, was discovered; but when it was posted, or that it was not posted before the midnight of the 26th of July, the evidence fails to show. Plaintiff, having failed to

make the necessary proof, is, therefore, not entitled to double damages.

So much of the judgment of the trial court as was rendered for such damages is set aside. In other respects it is affirmed. The cause is remanded for a new trial as to the penalty.

---

66 299
84 117

WILLIAMS v. SMITH.

Opinion delivered March 25, 1899.

GIFT—DELIVERY.—Evidence that a husband delivered a sum of money to a firm of merchants with whom his wife kept an account as a gift to her, and that she was informed of and accepted the gift, is sufficient to prove a valid and irrevocable gift. (Page 301.)

Appeal from White Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

The appellee as administrator of the estate of Martha Teer, who was the deceased wife of Manuel Teer, of whose will the appellants were executors, presented to the probate court, for allowance against the estate of Manuel Teer, a claim in favor of Martha Teer for $700, which was allowed by the probate court. The executors of the will of Manuel Teer appealed to the circuit court, where the cause was submitted to the court sitting as a jury. The court found for the appellee, the administrator of Martha Teer, and rendered judgment for $1,022 in his favor, and ordered that the judgment be certified to the probate court for classification against the estate of Manuel Teer. From that judgment said executors appealed to this court. No declarations of law were asked or given, and the sole question here is, is the evidence sufficient to support the finding and judgment of the circuit court?

W. H. Lightle testified on behalf of appellee (plaintiff below) as follows: "I was acquainted with Manuel Teer and his wife in their lifetime. They each had an account with the firm

of J. E. & W. H. Lightle, and did business with the firm for a great many years. They kept separate accounts for several years. At the time of the death of Mrs. Martha Teer, she had a credit of $700 with our firm. Some time after her death I transferred the same, at the request of Manuel Teer, her husband, to his account. I have a memorandum of the date that the $700 was deposited with our firm, but Mr. Pitts kept our books, and he will testify as to the entries. I remember that the amount was deposited with our firm, but I do not remember who paid the money there, as we had many transactions that large and larger. At the time we transferred the balance due Mrs. Teer to the credit of Manuel Teer, no letters of administration had been taken out on the estate of Martha Teer."

Q. "I will ask you if Mrs. Teer knew that $700 was there?"

A. "She was advised of the deposit. She kept an account there, and settled up occasionally, and left that $700 to her credit. When I said I did not remember when the $700 was deposited there, I meant I did not remember exactly the day it occurred."

CROSS-EXAMINATION.

Q. "Did she come to town after the money was deposited?"

A. "I think she did. I think she was here about the time the trouble occurred among some of our citizens. I mean the death of Mr. Jap Hicks' children."

Q. "Was not her health very bad and so precarious at this time as to prevent her from traveling over the rough road from her house to Searcy from June up to her death?"

A. "No, sir; I thought she was one of the stoutest and healthiest women of her age I ever saw."

R. L. Pitts testified: "I was bookkeeper for J. E. & W. H. Lightle at the time the deposit of the $700 was made for Mrs. Teer, and my book of original entry shows that we received from Manuel Teer $700 on the account of Martha Teer on June 16, 1888. This deposit was cash. It was deposited as cash, and so marked on the book of original entry. I continued to keep the books through the years 1888 and 1889, and

on the 21st of May, 1889, Martha Teer's account was charged to Manuel Teer.

D. McRae, for appellants.

To constitute a gift, the donor must relinquish all dominion over the property. Thornton, Gifts and Advancements, § 3. For definition of gift see 9 West. Rep. 418; 45 Ohio St. 108. Unless the donee is informed of the gift, no presumption of acceptance arises. Thornton, Gifts and Advancements, 225; 59 Ark. 93; 43 Ark. 307.

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

The gift was complete and irrevocable on delivery, and it did not matter that it was made to a bailee. 43 Ark. 319; 59 Ark. 194; 60 Ark. 169; 40 Vt. 598; 40 Conn. 518; 43 Conn. 17; 32 Md. 78. Knowledge of the donee is not essential to the validity of a gift *inter vivos*. 16 Abb. Pr. 380; 75 N. Y. 134; 95 N. Y. 206; 23 Abb. N. C. 43; 123 Ill. 621. Acceptance of donee is presumed. 52 N. H. 238; 30 Cal. 122–3; 3 Pom. Eq. § 1149; Bail. Ch. 107.

HUGHES, J., (after stating the facts.) The evidence in this case seems to us to clearly show that Manuel Teer made to his wife, Martha Teer, a gift of $700 in their lifetime, and that she was informed of it and accepted it. The money was delivered to J. E. & W. H. Lightle, with whom she had an account, by her husband, who had the amount placed to her credit. What more could be required to constitute a valid gift from a husband to his wife? The delivery and the gift of the money were complete, and could not be revoked. "If the gift be intended *in presenti*, and be accompanied with such delivery as the nature of the property will admit, and the circumstances and situation of the parties render reasonably possible, it operates at once, and, as between the parties, becomes irrevocable. Such delivery may be made to a bailee as effectually as to a donee in person. * * * If there be only an intention to give, and no delivery, it will be inchoate and incomplete, however strong the expression of the intention may be; and the property does not pass. One is bound by his acts, but without consideration he is not bound to carry out his

voluntary intentions, however firmly or earnestly he may express them." *Nolen* v. *Harden*, 43 Ark. 319, 320; *Ammon* v. *Martin*, 59 Ark. 194; *Howard* v. *Savings Bank*, 40 Vt. 598; *Minor* v. *Rogers*, 40 Conn. 518.

The evidence in this case is sufficient to sustain the findings of the court, and the law is with the appellee.

The judgment is affirmed.

BROWN *v.* HENDERSON.

Opinion delivered March 25, 1899.

PUBLIC DITCH—REVIEWERS' REPORT CONCLUSIVE.—In a statutory proceeding to have a ditch constructed under an order of the county court, a report of the reviewers, finding that the ditch would not be of public benefit or utility, is conclusive, and the court is bound to dismiss the proceeding, and tax the costs against the petitioner. (Page 303.)

Appeal from Monroe Circuit Court.

JAMES S. THOMAS, Judge.

STATEMENT BY THE COURT.

A. Brown filed a petition in the county court of Monroe county, asking said court to order the construction of a ditch across certain lands in said county. The county court, in obedience to the statute, appointed viewers to examine the line of the proposed ditch and make report thereon, and said viewers reported in favor of the construction of said ditch. Afterwards R. M. Henderson and others filed a remonstrance against said proposed ditch as located by the viewers, and the county court appointed reviewers to review the action and report of the viewers, and said reviewers, after performing said duty, reported to the court that said ditch would not be of public benefit and utility, and recommended that said ditch "be not allowed or opened."

Petitioner Brown thereupon excepted to the report of the reviewers, but the court dismissed his petition, on the ground that the reviewers had reported that the said ditch would not

be of public benefit and utility, and against its construction. Brown appealed to the circuit court, but that court sustained the action of the county court, and dismissed the petition for the same reason.

Grant Greene, Jr., for appellant.

It was the duty of the circuit court to try the case *de novo*, upon the issues presented on the report of the receivers and exceptions thereto, as, also, upon the motion to dismiss and response thereto. Sand. & H. Dig. §§ 1216, 1264, 1269. Upon these issues either party is entitled to a trial by jury. 5 N. E. 732; 8 N. E. 232; 31 N. E. 569.

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

Upon adverse report of the reviewers, the court should dismiss the petition. Acts 1891, p. 286, § 7. By submitting whatever issue of fact there was to the court, appellant waived a jury trial. 57 Ark. 590. The motion to dismiss was an *ex parte* one, and no appeal lies. 15 Am. & Eng. Enc. Law, 895.

RIDDICK, J., (after stating the facts.) The only question presented by this appeal is whether, in a statutory proceeding to have a ditch constructed under an order of the county court, a report of the reviewers finding that the ditch would not be of public benefit or utility is conclusive upon petitioner. The circuit as well as the county court held in this case that such report was final, and refused to hear evidence to the contrary to show that the ditch would be of public utility. We are of the opinion that this ruling was correct. The statute provides that, upon the filing of the petition and a bond conditioned to pay all expenses, if the county court shall fail to establish the ditch, the county court shall appoint viewers to make a survey of the line of the proposed ditch. If these viewers report against the proposed work, the statute expressly requires the court to dismiss the petition, and tax the costs against the petitioner. Sand. & H. Dig. § 1209. If they report in favor of the construction of the ditch, the statute then requires notice to be given to the owners of lands affected by such work. Any person interested in the location of the proposed ditch may then file a remonstrance against the construction of the ditch, and, upon giving

bond conditioned to pay all costs and expenses occasioned by the remonstrance if the action of the viewers be sustained by reviewers, the county court is required to appoint reviewers to review the action and report of the viewers. If the reviewers sustain the action of the viewers, and report in favor of the ditch, the statute provides that the court shall "establish the same as described in the report of the viewers as it finds the same corrected or changed in the report of the reviewers." Sand. & H. Dig. § 1214. This shows that if the ditch is established after the report of the reviewers, it must be in accordance with said report, and, as the report of the reviewers in this case was against the construction of the ditch, it cannot be established.

Again, the law provides that if the ditch is established, the costs of locating the same shall be apportioned and taxed against the owners of the land assessed for the construction of the ditch (Sand. & H. Dig. § 1215); but another section provides that if the reviewers find the ditch not to be of public benefit or utility, the entire costs shall be taxed against the petitioners (Sand. & H. Dig. § 1213). This also shows that a finding by the reviewers against the construction of the ditch was intended to be final, and precludes further investigation, so far as that proceeding is concerned. For, if the intention was not to make an adverse finding of the reviewers conclusive of the question submitted to them, the statute would not have required all costs to be taxed against the petitioner upon the return of such a report and finding. We are of opinion, therefore, that when a report by the reviewers against the construction of a proposed ditch has been regularly made and in due form, the county court must dismiss the proceeding, and tax the costs against the petitioner. The statute, in this respect, is similar to that under which public highways may be laid out and established, and where an adverse report, either by the viewers or reviewers, is conclusive, and ends the proceeding. If the petitioner has any remedy after such adverse finding, it is by filing another petition and bond, and commencing a new proceeding. *Jones* v. *Duffy*, 119 Ind. 440.

No question is raised here as to the regularity of the action or report of the viewers, but only as to the correctness of their

finding. Being of the opinion that the petitioner cannot question such finding in that respect, when regularly made, the judgment of the circuit court sustaining same is affirmed.

---

66 305
s70 343
66 305
77 479

ROULSTON v. HALL.

Opinion delivered April 1, 1899.

1. JUDGMENT—EVIDENCE—RES INTER ALIOS.—A decree of divorce which found that the husband was occupying a certain place as a homestead is not admissible against a stranger to prove that it was the husband's homestead. (Page 307.)
2. ESTATE IN ENTIRETY—DOWER.—Where land is conveyed to a husband and wife, they take an estate of entirety, which is not subject to dower. (Page 307.)
3. SAME—DIVORCE.—Upon the granting of a divorce, the wife is entitled to receive the rents of one half of land held by her and her husband by the entirety, so long as both live; the entire property, at the death of either, going to the survivor. (Page 309.)

Appeal from Garland Circuit Court.

A. M. DUFFIE, Judge.

STATEMENT BY THE COURT.

Appellant brought suit in ejectment against appellee, claiming title to, and right to possession of, an undivided one half of lot 9, and south half of lot 8, in block 3 of Smith's addition to Hot Springs, in Garland county, Ark., and claiming rents therefor.

Appellee denied appellant's title and right to possession, claimed the property as a homestead, claimed title under and from Smith and wife to herself and her husband, Ben Hall, from whom the appellant also claimed to deraign title through said Ben Hall. Appellee also denied that the rental value of the property was $800 per month, as claimed by appellant. Appellant replied, denying specifically the allegations of the appellee's answer. The question of the rental value of the property was submitted to a jury, which found it to be $101.25.

All other questions in the case were submitted to the court sitting as a jury. The court gave judgment for the appellee for one half of said property, and for one third of the other half during the natural life of the appellee. From this judgment, this case is brought here by appeal.

It appears from the evidence that Ben Hall and Addie Hall, his wife, purchased this property from Smith and wife, who conveyed it to them. Afterwards Ben Hall sued his wife, Addie Hall, for divorce in the chancery court of Tennessee, and procured a decree dissolving the bonds of matrimony between himself and Addie Hall, the appellee here, and married another woman, and she and he conveyed his interest in said property to appellant, Roulston. Addie Hall sued Ben Hall in the chancery court of Garland county, and obtained a decree in her favor, dissolving the bonds of matrimony between herself and Ben Hall. In this suit Ben Hall set up the decree in his favor for divorce made in Tennessee. The chancery court of Garland county found the decree to have been rendered without jurisdiction, and therefore void, and adjudged and decreed that Addie Hall was entitled to one half of said property and to one third of the other half for her lifetime, and that the other part of said property was Ben Hall's. The court found in this decree that Ben and Addie Hall had occupied this property for several years, as a homestead, before the institution of her suit.

The appellee in this ejectment suit introduced in evidence, over the appellant's objection, and to which he excepted, the decree of the Garland chancery court made in the case of Addie Hall *v.* Ben Hall for divorce, and also introduced the filing mark of the original complaint in said cause, to which appellant excepted.

Without setting out the declarations of law given and refused, it will be sufficient to state the court's conclusions.

Z. T. Roulston, pro see.

Appellees took an estate by entireties, and each was entitled to their moiety, on divorce. 26 Ark. 368; 31 Ark. 580; Mansf. Dig. § 2571; 29 Ark. 202. The wife was not entitled to dower. Sand. & H. Dig. § 2520. The court could not take judicial knowledge of the pleadings and judgment in a suit

entirely different from that at bar. 35 Ark. 450; 32 Ark. 315.

Wood & Henderson, for appellee.

The deed from appellee's husband did not convey her homestead to appellant. 57 Ark. 242; 62 Ark. 431; 64 Ark. 494; 60 Ark. 269. The subsequent divorce did not remedy the void conveyance. 47 Ark. 215; 47 Ark. 413. The decree of chancery court granting the divorce and apportioning the property was not open to collateral attack. 34 Ark. 399; 37 Ark. 155; 52 Ark. 1; 24 Ark 122. Appellant, having bought during the pendency of the divorce proceedings, was bound by the decree. 20 Ark. 85; 57 Ark. 97; 17 Ark. 203; 23 Ark. 336.

HUGHES, J., (after stating the facts.) The contention of the appellant is that the judgment of the court should have been for him for an undivided one-half interest in the property, as prayed for, and for $101.25 rent, as per verdict of the jury. Appellee, as we understand, contends that the land was a homestead, and that Ben Hall, while her husband, conveyed the land to appellant, and that she did not join in the conveyance, which is therefore void, and that, if not entitled to hold the property as a homestead, the court correctly decreed her one-third interest for her natural life in the half of said property adjudged to appellant, less said one third so decreed to her in lieu of alimony. There was no competent evidence that the property was a homestead. The decree of the chancery court of Garland county in case of Addie Hall *v.* Ben Hall for divorce was relied upon only to show that it was a homestead. Roulston, the appellant, was not a party to that suit, and the question whether the property was a homestead was never adjudicated in that case as to him, and Roulston, the appellant, is not bound by that decree. That decree was not evidence in this case that said property was a homestead, and the court below did not find that it was a homestead. "A judgment is evidence of nothing, in a subsequent action between different parties, except that it had been rendered." *Thomas* v. *Hinkle*, 35 Ark. 450.

The lot having been conveyed to Ben Hall and Addie Hall, husband and wife, they took it as an estate of entirety, and it was never subject to dower. If one dies, the other takes the

whole. *Robinson* v. *Eagle*, 29 Ark. 202. The wife's right to dower is inchoate till her husband dies, and at his death, in case of an estate of entirety, she takes, not dower, but all. "Dower will not be carved out of an estate held in joint tenancy; seizin in severalty is necessary to support it." *Cockrill* v. *Armstrong*, 31 Ark 580. And this is true as to an estate by entirety.

We suppose the court below gave the appellee the decree for one-third interest for her natural life in the appellant's half of said property, because it was adjudged to her in the suit of in Addie Hall *v.* Benjamin Hall in the Garland chancery court. And we suppose that the learned chancellor in that case awarded it to her under section 2517 of Sandel & Hill's Digest, where it is provided that "in every final judgment for divorce from the bonds of matrimony granted to the wife against the husband, [the wife] shall be entitled to one third part of the husband's personal property absolutely, and one third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been so relinquished by her in legal form." But the husband, Ben Hall, had not an estate of inheritance in these lots. Where land is conveyed to husband and wife, they do not take by moieties, but both are seized of the entirety,—the whole in contradistinction to a moiety or part only. *Robinson* v. *Eagle*, 29 Ark. 202; 2 Kent's Comm. 132; 4 Kent's Comm. 414. They are called tenants by entirety. Estates by entirety are sometimes spoken of as joint tenancies, but not with strict accuracy. Like a joint tenancy, they possess the quality of survivorship. Husband and wife are but one person in law, and a conveyance to husband and wife is, in legal contemplation, a conveyance but to one person. *Shaw* v. *Hearsey*, 5 Mass. 521; *Dias* v. *Glover*, Hoff. Ch. 71; *Doe* v. *Garrison*, 1 Dana, 35; *Gibson* v. *Zimmerman*, 12 Mo. 385; Boone's Law of Real Property, § 365.

The rule of the common law that a conveyance to husband and wife constitutes them tenants by the entirety—the survivor taking the whole estate—is not changed by the abolition of joint tenancies, nor by the act of the legislature enabling married women to acquire and hold property separate from their hus-

bands. See *Marburg* v. *Cole*, 49 Md. 402; *Diver* v. *Diver*, 56 Pa. St. 106; *Jones* v. *Chandler*, 40 Ind. 588; *McDuff* v. *Beauchamp*, 50 Miss. 531; *Garner* v. *Jones*, 52 Mo. 68; *McCurdy* v. *Canning*, 64 Pa. St. 39; *Bennett* v. *Child*, 19 Wis 362; *Hulett* v. *Inlow*, 57 Ind. 412, S. C. 26 Am. Rep. 64; *Re* Shaver, 31 Upper Can., Q. B. 605; *Robinson* v. *Eagle*, 29 Ark. 202.

Neither tenant by entirety can convey his or her interest so as to affect the right of survivorship in the other. The alienation by the husband of a moiety will not defeat the wife's title to that moiety if she survive him; but, if he survive, the conveyance becomes as effective to pass the whole estate as it would had he been sole seized at the time of the conveyance. The husband may do what he pleases with the rents and profits during coverture, but he cannot dispose of any part of the inheritance, without his wife's consent. Boone, Real Property, § 366 and cases cited. An estate of inheritance is "a species of freehold estate in land, otherwise called a 'fee,' where the tenant is not only entitled to enjoy the land for his own life, but where, after his death, it is cast by the law upon the persons who successfully represent him *in perpetuum* in right of blood, according to a certain established order of descent." 1 Steph. Comm. 218; Co. Litt. § 51; Black's Law Dictionary, 436, "Estate of Inheritance." From these definitions it seems that an estate held by entirety cannot be an estate of inheritance.

It follows, from what has been said, that the court erred in giving judgment for appellee for one half of said property, and for one-third of the other, as during the lifetime of her husband she was only entitled to the rents of one-half, but in case of the death of the husband to the whole. The husband was entitled to one-half the rents, until the death of his wife, in which event he would be entitled to the whole estate. His vendee therefore is entitled to one-half the rents, while the wife of his vendor lives.

Reversed, and remanded for a new trial.

BANK OF PARIS v. PEARSON.

Opinion delivered April 1, 1899.

1. NEGOTIABLE INSTRUMENT—TRANSFER.—A note payable to bearer, or to a designated person or bearer, may be transferred by delivery without indorsement. (Page 312.)

2. SAME—POSSESSION AS EVIDENCE OF TITLE.—Possession of a note payable to bearer is *prima facie* evidence of ownership, and, without notice to the contrary, one may purchase it without inquiry. (Page 312.)

Appeal from Scott Chancery Court.

EDGAR E. BRYANT, Judge.

STATEMENT BY THE COURT.

The Bank of Paris was the holder of two negotiable promissory notes made by Walter Pearson and S. J. Pearson to Evans and Hiner or bearer. Evans discounted these notes at the bank before the maturity thereof, receiving value for same, and, after indorsing same, he delivered same to the bank. The notes were secured by a mortgage on certain lands. The bank, after the maturity of the notes and demand for payment, brought suit in equity against the makers, and asked for judgment for the debt and for foreclosure of the equity of redemption in the land mortgaged, etc.

The defense denied that the plaintiff bank was an innocent purchaser, and alleged that the notes and mortgage were without consideration, and were obtained through fraud; hence were null and void. The answer set up specifically facts which, it alleged, precluded the bank from being an innocent holder for value, and which, it claimed, showed a failure of consideration.

The facts, so far as it is necessary to set them out, tended to show that E. Hiner, who was a member of the firm of Evans & Hiner, the payees, sometime in February before the notes were due, offered to discount and sell same to the bank. The bank, after making such investigation as it desired as to the security, agreed to take the notes at a discount of thirty dollars.

Thereupon it paid Hiner $170, and Hiner indorsed the same, and delivered them to the bank. The bank had no notice of any contract or agreement between the makers and payee of the notes, other than that set forth in the notes and mortgage. After the notes matured, payment was demanded, and, upon refusal, this suit was brought.

The court below found "that the transfer of Edwin Hiner of the two notes to plaintiff could only transfer to plaintiff the undivided one half interest originally owned by him, and not Evans' half, as the same had never been legally indorsed over to him by Evans, and that the plaintiff is not a *bona fide* holder of said notes, to their full value, but that the court will enforce Hiner's original one half interest for plaintiff." The court then rendered judgment against the defendants for one hundred dollars, and directed a foreclosure of the mortgage for said amount. The bank appeals.

Anthony Hall, for appellant.

A note or bill payable to bearer does not require indorsement to transfer title to it. 1 Dan. Neg. Inst. § 729; 4 Am. & Eng. Enc. Law (2 Ed.), 250; 1 Mason, 243; 106 U. S. 593; 5 Ark. 536; 9 Ark. 219; 31 Ark. 20. *Prima facie*, the possessor of such a note is its owner. 1 Dan. Neg. Inst. § 663*a*; 42 Ark. 22. Indorsement of such a note is both an indorsement and a guaranty of it. 1 Dan. Neg. Inst. §§ 663*a*, 669; 4 Am. & Eng. Enc. Law (2 Ed.), 592. Appellant, being a *bona fide* purchaser before maturity, will be protected against the alleged infirmity of the contract, as between the parties. 1 Dan. Neg. Inst. § 769*a*; Tied. Comm. Pap. § 288; 28 Ark. 338; 31 Ark. 129; 35 Ark. 146; 41 Ark. 242; 48 Ark. 454; 49 Ark. 465; 61 Ark. 317.

Leming & Hon, for appellees.

Appellant admits the correctness of the finding of the court by failing to set out the evidence on which it was based. 55 Ark. 548; 57 Ark. 305. Transactions between attorney and client must be *uberrimae fidei*. 1 Am. & Eng. Enc. Law, 959. Having failed to rebut the presumption of invalidity, appellant can not recover. 48 Ark. 458. A partner in a non-trading firm has no authority to transfer or indorse commercial paper.

1 Parsons, Cont. 287, 251; 17 Am. & Eng. Enc. Law, 993–4. The failure of adult defendants to appeal does not affect the rights of infant defendants. 24 Ark. 377; *ib.* 438.

WOOD, J., (after stating the facts.) It is settled by the rules of the law merchant, which obtain in this state, that when a bill or note is, by its terms, made payable to bearer, or to a designated person or bearer, it may be negotiated so as to pass the legal title by delivery without indorsement. *Buckner* v. *Bank*, 5 Ark. 536; *Edison* v. *Frazier*, 5 Ark 219. See, also, *Evans* v. *Speer Hardware Co.*, 65 Ark. 204; 4 Am. & Eng. Enc. Law, p. 250 (2 Ed.), and authorities cited.

Possession of the notes by Hiner was *prima facie* evidence of ownership in him, and, without notice to the contrary, appellant could buy them without inquiry. 1 Dan. Neg. Inst. § 812; *Winship* v. *Merchants National Bank*, 42 Ark. 22.

No infirmity appearing upon the face of the paper, the facts in reference to its transfer show appellant to have been an innocent holder in good faith for value.

It follows that the decree of the court is erroneous in not being for the full amount of the notes, and the same is reversed, and the cause is remanded, with directions to enter a decree for the full amount of the notes, and for foreclosure of the mortgage for said sum, and such other proceedings as may be necessary, not inconsistent with this opinion.

TEXARKANA & FORT SMITH RAILWAY COMPANY *v.* SCULL.

Opinion delivered April 1, 1899.

BILL OF EXCEPTIONS—DELIVERY TO CLERK.—Where time is given by the trial court beyond the term in which to prepare a bill of exceptions, the rule that the bill must be delivered to the clerk within the time fixed is not complied with by a delivery within that time to a common carrier to be delivered to the clerk. (Page 312.)

Appeal from from Little River Circuit Court.

WM. P. FEAZEL, Judge.

Scott & Jones, for appellee, on motion to advance and affirm.

Shaver & Norwood, *Trimble & Braley* and *Jno. A. Eaton*, for appellants, in response.

The delivery of the bill of exceptions to the express company within time was tantamount to a delivery to the clerk, and the negligence of the carrier is not imputable to appellant. In the absence of a statute, indorsement by the clerk is not essential to filing any paper. 8 Enc. Pl. & Pr. 927; 6 Ark. 208; 12 Ark. 62; 21 Ark. 578. The bill of exceptions could be filed *nunc pro tunc*. 45 Ark. 102, 107.

WOOD, J. The circuit court granted sixty days in which to prepare a bill of exceptions. The sixty days expired September 13, 1898. A bill of exceptions was signed by the judge September 6, 1898, and was on the 7th delivered to the express company at Mena for transmission to the clerk of the circuit court at Richmond, Ark. On the 14th of September the clerk, residing at Richmond, Arkansas, received a postal notice of the receipt of a package addressed to him by the agent of the express company at Ashdown, in Little River county, Ark. Immediately upon receipt of this notice, the clerk, Ed. J. Cheever, signed the order for the delivery of said package to O. Bettis, the mail carrier between Ashdown and Richmond, and on the 15th the package, containing the bill of exceptions in the above cause, was delivered to him by the mail carrier, and same was filed in his office September 15, 1898.

Appellant, while conceding that the bill of exceptions was not actually received at the office of the clerk of the circuit court of Little River county and marked "Filed" within the sixty days allowed, yet contends that, inasmuch as the bill of exceptions was signed by the judge within the time, and same was delivered to a common carrier within the time, this constituted a constructive delivery of the bill of exceptions to the addressee, the clerk of the circuit court. The law does not recognize constructive delivery of bills of exceptions. Our decisions make the actual delivery to and filing by the clerk within the time prescribed by the court's order a prerequisite to the

consideration of alleged errors by the trial court on appeal. *Stinson* v. *Shafer*, 58 Ark. 110, and authorities there cited.

There being nothing before us to show any errors in the rulings of the circuit court, its judgment is affirmed.

FILES *v.* REYNOLDS.

Opinion delivered March 18, 1899.

1. JUSTICE OF THE PEACE—JURISDICTION—PENAL BOND.—A justice of the peace has jurisdiction of an action on a bond to indemnify a principal against loss through his agent, regardless of the amount of the penalty of such bond, if the amount sought to be recovered is within his jurisdiction, and the agency has terminated, so that the right to recover a judgment for the penalty of the bond, as security for any demands that might thereafter be sustained by breach of any condition of such bond, had ceased to exist. (Page 315.)
2. PARTY—ACTION ON BOND.—Where a bond is made payable to a principal or a designated agent, either may bring suit upon it. (Page 316.)
3. FOREIGN CORPORATION—FAILURE TO FILE CERTIFICATE.—In a suit brought by the agent of a foreign corporation upon a bond made payable to such corporation or its agent, it is not ground for a motion to dismiss that the corporation has not filed with the secretary of state a certificate designating a citizen of the state as its agent for receiving service of process and its principal place of business; such matter, if good for any purpose, should be pleaded in bar, as a defense. (Page 316.)

Appeal from Pulaski Circuit Court, Second Division.

JAMES W. MARTIN, Judge.

A. W. Files, pro se.

J. H. Hamiter, for appellee.

BATTLE, J. J. H. Reynolds commenced an action against John M. Files and A. W. Files before a justice of the peace. The basis of the action was an account for books and money furnished J. M. Files, while he was in the service of the Southwestern Publishing House, of Nashville, Tennessee, amounting in the aggregate to the sum of one hundred dollars and eighty cents, and a bond in the following words and figures:

"Know all men by these presents, that I, the undersigned, do hereby agree and become responsible to the Southwestern Publishing House, of Nashville, Tenn., or their agent, J. H. Reynolds, at Little Rock, Ark., as parties of the first part, in the sum of five hundred ($500) dollars, under the following conditions, to-wit:

"That Mr. John M. Files, party of the second part, shall act as canvassing and collecting agent for the said parties of the first part for the remainder of the year A. D. 1892, or so long as it may be mutually agreeable between the two parties.

"Contract as follows: We, the Southwestern Publishing House, or J. H. Reynolds, our agent, as parties of the first part, hereby agree to furnish to the said John M. Files, party of the second part, with books to the amount of two hundred and fifty ($250) dollars, for the purpose of making deliveries in all and such towns and cities as they, the two parties, may mutually agree upon; and it is further agreed that we, as parties of the first part, do agree to furnish the said John M. Files, as party of the second part, with cash sufficient to pay traveling expenses and board bills for the first two weeks, after which he agrees to pay back said cash out of commissions allowed him on sales made for the said parties of the first part.

(Signed) "SOUTHWESTERN PUBLISHING HOUSE,
"Per J. H REYNOLDS, Agent.
"JOHN M. FILES.
"A. W. FILES."

It was claimed that John M. and A. W. Files were bound by the bond for the payment of the account. The plaintiff recovered a judgment in the justice's court, and A. W. Files appealed to the circuit court; and the plaintiff was again successful, recovering a judgment in the circuit court against A. W. Files for $15.80.

Files contends that the justice of the peace did not have jurisdiction of the subject-matter of this action, and that the circuit court acquired none by appeal. This contention is based upon the fact that the bond sued on was in the sum of $500. But the contention is not correct. At the time this action was commenced, John M. Files was not in the service of the Southwestern Publishing House, and all his liabilities under the bond

had accrued. Hence the right to recover a judgment for the penalty of the bond "as a security for any demands that may be thereafter sustained by any further breach of any condition of such bond" had ceased to exist, and was not directly or indirectly involved in this action. The amount of the account sued on only was in controversy, and was within the jurisdiction of the justice of the peace. *Durfee* v. *Dean*, 52 Mich. 387.

Files further insists that the plaintiff had no right to maintain an action on the bond, because it was in favor of the Publishing House, and that the circuit court erred in refusing to dismiss this action upon the motion filed by him for that purpose. The $15.80 recovered was for money advanced by the plaintiff according to the terms of the bond, and was due to him; and he had the right to sue for it in this action. For our Code of Civil Practice provides that every action shall be brought in the name of the real party in interest, except therein otherwise specially provided; and the bond sued on made the parties of the second part liable to the Publishing House or Reynolds, its agent, for money furnished according to its stipulations, and thereby authorized either of them to sue for and recover thereon whatever may be due the party suing on account of the advances so made. The court did not err in refusing to dismiss.

He contends that the trial court erred in denying a motion made by him to dismiss the action, because the Publishing House was a foreign corporation, and had not filed with the secretary of state a certificate designating a citizen of this state as its agent upon whom service of summons and other process can be made, and its principal place of business. He is in error. This is a matter which, if good for any purpose, should be pleaded in bar, as a defense, and tried like other issues of fact in the action.

He raises many questions which can be presented only through a motion for a new trial. He asked for a new trial on the ground of newly discovered evidence, and no other. He has discovered that he can prove by John M. Files, the principal on the bond sued on, that the $15.80 for which judgment

was rendered was money advanced to him before A. W. Files signed the bond.

In order to make it appear that he is entitled to a new trial on account of this testimony, he must show, among other things, that it could not have been procured by due diligence at the former trial. That does not appear. The record shows that the deposition of John M. Files, by whom he expects to prove the newly discovered facts, was taken in this action, and was opened, published and filed on 22d of January, 1897, and that the last trial was on the 10th of March, 1897. In that deposition the defendant was asked the following question: "Did not J. H. Reynolds furnish you with money out of his own pocket to pay your traveling expenses and board bills the first two weeks (meaning the first two weeks after the execution of the bond), and have you ever paid this money back to J. H. Reynolds?" To which he answered: "There was no contract for J. H. Reynolds to furnish me money from his own pocket, but did receive $10.00 at one time and $8.00 at another, but understood that Reynolds, as per contract and bond, charged the same to the Southwestern Publishing House." A. W. Files was put upon notice by this question, many months before the last trial, that John M. knew that Reynolds had advanced to him (John M.) money to enable him to perform the contract evinced by the bond sued on. Then, again, he (A. W.) ought to have known that John M. knew all the facts necessary to show the extent of his liability on the bond. Under these circumstances he should have made a reasonable effort to discover the facts affecting him in this action. But he does not show what effort, if any, he made, and in that manner fails to show that he could not have procured the newly discovered evidence by the use of due dilligence. To us it appears he was guilty of negligence in the failure to make the discovery in time.

Judgment affirmed.

FARRIS v. MORRISON.

Opinion delivered April 1, 1899.

PAYMENTS—APPROPRIATION.—The right of a creditor to appropriate general payments by his debtor to any debt due by the latter does not authorize a creditor to appropriate payments made by a debtor firm to the individual debts of one or more members of such firm. (Page 319.)

Appeal from Stone Circuit Court.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

D. A. Morrison brought suit against Champ Farris and others upon a promissory note executed by them to him for the sum of $1,111.17. The defendants answered, admitting the execution of the note, but alleged that it had been paid, and set out the sums paid and the date of payment. On the trial, the evidence showed that certain of the defendants were partners, doing business under the firm name of N. B. Union & Co.; that such firm became indebted to plaintiff, Morrison, and the note sued on was given in settlement of said indebtedness. The plaintiff claimed that he held another note of the firm of N. B. Union & Co., and that, in the absence of any direction by defendants, the amounts claimed to have been paid by defendants were credited by him upon said note, and not upon the note sued on. The defendants, on their part, denied that the note upon which the payments had been applied by plaintiff was executed by the firm of N. B. Union & Co., or that the firm was liable upon, or responsible for the payment of, the note, and contended that plaintiff had no authority to apply payments made by the N. B. Union Co. upon the last mentioned note. The note sued on was signed by eleven persons, to-wit: Wm. H. Morrison, Champ Farris, E. E. Branscum, J. M. Gammill, J. A. Richardson, L. R. Farris, P. L. Farris, J. J. Goodman, P. M. Farris, W. H. Kendrick and Isaac Branscum. The note upon which the payments in question were credited by plaintiff

was signed by six persons, to-wit: W. H. Morrison, J. A. Richardson, J. M. Gammill, P. M. Farris, L. R. Farris and C. Farris. There was evidence tending to show that the firm of N. B. Union Co. was composed of ten persons, all of whom signed the note in suit except J. R. Farris, and five of the members of said firm were signers upon the note upon which payments were applied by plaintiff. There was evidence tending to show that the last mentioned note was not executed by the firm of N. B. Union & Co., and was not a debt of the firm; and there was also evidence to the contrary, tending to show that the note was a debt of the firm, and that the credits named were properly applied. Upon the question of the application of payments, the circuit judge instructed the jury as follows: "Unless the defendants directed the application of the payments made upon the indebtedness, the plaintiff had the right to apply them to any indebtedness he saw proper to apply them to." And he refused the request of defendants to instruct the jury as follows: "The money paid by the N. B. Union Co., to be applied to their indebtedness, could not be applied to any other individual indebtedness, although it might be an indebtedness of some of the individuals composing the partnership; and if you believe from the evidence that money belonging to the N. B. Union Co. was applied to any indebtedness other than that of the N. B. Union Co., the defendant would be entitled to credit for such an amount."

There was a verdict and judgment in favor of plaintiff, from which defendants appealed.

J. C. Yancey and *F. D. Fulkerson*, for appellants.

Partnership funds paid to a creditor without instructions as to the application of the payment must be applied to firm debts, in preference to those of individual partners. 49 Ark. 457; 85 Ala. 38; 124 Ill. 474; 115 Ind. 45; 78 Ia. 617; 45 Minn. 495. Consent of all the partners would be necessary to change this rule, and the burden is on the creditor to show this consent. 48 Ark. 557; 42 Ark. 422; 54 Ark. 449; 60 Ark. 18; 52 Ark. 556.

RIDDICK, J., (after stating the facts.) The question presented by this appeal is a very simple one, and relates to the

appropriation of payments. The right of appropriation belongs to the debtor, and, when he owes a creditor more than one debt, he can, in making a payment, appropriate it to whichever debt he pleases. If the debtor makes the payment generally, without appropriating it to any particular debt, the creditor may then appropriate it to any debt due from the debtor making the payment. *Bell* v. *Radcliff*, 32 Ark. 645. But the creditor cannot appropriate the payment to the debt of a third party, for which the payer is not liable. If the debtor was a firm of partners, the creditor cannot, without its consent, appropriate moneys paid by the firm to the individual debts of one or more of the members of the firm. *Feucht* v. *Evans*, 52 Ark. 556.

Now, we do not suppose that the learned judge before whom this cause was tried would differ with us on the proposition of law above stated, or that he intended to give to the jury a different rule of law; but the instruction given by him to the jury on this point was not full enough, and liable, under the facts in proof, to be misunderstood and to mislead the jury. The note upon which this action is founded was given for a firm debt, and there was evidence tending to show that the plaintiff-creditor had, without the consent of said firm, appropriated money paid by the firm to the individual debts of certain members of the firm. This, of course, the creditor had no right to do. But the instruction complained of told the jury that, in the absence of any direction by the debtor, the creditor could apply the payment to any indebtedness he chose to apply it to, without confining them to the debts of the firm making the payment. The defendant objected to this instruction, and prepared and asked another instruction, stating the law correctly, and so that it could not be misunderstood, which the judge refused to give. The refusal to give such instruction was, in our opinion, under the circumstances as stated in the bill of exceptions, prejudicial error, for which the judgment must be reversed, and a new trial granted. It is so ordered.

BOONE COUNTY BANK *v.* EOFF.

Opinion delivered April 8, 1899.

SHERIFF—LIABILITY ON OFFICIAL BOND.—Where a sheriff sold attached property, and took a note for the purchase money payable to a bank which was one of the attaching creditors, and the bank, after collecting the note, loaned the money, without the sheriff's authority, to the sheriff's deputy, who executed his individual note secured by mortgage, the bank cannot hold the sheriff liable on his official bond for its pro rata of the money so collected and loaned. (Page 324.)

Appeal from Boone Circuit Court.

BRICE B. HUDGINS, Judge.

W. F. Pace, for appellants.

Appellee (the sheriff) had no right to impeach appellant's judgment. Drake, Att. § 304; 1 Black, Judg. §§ 160, 246, 268, 269; 2 *id.* § 604; 54 Ark. 525. The return of the sheriff is conclusive as to the method by which the sheriff came into possession of the goods. 14 Ark. 11; 4 Ark. 185. It was the duty of the sheriff to hold the fund derived from the sale of the goods. Sand. & H. Dig. § 350. The court erred in giving instruction No. 5. The order apportioning the funds cannot be collaterally impeached. 1 Black, Judg. §§ 1, 246. Proof of an essential fact, which a party has neglected to allege, is incompetent, and cannot be treated as amending the pleading. 42 Ark. 514; 40 Ark. 352; 54 Ark. 304; 43 Ark. 525. There is a total each of evidence on which to base instruction No. 5. Sand. & H. Dig. § 5766; Gr. Pl. & Pr. § 477; 41 Ark. 394; 59 Ark. 170.

J. W. Story and *W. S. & F. L. McCain*, for appellees.

There was no error in the court's instructions. Appellant was not entitled to a new trial on the ground of surprise. 26 Ark. 496; 55 Ark. 567; 57 Ark. 60; 91 Ind. 44; 29 Ark. 225.

BUNN, C. J. This is a suit by the Boone County Bank against the sheriff of Boone county and the sureties on his

official bond for money collected by him in an attachment proceeding against one Hulen, and which said sheriff failed and refused to pay over to said bank, the plaintiff in said attachment proceeding. There was a demurrer to each of four of the paragraphs of the answer of the sureties, but the same was overruled as to each, and plaintiff reserved its exceptions, and trial by a jury was had, which resulted in a verdict for the defendants. Motion for a new trial on eighteen several grounds was made, and overruled, and plaintiff excepted, tendered its bill of exceptions in due time, and, the same being certified, took its appeal to this court.

The facts in this case are: D. A. Eoff, one of the defendants, and the principal obligor on said bond, held the office of sheriff for the term beginning October 30, 1892, and ending October 30, 1894, and at the September election in 1894 was elected to succeed himself, that is, for the term beginning October 30, 1894, and ending October 30, 1896, for the new term, with his co-defendants as his sureties.

On the 11th day of October, 1894, while filling the former term, and in obedience to these several writs of attachment issued in vacation, and before judgment, against the property of said Hulen, at the instance and in favor of said bank, L. Kirly and R. P. Bryant, respectively, he sold said property, and one A. S. Johnson became the purchaser thereof for the sum of $1,944.85, which sum, we infer, was to be applied *pro rata* towards the satisfaction of the judgments the three plaintiffs aforesaid should thereafter obtain in said three suits.

The sheriff, the said D. A. Eoff, had been transacting most, if not all, of his financial business with said bank, of which R. F. King was president and apparently the active manager, and he was present at the sale (which was some miles distant from Harrison, the county seat and domicile of the bank), looking after the bank's interest in this matter; and when the sale was over, he and Johnson, at the suggestion of the sheriff, proceeded to the office of the bank at Harrison to prepare such papers as were necessary to consummate the sale and purchase, as the same had been made on a credit of three months from the date of sale. It seems that the sheriff, individually, owed A. S. Johnson about two hundred dollars or

more, and this, at Johnson's request, was allowed by King as a credit on the purchase price to be paid by Johnson. It was then arranged between King and Johnson that Johnson should give his note to the bank for $789.53 and two separate notes payable to the sheriff covering the balance for the benefit of the other plaintiffs in attachment, costs, etc. We infer that the note to the bank was based on the estimated amount that would be coming to the bank from its share of the proceeds of the property sold after payment of costs, for we find that on the 11th of November, 1896, final judgment was rendered in the attachment suits, and the judgment in favor of the bank at that time was $919.76.

On the 5th of August, 1895, Johnson paid off these notes at the bank, and to the bank, and the gross amount of the three, the sum of $1,698.45, which appears to have been the balance of the $1,944.85 after deducting $229.05, the amount owing by the sheriff to Johnson, as stated, together with interest on said balance until the date of the payment of said notes, to-wit, the 5th of August, 1895. This balance and interest, amounting to $1,698.45, was on said 5th day of August, 1895, deposited in said bank to the credit of the sheriff, D. A. Eoff, in said transaction involving said attachment suits.

Before the sale of the attached property, and after the commencement of the attachment suits, a suit had been instituted against the sheriff for this property by other creditors of Hulen, and by reason of this latter suit the order of sale before judgment was made.

On or before the 14th of August, 1895, B. B. Eoff, a brother of D. A. Eoff, the sheriff, and his deputy at the time, applied to R. F. King, the president of the bank, to get the money from the Hulen sale then in the bank as stated. King refused to let him have it, although, as he testifies, he "had the right and authority to collect the money;" meaning, doubtless, that he had the authority to draw it out of the bank. Being refused the money, B. B. Eoff says, he then desired to borrow the money on his own private account, and so informed King, who responded that, while the bank was not lending, yet that if he (Eoff) would give him (King) for the bank security, he would lend him (Eoff) the Hulen attachment money. B. B.

Eoff then gave his individual note to the bank for $1,340.27. This note and mortgage were dated 1st of July, 1895, but the mortgage was not acknowledged until the 16th of August, 1895; and B. B. Eoff testifies that suit to foreclose this mortgage was pending when he testified, and that he had then confessed judgment in that proceeding, and had offered to make the bank a deed to the mortgaged premises.

The testimony of R. F. King shows that the money, the $1,340.27 thus borrowed by B. B. Eoff, was paid to him by the cashing of two several checks drawn by him in the name of his brother, D. A. Eoff, the sheriff, the one dated August 14, 1895, for $500, and the other dated August 17, 1895, for $1,198.45.

The other two attachment creditors of Hulen appear to have been settled with. At all events, neither is complaining here, and we presume they have been paid their *pro rata* shares of the proceeds of the sale of the attached property.

The plaintiff bank in this action sues the sheriff on his official bond for its *pro rata* share of said proceeds only, and the question before us is, is the sheriff bound for the same on his bond?—which, of course, means, are the defendant sureties bound to the bank for the same? If this were a suit by the other two attaching creditors against the sheriff for his failure to pay over their shares of said proceeds of sale, we can readily see that the sheriff and his bondsmen could only defend by showing that the money had been paid to the plaintiffs, if the sheriff had in fact collected it, or should have done so. But this suit is against the sheriff and bondsmen by the bank, and the sole defense is that the defendants are not bound by reason of the connection the bank has had with these funds, and its action in relation thereto. As before stated, judgments were finally rendered in the attachment suits on the 11th of November, 1896, and at the same time the trial court apportioned the said funds, giving the bank as its share the sum of $808.46, and for this sum it sues in this action.

If B. B. Eoff borrowed the $1,340.27 from the bank itself, and as of its own money, then the proceeds of the attachment sale of Hulen's property is still in the bank; and of course this suit is without foundation upon which to rest, for in that case the bank would have to pay itself out of the funds in its hands.

If, however, as the bank contends, the Hulen funds were drawn out by D. A. Eoff, the sheriff, by and through his authorized deputy, before final judgment and distribution of the fund, then the question grows more complicated. In that case (and we will assume it to be the case) we are led to inquire the more particularly as to the relation of the bank to the sheriff, and of both to the fund in bank, and to it subsequently. So far as that part of the Hulen fund now sued for is concerned, the bank is entitled to it, and was on the 5th day of August, 1895, although at that time it had to await the final order of the court to come fully into the enjoyment of it. Without the advice or consent of the sheriff, on the 5th of August, 1895, no doubt in anticipation of its rights under the final orders of the court, it loaned this money to B. B. Eoff individually, and took his individual note therefor, and his real estate mortgage to secure the same. The sheriff disclaims all knowledge of, or participation in, this transaction. But it is contended that because of the fact that B. B. Eoff drew out the amount borrowed on his note and mortgaged in the name of his principal, therefore the money he received belonged to the latter as sheriff. That might be true or not, according to circumstances. If the sheriff really had such a fund in bank subject to his disposition, it was so by reason of the same being placed to his credit on the 5th of August, 1895, when paid into the bank by Johnson. But that placing of the amount to the credit of D. A. Eoff was at the time purely an arbitrary matter in the bank; for that part of the fund was the proceeds of a note from Johnson to the bank, made on the day of the attachment sale, and, we infer, by the consent of the sheriff. It is true that at that time the court had not rendered judgment in the attachment suits, and, of course, had made no order of distribution of the fund between the plaintiff in the attachments; but the amount coming to the bank had been estimated by the bank, and, in this view of it, it took a separate note from Johnson for the amount coming to it, and the amount, as between the bank and the sheriff, was considered as paid to the bank, especially since it had agreed with Johnson to extend the time of payment beyond the three months, and did so extend it to him.

Again, if this part of the fund was in bank, and belonged to D. A. Eoff, the sheriff, at the time B. B. Eoff, the duly authorized deputy, applied to draw it out for the sheriff, the bank had no legal right to refuse to permit him to do so, unless, under some rule of the banking law, the bank has the right to appropriate a depositor's fund or balance in bank on his general account showing a balance to the bank. That condition is not presented here, and perhaps could not be, without defeating the case as against the bondsmen.

But, assuming, for the sake of argument, that this part of the fund belonged to the sheriff when B. B. Eoff borrowed it out of the bank, did not the bank, as the agent of the sheriff, assume to loan it without the direct authority of the sheriff, and should not the bank be held to account for collection of the amount loaned to B. B. Eoff? This fund was in fact the bank's own fund, when it loaned it out, subject only to the final judgment of the trial court, and that judgment was rendered before the institution of this suit. So that the contention of the bank now really is that the sureties on the sheriff's bond should be made to pay it back the money which it loaned out. If that be true, what is to become of the money due on B. B. Eoff's note, when collected? For that is the same money now sued for, according to the bank's contention. In this view of the case, there is no substantial error in the instructions of the court, nor in refusing instructions asked.

The demurrer to the first, second, third and fourth paragraphs of the answer was properly overruled, because each of these paragraphs was a specific denial of facts alleged in the complaint, and if the matter therein stated was not properly stated with sufficient explicitness or certainty, as seems to be the real ground of objection, a motion to make more explicit and certain should have been made, instead of the interposition of the demurrer.

Affirmed.

McILROY BANKING COMPANY *v.* DICKSON.

Opinion delivered April 8, 1899.

1. ADMINISTRATION—AUTHENTICATION OF CLAIMS.—Claims against estates of deceased persons, capable of being asserted either in a court of law or equity, must be authenticated by affidavits of the claimants to the effect that the claims are just, and have not been paid, in whole or in part, as the case may be. (Page 330.)

2. SAME.—The general rule that claims against estates of deceased persons must be authenticated by affidavit of the claimant applies to a claim arising out of an alleged breach of trust or for the amount of a defalcation by a bank cashier. (Page 330.)

3. SAME—AUTHENTICATION OF SECURED CLAIMS.—The claim of a corporation against the estate of a deceased shareholder need not be authenticated, to entitle the corporation to enforce its statutory lien on his stock for the amount of his indebtedness. (Page 331.)

4. HOMESTEAD—TRUST DEBT.—Money borrowed of a bank by its cashier by means of an overdraft in the usual course of business, and used by him to build a house, cannot be followed into the building as an express trust fund, so as to subject the building to execution, under constitution 1874, art. 9, § 3, providing that homesteads shall be subject to execution against "trustees of an express trust for moneys due from them in their fiduciary capacity." (Page 331.)

5. BANK CASHIER—TERM OF OFFICE.—Under Sand. & H. Dig. § 1332, providing that private corporations shall choose such other officers as the by-laws of the corporation shall prescribe, all of which said officers shall hold their offices until others shall be chosen in their stead," where the cashier of a bank corporation was chosen for an unfixed term of office, and at the end of a year was re-elected to succeed himself, the act of re-electing him ended his first term, and a bond given by him to cover his first term of office will not cover defalcations occurring in the second term. (Page 332.)

Appeal from Washington Chancery Court.

EDWARD S. McDANIEL, Judge.

J. D. Walker, *Walker & Walker* and *O. W. Watkins*, for appellant.

The burden was on the cashier to account for shortages in the bank's assets. 12 Pick. 303; 1 Pet. 46; 1 Morse, Banks, etc., § 42, note *a*; Murfree, Off. Bonds, § 597. The judgment

of the court declaring appellant's lien upon the capital stock owned by the cashier was correct. Sand. & H. Dig. § 1342; 2 Beach, Priv. Corp. § 646; 60 Ark. 198. The court did not err in refusing to dismiss appellant's complaint. 32 Ark. 300; Woerner, Adm. § 386; 56 Ark. 476; *ib.* 73; 39 Ark. 111. Chancery had jurisdiction. 29 Ark. 407. The homestead was not exempt from the payment of the bank's claim, since the cashier stood in the position of a trustee of an express trust. Const. Ark. § 3, art. 9; 1 Perry, Tr. § 2; 56 Ark. 585; Suth. Stat. Const. § 268; 3 How. 202; 37 La. Ann. 410; 1 Pom. Eq. § 157. The bank had a right to follow up the trust fund into the house. 36 Fed. 229; 133 U. S. 694. Our statutes do not limit a cashier's term of office to one year. Sand. & H. Dig. §§ 1330, 1332. Hence his bond was a continuing obligation, and did not expire in one year. 2 Met. 522; Morse, Banks, etc., §§ 16, 27; 7 N. H. 21; Murf. Off. Bonds, 633; 1 Har. & G. (Md.) 413; 2 Pick. 340; 40 U. S. App. 225. The construction placed on a contract by the parties should control. 131 N. Y. 19; 124 U. S. 505; 95 U. S. 505; *id.* 269; 1 Beach, Cont. 721.

L. W. Gregg and *B. R. Davidson*, for appellees.

Mere proof of shortage does not make out a case of misappropriation. 87 Fed. 157–161. An affidavit authenticating a claim against a decedent's estate is a condition precedent to the right to maintain an action against the personal representative. 7 Ark. 78; 14 Ark. 237; 14 Ark. 247; 30 Ark. 756; 48 Ark. 360; Sand. & H. Dig. §§ 114, 116, 119; 28 Ark. 267; 25 Ark. 318; 38 Cal. 323; 56 Mich. 15; 32 N. E. 184; 5 Stew. (N. J. Eq.) 146; 90 Ill. 457; 51 Ala. 292; 58 Ala. 25. The affidavit to the complaint is not sufficient for this purpose. 48 Ark. 304; 18 Ark. 334; 21 Ark. 519. By our statute, and by reason of the fact that the cashier was, in fact, elected every year, the office was an annual one. Sand. & H. Dig. §§ 1330–1332, 1337. The clause in the statute continuing the terms of all officers not therein named "until others shall be chosen in their stead" is intended to cover only a reasonable time, and beyond that the bondsmen are not held liable. 72 Mo. 597; 7 Gray, 1; 40 N. Y. L. 215; 34 Vt. 371; 4 Dill. 185. Re-election of the same party is the

election of a successor, within the meaning of the law, and discharges the old bond. 40 Kas. 661; 40 N. Y. L. 207; 29 Minn. 398; 72 Mo. 597; 7 Gray, 1; 40 N. Y. L. 215; 34 Vt. 371. The bond was an annual one. 2 M. & Sel. 363–370; 33 Barb. 196; 42 N. H. 59; 39 Eng. L. & Eq. Rep. 326; 2 Saund. Part 2, 403; 6 East, 506; 2 Bing. 32; 2 Barn. & Ald. 431; 72 Mo. 597, 602; 4 Dill. 186; 1 How. 250; 67 Cal. 505; 48 Pa. St. 446; 28 Conn. 387; 40 N. Y. L. 215; 33 Barb. 196; 45 N. Y. Supp. 420; 16 Fla. 204; 2 Hill (S. Car.), 589; 7 Gray, 1; 8 Allen, 371; 40 Kas. 661; 64 Cal. 213; 10 Ia. 39; 80 Me. 362; 29 Minn. 398; 34 Vt. 371; 69 Vt. 12. A surety's liability can not be extended by implication. 15 Peters, 187–208–209; 9 Wheat, 703; 111 U. S. 38–42; 21 Wall, 652; Murf. Off. Bonds, § 620. The fact that the business of the bank was carried on in an illegal manner (see Sand. & H. Dig. §1715) released the sureties. 41 Miss. 142–186; 1 Story, Eq. § 215; 5 So. Law Rev. 813; Kerr, Fr. & Mist. 123 and note; 22 Ind. 207; 36 Me. 179; Thomp. Liab. Off. Corp. 520; 3 M. & G. 378; 1 Story, Eq. 323–5; 23 Eng. L. & Eq. Rep. 633; 39 N. J. L. 135; 34 O. St. 411; 40 *id.* 409. The knowledge of the president or directors as to the illegal methods is sufficient. 75 Fed. 769; Th. Corp. §§ 5222–5229 and note 2; Wade, Notice, §§ 681–2. The election of an "assistant cashier" also released the sureties. 16 Gray, 474; 6 Curtis, 233–236. None of appellees occupy the station of trustee of an express trust. 26 Barb. 635–640; Bouvier's Dict. "Trusts;" Anderson's Dict. "Trusts," "Express Trusts;" Rap. & Law. Dict. same. The exemption laws are construed most strongly for the protection of the homestead. 56 Ark. 563; 25 Ark. 272; Thomp. Hom. & Ex. §§ 4, 7, 731, 936.

J. D. Walker and *Walker & Walker*, in reply.

When the estate of a decedent is jointly liable, with others, for a debt, affidavit to the claim is not required before suit, but would become necessary only after a judgment was recovered and sought to be enforced against the estate. Sand. & H. Dig. § 5634; 50 Ark. 63; Ohio Code, § 38; 5 Oh. St. 586; 3 Abb. 306. Equity, once having jurisdiction, will afford full relief in all respects. 51 Ala. 445; 13 Mo. 321; 43 Miss. 437. The

intention of the parties as to the duration of the bond governs. 1 Brandt, Suretyship and Guaranty, § 172; 1 Allen, 339; 75 Cal. 513; 5 H. L. Cas. 856; 8 Heisk. 312. The statute making the office of director annual did not affect the cashier's term. 3 La. Ann. 674; 81 Cal. 528. The enumeration of parties in the statute impliedly excluded all others. Broom's Leg. Max. 652; Suth. Stat. Const. § 327; 31 La. Ann. 678.

BUNN, C. J. This is a bill in equity against the widow, heir and executrix of a deceased cashier of the plaintiff bank, and against his bondsmen as such cashier, and seeking to subject certain property, of which he died seized, to the satisfaction of such decree as might be rendered against his estate. Decree in part for plaintiff and in part for defendants, as will appear in the statement of facts and the opinion, and both parties appealed.

The findings of fact by the court were to the effect that the deceased was owing the bank, as shortage in his account, something over $18,000; that he had $3,500 worth of paid up stock in the bank, and that this was subject to his said indebtedness, and was so appropriated; that the homestead of deceased was not bound for any of said shortage; that the claim was not authenticated, as required by statute, so as to authorize a judgment against the estate.

The statute requires that all claims against estates of deceased persons, capable of being asserted either in a court of law or equity, shall be authenticated by affidavits of the claimants to the effect that the claims are just, and have not been paid, in whole or in part, as the case may be. *Ryan* v. *Lemon*, 7 Ark. 78; *Bernie* v. *Emboden*, 14 Ark 237; *Sanders* v. *Rudd*, 21 Ark. 519; *Walker* v. *Byer*, 14 Ark. 247; *Bennett* v. *Dawson*, 18 Ark. 334; *Alter* v. *Kinsworthy*, 30 Ark. 756; *Wilkerson* v. *Gordon*, 48 Ark. 360.

And this affidavit is necessary to authenticate a claim arising out of an alleged breach of trust. *Green* v. *Brooks*, 25 Ark. 318.

The affidavit is necessary to authenticate the claim for the amount of a defalcation, like the one in suit. But there are exceptions to the rule, as in the cases of mortgages and the

like, and it is contended by the plaintiff that its prayer to subject the bank stock and the homestead to the payment of this defalcation is properly among the exceptions.

The statute gives the bank a lien on all stock of a debtor to the bank for the amount of his indebtedness; and not only so but specifically provides for the enforcement of this lien. Sections 1342, 1352, 1353 and 1354 of Sandels & Hill's Digest. And the law is even stronger in favor of the bank when we take into consideration the fact that the stockholder really has no power to control or dispose of his stock while so indebted, except by the consent of the bank; for no transfer of stock is available except it be made on the books of the bank. This being the case, there was no necessity for an authentication of the claim, in order to subject this stock to the payment of the debt *pro tanto*, for the bank, in effect, had the possession of the stock.

There is some uncertainty as to whether the plaintiff means to include the $1,801.50 expended by the deceased in erecting his residence as his homestead in the $18,000 defalcation decreed, or that it is a separate and additional misappropriation of its funds by the deceased; but we infer that it is a part of the former, as the decree for that amount seems to be for the balance of accounts generally, but this is really not material.

It is contended by plaintiff that this indebtedness of the deceased is for an express trust fund, for which he has failed to account, and therefore, under section 3, article 9, of the constitution, the homestead is not exempt from execution or other process to satisfy the decree for such indebtedness. What has been already said in reference to the want of authentication of the claim of the bank against the estate of Dickson settles this question; for, when there can be no judgment on the debt, there of course can be no process on it against the debtor's property of any class.

It is contended, however, in this connection, that the money expended in building Dickson's residence was a portion of the trust fund of the bank in his hands and under his control at the time, and that the same can be followed into the building, and the latter made subject to its repayment to the bank. The facts of this part of the case are these: That Dick-

son was the owner by inheritance of the lot of ground upon which the residence was erected; that he expended in the erection of the building the sum of $1,801.50, which was paid out to workmen, material men and laborers from time to time in small amounts, on checks drawn by Mrs. Lelia Dickson, the wife of J. L. Dickson, as he stated, in order to keep that separated from his other accounts; and, after the completion of the building, it appears that Dickson paid, in cash or its equivalent, on this $1,801.50 due the bank, the sum of $951.50, and gave his note for the balance ($750), which note, however, the plaintiff says it has been unable to find. There does not appear to have been any secrecy or concealment connected with this transaction. Everything seems to have been open to the inspection of the directors and other bank officials. This being the case, the money so drawn out and expended on said building constituted rather a loan in the usual way from the bank than a misuse of trust funds; for, in incurring an indebtedness by checks on a bank in the usual way, even where one overdraws, the drawer does not ordinarily make himself a trustee to account as such for the amount drawn out, and in the absence of secrecy, as we have said, we think this was no trust fund. Besides, Dickson all this time had $3,500 worth of stock to his credit in bank, to answer for any overdraft he might make. It follows, therefore, that the homestead cannot be reached and made subject to the overdraft, as is sought to be accomplished in this case.

The defendants contend that the office of cashier held by the deceased, J. L. Dickson, was an annual office, and therefore that the bond given to cover the first term of one year is not a bond for defalcations accruing during the second term or year, as is alleged in this case. Whether the language of the act justifies such a contention, it is unnecessary for us to stop to inquire just now. This much, however, does appear, that the cashier of this particular bank at least held subject to the will and pleasure of the directors, and that these, at the end of the first term or year, proceeded to and did re-elect or choose Dickson to succeed himself, but failed to exact the usual bond of him for the future term, whatever that might be; and so the question with us is whether the old bond of

the previous year covered Dickson's official conduct during his new term. The statute on the subject is as follows, to-wit: Section 1332, Sandels & Hill's Digest: "The directors of every such corporation shall choose one of their number to be president, and shall also choose a secretary and treasurer, which two last-named officers shall reside and have their place of business and keep the books of said corporation within this state, and shall choose such other officers as the by-laws of the corporation shall prescribe; all of which said officers shall hold their offices until others shall be chosen in their stead." Neither the statutes nor by-laws of the bank in this case fix the term, other than is done in the section of the digest quoted above. The directors chose Dickson as his own successor at the end of the first year, and, in the meaning of the statute quoted, that act ended the first term of Dickson; and, as all the shortages complained of occurred after this re-election, it follows that they are not covered by the bond given for the expired term or the first year. The bondsmen, therefore, are not liable. It is unnecessary to discuss the question of fact whether Dickson was really in arrears or not. A majority think there is evidence to sustain the chancellor, while a minority are inclined to think otherwise.

Affirmed.

KING v. WILLIAMS.

Opinion delivered April 8, 1899.

SPECIFIC PERFORMANCE—ORAL MORTGAGE.—An oral agreement by one to execute a mortgage on certain land to another if the latter would release certain mortgages held by him will be enforced where the former has received the benefit of the performance by the latter of his part of the agreement. (Page 335.)

Appeal from Sharp Chancery Court.

JOHN B. MCCALEB, Judge.

Sam H. Davidson, for appellant.

An oral agreement to execute a mortgage is within the statute of frauds. 8 Am. & Eng. Enc. Law, 697, note 12. The precise terms of an oral contract must be shown before it will be specifically enforced, if at all. 45 Ark. 17; 49 Ark. 306; 44 Ark. 334. Part performance must be shown. 39 Ark. 424. An oral mortgage can not be established in this state. 57 Ark. 220; 12 Ark. 428; 30 Ark. 745; 34 Ark. 346.

E. B. Kinsworthy, for appellee.

The appellant owned no other land but that described in the complaint, and hence there could have been no misunderstanding as to it. The description was sufficient. 9 S. W. 867; 13 So. W. 559; 65 Tex. 255; 34 Ark. 251; Tied. Real Prop. § 827, and note; 27 N. J. Eq. 240. Where an oral agreement has been so far performed that the parties cannot be placed *in statu quo*, the statute of frauds does not apply. 8 Am. & Eng. Enc. Law, 738, and note; 64 Ark. 19; Bish. Cont. § 1237; 110 Mich. 143; 9 Peters, 86; 9 Gratt. 1; 29 Ia. 299; 64 Pa. St. 424. Specific performance is within the discretion of the court, and will not be reviewed unless abused. 43 Am. St. Rep. 685; 43 *ib.* 192; 34 *ib.* 672.

BATTLE, J. This action was instituted by John H. Williams against David R. King to compel him to perform an oral contract to execute a mortgage, and at the same time to foreclose the lien to be thereby created.

On the 31st day of December, 1894, the plaintiff, John H. Williams, held two notes, which were executed to him by the defendant, David R. King,—one for the sum of $448.88 and ten per cent. per annum interest thereon from date until paid, bearing date August 10, 1892, and due on the 1st day of January, 1893; the other for the sum of $150 and ten per cent. per annum interest thereon from date until paid, dated January 1, 1893, and due twelve months after date. The former was secured by a mortgage on one house and eleven lots in the town of Center, in the county of Sharp, in this state; and the latter was secured by a mortgage on one hundred and sixty acres of land in the same county.

On or about the first day of January, 1895, the defendant, having agreed to sell the house and eleven lots to A. P. Paden

at and for the price and sum of $500, and to sell twenty acres of the one hundred and sixty acres to Alexander Paden for the sum of one hundred and fifty dollars, orally proposed to plaintiff to pay him $500 in part payment of his indebtedness to him, and to mortgage certain lands to secure the balance thereafter remaining due, if he (plaintiff) would release from the mortgages the property which was held by him as security for debts as before stated. Plaintiff verbally accepted this proposition, and caused the mortgage to secure the note for $150 to be satisfied on the record, and delivered the other to A. P. Paden in release of the property therein described, it not being recorded. The defendant thereupon conveyed the twenty acres to Alexander Paden, and the house and eleven lots to A. P. Paden, who caused the $500 which he agreed to pay for the property conveyed to him to be delivered to the plaintiff. This last-mentioned sum was appropriated, according to agreement, to the satisfaction of the note for $150, and of $28.54, which the defendant owed to the plaintiff on account, and the balance of $293.36, estimated to be thereafter remaining, was applied to the part payment of the note for $448.88, and was credited thereon as paid on the third of January, 1895. Plaintiff received no part of the money paid for the twenty acres sold to Alexander Paden. After entering into the agreement with plaintiff, and consummating the sales and conveyances to the Padens, and receiving the benefit of the performance by plaintiff of his part of the agreement, the defendant moved upon the land, which he proposed to mortgage to plaintiff to secure the unpaid balance of his indebtedness, and made it his place of residence, and occupied it as a homestead, and refused to mortgage it, as he had proposed and agreed to do. In addition to this property and his exemptions, he has not property in this state out of which the plaintiff can collect the amount he owes him by process of law.

Upon this state of facts the trial court decreed that the agreement to mortgage be enforced, and ordered that the lands which were to be encumbered thereby be sold to pay so much of said indebtedness as remains unpaid; and we think it did right. *Cole* v. *Cole*, 41 Md. 301; *Dean* v. *Anderson*, 34 N. J.

Eq. 496; *Irvine* v. *Armstrong*, 31 Minn. 216; *Hicks* v. *Turck*, 72 Mich. 311; *Stoddard* v. *Hart*, 23 N. Y. 556.

Decree affirmed.

McCOMBS v. WALL.

Opinion delivered April 8, 1899.

66 336
70 204

1. ADJACENT PROPRIETORS—AGREEMENT TO FIX BOUNDARIES.—Under an agreement between two adjacent proprietors to the effect that they would meet on a certain day, and run off the boundary line, and establish same between their respective lands, "each agreeing to abide by the line as established by the surveyor, and according to our deeds," neither party was bound by any line established by the surveyor not in accordance with their deeds. (Page 343.)

2. FORMER ADJUDICATION — CONCLUSIVENESS. — To render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear, by the record or by extrinsic evidence, that the particular matter sought to be concluded was raised and determined in the prior suit. (Page 343.)

Appeal from Ashley Circuit Court.

MARCUS L. HAWKINS, Judge.

Robt. E. Craig, for appellant.

The previous suit in chancery, involving the same matters as arise in this action, renders them *res adjudicatae* (2 Black, Judg. §§ 505, 549, 609), and not open to collateral attack. 1 Black, Judg. 193, 194. Limitation was suspended during the pendency of that case. 7 Am. St. Rep. 679. The court erred in refusing to instruct the jury that one employed to do all acts connected with a certain subject-matter was, as to such, a general agent. 13 Am. St. Rep. 204; Story, Ag. § 17; Laws. Cont. 169; 1 Am. & Eng. Enc. Law, 348. The court erred, also, in refusing to give instructions 4 and 6 asked by appellant. No greater formality is required in authorizing an agent to do an act than would be required for the master himself to do it. 1 Laws. Rights & Rem. 10 and 11; Laws. Cont. 169; 55 Am. Dec. 330; 17 Am. Dec. 53. Oral partition, followed

by possession, is not within the statutes of frauds. 27 Am. St. Rep. 870; 17 Am. St. Rep. 549; 39 *id.* 154 and note; 10 *id.* 745; 66 Am. Dec. 581.

J. G. Williamson, for appellee.

The seven-year statute of limitations gives such title as will support ejectment. 34 Ark. 534; 38 Ark. 181; 48 Ark. 312; 49 Ark. 266; 50 Ark. 68. Fencing and cultivation of part of what is so fenced was sufficient adverse possession of all. Angell, Lim. § 383, p. 387. Limitation ran in favor of appellee until she was made a party to the chancery suit. 17 Ark. 608; 64 Ark. 345; Angell, Lim. § 390; 47 Ark. 120; 62 Ark. 401. Prior to the act of February 16, 1893, a married woman's power of attorney was void or voidable. Sand. & H. Dig. § 4941; 15 Ark. 237; *ib.* 480; 24 Ark. 264; 30 Ark. 612; 36 Ark. 217. Until the act of March 19, 1895, a married woman was not bound by her executory contract. Acts 1895, p. 58; 30 Ark. 385; *ib.* 612; 44 Ark. 112; 53 Ark. 309. Her contracts must be for the *benefit* of her separate estate. 48 Ark. 220; 33 Ark. 265; 35 Ark. 365; 39 Ark. 238. The issues in the chancery suit were not the same as in this, and hence there is no estoppel. 2 Black, Judg. 609; 53 Ark. 307; 55 Ark. 286; 17 Ark. 203.

BATTLE, J. On the 13th day of November, 1895, Mrs. J. A Wall instituted an action against W. F. McCombs to recover possession of a certain part of the south half of the northeast quarter of section nine in township fourteen south, and in range four west. She stated in her complaint that Wiley J. Cammack, being seized and possessed of the land, bargained, sold and delivered it to J. E. Ketchens, on the 27th of November, 1873, and on the same day undertook to convey it to Ketchens by deed, but failed to describe it correctly; that Ketchens took possession of it on the same day, and held actual, adverse, continuous, peaceable, open, notorious, and uninterrupted possession thereof from that time until on or about the first day of July, 1879, when he departed this life, intestate, leaving her (the plaintiff) his only heir at law; that upon the death of Ketchens, her father, she took possession

of the land, and held actual, peaceable, uninterrupted, continuous, adverse, open, and notorious possession thereof until sometime in January, 1895, when the defendant unlawfully ousted her, and took possession of the same. The land is described in the deed executed by Cammack to Ketchens as follows: "A certain tract of land situated and lying in the county of Ashley, state of Arkansas, bounded and described as follows, to-wit: Lying on the southwest side of the public road known as the 'Hamburg and Grand Lake Road,' and northwest of lane, northern part of the northeast quarter of section nine (9), and corners in section ten, taking one and a half acres, more or less, in township seventeen, range four west, containing ninety acres, more or less."

The defendant answered, and averred that he was the owner of the land sued for and entitled to the possession of the same. He alleged that W. J. Cammack conveyed the land to him on the 30th of October, 1890; that the land was laid off and set apart to him by commissioners appointed by the Ashley circuit court; that he and his predecessors in the title had held open, continuous, adverse, notorious and peaceable possession of the same for more than twenty years; and that he and plaintiff, by her husband and agent, entered into a written agreement, on the 15th of November, 1894, to meet on said land in January, 1895, and cause the division lines between them to be "run off" and established by a competent surveyor, which they did, and agreed that the lines so established should be and remain the division lines between their lands, and they then and there, each with the consent of the other, took possession of their respective land up to the line so established, and have so held ever since.

The land in controversy was described in the deed executed by Cammack to McCombs as the "south part of the northeast quarter of section nine," in township seventeen south, and in range four west. Other lands were conveyed by the same deed, and all the real estate conveyed was described as containing three hundred and ten acres, and being the same lands which the Ashley circuit court ordered to be divided between Wiley J. Cammack and Rosamond Sherrer by decree rendered on the 21st day of April, 1888, in an action wherein A. W. Cammack and

Rosamond Sherrer were plaintiffs, and Wiley J. Cammack and others were defendants.

The agreement mentioned in the answer was as follows:

"Portland, Ark., November 15, 1894.

Know all persons that we, J. E. Wall and W. F. McCombs, have this day agreed to meet at Portland, Ark., between the 1st and 10th of January, 1895, and run off the lines and establish same between us in sections 9 and 10, township 17 south, range 4 west; each agreeing to abide by the line as established by the surveyor and according to our deeds.

[Signed] W. F. McCombs.
J. E. Wall."

After filing his answer, the defendant amended it, and alleged that, while the deed executed by Wiley J. Cammack to J. E. Ketchens purported to convey the land mentioned in the pleadings, the grantor therein had no title to convey; that a suit was instituted on the 21st day of December, 1881, by A. W. Cammack, and other heirs of Lewis Cammack, deceased, in the Ashley circuit court, against Wiley J. Cammack and others; that it was alleged in the complaint in that action that Wiley J. Cammack acquired and held the lands in controversy in this action, and other lands described, under conveyances executed to him, in trust for the heirs of Lewis Cammack, deceased; that Amy J. Ketchens was a daughter of Lewis Cammack; that Amy J. had died intestate, leaving Mrs. J. A. Wall, the plaintiff in this action, who was her daughter, her heir at law; that Mrs. Wall was an heir of Lewis Cammack, in right of her mother, and was a party to the action instituted by A. W. Cammack and others as before stated; that a decree was rendered in the latter action, by which it was adjudged that Wiley J. Cammack had no title to the land which he undertook to convey to J. E. Ketchens in 1873, but that Amy J. Ketchens was entitled to a distributive share in the estate of Lewis Cammack, deceased, and that Mrs. Wall, as her heir, was entitled to the same; that the court assigned to Mrs. Wall, by said decree, "that part of the northeast quarter of section nine in township seventeen south, and in range four west, lying southwest of the Hamburg and Grand Lake road (a portion thereof being in section ten south and east of said road) and northwest of the

lane, and one and a half acres in the southwest quarter of section ten, and containing ninety acres of land;" and that commissioners were appointed by said decree, who proceeded under the orders of the court and set apart to Wiley J. Cammack the south half of the northeast quarter of section nine, in township seventeen south, and in range four west, the land in controversy, which he, Wiley J. Cammack, afterwards conveyed to McCombs, the defendant in this cause.

Plaintiff, Mrs. Wall, recovered in this action 14.52 acres of the land in controversy.

Evidence was adduced in the trial of this cause tending to prove that plaintiff and her father, under whom she claims, held open, actual, continuous, and adverse possession of the land recovered for more than seven years before she was made a party to the action instituted by A. W. Cammack and others, or was dispossessed by the defendant, McCombs. The deeds under which each party, respectively, claimed were undisputed. Evidence was adduced by the defendant to show that J. E. Wall, the husband of the plaintiff, acted as general agent in the control and management of her lands and business, and that he entered into the written agreement with McCombs to establish lines, as alleged in the answer, and that they met at the time appointed, and a surveyor, acting under the agreement, established divisional lines, and McCombs took possession accordingly, and thereby dispossessed the plaintiff of the land recovered in this action. The defendant also introduced in evidence certified copies of the orders and decree in the action instituted in the Ashley circuit court, on the 21st day of December, 1881, by A. W. Cammack and others, but failed to introduce as evidence any part of the pleadings or depositions therein, or copies of the same. In this copy it appears that Alice Ketchens, so called in the decree, who is now Mrs. Wall, was made a party to that action some time in August, 1886, and that a decree was rendered therein, the material part of which is in the words and figures following:

"It appearing to the court that all of said defendants had been duly and in due time served with process herein, and all of said parties being represented before the court by counsel, the court, after hearing the pleadings and proof and the argu-

ment of counsel, doth find * * * that all the property in controversy in this action, except the east half of the northwest quarter of section ten, township seventeen south, range four west, was purchased with the money raised by hypothecating the said property; that the same was in equity the money of said deceased, Lewis Cammack, * * * and that the said Wiley J. Cammack has held the same as trustee since his father's death, May 8, 1868. * * * It is therefore ordered, considered and adjudged and decreed, * * * that the northwest quarter of section eleven, township seventeen south, range four west, vest in the said Mary J. Rucker, and in her heirs, in fee simple. And that the northern part of the northeast quarter of section nine, and a corner of section ten, taking one and one half acres in said township and range, and containing ninety acres, and all lying on the southwest side of the public road known as the 'Hamburg and Grand Lake Road,' and north and west of lane, vest in Alice Ketchens, and her heirs in fee simple. It appearing to the court that the said Alice is the sole heir of her said sister, Willie, who has departed this life since the commencement of this suit, and * * * that the remainder of said lands involved in this suit, which were of the estate of Lewis Cammack, to-wit, northeast quarter and west half of northwest quarter of section ten, less one and one-half acres deeded to Ketchens, and south part of the northeast quarter of section nine, township seventeen south, range four west, containing in all 310 acres, * * * be equally divided, share and share alike, between Wiley J. Cammack and Rosamond Sherrer."

No division of land was ordered to be made, except between Wiley J. Cammack and Rosamond Sherrer.

The defendant, W. F. McCombs, asked and the court refused to give the jury in this action the following instructions:

"First. In determining whether or not J. E. Wall was a general agent of plaintiff, and by her held out to the world as such, in regard to the management, control and disposition of her lands in sections 9 and 10, township 17 south, range 4 west, you may take into consideration the relation of the parties, all the acts, doings, renting, collecting, leasing, improving, trading, contracting to sell, and all other things known to the

public, done by him to and about said property for the plaintiff; and if you believe, from all these, he was her general agent to and about said property, then, as such, he would have the authority to make and execute the agreement of November 15, 1894, and plaintiff would be bound by it."

"Second. If you believe from the evidence that J. E. Wall entered into a written contract November 15, 1894, with W. F. McCombs to meet at Portland in January, 1895, and run off and establish the line, and abide by the line so established between the property of plaintiff and defendant, and further believe from the evidence that J. E. Wall and McCombs did meet as agreed, run off, establish, and agree on said line, as the division line between said properties, and each took possession up to said line, then the plaintiff is bound by the acts of said J. E. Wall, if he was her general agent to attend to said property and acting within the scope of authority which she held him out to the world to possess."

"Third. If the jury believe from the evidence in this case that the northeast quarter of section nine was involved in the suit between A. W. Cammack et al. *v.* W. J. Cammack et al., and in said suit it was decided that the land did not belong to W. J. Cammack, but that he held the same in trust for plaintiff's mother and others, then limitation was suspended from the time of the institution of said suit as to said land until the appeal to the supreme court in said cause was dismissed.

"Fourth. The court instructs the jury that where under a deed 80 or 90 or other numbers of acres are called for in the northern part of a section or quarter section, then the same will be laid off by running the line parallel with the northern boundary of said section or quarter section, and sufficiently far from the northern boundary to include the number of acres called for."

According to this statement of the evidence Mrs. Wall acquired title to the 14.52 acres recovered by her by seven years' adverse possession, and is entitled to hold the same, if she has not lost the right to do so by the agreement to establish boundary lines which was entered into by her husband and McCombs on the 15th day of November, 1894, or by the

decree rendered in the action instituted in the Ashley circuit court on the 21st day of December, 1881.

Did she lose it by virtue of the agreement between her husband and McCombs? This agreement was not to establish the boundary lines between the adjoining lands of Mrs. Wall and McCombs, but between the land acquired by Mrs. Wall and those acquired by McCombs through deeds, the language of the same being, "each agreeing to abide by the line as established by the surveyor and according to our deeds." If the 14.52 acres had not been described in any deed through which Mrs. Wall claims, and were included in the description of the lands conveyed to McCombs, the effect of the agreement, if enforced, would be to take the 14.52 acres from Mrs. Wall and convey it to McCombs, when in fact she had acquired title to it by adverse possession. Her husband had no authority to bind her by such an agreement. His general agency for her, which was established by circumstantial evidence, was insufficient to vest him with such power. On the other hand, if the 14.52 acres were included in the vague and indefinite description of land contained in the deed executed by Wiley J. Cammack to J. E. Ketchens on the 27th of November, 1873, the establishment or survey of the boundary lines would not be binding upon Mrs. Wall, because in that case they were run in mistake and ignorance or wilful disregard of the lands owned by her, and not according to her deed; and, if it was not included in the description of the lands in the deed under which Mrs. Wall or McCombs claims, neither of them would be entitled to it by virtue of anything that was done under the agreement to establish lines, because neither party promised to abide by any lines except those established according to their deeds. The boundaries of no land were to be ascertained by a survey, except those described in the deeds under which the parties claimed.

Was the plaintiff, Mrs. Wall, concluded as to the property in controversy in this action of the decree rendered in the suit instituted by A. W. Cammack and others? The rule decisive of this question and followed by this court in *Dawson* v. *Parham*, 55 Ark. 286, is stated by the supreme court of the United

States in *Russell* v. *Place*, 94 U. S. 608, as follows: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to give this operation to the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." It further said in the same case "to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,—that is, that the verdict in the suit could not been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

In *Shaver* v. *Sharp County*, 62 Ark. 78, it is said: "That which has not been tried cannot have been adjudicated. * * * That which is not within the scope of the issues presented cannot be concluded by the judgment."

The record in this case does not show what issues of law or fact were determined by the court in the suit instituted in the Ashley circuit court on the 21st of December, 1881. It does show that the court found that certain lands were held by Wiley J. Cammack in trust for the heirs of his deceased father, and decreed that one and a half acres in section ten, and "the northern part of the northeast quarter of section nine, and in township seventeen south, and in range four west, containing 90 acres, and lying on the southwest side of the public road,

known as the 'Hamburg and Grand Lake Road,' and north and west of a lane, vest in Alice Ketchens, now Mrs. Wall; and ordered that other lands, describing a part of them as the south part of the northeast quarter of section nine, in township seventeen south, and in range four west, be equally divided between Wiley J. Cammack and Rosamond Sherrer. There is no effort in the decree to define the boundaries of the land adjudged to plaintiff. One and a half acres were set apart to her in section ten. She is entitled, according to the decree, to eighty-eight and a half acres of land in addition. This lies on the southwest side of a public road, which runs through the north half of this quarter of a section, and northwest of a lane. How much of the north half of the quarter lies southwest of the road, and how much of the eighty-eight and a half acres lies in it, does not appear. It is evident that it could not be as much as eighty acres,—the whole of its contents. According to the evidence, and the landmarks with which it was described, it extended into the south half of the northwest quarter of section nine, and probably included that to which she had acquired title by adverse possession. There is nothing in the copy of the record in the suit instituted in the Ashley circuit court on file in this action, or extrinsic evidence, to show that Mrs. Wall's title or right to the 14.52 acres recovered in this action was necessarily or in fact tried, or determined, or involved, in the former suit, or that her possession of it was ever disturbed by anything that was done therein. She is not, therefore, concluded by the decree in the former suit, and can sue and contend for it (the 14.52 acres) in this action.

According to what we have said, the trial court committed no reversible error in refusing to give the instructions asked for by the defendant, and numbered first, second and third. The instruction copied in this opinion, and numbered fourth, was inapplicable. The only question submitted to the jury as to the title to the land in controversy was, has plaintiff acquired title to it by adverse possession? Had the instruction been given, it could have been of no assistance to the jury in deciding that question.

Judgment affirmed.

THOMPSON v. WILLARD.

Opinion delivered April 15, 1899.

JUSTICE OF THE PEACE — JURISDICTION — TORT.—Under constitution of 1874, art. 7, § 40, providing that justices of the peace shall have "concurrent jurisdiction in all matters of damages to personal property where the amount in controversy does not exceed the sum of one hundred dollars," a justice of the peace has no jurisdiction of an action for conversion of a horse in which the damage claimed is seventy-five dollars for the conversion and thirty dollars for the unlawful detention. (Page 347.)

Appeal from Hempstead Circuit Court.

RUFUS D. HEARN, Judge.

James H. McCallum, for appellant.

The justice of the peace had no jurisdiction, since the amount in controversy was over $100. Sand. & H. Dig. § 4317, note 2. For meaning of phrase "all matters of damage to personal property," as used in the statute, see 41 Ark. 478; 42 Ark. 210; 47 Ark. 59; 48 Ark. 293. The total amount claimed or involved is the test. 7 Ark. 258; 13 Ark. 40; 44 Ark. 100; 45 Ark. 346; 47 Ark. 59; 48 Ark. 293; 62 Ark. 209.

D. B. Sain, for appellee.

The $75 claimed as the value of the mare was the criterion of jurisdiction. 44 Ark. 100; 45 Ark. 346; 10 Ark. 326. The justice had jurisdiction of any amount up to the limit of value of property prescribed by the constitution, and for whatever damages are due plaintiff. Sand. & H. Dig. § 6350; 33 Ark. 816; 36 Ark. 651; 39 Ark. 246; 45 Ark. 295; 57 Ark. 527.

BATTLE, J. This action was instituted by Willard against Thompson, before a justice of the peace, to recover damages for the unlawful detention and conversion of a mare, the property of the plaintiff. After alleging in his complaint that the mare belonged to him, and was sold by Thompson without his con-

sent, and without any order of court or authority of law, he said, "I therefore ask judgment against the said Floyd Thompson for seventy-five dollars for the conversion of said mare, and the sum of thirty dollars for damages for the detention of said mare." Did the justice of the peace have jurisdiction of the subject-matter of this action?

The action is for a tort, the unlawful conversion of a mare. The amount of damage claimed is seventy-five dollars for the conversion, and thirty dollars for the unlawful detention, making one hundred and five dollars, the total amount demanded. Under the constitution of this state (art. 7, § 40), justices of the peace have concurrent jurisdiction with the circuit courts "in all matters of damage to personal property when the amount in controversy does not exceed the sum of one hundred dollars;" that is to say, "in all matters of damage resulting from the loss, conversion, or destruction of personal property, as well as from injury to it, when the amount in controversy does not exceed one hundred dollars." *St. L., I. M. & So. Ry. Co.* v. *Briggs*, 47 Ark. 59; *Same* v. *Heath*, 41 Ark. 476. The amount in controversy is the sum demanded. *Little Rock, Mississippi River & Texas Railway* v. *Manees*, 44 Ark. 100. The amount demanded in this case is one hundred and five dollars. Consequently, the justice of the peace had no jurisdiction. The fact that any part of the amount demanded cannot be recovered will not give the justice of the peace jurisdiction, because he is without jurisdiction to so determine. *Trammell* v. *Russellville*, 34 Ark. 105.

The justice of the peace having no jurisdiction, the circuit court acquired none by appeal.

The judgment of the circuit court is, therefore, reversed, and the action is dismissed.

KIZER v. TEXARKANA & FORT SMITH RAILWAY COMPANY.

Opinion delivered April 15, 1899.

INTERSTATE COMMERCE ACT—UNDUE PREFERENCE.—A contract by which a carrier undertakes to carry the lumber of a certain shipper to a point beyond the state at a stipulated rate, which is less than the lumber could be shipped over the carrier's line without loss to the carrier, and therefore less than the carrier will carry lumber for others under the same conditions, is void under the interstate commerce act making it unlawful for a carrier to give any undue or unreasonable preference or advantage to any particular person. (Page 354.)

Appeal from Little River Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

This is an action to recover from the railway company an amount which the appellant alleges was exacted of and paid by him for freights on lumber, which he shipped over appellant's road, in excess of the amount stipulated for by him in a contract made by him with the appellee, which contract is as follows, to-wit:

"State of Texas, Bowie county. This agreement, by and between W. L. Whitaker, as president, manager and owner of the Texarkana & Ft. Smith Railway Company of the first part, and A. J. Kizer, for himself and his associates, heirs, successors and assigns, of the second part, witnesseth:

"1. That the party of the second part, individually or associated with others, in partnership or incorporation as he may elect, agrees to construct and maintain a sawmill in Little River county, on the line of said railway, for the manufacture of pine, oak and other kinds of lumber at a point already selected by the party of the second part.

"2. That the party of the second part agrees, in consideration of the foregoing, and for and in behalf of said railway and said company, to furnish cars and ship all lumber manufactured by said mill for said party of the second part, for his

heirs, successors and assigns of said mill over all routes over which lumber is usually shipped from Texarkana, Texas, and Arkansas, at a rate not to exceed two cents per hundred pounds over the rates charged by the different railway companies from Texarkana.

"This contract to be in force until January 1st, eighteen hundred and ninety-seven (1897) A. D.

[Seal] "TEXARKANA & FT. SMITH RY. CO.
"By W. L. WHITAKER, President."

Exhibit B to the complaint is an itemized account showing an overcharge, commencing January 12, 1893, and ending December 27, 1894, on 346 cars of lumber, and the entire amount of these overcharges was $1,304.15. Summons was issued December 20, 1895.

To the foregoing complaint, an amendment was filed setting forth 146 similar overcharges that were made during the year 1895, and amounting to the sum of $566.23.

The defendant's answer denied that it executed the written contract, Exhibit "A" to the complaint, and alleged the same was not its act and deed. It denied that it overcharged the plaintiff upon his said shipments in the sum of 2 cents per hundred or in any amount, and averred that it never charged plaintiff anything except the usual, customary and reasonable rates. That, if said Whitaker ever executed said contract, it was without authority from defendant or its board of directors, and was *ultra vires* and an illegal act on the part of said Whitaker; that the rate mentioned in said contract was less than the established and reasonable regular rates charged by the defendant for similar services, and that the defendant's regular tariff rates were and are, in all respects, reasonable, and the rate mentioned in said contract was unreasonable, and would constitute an unlawful discrimination against the rest of the public; all of said traffic being interstate, and said contract is void and incapable of enforcement. This answer was verified by W. A. Williams, who stated therein that he was the general manager and authorized agent of the defendant, and that he believed the averments therein to be true.

To this answer, an amendment was filed which alleged that the defendant's line of railway between Rankin and Texarkana

is an interstate line of road, its portion north of Red River being in Little River county, Arkansas, and the portion south of Red River being in Bowie county, Texas, and all shipments from Rankin to Texarkana are interstate shipments. It denied that it demanded, or that plaintiff paid it, any amount by reason of the shipments mentioned in the original or amended complaint, except what was justly and legally due the defendant, etc.

The facts, as found by the court, sitting as a jury, are as follows, to-wit:

"The court finds that on the 10th day of September, 1891, the plaintiff and defendant entered into a contract in writing, whereby plaintiff agreed to construct and maintain a sawmill in Little River county, Arkansas, on the line of defendant's road at a point already selected by plaintiff, for the manufacture of pine, oak and other kinds of lumber, and the defendant agreed on its part to furnish cars and ship all lumber manufactured by said mill for plaintiff over all roads over which lumber is usually shipped from Texarkana, Texas and Arkansas, at a rate not to exceed 2 cents per hundred pounds over the rates charged by the different railroad companies from Texarkana, and that plaintiff has in all things complied with his part of said contract; but that defendant, from and after the 30th of November, 1892, has refused to ship such lumber for plaintiff at the contract price, but has charged plaintiff a greater rate for shipping said lumber than the rate provided by the contract, and that plaintiff was compelled to pay such higher rate, in order to get his lumber shipped. That the contract was executed on the part of the defendant by W. L. Whitaker, who was then the president and general manager of the defendant company, and as such had authority to make freight rates and to execute a contract fixing the rate for shipment of freight; that, at the time the contract was entered into, the defendant's road was not completed to Rankin, the point where plaintiff's mill was located, and that no freight rates had been established in Arkansas for the shipment of freight for that point. That defendant did establish the following rates November 15, 1892, to take effect November 30, 1892; not to exceed three cents per 100 pounds from any point on de-

fendant's road to Texarkana. When said instrument was signed by Whitaker, it was contemplated that plaintiff and Wm. Buchanan and B. T. Estes should be associated with him in the establishment of the sawmill mentioned in said instrument. Buchanan and Estes were directors of the defendant company, and Whitaker was its president and general manager at that time. The contract was written by Estes, who is the plaintiff's father-in-law. The defendant company then had its regularly constituted board of nine directors. There was no action of said board of directors authorizing or ratifying the execution of said contract made by Whitaker, shown by the minutes of the company. In September, 1891, the defendant's railroad extended from Texarkana northward through Bowie county, in the state of Texas, and across Red river past Ogden in Little River county, Arkansas,—a distance of about fifteen miles,—and, at the time of the execution of said contract by Whitaker, sawmills were located on the line of said railroad at Corbin, Texas, and Ogden, Arkansas, and other points. Plaintiff had selected and established the site for his sawmill at Rankin, about twenty-five miles north of Texarkana in 1890 before the contract sued on was executed. The defendant's road was in process of construction northward, and was completed to Rankin in December, 1891. As soon as the road reached Rankin, the plaintiff put in his sawmill there, and by agreement between himself and defendant became, and has ever since been, and still is, the defendant's regular local agent at said town of Rankin, and as such agent had and has control of defendant's local freight and passenger business at that point. When the contract sued on was signed by Whitaker, the defendant's regular tariff rate for transportation from Corbin to Texarkana, charged and collected from the mill owners at Corbin, was $10 per car of 30,000 pounds, and when the road reached the different mills the rates for shipments of lumber originating on said railroad at Corbin, Ogden, and other points were regulated, and so understood by the shippers to points on other railroads beyond Texarkana, in accordance with such traffic arrangements as might exist from time to time between the defendant and its connecting carriers at Texarkana. It was customary for the connecting roads leading out of Texarkana to allow the defendant

certain pro rates on all shipments of lumber originating on defendant's line, and the defendant gave the shippers on its said line the benefit of such pro rates, when said pro rates amounted to as much as four cents per hundred pounds. The defendant allowed the shippers on its line the same through rates as were enjoyed by the shippers from Texarkana. When such pro rates were less than four cents per hundred pounds, the defendant charged shippers on its line an arbitrary of an amount sufficient to make up said four cents. Lumber cannot be transported from Rankin or other points on defendant's line to Texarkana without loss to the railroad at a less rate than four cents per hundred pounds. In November, 1892, the defendant's connecting carriers at Texarkana all withdrew their pro rate arrangements with the defendant, and ceased to allow it any pro rates at all, whereupon the defendant, after fifteen days' previous notice, established and published at all stations along its line, a rate of three cents per hundred pounds on all shipments of lumber to Texarkana. The defendant's regular established rates varied from two and three to four cents per hundred during the time complained of by the plaintiff, in accordance with the pro rate allowed it by the connecting carriers, and the defendant has demanded of and collected from the plaintiff the same rates for transportation of his lumber as were contemporaneously charged other shippers and the public in general under the same circumstances and conditions, and no more.

"In December, 1891, W. A. Williams became general manager and the only authorized traffic agent of the defendant. In December, 1892, the defendant company was reorganized, and its properties and franchises and securities were purchased by the present management of the road, who had no notice or knowledge of the existence of the contract sued on. The defendant's tariff rates on shipments of lumber from points along its lines were regularly furnished to plaintiff, who knew, at the time he made each shipment complained about, the established rate which would be charged himself as well as the rest of the public. After plaintiff made his first shipment at the three-cent rate, which shipment was on January 12, 1893, from Rankin to La Junta, Colorado, and after said shipment had

been delivered to the consignees, the plaintiff wrote to Whitaker and to W. A. Williams, protesting against the rate, and calling attention to the contract which had been executed by Whitaker. This was the first that Williams or the management of the road knew of the existence of the contract, and Williams at once interviewed Kizer, and repudiated the contract as illegal, and notified Kizer that he would be charged the same rates as other shippers were charged, and that he must be governed by the regularly established rates of the defendant, as promulgated from time to time. After which the plaintiff made the shipments mentioned in his original and amended complaint, wherein he was charged by the defendant the sums mentioned in said complaints in excess of the rate specified in the contract sued upon. But the charges made in all cases were in accordance with the regularly established and adopted tariff rates of the defendant."

The plaintiff objected to the foregoing finding of facts, and, the objections being overruled, the exceptions were saved.

And thereupon the court declared the law as follows: "The court concludes that the contract sued upon in this case is void, and cannot be enforced; and, inasmuch as the plaintiff has paid no more than the other shippers under the same circumstances and conditions, such contract is unlawful and prohibited by the interstate commerce act, and is void."

To this declaration of law the plaintiff objected, and, his objections being overruled, he excepted.

Judgment being rendered for the defendant, the plaintiff filed his motion for a new trial in apt time, setting forth in said motion the following grounds:

"(1). Because the judgment is contrary to the evidence. (2). Because the judgment is contrary to the law. (3). Because the judgment is contrary to the law and evidence. (4). Because the court erred in its declaration of law. (5). Because the court erred in refusing to declare the law as asked by the plaintiff. (6). Because the court erred in its conclusions of law. (7). Because the court erred in its findings of fact."

This motion was by the court overruled, and exceptions

duly saved. The bill of exceptions was filed in proper time, and appeal has been taken to this court.

Scott & Jones, for appellant.

The contract sued on is not illegal, as being contrary to the interstate commerce law. 43 Fed. 37; 145 U. S. 263; 162 U. S. 297; 32 S. W. 427; 33 Atl. 239.

Wm. T. Hudgins, for appellee.

Appellant's contract gave him an illegal and unreasonable preference, and is therefore void. Interstate Com. Law, §§ 1, 2 and 3; 45 Am. & Eng. Ry. Cas. 234; 13 Am. Rep. 457; S. C. 18 *id.* 754; 43 Oh. St. 571; 23 Am. & Eng. Ry. Cas. 612; 27 *id.* 8; 67 Ill. 11; 1 Int. Com. Rep. 685; 2 *id.* 496; 3 Int. Com. Rep. 502; 1 *id.* 300; 2 *id.* 95.

HUGHES, J., (after stating the facts.) We are of the opinion that the facts in this case, as found by the court, as set out in the statement of facts, show that the contract upon which the appellant relies is within the prohibition of sections one and two and three of the interstate commerce law enacted by congress. The sections of this law invoked by appellee are as follows:

"Section 1. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

"Section 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. such common carrier shall be deemed guilty of un-

just discrimination, which is hereby prohibited and declared to be unlawful.

"Section 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Act of congress of February 4, 1887.

The shipments from Rankin to Texarkana for overcharges on which appellant brought this action were interstate commerce. The evidence tends to show, and the court found, that the appellant's lumber could not have been shipped from Rankin to Texarkana at a less rate than four cents per hundred pounds without loss to the railroad; that appellee charged the appellant the same rate as it charged other shippers under like circumstances and conditions, and no more, which varied from two and three to four cents per hundred in accordance with the pro rata allowed it by connecting carriers. This contract on which appellant relies proposed to allow appellant a special rate, in no event to exceed two cents per hundred pounds. This would give appellant an unreasonable preference and advantage over other shippers of lumber in the same county, of from one to two cents per hundred pounds. There was no other railroad through that county, and there were several mills shipping lumber over said road between Rankin and Texarkana. This contract appears to be plainly within the above-quoted provisions of the interstate commerce law. These provisions place "special rates, rebates, drawbacks and other devices" under the same prohibition, and make such unlawful in express terms. "It has been adjudged in many cases that when these circumstances arise, the contract which was entered into by the parties in this action is contrary to public policy, and cannot be enforced." *Bullard* v. *Northern Pacific R. Co.* 45 Am. & Eng. R. Cases, 544, and cases there cited. "An agreement by a railroad company to carry goods for certain persons at a cheaper rate than it will carry under the same conditions for

others is void as creating an illegal preference." *Messenger* v. *Pennsylvania Rd. Co.*, 36 N. J. L. (7 Vroom) 407; S. C. 13 Am. Reports, 457.

"In *Atkinson* v. *Ritchie*, 10 East, 530, Lord Ellenborough, C. J., said in the opinion "that no contract can be properly carried into effect which was originally made contrary to the provisions of the law, or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt." Professor Pomeroy writes: "An illegal contract is, as a rule, void, not merely voidable, and can be the basis of no judicial proceeding. No action can be maintained upon it, either at law or in equity." "The principles which have been stated are applicable to the act of congress to regulate commerce, and the contract which has been described." *Bullard* v. *Northern Pacific R. Co.*, 45 Am. & Eng. R. Cas. 245.

We think the contract relied on in this case is prohibited by the act of congress to regulate commerce, and is void.

The judgment is affirmed.

BUNN, C. J. I concur in the decision and opinion of the court for the reasons therein stated, and for the additional reason that the defendant railway company, which is the successor of the company formerly owning the road, and alleged to have been represented by Whitaker, had no notice of the existence of the special freight contract said to have been made with the lumber company by Whitaker, as agent of the predecessor company, and the same not constituting a lien on the property of the road.

WOOD and RIDDICK, JJ., dissent.

STEPHENS *v.* STEPHENS.

Opinion delivered April 15, 1899.

EVIDENCE—PURPOSE FOR WHICH MORTGAGE WAS EXECUTED.—Where, to rebut the defense of payment in a suit on a note, the plaintiff introduced in evidence a mortgage given to secure the note, which was executed at

the same time the payment was alleged to have been made, it was competent for the defense to prove that the mortgage was given, not for the purpose of securing the note, but for the fraudulent purpose of covering up property. (Page 358.)

Appeal from Jackson Circuit Court.

RICHARD H. POWELL, Judge.

J. M. Bell, *Jos. W. Phillips* and *S. D. Campbell*, for appellant.

It was error to allow appellee to introduce the trust deed as evidence. 61 Ark. 119. The court erred in its instructions to the jury. 57 Ark. 520; 24 Ark. 251.

W. S. Brown and *J. W. Butler*, for appellee.

The trust deed was competent as evidence, and the instruction touching it was correct

WOOD, J. Appellee sued M. M. Stuckey, as administrator of the estate of G. K. Stephens, deceased, on the following promissory note:

"$5,000. Newport, Arkansas, January 6, 1891. One day after date, for value received, I, we, or either of us, promise to pay to the order of T. S. Stephens five thousand dollars, at the Jackson County Savings Bank, Newport, Arkansas, with interest at the rate of eight per cent. per annum until paid. The makers and indorsers of this note hereby severally waive presentment of payment, notice of non-payment and protest. [Signed] G. K. Stephens." Indorsed: "T. S. Stephens." "Credit by rent November 1, 1895, $260." "Credit by rent November 1, 1896, $60.26."

The complaint averred the presentment of the claim above, verified, to such administrator for allowance, and the disallowance of said claim. M. M. Stuckey, administrator, answered that his intestate during his lifetime, together with intestate's wife, on July 8, 1895, had conveyed, by their warranty deed, certain lands to Mary Emma Stephens, wife of plaintiff, which deed was delivered to plaintiff, and by him received in full accord and satisfaction of said note, and exhibited a copy of said deed with his answer. M. M. Stuckey resigned his administration. Isaac W. Stephens, appellant herein, was duly appointed,

and he qualified as administrator in succession, and upon his appearance this cause proceeded to trial before a jury on the issue made by the pleadings. Verdict and judgment for appellee, and this appeal duly prosecuted.

It is contended that the verdict was contrary to the evidence. The evidence on behalf of appellant tended to show that on July 8, 1895, a deed was executed by G. K. Stephens to Mary Emma Stephens, wife of T. S. Stephens, conveying to her, in consideration of the $5,000 note held by T. S. Stephens, certain lands; that said deed was thus made at the request of T. S. Stephens, and in satisfaction of the note of George K. Stephens. There was evidence on behalf of the appellee which tended to show that the note in suit had not been paid or satisfied. The verdict of the jury therefore would be conclusive of the controverted question of fact. It is also contended that the court erred in allowing the record of a certain mortgage or deed of trust to be read as evidence. It was shown that a mortgage or deed of trust was written at the same sitting and by the same person who wrote the deed which it was alleged was made in satisfaction of the note sued on. This mortgage or deed of trust purported to convey certain lands mentioned to secure the note in suit. The witness who testified to the above was proceeding to testify that there was no real consideration in fact for the mortgage or deed of trust, but that it was given for the real purpose of placing the lands of Geo. K. Stephens where they could not be reached by a suit against him as surety on the bond of one Hobgood. Appellee objected to this testimony as tending to show "that Geo. K. Stephens was engaged in a fraudulent transaction, which he could not claim in this proceeding," and the court sustained the objection. Appellee, over the objection of appellant, was allowed to read the record of this deed of trust to the jury. The court, also over appellant's objection, gave the following instruction: "The jury is instructed that if they find the deed of trust of date July 8, 1895, was executed for the purpose of hindering and delaying creditors, only creditors could uncover the property and set aside the conveyance. As between the parties, if they so find, the conveyance cannot be disturbed, and is binding."

This was not a suit to foreclose the deed of trust. But,

upon the theory that the deed of trust was given in good faith to secure the note of $5,000, appellee would have the right to read it in evidence, whether he were seeking foreclosure or not, for the purpose merely of showing that it had not been satisfied. This would be an evidentiary fact, tending to show that the note had not been paid. But, on the other hand, if the mortgage was not given to secure the note, but only for the purpose of covering up the property of G. K. Stephens, then the fact of the mortgage being unsatisfied would not tend to prove that the $5,000 note was still unpaid, and the court should have permitted the testimony of appellant tending to show that the purpose of the deed of trust was only to cover up the property of G. K. Stephens. Exception, however, was not taken by the appellant to the ruling of the court excluding the testimony offered to this end. But he did except to the giving of the instruction of the court, which practically raised the same question. For the instruction was in keeping with the view the court seems to have entertained in excluding the testimony of appellant tending to show that the purpose of the deed of trust was simply to cover up the land of G. K. Stephens. The court, in other words, by excluding this evidence and by giving the instruction, in effect said to the jury that the deed of trust was good for the purpose of showing that the note of $5,000 had not been paid, which would be true only in case the deed of trust was given in good faith to secure the note of $5,000; but if it was given merely as a fraudulent scheme to cover property, then it would be no evidence whatever in this proceeding that the note of $5,000 had not been paid, as alleged in the answer and shown by the evidence on the part of the appellant.

For the error of the court in giving the instruction *supra*, the judgment is reversed, and the cause is remanded for new trial.

BAUGH v. PRAIRIE COUNTY.

Opinion delivered April 15, 1899.

STATUTE OF LIMITATION—CLAIM FOR OFFICERS' FEES.—A claim against a county for fees due an officer is a liability not in writing, within § 4822 of Sand. & H. Dig., and barred after the lapse of three years. (Page 360.)

Appeal from Prairie Circuit Court.

JAS. S. THOMAS, Judge.

W. L. Baugh, pro se.

Appellant's claim is founded on statute, and is not within the meaning of section 4822 of Sand. & H. Dig. Wood, Lim. § 19, p. 41.

PER CURIAM. The appellant, W. L. Baugh, was, in 1892, treasurer of Prairie county, and claims that the county is due him the sum of $9.06 for commissions on moneys collected and turned over by him in that year. The county pleaded the statute of limitations of three years, which was sustained by both the county and circuit courts. It is admitted that over three years had elapsed between the time the right of action accrued and the bringing of this action, and we are of opinion that the ruling of the circuit court was correct. Although the statute defines the amount of fees and commissions to which appellant was entitled for such services, still, after the performance of the service, the amount due him from the county was only an ordinary debt. It was a liability not in writing, within the meaning of the statute, and barred after the lapse of three years.

Judgment affirmed.

BROWN v. TOLER.

Opinion delivered April 15, 1899.

1. SCHOOL LAND—SALE—WHEN PAYMENT IMMEDIATE.—Under Sand, & H. Dig. § 7119, providing that if any bidder at a sale of sixteenth section land "shall fail to perfect his bid by paying the cash, the collector shall immediately resell the land," a finding that payment was made immediately after the sale will be supported by proof that the highest bidder, with the collector's consent, went off and procured the money, and, within an hour after the land was struck off to him, paid it to the collector before he had finished preparing the certificate of sale. (Page 362.)

2. SAME—WHO MAY OBJECT TO SALE.—One who is not an inhabitant of the township or county in which sixteenth section school lands are situated cannot object to the regularity of a sale of such lands. (Page 363.)

Appeal from Grant Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

The appellee, E. B. Toler, sheriff and collector of Grant county, sold at public sale a portion of the sixteenth section or school land in said county. The only bidders at the sale were appellant, Brown, and one Gates, who bid for the Haywood Lumber Company. The lands were struck off and sold to Gates, as agent for such company, for the sum of $1,780, that being the highest bid offered. Gates did not pay for the land so soon as it was struck off to him, but while the collector was preparing the certificate of purchase he went off and procured the money, and in about one hour returned, and paid it to the collector before the collector had finished preparing such certificate. During Gates' absence Brown tendered the amount of his first bid $840 to the collector, and insisted that he be declared the purchaser, but the collector refused to accept it. When the collector reported the sale to the county court, Brown appeared, was made a party to the proceedings, filed objections and exceptions to the report, and asked that he be declared the purchaser, and that the collector be required to deliver him certif-

icates of purchase for the land. His exceptions were overruled, and he appealed to the circuit court. He did not amend his exceptions in any way, but introduced evidence, and endeavored to show to the circuit court that there had been no petition filed for the sale of the land, and that the collector had no authority to sell. The circuit court gave judgment against him, and he appealed.

Wood & Henderson, for appellant.

There was no lawful petition for the sale of school lands, because: (1) Said petition was signed by a majority only of the "voters" of the township, whereas the statute says it shall be signed by "a majority of the male inhabitants," which would include minors. Webst. Dict. "Inhabitants;" 132 Mass. 89, S. C. 42 Am. St. Rep. 424; 103 U. S. 694; 36 Ark. 178; 40 Ark. 290; 56 Ark. 110. (2) Said petition was presented to the "sheriff," and not to the "collector." 37 Ark. 381; 33 Ark. 396; 31 Ark. 571, 574. Since appellee did not pay cash on his bid, it should have been set aside, and the land re-sold. Sand. & H. Dig. § 7119.

Hill & Auten, for appellee.

Appellant had no interest in this proceeding of the court, and cannot urge any objection thereto. 22 Ark. 191; 44 *ib.* 225; 8 Am. St. Rep. 544; 40 La. Ann. 474. The burden is on him who attacks an official act. 1 Jones, Ev. §§ 38–40; 116 Cal. 56; 92 Am. Dec. 526; 64 *ib.* 680; 85 *ib.* 428. The petition, signed by a majority of the adult male inhabitants, was sufficient.

RIDDICK, J., (after stating the facts.) The petition and exceptions filed by Brown in the county court raised the question whether he was entitled to be declared the purchaser of the lands, instead of Gates. His exception to the report on this point was based on the fact that Gates did not at once pay for the land so soon as it was struck off to him, but was allowed by the collector about an hour to procure the money, and make the payment. We see nothing in this exception. It is true that the statute provides that sale shall be made for cash, and that if any bidder fails to perfect his bid by paying the cash.

the collector shall immediately resell. Sand. & H. Dig. § 7119. But whether the payment was made "immediately" was a question of fact to be determined by the circuit court in connection with the circumstances in proof. The facts in this case are not such that we can say that the court erred in finding that the payment was made immediately, within the meaning of the statute. Within an hour after the sale, and before the collector had finished preparing his certificate of purchase, the purchaser paid the money. The meaning of the statute is that the payment shall be made promptly and without delay, and we think the court was justified in holding that it was so made in this case. *Queen* v. *Justices of Berkshire*, 4 Q. B. Div. 469.

While Brown did not amend his petition and exceptions filed in the county court, he undertook on the trial in the circuit court to raise a question as to the authority of the collector to make the sale. His exceptions not only do not raise such question, but he neither alleged nor proved that he was an inhabitant of the township or county in which the lands were situated. So far as the record discloses, he had no interest in these lands, and no right to object to the sale by the collector.

We are therefore of opinion that the judgment of the court was right, and should be affirmed. It is so ordered.

FORD v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY.

66 363
76 522

Opinion delivered April 15, 1899.

RAILROAD—STOCK-KILLING—NEGLIGENCE.—In an action against a railroad company for killing a cow, it was proved that the engineer was keeping a careful lookout, and that the animal came on the track from behind a box car too close to the engine for him to check the train. There was evidence that at the time of the killing the train was running through a populous town at a high and unusual rate of speed, and that it had approached within eighty rods of a street crossing without having given either of the statutory signals. *Held*, that it was error to direct a verdict for the defendant. (Page 366.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

STATEMENT BY THE COURT.

The plaintiff, M. H. Ford, was the owner of a cow, which was struck and killed by an engine and train of the defendant company. The injury occurred within the corporate limits of Marianna, a town of from 1,500 to 1,800 inhabitants. The cow was killed near the depot of the company, about 500 feet south of the public crossing on Tennessee street, and about 600 feet north of the crossing on Louisiana street. Trice's gin is on the side of the railroad just north of the crossing on Louisiana street, and south of the depot. One of the witnesses described the track through that portion of the town as follows: "The track is perfectly straight from Trice's gin north clear through the town. There is a curve just south of Louisiana street. There are a lot of houses and sheds and other obstructions along the east side of the track from Trice's gin up to within a short distance of the depot, and on the west side there is a long line of lumber piles near the track. From the depot north, nearly to the edge of the town, the fences and houses are built out near the railroad track, many of them within ten or fifteen feet of the track." On the question of the speed of the train at the the time the cow was struck, the engineer testified that at the time of the accident he was in charge of the pay train, and that it was running through the town at the rate of eighteen or twenty miles an hour. The train had no regular schedule time, but when it came into Marianna on that day had lost a little time, and he was trying to make it up. "We usually," he said, "run slow through towns. I don't believe I ever did run through town as fast as we run that train that day. We had only the engine, tender and two coaches, with air brakes. With that train and air brakes I could stop the train running at the rate of thirty miles an hour in about 150 feet, and at the rate of ten miles an hour in seventy-five or 100 feet, and at five miles an hour in about forty feet." He also said that he was keeping a lookout, and saw the cow when she came from behind a box car and upon the track, about thirty-four feet ahead of the engine, too close to avoid striking her.

The agent of the company testified that the train was run-

ning faster than he "ever saw a train go through town before." It was, he said, "running so fast that it threw the cow up so high I thought it would be thrown over on the depot platform, and I ran back from it, and I knew that the train whizzed by me faster than I ever saw a train run by that depot."

The man employed by defendant as porter at its depot testified on this point as follows: "The train was running very fast when it struck the cow and passed the depot. I can't say how many miles an hour it was running, but it just went by 'whew!' and I could hardly see anything but dust. It was running faster, I think, than the regular speed of the passenger trains on this road. I did not hear either the whistle or bell. I heard her blow at the crossing below the gin, but not after that."

Another witness said: "I heard the engine blow up at the crossing beyond the gin, and I started across the track at the Tennessee street crossing with my wagon, thinking I had plenty of time to cross, and the train came so fast that it like to have caught me. It was running very fast; faster than I ever saw a train run before. Neither the bell was ringing nor the whistle blowing. Neither were sounded after the blow at the crossing south of the gin. I was right on the side of the track when it passed, and could have heard it had it blown or whistled."

There was other evidence to the same effect that the usual speed of passenger trains on that road was from twenty-eight to thirty miles an hour, and that this train was running faster than the ordinary speed of the passenger trains. After the evidence was all in, the circuit judge directed a verdict for defendant, and gave judgment accordingly.

McCulloch & McCulloch, for appellant.

The mere fact that, after the animal came into view from the train, its killing could not be avoided does not overcome the presumption of negligence; for it was shown that those in charge of the train were negligent both in failing to sound proper signals and in running at the rate of speed too high for safety in a town; and the jury should have been left to say whether either of these caused the injury. 53 Ark. 201; 63 Ark. 177; 60 Ark. 409; 64 *id.* 535; 6 Am. & Eng. Enc. Pl. &

Pr. 686. The court erred in directing a verdict for appellee. *id.* 684–6.

RIDDICK, J., (after stating the facts.) The only question in this case is, whether the evidence at the trial was legally sufficient to support a verdict in favor of the plaintiff. In order to test that question, we must accept as true that view of the facts the most favorable to plaintiff which the evidence warrants. It is admitted that the cow was killed by defendant's train, and this, under the statute, makes out a *prima facie* case against the defendant. To rebut this, the engineer testified that he was keeping a careful lookout, and that the cow came upon the track from behind a box car, and too close to the engine for him to check the train and avoid striking her. As this testimony was not contradicted, we take it to be true; but although he kept a proper lookout, he may have been guilty of negligence in other respects.

There was evidence tending to show that, as the train came into the town from the south, it gave the signal for Louisiana street crossing, and then, running at a high rate of speed, exceeding thirty miles an hour, passed through the town, and over Tennessee crossing, without giving any further signal of any kind, meantime in its passage through the town striking and killing two cows, one of them the property of the plaintiff.

Public convenience and necessity of course require that railroad trains should run at a high rate of speed, and the mere fact that a train was running fast at the time of striking an animal is no proof of negligence on the part of the company, when unconnected with other facts tending to show that it was negligence under the circumstances to run at such speed; for trains are expected to run fast. But when the accident happens in a city or populous town, the circumstances then may be such that the jury would be justified in finding the company guilty of negligence in running its train at a great and unusual rate of speed, and this is certainly true when the statutory signals are not sounded for the different street crossings. *St. Louis, I. M. & S. Ry. Co.* v. *Hendricks*, 53 Ark. 201; 3 Elliott, Railroads, § 1160.

We think therefore that the evidence in this case would support a finding that the company was negligent, and the next

question is, would it authorize a finding that such negligence was the cause of the injury? The evidence tended to show that, at the time of the accident, the train was approaching, and within eighty rods of, the crossing on Tennessee street, but gave no signal of its approach. This court said, in a similar case, that, under such circumstances, it was a question for the jury to say whether the failure to give the statutory signals contributed to the injury. *St. L., I. M. & S. Ry Co.* v. *Hendricks*, 53 Ark. 201.

In addition to this, if we assume that the jury were justified in finding, and would have found, that, under the circumstances, the company was guilty of negligence in running its train at a high rate of speed, it would be for them to determine whether such speed was the proximate cause of the injury. The cow was close to the engine when first discovered,—too close for the engineer to avoid the collison with the train running at the rate of thirty miles an hour; but what would have been the effect of a lower rate of speed we are unable to say. Although the train could not have been stopped before reaching the point at which the cow came on the track, we are not able to say that a lower rate of speed would not have permitted the cow to cross the track before being struck by the train. This question was one peculiarly within the province of the jury to determine.

On the whole case, we are of the opinion that the circuit judge erred in directing a verdict. The judgment is therefore reversed, and a new trial ordered.

FARNSWORTH v. HOOVER.

Opinion delivered April 15, 1899.

66 367
f69 124

66 367
81 115

1. HOMESTEAD—MORTGAGE—NON-JOINDER BY WIFE.—A mortgage on land executed to secure money advanced to the mortgagor to pay for the land is valid although the mortgagor's wife failed to join in its execution, being within the exception in Sand. & H. Dig. § 3713, providing that "no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity, except for * * * the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same." (Page 373.)

2. MORTGAGE—FORECLOSURE.—Where each of the notes secured by a mortgage provided that "on failure to pay interest thirty days after due the holder may collect principal and interest at once," it was not necessary for the mortgage also to contain a condition making the whole debt due upon failure to pay any installment of interest, in order to justify foreclosure for the entire debt in case of such failure. (Page 374.)

3. ELECTION—LACHES.—Delay of nine months by a mortgagee in making his election to declare the mortgage due after default in the payment of interest is not unreasonable. (Page 375.)

4. JUDICIAL SALES—PLACE.—Sand. & H. Dig. §§ 3095, 3096, fixing the place of sale of real property upon execution or by virtue of a judgment or order of sale, refer to sales made by the sheriff of real property upon execution issued by the clerk, not to sales made by the court through its commissioner, as in case of mortgage foreclosures. (Page 375.)

5. SAME—NOTICE.—The fact that a commissioner's sale of real property was made upon a notice of nineteen days only, instead of twenty, is an irregularity which is cured by a confirmation of the sale. (Page 376.)

Appeal from Benton Circuit Court.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

This is a suit in equity by appellees to foreclose a mortgage executed by appellant in favor of appellees. On August 23, 1890, one Daily and wife owned the land in controversy, and executed a mortgage thereon to secure a note given by them to the Lombard Investment Co. for a $500 loan. This note was due in five years, and up to maturity bore interest at six per cent. per annum; after maturity or default in any of the conditions of the note or mortgage, at ten per cent. per annum.

On November 12, 1892, Daily and wife sold the land to one Donaldson for $1,800, "subject to the $500 mortgage in favor of the Lombard Investment Co." That amount was deducted from the purchase price, and Donaldson assumed the Lombard mortgage. On December 21, 1892, Donaldson executed a mortgage on the property to Hoover Bros. for $726, subject to the Lombard mortgage.

In April, 1893, A. Farnsworth (appellant herein) purchased the land from Donaldson for $2,000, paying $800 in cash; executing his note to Donaldson, due September 1, 1895

bearing interest at ten per cent, and agreeing to make payments by which Donaldson could meet the interest coupons on the Lombard note. Donaldson gave Farnsworth a bond for title, it being understood that Donaldson should pay off the mortgage as Farnsworth made his payments, and, when the note was paid, make him a clear title. In the summer of 1894, Donaldson, learning that Farnsworth would be unable to pay his note at maturity, and not feeling able to give him further time, assisted Farnsworth in negotiating a contract with Hoover & Bro. (appellees), to which Donaldson and Farnsworth were both parties. By this contract Hoover & Bro. undertook to buy up the Lombard mortgage. Donaldson and wife were to execute a warranty deed to Farnsworth, surrender his $1,200 note, and take up the bond for title; and Farnsworth was to execute anew his notes to Hoover & Bro. for the aggregate amount of the Donaldson and Lombard mortgages running from two to five years, bearing interest at ten per cent. Farnsworth and wife were to execute a new mortgage to secure these notes, and the old ones were to be surrendered and satisfied. Hoover & Bro. bought the Lombard mortgage for $553. In December, 1894, the matter was closed up, a man by the name of Nance being employed by Hoover & Bro. to make the necessary calculations and draw up the papers.

The aggregate amount was obtained by adding to the amount due on the Donaldson note to Hoover & Bro. the amount paid by Hoover for the Lombard mortgage, with six per cent. interest thereon from date of payment. This aggregate amount was $1,289.30. On December 6, 1894, Farnsworth gave four notes, with interest coupons attached—one for $389.30, due December 31, 1896, and three for $300 each, due December 31, 1897, 1898 and 1899, respectively, and each bearing ten per cent. interest per annum from date until paid, payable annually according to interest coupons attached.

Every coupon was for the exact amount of one year's interest at ten per cent., except the first, which was for $42.60, instead of $38.93. Each note provided that unpaid interest should bear interest at ten per cent. per annum, and that, on failure to pay interest within thirty days after due, the holder

might collect principal and interest at once. At the time these notes were executed, pursuant to the contracts, Donaldson and wife conveyed the land to Farnsworth, and surrendered his notes. Farnsworth and wife then executed the mortgage in suit to secure said notes. Mrs. Farnsworth did not join her husband in the granting clause of this mortgage, nor did she release her homestead in the body of the mortgage, nor did she acknowledge the execution of same, and in the acknowledgment release and relinquish her homestead rights in this land. At the time she and her husband executed the mortgage, they resided on said land as their homestead. The power of sale in the mortgage required the sale to be made at Siloam Springs, Benton county, Arkansas.

When the first interest coupons became due, Farnsworth failed to pay them, and, after some correspondence, suit was brought. Before the institution of suit, Farnsworth was notified by appellees that they elected to declare the whole debt due. This suit was filed in equity by appellees September 11, 1896, to foreclose the mortgage, asking judgment for the full amount of the notes.

Appellants answered, setting up usury, that the mortgage was void under the homestead act, that no foreclosure could be had until all the debts were due, and that the mortgage was a cloud on their title.

Appellees filed an amendment to complaint, denying usury and setting out the facts beginning with the ownership of Daily and extending to the execution of the mortgage. They also alleged that the notes and mortgage were for purchase money, and therefore they ask to be subrogated to the right of the original lien holders, in the event their mortgage be held invalid.

Appellants answered, setting up usury in the Lombard loan, denying the other allegations, and claiming that the final transaction was a new loan from Hoover & Bro. to Farnsworth.

The court found that the mortgage from Farnsworth and wife was invalid; that there was an excess of interest in the first coupon, which was the result of some error in calculation; that there was no intention to charge or to pay more than lawful interest; that the Lombard note and mortgage were valid

and free from usury; that the amount thereof was deducted from the purchase money when Donaldson bought the land from Daily, and that Donaldson verbally agreed to pay the same, that appellees purchased the Lombard debt at request of Farnsworth; that the notes sued on were the aggregate amount of the Donaldson note to Hoover & Bro., and the amount paid by Hoover & Bro. for the Lombard debt; that the same amount was due on these latter notes as on the notes sued on, $1,590.13; that the consideration for the execution of the warranty deed by Donaldson to Farnsworth, and the surrender of the purchase-money note of $1,200 to Farnsworth, and the attempted cancellation of the Donaldson and Lombard mortgages, was the execution of the notes and mortgages sued on, and that appellants intended to execute a valid mortgage, and appellees supposed they were receiving a valid mortgage; that Farnsworth had in fact paid only $800 of the purchase money for the land; that the prior valid liens were not discharged by the execution of the invalid mortgage; and that appellees were entitled to a foreclosure of such liens, and to judgment for their debt.

Judgment was given against A. Farnsworth for $1,590.13 and costs of suit, and a lien was declared and fixed upon the land, and a commissioner appointed to sell the same, in default of payment in twenty days. The sale was ordered to be made at the front door of the postoffice in Siloam Springs, on a credit of three months, upon notice as in execution sales of real estate.

The appellants excepted to the findings, orders and decree of the court, and prayed an appeal.

On October 4, 1897, the commissioner filed his report, showing appraisal of lands at $2,000 and sale to appellees for $1,690. Appellant excepted to the confirmation of report, on the ground that the full twenty days' notice of sale had not been given, and that the sale was not at the court house door. These exceptions were overruled, and the sale confirmed. Appellants appealed from this.

E. P. Watson, for appellants.

The notes sued on are usurious. Pingrey, Mort. §§ 792,

793; 108 Ill. 633. Appellant is not estopped to plead usury in the Lombard mortgage. 55 Ark. 318; 53 Ark. 345. In the absence of authority in the mortgage, on a partial default foreclosure for the whole amount was error. 8 Am. & Eng. Enc. Law, 192. The reservation of the right in the notes was not sufficient. 58 Cal. 6; 8 Blackf. 465; 1 Bibb, 149; 1 Paige, 450. Notice of an election must be given within a reasonable time. 8 Am. & Eng. Enc. Law, 192, 193, and note 1. A wife must join her husband, to convey the homestead. Thomp. Hom. §§ 170–172; Jones, Mort. §§ 947–949; 15 Wis. 666; 72 Ill. 562. The sale was invalid because not made at the place prescribed by the statute. Sand. & H. Dig. § 3096; Ro rer, Jud. Sales, § 103; 23 Ark. 39. Further, because the required length of notice was not given. Sand. & H. Dig. § 3095; 33 Ark. 621; 34 Ark. 85

L. H. McGill, for appellees.

The note and mortgage are to be construed together, and the authority in the notes to declare the whole debt due on any default is sufficient. Jones, Mortg. §§ '70–76, 349–354, 1179. A mere error in calculating interest does not constitute usury. 63 Ark. 225; 62 Ark. 370; 27 Am. & Eng. Enc. Law, 970–1. Interest may be deducted in advance for a year. 60 Ark. 288; 27 Am. & Eng. Enc. Law, 991; 31 Ill. 490; 40 Oh. St. 248; S. C. 48 Am. Rep. 68; 46 Am. St. Rep. 171. Appellant cannot plead usury in the Lombard mortgage. 27 Am. & Eng. Enc. Law, 952; 47 N. J. Eq. 396; 46 S. W. 92; *ib.* 370; 2 Jones, Mort. §§ 1494–5; 20 Am. Rep. 756; 32 Ark. 346; 61 Ark. 329; 27 Am. & Eng. Enc. Law, 956; 42 Ark. 600. When the execution of the deed to the land and the mortgage for the purchase money are simultaneous, homestead rights do not avail against the mortgage. Thomps. Hom. §§ 330, 348; 1 Freeman, Ex. 249*f*; 9 Am. & Eng. Enc. Law, 471; Sand. &. H. Dig. § 3713. In sales under foreclosure, etc., the court is not restricted by the statute prescribing the time, place and notice of sales. Sand. & H. Dig. §§ 5856–9. The requirement as to selling at the court house door is directory. 34 Ark. 399; 38 Ark. 571; 51 Ark. 84.

WOOD, J., (after stating the facts.) We deem it unnecessary to set out in detail, and to discuss at length, the evidence upon which the court below based its findings. We are of the opinion that the findings of fact embraced in the court's decree are supported by the evidence. We are safe in saying that they are not clearly against the weight of evidence. Therefore the court's findings of fact will be sustained. Did the court err in its rulings upon any of the questions of law?

1. The court found that the mortgage from Farnsworth and wife was invalid. Sand. & H. Dig. § 3713, provides: "No conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity, except for taxes, laborer's and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument, and acknowledges the same." The contract between Donaldson, Farnsworth and Hoover & Bro., by which Donaldson and wife were to execute a warranty deed to Farnsworth, and Farnsworth was to execute his notes to Hoover & Bro. for the aggregate amount of the Donaldson and Lombard mortgages held by Hoover & Bro., as set forth in the statement of facts, however circuitous the method, was tantamount to an advancement by Hoover & Bro. to Farnsworth of the purchase money to the amount of these mortgages. For, according to the agreement, it was only by paying off these mortgages that Farnsworth was to get his warranty deed from Donaldson to the land. The execution of the mortgage from Farnsworth to W. G. Hoover & Bro. to secure the amount of these mortgages, simultaneously with the execution of the deed from Donaldson to Farnsworth, was, in reality, nothing more nor less, in effect, than a mortgage to secure the purchase money. It was, in legal effect, the same as if Hoover & Bro. had taken the deed to themselves from Donaldson, and then conveyed the land to Farnsworth, and taken a mortgage back to secure the amount of the Donaldson and Lombard mortgages, which represented the purchase price Farnsworth was to pay for the land. "A homestead exemption," says Mr. Jones, "cannot be set up against a mortgage to secure money borrowed with which to pay the purchase price, when such mortgage is executed simultaneously with the deed of purchase." 1 Jones, Mort. § 468.

The mortgage in controversy comes within the exception, "purchase money," named in the statute. The court therefore erred in declaring it invalid because Mrs. Farnsworth had not executed and acknowledged it in the manner required by the statute in other cases. This error, however, was not prejudicial, for the court granted appellees the same relief that it should have granted by enforcing the Farnsworth mortgage.

This court will not reverse except for prejudicial errors, and, although there was no cross-appeal by appellee on the ruling of the court holding the mortgage invalid, the appeal from its ruling enforcing the Lombard and Donaldson mortgages raises the question here as to what decree the court should have rendered; and, in that view, it is proper to pass on the validity of the Farnsworth mortgage.

2. Was the suit to foreclose for the entire mortgage debt premature? Each of the notes for the principal contained this condition: "On failure to pay interest thirty days after due, the holder may collect principal and interest at once." The mortgage contained the following: "This sale on condition that, whereas I am justly indebted unto the said W. G. Hoover & Bro. in the sum of twelve hundred eighty-nine and 80-100 dollars, evidenced by one promissory note of three hundred eighty-nine and 30-100 dollars, due December 31, 1896, and drawing interest at the rate of ten per cent. per annum from December 31, 1894, as shown by coupons attached; also three promissory notes of three hundred dollars each, due December 31, 1897, and December 31, 1898, and December 31, 1899, respectively, and drawing interest at the rate of ten per cent. per annum from December 31, 1894, as shown by coupons attached and all of even date herewith. * * * Now, if I shall pay said moneys *at the time and in the manner aforesaid,* then the above conveyance shall be null and void," etc. The mortgage sufficiently identifies the notes, evidencing the debt which it was given to secure. The mortgage being only a security or incident to the debt, it was not necessary for it also to contain a condition making the whole debt due upon failure to pay any installment of interest, in order to justify foreclosure for the entire debt. It was sufficient that the notes contained such a provision. The notes and mortgage were executed at

same time, and in relation to the same subject, as parts of one transaction constituting one contract. 1 Jones, Mort. §§ 71, 76, 349, 354; *Fletcher* v. *Daugherty*, 13 Neb. 224.

In the cases cited to support the opposite view, neither the note nor mortgage contained such a provision as that in the notes sued on herein. In the absence of such a clause in either the note or mortgage, there would, to be sure, be no authority to declare the whole debt due.

We do not find any waiver of the right to declare the principal due. An indulgence for a period of nine months, especially while the parties were conferring about the matter, certainly would not be an unreasonable length of time to wait before declaring an election to foreclose for the entire amount of the mortgage debt.

3. Was the sale illegal? It is insisted that it should have been made at the court house door, and upon twenty days' notice, according to the requirements of sections 3095 and 3096 of Sand. & H. Dig. Those sections are as follows: "Sec. 3095. The time and place of sale of real property upon execution, or by virtue of a judgment or order of sale, must be advertised for at least twenty days next before the day of sale, by posting printed advertisements at the court house door and five other public places in the county in which the sale is to be made, one of which is to be upon the premises to be sold," etc. "Sec. 3096. The sale of real estate shall be made at the court house door, uuless, at the request of the defendant who owns the land, the officer shall appoint the sale upon the premises."

These sections refer to sales made by the officer of real estate upon execution issued by the clerk on a judgment or order of sale, and where the time, place and notice to be given are not fixed specifically by the judgment. The latter section shows clearly that this statute is not intended to apply to sales made by the court through its own special agent or commissioner for that purpose, as in case of mortgage foreclosures; for, if the court's order in a decree of foreclosure directed the sale made at a certain place, the officer would have no right to change it at the request or behest of the defendant, as is contemplated by section 3096, *supra*. Sand. & H. Dig. §§ 5856–5860, concerning mortgage foreclosures and sales thereunder,

nowhere prescribe the time, place and notice to be given in such sales. These are left entirely in the discretion of the court, which must be presumed to arrange for the most advantageous sale possible. See *Sessions* v. *Peay*, 23 Ark. 39.

The report of the commissioner who made the sale shows that it was made at the place designated by the decree of the court. The chancellor found that the only irregularity in the sale was that the notice of sale had been posted on the premises to be sold nineteen days before the day of sale. The decree required that the notice should be posted twenty days. The court further found "that the failure on the part of the commissioner to post the notices twenty days before the sale was not intentional;" that the defendants had actual knowledge that such notice was posted upon the premises, and made no objection to the sale until the filing of the exceptions; that no evidence has been submitted to show that any injury resulted to defendants by reason of such irregularities." If posting on the premises the full twenty days according to the order of the court was an imperious requirement of the law, no proof or finding that no injury resulted would cure the irregularity. But such is not the case. The sale being made under the court's supervision, it was within its sound discretion to confirm or reject according to the justice of the case. And, as the irregularity of posting under all the circumstances might well be considered *de minimis*, the court did right to confirm the sale.

Finding no prejudicial errors, the decree of Benton chancery court is affirmed, and the cause is remanded, with directions for such other and further proceedings by such court as may be necessary to enforce them.

BRANDON v. YEAKLE.

Opinion delivered April 22, 1899.

WILL—CONSTRUCTION—CREDITS.—A testator bequeathed to his mother-in-law and to his mother each a half interest in "any stock, notes, bonds or other credits" of which he might die seized, and devised to his mother-in-law all the remainder of his personal effects not enumerated in the will. After execution of the will, the testator purchased a half interest in an insurance agency, paying for the same with the proceeds of the sale of stock held by him at the time the will was made, which interest he owned at his death. *Held*, that his interest as partner in the insurance business was included in the term "credits." (Page 380.)

Appeal from Pulaski Chancery Court.

THOMAS B. MARTIN, Chancellor.

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

For definition of "credit," see Century Dict.; Webst. Dict. There can be no *credit* where there is no *debt*. Drake, Att. § 544; 135 Ill. 67; 3 Mass. 288. Stock in a corporation is not a *credit*. 10 Beav. 47; 8 Eng. Cas. 438; 30 La. Ann. 1380; 5 Ala. 539; 53 Kas. 452-3; 4 Wood, 46. Nor is the interest of a partner in a partnership a *credit*. 4 Bates, Partnership, § 256; 12 Pet. 232; 54 Ark. 397; 26 Ark. 138. Good will is part of the assets of an insurance partnership. 9 Neb. 261; 1 Har. 253; 27 Beav. 53; 22 Beav. 84. The term "credit" is to be construed in the light of associated words. 4 Cush. 313; 1 Bl. Comm. 60; 95 U. S. 708; 3 Sumn. 386. Whether property is a *credit* or *personal effect* is determined by its condition at the time of the testator's death. 51 Ark. 70. The term "personal effects," in the residuary clause, is general, and entitles appellant to the property in controversy. 6 Am. & Eng. Enc. Law, 174; 2 Jar. Wills, chap. 23.

S. R. Allen and *E. W. Kimball*, for appellees.

A "*credit*" is "*anything due to a person.*" Vol. 1, Universal Dict. 1343, "credit," 5; 112 N. Carolina, 38; 8 Am. &

Eng. Enc. Law (2 Ed.), 231. The surviving partner holds the good will in trust, just as any other asset, for the benefit of the whole partnership estate. 9 Neb. 261; 1 Har. 253; 17 Am. & Eng. Enc. Law, 1159; 48 Ark. 557; 54 Ark. 397; 26 Ark. 138; 1 Bates, Part. § 256. For construction of word "effects," see 14 How. 400; 15 Vesey, 319.

BUNN, C. J. This is an appeal from a decree of the Pulaski chancery court construing the last will and testament of the late Robt. V. Yeakle, of the city of Little Rock.

Only two of the clauses of said will are directly involved—the third and the ninth clauses. The third clause reads as follows: "I give, devise and bequeath to my beloved mother-in-law, Mrs. Theresa E. Brandon, one-half ($\frac{1}{2}$) of any balance of money I may have in any bank, together with one-half ($\frac{1}{2}$) of any stock, notes, bonds or other credits, of which I may die seized, such stocks, notes, bonds or other credits to be sold as soon after my death, by my executor hereinafter named, as practicable, and to the best advantage, and one-half ($\frac{1}{2}$) of the proceeds thereof to be paid to my beloved mother-in-law, Mrs. Theresa E. Brandon, the other half ($\frac{1}{2}$) of all balance of money, proceeds of stock, notes, bonds or other credits to be paid, by my executor hereinafter named, to my beloved mother, Mrs. Virginia R. Yeakle, now of Baltimore, Maryland." The ninth clause is as follows: "I give, devise and bequeath to my beloved mother-in-law, Mrs. Theresa E. Brandon, any and all of the remainder of my personal effects of whatever nature not enumerated herein, to do with or dispose of as she may deem right, proper and best, without let, hinderance or control of any person whomsoever."

The will was made on the 4th day of September, 1886, and sometime in January, 1891, the testator bought a half interest in an insurance agency business in the City of Little Rock, paying therefor the sum of $2,150, apparently partly in cash and partly on credit, completing the payment in November, 1891; and it appears that the money thus paid was the proceeds of the sales of certain stocks in the Ladies' Building & Loan Association of Little Rock, as follows; On January 12, 1891, 80 shares to a party not named for $1,733.48; on

August 6, 1891, to W. Pollock, 60 shares, $750; on November 9, 1891, 40 shares to the association $816, aggregating the sum of $3,299.48,—a sum sufficient to cover the purchase price and interest on deferred payments of same,—clearly indicating that the said interest in the insurance agency business was paid for out of the proceeds of said stocks, a species of property named in said third clause of the will; and therein disposed of, had the same remained until the testator's death. But if the same was paid for in money on hand, money was also named in said third clause, and disposed of therein, and, had the testator died without investing the same in the insurance business or other species of property, would have been disposed of clearly under said third clause.

But this interest in the insurance business is not specifically named or referred to anywhere in the will, and it therefore follows that this transaction amounted to a change in the character of this much of his property between the time of making of his will and his death, which occurred on January 27, 1892, in the city of Little Rock.

The appellant contends that this interest in the insurance business amounts to little more than an interest in the "good will" of the business, there being but a small amount of property belonging to the same, consisting of a safe, desk and other like furnishings of an office for such a business; and that, as such property, it is not included in any of the clauses of property named in the said third clause of the will, but that it is really and in fact included in the general designation of the "remainder of my personal effects of whatsoever nature" given in the said ninth clause of the will; and this defines the issue in this cause, the appellee contending that this "good will" or insurance business is included in the word "credits" named in the third clause.

The business was sold by the surviving partner for the sum of $6,005.70, and one half, or $3,002.85, paid over by her to the executor of the will, as the share of the deceased in the business. If this insurance business is included in the designations of property mentioned in the third clause, then the amount so received by the executor belongs equally to the appellant and the appellee. But if this business is included in

the designation of property named in the ninth clause, the appellant gets the whole amount so received by the executor.

It is contended by the appellant that the word "credits" is but the correllative of "debts," and means nothing more than a balance of book accounts in favor of the credit side, or sometimes it means the trust given or received from one to another, and the like, and that since a "good will" of a business is not either of these, then it is not included in the third clause. It is contended by the appellee, on the other hand, that the word "credits," as employed in the will, is the equivalent of assets, and that therefore the insurance business is included in the descriptive words of that clause.

This kind of discussion is altogether unsatisfying in its very nature. It is philological in the highest degree, and necessarily theoretical, and does not always readily convince, when applied to the practical affairs of life. It necessarily leaves out of consideration the fact that the average man is not always accurate in his use of words, that provincialism and local association have much to do in giving meaning to words, and, above all, in this particular case, that the testator, in investing his money or proceeds of stock in this insurance business, in all probability never dreamed that he was thereby working a change in the testamentary disposition of his property; and that, had such a thing occurred to him at the time, he would have made the necessary change in the language of the will to make the disposition of the new acquisition conform to the first intention. And in this connection it is well to call attention to the fact that there is not a particle of evidence, not a circumstance, going to show that the testator had undergone a change of sentiment towards these relatives from first to last, nor of the fact that their relative conditions had changed at all, so as to make proper a different disposition of his property, relatively to them, from that he had first made.

This is not an instance where the testator has made a codicil to his will, whereby it is claimed on the one hand, and denied on the other, that he has made a change in the disposition of his property, or any portion thereof. If that were the case, we might well give the benefit of the doubt, to say the least, to the side asserting that he intended a change in the

disposition of his property from what he first intended. Otherwise, why make it a codicil at all? But the change in disposal of the property, if change there was, in this instance, was brought about by a change in the character of the property itself. And now we are called upon to say whether or not he intended (and his intention is what we are striving for) any change, and, if he did, how did he expect the change to affect his disposition of his property?

Of course, the will must be construed with reference to the property referred to therein as it stood, not when made, but at the death of the testator, and so we are at last left to say what disposition did the will make of the insurance business and the proceeds thereof.

It is useless to speculate as to what the average man means by the use of the word "credits" as descriptive of a class of property. If he means nothing more than a balance between debits and credits, in which the latter are the larger, then it is probable he would have said so in so many words. If that is not what was meant, there is no other meaning of the word, according to the argument of the appellant's counsel, which can be called a definition of property at all, for surely such expressions as trust and confidence convey no idea of property. It is probable therefore that the testator used the word "credits" in the sense of assets,—something belonging to him, but of an intangible nature.

Again, in order to maintain her position, appellant must show, not only that the insurance business is not included in the description and classification of property in the third clause, but that it is in fact included in the ninth clause; otherwise the testator would have died intestate as to this portion of his property,—a construction not favored by the law,—and in which event, moreover, the mother would take as a lawful heir, rather than the mother-in-law.

But can it be said that this insurance business comes within the classification of the ninth clause, which is thus expressed: "Any and all of the remainder of my personal effects of whatever nature?" "Personal effects," without qualifying words, generally include such tangible property as is worn or carried about the person, but for the most part, as used in

wills, the phrase derives its meaning from descriptions of articles and classifications immediately preceding. Thus in the present case in the eighth clause the testator gave his books to his youngest brother; in the seventh clause he released certain secured claims to his mother, for the benefit of herself and his brothers and sisters; in the sixth clause he gave his gold watch to his brother Thomas; in the fifth clause he gave certain articles of jewelry and personal ornaments to his sister, Elizabeth J. Yeakle; in the fourth clause he gave his real estate in Arkansas to his oldest brother, Mahlon M., in trust for himself and the other brothers and sisters. These claims, in the order, were immediately followed by the ninth, in which the testator seems to have attempted to include whatever of personal effects he had inadvertently left out in the clause preceding, and express them under the term "remainder." For the meaning of "personal effects," see *Lippincott's Estate*, 173 Pa. St. 368.

It thus appears that it could be more easily shown that this insurance business falls under the classification in the third clause than under that of the ninth clause.

A majority of us cannot find anything in the chancellor's findings that we can object to, under the circumstances.

The decree is therefore affirmed.

BATTLE, J., dissented.

---

66 382
74 595
74 596
75 593

WHITE SEWING MACHINE COMPANY *v.* WOOSTER.

Opinion delivered April 22, 1899.

1. HOMESTEAD—ESTATE OF CURTESY.—The possessory interest of a tenant by the curtesy, consummate, is sufficient to support a claim of homestead. (Page 385.)

2. SAME—CONVEYANCE.—A surviving husband, having a right of homestead in an estate by the curtesy, may convey such estate to his children without interference by his creditors. (Page 385.)

3. CLOUD ON TITLE—EXECUTION SALE—HOMESTEAD—A sale of a homestead under execution by the creditors of the homesteader creates a

cloud upon the title of the latter, and of his assigns, which equity will remove. (Page 385.)

4. HOMESTEAD—WHEN NOT LOST.—A husband who, as head of the family, has acquired a right of homestead in his wife's land during her lifetime, and has continued to occupy it as such, does not lose his right to claim it as exempt by reason of the disintegration of the family on the death of the wife and the separation or coming of age of the children. (Page 386.)

5. SAME—ABANDONMENT—LEASE.—A lease of the homestead for a short term will not constitute an abandonment. (Page 386.)

Appeal from Franklin Chancery Court.

THOMAS B. MARTIN, Chancellor.

John G. B. Simms, for appellant.

A husband has no right of homestead in the lands of his wife. Const. (1874), art. 9, §§ 3–6. No homestead is allowed to a person after ceasing to be the head of a family. Freeman, Ex. § 240. Occupancy is essential to the claim. 29 Ark. 401; 31 *ib.* 466; 42 *ib.* 175; 51 *ib.* 87. A *home* is necessary to a homestead exemption. Freeman, Ex. § 241. A mere aggregation of individuals is not a *family*. 42 Ark. 539.

Sam Frauenthal, for appellees.

A tenant by curtesy can claim homestead. Thomps. Hom. & Ex. § 174; 79 Ill. 456; 54 Ark. 9; 56 Ark. 621. The husband did not cease to be the head of the family because of the death of his wife and the coming of age of his children. 43 Ark. 439; 48 Ark. 540. There was no abandonment of the homestead. 56 Ark. 621. Homestead laws are liberally construed. 38 Ark. 112. The requirement as to occupancy is less strict as to estates acquired by inheritance than by purchase. Waples, Hom. & Ex. 204–5; 78 Ky. 398.

BUNN, C. J. This is a bill in the Faulkner chancery court by the appellees against the appellant company to remove a cloud upon plaintiff's title to lots Nos. 11, 12, 23 and 24 in block 26 of Robinson's plan of the town of Conway, Faulkner county, Arkansas. Decree for plaintiffs, and the defendant appealed to this court.

Narcissa Wooster departed this life on the 25th of October, 1896, leaving surviving her her husband, J. P. Wooster, Sr., and her and his children, J. P. Wooster, Jr., aged 27 or 28 years; Mrs. Mary Ellen Gellenwater, aged 25 years; and Mrs.

Annie L. Tate, aged 22 years,—and seized of the lots above named. For many years she had been afflicted with rheumatism, and had, in company with her husband, made three several visits to Hot Springs in this state, seeking relief from the waters of that place, making a considerable stay on each visit, the first of which was before they settled upon the lots in controversy and occupied them and the buildings thereon as their homestead, which was in 1888. On the last visit, it became apparent that their stay would be indefinitely prolonged, and they leased their homestead to one Hardin for one year, beginning the 7th of August, 1896, and expiring the 7th of August, 1897. From their entrance upon the premises, the wife and husband continued to claim the same as their homestead, neither of them having any other homestead, and never were absent from the same, except as stated, and therefore never abandoned the same, nor did any act amounting to an abandonment. The wife, the owner of the fee in the homestead, died in October, 1896, and their said children were all then of age, and said lease had not then expired; and the husband and father, then the tenant by the curtesy and otherwise entitled to the possession, was thus prevented from resuming the possession, and was in fact still further delayed in taking possession by the extreme illness of the lessee, Hardin, after the expiration of the lease.

Soon after the death of Mrs. Wooster, the defendant company, having previously obtained a judgment against J. P. Wooster, Sr., caused execution to be issued and levied upon his life estate in the land in controversy, and on the 2d of January, 1897, the same was sold thereunder to the defendant company, and the sheriff gave to it his certificate of sale and purchase, and this certificate constitutes the alleged cloud upon plaintiff's title.

The plaintiffs are the owners of the fee by inheritance from their mother, the said Narcissa, and two of them of the possessory right of their father by purchase from him as evidenced by deed dated December, 1896, about two months after the death of the mother, but after the levy of the execution of defendant, as stated above. The consideration of the deed from the father to the two children, as testified by him, was $400,

which he owed them, the amount stated in the deed, and the further consideration that he was to be permitted to share the use and occupation of the home with them.

The father and husband sought in every proper way to assert his homestead claim against the execution of defendant, but all his efforts to obtain a supersedeas against it were of no avail, and he seems to have given up the contest in despair.

The husband, during the life time of his wife, had but an inchoate right in the property, subject to be defeated by the survival of the wife, and to become consummate, in case of her death before his. He had, however, independent of this, a joint homestead right with his wife (she assenting, as appears to have been the case), growing out of his marital relations with her, as against the rest of the world. *Orr* v. *Shraft*, 22 Mich. 260; *Buck* v. *Lee*, 36 Ark. 525.

After her death, he, being the tenant by the curtesy, owned a life estate in the property, and had possession through his tenant, Hardin, and was entitled to claim his interest as exempt from execution as his homestead, since almost any possessory interest will support a homestead claim. *Rockafellow* v. *Peay*, 40 Ark. 69; *Sims* v. *Thompson*, 39 Ark. 301; *Ward* v. *Mayfield*, 41 Ark. 94; *Robson* v. *Hough*, 56 Ark. 621; *Thompson* v. *King*, 54 Ark. 9. It is held in *Thompson* v. *King*, *supra*, that the tenancy by the curtesy must yield to the right of homestead in the minor children, but in this case, where the life tenancy attached on the death of the wife, there were no minor children to claim in opposition to the tenant by the curtesy.

The husband continued, in every proper way, to assert his homestead right from the time he and his wife and family began to occupy it as such in 1888, jointly with her until her death, and afterwards until sold to his children, and even after that, doubtless to preserve his reservation testified to by him. If this property constituted his homestead from the beginning, he being then a citizen of the state, a married man and the head of a family, and he continued to assert his claim to it as a homestead on all proper occasions and in every proper way, as he appears to have done, and had never abandoned it, as appears to be the case, until the sale to his children as aforesaid, he had

a right to claim it as exempt from the payment of his debts, and therefore to convey to his children, without let or hinderance from his creditors. In such case, moreover, there was nothing left in him upon which the execution could be levied, and the sale carried nothing with it. But the sale under the execution was in so far voidable only as to create a cloud upon the title of plaintiff.

In *Stanley* v. *Snyder*, 43 Ark. 429, this court said: "The constitution, which contains our homestead law, 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."

Now in the case at bar, J. P. Wooster, Sr., was the former head of the family,—that is the head of the family before the wife died, and the children had reached their majority and separated from the family, if, in fact, there was ever any such separation. He was also in possession at the death of his wife, through their tenant, Hardin, whose lease had not then expired, and he still had title sufficient to support a homestead claim, and the doctrine of Stanley *v.* Snyder, *supra*,—once a homestead always a homestead, as long as occupied and claimed as such—we think, applied to him; and it follows that his children, purchasing from him, took free from the claims of their father's creditors, and were entitled to the relief asked.

The decree is affirmed.

WOOD, J., dissenting.

SIDWAY v. HARRIS.

Opinion delivered April 22, 1899.

1. USURY—WHAT DOES NOT CONSTITUTE.—A loan is not rendered usurious by reason of the fact that the borrower paid the fee of an attorney for passing upon the abstract of title and other papers presented to the lender as a basis upon which to effect a loan, and also paid a commission to his own broker for procuring the loan. (Page 389.)

2. FOREIGN CORPORATION—VALIDITY OF ACTS DONE BEFORE ACT OF 1887.—The act of April 4, 1887, regulating foreign corporations doing business in the state, which provides [§ 3] that "any foreign corporation that has heretofore engaged in business or made contracts in this state may, within ninety days from the passage of this act, file such certificate [of appointment of an agent] with the secretary of state, and thereon all their contracts made before this act goes into effect are hereby declared as valid as if said certificates had been filed before they began business in this state," did not have the effect to invalidate such existing contracts of foreign corporations which had complied with all laws in force at the time the contracts were entered into, but neglected to comply with the act of 1887. (Page 390.)

3. SAME—EVIDENCE.—Proof that a certificate of appointment of an agent of a foreign corporation did not comply with the act of April 4, 1887, does not show non-compliance therewith, as it is not shown that another and valid appointment was not made. (Page 393.)

Appeal from Baxter Circuit Court in Chancery.

JOHN B. MCCALEB, Judge.

L. B. Sidway and the American Mortgage Company of Scotland (Limited) brought suit against John W Harris and wife to foreclose a deed of trust executed by him to Sidway as trustee for the company. The facts are stated in the opinion.

DeRoos Bailey, for appellants.

The burden of proving usury is on him who alleges it. 109 N. Y. 477; 57 Ark. 256. When an agent receives a *bonus*, which, added to the interest exacted by the lender, exceeds ten per cent. per annum, but without the knowledge of the lender and without circumstances from which such knowledge could reasonably be presumed, the lender is not guilty of exacting

usury. 51 Ark. 544; 54 Ark. 155; *ib.* 50; 57 Ark. 251; 63 Ark. 249; 116 U. S. 98; 57 Ark. 357; 38 N. Y. 281. Authority to exact usury is never presumed. 116 U. S. 561. Authority to employ sub-agents is not implied. 54 Ark. 566.

Horton & South, for appellee.

A foreign corporation cannot do business in Arkansas until it files the required certificate, *signed by its president.* Sand. & H. Dig. §§ 1323, 1324; Const. Ark. art. 12, §11; 104 U. S. 11; 113 U. S. 727; 27 Am. & Eng. Enc. Law, 378, note 2; 23 Ark. *ib.* 298, 299; 8 *ib.* 330–340. If the principal suffers the agent to loan money in his own name, without disclosing his agency, the agent will be treated as principal as to all consequences of his acts. Mechem, Ag. § 745; 54 Ark. 566; 3 Neb. 256; 11 *ib.* 487; 53 Ia. 627. The transaction was usurious. 47 Ark. 287; 55 *ib.* 268, 143; 51 Ark. 143; 54 Ark. 573, 40; 64 *ib.* 47, 48.

BUNN, C. J. This is a suit to foreclose a deed of trust given on land to secure a note for $850, both dated January 9, 1887, bearing interest at the rate of eight and a half per centum per annum, payable annually on the 1st day of January of each year, and the principal due January 1, 1894. The interest, up to the maturity of the principal note, was evidenced by coupon notes, each for $72.25, and payable at the end of each year, as stated. The whole after the maturity of the principal to bear ten per cent. per annum interest until paid. On default of the payment of any one of them, the whole debt might be treated as due at the option of the holder, and all expenses, such as taxes and sums laid out by the parties interested in the preservation of the property, were to be added to the mortgage debt, and also an attorney's fee of ten per cent. in case of suit. The notes, on their face, were made payable in Chicago; but the defendants, in their answer, insist strenuously that this is an Arkansas contract, and the plaintiffs seem to have conceded the point, and the cause was heard and determined according to the laws of Arkansas. One of the defenses set up in the answer is the plea of usury; and if this case is governed by the laws of Arkansas, and if the plea of usury is established by the evidence, the defendant asks that the contract may be declared to be null and void, and the note and deed of trust be

cancelled and held for naught. If, on the other hand, the case is governed by the laws of Illinois, and the plea of usury be sustained, he asked that all interest be forfeited, and that he have his recoupment or setoff for such of the interest as he has paid.

On the objection of the defendant, in his answer, to the application of the laws of Illinois, notwithstanding the note is made payable in Chicago, the case was tried and decree rendered as if the case was governed by the laws of Arkansas, and we cannot do otherwise than so treat it now. The interest expressed in the face of the note is eight and one-half per centum per annum, and the maximum rate in this state is ten per centum per annum. It follows, therefore, that, upon the face of the contract, it is not usurious. But it is contended that the extraneous proof shows that the contract was in fact usurious; for, while the amount of money loaned to the defendant, ostensibly, was $850, yet, in truth and in fact, only $786.25 were loaned to him. The annual interest on the $850 would be $72.25 at the rate of 8½ per cent. and this is the amount called for by each of the interest coupons; while the annual interest on $786.25, the amount claimed to have been actually received on the loan by the defendant, at the rate of ten per cent.—the highest legal rate in this state—would be $78.62, which is greater than the annual rate sought to be collected. The plea of usury is to the effect that the plaintiff would receive more than ten per centum per annum by his usurious contract, but, taking the statement of the defendant to be true that he only borrowed $786.25, instead of the $850, the calculation still does not show usury.

Again, the difference between the amount called for by the note and that claimed in fact to have been loaned to the defendant is $63.75, and this amount is shown by the evidence to be made up of the $25 paid an attorney in Chicago for passing upon the abstract of title and other papers presented by the defendant as a basis upon which to effect the loan, and is put down among the expenses he agreed to bear, and $38.75 which the duly-authorized agents of the defendant in Arkansas appear to have taken out of the fund received by them for him as their fee and expenses paid by them. Under the rulings of this

court, these transactions do not evidence usury in the contract. So, looking at it from every standpoint, we see no usury in this case according to the laws of this state.

There is another question raised by the answer, namely, that the plaintiff corporation—the real lender of the money, as is claimed by it—had not *by its president* appointed, in writing filed in the office of secretary of state, an agent, and designated his place of business, upon whom service of process might be had in order to bind said corporation.

When the contract sued on herein was made, to-wit, the 9th of January, 1887, the act of April 4, 1887, upon which this plea was presumably made, had not been passed and become a law. This record shows that on the 31st of January, 1883, the corporation, over the signatures of two of its directors and its secretary, attested by its corporate seal, had appointed (in writing, and caused the same to be filed in the office of the secretary of state) John M. Rose, Esquire, as its agent, designating his residence in the city of Little Rock, upon whom such service might be had, and, when had, that it should be binding upon it. At that time there was only the constitutional provision and prior statutes carried over by the constitution on the subject in force, and the appointment so made by the plaintiff corporation will, of course, be seen to be a full compliance with that provision, and, strange to say, was in substantial compliance with the act of April 4, 1887, passed more than four years afterwards. except that the certificates was made by two directors and the secretary, instead of the president, as the later act requires.

The constitutional provision and the compliance therewith may be regarded as constituting an implied contract between the state and this foreign corporation to govern all business transactions had until there should be a change in the law, which change, of course, the state had a right to make at any time to regulate future business. Whether it could make such change in the laws so as to operate retroactively is another question.

The said act of April 4, 1887, (see Acts of 1887, pp. 234, 235) reads as follows, to-wit:

Section 1. "Before any corporation shall begin to carry on business in this state, it shall, by its certificate under the hand of the president and seal of such company, filed in the

office of the secretary of state, designate an agent, who shall be a citizen of this state, upon whom service [of] summons and other process may be made. Such certificate shall also state the principal place of business of such corporations in this state. Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the courts of this state."

Sec. 2. "If any such foreign corporation shall fail to comply with the provisions of the foregoing section, all its contracts with citizens of this state shall be void as to the corporation, and no court of this state shall enforce the same in favor of the corporation."

These two sections plainly refer to corporations contemplating engaging in business in this state—business to be transacted after the passage of the act—and section 3 has reference to corporations which have already been carrying on business in the state, and reads as follows:

Section 3. "Any foreign corporation that has heretofore engaged in business or made contracts in this state may, within ninety days from the passage of this act, file such certificate with the secretary of state, and thereon all their contracts made before this act goes into effect are hereby declared as valid as if said certificate had been filed before they began business in this state."

Section 7. "This act shall take effect and be in force from and after its passage. Approved April 4, 1887." Whatever became of sections four, five and six does not appear, as they were not included in the published acts.

The third section seeks to validate whatever the corporation had done before the passage of the act, provided it would comply with the act within ninety days from and after its passage. That presupposes, of course, that the prior acts and doings of the corporation were invalid for some reason—perhaps because it had not complied with the pre-existing laws, which made such compliance a prerequisite to its carrying on of any business in this state. But we have seen that this foreign corporation had, previous to the passage of the act of April 4, 1897, been carrying on business in strict compliance with the then existing laws, and that the subject of this litigation con-

stitutes a business which it was fully authorized to transact at the time, and had transacted. To say that, because the plaintiff corporation did not strictly comply with the act of April 4, 1887, within the ninety days named in the third section of that act, all its business lawfully transacted before the passage of the act was consequently invalidated and rendered null and void, would be to say that the state could and did in that instance in a sense impair the obligation of its implied contract with foreign corporations in granting them the privilege of doing business within its borders upon compliance with existing laws.

It is but fair to call attention to the fact that the act does not state that a non-compliance within the ninety days would invalidate all business transacted previous to the passage of the act, but only that a compliance will render all such transactions of business valid; and hereof it must be said, further, that the legislature doubtless meant to say that when a foreign corporation had been carrying on business before the passage of the act, without complying with the then existing laws on the subject, and its business therefore was of questionable legality, to say the least, yet, if it would comply with the terms of the act within the ninety days, all doubts would be removed, and all its previous acts validated. It doubtless never had any reference to business previously carried on in strict compliance with the law. Especially should this view be taken, when, as in this case, the whole object of the act of 1887 had been fully accomplished by the certificate filed by the corporation in 1883, by which it had appointed its agent, named his place of business, and obligated itself to be bound by any service of process made upon him there; and the presumption is that its two directors and its secretary, with the use of its corporate seal, had the authority under the laws of Great Britain or the by-laws of the corporation, or both, to do this very thing. At all events, having done so in the manner it did, and acted on the fact of having done so, it would not be allowed to disclaim the authority of its agent, these directors, and its secretary.

This objection to the certificate that it was not made by the president, and therefore did not comply with the act of April, 1887, was exceedingly technical, seeing that it really

stated every fact and accomplished every purpose which the later act was designed to state and to accomplish.

The defendant assumed to prove, as he had alleged, that the plaintiff corporation had not complied with the law in the respect named. He, in fact, alleged only that the plaintiff had not sufficiently complied with the law in the manner of its appointment of John M. Rose, Esquire, and for evidence in support of his allegation to this effect refers to the certificate of Mr Rose's appointment, which is copied in the record. Might there not have been another certificate of appointment? This theory is not negatived by anything in the answer. Otherwise than is shown in the alleged defects in the certificate of appointment of Mr. Rose, there is neither allegation nor proof of non-compliance with the law on the part of the plaintiff; and yet it was for the defendant to affirmatively show that the proper certificate was not filed in the secretary of state's office within the ninety days next succeeding the passage of the act of 1887; for, until the contrary is shown, a compliance with the law on the part of every one is to be presumed.

The decree is reversed, and the cause remanded, with directions to foreclose the deed of trust.

---

66 393
f79 262

MOORE v. TERRY.

Opinion delivered April 22, 1899.

1. WRITTEN CONTRACT—PAROL EVIDENCE TO VARY.—Where a mortgage by its terms provides that it is given to secure the sum of $100 due at a time fixed, "and all other indebtedness which may then be due" to the mortgagee by the mortgagor, it is not admissible to prove by parol evidence that it was intended to be a security for the sum of $100 and no other indebtedness. (Page 399.)

2. MORTGAGE FOR ADVANCES—VALIDITY.—A mortgage which provides that it shall be security for a debt of $100 to mature in the future "and all other indebtedness which may then be due" to the mortgagee by the mortgagor is intended to secure all other indebtedness of the mortgagor to the mortgagee at the time the debt of $100 matures, and is valid. (Page 400.)

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

This is an action of replevin brought by the appellant against the appellee, in a justice court of Garland county, to recover possession of two mules, for the purpose of subjecting them to the satisfaction of a chattel mortgage executed by appellee to appellant. Appellant executed his bond as required by law, an order of delivery was issued thereon, and duly served by taking the mules from appellee and delivering them to appellant.

The appellant answered in the justice court, alleging that on the —— day of ———, 1896, she gave appellant a chattel mortgage on the mules sued for, to secure payment of one hundred ($100) dollars, evidenced by her promissory notes,—one for fifty ($50) dollars and two for twenty-five ($25) dollars each,—which she had paid, fifty ($50) dollars herself and fifty ($50) dollars through one J. A. Smith. She also denied that she was then indebted to appellant in any sum; her answer being duly verified. Upon her motion the cause was transferred to the court of common pleas. In common pleas court she filed her amended answer, in which she admitted being indebted to the appellant in the sum of seventy-three dollars and seventy-eight cents ($73.78). In this amended answer she alleges that on August 19, 1896, she executed a mortgage to appellant of the mules described in appellant's affidavit in replevin to secure notes of one hundred ($100) dollars, and that the seventy-three dollars and seventy-eight cents ($73.78) was due upon open account made subsequently to the execution of the mortgage, and, the notes having been paid, there was nothing due on the mortgage. She claimed damages in the sum of $187 in this amended answer, and prayed judgment over. This pleading is also verified.

There was a trial in common pleas court, and judgment against appellant, from which he duly prosecuted his appeal to the circuit court of Garland county.

"CHATTEL MORTGAGE WITH POWER OF SALE."

"Know all men by these presents that I, Lottie Terry, for

and in consideration of the sum of one hundred ($100) dollars, the receipt of which is hereby acknowledged, have bargained, sold and conveyed, and by these presents do hereby bargain, sell and convey to W. F. Moore, and unto his executors, administrators and assigns, the following described property in Garland county, Arkansas, to-wit: One pair (2) mules, brown in color, about fourteen and one-half hands high, one named Bird and one named Daisy, both of them mares. To have and to hold the same unto the said W. F. Moore, his executors, administrators and assigns forever, conditioned, however, as follows: Whereas, Lottie Terry is indebted to the said W. F. Moore in the sum of one hundred ($100) dollars, as follows: Three (3) promissory notes, one for the sum of twenty-five ($25) dollars, due and payable in thirty (30) days from date; one for the sum of twenty-five ($25) dollars, due and payable sixty days from date; the further sum of fifty ($50) dollars, due and payable ninety (90) days from date, with interest from date until paid at the rate of ten (10) per cent. per annum: Now, if Lottie Terry shall well and truly pay to the said W. F. Moore the sum hereinbefore mentioned, and all other indebtedness which may then be due the said W. F. Moore by Lottie Terry, together with the costs of this trust, on or before the time specified above, then this conveyance shall be void, otherwise to remain in full force and effect." (The above contains all of the mortgage material to this litigation; the balance contains the usual provisions relating to default and disposition of the property. The mortgage is dated August the 19, 1896, duly signed and acknowledged.)

Appellee testified on her own behalf: "I owed plaintiff for groceries. The day before the mortgage was executed he wanted payment, which I was unable to make. Said he had to raise money, and asked me for a mortgage on my mules. I told him to give me a day to think it over. Next day I agreed to give him a mortgage for one hundred ($100) dollars, to secure the account due and money needed for building and loan purposes. The notes and mortgage were prepared, and I signed them. I asked Mr. Moore if I paid off the notes if the mules would be mine, and the mortgage discharged. He said, 'Yes,' and the notary assented to this. I paid off the notes.

Before this suit was brought, Mr. Moore did present my ac count for what I was owing him, but I was not able t pay it, and did not consider that the account was include in, and secured by, the mortgage. I owe the amount claimed b him, and intend to pay it when I can. The mortgage wa given to enable appellant to raise ready money, and neither he no I knew the exact amount I owed him then. The mortgage was no intended to secure future advances, or anything but the notes and nothing was ever said between me and Mr. Moore about fu ture supplies and advances. Nothing was said about anythin except the account and money to be advanced for building an loan purposes, and I did not know of the clause in the mort gage as to "other indebtedness," and I would not have execute the mortgage to secure other indebtedness, and I was particula for it to be understood that when the notes were paid the mule and mortgage were to be released. After the mortgage wa given, I continued to buy groceries from plaintiff, but ha no idea he would claim such amounts were covered by th mortgage." She denied that the mortgage was given to secur anything except the notes, and it was not intended that othe advances would be secured by it. Plaintiff objected to he statements, because they tended to vary and contradict th terms of the mortgage. The court overruled the objections and plaintiff excepted.

In rebuttal, plaintiff testified: "At date of mortgage, de fendant owed me, as shown by my books, eighty-one dollar and sixty-one cents ($81.61.) It was understood between de fendant and me that I was to advance money for her buildin and loan dues, which I understood would be about thirty ($30 dollars, and to continue to advance her supplies, all of whic should be secured by the mortgage. To carry out this agree ment, I advanced her money and supplies until the maturity o the last note. I was advised that the mortgage would no secure any advances made after maturity of the last note, an have not included in my account anything charged to her afte that time, although there is a small balance charged against he after that date." It was also proved that the mortgage was o a regular printed form, and the words "all other indebtedness were in the printed portion. Defendant also testified that, whil

the mortgage was read to her, she was inexperienced in such matters and did not know the mortgage contained such clause.

The plaintiff requested the court to instruct the jury as follows:

"(1). You are instructed under the law and the evidence to find for the plaintiff the property in controversy. (2). If you find from the evidence that the debt claimed by the plaintiff against the defendant is for money and supplies furnished by the plaintiff to the defendant between the time of the execution of the mortgage and the maturity of the last note, you will find for the plaintiff. (3). You are instructed that the mortgage in this case, executed by the defendant to the plaintiff, secured the indebtedness represented by the notes therein described, and all other indebtedness which might be due on the maturity of the last note, to-wit, November 20, 1896; and if you find from the evidence that the sum alleged in the affidavit of the plaintiff and admitted by the defendant in her answer was due plaintiff on the date of the filing of this suit for supplies furnished to her or money paid or advanced to her on or prior to November 20, 1896, you will find for plaintiff. (4). You are instructed that parol testimony cannot vary or contradict the terms of the written mortgage. By the terms of the mortgage it secures a debt of $100 and all other indebtedness which might be due from defendant to plaintiff ninety days after its execution, and the amount due on said date is not in dispute. If you find from the evidence that the debt due ninety days after date of the mortgage was for supplies furnished and money advanced by plaintiff to defendant, you will find for the plaintiff. (5). You are instructed that it is not necessary that the consideration for which the mortgage was given appear upon the face of it, or that it should show upon its face [that] the other indebtedness mentioned should be for money advanced or supplies furnished; it is sufficient if the time is limited in which other indebtedness should accrue between the mortgagor and the mortgagee, besides that particularly described in the mortgage."

The court refused to give each and every one of said instructions, to which plaintiff duly excepted.

And the court of its own motion instructed the jury as follows:

"(c.) If you find from the evidence that the defendant executed the mortgage for the purpose of securing notes for the sum of one hundred dollars, but not for the purpose of securing any other sum or amount that might be advanced by the plaintiff, and that said hundred dollars have been paid, then you will find for the defendant. But if the proof shows that the defendant executed the mortgage not only to secure the hundred dollars mentioned in the mortgage, but any other amount that might be advanced, and that the plaintiff advanced other amounts, and that there is a balance due plaintiff for said amounts, then you will find for the plaintiff. And in that case the form of your verdict will be: 'We, the jury, find for the plaintiff.' But, if you find for the defendant, you should find the value of each mule, and assess the defendant's damages at what the proof shows she is entitled to. In determining the question whether the mortgage was intended to cover any other sum than the one hundred dollars mentioned, you will take into consideration all the evidence, facts and circumstances introduced in the case."

To the giving of this instruction the plaintiff duly excepted.

The defendant moved for a new trial upon the following grounds, to-wit:

"Because the court erred in overruling plaintiff's motion to strike the amended answer.

"Because the court erred in permitting defendant to testify in her own behalf as to such matters and things as would vary or contradict the written contract, as shown by the mortgage.

"Because of the court's error in refusing each and every instruction prayed for by plaintiff, and in giving to the jury instruction (c).

"Also because the verdict was contrary to the law and the evidence."

The motion for a new trial was overruled, to which plaintiff duly excepted, prayed and was granted an appeal, and in apt time presented his bill of exceptions, which was duly signed, filed and made a part of the record.

Greaves & Martin, for appellant.

It was error to allow appellee to contradict or vary her written contract by parol. 1 Gr. Ev. §§ 257, 277, 281, 282; 4 Ark. 154; 55 Ark. 651; 15 Ark. 543; 35 Ark. 164; 50 Ark. 393; 55 Ark. 347; 28 Ark. 146; 64 Ark. 650. A mortgage to secure future advances is valid, and replevin will lie to recover the chattels, in order that they may be subjected to the mortgage. 32 Ark. 598; 46 Ark. 70; 32 Ark. 598; 46 Ark. 70; 50 Ark. 256; 55 Ark. 569; Jones, Chat. Mort. § 95; 97 Ala. 615. The consideration expressed in the condition clause of the mortgage controls. Jones, Chat. Mort. § 79; 64 Ill. 123. Nor can the consideration be varied or altered by parol. 12 Wend. 61; 1 Johns. 139; S. C. Am. Dec. 304; 68 Me. 442.

Reid Gantt, for appellee.

The mortgage in this case was not intended to secure future advances. Future liabilities intended to be secured should be described with reasonable certainty. 1 Jones, Ch. Mort. § 367, and note 7. This failing, they are not included in the security. 1 Jones, Ch. Mort. §§ 374, 360, 377; 55 Ark. 571; 13 Minn. 194; 30 Ark. 745; 54 Ia. 160; 6 N. W. 178; 51 Ala. 335; 68 Ala. 389.

HUGHES, J., (after stating the facts.) It is the opinion of the court that the circuit court erred in admitting parol testimony to vary the terms of the mortgage, and in refusing to give the instructions asked upon the part of the appellant, and in giving instruction marked for the appellee, upon its own motion, for which errors the judgment must be reversed. There was in the language of the mortgage no ambiguity, and it is not pretended that the appellee, through fraud or duress, was induced to execute the same. While parol evidence may be admitted sometimes to show the circumstances under which it was executed, yet, when an instrument in writing is clear and unambiguous, it is inadmissible to vary or contradict its terms. This is familiar law. *Featherstone* v. *Wilson*, 4 Ark. 154; 1 Greenleaf Ev. §§ 257, 277, 281, 282; *Richie* v. *Frazier*, 50 Ark. 393; *Jenkins* v. *Shinn*, 55 Ark. 347; *Rector* v. *Bernaschina*, 64 Ark. 650; *Cato* v. *Stewart*, 28 Ark. 146.

A mortgage given to secure indefinite advances limited to a certain time is valid. *Fort* v. *Black*, 50 Ark. 259. Mortgages to secure future advances are valid, according to our decisions. *Martin* v. *Holbrook*, 55 Ark. 659.

The mortgage in this case was given to secure the sum of one hundred dollars, "and other indebtedness which may then be due the said W. F. Moore by Lottie Terry." The words "then due" refer to the time when the one hundred dollars were to become due.

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

HAYS v. McLAIN.

66 400
83 286

66 400
87 168

Opinion delivered April 22, 1899.

1. AGREEMENT NOT TO RESIST SUIT—EFFECT.—Where the owner of two mortgages on a decedent's lands agreed with his widow, in consideration of a release by her of her dower and homestead therein, that if no fight was made upon his right to foreclose said mortgages, and he became the purchaser of said lands, he would convey a part thereof to her, the effect of such agreement was to entitle her to such conveyance upon his purchase at foreclosure sale if she made no resistance to his foreclosure suit, and instigated none, notwithstanding resistance was made by decedent's heirs. (Page 405.)

2. PARTIES—CROSS-BILL—MORTGAGE FORECLOSURE.—In a suit by heirs to compel specific performance of an agreement to convey land, a cross-bill alleging that, after the agreement was made, deceased became indebted to defendant and executed a deed of trust conveying the land as security for such debt, and praying a foreclosure thereof, is defective for failure so make deceased's administrator and the trustee parties defendant. (Page 405.)

3. PLEADING—COUNTER-CLAIM—SUBJECT OF ACTION.—In a suit to enforce specific performance of a contract to convey land, defendant cannot, by way of counter-claim, ask foreclosure of a mortgage on the land given by plaintiff to defendant. (Page 406.)

Appeal from Clark Circuit Court in Chancery.

RUFUS D. HEARN, Judge.

STATEMENT BY THE COURT.

The complaint alleges that on May 2, 1889, one Mar-

cellus McLain and wife executed a mortgage on certain lands in Clark county to the British-American Mortgage Company to secure the indebtedness amounting to $1,368. That on November 26, 1892, said McLain executed a second deed of trust upon said lands included in the deed of trust to the British-American Mortgage Company to the appellant to secure the payment of $942, which deed of trust was not signed by the wife. Both deeds covered the homestead. The land included in each was the same, except that there was one 40-acre tract in the last, not in the first. That McLain died, intestate, February 24, 1893, and no administration was had on the estate. That appellant purchased the British-American Mortgage Company's note prior to January 3, 1894, and on that day, to induce McLain's widow to release her dower and homestead in the lands included in the deed of trust to Hays, he gave her the following contract, to-wit: "This agreement witnesseth, That whereas C. A. McLain has this day released her dower to me, subject to the terms of a certain mortgage executed to me by Marcellus McLain, in certain land in Clark county described therein: Now I have purchased the mortgage given by McLain and his wife, the said C. A. McLain, to the British-American Mortgage Co. for about the sum of fourteen hundred dollars; and that I will proceed to foreclose both of said mortgages, and will, at the sale under said mortgage, if no fight is made upon said foreclosures, bid the amount due me and the British-American Mortgage Co. for said land, and that if I become the purchaser of said lands under said foreclosure for the amount due us, I will accept the upper place in full of the debt due me, including the amount due the British-American Mortgage Co. and will convey the lower place to the said C. A. McLain by deeds with special covenants of warranty. By the lower place is meant the land owned by Marcellus McLain and mortgaged to me in section 18, township 9 south, range 21 west. January 3, 1894. John Hays." That appellant caused suit to be brought, in the Clark circuit court on January 16, 1894, to foreclose both said deeds of trust, and on October 29, 1894, obtained a decree. That the said widow performed her part of the agreement, and made no

fight, nor did she encourage any one else to do so. That on the 2d day of November, 1895, said land was sold at commissioner's sale under said decree, and purchased by Neal Sloan for appellant's benefit for $2,500, which sale was approved by the court. That said widow married one W. A. Robinson, and died, leaving her surviving the appellees herein as her heirs at law. Prays that appellant be required to convey said lands known as the lower place to the heirs.

The answer alleges that the upper place was a black-land farm, the rent of which was worth $350 per annum, and that if no contest had been made in the foreclosure suit, the appellant would have received, and it was a part of the consideration of said contract that he should receive, the rent for the years 1894 and 1895; but that said suit was bitterly contested, by reason of which appellant lost said two years' rent, which was more than the value of the lower place, and in addition appellant was forced to pay a large sum in expenses and cost of suit. Further answering, says: The said widow encouraged the defendants in making said defense in said foreclosure suit, and received and appropriated the fruits of the delay. Appellant also, by way of cross-bill, says that, after execution of said contract, said widow became indebted to appellant in the sum of five hundred dollars, and executed a deed of trust for appellant's benefit, to secure the same and other indebtedness upon "pt. SW. and NW. of SW. section 18, T. 9, R. 11, 160 acres of land;" alleges that the agreement was that the widow and her husband, W. A. Robinson, should give, and they intended to give, and that appellant should receive, and he intended to receive, a deed of trust upon the east half southwest quarter, the east half west half southwest quarter, and the northwest quarter of southeast quarter of section eighteen, township nine south, range twenty-one west, but that, by a mistake in the draughtsman of said deed of trust, said land was improperly described as above set out. Alleges that the conditions of the deed of trust have been broken, and prays that W. A. Robinson be made a party; that it be reformed and foreclosed, in case the court should hold that the contract set out in the complaint should be enforced. Note and trust deed exhibited.

Appellees demur because appellant has no legal capacity to sue,

and because there is a defect of parties; also a general demurer This demurrer was sustained on the ground that the answer did not state facts sufficient to constitute a cause of action, and was confessed on the ground of defect of parties, and cross-bill dismissed. Subsequently, the order dismissing the cross-bill was set aside; the amended cross-bill filed; demurrer renewed, and sustained by the court, without stating on what ground; cross-bill dismissed; and exception noted.

John McLain was one of the defendants in foreclosure suit. Represented no one but himself. Had no understanding that he would divide anything he might recover by his resistance to the suit. Has no interest in this case, except is half brother of the minor plaintiffs.

John Hays: "The object of making the contract sued on was to avoid expense in the suit, and to get the rent of the upper place earlier. The contract contemplated no resistance to the foreclosure by any one, and Mrs. McLain stated she would guaranty that no fight would be made by any one, and I think this is what is set out in the contract. A resistance was made, as is shown by the records of the court, and I lost the rent of the upper place for two years. The rent was received by Mrs. McLain. The first year it amounted to between $300 and $350, and to $325 the second year. I furnished her money and supplies after the execution of the contract, and collected this rent for her, and applied it on the debt for money and supplies. I think $600 is a fair value of the lower place. The contract was made January 3, 1894, and the foreclosure suit was filed January 10, 1894. I do not personally know that Mrs. McLain joined in the resistance to the foreclosure. She told me, after the fight began, that John was claiming under a deed made by his father to her and him, and she would get half if he won."

Guy Nelson: "I and Mr. Crawford were attorneys for Mrs. McLain and John C. McLain in the Hays foreclosure suit. I negotiated the trade for Mr. Crawford and myself to represent them in that suit. A short time afterwards Mr. Tompkins and I came to Okolona to take depositions, and on that day at Mr. Hays' house Mrs. McLain informed me that our services would not be needed any further, as she had settled with Mr.

Hays. We filed no answer for her, and did not consult her further, and we informed John C. McLain of these facts, and read the contract with Mr. Hays. John C. McLain has no interest in this suit. Is not bound for costs or attorney's fees. Mr. Crawford and I are responsible for costs."

Then follows the testimony of Mrs. C. A. Robinson, the widow of McLain, taken in the foreclosure case, which we are so sure is immaterial and inadmissible that we do not abstract it. Then follows the complaint in the foreclosure case filed January 10, 1894. That complaint seeks to foreclose the deed of trust to the British-American Mortgage Co., and the deed of trust given by McLain to Hays. This was the suit referred to in the contract set up in the complaint. Abstract or decree against Charity A. McLain foreclosing her interest rendered March 2, 1894.

Separate answer of John C. McLain pleading a deed given to him and the widow of Marcellus McLain, which was dated November 26, 1892, which was filed for record February 15, 1894. This deed was dated before the date of the deed of trust to Hays. This answer also pleads usury and payment. The court decreed that the deed to John C. McLain and the widow be set aside, the plea of usury and payment failed, and on October 29, 1894, the court decreed the foreclosure of the two deeds of trust giving the defendants a year to redeem. The land was sold November 2, 1895, by special commissioner, bid in by Neal Sloan for $2,500. and ultimately deeded to him.

The court, on April 27, 1897, decreed that the plaintiff should deed the lower place to the heirs at law of the widow. Special objections were taken to the depositions of C. A. McLain and Guy Nelson, and overruled, as shown by the decree, and the appellant excepted, and brings the case here for review.

M. W. Greeson and *W. V. Tompkins*, for appellant.

The circumstances surrounding the parties to a contract are to be considered in arriving at their intention. 13 Ark. 116; 55 Ark. 20; 17 Conn. 201; 52 Ark. 65. Appellee, having accepted benefits of the suit, is estopped to disclaim her participation in same. 55 Ark. 418; *ib.* 112; 1 Am. & Eng. Enc. Law (2 Ed.), 1196. The estoppel extends to her heirs. 94

N. Y. 221; 13 Ark. 220. One who seeks specific performance must himself be free from fault. 34 Ark. 676; 33 Ark. 294. Equity has jurisdiction to correct a mistake, so as to conform the contract to the intention of the parties. 61 Ark. 127; 33 Ark. 136; 2 Pom. Eq. Juris. § 845.

J. H. Crawford, for appellee.

The acts of the parties under a contract are to be looked to in construing it. 1 Dr. & W. (Irish Chy.) 353; 46 Ark. 131; 52 *ib.* 75; 13 S. W. 731; 86 Fed. 574; 46 S. W. 14; 40 Atl. 841; 132 Ind. 114; 93 Mich. 450. The matter set up in a cross-bill must be germane to the subject-matter of the original complaint. Story, Eq. Pl. §§ 389, 631; 17 How. 130; *ib.* 591, 595; 1 Wall. 5; 9 Wall. 809; 58 Fed. 347, 352; 102 Ala. 522; 41 Pac. 530; 33 W. Va. 682; 74 Fed. 327; 31 Ark. 345. A patent ambiguity of description cannot be aided by parol. 30 Ark. 657; 40 *ib.* 237, 241; 41 *ib.* 495; 60 *ib.* 487; 1 Y. & Coll. 583; 112 Mo. 519; 19 Conn. 63; 104 N. C. 16; 102 Mass. 24; 15 Mich. 18.

HUGHES, J., (after stating the facts.) The court is of the opinion that it does not appear from the facts in this case that Mrs. Robinson (Charity A. McLain) violated her agreement with the appellant, Hays. We think that the fair and reasonable construction of said agreement is that she herself would not make resistance to his suit for foreclosure of the two mortgages, nor instigate such resistance. We think it sufficiently appears that she did neither. She was not responsible for the action of John C. McLain, her step-son, in making such resistance.

Hays says that, by reason of the delay caused by such resistance, he lost two years' rent of the land, but he admits that he received the interest on his debt during the time. It is not apparent that this delay in the foreclosure suit would not have occurred had there been no resistance.

We are of the opinion that the decree that the plaintiff, John Hays, should make deed to the "lower place" to the heirs of Mrs. C. A. Robinson is correct, and should be affirmed. The appellant's cross-complaint should have made the administrator of Mrs. Robinson a party, as it sought to enforce a money de-

mand against her estate. It should also have made the trustee, holding the legal title, defendant.

Was the cross-complaint of appellant germane to the cause of action in the original complaint? We think not. "When a defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject-matter of the action, he may make his answer a cross-complaint against the co-defendant or other persons. Sandels & Hill's Digest, § 5712.

The Code defines a counter-claim to be "a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transactions, set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." Section 117, Civil Code; Sandels & Hill's Digest, § 5723. It is apparent that the cause of action in the appellant's cross-complaint did not arise out of the contract or transactions set forth in the original complaint. Is it connected with the subject of the action? It is sometimes difficult to determine when a cause of action set forth in a counter-claim is connected with the subject of the action. We think, however, in this case that the cause of action set up in the counter-claim is a separate and independent cause of action, not connected with the cause of action set forth in the original complaint. The original action was to enforce specific performance of a contract to convey land. The cross-complaint asked a decree to foreclose a mortgage upon the land. It seems clear that there was no connection between the causes of action.

"A counter-claim, *eo nomine*, was unknown in the former system of pleading; but the subject-matter of such a plea was, in actions *ex contractu*, often available under a plea which might be styled recoupment. * * * The defense termed counter-claim under the Code is but the plea of recoupment under the old practice, and, in general, is to be governed by the same practice, except [that] under the provisions of sections 418 and 419, Civil Code, if the defendant's demand exceeds that of the plaintiff, he may be entitled to a judgment for the excess. This defense only applies, however, to breaches of stipulations, fraudulent or otherwise, growing out of the contract sued upon,

and not upon entirely separate and distinct transactions." *Bloom* v. *Lehman*, 27 Ark. 490, 491.

In section 745 of Pomeroy's Code Remedies, it is said (after reviewing many adjudged cases) that "these cases must be considered as establishing the doctrine that the defendant's cause of action, in order to constitute a valid counter-claim, must to some extent defeat, modify, qualify or interfere with the relief which would otherwise be obtained by the plaintiff." This limitation "results from the fact that the codes make no provision for two independent and antagonistic judgments rendered in favor of the adverse parties in the same action. One judgment alone is contemplated by the statute, which shall determine the substantial rights of the parties." Pomeroy, Code Remedies, § 747.

In Newman on Pleadings and Practice, p. 610, it is said: "A counter-claim, however, under the Code, is but another name for a cross-petition, and may be so styled with propriety, especially in an action prosecuted by equitable proceedings." *Hill* v. *Butler*, 6 Ohio St. 207; Newman, Pldg. & Pr. p. 612. In Newman, Pldg. & Pr. p. 612, it is said: "The language of the amendment to the code must, no doubt, be understood as embracing substantially the same subject-matter, in this respect, that was necessary for a cross-petition under the former system. Under that system, anciently a cross-bill was defined to be 'a bill brought by a defendant against the plaintiff or other parties in a former bill pending, touching the question in that bill.' * * * 'If the bill was filed for a certain purpose, the defendant to the bill could not, by any cross-bill, bring into litigation in that suit other causes of action which he might have against the complainant, unless there existed some connection or special circumstances, such as insolvency, non-residence, etc., which would render it necessary, in order to avoid irreparable injury. Thus, if a bill was filed for specific execution of a contract for land, the defendant could not, by way of cross-bill, bring into litigation * * * a debt due by the complainant unconnected with the contract sued on."

What is a counter-claim is a vexed question, but we think the citations from the authorities above are sufficient to show

that the appellant's cross-complaint in this case is not one, within the meaning of the authorities.

The decree of the circuit court is in all things affirmed, without prejudice to the right of appellant to bring an independent action to foreclose his mortgage.

WOOD, J. I concur in the opinion of the court except as to what is said in regard to the counter-claim. Mr. Bliss says: "The cause of action has been described as being a legal wrong threatened or committed against the complaining party; and the object of the action is to prevent or redress the wrong by obtaining some legal relief. The subject of the action is clearly neither of these; it is not the wrong which gives the plaintiff the right to ask the interposition of the court, nor is it that which the court is asked to do for him, but it must be the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this is, ordinarily, the property, or the contract and its subject-matter, or other thing involved in the dispute." Bliss, Code Pldg. § 126, and note. This is sensible and plain, and ought to be adopted as the proper construction. The court, in my judgment, fails to properly discriminate between the cause of action and the subject of the action. Here the cause of action is the alleged failure to convey certain lands by deed. The object of the action is to require the appellant to make the deed conveying the land, and thus redress the wrong done in withholding it. But the subject of the action is not the wrong done, nor the relief asked, but it is the land itself for which the deed is sought, and about which the controversy has arisen. There is no good reason why a mortgage given by appellee to appellant upon the same land should not be foreclosed in this proceeding, but, on the contrary, the best of reason why it should be done, namely, to end the controversy between the parties litigant concerning this land in one suit, and thus avoid the delay and costs incident to another suit. Thus both the letter and spirit of the statute to avoid a multiplicity of suits would be subserved.

KANSAS CITY, PITTSBURG & GULF RAILROAD COMPANY v. MOON.

66 409
77 37

Opinion delivered April 22, 1899.

1. CONSTITUTIONAL LAW—RAILWAY EMPLOYERS' ACT.—The constitutionality of the act of March 25, 1889, prohibiting the withholding of the wages of railway employees, is affirmed. *Leep* v. *Railway Co.*, 58 Ark., 407, followed. (Page 413.)
2. PENALTY FOR FAILURE TO PAY WAGES—DEMAND.—On discharge of a railway employee, the company's liability for the penalty for failure to pay the wages due him is not affected by his failure to make demand for the amount due him. (Page 413.)
3. INFANCY—CONTRACTS.—A minor may disaffirm contracts made by him. (Page 413.)
4. MINOR—RIGHT TO SUE FOR WAGES.—With his father's permission, a minor may sue his employer to recover wages due him and the statutory penalty for withholding same. (Page 413.)
5. PENALTY—MERGER.—The penalty for withholding an employee's wages under the act of March 25, 1889, namely, the liability to pay the wages at the contract rate until the wages earned at the time of discharge are paid, continues to run until the right of action is merged in the judgment. (Page 414)

Appeal from Polk Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

June 30, 1897, Virgil H. Moon, by his next friend, W. L. Moon, brought his action before A. P. Alexander, a justice of the peace of Center township, Polk county, Arkansas, to recover $3.30 unpaid wages and exemplary damages at the rate of one dollar and ten cents ($1.10) per day. Summons was made returnable July 17, 1897. On that day the cause was, on motion of defendant's attorney and by consent of parties, continued until July 21st. On that day, on motion of defendant's attorney, and by consent of the parties, the case was continued until July 30, 1897. On July 30th the cause was again continued, because no bond for costs had been given, until the 7th day of August, 1897, and on August 7th judgment was rendered in favor of plaintiff for $3.30 wages and $88 as exem-

plary damages. The defendant prayed, and was allowed, an appeal to the circuit court. On September 11, 1897, the cause was tried at the August term of the circuit court by a jury, the jury returning a verdict as follows: "We, the jury, find for the plaintiff $3.30 as judgment, and penalty $119.60." Judgment was rendered upon this verdict.

Motion for new trial was duly filed within the time fixed by the statute, and was thereafter overruled, and sixty days given in which to prepare and file a bill of exceptions, which was filed on the 11th day of November, 1897, within the time fixed by the court.

Virgil H. Moon, testifying on behalf of the plaintiff, said: "I live about a quarter of a mile of Hatfield. On last May, on the 1st, 3d and 4th days, I was performing labor for the Kansas City, Pittsburg and Gulf Railroad. It consisted of labor on the track that lies between Rust and Janssen. I was under the direction of the foreman by the name of Pat McGuire, and I was in the employ of the Kansas City, Pittsburg and Gulf Railroad. I was receiving $1.10 per day. I was discharged on the 6th day of May. On the day I was discharged, I received the following paper or letter, introduced in evidence:

"LETTER OF IDENTIFICATION. Kansas City, Pittsburg & Gulf Railroad Co. Instructions to foremen: If claimant can write, his name must be signed on the line provided for that purpose. If he cannot write, you must indorse on that line, 'He cannot write,' and sign your initials under.

"To agents. See that the above instructions are complied with, and, if necessary, require claimant to sign his name, as a means of identification. May, 1897. W. N. Terry, Roadmaster, Mena, Ark.

"Time check has been issued to Virgil Moon for three day's work at $1.10, $3.30, less board $——; hospital dues—cents. $——; amount due $——; on section No. 15 for month of May,—who will apply at Mena, Ark., for his money. Signature of claimant appears below. Yours truly. Pat McGuire, foreman.

"Foreman will write in station where money is to be paid. Claimant's signature, Virgil H. Moon. Filed August 7, 1897, A. P. Alexander, J. P."

"I took this paper to Roadmaster W. N. Terry, at Mena. It is addressed to him. I did not go to Mena the first time. He came down on the train, and stopped at Hatfield. I presented it to him. He said he would look it up. I waited some two weeks, and then went to Mena to see him. I spoke to him about it, and he said he would look it up. He did not pay me; just said that he would look it up. They have not offered to pay me. The wages that I sue for are for labor performed last May of this year. I am eighteen years old past. I presented the paper to him on the train at the town of Hatfield about two weeks after I was discharged. I had read this order or statement. I did not present it to Terry until two weeks after I got it; and about two weeks after that I went to Mena, and presented it to him on the platform of the depot. I was not at his office. I did not go to the agent's office. I did not apply to anybody but Terry, the roadmaster. I have had this order in my possession ever since, except when it was filed as evidence twice, first at the office of W. N. Martin, then at the office of Alexander, at Mena. I worked continuously for three days. I worked the 1st, 3d and 4th days, and the 5th day I was sick, and could not work, and he told me he would do without me that day, and when I came back the next morning I was told he had another man, and he gave me that check. I received the check on the 6th. I commenced work in March. I began work about the 17th day of March, and worked until the 6th day of May, worked continuously until the time of my discharge, except one day that I was sick. I had received my pay prior to that time for the work I had done in March and April. I got it once on the train at Hatfield in the form of a check, once at Mena by the way of check. That was the regular way of paying employees. There was a stated time for paying them off. They were supposed to be paid between the 15th and 20th of each month. At these times I was paid by check. At Hatfield I was paid by W. N. Terry, and at Mena by Mr. Disbrow. When I got these checks, I would go and get the money. When I received my pay, I simply got a check. Did not get a paper like this. I supposed that Terry would possibly pay me. He said he would look it up, and I was waiting for him to make some reply. I went

and consulted section foreman, Pat McGuire, and asked him what about it, when I would get my pay, and he said for me to go to Mena. I never made a demand at Mena for the check until two weeks after the time I made my demand at Hatfield, and four weeks had then elapsed.

Dr. W. L. Moon testified for plaintiff: I am the father of Virgil L. Moon. I sue for the use and benefit of my son. I first brought suit for him fourteen days after he was discharged, before W. N. Martin, justice of the peace of Cove township.

The following proceedings were then had:

Attorney for the defendant: "If your honor please, we make offer of the transcript from said justice, showing judgment between the same parties for the same wages." The court: "You will have to file a special pleading for that." Attorney for defendant: "Then we ask permission to make the plea. This under the ruling that we make a special plea." The court: "We cannot let you do so at this time." To which ruling of the court defendant excepted.

Trimble & Braley, *Shaver & Norwood* and *John A. Eaton*, for appellant.

The penalty ceased to run at the date of the judgment of the justice. 64 Ark. 83–93; 29 Ark. 80; 32 Ark. 573; 45 Ark. 373; 122 Ind. 433; 24 N. E. 83. The statute (Sand. & H. Dig. §§ 6243, 6244, 6245) is in derogation of common law, and must be strictly construed. 6 Ark. 279; Suth. Stat. Const. §§ 290, 400; Endl. Int. Stat. §§ 127–128. The father, as the natural guardian, had a right to demand and receive the minor son's wages. Sand. & H. Dig. § 3568; 32 Ark. 92. Further, upon the question of merger of the claim in the justice's judgment, see Black, Judg. § 674; 29 Ark. 80; 15 Am. & Eng. Enc. Law, 339.

J. I. Alley and *W. S. & F. L. McCain*, for appellee.

The judgment before the justice of the peace was void for want of service; hence no merger took place. Black, Judg. § 680; Freeman Judg. § 117. A father may, either expressly or impliedly, waive his right to receive his minor son's wages. Schouler, Dom. Rel. 252*a*; 14 Am. & Eng. Enc. Law, 757 note 3. The father's knowledge of the receipt by the son of wages

due the latter warrants the presumption of waiver of the father's right. 37 N. W. 949; 58 Vt. 248; 3 Pick. 201.

HUGHES, J., (after stating the facts.) This action was brought, under section 6243 of Sandels & Hill's Digest, to recover $3.30 wages due the appellee and the penalty for not having paid the same when the employee was discharged. That section reads: "Whenever any railroad company, or corporation engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge, with or without cause, or refuse to further employ, any servant or employee thereof, the unpaid wages of any such servant or employee then earned, at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such non-payment, the wages of such servant or employee shall continue at the same rate until paid: Provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time." This act was decided to be constitutional in *Leep* v. *Railway Co.*, 58 Ark. 407, which has been affirmed on appeal to the supreme court of the United States.

It is contended that the right of action for the penalty accruing was merged in the so-called judgment before M. N. Martin, a justice of the peace. But this cannot be, for there was no jurisdiction for the want of service to render that judgment. It was void, and bound neither party. It was in fact no judgment. There could, therefore, be no merger of the cause of action in it. Black on Judgments, 680.

The plaintiff (appellee) was discharged by the railroad company, which, it appears, has not paid the wages due him at the time of his discharge. It was the duty of the company to pay him. He was not obliged to make demand for the amount due him. If it could be said that he accepted the certificate of identification and statement of his account as payment, it is replied that he was a minor, and elected to disaffirm this agreement. 10 Am. & Eng. Enc. Law (1 Ed.), p. 628.

It appears from the evidence that the plaintiff's father knowingly permitted him to collect his wages, and though he

was a minor, and his father was entitled strictly to collect his wages, he waived this right, no doubt, commendably, to encourage his son. He was not bound to collect, or refuse his son the right to do so. According to the case of *St. Louis, Iron Mountain & Southern Railway Co.* v. *Paul*, 64 Ark. 83, 93, the appellee wes entitled to the penalty up to the time of the judgment.

---

66 414
77 601

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

Opinion delivered April 22, 1899.

RAILWAY—INJURY TO STOCK—NEGLIGENCE.—Proof that, immediately after the stock alarm on a locomotive was sounded, a mare was found standing on the right of way within a few feet of the track, that she had two cuts on the inside of her hind legs, and that after the injury she was very much afraid of trains, when she had not been afraid of them before, is sufficient to justify a finding that she was injured through the negligence of the railway company. (Page 415.)

Appeal from Conway Circuit Court.

JEREMIAH G. WALLACE, Judge.

STATEMENT BY THE COURT.

This suit is for damages in the sum of $25 for injury to plaintiff's mare, through the alleged negligence of the company.

The proof shows that on August 17, 1896, plaintiff heard an engine blowing the stock alarm twice right close together, and went down immediately where the engine was blowing the stock alarm, and found his mare standing right at the edge of the right of way, not over three feet either way, on or off the right of way. She had two cuts on the inside of her hind legs. The cuts were about three inches long. He thought they extended to the bone. The cuts were right in the middle of the inside of the leg about eight or ten inches from the ground. The cuts extended up and down the inside of the leg, and not cross ways. The cut was about as long as your finger. There was no other injury that plaintiff could find. She was

his wife's buggy mare. After the injury she was very much afraid of trains, and plaintiff had to trade her off on that account. The plaintiff did not know whether the train struck her or not. The mare was not lying down, but standing up when plaintiff found her. The mare was not breachy. Plaintiff testified that he was damaged by reason of the loss of the use of the mare on account of the injury $25. The above was the testimony. The jury returned a verdict in favor of plaintiff for $15. Judgment was entered accordingly, and the company appeals.

Dodge & Johnson and *Oscar L. Miles*, for appellant.

Mere proof that an animal was found wounded near a railroad track creates no presumption that it was done by a railroad train. This latter fact must appear from the proof. 42 Ark. 128; 56 Ark. 522; 60 Ark. 189.

Chas. C. Reid, for appellee.

The proof shows that the animal was injured by the train, and this raised the presumption of negligence on the part of defendant. 42 Ark. 122.

WOOD, J., (after stating the facts.) There was evidence to justify the verdict. While the proximity of the mare to the railway track and the nature and appearance of the injury would not, alone, furnish the basis for an inference that the injury was produced by the train, yet, when these are considered in connection with the blowing of the stock alarm, and the finding of the animal immediately thereafter at the place where the stock alarm was given, close to the right of way, injured as described,—also in connection with the fact that after the injury the mare was very much afraid of trains,—the most reasonable conclusion, we think, from all the circumstances, is that the train produced the injury. *Railway Co.* v. *Sageley*, 56 Ark. 549. The sounding of the stock alarm twice tends to show that some animal was in danger, and this was the only animal found injured there. While the plaintiff did not state that his mare was not afraid of trains before the inquiry, his language plainly implies that she was not. He says that after the injury she was very much afraid of trains, and he had to trade her off on that account.

Taking all the evidence, there was was a *prima facie* case of injury by the railway company, and, in the absence of proof to the contrary, it will be presumed that it was caused through the company's negligence.

Affirmed.

BUNN, C. J., and BATTLE, J., dissenting.

---

66 416
84 35
84 36

BLEVINS v. CASE.

Opinion delivered April 22, 1899.

INJUNCTION—ADMINISTRATOR'S SALE—EVIDENCE.—In a suit by an administrator to enjoin a sale of his decedent's land upon the ground that the sale was ordered on petition of a creditor who had failed to make demand in writing of the administrator to present a petition for an order of sale, as required by Sand. & H. Dig. § 201, the administrator's testimony that he "did not have legal notice" is not sufficient to show that the creditor did not make a proper demand. (Page 418.)

Appeal from Cleburne Circuit Court, in Chancery.

BRICE B. HUDGINS, Judge.

STATEMENT BY THE COURT.

This was a suit to enjoin the sale of certain lands ordered by the probate court of Cleburne county for the payment of a certain claim which had been allowed by said court. It appears from the record that the appellant was appointed administrator *de bonis non* on the 28th day of December, 1883; that the claim was allowed by the probate court in October, 1886. The order of the probate court directing sale of lands to pay said claim was made on the 21st day of July, 1896. The appellant in his suit to enjoin set up, *inter alia*, that the claim allowed by the probate court was pretended and fraudulent, and he alleged various reasons why it was simulated and fraudulent, and should not have been allowed by the probate court, none of which we deem it necessary to mention. He alleged that he knew nothing about the pretended claim until after the institution of proceedings by the appellee for the sale of the land. He further

alleged that the appellee (Case) was not a creditor, nor the owner of said claim by assignment of it to him; that he (Case) never made legal demand to him as administrator of said estate to petition the probate court for an order to sell lands belonging to the estate for the payment of debts. He sets up that the petition of Case to the probate court for the sale of lands was not properly verified. He says that Case is estopped by delay, laches and neglect to pursue his remedy for the allowance and collection of said pretended claim. He prays that the judgment of allowance be vacated and quashed, and that a restraining order issue, restraining him from the enforcement of or attempt to enforce the said order of the probate court for the sale of the lands. Demurrer to the complaint was overruled.

The answer denied all the allegations of the complaint, and says: "If such order of sale by the probate court is prejudicial to plaintiff, he has an adequate remedy at law, and is not entitled to the determination which he seeks here."

The chancellor found "that there was no fraud proved by the plaintiff in procuring the order of allowance of the claim upon which the order of sale in said probate court was based; that the defendant has been and is guilty of laches in the prosecution of his said claim in the said probate court, so far as is shown in this cause; and, it appearing, also, to the court that pending on the law side of this court is a suit between the parties hereto, on appeal from the probate court of this county, involving the issues in this cause, and the court, being of the opinion that laches may be pleaded in a court at law, doth, upon the whole, find for the defendant." The court thereupon dismissed the plaintiff's complaint for the want of equity.

Ben Isbell, for appellant.

An affiant to a claim must *subscribe*, as well as swear, to it. Sand. & H. Dig. § 114. A justice's certificate should show his jurisdictional limits. 17 Ark. 284; 5 Ark. 61; 15 Ark. 657. The allowance of the claim, being before the date of the affidavit, was premature. §§ 119, 115. The time for appeal from the order of the probate court allowing the claim having expired, appellant has no remedy outside the chancery

court. 32 Ark. 283; 35 Ark. 157; 14 Ark. 360; 1 Ark. 116; 5 Ark. 505; 27 Ark. 157; 32 Ark. 18; 6 Ark. 79. Chancery has jurisdiction to relieve from surprise, accident, mistake or fraud. 32 Ark. 283; 35 Ark. 157; 14 Ark. 360; 31 Ark. 83; 5 Ark. 501. The application for the sale of the land was unreasonably delayed. 56 Ark. 633; 46 Ark. 373; 47 Ark. 470; 37 Ark. 155.

WOOD, J., (after stating the facts.) We will not undertake to set out the evidence, but we are of the opinion that the court was correct in finding that there was no fraud in procuring the order of allowance of the claim upon which the order of sale was founded. If it be true, as appellant alleges, that appellee did not demand of him, in writing, as the personal representative of Gresham, deceased, sixty days before the next term of the probate court, to present his petition praying for an order to sell the lands belonging to the intestate, as required by law, then the court might have been without jurisdiction to make the order. The probate court is a court of superior jurisdiction. *Borden* v. *State*, 11 Ark. 519; *Ex parte Marr*, 12 Ark. 84; *Montgomery* v. *Johnson*, 31 Ark. 74; *Apel* v. *Kelsey*, 52 Ark. 341; *Alexander* v. *Hardin*, 54 Ark. 489. It has exclusive jurisdiction of the payment of claims against the estate of deceased persons. *Horner* v. *Hanks*, 22 Ark. 572. Where a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction.

The evidence was not legally sufficient to overcome this presumption. The appellant simply says that he did not have *legal* notice, thus virtually admitting that he did have notice. But he does not show that it was not *legal*. That was a question for the court. The appellant's *ipse dixit* that the notice was not legal would not make it so.

Affirm.

66 419
74 595

SLAYDEN-KIRKSEY WOOLEN MILLS *v.* ANDERSON.

Opinion delivered April 22, 1899.

1. FRAUD—HUSBAND IMPROVING WIFE'S PROPERTY.—A husband will not be permitted to defraud his creditors by improving his wife's property with assets belonging to him. (Page 421.)
2. FRAUDULENT CONVEYANCE—SUBSEQUENT CREDITORS.—Where land was purchased and paid for by the husband, and title taken in the name of his wife, with the actual intent to hinder and delay his creditors, the land is subject to debts of his creditors, both prior and subsequent. (Page 422.)

Appeal from Jackson Circuit Court.

RICHARD H. POWELL, Judge.

S. M. Bains, for appellant.

The burden was on appellee to show *bona fides*. 57 Ark. 573; 50 Ark. 46.

M. M. Stuckey, for appellees.

Fraud must be proved by him who alleges it. 8 Am. & Eng. Enc. Law, 654; 9 Ark. 483; 31 Ark. 554; 38 Ark. 425. Knowledge of or participation in the fraudulent intent is necessary to charge one with fraud. 32 Ark. 255; 60 Ark. 425; 61 Ark. 255.

RIDDICK, J. The appellant, a corporation, recovered judgment against R. W. Anderson in January, 1895, for the sum of $236.98, and brought this action in equity to subject certain town lots held in the name of his wife to the satisfaction of the judgment. Anderson had, for several years before the recovery of this judgment, been engaged in mercantile business at Jacksonport, Arkansas, but became embarrassed financially, and about December 10, 1894, failed in business, and was insolvent at the time this action was commenced. Previous to his failure, he disposed of his stock of goods to his mother-in-law, Mrs. Nixon, in settlement of a debt which he claimed to have owed her. She lived in Indiana, but Anderson continued to carry on

the mercantile business at Jacksonport in her name and as her agent. He had also, shortly before his failure, purchased several pieces of real estate, the conveyances for which were made to his wife, he claiming that she paid the purchase money. Plaintiff had an execution issued on the judgment above mentioned, and levied upon four lots in the town of Jacksonport. These lots had been purchased by R. W. Anderson from Bertha Gause in October, 1894, in the name of his wife, Mrs. E. J. Anderson, and the conveyance was made to her for a consideration of $25, as expressed in the deed. Afterwards, on the 3d day of November, 1894, Anderson and his wife conveyed said lots to James Nelson, the consideration named in the deed being also twenty-five dollars, and on the same day Nelson conveyed the same property with improvements thereon to J. E. Bridges in trust to secure the payment of a note from him to Mrs. E. J. Anderson for the sum of $700. Previous to the conveyance of these lots by Bertha Gause to Mrs. Anderson, R. W. Anderson and James Nelson had, with the intention of becoming the owners of the lots, improved the same by erecting thereon a mill building, with grist mill and attachments. The building was erected by R. W. Anderson and James Nelson under a contract between them by which it was agreed that Nelson was to furnish the mill wheel, buhr stones and his own labor, and Anderson was to furnish the building site, material for building, gearing for the mill, and pay all extra labor necessary in erecting same, and they were to be equal partners in the mill.

The question to be determined here is whether this mill property, or the note for $700, which the trust deed upon the property was given to secure, was the property of R. W. Anderson or of his wife. The circuit court decided that it was the property of Mrs. Anderson, and so dismissed the complaint for want of equity.

Now, if this mill property had been in fact paid for by the money of his wife, there was no reason why Anderson should not have made a full and fair statement about the matter. Nelson testified that he and Anderson were partners in the erection of the mill, that the lumber and other material that went into the mill were furnished by R. W. Anderson, and that, if Mrs. Anderson had any interest in the mill, he did not know it

He also said that the trust deed executed by him to Bridges and the note given to Mrs. Anderson for $700 were so executed at request of R. W. Anderson, and in settlement of matters between himself and R. W. Anderson. Mrs. Anderson also testified that her husband and Nelson were jointly interested in the mill, and that Nelson owed her nothing. It is plain, therefore, that, if Mrs. Anderson had any interest in this mill property, it was secured through her husband acting as her agent. He must, therefore, have been familiar with the transactions in reference to the purchase of the lots and the erection of the mill, but of which his wife, according to her own testimony, knew almost nothing. But when he was questioned about these matters, he seemed much disinclined to make a fair and full statement concerning them. When asked about the terms of the contract under which Nelson had erected the mill, he at first denied knowing anything about it, and said he "guessed Nelson was running his own business." When asked if he knew who paid Nelson for erecting the mill, he answered, "No; I don't know anything about it. It is his own mill. I don't reckon he got any pay for it." To the question whether his wife had any interest in the mill before she received the deed from Bertha Gause, he answered: "I don't remember. I don't know what time the mill was put up."

Now, Anderson was an insolvent merchant. He purchased and improved this property in his wife's name a short time before his failure, and while he was heavily in debt. Instead of making a full and frank disclosure of his wife's interest in the property, if she had any interest, his testimony is full of contradictions and evident evasions. He displays such absurd ignorance of important transactions to which he must have been a party, either in his own behalf or as agent for his wife, that we can attach but little importance to his testimony. Nelson, who was a disinterested witness, and seems to have made a fair statement, not only testified that Mrs. Anderson was not a party to the contract for erecting the mill, but that Anderson, in a conversation with him, said that if his creditors would let him alone he would pay out all right, but "if they came on to him he was going to be ready for them."

Now, even if the lots in controversy belonged to his wife,

Anderson would not be permitted to defraud his creditors by improving her property with assets belong to him. *Seasongood* v. *Ware*, 104 Ala. 212; *Lynde* v. *McGregor*, 13 Allen, 182; *Humphrey* v. *Spencer*, 36 W. Va. 11; *Campion* v. *Cotton*, 17 Ves. (Eng.) 264. But a careful consideration of the evidence convinces us that these lots were purchased and improved by Anderson out of his own funds, and that he had the conveyance mentioned made to his wife in order to prevent the lots from being seized under executions against him.

It is true that the plaintiff introduced no evidence to show the time when Anderson became indebted to it. But the complaint, which was filed in May, 1895, alleged that Anderson had for more than two years been heavily embarrassed and in debt, and was then insolvent. There was no denial of this allegation, and we must therefore take it as true. If the conveyance of the lots in question were paid for and improved by Anderson, and the title taken in his wife's name, with the actual intent to hinder and delay his creditors, such land would be subject to debts of creditors, both prior and subsequent to such transaction. In equity, such lands would be treated as his property, and subject to his debts, whether such debts existed at the time such land was purchased or were contracted shortly afterwards. *May* v. *State National Bank*, 59 Ark. 614.

Our conclusion is that plaintiff made out its case, and that the court erred in dismissing its complaint. The judgment is therefore reversed, and the cause remanded, with an order that a decree be entered in accordance with this opinion.

---

66 422
76 262

BOLES *v.* MCNEIL.

Opinion delivered April 29, 1899.

1. TAX SALE—ADVERTISEMENT—DESCRIPTION OF LAND.—A tract of land was assessed for taxation by the following description:

	Parts of Section	Sec.	Tp.	R.	Area	Value
A. W. Dinsmore	E ½ SE.	12	20	32	80	160

In the advertisement of the land for sale for delinquent taxes it was described as follows:

A. W. Dinsmore	Parts of Sec. E^2 SE.	Sec. 12	Tp. 20	R. 32	Area 80	Value 160

Held that the land was sufficiently described in the advertisement. (Page 424.)

2. TAXATION—FILING DELINQUENT LIST OF REAL ESTATE—TIME.—Sand. & H. Dig., § 6574, provides that the collector, after attending at the voting precincts for the purpose of collecting taxes, thereafter shall attend at his office at the county seat *from* the tenth of April each year to receive taxes from persons wishing to pay the same. Section 6589, *ib.*, provides that "at any time after the tenth day of April in each year after such tax may be due, the collector shall distrain sufficient goods and chattels belonging to the person charged with taxes levied upon the personal property to pay the taxes due upon personal property of said person." Section 6603, *ib.*, provides that "the collector shall, by the second Monday in May in each year, file with the clerk of the county court a list or lists of all such taxes levied on real estate as such collector has been unable to collect," etc. *Held*, that the use of the word "from" in section 6574, *supra*, was a clerical misprision for *until;* that the delinquent list of real estate may be filed by the collector at any time after the tenth day of April, and on or before the second Monday in May. (Page 425.)

Appeal from Benton Circuit Court.

EDWARD S. MCDANIEL, Judge.

E. P. Watson, for appellant.

The description of the land was sufficient. Cooley, Taxation, 407; 64 Ark. 580; 81 Ind. 180; 78 Ill. 570. The collector had the discretionary power of filing the delinquent list at any time after April 10, and before the second Monday in May. Sand. & H. Dig. §§ 6574 and 6603. The word "by," as used in the statute, means "before." Webst. Dict.; 5 Am. & Eng. Enc. Law (2 Ed.), 82. The use of the word "until" in section 5731 Mansf. Dig. was a clerical error, and one which this court can correct. 34 Ark. 263; 35 Ark. 56.

J. A. Rice, for appellee.

A description referring to land as the "E^2", etc., is insufficient. 44 Am. St. Rep. 516; 55 N. Y. 200; 59 Ark. 460; 44 Am. St. Rep. 516; 26 Minn. 212; 2 N. Dak. 141. Filing the delinquent list before the second Monday in May was a premature act. 35 Ark. 505.

BATTLE, J. The subject-matter in controversy in this action is the east half of the southeast quarter of section twelve

in township twenty north, and in range thirty-two west, and fractional southwest quarter of the southwest quarter of section seven in township twenty north and in range thirty-one west. Appellee deraigned title to the same from the United States, and the appellant claimed under a purchase at a tax sale. The circuit court held that the tax sale was invalid, and rendered judgment in favor of the appellee against the appellant for the possession of the land.

The court found that the sale of the east half of the southeast quarter of section twelve in township twenty north, and in range thirty-two west, for taxes was invalid, because it was not sufficiently described in the notice of the sale at which it was sold, and held that the sale of both tracts for taxes was void, because they were prematurely returned delinquent on account of the non-payment of the taxes assessed against them for the year 1892.

These lands were assessed for taxation as follows:

	Parts of Sec.	Sec.	T.	R.	Area	Value
A. W. Dinsmore	E ½ SE.	12	20	32	80	160
A. W. Dinsmore	Frl. SW. SW.	7	20	31	50	160

Taxes to the amount of $2.08 were levied on each of them for the year 1892. Both tracts were returned delinquent on account of the non-payment of these taxes on the first day of May, 1893. The clerk added a penalty of twenty-five per cent. on the total taxes levied, and caused the same to be advertised for sale for the taxes and penalty due thereon, in the manner provided by law, in words and figures as follows:

	Parts of Sec.	Sec.	T.	R.	A.	Val.	Tax	Pen.	Total
A. W. Dinsmore	Frl. SW. SW.	7	20	31	50	160	2.08	.52	2.60
A. W. Dinsmore	E^2 SE.	12	20	32	80	160	2.08	.52	2.60

They were sold by the collector of taxes, pursuant to the advertisement, and were purchased by the appellant. Was the east half of the southeast quarter of section twelve sufficiently described in the advertisement?

The statutes of this state provide that each tract or lot of real property shall be so described in the assessment thereof for taxation as to identify and distinguish it from any other tracts or parts of tracts; and that the same shall be described, if practicable, according to section, or sub-division thereof, and con-

gressional townships. In an endeavor to comply with this requirement of the statutes, the assessor described one of the tracts in controversy in his assessment as follows:

Parts of Sec.	Sec.	Tp.	R.	Area.	Value.
E ½ SE.	12	20	32	80	$160

And the clerk described it in the advertisement for sale as follows:

Parts of Sec.	Sec.	Tp.	R.	Area.	Value.
E^2 SE.	12	20	32	80	$160

From these descriptions, it is evident that the clerk, following the description in the assessment, attempted to describe an eighty acres in section twelve, in township twenty, in range thirty-two, in his county (Benton) and in this state. It was a legal sub-division of a section of land,—one-half of a quarter. In a column with the caption, "Parts of Sec." he described it as "E^2 SE." The first letter is the abbreviation of east, and the next two of southeast. In the order they were printed, and in the column they stand, they described a part of a section as east of southeast, and that part of a section, as shown by the description, contained eighty acres,—a half of a quarter of a section. They could designate only one legal sub-division of a section, and that is the east half of the southeast quarter. The land so described was the east half of the southeast quarter of section twelve in township twenty, in range thirty-two, and in the county of Benton. Then, again, it was assessed, and advertised for sale, in the name of A. W. Dinsmore, who was the owner of it at the time it was assessed and advertised, subject to a mortgage. This makes the identification of the land more full and complete. We think the description was sufficient. But we do not mean to hold that it would have been sufficient in the absence of the statement of the number of acres the tract described contained.

Was the land prematurely returned delinquent? It was returned on the first day of May, 1893. Appellee contends that it should have been returned on the second Monday in May, 1893, which was the ninth.

Section 5731 of Mansfield's Digest reads as follows: "The collectors shall cause printed notices to be posted in three pub-

lic places in each township, town or city throughout the county, one of which shall be at the place of holding elections in such township, town or city, and published in some newspaper published in the county, if any there be, stating on what day the collector or his deputy will attend at the places of holding elections, in each township, town or city, which day shall not be prior to the first Monday in November of each year, but as soon thereafter as practicable, for the purpose of receiving taxes. The collector or his deputy shall attend, for the purpose aforesaid, on the day and at the places named in such notices, and thereafter shall attend at his office at the county seat until the 10th day of February of each year, to receive taxes from persons wishing to pay the same."

Section 5760 of the same digest reads as follows: "The collector shall, by the first Monday in March in each year, file with the clerk of the county court a list or lists of all such taxes levied on real estate as such collector has been unable to collect, therein describing the land or town or city lots on which said delinquent taxes are charged, as the same are described on the tax-book, and the collector shall attach thereto his affidavit to the correctness of such list. The clerk of the county court shall carefully scrutinize said list, and compare the same with the tax-book and record of tax receipts hereinbefore provided for, and shall strike from said list any tract of land, town or city lot upon which the taxes have been paid, or which does not appear to have been entered upon the tax-book, or that shall appear from the tax-book to be exempt from taxation."

The act entitled "An act to amend the revenue laws of this state," approved March 28, 1887, amended many sections of Mansfield's Digest by merely changing the time when various acts should be done. It amended section 5731 by changing the word November to January, and the word "until" in the last sentence to "from," and the word February to April, making the last sentence as amended read: "The collector or his deputy shall attend, for the purpose aforesaid, on the day and at the place named in such notice, and thereafter shall attend at his office at the county seat from the 10th day of April of each year, to receive taxes from persons wishing to pay the same." It amended section 5760 by changing the words "first Monday

in March" to the words, "second Monday in May," and omitting the words "hereinbefore provided for," in the last sentence.

The decision of the last question in this case involves to some extent the construction of these two sections. Much depends upon the effect that shall be given to the word "from" in the last sentence in section 5731, as amended. The question presented by it is, was the use of it a clerical error?

Section 5731, as amended, after providing that the collector or his deputy shall attend at the places of holding elections in his county, for the purpose of receiving taxes, says: "and thereafter [he] shall attend at his office at the county seat from the 10th day of April of each year, to receive taxes from persons wishing to pay the same." It obviously means that the collector shall commence receiving taxes at the county seat immediately after he has attended the places of holding elections. The word "thereafter" denotes the beginning of the receiving of taxes at the county seat. Giving the word "from" in the same sentence full force and its literal meaning, the collector would be required to commence receiving taxes at the county seat at two different periods of time. That is impossible. The legislature evidently meant to say, "and thereafter [he] shall attend at his office at the county seat until the 10th day of April of each year, to receive taxes from persons wishing to pay the same." The word "from" is a clerical error evidently, made in copying section 5731 of Mansfield's Digest. This is made apparent by the sections following, which prescribe the duties of the collector after the 10th of April. Section 5746 of Mansfield's Digest, as amended by the act of March 28, 1887, says: "At any time after the tenth day of April, in each year, after such tax may be due, the collector shall distrain sufficient goods and chattels belonging to the person charged with taxes levied upon the personal property, to pay the taxes due upon the personal property of said person, and a penalty of twenty-five per centum thereon, * * * and the costs that may accrue, and shall immediately proceed to advertise the same in three public places in the county, stating the time when, and the place where, said property shall be sold." From the two sections quoted, it is apparent that the legislature intended that the collector shall

remain at his office at the county seat until the tenth day of April, for the purpose of receiving taxes on all classes of property, and that he may then proceed to collect unpaid taxes on personal property by distraint. Any other construction would make the two sections conflict; for a different construction would make the former section require the collector to remain at his office at the county seat after the tenth day of April, to receive taxes on personal property and lands, while the latter would make it his duty to leave his office after the tenth day of April for the purpose of collecting taxes on personal property by distraint.

Tax-payers are allowed by the act of March 28th from the first Monday in January to the tenth day of April in each year to pay taxes on all classes of property without penalty. After that time the collector may distrain to pay taxes on personal property, which have not been collected, and a penalty of twenty-five per cent. thereon, and may make out a list of the real property on which the taxes have not been paid. He is required to file such list by the second Monday in May of each year. Owners of land may pay taxes thereon at any time before the list is filed, without paying a penalty, but there is no duty upon the collector to keep the tax books open for that purpose after the tenth day of April. He can file a list of the lands on which the taxes have not been collected at any time after the tenth of April, and on or before the second Monday in May.

It follows that the lands in controversy were not prematurely returned delinquent on account of the non-payment of the taxes of 1892.

Reversed and remanded for a new trial.

ROBINSON v. DAVIS.

Opinion delivered April 29, 1899.

APPEAL—AFFIRMANCE—AMENDMENT.—Where the circuit court sustained a demurrer to defendant's petition to vacate a judgment against her on the ground of newly discovered evidence, but offered to grant leave to amend, of which she declined to accept, taking an appeal instead, the supreme court, on affirming the judgment appealed from, may remand the cause with leave to amend. (Page 432.)

Appeal from Drew Circuit Court.

MARCUS L. HAWKINS, Judge.

W. G. & W. B. Streett, for appellant.

The presumption, in the absence of proof to the contrary, is that an officer having a duty to perform performs that duty in accordance with the law. 25 Ark. 311; 30 Ark. 69; 35 Ark. 99; 31 Ark. 609. The evidence fails to show that the land was sold three times, as alleged by appellees. A new trial should have been awarded on the ground of surprise.

Jno. C. Connerly, for appellees.

Section 4197 Sand. & H. Dig. enumerates the grounds for new trial, and appellant's case does not fall within any of its clauses.

HUGHES, J. Joe Davis, one of the appellees, brought this suit in ejectment against Nancy Robinson, in the circuit court of Chicot county, to recover the northeast ¼ of section seventeen, in township sixteen south, and range one west, situated in said county of Chicot. Judgment by default was rendered for the plaintiff. This judgment was set aside, and a new trial was granted. The Sunny Side Lumber Company purchased the land of Joe Davis pending the litigation, and upon its applicaton was made a party plaintiff to the suit, and obtained a change of venue to the county of Drew, where the circuit court, on trial of the cause, found for the plaintiff, and rendered judgment accordingly. Before the next term of the court thereafter, the ap-

pellee (defendant below) filed her petition, under sections 4197 and 5843 of Sandels & Hill's Digest, to vacate this judgment; alleging surprise in the trial and unavoidable casualty brought about by the plaintiff in the suit preventing the defendant from making proper defense, and newly discovered evidence not before obtainable. The court sustained a demurrer to this petition, but granted the defendant leave to amend, which the defendant failed to do, and appealed to this court.

In the suit in ejectment the appellant relied upon a donation deed by the commissioner of state lands, founded on a forfeiture of said land to the state for the taxes of 1873, 1874 and 1875. The court found upon the trial that the forfeiture was void for the reasons, as stated in the opinion of the court, that the land was sold for taxes three times in one day for taxes of 1873, 1874 and 1875; that the land was sold for an illegal levee tax; that the land was sold for an excessive school tax for the year 1873. It seems that the ground that the land was sold for an illegal levee tax is abandoned. We are of the opinion that it does not appear that the land was sold for taxes three times in one day. If it had been, it is a question whether the sale would be void on this account. But this question is not before us, as there is no appeal from that judgment. In his attack on the tax title of the appellant, the appellee introduced in evidence the certified copy of the delinquent list from which the sale of the land was made, which, on its face, shows that the school tax for the year 1873 in the district in which the land lies was extended on an assessment of the land at $669.60, and amounted to $4.85. It was also shown that the rate of school tax for 1873 in that district was 5 mills on the dollar. It appeared, therefore, that the land had been sold for an excessive district school tax for 1873, and this rendered the sale void; and the court so declared, which was, of course, correct.

The appellant's petition to set aside the judgment was, in substance, as follows: "Plaintiff has discovered, since the trial of this cause, that the certified copy of the sale of said land for taxes, offered in proof by defendants [appellees here], contained an error in the amount of the assessment, and upon which the finding of the court was based; that, by a clerical error or some

cause unknown to plaintiff Robinson, the valuation of said lands, as shown by the exhibit then produced, was made to read $669.60, when it should be $969.60; that upon said erroneous valuation the whole tax appeared to be excessive, when, upon the correct valuation, $969.60, the extension of the taxes was and is correct, and said sale is not "void for excessive taxes." Exhibits showing the above statements to be correct are filed with, and referred to in the petition. It is further stated in said petition that "this cause being in said Drew county circuit court on change of venue from Chicot county, where the records were kept, she had no means of obviating the surprise caused by the erroneous exhibit offered in proof as aforesaid, and was misled by the same error that caused the court to find against her." These allegations, together with all others in said petition, are admitted by appellant's demurrer as true.

A duly-certified copy of the assessment of this land, as adjusted by the board of equalization of Chicot county for 1873, exhibited with appellant's petition, shows that for that year 1873 said land was assessed at $969.60 instead of $669.60, as shown by the delinquent list as aforesaid. And a duly certified copy of the tax book relating to this land, exhibited with appellant's petition, shows that taxes had been extended on this land for 1873 on a valuation of $969.60, as shown by the assessment list for that year; thus showing that there was an error in the delinquent list in showing the assessed valuation to be $669.60, whereas in fact it was $969.60, and that, therefore, the land was sold for the correct amount of school tax, which, at 5 mills on $969.60, would be $4.85.

So it appears that the facts, as they really were, were not presented to the court, which, had they been, might have secured for defendant a judgment. But the judgment of the court upon the evidence before it was correct, and must be affirmed. The petition of the appellant to vacate the judgment can be considered only on the ground of newly discovered evidence. If the appellant was surprised on the trial, it was her duty to have asked at once for a postponement of the trial, to enable her to procure her testimony. This she did not do, and no question of surprise in the case is before this court. When the demurrer to the appellant's petition was sustained in the court below,

and she was granted leave to amend, she declined to do so. The petition does not clearly state that she had no notice, before the trial, of the condition of the record, upon which the appellee relied to show that her title was void. The records were in Chicot county. The trial was had in Drew county, upon change of venue. The question which confronts us is, can this court, upon an affirmance of the judgment of the circuit court sustaining a demurrer, remand the cause with leave to amend?

Amendment is always discretionary with the court. *Fenno* v. *Coulter*, 14 Ark. 38. It is apparent that the merits of this controversy were not made to appear to the court below, and that it went off upon an untrue presentation of the real facts in the case. It was tried upon a part only of the record relating to the forfeiture of the land for non-payment of taxes. The record was inconsistent and contradictory; the delinquent list and sale list showing that the land had been assessed for 1873 at $669.60, and the assessment list and tax book showing the assessed valuation to be for that year $969.60. It is apparent that, if the matter stands as it now does, the appellant is without remedy against a judgment against her that deprives her of her land for failure of her title, when, had the facts been fully presented, her title would not have been declared void. The appellant's deed was *prima facie* evidence of title in her deed from the state. She may have supposed that the record was regular and consistent, but on the trial, in a county other than that where the records of the tax sale were, it was suddenly developed that the record did not sustain her deed. This showing by the record introduced was false, and misled the court; but she had no means then and there of showing, and perhaps did not know,—what she afterwards discovered,—that it was false. To remand the cause with leave to appellant to amend her petition will not deprive the appellee of an opportunity to present his whole case. *Kirstein* v. *Madden*, 38 Cal. 158; *Penny* v. *Vancleef*, 1 Hall (N. Y.), 168.

To allow amendment is the rule; to refuse, the exception. *Tiffany* v. *Henderson*, 57 Ia. 490. "The rules for amendment are exceedingly liberal, when justice will thereby be done, and wrong prevented." *Church* v. *Holcomb*, 45 Mich. 39. In this case of *Church* v. *Holcomb*, Judge Cooley delivered the opinion

of the court. The judgment was affirmed, and the cause was remanded with leave to amend. See also *Lane* v. *Lane*, 87 Ga. 268; *Cottrell* v. *Watkins*, 89 Va. 801; *Branch* v. *Knapp*, 61 Ga. 616; *Picquet* v. *Augusta*, 64 Ga. 516; *Pease* v. *Morgan*, 7 Johns. (N. Y.) 468; *Manz* v. *St. L. I. M. & So. Ry. Co.* 87 Mo. 278. In *Thatcher* v. *Candee*, 42 N. Y. 157, a demurrer was sustained to the complaint for the want of proper parties. The judgment was affirmed in the court of appeals, and the cause was remanded with leave to amend.

We think that appellant should have an opportunity to show that she is not at fault for not having had the record of the tax sale at the trial, and, if not in fault, that she should have an opportunity to present it, and invoke the judgment of the court thereon. Remanded, with leave to amend.

TUPY v. KOCOUREK.

Opinion delivered April 29, 1899.

1. AFTER-ACQUIRED TITLE—CONFIRMATION OF TAX TITLE.—Where a purchaser of land at tax sale conveyed it to another by warranty deed, a decree of confirmation of such tax title, rendered after such conveyance was made, will inure to the benefit of the grantee therein. (Page 435.)

2. TAX SALE VALIDITY.—A purchase of land from the clerk for the taxes due thereon, under the act of March 16, 1879, is void. Following *Shaw* v. *Hill*, 46 Ark. 333. (Page 436.)

3. SALE OF LAND—SUFFICIENCY OF TITLE.—Under an executory contract to convey land by warranty deed, the vendee is entitled to receive, not only a title that is good against adverse claimants, but also one that he can hold without reasonable apprehension of its being assailed, and that he can readily transfer in the market, if he desires. (Page 436.)

4. EXECUTORY SALE—RESCISSION—PRACTICE.—Where, by an executory contract, two tracts of land are sold for a lump sum, and the title to one of them fails, the vendee, if he has not been in possession, is entitled to have the contract rescinded as to both tracts, or to have judgment of recovery against the vendor for so much of the purchase money as has been paid, together with six per cent. interest per annum, also to have same declared a lien upon the tract to which the vendor has good title, and to have his note for the balance of the purchase money cancelled. (Page 436.)

Appeal from Prairie Circuit Court.

JAMES S. THOMAS, Judge.

McClintock & Lankford, for appellant.

The confirmation of the tax title should be set aside on account of fraudulent concealment of facts. Black, Judg. § 368; 42 Ark. 638. The subsequent deed of the clerk, when by mistake the land has been sold twice, could be no bar to the first purchaser in the assertion of his claim. 2 Wall. 605; 78 Wis. 701; 128 U. S. 456; 101 U. S. 260; 25 Kas. 340; 13 Wall. 72; 91 U. S. 330; 106 U. S. 447; 30 Kas. 67. A purchaser will not be compelled to accept any other than a good title. Bisph. Eq. § 378; 28 Am. & Eng. Enc. Law, 70; 22 *id.* 948; 23 Ark. 235; 44 Ark. 196; 59 Md. 492; 63 Ark. 548; 3 Allen, 25; 33 Mich. 396. As to what is a *good* title, see 121 N. Y. 353; 24 N. E. 868; 28 Pac. 1046; 22 S. W. 1070; 35 N. E. 814; 67 Pa. St. 436; 24 N. Y. Eq. 327; 31 Mo. 54; 132 Ill. 607; 120 N. Y. 253; 63 Ark. 551. The presumption is that a contract to convey title means to convey a *good* title. 121 N. Y. 353; 115 *ib.* 586; 120 N. Y. 253.

J. H. Harrod, for appellee.

Seven years' actual possession gives title to land. 34 Ark. 534; 34 Ark. 547; 38 Ark. 181. Two years' possession, even where the description of land is insufficient, will bar recovery. 59 Ark. 460; Sand. & H. Dig. § 4819; 60 Ark. 163; 60 Ark. 499.

WOOD, J. This suit is upon a promissory note for $1,380 made by Tupy to Kocourek as part of the purchase price for the S. W. ¼ of section 13, and the S. W. ¼ of section 5, township 1 north, range 5 west, in Prairie county, Arkansas. It is alleged that Kocourek owned the S. W. ¼ of section 13, and his wife Anna the S. W. ¼ of section 5. Upon the payment of the note, Kocourek and his wife were to execute warranty deeds to the lands mentioned. When the note was due January 1, 1895, Kocourek and his wife made warranty deeds, tendered them to Tupy, and demanded payment of the note, which was refused, and this suit followed. The answer set up no title in

Kocourek to the S. W. $\frac{1}{4}$ of section 13, nor in Mrs. Kocourek to the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 5.

The chancellor found that Mrs. Kocourek had title by the statute of limitations of seven years. This finding was correct. He also found that John Kocourek had title by a certain decree of confirmation. Was this finding correct? In 1866 S. P. Hughes bought the land (S.W. $\frac{1}{4}$ of sec. 13) at tax sale. In 1869 Hughes conveyed the land by warranty deed, upon consideration of $200, to one Roy. In 1880, the clerk of Prairie county executed a deed to S. P. Hughes conveying the land for the taxes of 1878 and 1879. In 1895, Kocourek petitioned the clerk of Monroe county for a deed to the land, either to himself or Hughes. The petition set up the purchase by Hughes at tax sale of 1866, and alleged that certificate of purchase had been issued, and same had been lost, mislaid, or destroyed. The affidavit of Hughes was not filed to that effect. The petition also set up a conveyance of the land from Hughes and wife to Henry in 1884, and from Henry and wife to Konigsmark in 1890, and from Konigsmark to Kocourek in 1892. The clerk in January, 1895, executed the deed to Hughes conveying the land. In September, 1895, a decree was rendered confirming the tax title of S. P. Hughes, and confirming and quieting the title of Kocourek, after reciting the facts, as shown *supra* in the petition to the clerk for a deed. It nowhere appears that Roy ever conveyed the lands back to S. P. Hughes or to Kocourek. It is manifest, therefore, that the confirmation of the tax title of S. P. Hughes acquired in 1866 could not inure to the benefit of either Hughes or Kocourek; for Roy had acquired all the interest that Hughes had under the tax title, by virtue of the warranty deed from Hughes in 1869. The deed made by the clerk to Hughes in 1895, based upon the assumption that Hughes had never conveyed the land, could not affect Roy's title. The petition of Kocourek to the clerk for a deed did not disclose the fact that Hughes had previously conveyed the land to Roy. The clerk could not decide who had the right to a tax deed when the facts were not disclosed, and his execution of same, under the circumstances, could confer no rights upon Hughes or Kocourek, who claimed under Hughes, antagonistic to Roy. Roy's title, so far as this record discloses, is good against any one claiming

under the confirmation of the tax title of S. P. Hughes, acquired in 1866. The court, therefore, erred in finding that Kocourek had title to the southwest $\frac{1}{4}$ of section thirteen.

The deed of the clerk to Hughes for the taxes of 1878 and '79 was void. *Shaw* v. *Hall*, 46 Ark. 333.

But it is contended that, in the absence of insolvency or fraud on the part of Kocourek, Tupy cannot refuse to pay, inasmuch as the contract only called for a warranty deed, which has been tendered him. Tupy had never been in possession of the land. Where there is no stipulation to the contrary, the law will presume, in a contract for the sale of lands upon a valuable consideration, that the vendor intended to convey a good title, and the vendee will not be compelled to pay his money and accept it, unless it is good. *Irving* v. *Campbell*, 121 N. Y. 353; Bisph. Eq. § 378; 28 Am. & Eng. Enc. Law, p. 70; 22 *id.* p. 948.

One who contracts and pays his money for a title to land ought to get, not only a title that he can hold against all adverse comers, but one that he can hold without reasonable apprehension of its being assailed, and one that he can readily transfer, if he desires, in the market. *Irving* v. *Campbell*, 121 N. Y. 353; *Sheehy* v. *Miles*, 28 Pac. 1046; *Street* v. *French*, 35 N. E. 814; 22 Am. & Eng. Enc. Law, p. 948, note; *Griffith* v. *Maxfield*, 63 Ark. 548, and authorities cited. In common parlance, a warranty deed means a perfect title; and, in legal contemplation, when parties contract for a warranty deed, they must be understood to mean a title paramount to all others. Devlin, Deeds, § 937.

The contract for the sale of this land cannot be severed. The title to half of the land is not such as the contract contemplated. Therefore the appellant is entitled, in his cross-complaint, to have the contract rescinded, and to have judgment against the appellee for the amount of $1,100, with interest from the date of its payment at 6 per cent. per annum, and to have same declared a lien on the S.W. $\frac{1}{4}$ section 5, and to have this land sold to satisfy same, and to have his note of $1,380 in the hands of appellee surrendered and canceled. The decree is therefore reversed, and the cause is remanded, with directions to enter a decree in accordance with this opinion, and for such

other and further proceedings as may be necessary, and not inconsistent herewith.

HUGHES, J., did not sit in this case.

SPARKS v. MOORE.

Opinion delivered May 6, 1899.

MARRIED WOMEN—POWER TO CONTRACT.—Under the act of March 19, 1895, providing that, from and after the passage of that act, "it shall be lawful for married women to make executory contracts, and to execute letters of attorney containing a power to convey real estate as agents or attorney, which shall have the same force and effect as those made by unmarried persons," the powers of married women to make contracts generally were not enlarged, but only their powers to make executory contracts, including powers of attorney, concerning their separate real estate. (Page 438.)

Appeal from Cross Circuit Court.

FELIX G. TAYLOR, Judge.

N. W. Norton and *J. T. Patterson*, for appellant.

The common-law disabilities of married women remain, except in so far as they have been removed by statute. 32 Ark. 776; 39 Ark. 361. Their power to contract *generally* is not enlarged by either the constitution or the "married woman's act." Sand. & H. Dig. chap. 105; 43 Ark. 164. The act of 1895 should be construed to harmonize with the "married woman's act." 23 Ark. 304; 5 Ark. 236. A married woman's contracts must be made in reference to her separate estate or for her personal benefit. 29 Ark. 346. Executory contracts of married women to convey land are not binding. 39 Ark. 357; 53 Ark. 509.

Grant Green, Jr., *Jno. T. Hicks* and *R. A. Dowdy*, for appellees.

The act of 1895 authorizes married women to make executory contracts, as well as to execute letters of attorney.

BUNN, C. J. This is a suit on a note executed to John H. Dye by G. N. Sparks and his wife, P. J. Sparks, for the sum of $262.20, owing by G. N. Sparks to John H. Dye for tuition account of his daughter at Galloway College. The note was assigned to Moore & Lyons by Dye, and they brought this suit before a justice of the peace against both the makers. At the trial G. N. Sparks failed to appear, and judgment was rendered against him, and he is not in the present controversy. His wife, the said P. J. Sparks, entered her appearance in the justice-of-the-peace court, and made defense, pleading her coverture, and that the debt for which the note was given was not her debt nor contracted for her property, but that it was the husband's debt, and that therefore she was not liable. The justice of the peace sustained her contention, and so adjudged, and the plaintiffs appealed to the circuit court, where the court sustained her finding of facts as true, but held that she was liable, and Mrs. Sparks took her appeal to this court.

This issue thus made is to be decided by a proper construction of the act approved March 19, 1895, entitled "An act to define the rights of married women." Before the passage of this act, the power of married women to contract was restricted to matters connected with her separate property, and for the benefit thereof, and in the course of her business as a trader, and she had no power to make executory contracts as to the separate real estate.

The act of March 19, 1895, is short and reads as follows: Section 1. "That, from and after the passage of this act, it shall be lawful for married women to make executory contracts and to execute letters of attorney containing a power to convey real estate as agents or attorneys, which shall have the same force and effect as those made by unmarried persons."

Before the passage of this act, a married woman could not execute a title bond nor make an executory contract to convey her lands. *Stidham* v. *Matthews*, 29 Ark. 650; *Wood* v. *Terry*, 30 Ark. 385; *Chrisman* v. *Partee*, 38 Ark. 31; *Felkner* v. *Tighe*, 39 Ark. 357.

This act does not enlarge her powers, other than to give validity to her executory contracts in cases where before she could only make contracts conveying her separate property.

Where before she could make contracts binding upon herself, but could not make executory contracts, she can now, since the passage of the act quoted, make executory contracts also, and, furthermore, she can make contracts through an agent or attorney duly authorized, as if she were a *femme sole*, wherever she could contract directly before.

The act does not have the effect of further enlarging her powers to make binding contracts than is indicated above, and her common law disabilities to contract generally, except when changed or modified by constitutional or statutory provisions, still remain.

Reversed, and judgment for appellant.

WOOD, J., and RIDDICK, J., did not participate.

KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY *v.* KING.

66 439
67 516

66 439
84 373

66 439
189 578

Opinion delivered May 6, 1899.

RAILROADS—STOCK KILLING—NEGLIGENCE.—The statutory presumption of negligence arising from proof that a horse has been killed by a train is rebutted by the uncontroverted testimony of the engineer that it was a cloudy night, that he could see only about 100 yards ahead, that he was keeping lookout, and on discovering the animal gave the stock alarm and put on brakes, that he did all he could to stop the train, which was going at the rate of twenty-five miles an hour, and could not have been stopped within less than 400 yards, and that after he discovered the horse he ran 100 yards down the track before he was killed. (Page 441.)

Appeal from Lawrence Circuit Court.

RICHARD H. POWELL, Judge.

W. J. Orr, for appellant.

The complaint, in order to state a cause of action, should state that the killing occurred in the county where the suit is brought. Sand. & H. Dig. § 6352; 55 Ark. 282; 45 S. W. 909; 38 Ark. 206. Appellant saved due exceptions to all the testimony as to where the animal was found, etc., and hence the

question of its competency is fairly before the court. Pleading over does not waive the objection that the complaint does not state a cause of action. 43 Ark. 230; 44 Ark. 202; 49 Ark. 277. The court erred in reading section 6207, Sand. & H. Dig. to the jury, as an instruction. The "lookout statute" is to be construed strictly. 52 Ark. 152. The verdict is unsupported by the evidence. The appellant rebutted the presumption of negligence, and then it lay upon appellee to prove it. 41 Ark. 163; 78 Ky. 621; 39 Ark. 413; 40 Ark. 336; 47 Ark. 321; 53 Ark. 96.

R. A. King, pro see.

The evidence sustains the verdict. The venue of an action may be proved in circuit court, on appeal from justice court, though it does not appear on the justice's record. 55 Ark. 282.

BUNN, C. J. This is a suit for damages in the negligent killing of a horse by one of the trains of the defendant company. Judgment for plaintiff in the sum of $65, and defendant appealed. This action was commenced before a justice of the peace, based on an account for said damages. The defendant was duly summoned, but failed to appear on the day set for trial, and, after waiting three hours, the justice of the peace took the testimony, and found for the plaintiff in the amount claimed, to-wit, the sum of $65, and rendered judgment accordingly. Thereafter, in due time and in due form, the defendant filed its affidavit, and took an appeal to the circuit court, where also judgment was rendered for plaintiff in the said amount of $65, and the defendant, saving all proper exceptions, appealed to this court. After verdict, defendant filed its motion in arrest of judgment, as follows: "The defendant moves the court to arrest the judgment herein, for the reason that the statement filed with the justice and relied on by the plaintiff does not state a cause of action or facts sufficient to constitute a cause of action."

The contention of the defendant, as more particularly stated in their brief and argument, is that the venue was not laid in the account filed, and there was no proof of the county in which the killing is alleged to have occurred, and no motion made to amend or amendment made; therefore there was nothing upon which to find a judgment. Without disposing of this

question, which will not probably arise in a new trial, we proceed with the further statement of the case. The motion in arrest was overruled, and defendant excepted.

The defendant filed motion for new trial on four several grounds, the first being substantially the same as for the motion in arrest; the second, because the court read to the jury as an instruction section 6207 of Sandels & Hill's Digest (known as the "lookout statute"); the third, because the verdict is not supported by sufficient evidence; and the fourth, because the verdict is contrary to the evidence.

The question of the sufficiency of the evidence to sustain the verdict is the only one we need to discuss or consider. There is no contention that the horse was not killed by the engine at the time and place alleged in the complaint. The plaintiff's uncontradicted evidence shows his ownership of the animal and the value thereof; and the testimony of the engineer is the only testimony as to the circumstances attending the killing of the animal. He stated, in brief, that it was a cloudy, if not a dark, night, and that he could see the animal only about the distance of 100 yards ahead; that his headlight was an oil light; that the animal was standing on the track when he first saw it; that he was keeping a lookout, and at once he gave the stock alarm, which consisted of a succession of short whistles, and put on the brakes and the air, and did all he could to stop the train, which consisted of twenty-three or twenty-four heavily loaded freight cars, besides the caboose, and that he was running at a speed of twenty-five miles an hour, and could not have stopped his train within less than 400 yards; that the horse did not run more than 100 yards after he saw him; that he did not succeed in slowing up much, but he knew of nothing else he could have done to stop the train than he did do; that his stock alarm aforesaid frightened the animal.

We think the statement of the engineer is altogether reasonable, and not contradictory, and fairly removes the statutory presumption of negligence when an animal is injured by the running of a train, and that therefore there is not sufficient evidence to sustain the verdict, since the evidence of the engineer is unimpeached, and cannot be arbitrarily discarded.

Reversed and remanded.

ACRUMAN v. BARNES.

66 442
f69 123

Opinion delivered May 6, 1899.

HOMESTEAD—PURCHASE MONEY—EXEMPTION OF INSURANCE MONEY.—Money borrowed for the purpose of buying a home, and so used, is "purchase money," within the exception to art. 9, § 3, Constitution 1874, exempting homesteads, and in case of the destruction of the residence by fire the borrower cannot hold the insurance money due on a policy taken by him for his own benefit exempt from seizure on process of garnishment or execution for the debt due the lender. (Page 444.)

Appeal from Dallas Circuit Court.

JOHN B. MCCALEB, Judge.

STATEMENT BY THE COURT.

Appellee, Barnes, owned a homestead of less value than $2,500, which ordinarily was exempt from sale under execution. He sold his homestead to one Pulliam, and afterwards bought it again from Pulliam, and paid him $1,000 therefor, which one thousand dollars was loaned to him for the purpose of repurchasing the homestead by the appellant, Acruman. As a part of the transaction, the appellee, Barnes, executed to appellant, Acruman, at the time, a mortgage on the homestead to secure the payment of the one thousand dollars. Barnes, of his own motion and with his own means, insured the building, constituting, with the land on which it was situated, the homestead.

The building was afterwards consumed by fire, of which Barnes made proof, and established the liability of the insurance company for the loss. Before payment for the loss by the insurance company, Acruman sued Barnes on the debt for the money loaned, and garnished the insurance company. A trial was had, and resulted in a judgment against Barnes for the debt. The insurance company answered, and admitted its liability for $1000 on the insurance policy held by Barnes. Barnes was made a party to the garnishment proceedings, and filed an intervention, claiming that the property was not insured for the

benefit of creditors, but to protect his homestead; that he expected, with the insurance money, to purchase another residence, and that he claimed the money exempt from the payment of his debts, under the law exempting the homestead. He filed his schedule as required by the statute.

The circuit court held that Acruman had no interest in the insurance policy, and acquired none in the insurance money by the garnishment proceedings, and that the $1,000 insurance money was exempt, from which Acruman appealed.

R. C. Fuller and *Thornton & Thornton*, for appellant.

As to whether, as against ordinary debts, the insurance money collected on a loss of the homestead is exempt, the cases are divided. *Pro:* 66 Miss. 683; 54 N. H. 125; 12 Ill. App. 240. *Contra:* 50 Cal. 101; 88 Tex. 218; 5 S. W. 193; Thomp. Hom. & Ex. § 750; 31 Ark. 652. But the exemption in no case extends to bar purchase-money claims. 62 Ark. 168. Money borrowed from a third person by the vendee of a homestead and paid to the vendor is purchase money, and the homestead is not exempt as against the lender. 66 Ill. 164; 51 Ill. 500; 54 Ga. 502; 8 Cal. 271; 10 Cal. 385; 16 Kas. 54; 13 Tex. 333; Wap. Hom. & Ex. 911; 73 Wis. 557; 71 Ga. 333; 59 Ga. 232; 60 Tex. 24; *ib.* 315.

W. S. Amis, for appellee.

The term "purchase money" means the money paid *by the vendor to the vendee*, and does not include money borrowed by the purchaser to complete his purchase. 37 Ill. 438; 15 Barb. 568; 38 Md. 270; 99 Am. Dec. 537. Both parties had an insurable interest in the property. Tiedeman, Real Prop. § 327. A mortgagee has no right to the benefit of a policy taken by the mortgagor, unless it is assigned to him. 10 Peters, 507; 101 U. S. 439. The insurance money is exempt. 31 Ark. 657; Thomp. Hom. & Ex. § 748; 29 Vt. 289; 37 Vt. 263; 11 Kas. 617; 50 Cal. 101; 65 Barb. 524. It is exempt even as against specific liens on the property. 55 Tex. 58; 30 S. W. 1050; 5 S. W. 193; 2 Duv. 527; 49 N. W. 851; 50 Cal. 101; 65 Barb. 524; 48 N. Y. 188; 26 N. Y. 253; 2 Vt. 342; 29 Vt. 289; 29 Minn. 309; 31 Ark. 652; 68 Ia. 641; 62 Ia. 463.

HUGHES, J., (after stating the facts.) Where money is loaned with which to purchase a homestead, upon the understanding that it will be so used, and it is so used, and a mortgage is given to the lender to secure the payment of the money loaned for that purpose, if the building constituting a part of the homestead is insured for the benefit of the owner of the homestead, and afterwards is consumed by fire, is the money due on the policy of insurance exempt from seizure on process of garnishment or execution for the debt due the lender?

Article nine, section three, of the constitution of 1874, provides that "the homestead of any resident of this state, who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens." Acruman's testimony shows that he loaned the money to Barnes to be used for the purchase of the homestead property, and Barnes swears he used it for that purpose. Barnes executed a mortgage to Acruman upon the same property to secure the payment of the money loaned with which to purchase it. In some courts it is held that money loaned to purchase property cannot be considered purchase money as between the lender and borrower, but only between the vendor and purchaser of the property. *Heuisler* v. *Nickum*, 38 Md. 270. But, in our opinion, the weight of authority and the better reason is that money borrowed of a third person with which to purchase a homestead, when it is understood between the lender and the borrower that it is to be used for that purpose, and it is so used, is purchase money, *Allen* v. *Hawley*, 66 Ill. 164; *Hamrick* v. *People's Bank*, 54 Ga. 502; *Carr* v. *Caldwell*, 10 Cal. 385; *Nichols* v. *Overacker*, 16 Kas. 54. "Things bought with borrowed money, borrowed with the avowed purpose of buying them, are not exempt as against the lender." Waples, Hds. & Ex. 911; *Houlehan* v. *Rassler*, 73 Wis. 557. "The homestead is liable for money borrowed to pay a balance due on the purchase price." *White* v. *Wheelan*, 71 Ga. 533; *Middlebrooks* v. *Warren*, 59 Ga. 232. "One who loans money to enable another to purchase a homestead cannot be defeated in collecting it by the claim of homestead immunity upon the

part of the borrower." *Wahrmund* v. *Merritt*, 60 Tex. 24; *Eylar* v. *Eylar*, 60 Tex. 315.

The insurance money due the appellee in this case was not exempt from the debt due the appellant for the thousand dollars loaned him by the appellant with which to purchase the homestead, for the loss of which the insurance money was due the appellee. The money loaned, under the circumstances, was purchase money, according to the authorities. Wherefore the decree of the chancellor holding that the money is exempt is erroneous.

The judgment is reversed, with directions to enter a judgment for the appellant.

---

66 445
f79 262

WEST-WINFREE TOBACCO COMPANY *v.* WALLER.

Opinion delivered May 6, 1899.

WRITTEN CONTRACT—PAROL EVIDENCE TO CONTRADICT.—Where one employed to travel for a year as salesman gave a written guaranty, signed by two indorsers, that he would refund advances made to him in excess of what might be due him under the contract of employment, it is not competent for the indorsers to show, by parol testimony, that they intended to become liable only for advances made within thirty days from the date of the guaranty. (Page 447.)

Appeal from Columbia Circuit Court.

CHAS. W. SMITH, Judge.

STATEMENT BY THE COURT.

This case was commenced in a justice of the peace court, and comes here by appeal from the circuit court. The appellant company employed one L. Harper, about December 20, 1894, to travel and sell tobacco for it, and were to advance him money to defray his expenses, to give him a salary, and a per cent. on all he sold over $3,000 worth. Harper agreed to work for them during the year 1895, and gave the appellant a guaranty, with appellees as securities, that he would pay it (appellant) back all moneys advanced to him by appellant, to the

amount of $100 more than he was entitled to receive under their contract, as expense money, wages or otherwise. Harper worked for appellant four or five months, and quit owing the appellant $100 advanced to him more than he was entitled to receive for wages, expense money or otherwise. The appellant company sued Harper, and recovered a judgment against him for said one hundred dollars, with 6 per cent. per annum interest from the 26th day of January, 1895. Execution was issued upon said judgment, and returned *nulla bona*. The appellant company then sued the sureties, Waller and Couey, on their guaranty, which is as follows:

"$100. Magnolia, Ark. January 10, 1895. On demand after thirty days after date for value received, I promise to pay West-Winfree Tobacco Co., or order, without offset, negotiable and payable at Columbia County Bank, Magnolia, Ark. This is to cover advances in excess of my dues, as per your offer of December 20, 1894, which I accept to amount of cost of collection, one hundred dollars. Homestead and all other exemptions waived by the maker and each indorser.

"L. HARPER."

Indorsement on Note or Bond: "Homestead and all other exemptions waived. We guaranty within. Protest waived.

"J. M. WALLER,

"J. E. COUEY."

Upon this note or bond a trial was had in the circuit court, on an appeal from the justice, at the August term thereof, 1897; and judgment was rendered against the plaintiff, whereupon the plaintiff filed its motion for a new trial, which was overruled, to which appellant excepted, and brought the case here by appeal.

On the trial of the case, J. M. Waller was allowed, over the objection of the appellant, to testify that on or about January, 1895, L. Harper came to him, and asked him to sign a bond to the West-Winfree Tobacco Company, in order to secure him a position as traveling salesman for it. "I told him I could not do so. He came back two or three days afterwards, and told me that if I would go on the bond Mr. J. E. Couey would go on it too, and I went down to Mr. Couey's place of business, and Mr. Harper presented the instrument herein sued on, and

Mr. Couey and I signed the indorsement written on the back of the instrument. The bond or note is for one hundred dollars, and I signed the instrument or guaranty for thirty days, and for no longer. I signed the guaranty for one hundred dollars to be advanced within thirty days from the date of the instrument, and for no advancement made after thirty days after the date thereof." The other surety, Couey, was also allowed to give testimony to the same effect, over appellant's objection, to which it excepted.

The court refused to instruct the jury, at the instance of the plaintiff, "that the paper sued on in this case is a continuing guaranty, and is made to secure money advanced by them to Harper at any time during the year he was working; provided they advanced him more than he was entitled to be paid under his contract." The plaintiff excepted to the court's refusal to give this instruction.

J. M. Kelso, for appellant.

It was error to admit parol evidence to contradict the written obligation in suit. 19 Ark. 600; 13 Ark. 593; 20 Ark. 293.

A. S. Kilgore and *J. Y. Stevens*, for appellees.

A guaranty will not be construed as being a continuing one, unless the parties plainly so state. 30 Am. Rep. 577; 57 Ark. 595; 48 Am. Rep. 454; 61 Ark. 423. Parol evidence was competent to explain the doubt as to the import of the guaranty in the note. 1 Rice, Evid. 320; 76 Tex. 25; 30 Am. Rep. 575. The complaint does not state a cause of action, because it fails to show acceptance of the guaranty and consideration therefor. 64 Ark. 648; 56 Am. Dec. 610; 58 Am. Dec. 659. No prejudicial error being shown, no reversal can be had. 50 Ark. 68; 51 Ark. 186; 46 Ark. 485; 46 Ark. 542; 33 Ark. 220.

HUGHES, J., (after stating the facts.) There is no ambiguity in the meaning of the note guarantied by the appellees, and its proper construction was that asked to be placed upon it in the fourth instruction asked for by the plaintiff, which the court refused to give, and in so doing committed error, in our opinion.

The testimony of Waller and of Couey was incompetent, and the court erred in admitting it. It tended to contradict or vary the terms of an unambiguous written contract.

For the errors indicated the judgment is reversed, and judgment is ordered to be rendered below for plaintiff, for which purpose let the case be remanded.

BUNN, C. J., and BATTLE, J., not sitting.

RUTHERFORD v. McDONNELL.

Opinion delivered May 6, 1899.

1. PARTNERSHIP ASSETS—AUTHORITY OF PARTNER TO SELL.—A member of a firm engaged in farming has no implied authority to sell the live stock and farming utensils of the firm without the consent of his partner. (Page 450.)

2. SALE—MUTUAL MISTAKE—RESCISSION.—Where a partner sold, and his vendee bought, the firm assets under the mistaken belief that such partner had authority to sell the same, and, as part consideration thereof, the vendee satisfied a decree in his favor against the firm, foreclosing a mortgage on such assets, the sale will be rescinded, the satisfaction of decree set aside, and the foreclosure decree enforced by sale of the assets. (Page 451.)

Appeal from Jefferson Chancery Court.

JAS. F. ROBINSON, Chancellor.

STATEMENT BY THE COURT.

The facts in this case are, briefly stated, as follows: Eliza R. Walkerwitz, a married woman, owned certain farming lands in Jefferson county; also live stock and other personal property on said farm. She entered into a partnership with James S. Rutherford for the purpose of cultivating said lands, and sold him a half interest in the personal property for the price of $1,800. For the payment of this, he executed his note, but has never paid the same. Afterwards, Mrs. Walkerwitz and the firm became indebted to James S. McDonnell for money borrowed to run the farm and for other purposes, to the amount of several thousand dollars. To secure these sums,

Mrs. Walkerwitz executed to McDonnell a mortgage on her lands, and the firm of Walkerwitz & Rutherford also executed to him a mortgage on the personal property above mentioned. In March, 1894, McDonnell brought suit, in the chancery court of Jefferson county, to foreclose these mortgages. He recovered judgment against Walkerwitz & Rutherford for the sum of $12,500, all of which was adjudged to be a lien on the lands of Mrs. Walkerwitz, and a portion of which—to wit, $1,088—was declared to be a lien on the personal property of the firm of Rutherford & Walkerwitz. Afterwards, in March, 1895, McDonnell and Mrs. Walkerwitz agreed upon a full settlement of said judgment and decree, as follows: McDonnell was to pay Mrs. Walkerwitz $500, and release from the mortgage and decree certain live stock and farming utensils, and she was to convey to him all the lands described in the mortgages and decree, and also all the live stock and farming utensils described in the mortgage, except that portion released to her; and such conveyance of the land and live stock was to be taken by him in full satisfaction of all debts due him from Mrs. Walkerwitz, both as an individual and as a member of the firm of Walkerwitz & Rutherford. This agreement was carried out by proper conveyances from Mrs. Walkerwitz. McDonnell took possession of the lands conveyed to him, but Rutherford, who had possession of the personal property, claimed that he owned a half interest therein, and he refused to surrender the same. McDonnell thereupon brought this action to quiet his title, and to subject any interest of Rutherford in the property to the payment of his decree. Rutherford answered, alleging that the decree had been satisfied in full by the conveyance from Mrs. Walkerwitz; that he was not a party to such conveyance, and that the same did not affect his one-half interest in the personal property; and that plaintiff had no interest in or claim on the same. He also demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action in equity. The chancellor found, in favor of the plaintiff, that Rutherford had no interest in the property, and decreed accordingly.

Austin & Taylor, for appellant.

Appellee's demurrer should have been sustained, because equity had no jurisdiction to relieve the appellant from the effect of his voluntary discharge. 1 Pet. 1. The release of one partner from a partnership debt releases all. Lindl. Part. *237; 52 Am. Dec. 56, and notes; 61 Am. Dec. 283; 1 Am. St. Rep. 475. If one partner makes a conveyance of partnership property, to be binding on the others, it must be shown that it was made with the consent of such other partners. 49 Miss. 569; 1 Lindl. Part. 336; 1 Ark. 206; 37 Ark. 228; Parsons, Part. 162; 12 Peters, 221.

J. M. & J. G. Taylor and *Crawford & Hudson*, for appellee.

If the complaint stated a cause of action cognizable in either law or equity, it was not demurrable. Even if a motion to transfer would have availed appellant anything, it is now too late to make it. 32 Ark. 164. A partner has a right to use the partnership property in the payment of partnership debts, and to execute the necessary transfers thereof. Bates, Part. 820, 453; 36 Ark. 624; Jones, Liens, § 789; Parsons, Part. *162, 165; 13 Ia. 474; 3 Johns. 70; 3 Sandf. 290; 14 Abb. Pract. 332; 15 Ves. 557; 4 Day, 428; Cowp. 445; Cranch (S. C.) 280; 17 Vt. 390; 1 Brock. 461; 6 Pick. 360; 1 Met. 518; 5 Paige, 31, 32; 5 Hill, 163; 7 *id.* 585; Story, Part. 164; 48 Fed. 817. Appellant, by his acquiescing to the transfer and permitting appellee to expend his money and release his securities on the faith of the deed, is estopped to deny his partner's authority to execute same. Herm. Est. §§ 1061, 1071; 24 Ark. 371, 399; 33 Ark. 465, 468; 14 Ark. 505, 514; Big. Est. 503–6; 33 Ark. 465.

RIDDICK, J., (after stating the facts). The appellant, Rutherford, insists in this case that Mrs. Walkerwitz had no power to sell his interest in the partnership property, and that the chancellor erred in holding that he now had no interest in such property. As the partnership of Walkerwitz & Rutherford was not formed for the purposes of trade, but to cultivate the lands of Mrs. Walkerwitz, we concur in the contention that she could not sell the live stock and farming utensils of the firm without the consent of Rutherford. That property was

not held for the purpose of sale, and we do not think that power to sell it without consent of her partner can be inferred from the terms of the partnership. *Lee* v. *Onstott*, 1 Ark. 206; *Drake* v. *Thyng*, 37 *ib.* 228; *Cayton* v. *Hardy*, 27 Mo. 536.

It may, therefore, be true that Rutherford was not bound by such sale, and could recover his interest in the property upon paying or satisfying the decree or foreclosure, or so much of it as affects his property. He does not, however, offer to do that, but asserts that the decree has been satisfied in full by the contract and conveyance of Mrs. Walkerwitz, and that he now has an undivided half interest in the personal property of the firm, free from the lien of such decree. We think that the evidence shows that the satisfaction of the decree depended upon the sale of the property, both real and personal, to McDonnell. Mrs. Walkerwitz assumed to be the owner of the property. As no part of the note given by Rutherford for one-half interest in the property has been paid, the property was treated by both Mrs. Walkerwitz and McDonnell as her property, and she undertook to convey, not a one-half interest in the property, but a title to the whole, in satisfaction of the judgment and decree. If Mrs. Walkerwitz and McDonnell were acting under a mutual mistake as to her ownership and right to sell the property, and Rutherford refuses to ratify her act and make the sale good, McDonnell should be allowed to rescind the sale and set aside the satisfaction of the decree, and the foreclosure decree should be enforced by a sale of the property. Benjamin, Sales, (Bennett's Ed.) p. 368 and note; *Cooper* v. *Phibbs*, 2 L. R. Eng. & Ir. App. Cas. 170.

If there was any agreement between Mrs. Walkerwitz and McDonnell as to the price of the land, it might be unnecessary to rescind sale of land, but the price of same could be credited on the decree. The same thing may be said of her interest in the personal property, if there was any agreement as to the price. But the evidence here does not show that there was any agreement between Mrs. Walkerwitz and McDonnell as to the price of either the land or the personal property, but the chancellor disposed of the case upon the theory that Mrs. Walkerwitz could sell the personal property without consulting Rutherford.

The judgment will, therefore, be reversed, and the cause

remanded, with an order that Mrs. Walkerwitz be made a party, and for further proceedings.

NOTE. By consent of the parties this case was subsequently affirmed. [Reporter.]

RICHARDSON v. BALES.

Opinion delivered May 6, 1899 .

STATUTE OF LIMITATIONS—RECOVERY OF MONEY PAID UNDER MISTAKE.—An action to recover of money paid under mistake of fact is barred in three years from the date of payment if there was no fraudulent concealment, even though the mistake was not discovered until a year or two afterwards. (Page 453.)

Appeal from Saline Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

Mrs. N. C. Richardson, on the 31st day of October, 1896, brought suit against Henry Bales to recover $733.61, due her for money loaned, and evidenced by four promissory notes of defendant. On the 2d day of November, 1896, Bales filed an answer admitting the execution of the notes sued on, but alleged, by way of set-off, that Mrs. Richardson was due him the sum of $471.10, paid to her through mistake in a certain settlement had between them about other matters on the 19th of July, 1893, and also that he was entitled to an additional credit of six dollars for money had and received by Mrs. Richardson. Mrs. Richardson filed a reply, denying that Bales had paid her money by mistake, and controverting the other allegations of the answer. She also pleaded the statute of limitations of three years against the set-off claimed by Bales.

On the trial in the circuit court Mrs. Richardson asked the judge to instruct the jury that the claim of defendant to recover money paid by mistake was barred by statute of limitations in three years from date of such payment, which he re-

fused to do. There was a verdict and judgment for plaintiff for amount of her demand, less the amount of the set-off claimed by defendant, from which judgment she appealed.

E. H. Vance, Jr., for appellant.

The demurrer to defendant's answer should have been sustained. Sand. & H. Dig. § 5722; 35 Ark. 106; *id.* 110; 60 Ark. 611; Bliss, Code Pldg. § 334. As the account for $6 shows on its face that it is barred, the demurrer thereto should have been sustained. 31 Ark. 684; 34 Ark. 164; 49 Ark. 253; 49 Ark. 438; 32 Ark. 281.

J. S. Williams, for appellee.

The demurrer to the answer and cross-complaint was properly overruled. 119 Ind. 79; 49 Ark. 253. Limitation does not run against fraudulent mistake until after it is dismissed. 69 N. W. 1049; 39 S. W. 919; 49 Pac. 632; 53 Pac. 410; 45 S. W. 974; 21 Wall, 342, 347, 349; 120 U. S. 130. The jury's finding against the appellant on the facts as to the limitation will not be disturbed. 46 Ark. 142; 51 Ark. 467; 56 Ark. 314; 47 Ark. 196.

RIDDICK, J., (after stating the facts.) The only question presented by this appeal is whether the claim of defendant to recover money paid by mistake was barred by the statute of limitations. It is admitted that the alleged overpayment was made in a settlement having no connection with the notes sued on, and over three years before the filing of the answer claiming the same as a set-off, and we are of the opinion that the claim was barred. Under our statute, an action to recover money paid under a mistake of fact, when there is no fraudulent concealment, is barred in three years from the date of payment. The right of action arose upon such overpayment, and the statute commenced to run immediately, even though the mistake was not discovered until a year or two afterwards. Sand. & H. Dig. § 4822; *Leather Mfg. Bank* v. *Merchants Bank*, 128 U. S. 26; *Sturgis* v. *Preston*, 134 Mass. 172; *Ware* v. *State*, 74 Ind. 181; *Jones* v. *School District*, 26 Kas. 490; Buswell, Limitations, § 171.

There is nothing in the pleadings or proof to show any

concealment of facts on part of plaintiff. The note upon which defendant claims to have made the overpayment was at once handed to him, and if he did not look at it he alone was to blame. The record shows that, at the time this settlement was made in which he says the mistake occurred, defendant and plaintiff were husband and wife. He wanted a divorce, and, in order to induce her to bring suit for a divorce, he agreed to pay her attorney's fee. As the settlement was made by defendant with that object in view, and for the purpose of smoothing the road to a divorce, he doubtless felt disposed to be liberal with his wife. His testimony displays the state of mind in which he made the settlement. "I had," he said, "considerable notes and mortgages, and I threw them down upon the table, and told her to take what she wanted." This very liberal proposition was made before the divorce. Afterwards, when the divorce had been granted, he continued to borrow money from his divorced wife, but when she sought to recover it, he alleged as a set-off a mistake and overpayment in the former settlement.

We have read the evidence carefully, and think there is reason to doubt whether any such overpayment was made. If there was an overpayment, we are still in doubt whether it was due to the alleged mistake or to the fine liberality of a man desirous of a divorce, and who, to quote the language of one of his witnesses, "was paying attention to another woman." In any event, his action to recover for the overpayment was clearly barred by the statute of limitations before this suit commenced.

This disposes of the whole case of defendant, except an item of six dollars, for which he claims credit, and which, we think, should be allowed. As defendant does not dispute the notes sued on, and as his claim of an overpayment, if there was ever any merit in it, is now barred by limitation, we think plaintiff should have judgment.

The judgment of the circuit court will, therefore, be reversed, and a judgment entered here in favor of plaintiff for the amount of notes sued on, less the credit of six dollars.

ALKIRE GROCERY COMPANY *v.* JACKSON.

Opinion delivered May 13, 1899.

HOMESTEAD CONVEYANCE—FRAUD.—In 1888 a father conveyed his homestead to his two sons, but his wife failed to join in its execution. In 1892 one of the sons, being insolvent, conveyed his half interest in such homestead without valuable consideration to his mother. *Held*, (1) that while the first conveyance was void under the act of March 18, 1887, it was validated by the curing act of April 13, 1893; (2) that the second conveyance was fraudulent. (Page 457.)

Appeal from Benton Circuit Court, in Chancery.

EDWARD S. MCDANIEL, Judge.

W. L. Stuckey and *L. H. McGill*, for appellant.

A fraudulent conveyance passes no title, as against creditors affected thereby. Bump, Fr. Conv. §§ 451, 468. The curative act of April 13, 1893, (Sand. & H. Dig. § 743) validated all conveyances avoided by Sand. &. H. Dig. § 3713; 58 Ark. 117; 60 Ark. 269. The conveyance to the mother was simply a cloud upon appellant's title, and the better practice was to remove the cloud before proceeding to sell the property on their judgments. Wait, Fr. Con. § 60; 33 Ark. 328.

T. M. Gunter, for appellees.

There was no frauduleut conveyance. Bump. Fraud. Conv. §§ 21, 535. No subsequent act or circumstance can make an originally good conveyance fraudulent. *Id.* 33. All conveyances affecting the homestead of a married man are rendered invalid by the act of March 18, 1887, unless the wife joined in the conveyance. Sand. & H. Dig. § 3713. Subsequent abandonment of the homestead could not validate the conveyance. 57 Ark. 242. If the act of 1893 operated to validate the conveyance of the homestead, it immediately passed the title on to the mother. 5 Ark. 693; 33 Ark. 251; 15 Ark. 73.

BUNN, C. J. The plaintiff and appellant company—a Missouri corporation—recovered a judgment against the defend-

ant—the appellee—John T. Jackson, in the sum of $640, and costs, in the Benton circuit court, on the 8th of October, 1894, and on the 24th of November, 1894, filed its bill, with proper allegations, to set aside a certain conveyance made by said defendant to his mother, and to subject the lands so conveyed to the satisfaction of its said judgment. The defendant, John T. Jackson, and his mother, Elizabeth Jackson, (made also a party defendant in the bill) filed their answer, and the cause was heard upon the pleadings and testimony in the case, and the chancellor found that the conveyance from John T. Jackson to his mother was fraudulent and void as to his creditors, but that his deed from his father, made some years previously, was void, and that therefore he conveyed nothing to his mother, and so dismissed the bill for want of equity, and the plaintiff company appealed.

The history of the case in brief is as follows: Andrew Jackson, the husband of Elizabeth Jackson, and the father of John T. Jackson and N. S. Jackson, was the owner of the lands in controversy, and occupied the same as his homestead, being married and the head of family as aforesaid, and the same was a rural homestead containing 120 acres, and valued at a sum less than $2,500, and on the 27th of September, 1888, subsequent to the passage of the homestead act of 1887, he conveyed to his two sons, the said N. S. and John T. Jackson, for a nominal consideration, his said homestead, and his wife did not join therein, as required by said act, in order to make the deed valid.

In the years 1890 and 1891, at Maysville in Benton county, the said N. S. Jackson and John T. Jackson composed a mercantile firm and partnership, and carried on business as such, and failed, being indebted to the appellant company, as stated, and perhaps other creditors, and were insolvent.

The plaintiff first brought suit in the Benton circuit court on the 4th of December, 1891, for this debt, against N. S. Jackson and Andrew Jackson as partners. N. S. Jackson made default, and judgment was rendered against him, but Andrew Jackson, the father, having made showing that he was not a member of the partnership, and was not therefore responsible, and John T. Jackson having informed plaintiff's counsel that

he ,and not his father, was a member of the firm, or had been during the period of its existence, the cause was dismissed as to Andrew Jackson, without prejudice; and on the 9th day of March, 1893, plaintiff brought this suit against said Andrew and John T. Jackson, for said debt, in said circuit court and on the trial by jury verdict and judgment was for Andrew Jackson, upon his defense that he was not a partner in said partnership, the final judgment was taken by default against the said John T. Jackson, and still remains unsatisfied and unreversed.

John T. Jackson, in this cause, shows that he was a minor during the life of this partnership, which ended the 10th of March, 1891, and that he was born in July, 1870, and did not reach his majority until July, 1891, after the close of the partnership, but the judgment was against him upon suit filed after his arrival at his majority, and upon due personal service, and no defense of any kind was made thereto. There is, therefore, nothing in this plea of infancy. On the 27th of September, 1892, the suit against Andrew and N. S. Jackson was dismissed without prejudice as to Andrew Jackson, on it being suggested that John T. Jackson had been a member of the firm of N. S. Jackson & Co., and on the 9th of March, 1893, the suit was instituted against Andrew and John T. Jackson, and judgment afterwards taken by default against the latter. Between the dismissal of the one suit and the institution of the other, John T. Jackson conveyed his half interest in the homestead to his mother, to-wit: the 27th day of September, 1892, the very day upon which the first suit was dismissed as to Andrew Jackson as aforesaid. The court found that this deed was without consideration, and was executed in fraud of the creditors of John T. Jackson.

On the other hand, the appellee contend that Jno. T. Jackson had nothing to convey by his deed to his mother, his deed from his father being void under the act of 1887, under which only he held; and the circuit court in chancery sustained this view of it.

While it is true that the deed of 1888 from father to the sons was void under the act of 1887, the wife not having joined in the execution of it, the same was validated, as a conveyance

from the father alone, by the subsequent act approved April 13, 1893. Therefore, subject to his mother's dower yet inchoate (for she had never signed her relinquishment of it), John T. Jackson was the owner of an undivided one-half interest in this homestead—a half interest of all that the father had therein—at the time he undertook to and did convey to his mother. Being in debt and insolvent at the time, his voluntary conveyance of his interest in this property was, as found by the circuit court, fraudulent as to his creditors, and therefore void as to them. But the circuit court erred in holding that he had nothing to convey, when he conveyed to his mother; for, while his title was at first void, it was subsequently (and before the rendition of the judgment against him) made valid by removal of the legal obstacle to its validity, and in this shape was conveyed to his mother—a valuable subsisting right in the lands.

His interest in said lands should have been made subject to sale under execution upon appellant's judgment by the court below, and, failing to so decree, there was error in the decree rendered. The decree is therefore reversed, and the cause remanded, with directions to order a sale of John T. Jackson's one-half interest in said lands, subject to the dower interest of the mother, and for such other proceedings as may not be inconsistent herewith.

FLOWERS v. JACKSON.

Opinion delivered May 13, 1899.

APPEARANCE—RECITAL OF RECORD.—A recital in the record of a cause that "it is ordered that this cause be and the same is hereby continued by consent," is insufficient to show that defendant has entered his appearance. (Page 459.)

Appeal from Ashley Circuit Court.

MARCUS L. HAWKINS, Judge.

Robt. E. Craig, for appellant.

A judgment entered by default against a party who has not been served is void. 1 Black, Judg. 83; Sand. & H. Dig. § 4190. The *nunc pro tunc* order, being without proper notice to appellant, did not give jurisdiction. 34 Ark. 300. To sustain a default judgment, the complaint must state a cause of action. 49 S. W. 489; 1 Black, Judg. 84. The complaint is fatally defective in the description of the laud. 56 Ark. 172; 59 Ark. 460; 60 Ark. 487; 62 Ark. 188.

G. W. Norman, for appellee.

Tho description is good. 45 Ark. 28; 66 Miss. 404; 28 N. E. 180; 5 Lawson, Rights & Rem. 3481; 21 Ark. 547–576. Evidence was admissible to show what *portion* of the land described, as within certain boundaries, is meant. 11 Neb. 488; 16 Wis. 374; 5 Dana, 376; 2 Ballard's Ann. Real Prop. 165; *ib.* 217; 52 N. W. 1112; 8 Am. & Eng. Enc. Law, 154. Appellant's giving bond was an appearance. 43 Ark. 230; 41 Ark. 75; 6 Ark. 459; 9 Ark. 160–174. Agreeing to a continuance is a waiver of any defect in the service of the original writ. 4 Ark. 70; 14 Ark. 234; 39 Ark. 352; 20 Ark. 12; 35 Ark. 95; 35 Ark. 276.

BATTLE, J. T. A. Jackson brought an action of forcible entry and detainer against W. J. Flowers in the Ashley circuit court for the possession of a certain tract of land. He sued out a writ of possession, directed to the sheriff of Ashley county, and commanding him to deliver the possession of the land to the plaintiff, and to summon the defendant to appear in court on the first day of its August (1895) term and answer the plaintiff in the action. It does not appear that any part of the writ was served. No return, showing service, was made by the sheriff. A judgment by default was, however, rendered against the defendant for the possession of the land, and for forty-seven dollars for rent and damages, and for the costs of the action. From this judgment, the defendant has appealed.

The court erred in rendering judgment without legal service of the writ upon the defendant. But appellee insists that service was waived, at a term previous to the term at which the judgment was rendered, by the appellant appearing and

consenting that the action be continued. The only evidence in the record of the truth of this statement is an order in the words following: "It is ordered that this cause be and the same is hereby continued by consent." This contention is sufficiently answered in *Higgins* v. *Beckwith*, 102 Mo. 463, as follows: "Nor was any jurisdiction acquired over the defendant by reason of the entry of record, * * * whereby the court ordered that the 'cause be continued by agreement.' The appearance of the defendant had never been entered, so far as the record shows, nor that he was present in court, and so it would require a record entry of more affirmative character to show jurisdiction acquired over him. *Non constat* but that the cause was continued by agreement of the plaintiff, or upon correspondence with the defendant."

The judgment of the circuit court is, therefore, reversed; but, as the defendant has voluntarily appeared, and prosecuted an appeal, the cause will be remanded, with instructions to the court to proceed as it could if he had been duly and in due time served with process.

SPARKS v. ROBINSON.

66 460
87 427

Opinion delivered May 13, 1899.

USURY—PAROL EVIDENCE TO EXPLAIN WRITING.—A written instrument, reciting the sale of a sewing machine for $8, and providing that the seller may redeem it at the end of a month by repaying the $8, with ten per cent. added, may be shown by parol evidence to be a shift for a usurious loan of money. (Page 463.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

Appellee received of appellant the sum of $8, and turned over to him a sewing machine valued at $45. Appellee claims that she let appellant have the machine as security for the sum of $8 borrowed of appellant. Appellant contends that he

bought the machine of appellee. At the time of the transaction the following instrument was signed by appellant and appellee: "No. 1865. Price, $8.00.

"Absolute Bill of Sale to Capital Loan Office, 105 East Markham st., Little Rock, November 16, 1895.

"Sold with the right of redemption by R. J. Robinson, of 1526 North street, to W. A. Sparks one Singer sewing machine, for the sum of eight dollars. The vendor, undersigned, reserves the right to redeem said article by the 16th day of December, 1895, and to reimburse the price for said article. After that date, if said article is not redeemed as aforesaid, I, W. A. Sparks, become the absolute owner of same without default to vendor. W. A. Sparks is not responsible for the loss or damage of said article by fire, robbery or deterioration of any kind. It is further agreed and understood that no article will be shown or returned without this ticket of sale. This done and passed upon at Little Rock, Ark., on date aforesaid.

"MRS. R. J. ROBINSON, Vendor.
"W. A. SPARKS, Buyer."

The form of the ticket of sale, which the proof shows was issued monthly, was as follows: "This is to certify that if the holder of this certificate presents the same at my office, at 105 East Markham street, not later than thirty days from date, he has the option of purchasing any one article of merchandise in my place of business that is for sale at a price not to exceed ten per cent. above its actual cost; including one sewing machine, $8.00, if preferred. This offer will be void after thirty days from date. All goods bought and sold for cash.

[Signed] "W. A. SPARKS."

One of these tickets, as indicated by the purported bill of sale *supra*, was issued to appellee when she signed the alleged bill of sale.

The testimony of appellee was to the effect that she borrowed of Sparks $8, and that she understood at the time that she was to pay eighty cents per month for the use of it. She stated that she left the machine with Sparks for the sole purpose of borrowing money on it. "There was nothing said," quoting the witness, "about interest when I pawned the machine, but I knew I would have to pay ten per cent. a month,

and when I went back next month he (Sparks) said the interest was eighty cents. I asked him if I could get the machine with $8, and he (Sparks) said: 'Not unless I paid the interest.' "

The testimony on behalf of appellant is in substance as follows: Sparks testified "that she, Mrs. Robinson, said she could get along on $8. I let her have $8 on the machine; that is, I bought it from her, and took a bill of sale for it." Nothing whatever was said about interest. She returned in about a month to pay interest, and to get him to keep the machine a month longer. He said he could not, and did not accept interest. He told her that if she took the machine then, it would cost her $8, and whatever she might be disposed to give in addition. She said she was going to move, and would like for him to keep it, as she didn't need it, and didn't want to be bothered with it. She then wanted to pay him a dollar per month storage on it. She offered eighty cents per month, saying it was the same amount other pawnbrokers would charge her interest. He (Sparks) accepted eighty cents per month, with the distinct understanding that it was not interest. Sparks further stated that he made no contract whatever for interest on any of his loans; that he trusted to a man's honor as to what he should pay him (Sparks) for the use of his money. He expected something for the use of the $8.

Sparks was corroborated by another witness as to the conversation between himself and Mrs. Robinson about storing the machine, and her offering $1.00 per month, and his refusing, and accepting 80 cents, and telling her at the time that he could not charge interest; that the law did not allow that.

The action was replevin. The court rendered judgment for appellee for the return of the machine, or its value, $45, and $25 damages.

Fulk, Fulk & Fulk, for appellant.

The sale passed title to appellant. 5 Ark. 161. Since the transaction was a *sale*, and not a borrowing of money, no question of usury can arise. 55 Ark. 268; Perley, Interest, 201–2. The intention to take and give usury must be present in the minds of both parties. Tyler, Usury, 103. Subsequent acts cannot taint an originally good contract with usury.

25 Ark. 258. The burden was on appellee to prove usury, and the presumption was against it. 40 N. Y. 248; 109 N. Y. 473. Usury must be specially pleaded to avail as a defense. 22 Ark. 409; 30 Ark. 135, 145.

W. C. Adamson, for appellee.

Findings of fact by the court sitting as a jury, or a verdict, will not be disturbed if supported by any evidence at all. 40 Ark. 144; 60 Ark. 250; 13 Ark. 474; 25 Ark. 89; 50 Ark. 511; 26 Ark. 360. The instrument executed by appellee was a mortgage, and not a sale. 38 Ark. 264; 31 Ark. 62. If a sale is a mere device to cover an usurious loan, its feigned character will not prevent a plea of usury. 47 Ark. 287; 55 Ark. 270. An *aggregatio mentium* is not necessary to usury. 37 Minn. 441; 1 Stew. 391; 62 Ark. 370. Usury is the *taking*, not the *bargaining for*, excessive interest. 62 Ark. 370; 1 Stew. (Ala.) 391; 26 Pa. St. 273. The defense of usury may be pleaded in a justice's court without a formal, special plea. 7 Ark. 146; 36 Ark. 501.

WOOD, J., (after stating the facts.) There was evidence to support the finding that the transaction reflected by the above facts was a loan of money at the rate of ten per cent. per month, and that it was usurious and void.

The court was clearly justified in concluding that the instrument purporting to be a bill of sale, although absolute on its face, was intended by the parties as nothing more than a security for the money advanced. The right of redemption was reserved to the grantor in the face of the instrument, and the extraneous proof warranted the conclusion that the instrument was intended as a mortgage. *Stryker* v. *Hershy*, 38 Ark. 264. In case of a mortgage the mortgagee becomes the absolute owner, where there is a failure to pay, and no redemption.

The instrument itself, and the sale ticket given with it, show that the grantor had the privilege of redeeming in thirty days, by paying the principal and not exceeding ten per cent., and the proof shows that at the end of each month the eighty cents, or ten per cent. per month, was collected, and another sale ticket was issued granting the same privilege. And this might be continued *ad infinitum*. The law shells the covering, and

extracts the kernel. Names amount to nothing when they fail to designate the facts. We are of the opinion that the court was justified in concluding that the papers called "bill of sale" and "sale tickets" were nothing more or less than a shift for a usurious loan of money. *Tillar* v. *Cleveland*, 17 Ark. 287; *Ellenbogen* v. *Griffey*, 55 Ark. 270, and cases there cited.

The damages may be excessive, but this was not made a ground of the motion for new trial.

No written pleadings were necessary, and the proof raises the issue of usury.

Affirm the judgment.

KELLEY *v.* TELLE.

Opinion delivered May 27, 1899.

1. STATUTE OF LIMITATIONS—NEW PROMISE.—Where the maker of a note definitely and unconditionally admits in writing the execution and validity of the note, and, in effect, promises to pay the same according to its terms and effect, such writing constitutes a new date from which the statute of limitations begins to run. (Page 465.)
2. CONFLICT OF LAWS—PLACE OF CONTRACT.—Where a note was signed in the Indian Territory, was made payable on demand, and was delivered to the payee in Arkansas for money loaned there, it is an Arkansas contract. (Page 466.)

Appeal from Sebastian Circuit Court.

EDGAR E. BRYANT, Judge.

H. C. Mechem and *F. A. Youmans*, for appellant.

The acknowledgment, in the letter of appellee, that the note was due, and his promise to pay same, are explicit, and were sufficient to toll the statute of limitations. 10 Ark. 134; 18 S. E. 504; 22 Pick. 291; 107 N. Y. 346. Nor was the concluding clause of the sentence a condition attached to the acknowledgment. 9 Exch. 282.

Hill & Brizzolara, for appellee.

Appellant has no standing in this court, because there was

no motion for a new trial nor bill of exceptions. 36 Ark. 491; 38 Ark. 568; 2 Ark. 14; 26 Ark. 503; 22 Ark. 224. The presumption is in favor of the correctness of the court's finding, and, so long as there is evidence on which to base it, it must stand. 54 Ark. 229; 57 Ark. 483; 51 Ark. 93; 60 Ark. 250. The promise in the letter was too indefinite to toll the statute. 12 Ark. 595; 26 Ark. 540; 22 Ark. 217. The letter, taken as an entirety, is only a proposal by appellee to compromise a debt due him from appellant and allow credit for $1,000. The whole letter is to be considered. 52 Ark. 454; 122 U. S. 239; 1 Gr. Ev. § 201. An admission, to toll the statute, must be unconditional. Wood, Lim. § 139; 52 Ark. 288. The note is governed by Choctaw laws, which do not authorize suits by one Indian against another for debts. 61 Ark. 329; 33 Ark. 645; 26 Ark. 356; 9 Ark. 233; 14 Ark. 189; 44 Ark. 213; 7 Ark. 230; 47 Ark. 54; Rand. Comm. Pap. § 21; 1 Dan. Neg. Inst. § 873.

H. C. Mechem and *F. A. Youmans*, for appellant, in reply.

No bill of exceptions is necessary to the consideration of an assignment of error based upon findings of facts made by the court and incorporated in the judgment, where the error alleged is that the judgment did not conform to the facts. 34 Ark. 686; 40 Ark. 21; 62 Ark. 340; 65 Ark. 20. The place of delivery determines the place of a written contract. 1 Dan. Neg. Inst. § 868; 69 Me. 105; 125 Mass. 374.

BUNN, C. J. The note sued on in this case was signed by the appellee, in Choctaw Nation, Indian Territory, on the 10th of January, 1888, and was payable on demand, and delivered to payee in Fort Smith, Ark., for money loaned there. No demand was made until the institution of the suit, which was on the 6th day of October, 1893, more than five years after the execution of the note. On the 8th of February, 1890, defendant, Telle, addressed a letter to plaintiff's intestate at Fort Smith, Ark., from Atoka, Indian Territory, in which the defendant and appellee definitely and unconditionally admitted the execution and validity of the note sued on, and, in effect, definitely promised to pay the same according to the legal tenor

and effect thereof. This furnished a new date from which the statute runs, and in that view of the case the bar had not attached when the suit was instituted. The conclusion of law of the trial court was erroneous, to the effect that the debt sued on was barred by the statute of limitations.

This, properly speaking, is the only question addressed to us by the record, but as the parties have discussed another, which may be involved in a new trial, we will dispose of that also. It is this: Was this an Arkansas contract, and had the Sebastian circuit court jurisdiction to hear and determine the same? We are of opinion that the contract was completed in Arkansas by the delivery of the note to the payee at Fort Smith, and is valid according to the laws of the state, and that the circuit court had jurisdiction in the matter.

Reversed, and remanded for further proceedings not inconsistent herewith.

WOOD and RIDDICK, JJ., did not participate.

66 466
66 485
66 466
69 528
66 466
70 331
66 466
75 126
76 305
e76 310
76 311
j76 315
j76 317
j76 318
j76 322
j76 323
66 466
f79 521
81 537
81 546

STATE v. LANCASHIRE FIRE INSURANCE COMPANY.

Opinion delivered May 27, 1899.

1.—STATUTES—CONSTRUCTION.—In construing statutes courts attach but little weight to expressions of individual members of the legislature, or to the fact that certain amendments have been rejected, for the reason that, whatever the legislature may have intended, such intention can have no effect unless expressed in the statute. (Page 471.)

2. SAME—EXTRA-TERRITORIAL EFFECT.—The legislature is presumed to intend that its statutes shall not apply to acts or contracts done or effected beyond the limits of the state, and having no reference to or effect upon persons or property in this state. (Page 472.)

3. STATUTES—CONSTRUCTION.—The courts will not construe an act to be unconstitutional, in whole or in part, if it can be reasonably construed to take effect in all its parts. (Page 476.)

4. ANTI-TRUST ACT—CONSTRUCTION.—The "anti-trust act," which provides that "any corporation organized under the laws of this or any other state, or country, and transacting or conducting any kind of business in this state, or any partnership or individual, * * * who shall create, enter into, become a member of or a party to any pool, trust,

agreement, combination, confederation or understanding * * * to fix or limit * * * the price or premium to be paid for insuring property against loss or damage by fire * * * shall be deemed and adjudged guilty of a conspiracy to defraud," etc., (Acts 1899, p. 50) does not apply to pools or combinations formed outside of this state, and not intended to affect, and which do not affect, persons or property or prices of insurance in this state. (Page 477.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

The attorney general of the state filed a complaint against the defendant Lancashire Insurance Co., alleging that it was a foreign corporation organized under the laws of England; that it was, on and after March 6, 1899, engaged in the business of insuring property in this state against loss or damage by fire, and that, while so engaged, it became and was a member of a pool or combination with other corporations engaged in a similar business to regulate or fix the price or premium to be paid for insuring property against loss or damage by fire. Wherefore he asks judgment against said company for the sum of five thousand dollars.

The defendant company filed its answer, admitting that it was engaged in the business of insuring property against loss or damage by fire as alleged in the complaint, but denied that, while so engaged in business of insuring property in this state, it became or was a member of any pool or combination, either in this state or elsewhere, for the purpose of fixing or regulating the price or premium to be paid for insuring property in this state against loss or damage by fire, etc.

The state by her attorney filed a demurrer to this answer, on the ground that it did not state facts sufficient to constitute a valid defense. The circuit court overruled the demurrer, and, the state electing to stand on its demurrer, final judgment was entered against it, from which judgment the state appealed.

Jeff Davis, Attorney General, and *Chas. Jacobson*, for appellant; *Jesse C. Hart* and *Hal L. Norwood*, of counsel.

The state has power to annex any conditions it sees fit to the permission it gives to foreign insurance companies to do

business in the state. 8 Wall. 168; 18 How. 404; 13 Pet. 519; 94 U. S. 535. The agreement in this case constitutes a "*trust*," within the meaning of the act. The court will take judicial knowledge of the records and journals of the legislature, in so far as they throw light upon the intention of the lawmakers. 5 Ark. 613; 57 Fed. 429; 58 Fed. 768; 23 Wall. 307; 70 Ind. 332, 338; 23 Enc. Law, 335; 91 U. S. 79; 107 Ind. 348; 112 Ind. 75; 87 Ala. 225; 33 Ct. Cl. 135; 33 Ct. Cl. 36. The word "*any*" as used in the act is to be given its plain and usual meaning, and not restricted to trusts, etc., in this state. 133 N. Y. 332; 112 Pa. St. 620; 166 U. S. 290, 312, 320, 325. An act which, though committed in another state, takes effect in Arkansas, is punishable here, if contrary to our law. Clark's Cr. Law, 360, 364, 366. 49 Am. Dec. 474; 53 Ark. 386. This statute is an exercise of the state's police power. As to extent of this power, see 123 U. S. 623; 161 U. S. 677. The legislature prescribes the bounds of public policy, and rules may be prescribed by it looking to the supervision of whatever in business is contrary to such public policy. Beach, Monopolies & Ind. Trusts, § 13; 94 U. S. 124; 5 How. 583; 129 U. S. 29; 104 N. C. 710; 7 Cush. 84; 27 Vt. 140; Cooley, Const. Lim. pp. 707–720; 165 U. S. 16; 113 U. S. 109; 137 U. S. 89; 163 U. S. 304; 127 U. S. 634; 157 U. S. 160–165; 169 U. S. 391–393; 1 Thayer's Cas. Const. Law, 453. Insurance business may be so regulated. Cooley, Const. Lim. 743, 744; 42 Conn. 583; 97 Ill. 593; Tied. Police Power, 281; 10 Wall. 410; *ib.* 566; 15 Kas. 628; The policy of all this state's legislation, prior to the act of March 6, 1899, has been to encourage and protect foreign insurance companies. The construction given the latter act by the appellant would effectually repeal all such prior enactments. Repeals by implication are not favored. 11 Ark. 94–103; *ib.* 481–496; 28 Ark. 317–325; 29 Ark. 225–237; 34 Ark. 499; 48 Ark. 159; 56 Ark. 45–47; 41 Ark. 149; 45 Ark. 90–92. The title of the act may properly be considered in construing it. Black, Int. Stat. 174; 144 U. S. 550–563; End. Int. Stat. §§ 62, 65; 143 U. S. 447–462. Penal laws have no extra-territorial effect. Cooley, Const. Lim. 128; End. Int. Stat. §§ 167–171; Bish. Writ. Law, § 141; Story, Conf. Laws, §§ 18–

20; 37; Fed. 497. An unconstitutional meaning must not be given to a law, if it be susceptible of any other construction. End. Int. Stat. § 178; 112 U. S. 269; 12 Pet. 76; Black, Int. Law, 91; 7 Cranch, 350. The same language in the act makes *persons* and *corporations* guilty of an offense. If the word "any" be construed to have extra-territorial effect as to *persons*, the act is unconstitutional. 18 L. R. A. 628; 50 Kas. 609; 25 L. R. A. 243; 47 Tex. 381; 25 L. R. A. 250. The rule of strict construction of penal statutes does not require that the narrowest construction be given to plain words. 6 Wall. 395; 92 U. S. 244; 31 Fed. 800; 14 Pet. 474–475; 32 Fed. 726; 42 Fed. 891; 13 Johns. 49; 118 Mo. 380. Nor does it prevent the court from applying other rules of statutory construction. 163 Ill. 56. The question before the court is the provision in the statute against certain acts of corporations; and the constitutionality of the act, so far as concerns individuals, is not in the case. 58 Ark. 407; 12 So. 690. Unconstitutional parts of a statute may be rejected. 71 N. W. 941; 14 So. 50.

Rose, Hemingway & Rose, Blackwood & Williams, Cockrill & Cockrill, J. M. Moore, Dodge & Johnson, Carroll & Pemberton, and *Morris M. Cohn,* for appellee.

That construction is to be given to an act which will render effectual and constitutional every word or part of it, if possible. 15 Ark. 555; 17 Ark. 608, 652; Bish. Writ. Laws, 5, 82; 56 Ark. 495; 22 Ark. 369; 112 U. S. 269; 12 Pet. 76; 3 Pet. 448; Cooley, Const. Lim. 220. The word "any," as applied to corporations and to persons, must be given the same meaning. Endl. Int. Stat. §§ 23, 265; Suth. Stat. Const. §§ 239, 82; Black, Int. Laws, 60–98; Potter's Dwarris, 188; 11 Ark. 44. The terms of the act are clearly those of a criminal act. 116 U. S. 616, 634; 150 U. S. 476–480; 37 Fed. 497. The word "any" in this act must be construed just as it is in any other criminal act—*i. e.*, to refer to crimes in this state, because this was the underlying purpose of the law. Endl. Int. Stat. §§ 44, 114, 118, 121, 125, 170, 172, 173, 174. Penal acts are to be strictly construed, and can not be extended by implication. 6 Ark. 134; 43 Ark. 415; 53 Ark. 336;

64 Ark. 271; 2 Elliott, Railroads, § 710; 6 Wall. 385; 87 N. C. 255; 23 Am. & Eng. R. Cas. 654; 56 Ark. 45; 51 Ark. 309–315; 65 Ark. 183; 59 Ark. 344–356; 47 Ark. 442; 41 Ark. 517; 52 Pac. 789; 18 Wall. 409. The law should have no construction which will give it an extra-territorial operation. 162 U. S. 197; Story, Conf. Laws, §§ 18–20; Black, Int. Laws, 91; End. Stat. Con. §§ 169, 170, 335; Bish. Stat. Cr. § 141; 4 H. L. Cas. 946, 955; 4 Kay & J. 367; 3 H. L. Cas. 100; 12 Ch. Div. 522; 3 Starkie, 158; 2 Bing. N. C. 722; 4 M. & Gr. 335; 2 Rose, 311; 3 Mo. Pl. Crown, 133; 3 Wheat. 610; 7 Cranch, 350; 10 Oh. St. 587; 10 So. 86; 1 Park. Cr. Rep. 645; 1 Bish. M. & D. §§ 353, 657; 2 Nelson, M. & D. 568; 86 N. Y. 18; 113 Mass. 458; 2 Park. Cr. Rep. 195; 61 Ark. 329, 338; 60 Ark. 269. The act is a criminal one, and hence unconstitutional, because it attempts to impose a criminal liability without presentment or indictment by a grand jury. 116 U. S. 616, 634; *ib.* 436; 150 U. S. 476, 480; 37 Fed. 497.

RIDDICK, J., (after stating the facts.) This is an action against a foreign insurance company in which the state, through her attorney general, claims a penalty of five thousand dollars. The question presented is whether a foreign corporation, doing a fire insurance business in this state, subjects itself to a penalty, under the recent statute against trusts and combinations, by entering into an agreement with other insurance companies for the purpose of fixing rates of insurance in foreign countries, when such agreement is neither made in this state, nor intended in any way to affect the prices or premiums to be paid for insuring property in this state.

As the legislature has the power to entirely exclude foreign insurance companies from doing business in this state, it can, of course, dictate the terms upon which such companies may do business here. The whole matter rests in the discretion of the legislature. *Paul* v. *Virginia*, 8 Wall. (U. S.) 168. There is no controversy on this point, but the attorney general contends that no insurance company, while a member of a trust or combination to fix rates in any portion of the world, can do business here, without becoming liable to a penalty under our sta-

tute. The defendant, on the other hand, denies that the language of the statute in question carries the meaning contended for by the attorney general, and the question before us has reference, not to the power of the legislature,—for that is conceded,—but to the proper construction and meaning of the statute.

The statute in question, so far as it affects this case, provides that "any corporation organized under the laws of this or any other state or country, and transacting or conducting any kind of business in this state, or any partnership or individual, * * * who shall create, enter into, become a member of or party to any pool, trust, agreement, combination, confederation or understanding * * * to fix or limit * * * the price or premium to be paid for insuring property against loss or damage by fire, * * * shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties as provided by this act." Acts 1899, p. 50, § 1. Another section provides that any person or corporation violating any provisions of the act shall forfeit not less than $200 nor more than $5,000 for every such offense, and each day such corporation or person shall continue to do so shall be a separate offense. *Id.* § 2.

Before proceeding to discuss the language of this statute, we will notice an argument on the part of the attorney-general to the effect that the intention of the legislature that this statute should have the broad meaning contended for by him is conclusively shown by the fact that, after he had placed such construction upon the statute, the legislature rejected a proposed amendment expressly limiting its effect to combinations formed to affect prices in this state. This argument assumes that the only reason moving members of the legislature to oppose such amendment was that they agreed with the attorney general in his construction of the act, and desired the act to stand as he construed it. But how can we know that this assumption is true? While some members may have acted from that motive, is it not just as reasonable to suppose that others differed with him in his construction of the law, and voted against the amendment on the ground that it was unnecessary and a needless waste of time to pass an amendment in order to

make the law mean what they supposed it already meant? The settled rule, established by the highest authority, is that but little weight should be attached to expressions of individual members of the legislature, or to the fact that certain amendments were rejected. *Aldridge* v. *Williams*, 3 How (U. S.), 24, opinion by Chief Justice Taney; Black on Interpretation, 226. These matters are liable to be misunderstood. It is not always true that those members who speak are the most influential, or that those who speak express the views of those who do not speak, and we therefore have no means of knowing the reasons that influenced the legislature in voting down the amendment. To determine the meaning of a statute, the courts must look mainly to the language of the act itself; for that is the final expression of the legislative will, and therein must such will and intention be sought. Whatever the legislature may have intended, such intention can have no effect unless expressed in the statute; for this, being a penal statute, cannot be extended by implication. It would be in the highest degree unjust to punish conduct not clearly forbidden by the law itself. *Casey* v. *State*, 53 Ark. 336. And so, to quote the words of a recent opinion of the supreme court of the United States, "we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein." *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 318.

The words of the statute to which counsel for state attach such a wide meaning are "any corporation," "any partnership or individual," "any pool, agreement, contract, combination." It will be noticed that these are general words. The statute nowhere expressly says that it was intended to have the wide extra-territorial effect which the construction of counsel for the state necessarily imputes to it. Now, in determining the meaning of this statute, we must keep in mind certain well-known rules of construction, based on reason, and so well settled that members of the legislature must be supposed to have been familiar with them, and to have had them in view in framing the law. One of these rules is that the legislature is presumed to intend that its statutes shall not apply to acts or contracts done or effected beyond the limits of the state and having no

reference to or effect upon persons or property in this state. As the legislature of each state assembles to legislate especially for the benefit of the people of that state, it is reasonable to suppose, when the statute does not expressly show to the contrary, that it was not designed to punish acts done or contracts made in foreign countries, and affecting only the people of such countries. For this reason, although the legislature may use general words, such as "any" or "all," in describing the persons or acts to which the statute applies, still it does not follow that the law has an extra-territorial effect; for it is presumed that the legislature did not intend it to have such effect unless the language of the statute admits of no other reasonable interpretation. *Bond* v. *Jay*, 7 Cranch (U. S), 350. The reports furnish numerous instances of the application of this rule, by which general words used in statutes are taken as limited to cases within the jurisdiction of the legislature passing the statute, and confining its operation to matters affecting persons and property in such jurisdiction. It will be necessary to notice only a few of such cases.

In the case of *United States* v. *Palmer*, 3 Wheat. 610, there was a prosecution under a statute which provided for the prosecution and punishment of "any person or persons" committing murder or robbery upon the high seas. Chief Justice Marshall, discussing in that case the question whether the act applied to all persons committing such crimes, or only to those owing allegiance to the United States or committing the offense against her citizens, said that no doubt congress had power to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offense against the United States. He admitted that the words, "any person or persons," used in the statute, were broad enough to comprehend every human being, but he said that such general words must be limited in some degree, and he held that it was offenses against the United States, not offenses against the human race, that congress by the law intended to punish. "Every nation," he said "provides for such offenses the punishment its own policy may dictate, and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government."

So a learned English court, construing an act of parliament which abolished certain weights and measures, and enacted "that any contract, bargain or sale made by any such weights or measures shall be wholly null and void," held that the general words used in the law should be limited to contracts in which the goods bought or sold were to be weighed in that country, and that the statute, though the words used were as broad as those under consideration here, had no application to contracts, though made in England, when the goods were to be weighed in a foreign country. *Rosseter* v. *Cahlmann*, 8 Ex. 361.

If it were necessary, hundreds of cases and statutes could be referred to in which general words are thus limited. It is common for penal statutes to contain general words, such as "any" or "all," in order to cover all persons of the kind referred to in the state where the legislature assembles; but these general words must necessarily be treated as limited in some respects, otherwise innumerable conflicts between the laws of different states and countries would result, and unutterable confusion be brought into the law. Among the vast number of cases construing such statutes, it is doubtful if one can be found in which such general words have not been treated as limited to some extent, for it is unusual for a legislature to intend that its statutes shall apply over the whole world. For these reasons, we think the words, "any pool or combination," used in the statute here, must also be treated as limited, and we cannot adopt the broad construction contended for by the state's counsel.

The cases cited by the attorney general on this point do not, we think, support his construction of this statute. Take, for instance, the case of *Leonard* v. *Commonwealth*, 112 Pa. St. 620, cited by him, in which the court construed a section of the constitution of Pennsylvania which provided that "any person who shall, while a candidate for office, be guilty of bribery, fraud or wilful violation of any election law shall be forever disqualified from holding any office of trust or profit in this commonwealth." The court held that this meant "any election law then in existence, or thereafter to be passed by the legislature, which that body had a right to pass." It will be no-

ticed that the court limited the general words "any election law" to laws passed by the legislature of Pennsylvania. But if the court had applied the rules of construction contended for here by counsel for the state, the words "any election law" would have included the election laws of every state or country, so as to prohibit persons violating such laws in another state from afterwards holding office in Pennsylvania. But no such broad construction was suggested by either court or counsel in that case.

Again, take the illustration that the attorney general makes of a man in Missouri who shoots and kills a person in this state. He says that such a man could be indicted and punished here. Suppose that this is so, still the argument is not in point, for the defendant here denies that, either in Missouri or elsewhere, it has entered into or made any combination to affect rates in this state. In other words, to continue the illustration, it denies that it has shot or killed any man in this state. Yet the state by its demurrer says that this is not a good answer.

But let us follow the argument of counsel for the state, and see whither it would lead. The defendant company is an English corporation engaged in the business of fire insurance. It may, and probably does, carry on such business, not only in America, but also in Europe and Asia. Now, under the construction which counsel for the state seeks to have placed on this statute, if this English company, while doing business here, should at its office in England enter into an agreement with other foreign companies for the purpose of fixing rates of fire insurance in Hong Kong or in the city of Canton, China, it would at once become liable to a penalty under our statute; for counsel for the state contend that the words, "any pool or combination," used in the statute, embrace such combinations in any portion of the world. This, we admit, is the logical result of their construction of the law. There is no middle ground. Either the act applies only to combinations affecting persons, property or prices in this state, or its scope is unlimited. If this be the meaning of the statute, then, if the attorney general was informed that a company doing business here had entered into a combination in Japan or South Africa fixing rates for fire in-

surance in those countries, he would be required to institute an inquiry, and perhaps to take proof. It is easy to see that under such a law litigation might take a wide range, for the field of evidence would be as wide as the habitable globe. Investigations of that kind would be expensive. The time of the attorney general and the courts of the state would often be consumed by controversies concerning trusts and combinations in different parts of the world, having no reference to or effect upon the people of this state. If the legislature intended the statute to have such a broad scope, it should have expressly said so in plain words.

It is so unusual for a legislature to intend that its acts shall have such world-wide effect that courts are never justified in putting such construction upon them if their language admits of any other reasonable interpretation. *Bond* v. *Jay*, 7 Cranch, 350. Such a construction might result in defeating the main purpose in passing the act, for it is evident that one object in passing the act was to encourage competition. By preventing the combinations and agreements named in the act, the legislature wisely intended to stimulate competition, and thus reduce prices. But it might happen that a company willing to lower prices here might, by force of circumstances, be compelled to enter such combinations in certain foreign countries whose laws permit them. If such a company can, for that reason only, be shut out from doing business here, although its contract as to prices in such foreign country had no reference to, or effect upon, prices here, competition, instead of being increased, might be lessened, and prices thereby increased.

Again, this statute not only forbids corporations from entering into pools and combinations, but it also forbids individuals, persons and partnerships, and they are subjected to like penalties. Now, while the legislature can dictate the terms under which corporations of other states may do business here, it does not have such control of the citizen. If a merchant of Missouri, doing business also in this state, should enter into a pool or combination in Missouri to regulate prices there, but not intended to have effect in this state, our legislature could not on that account prevent him from doing business here or subject him to a penalty. So, if we adopt the construction con-

tended for by the attorney general, we must assume, as to a portion of the statute, that the legislature was attempting to do something it plainly had no right to do, and such portion must be treated as unconstitutional and void. But courts always endeavor to avoid declaring an act or any part thereof to be unconstitutional. If it can reasonably be done, they avoid such a result by giving the statute such a construction as will enable it to take effect in all its parts, for the presumption is that the legislature intended the whole act to take effect. This furnishes another reason why the construction contended for by counsel for the state should not be adopted.

Our conclusion is that this statute does not apply to pools or combinations formed outside of this state, and not intended to affect, and which do not affect, persons, property or prices of insurance in this state. In other words, we are of the opinion that the legislature, by this act, did not intend to prohibit or punish acts done or agreements made in foreign countries by corporations doing business here when such acts or agreements have reference only to persons, property or prices in such foreign countries. We therefore hold that the answer sets up a valid defense, and that the demurrer thereto was properly overruled. Entertaining no doubt of the correctness of the judgment of the circuit court, the same is affirmed.

WOOD J. The proposition, when analyzed, is exceedingly simple. The legislature has no extra-territorial power to punish crime. The crime specified in this act is the entering into, becoming "a member of, or a party to, any pool, etc., to fix or limit the prices or premiums to be paid for insuring property against loss or damage by fire," etc. If a foreign corporation doing business in this state enter into, or become a member of, this pool or trust beyond the limits of the state, then the crime is clearly committed beyond the limits of the state, unless the pool or trust is to fix the premiums for insuring property in Arkansas, in which event the crime put in motion in the foreign state takes effect and becomes complete in Arkansas. Just as in the cases cited by the attorney general, where a man in one state throws a stone or shoots a gun across the line and kills a man in another state, or forms a conspiracy in one state to burn

or destroy property in another state, the crime in such cases becomes complete where the person is killed, or where the property is destroyed. But where the foreign corporation enters into, and becomes a member of, a pool, or trust in a foreign state, which does not purport to, and does not in any manner, affect the property of the people of this state, of course no crime is committed in this state.

The legislature certainly did not intend to make a crime and punish the mere act of doing business in this state by a foreign insurance company, although a member of a pool or trust, whether in or out of the state; for the very gravamen of the crime is entering a pool or trust to fix the price or premiums to be paid for insuring property, etc. Now, suppose the member of the pool or trust in the foreign state proposed to do business, and did business, in Arkansas on a strictly competitive basis, which tended to cheapen and lower the rates of insurance to the people of this state, could any dispassionate lawyer say that the legislature intended by this act to punish such a beneficial and commendable deed as that? Certainly not. The legislature manifestly was intending to correct an evil existing which affects, or might affect, injuriously the people of this state. Now, the prohibiting of foreign corporations from doing business in this state on any terms and conditions that the legislature may prescribe is one thing, and the punishing of them for any crime they may commit is another and entirely different thing. As to the former—the privilege to do business—the legislature had the power to say: "Foreign corporations, you cannot do business in this state, if you are a member of a pool or trust to fix or limit prices anywhere in the wide world." As to the latter—the entering the pool or trust, the crime,—they could say: "You will be punished with the severe penalties denounced by the act, if you are a member of a pool or trust to fix the price or premium upon property in Arkansas."

As the legislature had no power to punish foreign corporations for becoming members of a pool or trust outside of the state, which did not propose to affect prices in the state, and as it did have full power to punish them for entering pools or trusts to affect prices or premiums in Arkansas, and also to

forfeit their right to do business in this state, is it not conclusive that they intended by the words "any pool or trust" to mean any pool or trust to fix the price or premium on property in this state? We must not convict the legislature of doing or attempting to do a vain and idle thing. Had the legislature intended to exclude foreign corporations that were members of a pool or trust anywhere in the world to fix prices anywhere outside of this state, how easy would it have been to have made it unlawful for such corporations to do business in this state, and to have provided sufficient penalties for the violation of such law to secure its enforcement. But no such thing as that was provided in the act under consideration. The purpose of the legislature is doubtless correctly reflected in the title: "An act providing for the punishment of pools, trusts and conspiracies to control prices," etc. The fact that the legislature embraced the other persons named in the act along with foreign corporations shows that it intended that these corporations might be considered as violating the law in the same way as any "partnership or individual or any other association or persons whatsoever" might do. It is an egregious mistake to suppose that a foreign corporation is guilty of an offense for merely doing business in this state, or to consider the act of doing business as an element of the offense under this law. It would be no more an offense for them to do business than for domestic corporations or individuals to do business. Foreign corporations are expressly authorized to do business. The doing of business by them is not an ingredient of the offense at all. The words, "and transacting or conducting any kind of business in this state," applied to them, are used in the sense merely of *descriptio personarum.* They merely indicate that these corporations are within the legislative jurisdiction because of the fact of their doing business in this state. There are no separate acts conjoined, as the attorney general supposes and argues, but one act. The proof which would establish the crime would also establish the forfeiture of the right to do business in the state. The legislature could both forfeit the right of the insurance company to do business and punish for the crime of entering a pool or trust to fix the price or premium, if the act

was done, or became complete and effectual, in Arkansas, but it could not punish for the crime unless it did.

Therefore the fact that the legislature has included individuals and domestic and foreign corporations, and has prescribed, as a result of the violation of this act, both a penalty for the crime committed and a forfeiture of the right to do business, shows conclusively that, as to foreign corporations, it could only have intended to reach such of these corporations as were in a pool or trust in this state, or in a foreign state, to regulate prices in this state.

---

66 480
187 79

STATE v. AETNA FIRE INSURANCE COMPANY.

Opinion delivered May 27, 1899.

PLEADING—INDEFINITE COMPLAINT—REMEDY.—A complaint against an insurance company seeking to recover a penalty for violation of the "anti-trust law" (Acts 1899, p. 50), which alleges (substantially in the language of the act) that the defendant, while engaged in business in this state, became and was "a member of a pool, trust, agreement, combination, confederation, or understanding with the corporations engaged in similar business, to regulate or fix the price or premiums for insuring property," etc., is not demurrable for failure to allege that such pool, trust, agreement, etc., was formed for the purpose or had the effect of influencing the company's business in this state, as the remedy, in case the complaint is indefinite or uncertain, is a motion to make it more specific and certain. (Page 482.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

Jeff. Davis, Attorney-General, and *Chas. Jacobson*, for appellant; *Jesse C. Hart* and *Hal L. Norwood*, of counsel.

The complaint states a cause of action. 25 Ark. 84; 26 Ark. 228, 230. If any of the averments were uncertain or incomplete, the remedy was by motion to make more specific, and not by general demurrer. 32 Ark. 315; 38 Ark. 393; 31 Ark. 657; 52 Ark. 378; 19 Ark. 695; 27 Ark. 369; 31 Ark. 379; 19 Ark. 173. A demurrer should not require any statement of

facts to sustain it. 16 How. Pr. 422; 2 Estee's Pldg. § 3074; 23 How. Pr. 396; 43 Barb. 261.

Blackwood & Williams, *Rose*, *Hemingway & Rose*, *Cockrill & Cockrill*, *J. M. Moore*, *Dodge & Johnson*, *Carroll & Pemberton* and *Morris M. Cohn*, for appellees.

The demurrer properly raises the question in this case. 11 So. 86; S. C. 94 Ala. 456.

BUNN, C. J. This is a suit for a penalty and forfeiture against the appellee insurance company by the State of Arkansas, on the relation of the attorney general, under the act of the general assembly, commonly known as the "anti-trust law," passed March 6, 1899. (Acts 1899, p. 50.)

There was a demurrer to the complaint interposed, and the same was sustained, and, plaintiff failing to plead over, judgment was rendered for the defendant, and the plaintiff appealed to this court.

The complaint is as follows: "The plaintiff, the State of Arkansas, by her attorney general, Jeff Davis, complains of the defendant, and for cause of action alleges:

"1. That the defendant is a foreign corporation, organized and existing under the laws of the state of New York, and doing business in this state. That the defendant is engaged in the business of insuring property against loss or damage by fire, lightning, storm, cyclone and tornado, in this state, and was so engaged on and after the 6th day of March, 1899.

"2. That, while so engaged in the business of insuring property in this state against loss or damage by fire, cyclone, lightning, storm and tornado, the said Aetna Insurance Company became and was a member of a pool, trust, agreement, combination, confederation, or understanding with other corporations engaged in similar business to regulate or fix the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone and tornado, the said combination being commonly known or designated as an insurance exchange, or rating bureau, contrary to the form of the statute in such cases made and provided.

"3. That, by an act of the general assembly of Arkansas, approved March 6, 1899, and known as the "anti-trust law," it is provided that if any corporation, organized under the laws of this state or of any other state or country and transacting or conducting any kind of business in this state, shall enter into, or become a member of any pool, trust, agreement, confederation, or understanding with any other corporation, individual, or any other person or association of persons, to fix the price or premium to be paid for insuring property against loss or damage by fire, tornado, lightning, storm or cyclone, said corporation shall be adjudged guilty of a conspiracy, and its corporate existence shall, upon proper proof thereof, be declared forfeited, void, and of no effect, and shall thereupon cease and determine, and shall thereby forfeit its right and privilege thereafter to do business in this state. It is also provided in said act as aforesaid that said corporation shall forfeit not less than $200 or more than $5,000 for every such offense. Wherefore plaintiff alleges that defendant, by becoming a member of said combination as aforesaid, became liable to the plaintiff in the sum of $5,000, and an action accrued to plaintiff in said sum, according to the provisions of said act.

"Premises considered, plaintiff prays that defendant's corporate existence shall be declared forfeited, void, and of no effect, and shall forfeit its right and privilege to do business in this state, and that plaintiff have and recover judgment against said defendant in the sum of $5,000 and all her costs in this suit expended, and for such other and further relief as plaintiff shall be entitled to under the proof in this case."

To this complaint the defendant interposed a general demurrer to the effect that the same does not state facts sufficient to constitute a cause of action.

The state charged in her complaint, and the charge was admitted to be true by the demurrer of the defendant, that the defendant, while engaged in business in this state, became and was "a member of a pool, trust, agreement, combination, confederation or understanding with other corporations engaged in similar business, to regulate or fix the price or premium for insuring property," etc. This charge was substantially in the language of the act. The state had a good cause of action,

but, according to our construction of the act, the cause of action was defectively stated, in this, that it does not charge that the pool or combination was for the purpose, or had the effect, of influencing the defendant's business in this state, no matter where formed. The complaint is uncertain and ambiguous, and doubtless made so because the language of the act itself is ambiguous, more or less.

Ordinarily, it is sufficient to declare in the terms of a penal act, and such declaration is not the subject of a general demurrer; for, as said by the supreme court of North Carolina, in *Commissioners of Edenton* v. *Capeheart*, 71 N. C. 156, "the demurrer of course admitted all the facts averred in the complaint. The complaint alleges that defendant violated ordinance No. 43, made under section 14 of the act of March 28, 1869. Upon the authorities, this is a sufficient averment that defendant did some act by which, under that act and ordinance, he became liable to a town tax, e. g., shipped fish from the town. If the defendant had meant to put in issue that what he did was not a shipping of fish within the ordinance, as properly understood, he should have answered, either stating specially what he had done, and denying that he had otherwise acted in violation of the ordinance, or have defended generally, and procured the justice to find the special facts. In either of these ways the question of law could have been presented to the superior court, whether the acts of the defendant brought him within the ordinance."

So it is with the defendant in the case at bar. It contended in argument, and its contention was correct, that the true meaning of the act upon which the complaint is based is that the act of a person, partnership or corporation doing business in this state, and who is a member of a pool, combination, etc., no matter where formed, having for its object or effect the influencing of its business in this state, and that alone, is denounced by the act. This was the offense set up in the complaint, for it was expressed substantially in the terms of the act, and the general demurrer should not have been sustained. If the complaint was thought to be indefinite and uncertain, as it was in our view of the law of the case, it was the proper subject of a motion to make more specific and certain, or, if the

defendant did not choose to do this, he should have answered, stating the facts showing that it was not the subject of the act's prohibition and penalty. *Morse* v. *Gilman*, 16 Wis. 531; *Demartin* v. *Albert*, 68 Cal. 277.

This position must be not understood as controverting the theory that, in some cases, it is essential that the complaint should negative the liability of those not comprehended in the statute invoked; but all that is intended to be said is that a general demurrer is not proper in a case like this.

The only case cited by appellee on this point is that of *Collier* v. *Davis*, 10 Southern Rep. 86. This case was subsequently more fully reported in 94 Ala. 456. In that case, the plaintiffs, Collier & Pinckard, loan brokers, engaged by special contract to negotiate a loan of $10,000 for the defendants, Davis & Davis, to be secured by a mortgage on their farm in Lowndes county, Alabama. The loan was effected from the American Freehold Land Mortgage Company of London, Limited. Plaintiffs afterwards brought suit for the amount defendants had agreed to pay them for their services in procuring the loan. The defendants interposed a plea or special answer, in which they alleged that the plaintiffs in this transaction were the agents of said American Freehold Land Mortgage Company of London, a foreign corporation, and that the latter had no known place of business in Alabama with an agent thereat, and that therefore, under the statutes of that state, the contract sued on was null and void, constituting a part of the company's doing business in that state. A demurrer was interposed to this plea, which the trial court overruled, but which the supreme court on appeal sustained, and thereupon dismissed the case, saying: "If the complaint or plea had averred or shown that the agreement between Collier & Pinckard on the one side and Davis Brothers on the other was entered into in Alabama, then it would have been shown that a foreign corporation, through its agent, or the agent of a foreign corporation, had engaged in business, or transacted business, in Alabama, without a compliance with our constitution and statute. This would have made the agreement illegal and non-enforceable. There is nothing, however, to show that such was the case. It is perfectly consistent with every

averment of the pleadings that the agreement declared on was executed outside of the State of Alabama. And if Collier & Pinckard were not agents of the corporation, then there is nothing stated that is incompatible with the idea that the loan was to be negotiated outside of Alabama's limits. The *situs* of the security offered (the location of the land mortgaged) is not necessarily determinative of that inquiry [*i. e.*, where the agreement was made], although it may be a factor to be considered." By their special plea the defendants undertook to show that the transaction was one denounced by the legislative enactment, and by it made void. They failed to state all the essential facts necessary to this end, and, since the defect was not cured by anything in the complaint, the plea was bad on demurrer. If the conclusion of facts was as found by the court (and we are not sure that it was), it must readily be admitted that a failure on the part of the defendant to bring the contract within the denunciation of the law, in their recital of the essential facts, rendered their plea the subject of a general demurrer, because surely the very statement of the point is to the effect that the facts as stated did not constitute a defense. When the defendant undertakes to state his defense, he should state all that is essential to his defense, and of course should not fail to state the most essential element of his defense. The statute of Alabama was unambiguous, and prohibited foreign corporations from *doing business in the state* except on the performance of certain conditions. To attempt by answer to bring a business within the purview of the statute, and not to state where it had been transacted, was of course no defense in the case, and was therefore the subject of a general demurrer.

The demurrer was not proper, and of course was improperly sustained, and for this error the judgment of the court below is reversed, and the cause remanded with directions to overrule the demurrer, and on motion permit plaintiff to amend her complaint by making the same more specific and certain as to the point indicated; or, if the defendant chooses to do so, permit it to answer, setting up the facts constituting its defense, under the rulings of its court in the companion case of to-day, to-wit: *State* v. *Lancashire Fire Insurance Company*, *ante*, p. 466.

EUCLID AVENUE NATIONAL BANK *v.* JUDKINS.

Opinion delivered May 27, 1899.

1. CREDITOR'S BILL—PRACTICE.—Prior to the passage of the act of March 31, 1887, it was a prerequisite to a suit in equity by a creditor to annul a fraudulent conveyance that the creditor should reduce his claim to judgment at law, and have execution issued, and a return of *nulla bona*. (Page 488.)

2. SAME—PROOF OF DEBTOR'S INSOLVENCY.—While the act of March 31, 1887, dispenses with the necessity of obtaining a judgment at law, and having execution issue and a return of *nulla bona*, before a creditor's bill will lie to set aside a fraudulent conveyance by a debtor, it is still necessary, under that act, to prove the insolvency of the debtor. (Page 488.)

3. SAME—SUFFICIENCY OF AVERMENTS.—A bill in equity to set aside a conveyance by a joint debtor, alleged to be insolvent, will be demurrable if it fails to allege that the other debtors, jointly bound with him, were likewise insolvent. (Page 489.)

Appeal from Lawrence Circuit Court.

RICHARD H. POWELL, Judge.

STATEMENT BY THE COURT.

The complaint in this case is as follows: "Plaintiff states that it is a corporation, duly organized under and by virtue of the laws of the state of Ohio; that as such corporation it obtained a judgment against the defendant, J. B. Judkins, the White Sewing Machine Company, and H. R. King, in the Pulaski circuit court on the 16th day of June, 1890, for the sum of $1,719.54, as will appear by reference to a copy of said judgment herewith filed, marked exhibit "A," and made a part hereof, (a transcript of which judgment has been duly filed in Lawrence county, as required by law); that no part of said sum, nor the interest or costs, have been paid. Plaintiff states further that on or about the 4th day of March, 1891, the defendant, J. B. Judkins, in anticipation of the judgment against him as above referred to, fraudulently, and with the intent to place all of his property beyond the reach of his creditors, ex-

ecuted and delivered to the defendant, W. A. Townsend, a deed to the following described lands: [Here follows a description of the lands.] Plaintiff states that after said defendant Judkins had executed the deed to Townsend as aforesaid, he, the said Judkins, had no property whatever left in his hands subject to execution out of which his debts, or any part thereof, could be made by law. Plaintiff states further that said above-mentioned transfer was wholly without consideration, and was for the sole purpose of placing the property of said Judkins out of the reach of his creditors as aforesaid. Plaintiff further states that, even though the said defendant should have paid a valuable consideration for said land, still it was done for the fraudulent purpose of aiding and abetting the said defendant Judkins in defrauding, hindering and delaying his creditors in the collection of their debts, and not as a seeking to collect his debt, and more especially was it done for the purpose of assisting and aiding the said Judkins to defeat this plaintiff in the collection of its debt, as hereinbefore mentioned and set forth, as said defendant, Townsend, well knew that the transfer of the said Judkins to him of said property was for the express purpose of putting all the property of the said Judkins beyond the reach of the creditors of said defendant, Judkins. Wherefore plaintiff prays judgment for the said deed from the defendant, J. B. Judkins, to the defendant, W. A. Townsend, be cancelled, set aside, and held for naught, and that said lands be sold to satisfy the claim of the plaintiff, as herein set forth, and, should there be other creditors of the said Judkins desirous of joining in this suit, that they be permitted to join herein, and said property be sold to satisfy all said claims, or pro rata, as the court may think just and proper, and for all other proper relief."

To this complaint a general demurrer was inteposed, and sustained by the court, and, plaintiff standing upon its complaint, judgment was entered dismissing same, and for costs, etc.

J. H. Harrod, for appellant.

The bill contained all the essential averments of one to set aside a fraudulent conveyance. Bump, Fr. Conv. 551. A

fraudulent conveyance is void, as against prior or subsequent creditors. 59 Ark. 614; Sand. & H. Dig. § 3742; 11 Ark. 411.

W. A. Townsend, pro se.

Appellant's exception to the opinion of the court is not sufficient. The exception must be to a ruling, and must be saved at the time of the ruling. Sand. & H. Dig. §§ 5844, 5845, 5847. Black's Law Dict. Title "Decision." The complaint should have shown the necessity for equitable intervention. Wait, Fraud. Conv. §§ 75, 140; 11 Ark. 420, 421; 63 Ark. 407, 417; 56 Ark. 481, 482. It is not shown that appellant had not a full remedy at law against the appellee's codefendants. Hence, even if there had been fraud in the sale, it is not shown to have affected the efficacy of appellant's remedy of a levy and sale of such property. 12 Ark. 303; 43 Ark. 462; 26 Ark. 43; 39 Ark. 74; Wait, Fraud. Conv. §§ 60, 73, 75, 140, 143; Bump, Fraud. Conv. § 559. The intent to defraud must be present, and shared by both parties, where the conveyance is for a consideration. 31 Ark. 556; 41 Ark. 325; 49 Ark. 22; 56 Ark. 417; 60 Ark. 433; 64 Ark. 187; 46 Ark. 551; 55 Ark. 116.

WOOD, J., (after stating the facts.) 1. Prior to the passage of the act of March 31, 1887 (Sand. & H. Dig. § 3134), the rule obtained requiring the plaintiff, in a proceeding in equity to set aside a fraudulent conveyance as to creditors, to reduce his claim to judgment at law, and have execution issued, and a return of *nulla bona*, as prerequisites to the relief sought. This was necessary in order to show that the plaintiff did not have a complete remedy at law. It was the method prescribed for showing the insolvency of the debtor, and that the creditor could not collect his debt at law. *Meux* v. *Anthony*, 11 Ark. 418; *Phelps* v. *Jackson*, 27 Ark. 589; *Wright* v. *Campbell*, *id.* 637; *Sale* v. *McLean*, 29 Ark. 621; *Clark* v. *Anthony*, 31 Ark. 548; *Hunt* v. *Weiner*, 39 Ark. 74.

The act of March 31, 1887, *supra*, provides "that in suits to set aside fraudulent conveyances, and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency, but in such cases insolvency may be proved by any competent testimony, so

that only one suit shall be necessary in order to obtain the proper relief." The design of this act was, not to do away with the necessity of showing insolvency to entitle one to the equitable relief, but only to broaden the methods of proving it. The statute makes unnecessary the expense and delay incident to obtaining judgment and the issuing and returning of process thereon when insolvency—the ultimate fact to be established—may be proved by other and more direct methods. *Riggin* v. *Hilliard*, 56 Ark. 481. The old and familiar rule that, before one can seek relief from a court of equity, he must show that he does not have a complete and adequate remedy at law still prevails in this state.

Section 3034 of Sand. & H. Dig. provides that "on a judgment or decree against several, the execution must be joint." Now the complaint in this case shows that plaintiff's judgment was against the White Sewing Machine Company and H. R. King, as well as against the defendant Judkins, and there is no allegation that the White Sewing Machine Company and King were sureties merely. They appear as joint principals. The complaint shows that Judkins had "no property whatever left in his hands subject to execution, out of which plaintiff's debt could be made by law," but it does not show that the other joint judgment debtors, the White Sewing Machine Company and H. R. King, did not have property subject to execution ample to satisfy plaintiff's debt at law. The complaint did not allege the insolvency of these joint judgment debtors with Judkins. Herein it fails to show any occasion for the interposition of a court of equity. The complaint shows that the bank had already obtained judgment against Judkins, the White Sewing Machine Company and H. R. King. Under the statute of 1887, *supra*, the obtaining of judgment at law was not necessary, but it was necessary to show the insolvency of all the joint judgment debtors; for, in the absence of such an allegation, or a showing of some other facts calling for equitable relief, it does not appear that a resort to equity is proper. *Davis* v. *Fire Ins. Co.*, 63 Ark. 412. See *Howard* v. *Sheldon*, 11 Paige, Ch. 558; *Child* v. *Brace*, 4 *ib.* 309.

The demurrer was properly sustained.

Affirmed.

66 490
77 243
66 490
83 544
66 490
86 258

BANKS v. DIRECTORS OF ST. FRANCIS LEVEE DISTRICT.

Opinion delivered June 3, 1899.

JUDICIAL SALE—REDEMPTION.—Where a judicial sale of land has been conducted fairly, and in substantial compliance with the law and the orders of the court directing the same to be made, it is error to permit the original owner to redeem before confirmation. (Page 492.)

Appeal from Crittenden Circuit Court, in Chancery.

FELIX G. TAYLOR, Judge.

Norton & Prewett, for appellant.

There was no right of redemption by the statute. Acts 1895, p. 91. When a statute gives no right of redemption, there is none. 2 Desty, Tax. § 140; 51 Ark. 453. The law in force at the rendition of the judgment must control. 43 Ark. 420; 69 N. W. 826, 828. The appellant's title was not such as could be tried on a summary motion. 3 How. 62; 8 Sm. & Marsh. 456; 14 Enc. Pl. & Pr. 81, 84. The sale by the commissioner was not a judicial sale. Freeman, Void Jud. Sales, § 1; 5 Mason, 420; 52 Ark. 290.

R. C. Brown and *Thos. M. Scruggs*, of Memphis, Tenn., for appellees.

The mere omission from the act of 1895 of the redemption clause of the act of 1893 did not work a repeal of the latter. Repeals by implication are not favored. 11 Ark. 103. *ib.* 496; 41 Ark. 149; 45 Ark. 90. They must be necessary and unmistakably intended. 34 Ark. 499; 10 Ark. 588; Crawf. Dig. Ark. Reps. 857; 48 Ark. 159; 56 Ark. 45. Having become parties and invoked the aid of the court, appellants are bound by the decree.

BUNN, C. J. This is a motion in the chancery court of Crittenden county to compel the commissioner of said court to make deeds, in pursuance of sale made by him under the decretal order of said court, to the petitioners as purchasers at

said sale. The motion was overruled, and the movers appealed to this court.

On November 28, 1895, said court decreed the sale of the lands in controversy for the non-payment of the levee district taxes assessed against them, under the provisions of the act entitled "An act creating the St. Francis Levee District," approved February 15, 1893, and the amendatory act, approved March 21, 1893, and a further amendatory act, approved April 2, 1895; and appointed J. L. Holloway as commissioner to sell the same, and the sale was made accordingly by him, and the appellants became the purchasers, on the 21st and 22d of July, 1896, the dates of said sale, and paid in cash the amount bid by each to said commissioner, and demanded of him their deeds accordingly, which he declined then and there to give. Said commissioner filed his report of sale at the following term, to-wit: on the 19th day of November, 1896, in which it appeared that various parties whose land had been sold by him at said sale had, before the completion of his report, come forward and paid him the taxes, penalty and costs, and he had given them certificates of redemption.

Thereupon, the appellants, Lem Banks, F. A. Cordes and Minor Merriwether, purchasers at said sales, to-wit on the 3d of December, 1896, filed their separate and several motions, which are as follows: "Comes Lem Banks, and moves the court for an order directing J. L. Holloway, commissioner in this cause, to execute and deliver to him a deed for lands by him bought at the sale under the decree herein rendered, and for cause says: That, as directed by the decree of this court, the commissioner, on the 21st and 22d days of July, 1896, offered at public outcry to the highest and best bidder for cash, and, after giving the notice required by said decree, and otherwise complying with its provisions, sundry lands situated in Crittenden county, Arkansas, among them the following tracts, which were condemned and sold in the names of the parties hereafter appearing in the lines with the tracts respectively, and were struck off to him at the sums opposite the tracts respectively; the names of the parties being first on each line, followed by a description of the land, and the amount bid and paid for the same. The list of the lands purchased by him is

then given, with the names of the owners, and also the taxes assessed against each tract. Similar motions were made and filed by the other two purchasers, and all three were overruled by the court, to which exceptions were duly made and saved, and this ruling of the chancellor raises the issue in this case, that is to say, whether the said owners had a right to redeem at the time and in the manner they did.

The amendatory section had the effect of repealing the original clause allowing redemption, and the amendatory act fails to provide for redemption elsewhere. It follows that there is no statutory right of redemption from sales under these condemnation proceedings, except as in favor of infants and insane persons, which is provided for. The act provides that the enforcement of the payment of the taxes, penalties and costs assessed and levied against the lands in the district shall be in the chancery courts, in the counties where the lands are respectively situated, and, in condemning the lands and making sales thereof, these courts are to proceed according to the usual course of chancery courts.

The usual method of chancery courts, when enforcing liens on lands to pay money demands, is to condemn the lands to be sold, and to direct the sale to be made on a certain day in the future, unless the lands are sooner redeemed by the payment of the debt, interest and costs. And, if not so redeemed, the sale is made, and thereby the rights of purchaser attach, and will not be disturbed by the court on passing upon the report of sale and exceptions thereto, where the sale has been fair and in substantial compliance with the law and the orders of the court directing the sale to be made. Of course, a suggestion of judicial defects will be the subject of inquiry at every stage of the proceedings.

The original decree condemning these lands for sale contained the following as to the privilege of redemption: "And it is further ordered and decreed that any of said defendants, or any persons for them, or any person claiming any of said lands or interest therein, may, before sale, pay to the clerk of this court the amount of taxes, interest, penalty and costs set opposite each tract severally, both in foregoing statement and the costs hereinafter provided for that may have occurred at the

time of payment, and said clerk shall give a receipt therefor, and note the fact of payment, and by whom paid, on the margin of this decree, and against the tract so paid on." This decree in effect permits redemption up to the sale, but not afterwards, and under it the commissioner permitted many tracts to be redeemed before the day of sale, and no controversy over this fact is made here. Another provision in the original decree reads as follows, to-wit: "And it is further ordered, adjudged and decreed that said commissioner shall execute deeds of conveyance to purchasers of land so sold, and shall include all the lands sold to a purchaser in one deed unless otherwise directed by the purchaser, and for each deed the commissioner shall receive a fee of one dollar, to be paid by the purchaser."

The time for making the deed or deeds is after confirmation of sale; for, until the sale is confirmed, it can never be known what changes there may be made in the report of sale in order to its confirmation. In this respect the sale may be said to be incomplete until confirmation. But where the sale has been fairly conducted according to law under the decretal orders of the court, the rights of the purchasers cannot be disturbed by matters occurring after the sale brought in by the commissioner, although approved by the court on final hearing and confirmation of his report of the sale.

The following lands were sold, but afterwards permitted to be redeemed before the commissioner's report of sale was confirmed, and released to their respective owners on payment of the taxes, penalty, interest and costs assessed against them, namely:

N. E. $\frac{1}{4}$ and W. $\frac{1}{2}$ Sec. 21, T. 7 N., R. 7, taxed to Jonas Carr.

S. E. $\frac{1}{4}$ W. $\frac{1}{2}$ Sec. 21, T. 7, R. 7, taxed to C. W. Willets, Receiver.

S. W. Frl. $\frac{1}{4}$ Sec. 21, T. 7, R. 7, taxed to Charles Morgan.

S. E. $\frac{1}{4}$ Sec. 6, T. 4, R. 8, taxed to Estate of J. N. Williford.

W. $\frac{1}{2}$ Sec. 7, T. 4, R. 8, taxed to Estate of J. N. Williford.

N. E. $\frac{1}{4}$ Sec. 6, T. 4, R. 8, taxed to Estate of J. N. Williford.

N. E. $\frac{1}{4}$ Sec. 7, T. 4, R. 8, taxed to Estate of J. N. Williford.

And perhaps other tracts. At all events, all lands belong-

ing to the estate of J. N. Williford and the North American Trust Company, S. M. Jarvis, trustee, and C. N. Willets, Receiver.

Before final decree of confirmation, it was shown, by proper affidavits in regard to these lands, that, while the owners of them were residing in other states, yet, in each case, respectively, these owners had an agent or tenant in actual occupancy during the whole period of assessment, levy and suit to foreclose; and that, as the only notice of the bill to foreclose was constructive notice, actual notice should have been given on these agents and tenants, and, as this was not done, the foreclosure and sale were void as to these lands; but, as the owners had voluntarily appeared, and paid the taxes, interest, penalty and costs, without controversy, there was no error in the chancellor releasing these lands, and his decree as to them is affirmed; but as to the other lands involved in this controversy, saving the rights of minors and insane persons named in the act, the decree of confirmation is reversed, and the cause remanded, with directions to the chancellor to have the report corrected on the facts, and under the rule here laid down, and order deeds to be made accordingly.

LITTLE ROCK TRACTION & ELECTRIC COMPANY v. NELSON.

Opinion delivered June 3, 1899.

66 494
69 383
69 560

66 494
f79 89
f80 534
e82 218
f82 328

66 494
f85 304

66 494
f88 454

1. EVIDENCE—OPINION OF NON-EXPERT.—In an action against a street car company to recover damages sustained by plaintiff in attempting to board a moving car, it was error to permit plaintiff, a non-expert, to testify that he would have had no difficulty in getting on the car if it had not moved forward with sudden rapidity after he started to get on it. (Page 498.)

2. SAME.—It was error to permit a non-expert witness to testify that it was not dangerous to get on a street car by the front platform when it was running slowly. (Page 499.)

3. SAME—COMPETENCY.—Evidence that boys had ridden on defendant's cars at different times, with or without permission and without paying fares, is incompetent to prove that plaintiff was or was not entitled to ride on the car he attempted to board at the time he was injured. (Page 499.)

4. SAME—RES GESTAE.—In a personal damage suit against a street car company, a statement as to the cause of the accident, made by the motorman in charge of the car after the injury was complete, after the plaintiff had been removed from where he had fallen and was sitting in the car, and after the motorman had taken down the names of the eye-witnesses of the accident, is inadmissible as part of the *res gestae.* (Page 499.)

5. SAME—ADMISSION—IMPRESSION OF WITNESS.—It was not error to exclude testimony of a witness to the effect that he heard plaintiff talking about the accident in which he was injured, and that the impression left on his mind by what plaintiff said was that the injury was due to plaintiff's fault. (Page 503.)

6. STREET CARS—TRESPASSERS.—The employees of a street car company are under no obligation to keep a lookout to prevent boys endeavoring to ride without permission, and without paying fare, from entering its cars while in motion. (Page 505.)

7. SAME.—An infant riding upon a street car, without paying fare, by invitation of the motorman in charge of the same, who has authority to receive and let off passengers, is not a trespasser. (Page 505.)

8. SAME—INFANT PASSENGER.—In entering, riding upon and leaving street cars, an infant is bound to exercise prudence equal to his care, knowledge and experience. (Page 505.)

Appeal from Prairie Circuit Court, Southern District.

JAMES S. THOMAS, Judge.

Rose, Hemingway & Rose and *C. T. Coleman*, for appellant.

It was error to permit plaintiff to testify as to his opinion with regard to the danger or difficulty of boarding the car. 1 Whart. Ev. 509; 29 Ark. 448; 24 *id.* 251; 56 *id.* 612; 57 *id.* 387. It was error to admit evidence of what the motorman said after the accident—it was not of the *res gestae.* 95 N. Y. 275; 19 Am. & Eng. Ry. Cas. 400; 58 Ark. 47; 1 Greenlf. Ev. § 108; 1 Wh. Ev. § 262. No proper foundation was laid for the impeachment of appellant's witness, Kelly. Sand. & H. Dig. § 2960; 37 Ark. 324. The court should have directed a verdict for defendant. The evidence shows that appellant was not negligent, and that appellee was. 58 Ark. 323; 114 N. Y. 108; S. C. 21 N. E. 102; 45 Ark. 246; 57 Ark. 461. One who boards a moving car does so at his own risk. 23 Atl. 566. Appellee's instructions are erroneous, because based on the theory that he had used all the care to protect himself reasonably to be expected of one his age. 14 S. W. 762; 21 S. W.

163. There is no duty resting on one person to anticipate or take precaution against the wrongful acts of another. 49 Ark. 262; 47 *id.* 502; 50 *id.* 483; 107 Mass. 108. One who rides without paying fare is not protected as a passenger. 59 Ark. 404; 47 N. W. 809; 13 S. W. 19; 81 Ill. 245; 85 *id.* 80; 22 Barb. 91; 8 Kas. 505; 157 Mass. 377; 110 Mo. 81; 23 S. C. 531; 67 Fed. 523; 65 N. W. 450; 66 *id.* 401; 91 N. Y. 420. It was not the motorman's duty to devote his entire attention to the protection of appellee. 17 S. E. 651. As the motorman had no knowledge of the danger of appellee on the car, he was not negligent. 23 Atl. 345; 74 Pa. St. 421; 6 Am. & Eng. Ry. Cas. 526; *ib.* 525; *ib.* 690; 26 N. E. 967.

T. J. Oliphint and *G. W. Murphy*, for appellee.

Appellee was not a trespasser, nor was he guilty of contributory negligence. He was a passenger, and entitled to protection as such. 55 U. S. 468; 29 Am. Rep. 619; 2 S. W. 315; 18 S. W. 1090; 3 L. R. A. 156; 11 S. W. 751; 10 S. E. 730; 8 So. 708. There was no error in the admission of appellee's and witness Martin's opinions as to the degree of danger. 27 Atl. 309; 47 N. W. 459. The statement of the motorman was admissible as part of the *res gestae*. 48 Ark. 333; 65 Ark. 261.

BATTLE, J. The Little Rock Traction & Electric Company seeks to set aside a judgment which was recovered against it by Cecil Nelson in the circuit court of the southern district of Prairie county for the sum of $2,500, which was assessed against it, by the verdict of a jury, as compensation to Nelson for personal injuries alleged to have been sustained by him in consequence of the failure of the company to exercise due care in the operation of its street railway.

The judgment was recovered in an action instituted by Cecil Nelson, by his father and next friend, J. W. Nelson, against the Little Rock Traction & Electric Company. The plaintiff, after alleging that he is only ten years old, and that the defendant is a corporation operating a street railway in the city of Little Rock, stated the circumstances and causes of the injuries as follows: On the 11th of August, 1896, at the

instance of the defendant's motorman, he took passage on the car passing from Rector avenue to the end of the car line and return. At the end of the line the car stopped for a few minutes, when he and other passengers got out, and remained until the car was ready to return. When the motorman was ready, and in the act of starting, he again invited the plaintiff to get on board, which he attempted to do by its rear entrance, but was prevented from doing so by the motorman. Plaintiff thereupon, seeing that the motorman intended that he should get on at the front entrance, ran to the front end of the car, caught hold of the upright "handle-bars" and of the first step, and attempted to enter the car while it was moving slowly, when this method of entrance seemed safe. At this time the motorman, knowing that the plaintiff was trying to get on, negligently and wrongfully turned on the full electric current, thereby causing the car to make a sudden lurch forward, and increased its speed, and causing him to lose his footing on the steps and his hold of one of the "handle-bars." Being unable, on account of the accelerated speed, to regain his footing, and discovering that he could not release his hold of the other "handle-bar" without incurring serious injury, he held on to it, calling as loudly as he could to the motorman to stop the car, which he failed to do. At last, after plaintiff had been dragged a great distance, his strength failed, his hold of the "handle-bar" yielded, he fell, and the whole of the car ran over his foot and ankle, crushing them so badly that his leg had to be amputated.

The defendant answered as follows: "It is not true that the plaintiff was, at the time of his injury, riding on the car by the invitation of its motorman; but he was a willful trespasser on the car, though he had been often warned against trespassing thereon; and his injury was due to his own willful wrong and contributory negligence, and not to any negligence on the part of the defendant. Defendant specifically denies all acts of negligence charged in the complaint."

The evidence in the case is too voluminous to set out in an opinion, and for that reason we shall state only so much of it as may be necessary to present the questions that will be decided.

It was shown by the evidence that the plaintiff received the injury for which he asked damages while he was attempting to board a car of the defendant. He (the plaintiff) testified that he got on the car at Rector avenue on the East Ninth street line; that Gillis, the motorman, invited him to get on; that two other boys, Grover Hammond and George McKee, went with him; that they rode on the car to the end of the Ninth street car line, where the car was stopped for a few minutes; that, when the motorman was about to move the car, he invited him and the other boys to get on; that the car was running slowly when they boarded it, George and Grover getting on the south side and he on the north; that the motorman whipped them off, and he ran to the front end of the car, and placed one foot upon the car, when it moved suddenly and rapidly forward, and he slipped, and fell; that he held on as long as he could, when he let loose his hold, and the car ran over his left foot. After he made this statement, his counsel asked this question: "What difficulty would you have had in getting on if it had remained going as it was when you started on it?" And he answered: "I guess I would have got on if it had not started fast." To the question and answer the defendant objected, but the objection was overruled, and exceptions were saved. Was the testimony admissible?

As a general rule, witnesses who are not required to testify as experts must state facts, and not conclusions. The opinions of such witnesses are admissible on conditions which are correctly stated in *Commonwealth* v. *Sturtevant*, 117 Mass. 122, 137, as follows: "First, that the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time; and, second, that the facts upon which the witness is called upon to express his opinion are such as men in general are capable of comprehending and understanding." According to this rule, opinion evidence is not admissible when the fact is susceptible of being adequately exhibited to the jury in the ordinary way. *Madden* v. *Missouri Pacific Railway Co.*, 50 Mo. App. 666, 673; *President, etc., of the Baltimore and Yorktown Turnpike Road* v. *Leonhardt*, 66 Md. 70, 77; 2 Fetter, Carriers of Passengers, § 465.

The testimony in question involved a submission to the witness of the decision of one of the questions which was within the exclusive province of the jury to determine, and that was, did the plaintiff exercise due care in boarding the defendant's car? This was a question which a jury of ordinary intelligence and experience in the affairs of life could decide upon a full presentation of all the facts and circumstances of the case, without the aid of the opinion of the witness. The testimony objected to was, therefore, incompetent. *Madden* v. *Missouri Pacific Ry. Co.*, 50 Mo. App. 666, 673; *President, etc., of the B. & Y. Turnpike Road* v. *Leonhardt*, 66 Md. 70, 77.

Branch Martin was allowed to testify, over the objections of the defendant, that he did not think it was dangerous to get on the East Ninth street cars by the front platform, when they were running slowly. This testimony was incompetent, for the same reason the opinion of plaintiff, as above stated, was not admissible.

Evidence was adduced at the trial to prove that boys had ridden on defendant's cars at different times without permission, and, at other times, by invitation, and without paying fare. This evidence was incompetent. It did not tend to prove that the plaintiff was or was not entitled to ride on the car he attempted to board at the time he was injured.

J. H. Williams testified that when Cecil Nelson fell, and was injured, he ran to his assistance, and called to Gillis, the motorman, who thereupon stopped the car, and moved it back where Cecil was, and put him on it. The witness testified further, over the objections of the defendant, as follows: "When he (Gillis) came back, and got the boy (Cecil), and put him on the car, he took my (witness's) name and two more of the boys' names, Will Tatum and Sam Armstrong. He (Gillis) says: 'It was my own carelessness that the boy got hurt, running them from one end of the car to the other, playing with them.'" When this statement was made, he says Cecil was sitting down in the car. Appellant contends that this testimony as to the statement made by the motorman is incompetent, and the appellee insists that it was a part of the *res gestae*, and was properly admitted. Was it a part of the *res gestae?*

In determining what constitutes the *res gestae*, we have repeatedly quoted approvingly from Wharton on Evidence as follows: "The *res gestae* may be therefore defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist, as we will see, of sayings and doings of any one absorbed in the event, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or emanations of, such act, and are not produced by the calculated policy of the actors. They are the act talking for itself, not what people say when talking about the act. In other words, they must stand in immediate causal relation to the act,—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. * * * Declarations which are the immediate accompaniments of an act are admissible as a part of the *res gestae*; remembering that immediateness is tested by closeness, not of time, but by causal relation, as just explained." 1 Wharton, Evid. (3 Ed.) §§ 259, 262.

In *Lund* v. *Tyngsborough*, 9 Cush. 36, which is said to be "the leading case in this country upon *res gestae* declarations in cases involving injuries to persons," the following is a part of the conclusions of law reached by the court:

1. "That a declaration, if it has its force by itself, as an abstract statement, detached from any particular fact in question, is not admissible in evidence, because it depends for its effect on the credit of the person making it, and, therefore, is hearsay."

2. "That whenever the act of the party may be given in evidence, his declarations, made at the time, are also admissi-

ble, if they were calculated to elucidate and explain the character and quality of the act, and were so connected with it as to derive credit from the act itself, and to constitute one transaction."

3. "That there must be a main or principal fact or transaction, and that such declarations only are admissible as grow out of the principal transaction, serve to illustrate its character, are contemporary with it, and derive some degree of credit from it." Gillett, Ind. & Coll. Ev. § 247.

In *Alabama Great Southern Railroad Company* v. *Hawk*, 72 Ala. 112, it is said: "What lapse of time is embraced in the word 'contemporaneous' is often a question of difficulty. Perfect coincidence of time between the declaration and the main fact is not, of course, required. It is enough that the two are substantially contemporaneous; they need not be literally so. The declarations must, however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as virtually to constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the ear-marks of a device, or afterthought, nor be merely a narrative of a transaction which is really and substantially past."

The rule, as stated in the cases we have cited, has been substantially adopted by this court. In *Clinton* v. *Estes*, 20 Ark. 225, it is said: "It may be difficult to determine, at all times, when declarations shall be received as a part of the *res gestae*. But when they explain and illustrate it, they are clearly admissible. Mere narratives of past events, having no necessary connection with the act done, would not tend to explain it. But the declaration may properly refer to a past event as the true reason of the present conduct."

In *Carr* v. *State*, 43 Ark. 104, in speaking of what declarations constitute a part of the *res gestae*, the court said: "Nor need any such declarations be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let-down from the moment of the event they

illustrate. But they must stand in immediate causal relation to the act, and become part either of the action immediately preceding it, or of the action which it immediately precedes."

In *Fort Smith Oil Company* v. *Slover*, 58 Ark. 168, it was held that the statements of the deceased as to how he had been hurt, made about thirty minutes after the injury and after he had been carried home, in response to questions asked by his wife, were no part of the *res gestae*, the court saying: "It appears to the court that these statements of the deceased made to his wife have no causal relation to the act they are supposed to have been intended to illustrate; that they were not so connected with the principal fact, or such immediate emanations from it, or such immediate accompaniments of it, as to constitute parts of the *res gestae*."

In *St. Louis, Iron Mountain & Southern Railway Company* v. *Kelley*, 61 Ark. 52, it was held that a statement made by a railroad brakeman a few minutes after a child was struck and injured by a train, after the acts to which it referred were completely past, and the child had been borne away from the place of the accident, in response to a question as to how the injury occurred, was a narration of past events, and no part of the *res gestae*. The court said: "If, at the time of the accident, or immediately afterwards, the brakeman, * * * moved by the excitement of the occasion, had exclaimed to the engineer, 'I gave you the signal in time to have stopped, but you were looking the other way,' such an instinctive exclamation, made under the effect of the excitement caused by the accident, would have been a part of the *res gestae*, and admissible. And so a spontaneous utterance of that kind, if made to bystanders immediately after the accident, would be admissible, when it emanated from, and was called forth by, the excitement of the occasion." In this connection an author has truly said: "Where an act of personal violence, voluntary or involuntary, is committed, it is possible to conceive of cases where such act generates in the victim a height of excitement so great as to wholly subordinate his own personality for the time, and to render him the unconscious instrumentality through which the act is still forcing itself, much like the reverberation of the

blast is heard in the adjoining mountains." In that case the event is speaking through the person, and what is said is a part of the *res gestae*.

In *Little Rock, M. R. & T. Ry. Co.* v. *Leverett*, 48 Ark. 333, it was held that the statement of the deceased, Leverett, made immediately after he was injured by a railroad train, while he was under a car and struggling to get out, in response to questions asked by his brother, was admissible. The court said: "The statement of Leverett was made immediately after he was run over, and while the wrong complained of was incomplete, he being still under the car, and was a part of the *res gestae*, and fairly goes to explain the cause of the condition in which he was at the time it was made. It was an emanation of the act in question, and so connected with the cause of his injuries as to preclude any idea that it was the product of calculated policy. Aside from any credit due Leverett for veracity, the circumstances immediately preceding and connected with his statement impress the mind with confidence in its truth."

The doctrine in the Leverett case, though questioned, is, we think, sustained by the weight of authority. Gillett, Indirect and Collateral Evidence, § 259, and cases cited.

In this case the statement of the motorman, if the testimony of Williams be true, was a relation of what had occurred. When it was made, the injury was complete, and Cecil had been removed from where he had fallen, and was sitting in the car. The motorman obviously made it for the purpose of showing that he was guilty of no intentional wrong; for he said, "he was playing with the boys." When he made it, he took the names of persons who saw the accident, doubtless, for the purpose of using them as witnesses, if necessasy, to prove how the accident occurred. He evidently thought that an effort might be made to hold his employer liable for the injury, and made the memorandum to enable it to ascertain the facts, and to prepare to meet any demand for reparation. The statement, therefore, was no part of the *res gestae*, was incompetent, and its admission was prejudicial to appellant.

Thomas W. Baird testified in behalf of the defendant as follows: "I got on the car after Cecil was hurt, when Gillis

was carrying him home. The boy was talking all the time; did not seem to suffer much; seemed to be concerned about what his mother would say of it. Such things excite me, and I could not repeat the exact words. But the impression left on my mind was that it was his own fault. I don't think he said so in so many words, but what he said left that impression on me, that it was his own fault." So much of this testimony as relates to the impression of the witness was excluded by the court on motion of the plaintiff. In excluding it, I think the court erred, but a majority of the court thinks that it was properly excluded.

Numerous instructions were given by the court to the jury. Among them the following was given at the request of the defendant: "If the injury to Cecil Nelson would not have occurred if he had exercised the care and caution that fairly and reasonably appeared proper to one of his age, understanding and intelligence, under the circumstances, the plaintiff cannot recover." After instructing the jury in this manner, it said to to them: "There are two theories in this case, and the instructions above given present the law upon the theories of the respective parties. The instructions given on the part of the defendant are given upon the theory that Cecil Nelson did not attempt to enter the car on the invitation of Gillis, and are to be understood in that way." In the last instruction the court told the jury, in effect, that the only valid defense in the action was based on the theory that Gillis had not invited the plaintiff to ride, and to exclude from their consideration and decision the question whether, admitting the invitation to have been given, the plaintiff was guilty of such contributory negligence as would defeat his recovery. In this respect the instruction was highly prejudicial to the defendant. One of the defenses to the action was, the injury, which was the basis of this action, was due to plaintiff's own wilful wrong and contributory negligence, and not to any negligence on the part of the defendant. Evidence to support this defense was adduced, and upon it instructions were given at the instance of the defendant.

Appellant insists that other instructions, which were given to the jury, were erroneous and prejudicial to it. But it is not

necessary to mention the objections to them specifically. A statement of the law of the case will be a sufficient answer to appellant's contentions.

The employees of a street railway company are under no obligations to keep a lookout to prevent boys endeavoring to ride without permission and paying fare from entering its cars while in motion. Such a boy who does or attempts to do so is a trespasser, "and the company owes him no duty, save not to injure him wantonly." *Catlett* v. *Railway Company*, 57 Ark. 461.

A boy ten years of age riding upon a street car, without paying fare, by invitation of a motorman in charge of the same, who has authority to receive and let off passengers, is not a trespasser. The invitation of the motorman is an act within the general scope of his employment, for which he is responsible to his master. If the boy accepts it innocently, he is no trespasser, and it is the duty of the company to extend to him the diligence due to passengers of his age and discretion. *Wilton* v. *Middlesex Railroad Company*, 107 Mass. 108; *Metropolitan St. Rd. Co.* v. *Moore*, 83 Ga. 453; *Brennan* v. *Fair Haven & Westville R. Co.*, 45 Conn. 284; *Muehlhausen* v. *Railroad Co.*, 91 Mo. 332; *Buck* v. *People's Street Ry., etc., Co.*, 108 Mo. 179.

In entering, riding upon and leaving street cars, a boy ten years of age, or over, is bound to exercise prudence equal to his care, knowledge and experience. To that extent he is under a legal duty to avoid danger, and is held responsible in law for acts or omissions contributing to his own injury. *Erwin* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 35 Am. & Eng. Railroad Cases, 390, and notes; 1 Fetter, Carriers of Passengers, § 183, and cases cited; Booth, Street Railway Law, § 385, and cases cited; *Ridenhour* v. *Kansas City Cable Ry. Co.*, 102 Mo. 270.

Reversed and remanded for a new trial.

SULLIVAN v. STATE.

66 506
70 25

Opinion delivered June 3, 1899.

1. CONFESSION—FLATTERY OF HOPE.—A confession by one accused of larceny is inadmissible if it is induced by the promise of the owner of the stolen property that if accused would confess he would make it easy with him. (Page 508.)

2. INSTRUCTION—INVASION OF JURY'S PROVINCE.—An instruction, in a prosecution for the larceny of some meat, "that the confession made by the defendant to Col. B. A. Johnson, together with the fact that the meat was stolen, will justify you in finding the defendant guilty," is erroneous in that it invades the province of the jury in assuming as a fact that the meat was stolen, and in telling them to give full credence to the testimony of Johnson, and to the confession of defendant alleged to have been made to him. (Page 509.)

Appeal from Greene Circuit Court.

FELIX G. TAYLOR, Judge.

STATEMENT BY THE COURT.

At the September term, 1895, of the Greene circuit court the appellant, William Sullivan, was indicted for grand larceny. At the spring term, 1899, the cause came on for trial. Appellant, waiving formal arraignment, entered his plea of not guilty, was tried, convicted and sentenced to one year in the penitentiary, and appealed to this court.

The evidence on which appellant was convicted, in part, is as follows:

B. A. Johnson, for the state: Was acquainted with the appellant in May, 1895. About that time witness had fourteen or fifteen dollars' worth of meat stolen from him. "Don't know of my own knowledge who took it. Other parties found the meat. I identified it by a wire that it was hung up by. This was in Greene county, Arkansas."

O. M. Batey, for the state: "Was a justice of the peace in Greene county in 1895. At that time two men named Allen were tried before me for the larceny of some meat. William Sullivan testified before me that time. I made no promise to

him to get him to make a statement. Sullivan testified that he and one of the Allen boys went to Col. Johnson's smoke house, and pried the hinges off the door, and went in, and carried off a certain amount of meat; took it off a piece; met the other Allen boy there with a sack to help them carry it off. He said they took three (3) middlings and four (4) hams. I committed William Sullivan to jail. This was sometime after. I made no promise of leniency to get him to testify. I was using him as a witness against the Allen boys. I did not bind him over for stealing the meat, but for stealing the clothes." The evidence of the witness as to Sullivan's testimony before him was objected to by appellant, and proper exceptions saved, and was excluded by the court, and the jury told not to consider it at all.

B. A. Johnson, for the defense: "I had a talk with Sullivan about stealing the meat before he went on the stand at Esquire Batey's. He came to my house not a great while after the meat was taken, and I got after him, for I suspected that he knew about the parties. I thought he was young, and I could get him to tell about it. He told me finally, after working with him for some time, that he would let me know the next day. He said that he thought the meat could be found. My recollection is that he went and had a conversation with his aunt, and he agreed to tell the story if we would agree to make it easy with him. I told him that I would make a state's witness of him to help convict the others. At the examining court it was my understanding that he was not to be bound over; that if we bound him over, the whole thing was gone. I think I told his aunt to go and see him, and we would try and make it as light on him as possible. It was our understanding that he would not be prosecuted if he would testify against the Allen boys. I was not holding any office in the county at that time, nor acting in any official capacity whatsoever. Sullivan confessed being with the Allen boys at the time they stole the meat. I simply told appellant that I would do all I could to make a state's witness of him against the Allen boys, if he would testify; that if he would tell all he knew about it, I would do what I could to make him a state's witness; that I would use my efforts to have that done." Defendant moved the court to exclude the

testimony of B. A. Johnson in regard to the confession made to him. Motion overruled, and exceptions saved.

Crowley & Huddleston, for appellant.

The court erred in the giving and refusal of instructions. It was also error to admit evidence of the confession of defendant, because same was not voluntary. 22 Ark. 336; 50 Ark. 305; 48 S. W. 904; 168 U. S. 575, 576. It was also error to admit the evidence of the magistrate before whom the preliminary examination was had.

Jeff Davis, Attorney General, and *Charles Jacobson*, for appellee.

The withdrawal of the improper evidence cured the error of its admission. 60 Ark. 45; 43 Ark. 99; 56 Ark. 603; 60 Ark. 76; Elliott, App. Prac. § 702; 58 Ark. 482. Whether or not the confession was voluntary, it was within the province of the court to decide, upon all the facts of the case, and its ruling thereon is conclusive. 28 Ark. 121; 28 Ark. 531. There was no error in refusing to instruct the jury that it was for them to determine the admissibility of the confession. 28 Ark. *supra*. There was no error in the instruction given for the state. 43 Ark. 367.

HUGHES, J., (after stating the facts.) After much other testimony had been given, the court instructed the jury "that the confession made by the defendant to Col. B. A. Johnson, together with the fact that the meat was stolen, will justify you in finding the defendant guilty." Defendant excepted.

The testimony of Col. B. A. Johnson as to the confessions of the defendant was not admissible. The proof shows that they were made by the defendant in the hope that, if he would confess, he would be made a state's witness against others, and that he would not be bound over or prosecuted "if he would testify against the Allen boys." This was promised him by Col. B. A. Johnson before he went on the stand as a witness. Col. Johnson, at the time he induced the defendant to make the confessions, was not in official position of any kind, but he was the owner of the stolen meat, the party injured, and really the prosecutor in the case, and as such was a person "in authority," within the meaning of the law.

In *Warickshall's Case*, 1 Leach's Cr. Cas. 299, Eyre, C. B., said: "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." "The material inquiry, therefore, is whether the confession has been obtained by the influence of hope or fear applied by a third person to the prisoner's mind." 1 Greenleaf, Ev. § 219. Lord Campbell stated the rule to be that "if there be any worldly advantage held out, or any harm threatened, the confession must be excluded." *Reg.* v. *Baldry*, 16 Jur. 599, 12 Eng. Law & Eq. 590. If the threat or inducement is held out, actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate or constable is such a person. 1 Greenleaf, Ev. § 222; *Com.* v. *Sego*, 125 Mass. 210; *Knapp's Case*, 10 Pick. 489; *Charles* v. *State*, 11 Ark. 408; *Corley* v. *State*, 50 Ark. 305; *Reg.* v. *Moore*, 16 Jur. 622; 12 Eng. Law & Eq. 583.

It is true that, the principle of law that the confession must be voluntary being strictly adhered to, the question whether it is voluntary must be decided primarily by the presiding judge.

The instruction given by the court was clearly erroneous. It invaded the province of the jury in assuming as a fact that the meat was stolen, and in telling them to give full credence to the testimony of Johnson, and to the confession of the defendant alleged to have been made to him, which we have shown was inadmissible. It is error for the court in charging a jury to assume facts to have been proved, when they are disputed, or to charge the jury upon the weight of evidence. This is elementary. The constitution forbids it. For the errors indicated, let the judgment be reversed, and the cause remanded for a new trial.

BUNN, C. J., and BATTLE, J., did not participate.

STATE v. WELBON.

Opinion delivered June 3, 1899.

SUBSTITUTION OF INDICTMENT—IDENTITY OF OFFENSE.—An indictment against a railway station agent for a violation of the "separate coach act" of February 23, 1891, charged that said agent did then and there unlawfully and wilfully fail and refuse to keep open a separate waiting room for the African race, as provided by law. A subsequent indictment charged that, certain persons of the African race occupying the rooms set aside and provided for the white race, said agent "did there wilfully neglect to assign said passengers and persons of the African race to the rooms provided and used for the African race, and that he did unlawfully neglect to eject said persons of the African race from said room so provided for the white race. *Held*, that if the first indictment charged a violation of the "separate coach act," the second one charged a different offense, so that the latter could not be substituted for the former. (Page 511.)

Appeal from Lawrence Circuit Court, Eastern District.

FREDERICK D. FULKERSON, Judge.

Jeff Davis, Attorney General, and *Chas. Jacobson*, for appellant.

If there was any doubt as to the sufficiency of the first indictment, re-indictment was the proper course. 32 Ark. 236. The second indictment superseded the first. Sand. & H. Dig. § 2099. The first indictment should have been quashed. 50 Ark. 541. The time during which it was pending is not to be computed as part of the time of limitation of prosecution for the offense. Sand. & H. Dig. § 1957; 42 Ark. 109.

J. E. Williams and *Dodge & Johnson*, for appellee.

The two indictments are not for the same offense, nor would they be sustained by the same evidence. Hence section 2099, Sand & H. Dig., does not authorize the substitution of one for the other. 50 Ark. 28.

HUGHES, J. This appeal is taken from an order of the circuit court of Lawrence county overruling a motion of the state to substitute one indictment for another. The

appellee was indicted first on the 10th day of March, 1898, by the grand jury of Lawrence county, charged with violating the law in regard to the comfort of railway passengers by unlawfully and wilfully failing and refusing to keeping open a separate waiting room for the African race, and the said crime was charged to have been committed on the 1st day of February, 1898. At the March term of said court, 1899, on the 10th day of March, the grand jury of said county returned an additional indictment against the same appellee, charging him with violating the law in regard to the comfort of railway passengers by neglecting to assign certain passengers of the African race to the room provided and used for said race, and permitting the said passengers to occupy the room provided for the white race, and the second count in the same indictment charged him with failing to eject said persons of the African race from such room. The latter indictment the state, through the prosecuting attorney, on the 17th day of March, asked to substitute for the former indictment by motion to quash indictment No. 29 and proceed on indictment No. 116. This motion was by the court overruled.

Section 2099 of Mansfield's Digest reads as follows: "If there shall be at any time pending against the same defendant two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be suspended by such indictment, and shall be quashed." This section has received the construction of this court in a former case, as follows: "Where two indictments against the same defendant are so diverse as to preclude the same evidence from sustaining both, and where each sets out an offense differing in all its elements from that in the other, they are not for the 'same offense' within the meaning of this section." *State* v. *Hall*, 50 Ark. 28. The two indictments must, therefore, be for the same offense, and what constitutes the same offense, or the test for determining whether they are the same offense, is there laid down and defined to be the same evidence sustaining both, and, further, that out of the same facts a series of charges shall not be preferred.

Omitting the formal parts, and giving the charging parts of the indictments side by side, the indictments are as follows:

The first charges that the said agent did then and there unlawfully and willfully fail and refuse to keep open a separate waiting room for the African race as provided by law.	The second charges that, certain persons of the African race * * occupying the waiting rooms set aside and provided for the white race, the said C. M. Welbon did there willfully neglect to assign said passengers and persons of the African race to the rooms provided and used for the African race, to which said passengers and persons belonged; and the second count charges that he did then and there unlawfully neglect to eject said persons of the African race from said room so provided for the white race.

The sections of the statute under which these indictments were found are as follows: Section 2 of the act, approved February 23, 1891, entitled, "An act to promote the comfort of passengers on railway trains, and for other purposes," provides: "That the officers of such passenger trains and the agents at such depots shall have power, and are hereby required, to assign each passenger or person to the coach or compartment or room used for the race to which such passenger or person belongs. * * * Any officer of any railroad company assigning a passenger or person to a coach or compartment or room other than the one set aside for the race to which said passenger or person belongs shall be liable to a fine of twenty-five dollars. * * * Should any passenger or any other person not a passenger, for the purpose of occupying or waiting in such sitting or waiting room not assigned to his or her race, enter said room, said agent shall have the power, and it is hereby made his duty, to eject such person from such room." * * * Section 3 of this act provides: * * * "Any agent at such depot who shall

refuse or neglect to carry out the provisions of this act shall, on conviction, be fined not less than twenty-five dollars nor more than fifty dollars for each offense." Acts 1891, pp. 16, 17. The act approved April 1, 1893, amends only section 1 of the foregoing act, and leaves sections 2 and 3 unmodified. Acts 1893, p. 200.

If the first indictment charges any violation of the statute by the agent of the railroad company, the second one charges a different and distinct offense. The prosecuting attorney might have dismissed the first indictment, and the grand jury might have thereupon found the second, and thus saved the case from the operation of the statute of limitations. But we do not think he could substitute one for the other.

The judgment of the circuit court is affirmed.

BUNN, C. J., and BATTLE, J., not participating.

GRIFFITH v. MAXFIELD.

Opinion delivered June 3, 1899.

1. DECLARATION OF TRUST—CONSTRUCTION.—The owner of land, in consideration of love and affection, made a written declaration that he held it, one-half for himself, the other half in trust for his three brothers, reserving to himself the right and power to sell and convey said land, to any person or persons at such prices as he might deem proper and advantageous to himself and beneficiaries. The three brothers accepted the terms and provisions of the trust. *Held*, that the instrument did not convey any title or interest in the land itself to the brothers, but was merely the declaration of a purpose to hold one-half of the proceeds of the land in trust for them. *Held*, also, that if the instrument were sufficient, under the statute of uses, to convey to the brothers an equitable interest in the land, the grantor, by expressly reserving a power to sell and convey, retained the authority to make conveyances of the land in his own name. (Page 520.)

2. SAME—CONSIDERATION—EVIDENCE.—Where the owner of land signed a declaration of trust, reciting that the lands declared to be held in trust "had been acquired by the said labor and investments" of the beneficiaries, his brothers, it may be shown by parol proof that there was no consideration for the instrument except love and affection. (Page 521.)

3. POWER—SURVIVORSHIP.—Where, in making a declaration of a trust in land, the trustee reserves to himself the power to sell and convey the land and retains an interest in the land itself, his right to execute the power will not be affected by the death of the beneficiaries. (Page 521.)

Appeal from Independence Circuit Court.

RICHARD H. POWELL, Judge.

J. W. Butler and *J. C. Yancey*, for appellant; *F. D. Fulkerson*, of counsel.

The complaint states simply a cause of action in debt. 6 Ark. 497; Ch. Pl. 99, 313; 110 Pa. St. 569. The court erred in transferring this case to equity on defendant's motion. Const. Ark. (1874), art. 2, § 7; Sand. & H. Dig. §§ 5608–5609; 52 Ark. 415; 56 Ark. 396; 22 Ark. 32. The court erred in postponing the case after submission, and suggesting the necessity of additional evidence. The title tendered to appellant was defective, and not such as he was compelled to accept. Waterman, Spec. Perf. § 412; 67 Pa. St. 396; 63 Ark. 551. Under the statute of uses, the "Declaration of Trust" vested the legal title to the property in appellee's three brothers. 33 Ark. 255. Appellant was entitled to a deed with the usual covenants of the vendor. 44 Ark. 152; 33 Ark. 255.

H. S. Coleman, for appellees.

Since it was necessary to state an account, even if appellant's contention that appellee had not executed, and could not execute, a deed be correct, a resort to equity was proper. 1 Story, Eq. Jur. § 501; 26 Wis. 588; 30 Ala. 311; 83 N. C. 406. *A bargain and sale* of the land was necessary to make the declaration of trust come within the statute of uses. 33 Ark. 255. The intention of the parties that Theo. Maxfield should retain the legal title, with full power to sell, will control the instrument, even if within the statute of uses. 33 Ark. 256; 53 Ark. 188. Theo. Maxfield held the naked legal title in trust for appellee. 16 Ark. 120; 13 Ark. 533; 14 Ark. 634; 39 Ark. 375.

Robert Neill, for appellees.

Equity having jurisdiction for one purpose will take jurisdiction of the whole case. 56 Ark. 396. For definition of

"Declaration of Trust" see 5 Am. & Eng. Enc. Law, 368; And. Law Dict. 320. The power to sell was not revoked by death of several of the parties interested. 2 Washb. Real Prop.663–4; 18 Am. & Eng. Enc. Law 878; 8 Wheat. 175.

WOOD, J. Appellant bought of the firm of Theo. Maxfield & Bros., composed of Theodore, Edward, Charles, and John Fred Maxfield, a certain tract of land, for which he executed his promissory note for $600, with interest at the rate of ten per cent per annum, took the bond for title of Theo. Maxfield & Bros., and went into possession under his purchase. Appellant paid the note, and was tendered a warranty deed, duly signed and acknowledged by Theodore Maxfield and his wife, which, after examination, he refused to accept. Appellant offered to surrender the possession of the land to Theodore Maxfield, which was refused, and thereupon appellant brought this suit against Theodore and Charles Maxfield as survivors of the firm of Theo. Maxfield & Bros. to recover the sum of $650, as damages for the alleged breach of the bond for title.

The principal question in the case is: Was the deed of Theodore Maxfield and wife a compliance with the stipulations of the bond for title? The bond was in the usual form, and contained the following clause: "Now, if the said Theo. Maxfield & Bros. shall make a good and sufficient title in fee simple to said W. R. Griffith, his heirs and legal representatives, to the above-described lots of lands, upon the payment of the above promissory note and the interest that shall accrue thereon, then this obligation shall be void; otherwise, to remain in full force and effect." If the deed of Theodore Maxfield and wife conveyed to Griffith "a good and sufficient title in fee simple," it fulfilled the express stipulation of the bond. Was it a good title?

Omitting unnecessary details, we will state only such facts as are required to make clear the rulings upon the objections urged in appellant's brief to the title. In 1881 Theodore Maxfield, who up to that time had acquired considerable real and personal property, gave to his three brothers, Edward, Charles W. and J. Fred, an interest in his mercantile and woolen-mill business, and entered into a partnership with them. Edward

owned "a sort of working interest" at the time of the organization of the firm; but the other brothers, Charles W. and J. Fred, had no interest whatever, and the gift of Theodore to them was purely voluntary,—in consideration of love and affection. The firm dealt only in personal property, and their business continued unchanged until the 10th of January, 1883. During these years Theodore became the owner, in his own name and right, of a large amount of real estate, consisting of 4,000 acres of farming land and 500 town lots, which, Theodore says, they estimated to be worth $100,000 at the time the declaration of trust was made, on the 10th of January, 1888. The firm had no title to, nor interest in, any of the land, except a few unimportant tracts. A separate account, under the head "Real Estate," was kept on the books of the firm, in which were entered all the purchases and sales of real estate made by Theodore. All the money which was received from either the firm's business or Theodore's real estate business was kept in one common depository, and, when Theodore took out money to pay for land, it was charged to him on his "real estate" account, and when he turned in any on the sale of the land, it was credited to him on his "real estate" account.

On January 10, 1888, Theodore, on his own motion, and without any consideration, had a declaration of trust prepared by his attorney, and it was signed by him and the other members of the firm. The provisions of this instrument, after describing the land and naming the parties, are as follows: "And whereas said parcels of land, although held in severalty by the said Theodore Maxfield as in fee simple, are in equity the property and estate of all the said above-named parties thereto, as tenants in common in the shares and proportions as follows, to-wit: Theodore Maxfield, an undivided four-eighths ($\frac{4}{8}$); Edward Maxfield, an undivided two-eighths ($\frac{2}{8}$); Charles W. Maxfield, an undivided one-eighth ($\frac{1}{8}$) and John Fred Maxfield, an undivided one-eighth ($\frac{1}{8}$); the said lands having been acquired by the said labor and investment of all the said several parties hereto: Now, therefore, I, the said Theodore Maxfield, in consideration of the above recited, and the sum of one dollar to me in hand paid by the said Edward Maxfield, Charles W. Maxfield and John Fred Maxfield, the receipt whereof I do hereby acknowledge, do hereby

declare and make known that I hold the above-described lands as follows, to-wit: An undivided four-eighths ($\frac{4}{8}$) in my own right, in fee; an undivided two-eighths ($\frac{2}{8}$) in trust for the above-named Edward Maxfield; in trust for the above-named Charles W. Maxfield an undivided one-eighth ($\frac{1}{8}$); in trust for the above-named John Fred Maxfield an undivided one-eighth ($\frac{1}{8}$); hereby reserving and retaining to myself the right and power to sell and convey to any person or persons any and all of the above-described lands at such price or prices, and upon such terms, as I may deem proper and advantageous to myself and co-owners, the beneficiaries. In consideration of the provisions herein above recited, and of divers other good and valuable considerations us hereunto moving, we, the said Edward Maxfield, Charles W. Maxfield and John Fred Maxfield, beneficiaries in this instrument, hereby accede to and accept the provisions and terms of this declaration of trust, and acknowledge our separate beneficial and equitable interests in the lands above described to be as above stated and set out."

The instrument is signed by all of the parties,—Theodore, Edward, Charles W. and John Fred Maxfield,—and bears date January 10th, 1888.

In 1872 Theodore Maxfield and his brother, George R. Maxfield, purchased a tract of land, of which the lot in controversy was a part, and held possession of the same as tenants in common until March 4, 1887, when George Maxfield died intestate, leaving a widow and four minor children. But they did not reside upon the lot in controversy,—same was not the homestead. The firm of Theo. Maxfield & Bro., *supra*, was the principal creditor of the estate of George R. Maxfield, deceased. Charles W. Maxfield was appointed and duly qualified as administrator of the estate of George R. The interest of George R. Maxfield in the lands, including the lot in controversy, was sold by the administrator on the 30th of September, 1887, under an order of the probate court, to pay debts. The half interest of George R. in the lands owned by him and Theodore was appraised at $1,750, and was bought by Theodore for the sum of $2,100, and on the 9th day of January, 1888, under an order from the probate court, the administrator made him a deed to the land.

1. The first objection made by appellant to the deed of Theodore Maxfield and wife is as follows: "Because the evidence shows that Charles W. Maxfield, the administrator, was interested in the purchase of the land which he sold at his administrator's sale."

There is no such proof in the record. The facts that Charles W., the administrator, was a member of the firm of Theo. Maxfield & Bros., which held the claim against the estate of George R., which claim, among others, the land was sold to satisfy; that Theodore and John Fred were his bondsmen; that Charles W., the administrator, allowed a claim of $1,686.33 in favor of the firm, which, without proof, was probated against the estate; that the administrator procured an order, and sold the land in controversy, with other lands; that Theodore Maxfield purchased the land at said sale, and obtained deed to same, January 9, 1888, and the next day executed the deed of trust to Chas. W. and the other brothers of this same land, declaring it "had been acquired by the said labor and investment of all the said several parties" thereto,—none of these facts, in our opinion, prove that Charles W. was interested in the purchase of the land at the sale by him as administrator. The land was purchased by Theodore Maxfield, not by Charles W. The evidence on this point by Theodore Maxfield is as follows:

"Q. When this half interest in what was known as the 'McGruder place' was to be sold by the administrator, I will ask if you and the administrator had any understanding between you that you were to buy the land?

"A. There was not.

"Q. Was there any understanding that you were to buy in the land for the firm of Theodore Maxfield & Bros.?

"A. There was not. On the other hand, I expected to sell my interest.

"Q. State, if at the sale you made any public declaration to the bystanders about this land.

"A. I stated at the court house door, when the property was sold, that my half interest in the property would be for sale at the same price that my brother George's interest brought,—that any one wanting to purchase it could have my interest in it for

the same price as the half interest that was being offered for sale. * * * *

"Q. State why you bid more than the appraised value of the land.

"A. I wanted to sell, and, in the first place, offered my interest for sale. I wanted to sell my interest, and not to buy. * * * * * I was interested, not only for myself, but for my brother's widow, to have the property bring as much as it would. I did not calculate to take it. I bid $2,100, and there were no further bids, and it dropped on me.

"Q. State if the firm of Theodore Maxfield & Bros. was interested in any way in the purchase of that land.

"A. No, sir. They were not. I had owned one-half interest for twelve or fifteen years, and, when this was sold, I bought it for my own use and benefit, and the firm had no interest in it whatever.

The testimony of Charles Maxfield was to the same effect, and, without setting it out in *haec verba*, it shows, of the proceeds of the sale by him as administrator, he had "close to the sum of $1,000," after paying the debts, which sum he paid to the widow and heirs of George R. Maxfield. This witness shows how the amounts were paid, and explains the entries made on the book of Theodore Maxfield & Bros., which it would too greatly encumber this record to set out at length; but we think, in the light of his evidence, it is clear that there is no inconsistency between his testimony and the book entries as to how the amount was paid for which George R. Maxfield's half interest was sold. But, if there were, the cogent fact remains, and it is undisputed, that the land was sold, purchased by Theodore Maxfield, paid for by him, and the money paid over by the administrator to the proper parties.

Charles Maxfield says: "When I made the deed, he (Theodore) settled up and paid me. It was charged to Theodore's account. By charging it to Theodore's account, that authorized me to settle with the widow. The amount was going to the firm after it was charged to Theodore. After paying the account, the balance was paid to the widow in cash. The children were paid a hundred dollars each, and the widow got the other five hundred. The widow really was paid all of

it. After paying the debts, the balance in my hands was $890, which I paid to the widow, and took her receipt for it."

It is not pretended that the account of the firm of Theodore Maxfield & Bros. against the estate of George R. was simulated or fraudulent. The allowance of the account by the administrator and probate court without proof was merely error, which might have been corrected by appeal from such allowance. It did not in any manner affect the regularity and validity of the sale made by the administrator to pay debts under the order of the probate court. Nor does any or all of the above facts tend in the remotest to show that the administrator was interested in the purchase. The most that it could be said to show would be that the administrator, being a member of the firm holding the account against the estate, was therefore interested in the proceeds for which the lands sold, to the extent of his interest in the debt due the firm; but that would in no way make him a party to the purchase of the land, in the sense condemned by the law. Had the proof showed that the land was paid for by the firm, and that the amount withdrawn from the firm had not been charged up to Theodore Maxfield, then there would be something in the contention that Charles W. Maxfield was interested in the purchase at his own sale as administrator. As we gather from the record, the proof is the other way. There is no defect in the title of Theodore Maxfield growing out of any fatal defect or irregularity connected with the administrator's sale, at which he purchased.

2. It is next contended that, "by the deed styled 'a declaration of trust,' the three brothers became seized of the equitable estate of a one-half undivided interest in said land." This contention, of course, concedes (we suppose, for the sake of argument) the correctness of the conclusion we have just reached *supra*, that Theodore Maxfield acquired title to a half interest of the land in controversy through the sale of and deed by the administrator of the estate of George R. Maxfield under the order of the probate court. Did Charles W., Edward and John Fred acquire an equitable title in the property, which Theodore could not convey by the deed? The instrument itself furnishes an irrefutable negative answer. The error into which counsel for appellants fall is in calling the declaration of

trust a "deed," and in supposing that it has the force and legal effect of a deed in conveying title to real estate. Neither the words "bargain and sell" in the present tense, nor any words of similar import, indicating a present purpose to convey any interest or title in the land itself, are used. There is no grantor and grantee. In *Holland* v. *Rogers*, 33 Ark. 255, the court uses this language: "A simple bargain and sale of land, in writing, in words of the present and without any more, is a conveyance, operating under and by virtue of the statute of uses, always upon sufficient consideration. It was devised in England as a common assurance soon after the passage of the statute, and has become the most common mode of conveyance in the United States. It is more than a quit-claim or a release. It actively effects a divestiture of title from the grantor, and transmits it to the grantee, with or without covenants of warranty."

We do not think the language of the instrument, under the statute of uses, could be construed as operating to convey any title or interest in the land itself to the brothers of Theodore Maxfield. It is merely the declaration of a purpose to hold the land himself, or to convey it and hold the proceeds in trust for them. It simply means that whatever use it may be subjected to by him in the way of rental or otherwise, or by sale, they shall share with him in the proceeds thereof, in the proportion designated in the declaration. See *McCulloch* v. *Chatfield*, 15 U. S. A. 48.

This view is strengthened by the extraneous, uncontradicted proof that there was no consideration for the instrument, except love and affection. The recital that the lands "had been acquired by the said labor and investments of all the said several parties" pertained to the consideration for the instrument, and oral proof on this point was proper. A declaration of trust or use is an act by which a person acknowledges that a property, the title to which he holds, is held by him for the use of another. Anderson's Law Dict. 320.

But if we concede that the instrument, under the statute of uses, was sufficient to convey from Theodore Maxfield an equitable interest in the land to the brothers named, in the propor-

tion designated, then, by the terms of the same instrument, has not Theodore Maxfield reserved to himself "the right and power to sell and convey to any person or persons any and all of the above-described lands at such price or prices, and upon such terms, as I (he) may deem proper and advantageous to myself (himself) and co-owners, the beneficiaries?" And do not the beneficiaries accede to and accept the terms and provisions of the declaration of trust, and acknowledge their separate beneficial and equitable interest in the lands described *to be as therein stated and set out?* The power which Theodore Maxfield reserved to himself was a power coupled with an interest in the land, and it was not revoked by the death of Edward or John Fred Maxfield. Nor did the failure of Charles W. to join in the deed make it any the less effectual to convey a perfect title. Mr. Wharton defines a power as "an authority retained by or conferred upon a person to deal with property so as to affect, more or less, estates or interests therein possessed, either by himself or by others, albeit underived therefrom." 18 Am. & Eng. Enc. Law, 878. "Where the right or authority to do the act is connected with or flows from an interest in the subject on which the power is to be exercised, the power is said to be coupled with an interest; but, where it is disconnected from any interest of the donee in the subject-matter, it is a naked power." 18 Am. & Eng. Enc. Law, 887. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death. *Hunt* v. *Rousmanier's Admrs.*, 8 Wheat. 174.

It follows from what we have said that the deed of Theodore Maxfield and wife, tendered to appellant, conveyed a perfect title, and was a full compliance with the condition of the bond for title.

3. The court did not err in postponing the case and allowing testimony to be taken. This was a matter purely in the discretion of the court, and the testimony was relevant and proper.

4. The appellant has no cause of action. The questions raised, the evidence being uncontradicted, were those of law. It would be folly to remand the cause for trial at law, even if

the court erred in transferring it to the equity docket, for the error was not prejudicial. The judgment could not have been otherwise.

Let the judgment be affirmed.

MAXEY v. STATE.

66 523
85 380

Opinion delivered June 10, 1899.

1. NEW TRIAL—CUMULATIVE EVIDENCE.—It is not error to refuse to grant a new trial for newly discovered evidence that is merely cumulative. (Page 525.)

2. INSTRUCTIONS—SPECIFIC AND GENERAL.—The court's refusal to give a specific instruction will not be prejudicial if the same matter is covered by other and more general instructions given. (Page 526.)

3. RAPE—INSTRUCTION—REPUTATION OF PROSECUTRIX.—In a prosecution for rape there was evidence that the general reputation of the prosecutrix for truth and immorality was bad, but none that she had a bad reputation for chastity. The court refused to give an instruction that "the character of the woman may be called in question for the purpose of affecting the probability of the act being voluntary or against her will." *Held*, that the refusal was not error; that if the proof of character is to affect the probability of her assenting to the act of sexual intercourse, her general reputation for chastity must be shown; that if it is to affect her credibility as a witness generally, her general reputation for truth and immorality must be proved. (Page 537.)

Appeal from Crawford Circuit Court.

JEPHTHA H. EVANS, Judge.

Chew & Fitzhugh, for appellant.

It was error for the court to deny the defendant's motion for continuance to enable him to obtain the evidence of the witnesses who were in Texas. 60 Ark. 564; 21 Ark. 460; 50 Ark. 161; 32 Ark. 462; 1 Bish. Cr. Proc. 951, a, b and c; 38 L. R. A. 721; 4 Am. & Eng. Enc. Pl. & Pr. 847–849, 861; 80 Ky. 480; 65 Ga. 332; 14 S. W. 1008. The fact that the evidence sought is cumulative is no reason for denying the motion in a felony case. 14 S. W. 1008. The court erred in refusing to give the sixth instruction asked by defendant, cautioning the

jury as to the weight to be given to the evidence of an impeached witness. Sackett, Inst. 34–36; 1 Thompson, Trials, 520, 536–7; 2 *id.* 2423–6; 1 Tex. App. 432; 25 Mo. 553. It was error to refuse the fourth instruction asked by defendant. 63 Ark. 470; 2 Bish. Cr. Law, 1122; 1 Whart. Cr. Law, § 557; 59 N. Y. 374; 4 N. E. 63. The remarks of the attorney for the state were improper, and constitute ground for reversal. 62 Ark. 126; *ib.* 516; 58 Ark. 473; 63 Ark. 174.

Jeff Davis, Attorney General, and *Chas. Jacobson*, for appellee.

WOOD, J. Appellant was convicted of the crime of rape. The prosecutrix was a German woman, forty-nine years of age, who could not speak English well, and testified through an interpreter. The proof on behalf of the state (without setting it out in detail) tended to show that the prosecutrix was led by a young white boy, Tommy Downs, to a place about one quarter of a mile from the depot at Van Buren, and turned over by him, in the woods near the Morrell place, to the appellant, who claimed that he would get her a place to stay all night. The testimony to the effect that the prosecutrix was led by Tommy Downs, and taken to where he said he delivered her over to the appellant, at appellant's request, is such as to leave no well-founded doubt of that fact. But the testimony going to show that the prosecutrix was raped by the appellant is exceedingly unsatisfactory, so much so as to give us serious pause as to whether it is sufficient to support the verdict.

The testimony of the prosecutrix, in itself, as it appears in this record, is incoherent and desultory. Her reputation for truth and morality is shown to be bad. As one of the witnesses expresses it, "utterly worthless." Another witness said: "From my knowledge of this person, I believe her to be insane upon the subject of being raped, and she has a mania of accusing persons of having assaulted her with intent to rape. While an inmate of the poor farm, she falsely accused me and others of rape." This witness was the superintendent of the poor farm in Missouri. Another witness (Carl Starck) testified that he regarded her as sixty-five per cent. insane; that her reputation for truth and morality was bad; that she told him that "she had

made lots of money by killing unborn children for women." He said: "She had a mania for placing herself in a place where she will be commiserated. Anything," says he, "that will cater to that." Believing her story, however, there was some evidence to justify the conclusion that the appellant had sexual intercourse with her by force, and that it was against her will. Though there is no proof whatever of any actual physical resistance, there were circumstances from which the jury might have concluded that her will was overcome through fear of violence. But, however unsatisfactory, under the rule which has so long been adhered to by this court, we cannot set aside the verdict. For to do so would devolve upon us the duty of passing upon the credibility of the witnesses and determining the weight of the evidence. That was peculiarly the province of the jury, and, as the learned circuit judge, who saw and heard the prosecutrix and all the other witnesses testify, refused to set aside the verdict, we will not disturb it, because, as improbable as it may be, considering the character and demeanor of the prosecutrix, that any negro had sexual intercourse with her and against her will, yet it was not impossible, and, notwithstanding the reputation she is shown to have possessed, it was still a question for the jury, and not for this court, to say whether her testimony was true. The jury must have believed her, and the circuit judge, who had a much better opportunity than we of judging of the credibility of the witnesses and the presence or absence of anything like passion or prejudice upon the part of the jury, has permitted the verdict to stand, and we will therefore not disturb it.

1. Were there any errors of law? The court did not err in overruling the motion for a continuance. One of the grounds insisted upon for a continuance was that appellant had been informed, and he believed he could prove, "by divers and various persons, who were citizens and residents of Terrell, Texas, but whose names were unknown to the defendant, that in the year 1895 said Hulda Mayer, the prosecutrix, falsely and fraudulently charged two negro men with having raped her, and that on account of said false charges said two innocent men were hanged." If this testimony were competent at all, it was only so for the purpose of showing a disposition upon the part

of the prosecutrix to falsely accuse persons of raping her. That disposition was abundantly shown by other evidence in the case, and, even if the motion had been definite enough to have assured the court that such testimony could have been obtained, still no prejudice has resulted to the appellant in not allowing him time to obtain it.

2. It is insisted that the court erred in not giving, at the request of the defendant, the following as instructions:

"(4). If the jury believe from the evidence that, at the time the rape is alleged to have been committed, the prosecuting witness had it in her power to resist the defendant, and prevent the offense by kicking, biting, striking him, or by making an outcry, or by any other mode calculated to repel his attack, and that she failed to make all the resistance then in her power to make, then this is a circumstance that the jury should take into consideration, with all the other evidence in the case, in determining whether the rape was actually committed."

"(6). The jury are instructed that in prosecutions of this kind the character of the woman may be called in question for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will, or whether there was any intercourse whatever; and if the jury believe from the evidence that the prosecuting witness is a woman of bad fame or evil repute, or that her reputation for truth and morality is bad, then they may take this fact into consideration for that purpose, together with all the other evidence in the case, in determining the amount of credit, if any, to which her testimony may be entitled."

The court gave the following, as requested by the defendant: "To authorize a conviction of rape, the jury must believe from the evidence beyond a reasonable doubt that the defendant had carnal connection with the prosecuting witness forcibly and against her will, and that she did not yield her consent during any part of the act. To constitute the crime of rape, the will of the female alleged to have been outraged must have been overcome, either by force, violence or fear. If she consents to sexual intercourse in the least during any part of the act, there

is no such an opposing will as the law requires to convict on the charge of rape."

Also the following on its own motion: "To authorize a conviction of rape, the jury must believe from the evidence, beyond a reasonable doubt, that the defendant had carnal knowledge of the prosecuting witness forcibly and against her will, and that she did not yield her consent during any part of the act. To constitute the crime of rape, the will of the female alleged to have been outraged must have been overcome, either by force, violence or fear. If she consents to sexual intercourse in the least during any part of the act, there is not such an opposing will as the law requires to convict on the charge of rape."

The fourth request by appellant specifies particular acts, and tells the jury that they may consider the absence of these as a circumstance, in connection with all the other evidence, in determining whether the rape was actually committed. Every proposition set forth in this request is comprehended under the general terms used by the court in the instructions given *supra*. Therefore the absence of the specific acts, which counsel sought to embody in an instruction, going to show the want of force or consent, upon the part of the prosecutrix, to the act of sexual intercourse, if same occurred, could have been, and doubtless were, pressed upon the jury in argument, and the appellant got the benefit of them. The appellant could not have been prejudiced by the refusal of the court to give the instruction, even if the giving of it were otherwise proper.

Was number six, *supra*, proper? It is undoubtedly true that in prosecutions of this kind the general reputation of the prosecutrix for lack of chastity, or the fact of her being a common prostitute, may be adduced in evidence. "It helps," says Mr. Bishop, "the probabilities that the connection was voluntary on her part, and that his (the prisoner's) manifestations of apparent force came rather from his presuming her consent than from a purpose to ravish her." 2 Bish. Cr. Pro. § 965; *Pleasant* v. *State*, 13 Ark. 360. Mr. Wharton says: "That it is no defense to an indictment for rape that the prosecutrix was a woman of loose character, there can be no question; and if the fact of a forcible connection against the

prosecutrix's will be established, her prior looseness would have nothing to do with the issue; on the other hand, when the issue is consent on the part of the prosecutrix, her prior history as to chastity is logically material." 1 Wharton, Cr. Law, § 568. The reason for permitting evidence of the bad reputation of the prosecutrix for chastity in cases of rape is that it is more probable that an unchaste woman assented to such intercourse than one of strict virtue. The evidence is received upon this ground, and not for the purpose of impeaching the credibility of the witness. 3 Rice, Ev. §§ 820–1.

The instruction says the "character of the witness may be called in question for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will." Our statute permits a witness to be impeached by showing that "his general reputation for truth and immorality renders him unworthy of credit." Sand. & H. Dig. § 2959. Now a witness may be untruthful, and have a bad reputation for morality in other respects, and yet be perfectly chaste, so far as sexual intercourse is concerned. The untruthfulness or immorality of the prosecutrix, in other respects than pertains to her chastity and virtue, does not "affect the probability of the act of intercourse being voluntary or against her will."

The instruction says the "character of the witness may be called in question." So it may, but character for what? The instruction is faulty in not designating. If it is to affect the probability of her assenting to the act of sexual intercourse, then it must be a general reputation for chastity that is put in evidence. If it is to affect her credibility as a witness on all points, then it must be her general reputation for untruthfulness and immorality that is adduced.

Under the generic term "immorality," of course, lack of chastity may be included, and where it is shown to be included in the inquiry, then, under our statute, it might affect both the question of the credibility of the witness, and the question of her consent or dissent to the act of sexual intercourse. There was no effort to prove that the prosecutrix had a bad reputation for chastity, specifically. The examination was directed to her general reputation for truth and immorality.

The court gave an instruction on the credibility of the witnesses generally, which was sufficient on that point.

Third. The court excluded all improper remarks of counsel from the jury, and in this way and by its tenth instruction,* we think, removed any prejudice that such remarks might have otherwise produced.

Finding no error the judgment must be affirmed.

---

*NOTE.—The tenth instruction referred to in the opinion as given by the court is as follows:

"10. You must not allow the gravity of the charge, or the fact that the defendant is a negro man and the prosecuting witness a white woman, to in any way sway or bias your judgment in your deliberations upon a verdict. You must look alone to the evidence in this case, and from it make your decision. The defendant is entitled to your calm, unbiased and deliberate judgment upon the truthfulness of the charge against him. He is presumed by the law to be innocent, and this presumption is evidence in his behalf, and protects him from a conviction until his guilt is established beyond a reasonable doubt. If, therefore, you have a reasonable doubt of the defendant's guilt, after a careful and unbiased consideration of all the evidence in the case, you must resolve that doubt in his favor, and return a verdict of not guilty."—REPORTER.

BEATY v. JOHNSTON.

Opinion delivered June 17, 1899.

1. CONTRACT—CONSTRUCTION—SET-OFF.—On March 15, 1894, the stockholders and directors of a gas company sold its plant for a fixed sum, payable in installments, the last to be due May 1, 1894. In addition, the purchaser was to give the vendors $5,000 in paid-up non-assessable stock of a new corporation he intended to organize. The vendors were to have the dividends accruing in the old company up to May 1, 1894, when the purchaser was to perform his part of the contract, and afterwards these dividends should go to him. The purchaser failed to pay the last installment when it fell due on May 1, 1894, but he paid it on March 15, 1895, after a decree had been had in the United States court against him foreclosing the vendor's lien. In a suit by the purchaser to recover the dividends accruing in the old company from May 1, 1894, to March 15, 1895, *held*, (1) That the purchaser was entitled to receive the dividends or net earnings during the period in question. (2) That such dividends were not payments upon the purchaser's debt, so that the right to recover them was not concluded by the judgment of

the federal court; and if they were proper set-offs in that court, the failure to use them as such did not create a forfeiture of the right to use them as a basis of recovery in another action. (3) That the vendors were entitled to set-off against such dividends the value of the paid-up stock in the new company which the purchaser agreed to convey to them. (Page 533.)

2. EVIDENCE—VALUE OF CORPORATE STOCK.—In determining the value of the corporate stock of a gas company, in a suit to recover damages for non-delivery thereof, there is no presumption that the face value of the stock is its real value, but such value may be shown by proof of its market value at the time and place of delivery, or, if it had no such market value, by proof of the value of the property and business of the corporation as compared with its liabilities at the time. (Page 533.)

Cross Appeals from Sebastian County, Fort Smith District.

EDGAR E. BRYANT, Judge.

H. C. Mechem and *F. A. Youmans*, for appellant.

The court erred in holding that the decree in the federal court did not merge the contract to convey stock. 1 Freeman, Judg. §§ 215, 240; 1 Herman, Est. §§ 125, 222; 54 O. St. 214; 37 Ind. 264; 117 Ind. 315; 111 Pa. St. 99; 24 Minn. 4; 47 N. W. 151; 17 Conn. 420; 59 Mo. App. 26; 15 Ill. 420; 50 Miss. 391; 63 Ark. 259; 54 Conn. 253; 49 Ga. 585; 20 N. J. Law, 249. But the question of whether the contract was entire or severable was never before that court, and the question is not *res judicata*. 1 Herman, Est. § 129; 140 U. S. 254; 44 Oh. St. 497; 48 Pac. 569; 41 Cal. 278; 43 Cal. 311; 38 Am. St. Rep. 749; 38 N. Y. 65; 55 Ark. 565; 34 N. J. L. 420; 44 N. Y. 1; 60 Wis. 256. It was error for the court to instruct the jury that "stock is *prima facie* worth its face value." 4 Ark. 147; *id.* 534; 58 Ark. 108; 1 Sedg. Dam. §257; 12 Ill. 190; 3 Met. 196; 17 Wis. 328; 10 Ind. 20; 5 Oh. St. 186; 130 N. Y. 372. If the stock had no ascertainable market value, its real value should have been ascertained by its capacity to earn dividends, and by the relation of the assets to the liabilities of the corporation. 99 Mass. 349; 28 Mo. App. 450. Appellant was entitled to earnings from the date the sale was to go into effect under the terms of the contract. 7 N. H. 454; 83 Ga. 747; 3 Ex. Div. 24.

Read & McDonough, for appellees.

While in a sale *in praesenti* the dividends belong to the purchaser [Cook, Corp. § 539; 2 Thompson, Corp. § 2172], yet the parties can contract otherwise, and their intention will be effectuated. Cook, Corp. §§ 539, 541; 15 Cal. 21; 56 N. Y. 553; 11 R. T. 569; 13 R. I. 173; 53 Ark. 65; 23 Ark. 582; 3 Ark. 222. The question of the dividends and profits could have been pleaded in the former suit, and is now *res judicata*. 1 Herman, Est. § 125; 98 N. Y. 351; 45 N. E. 368; 85 N. Y. 427; 45 S. W. 67; 68 Mo. App. 637; 40 Atl. 1; 2 Black, Judg. § 754; 34 Me. 63; 56 Am. Dec. 631; 27 S. E. 560; 14 Ind. App. 223; 52 Ia. 654; 21 Am. & Eng. Enc. Law, 206, 208, 211; 7 Wall. 613; 37 Ind. 264. It makes no difference that the judgment was by default. 41 Mich. 90; 60 N. W. 803; 69 N. W. 908; 58 Kas. 745; 21 N. Y. Supp. 133, 284; 75 N. Y. 150; 25 Ill. App. 245; 66 N. Y. 385; 114 Pa. St. 387; 35 Vt. 530; 21 Minn. 515; 28 Fed. 505. On a default the plaintiff has a right to prove the amount due. 25 Ark. 36; 45 Ind. 14; 1 Heisk. 442; 39 N. J. Law, 195; 14 Ark. 220. The presumption is that the court's adjudication of the amount was made on evidence. 2 Bush (Ky.), 169; 20 O. St. 315. If the contract is indivisible, appellant can not recover on the dividends without delivering the shares of stock. 43 Ark. 185; 34 Neb. 450; 38 Ark. 111; 4 Ark. 577. But the contract was divisible,—at least as to the new stock. 62 N. W. 352; 58 Pac. 164; 40 Pac. 409; Clark, Cont. 657–661; 2 Cush. 290; 2 Met. 370; 5 Allen, 4; 55 Mo. App. 389. If not originally divisible, the parties have made the contract so by their actions. 27 Atl. 960; 37 N. E. 105; 1 Herman, Est. 40, 44; 6 Ore. 258; 82 Mass. 208; 26 N. J. L. 284; 15 Wis. 107; 1 Herman, Est. 40. The matter of the stock is not *res judicata*. 11 Ark. 666; Black, Judg. §§ 620–621; 44 Pac. 401; 22 S. E. 889; 17 Atl. 473; 104 Ill. 369; 72 Fed. 147; 13 Barb. 160; Clark, Cont. 706; 7 L. R. A. 576. The federal court decided that the contract was severable, and appellant's acquiescence in that decree binds him. 84 Ala. 508; S. C. 5 Am. St. Rep. 387; 25 N. E. 292; 30 S. E. 154. The measure of damages for the non-delivery of the stock was, *prima facie*, its face value. 12 Atl. 743; 1 Cook, Corp. § 581, p. 786, note 2; 2 Suth. Dam. § 659.

BUNN, C. J. This is a suit by appellant, Beaty, against appellees, W. J. Johnston and other stockholders and directors of the Fort Smith Gas Light Company, for the sum of $9,885.81, less credits, leaving a balance of $5,028.83, being the amount of dividends or net earnings of said company from the 1st of May, 1894, until the 15th of March, 1895, which the defendants had collected and appropriated to their own use. Defendants answered, setting up an off-set about equal to the amount claimed by the plaintiff. Verdict for defendants, and, on motion by plaintiff for new trial, court required a remittitur by defendants, so that the allowed claims of both were substantially equal, and both parties appealed.

On March 15, 1894, the appellees, stockholders and directors of the Fort Smith Gas Light Company, a corporation, bargained and sold their plant to appellant for the sum of $76,657.50, to be paid in installments as follows, to-wit: $5,000 on the 28th of March, 1894; $15,000 on the 15th of April, 1894, and the balance, $56,657.50, on the 1st of May, 1894. In addition, Beaty was to give them $5,000 in paid-up non-assessable stock of a new corporation he intended to organize, to be known as the Fort Smith & Van Buren Railway Power & Light Company.

Appellant paid the first and second instalments when due, but failed to pay the third installment of $56,657.50 on the 1st of May, 1894, when the same was due, and also failed to deliver to appellees the $5,000 stock in the new company; and they on the 28th of July instituted suit against him in the circuit court of the United States for the Fort Smith district, for said balance and the value of said paid up non-assessable stock, and obtained decree against him for the said balance of $56,657.50, with six per cent. per annum interest from the 1st of May, 1894, to the 15th of March, 1895, on which last day appellant paid the same in full satisfaction of said decree. The court, as to the $5,000 stock, held, in effect, that the contract under which it should have been issued and delivered was divisible, and that this part was not considered, but left to future controversy between the parties. No appeal was taken from this ruling by either party, and both parties are therefore bound by this decision of the United States court as to this.

Afterwards appellant Beaty brought this suit against appellees, for the dividends or net earnings, less credits, of the old corporation from the 1st of May, 1894, to the 15th of March, 1895, amounting as stated, to the sum of $5,028.82, and the appellees answered, denying the right of appellant to said dividends or net earnings, and pleading *res judicata* as to same, and pleading the value of said $5,000 stock, which appellant had failed to deliver to them, as a set-off. Replying to this, the appellant pleaded *res judicata* as to this $5,000 stock, claiming that it had been or should have been determined in the suit in the United States court. Thus were formed the issues in this case.

The dividends or net earnings of the old corporation from the 1st of May, 1894, to the 15th of March, 1895, were not payments upon the appellant's debt sued for in the United States court, as was the case in *Warner* v. *George*, 58 Fed. Rep. 435, cited by appellees, and if they were proper set-offs, or might have been used as such, the failure to use them in said suit as such did not create a forfeiture of them as a debt against appellees in behalf of appellant. See Sand. & H. Dig. § 5728. This controversy over the dividends grew out of that part of the contract of sale and purchase of the old corporation which, in substance, provided that the vendors shall have the dividends accruing up to the 1st of May, 1894, when the vendee was to have paid the purchase money in full, and performed other parts of his contract; and afterwards these dividends should go to him. Appellees contend that appellant was entitled to no dividends until he had performed his contract, and thereby became the owner in fact of the corporate plant, stock, franchise and so forth, which he did not become until the 15th of March, 1895. On the other hand, appellant contends that appellees were entitled to no dividends after the 1st of May, 1894, but were only entitled to their debt and interest, which were adjudged against him in the federal court, and all of which he at once paid. In this we think the appellant was correct.

The appellees' set-off of $5,000, the face value of the stock which appellant failed to deliver to them, although obliged to do so, as a part of the consideration of the purchase of the old plant, was properly pleaded, and was a proper set-off, to the

extent of its value; for it was eliminated from the federal court proceeding expressly by the rulings of that court, from which no appeal has been taken. But the manner of ascertaining the value of said stock was erroneous. Proof should have been made by the appellees of its market value on the 1st of May, 1894, when it should have been delivered; and legal interest allowed on this valuation from that day. Or, if it had no market value at that time, then the value should have been proved by showing the value of the property and business of the corporation as compared with its liabilities at the time. 2 Cook, Corporations, § 581.

The contention of appellees that this value is, *prima facie*, the face value of the stock, and therefore in this case was $5,000, and that the burden was on appellant to show that its value was less than that sum, is sustained by some authorities, as in the *Appeal of Harris* (Pa.), 12 Atl. Rep. 743. But the question was not discussed in that case, and the weight of authorities seems to be the other way. The corporation here involved was not a banking institution, and there is no presumption that its paper, its certificates and obligations of any kind were worth dollar for dollar, as may be, and as seems to be, the case with banking institutions, where there is no question of insolvency.

The doctrine of *Barnes* v. *Brown*, 130 N. Y. 372, and other cases cited by appellant's counsel in their brief fully sustains his contention, we think. It follows that the value of the stock on the 1st of May, 1894, was not ascertained, and the set-off therefore was not properly sustained. Said value should have been shown, as indicated above, by the appellees.

For this error, the judgment is reversed and remanded. In other respects the judgment of the court below is in all things affirmed.

Reversed and remanded.

WOOD and RIDDICK, JJ., did not participate.

66 535
77 297

HENCKE v. STANDIFORD.

Opinion delivered June 17, 1899.

1. CONTRACT—PUBLIC POLICY.—Where the ordinance of an incorporated town provided that, before the recorder should issue any license to sell liquors, the applicant therefor should file with him the receipt of the treasurer for the amount of money required to be paid for such license, a license issued before such sum is paid is void, and a note given in payment of such license fee is without consideration. (Page 537.)

2. EVIDENCE—PROOF OF TOWN ORDINANCE.—It is not admissible to prove by parol that a town council met and decided to allow a note to be taken in payment of a fee for a liquor license. (Page 539.)

Appeal from Randolph Circuit Court.

JOHN B. MCCALEB, Judge.

STATEMENT BY THE COURT.

This suit was by the appellant as treasurer of the incorporated town of Pocahontas on the following instrument:

"$500. On or before November 15, 1895, we or either of us promise to pay John Hencke, as treasurer of the incorporated town of Pocahontas, Ark., or successor in office, five hundred dollars, value received, to bear interest from date until paid at the rate of ten per cent. per annum." Signed by the appellees.

The answer admitted the execution of the note, but denied liability, upon the ground "that the note was executed for dramshop or saloon license issued to Sam Standiford, authorizing him to retail liquors within the incorporated town of Pocahontas, Ark., for and during the year 1895, and that said action in taking said note was not authorized by any law of the State of Arkansas, nor by any ordinance, by-law, or resolution of the incorporated town."

The ordinance of the town in evidence provided, in the first section, that it should be unlawful to sell certain designated liquors within the corporate limits without first procuring a license authorizing such privilege. Section two directed and authorized the recorder of the town to issue the license, when

applied for by any person over 21 years of age, which license should continue in force for the period of one year. Section three is as follows: "That, before the recorder shall issue any license as provided in the foregoing section, the applicant therefor shall file with him the receipt of the treasurer of said incorporated town for the amount of money hereinafter required to be paid for such license." Section four provides: "Any person or persons desiring to obtain license as hereinbefore provided shall first pay into the treasury of the incorporated town of Pocahontas the sum of $500, and the further sum of two dollars for the fees for issuing each license," etc. Section 5 is as follows: "Any person who shall sell, either for himself or for another, or be interested in the sale of, any ardent, vinous, malt or fermented liquors, or any compound of preparation thereof commonly called tonics, or bitters, or medicated liquors, without the owners thereof having previously procured a license authorizing the sale thereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than ten nor more than twenty-five dollars, and each day such person shall be so engaged shall constitute a separate offense."

There was testimony to show that the makers of the note or the licensees represented to the treasurer that arrangements had been made with the town council to accept the note in suit and to grant license for the year 1895. They asked the treasurer to give them a receipt for the license. He refused to do this, but did give them a receipt for the note. The receipt for the note was presented to the recorder of the town, and he issued license to Sam Standiford to keep a dramshop in Pocahontas for the year 1895. An effort was made to show by the mayor of the town that the town council had met and decided to allow Sam Standiford to give the note in controversy for his license. It was shown that no record was made of the meeting, and that the resolution was not passed like an ordinance was required to be passed. The court refused to allow the testimony of such alleged resolution of the council, and exceptions were duly saved.

The court found that "John Hencke had no authority from the common council of the said incorporated town of Pocahontas, Ark., to receive said note, nor the recorder of said

town to issue license on same, and that therefore said note is void as against public policy.

P. H. Crenshaw, for appellant.

Appellees are estopped to deny the authority of the municipality to grant them the license for the note. 36 Ark. 577; *ib.* 96: 60 Ark. 497; 33 Ark. 465. Taking a note as payment of a pre-existing obligation, when so agreed, is payment. 14 Am. Law Reg. (N. S.) 59. In addition to this, if, by their false representations, they induced the town treasurer to become liable for the amount, they are liable to him personally as guarantors on the note. Nor was the taking of the note contrary to public policy.

Witt & Schoonover, *S. A. D. Eaton* and *J. T. Lomax*, for appellees.

The note given in this case was void, the contract on which it was founded being against public policy. Greenhood, Public Policy, 306; 30 Miss. 414; 51 Miss. 196; 47 Mich. 228; 11 Am. & Eng. Enc. Law, 670, 671. A promise to pay is not the payment contemplated by the ordinance. 36 Ark. 576; 60 N. W. 1010; 66 N. W. 1126. No one can estop himself from taking advantage of the defense that a contract is contrary to public policy. 47 Ark. 354; Greenhood, Public Policy, 115.

WOOD, J., (after stating the facts.) Was the finding of the court correct? Under section three of the ordinance the applicant for license had to file with the recorder the receipt of the treasurer of the town for the amount of money required to be paid for the license before the recorder was authorized to issue the license, and under section four the applicant for license had to first pay into the treasury of the town the sum of $500.

It will thus be seen that the issuance of the license was illegal. The license itself was void. It conferred no rights and no protection to the applicant against the penalties of a violated law, and of course imposed upon him no obligation to pay the note which he had given for such license. The note was wholly without consideration and void. The supreme court of Nebraska, in discussing a question similar to this, said:

"There was still no authority for the issuing of the license without payment in full of the license fee. The payment into the village treasury of the sum of $500 was just as essential to a valid license as the petition or notice. The proposition that the several municipal bodies can, under the provisions of our statute, license the sale of liquors on the credit of a licensee is not entitled to serious consideration. And a license so issued is not voidable merely, but void." *Zielke* v. *State*, 60 N. W. Rep. 1010. The same may be said of the license for which the note was given under the ordinance set out above. See also *Fry* v. *Kaessner*, 66 N. W. Rep. 1126. An officer having charge of the collection of fees for liquor license has no authority to receive anything in payment but legal tender money, or such money as passes current at the time. Black, Int. Liquors, § 184, and authorities cited. Fees or charges for liquor licenses are not "debts," in the ordinary acceptation of that term. The only methods for the collection of such fees are those provided by statute; and if the statute does not provide for their collection by civil action, no such action can be maintained. Especially could this not be done in the face of an ordinance which provides for the payment of the license fee before the license shall issue, and prescribes the amount of the liabilities to the town, county or state in case of a sale without license, which is collectible by criminal procedure. Black on Int. Liq. § 185, and authorities cited.

"The conditions of taxation were not imposed for the primary purpose of increasing the revenues of municipalities that receive the tax. They are imposed for motives of public policy, to restrain the sales of a dangerous commodity, and confine them in the hands of responsible and law-abiding parties, who can make good such claims as are laid upon them. The payment of the money to the municipality is resorted to as an equitable distribution, somewhat proportioned to the mischief likely to arise from the traffic. But no community has the right to determine for itself whether this money shall be collected. The duty of the officer is absolute, and made so because the community is not to be damaged by the indisposition of its legal guardians to protect it. The policy of the law cannot be lawfully thwarted. The law would be a dead letter in those places needing its en-

forcement, if the local authorities could thus defeat its operation." The above quotation is taken from the decision of the supreme court of Michigan in a case where a sheriff took a note for liquor license, under a statute making it a misdemeanor for one to sell liquor until he had paid to the county treasurer of the proper county the full amount of the tax, and authorizing the treasurer, in case of non-payment, to issue his warrant for the amount to the sheriff, who was authorized to collect same by levying on certain property, etc. "The arrangement," said the court, "was illegal, and the note void." *Doran* v. *Phillips*, 47 Mich. 228; *Baldwin* v. *Scoggin*, 15 Ark. 427; *Shorman* v. *Eakin*, 47 Ark. 351. So say we. *Newsom* v. *Thighen*, 30 Miss. 414; *McWilliams* v. *Phillips*, 51 Miss. 196; Greenhood, Public Policy, pp. 306, 310.

Second. The court did not err in excluding the testimony of a certain witness going to show that the town council met and decided to allow Sam Standiford to give the note in controversy for his license.

An ordinance of the town could not be proved in this way, and nothing short of an ordinance would have been sufficient to authorize the taking of the note, and it is shown that no such ordinance was passed.

Affirm the judgment.

MUSKEGON LUMBER COMPANY *v.* BROWN.

66 539
73 264

Opinion delivered June 24, 1899.

1. TAX SALE—COSTS.—Under the revenue act of 1871 (Acts 1871, p. 162), the tax collector had no authority to sell lands delinquent for taxes for any costs except the cost of advertising. (Page 542.)

2. SAME—STATE LANDS.—Lands which have been sold to the state for non-payment of taxes under an overdue tax decree are the property of the state, and not subject to taxation while so owned. (Page 542.)

3. SALE OF FORFEITED LANDS—CLERK'S CERTIFICATE.—The commissioner of state lands had no authority, under Sand. & H. Dig. § 4565, to sell lands forfeited to the state for non-payment of taxes until their forfeiture had been duly certified to him by the county clerk. (Page 542.)

Appeal from Grant Circuit Court, in Chancery.

ALEXANDER M. DUFFIE, Judge.

Hill & Auten, for appellant.

The deed in this case is sufficient to convey to appellant all the title which the state had. 1 T. B. Mon. 30; 35 Neb. 587. The state is bound by its contracts in the same degree as if it were an individual. 22 Am. St. Rep. 626; 104 Cal. 690; 127 Ind. 204; 71 N. Y. 549; 43 Am. St. Rep. 158; 42 Ala. 548; S. C. 94 Am. Dec. 665; 2 Paine, 557; 4 Peters, 87; 8 How. 313; 3 Johns. Cas. 174; 22 Ala. 718; 7 Cal. 527; 10 Mass. 155; 3 Pick. 224.

Wood & Henderson, for appellee.

The tax sale of 1872 is void because the items of twenty-five cents to the clerk and fifty cents to the collector were not legal charges to include in the price for which the land was sold. 56 Ark. 93; 61 Ark. 36; 61 Ark. 414. Also, because the tracts were sold in groups. 61 Ark. 414; 55 Ark. 104; 30 Ark. 579; 31 Ark. 491. At the date of the sale the county clerk had not certified the lands to the commissioner of state lands, and hence the latter had no authority to sell them. 28 Ark. 356; 48 Ark. 155; 42 Ark. 118; 39 Ark. 580; 40 Ark. 251; 54 Ark. 269; 7 Wall. 666; 4 S. W. 878; 31 Ark. 340. Appellant's suing out the injunction estops him to set up a title acquired in violation thereof. 49 Ark. 253; 53 Ark. 314; 47 Ark. 320; 57 Ark. 638; 47 Ark. 301; 7 Am. & Eng. Enc. Law, 22, notes.

BATTLE, J. The Muskegon Lumber Company applied to the Grant circuit court for a decree confirming a purchase of certain lands by it from the state of Arkansas. A part of these lands were claimed and held by the state under a forfeiture in 1872 for the taxes of 1871, and the penalty and costs charged against the same. The lands last referred to are as follows: the E. ½ of N. E. ¼ of section 35 and the N. E. ¼ of N. W. ¼ and the S. E. ¼ of the N. W. ¼ of section 36, in township 5 south and range 15 west. Another part of the lands so purchased was held and claimed by the state under a forfeiture in 1886 for the taxes assessed against the same for the years

1876 and 1885 and the intervening years. The latter part is as follows: The S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, of section 26, and the S. W. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 35, in township five south and in range fifteen west. Joseph Brown appeared, and answered the application for confirmation, and claimed the lands forfeited for the taxes of 1871 and one undivided half of the other lands above described, and alleged that the forfeiture of all the lands claimed by him was illegal, null and void. The trial court, upon a final hearing, declared the forfeitures and purchases aforesaid void, to the extent they affect the title of Brown to the land in controversy.

Each tract of the land forfeited in 1872 was sold to the state for the taxes assessed against it for 1871 and penalty, and the costs of advertising them for sale, and for the sum of twenty-five cents as clerk's costs, and the sum of fifty cents as collector's costs. The lands forfeited in 1886 were sold to the state under a decree of the Grant circuit court, rendered in an action instituted on the relation of T. C. Trimble, under an act of the general assembly entitled "An act to enforce the payment of overdue taxes," approved March 12, 1881. They were sold under this decree on the 18th day of September, 1883, for the taxes of the years 1876 to 1880 inclusive. After this sale was confirmed by the circuit conrt, taxes were assessed against the lands that were sold under the same for the years 1876 to 1885, inclusive, and the lands were forfeited and sold to the state for the last mentioned taxes on the 16th day of April, 1886. The lands forfeited in 1872 were sold to the state under the same decree. The clerk of Grant county failed to certify to the commissioner of state lands that the lands were sold under the decree. He was restrained by an order of the Grant circuit court from so doing. He, however, certified the forfeitures in 1872 and 1886 to the commissioner of state lands, who sold the lands, under the forfeitures so certified, to the Muskegon Lumber Company, on the 6th and 15th days of April, 1891, while the restraining order was still in force.

All the lands in controversy belong to Brown, to the extent he claims the same, provided the sale or forfeiture of them

in 1872 and 1886, and the sale under the decree, were illegal. The question is, were the forfeitures in 1872 and 1886 valid? The sale under the decree is unquestioned. But he can redeem from this sale, if his title be otherwise valid. Acts of 1895, p. 35.

The forfeiture in 1872 was void, because the collector had no authority to sell lands delinquent for taxes for any costs except the cost of advertising. Acts of 1871, pp. 162, 186, §§ 100, 101, 102, 103, 105 and 187; *Cairo & Fulton Railroad Company* v. *Parks*, 32 Ark. 131; *Goodrum* v. *Ayers*, 56 Ark. 93; *Cooper* v. *Freeman Lumber Co.*, 61 Ark. 36; *Salinger* v. *Gunn*, 61 Ark. 414.

The forfeiture in 1886 was void, because the lands belonged to the state, and were not subject to the taxation on account of which they were forfeited in that year, they having been previously sold to the state under the decree of the Grant circuit court. Sand. & H. Dig. § 4675; *Joyner* v. *Harrison*, 56 Ark. 276.

At the time the Muskegon Lumber Company undertook to purchase the land in controversy, the statutes conferred upon the commissioner of state lands no authority to sell land forfeited to the state for non-payment of taxes until they were certified to him by the county clerk. Sand. & H. Dig. § 4565. The forfeiture and the certificate of the clerk vested him with the power to sell. The office of the certificate was to inform officially him of the forfeiture, and that the land was subject to sale by the state on account of such forfeiture. Until he secured this information, he had no power to act. If the forfeiture was void, the certificate conferred no power, and could not have been made to serve the purpose of certifying sales or forfeitures to the state, which the law required to be certified to him by another certificate. Each certificate served its own purpose, and ceased to be of any effect if the forfeiture certified by it was void. A forfeiture did not confer any power to sell until it was certified, and the deed of the commissioner vested no title, which he had no power to convey.

The act to enforce the payment of overdue taxes required the sale of lands under decrees to the state for taxes to be cer-

tified to the county clerk, and made it his duty to send certified copies of the certificate to the commissioner of state lands and to the auditor. That was not done in this case.

Decree affirmed.

BUNN, C. J., and RIDDICK, J., did not participate.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY v. NEAL.

Opinion delivered June 24, 1899.

1. CARRIER—FAILURE TO CARRY PASSENGER TO DESTINATION—DAMAGES.—A passenger who boards a freight train and surrenders a ticket entitling him to be carried to a certain station is entitled to recover his damages when he is discharged from the train a mile before reaching such station, as the carrier is bound at least to discharge him in the station yard at a place not unreasonably distant from the platform. (Page 544.)
2. SAME—ATTORNEY'S FEE.—A passenger recovering damages from a carrier for failure to discharge him at the station of his destination is entitled (under Sand. & H. Dig. § 6281) to recover a reasonable attorney's fee, to be taxed as part of the costs. (Page 544.)

Appeal from Crawford Circuit Court.

JEPTHA H. EVANS, Judge.

STATEMENT BY THE COURT.

The evidence in this case shows that the appellee, a citizen of the city of Van Buren, bought a ticket from the appellant at Van Buren, which entitled him to be carried thence on a local freight train of the appellant to the city of Fort Smith, and the train carried him to within about one mile of the station at Fort Smith and stopped; and that, after waiting some ten minutes, the appellee inquired of the employees on the train if the train would carry him to the station at Fort Smith, and was informed that it would not, and that, if he was waiting for that, he had as well go on; that it was dark, and the appellee got out of the car, and walked on toward town, and met a street car, which he boarded, and went up town paying

street car fare of five cents. That appellee paid fifteen cents for his ticket from Van Buren to Fort Smith.

The appellee recovered a judgment for ten dollars damages, and on his motion the court assessed an attorney's fee of ten dollars against the appellant as costs. The railroad company excepted, and appealed to this court.

L. F. Parker and *B. R. Davidson*, for appellant.

It was appellee's duty to have informed himself as to where the train would stop. 47 Ark. 74; 45 Ark. 256, 263; 71 Pa. St. 432; 11 Tenn. 533; 38 Kas. 608. It was not necessary for appellant to show actual notice to appellee of the rule. 11 Neb. 177; 38 Ga. 410. A railway company is under no obligations to deliver one who rides on a freight train at a passenger station. 144 Ill. 261, 270; 7 So. 344; 53 Mo. App. 462. It was error to tax the attorney's fee as costs. 21 Ark. 431; 37 Ark. 605; 36 Ark. 191; 42 Ark. 97; 49 Ark. 492.

HUGHES, J., (after stating the facts.) The appellant contends that, unless it appears from the evidence that it was the custom of freight trains on that road to receive and discharge passengers at the platform of the passenger depot, it should not be required of them. Conceding this to be true, it does not follow that appellant was not bound by its undertaking at least to discharge the passenger in the yard of the station, at a place not unreasonably distant from the platform at the station. This, we think, the contract of carriage obliged it to do. Of course, there is always incident to travel on a freight train the delays of frequent stopping and switching, for which they are not liable to passengers. But in this case the appellee was informed by the employees of the company that they would not pull up to the station, and that, if that was what he was waiting for, he had as well go on. Section 6284 Sandels & Hill's Digest, provides: "Local freight trains on all railroads or railways in this state shall carry passengers from and to any and all of their stations." A railroad station is a place where passengers are received upon and discharged from railroad trains.

It is contended that the court erred in assessing an attorney's fee of ten dollars, as costs against it. But we think otherwise. The statute covers this contention, in express terms.

Section 6281 of Sandels & Hill's Digest provides: "In all actions at law or suits in equity against any railroad company, its assignees, lessees, or other person or persons operating any railroad in this state partly therein, for the violation of any law regulating the transportation of freight or passengers by any such railroad, if the plaintiff recover in any such action or suit, he shall also recover a reasonable attorney's fee, to be taxed as a part of the costs, and collected as other costs are or may be by law collected." (Act of April 4, 1887.)

Finding no error, the judgment is affirmed.

BUNN, C. J., and BATTLE, J., did not participate.

NOTE.—As to the constitutionality of statutes giving attorney's fees in such cases as this, see *Gulf, Colorado & Sante Fe Railway Co.* v. *Ellis*, 165 U. S. 162-3.—REPORTER.

PAYNE v. STATE.

Opinion delivered July 1, 1899.

66 545
d68 442
66 545
73 512
76 518
66 545
84 100

1. EVIDENCE—MINUTES OF EXAMINING COURT.—It was not error to refuse to permit minutes of evidence taken before the examining court to be read for the purpose of impeaching the testimony of a witness. (Page 546.)

2. NEW TRIAL—MISCONDUCT OF JURY.—A new trial will not be granted in a felony case because the bailiff in charge of the jurors, as well as some of the jurors, drank intoxicating liquors, and because some of the jurors were separated from their fellows, if the trial court found from the evidence that the verdict was pure, and it appears affirmatively that there was no proof to justify a different verdict. (Page 548.)

Appeal from Lee Circuit Court.

HANCE N. HUTTON, Judge.

Jas. P. Brown, for appellant.

The evidence does not justify the verdict. It was error for the court to refuse to allow the witness, Roach, to be impeached by the written minutes of the proceedings in the ex-

amining court. 10 L. R. A. 696. Where the jury is allowed to separate, the burden is on the state to show that they were not improperly influenced. 40 Ark. 454, 471.

Jeff Davis, Attorney General, and *Chas. Jacobson*, for appellee.

Appellant was not prejudiced by the court's refusal to admit the minutes of Roach's testimony. A juror cannot be used to impeach his own verdict. 13 Ark. 317; 15 Ark. 403; 29 Ark. 293; 35 Ark. 109; 59 Ark. 132. Misconduct of a jury, to be ground for a new trial, must occur after the cause is submitted to them, and while they are deliberating. 62 Ark. 543; 57 Ark. 1; 44 Ark. 115; 40 Ark. 454.

WOOD, J. This is an appeal from a conviction of murder in the second degree. The first, second and third grounds of the motion for new trial are that the verdict was contrary to the law and the evidence. No objection is urged to the charge of the court. There is some conflict in the evidence as to particular circumstances of the fatal rencounter, but we are convinced, from a careful reading of the evidence as set forth in the transcript, that it is legally sufficient to support a verdict for murder in the second degree, and no useful purpose can be accomplished by setting it out and discussing the facts at length.

The fourth ground sets up error in the refusal of the court to permit the reading of the minutes of the evidence taken before the examining court. This was sought for the purpose of contradicting the evidence of a certain witness. The minutes were identified by the examining magistrate as the testimony of witness sought to be impeached, which was reduced to writing and signed by the witness in the presence of the magistrate. The testimony, however, was reduced to writing by a clerk of the magistrate.

The ruling of the court was correct. If it be conceded that the minutes were properly identified, still it was not proper to prove what the testimony of a witness was before an examining court by reading the minutes of such testimony reduced to writing and signed by the witness. The proper method of proving such testimony is to call a witness who heard it, and

let him testify as to the facts. The magistrate before whom the testimony was taken, the clerk who took it down, or any other witness who was present and heard it, is competent for the purpose. The witness, called for the purpose of showing the contradiction in the testimony of the witness sought to be impeached, must give his own knowledge or memory of what the testimony of the witness was before the examining court. The minutes may be used only for the purpose of refreshing the memory. The reason for this is obvious under our present statute, which is as follows: "The magistrate in the minutes of the examination shall state the name and place of residence of each witness, and shall make a general statement of the substance of what was proved, and file the same with the proceedings." Sand. & H. Dig. § 1997. This court, in *Shackleford* v. *State*, 33 Ark. 539, said concerning this statute: "That the object of making such statement is not that it shall be used as evidence is obvious, and it can make no difference, as to the admissibility of the proof of the evidence before the examining court, that the substance of it was taken down, as in this case, or the statement fuller than required by the statute, for it would not be superior to oral proof."*

True, in *Atkins* v. *State*, 16 Ark., at page 588, this court uses this language: "It may be remarked that if Powell made a statement upon the final trial differing from that made by him before the examining magistrate, and his testimony before the examining court was reduced to writing, it should have been produced for the purpose of contradicting him, as it would be the best evidence for that purpose. The prisoner could not introduce secondary evidence, without showing that it was not in his power to produce the statement of the witness as reduced to writing by the magistrate." There is no conflict in these decisions when the statutes under which they were respectively rendered are considered. The statute under which *Atkins* v. *State*, *supra*, was decided provides as follows: "The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and signed by the witnesses respectively." Gould's Dig. ch. 52, § 40. The difference in the

*See, *contra*, *Dolan* v. *State*, 40 Ark. 461.—REPORTER.

two statutes is obvious, and makes the difference in the decisions. In the latter case the evidence itself of the witnesses is reduced to writing and signed by the witnesses. In the former—our present statute—only a general statement of the substance of what was proved is made by the magistrate. The present statute does not require the evidence of witnesses before an examining court to be reduced to writing and signed by them, as formerly, when *Atkins* v. *State* was decided. Iowa has a statute making it the duty of the grand jury to appoint a clerk "who must take and preserve the minutes of the proceedings and of the evidence given before it." Code Io. § 4275. Also a statute (sec. 4241 of the code) which requires the magistrate to write or cause to be written out the substance of the testimony only, almost identical with ours. The supreme court of Iowa, in passing on a case where the question was whether such minutes could be used as impeaching evidence, said: "But the minutes of a witness' testimony before a grand jury, and the substance of his testimony taken before an examining magistrate, are in no proper sense the writing or the act of the witness. * * * Unlike a deposition or affidavit, they do not purport to give statements of fact in full, but are what the law requires, mere "minutes." They are often taken down by persons wholly inexperienced in reducing the language of others to writing. * * * What we have said in regard to the evidence taken before the grand jury applies with equal force to the evidence taken in preliminary examination. * * * It is not required to be read over to the witness, and is but the act of the magistrate or his clerk. Excluding the written minutes or substance of the evidence from being introduced does not prevent an impeachment. * * * An examining magistrate, or his clerk, or any person who heard the testimony, may be called for the same purpose." Accordingly, it was held that the minutes should be excluded. *State* v. *Hayden*, 45 Io. 11; *State* v. *Adams*, 78 Io. 292.

The fifth ground for a new trial alleges misconduct of the jury in separating from each other, contrary to the instructions of the court, "whereby the interests of the defendant, his life and liberty, were subject to great peril." The sixth charged that

the deputy sheriff, in charge of the jury, "became grossly intoxicated with liquor, and his conduct at the hotel where he had said jury was so grossly improper, on account of said intoxication, as to greatly disturb the proprietor and his family, which said conduct of said deputy "was seriously and grossly unjust to defendant, and greatly imperiled his interests of life and liberty in this cause."

We will consider both of these grounds together. There is testimony tending to prove that on Tuesday evening, April 4th, after the jury had been impaneled and the opening statements made, the jury were placed in charge of John Simms, a deputy, who, as well as the jury, was properly admonished by the court, as the law directs, and the court thereupon adjourned for the day. During Tuesday night, the deputy sheriff, as well as some of the jurors, are shown to have drunk intoxicating liquor to the extent of becoming drunk or under its influence, and some of the jurors separated from their fellows. There was proof, on the contrary, going to show that neither, the officer having the jury in charge nor any member of the jury was in the least intoxicated or under the influence of liquor. Also going to show that the jury were not subjected to any improper influence, and that none of the jurors, while temporarily separated from their fellows, conversed with any one about the case, or was otherwise guilty of any misconduct. All these matters were submitted, upon the evidence pro and con, to the trial court, who pronounced the verdict pure, and we cannot, under the rule established by this court in *Dolan* v. *State*, 40 Ark. 454, say that the verdict is impeached for improper conduct. This, according to that case, is the real test. Chief Justice English, after an exhaustive review of the authorities, concluded by a quotation from Mr. Wharton on Criminal Law, § 3111, which, in part, is as follows: "Such misconduct on the part of the jury certainly deserves strong condemnation and punishment, * * * but this is a matter entirely apart from the question of setting aside the verdict when its fairness is not impeached." This was the law for that case, and, under the facts, must rule this. But each case must depend upon its own peculiar facts and circumstances. Were we convinced that

the doctrine were otherwise than as announced in *Dolan* v. *State*, we would not think of overruling it in a case like this, where we are satisfied that the verdict is fully sustained, both as to the guilt and the degree of the crime, and that there is no proof to justify a different conclusion.

Inasmuch as such a large discretion is vested in the trial courts in passing upon questions of this character, we cannot refrain from the suggestion that a proper charge from the trial judge to the officer and jurors to abstain from the use of intoxicating liquors during the progress of trials of this magnitude, followed up by condign punishment in cases of disobedience on their part,would, in our opinion, effectually suppress the pernicious practice, and this is the only way it can be done.

A majority of the judges think the purposes of justice, under all the circumstances of this case, will be subserved by imprisonment for fifteen years in the penitentiary, and the judgment is modified to that extent, and in other respects affirmed.

BATTLE and HUGHES, JJ., did not participate.

SUMMERS *v.* HEARD.

Opinion delivered February 18, 1899.

[66 550
s73 513]

66 550
f85 310

1. PARTNERSHIP—RIGHTS OF PARTNER.—One who enters into a partnership with another thereby acquires an equity to compel the application of the firm's assets to the payment of debts of the firm, and to have the surplus thereafter remaining applied to a debt due to himself on partnership account and to an adjustment of balances and cross-demands between his co-partner and himself, and, upon a dissolution of the partnership, to have his proportionate share of the assets remaining on hand. (Page 559.)

2. EXECUTION—SALE OF PARTNER'S INTEREST.—Where the interest of a partner in the firm assets has been levied on under execution, and his co-partner has given the officer notice of his claim therein, the officer cannot sell such interest until it has been ascertained and set apart by equitable proceedings, in the manner provided by Sand. & H. Dig. § 3065. (Page 559.)

3. DAMAGES—SALE OF PARTNERSHIP ASSETS.—By the unlawful sale of a firm's assets under execution against a member thereof, the other member is damaged, not only by the loss of his individual interest in the surplus of the firm's assets after its debts are paid, but also by the loss of his equity to have such assets applied to payment of the partnership debts, including any debts due himself on the partnership account. (Page 560.)

4. PARTIES—WAIVER OF DEFECT OF.—While all the partners should be joined in an action for damages for taking partnership property on execution against one partner individually, a defect of parties in this respect will be waived by failure of the defendant to take advantage of it by demurrer or answer. (Page 560.)

5. CONTRACT—CONSIDERATION.—A verbal promise by one about to become a partner to pay individual debts of his co-partner, made without consideration, is not binding. (Page 560.)

6. MORTGAGE—TENDER.—A creditor's lien under a bill of sale intended as security cannot be enforced against the purchaser of a half interest in the property subject to the lien who tenders the amount of the debt secured and keeps his tender good. (Page 561.)

7. CONVERSION—DAMAGES.—In the absence of any allegation and proof of special damages, the measure of damages for the conversion of a stock of goods is the value of the goods at the time and place of the conversion, with six per cent. interest thereon from that time. (Page 562.)

Appeal from Monroe Circuit Court.

JAMES S. THOMAS, Judge.

J. C. Hawthorne, *J. N. Cypert* and *Grant Green, Jr.*, for appellants.

The appellants acted in good faith and without malice. Therefore the court's instructions as to examplary damages were erroneous. 39 Ark. 387; 35 Ia. 306; 3 Suth. Dam. 472. The true measure of damages was the value of the property, with interest. 39 Ark. 387; 29 Ark. 448; 63 N. W. 737; 59 N. W. 387; 49 Pac. 910; 3 Suth. Dam. 472–5, 491; 527–8, 572. The sixth instruction given for appellee was erroneous. Appellee's knowledge put him on notice of the fraud of the transfer to him. 58 Ark. 446; 21 S. W. 1026; 50 Tex. 106; 42 Minn. 519; 39 Am. Rep. 481; 56 Mo. App. 541; 86 Mich. 556; 79 Wis. 1. The agreement to sell the goods, pay himself out of the proceeds, and return the balance, was fraudulent. 49 Cal. 620; 55 Wis. 181; 1 L. R. A. 336; 32 L. R. A. 33, 40, note, 41, note; 38 Atl. 991. Appellee's attempt to buy an interest

in the business, without having the proceeds paid on debts of the business, was fraud on the creditors. 58 Ark. 446; 50 Ark. 320; 55 Ark. 579; 11 Fed. 559; 52 Ark. 556; Big. Fraud, 288. If appellee mixed and confused the new goods which he bought with the stock, so that they were not distinguishable, the whole stock was subject to appellant's claim. 52 Mass. 493; 3 N. Y. 379; 1 Am. & Eng. Enc. Law, 57, and note; 49 Ark. 457; 60 Ark. 425; 11 So. 946.

N. W. Norton, *Parker & Parker*, for appellees.

The officer, after being notified that the property was that of the partnership, had no right to do more than take an inventory. Sand. & H. Dig. § 3062. Appellant's statement of the rule as to measure of damages only applies to cases where the business is not broken up. 59 Miss. 430; 23 O. St. 358; 1 Suth. Dam. 98–99, 121–2; 3 Suth. Dam. 153, 475–6; 80 N. Y. 614; 11 Mich. 542; 14 *ib.* 34; 32 *ib.* 77; 82 Am. Dec. 679; 23 S. W. 474; 16 S. W. 1101; 46 Fed. 927; 52 N. W. 609. Exemplary damages proper. 44 Ark. 486; 1 Suth. Dam. 720, 723, 724, 725, 729.

J. C. Hawthorne, for appellants, on motion for rehearing.

The instruction of the court as to "actual damages," in which the court directed the jury that, in addition to the value of the property at time of seizure and interest thereon, they might assess "such further sum as you will find from the proof that the plaintiff had sustained from being deprived of his business," is abstract and erroneous.

Parker & Parker and *Norton & Prewett*, for appellee, on motion for rehearing.

Appellee was entitled to compensation for the injury done his business. 72 N. W. 553; 49 Pac. 911; 2 N. W. 847. Where one is engaged in a prosperous business, the damage occasioned him by seizing his goods is not measured simply by the value of the goods. 14 Mo. 104; 61 N. Y. 245; 60 N. Y. 448.

BATTLE, J. This action was instituted by S. F. Heard against Summers & Watson and others to recover damages

caused by a constable, W. M. Graham, one of the defendants, levying on and selling a stock of drugs and other goods belonging to a partnership, composed of himself and O. F. Jenkins, or Jenkins' wife, to satisfy an execution in favor of the defendants, Summers & Watson, and against O. F. Jenkins, as well as executions in favor of others and against the same person. Plaintiff alleged in his complaint that, on or about the 13th day of April, 1895, he was in possession of a stock of drugs and other goods in the town of Clarendon, in this state; that he was the owner of one-half of such stock, and the other half was pledged to him as security for money loaned; that O. F. Jenkins, or his wife, owned the latter half, subject to the pledge; that, on the day before stated, the defendant, W. M. Graham, as constable of Cache township, in Monroe county, had in his hands sundry executions issued by a justice of the peace against O. F. Jenkins, and in favor of different persons, the defendants Summers & Watson being of the number; that Graham undertook to levy the executions upon the stock in his possession, when he asserted his right thereto, and the defendants Summers & Watson, Parker C. Ewan, J. P. Lee and M. J. Manning, executed and delivered to the constable a bond, whereby they agreed to indemnify him against all damages which he might sustain in consequence of the seizure and sale of the goods, and to pay to any claimant of the stock any damages he should sustain by reason of such seizure and sale under executions; that the constable seized the goods; that, within fifteen days thereafter, the plaintiff gave him notice that the goods so seized were partnership property, and in part belonged to the plaintiff; and that the constable, disregarding his claim and rights, sold the stock under the executions. Plaintiff further alleged that the goods so sold were worth the sum of $1,500, and that he was damaged by reason of such seizure and sale in the same amount; and he asked for judgment for $3,000.

The defendants, answering, denied that plaintiff was in possession, or the owner, of the stock of goods, and admitted the issue of the executions, the levy thereof, the claim by plaintiff, the execution of the bond to indemnify, the notice to the constable by plaintiff, and the sale, and denied that the goods were of the value of $1,500. Answering further, they

alleged: "That O. F. Jenkins was indebted to the defendants, Summers & Watson, W. N. Wilkerson & Co., and other creditors, and that claims amounting to five hundred dollars were in the hands of Ewan, Manning & Lee for the purpose of collection, and that in October, 1894, the said O. F. Jenkins, for the purpose of securing the payment of said sums, pledged all of said goods to the defendants; that the plaintiff's agent soon thereafter came to Clarendon, and was advised of the financial condition of Jenkins, and also that the goods were in the possession of Ewan, Manning & Lee as collateral security for the payment of the claims held by them; that he thereupon agreed to pay the claims held by Ewan, Manning & Lee, and also all other indebtedness of said O. F. Jenkins, and to become the owner of one half interest in the stock of goods in consideration therefor; that, notwithstanding this agreement, he disregarded it, and pretended to purchase one half interest in said stock of goods for the sum of five hundred dollars, but only paid two hundred and fifty dollars thereon; that he knew, at the time of the purchase, that the goods were pledged to the defendants, and that Jenkins held the property as their agent; that, for the purpose of further complicating the affairs of the said Jenkins, and aiding him to defraud his creditors, he induced said Jenkins to make and deliver to his wife, Mrs. C. W. Jenkins, a bill of sale of the other half interest in the stock of goods, and then induced the wife to pledge the said goods to him as security for money that he had originally agreed to pay for the one half interest to which he claimed title; that the pledge was made without consideration, and that the consideration for the purchase of the goods was made for the purpose of defrauding the creditors of Jenkins; that there was no consideration moved from Mrs. C. W. Jenkins to her husband for the transfer of the portion of the goods; that the defendant O. F. Jenkins and his wife were insolvent. The plaintiff knew these facts, and entered into the transaction with them for the purpose of, and with a view to, defeating the claims of the creditors."

The issues in the action were tried by a jury. Evidence was adduced at the trial tending to prove substantially the following facts: In October, 1894, O. F. Jenkins was doing a

mercantile business in Clarendon, in this state, selling drugs and other goods. He was much in debt. Ewan, Manning & Lee, a firm of lawyers, held for their clients claims against him amounting to $295.12. To secure these claims, he executed to them a bill of sale, whereby he bargained and sold to them his stock of goods. This was on the 30th of October, 1894. In December following, S. F. Heard, through his agent, Cicero Heard, entered into negotiations with Jenkins for the purchase of one-half interest in his stock of goods and a partnership in his business. On the 19th of the same month, he promised Ewan, Manning & Lee that he would form no partnership with Jenkins until Jenkins' debts were paid. On the 19th of December, 1894, Heard purchased of Jenkins one-half of his stock of goods, and formed a partnership with him in the business in which Jenkins was at the time engaged. On the 20th of the same month, he paid to Ewan, Manning & Lee $200 on the bill of sale, in part payment of the claims held by them, and at other times paid ninety-five dollars to other creditors. About the last of February, 1895, Ewan, Manning & Lee received the claim of W. N. Wilkerson & Co. against Jenkins for $224.53, and Heard promised to pay it. In the meantime, Heard, having ascertained that the stock of goods purchased was not as large or valuable as represented, and that Jenkins' indebtedness was much larger than he said it was, offered to rescind their contract; and Jenkins refused, but in lieu thereof agreed with Heard to take, and did accept, the $295 paid to his creditors in full payment of the amount to be paid for one-half of the goods and for the partnership business. Afterwards Jenkins sold, or pretended to sell, the other half interest in the goods and partnership to his wife for $100, taking her note for the purchase money. On the 4th of March, 1895, Jenkins and his wife mortgaged his or her half interest in the goods to Heard, to secure him in any advances he might make in carrying on their business. In the course of time, the new firm, of which Heard was a member, added to their stock new goods of the value of about $800, and owed for them about the same amount, including $157.40 advanced by Heard. Finally, after some delay, Heard refused to pay the claim of W. N. Wilkerson & Co., or any other claims against Jenkins. Summers & Watson

and other creditors thereupon obtained judgments by confession against Jenkins before a justice of the peace, and caused executions to be issued upon the same, and placed them in the hands of W. M. Graham, a constable, to serve. To induce the constable to seize the goods of Jenkins & Heard to satisfy the executions, Summers & Watson, Parker C. Ewan, J. P. Lee and M. J. Manning executed to him a bond of indemnity in the manner and to the effect stated in the complaint. Graham, the constable, then seized the goods of Jenkins & Heard. Within fifteen days after this, Heard notified the constable that he had seized the partnership property of Jenkins & Heard, and that one-half belonged to him, and that the other half was held by him in trust; and he tendered to Ewan, Manning & Lee the balance of ninety-five dollars due on the claims which the bill of sale was executed to secure, and they refused to accept it. The constable disregarded his notice, and refused to surrender the possession of the property seized, but sold it under the executions. The value of the goods sold were variously estimated at $400 and $1,400.

Evidence was adduced at the trial tending to prove that the purchase by Heard from Jenkins was made in good faith, and was also adduced tending to prove that it was fraudulent and void. One witness testified that Jenkins & Heard were doing a profitable business at the time their property was seized, but the evidence does not show the damage suffered, further than the value of the goods sold.

The court instructed the jury, in part, as follows: "The court instructs the jury that a partner has no such beneficial interest in the chattels of the firm as will be bound by a general lien of an execution against him individually. His interest is subject to the paramount claims of the creditors of the firm, and a surplus only would be subject to individual debts, and then only by following statutes providing for such cases, and not by sale under execution."

"Under the law, partnership property cannot be sold under execution against individual members of the firm if the other members of the firm notify the officer in writing of his claims and interests. All an officer can do in such a case is to take an inventory of the property, and have it appraised, and then

return the inventory and appraisement with the execution. If, instead of so doing, he proceeds to advertise and sell the property, he is a trespasser, and is liable for actual damages, or actual and exemplary damages.

"If, in this case, you find from the proof, by a preponderance, that Heard and Jenkins were partners, or that Heard and Jenkins' wife were partners, in the property seized, and that, within fifteen days after the seizure, Heard, in writing, notified the defendant, Graham, or his deputy making the levy, that such goods were partnership property, and that he (Heard) was a joint owner and partner therein, and that defendant, Graham, or his deputy, after such notice, proceeded to advertise and sell the property, the plaintiff is entitled to receive both actual and exemplary damages.

"Fraud is never presumed, but must be proved by the party alleging it. One engaged in business, though insolvent, has the right, like any other person, to dispose of the whole or any part of the business, and the purchaser will have a good title, unless the sale was made with the intent on the part of the seller to defraud his creditors, and the fraudulent purpose was participated in by the purchaser; and Heard's purchase of the half interest must be upheld, unless by preponderance of proof you find that Jenkins, in selling to Heard the half interest, intended to defraud his creditors, and that Heard participated in the fraud."

In this connection the court further instructed the jury "that every sale and conveyance made by the parties with the intent to hinder, delay or defraud creditors in the collection of their debts is fraudulent and void as to such creditors, whether such sale or conveyance is made with or without a valuable consideration therefor."

Many other instructions were given, but it is not necessary to set them out in this opinion.

The defendants asked, and the court refused to give, the following instructions: "If the jury find from the evidence that the plaintiff, Heard, undertook to purchase the stock of drugs in controversy, or an interest therein, subject to the bill of sale held by the defendants to secure the payment of certain debts due from O. F. Jenkins to his creditors, which debts

plaintiff agreed to pay, and with the understanding between him and the defendants that he should acquire no interest therein until said debts were paid, and further find that, before the debts secured by the bill of sale were paid, other claims of O. F. Jenkins came into the hands of the defendants for collection, and that the plaintiff agreed to pay said claims upon the same terms that he had agreed to pay the claims mentioned in the bill of sale, he could not afterwards acquire a title from Jenkins to said property superior to that of the defendants until the claims which he had assumed to pay where satisfied."

"If the jury find from the evidence that Jenkins had pledged the stock of drugs for the payment of said debts held by the defendants, Ewan, Manning & Lee, against said Jenkins, and that the plaintiff, Heard, was fully advised of the same, and then said Heard purchased said drugs or an interest in the same, he bought subject to the prior rights of the pledgees, Ewan, Manning & Lee, and the drugs were still liable to seizure under execution; and, if so seized and sold, your findings should be for the defendants."

"The jury are instructed that, although they may find from the evidence that the plaintiff paid the sum of $200 to certain of the creditors of Jenkins, still, if they further believe from the evidence that at the time of said payment the plaintiff knew of the existence of other and further debts from the said Jenkins due to other creditors, and the payment of said sum was received by said creditors or the attorneys thereof, who are the defendants herein, with the understanding that plaintiff should not acquire any interest in said stock of drugs as a partner of said Jenkins until after all the debts of the said Jenkins were paid, and that the money received by the defendants, Ewan, Manning & Lee, was so received with that understanding, and that afterwards the plaintiff procured or induced the said Jenkins to convey a half interest in said stock of drugs, upon the consideration of the said wife's executing her note to her said husband for $100, and afterwards the plaintiff prepared and had Jenkins' wife to convey to him the half interest so sought to be acquired by her, such conveyance or attempted conveyance would be a fraud upon the rights of the creditors of Jenkins, and the plaintiff acquired no title to said

property, as against said creditors of Jenkins, and you will find for the defendants."

The defendants asked, and the court refused, other instructions; but, as they were inapplicable to the facts in this case, it is unnecessary to consider them.

The jury returned a verdict in favor of the plaintiff for $930, actual damages, and six per cent. interest thereon from the 15th of April, 1895, the date of the levy of the executions, and $250, exemplary damages; and the court rendered judgment accordingly. The defendants filed a motion for a new trial, and the court directed that a new trial be granted, unless the plaintiff remitted the exemplary damages and $230 of the actual damages, which the plaintiff did, and the court thereupon set aside the judgment rendered, and directed another to be entered in favor of the plaintiff against the defendants for $770.85, the amount of $700 and six per cent. per annum interest thereon from the 15th of April, 1895, and overruled the motion for a new trial, and the defendants appealed.

The jury obviously found that the sale by Jenkins to Heard of one half interest in the stock of goods, and the partnership between them, were made in good faith. Their verdict in this respect was sufficiently sustained by evidence. In the further consideration of the case we therefore will assume this to be a fact.

When Heard purchased the one half interest, and entered into the partnership with Jenkins, he acquired an equity to compel the application of the assets belonging to the partnership to the payment of the joint debts of the firm, and to have the surplus thereafter remaining applied to the debt due to himself on partnership account, and to an adjustment of balances and cross-demands between Jenkins and himself. 2 Bates, Partnership, § 820. After this, and upon a dissolution of the partnership, he was or would be entitled to one half of the assets remaining on hand. In recognition and enforcement of such rights and equities, the statutes of this state provide that, when the property of a partnership is levied upon to satisfy an execution against one of the partners, the officer shall not, by virtue of his levy, deprive the partners of the possession of the property levied upon, except for the purpose

of making an inventory thereof, and having the same appraised; and that, "upon the execution being returned by the officer that he had levied the same upon the property in which the debtor was * * * partner, and that the same was claimed by the other * * * partners, the execution creditor may proceed by equitable proceedings to subject to the satisfaction of his execution the interest of the debtor so levied upon." Sand. & H. Dig. § 3065. So, as Jenkins' interest in the assets of his firm was his proper proportion of the surplus of the whole after the payment of debts, including the amount due Heard, it is evident that this is all the officer holding the executions against him could levy upon, and that it could not be taken possession of and sold before it was ascertained and set apart by equitable proceedings in the manner provided by the statutes.

The loss of his individual interest in the assets of his firm was not the only damage suffered by Heard in the sale of the partnership property under the executions against Jenkins, but he was damaged by the loss of his equity to have the assets of his firm applied to the payment of the joint debts contracted by himself and Jenkins on account of their partnership, including the debt due to himself on the same account. The loss of this equity left Heard still individually liable for the joint debts, with less ability to pay. But this loss was suffered by both partners in common, and the action for damages incurred thereby should have been brought by both partners. This defect in parties to this action was, however, waived by the failure of the appellants to take advantage of it by demurrer or answer. Sandels & Hill's Digest, §§ 5718, 5720.

The evidence was sufficient to sustain the judgment of the trial court as to the amount recovered by appellee. But appellants insist it should be reversed on account of the refusal of the court to give the instructions asked for by them. We do not think so. The bill of sale executed by Jenkins to Ewan, Manning & Lee to secure certain debts held by them for collection made no debt liens on the property described therein, except those it was given to secure. The verbal promise of Heard to Ewan, Manning & Lee to pay any other debts of Jenkins was without consideration and void; and, being void, could not

affect the sale by Jenkins to Heard or their partnership. The bill of sale did not affect the right of appellee to recover in this action. The evidence in this case does not show that any one of the execution creditors of Jenkins was secured thereby as to any debt he sought to collect by the seizure and sale of the property of Jenkins & Heard; and, if he was, he could not enforce the lien thereby acquired by execution. Then, again, Heard offered to pay Ewan, Manning & Lee the $95 remaining due on the debts secured by the bill of sale, and they refused to accept it unless he would pay other debts of Jenkins held by them for collection. He had a right to redeem the property he had purchased; and as long as he was willing and offered to do so, and kept his tender good, the lien could not be enforced by seizure and sale of the property.

The sale by Jenkins of his half interest in the assets of Jenkins & Heard to his wife, and her pledge to Heard to secure advances to be made by him on partnership account, did not affect Heard's right to recover in this action. He acquired no rights by the pledge in addition to the partner's lien or equity which he already had.

Finding no prejudicial errors in the proceedings of the trial court, its judgment is affirmed.

HUGHES and RIDDICK, JJ., concur.

BUNN, C. J., and WOOD, J., dissent.

[The following opinions on a rehearing were delivered June 17, 1899.]

RIDDICK, J. This was an action for damages caused by the seizure and sale of a stock of goods claimed by plaintiff, the facts of which are fully stated in the opinion of the court by Mr. Justice Battle. It is insisted on the motion to rehear that the court erred in giving to the jury the following instruction in reference to the measure of damages: "If you find for the plaintiff, you will assess the actual damages at the value of the property at the time of the seizure, with six per cent. interest thereon from the seizure up to this date, and such further sum as you will find from the proof the plaintiff has sustained from being deprived of his business."

As a general rule, the measure of damages in an action of this kind is the value of the property at the time and place of the conversion, with interest thereon from that time. *Kelly* v. *McDonald*, 39 Ark. 387; *Jones* v. *Horn*, 51 *ib.* 19. There is nothing shown here to take this case out of the general rule. The goods taken and converted were such as are generally kept for sale by druggists, and there is nothing in the evidence to show that they could not have been readily replaced by the purchase of other like goods in the market, thus preventing any stoppage of business. Under the facts of this case, plaintiffs cannot, in addition to the value of the goods and interest, recover for use of goods as for loss of profits. *Anderson* v. *Sloane*, 72 Wis. 566.

It is said on part of appellees that the complaint alleged that the seizure and sale of the stock of goods destroyed plaintiff's business; that this allegation, not being denied, must be taken as true. If we concede this statement to be correct, still, before any recovery could be had for loss of business, the amount of such special damages should be alleged and shown by evidence with some degree of certainty. We have nothing of the kind here. The value of the business said to be destroyed is not alleged, nor is there in the transcript any competent evidence of such value. There is in the complaint only the general allegation that the business was established and profitable, and that it was destroyed by the levy and the sale of the stock of goods. On the trial, the plaintiff was allowed, over the objection of defendants, to state generally that he was doing a good business, which was improving; that others were doing well in the drug business; and that he did not see why he could not do well also. This evidence, even if there were no other objection to it, was too vague and indefinite, and should have been excluded. But the circuit judge refused to exclude it, and, by the instruction above noticed, told the jury that, in addition to the value of his goods and interest, they should allow the plaintiff such further sums as the proof showed that he had sustained by being deprived of his business. Even if it were proper to allow damages for stoppage of business in this case, this instruction would still be erroneous; for it does not limit the damage for such loss to the time necessarily required for

replacing the goods seized by defendants, but leaves the jury free to assess damages for loss of profits for any length of time they might choose to fix upon, and was, when taken in connection with the evidence above noticed, calculated to mislead the jury, to the prejudice of appellant. The evidence and instruction as to loss of business were both, we think, improper; for, as before stated, in the absence of any allegation or proof as to special damages, and where no grounds for exemplary damages are shown, the recovery in cases of this kind is limited to the value of the goods converted, with interest from the time of conversion. *Kelly* v. *McDonald*, 39 Ark. 387; *Jones* v. *Horn*, 51 *ib.* 19; *Ingram* v. *Rankin*, 47 Wis. 406; *Anderson* v. *Sloane*, 72 Wis. 566.

This point was not overlooked in the former consideration of the case, but at that time we were of the opinion, taking into consideration the amount of the verdict, the remittitur required by the circuit judge, and all the evidence, that no prejudice resulted from the instruction noticed. The question was not discussed in the former opinion, for the reason that a difference among the judges in regard to the decision of the case arose on other points, which were discussed at length, but, there being at that time no disagreement on this point, it was passed without discussion. I concurred in the former opinion delivered in this case, and find no reason to change on any of the questions discussed therein, but a further consideration of the question has convinced me that the instruction above noticed was not only erroneous but prejudicial. As I am not able to say what effect it had upon the verdict of the jury, I think it safer to reverse and remand for a new trial.

For the reasons above stated, the judgment is reversed, and cause remanded for a new trial.

WOOD, J., concurs, and BUNN, C. J., concurs also, but for reasons stated by him in separate opinion.

BUNN, C. J., (concurring). When this cause was decided by us in the first instance, I dissented from the opinion of the majority of the court, because the trial court had excluded certain evidence which went to make up a cause of fraud and overreaching on the part of the plaintiff, whereby he was en-

abled the more readily to prove his claim of being a partner with Jenkins and wife, and therefore to sustain his contention for damages on account of the levy and sale of the goods.

On this (the defendant's) motion for a rehearing, the instructions on the measure and manner of assessing damages being more particularly called to our attention, I find that there was no evidence to sustain actual damages for loss of business, etc., and, as against the officer making the levy and sale out of the defendants, no evidence upon which exemplary damages should have been assessed, and only inferentially against the others.

This instruction, or, rather, these instructions, as to damages, were erroneous. The remittitur entered by the court tended to cure the defect, and, if this was all the error in the case, I might concur in the idea that the error so corrected was not reversible, seeing that the jury apparently left out of consideration the damages for loss of business; but the error of the court as to the fraud of the plaintiff, and the exclusion of testimony relating thereto, constrain me to sustain the motion for a new trial on both grounds, as only in that way can justice be done, as I view it, and, indeed, taking all the circumstances under consideration, I cannot certainly say that errors in the instructions as to damages were not reversible errors. Had the court not erred as to the question of fraud, there would have been no occasion for these instructions as to damages, in my opinion.

BATTLE, J., (dissenting.) Appellants ask for a rehearing of this cause upon two grounds:

First. Because the court overlooked the error contained in an instruction given by the trial court to the jury in the following words: "By actual damages is meant such sum as will compensate for actual loss sustained; and, if you find for plaintiff, you will assess the actual damages at the value of the property at the time of the seizure, with six per cent. interest thereon from the time of seizure up to this date, and such further sum as you will find from the proof the plaintiff has sustained from being deprived of his business."

Second. "Because the evidence was not sufficient to support the verdict of the jury."

It is unnecessary to say anything as to the second ground of the motion, in addition to what has already been said in the opinion of the court. Counsel for appellants have filed no briefs nor made any argument in support of their motion, but rely upon their brief which was on file when this cause was submitted for decision. No reason for additional comments has been suggested.

The motion seems to be based upon the belief that the instruction copied in this opinion was overlooked by the court. I know of no reason for this belief, except the failure to make mention of it in the opinion of the court. In preparing that opinion, I carefully considered the instruction, and thought no specific mention of it was necessary. In speaking for the court, and referring to that and other instructions, I said: "Many other instructions were given, but it is not necessary to set them out in this opinion." Referring to these instructions and all other proceedings of the trial court, this court said: "Finding no prejudicial errors in the proceedings of the trial court, its judgment is affirmed."

I think the opinion of the court is correct, especially as to the instruction mentioned in the motion. The part of the instruction objected to is in these words: "And such further sum as you will find from the proof the plaintiff has sustained from being deprived of his business." In the opinion it is said: "The evidence does not show the damage suffered, further than the value of the goods sold." Inasmuch as the jury were told by this instruction to return a verdict in favor of the appellee for such damages as they found from the proof that he had sustained by the loss of his business, and the evidence did not show that he had sustained any, it is difficult, if not impossible, to see how it could be prejudicial.

The record in the case clearly shows that the appellants were not prejudiced by the alleged error contained in the instruction. In connection with it, the court instructed the jury as follows: "Exemplary damages are given by law as a punishment, and to deter others from the commission of like trespass. In order to justify exemplary damages, the sale and the conversion of the property must have been malicious, and the sale is maliciously made under the law if made without reason-

able cause to believe that it should be made under execution in hand; and if in this case you find (the) property to have been partnership property, and also find that Heard in writing notified the defendant, Graham, or his deputy in charge of his interests, and that, notwithstanding the notice, the goods were sold under execution, the law will imply malice, and you will, in your sound discretion and judgment, assess such sum as you see proper as exemplary damages." The evidence showed that the value of the goods sold was variously estimated at $400 and $1,400, and that the goods were invoiced, by the person selected by the constable to appraise them, at $930.06. The jury returned a verdict in favor of the appellee for $930, actual damages, and six per cent. interest thereon from the 15th of April, 1895, the date of the levy of the execution, and $250, exemplary damages; and the trial court compelled him to remit the exemplary damages and $230 of the actual. Why did they return a verdict for $930 for actual damages? Manifestly, because the goods were estimated to be worth that much by the persons selected by the court to appraise them. If so, they found that the $930 was the value of the goods, and that that was the damage sustained by the loss of the same. This is further evidenced by the fact that the court instructed the jury that, if they found for the appellee, they would assess his damages at the actual value of the property sold and six per cent. interest thereon from the time of the seizure thereof, and the fact that they were not instructed to allow any interest on any other damage, and by the fact they returned a verdict for $930 and six per cent. interest thereon from the time of the seizure. But it has been said that they might have been induced, by the objectionable part of the instruction, to estimate the actual damages at $930. This is an unreasonable assumption. They were told by that part of the instruction not to allow the appellee any damages for loss of business unless they found from the proof that he had sustained such loss. The evidence did not show that he had. There was no cause in the instruction for the prejudicial effect attributed to it; and the jury manifested no disposition to travel beyond the instruction of the court to increase the actual damages of the appellee, as is shown by the fact that they could have found the actual value of the goods

sold to be $1,400, according to the evidence, instead of $930.

In assessing the actual damages at $930, did the jury intend to compensate the appellee for loss of business in addition to the value of the goods sold? I think not. There was no occasion for them to cover up an award for such loss by the assessment of $930, without evidence to sustain them in so doing, when they could have found the actual value of the goods to be a much larger sum. Neither did they do so. The court instructed them that if they found the "property to have been partnership property, and also found that Heard, in writing, notified the defendant, Graham, or his deputy in charge, of his interest, and that, notwithstanding the notice, the goods were sold under execution, the law will imply malice," and they might return a verdict for exemplary damages in such sum as to them might seem proper. In response to this instruction, the jury returned a verdict in favor of appellee for $250. This sum was awarded as a punishment of appellants for depriving appellee of his business. The return of the verdict for $930 could not have been the result of any prejudice of the jury against appellants on account of such loss. If there was any, it found full gratification in the return of the verdict for $250. The award of $930 for actual damages, as appears from the record, was based solely upon the invoiced value of the goods sold.

I think the motion should be denied.

HUGHES, J., concurs with me in this opinion.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY v. OSTRANDER.

Opinion delivered July 1, 1899.

1. RAILROADS — INTERSTATE COMMERCE — FALSE CLASSIFICATION. — The freight agent of a railroad company has no authority, by means of a false classification of goods received for shipment to another state, to bind a connecting carrier to carry such goods at a rate lower than the regular rate then established and in force. (Page 570.)

2. SAME—FALSE REPRESENTATIONS OF SHIPPER.—If a shipper, by making false representations to the agent of a railroad company, obtains a rate lower than the regular rate then established and in force, a connecting carrier is not bound thereby. (Page 571.)

Appeal from Benton Circuit Court.

EDWARD S. MCDANIEL, Judge.

STATEMENT BY THE COURT.

The appellee, C. E. Ostrander, in 1896, moved his home from Oto, Iowa, to Rogers, Arkansas. Being the owner of certain personal property, to-wit, household furniture, sewing machine, cooking utensils, buggy and about 600 bushels of oats, which he wished to ship from Oto to Rogers, he applied to the agent of the Illinois Central Railway Company at Oto for rates on a car from that place to Rogers, naming the goods he desired to ship. The agent informed him that he would have to consult the general agent of the company, and thereupon he telegraphed the general agent as follows: "Party wants to ship 600 bushels of oats to be used as seed, about one thousand pounds of household goods, buggy, etc., as car load of emigrant movables. Will rate given on emigrant movables apply on this?" The general agent of the Illinois Central replied that "rates quoted on emigrant outfit from Oto to Rogers, Arkansas, will apply on shipment, including the articles you mention." The local agent then informed Ostrander that the through rate to Rogers from Oto on his car would be $79, this sum being in conformity to the published rates on car load of emigrant's outfit, but lower than ordinary rates on such goods. The goods were thereupon loaded on car at Oto. Ostrander paid the $79 freight charges in advance, and received a bill of lading, showing that goods were consigned to Henry F. Carson, Rogers, Arkansas, and that charges had been prepaid.

The line of the Illinois Central Company, which issued the bill of lading, extends only a short distance from Oto towards Rogers, the point to which the goods were shipped, and the car had to pass over other lines of railway. It arrived at Rogers a few days after its shipment from Oto, having been carried over lines of different companies, among which were the Santa Fe Railway Company and the appellant company. The car had a

way bill attached, showing that the Santa Fe Company had paid to a connecting carrier, from which it received the car at Kansas City, a balance of seventy-eight cents due or claimed to be due for freight. The amount due, as shown by the way bill from Kansas City to Rogers, was $83.33, that being, so the company claimed, the amount of regular charges on that class of freight from Kansas City to Rogers. Ostrander and the consignee, Carson, demanded the goods at Rogers, but the agent of the appellant refused to deliver them, unless the additional charges above mentioned were paid. Ostrander refused to pay, and brought replevin to recover possession of the goods. On the trial it was shown that the term "emigrant movables," according to published rates of the Illinois Central and other railway companies belonging to the "Western Freight Association," included household furniture, farming utensils, etc., of the emigrant, but did not include oats "unless intended for seed or for feeding animals while in transit." Oats not intended to be used for seed or for feeding in transit were subject to ordinary rates, which were higher than those charged for emigrant's movables. Only a small portion of the oats shipped by Ostrander were intended for seed, and none were used for feeding in transit. The remainder, about 565 bushels, were sold by him or fed to stock upon his farm.

There was a judgment in favor of plaintiff, from which the company appealed.

L. F. Parker and *B. R. Davidson*, for appellant.

The contract with the original carrier could not deprive appellant of its right to be paid for transporting the car and for amounts of advance charges paid by it to connecting lines. 56 Ark. 439; *id.* 430; 54 Ark. 399; 7 Baxter (Tenn.), 345; 25 Wis. 241; 13 R. I. 578; 6 Allen, 246; 22 Kas. 659; 42 Am. & Eng. Ry. Cas. 503. This was an interstate shipment, and appellant was compelled to charge appellee the ordinary freight rates. Act of Cong. of March 2, 1889; 41 Fed. 592. The original carrier was the agent of appellee, not of appellant. 25 Wis. 241–270; Hutch. Car. § 108; 9 Am. & Eng. Ry. Cas. 41; 6 Allen, 240; 13 Reporter, p. 15. A subsequent carrier has a right to pay the charges claimed by a connecting carrier, and

has a lien for same. Hutch. Car. §§ 477, 478; 25 Wis. 241–270; 6 Allen, 246.

RIDDICK, J., (*after stating the facts.*) The only question in this case is whether the appellant company had the right to hold the goods of Ostrander for any charges in addition to those he had paid the Illinois Central Company. Now, conceding that the appellant company had agreed upon joint tariff rates with the Illinois Central and other carriers operating the lines over which the goods of Ostrander were carried, still the evidence shows that the rate quoted to Ostrander was for "emigrant's movables," and that this rate, as agreed upon and published, did not include oats, except such as were to be used by the emigrant for seed or feeding animals in transit. Other oats were subject to higher rates. The agent at Oto testified that Ostrander informed him that the oats were intended for seed. Ostrander denied this, and the agreed statement of facts says that the agent informed Ostrander that he could ship oats at emigrant's rates if they were raised by him. But the agent had no right to change the published rates of the company in that way, and, if he said this to Ostrander, it is evident that he was acting without authority, for, in his telegram to the general agent describing the goods, he says: "Party wants to ship 600 bushels of oats to be used as seed." The general agent, on this information, directed him to bill them at emigrant rates. If this act of the local agent of the Illinois Central bound that company, it certainly did not bind the appellant company, which was not a party to the agreement, and had not authorized it.

An amendment to the interstate commerce act of congress provides that "any common carrier subject to the provisions of this act or, whenever such carrier is a corporation, any officer or agent thereof, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means shall knowingly and wilfully assist, or shall wilfully suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier shall be guilty of a misdemeanor." The pun-

ishment for such offense is a fine of not over $5,000, or imprisonment in the penitentiary, or both, in the discretion of the court. Sup. to Revised Statutes of U. S. (2 Ed.) vol. 1, 686; *Baird* v. *St. Louis, I. M. & S. Ry. Co.*, 41 Fed. Rep. 592.

This shipment from Oto to Rogers was interstate commerce, and controlled by the act of congress above mentioned. It is evident, therefore, that the local agent of the Illinois Central had no right to give Ostrander a lower rate on his oats by falsely classifying them as "emigrant movables," when they were not such in fact. The evidence conclusively shows that, with exception of about thirty bushels, Ostrander did not ship these oats for the purpose of using them as seed oats or for feeding stock in transit. He makes no such claim, and the agent therefore had no right to bill them at emigrant rates, for by so doing he in effect gave Ostrander a lower rate on oats than was allowed other shippers, and lower than the regular published rates. In other words, if Ostrander obtained the low rate by representing to the agent that the oats were to be used for seed, he was guilty of a fraud, and neither the appellant or the Illinois Central is bound by the contract obtained in that way. On the other hand, if he stated the truth, and the agent, in order to favor Ostrander, billed the oats at emigrant rates, knowing that they did not come within the published definition of emigrant goods, he was guilty of a violation of the law, and his contract did not bind appellant company. Take any view of the facts sustained by the evidence, and the appellant company was not bound.

We therefore think it had the right to charge for transporting the oats intended for seed according to its regular rates for goods of that kind and quantity. If Ostrander has any remedy, it is against the company making the contract.

Judgment reversed, and cause remanded for a new trial.

VAUGHAN v. WALTON.

Opinion delivered July 1, 1899.

MORTGAGE SALE—RIGHTS OF PURCHASER.—Though the purchaser at a sale under a power contained in a mortgage bids and pays the full amount of the mortgage debt, he is entitled to the possession of the premises during the period allowed by the statute for redemption. *Danenhauer* v. *Dawson*, 65 Ark. 129, followed. (Page 572.)

Appeal from Sebastian Circuit Court.

EDGAR E. BRYANT, Judge.

Ira D. Oglesby, for appellant.

Where the purchaser at mortgage sale bids the *full amount of the mortgage debt*, interest and costs, the mortgagor being in possession at the time of the sale, the purchaser is not entitled to possession of the lands during the year allowed the mortgagor in which to redeem. 54 Ia. 650; 78 Ky. 496; 43 Ill. 327; 63 Ill. 426; Wiltsie, Foreclosurses, 673; 35 Pac. 169; 52 N. W. 897; 61 N. W. 668. This case is not within the rule announced in *Danenhauer* v. *Dawson*, 65 Ark. 129.

H. C. Mechem and *F. A. Youmans*, for appellee.

This case falls within the rule laid down in *Danenhauer* v. *Dawson*, 65 Ark. 129. The fact that the property here sold for the full amount of the mortgage debt does not alter the rule.

RIDDICK, J. This is an action of ejectment to recover the possession of land sold under a power contained in a mortgage. The plaintiff bid at such sale the full amount of the mortgage debt, and, in consideration of the payment of that sum of money, the land was sold and conveyed to him.

The defendant, who is also the appellant, is the mortgagor, and she contends that the purchaser at the mortgage sale is not entitled to the possession of the premises sold until the expiration of the year allowed for redemption. The question presented is whether, when the purchaser at a mortgage sale bids

and pays the full amount of the mortgage debt, he is entitled to the possession of the premises sold during the year allowed for redemption, or is the mortgagor entitled to the possession during that time? The facts here are not entirely similar to those in the case of *Danenhauer* v. *Dawson* (65 Ark. 129) recently decided by this court; for the land there did not sell for enough to pay the mortgage debt, as it did in this case. But the question presented here was discussed at some length in that case, both in the opinion of the court and the dissenting opinion.

The decision in that case was based mainly on the conclusion reached by a majority of the judges that, when neither the deed nor the statute forbids, the right to the possession of the mortgaged lands follows the legal title. The legal title under our law passes by the mortgage to the mortgagee, and a sale and conveyance of the mortgaged premises by him under the power contained in the mortgage vests the title in the purchaser with the consequent right to possession and to the rents and profits. The title of the purchaser is subject to be defeated by the exercise of the mortgagor's right of redemption, but, in order to recover possession, and call the purchaser to account for the rents and profits, the mortgagor must redeem. *Danenhauer* v. *Dawson*, 65 Ark. 129.

Counsel for appellant earnestly contends that the rule announced in *Danenhauer* v. *Dawson* should not be extended to a case such as this, and asks why should the purchaser, under the state of facts in this case, stand in a more favorable position than the purchaser at an execution sale. Our reply is that the statutes controlling the two cases are different, and make the distinction complained of. The statute defining 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. Sand. & H. Dig. § 3100. There is no such provision in the statute regulating sales under mortgages and deeds of trust. If the mortgagor has any right to the possession of the premises after the sale, it must come from the statute giving the right to redeem, for he had none before the passage of that act. But by the statute the bare right to redeem is given, and nothing more. It does not confer, nor attempt to confer, upon the mortgagor any

right to the possession of the premises during the period allowed for redemption. As there is nothing, either in the statute or the mortgage, to the contrary, the right to the possession during the year allowed to redeem must follow the legal title, which, after the conveyance, is in the purchaser. In order to acquire the legal title, and the consequent right to possession, the mortgagor must redeem.

Counsel for appellant has cited several cases from other states holding that the mortgagor has the right to possession of premises until expiration of the period allowed for redemption, but these cases are based upon statutes and rules of law in reference to mortgages very different from those in force in this state. Take, for instance, the first case cited by counsel, that of *White* v. *Griggs*, 54 Iowa, 650. The decision in that and other Iowa cases is based on a statute which expressly provides that the mortgagor is entitled to the possession of the mortgaged premises until the expiration of the time for redemption. See *Myton* v. *Davenport*, 51 Iowa, 583, where the statute is referred to and quoted. And so the other cases cited by counsel for appellant on this point are based on statutes similar to that of Iowa, or upon adjudications to the effect that the legal title to the mortgaged premises does not pass by the mortgage to the mortgagee, but remains in the mortgagor until after the foreclosure and the expiration of the period for redemption. A mortgagee in those states gets no title, but only a security for his debt, until foreclosure is complete. *Wagar* v. *Stone*, 36 Mich. 364; *Taliaferro* v. *Gay*, 78 Ky. 496.

In this state the law is different. Our statute, as before stated, does not contain the provision of the Iowa law allowing the mortgagor to hold possession during the redemption year; and it is settled law with us that the legal estate in the mortgaged premises passes by the mortgage to the mortgagee, subject to be defeated by the performance of the conditions of the mortgage. Unless controlled by stipulations in the deed to the contrary, the right of possession in this state follows the legal title. *Whittington* v. *Flint*, 43 Ark. 504. For these reasons, we think the cases cited by counsel can have but little weight in this state.

The judgment from which this appeal was taken was ren-

dered by the circuit court before the decision of this court in *Danenhauer* v. *Dawson*, but the circuit judge arrived at the conclusion, subsequently reached by us in that case, that the purchaser was entitled to the possession, there having been no redemption.

While the question is not free from doubt, and is one on which difference of opinion may be expected, still we see no reason to alter the conclusion first reached by us, and the judgment is therefore affirmed.

STATE *v.* SLOAN.

Opinion delivered October 7, 1899.

66 575
69 473
d69 477
66 575
72 125
66 575
75 124
e76 201
76 205
j76 209
77 257
66 575
84 310
84 395
66 575
j78 462
81 564

1. CONSTITUTIONAL LAW—LEGISLATIVE DISCRETION.—Under the constitutional provision that "no state tax shall be allowed, or appropriation of money made, except to raise means * * * for defraying the necessary expenses of government, * * * except by a majority of two-thirds of both houses of the general assembly" (Const. 1874, art. 5, § 31), *held* that the power to appropriate money by a vote of a simple majority of both houses in order to defray the necessary expenses of government carries with it the right to determine what is a necessary expense. (Page 579.)

2. SAME—NECESSARY EXPENSES OF GOVERNMENT.—Where a bill making appropriation for building a new capitol received a majority merely of the votes of both houses of the general assembly, and the presiding officers of both houses decided that the bill received the majority necessary for its passage, from which decision no appeal was taken, it will be inferred that the legislature ratified the acts of its officers, and thereby declared that the bill was constitutionally passed, and therefore that the building of a new capitol was a necessary expense of government. (Page 579.)

3. APPROPRIATION BILLS—UNITY OF SUBJECT.—Under the provision of the constitution that all appropriations other than for the ordinary expenses of the government "shall be made by separate bills, each embracing but one subject" (Const. 1874, art. 5, § 30), the unity of the subject of an appropriation bill is not broken by appropriating several sums for several specific objects which are necessary or convenient to the accomplishment of one general design, notwithstanding other purposes than the main design may thereby be subserved. (Page 580.)

4. SAME.—The act providing for the erection of a new state capitol and making an appropriation therefor does not violate the constitutional

inhibition against embracing more than one subject in an appropriation bill, although it provides that the capitol shall be located on the present penitentiary grounds, and authorizes the penitentiary board to procure new grounds and build a new penitentiary, and to pay for the same out of the fund at its disposal at the time the act was passed. (Page 581.)

Appeal from Pulaski Chancery Court.

THOMAS B. MARTIN, Judge.

Jeff Davis, Attorney General, and *Chas. Jacobson*, for appellant.

The act under consideration is unconstitutional in that it embraces two special appropriations under one head and in one bill. Const. Ark. 1874 art. 6, §§ 29, 30; 7 So. 231; 4 La. Ann. 298; 13 Mich. 494; 32 La. Ann. 780; 39 Pac. 1096; 13 So. 688; 29 Pac. 771. The erection of the new capitol is not a necessary expense of government, and it requires a vote of two-thirds of both houses to appropriate money therefor. Const. art. 6, § 31. The joint resolution was not legally passed. It required the governor's assent. Const. U. S. art. 1; Story, Const. §§ 881, 891; 6 Op. Atty. Genl. 680; 3 Dall. 378; 16 Ind. 46; 5 Pick. 64; 1. W. Va. 176; 11 N. E. 180; 30 Pac. 40; 91 Ind. 546. Constitution is to be construed strictly. 5 Ind. 570; 7 N. Y. 9; 7 How. (Miss.) 724; 29 S. E. 364.

Thos. M. Mehaffy, *Jno. D. Shackleford* and *Carmichael & Seawel*, for appellees.

The bill did not contain two appropriations. Matters incidental to the main object of the bill may be included. 32 Ark. 520; *id.* 417; 35 L. R. A. 188; 55 Kas. 751; 146 Ind. 189; 18 Ia. 767; 95 Tenn. 546; 88 Tex. 515; 114 Cal. 141; 58 Kas. 268; 58 N. J. L. 168. A majority of two-thirds was not necessary, for the appropriation is for a "necessary" expense of government. Art. 5, § 31, Const. Ark. The legislature is the judge of what are such "necessary" expenses. Cooley, Const. Lim. 599, 200, 152, 154, 202, 220, 663; 15 N. Y. 545; 24 N. E. 6; 45 N. W. 33; 48 Ark. 370; 35 Ark. 73; 59 Ark. 513; 61 Ark. 21; 76 N. Y. 476; 35 Pac. 302; 30 La. Ann. 662; End. Int. Stat. §§ 375, 376, 421. The presumption is that the legislature acted properly, and found the appropriation to be necessary. 28 Pac. 673; 27 Pac. 1098;

47 Pac. 359; 28 N. E. 358. "Necessary" means "reasonably requisite and proper." 24 Conn. 347; 4 Wheat. 316; 46 Conn. 156. The court can take judicial knowledge of the necessity for a new state house. 20 Minn. 453; 45 Mich. 135.

BATTLE, J. This action involves the constitutionality of an act of the general assembly entitled, "An act to provide for the erection of a new State Capitol," approved April 17, 1899. For the purpose of erecting and completing a new state capitol building for the State of Arkansas at the city of Little Rock, in this state, this act provides for the appointment and organization of a board to be known as the "Board of State Capitol Commissioners," and, among other things, makes it their duty, as soon as practicable, to secure a suitable set of plans and specifications for the capitol building to be erected; and provides that the building shall be so planned that suitable quarters for all departments of the state government will be provided for in the best possible manner, and shall be fire proof and constructed of granite, brick and iron, and shall have a roof of either slate or sheet metal, and shall be provided with proper heating, lighting and ventilating apparatus and with the most modern sanitary arrangements; and that the reasonable cost of the building shall not exceed one million dollars. The act further provides that the board shall acquire, in the manner most economical and most desirable to the state, a piece of land suitable to the manufacture of brick and a granite quarry or a piece of granite land upon which a desirable quarry can be opened; and that the board shall appoint a superintendent of the granite quarry, who shall be a competent and experienced quarryman and shall have a thorough knowledge of stone cutting; and makes it the duty of the state penitentiary board to "turn over" to the board of state capitol commissioners such number of convicts as can be advantageously worked upon the construction of the capitol building and the manufacture of brick and the quarrying and cutting of stone therefor, not exceeding two hundred in number. The act then makes the provisions contained in sections 11 and 12 of the act, which are as follows:

"Sec. 11. That, for the purpose of carrying out the provisions of this act for the employment of an architect, superintendence, the purchase of tools, machinery, lands for the manufacture of brick, and quarrying of stone or leases thereof, and for the transportation of materials, and other purposes necessary to the carrying out of the provisions of this act, there is hereby appropriated the sum of fifty thousand ($50,000) dollars out of any moneys in the state treasury which may arise from the sale of lands, except school lands, belonging to the state for the two (2) years commencing on the 1st day of April, 1899, and ending on the 31st day of March, 1901, and also all fees paid to the commissioner of state lands, and also the net proceeds of the labor of the state convicts during the same period.

"Sec. 12. The new state house shall be located on the present penitentiary grounds of the state. The board of penitentiary commissioners is hereby invested with authority to abandon the present penitentiary grounds of the state, to turn the same over to the state house board for the purposes provided in this act. The penitentiary board is authorized to procure new grounds at such place as they may select in Pulaski county; cause new buildings and walls to be constructed for use as a penitentiary, the expenses thereof to be paid out of the fund now at the disposal of said penitentiary board." Acts 1899, p. 212.

It is contended, in behalf of the state, that the act is unconstitutional for two reasons: (1) Because the building of a new state capitol is not a necessary expense of government, and the act was not passed by a majority of two-thirds of both houses of the general assembly; and (2) because the act embraces more than one subject of appropriation. The sections of the constitution of which it is said to be in violation are as follows: "No state tax shall be allowed, or appropriation of money made, except to raise means for the payment of the just debts of the state, *for defraying the necessary expense of government*, to sustain common schools, to repel invasion and suppress insurrection, except by a majority of two-thirds of both houses of the general assembly." "The general appropriation bill shall embrace nothing but appropriations for the ordinary expense of the executive, legislative and judicial departments

of the state. All other appropriations shall be made by separate bills, *each embracing but one subject.*" Art. 5, §§ 31 and 30.

First. There is nothing in the constitution of this state defining what is a necessary expense of government, or denying or limiting the right of the legislature to determine the question. On the contrary, the right is impliedly delegated to it; for the power to appropriate money to defray the necessary expenses of government carries with it the right to determine what is a necessary expense. Upon this principle, local and special laws have been upheld by this court, notwithstanding the constitution denies to the legislature the power to pass a a special or local law in any case where a general law, which would afford the same relief, could be enacted; holding that the power to pass a special or local act under given circumstances empowered it to determine when the circumstances existed. *Davis* v. *Gaines*, 48 Ark. 370; *Boyd* v. *Bryant*, 35 Ark. 73; *Carson* v. *Levee District*, 59 Ark. 513; *Powell* v. *Durden*, 61 Ark. 21.

But how is it shown that the legislature decided that the building of a state capitol was a necessity of government? That question need not have been directly and expressly submitted for decision. When the vote of either house was taken for the purpose of deciding whether the bill introduced for the purpose should be passed, it was the duty of the presiding officer to decide whether it received the majority necessary for it to become a law, and if, a majority so voting, he decided that it had, and no appeal was taken, the house thereby ratified, approved and adopted his decision. When it had passed both houses in this manner, it was enrolled, and in that form was signed by the presiding officer of each house in attestation of the fact that it had passed both houses with the requisite majority, and, thus attested, was taken by a committee to the governor for his approval. In this way the legislature declared that it had passed the bill by a constitutional majority, and thereby that the building of a new capitol was a necessity of government; for its action is referable only to the power under which it could have constitutionally passed the bill; and it thereby

accomplished what it had undertaken to do, because it had the authority.

Second. Are there two subjects of appropriation in the act of April 17, 1899? Similar questions have arisen under a clause of the constitutions of many states which declared that no act should relate to more than one subject, and that should be expressed in its title. Under this clause, the courts have uniformly held that the unity of the subject of an act was preserved, and there was no violation of the constitution, so long as the different parts of the act relate, directly or indirectly, to the same general object fairly indicated by its title; and that the unity of object must be looked for in the ultimate end, and not in the details or steps leading to the end; for it is within the province of the legislature to determine and provide what means will contribute to the accomplishment of the general object of an act, and it may include under its title every means convenient or necessary or that may tend to carry into effect the main design, without regard to the secondary objects thereby accomplished. In speaking of a section of the constitution of Kentucky which declared, "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title," the Supreme Court of the United States said: "It is enough if the law has but one *general* object, and that object is fairly expressed in its title." Judge Cooley, in speaking of such clauses or sections, said: "The general purpose of these provisions is accomplished when a law has but one *general* object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone would not only be unreasonable, but would render legislation impossible." *Fletcher* v. *Oliver*, 25 Ark. 299; *People* v. *Mahaney*, 13 Mich 481, 495; *Ackley School District* v. *Hall*, 113 U. S. 135 *Carter County* v. *Sinton*, 120 U. S. 522; Cooley's Con. Lim (6 Ed.) p. 172.

From the doctrine of the cases referred to we deduce by analogy the following rule: The unity of the subject of an appropriation is not broken by appropriating several sums for several specific objects, which are necessary or convenient or

tend to the accomplishment of one general design, notwithstanding other purposes than the main design may be thereby subserved. As an illustration, suppose the legislature provides for the building of a capitol and appropriates a certain sum for the purchase of the brick used in its construction, a certain sum for the granite, a certain sum for all other materials, and a certain sum for all the labor performed in its erection. There would be but one subject of appropriation, and that would be the construction of a capitol, and the sum total of all these appropriations would constitute only one appropriation made for that purpose.

But it is said that there are two subjects of appropriations in the act of April 17, 1899, and they are a new capitol and a new penitentiary. This statement is not accurate. The board of state capitol commissioners is not unlimited in its power to build a capitol. They are required to build it on the "present penitentiary grounds of the state." They can build it in no other place. The subject of the act is, then, the building of a state capitol upon the ground now occupied by the penitentiary. The legislature had the unquestionable right to select the location and fix the dimensions of the ground to be used for that purpose. In the exercise of this right, they set apart the whole of the penitentiary ground for the site. When they located it as they did, they knew that the destruction of the present penitentiary will necessarily follow, and that some place will be needed for the confinement and safe-keeping of convicts when they will not be lawfully employed outside of the penitentiary walls. The laws of the state require a prison to be maintained for that purpose. The penalty for every felony which is not capital is imprisonment in the penitentiary. They doubtless foresaw that the building of a penitentiary cannot be postponed until the building of a new capitol, which will probably occupy many years, will be completed. They obviously found that it is necessary to procure other grounds, and to build a new penitentiary for the convicts to occupy when the old will be vacated, before the capitol can be located and erected as they desired or intended; that this is an obstacle which must be first removed; and that the necessity of the state demands it. To provide for this necessity, they authorized the penitentiary board to procure other grounds, and cause new buildings and walls to be

constructed for use as a penitentiary. This will be necessary, just as it is necessary to clear away the dense and heavy timber and undergrowth that encumber a lot of ground before the erection of a building on the same. The money that will be expended in the purchase of ground and the building of a new penitentiary will be in aid and for the furtherance of the main subject of appropriation, and will be expended in replacing what will be used in the accomplishment of the main object of the act; and the authority so to use it is equivalent to an appropriation of money to purchase grounds for the location of a capitol. In fact, every appropriation and provision in the act relates or contributes to the accomplishment of its general object—the building of a new capitol upon the penitentiary grounds.

The provisions made for the building of a penitentiary are peculiar. This act authorizes the penitentiary board to pay for the grounds, buildings and walls out of the fund at its disposal at the time the act was passed. The money to be expended and liabilities to be incurred are limited by this fund. No other fund can be used, the liabilities incurred cannot exceed it, and the limits of expenditures are circumscribed by it. No separate appropriation, however, was made, but the board was authorized to use the fund already at its disposal for other and additional purposes, which are specified.

Giving to the act the benefit of all reasonable doubts as to its validity, which it is our duty to do, we hold that it is constitutional.

Decree affirmed.

LITTLE ROCK TRACTION & ELECTRIC COMPANY v. WILSON.

66 582
69 618

66 582
90 241

Opinion delivered October 7, 1899.

GARNISHMENT—PRACTICE.—A judgment rendered by a justice of the peace in favor of a plaintiff against a garnishee in a case in which allegations and interrogatories have not been filed, though irregular, is not void. (Page 584.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

Rose, Hemingway & Rose, for appellant.

The statutes authorizing and regulating garnishments must be strictly construed. 5 Ark. 135; Rood, Garnishment, §§ 3, 5 and 6. The allegations and interrogatories provided for by the statute are jurisdictional, they being the means by which jurisdiction of the subject-matter is obtained. Hempst, 662; 16 Ore. 329; S. C. *id.* 539; 23 Ore. 206; 18 Ark. 593. The decrees of court, even of general jurisdiction, rendered without pleadings, are void. 93 U. S. 283; 56 Ark. 422; 55 Ark. 205. Since default by the garnishee must be in failing to answer interrogatories, there can be no default judgments where none are filed. 31 Ill. 144; 29 Ill. 315.

Marshall & Coffman, for appellees.

The judgment could not be quashed on certiorari unless void for want of jurisdiction. 55 Ark. 200, 205. Garnishment is a creature of statute, and the attitude of the garnishee and his duties are dependent solely upon the various statutes. Rood, Garn. § 178. Nowhere, except in Oregon, have the allegations and interrogatories been held to constitute a complaint in a new suit. Issues in garnishment are made up by denial and reply, and not by answers and interrogatories. 30 Mo. App. 341. The denial to the answer stands in the place of a complaint. 75 Mo. 380; 9 Enc. Pl. & Pr. § 844–5; Rood. Garn. 354. *After answer*, one attachment garnishment requires a regular suit. 52 Ark. 130. As showing the light in which one court has held the allegations and interrogatories, see: 31 Ark. 652, 656; *Ib.* 387; 8 Am. & Eng. Enc. Law, 1120; Sand. & H. Dig, § 3510; 4 Ark. 516; 18 *ib.* 593; 7 Ark. 338. Upon failure to appeal and answer, default is not taken on the allegations and interrogatories or for the amount alleged to be due in them, but *on the writ*, for the amount of the original judgment and costs stated therein. Sand. & H. Dig. § 3516; 5 Ark. 183; 8 Am. & Eng. Enc. Law, 1247; 12 Ia. 22. There was no lack of jurisdiction on account of want of pleadings.

BATTLE, J. Appellant filed a petition in the Pulaski circuit court, which, omitting the caption, is in the words and figures following:

"Petitioner, a corporation organized and existing under the laws of this state, represents to the court that, on the 21st day of June, 1897, the defendant, J. B. Dickinson, recovered a judgment before the defendant, T. W. Wilson, justice of the peace for Big Rock township, in said county, against Taylor Kincade for $13.75. On the 6th day of July, 1897, said Dickinson sued out a writ of garnishment before said Wilson, as justice of the peace, directed to the petitioner herein, requiring it to appear and answer on the 16th day of July, 1897, which writ was served on Allen H. Johnson, as president of the petitioner, on the day it was issued. On said 16th day of July, 1897, said Wilson, as justice aforesaid, entered up a judgment against the petitioner in favor of said Dickinson for $18.95, the amount of judgment and costs against said Kincade. Petitioner states that said Dickinson wholly failed to file the allegations and interrogatories required by law at the time of the suing out of said writ, or any time thereafter, and petitioner was not required to appear and answer said writ, and said justice was wholly without jurisdiction to enter said judgment against petitioner, and said judgment is absolutely void; all of which appears by a certified copy of the record of said justice, made a part of this petition. Wherefore your petitioner prays a writ of certiorari from this court directed to said Wilson, commanding him to bring up the records of his court in the case of J. B. Dickinson *v.* Taylor Kincade, Little Rock Traction & Electric Company, garnishee, to the end that the same may be inspected and said judgment quashed."

The circuit court refused to grant the petition, and rendered a judgment against the petitioner in favor of the defendant for costs; and petitioner appealed.

The question presented by the petition for decision is, is a judgment rendered by a justice of the peace in favor of a plaintiff against a garnishee in a case in which allegations and interrogatories were not filed at the time prescribed by law, or at any other time, void?

Section 3508 of Sandels & Hill's Digest of the statutes is

as follows: "In all cases where any plaintiff may have obtained a judgment in any court of record, or before any justice of the peace, and such plaintiff shall have reason to believe that any other person is indebted to the defendant, or has in his hands or possession goods and chattels, moneys, credits and effects belonging to such defendant, such plaintiff may sue out a writ of garnishment, setting forth such judgment, and commanding the officer charged with the execution thereof to summon the person therein named, as garnishee, to appear at the return day of such writ, and answer what goods, chattels, moneys, credits and effects he may have in his hands or possession belonging to such defendant to satisfy said judgment, and answer such further interrogatories as may be exhibited against him."

In *Probst* v. *Scott*, 31 Ark. 652, this court held that a writ of garnishment issued under this section of the statute, though not an execution, is in the nature of an execution, and is a means provided for obtaining satisfaction of the judgment of the creditor out of the property of the debtor, and that the defendant in the judgment upon which the writ issued could, under the constitution of 1868, select the debt owing him as exempt from a garnishment process, provided it did not exceed the amount he was allowed to hold as his exemption from sales under executions. In other cases it was held that the service of a writ of garnishment created a lien in favor of the plaintiff in the judgment upon any indebtedness of the garnishee to the defendant, and that no subsequent arrangement or cancellation of the indebtedness between the garnishee and defendant could defeat the lien thus acquired. *Martin* v. *Foreman*, 18 Ark. 249; *Adams* v. *Penzell*, 40 Ark. 531; *St. Louis, I. M. & S. Ry. Co.* v. *Richter*, 48 Ark. 349.

Section 3508 was amended by the act of April 19, 1895. As amended, the statute provides that a writ of garnishment may issue "in all cases where any plaintiff may begin an action in any court of record, or before any justice of the peace, or may have obtained a judgment before any of such courts, and such plaintiff shall have reason to believe that any other person is indebted to the defendant, or has in his hands or possession goods and chattels, moneys, credits and effects belonging to such defendant." No condition upon which the writ shall be issued,

except those named, is prescribed or required. It is true that the act of April 8, 1889, provides that "the plaintiff shall, on the day on which he sues out his writ of garnishment, prepare and file all the allegations and interrogatories, in writing, with the clerk or justice issuing such writ, upon which he may be desirous of obtaining the answer of such garnishee touching the goods and chattels, moneys, credits and effects of the said defendant, and the value thereof, in his hands and possession at the time of the service of such writ or at any time thereafter." Before the enactment of the code of practice in civil cases, the statutes upon garnishments provided that the allegations and interrogatories should be prepared, and filed "on or before the return day of the writ." The act of 1889 re-enacted these statutes, making only a few changes, but made none as to the conditions upon which the writ should issue, but left the statutes which were re-enacted unchanged in that respect, at the same time providing that the allegations and interrogatories should be filed on the day of its issue, which may be either before or after. The object of the change was probably to allow the garnishee more time in which to prepare his answers, and for no other purpose.

The chief jurisdictional fact is the commencement of the action in which the writ of garnishment was issued, or the rendition of the judgment upon which it was issued. In the latter case it serves as an execution, seizing and holding the credits and effects of the defendant in the hands of the garnishee for the purpose of satisfying the judgment; and in the former case, as an order of attachment to seize and hold the credits and effects for the satisfaction of the judgment the plaintiff shall recover. In both cases the clerk or justice of the peace has the right to issue it, regardless of the filing of the allegations and interrogatories, and the officer to whom it is directed can lawfully serve it. The filing, then, of the allegations and interrogatories is not necessary to create a lien upon the property of the defendant in the possession of the garnishee. Thus far the court can safely go within the limits of its jurisdiction without the filing of any pleading. It is not reasonable to suppose that it was the intention of the statutes that the court or justice of the peace shall lose the juris-

diction so far rightly exercised, and that the issue and service of the writ shall become void, by the failure to file the allegations and interrogatories, when their language expresses or indicates no such intention. But we do not mean to say that the allegations and interrogatories need not be filed. They ought to be filed, but the failure to file them cannot defeat the jurisdiction of the court, but, like any other failure of a court exercising its jurisdiction to conform to the law in any important particular, constitutes an error for which a judgment against the garnishee can be set aside on appeal or writ of error, but which could not have been reached as a general rule by a writ of certiorari at the time the judgment appealed from in the case before us was rendered.

The writ of garnishment gives the person therein named as garnishee notice of the object of its issue, and commands him to appear at its return day, and answer what goods, chattels, moneys, credits and effects he may have in his hands or possession belonging to the defendant. To this extent it serves as a summons and a pleading. The allegations and interrogatories call his attention to, specify and remind him of, the goods, chattels, moneys, credits and effects supposed to be in his possession, touching which he is required to answer. If they had not been required by the statutes, there could be no necessity for their filing. The fact that the proceeding instituted by the writ may, so far as it affects the garnishee, be in the nature of an action against him does not render the filing of the allegations and interrogatories a prerequisite to the investiture of the court or justice of the peace with jurisdiction. This was a matter clearly within the control of the legislature.

In the case before us the appellant had a full, complete and adequate remedy by appeal. It lost it by its own negligence, and is not entitled to the relief sought.

Judgment affirmed.

RIDDICK, J., took no part.

66 588
69 145

66 588
75 257

66 588
85 430

588
66 315
86 137
88

66 588
90 510

STANDARD LIFE & ACCIDENT INSURANCE COMPANY v. SCHMALTZ.

Opinion delivered October 7, 1899.

1. INSURANCE—ACCIDENTAL KILLING—EVIDENCE.—In an action against an accident company to recover for the accidental killing of plaintiff's husband, the proof was that deceased was a railroad machinist, and that one of his duties was to remove cylinder heads of engines. He was a strong man, and had frequently removed cylinder heads without injury. On the occasion when his fatal injuries were received, the cylinder head stuck, and he picked up a steel bar and removed it, and as he did so he dropped the bar and caught the cylinder head to prevent its falling. He was immediately taken sick. His stomach filled with blood, of which he vomited great quantities. He groaned; his face became deadly pale, and assumed a blanched, anxious expression, indicating great pain. He continued to vomit blood at intervals until he died. His physician testified that his death was caused by the rupture of a blood vessel in his stomach. *Held*, that there was evidence to sustain a finding of the jury that his death was accidental. (Page 593.)

2. ACCIDENT INSURANCE—RISKS CONTEMPLATED BY PARTIES—Although a policy of accident insurance stipulates that it does not cover injuries from "lifting," the insured will nevertheless be liable for an accidental injury so received by insured while engaged in the customary duties of his employment, where the application for insurance notified the insurer of the nature of his occupation. (Page 596.)

3. PROOF OF DEATH—WAIVER.—Evidence that an accident company knew that the beneficiary in a policy expected to collect the policy and relied upon it to furnish the customary blanks for proof of death by accident, and wilfully encouraged her to rely upon it to furnish such blanks until the time for making the proof had expired, and failed to furnish any, is sufficient to support a finding that the company had waived the proof. (Page 597.)

4. EVIDENCE—PREJUDICIAL ERROR.—Evidence tending to prove an undisputed fact in the case cannot be prejudicial, however incompetent. (Page 600.)

5. SAME—INVITED ERROR.—Where appellant, on the cross-examination of a witness, elicited testimony relating to the probability as to the mode in which deceased received injuries, it cannot complain if on re-examination appellee elicited testimony relating to the same subject. (Page 600.)

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

H. C. Hynson and *Scott & Jones*, for appellant.

The death of the insured, though perhaps accidental, was not from "accidental cause." The means or *cause* of his death was not accidental, though the result may have been unforeseen or accidental. 76 N. W. 683; 127 U. S. 661; 75 Wis. 116; 47 N. Y. 52; 144 Mass. 572; 44 Pac. 996; 1 Am. & Eng. Enc. Law, 331; 112 N. Y. 422; S. C. 8 Am. St. Rep. 763; 80 Mo. 251; 28 S. W. 877; 3 N. E. 818; 1 Am. & Eng. Enc. Law, 291; 23 Fed. 712; 131 U. S. 100; 3 Joyce, Ins. § 2863; 30 S. W. 879; 70 N. W. 460; 154 Mass. 77; 44 Pac. 996; 60 Ark. 381; 22 S. E. 976. This case is covered by the stipulation, in the policy, against liability for injuries from "overexertion, wrestling, *lifting*," etc. 22 S. E. 796. There was no waiver by appellant of the proof of death within sixty days. 44 S. W. 464; 64 Neb. 590; 11 Mo. 278; 43 N. H. 621. The statements made by deceased to his physician the day after the injury were not part of the *res gestae*. 51 Ark. 509; 73 Fed. 774.

Williams & Arnold, for appellee.

The jury, upon all the evidence, were entitled to say whether the cause of decedent's death was accidental. An injury is from "accidental cause" if it is produced by means which were neither designed nor calculated to cause it. 131 U. S. 60; 29 C. C. A. 223; S. C. 85 Fed. 401; 12 U. S. App. 381, 386, 387, 389; 5 C. C. A. 347, 350, 351, 353; 55 Fed. 949, 952, 953, 955; 1 Fost. & F. (Eng. N. P.), 505; 69 Pa. 43 (1893); 1 Q. B. 750; 24 C. C. A. 309; S. C. 78 Fed. 754. The jury may infer an accident from other facts in proof. 24 C. C. A. 654; 79 Fed. 423. The "lifting" which caused decedent's death was an ordinary incident of his employment, and was contemplated by the parties when he was insured as a machinist. 57 N. W. 186; 63 N. W. 593; 1 Am. & Eng. Enc. Law (2 Ed.), 310, 311, 319; 95 U. S. 673–9; 65 Mo. 328; 65 Ark. 61; 52 Ark. 11. The testimony of decedent's physician as to his statements was admissible. The statements were *res gestæ*. 40 S. W. 909; 2 Cinn. Sup. Ct. Rep. 98; S. C. 4 Big. Life & Acc. Ins. Rep. 366; 46 Barb. 369; 11 Allen, 324. Not only was the jury justified in finding that

there was a waiver of further proof of death, but the information furnished substantially complied with the requirements of the policy. 52 N. W. 582; 52 Ark. 11.

BATTLE, J. Catherine Schmaltz sued the Standard Life & Accident Insurance Company for the sum of two thousand dollars, upon a policy of insurance against accidents, which was executed by the defendant to her husband, E. Schmaltz, in his lifetime. She alleged in her complaint that the defendant insured her husband, for her benefit, against the loss of life resulting from bodily injuries caused solely by external, violent and accidental means; and that, on the third day of April, 1897, her husband, while engaged in the performance of the duties incident and pertaining to his employment and occupation as a machinist, in an effort to remove the cylinder head of an engine he was repairing and to prevent the same from falling, violently, unexpectedly and accidentally, and by external means wrenched his body in such a manner as to rupture one of the blood vessels of his stomach, and thereby caused his death; and that, immediately after his death, "she gave notice thereof, and within the time prescribed by said policy made out and forwarded to said insurance company proofs of his death, and that she had in all other respects complied with the provisions and requirements of said policy."

The defense to the action was as follows: The deceased did not suffer death from injuries by external, violent, and accidental means, the policy having specially exempted the defendant from liability for all injuries which resulted from lifting or over-exertion, and he came to his death by those means; and the proof of death had not been furnished as required by the policy.

The issues of fact were tried by a jury, and they returned a verdict in favor of the plaintiff for $2,000, the amount of the policy, and the court rendered a judgment in her favor for that amount against the defendant; and it appealed.

First. The appellant contends that the verdict was not sustained by sufficient evidence. The undisputed facts are: (1) The appellant insured E. Schmaltz for the benefit of appellee, his wife, in the sum of $2,000 against loss of life re-

sulting from bodily injuries caused solely by external, violent and accidental means, and agreed to pay that amount to her in the event of death caused by such means. And (2) the insured died within the term of his insurance from a sudden and unexpected rupture of one or more blood vessels in the stomach. But appellant insists that the death was not caused by external, violent and accidental means. Upon this point the trial court instructed the jury as follows:

"1. If you find from the evidence that E. Schmaltz came to his death by violent, external and accidental means in removing the cylinder head of an engine, and if you further find that the removal or lifting of said cylinder was in the line of his occupation and duty as a machinist, and that he incurred no more risk or danger in removing or lifting said cylinder head than was customary among reasonably prudent machinists in the performance of like duties, then you are instructed that the removal of said cylinder head was not within the exceptions of the policy.

"2. A person may do certain acts, the result of which may produce unforeseen consequences, and may produce what is commonly called accidental death, although the means are exactly what the man intended to use and did use, and was prepared to use. In such case the means would not be accidental, although the result might be accidental. In this case you are told that the plaintiff must prove by a preponderance of the evidence that the injury to the deceased was caused by external, violent and accidental means, and it is not sufficient that she prove that the result of the means employed by deceased was unforseen, unexpected and accidental.

"3. If the jury find from the evidence that, in the removing of the cylinder head from the engine, and carrying it off and putting it down, deceased acted in the manner he intended to act, and used the means he intended to use in the manner he intended to use them, and in so doing a blood vessel was ruptured, then you are told that the injury was not the result of accidental means, and plaintiff cannot recover.

"4. The jury are instructed that if they find from the evidence that deceased was removing a cylinder head from an engine, and in so doing he used the ordinary and usual means

employed under the circumstances then existing, and without the occurrence of any unforeseen, accidental or involuntary movement of the body in removing said cylinder head, a blood vessel was ruptured in the body of deceased, then the cause of the injury was not accidental, and you are instructed that the burden of proof is on the plaintiff to show by a preponderance of the evidence that (there) was such an unforeseen and accidental or involuntary movement of the body, and that this caused the rupture of the blood vessel."

As the correctness of these instructions is not questioned by either party, we make no comment upon them.

The evidence adduced in the trial tended to prove, substantially, the following facts: E. Schmaltz, at the time he was injured, was a strong, healthy, active, muscular man, weighing from one hundred and seventy to one hundred and seventy-five pounds. He had occupied the position of railroad machinist for seven or eight years; was employed in that capacity at the time he was insured, and when he was injured, and in the intervening time; and had frequently lifted cylinder heads from engines without accident or injury. Railroad machinists usually perform this duty; and it is not a dangerous undertaking, though the piece of machinery is unhandy. On the 3d of April, 1897, he removed a cylinder head seventeen inches in diameter and about one inch thick, and weighing about eighty pounds, from an engine. He did so in the usual way. It was uncomfortably warm, and he used some "waste" to protect his hands. The head stuck, and he picked up a steel bar and removed it, and as he did so he dropped the bar and caught it (the cyclinder head) as quickly as he could in order to prevent it from falling, and while he was in a stooping position, standing on his toes. A witness, who saw him catch it, says he "supposed from his movements it was as quick as possible." He was immediately taken sick. His stomach filled with blood, of which he vomited great quantities. He groaned; his face became deadly pale, and assumed a blanched, anxious expression, and clearly indicated that he was suffering great pain. He continued to vomit blood at intervals until he died. His physician, who attended him in his last illness, testified that his death was caused by the rupture of a blood vessel in his stomach.

We think that the evidence was sufficient to sustain the verdict of the jury as to the means of death. The facts in this case are similar to those in the *United States Mutual Accident Association* v. *Barry*, 131 U.S. 100. In that case the plaintiff's husband was, at the time of his injury, robust and in good health, weighing from 160 to 175 pounds. He and two others jumped from a platform four or five feet from the ground. The other two alighted safely; but the plaintiff's husband, Dr. Barry, ruptured a blood vessel of the stomach, from which he died. Upon this evidence the trial court instructed the jury as follows: "We understand from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice and not from any perilous necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty; but you must go further and inquire, and here is the precise point on which the question turns: was there or not any unexpected or unforeseen or involuntary movement of the body, from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting. Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to do, in the way he intended to? Did he or not unexpectedly lose or relax his self control in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body, in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the question in hand.

"And I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated, or would naturally anticipate, then any resulting injury was not effected through any accidental means. But if, in jumping or

alighting on the ground, there occurred from any cause any unforeseen or involuntary movement, turn, or strain of the body, which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means.

"Of course it is to be presumed that he expected to reach the ground safely and without injury. Now, to simplify the question and apply to its consideration a common-sense rule, did anything, by chance or not, as expected, happen, in the act of jumping or striking the ground, which caused an accident? This, I think, is the test by which you should be governed, in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means."

Again on the question of external or visible marks of injury the court said: "Visible signs of injury, within the meaning of the certificate, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see, but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs." In addition to this, the court instructed the jury that the jumping from the platform was external and violent means within the meaning of the policy. That the main question was "whether there was an accident."

Mr. Justice Blatchford in delivering the opinion of the Supreme Court of the United States in that case, on appeal from the decision of the lower court, said: "It is further urged that there was no evidence to support the verdict because no

accident was shown. We do not concur in this view. The two companions of the deceased jumped from the same platform, at the same time and place, and alighted safely. It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all of the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term "accidental" was used in the policy in its ordinary, popular sense, as meaning "happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;" that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

In the case before us the deceased was a strong, muscular man. The cylinder head removed weighed only eighty pounds. He had been engaged in the service in which he was employed at the time of his death seven or eight years, and in that time had frequently removed cylinder heads without detriment to himself. Other machinists had been accustomed to do the same kind of work without injury. The jury could have reasonably inferred from the evidence that the death of the deceased was caused by "external, violent and accidental means."

The case at bar is unlike *Feder* v. *Iowa State Traveling Men's Association*, 78 N. W. Rep. 252, cited by appellant. In that case, "the decedent, at the time of his death, was about twenty-six years of age, and had been in Denver, where his death occurred, about nine months. He was suffering from consumption, and went to Denver, and resided there on account of his health. He was benefited by the change of climate and the medical treatment he received, and his health had been considerably improved, and was constantly improving at the

time of his death. During the day of his death he had been as well as usual, and in the evening was with two of his brothers in their office. Preparatory to leaving it, the decedent went to a window to close the shutters. A chair stood in front of the window, and he stood on his toes, and reached over the chair towards the shutters, and, as he did so, blood began to flow from his mouth. He was placed on a lounge, and died within a few minutes." In commenting on these facts, the court said: "The cause of his death was hemorrhage from a ruptured artery, and the evidence would have authorized the conclusion that the rupture of the artery was not due to the disease from which he was suffering. There is no evidence that he fell, slipped, lost his balance, failed to catch the shutter when he reached for it, or that it moved at his touch more or less readily than he had expected it would move; in other words, there is no evidence whatever that anything was done or occurred which he had not foreseen and planned, excepting the rupture of the artery, and the consequences which resulted from it."

In *Feder* v. *Iowa State Traveling Men's Association*, 78 N. W. Rep. 252, the decedent was in a debilitated condition. He was incapable of making much effort, physically, without subjecting himself to injury. In an effort to close the shutters of a window, which could not have required much exertion, he ruptured an artery. It did not appear in the report of the case we have that he had made the same or a similar effort at any time before the fatal injury. In the case before us the facts are different. The decedent, at the time of his injury, was healthy and strong, and had removed cylinder heads frequently in safety, and others in the same employment had done the same act without injury. At the time he was injured he was attempting to perform the same act in the usual way, but there is reason to believe that he failed in this, and in an effort to prevent the head from falling he made some sudden, unusual, unexpected and involuntary movement of the body, which caused the injury from which he died. In this way only we can reasonably explain why his last removal of the cylinder head was attended with injury and the others were not.

Second. One of the stipulations of the policy sued on was that it did not "cover * * * * injuries * * * * from

overexertion, wrestling, lifting, * * * unnecessary exposure to danger." Appellant insists that it was exempt by this stipulation from liability for the injury which caused the death of Schmaltz. This contention is not correct. One of the duties of Schmaltz was to remove cylinder heads, when it was necessary to be done for the purpose of repairing engines in the course of his employment. The dangers and probabilities of accidents happening while in the discharge of that duty doubtless entered largely into the consideration and contemplation of the parties when the contract of insurance was made. As an evidence of this fact, the appellant required the insured to state his occupation and employment in his application for insurance, and to agree, if he should engage in any occupation or work rated by the appellant "as more hazardous" than the class agreed to, that was the occupation stated in the application, that his "insurance, weekly indemnity, or specific indemnity" should "be limited to the sum which the premium paid by" him would purchase at the fixed rate fixed by the "appellant" for such "increased hazard;" and provided in the policy that "if the insured" was "injured in any occupation or exposure classed" by appellant "as more hazardous than that stated in said application, the insurance, weekly indemnity or fixed indemnity" should "be for such sum" only as the premium would "purchase at the rate" fixed by "appellant" for such "increased hazard." Having obtained this knowledge or notice, and entered into this agreement, the appellant undoubtedly became bound, by the delivery of the policy, to insure Schmaltz, to the extent of $2,000, against all injuries which were caused solely by external, violent and accidental means while he was doing lifting, or making exertions, which pertained to his occupation and employment. Having paid for this protection, he was entitled to its benefit. *Dailey* v. *Preferred Masonic Mutual Accident Association*, 57 N. W. Rep. 186; *Phœnix Ins. Co.* v. *Flemming*, 65 Ark. 61; *Ins. Co.* v. *Brodie*, 52 Ark. 11; *Wilson* v. *Northwestern Mutual Accident Association*, 53 Minn. 470.

Third. It is also provided in the policy that affirmative proof of death must also be furnished to appellant "within two months of time of death; * * * else all claims based

thereon shall be forfeited." The appellant insists that this proof was not furnished, and that, in consequence of such failure, the appellee is not entitled to recover; and appellee contends that this proof was waived.

The facts, as shown by the evidence, are substantially as follows: H. O'Flynn was, at the time Schmaltz was injured and died, general manager of appellant for the states of Missouri, Arkansas and Texas, with his principal place of business in St. Louis, in the state of Missouri. When any person insured by appellant died from an injury, notice of his death was required to be sent to the insurer, and "proof blanks in such cases" were furnished by it through O'Flynn. He had authority to investigate, but not to settle amounts above $50. All blanks were furnished by the appellant.

On the 11th of April, 1897, and within six or seven days after the death of Schmaltz, and as soon as appellee was able, she wrote a letter to O'Flynn, asking for blanks in order to send proofs of the death of her husband. "She stated in her letter that he died from an accident on the 4th of April, 1897, giving the number of the policy by which he was insured and her address. On April 13th, O'Flynn, having received this letter, enclosed it to J. S. Heaton, the appellant's attorney who had charge of such matters, stating that he had merely notified the lady that her letter had been referred to the company, and that he would not do anything further until he heard from him. On the same day he wrote to Mrs. Schmaltz, acknowledging the receipt of her letter, saying that it had been referred to the company, and on hearing from them he would communicate with her further." On the 17th day of April he enclosed to Mrs. Schmaltz a blank 'in which the full particulars of the death of E. Schmaltz were called for, asking her to fill it out and return it to him, and he would forward it to the home office for final claim papers." She filled out the blanks, giving full answers to all questions contained therein, and forwarded it to O'Flynn by mail, and he sent it to appellant, and it received it. "On the 7th of May, 1897, Mrs. Schmaltz not having received final proof papers, wrote to O'Flynn a letter asking for an answer to her letter in which she had enclosed the blank notice of injury which had been furnished by him." Not hear-

ing from him, she went to H. C. Hynson, the attorney employed by appellant, and talked with him about the matter, and he said he could not understand her, and to send some one to talk to him about her business. She then went to see G. A. Hays, and requested him to look after her interest. On the 8th of June, 1897, Hays, in her behalf, wrote a letter to appellant, asking what it intended to do in reference to her claim under the policy. On the 24th of June he wrote to it (the appellant) that he understood from H. C. Hynson that no proof of death had been forwarded, and asked it to send the necessary blanks. (Appellant avoided mentioning the additional proofs until after the time for furnishing them had expired. In the meantime O'Flynn had made an investigation as to the death of Schmaltz. Hence the silence; no additional information was needed.) On the first of July, 1897, Hynson wrote a letter to Hays, in answer to his letter of June 24th, in which he denied liability under the policy on account of the failure to furnish proofs of the death of the insured, and refused, for appellant, to furnish blanks.

Appellant ought to have known that appellee relied upon it to furnish her with blanks to make all the proof of her husband's death that it required. It had been furnishing them for such purposes in such cases. Her letter to O'Flynn asking for blanks to make the necessary proof of death had been forwarded by its general manager to, and received by, it. In response it sent a blank notice of injury, and its agent, through whom it furnished blanks for proof, promised that he would, when the notice was returned to him, forward it to the home office for "final claim papers." The blank for notice was properly filled out, and returned to, and received by, appellant. It knew that she intended to collect the amount for which her husband was insured, and that she intended to make such proof of his death as it required, because she had given notice of death and asked for blanks for that purpose. There was sufficient evidence to induce the jury to believe that it (the appellant) willfully encouraged her to rely upon it to furnish the blanks to make all the proof it required, and intentionallyfailed to furnish any, and thereby waived proof of death by accident—that it willfully and deliberately lulled her into se-

curity, and when the time for making the proof had expired informed her that she had forfeited the policy. It cannot take advantage of such wrong.

Fourth. R. L. Grant testified, in the trial of this action, that he was a practicing physician, and that he attended E. Schmaltz in his last illness. He was allowed to testify, over the objection of appellant, that when he first visited him he asked him what caused the injury, "and he said he was lifting a cylinder head from an engine at the round house in the Cotton Belt yards, and he said he did not know exactly how it did occur;" that "he was lifting it off, and about the time he set it on the ground he felt an uneasiness in his stomach, felt something pop somewhere in him, he did not know where, and he walked off." Appellant insists that the court erred in permitting the witness to testify as he did. If this contention be correct, which we do not decide, no prejudicial error was committed, because the fact that the death of Schmaltz was caused by the rupture of a blood vessel in his stomach while he was removing the cylinder head of an engine he was repairing is undisputed. It was alleged by appellee in her complaint, and was not denied by appellant in its answer; and it was not disputed in the evidence. It is not, therefore, a reversible error.

Fifth. After appellant had cross-examined the witness, R. L. Grant, the physician, appellee asked him whether a rupture of the kind received by Schmaltz "would not more likely occur from a jerk or wrench of the body than from ordinary lifting," and he answered in the affirmative. Appellant objected to this testimony. But it had no right to complain; for on cross-examination the witness, in response to questions asked by it, had stated "that it was not necessary that there should be an unusual jerk or slip to rupture a blood vessel in the stomach, but that it might be ruptured by over-exertion, or by excessive lifting in the usual and ordinary manner of lifting or straining." Having invited appellee to enter this field of inquiry, it should not complain because she accepted the invitation. The testimony elicited by the appellant on cross-examination related to the probability of the manner in which the injury occurred; and that elicited by the re-examination of the witness was confined to the same subject. The witness, on

cross-examination, thought that a blood vessel in the stomach might be ruptured by over-exertion, or by excessive lifting in the usual and ordinary manner of lifting or straining, but, on re-examination, was of the opinion that such a rupture would more likely be caused by a jerk or wrench of the body.

Sixth. We do not think that appellant's objection to the third instruction, given by the court to the jury at the instance of appellee, is tenable when all the instructions given are read and considered together, as it was the duty of the jury to do.

Judgment affirmed.

DE ARMOND v. DE ARMOND.

Opinion delivered October 7, 1899.

66 601
f90 44

DIVORCE—REVERSAL—PRACTICE.—Where a complaint for divorce brought by a wife on the ground of wilful desertion by her husband was sustained by the proof, a decree dismissing the complaint for want of equity will be reversed, and the cause remanded with directions to enter a decree in favor of plaintiff. (Page 602.)

Appeal from Faulkner Chancery Court.

THOS. B. MARTIN, Chancellor.

E. A. Bolton, for appellant.

To constitute such desertion as entitles to divorce, three things are necessary: (1) Cessation of the deserter from cohabitation for the statutory period; (2) the intent of the deserter not to return; (3) absence of consent of the deserted party. 34 Ark. 37; 53 Ark. 484; 62 Ark. 611; 5 Am. & Eng. Enc. Law, 799. The evidence clearly establishes all these, and plaintiff was entitled to a divorce.

WOOD, J. Appellant brought suit for divorce. She alleged, with proper averment, wilful desertion of her husband for a period of more than one year. The answer denied the material allegations of the complaint. The cause was heard upon the complaint and answer and depositions of several wit-

nesses taken on the part of the plaintiff. The complaint was dismissed for want of equity. The statute provides that: "The circuit court shall have power to dissolve and set aside a marriage contract, not only from bed and board, but from the bonds of matrimony, for the following causes: * * * Second. Where either party wilfully deserts and absents himself or herself from the other for the space of one year without reasonable cause." The proof fully sustained the charge, and therefore the decree dismissing the complaint for want of equity was erroneous. The appellant is entitled to a divorce *a vinculo matrimonii*, as she prays in her complaint.

The decree of the chancellor is therefore reversed, and the cause is remanded, with directions to enter a decree in favor of appellant for divorce, and for alimony and attorney's fees.

KANSAS CITY, PITTSBURG & GULF RAILWAY COMPANY v. HOLDEN.

Opinion delivered October 7, 1899.

CARRIER—EJECTION OF PASSENGER.—A railway passenger cannot be ejected from a train for refusal to pay fare if he tenders the fare before any effort is made to stop the train in order to eject him; nor can he be ejected at all save at some usual stopping place. (Page 605.)

Appeal from Polk Circuit Court.

WILL P. FEAZEL, Judge.

STATEMENT BY THE COURT.

Appellee sued appellant for damages for alleged wrongful ejection from its train. Holden boarded appellant's train at Hatton, a mail station on its railroad, and entered the coach. Janssen is a station on appellant's road several miles north of Hatton, and DeQueen is a station some distance south of Hatton. Hatton was not a passenger station. Trains only slowed up there for the purpose of taking on mail. They were not allowed to stop and take on passengers there. When Holden entered the coach, he sat in a seat facing two passen-

gers who had bought tickets at Janssen from Janssen to DeQueen. One of these, when Holden sat down, placed a hat check in Holden's hat. He said he did it "just for a joke." When the conductor came to Holden and demanded his fare, Holden insisted that he had given the conductor a ticket from Janssen to DeQueen, exhibiting the hat check. The conductor looked through his tickets, and found no such one, and told Holden he knew he didn't get on at Janssen. They continued disputing about it until the train had run perhaps fifteen miles, when the conductor told Holden he was trying to beat him, and stopped the train and ejected Holden.

There was some proof to the effect that Holden pulled out of his pocket some silver, as much as three dollars, before the conductor pulled the bell cord to stop the train, and that Holden offered to pay his fare before the bell cord was pulled and before the train was stopped, but that the conductor refused to take it, saying according to Holden: "Damn you, I knowed you got on at Hatton, and your money ain't no good to you now." There was also evidence to justify the conclusion that the conductor at the time he ejected Holden was quite angry; that he took hold of Holden by the collar of his coat, and put his hands on Holden's shoulders, and pushed him out of train, Holden protesting that he had money to pay his fare. There was evidence also to the effect that Holden went upon the train intending and prepared to pay his fare.

There was a jury trial and a verdict for plaintiff in the sum of $50; also an attorney's fee of $50 was taxed as a part of the costs.

Trimble & Braley, *Jno. A. Eaton* and *H. L. Norwood*, for appellant.

Appellee was a mere trespasser, and appellant owed him no greater duty than that of not injuring him by gross or wilful negligence. 81 Ill. 245; 85 Ill. 80; 64 Ia. 48; 8 Kas. 505; 82 Ill. 427. One who refuses to pay fare and comply with the reasonable regulations of the carrier is a trespasser. 4 Fed. App. 413; 30 N. E. 1106; 28 Ind. 1. When a person boards a train at a place other than the proper one for the purpose, he does not become a passenger until he is accepted

by the carrier with the knowledge of the place of his offering himself. 44 Am. & Eng. Ry. Cas. 360; S. C. 19 Ore. 354; 24 Pac. 238; 68 Miss. 643; 10 So. Rep. 60; 31 Ill. App. 460; 58 Am. & Eng. Ry. Cas. 1; 161 Mass. 298; 37 N. E. 165. One desiring passage must present himself at the proper place and to the proper conveyance of the carrier. 66 Ga. 252; 91 Tenn. 428; S. C. 19 S. W. 232; 45 Fed. 448. The statute prohibiting the ejection of persons *for refusal to pay fare* at other than regular stopping places does not apply to cases where, through fraudulent imposition on the carrier or other improper conduct, the passenger gives the carrier a right to eject him. For any offense against its reasonable regulations, other than that set out in the statute, the carrier has its common-law right of ejecting the passenger at any safe place. 49 Ark. 437; 34 Am. & Eng. Ry. Cas. 507; S. C. 16 Pac. 937; 19 Mich. 305; 37 Am. & Eng. Ry. Cas. 100; S. C. 25 Fla. 40; S. C. 5 So. 633; 68 Ind. 586; 34 Am. Rep. 277; 34 Am. & Eng. Ry. Cas. 359; 39 Minn. 3; 38 N. W. 625; 22 R. R. Cas. 402; 34 Minn. 210; 25 N. W. 349; 43 Ill. 420; 27 Am. & Eng. Ry. Cas. 98; 69 Ia. 15; 28 N. W. 410; 1 Ill. App. 472. Persons intending to take passage on trains must apply at the proper place. 52 Am. & Eng. Ry. Cas. 351; 8 Utah, 165; 30 Pac. 366; 44 Am. & Eng. Ry. Cas. 360; 19 Ore. 354; 68 Miss. 343; 10 So. 60; 31 Ill. App. 460; 91 Tenn. 428; 19 S. W. 232; 45 Fed. 448. Having no right on the train, plaintiff cannot complain of the manner of his ejection. 47 Ia. 82; 29 Am. Rep. 458. The tender of fare by appellant came too late. 52 Ia. 342; S. C. 3 N. W. 121; 52 Am. & Eng. Ry. Cas. 324; S. C. 88 Ga. 529; S. C. 15 S. E. 13; 40 Am. & Eng. Ry. Cas. 649; S. C. 104 N. C. 312; S. C. 10 S. E. 556; 13 Am. & Eng. Ry. Cas. 31; S. C. 39 Oh. St. 444; 101 N. Y. 367; S. C. 54 Am. Rep. 699; S. C. 26 Am. & Eng. Ry. Cas. 185; 6 Am. & Eng. Ry. Cas. 327; S. C. 132 Mass. 116; S. C. 42 Am. Rep. 432; 16 Am. & Eng. Ry. Cas. 374; S. C. 9 Lea, 180; S. C. 42 Am. Rep. 668; S. C. 42 Fed. 787; 44 Am. & Eng. Ry. Cas. 402; S. C. 44 Kas. 394; 24 Pac. 500; 47 Ia. 82; 29 Am. Rep. 458; 15 Gray, 20; 77 Am. Rep. 347.

WOOD, J., (after stating the facts.) The verdict settled

the controverted questions of fact in favor or appellee. Evidently the jury were justified in coming to the conclusion that, if Holden had paid his fare promptly on the demand of the conductor, he would have been accepted and permitted to ride as a passenger, notwithstanding he boarded the train at Hatton, where passengers were not received. The mere fact of his getting on at Hatton, therefore, made no difference. The conductor did not object to that, for, after being informed that Holden had boarded the train at Hatton, he elected to treat him as any other passenger, and demanded of him his fare. The conclusion seems warranted from the proof that it was only the persistent refusal of Holden to pay his fare and the aggravating circumstances thereof, and not the fact of his having boarded the train at Hatton, that caused his ejection. The conduct of Holden was exceedingly reprehensible. Those who go upon trains for the purpose of becoming passengers thereon, to enjoy the privileges and be entitled to the benefits and protection of passengers, must conform to the reasonable requirements of the carrier in regard to the payment of fare for transportation. One who enters a train with the *bona fide* intention of paying his fare but who wilfully and unnecessarily from whatever motive, delays the conductor in the collection thereof beyond the time required for the convenient and orderly dispatch of the carrier's business in that particular may, if he persists until an effort is being made to stop the train, be treated as refusing to pay fare, and ejected from the train for that reason. Hutchinson, Carriers, 587 *et seq;* 4 Elliott, Railroads, § 1637; 1 Fetter, Carriers of Passengers, § 314.

A systematic and orderly dispatch of the business of common carriers of passengers by railways, so as to be conducive to the comfort and convenience of the traveling public, would not be at all compatible wlth a capricious, wilful or unnecessary delay upon the part of one or more passengers in the matter of the payment of fare for transportation. Railroads "are entitled to the payment of full fare upon demand." The moment the passenger declines after reasonable opportunity has been given to pay, the carrier is released from all obligation to carry him. *Hoffbauer* v. *D. & N. Ry. Co.*, 52 Ia. 342. See

note to *Stone* v. *Ry. Co.*, 29 Am. Rep. 458; 1 Felter, Carriers of Passengers, § 314.

The jury were justified in concluding that Holden went upon appellant's train with the intention of becoming a passenger, and of ultimately paying his fare. The conductor, waiving the place of his getting on, offered to accept him as a passenger by demanding his fare for transportation, and by permitting him to ride several miles as a passenger, and, by not treating him as a trespasser *ab initio*, and ejecting him immediately for getting on at an improper place for the reception of passengers. Having done all this, without taking any steps to eject him until (as the jury found) he had offered to pay his fare, the conductor could not then eject him.

"According to the weight of authority, and the better reason," says Judge Elliott, a passenger who has persistently refused to pay his fare or procure a ticket cannot gain a right to be carried and make the expulsion unlawful by a tender of the fare after the conductor has begun to expel him." Elliott, Railroads, § 1637, and authorities cited. In this case the jury might have found that the conductor did not begin to expel Holden until after he had tendered his fare. He therefore had no right to expel him. But if we were wrong about this, and the peculiar circumstances of Holden's refusal to pay his fare for so long justified his ejection, still the judgment was correct; for, under our statute, after the conductor had elected to treat Holden as a passenger, he could not thereafter eject him except at some usual stopping place selected by the conductor. Sand. & H. Dig., § 6192. Then the conductor would be justified in using whatever reasonable force might be necessary and proper to eject the recusant passenger; but the passenger, although in the wrong, would still be entitled to protection against unnecessary and wanton violence or insult. Hutchinson, Carriers, § 580g; 4 Elliott, Railroads, § 1637.

As a judgment against the railroad is inevitable from what we have said, it becomes wholly unnecessary to discuss objections to the instructions of the trial court, and its judgment is affirmed.

HOUSTON v. STATE.

Opinion delivered October 7, 1899.

INDICTMENT FOR ALTERING MARK OF HOG—ALLEGATION OF VALUE.—In an indictment for a felony consisting of the felonious altering of the mark of a hog with intent to steal the same, it is unnecessary to allege the value of the animal. (Page 608.)

Appeal from Ouachita Circuit Court.

CHAS. W. SMITH, Judge.

J. Y. Stevens, for appellant.

The indictment was defective because it did not allege the value of the hog 2 Bish. Cr. Proc. § 713; 33 Ark. 567; Sand. & H. Dig. § 1764. An indictment based on a statute must use such language as to clearly indicate the section upon which it is based. 1 Bish. Cr. Proc. § 612. The court erred in refusing the fourth and fifth instructions asked by appellant.

Jeff Davis, *Attorney General*, and *Chas. Jacobson*, for appellee.

The act of February 12, 1883, being subsequent to that on which this indictment was based (Sand. & H. Dig., § 1764), repeals the provisions of the latter as to punishment, and substitutes its own therefor.

RIDDICK, J. The appellant, Will Houston, was convicted of the crime of altering the mark of a hog, the property of T. J. Featherston, with intent to steal the same. The only question raised on his appeal to this court is whether it is necessary for the indictment to allege the value of the animal in offenses of that kind. The statute under which Houston was indicted was passed in 1869, and is as follows: "If any person shall mark, brand, or alter the mark or brand of any animal the subject of larceny, being the property of another, with an intent to steal or convert the carcass or skin of any such animal to his own use, or to prevent the identification thereof by the true owner, he shall on conviction be punished in the manner pre-

scribed by law for feloniously stealing property the value of such animals." Sand. & H. Dig., § 1764.

We think that the legislature intended by this statute to make the crime of altering the mark of a hog or a cow with intent to steal it punishable in the same way that the larceny of such an animal was punished. The statute, in effect, we think, means that one who commits such a crime shall be punished in the manner prescribed by law for feloniously stealing property of that kind and value. At the time this statute was passed, it was only petit larceny to steal a hog or cow under the value of ten dollars, but subsequently in 1883 the following statute was passed:

"Every person who shall mark, steal or kill or wound with intent to steal any kind of cattle, pigs, hogs, sheep or goats shall be guilty of a felony, and, upon conviction thereof, be imprisoned at hard labor in the penitentiary for any time not less than one year nor more than five years." Sand. & H. Dig. § 1700.

This statute makes it a felony to steal a hog without regard to its value. *Walker* v. *State*, 50 Ark. 532. As we think that the legislature, by the statute of 1869 first referred to, intended to punish one who altered the mark of a hog with the intent to steal it just as the larceny of such a hog would be punished, we are of the opinion that, since the passage of the statute of 1883 making it an offense punishable by imprisonment in the penitentiary to steal a hog without regard to its value, the same punishment is to be applied to one who alters the mark of a hog with intent to steal it.

We therefore hold that the circuit court did not err in holding it to be unnecessary to allege the value of the hog in the indictment in this case.

Judgment affirmed.

WEAR-BOOGHER DRY GOODS COMPANY *v.* SMITH.

Opinion delivered December 3, 1898.

TENANT BY THE CURTESY—SALE—RIGHTS OF HEIR.—A sale by a father of land of which he is a tenant by the curtesy will not affect the title of his daughter as heir of her mother, nor will she be entitled to share in the proceeds of such sale. (Page 611.)

Appeal from Howard Circuit Court in Chancery

WILL P. FEAZEL, Judge.

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

Fraud may be shown by circumstantial evidence. 59 Ark. 625; 52 Ark. 470. The close relationship of the parties to the transfer, together with other circumstances in the case, raised a presumption of fraud, and cast the burden on appellees to disprove same. 57 Am. Dec. 577; 50 Ark. 289; 55 Ark. 721; 46 Ark. 550; Wait, Fr. Con. §§ 300–301; Bump, Fr. Con. pp. 54–55. In no event would the daughter be entitled to more than her money and interest thereon. 16 Ohio St. 510. Having held out the funds of his "secret trust" as his own, and induced creditors to contract with reference to them, he cannot now withdraw these funds from their reach after such a lapse of time. 28 S. W. 147; 21 S. W. 529; 62 Ark. 32; 50 Ark. 46; 94 U. S. 22.

W. C. Rodgers, for appellees.

The objection that an answer is not verified cannot be raised on appeal for the first time. 29 Ark. 500, 502. There is no burden of proof cast upon appellees by reason of their relationship. As a creditor or purchaser for value in good faith, the child or parent stands upon the same footing as third persons, and the law as fully protects their rights. 82 Wis. 382; 46 Pac. 293; 63 Mich. 575; 5 Kas. App. 456; 74 Mich. 191; 104 Ind. 373; 64 Ia. 577; 104 U. S. 530. The burden is

on the one alleging fraud. 37 Ark. 145, 149; 69 Ia. 598; 68 Vt. 360; 26 Ore. 394; 65 Wis. 153; 38 Ark. 419, 427; 11 Wash. 550. Insolvency raises no presumption that a payment of a *bona fide* debt is fraudulent. 26 Ark. 20.

BUNN, C. J. This is a bill in equity to enjoin the Howard County Bank from paying out certain funds therein deposited to the credit of Mayme Smith, and subject to her order and that of her father, J. F. Smith, acting as her agent, she residing in the state of Mississippi; and to subject and appropriate the same, as the money of said J. F. Smith, to the payment of the plaintiff's judgment against him, which is largely in excess of the amount so deposited.

The evidence and pleading show that J. F. Smith was insolvent, and the main issue in this case is whether the said fund in bank is the property of the daughter, Mamye Smith, or the property of the father, J. F. Smith, the bill alleging that the same was deposited in her name and as her money in fraud of his creditors, the same belonging to him in fact.

J. F. Smith, in his answer and testimony, shows that his first wife, the mother of his said daughter, Mamye Smith, her only child, died in 1874, intestate, possessed of a tract of land, which he soon after sold for $400, and a house and lot in Paraclifta, which he sold in 1876 for $1,300, part of which he invested in a farm, which he improved, so that in 1883, or about ten years before giving his testimony, he sold for $2,500. He shows also that he received from his said first wife's estate about $500 in cash (date not named), and that he sold a piano and a horse belonging to his said daughter for $400, which was part of the $1,500 originally deposited to the credit of his daughter in said bank, which, with ten per centum per annum interest, made up his indebtedness to his daughter. He shows also that in his settlement with Hill, Fontaine & Co., his principal creditor, he received in cash from them to pay his home creditors the sum of $5,500, $3,700 of which he paid to his daughter on the debt of $7,000, and of this sum he paid $2,200 directly to her, and deposited in said bank to her credit the sum of $1,500; that he drew out of said bank in her name and for her from time to time until there remained the sum enjoined herein.

The allegation against him is, in effect, that the said money was and is his own, and not his daughter's, and that he caused it to be thus transferred to cheat, hinder and delay his creditors; and in response to this charge he attempts to show that the money is in fact not his, but the property of his daughter, and also her title thereto by the statement of facts recited above, with the further statement that he gave no note or other writing evidencing his indebtedness to his daughter, but that he used the funds with her full knowledge and consent, and that he was never her statutory guardian.

From his own statement he does not show that the proceeds of the land and the house and lot belonged to his daughter, while it may be conceded that the $500 derived from the grand father's estate and the $400 for the piano and horse were hers.

J. F. Smith could not lawfully sell the tract of land and the house and lot—the inheritance of his daughter—that is, he could not sell the fee in the same, which belonged to her. We may assume that he owned a curtesy right in both, and could, of course, sell that; but the proceeds of such sale would not belong to his daughter, but to himself. Now, then, since the $2,200 and the amount drawn out of the deposit more than cover the amount he shows he could have received of her money, it follows that the sum in bank is not hers but his, and of course subject to the claims of his creditors—that is to say, the judgment of the appellants, which is largely in excess of said sum.

The testimony of J. T. Conway, so far as it goes, tends to sustain this conclusion.

The decree is therefore reversed, and decree is entered here that the bank will pay over said sum to the appellant, or so much thereof as will satisfy their judgment, $1,739, and interest.

HUGHES and WOOD, JJ., dissenting.

66 612
76 98
66 612
d79 184
66 612
f85 497
66 612
e89 127

MUTUAL LIFE INSURANCE COMPANY *v.* PARRISH.

Opinion delivered June 10, 1899.

1. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—To prevent a miscarriage of justice, it is proper to grant a new trial for newly discovered evidence rebutting the undisputed evidence on which the verdict was based, where the party asking for a new trial had no knowledge of such rebutting evidence, and could not reasonably have been required to make effort to ascertain it before or during the trial. (Page 620.)

2. SAME—SURPRISE.—Where a party is surprised at the trial by testimony he knows to be false, and wishes to rebut it, it is his duty to ask a postponement or suspension of the trial till he can procure rebutting evidence; but if he does not know whether the testimony is true or false, nor whether he can rebut it, he will not be required to move for a continuance before he can ask for a new trial. (Page 620.)

3. INSURANCE POLICY—PRESUMPTION FROM POSSESSION.—The mere manual possession of a policy of life insurance by either party to the contract of insurance makes a *prima facie* case for that party, subject to be rebutted by proof *aliunde* that the contract was or was not complete and valid. (Page 621.)

4. SAME—WHEN INSURER NOT BOUND.—Where a contract of life insurance contained a condition that the policy should not take effect until the first premium should have been paid during the continuance in good health of the applicant, the insurer will not be bound unless such condition is complied with. (Page 622.)

Appeal from Pulaski Circuit Court.

JOSEPH W. MARTIN, Judge.

STATEMENT BY THE COURT.

The plaintiff sued on a policy for $2,000 upon the life of his deceased wife, bearing date July 24, 1896, alleging that she died October 12, 1896. The policy is exhibited with the complaint, and recites that it is issued "in consideration of the application for this policy, which is hereby made a part of this contract."

The answer set up that the application provided that the contract should not take effect until the first premium on the policy should have been paid during the continuance in good health of the applicant, and that said premium was not paid,

nor the policy delivered, during her continuance in good health, nor until she had fallen sick of the malady of which she died.

The case was submitted to the court, sitting as a jury, which found in favor of the plaintiff, and rendered judgment accordingly. Defendant appealed to this court.

On July 24, 1896, Mrs. Parrish, of Waldo, Ark., applied there for a policy of $2,000 on her life for the benefit of her husband. The application was forwarded through the state agency at Little Rock, and on the 24th of August the policy was received by the state agency. At the time of the application, Mrs. Parrish gave two notes for the first premium, one a "delivery note" payable when the policy was delivered, the other payable on December 1st. The state agent sent the policy and the delivery note to Drake, the soliciting agent. Drake was then in Texas, and sent the policy and note to Dr. Weaver at Waldo for delivery upon payment. Weaver received them about September 1st, and held them, waiting for Mrs. Parrish to take them up. On October 6th Mrs. Parrish went to bed with the illness of which she died. On the evening of the 9th, when her condition was desperate, her step-brother paid the premium, and took the policy. She died on the 12th. The application, which was made a part of the policy, provided that the insurance should not take effect unless the first premium was paid in cash while the assured was in good health.

On the trial Parrish swore that he demanded the policy before his wife fell ill, but that its delivery was refused unless he would pay the full amount of the delivery note, when he had been promised a discount.

After setting out in its motion for a new trial grounds in three several paragraphs, the fourth ground of the motion is as follows:

"4. That the testimony of the plaintiff, who was a witness in the trial of the cause, and testified, in effect, that he offered to pay Dr. J. H. Weaver $25 in full of the delivery note, and demanded the policy on or about September 1, 1896, and thereafter, and within a few days, that he offered to pay Dr. Weaver the sum of $29.70, the full amount of the note, and demanded a delivery of the same with the policy, and that he at other times offered to pay the amount of the first premium, or such

an amount, less an agreed discount, to Dr. Weaver, and that the offer was declined prior to the time when the payment was actually made on the 9th or 10th of October, 1896, and at a time when Mrs. Lenora Parrish was in good health, —was an entire surprise to the defendant and its officers and attorneys; that they had never heard of any such offers; that, in their correspondence with Dr. Parrish, he had never informed them of any such offer, and that they at the time the trial began in good faith believed that he had never made any offer to pay any amount on account of the first premium until the payment was in fact made, either on the 9th or 10th of October, 1896; that the defendant, its officers and attorneys, had information that the delay in delivering the policy was due entirely to the failure of the plaintiff to raise money to pay the first premium, and that he, on more than one occasion, requested of the local agent, J. W. Drake, and of the local examiner, J. H. Weaver, indulgence until he could arrange and get the money to pay the said first premium; that, such being the case, they were not prepared on the trial of the cause to introduce evidence to show that the testimony aforesaid was not true, or to prove that it was true that no offer was made to pay the premium until it was in fact paid, and that the delay was entirely due to the failure of the insured, Mrs. Lenora E. Parrish, and of her husband, Dr. J. C. Parrish, to raise money to pay the first premium, or $25 thereon. Defendant alleges that the truth is that no offer was made to pay anything on account of the first premium until the payment was actually made, and it believes that if a new trial is granted it can establish these facts to a jury; that it was not prepared to establish them for the reason aforesaid, that it had never heard, or had any reason to suppose, that a different state of facts would be contended for. The defendant further alleges that J. H. Weaver and J. W. Drake were not at the time of the trial, and had not been, for a number of years, in the employ of the defendant company; that Drake is a non-resident of the state, and Dr. Weaver lives at Waldo, a considerable distance from the place of trial; that, after the defendant learned of the testimony aforesaid, it was entirely impossible for it to have produced either of said witnesses to testify in the cause; that the defendant has learned,

since the trial of the cause that it can prove the facts as above set out by it by the said witnesses, Weaver and Drake, and it herewith files an affidavit, duly verified by each of said parties, in support of this motion. It therefore prays that the verdict be set aside, and a new trial awarded."

Attached to the motion were the following affidavits:

"W. E. Hemingway, being sworn, says that he represented the defendant as its attorney in preparing for the trial of this cause; that he never had any information to the effect, or which would warrant him in believing, that any offer to pay the first premium of the policy sued on was ever made until the time when the payment was actually made; that he had no reason to suppose that testimony to such effect would be introduced on the trial of the cause. On the contrary, all information led him to believe, and he in fact did believe, that there would be no such testimony, and that the delay in finally paying the first premium was due to the failure of the insured and of her husband to offer to pay it earlier; that the testimony of Dr. Parrish upon this point was an entire surprise to him, and that he knows no way he could have anticipated it, or that he could have met it; that he believes the facts set forth in the fourth ground in the motion for a new trial are true.

"W. E. HEMINGWAY.

"Subscribed and sworn to before me this 5th day of May, A. D. 1897. "H. G. DALE, Clerk.

"By J. J. MCEVOY, D. C."

Dr. J. H. Weaver says, upon oath, that he was in August, 1896, a local medical examiner of the Mutual Life Insurance Company, resident at Waldo, Ark.; that on or about August 31, 1896, the local agent of said company, J. W. Drake, delivered to him the note of Mrs. Lenora Parrish for $29.70, payable on delivery of the policy on her life, and the policy of the company to be delivered on payment of said note; that he notified Dr. J. C. Parrish that he held the policy and note, and requested him to call and pay the note and receive the policy; that Dr. Parrish, nor any other person for him or Mrs. Parrish, ever offered to pay the note or take the policy until it was done on the 9th or 10th day of October, 1896; that he was ready and willing, from the time the policy and note

were received, to deliver the policy on payment of the note, until instructed by Drake to hold policy for payment of second note, and did so the first time payment was offered. It is not true that on the 1st day of September, or any other day prior to that on which the note was paid, Dr. Parrish offered to pay $25, and take the note; or that the affiant refused to deliver the policy and accept settlement of the note on payment of $25; or the affiant told Dr. Parrish that he could not accept $25 in settlement of the note because he did not know what discount Drake had agreed to allow upon it. But affiant says he did know what discount Drake had agreed to give on the note, because he stated, in his letter to affiant forwarding the note and policy, that he had agreed to discount it $4.70, and he instructed affiant to take for it $25, which was the amount of it less $4.70. And affiant says that the delay in paying the note and taking up the policy was due to the failure of Parrish to provide money to pay the amount agreed upon, but agreed to do so in a few days later on. I received a letter of instructions not to deliver until the second note was paid. J. H. Weaver.

"Sworn and subscribed before me this 3rd day of May, 1897. B. F. Luce, J. P."

"Waldo, Ark., September 19, 1896.

"Mr. John Drake, Ladonia, Tex.:

"Dear Sir:—I have seen Dr. Parrish. He says only one of his notes is due now. He promised to have done that yesterday, but failed to do so. If you want me to collect both notes, please forward the other one to me, and instruct me what to do. Awaiting your answer, I remain

"Your friend, J. H. Weaver."

J. W. Drake, being duly sworn, on his oath says: "In July, August and September, 1896, I was the local agent of the Mutual Life Insurance Company, of New York, at Buckner, Ark. That the application of Mrs. Lenora Parrish, upon which the policy sued on was written, was taken by him. Sometime in August, 1896, was in Waldo, and Dr. J. C. Parrish asked if I had heard anything from his wife's application. I told him that I had not heard anything, but that I thought it would be approved, and that the policy would reach me in a few

days. Dr. Parrish said that he did not know whether he would have the money or not when it came, and for me to notify him when I received it, and give him time to get up the money. I received the policy on the 25th or 26th of August, and on the 31st of the same month I sent it to Dr. Weaver to deliver to Dr. Parrish, and requested him to collect only $25 on the $29.70 delivery note, and to forward the amount to H. L. Remmel, general agent at Little Rock. Within five days after this, I received a letter from Dr. Weaver, stating that Dr. Parrish did not have the money, and asked a few days' indulgence. I wrote Dr. Weaver that if Dr. Parrish would take it up by September 10th it would be all right. On September 12th, I received another letter from Dr. Weaver, stating that Dr. Parrish had not taken up the policy, and asking me what he should do. In answer to that letter, I wrote Dr. Weaver that I had a few days yet allowed me for the delivery of the policy, but not to deliver it unless both notes were paid. I had then grown afraid of Dr. Parrish, because of his failure to pay the delivery note and take up the policy. I had never before that instructed or authorized Dr. Weaver to demand anything on the note maturing in December, or to demand more on the delivery note than $25. If Dr. Weaver ever demanded more than $25 on the delivery note, or demanded anything on the second note before I wrote him in reply to his letter received on the 12th of September, I never heard of it. If Dr. Parrish offered to pay $25 to Dr. Weaver on or about September 1st, on the delivery note, or if a day or two later he offered to pay the face of the delivery note, or if Dr. Weaver declined either of such offers, I never heard of it. Up to the time that I wrote the last letter that I have referred to, which was the third one I wrote Dr. Weaver on the subject, I was anxious to deliver the policy upon the payment of $25 in full of the delivery note; and if Dr. Weaver demanded more upon that note, or made any demand on the other note, or declined to accept $25 in payment of the delivery note, it was not under instructions from me, nor reported to me, and I knew nothing of it. I kept all letters upon the subject from Dr. Weaver to me on file until a short time ago. I then heard in some way that the matter was settled, and, believing that to be true, I de-

stroyed all of them, except one, which was preserved by accident. I attach it to this affidavit. It was answer to my third letter, above referred to. I kept no copies of my letters to him.

"J. W. DRAKE.

"Sworn to and subscribed before the undersigned, a notary public in and for Fannin County, Texas, this the 3d day of May, 1897. "E. W. CUMMINS,

"Notary Public in and for Fannin County, Texas."

H. L. Remmel, being sworn, says that he is the general agent of the defendant company within the State of Arkansas, and that he believes the facts set out in the fourth ground of the motion for a new trial are true. "SID B. REDDING,

"Notary Public in and for the county of Pulaski, State of Arkansas."

And afterwards, to-wit, on the 3d day of June, 1897, the plaintiff appeared by T. J. Oliphint, his attorney, and the defendant by its attorney, and the motion for a new trial coming on to be heard, and the court, being sufficiently advised in the premises, orders that the motion be overruled. But the judge announced that if it was within his discretion, under the decisions of the supreme court of this state, to grant a new trial, he would be inclined to do so, if it were not for the fact that the affidavit of J. H. Weaver, in support of the motion for a new trial, shows that he demanded the payment of the note given in part payment of the first premium and payable December 1st, as well as the full amount of the delivery note before delivering the policy.

To the court's action in overruling the motion for a new trial the defendant at the time expected, and the court granted leave to defendant to prepare and file its bill of exceptions.

Rose, Hemingway & Rose, for appellant.

The evidence failed to show a valid tender. One who would make a tender must actually have the money and offer it. Anson, Cont. 361; 2 Greenleaf, Ev. § 603; 2 Pars. Cont. 642; 2 Chitty, Cont. (11 Am. Ed.) 1192; 1 Add. Cont. § 356. The tender must be made to one authorized to receive it. 25 Am. & Eng. Enc. Law, 918; 10 Ark. 18; 28 Ark. 95; 11 Ark. 189. There was no acceptance of the appellee's proposition for

insurance, in the mere sending of the policy to appellant's agent to be delivered on payment of the notes. Pollock, Cont. 12; Harr. Cont. 344; Metc. Cont. 18; L. R. 16 Q. B. D. 731; S. C. 38 Moak's Eng. Rep. 233; 13 Ark. 462; 1 Gray, 336; 103 Mass. 78; 117 Mass. 528; 102 U. S. 108; 2 Life Ins. Cases, 161; 41 Conn. 97; S. C. 5 Life Ins. Cases, 29; 3 *id.* 612; S. C. 17 Minn. 153; 35 N. E. 190; 18 W. Va. 782; 92 U. S. 377. No payment, except cash, was authorized by the company, and the agent could not bind it by any other sort of contract. 1 Biddle, Ins. §§ 201, 907. The court erred in denying appellant a new trial on the ground of surprise. The action of the trial court in this respect is reviewable here. 11 Ark. 671; 13 *id.* 362; 20 *id.* 496; 38 *id.* 498. Appellant's case falls within the rule allowing a new trial on the ground of surprise and newly discovered evidence. 2 Ark. 346; *id.* 33; *id.* 133; 17 *id.* 404; 26 *id.* 496; Hilliard, N. Tr. 521; 51 Mo. App. 572; 39 Ill. App. 585; 52 N. W. 267; S. C. 50 Minn. 551; 60 N. W. 493; 34 N. Y. 911; 14 S. E. 186; 69 N. W. 77.

T. J. Oliphint and *A. S. Kilgore*, for appellee.

Appellant should have asked for a continuance, if surprised. By failing to do so and proceeding to verdict, he waives the objection. 57 Ark. 64; 55 Ark. 568; 18 Conn. 484; 3 Mon. (Ky.) 14; 14 Wend. 62; 56 Cal. 473; 24 Cal. 240; 32 Cal. 211; 3 Graham & Waterman, New Tr. 968; Hayne, New Trial & App. § 85. The acknowledgment of receipt of the first premium, contained in the policy, is binding on the company, in the absence of fraud, error or duress. Bac. Ben. Soc. § 353; 10 La. Ann. 737; 37 Ill. 354; 77 Ill. 22; 41 Md. 59; 25 Barb. 189; 11 Ind. 462; 11 N. E. 620; 9 Western Rep. 284; 1 Disn. 2; 2 Disn. 128; 35 N. J. 429. Mailing of the policy containing the acknowlegment of receipt of premium completed the contract. 40 N. J. L. 103; 29 N. J. L. 486; 30 Fed. Rep. 902; 1 B. & Ald. 681; 6 Wend. 103; 9 How. 390; 2 Kent's Comm. 477; Bac. Ben. Soc. § 272.

HUGHES, J., (after stating the facts.) A majority of the judges of this court are of the opinion that there is error in the judgment of the circuit court in refusing to grant a new

trial upon the ground and for the reason set forth in the fourth ground of the motion, for which error the judgment should be reversed, and this cause remanded for a new trial.

The motion and affidavits appended speak for themselves, and certainly seem to show that the motion should have been granted, in order that the cause might be tried and determined upon all the facts of the case, and that there might not be a probable miscarriage of justice for the lack of important legitimate evidence, of the existence of which the appellant did not know, and which he could not have been reasonably required to make any effort to ascertain before the trial nor until the trial was over.

The court announced that if it was in his discretion, under the decisions of the supreme court of this state, to grant a new trial he would be inclined to do so, if it were not for the fact that the affidavit of J. H. Weaver, in support of the motion for new trial, shows that he demanded the payment of the note given in part payment of the first premium and payable December 1st, as well as the full amount of the delivery note, before delivering the policy. It seems, from inspection of the affidavit of J. H. Weaver referred to, that it does not contain this statement. It was not until after the tender is alleged to have been made that Weaver received instructions not to deliver the policy till both notes were paid. If the affidavit of Weaver is true, justice will be defeated, unless a new trial be granted.

When a party is surprised upon a trial by testimony he knows to be false, and he wishes to rebut it, it is his duty to ask a postponement or suspension of the trial till he can procure his evidence. He cannot take his chances, without doing this, and, if he loses, then ask for a rehearing for newly discovered evidence. *Nickens* v. *State*, 55 Ark. 567; *Overton* v. *State*, 57 Ark. 60. But if he does not know whether the testimony is false or true, nor whether he can rebut it, how can he make the affidavit necessary to entitle him to an adjournment? He can ask a new trial only after he has ascertained the facts, unless he would swear to facts about which he knew nothing to get a postponement, which would be perjury. To get a continuance, one must swear to facts.

As the case must be remanded for a new trial, we state the court's views of the law applicable to the case.

Whether a contract for insurance has been completed "depends upon the question whether the respective parties have come to an understanding upon all the elements of the contract,—the parties thereto; the subject-matter of insurance; the amount for which it is to be insured; the limits of the risk, including its duration in point of time and extent in point of hazards assumed; the rate of premium; and, generally, upon all the circumstances which are peculiar to the contract and distinguish it from every other, so that nothing remains to be done but to fill up the policy and deliver it on the one hand, and pay the premium on the other. If, upon all these points, an agreement has been arrived at, and no stipulation is made that the delivery of the policy shall be the test of the consummation of the contract, and no law makes such delivery a condition precedent to its validity from that time, unless another time is fixed, the contract is complete, and binds the parties. The policy, as we have seen, is not essential to its validity. It is but the form and embodiment, the expression and evidence, of what has already been agreed upon, adding nothing thereto and detracting nothing therefrom. And whether issued immediately upon the arrival at a mutual understanding, or subsequently, before the loss or after the loss, with or without knowledge, or not issued at all, the obligations of the parties are not affected." 1 May, Insurance (3 Ed.), § 43, and cases cited; *id.* § 43A, and cases cited. "If an application sent on approval is actually accepted by the company at its home office, though no notice of the acceptance is given to the insured, and afterwards rejected only because the premises burned before a policy was made out, the company is bound, and this question of fact is for the jury." *Id.* § 54C; *Welsh* v. *Continental Ins. Co.*, 47 Hun, 598. "A policy may be binding, although never delivered between the parties. *Loring* v. *Proctor*, 26 Maine, 18, 29. Everything depends on the intention of the parties. *Id.* § 55A.

"If there has been no payment of the premium, and no delivery in fact of the policy, the contract is, *prima facie*, incomplete, and he who claims under it must show that it was

the intention of the parties that it should be operative, notwithstanding these facts. The presumption of law is that the delivery of the policy and the payment of the premium are dependent upon each other. But this presumption may be rebutted by showing a waiver of the payment or such other facts as go to show the intention and understanding of both parties that the policy shall be valid as if delivered, notwithstanding the non-payment of the premium." The mere manual possession of the policy by either party makes a *prima facie* case for that party, subject to be rebutted by proof *aliunde* that the contract of insurance was complete and valid, or that delivery was essential to completion or not without delivery. 1 Bac. Ben. Soc. § 273, and cases cited.

Unless provided otherwise in the contract, the acceptance of the proposal to insure for the premium offered is the completion of the negotiation, and, after the policy or certificate has been forwarded to the agent of the company for delivery, the contract cannot be rescinded without the consent of the party insured. It is, of course, different if any act remains to be done by the insured, or if it be stipulated that it shall not be binding until delivered by the agent, or shall not be operative till the first premium is paid. *Northampton, etc., Ins. Co.* v. *Tuttle*, 40 N. J. L. 103; 1 Bacon, Ben. Soc. § 272, p. 538.

Without discussion of the various instructions given and refused by the court, we have given at some length the court's views of the law that seems applicable to the case under consideration.

For the error of the circuit court in overruling the fourth ground of the motion for new trial, the judgment is reversed, and the cause is remanded for a new trial.

WOOD and RIDDICK, JJ., concur in judgment, but not in the opinion rendered.

66 623
75 148

ST. JOSEPH'S CONVENT *v.* GARNER.

Opinion delivered October 14, 1899.

1. WILL—TESTAMENTARY CAPACITY.—The fact that a testator was of weak mind and not "bright," or that she was not as intelligent as the average girl, does not show that she did not have sufficient testamentary capacity to execute a will. (Page 628.)

2. SAME—PROBATE ON INSUFFICIENT EVIDENCE.—An order of the probate court admitting to probate a certified copy of the will of a resident, instead of requiring the original will to be produced, is irregular merely, and cannot be set aside for that reason on collateral attack. (Page 629.)

Appeal from Randolph Circuit Court in Chancery.

JOHN B. MCCALEB, Judge.

S. A. D. Eaton and *A. J. Witt*, for appellant.

The probate of a will is conclusive as to all matters affecting the validity of the will or of its probate. Croswell, Ex. & Adm. 34. It was error for the court to refuse to transfer this case to law, after the filing of the supplemental complaint and answer. Sand. & H. Dig. § 6121. The will, having been executed and proved according to the laws of Missouri, is valid here. 31 Ark. 175. The copy of the will was the best evidence of its contents obtainable at the time, and it was sufficient for purposes of probate. 14 S. W. 964. The sufficiency of the evidence adduced in the probate court is not open to review now. Sand. & H. Dig. § 7410; 31 Ark. 175; 34 Ark. 451; 51 Ark. 281; 46 N. J. Law, 211.

Chas. E. Elmore and *P. H. Crenshaw*, for appellees.

The probate court had no jurisdiction, because the testatrix, at the date of her death, was a resident of this state, and only a certified copy of her will was submitted for probate, instead of the original will. Sand. & H. Dig., § 7408 (cf. *ib.* 7413); 29 Ark. 52; Freeman, Judg. § 120; Black, Judg. § 208. Appellees have the right to collaterally attack the will in this proceeding. 37 S. W. 204.

BATTLE, J. "On March 8, 1897, appellant filed its complaint in equity against appellees, alleging that it was a corporation, organized and existing under and by virtue of laws of the state of Missouri, and that it was authorized to acquire and hold real and personal property; that it was the owner of the fractional southwest quarter (west of river), and the southeast quarter of the northwest quarter of section 13, township 19 north, range 2 east, Randolph county, Arkansas; that it derived title through one Ellen McKenzie, who, being the owner of said lands, executed her last will and testament on February 13, 1891, and thereby devised and bequeathed to plaintiff all her property, real and personal, of which she should die seized; that said Ellen McKenzie thereafter died seized and possessed of said lands, and that on July 13, 1891, said will was duly admitted to probate in Randolph county, Arkansas, by the probate court thereof, and admitted to record as a valid will; that defendants (except Poe) claim title adverse to the plaintiff by virtue of claim that they are heirs at law of Ellen McKenzie, deceased; that at July term, 1896, of the Randolph circuit court the defendants (except Poe) brought suit in ejectment against Jeremiah Poe, who was then in the possession of said lands, and that, at said term, in said cause, a judgment for the possession of said lands was rendered in favor of said plaintiffs; that the plaintiff had no knowledge or information regarding said suit, and was not made a party thereto, although plaintiffs in that suit well knew of this plaintiff's rights in the premises; that said court in said suit had no jurisdiction to determine rights of plaintiff, and that said suit and judgment were frauds on its rights; that said Poe has not been ejected under said judgment, but is in possession and holds as the tenant of plaintiff; that defendants threaten to eject him, and, unless restrained by this court, will proceed by judicial process under said void judgment to obtain possession of said lands, which, if done, will cause plaintiff irreparable injury, for which it will have no adequate remedy at law; and that defendants, Maggie Hamilton and Walter Hamilton, are minors, without statutory guardian. Plaintiff asked for a temporary restraining order, restraining defendants from interfering with the possession of Poe; that, on final hearing, the injunction be made perpetual,

and that plaintiff's title to said lands be quieted as to the claim of all the defendants; that said judgment be cancelled and annulled, and for proper relief."

"Adult defendants, on August 2, 1897, filed an answer and cross-complaint, in which they denied the corporate existence of plaintiff; denied that plaintiff was owner of said lands; denied that plaintiff derived title from Ellen McKenzie 'in manner and form as charged in complaint;' denied that Jeremiah Poe, their co-defendant, was in possession as tenant of the plaintiff; alleged that they, together with the minor defendants, Maggie and Walter Hamilton, were the owners and in the possession of the lands described by virtue of inheritance from Ellen McKenzie, who, at her death, was seized and possessed thereof; that the defendants are her 'sole' and only heirs at law; allege that said Ellen McKenzie was a resident of Randolph county, Arkansas, and that at the time of her death she was temporarily absent from the state for her health, and an inmate of the St. Joseph's Convent of Mercy; denied that Ellen McKenzie ever signed, made or executed the last will and testament on which plaintiff relies, or that she ever made or executed any will whereby she left any property to plaintiff; charges that if any instrument is in existence purporting to be the last will and testament of Ellen McKenzie, same is not her act and deed, and same was obtained fraudulently; deny that said will was ever admitted to probate or allowed of record in Randolph county, in manner and form provided by law, and deny that the will was ever proved in manner required by the laws of Arkansas. They further allege in their answer that Ellen McKenzie, at the time of her death, and for many years prior thereto, was of unsound mind, and 'disposing' memory, incapable of contracting and being contracted with, and incapable of disposing of her property by will or otherwise. They further alleged that Ellen McKenzie for a long time before her death was an invalid, and was an inmate of St. Joseph's Convent of Mercy for her health, and that plaintiff took advantage of her weak mental condition, and fraudulently induced and inveigled her into the execution of said pretended last will and testament, in fraud of defendants.

Defendants alleged that they obtained possession of lands in controversy by virtue of a judgment of Randolph circuit court, at July, 1896, term, in a cause wherein all of defendants, except Jeremiah Poe, were plaintiffs, and said Poe was defendant; and denied that said judgment was a fraud on the rights of plaintiff in this cause. Defendant Poe alleged that he was in possession of lands as the tenant of his co-defendants. Defendants further alleged that the pretended will is a cloud on their title. They asked that the complaint be dismissed, that the will be canceled, and that defendant's title to the land be quieted."

After this plaintiff filed an amended complaint, attempting to change the form of the action to ejectment, alleging that at the time the suit was commenced it believed that it was in possession of the land in controversy, but that it had since ascertained that the defendants were in possession; that it acquired title as alleged in the first complaint; and asked for judgment for lands and damages; and moved that the action be transferred to the law docket. The motion to transfer was overruled.

P. H. Crenshaw was appointed guardian *ad litem* of the minor defendants; and he accepted the appointment, and filed an answer, denying all material allegations in the complaints, and adopting the answers of his co-defendants.

Plaintiff filed an answer to the cross-complaint of the defendant, denying all allegations of fraud and undue influence, and alleging that Ellen McKenzie was a resident of the state of Missouri at the time of her death; that she was weak physically, but of sound and disposing mind, memory and understanding, and that she made the will, upon which it relies, "of her own volition, without solicitation or persuasion on part of plaintiff or any one in its behalf," and that it was probated according to law, and "is in all things valid and effective as a conveyance of real estate."

Defendants filed an answer to the amended complaint, denying allegations and claiming title as they did in the first answer.

The court, upon final hearing, found that the plaintiff "is a corporation duly organized and existing according to the laws of the state of Missouri; that Ellen McKenzie, on the 13th day of February, 1891, made and executed her last will and testa-

ment whereby she devised and bequeathed to the plaintiff the following lands in Randolph county, Arkansas, to-wit: the fractional southwest quarter (west of river) and the southeast quarter of the northwest quarter of section 13, township 19 north, range 2 east; that the said Ellen McKenzie departed this life in the city of St. Louis, Mo., sometime during the month of May, 1891, and that, at the date of her death, she was a citizen and resident of Randolph county, Arkansas, and that said last will and testament of said Ellen McKenzie had not been filed, admitted to probate, nor admitted of record, in conformity to the laws of the state of Arkansas; further that the said plaintiff claims title to said property by virtue of said will; that the said Ellen McKenzie was seized and possessed of the above-described lands at her death; and the court further finds that there is no proof to support the allegations of plaintiff's complaint that the said last will and testament of the said Ellen McKenzie was duly admitted to probate in said Randolph county, Arkansas. And the court further finds that the said Ellen McKenzie was never married, and that she left no issue of her body surviving her at her death, and that the defendants, except Jeremiah Poe, are next of kin and her sole and only heirs at law." Upon these findings the court dismissed the first and amended complaints; and the plaintiff appealed.

The undisputed evidence adduced at the hearing tended to prove that the plaintiff was a corporation, duly organized and existing under the laws of the state of Missouri, with authority to acquire and hold real and personal property; that Ellen McKenzie was the owner of the land in controversy at the time of her death; that she made a last will and testament, and thereby devised it to plaintiff; that it was proved and admitted to probate in the city of St. Louis, in the state of Missouri, where she died; and that a certified copy of the same, together with the proofs thereof, duly authenticated, were presented to the probate court of Randolph county, in this state, and the certified copy was admitted by such court to probate "as a valid will of lands in this state." The order of the court admitting it to probate is in the following words: "On this day the court examined a certified copy of the last will and

testament of Ellen McKenzie, deceased, late of the city of St. Louis, in the state of Missouri, together with the proofs thereof, duly authenticated, and, it appearing that said will had been duly executed and is the last will and testament of the said Ellen McKenzie, deceased, it is therefore considered and ordered by the court that said certified copy of said will be, and the same is hereby, admitted to probate as a valid will of lands in this state, and further ordered that said certified copy of said will, together with all endorsements thereon, be duly recorded in the book of wills in and for Randolph county."

The evidence also tended to prove that Ellen McKenzie was a resident of Rancolph county, in this state, at the time of her death; and that she died leaving the defendants, except Jeremiah Poe, her only heirs at law.

Over the objections of the plaintiff, Jacob Hufsteder, J. A. Luttrell, and D. W. Reynolds, who did not attest the will, were allowed to testify as to the mental capacity of Ellen McKenzie. Hufsteder, testified that her mind was weak, and that he did not think she understood what a contract is. Luttrell did not think that she was very bright, or that she was capable of making wills or contracts, and testified that her teacher said that she could not learn anything; and Reynolds said she did not have "a bright intellect like other children."

The effort to impeach the testamentary capacity of Ellen McKenzie was indeed feeble. If her capacity to make a will could have been questioned in this action, the testimony produced to prove her incompetent was not sufficient to accomplish that purpose. The substance of it was, she was "weak-minded," "not bright," not as intelligent as other girls, and the opinion of a witness, who, without stating any other facts, testified that he did not think that she was capable of making contracts or a will. There is nothing to indicate what he considered the test of the capacity to make a will. Hence his opinion is entitled to no consideration. The fact that her mind was weak, not "bright," or that she was not as intelligent as the average girl, does not show that she did not have sufficient testamentary capacity to execute the will in question. In *McCullough* v. *Campbell*, 49 Ark. 367, this court said: "Old age, physical infirmities, and even a partial eclipse of the mind would not prevent

her from making a valid testament, if she knew and understood what she was doing—if she could retain in her memory, without prompting, the extent and condition of her property, and comprehend to whom she was giving it, and be capable of appreciating the deserts and relations to her of others whom she excluded from participation in her estate."

The trial court obviously attached no importance to this testimony, but based its decree entirely upon its finding that the will was not probated according to the laws of this state. The reason for this finding is, a certified copy of the will was probated in Randolph county, in this state, where the testatrix resided at the time of her death, instead of the original. If this be true, was the probate of the will void, and can it be questioned in this action? This question was decided in the negative in *Janes* v. *Williams*, 31 Ark. 175. In that case James W. Duckett, the testator, resided at the time of his death in Sevier county, in this state. His will was proved and probated in the Court of Ordinary of Newberry district, in the state of South Carolina, and it was probated in Sevier county, in this state, by an authenticated copy of the will and the evidence by which it was established in South Carolina. Parties claiming as heirs and denying the existence of a valid will attempted, in an action in equity, to have the probate of the will in Sevier county set aside, because the authenticated copy, instead of the original, was probated in this state. Upon this part of the case this court said: "The order and judgment of the court to admit to record the will as probated, upon the copy of the will and the proof and orders certified from the Court of Ordinary of Newberry district never was set aside, nor was there any attempt made to set it aside. The attack made upon the validity of the will, and its probate in Arkansas, is, evidently, based upon the assumption that it was not a will unless probated as such; that as Duckett resided in Sevier county, Arkansas, the will should be probated there to give it effect, and particularly as the landed estate of Duckett lay in Sevier county, in this state. Let us concede that such should have been done, and that the evidence produced before the court of probate was not sufficient to warrant the judgment and decision of the court, and that the proceedings were erroneous,

yet, however erroneous the judgment of the court, it is binding upon all parties, until reversed by a higher tribunal. *Miller* v. *Barkeloo*, 8 Ark. 318.

* * * * * * * * * * *

"It will readily be perceived that, as the testator in this instrument had a known domicile, and did devise land, it was necessary that the will should be proved in the county of Sevier, where the lands lie, and which was also his place of residence, as alleged by plaintiffs. In the case before us, there was an attempt to furnish what was assumed to be competent evidence,—an authenticated copy of the will, the proof upon which it was established and probated in South Carolina, together with the statement that the testator's domicile was in South Carolina. This was all of the evidence. There was nothing to prove the contrary. It was presented for the consideration and judgment of a court of competent jurisdiction, and it was held to be sufficient. We think the evidence not sufficient; certainly not to devise real estate in Arkansas, but, until reversed and set aside, for which provision is made by statute, we do not feel at liberty to treat the judgment of the court as void. * * * We must hold that the will of James W. Duckett must be taken and held as a probated will, with all the rights which arise under it."

To the same effect was the law declared in *Ludlow* v. *Flournoy*, 34 Ark. 460. In that case the court said: "At the time the will of Thompson B. Flournoy was probated, the probate court had full jurisdiction of the matter. If it granted the probate on insufficient evidence, it was only error. It might have been corrected by making an issue of *devisavit vel non*, as prescribed by the statute. It is not shown that any fraud was perpetrated upon the court or parties interested in procuring the probate, and the proceedings and orders of the court must stand. They cannot be in any manner collaterally attacked, nor even directly in chancery, except for fraud, or, perhaps, some other particular ground of chancery jurisdiction."

In the case we have under consideration the probate court of Randolph county had jurisdiction of the probate of the will of Ellen McKenzie, deceased. It found that the will, of which

a certified copy was before it, "had been duly executed, and is the last will and testament of the said Ellen McKenzie, deceased;" and upon this finding ordered that the certified copy be admitted to probate as a valid will of lands in this state, and that it be recorded as such. According to the previous decisions of this court, this order or judgment cannot be set aside or questioned in this action.

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

APPENDIX.

I.

IN MEMORIAM.

AUGUSTUS HILL GARLAND.

At a meeting of the court held on Saturday, April 8, 1899, the Chief Justice, the Associate Justices and members of the bar being present, the Hon. Sterling R. Cockrill, formerly Chief Justice of this court, addressed the court as follows:

MAY IT PLEASE THE COURT:

In obedience to the request of my brother members of the bar of this court, I present resolutions adopted by them upon the death of Augustus Hill Garland, who had long been an honored practitioner in the tribunals of this state.

The history of a state is found in the biography of its leading citizens; but I do not aspire to write history. When an honest and capable chronicler is found for Mr. Garland, he will write an important chapter in the history of Arkansas, and the play of Hamlet without the prince would be as complete as the state's history in the time in which he lived without his name in the title role. It is enough for this occasion, more than my feeble effort in this line can even approach successfully, to endeavor to portray something of Mr. Garland as a lawyer, and so of his character, for no man can be a great lawyer without great character. Surely no place more appropriate than this could be selected for honoring his memory, for he was pre-eminently a lawyer, and it was through the courts, and through this court as the font of the jurisprudence of his state, that his efforts found their scope, and crowned his success.

He belonged to the middle generation of the citizenship of Arkansas—he was of the link between the Arkansas pioneer and those who were too young to participate in the events which led to the conflict of 1861.

The indomitable spirit which had caused the valiant whites to brave hardships in the western shadows of the Alleghanies, at a later day impelled their descendants, and other strong hearts who joined them, to repeat the

old story begun upon the plains of Shinar, when the "Sons of the East" went westward in their quest of fortune, invading the then trackless empire upon the sunset side of the Mississippi. Their slender forces trod the western solitudes amid dangers we cannot appreciate; and while their deeds are scarcely chronicled as history, they were fraught with consequences which after generations felt, and will continue to feel as long as they shall reverence the qualities which inspired the formation of this government. Those men were not engaged simply in the felling of forests and in the pastime of the chase. Their watchfulness and patriotism thwarted the British effort to crush the southern colonies, and later frustrated the design of Spain to erect a rival government west of the Alleghanies. The circumstances that surrounded them made great characters, and gave to America the best generations of citizens that ever made or upheld a government.

Mr. Garland's descent was from that sort of ancestry. In 1833, while he was but fifteen months old, and Arkansas had not yet donned the habiliments of statehood, his parents pushed from the settlements of west Tennessee into southwest Arkansas. His father died soon after. Like most other great men, he was fortunate in his mother. She was strong physically, intellectually and morally. Judge Hubbard, her second husband, whom she married while Mr. Garland was still a boy, was a New Englander, and tradition has it that he was a good lawyer. I only know of him that his stepson revered his memory, and spoke of him as an intelligent and just man.

The influence of the boy's early training and surroundings accompanied him through life. The honors that were afterwards showered upon him never for a moment turned his head. He was made of sterner stuff. The hardy characteristics of the pioneer were impressed upon his mind—the initial quality of greatness was born with him, and that quality is the maximum quantity of common sense. Fashionable society, which stood ready to open its doors to him, and whose parlors he would have graced and entertained, had no allurements for him. His simple tastes and economical habits, his detestation of pretense, sham and humbug, and his unwillingness to take the time from his labors that was necessary to keep up the formal social functions of a city, kept him from them. Once when he told a newly-rich senator from the West, who felt under obligations to him for advice and assistance in the senate, that he declined invitations to entertainments because he was too poor to return the civilities in like style, he was overwhelmed by an offer to lend him money for all such occasions as long as he needed it; and the kind-hearted millionaire could not comprehend the sensibilities of the nature that declined a voluntary proffer to loan money. The misfortunes which came from the wreck of families who, he used to say, lived beyond their means only to keep up with the social procession shocked him, and added another cause for his aversion.

In 1885 he insisted that the newly-inaugurated administration, of whose political family he became a member, should return to democratic simplicity of life, and set an example of frugality and industry. He followed his own preaching, and the attorney general's office was not only managed with marked ability, but without circumlocution or red tape.

Though averse to formal social functions, he was genial in the society of his friends. He was strikingly impressive in appearance; his manners

were a model of simplicity, and coupled with dignity when he desired; his hospitality was cordial, and as generous as his means would permit; and his table was bountifully supplied after the manner of the South.

He moved to Little Rock in 1856, and went the circuit, as was the custom then, attending court as far east as Chicot county. His first cases of note in this court were *Booker, ex parte*, 18 Ark., and *McGehee* v. *Mathis*, 21 Ark. Both involved large interests, and either might have made his fortune easy, he has told us, when he was not yet thirty years old. But this court deprived him of the opportunity in the first case by deciding it against him; and the civil war swept away the fruits of the second while it was pending in the supreme court of the United States, where he carried and won it, reversing the judgment of this court pronounced through Judge Compton.

His first office was as a member of the convention of 1861, which on its second sitting pronounced the divorce of the state from the Union. His influence, perhaps as much as any other agency, induced the convention at its first session to vote down the ordinance of secession; but when there was no escape from the arbitrament of arms, with deep regret and many forebodings, he, like the knightly Lee, remained with his state and people.

He represented Arkansas in the Congress of the Confederacy—first in the house and then in the senate—from May, 1861, until the collapse at Appomattox. Many were indicted for treason for the part they took in what he has been pleased to call "the row between the states." None of the cases was ever tried, and no court has ever adjudged that a charge of treason could be made out against any participant in that conflict. Mr. Garland sought and obtained a pardon from President Johnson in July, 1865, the pardon reciting that he had made himself liable for heavy pains and penalties. He said his pardon was "large and capacious," and made him a *novus homo;* but there was still an impediment to the practice of his profession in any court of the United States. In January, 1865, Congress had enacted that no person should appear as attorney in any cause in a federal court until he had taken an oath that he had never voluntarily borne arms against the United States, or held office under the Confederate government, or given aid, counsel or encouragement to any one engaged in armed hostility to the United States. The supreme court had adopted a rule which enforced the act. Mr. Garland had been enrolled in that tribunal before the outbreak of hostilities, and had cases pending there when the war ceased. He prepared a petition to that court to be allowed to resume his practice, and conducted the case in person, receiving efficient and gratuitous aid from Messrs. Reverdy Johnson and Matt Carpenter. After a reargument, which was requested by the court, the case was decided in his favor by the close vote of five to four. Thus did he vindicate the rights of lawyers against legislative encroachment, and relieve his southern brothers of the bar from the effect of a legislative decree of perpetual exclusion from the practice of their profession, restoring to them the means of livelihood. It was among the first crumbs of comfort that came to the south after the war. The case gave him national renown. It was a chapter in his life which he took pride in adverting to, and he was not averse to being referred to as "Ex parte Garland," the style under which the case is reported. The esteem in which he was held in Arkansas was evinced by his election to the United States senate in 1866 by a legislature whose loyalty was not sufficiently

vouched to enable him to take his seat. He continued the practice of his profession at Little Rock, recognized by all as a lawyer of very great ability, a man of irreproachable character, and of great popularity.

In 1874 occurred the civil revolution known in local annals as the Brooks-Baxter war. Baxter's election as governor had been declared by the legislature which was authorized to decide the question. Brooks, the independent republican, who had received the democratic support, backed by the republican machine which had given the office to Baxter, took possession of the state house, claimed to be governor, and set up an independent government. There was doubt, hesitation and division among the democratic leaders as to what course should be pursued. I shall refer to the history of that period no further than to state that Mr. Garland did not hesitate, but laid aside all other business to become the deputy secretary of state under Governor Baxter, and from that position in the stormy and perilous days that followed, aided as he was by wise and sagacious men, he controlled the situation at home, and directed the negotiations at Washington which resulted in the enfranchisement of his people and the restoration of his political party to power. The adoption of the constitution of 1874 and the selection of officers under it quickly followed. The democratic convention assembled, and twice tendered the nomination for governor to Governor Baxter, who declined it. Mr. Garland did not seek the office, but told his friends that he would prefer to shun its responsibilities. But when the people, who now felt the first impulse of returning power, had sought to pay a debt of gratitude to Governor Baxter, their minds turned with one accord to Mr. Garland as their leader; and at their behest he assumed the perilous command. Their selection was fortunate. The power that has the force to conquer has not always the wisdom to administer, and the difficulties which surrounded the outset of his administration were without parallel, even in the reconstruction period. With intelligence and judgment never at fault, unwarped by surroundings which were likely to cloud the keenest foresight, he placated or fearlessly withheld a constituency inflamed by the fresh recollection of wrongs and outrages which it was now in their power to avenge. He looked beyond the passion of the hour, and restrained, not only the unlicensed hand of violence, but protected his political enemies from the legal consequences of their acts, without the thought of its influence upon his political promotion. He pitched his policy on a plane so broad and liberal, and directed the defense of his title with such sagacity that he silenced the tongue of detraction, and made his position impregnable to the investigation of a partisan congress anxious to overturn the state government. As a consequence, Arkansas leaped from a position of distrust to one of confidence and honor in the sisterhood of states. The bare contemplation of the fate that would have come to the people from a vacillating or mistaken policy will cause a shudder to those who are familiar with the history of that period.

The catholicity of views which marked his previous course found operation in the United States senate from 1877 to 1885. He engaged in the notable debates of that period on leading questions, never frittering away his strength upon immaterial issues, nor creating antagonism upon unnecessary issues. He kept his mind in tune with his profession by discussing the legal side of legislative questions, the constitutionality of measures,

and the writings and fundamental doctrines of the fathers, in which he was deeply versed. Such was his reputation as a lawyer with his associates that Senator Edmunds (himself a great lawyer) stated in debate once that he had not investigated the question under consideration, but that he would take it for granted that the law was thus and so because the gentleman from Arkansas had so stated it. When he was attorney general, and was commonly spoken of to fill a vacancy in the supreme court of the United States, and was hounded by newspapers that cared more for sensation or political capital than truth, the honorable senator from Vermont again earned the good will of Arkansas by announcing that if Mr. Garland's appointment as a judge of the supreme court was sent to the senate, confirmation would follow without the formality of reference to committee.

The South had no statesman more valiantly loyal and true to his section than he. He gloried in her history and achievements. But his patriotism was national and all-embracing. Eschewing sectionalism in debate, his abilities were directed to the service of his whole country. He stood forth a commanding figure in the councils of the democratic party among great leaders—men able to steer its course from the rocks of dissension and division that have since threatened it, and he enjoyed many marks of their friendship and esteem. In his reception by his political opponents, there was a tone of intimate personal admiration and an absence of animosity that was not always observable in other cases.

He was ambitious of political preferment, but office had no charm for him if it involved what he believed was sacrifice of principle or compromise of conscience. He evinced that spirit in his administration as governor, and a notable instance followed his first election to the senate.

The settlement of the disputed debt of Arkansas had long been a subject of contention, and when the Fishback amendment to the constitution prohibiting its payment was proposed by a democratic legislature, the feeling for its adoption was intense, and the voters of that party were believed to be overwhelmingly in favor of the amendment. It is an axiom in practical politics, and one rarely unheeded by its adherents, that an angry majority is a dangerous menace to the security of office holding. In obedience to that maxim, prospective candidates for office in Arkansas were then as prompt to define their position on finance in favor of the popular side as they are to-day. Mr. Garland held a seat in the United States senate. To remain mum upon the question at issue was to make his re-election fairly sure. To reach the haven and escape the impending storm, he had only to emulate the example of the noble Scot, as recorded by the Immortal Bard: "The noble Scot, Lord Douglas, when he saw the fortune of the day quite turned from him, and all his men upon the foot of fear, *fled with the rest.*" But Mr. Garland believed that it was wrong for the people to sit in judgment in a cause in which they themselves were defendants, and he canvassed the state against it. It is not necessary for our purpose to-day to enquire whether he was right in his position on the amendment. The honesty of purpose with which he pursued his conviction at the risk of his political existence is itself a title to fame. If his arguments did not convince the friends of the amendment, his lofty position taught them that he was worthy of their trust, and they returned him to the senate. He was tolerant and charitable toward those who differed from his opinions, and his party, from whom he

differed, meted out the same measure to him. He received every democratic and every republican vote in the legislature, a few greenbackers, two, I believe, voting for his brother.

Is it strange that he should have cherished the constant design of spending his declining years among a people who had thus confided in him? With his character, he had, of course, lived too long in public life not to be poor, and, as soon as that impediment would permit, he intended to retire to the neat cottage overlooking his famous spring beneath at Hominy Hill. And why should he not have wished to retire from the turmoil of Washington City to the quiet of his country home?

> "Hath not old custom made that life more sweet
> Than that of painted pomp? Are not those woods
> More free from peril than the envious court?"

But his fond hope was not realized. Before he reckoned it,

> "Silence settled wide and still
> On the lone wood and the mighty hill,"

never again to be disturbed by him; and the "mighty hill," his country seat, which was destined to become the Hermitage of Arkansas, becomes only a memory. On June 26, 1899, in the usual course of his business, he argued a case in the Supreme Court of the United Saates. His arguments rarely exceeded forty minutes in time, and never was he known to take the full two hours allotted by the rule of the court. His argument had not been long, but it was obvious to those who heard him on this occasion that he had nearly reached his logical conclusion. He faced the court, raised his right arm as in gesticulation, and his lips moved, but the last word had been uttered—he *had* reached *his* conclusion, and he sank to the floor dead.

He fell not like an ancient tree that is eaten at the heart till it is too weak to stand, but like the sturdy oak that is rent by the storm. He passed like a reaper who is called from the field while there is yet light in the west to gather the grain that is ripe for his hand. He had not reached life's ultimate December, but it is better to go before one's mission is full and complete than to linger until the grasshopper shall be a burden, and the years draw nigh when thou shalt say, "I have no pleasure in them." Applying Mr. Garland's own language, used upon the death of Judge Miller: "Who does not wish when his own end shall come, it may be like his?"

> "Ere sun could blight or sorrow fade,
> Death came with timely care."

Doubtless it was as he would have wished it.

The Supreme Court of the United States adjourned in deference to his memory; honors were paid to his remains in Washington; the legislature of Arkansas passed appropriate resolutions of regret, appointed committees to meet his remains, and caused them to lie in state in the senate chamber, whence they were interred in Mt. Holly. He had had his share of tribulations, and they were now over. He had been a man of deep sorrows. Thrice was he left childless. His amiable and beautiful wife, who was the idol of his life, and whose memory after her death was his most consecrated relic, died upon the eve of the Christmas festival which followed his first election to the United States Senate. Later his daughter,

who partook of her mother's beauty, met with a tragic death in the fresh bloom of her womanhood. His brother and sisters passed away ahead of him, and his mother, who was in much the prototype of her honored son, died at his home only a few years ago while yet in mental vigor and still his great reliance. It was apparent to those who knew him best that the poignancy of his repeated griefs penetrated his soul, and cast a shadow upon his being. And yet, through it all, the bubbling effervescence of abounding life in him shed a continual sunshine over the lives of others. His jests, his anecdotes, his reminiscences, his comments were a treat to any audience. He himself has said that "if in this life, beset with so many trials and sorrows, we cannot soften and flavor it with some pleasantry and fun as we trudge along, it would be a dreary and cheerless journey indeed—in fact, almost unendurable." His quick and active sense of humor, which he was never shy of using, was perhaps nature's safety valve to relieve an overburdened nature.

If called upon to give his leading trait, the response must be, the wonderful simplicity of his character. It was reflected in his mode of life; it was apparent in his manners, which were devoid of all display; it was felt in the clearness of his statements and homely illustrations, in his strong power of analysis and in his directness in getting at everything. Style in speech or writing he always sacrificed for clearness. He never used florid language. He let his matter run before his words, and found honest, plain expressions for the thing intended in all brevity. Nature gave him a big, level head, with a strong, sound, healthy mind. Both man and books became his intelligent studies, and he mastered them well. He owed nothing to the influence of college, wealth or society for his advancement. Chance and opportunity play their part in human affairs, and it may be that some will attribute his success to luck; but let it be remembered that it is the wise who do govern their own fates, and wisdom must be conceded to him.

There were better scholars in our state than he, though he was learned and a graduate from Bardstown; there were more splendid orators, though his clear handling of facts was most persuasive; there were better mixers, though he was of cordial and winning manners; there were men better qualified perhaps for the dash of leadership, but there was none of stronger mental force.

He told me that Alexander H. Stephens said to him once that he had known every representative that Arkansas had sent to Congress, and that our state was never so ably represented as when Sevier and Ashley were her senators; and Mr. Garland's own estimate was that Ashley was the profoundest lawyer in his especial line—real estate—that the nation then possessed. But in Garland himself we beheld the mightiest son of our commonwealth. He had his detractors, as Washington and Lincoln and Lee have had He did not grow excited or morose about their attack. He acted upon the principle, if you would be avenged on your enemies, let your life be blameless. In that sense he is avenged.

There doubtless have been, and it may be there are now, other sons of Arkansas who, with his surroundings, might have been all he was in breadth of views and in success; but none has in fact filled the place he occupies. His services gave character to Arkansas in the eyes of the nation beyond those of any other of her citizens, and they are a heritage for

the south as well. His splendid achievements in public life, his grand manly character, his very simplicity of life, make it fitting that Arkansas should select the marble image of Augustus Hill Garland to forever represent her in the hall of the statues in the capitol at Washington, where the effigies of the nation's notables are collected. By that course we would belie the statement that states are always ungrateful.

In obedience to the request of the members of the bar, I ask that the resolutions adopted by them, together with the report of their committee, be spread upon the records of this court for preservation as a faint memorial of him.

Judge Cockrill then read the report and resolutions of the bar of the supreme court, adopted at a special meeting, as follows:

MR. CHAIRMAN—Acting under the mandate of the bar to prepare a suitable memorial touching the character of our late associate and brother, Augustus Hill Garland, your committee feel that it would be superfluous to attempt to compress into a brief compass even the principal events of a life that forms a part of the history of our state and of our country at large; events that have been again brought to the general attention since his death, and which exhibit a remarkable series of triumphs over difficulties and obstacles that often seemed to be insuperable.

Mr. Garland lived very much in the public eye. He was successively a member of our constitutional convention of 1861, a member of the lower house of the Cenfaderate congress, a member of the Confederate senate, governor of this state, a senator of the United States, and attorney-general of the United States under the first administration of President Cleveland. The general estimate of his abilities and of his personal merit are sufficiently attested by the fact that in his promotion to these high positions he never encountered any serious opposition. In all of them, whether administrative or legislative, he displayed such abilities and fitness as fully justified the confidence so often and so freely reposed in him.

The high places to which he was often called by the voice of his fellow-citizens furnish the best evidence that he secured and maintained through life that cordial appreciation that waits upon the union of mental vigor and of personal worth. It is sufficient now to say that the trusts so often confided to his keeping were never betrayed; that he performed the various tasks assigned to him with entire singleness of purpose and with conspicuous talents. A considerable part of his adult life was spent in a very stormy period of our history, during which time he was destined to take a prominent part in public affairs. In these positions he was necessarily exposed to criticism; but under the most trying conditions the fairness and uprightness of his intentions shielded him from reproach. Having no personal aims in view, he always devoted his energies to the duties of the hour, with a confiding belief that the deeds that are well done will generally bear their appropriate fruits, though the precise methods by which ultimate results will be reached cannot always be foreseen.

Though for many years Mr. Garland occupied very high positions in the councils of the state and of the nation, there was but little in his composition that was dogmatic; and, though he adhered consistently to opin-

ions that he had formed by mature reflection, yet he was so tolerant of the views of others that he was always singularly free from that extreme partisan spirit that is often reckoned as a necessary equipment for all who aspire to success in political life; as is shown by the fact that while he always secured the full support of his own political party, he at various times also received the support of many of his political adversaries. He carried with him into the political arena much of that judicial temperament that enables its possessor to perceive both sides of questions that provoke discussion, a faculty that a long and assiduous practice at the bar tends most strongly to cultivate, one that added greatly to his success in other fields of endeavor, and gave a certain unity to his career, which was extremely varied and full of vicissitudes. The same training enabled him to preserve his equanimity in the hour of victory and in periods of defeat.

Having mentioned these traits that are plainly visible in his public life, we must speak of the deceased as he was known to us intimately in daily intercourse for many years; and in doing so we wish to avoid that spirit of vain and indiscriminate eulogy of the dead that a keen sense of recent loss is apt to breed, feeling that extravagant praise can neither avail the departed nor communicate instruction to the living, and that the highest tribute that we can pay to the memory of our departed brother will be found in a truthful delineation of his character, as it appeared to those who knew him longest, and who had opportunities of observing him under a great variety of circumstances. It was to these, we feel sure, that he was most favorably known. That he had faults, that he made mistakes, is simply to say that he shared in the common infirmities of humanity; but they were far outweighed by a clear judgment, a mind of unusual strength, and by many shining virtues that greatly endeared him to those who knew him best.

Mr. Garland was from first to last far more of a lawyer than a politician, using that word in its popular sense. He never wavered in his allegiance to his profession. Unlike most lawyers who turn from the forum to engage in political life, he always maintained an unbroken intercourse with the courts and with the bar, and still found an unabated pleasure in the writings of the long line of illustrious authors who have most successfully cultivated the extensive fields of jurisprudence; whatever may have been his public avocations, these were the companions of his solitude. He was not at any time a general or miscellaneous reader of literary works. He had a few favorite authors, whose writings he would read and re-read with ever increasing admiration and affection.

Next after the works of writers who have attained to the highest distinction in jurisprudence, he preferred to read those of the great fathers of the republic which have shed a clear and brilliant light on our institutions, and have had a most powerful influence on their development and history.

The deceased was generous to a fault. His tastes were simple and inexpensive, and he cared nothing for the acquisition of wealth. His principal concern in matters of that kind was to keep out of debt, of which he had a great abhorrence. In every relation of life his conduct was scrupulously honorable.

One thing that contributed very largely to his success in his profes-

sion was that he was capable of doing an immense amount of labor without seeming hurry or fatigue. Though quick to seize and analyze the most complex details of fact, and to apply appropriate legal principles, and though his memory of both was remarkably retentive, and his legal knowledge very extensive, yet he never trusted to the inspiration of the moment, but placed his main reliance on uncompromising labor.

Mr. Garland was of a very kindly and tolerant disposition. He took men as he found them, and never demanded ideal perfection. Always considerate towards all who were connected with the administration of justice, officers, witnesses and jurors; courteous towards his adversaries, respectful and deferential to the courts, he rarely gave offence even to those who were unduly sensitive. He had a fine sense of humor, which often relieved the tedium of legal proceedings, but which never degenerated into buffoonery, and was never used to wound the feelings of others. Strong and forcible in his presentation of law and facts, eager and intent upon victory, nevertheless his advocacy was a model of fairness. If he could not win on the merits of his case, he never resorted to any questionable methods. Whether in or out of the court room, his manners were affable, simple and unaffected, and with his friends he was always affectionate and companionable.

Through habits of close study he acquired an extraordinary familiarity with the decisions of the supreme court of the United States, and often made use of them with striking effects. His acquaintance with them was not only thorough but critical; hence it was entirely consistent with his habits of thought that he should prefer to practice in that high tribunal, where many of his most splendid triumphs were gained, and with which his memory is in many ways inseparably linked. It was in that presence when in the discharge of his duty as an advocate, and while addressing the court in a cause then pending, that he was touched by the hand of death and his voice became silent forever!

It was a tragic end of a memorable career. The mysterious monarch that with equal footsteps knocks at the doors of the palaces of kings and of the hovels of the poor had invaded the very sanctuary of justice to single out his chosen victim.

No spot in all our land is so replete with solemn memories. Here were solved by the calm light of reason and the unbiased equipoise of the law many of the most momentous questions that have ever been submitted to a mortal tribunal. This was for a long period the chamber of the senate of the United States, and here were delivered the great speeches of Clay, Webster and Calhoun that must remain as models for all future time. Here also was stricken suddenly in 1848 with his last illness in his seat in the senate Chester Ashley. He was one of the ablest lawyers that ever practiced at our bar; and he had appeared in many cases of great importance in the federal court of last resort. The circumstances attending the death of our late colleague and brother, in that chamber haunted by so many memories, were not inappropriate to the life of labor and duty that here found an end.

The deceased was a man of very strong family affections, and the center of all his thoughts was the domestic hearthstone. In the latter years of his life he paid many sad tributes to humanity, and his closing hours were darkened by severe domestic bereavements, afflictions that his affectionate

nature would not permit him for a moment to forget, and whose poignancy time could not alleviate. His death tells us the old, old story that is repeated in every flower that blooms, and with every leaf that falls, that all of our strivings, all of our ambition, all of our contentions, all of our victories, have for their exhibition only a narrow and a temporary stage, and that the actors themselves and the objects for which they contend are alike but for a day. His record is closed. For those of us who knew him intimately an interesting and an instructive page has been torn from the book of our lives. To us from this day he is a cherished memory, while to the younger members of the bar his life may well be an insipiration and a hope.

Though the deceased was born in the neighboring state of Tennessee, he was brought to this state by his parents when he was an infant of one year of age. Consequently all of his early associations and most of those of his later life were with the people of this state, for whom he always entertained strong feelings of affection. It was by this state he was most honored, and he was always active in his endeavors to promote its welfare and increase its prosperity, objects which he always cherished with unwavering devotion. Though for many years much of his time was occupied with duties that required his presence in the national capital, yet he always retained his citizenship in this state, which was to him as the land of his birth, and where his body will this day be laid to rest with ceremonies appropriate to his public services and amid the concourse of mourning friends.

In view of the matters here stated, we respectfully recommend that the meeting adopt the following resolutions:

1. *Resolved*, That the meeting fully approve the report of the committee just made as expressive of the character and virtues of Mr. Garland, and of the great loss that the bar and the community have sustained by his death.

2. That out of respect for the memory of the deceased the bar attend his funeral in a body, and that its members wear the usual badge of mourning for thirty days.

3. That to the surviving family of the deceased we respectfully tender our most sincere sympathy and condolence.

4. That S. R. Cockrill, Esq., be requested to present the proceedings of this meeting to the supreme court of this state, and that Joseph W. House, Esq., be requested to present them to the circuit court of the United States holding its sessions in this city.

U. M. Rose,
D. W. Carroll,
S. W. Williams,
John A. Williams,
Committee.

The Chief Justice responded as follows:

The court unites with you in the sentiments so aptly and eloquently expressed in your resolutions and in the presentation of them. It would perhaps be out of place, as it would be needless, for me to attempt to add anything to what has already been said, except in the most general way.

Mr. Garland's first appearance in public life among us was amid the stirring scenes and events of the spring of 1861. He was then in his twenty-ninth year. For one so young, he made his impress upon the mind and

hearts of that generation of older men, and that generation was distinguished for the intellectual ability and great worth of its public men. Standing as he did really in the ranks of the minority; that is to say, with the moderates when moderation was scarcely the characteristic of the majority, the spectacle would have been noteworthy, even had he been one of the elders; but for one so young as he was, it hurried him to the forefront at once, and a little while after we find him in the lower house of the Confederate Congress and then in the senate, where he ever maintained himself as became his character from the beginning. After the great struggle, for some years, there was little opportunity for an Arkansan to occupy public stations, but during this interval Mr. Garland became personally involved in a legal controversy in the United States supreme court, when he sought to and succeeded in having the lawyer's test oath declared unconstitutional, and this circumstance had much to do with keeping his name before the public as a man of moral courage and great strength of character; and when our internecine troubles of 1874 came upon us, and it became necessary to have a change, Mr. Garland was easily to be named as the first man among our people to lead in bringing order out of chaos. He rose afterwards to be senator and then attorney general of the United States, but his administration as governor of Arkansas will ever remain as the brightest star in his crown as a public man.

The very personality of the man, his manifest freedom from all personal malice, his excellent common sense and great caution, made his administration a success, although it covered a period the most remarkable and trying in our history. As a senator and as attorney general, he maintained himself, and then, going back into the walks of private life, about ten years ago, he stood before the United States Supreme Court the peer of any there, until the end came, and such an end to a great lawyer! Closing an argument before that tribunal, I think his last words were: "And this is our contention," and at once laid down and died. A fit declaration at the close of a life of legal contention—a fit place for such an one in which to close his labors.

Mr. Garland was one of the great men of Arkansas, and it is altogether befitting for the courts and other bodies having control of the public records to leave lasting memorials of his life and services there recorded. It is therefore ordered that the resolutions just read and presented by our Brother Cockrill be spread upon the records of the minutes of the proceedings of this court by the clerk, and he will receive, file and deposit in the proper place such other papers and documents in relation to this subject as may be presented for that purpose, to be there kept, subject to the future disposition of this court.

Associate Justice Simon P. Hughes spoke as follows:

The appropriate and felicitous resolutions of the bar are a just and fitting tribute to the memory of one of its most distinguished and best beloved members.

My acquaintance with Mr. Garland commenced over forty years ago, when he was a promising young lawyer, rapidly rising to distinction in his profession by industry and close application. I met him occasionally at the circuit court of Arkansas county, then attended by Judge Watkins, General James Yell, M. L. Bell, Herman Carlton, the Hon. Sam W. Williams and other lawyers of distinction.

He was at that time regarded as a sound lawyer of much ability. He had attained much distinction as a lawyer before he had achieved a national reputation in the celebrated case of *Ex parte* Garland before the supreme court of the United States, in which he most delighted to practice, and where he was stricken down on his last appearance in that august tribunal.

It was my pleasure to assist in electing him to the senate of the United States in 1867, and in nominating him for governor in 1874, and to serve as attorney general of the state during his administration as governor, which marked him as a conservative statesman of a high order of ability. As a statesman, he was conservative and liberal, and wise in that he did not seek to govern too much.

He was eminent in the forum and in the senate, and achieved an enviable reputation as a sound constitutional lawyer.

He was not only a man of fine ability who adorned the many high offices he held, but he was an upright, clean man in his private life, true to his fellow-man in all the relations of life, gentle and generous. He was urbane and kind-hearted, inclined to be shy, yet he was frank and cordial, and a fine social companion; simple and plain, detesting, in a marked degree, ostentation. He was a very modest man. "No one ever saw in his air the conceit of success, or detected in his language the self-gratulation of a praiseworthy deed." He had critics, but no enemies. The country admired him, his friends loved him. He was a kind husband and father, a true friend and noble citizen. He was of striking and imposing personality.

The records of this court and of the supreme court of the United States, the archives of this state and of the United States, bear testimony to his ability and his worth.

Augustus H. Garland is no more. His place at the forum is empty. The grave's dark eclipse rests upon that beaming face and majestic form. He fell in the harness. He left to his descendants a noble patrimony, and to his state a priceless heritage, in his illustrious character.

"So fades a summer cloud away,
So sinks the gale when storms are o'er,
So gently shuts the eye of day,
So dies a wave along the shore."

II.

OPINIONS NOT REPORTED.

Hoover *v.* Binkley; appeal from Sebastian circuit court in chancery, Greenwood district; Edgar E. Bryant, judge; reversed and remanded April 1, 1899; rehearing denied May 23, 1899; per Wood, J.

Little Rock & Ft. Smith Ry. Co. *v.* Miller Coal Co.; appeal from Yell circuit court; Jeremiah G. Wallace, judge; reversed and remanded June 3, 1899; per Bunn, C. J.

Bratton *v.* Davis; appeal from Searcy circuit court; Brice B. Hudgins, judge; judgment affirmed June 17, 1899; per Wood, J.

Pace *v.* Robbins; appeal from Marion circuit court in chancery; Brice B. Hudgins, judge; judgment affirmed July 1, 1899; per Wood, J.

St. Louis Southwestern Ry. Co. *v.* Cannon; appeal from Greene circuit court; Felix G. Taylor, judge; judgment affirmed July 1, 1899; per Wood, J.

McLendon *v.* State; appeal from Pulaski circuit court; Robert J. Lea, judge; judgment affirmed June 24, 1899; per Wood, J.

Goodman Bros. *v.* Garrett et al.; appeal from Little River circuit court; Will P. Feazel, judge; reversed and remanded July 1, 1899; per Bunn, C. J.

Burke *v.* St. Louis, I. M. & S. Ry. Co.; appeal from Pulaski chancery court; Thomas B. Martin, chancellor; judgment affirmed March 4, 1899; rehearing denied May 20, 1899; per Bunn, C. J.

Missouri Pacific Ry. Co. *v.* Bolling; Same *v.* Collins; appeal from Franklin circuit court, Ozark district; Jephtha H. Evans, judge; reversed and final judgment entered for appellant December 17, 1898; per Battle, J.

Fink *v.* Nelson; appeal from St. Francis circuit court; Hance N. Hutton, judge; reversed and judgment entered for appellant December 24, 1898; per Bunn, C. J.

Aiken *v.* State; appeal from Sevier circuit court; Will P. Feazel, judge; reversed and remanded January 7, 1899; per Hughes, J.

Little Rock & Ft. Smith Ry. Co. *v.* Cravens; appeal from Johnson circuit court; Jeremiah G. Wallace, judge; reversed and judgment entered for appellant February 4, 1899; per Battle, J.

Riggin *v.* Southern Bldg. & Loan Assoc.; appeal from Jefferson chancery court; James F. Robinson, chancellor; judgment affirmed February 25, 1899; per Bunn, C. J.

Ward *v.* Harr; appeal from Arkansas circuit court; James S. Thomas, judge; reversed and remanded March 11, 1899; per Bunn, C. J.

Brandon *v.* Foster; appeal from Sebastian circuit court in chancery, Greenwood district; Edgar E. Bryant, judge; judgment affirmed March 11, 1899; per Hughes, J.

Evans *v.* Evans; appeal from St. Francis circuit court in chancery; Hance N. Hutton, judge; judgment affirmed April 1, 1899; per Wood, J.

Pearrow *v.* Gleason; appeal from White circuit court; Hance N. Hutton, judge (on exchange of circuits); judgment affirmed April 15, 1899; per Hughes, J.

Lane *v.* Queen City Milling Co.; appeal from Craighead circuit court, Jonesboro district; Felix G. Taylor, judge; reversed and remanded March 11, 1899; per Hughes, J.

Hyde *v.* Sunny South Lumber Co.; appeal from Lafayette circuit court; Charles W. Smith, judge; reversed and remanded May 6, 1899; per Battle, J.

Germania Insurance Co. *v.* Blanks; appeal from Ashley circuit court; Marcus L. Hawkins, judge; affirmed May 27, 1899; per Hughes, J.

Pace *v.* Robbins; appeal from Marion circuit court in chancery; Brice B. Hudgins, judge; affirmed July 1, 1899; per Wood, J.

St. Louis Southwestern Ry. Co. *v.* Cannon; appeal from Greene circuit court; Felix G. Taylor, judge; judgment affirmed July 1, 1899; per Wood, J.

Emmerson *v.* Dardanelle Bank; appeal from Yell circuit court, Dardanelle district; Jeremiah G. Wallace, judge; reversed and remanded July 1, 1899; per Battle, J.; Wood, J., and Bunn, C. J., dissenting.

III.

CASES DISPOSED OF ORALLY.

Robbins *v.* State; appeal from White circuit court; Hance N. Hutton, judge; affirmed December 3, 1898; per Bunn, C. J.

Hodge *v.* Little Rock Cooperage Co.; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed December 3, 1898; per Battle, J.

Johnson Machine Co. *v.* Halpern; appeal from Monroe circuit court in chancery; James S. Thomas, judge; affirmed December 3, 1898; per Battle, J.

Pelt *v.* Arkadelphia Cotton Mills; appeal from Clark circuit court in chancery; Rufus D. Hearn, judge; affirmed December 3, 1898; per Hughes, J.

Mehaffey *v.* Johnson; appeal from Garland circuit court; Alexander M. Duffie, judge; dismissed for non-compliance with rule nine, December 6, 1898; *per curiam.*

St. Louis, I. M. & S. Ry. Co. *v.* Frank Waren; appeal from Bradley circuit court; Marcus L. Hawkins, judge; affirmed December 10, 1898; per Bunn, C. J.

Rector *v.* Aldrich & Moody; appeal from Garland circuit court; Alexander M. Duffie, judge; affirmed December 10, 1898; per Hughes, J.

Little Rock & F. S. Ry. Co. *v.* Simpson; appeal from Conway circuit court; Jeremiah G. Wallace, judge; affirmed December 10, 1898; per Wood, J.

State ex. rel Coquard *v.* Wood; appeal from Lee circuit court; Hance N. Hutton, judge; affirmed December 10, 1898; per Wood, J.

Reap *v.* City of Pine Bluff; appeal from Jefferson chancery court; James F. Robinson, chancellor; dismissed for non-compliance with rule nine, December 12, 1898; *per curiam.*

Demby *v.* State; appeal from Montgomery circuit conrt; Will P. Feazel, judge; affirmed December 17, 1898; per Bunn, C. J.

St. Louis, I. M. & S. Ry. Co. *v.* Martin; appeal from Poinsett circuit court; Felix G. Taylor, judge; affirmed on remittitur being entered December 17, 1898; per Bunn, C. J.

Missouri Pacific Ry. Co. *v.* Collins; appeal from Franklin circuit court; Jephtha H. Evans, judge; reversed and judgment here December 17, 1898; per Battle, J.

St. Louis, I. M. & S. Ry. Co. *v.* Hazeling; appeal from Independence circuit court; Richard H. Powell, judge; affirmed December 24, 1898; per Bunn, C. J.

Vaughan *v.* City of Fayetteville; appeal from Washington circuit court; Edward S. McDaniel, judge; affirmed December 24, 1898; per Battle, J.

Penzel Grocer Co. *v.* Ambler; appeal from Hempstead circuit court; Rufus D. Hearn, judge; affirmed December 24, 1898; per Wood, J.

Meyers *v.* Powe & Stewart; appeal from Clay circuit court; Felix G. Taylor, judge; affirmed on motion of appellee for non-compliance with rule nine, January 2, 1899; *per curiam.*

Green, Admr., *v.* Thayer; appeal from Polk circuit court; Will P.

Feazel, judge; dismissed for non-compliance with rule nine, January 2, 1899; *per curiam.*

Norman *v.* Stillwell; appeal from Ashley circuit court; Marcus L. Hawkins, judge; appeal dismissed by consent, January 2, 1899; *per curiam.*

De Marce *v.* Kirby; appeal from Miller circuit court; Rufus D. Hearn, judge; affirmed January 7, 1899; per Bunn, C. J.

Siegfried & Goldberg *v.* Beal & Doyle Grocery Co.; appeal from Woodruff circuit court; Hance N. Hutton, judge; affirmed January 7, 1899; per Battle, J.

Wassell *v.* Green; appeal from Pulaski circuit court; Joseph W. Martin, judge; appeal dismissed for non-compliance with rule nine, January 9, 1899; *per curiam.*

Arnold *v.* Parry; appeal from Cleburne circuit court; J. P. Roberts, special judge; dismissed for non-compliance with rule nine, January 9, 1899; *per curiam.*

Lincoln *v.* Kansas City, P. & G. R. Co.; appeal from Benton circuit court; Edward S. McDaniel, judge; affirmed January 14, 1899; per Bunn, C. J.

Bell *v.* State; appeal from Lee circuit court; Hance N. Hutton, judge; affirmed January 14, 1899; per Bunn, C. J.

Wilson *v.* Brown; appeal from St. Francis circuit court in chancery; Hance N. Hutton, judge; affirmed January 14, 1899; per Hughes, J.

Monroe County *v.* Jackson; appeal from Monroe circuit court; James S. Thomas, judge; appeal dismissed for non-compliance with rule nine, January 23, 1899; *per curiam.*

Thomas *v.* Barrick; appeal from Sebastian circuit court; Edgar E. Bryant, judge; affirmed January 28, 1899; per Bunn, C. J.

St. Louis, I. M. & S. Ry. Co. *v.* Hubbert; appeal from Hot Spring circuit court; Alexander M. Duffie, judge; affirmed on remittitur being entered, January 28, 1899; per Hughes, J.

Streett *v.* Watson; appeal from Chicot chancery court; James F. Robinson, chancellor; affirmed January 28, 1899; per Hughes, J.

Francis *v.* State; appeal from Phillips circuit court; Hance N. Hutton, judge; affirmed January 28, 1899; per Wood, J.

Little Rock & F. S. Ry. Co. *v.* Morris; appeal from Yell circuit court; Jeremiah G. Wallace, judge; affirmed January 28, 1899; per Wood, J.

Little Rock & F. S. Ry. Co. *v.* Morris; appeal from Yell circuit court; Jeremiah G. Wallace, judge; affirmed January 28, 1899; per Riddick, J.

Little Rock & F. S. Ry. Co. *v.* Hornor; appeal from Johnson circuit court; Jeremiah G. Wallace, judge; affirmed January 28, 1899; per Riddick, J.

Fulsom, Ex., *v.* Lee; appeal from Lonoke circuit court; James S. Thomas, judge; settled and appeal dismissed by consent, January 28, 1899; *per curiam.*

St. Louis, I. M. & S. Ry. Co. *v.* Duke; appeal from Miller circuit court; Rufus D. Hearn, judge; affirmed February 4, 1899; per Battle, J.

Miller & Ragland *v.* James; appeal from Saline circuit court; Alexander M. Duffie, judge; affirmed February 4, 1899; per Battle, J.

Oliver *v.* Moore; appeal from Sebastian circuit court; Edgar E. Bryant, judge; affirmed as a delay case, February 4, 1899; *per curiam.*

Duncan *v.* James; appeal from Washington circuit court; Edward S.

McDaniel, judge; appeal dismissed by consent, February 6, 1899; *per curiam.*

Ray *v.* Smith; appeal from Monroe circuit court; James S. Thomas, judge; affirmed February 11, 1899; per Bunn, C. J.

St. Louis, I. M. & S. Ry. Co. *v.* Branjan; appeal from Craighead circuit court; Felix G. Taylor, judge; affirmed February 11, 1899; per Battle, J.

Hot Springs Ry. Co. *v.* Murray; appeal from Garland circuit court; Alexander M. Duffie, judge; affirmed February 11, 1899; per Hughes, J.

Little Rock & F. S. Ry. Co. *v.* Latta; appeal from Yell circuit court; Jeremiah G. Wallace, judge; affirmed February 11, 1899; per Hughes, J.

St. Louis & San Fr. Ry. Co. *v.* Ullery; appeal from Sebastian circuit court; Edgar E. Bryant, judge; affirmed February 11, 1899; per Hughes, J.

Judah *v.* Stewart; appeal from St. Francis circuit court; Hance N. Hutton, judge; judgment settled and appeal dismissed by consent, February 18, 1899; *per curiam.*

Mann, Moon & Co. *v.* Fowler; appeal from Jefferson circuit court; John M. Elliott, judge; affirmed on remittitur being entered, February 25, 1899; per Riddick, J.

Clark, Recr., *v.* Henry; appeal from Lawrence circuit court; Richard H. Powell, judge; appeal dismissed by consent, February 25, 1899; *per curiam.*

Senter & Co. *v.* Wheeler; appeal from Lafayette circuit court; Charles W. Smith, judge; dismissed for non-compliance with rule nine, February 27, 1899; *per curiam.*

Terry *v.* St. Louis & San Fr. Ry. Co.; appeal from Washington circuit court; Edward S. McDaniel, judge; affirmed March 4, 1899; per Hughes, J.

Brandon *v.* Foster & Co.; appeal from Sebastian circuit court; Edgar E. Bryant, judge;

Arkansas & La. Ry. Co. *v.* Levi; appeal from Howard circuit court; Will P. Feazel, judge; affirmed March 18, 1899; per Wood, J.

Pulaski County *v.* Ark. Pump & P. Co.; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed by consent, March 18, 1899; *per curiam.*

Newton *v.* Geyer-Adams Co.; appeal from Clark circuit court in chancery; Joel D. Conway, judge; advanced and affirmed as a delay case, March 25, 1899; *per curiam.*

Jerome Hill Cotton Co. *v.* Gibson; appeal from Lawrence circuit court; Richard H. Powell, judge; affirmed March 25, 1899; per Bunn, C. J.

Texarkana & F. S. Ry. Co. *v.* Scull; appeal from Little River circuit court; Will P. Feazel, judge; advanced and affirmed as a delay case, April 1, 1899; *per curiam.*

Campbell *v.* Henderson & Co.; appeal from Washington circuit court in chancery; Edward S. McDaniel, judge; dismissed for non-compliance with rule nine, April 3, 1899; *per curiam.*

Weir *v.* Wilson; appeal from Benton circuit court; O. W. Watkins, special judge; dismissed for non-compliance with rule nine, April 3, 1899; *per curiam.*

Cheatham *v.* Schulte; appeal from Sebastian circuit court; Edgar E. Bryant, judge; reversed on confessed of error, April 3, 1899; *per curiam.*

Walton *v.* Powell; appeal from Sebastian circuit court; Edgar E. Bry-

ant, judge; dismissed for non-dompliance with rule nine, April 8, 1899; *per curiam.*

Palatine Ins. Co. *v.* Haglin; and Teutonia Ins. Co. *v.* Haglin; appeals from Crawford circuit court in chancery; Jephtha H. Evans, judge; settled and appeals dismissed by consent, April 10, 1899; *per curiam.*

Kopp *v.* St. Louis, I. M. & S. Ry. Co.; appeal from Clay circuit court in chancery; Edward D. Robertson, chancellor; affirmed for non-compliance with rule nine, April 17, 1899; *per curiam.*

Mansfield *v.* Aiken; appeal from White chancery court; David W. Carroll, chancellor; affirmed April 29, 1899; per Bunn, C. J.

St. Louis & San Fr. Ry. Co. *v.* Sims; appeal from Franklin circuit court; Jephtha H. Evans, judge; affirmed April 29, 1899; per Bunn, C. J.

St. Louis, I. M. & S. Ry. Co. *v.* Ross; appeal from Jackson circuit court in chancery; Richard H. Powell, judge; affirmed April 29, 1899; per Battle, J.

Hooker *v.* Jackson Dry Goods Co.; appeal from Greene circuit court in chancery; Felix G. Taylor, judge; affirmed April 29, 1899; per Battle, J.

Florence *v.* Keith; appeal from Logan circuit court in chancery; Jephtha H. Evans, judge; affirmed May 6, 1899; per Battle, J.

Anderson *v.* Anderson; appeal from Logan circuit court in chancery; Jephtha H. Evans, judge; dismissed by consent, May 6, 1899; *per curiam.*

McCracken *v.* Mechanics Bank; appeal from Craighead circuit court; Felix G. Taylor, judge; dismissed for non-compliance with rule nine, May 8, 1899; *per curiam.*

Gunn *v.* Ewan; appeal from Monroe circuit court; John C. Hawthorne, special judge; reversed and dismissed by consent, May 8, 1899; *per curiam.*

Nelson *v.* Ellis; appeal from Nevada circuit court in chancery; Rufus D. Hearn, judge; affirmed for non-compliance with rule nine, May 15, 1899; *per curiam.*

Penn *v.* Wilson; appeal from Boone circuit court in chancery; Brice B. Hudgins, judge; appeal dismissed by consent, May 15, 1899, *per curiam.*

Rush *v.* Johnson; appeal from Boone circuit court in chancery; Brice B. Hudgins, judge; affirmed for non-compliance with rule nine, May 15, 1899; *per curiam.*

Brady *v.* State; appeal from Poinsett circuit court; Felix G. Taylor, judge; affirmed on motion of attorney general, May 22, 1899; *per curiam.*

Zimmerman *v.* Kelsey; appeal from Arkansas circuit court; James S. Thomas, judge; affirmed May 27, 1899; per Hughes, J.

Germania Ins. Co. *v.* Blanks; appeal from Ashley circuit court; Marcus L. Hawkins, judge; affirmed May 27, 1899; per Hughes, J.

City of Pine Bluff *v.* Pine Bluff Water etc. Co.; appeal from Jefferson chancery court; James F. Robinson, chancellor; dismissed for non-compliance with rule nine, May 29, 1899; *per curiam.*

Ahern *v.* Schecker & Co.; appeal from Miller circuit court; Joel D. Conway, judge; advanced and affirmed June 3, 1899; *per curiam.*

Nix *v.* Harris; appeal from Pulaski circuit court; Joseph W. Martin, judge; affirmed June 3, 1899; per Bunn, C. J.

Shelton *v.* State; appeal from Craighead circuit court; Felix G. Taylor, judge; affirmed June 3, 1899; per Battle, J.

Richardson & May L. & P. Co. *v.* Cornerstone Church; appeal from

Jefferson chancery court; James F. Robinson, chancellor; affirmed June 3, 1899; per Riddick, J.

St. Louis, I. M. & S. Ry. Co. *v.* Bloom; appeal from Clark circuit court; Rufus D. Hearn, judge; affirmed June 3, 1899; per Riddick, J.

Hill *v.* Woolfort; appeal from Drew circuit court; Marcus L. Hawkins, judge; affirmed for non-compliance with rule nine, June 5, 1899; *per curiam.*

Murphy *v.* Dunning; appeal from Pope circuit court; Jeremiah G. Wallace, judge; affirmed June 10, 1899; per Bunn, C. J.

Monroe County Bank *v.* Davis; appeal from Monroe circuit court; James S. Thomas, judge; reversed and judgment for appellant, June 10, 1899; per Bunn, C. J.

Picchi *v.* Cassito; appeal from Polk circuit court in chancery; Will P. Feazel, judge; affirmed June 10, 1899; per Bunn, C. J.

Allen *v.* Collier; appeal from Greene circuit court in chancery; Felix G. Taylor, judge; affirmed June 10, 1899; *per curiam.*

Petit *v.* Browning; appeal from Arkansas chancery court; James F. Robinson, chancellor; affirmed June 10, 1899; per Hughes, J.

King *v.* Lenon; appeal from Pulaski chancery court; Thomas B. Martin, chancellor; affirmed June 10, 1899; per Riddick, J.

Greever *v.* Holt; appeal from Boone circuit court in chancery; Brice B. Hudgins, judge; affirmed June 17, 1899; per Hughes, J.

Peoples Building & L. Ass'n *v.* Morris; appeal from Benton circuit court in chancery; Edward S. McDaniel, judge; affirmed June 17, 1899; per Hughes, J.

Peoples Building & L. Ass'n *v.* Quarles; appeal from Washington circuit court; Edward S. McDaniel, judge; affirmed June 17, 1899; per Hughes, J.

Harkey *v.* Burnett; appeal from Yell circuit; Jeremiah G. Wallace, judge; affirmed June 17, 1899; per Riddick, J.

Bowman *v.* Crandall; appeal from Arkansas circuit court; James S. Thomas, judge; affirmed for non-compliance with rule nine, June 19, 1899; *per curiam.*

Moseley *v.* Jones; appeal from Yell circuit court; Jephtha H. Evans, judge; dismissed for non-compliance with rule nine; *per curiam.*

Davidson *v.* Simmons; appeal from Arkansas chancery court; James F. Robinson, chancellor; affirmed June 24, 1899; per Bunn, C. J.

Mooney *v.* Harper; appeal from Garland chancery court; Leland Leatherman, chancellor; affirmed June 24, 1899; per Hughes, J.

Jonesboro, L. C. & E. R. Co. *v.* Darr; appeal from Clay circuit court; Felix G. Taylor, judge; advanced and affirmed as a delay case, July 1, 1899; *per curiam.*

Breedlove *v.* State; error to Pulaski circuit court; Robert J. Lea, judge; affirmed July 1, 1899; per Bunn, C. J.

St. Louis, I. M. & S. Ry. Co. *v.* Tuohey, Admr.; appeal from Lonoke circuit court; James S. Thomas, judge; affirmed July 1, 1899, per Bunn, C. J.

Planters Mutual Ins. Ass'n *v.* Gorten; appeal from White circuit court; Hance N. Hutton, judge; affirmed July 1, 1899; per Battle, J.

St. Louis, I. M. & S. Ry. Co. *v.* Moore; appeal from Jefferson circuit court; John M. Elliott, judge; affirmed July 1, 1899; per Battle, J.

McTague *v.* Butler; appeal from Garland chancery court; Leland Leatherman, chancellor; affirmed July 1, 1899; per Battle, J.

St. Louis, I. M. & S. Ry. Co. *v.* Collatt; appeal from Saline circuit court; Alexander M. Duffie, judge; affirmed July 1, 1899; per Riddick, J.

Chatfield *v.* St. Francis Levee District; appeal from Crittenden chancery court; Edward D. Robertson, chancellor; affirmed in part and reversed in part by consent, July 1, 1899; *per curiam.*

Chatfield *v.* St. Francis Levee District; appeal from Cross chancery court; Edward D. Robertson, chancellor; affirmed July 1, 1899; *per curiam.*

Chatfield *v.* St. Francis Levee District; appeal from Cross chancery court; Edward D. Robertson, chancellor; affirmed July 1, 1899; *per curiam.*

Chatfield *v.* St. Francis Levee District; appeal from Crittenden chancery court; Edward D. Robertson, chancellor; affirmed July 1, 1899; *per curiam.*

Chatfield *v.* St. Francis Levee District; appeal from Poinsett chancery court; Edward D. Robertson, chancellor; affirmed July 1, 1899; *per curiam.*

Thompson *v.* Huffman; appeal from Logan circuit court; Jephtha H. Evans, judge; affirmed under rule seven, July 1, 1899; *per curiam.*

Brown Shoe Co. *v.* Childers; appeal from Lawrence circuit court; Richard H. Powell, judge; judgment entered here by consent, October 2, 1899; *per curiam.*

Little Rock & Fort Smith Ry. Co. *v.* Wallis; appeal from Faulkner circuit court; James S. Thomas, judge; affirmed October 7, 1899; per Battle, J.

St. Louis, I. M. & S. Ry. Co. *v.* Stadtman; appeal from Caighead circuit court, Jonesboro district; Felix G. Taylor, judge; affirmed October 7, 1899; per Battle, J.

St. Louis, I. M. & S. Ry. Co. *v.* Bragg; appeal from Ouachita circuit court; Charles W. Smith, judge; affirmed October 7, 1899; per Hughes, J.

St. Louis, I. M. & S. Ry. Co. *v.* Speers; appeal from Hot Spring circuit court; Alexander M. Duffie, judge; affirmed October 7, 1899, per Riddick, J.

McLean Bros. *v.* Wiley; appeal from Izard circuit court; M——— N. Dyer, judge; dismissed for non-compliance with rule nine, October 9, 1899; *per curiam.*

Hildebrand *v.* State; appeal from Nevada circuit; Joel D. Conway, judge; plea of pardon sustained and appeal dismissed October 9, 1899; *per curiam.*

St. Louis, I. M. & S. Ry. Co. *v.* Clark; appeal from Craighead circuit court, Jonesboro district; Felix G. Taylor, judge; affirmed October 14, 1899; per Wood, J.

Snyder *v.* Sunny South Lumber Co.; appeal from Lafayette circuit court in chancery; Charles W. Smith, judge; decree here by consent, October 14, 1899; *per curiam.*

Southwestern Telegraph & Telephone Co. *v.* Schults; appeal from Franklin circuit court, Ozark district; Jephtha H. Evans, judge; compromised and appeal dismissed by consent, October 14, 1899; *per curiam.*

INDEX.

ABANDONMENT: SEE HOMESTEAD.

ACCIDENT: SEE INSURANCE.

ACCOMPLICE AND ACCESSORY:

one who conceals crime through fear is not an accomplice. *McFalls* v. *State*, 16.

ACCOUNT:

if items of secured account bear different rates of interest, plaintiff must separate the items. *Honnett* v. *Williams*, 148.

ACKNOWLEDGMENT: SEE HOMESTEAD.

ACTION: SEE APPEARANCE.

ADMINISTRATION:

costs of unnecessary administration disallowed when. *Blaisdell* v. *Sumpter*, 7.

necessity of authentication of claims. *McIlroy Banking Co.* v. *Dickson*, 327.

claim arising out of breach of trust or defalcation must be authenticated. *Id.*

but not a claim secured by lien. *Id.*

in suit by administrator to enjoin sale of decendent's land on ground that it was ordered on petition of creditor who failed to make demand of administrator, the administrator's testimony that he did not have "legal notice" is insufficient. *Blevins* v. *Case*, 416.

ADVANCEMENT:

what is not. *Rhea* v. *Bagley*, 93.

ADVERSE POSSESSION: SEE LIMITATION OF ACTIONS.

AFTER-ACQUIRED TITLES:

statute relating to, does not apply to conveyances by state. *St. Louis Refrigerator & Wooden Gutter Co.* v. *Langley*, 48.

decree confirming tax title will enure to benefit of tax purchaser's grantee when. *Tupy* v. *Kocourek*, 433.

AGENCY:

principal bound by unauthorized acts of agent when ratified. *Creson* v. *Ward*, 209.

agent's statement to commercial agency admissible against principal when. *Triplett* v. *Rugby Distilling Co.*, 219.

ALTERING MARK: SEE ANIMALS.

ANIMALS:

indictment for altering mark of hog need not allege value. *Houston* v. *State*, 606.

ANIMALS—*Continued.*
railway not liable for animal injured at culvert when. *St. Louis, I. M. & S. Ry. Co.* v. *Bragg*, 248.
negligence presumed when. *Id.*
what complaint against railroad for killing stock at crossing should allege. *Little Rock & F. S. Ry. Co.* v. *Smith*, 278.
proof held not to establish failure of railroad to post stock killed. *St. Louis Southwestern R. Co.* v. *Markham*, 297.
error to direct verdict for railroad in stock-killing case when. *Ford* v. *St. Louis, I. M. & S. Ry. Co.*, 363.
evidence held to support finding of negligence in railway stock-killing case. *Little Rock & Ft. S. Ry. Co.* v. *Wilson*, 414.
statutory presumption of negligence by railway in killing stock held rebutted. *Kansas City, Ft. Scott & M. Ry. Co.* v. *King*, 439.

APPEAL AND ERROR: SEE EXCEPTIONS.
defect of form in instruction reached only by specific objection. *St. Louis, I. M. & S. Ry. Co.* v. *Pritchett*, 46.
right of taxpayer to appeal from illegal appropriation of county revenues. *Lee County* v. *Robertson*, 82.
rendering judgment by default on complaint stating no cause of action is error. *Warren* v. *Hess*, 113.
motion to dismiss suit brought by receiver not entertained on appeal when not made below. *Driver* v. *Lanier*, 126.
when bill of exceptions unnecessary. *Webb* v. *Kelsey*, 180.
when exclusion of mitigating evidence not prejudicial. *Russell* v. *State*, 185.
error in admission of testimony not prejudicial when. *Triplett* v. *Rugby Distilling Co.*, 219.
question not raised on appeal for first time when. *Id.*
when error in admitting evidence cured by instruction. *Williams* v. *State*, 264.
when such error not prejudicial. *Id.*
when error cured by remittitur. *Id.*
cost of printing abstract and brief disallowed when. *Baker* v *Allen*. 271.
appellant cannot complain of incompetent testimony if he first introduced evidence of same kind. *Beck* v. *Biggers*, 292.
supreme court on affirmance may remand with leave to appellant to amend. *Robinson* v. *Davis*, 429.
evidence tending to prove undisputed fact held not prejudicial. *Standard L. & A. Ins. Co.* v. *Schmaltz*, 588.
appellant cannot complain of error invited by him. *Id.*

APPEARANCE:
recital of record that cause is continued "by consent" held not to show appearance. *Flowers* v. *Jackson*, 458.

APPROPRIATION OF PAYMENTS: SEE PAYMENTS.

ASSIGNMENT: SEE SALES OF CHATTELS.

ASSIGNMENT FOR BENEFIT OF CREDITORS:
deed of, not void for want of filing. *Moore* v. *Goodbar*, 161.
when assignee considered as holding under assignment. *Id.*

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Continued.*
effect of assignee's failure to file bond. *Id.*
failure to provide for surplus after paying preferred debts not a reservation. *Id.*

ATTORNEY AND CLIENT:
for attorney's fee as costs, see COSTS.
agreement to give attorney contingent interest in litigation not champertous. *Davis* v. *Webber*, 190.
agreement of client not to settle without attorney's consent not enforceable. *Id.*
right of attorney to recover on *quantum meruit* where express contract is not enforceable. *Id.*
court may look to void contract to ascertain what attorney's services were worth. *Id.*
how value of services of attorney determined. *Id.*
in suit to enforce attorney's lien for services in certain suit error to include fee for services in another suit. *Id.*
effect of contract whereby a plaintiff conveyed to his attorneys a half interest in any judgment to be recovered. *DeGraffenried* v. *St. Louis, Southwestern Ry. Co.*, 260.

BAIL:
recital of authority to take bail held sufficient proof thereof. *Dunlap* v. *State*, 105.
bail not discharged by fact that accused was in custody under other warrants and escaped. *Id.*
consideration of bail bond held sufficient. *Id.*

BANKS:
term of office of bank cashier. *McIlroy Banking Co.* v. *Dickson*, 327.

BIGAMY:
no defense that defendant honestly believed that he had been divorced from first wife. *Russell* v. *State*, 185.
but such fact is admissible in mitigation. *Id.*

BILLS AND NOTES: SEE CONFLICT OF LAWS; USURY.
note payable to bearer is transferable by delivery. *Bank of Paris* v. *Pearson*, 310.
possession of note is *prima facie* evidence of title. *Id.*
note given in payment of municipal liquor license void when. *Hencke* v. *Standiford*, 535.

BILL OF EXCEPTIONS:
when unnecessary. *Webb* v. *Kelsey*, 180.
delivery to carrier within time not delivery to clerk. *Texarkana & F. S. Ry.* v. *Scull*, 312.

BOND FOR TITLE: SEE SALE OF LAND.

BUILDINGS:
effect of alteration of plans upon liability of contractor's surety. *Miller-Jones Furniture Co.* v. *Ft. Smith Ice & Cold Storage Co.*, 287.

BURGLARY:
description of house held sufficient. *Reed* v. *State*, 110.
allegation of intent held insufficient. *Id.*

CARRIERS:
liability for failure to carry passenger to destination. *St. Louis & S. F. Ry. Co.* v. *Neal*, 543.
passenger recovering therefor may recover reasonable attorney's fee. *Id.*
carrier not bound by false classification by agent of connecting carrier of freight received for shipment to another state. *St. Louis & S. F. Ry. Co.* v. *Ostrander*, 567.
carrier not bound by false classification of freight procured by false representation of shipper. *Id.*
contract of carrier to carry shipper's lumber to point beyond state at less than lumber of others can be carried is not enforceable. *Kizer* v. *Texarkana & F. S. Ry. Co.*, 348.
when railway company liable for ejecting passenger. *Kansas City, P. G. Ry. Co.* v. *Holden*, 602.

CASES OVERRULED, DISTINGUISHED, ETC.:
Atkins v. *State*, 16 Ark. 588, distinguished in *Payne* v. *State*, 547.

CHAMPERTY: SEE ATTORNEY AND CLIENT.

CIRCUIT COURT:
has jurisdiction to try contested election case when. *Payne* v. *Rittman*, 201.

CLERKS:
act fixing salary of county clerk of Independence county held constitutional. *Independence County* v. *Young*, 30.
construction of such act. *Id.*
county clerk not entitled to fee for taking proof of witness' attendance. *St. Francis County* v. *Folbre*, 91.
is entitled to fee for entering each order of allowance. *Id.*
is not entitled to fee for warrants ordered but not issued. *Id.*

CLOUD ON TITLE:
execution sale held a cloud on title of homestead. *White Sewing Machine Co.* v. *Wooster*, 382.

CONFESSION:
of guilt inadmissible when. *Sullivan* v. *State*, 506.

CONFLICT OF LAWS:
verbal contract entered into in another state to pay 8 per cent. interest on account is presumed valid. *Everton* v. *Day*, 73.
no presumption that foreign contract is void for usury. *Sawyer* v. *Dickson*, 77.
note executed in Indian territory but made payable and delivered in Arkansas held an Arkansas contract. *Kelley* v. *Telle*, 464.
statutes presumed not to have extra-territorial effect. *State* v. *Lancashire Fire Ins. Co.*, 466.

CONSTITUTIONAL LAW:
act fixing salary of county clerk of Independence county not unconstitutional. *Independence County* v. *Young*, 30.
act fixing salary of county treasurer of Independence county partially invalid as diverting taxes. *Gray* v. *Matheny*, 36.
effect of partial invalidity of act. *Id.*

CONSTITUTIONAL LAW—*Continued.*
levying court cannot divert taxes. *Lee County* v. *Robertson*, 82.
act of March 25, 1889, prohibiting withholding of railway employees' wages is constitutional. *Kansas City, P. & G. R. Co.* v. *Moon*, 409.
legislature has power to determine what are "necessary expenses of government." *State* v. *Sloan*, 575.
legislature held to have determined that a new capitol is a "necessary expense." *Id.*
appropriation bill providing for new capitol held to embrace "but one subject." *Id.*
so held though the act that a new penitentiary shall be built. *Id.*

CONTRACT: SEE ATTORNEY AND CLIENT; HUSBAND AND WIFE; BILLS AND NOTES; SALE OF LAND; SALE OF CHATTELS; FRAUDS, STATUTE OF; CONFLICT OF LAWS; USURY; REFORMATION; RESCISSION.
when ratification of contract made by agent in principal's name not a ratification of another contract not so made. *Martin* v. *Adams*, 10.
agreement to divest title held without consideration. *Parham* v. *Dedman*, 26.
construction of partition agreement between widow and heirs. *Webb* v. *Nease*, 155.
effect of vendor of land giving bond for title. *Strauss* v. *White*, 167.
effect of agreement to fix boundaries according to deeds. *McCombs* v. *Wall*, 336.
contract of carrier giving preference to shipper held void within interstate commerce act. *Kizer* v. *Texarkana & Ft. Smith R. Co.*, 348.
parol evidence inadmissible to vary written contract. *Moore* v. *Terry*, 393; *West-Winfree Tobacco Co.* v. *Waller*, 445.
effect of agreement not to resist law-suit. *Hays* v. *McLean*, 400.
construction of contract for sale of gas plant. *Beaty* v. *Johnston*, 529.
note given in payment of municipal liquor lincense held void when. *Hencke* v. *Standiford*, 535.
verbal promise to pay another's debt, without consideration, is void. *Summers* v. *Heard*, 550.

CONVERSION: SEE TROVER AND CONVERSION.

CORPORATIONS: SEE BANKS; INSURANCE.
to suit by foreign corporation on note, motion to dismiss will not lie because of failure to file certificate of appointment of agent. *Files* v. *Reynolds*, 314.
validity of acts done by foreign corporation in state before act of 1887. *Sidway* v. *Harris*, 387.
proof that certificate of appointment of agent by foreign corporation did not comply with act of 1887 does not show that no valid appointment was made. *Id.*

COSTS:
of unnecessary administration disallowed in equity when. *Blaisdell* v. *Sumpter*, 7.
liability of county for costs expended in procuring allowance, including fee for filing claim. *Jefferson County* v. *Philpot*, 243.

COSTS—*Continued.*
cost of printing abstract and brief on appeal disallowed when. *Baker* v. *Allen*, 271.
when error to render judgment against husband for wife's costs. *Hines* v. *Whitlow*, 121.
right of railway passenger to recover reasonable attorney's fee where he recovers for carrier's failure to discharge him at station. *St. Louis & S. F. Ry. Co.* v. *Neal*, 543.

COUNTERCLAIM AND SETOFF:
defense distinguished from. *Rhea* v. *Bagley*, 93.
in suit to enforce agreement to convey land defendant cannot by way of counterclaim ask foreclosure of mortgage thereon. *Hays* v. *McLean*, 400.
failure to avail one's self of setoff does not cut off right to recover. *Beaty* v. *Johnston*, 529.
right of vendor of gas plant to set off against sum due by him the value of stock which the vendee agreed to convey him. *Id.*

COUNTY:
constitutional and statutory prohibition against diversion of county revenues. *Lee County* v. *Robertson*, 82.
effect of illegal appropriation of county funds. *Id.*
right of taxpayer to appeal from illegal appropriation. *Id.*
liability for costs incurred in procuring allowance. *Jefferson County* v. *Philpot*, 243.

COUNTY COURT:
quorum court forbidden to divert taxes. *Lee County* v. *Robertson*, 82.
right of taxpayer to appeal from order of, misappropriating funds. *Id.*

COURTS: SEE CIRCUIT COURTS; EQUITY; COUNTY COURT; APPEAL AND ERROR.

CREDITORS' BILLS:
practice before act of 1887 required creditor first to reduce claim to judgment and have return of *nulla bona* on execution. *Euclid Ave. Nat. Bank* v. *Judkins*, 486.
under act of 1887 it is still necessary to prove debtor's insolvency. *Id.*
bill to set aside fraudulent conveyance by joint debtor should allege that co-debtors are insolvent. *Id.*

CRIMINAL LAW: SEE TRESPASS; BURGLARY.
when falsity of prosecuting attorney's opening statement not prejudicial. *McFalls* v. *State*, 16.
admission of evidence tending to incriminate one jointly indicted with defendant is not prejudicial. *Id.*
one who conceals crime through fear is not an accomplice. *Id.*
indictment charging sale of seed cotton on which exists landlord's lien not supported by proof of sale of ginned cotton. *Houston* v. *State*, 120.
substitution of indictments held erroneous, the offenses not being identical. *State* v. *Welbon*, 510.
indictment for altering mark of hog need not allege value. *Houston* v. *State*, 607.

CURATIVE ACT: SEE STATUTES.

CURTESY:
estate of, will support homestead when. *White Sewing Machine Co.* v. *Wooster*, 382.
sale of land by tenant by the curtesy will not affect heir's rights. *Wear-Boogher Dry Goods Co.* v. *Smith*, 609.

DAMAGES:
for being wrongfully arrested not recoverable in replevin. *Hodges* v. *Nall*, 135.
measure of, for wrongful seizure and sale of stranger's goods. *Perkins* v. *Ewan*, 175.
damages recoverable for obstructing flow of surface water. *Baker* v. *Allen*, 271.
prospective damages not recoverable when. *Id.*
how damages for non-delivery of corporate stock ascertained. *Beaty* v. *Johnston*, 529.
measure of damage to partner by wrongful sale of firm assets. *Summers* v. *Heard*, 551.
measure of damages for conversion of stock of goods. *Id.*

DEED. SEE AFTER-ACQUIRED TITLES; HOMESTEAD.
for declaration of trust, see TRUST.

DEFINITIONS:
credits. *Brandon* v. *Yeakle*, 377.
personal effects. *Id.*, 381.
counterclaim. *Hays* v. *McLain*, 406.
immediately. *Brown* v. *Toler*, 361.
any. *State* v. *Lancashire Ins. Co.*, 472.
res gestæ. *Little Rock Traction & Electric Co.* v. *Nelson*, 500.
contemporaneous. *Id.*, p. 501.
power. *Griffith* v. *Maxfield*, 522.
accidental. *Standard Life & Acc. Ins. Co.* v. *Schmaltz*, 595.

DEMAND: SEE REPLEVIN.
not necessary for railway employee to demand wages before suing for penalty for withholding same. *Kansas City, P. & G. R. Co.* v. *Moon*, 409.

DITCH:
reviewers' report against ditch conclusive. *Brown* v. *Henderson*, 302.

DIVORCE:
effect of, upon estate in entirety. *Roulston* v. *Hall*, 305.
practice as to reversal of decree refusing divorce. *DeArmond* v. *DeArmond*, 601.

DONATION: SEE PUBLIC LANDS.

DOWER:
not awarded in improvements made by purchaser from husband when. *Welch* v. *McKenzie*, 251.
not awarded in partnership lands. *Id.*
estate in entirety not subject to. *Roulston* v. *Hall*, 305.

DRAMSHOP AND SALOON:
one who while intoxicated in a saloon has money stolen from him there cannot recover from the saloon-keeper when. *Gage* v. *Harvey*, 68.

ELECTION: SEE WILLS.
delay of nine months before electing to declare mortgage due after default in one payment is not unreasonable. *Farnsworth* v. *Hoover*, 367.

EMPLOYERS' LIABILITY INSURANCE: SEE INSURANCE.

EQUITY:
when relief not granted against judgment at law. *Scroggin* v. *Hammett Gro. Co.*, 183.

ESTATE IN EQUITY: SEE DOWER; DIVORCE.

ESTOPPEL:
surety not estopped to claim discharge by alteration of principal's contract when. *Miller-Jones Furniture Co.* v. *Ft. Smith Ice & Cold Storage Co.*, 288.

EVIDENCE: SEE JUDICIAL NOTICE.
admission of evidence incriminating one jointly indicted with defendant not prejudicial. *McFalls* v. *State*, 16.
when confession made to officer not voluntary. *Hardin* v. *State*, 53.
defendant's testimony in another case not admissible against him when. *Id.*
when hearsay evidence prejudicial. *Reed* v. *State*, 110.
presumption from identity of names. *Driver* v. *Lanier*, 126.
value of goods illegally sold under process proved how. *Perkins* v. *Ewan*, 175.
reasonableness of attorney's fee shown by void contract when. *Davis* v. *Webber*, 190.
how value of attorney's services shown. *Id.*
accused's testimony not rebutted by proof of contradictory statements of wife. *Kinnemer* v *State*, 206.
evidence held not to show liability on policy of liability insurance. *Reigler* v. *Sherlock*, 215.
when written statement of debtor's agent to commercial agency admissible to show fraud. *Triplett* v. *Rugby Distilling Co.*, 219.
such statement provable by parol. *Id.*
when admission of secondary evidence not prejudicial. *Id.*
admission of incompetent evidence not prejudicial when. *Id.*
husband's statement not provable against wife when. *Tharp* v. *Page*, 229.
effect of taking general exception to evidence. *Williams* v. *State*, 264.
admission of improper evidence cured by instruction when. *Id.*
to what extent contemporaneous complaint by prosecutrix in rape case is provable. *Id.*
when such complaint not provable as part of *res gestæ*. *Id.*
when admission of improper evidence not prejudicial. *Id.*
appellant cannot complain of introduction of incompetent evidence if he first introduced evidence of the same kind. *Beck* v. *Biggers*, 292.
judgment not evidence against stranger. *Roulston* v. *Hall*, 305.
possession of note as evidence of title. *Bank of Paris* v. *Pearson*, 310.

EVIDENCE—*Continued.*
mortgage may be shown to have been executed for fraudulent purpose when. *Stephens* v. *Stephens*, 356.
proof that a certificate of appointment of agent by foreign corporation did not comply with act of 1887 did not show that no valid appointment was made. *Sidway* v. *Harris*, 387.
parol evidence inadmissible to vary written contract. *Moore* v. *Terry*, 393.
parol evidence inadmissible to contradict written contract. *West-Winfree Tobacco Co.* v. *Waller*, 445.
parol evidence admissible to prove written contract usurious. *Sparks* v. *Robinson*, 460.
opinion of non-expert inadmissible to prove that there would have been no difficulty in getting on street car if it had not lurched forward suddenly. *Little Rock Traction & Electric Co.* v. *Nelson*, 494.
error to permit non-expert witness to testify that it was not dangerous to get on street car by front platform when slowly moving. *Id.*
evidence that other boys had ridden on street cars without paying fare inadmissible to prove that plaintiff was entitled to ride without pay. *Id.*
statement of motorman after street-car accident held not part of *res gestæ*. *Id.*
impression of witness as to what plaintiff admitted inadmissible. *Id.*
confession inadmissible if induced by promise when. *Sullivan* v. *State*, 506.
parol evidence admitted to prove consideration of declaration of trust. *Griffith* v. *Maxfield*, 513.
no presumption that face value of corporate stock is its real value. *Beaty* v. *Johnston*, 529.
how value of corporate stock proved. *Id.*
town ordinance not provable by parol when. *Hencke* v. *Standiford*, 535.
minutes of examining court inadmissible to impeach witness. *Payne* v. *State*, 545.

EXCEPTIONS: SEE BILL OF EXCEPTIONS.
general exception to instruction does not raise objection to formal defect. *Williams* v. *State*, 264.
general exception to testimony does not raise objection to form of asking question. *Id.*

EXECUTIONS:
justice of the peace cannot issue, on forfeited forthcoming bonds. *Blass* v. *Brown*, 79.
vendor's interest in land subject to execution when. *Strauss* v. *White*, 167.
how partner's interest in firm assets sold under execution. *Summers* v. *Heard*, 550.

FEES: SEE CLERK.

FIXTURE:
box-house held not to be when. *Brannon* v. *Vaughan*, 87.
when addition to building is. *Id.*

FORCIBLE ENTRY AND DETAINER:
complaint held to state good cause of action in unlawful detainer. *Winkler* v. *Massengill*, 145.

FOREIGN CORPORATION: SEE CORPORTION.

FORFEITED LAND. SEE PUBLIC LANDS.

FRAUD AND FRAUDULENT CONVEYANCES: SEE CREDITOR'S BILL.
when concealment of title deeds a fraud upon grantor's creditors. *Bunch* v. *Schaer*, 98.
statement made by debtor's agent to commercial agent held admissible to show fraud. *Triplett* v. *Rugby Distilling Co.*, 219.
mortgage may be shown by parol to have been executed for fraudulent purpose. *Stephens* v. *Stephens*, 356.
conveyance of homestead not fraudulent as to creditors. *White Sewing Machine Co.* v. *Wooster*, 382.
husband not permitted to defraud creditors by improving wife's property. *Slayden-Kirksey Woolen Mills* v. *Anderson*, 419.
land of husband bought in wife's name is subject to his debts. *Id.*
conveyance of land by insolvent grantor without consideration to grantor's mother held fraudulent. *Alkire Grocery Co.* v. *Jackson*, 455.

FRAUDS, STATUTE OF:
parol agreement to divest title acquired by adverse possession held within the statute of frauds. *Parham* v. *Dedman*, 26.

GARNISHMENT:
judgment against garnishee without allegations and interrogatories filed is irregular, but not void. *Little Rock Traction & Electric Co.* v. *Wilson*, 582.

GIFT:
proof held to establish delivery of gift of money. *Williams* v. *Smith*, 299.

GUARDIAN AND WARD:
in suit against estate of natural guardian to recover rents collected defense may be made that such rents were expended in improvements. *Rhea* v. *Bagley*, 93.
such defense not barred by lapse of time. *Id.*

HOMESTEAD:
when widow required to elect between devise and homestead. *Helm* v. *Leggett*, 23.
defective acknowledgment of homestead cured by act March 11, 1891, when. *Williamson* v. *Lazarus*, 226.
homestead not subject to execution for money borrowed by cashier of bank and used in its building. *McIlroy Banking Co.* v. *Dickson*, 327.
mortgage to secure money advanced to pay for homestead is valid without wife's joinder. *Farnsworth* v. *Hoover*, 367.
may be based on estate of curtesy. *White Sewing Machine Co.* v. *Wooster*, 382.
surviving husband may convey such homestead to children. *Id.*
execution sale a cloud on homestead when. *Id.*
when homestead not lost by disintegration of family. *Id.*
lease not an abandonment when. *Id.*
insurance money of homestead destroyed by fire not exempt from process for money loaned to buy it. *Acruman* v. *Barnes*, 442.

HUSBAND AND WIFE: SEE FRAUD AND FRAUDULENT CONVEYANCES.
sufficiency of complaint against married woman, see *Warner* v. *Hess*, 113.

HUSBAND AND WIFE—*Continued.*
error in suit against married woman to foreclose mortgage to render judgment against husband. *Hiner* v. *Whitlow*, 121.
extent to which power of married women to contract are extended by act March 19, 1895. *Sparks* v. *Moore*, 437.
defective conveyance of homestead cured by act April 13, 1893. *Alkire Grocery Co.* v. *Jackson*, 455.

IDENTITY:
of names raises presumption of identity of persons. *Driver* v. *Lanier*, 126.

IMPROVEMENTS: SEE DOWER.

INDICTMENT: SEE TRESPASS; CRIMINAL LAW.

INFANCY:
right of minor to disaffirm contracts made by him. *Kansas City, P. & G. Rd. Co.* v. *Moon*, 409.
minor may sue for wages due him when. *Id.*
duty of infant riding on street car to use care. *Little Rock Traction & Electric Co.*, 494.

INJUNCTION:
lies to prevent unlawful vacation of street. *Texarkana* v. *Leach*, 40.

INSOLVENCY: SEE CREDITOR'S BILL.

INSTRUCTIONS:
defect of form reached only by specific objection. *St. Louis, I. M. & S. Ry. Co.* v. *Pritchett*, 46.
instruction as to duty of trainmen to keep lookout considered. *Id.*
error in felony case to re-read instructions in accused's absence. *Kinnemer* v. *State*, 206.
court should not confine jury's attention to one of two grounds of relief relied on. *W. W. Johnson Co.* v. *Triplett*, 233.
general exception to instruction does not raise objection to formal defect. *Williams* v. *State*, 264.
when error cured by instruction. *Id.*
instruction held to invade jury's province as to facts. *Sullivan* v. *State*, 506.
refusal to give specific instruction not prejudicial when. *Masey* v. *State*, 523.

INSURANCE:
judgment of recovery against employer held not to show liability on policy of liability insurance when. *Reigler* v. *Sherlock*, 215.
"anti-trust" act does not apply to pools or combinations among insurance companies formed outside of state and not affecting price of insurance in state. *State* v. *Lancashire Fire Ins. Co.*, 466.
complaint against fire insurance company for violating "anti-trust act," following language of statute, held sufficient on demurrer. *State* v. *Ætna Fire Ins. Co.*, 480.
evidence held to sustain finding that death of insured was accidental. *Standard L. & A. Ins. Co.* v. *Schmaltz*, 588.
policy of accident insurance held to cover risk from "lifting," though that was an excepted risk. *Id.*

INSURANCE—*Continued.*
insurer held to have waived proof of death. *Id.*
presumption from fact of possession of insurance policy. *Mutual L. Ins. Co.* v. *Parrish*, 612.
insurer not bound unless condition precedent complied with. *Id.*
INTEREST:
presumption is that contract entered into another state to pay 8 per cent. interest on account is valid. *Everton* v. *Day*, 73.
if items of secured debts bear different rates of interest, plaintiff must separate the items. *Honnett* v. *Williams*, 148.
INTERSTATE COMMERCE: SEE CARRIERS.
JUDGMENT AND DECREE:
decree confirming tax title held to cut off inquiry. *Porter* v. *Dooley*, 1.
not void for insufficiency of proof of publication, when. *Id.*
claim wrongfully allowed by county court not recoverable in justice's court. *St. Francis County* v. *Roleson*, 139.
no relief in equity against judgment at law where defeated party lost rights by failure to call up motion for new trial. *Scroggin* v. *Hammett Grocer Co.*, 183.
decree not admissible as evidence against stranger. *Roulston* v. *Hall*, 305.
former adjudication conclusive when. *McCombs* v. *Wall*, 336.
satisfaction of decree, made under mutual mistake, will be set aside. *Rutherford* v. *McDonnell*, 448.
recital in record that cause is continued by consent is insufficient to show entry of appearance. *Flowers* v. *Jackson*, 458.
conclusiveness of judgment admitting will to probate. *St. Joseph's Convent* v. *Garner*, 623.
JUDICIAL NOTICE:
taken of officers within court's territorial jurisdiction. *Webb* v. *Kelsey*, 180.
JUDICIAL SALES:
Sand. & H. Dig., §§ 3095, 3096, do not refer to sales by commissioners. *Farnsworth* v. *Hoover*, 367.
making sale upon only 19 days' notice an irregularity merely. *Id.*
error to permit redemption from judicial sale when. *Banks* v. *Directors of St. Francis Levee District*, 490.
JURISDICTION: SEE CIRCUIT COURTS; JUSTICES OF THE PEACE.
JUROR:
not subjected to improper influence when. *McFalls* v. *State*, 16.
when juror having opinion as to defendant's guilt is not incompetent. *Hardin* v. *State*, 53.
misconduct of, as ground for new trial, see NEW TRIAL.
JUSTICE OF THE PEACE:
cannot issue execution on forfeited forthcoming bond. *Blass* v. *Brown*, 79.
has jurisdiction of several torts combined in one suit when. *Little Rock & F. S. Ry. Co.* v. *Smith*, 278.
justice of the peace has jurisdiction of action on penal bond though penalty exceeds his jurisdictional limit when. *Files* v. *Reynolds*, 314.

JUSTICE OF THE PEACE—*Continued.*
has no jurisdiction in tort where total damages claimed exceed one hundred dollars. *Thompson* v. *Willard*, 346.

LACHES:
delay in making election held not unreasonable. *Farnsworth* v. *Hoover*, 367.

LANDLORD AND TENANT:
when landlord not liable for act of tenant in obstructing flow of surface water. *Baker* v. *Allen*, 271.

LEGISLATURE: SEE CONSTITUTIONAL LAW.

LIABILITY INSURANCE: SEE INSURANCE.

LIEN: SEE ATTORNEY AND CLIENT.

LIMITATION OF ACTIONS:
when part payment stops running of statute. *Everton* v. *Day*, 73.
when defense not barred by lapse of time. *Rhea* v. *Bagley*, 93.
two-years' adverse possession under tax deed sufficient to confer title unless there is right to redeem. *McConnell* v. *Swepston*, 141.
suit to foreclose mortgage barred when debt barred. *Whipple* v. *Johnson*, 204.
running of general statute not suspended by death of maker of note. *Id.*
when claim against county for officer's fees barred. *Baugh* v. *Prairie County*, 360.
action to recover money paid under mistake barred in 3 years. *Richardson* v. *Bales*, 452.
new and unconditional promise in writing held to constitute new date. *Kelley* v. *Telle*, 464.

MARRIED WOMEN: SEE HUSBAND AND WIFE.

MARSHAL:
who may fill vacancy in office of city marshal of second class. *Payne* v. *Rittman*, 201.

MASTER AND SERVANT:
servant cannot recover damages for injury caused by structural defect in machinery if he was negligent. *Henry Wrape Co.* v. *Huddleston*, 237.
act of March 25, 1889, prohibiting railroads from withholding wages of employees, is valid. *Kansas City, P. & G. Rd. Co.* v. *Moon*, 409.
penalty for failure to pay wages incurred when. *Id.*
right of minor servant to sue for wages due him. *Id.*
penalty under act of 1889 merged in judgment when. *Id.*

MAXIMS:
the law does not consider the cause of causes. *Gage* v. *Harvey*, 70.
maxim *de minimis* applied. *Farnsworth* v. *Hoover*, 376.

MERGER:
right to recover continuing penalty merged in judgment when. *Kansas City, P. & G. Rd. Co.* v. *Moon*, 409.

MISTAKE: SEE REFORMATION.
sale of goods and satisfaction of judgment, made under mutual mistake, will be rescinded and set aside. *Rutherford* v. *McDowell*, 448.

MONOPOLIES:
construction of "anti-trust act." *State* v. *Lancashire Fire Ins. Co.*, 466.

MORTGAGES: SEE LIMITATION OF ACTIONS; HOMESTEAD.
bond for title held equivalent to. *Strauss* v. *White*, 167.
oral agreement to execute mortgage enforced when. *King* v. *Williams*. 333.
may be shown by parol to have been executed for fraudulent purpose. *Stephens* v. *Stephens*, 356.
right to foreclose for failure of mortgagor to pay interest. *Farnsworth* v. *Hoover*, 367.
nine months' delay in electing to declare mortgage due on default in interest is not unreasonable. *Id.*
validity and construction of mortgage given for future advances. *Moore* v. *Terry*, 393.
effect of tender of secured debt by mortgagor's purchaser. *Summers* v. *Heard*, 550.
purchaser at sale under power entitled to possession during period allowed for redemption. *Vaughan* v. *Walton*, 572.

MUNICIPAL CORPORATIONS:
cities of second class not authorized to vacate streets. *Texarkana* v. *Leach*, 40.
such vacation may be enjoined. *Id.*
city council, not governor, is authorized to fill vacancy in office of marshal of city of second class. *Payne* v. *Rittman*, 201.
note given in payment of municipal liquor license held void when. *Hencke* v. *Standiford*, 535.
town ordinance not proved by parol. *Id.*

NAME:
presumption from identity of. *Driver* v. *Lanier*, 126.

NEGLIGENCE: SEE STREET RAILWAYS.
employee cannot complain of employer's negligence if he also was negligent. *Henry Wrape Co.* v. *Huddleston*, 237.
railroads not negligent in killing animal at culvert when. *St. Louis, I. M. & S. Ry. Co.* v. *Bragg*, 248.
negligence in killing animal presumed when. *Id.*
when error to direct verdict for railroad in stock-killing case. *Ford* v. *St. Louis, I. M. & S. Ry. Co.*, 363.
evidence held to justify finding against railroad for injury to stock. *Little Rock & Ft. S. Ry. Co.* v. *Wilson*, 414.
when statutory presumption of negligence by railway in killing stock rebutted. *Kansas City, Ft. Scott & M. Ry. Co.* v. *King*, 439.

NEW TRIAL:
not error to refuse new trial for newly discovered but cumulative evidence. *Maxey* v. *State*, 523.
not granted for misconduct and separation of jurors when. *Payne* v. *State*, 545.
when granted for newly-discovered evidence. *Mutual L. Ins. Co.* v. *Parrish*, 612.
when not necessary previously to ask for continuance on ground of surprise. *Id.*

NOTICE: SEE WRITS AND PROCESS; JUDICIAL SALES.
possession of land as notice of title. *Strauss* v. *White*, 167.

NUISANCE:
vacation and closing of public street is public nuisance when. *Texarkana* v. *Leach*, 40.
liability of landlord for nuisance erected by tenant. *Baker* v. *Allen*, 271.
when lower proprietor liable for obstructing flow of surface water. *Baker* v. *Allen*, 271.

OFFICES AND OFFICERS: SEE CLERKS; JUDICIAL NOTICE.
power of governor to fill vacancy in office of city marshal. *Payne* v. *Rittman*, 201.
bank cashier's term of office, see BANKS.

OVERDUE TAX SUIT: SEE PUBLIC LANDS.

PARENT AND CHILD:
liability of parent as natural guardian for rents collected for child. *Rhea* v. *Bagley*, 93.

PARTIES:
on bond payable to principal or agent either may sue. *Files* v. *Reynolds*, 314.
proper parties to cross-bill seeking mortgage foreclosure. *Hays* v. *McLean*, 400.
in suit for conversion of partnership assets all partners should join. *Summers* v. *Heard*, 550.
defect of parties may be waived. *Id.*

PARTNERSHIP: SEE DOWER.
partner not authorized to sell partnership property when. *Rutherford* v. *McDonnell*, 443.
right of partner as to application of partnership assets. *Summers* v. *Heard*, 550.
how partner's interest sold under execution. *Id.*
damages recoverable for unlawful sale of firm assets. *Id.*
in suit for conversion of partnership property all partners should be joined. *Id.*

PAYMENT:
right of creditor to appropriate, to account already due. *Everton* v. *Day*, 73.
part payment held to stop statute of limitations from running. *Id.*
payments by firm cannot be appropriated by creditor to partner's individual debts. *Farris* v. *Morrison*, 318.

PENALTY: SEE MASTER AND SERVANT.

PLEADING: SEE COUNTERCLAIM AND SET OFF.
rendition of judgment on complaint stating no cause of action is error. *Warner* v. *Hess*, 113.
complaint on note of married woman must show that she was competent to make it. *Id.*
complaint held to state good cause of action in unlawful detainer. *Winkler* v. *Massengill*, 145.
what complaint against railroad for stock-killing should allege. *Little Rock & F. S. Ry. Co.* v. *Smith*, 278.
complaint against fire insurance company alleging violation of "anti-trust act" in language of the statute held sufficient, 480.

PLEADING—*Continued.*
remedy for indefinite pleading is motion to make definite. *Id.*
POSSESSION:
when possession of land is notice of title. *Strauss* v. *White*, 167.
of note as evidence of title. *Bank of Paris* v. *Pearson*, 310.
POWER:
construction of power of attorney by widow authorizing attorney to represent her. *Welch* v. *McKenzie*, 251.
effect of reservation by grantor of a power to convey in deed declaring a trust. *Griffith* v. *Maxfield*, 513.
when power to sell and convey reserved by a trustee survives the death of the beneficiaries. *Id.*
PRESUMPTION: SEE INTEREST; USURY; NEGLIGENCE; EVIDENCE.
from possession of insurance policy, see INSURANCE.
PRINCIPAL AND AGENT: SEE AGENCY.
PRINCIPAL AND SURETY:
effect of alteration of plans of building upon liability of contractor's surety. *Miller-Jones Furniture Co.* v. *Ft. Smith Ice & Cold Storage Co.*, 287.
when surety not estopped to claim discharge by reason of material alteration. *Id.*
PROHIBITION:
will not lie if appeal would and no irreparable injury would result from its refusal. *Weaver* v. *Leatherman*, 211.
PUBLICATION: SEE WRITS AND PROCESS.
PUBLIC DITCH: SEE DITCH.
PUBLIC LANDS:
lands involved in pending overdue tax suit not subject to donation. *St. Louis Refrigerator & Wooden Gutter Co.* v. *Langley*, 48.
no title acquired to land sold to state at overdue tax sale until period of redemption expired. *Id.*
statute as to after-acquired titles does apply to state's deeds. *Id.*
donation deed is a quitclaim deed. *Id.*
lands sold to state in overdue tax suit not subject to taxation. *Muskegon Lumber Co.* v. *Brown*, 539.
land commissioner not authorized to sell forfeited lands until clerk has certified to forfeiture. *Id.*
PUBLIC POLICY:
contract against, is void. *Hencke* v. *Standiford*, 535; *Davis* v. *Webber*, 190.
QUIETING TITLE: SEE CLOUD ON TITLE.
RAILROADS: SEE CARRIERS; MASTER AND SERVANT.
instruction as to duty of trainmen to keep lookout considered. *St. Louis, I. M. & S. Ry. Co.* v. *Pritchett*, 46.
railroad not liable for animal injured at culvert when. *St. Louis, I. M. & S. Ry. Co.* v. *Bragg*, 248.
negligence in killing annimal presumed when. *Id.*
complaint against railroad for stock killing should allege what. *Little Rock & F. S. Ry. Co.* v. *Smith*, 278.

RAILROADS—*Continued.*
proof held not to establish liability for failure to post stock killed. *St. Louis Southwestern R. Co.* v. *Markham*, 297.
when error to direct a verdict for railroad in stock-killing case. *Ford* v. *St. Louis, I. M. & S. Ry. Co.*, 363.
evidence held to support finding of negligence in injury to stock. *Little Rock & Ft. S. Ry. Co.* v. *Wilson*, 414.
when statutory presumption of negligence in killing stock rebutted. *Kansas City, Ft. Scott & M. Ry. Co.* v. *King*, 439.

RAPE:
admissibility of proof of complaint made by prosecutrix in rape case. *Williams* v. *State*, 264.
refusal to give instruction as to reputation of prosecutrix approved. *Maxey* v. *State*, 523.

RATIFICATION: SEE AGENCY.

REAL ESTATE: SEE DOWER; DIVORCE; PUBLIC LANDS.

RECEIVER:
appointment of, pending appeal should be made by lower court. *Coleman* v. *Fisher*, 43.
when motion to dismiss receiver's suit not entertained on appeal. *Driver v. Lanier*, 126.
receiver alone authorized to sue when. *Id.*
fact that goods wrongfully seized under process were sold by receiver will not affect owner's right to recover. *Perkins* v. *Ewan*, 175.

REDEMPTION: SEE JUDICIAL SALES.

REFORMATION:
to justify reformation of deed of land proof of mistake must be clear and convincing. *Webb* v. *Nease*, 155.

REMITTITUR:
held to cure error of rendering "quotient verdict" when. *Williams* v. *State*, 264.

REPLEVIN:
when does not lie. *Hodges* v. *Nall*, 135.
damages for being unlawfully arrested not recoverable in replevin. *Id.*
when demand unnecessary. *Triplett* v. *Rugby Distilling Co.*, 219.

RESCISSION:
when unnecessary to make return of acceptance before suing to rescind. *Triplett* v. *Rugby Distilling Co.*, 219.
in a suit to rescind, where plaintiff claimed right to rescind on two grounds, court should not confine jury's attention to one ground. *W. W. Johnson* v. *Triplett*, 233.
vendee entitled to have rescission where vendor's title as to one of two tracts sold for lump sum has failed. *Tupy* v. *Kocourek*, 433.
sale under mutual mistake rescinded. *Rutherford* v. *McDonnell*, 448.

RES GESTÆ: SEE EVIDENCE.

ROADS AND HIGHWAYS: SEE MUNICIPAL CORPORATIONS.
right of interested landowner to notice of viewers' meeting not waived when. *Beck* v. *Biggers*, 292.

ROADS AND HIGHWAYS—*Continued.*
order establishing public road set aside for indefinite description when. *Id.*
viewers held not disinterested if related to principal petitioner when. *Id.*
SALE OF CHATTELS: SEE RESCISSION; COUNTERCLAIM AND SET-OFF.
effect of stipulation that property sold shall remain the vendor's until paid for. *Bank of Little Rock* v. *Collins*, 240.
such vendor's rights held assignable. *Id.*
sale made under mutual mistake rescinded. *Rutherford* v. *McDonnell*, 448.
SALE OF LAND: SEE RESCISSION; SPECIFIC PERFORMANCE.
effect of vendor's giving bond for title. *Strauss* v. *White*, 167.
such vendor's interest not subject to sale under execution. *Id.*
kind of title vendee entitled to receive under executory contract to give warranty deed. *Tupy* v. *Kocourek*, 433.
practice where vendor is unable to make deed to one of his two tracts sold. *Id.*
SALOON: SEE DRAMSHOP AND SALOON.
SCHOOLS AND SCHOOL LANDS:
payment by bidder for school land held to be "immediate" when. *Brown* v. *Toler*, 361.
who may object to regularity of sale of school land. *Id.*
SHERIFF:
not liable on official bond for money deposited by him in bank and loaned by bank to his deputy. *Boone County Bank* v. *Eoff*, 321.
SPECIFIC PERFORMANCE:
when enforced *pro tanto*. *Archer* v. *Turrell*, 171.
oral agremeent to execute mortgage enforced when. *King* v. *Williams*, 333.
rights of vendee where vendor's title as to one of two tracts fails. *Tupy* v. *Kocourek*, 433.
STATE: SEE PUBLIC LANDS.
not bound by statute as to after-acquired titles. *St. Louis Refrigerator & Wooden Gutter Co.* v. *Langley*, 48.
STATUTES CONSTRUED: SEE FRAUDS, STATUTE OF; LIMITATION OF ACTIONS.
act fixing salary of county clerk of Independence county not unconstitutional. *Independence County* v. *Young*, 30.
how amount of such salary determined. *Id.*
act fixing salary of county treasurer of Independence county held unconstitutional as diverting taxes. *Gray* v. *Matheny*, 36.
effect of partial invalidity of act. *Id.*
defective acknowledgment of deed of homestead cured by act of March 11, 1891, when. *Williamson* v. *Lazarus*, 226.
in construction of statutes little weight given to expressions of individual members of legislature or to rejection of amendments. *State* v. *Lancashire Ins. Co.*, 466.
statutes presumed to have no extra-territorial effect. *Id.*
act not construed to be unconstitutional in whole or in part if it can be construed to take effect in all its parts. *Id.*

STATUTES CONSTRUED—*Continued.*

"anti-trust" act construed not to apply to pools or combinations formed outside of state, and not intended to affect prices of insurance in state. *Id.*

STATUTES CITED:

ACT OF CONGRESS:
Feb. 4, 1887, §§ 1, 2, 3 . 354–5

GOULD'S DIGEST:
ch 52, § 40 547

MANSFIELD'S DIGEST:
§ 578 . . . . . 4, 5, 182
579 4
2099 511
4359 . . . . . 5, 183
5731 . . . . . 425, 427
5746 427
5760 426

CIVIL CODE:
§ 117 406
418–9 406

SANDELS & HILL'S DIGEST:
§ 110 206
201 416
489 243
699 52
787 245
810, 811 246
1209 303
1213 304
1214 304
1215 304
1264–5, 1266 141
1332 333
1342, 1343 } 1352–4 } 331
1480 187
1481 187–8
1482 188
1694 112
1700 608
1764 608
1997 547
2014–5 109
2080 66
2208 59
2212 58
2517 308
2220–1 20
2520 258
2820, 2822 292
2830 297
2909 63
3034 488
3065 560
3095–6 375
3134 488
3444 148
3508 . . . . . 584, 585

SANDELS & HILL'S DIGEST—*Continued.*
3713 373
4197 430
4223 198
4329 82
4565 542
4675 542
4822 453
4870 69
4946 119
5151 42
5208 42
5679 285
5712 406
5718, 5720 560
5723 406
5731 425
5760 426
5843 430
5851 246
5964–5 45
5968 135
6207 441
6281 545
6284 544
6350 298
6615 144
7119 363

CONSTITUTION OF 1874:
art. 5, §§ 30, 31 576
7, 11 204
7, 40 347
7, 51 141
9, 3 . . . . . 331, 444
16, 11 . . . . . 39, 85
16, 13 86

OTHER ACTS:
acts 1871, pp. 162, 186, §§ 100–3, 105, 187 542
act Mch. 12, 1881, §§ 2, 3, 6, 7, 15, 11 . . . . . 51, 52
acts 1887, pp. 234–5, §§ 1, 2, 3, 7 390–2
act Mch. 28, 1887, ... 426
act Mch. 3, 1887, §§ 1, 2, . 125, 126
act April 8, 1889, ... 586
act Feb. 23, 1891, § 2, pp. 16, 17, 512
act April 1, 1893, p. 200 . . 513
acts 1895, pp. 65–9, § 2–7 . . . . . 33, 34, 35, 38, 39
acts 1895, p. 167, § 4, 6, 8 . . 86
act Feb. 3, 1895, §§ 1, 8 . . 250
act April 19, 1895, . . . 585, 586
act Mch. 1895, § 1 438
acts 1899, p. 50, § 1, 2 . 471, 481
acts 1899, p. 212 . . 578, 580, 581

STREET RAILWAYS:
employees not required to keep lookout for boys stealing rides. *Little Rock Traction & Electric Co.* v. *Nelson*, 494.
infant riding with motorman's permission held not a trespasser. *Id.*
duty of infant passenger to use due care. *Id.*

SURPRISE: SEE NEW TRIAL.

SURVIVORSHIP: SEE POWER.

TAXATION: SEE PUBLIC LANDS.
decree confirming tax title cuts off inquiry as to validity. *Porter* v. *Dooley*, 1.
decree of confirmation of tax title held not void for insufficiency of proof of publication. *Id.*
act fixing salary of treasurer of Independence county held unconstitutional as sanctioning a diversion of taxes. *Gray* v. *Matheny*, 36.
lands involved in overdue tax suit not subject to donation. *St. Louis Refrigerator & Wooden Gutter Co.* v. *Langley*, 48.
no title acquired to land sold to state at overdue tax sale until period of redemption has expired. *Id.*
levying court cannot divert taxes raised to pay county debts. *Lee County* v. *Robertson*, 82.
such diversion forbidden by Acts of 1895, p. 170. *Id.*
minor's right to redeem from tax sale held assignable. *McConnell* v. *Swepston*, 141.
such right held not to pass to purchaser of ancestor's land when. *Id.*
decree confirming tax title not defective for failure of county clerk to certify as to official character of justice before whom proof was made. *Webb* v. *Kelsey*, 180.
description of land as "E² SE" in advertisement of tax sale held sufficient. *Boles* v. *McNeil*, 422.
when delinquent list of lands may be filed. *Id.*
purchase of land for taxes from clerk under act March 16, 1879, is void. *Tupy* v. *Kocourek*, 433.
under revenue act of 1871, collector could not sell delinquent lands for any costs save of advertising. *Muskegon Lumber Co.* v. *Brown*, 539.
lands sold to state under overdue tax decree not taxable. *Id.*

TENDER:
mortgage not enforced against purchaser of mortgaged property who tenders amount of debt secured and keeps tender good. *Summers* v. *Heard*, 550.

TREASURER:
act fixing salary of county treasurer of Independence county held partially invalid. *Gray* v. *Matheny*, 36.

TRESPASS: SEE EVIDENCE; STREET RAILWAYS.
indictment for, not defective for alleging property to belong to estate of deceased person. *Boarman* v. *State*, 65.
allegation that defendant cut timber implies that timber was growing. *Id.*
not necessary to allege value of trees. *Id.*

TRESPASS—*Continued.*
measure of damages for sale of stranger's goods under process. *Perkins* v. *Ewan*, 175.
fact that goods were sold by receiver immaterial. *Id.*

TRIAL: SEE CRIMINAL LAW; INSTRUCTIONS; EXCEPTIONS; VERDICT.
juror held not to have been subjected to improper influence. *McFalls* v. *State*, 16.

TROVER AND CONVERSION:
warehouseman selling another's goods stored is liable for their conversion. *Creson* v. *Ward*, 209.
damages recoverable for conversion of stock of goods. *Summers* v. *Heard*, 550.

TRUSTS:
effect of conveyance of trust property by trustee and beneficiaries. *Honnett* v. *Williams*, 148.
money borrowed of bank by cashier not a trust fund when. *McIlroy Banking Co.* v. *Dickson*, 327.
"anti-trust act," so-called, construed. *State* v. *Lancashire Fire Ins. Co.*, 466; *State* v. *Ætna Fire Ins. Co.*, 480.
instrument held not to convey interest in land, but to be mere declaration of trust. *Griffith* v. *Maxfield*, 513.
parol evidence admissible to prove that there was no consideration for trust save love and affection. *Id.*
power to execute trust survives when. *Id.*

USURY:
loan held not usurious on account of broker's commission. *Martin* v. *Adams*, 10.
no presumption that foreign loan contract is usurious. *Sawyer* v. *Dickson*, 77.
vendee of land who undertakes to pay off mortgage thereon cannot plead usury. *Hines* v. *Whitlow*, 121.
so if he buys expressly subject thereto. *Id.*
so held under act March 3, 1887, § 1. *Id.*
what does not constitute. *Sidway* v. *Harris*, 387.
parol evidence admissible to prove written contract to be usurious. *Sparks* v. *Robinson*, 460.

VARIANCE:
indictment alleging sale by tenant of seed cotton subject to landlord's lien not supported by proof of sale of ginned cotton. *Houston* v. *State*, 120.

VERDICT:
error of rendering "quotient verdict" cured by remittitur when. *Williams* v. *State*, 264.
error to direct a verdict when. *Ford* v. *St. Louis, I. M. & S. Ry. Co.*, 363.

WAIVER: SEE INSURANCE.

WAREHOUSE:
liability of warehouseman for selling goods stored. *Creson* v. *Ward*, 209.

WATERS AND WATERCOURSES:
landowner liable for obstructing flow of surface water when. *Baker* v. *Allen*, 271.
landlord liable for obstruction created by tenant when. *Id.*
prospective damages recoverable when. *Id.*

WILLS:
devise to widow so long as she shall remain unmarried is valid. *Helm* v. *Leggett*, 23.
when widow required to elect between devise and homestead. *Id.*
devise of "credits" held to convey interest in partnership. *Brandon* v. *Yeakle*, 377.
evidence held not to show want of testamentary capacity. *St. Joseph's Convent* v. *Garner*, 623.
probate of, on insufficient evidence held an irregularity merely. *Id.*

WITNESSES:
witness not impeachable by proof that her sons have been convicted of infamous crimes. *Lee* v. *State*, 286.
how reputation of prosecutrix in rape case impeached. *Maxey* v. *State*, 523.
not impeached by minutes of examining court. *Payne* v. *State*, 545.

WRITS AND PROCESS:
mode of proof of publication of warning order in tax confirmation suit. *Porter* v. *Dooley*, 1.
denial of subpœna duces tecum not error when. *Tharp* v. *Page*, 229.

7122 028